No. 99-1240

IN THE

Supreme Court of the United States

UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, *et al.*,
Petitioners,

v.

PATRICIA GARRETT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

STATEMENT OF FORMER PRESIDENT GEORGE H.W. BUSH AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF FORMER PRESIDENT GEORGE H.W. BUSH AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS[1]

INTEREST OF *AMICUS CURIAE*

As the President who pressed for the enactment of the Americans with Disabilities Act ("ADA") and signed it into law, I have a direct and personal interest in the defense of the ADA and the preservation of the important safeguards it provides to disabled Americans.

STATEMENT

On July 26, 1990, I had the privilege and honor of signing into law the ADA, comprehensive civil rights legislation intended to signal the end to unjustified segregation and exclusion of persons with disabilities from mainstream American life. *See Statement on Signing the Americans with Disabilities Act of 1990*, 2 Pub. Papers 1070, 1071 (July 26, 1990) ("*ADA Signing Statement*") (App. 3a). With the signing of the ADA, every man, woman, and child with a disability could pass through once-closed doors into a bright new era of equality, independence, and freedom. *See Remarks on Signing the Americans with Disabilities Act of 1990*, 2 Pub. Papers 1067, 1068 (July 26, 1990) ("*ADA Signing Remarks*") (App. 6a).

July 26, 1990 was a landmark occasion for me and for all Americans because, with the signing of the ADA, our country made an unequivocal statement to the world that Americans will not accept, will not excuse, and will not tolerate discrimination against persons with disabilities. *See*

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[1] Letters from the parties consenting to the filing of this statement are on file with the Clerk of the Court. No counsel for a party authored this statement in whole or in any part. No one other than Former President George H.W. Bush and his counsel made a monetary contribution to the preparation or submission of this statement.

ADA Signing Remarks at 1069 (App. 10a). The ADA works because it embodies what must be at the heart of all civil rights struggles—the spirit of inclusiveness, the devotion to individual rights, and equal opportunity. *See Remarks Commemorating the First Anniversary of the Signing of the Americans with Disabilities Act of 1990*, 2 Pub. Papers 963, 964 (July 26, 1991) (App. 12a). It ensures that no disabled American will ever again be deprived of the basic guarantee of life, liberty, and the pursuit of happiness. *See ADA Signing Remarks* at 1068 (App. 7a).

The ADA was enacted to address discrimination against persons with disabilities that permeated our society, including discrimination by public agencies in such areas as employment and the delivery of public services. *See ADA Signing Statement* at 1070 (App. 1a); *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 808-09, 815-17 (1989) (prepared statement of Hon. Richard L. Thornburgh, Attorney General of the United States) ("*Thornburgh Senate Statement*") (App. 16a-17a, 22a-23a); *Americans with Disabilities Act of 1990: Hearings on H.R. 2273 Before the House Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights*, 101st Cong. 198-99, 206-07 (1989) (prepared statement of Attorney General Thornburgh) ("*Thornburgh House Statement*") (App. 27a, 32a-33a).

In 1986, I personally accepted, on behalf of President Reagan, a report from the National Council on Disability ("NCD") entitled "Toward Independence." NCD is a congressionally established Council. All 15 members of the Council at that time had been appointed by President Reagan. *See ADA Signing Statement* at 1070 (App. 1a).

The report recommended enactment of comprehensive legislation to ban discrimination against persons with disabilities. *See id.* Specifically, NCD found that historically society has tended to segregate and isolate

individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.

NCD also found that 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.

Further, NCD found that unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, or religion, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination. The NCD findings, among others, are incorporated in Section 2 of the ADA, 42 U.S.C. § 12101.

My decision to embrace the ADA was based on two key factors. First, the comprehensive character of the legislation was a significant factor. *See ADA Signing Statement* at 1070 (App 1a). Given the pervasive nature of discrimination faced by individuals with disabilities and the wide range of barriers faced by such individuals in such areas as employment and public services, it was critical that the legislation be comprehensive and cover both public and private entities. *See Thornburgh Senate Statement* (App. 16a *passim*); *Thornburgh House Statement* (App. 26a *passim*).

My Administration recognized that then-existing civil rights laws were inadequate. For example, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, only covered recipients of federal assistance. It did not cover services provided by public agencies that did not receive federal aid.

Thus, Section 504 left broad areas of disability discrimination untouched or inadequately addressed. Many persons with disabilities in this nation still lived in an intolerable state of isolation and dependence. In 1990,

despite the existence of laws such as Section 504 of the Rehabilitation Act, persons with disabilities were still too often shut out of the economic and social mainstream of American life. The unreasonable failure to eliminate attitudinal, architectural, and communication barriers in employment, transportation, public accommodations, public services and telecommunications denies persons with disabilities an equal opportunity to contribute to and benefit in a meaningful way from the richness of American society. *See ADA Signing Statement* at 1070 (App. 1a-2a); *Thornburgh Senate Statement* at 809 (App. 17a); *Thornburgh House Statement* at 198-99 (App. 26a-27a).

In the 20 years preceding the enactment of the ADA, civil rights legislation protecting disabled persons had been enacted in a piecemeal fashion. Thus, federal laws prior to the ADA were like a patchwork quilt in need of repair. There were holes in the fabric—serious gaps in coverage that left persons with disabilities without adequate civil rights protections. To be effective in addressing the pervasive discrimination by public agencies, among others, the ADA needed to be cohesive, coordinated, and comprehensive. *See Thornburgh Senate Statement* at 812 (App. 19a-20a); *Thornburgh House Statement* at 201 (App. 28a-29a).

Second, the ADA was modeled on existing federal civil rights laws prohibiting discrimination on the basis of disability. These laws, such as Section 504, have proven to provide the proper balance between the rights of persons with disabilities and the legitimate concerns of covered entities. The ADA also used as its model the panoply of civil rights laws prohibiting discrimination on the basis of race, color, national origin, religion, and sex. *See Thornburgh Senate Statement* at 810, 813-15, 818 (App. 17a-18a, 20a-22a, 24a-25a); *Thornburgh House Statement* at 201-03 (App. 29a-30a).

In conclusion, I recognize that no single piece of legislation can alone change longstanding perception or

misperceptions; regrettably, attitudes can only be reshaped gradually. One of the keys to this reshaping process, however, is to increase contact between and among people with disabilities and their nondisabled peers. And an essential component of that effort was the enactment of a comprehensive law that promotes the integration of people with disabilities into all aspects of American life, including our workplaces, our communities, and our schools and other public services. *See Thornburgh Senate Statement* at 819 (App. 25a); *Thornburgh House Statement* at 212 (App. 36a).

Respectfully submitted,

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APPENDIX A

[2 Pub. Papers 1070 (July 26, 1990)]

[Page 1070]

* * * *

STATEMENT BY THE PRESIDENT ON SIGNING THE AMERICANS WITH DISABILITIES ACT OF 1990

July 26, 1990

Today, I am signing S. 933, the "Americans with Disabilities Act of 1990." In this extraordinary year, we have seen our own Declaration of Independence inspire the march of freedom throughout Eastern Europe. It is altogether fitting that the American people have once again given clear expression to our most basic ideals of freedom and equality. The Americans with Disabilities Act represents the full flowering of our democratic principles, and it gives me great pleasure to sign it into law today.

In 1986, on behalf of President Reagan, I personally accepted a report from the National Council on Disability entitled "Toward Independence." In that report, the National Council recommended the enactment of comprehensive legislation to ban discrimination against persons with disabilities. The Americans with Disabilities Act (ADA) is such legislation. It promises to open up all aspects of American life to individuals with disabilities — employment opportunities, government services, public accommodations, transportation, and telecommunications.

This legislation is comprehensive because the barriers faced by individuals with disabilities are wide-ranging. Existing laws and regulations under the Rehabilitation Act of 1973 have been effective with respect to the Federal

Government, its contractors, and the recipients of Federal funds. However, they have left broad areas of American life untouched or inadequately addressed. Many of our young people, who have benefited from the equal educational opportunity guaranteed under the Rehabilitation Act and the Education of the Handicapped Act, have found themselves on graduation day still shut out of the mainstream of American life. They have faced persistent discrimination in the workplace and barriers posed by inaccessible public transportation, public accommodations, and telecommunications.

Fears that the ADA is too vague or too costly and will lead to an explosion of litigation are misplaced. The Administration worked closely with the Congress to ensure that, wherever possible, existing language and standards from the Rehabilitation Act were incorporated into the ADA. The Rehabilitation Act standards are already familiar to large segments of the private sector that are either Federal contractors or recipients of Federal funds. Because the Rehabilitation Act was enacted 17 years ago, there is already an extensive body of law interpreting the requirements of that Act. Employers can turn to these interpretations for guidance on how to meet their obligations under the ADA.

The Administration and the Congress have carefully crafted the ADA to give the business community the flexibility to meet the requirements of the Act without incurring undue costs. Cost may be taken into account in determining how an employee is **[Page 1071]** "reasonably accommodated," whether the removal of a barrier is "readily achievable," or whether the provision of a particular auxiliary aid would result in an "undue burden." The ADA's most rigorous access requirements are reserved for new construction where the added costs of accessible features are minimal in relation to overall construction costs. An elevator exemption is provided for many buildings.

The careful balance struck between the rights of individuals with disabilities and the legitimate interests of business is shown in the various phase-in provisions in the ADA. For example, the employment provisions take effect 2 years from today for employers of 25 or more employees. Four years from today that coverage will be extended to employers with 15-24 employees. These phase-in periods and effective dates will permit adequate time for businesses to become acquainted with the ADA's requirements and to take the necessary steps to achieve compliance.

The ADA recognizes the necessity of educating the public about its rights and responsibilities under the Act. Under the ADA, the Attorney General will oversee Government-wide technical assistance activities. The Department of Justice will consult with the Architectural and Transportation Barriers Compliance Board, the Equal Employment Opportunity Commission, the Department of Transportation, the Federal Communications Commission, the National Council on Disability, and the President's Committee on Employment of People with Disabilities, among others, in the effort. We will involve trade associations, advocacy groups, and other similar organizations that have existing lines of communications with covered entities and persons with disabilities. The participation of these organizations is a key element in assuring the success of the technical assistance effort.

In signing this landmark bill, I pledge the full support of my Administration for the Americans with Disabilities Act. It is a great honor to preside over the implementation of the responsibilities conferred on the executive branch by this Act. I pledge that we will fulfill those responsibilities efficiently and vigorously.

The Americans with Disabilities Act presents us all with an historic opportunity. It signals the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life. As the Declaration of

Independence has been a beacon for people all over the world seeking freedom, it is my hope that the Americans with Disabilities Act will likewise come to be a model for the choices and opportunities of future generations around the world.

GEORGE BUSH

THE WHITE HOUSE,
July 26, 1990.

APPENDIX B

[2 Pub. Papers 1067 (July 26, 1990)]

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REMARKS ON SIGNING THE AMERICANS WITH DISABILITIES ACT OF1990

July 26, 1990

Evan, thank you so much. And welcome to every one of you, out there in this splendid scene of hope, spread across the South Lawn of the White House. I want to salute the Members of the United States Congress, the House and the Senate who are with us today -- active participants in making this day come true. This is, indeed, an incredible day especially for the thousands of people across the Nation who have given so much of their time, their vision, and their courage to see this act become a reality.

You know, I started trying to put together a list of all the people who should be mentioned today. But when the list started looking a little longer than the Senate testimony for the bill, I decided I better give up, or that we'd never get out of here before sunset. So, even though so many deserve credit, I will single out but a tiny handful. And I take those who have guided me personally over the years:

Of course, my friends Evan Kemp and Justin Dart, up here on the platform with me; and of course I hope you'll forgive me for also saying a special word of thanks to two from the White House, but again, this is personal, so I don't want to offend those omitted. Two from the White House

Boyden Gray and Bill Roper, who labored long and hard. And I want to thank Sandy Parrino, of course, for her leadership. And I again — it is very risky with all these members of Congress here who worked so hard, but I can say on a very personal basis, Bob Dole has inspired me.

This is an immensely important day, a day that belongs to all of you. Everywhere I **[Page 1068]** look, I see people who have dedicated themselves to making sure that this day would come to pass: My friends from Congress, as I say, who worked so diligently with the best interest of all at heart, Democrats and Republicans, members of this administration — and I'm pleased to see so many top officials and members of my Cabinet here today who brought their caring and expertise to this fight; and then, the organizations — so many dedicated organizations for people with disabilities, who gave their time and their strength; and perhaps most of all, everyone out there and others — across the breadth of this nation are 43 million Americans with disabilities. You have made this happen. All of you have made this happen. To all of you, I just want to say your triumph is that your bill will now be law, and that this day belongs to you. On behalf of our nation, thank you very, very much.

Three weeks ago we celebrated our nation's Independence Day. Today we're here to rejoice in and celebrate another "independence day," one that is long overdue. With today's signing of the landmark Americans for Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into bright new era of equality, independence, and freedom. As I look around at all these joyous faces, I remember clearly how many years of dedicated commitment have gone into making this historic new civil rights act a reality. It's been the work of a true coalition a strong and inspiring coalition of people who have shared both a dream and a passionate determination to make that dream come true. It's been a coalition in the finest spirit, a joining of Democrats and

Republicans, of the legislative and the executive branches, of Federal and State agencies, of public officials and private citizens, of people with disabilities and without.

This historic Act is the world's first comprehensive declaration of equality for people with disabilities, the first. Its passage has made the United States the international leader on this human rights issue. Already, leaders of several other countries, including Sweden, Japan, the Soviet Union, and all 12 members of the EEC, have announced that they hope to enact now similar legislation.

Our success with this Act proves that we are keeping faith with the spirit of our courageous forefathers who wrote in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights." These words have been our guide for more than two centuries as we've labored to form our more perfect union. But tragically, for too many Americans, the blessings of liberty have been limited or even denied. The Civil Rights Act of '64 took a bold step towards righting that wrong. But the stark fact remained that people with disabilities were still victims of segregation and discrimination, and this was intolerable. Today's legislation brings us closer to that day when no Americans will ever again be deprived of their basic guarantee of life, liberty, and the pursuit of happiness.

This Act is powerful in its simplicity. It will ensure that people with disabilities are given the basic guarantees for which they have worked so long and so hard: independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream. Legally, it will provide our disabled community with a powerful expansion of protections and then basic civil rights. It will guarantee fair and just access to the fruits of American life which we all must be able to enjoy. And then, specifically, first the ADA ensures that employers covered by the act cannot discriminate against qualified individuals with

disabilities. Second, the ADA ensures access to public accommodations such as restaurants, hotels, shopping centers, and offices. And third, the ADA ensures expanded access to transportation services. And fourth, the ADA ensures equivalent telephone services for people with speech or hearing impediments.

These provisions mean so much to so many. To one brave girl in particular, they will mean the world. Lisa Carl, a young Washington State woman with cerebral palsy, who I'm told is with us today, now **[Page 1069]** will always be admitted to her hometown theater. Lisa, you might not have been welcome at your theater, but I'll tell you — welcome to the White House. We're glad you're here. The ADA is a dramatic renewal not only for those with disabilities but for all of us, because along with the precious privilege of being an American comes a sacred duty — to ensure that every other American's rights are also guaranteed.

Together, we must remove the physical barriers we have created and the social barriers that we have accepted. For ours will never be a truly prosperous nation until all within it prosper. For inspiration, we need look no further than our own neighbors. With us in that wonderful crowd out there are people representing 18 of the daily Points of Light that I've named for their extraordinary involvement with the disabled community. We applaud you and your shining example. Thank you for your leadership for all that are here today.

Now, let me just tell you a wonderful story, a story about children already working in the spirit of the ADA, a story that really touched me. Across the Nation, some 10,000 youngsters with disabilities are part of Little League's Challenger Division. Their teams play just like others, but — and this is the most remarkable part — as they play, at their sides are volunteer buddies from conventional Little League teams. All of these players work together. They team up to wheel around the bases and to field grounders together and,

most of all, just to play and become friends. We must let these children be our guides and inspiration.

I also want to say a special word to our friends in the business community. You have in your hands the key to the success of this Act, for you can unlock a splendid resource of untapped human potential that, when freed, will enrich us all. I know there have been concerns that the ADA may be vague or costly, or may lead endlessly to litigation. But I want to reassure you right now that my administration and the United States Congress have carefully crafted this Act. We've all been determined to ensure that it gives flexibility, particularly in terms of the timetable of implementation, and we've been committed to containing the costs that may be incurred.

This Act does something important for American business, though and remember this: You've called for new sources of workers. Well, many of our fellow citizens with disabilities are unemployed. They want to work, and they can work, and this is a tremendous pool of people. And remember this is a tremendous pool of people who will bring to jobs diversity, loyalty, proven low turnover rate, and only one request: the chance to prove themselves. And when you add together Federal, State, local, and private funds, it costs almost $200 billion annually to support Americans with disabilities — in effect, to keep them dependent. Well, when given the opportunity to be independent, they will move proudly into the economic mainstream of American life, and that's what this legislation is all about.

Our problems are large, but our unified heart is larger. Our challenges are great, but our will is greater. And in our America, the most generous, optimistic nation on the face of the earth, we must not and will not rest until every man and woman with a dream has the means to achieve it.

And today, America welcomes into the mainstream of life all of our fellow citizens with disabilities. We embrace

you for your abilities and for your disabilities, for our similarities and indeed for our differences, for your past courage and your future dreams. Last year, we celebrated a victory of international freedom. Even the strongest person couldn't scale the Berlin Wall to gain the elusive promise of independence that lay just beyond. And so, together we rejoiced when that barrier fell.

And now I sign legislation which takes a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp. Once again, we rejoice as this barrier falls for claiming together we will not accept, we will not excuse, we will not tolerate discrimination in America.

With, again, great thanks to the Members of the United States Senate, leaders of whom are here today, and those who worked so tirelessly for this legislation on both sides of the aisles. And to those Members of the House of Representatives with **[Page 1070]** us here today, Democrats and Republicans as well, I salute you. And on your behalf, as well as the behalf of this entire country, I now lift my pen to sign this Americans with Disabilities Act and say: Let the shameful wall of exclusion finally come tumbling down. God bless you all.

APPENDIX C

[2 Pub. Papers 963 (July 26, 1991)]

[Page 963]

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REMARKS COMMEMORATING THE FIRST ANNIVERSARY OF THE SIGNING OF THE AMERICANS WITH DISABILITIES ACT OF 1990

July 26, 1991

First, may I greet the distinguished members of Congress here in the front rows, thank them for coming, thank them for their interest in the passage of this important legislation we're here to celebrate today, but also in their interest in following up on it. May I greet, also, the Attorney General Dick Thornburgh, and our Secretary of HHS Lou Sullivan and the Vice President, of course. He and I welcome you to the Rose Garden. And may I salute the other guests that are with us. And a special thanks today to the men and women from our business community. American corporations, you see, are a vital part of this team, and your support of the ADA is critical to its success.

One year ago, I stood over there — many of you present — on the South Lawn. And I will never, literally, never forget that sight or certainly the emotional feeling I felt on that day. Thousands of people from across the country had come to celebrate the signing of the Americans with Disabilities Act, one of the most comprehensive civil rights bills in the history of this country. And while people felt a justifiable sense of triumph last year, you also could see a feeling of eager impatience. After all, the signing of the

ADA didn't mark the end of a long struggle, it marked, really, a beginning.

Some of you here today joined me on the South Lawn, as I mentioned, a year ago, and we've made tremendous advances since that ceremony. We've introduced changes that will transform people's worlds. The ADA has also helped us, all of us, to understand a little bit more about ourselves. It reminds us that along with the privilege of being an American comes a duty to recognize and defend the rights of every American.

This bill does more than make the American dream of equality a reality for 43 million Americans with disabilities. It offers, in a sense, fresh testimony to our Nation's greatness. It demonstrates how we can advance the cause of civil rights. It shows what can happen when we work together, drawing upon the fundamental decency of the American people.

The quest for civil rights is not a zero-sum game. It shouldn't mean advancing some at the expense of others. The quest **[Page 964]** for civil rights is a quest for individual rights and equal opportunity and it's a crusade to throw open the doors of opportunity and tear down the walls of bigotry.

The ADA works because it calls upon the best in the American people, and then Americans respond. It works because it embodies what must be at the heart of all civil rights struggles: the spirit of inclusiveness, the devotion to individual rights and equal opportunity. That devotion runs deep in our Nation. We are the land of opportunity and always have been.

Our Constitution and our courts pledge equal protection under the law. But equally important, our people believe in legal equality. And many try to broaden opportunity in little ways, by reaching out to capable people and giving them a chance, giving them a fair chance.

America must be a country where the sons and daughters of poverty have the same grasp on the American dream as the children of privilege. And it must be a land where a child can overcome any obstacle and fulfill his or her own potential.

We see this promise fulfilled by a man I presented to this nation 4 weeks ago. And we can be proud to live in a country whose highest Court will include a man who understands the importance of basic American values: tolerance, industry, and decency. And I'm speaking, of course, of my nominee to the Court, Clarence Thomas.

While Judge Thomas was at the EEOC, he compiled an excellent record on disability issues, with which I hope all of you are familiar. But his life illustrates the principle that inspires all civil rights bills, the principle that we must throw open the doors of opportunity to everyone. And this spirit should guide us as we pursue all civil rights legislation, for our greatest strength lies in our ability to work together and honor the shared values we treasure.

We have worked together this last year. And in so doing, we've understood more fully just how much people with disabilities have to offer. We've demonstrated that social progress includes economic growth and that both play essential roles in the in the American dream. Businesses support the ADA because it gives everyone a chance to be productive in the workplace. It broadens our economic mainstream. It enables society to benefit from the wisdom, energy and industry of people who want just one thing, a fair chance.

And while we've made a strong start, we have much to do. As long as the doors of opportunity are closed to even one American, we must keep working at it.

The passage of the ADA, the world's first declaration of equality for people with disabilities, made this country the international leader on this human rights issue. And now the

world is watching to see how we use this act, how we remove the physical barriers we've created and the social barriers that we've accepted. Our success or failure in keeping the promise of the ADA will affect the lives of hundreds of millions of people with disabilities, not just here in the United States but throughout the world.

Our challenges remain great, but our will is even greater. In America — the most generous, optimistic nation on the face of the earth — we will not rest until every man and woman and child with a dream has a fair chance to realize it.

Most of this work will be done by individual Americans acting day by day to increase tolerance and understanding. But the ADA also required Five Federal Agencies to come up implementation regulation or guidelines. These regulations relating to employment, public accommodation, transportation, and communications are key to the full implementation of ADA.

And so I'm proud to announce that most of these Federal regs will be issued today.

All guidelines required of the Department of Justice, the EEOC, the FCC are in final form, and those regarding transportation will be issued soon. I want to thank the people of the Executive Branch who have worked so hard to make the ADA a reality.

And in addition, today I'm issuing a memorandum to Federal Departments and Agencies. And it directs them to recruit people with disabilities as Federal employees and to ensure that Americans with disabilities have access to Federal programs. The Federal Government must serve as a model employer for the rest of the Nation.

And again, thank you all so very much for your work, for your dedication, and for your devotion and your steadfast faith, and to **[Page 965]** many here, for your inspiring

example. And may God bless you all. And thank you very, very much.

APPENDIX D

[*Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. (1989)]

[Page 808]

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PREPARED STATEMENT OF RICHARD THORNBURGH

Mr. Chairman, distinguished members of the Committee, it is a great pleasure for me to be able to present to you the Administration's views on the proposed Americans With Disabilities Act. Twenty-five years ago to this day, Congress and the President were putting the finishing touches on the Civil Rights Act of 1964, the most important civil rights legislation ever passed. It is exciting for me to be a part of the process which, this year, will pass legislation that will extend the Nation's civil rights guarantees to the disability community. Persons with disabilities have already made enormous contributions to American society, and can and will contribute even more as legislation goes forward in this Congress to improve their even greater entry into the mainstream.

It is estimated that there are over 36 million Americans with disabilities. President Bush has consistently supported efforts to bring these Americans into the 'mainstream' of American society. As Vice President, he stated that we must develop programs and policies that promote independence, freedom of choice, and productive involvement in the social and economic mainstream. This means access to education, jobs, public accommodations, and public transportation — in

other words, full participation in and access to all aspects of society. This year, in his remarks to the Joint Session of Congress, the President reiterated this commitment. We at the Department of Justice wholeheartedly share these goals and commit ourselves, along with the President and the rest of the Administration, to a bipartisan effort to enact comprehensive legislation attacking **[Page 809]** discrimination in employment, public services, transportation, public accommodations, and telecommunications.

Despite the best efforts of all levels of government and the private sector and the tireless efforts of concerned citizens and advocates everywhere, many persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and dependence. Fifteen years have gone by since the Rehabilitation Act was passed. In that time the doors of educational opportunity have been opened to persons with disabilities. Nevertheless, persons with disabilities are still too often shut out of the economic and social mainstream of American life. The unreasonable and, in most cases, unthinking failure to eliminate attitudinal, architectural, and communications barriers in employment, transportation, public accommodations, and telecommunications denies persons with disabilities an equal opportunity to contribute to and benefit from the richness of American society. The continued maintenance of these barriers impose staggering economic and social costs and inhibits our sincere and substantial Federal commitment to the education, rehabilitation, and employment of persons with disabilities. The elimination of these barriers will enable society to benefit from the skills and talents of persons with disabilities and will enable persons with disabilities to lead more productive lives.

Efforts to develop comprehensive legislation to ensure equal opportunity for disabled persons should, of course, also be **[Page 810]** mindful of other principles as well. First, any

new legislation should take into consideration the existing fabric of Federal laws prohibiting discrimination on the basis of handicap. During the past two decades, Congress has enacted a series of statutes focusing on a wide range of problems and providing an intricate web of enforcement procedures. The courts and Federal agencies have also been active in interpreting these laws, defining the meaning of nondiscrimination in the context of disability. Any new legislation should be coordinated with this body of law in order to avoid inadvertent conflicts, confusion, the inefficient use of enforcement resources, and unnecessary litigation.

New legislation prohibiting discrimination on the basis of disability should use as its model the panoply of civil right laws prohibiting discrimination on the basis of race, color, national origin, and sex. We must end the anomaly of widely protecting women and minorities from discrimination while failing to provide parallel protection for people with disabilities.

New legislation should also be designed to keep the development of intrusive Federal regulation to a minimum. It is the Administration's goal to regulate the private sector only in those situations where it is necessary and only to the extent called for by the problem at hand. Concerns for the economic efficiency of America's businesses, especially its small entrepreneurs, and for competitiveness in the world economy must be given due weight. Legislation which unduly burdens American businessmen and women is ultimately in no one's interest. **[Page 811]** Federal action in this area should likewise recognize that States can act (and most have already acted) to protect the rights of persons with disabilities in ways tailored to each State's particular circumstances.

Finally, the issue of costs, both the fiscal cost of lost income tax revenues and increased transfer payments when disabled persons are not accommodated and the cost of accommodating persons with disabilities, must be

considered. Careful consideration must be given to whether the line on costs has been drawn in the proper place, and we will need to work together in the weeks ahead on this.

The cost issue is made more difficult because it is virtually impossible to put a price tag on the accommodations required by any bill in this area. For example, while widening an existing doorway will cost $300 to $600, no one can estimate with any degree of reliability how many doorways will need to be widened. Making accurate cost predictions is also hampered by ambiguity in the standards enunciated in S. 933.

Similarly, we must recognize that passing comprehensive civil rights legislation protecting persons with disabilities will have direct and tangible benefits for our country. As with the area of costs, we have found it difficult to quantify the exact economic benefits of legislation in fiscal terms. Certainly, the elimination of employment discrimination and the mainstreaming of persons with disabilities will result in more persons with disabilities working, in increased earnings, in less **[Page 812]** dependence on the Social Security system for financial support, in increased spending on consumer goods, and increased tax revenues.

With these principles as a guide, I would like to address the "Americans with Disabilities Act of 1989." This Committee is to be commended for its efforts in drafting S. 933. One of its most impressive strengths is its comprehensive character. Over the last 20 years, civil rights laws protecting disabled persons have been enacted in piecemeal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections. In some areas, there are overlapping pieces of fabric, duplication that has resulted in confusion and counterproductive enforcement efforts. The Administration supports the legislative effort to

enact a bill that is at one time cohesive, coordinated, and comprehensive.

I am pleased that S. 933 includes provisions pertaining to job discrimination. Perhaps the most glaring omission in the landscape of disability rights laws is that there is nothing in the Federal law that prohibits discrimination in employment in the private sector against those with disabilities. While persons who work for the Federal Government, who work in federally assisted programs, or who work for certain Federal contractors are protected from discrimination on the basis of handicap, most other workers are not. Each year in this country, **[Page 813]** over 150,000 young men and women with disabilities complete their education under the Education of the Handicapped Act, some receiving high school diplomas, some receiving certificates of completion. This education law has been one of our modern success stories in the disability area. But if our investment in the education of these students is to bear fruit, we must ensure that they face an employment arena similarly free of discrimination on the basis of handicap.

President Bush endorses your concept of paralleling in the disability area Title VII of the Civil Rights Act of 1964, the landmark statute that prohibits discrimination on the basis of race, color, national origin, sex and religion. Furthermore, it is the Administration's view that such legislation should use the standard provided by section 504 of the Rehabilitation Act of 1973 — the concept that nondiscrimination includes the requirement that an employer make reasonable accommodation to the known mental or physical impairments of qualified disabled persons as long as making the accommodation would not result in an undue hardship on the operations of the employer.

Such a law would be a major step forward for persons with disabilities. We must be mindful, however, of the cost burdens that this law more than other civil rights laws will place on businesses. It is our goal here to seek a balance: to

bring persons with disabilities into the mainstream of American economic life and reduce the cost to society of exclusion while, at the same time, keeping the American economic system strong and **[Page 814]** viable. We are concerned with the impact of S. 933 on small businesses. Because small businesses have limited financial resources, they do not have the advantage of spreading the costs of accommodations over a large payroll. Further, their small workforce gives them limited flexibility in restructuring jobs, a frequently used method of making reasonable accommodations. For these reasons, the Administration would like to join the dialogue with this Committee on the appropriate extent of coverage for smaller employers.

Of course, any legislation must be consistent with Federal drug-free workplace initiatives. I need not remind this Committee of the scourge of illegal drug use in this country and its frightening impact on daily American life. We believe that this bill should make clear that substance abusers should not be included within the protections of this civil rights statute. The bill should also be fully consistent with this Administration's commitment to the eradication of substance abuse in the workplace and elsewhere.

The inclusion of public accommodations in the "Americans with Disabilities Act" is a Federal recognition of their importance in American life. Just as Title II of the Civil Rights Act of 1964 opened up restaurants and theaters to Black Americans, S. 933 promises to persons with disabilities the ability to enjoy full participation in our American way of life. The Administration endorses the prohibition of discrimination on the basis of disability in public accommodations. Recent studies **[Page 815]** show that persons with disabilities are too often discouraged from attending concerts, going to restaurants, and attending movies. We recognize that requiring public accommodations to make themselves accessible to persons with mobility impairments and to provide auxiliary aide to those with

visual and hearing impairments could result in significant costs. We would like to work with this Committee to develop provisions that will ameliorate the cost burden. Similarly, we need to work together to define the parameters of coverage in this area. We think that modifications to S. 933 should address our concerns regarding the scope of public accommodations.

We also seek a bill in this area that will provide clear guidance so that unnecessary and costly litigation can be avoided. Great care then should be taken in crafting a standard for what constitutes discrimination. It may be preferable to use terms and concepts from section 504, a law that now has a 16-year history, rather than developing new terms and standards. Finally, any new legislative initiative should avoid potential confrontation with the First Amendment to the Constitution that might arise with the coverage of religious institutions.

The provision of accessible transportation for persons with disabilities has been one of the most complex issues faced by Congress and the Executive Branch. Four statutes[1] and a series **[Page 816]** of current DOT regulations present an interrelated, complicated set of obligations. Several Federal circuit courts have interpreted these statutes and rules. The President agrees with this Committee that additional legislation is needed to set the record straight. We must be careful, however, that our efforts clarify the picture, rather than adding to the confusion.

Our goal, and yours, is to ensure that persons with disabilities have access to adequate transportation in this

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[1] Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; section 16(a) of the Urban Mass Transportation Act of 1964, as amended, 49 U. S. C. § 1612 (a); section 165 (b) of the Federal-Aid Highway Act of 1973, as amended, 23 U.S.C. § 142, note; and section 317(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 1612(d).

country, and we support legislation that would focus our efforts on publicly funded transportation services. We recommend enactment of a bill that would, for the first time, guarantee that public bus systems in this country be accessible to persons with mobility impairments. Thus, legislation should require that all new public buses be accessible to persons with disabilities. The Secretary of Transportation should have the flexibility to relax this requirement for any municipality where accessible bus service would prove to be impractical. For instance, in localities with extremely inclement climates where wheelchair lifts do not function for much of the year, it may be more practical to provide accessible paratransit service. Because the average life of a bus is 12 years, accessible bus transportation would become a reality in this country in a relatively short period of time, except for the cases where accessible buses are ineffective. As with other sections of S. 933 that involve state **[Page 817]** and local government services, my experience as a Governor teaches me that it will be important to get input from the affected officials and people with disabilities from around the country before finalizing these provisions.

In addition, legislation should also require paratransit services that supplement, rather than duplicate, the fixed-route bus service. Ideally, paratransit service should be aimed at those severely disabled persons who are unable to use mainline accessible transportation.

Again, we should recognize the cost implications of these requirements. In the public transportation area, a considerable percentage of the capital costs of public transit authorities is borne by the Federal Government. It is unlikely, given existing fiscal constraints, that any substantial amount of new monies will be available in the Federal budget for transportation. Thus, these increased costs for accessibility must be carried out with already planned outlays. Given these fiscal constraints, we think some

reasonable limitation on paratransit service costs may be appropriate and we are prepared to discuss with the Committee the level for such a limit.

On another matter, the Administration agrees that a comprehensive bill should address the issue of making our Nation's telecommunications system accessible to deaf persons. The inability to communicate by telephone renders the routine tasks of daily living — such as making a doctor's appointment or inquiring about a job opportunity — difficult or even impossible **[Page 818]** to accomplish. Establishment of a telecommunications relay service is clearly a vital step toward full integration of deaf persons into the mainstream. Legislation addressing this issue, though, should take into account the ongoing Federal Communications Commission inquiry mandated by the Telecommunications Accessibility Enhancement Act,[2] and preserve the maximum degree of freedom for the FCC to use its expertise in determining which specific requirements will result in the most efficient and cost-effective system.

Because S. 933 uses existing civil rights laws for minorities and women as its model, the remedies under this bill should parallel these existing laws. For example, the enforcement procedures and remedies now available under title VII of the Civil Rights Act of 1964 should be used for violations of discrimination based on disability in the employment area; and Title II's enforcement scheme should be available to redress discrimination based on disability in places of public accommodation. This approach is fair and easy to-implement. It would provide persons with disabilities with a full array of remedies, including preventive relief and reimbursement for out-of-pocket expenses, including backpay. In addition, use of enforcement mechanisms already in existence should ease enforcement and eliminate

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[2] Pub. L. No. 100-542, 102 Stat. 2721 (1988).

inconsistencies and confusion among those who have to comply with the law.

[Page 819] I have witnessed the many faces of discrimination confronting persons with disabilities. As noted, over 36 million people in this country are disabled by reason of some physical or mental handicapping condition. The mere existence of these handicapping conditions does not for many of these individuals prevent then from interacting freely with others in society, or from performing the tasks that others perform on a daily basis. But persons with disabilities are all too often not allowed to participate because of stereotypical notions held by other in society — notions that have, in large measure, been created by ignorance and maintained by fear.

It is precisely these sorts of antiquated attitudes that have blocked people with disabilities from entering the mainstream of American life. Certainly attitudinal changes cannot be simply commanded or even legislated out of existence. No particular court order or single piece of legislation can alone change longstanding perception or misperceptions; regrettably, attitudes can only be reshaped gradually. One of the keys to this reshaping process is to increase contact between and among people with disabilities and their able-bodied peers. And an essential component of that effort is the development of a comprehensive set of laws supported by a helpful set of regulations that all work together to promote the integration of people with disabilities into our communities, schools, and workplaces.

APPENDIX E

[*Americans with Disabilities Act of 1990: Hearings on H.R. 2273 Before the House Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights*, 101st Cong. 198-99, 206-07 (1989)]

[Page 198]

PREPARED STATEMENT OF DICK THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA

Mr. Chairman, distinguished members of the Committee, it is a great pleasure for me to be able to present to you the Administration's views on the proposed Americans with Disabilities Act. It is exciting to be a part of a process which, this year, will see the passage of legislation that will extend the Nation's civil rights guarantees to Americans with disabilities. Persons with disabilities have already made enormous contributions to American society, and can and will contribute even more as legislation goes forward in this Congress to increase their access into the social and economic mainstream of American life. We want America to be an opportunity society for all Americans, and that requires taking actions to make opportunities available to Americans with disabilities.

Despite the best efforts of all levels of government and the private sector and the tireless efforts of concerned citizens and advocates everywhere, many persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and dependence. Over fifteen years have gone by since the Rehabilitation Act of 1973 conferred on Federal and federally assisted programs the responsibility to accommodate Americans with disabilities. In that time, the doors of opportunity have been opened to persons with disabilities. Nevertheless, persons with disabilities are still

too often shut out of the economic and social mainstream of American life. The unreasonable and, in most cases, unthinking failure to eliminate attitudinal, architectural, and communications barriers in employment, transportation, public accommodations, public services, and **[Page 199]** telecommunications denies persons with disabilities an equal opportunity to contribute to and benefit from the richness of American society. The continued maintenance of these barriers imposes staggering economic and social costs and inhibits our sincere and substantial Federal commitment to the education, rehabilitation, and employment of persons with disabilities. The elimination of these barriers will enable society to benefit from the skills and talents of persons with disabilities and will enable persons with disabilities to lead more productive lives.

On June 22, 1989, I testified on the Americans with Disabilities Act before the Senate Committee on Labor and Human Resources. At that time, the Administration endorsed the concept of comprehensive legislation in the disability rights area and viewed S. 933, the Senate analogue to H.R. 2273, as the appropriate vehicle for such landmark legislation. My testimony did, however, raise areas of concern that needed to be addressed before the Administration could specifically endorse the Americans with Disabilities Act. During this past summer, representatives of the Administration engaged in prolonged negotiations with the Senate on this bill. These discussions led to revisions in S. 933 and eventually to the bill that passed the Senate on September 7, 1989, with broad bipartisan support.

I am therefore pleased to reiterate the Administration's support of the Americans with Disabilities Act. This bill is **[Page 200]** fair, balanced legislation. It will ensure that persons with disabilities in this country enjoy access to the mainstream of American life. It builds on an extensive body of statutes, case law, and regulations to avoid unnecessary

confusion; it allows maximum flexibility for compliance; and it does not place undue burdens on Americans who must comply. The Administration asks that you consider the Americans with Disabilities Act expeditiously and the Administration hopes that the bill will be signed into law before the end of this year.

President Bush has consistently supported efforts to bring persons with disabilities into the mainstream of American society. As Vice President, he stated that we must develop programs and policies that promote independence, freedom of choice, and productive involvement in our social and economic mainstream. This means access to education, jobs, public accommodations, public services, and public transportation — in other words, full participation in and access to all aspects of society. This year, in his remarks to the Joint Session of Congress, the President reiterated this commitment.

We believe that S. 933, successfully incorporates the President's goals. It provides an effective means of combating discrimination and yet gives latitude to employers, public accommodations, and other entities covered by the bill to allow **[Page 201]** them the flexibility to achieve compliance without placing an undue burden on their operations.

The comprehensive scope of the Americans with Disabilities Act will fill serious gaps in the patchwork quilt of existing Federal laws protecting disabled persons. Perhaps the most glaring gap in the fabric of existing disability rights laws is that there is little in the Federal law that prohibits discrimination in employment in the private sector against those with disabilities. While persons who work for the Federal Government, who work in federally assisted programs, or who work for certain Federal contractors are protected from discrimination on the basis of handicap, most other workers are not. Each year in this country, over 150,000 young men and women with disabilities complete

their education under the Education of the Handicapped Act, some receiving high school diplomas, some receiving certificates of completion. This education law has been one of our modern success stories in the disability area. But if our investment in the education of these students is to bear fruit, we must ensure that they face a labor market similarly free of discrimination on the basis of handicap.

The Americans with Disabilities Act wisely parallels in the disability area title VII of the Civil Rights Act of 1964, the landmark statute that prohibits discrimination in employment on the basis of race, color, national origin, sex, or religion. The **[Page 202]** Americans with Disabilities Act, as passed by the Senate, appropriately phases in its coverage. When they go into effect two years after enactment, the employment provisions will cover only those employers with 25 or more employees. Two years later, coverage will be extended to include all employers with 15 or more employees. Under this phase-in approach, the more immediate burdens of compliance will fall on those larger businesses most able to bear them. We also believe that the two-year implementation period will ease any initial confusion regarding compliance requirements by giving the Administration adequate time to craft regulations and engage in wide-reaching technical assistance efforts.

Furthermore, the Administration is pleased that the employment provisions of the Americans with Disabilities Act closely follow the standards provided by section 504 of the Rehabilitation Act of 1973 — including the concept that nondiscrimination includes the requirement that an employer make reasonable accommodation to the known mental or physical impairments of qualified disabled persons as long as making the accommodation would not result in an undue hardship on the operations of the employer. The fact that many of the employment provisions of the Americans with Disabilities Act are drawn directly and, in many instances, even taken verbatim from the Federal regulations

implementing section 504 represents a particularly wise choice. The section 504 standards are familiar **[Page 203]** to large segments of the private sector already covered by the Rehabilitation Act. Experience has shown that these standards do not result in undue costs or excessive litigation.

The Administration is satisfied that the Senate-passed Americans with Disabilities Act is consistent with Federal drug-free workplace initiatives. I need not remind this Committee of the scourge of illegal drug use in this country and its frightening impact on daily American life. Under the Senate bill individuals who are illegally using drugs are not included within the protections of the bill and the legality of drug testing is not affected. The bill is fully consistent with this Administration's commitment to the eradication of substance abuse in the workplace and elsewhere.

The inclusion of public accommodations in the "Americans with Disabilities Act" is a Federal recognition that an opportunity society provides access to the mainstream of everyday life. Just as title II of the Civil Rights Act of 1964 opened up hotels, restaurants, and theaters to Black Americans, the Americans with Disabilities Act promises to persons with disabilities the right to enjoy full participation in our American way of life. The Administration endorses the prohibition of discrimination on the basis of disability in public accommodations and its extension to a wide range of entities. Persons with disabilities should not be discouraged **[Page 204]** from attending concerts, going to restaurants, and attending movies. And they should not have to face insurmountable obstacles in accomplishing such vital tasks of daily life as grocery shopping or visiting a pharmacy or doctor's office, or going to the dry cleaners.

We recognize that imposing an unlimited requirement that public accommodations make themselves accessible to persons with mobility impairments and provide auxiliary aids to those with visual and hearing impairments could result in significant costs. However, the ADA, as passed by the

Senate, provides a series of limitations on compliance requirements. For example, physical barriers need only be removed when the removal is "readily achievable" and auxiliary aids must be provided only if they will not result in an undue burden. Under the Americans with Disabilities Act, for example, a restaurant would not be required to provide menus in braille for blind patrons, if the waiters in the restaurant were willing to read the menu. The Act also has minimal requirements for retrofitting existing facilities. In fact, the Act's "readily achievable" standard requires that existing architectural barriers be removed when doing so is easily accomplishable or able to be carried out without much difficulty or expense.

As an essentially forward-looking bill, the legislation reserves the most rigorous accessibility requirements for new **[Page 205]** construction, resulting in an estimated increase of construction costs of no more than one percent. Even this now construction requirement has certain limitations that attempt to mitigate costs. The Americans with Disabilities Act contains an exception for placing elevators in new or altered buildings, perhaps the most costly capital expense for making buildings accessible. Any building that has less than 3,000 square feet per story or that is less than three stories in height need not be constructed with an elevator. The Administration believes a more prudent course would make the requirement apply to new construction of buildings with more than 3 stories. Only multistory shopping malls, professional offices of health care providers, and other categories of buildings designated by the Attorney General would be required to have elevators.

The Administration also supports the Senate bill's exclusion of religious organizations and entities controlled by religious organizations from the reach of the public accommodations provisions. Places of worship and the activities of entities controlled by religious organizations have been prudently excluded from the bill.

The Administration is well aware of the costs that litigation designed to test novel theories can impose an business in this country. In order to avoid unnecessary and costly litigation, the Americans with Disabilities Act, in most cases, **[Page 206]** Congress and the Executive Branch. Four statutes[1] and a series of current Department of Transportation regulations present an interrelated, complicated set of obligations. Several Federal circuit courts have interpreted these statutes and rules. The President agrees that additional legislation is needed to bring certainty to this area and believes that the Americans with Disabilities Act appropriately clarifies transit requirements.

Our goal, and yours, is to ensure that persons with disabilities have access to adequate transportation in this country. The Americans with Disabilities Act would, for the first time, guarantee that public bus systems in this country are accessible to persons with mobility impairments by requiring that all new public buses be accessible to persons with disabilities with the Department of Transportation empowered to grant waivers in the narrow circumstances where such buses are unavailable. No retrofitting of existing buses is required by the bill. Requiring that all new buses be accessible is a major change in Federal transportation policy and a welcome one. The unavailability of accessible public transportation in areas served by public transit continues to be a major barrier to the employment of persons with disabilities and a significant factor **[Page 207]** in continuing their isolation from everyday American life. The Administration views this provision of the Americans with Disabilities Act as a key component of the bill.

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[1] Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; section 16(a) of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1612(a), section 165(b) of the Federal-Aid Highway Act of 1973, as amended, 23 U.S.C. § 142 note; and section 317(c) of the Surface Transportation Assistance Act of 1982, 49 U.S.C.§ 1612(d).

Approximately 35% of the buses used in urban mass transit in this country are already accessible. Because the average life of a bus is 12 years, accessible bus transportation would become a reality in this country in a relatively short period of time.

In addition, the Administration is pleased that the Americans with Disabilities Act requires the provision of supplementary paratransit services. Approximately 75% of all transit agencies already provide paratransit services. The Americans with Disabilities Act would permit paratransit services that supplement, rather than duplicate, the fixed route bus service. Further, under the Americans with Disabilities Act, paratransit services need only be provided to those disabled persons who are unable to use mainline accessible transportation. Thus, those persons whose physical or mental disability is so severe that they are unable to use the accessible mainline bus system will be eligible to gain access to their community through paratransit services.

Again, the Americans with Disabilities Act wisely recognizes the cost implications of paratransit service. If providing paratransit services at a level that is comparable to the **[Page 208]** accessible fixed route system is so costly that it results in undue financial burden on the local transit authority, the local government can provide a reduced level of services. The Secretary of Transportation will issue regulations on what constitutes an undue financial burden and, in doing so, can use a "flexible numerical formula" that incorporates appropriate local characteristics. In this era of fiscal constraints, the paratransit provisions of the Americans with Disabilities Act strike a responsible balance between providing accessible transportation and protecting the economic viability of local transit providers.

During negotiations between the Senate and the Administration, the exact nature of the accessibility requirements for intercity bus services by private entities proved to be a thorny issue. The Administration believes that

the in depth three year study to be done by the Office of Technology Assessment will provide valuable information on cost effective ways to provide accessible intercity bus transportation and can provide a basis for further legislation in this difficult area. Because there is substantial evidence of the financial fragility of private intercity bus operators, the Administration expects that the study will provide detailed analyses and recommendations on a wide range of accessibility strategies and their relationship to the provision of bus service, particularly in rural areas. We think that delaying the implementation of the **[Page 209]** rather than attempting to develop new terms and standards, incorporates terms and concepts from section 504, a law that now has a 16-year history.

We are pleased that the Americans with Disabilities Act, as passed by the Senate, does not create additional monetary incentives for private litigation. Earlier versions of the bill would have unduly encouraged private suits by offering the prospect of jury trials, large monetary awards, and punitive damages. Under the Senate bill, the remedies available in suits by private litigants against public accommodations are limited to injunctive relief, attorneys fees, and court costs. Authority to seek monetary damages and civil penalties is given only to the Attorney General and, even then, only in pattern or practice cases or suits of general public importance. The Department of Justice intends to limit its requests for monetary damages to compensation for out-of-pocket losses and would not include speculative damages or damages for pain and suffering. In fact, it is only in the employment area that any monetary relief is available to private litigants, and that particular relief, in the form of back pay, has boon available under other civil rights employment statutes for the last 25 years.

The provision of accessible transportation for persons with disabilities has been one of the most complex issues faced by **[Page 210]** Americans with Disabilities Act's

requirement that new intercity buses be accessible until 7 years from the date of enactment for small providers (6 years for other bus service providers) is necessary. The three-year period between the completion of the OTA study and the effective date of the Americans with Disabilities Act's requirements will give more than ample time for the Department of Transportation and the Congress to make appropriate regulatory and statutory changes based on the study. Maintaining the Act's accessible bus requirement during this interim period will act as a spur to the development of technological advances in this area.

On another matter, the Administration strongly supports the Americans with Disabilities Act requirements mandating that our Nation's telecommunications system be made accessible to deaf persons. The inability to communicate by telephone renders the routine tasks of daily living — such as making a doctor's appointment or inquiring about a job opportunity — difficult or even impossible to accomplish. Establishment of a telecommunications relay service is clearly a vital stop toward full integration of deaf persons into the mainstream.

The Administration particularly endorses the technical assistance provisions in the Americans with Disabilities Act that were added to the bill in an amendment sponsored by Senator Dole. It is our belief that the entities covered by this landmark bill **[Page 211]** — employers, public and private transit agencies, State and local governments, telephone companies, and public accommodations — will comply with the law voluntarily. We therefore expect that Federal efforts to provide information on the law's requirements and on how to comply in a cost-effective manner will be well-received and reduce the total cost to society of complying.

We at the Department of Justice wholeheartedly share the goals of the Americans with Disabilities Act and commit ourselves to an effective program of enforcement of the Act's provisions. We have begun the process of analyzing the

Department's specific responsibilities under the bill and pledge that our enforcement effort will be fair and vigorous and that our technical assistance program will be thorough, creative and cost-effective. In addition, the Department of Justice is currently reviewing the impact of the Americans with Disabilities Act on its resources and organizational structure.

As a parent, as a former Governor, and as Attorney General, I have witnessed the many faces of discrimination confronting persons with disabilities. About 40 million people in this country are disabled by reason of some physical or mental handicapping condition. The mere existence of these handicapping conditions does not, for many of these individuals, prevent them from interacting freely with others in society, or from **[Page 212]** performing the same tasks that others perform on a daily basis. But persons with disabilities are all too often not allowed to participate because of stereotypical notions held by others in society — notions that have, in large measure, been created by ignorance and maintained by fear.

It is precisely these sorts of antiquated attitudes that have blocked people with disabilities from entering the mainstream of American life. Certainly attitudinal changes cannot be simply commanded or even legislated out of existence. No particular court order or single piece of legislation can alone change longstanding perception or misperceptions; regrettably, attitudes can only be reshaped gradually. One of the keys to this reshaping process, however, is to increase contact between and among people with disabilities and their more able-bodied peers. And an essential component of that effort is the enactment of a comprehensive law that promotes the integration of people with disabilities into our communities, schools, and work places.

Mr. Chairman, the "Americans with Disabilities Act" can be the vehicle that brings persons with disabilities into

the mainstream of American life. We have an historic opportunity to move legislation through the Congress given the broad support for its purpose. On behalf of the Administration, I pledge to this Committee and to the Congress our support to produce a bill that can be signed this year.

99-1240

In The
Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, ET AL.

Petitioners,

v.

PATRICIA GARRETT, ET AL.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR AMICI CURIAE LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

Amici are law professors with extensive experience in the study of constitutional law, the history of the Fourteenth Amendment and the jurisdiction of the federal courts.[1] Amici have no personal interest in the outcome of this litigation, but are deeply concerned with the development of jurisprudence regarding the respective roles played by the coordinate branches of federal government in protecting the civil rights of the people of the United States. Amici are also concerned as scholars and citizens with the role of the federal government in the correction of State discrimination against certain classes of people. A list of amici is attached to this brief as Appendix I.

SUMMARY OF ARGUMENT

The text and history of the Fourteenth Amendment make clear that its framers intended to vest in Congress the plenary power to remedy all forms of unconstitutional discrimination. The framers designed this authority fully cognizant that it would often be exercised at the expense of "state's rights" or "state sovereignty." History indicates as well that the "equal protection of the laws" manifested both a promise and a command: as a promise, it was to extend to all classes of persons, not merely those that would today be considered "suspect" or "quasi-suspect" classes; as a command, it forbade denials of equal protection, imposing an obligation on the states to refrain from invidious discrimination and to ensure that state laws were administered with actual equality, rather than the sham represented by statutes ignored in practice. Finally, history indicates that to secure this promise and to enforce this command, Congress was necessarily vested with the affirmative power to enact comprehensive legislation preventing or remedying state denials of equal protection, including both state discrimination and state failures to protect against discrimination.

The Americans with Disabilities Act represents the culmination of more than twenty years of

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[1] All parties consent to the filing of this brief. Counsel for neither party authored the brief in whole or in part. No person or entity made a monetary contribution to the brief's preparation or submission.

Congressional efforts to end State discrimination against people with disabilities through a variety of subsidies, restrictions and mandates in discrete areas such as education, transportation, voting, housing and institutional care. In enacting the ADA, Congress was explicit in its findings that these statutes had failed, and that discrimination (including discrimination by the States) was pervasive and nation-wide. Even so, the ADA itself was a product of several years of negotiation and compromise, the very kind of consultation and fact-gathering suggested by this Court in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442-43 (1985).

As the Court recognized in *City of Cleburne*, and other cases, discrimination based on disability, although potentially as arbitrary and irrational as other forms of discrimination, requires a different legal approach than other forms of discrimination. Developing the structure for remediation of disability-based discrimination is a particularly inappropriate task for courts (a conclusion reflected in the Court's choice of rational basis level of scrutiny) and particularly suited to legislative bodies (making deference to Congress in the development of the ADA particularly appropriate). In fact, discrimination against people with disabilities, both pervasive and complex, is a classic example of the sort of "difficult and intractable problem" identified by this Court in *Kimel v. Board of Regents*, 120 S.Ct. 631, 648 (2000) as justifying prophylactic measures aimed at preventing unconstitutional behavior.

Despite this Court's recent references to the deference due to Congress about the need for remedial legislation to protect the rights of citizens under the Fourteenth Amendment, State litigants have interpreted *Kimel* and *City of Boerne v. Flores*, 521 U.S. 507 (1997) as an invitation to dismantle almost fifty years of federal civil rights legislation. States are now questioning their obligation to follow virtually every civil rights enactment that Congress has ever passed, from Title VII to the Voting Rights Act. The Court has now firmly established that Congress may neither reverse Supreme Court interpretations of constitutional rights nor act to abrogate State immunity without a sufficient record of unconstitutional discrimination. In the case of the Americans with Disabilities Act, both requisites have been satisfied, and the Court should uphold Congress' exercise of its Section 5 powers.

I. *The Americans with Disabilities Act is Consistent with the Original and Historical Understanding of the Scope of Congressional Power under Section Five of the Fourteenth Amendment.*

A. *The Framers of the Fourteenth Amendment Intended to Vest Congress with Plenary Powers to Remedy State Discrimination.*

1. *The History of Section Five.*

On February 26, 1866, Republican Congressman John Bingham of Ohio reported to the House of Representatives a proposed Amendment to the Constitution, drafted by the Joint Committee on Reconstruction, the "Committee of Fifteen." This initial iteration of what would eventually be the Fourteenth Amendment to the Constitution provided as follows:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). After three days of debate, the proposal was tabled until April, Bingham voting with the rest of the Republican majority in favor of the postponement. *Id.* at 1095. It is generally agreed that the decision to table by Bingham and his Republican allies represented something of a strategic retreat; in its initial form, the proposed Amendment had little chance of commanding the necessary two-thirds majority. *See, e.g.*, BENJAMIN KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 215 (1914). It is also generally understood that the nominal reason for at least some of the opposition to the proposal was the fear that it would unduly centralize power. *See, e.g., City of Boerne*, 521 U.S. at 521-25.

The defeat of the original Bingham proposal, however, is not fairly reduced to a simple matter of state versus federal power. Some of the Republicans who voted to table the proposal were, like Bingham,

supporters of the measure.[2] Some Republicans who opposed the measure thought that it did not go far enough, *see* Cong. Globe, 39th Cong., 1st Sess. 1095 (1866) (statement of Rep. Hotchkiss). Finally, some Republicans were simply of the view that the Amendment was unnecessary; they were convinced that the Constitution already authorized congressional acts designed to secure equality under law, *see* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 253 (1988), a proposition that Bingham--in a distinct minority among Republicans--would not embrace. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1291 (1866). Democratic opposition to the measure, meanwhile, also transcended the simple opposition of state and federal power[3], and was in any event the identical argument that would be made in opposition to the final iteration of the Fourteenth Amendment. *See* Cong. Globe, 39th Cong., 1st Sess. 2538 (1866); *id.* at App. 134. *See also id.* at 2080-81.

Interestingly, the opponents and defenders of the initial Bingham proposal found some common ground on this score: it was no valid objection to the amendment to interpose a claim of "state sovereignty." Congressman Woodbridge defended the amendment against the charge that it abridged this elusive "state sovereignty": "It does not destroy the sovereignty of a State, if such a thing exists. It does not even affect its sovereign rights, but merely keeps whatever sovereignty it may have in harmony with a republican form of government and the Constitution of the country." *Id.* at 1088. *See also id.* (statement of Cong. Hale).

The modified proposal that emerged from the Joint Committee in April--the material terms of which

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[2] *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1054 (1866) (statement of Rep. Higby); *id.* at 1057 (statement of Rep. Kelley); *id.* at 1088 (statement of Rep. Woodbridge); *id.* at 1095 (statement of Rep. Bingham).

[3] The one Democrat to be heard at length on the bill was Congressman Andrew Rogers of New Jersey, a member of the Committee of Fifteen. Rogers did indeed object to the proposal on the grounds that it centralized power. *See* Cong. Globe, 39th Cong., 1st Sess. App. 134 (1866). However, the heart of the matter might have been the litany of social horrors Rogers perceived in the Bingham proposal: "under this amendment a negro might be allowed to marry a white woman . . . Under this amendment, Congress would have power to compel the State to provide for white children and black children to attend the same school . . ." *Id.* See also id. at 2080-81 (statement of Rep. Nicholson).

were also largely the work of Congressman Bingham--looked very much like the more "radical" proposal suggested by Congressman Hotchkiss, *see id.* at 1095: it secured the substantive rights by constitutional provision and gave to Congress the power to enforce those rights. *Id.* at 2286.

Democratic opposition to the modified amendment remained uniform--no Democrat in either body voted for the measure--and, typically, much of it was expressed in the rhetoric of "state's rights." *See, e.g., id.* at 2530 (statement of Rep. Randall); *id.* at 3147 (statement of Rep. Harding); *id.* at 2940 (statement of Sen. Hendricks); *id.* at App. 240. The opposition to Section Five was hardly surprising. As Bingham would later explain, the grant of power to Congress envisioned by Section Five matched and exceeded the grant envisioned in his original proposal:

> [Section Five's] grant of power . . . is full and complete. The gentleman [Rep. Farnsworth] says that amendment differs from the amendment reported by me in February; differs from the provision introduced by me, now in the fourteenth article of amendments. It differs in this: that it is, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition...

Cong. Globe, 42d Cong., 1st Sess. App. 83 (1871). *See also id.* at 84. *Cf.* KENDRICK, JOURNAL OF THE JOINT COMMITTEE at 311 n. 2.

Supporters of the Amendment, meanwhile, were also well aware that the revised Amendment would significantly alter the existing balance of state and federal power, substantially increasing the latter, at times at the expense of the former. Section Five was a vital part of the project, *see, e.g.*, Cong. Globe, 42d Cong., 1st Sess. 257 (1871) (statement of Rep. Baker) ("This section was of course necessary in order to carry the proposed article into practical effect."). As Senator Howard explained to the Senate in his introduction of the measure, Section Five gives Congress "authority to pass laws which are

appropriate to the attainment of the great object of the amendment." *Id.* at 2766. Section Five, Howard noted, provided "a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees." *Id.* at 2766. *See also United States v. Morrison*, 120 S.Ct. 1740, 1755 (2000)("Section 5 is a 'positive grant of legislative power' that includes authority to 'prohibit conduct which is not itself unconstitutional and [to] intrud[e] into "legislative spheres of autonomy previously reserved to the states."'")(citations omitted); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989)(plurality opinion of O'Connor, J.)("Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which Congress determines threatens principles of equality and to adopt prophylactic rules to deal with these situations.").

2. *Section Five was Intended to Permit Congress to Act Where States Failed to Protect the Rights of Citizens*

The record before the Thirty-Ninth Congress was replete with instances not merely of official acts of discrimination against the freedmen, but of official failures to prevent or remedy "private" acts of oppression, perpetrated under the watch of indifferent state officials, or with their acquiescence or active support. *See, e.g.*, S. Exec. Doc. No. 39-2 (1866) (Message of the President of the United States Communicating, in Compliance with a Resolution of the Senate of the 12th Instant, Information in Relation to the States of the Union Lately in Rebellion, Accompanied by a Report of Carl Schurz on the States of South Carolina, Georgia, Alabama, Mississippi, and Louisiana; also a Report of Lieutenant General Grant, on the Same Subject (Report on the Condition of the South)); H.R. Rep. No. 39-30 (1866) (Report of the Joint Committee on Reconstruction) (testimony on oppression and official failures to respond); H.R. Exec. Doc. No. 39-70 (1866).

Section One thus commands that no state shall "deny the equal protection of the law," and "when the equal protection is withheld, when it is not afforded, it is denied." Cong. Globe, 42d Cong., 1st Sess. 505 (1871) (statement of Sen. Pratt). As a

necessary consequence, the clause gave rise to an affirmative duty on the part of the states: they are obliged not merely to refrain from unequal treatment, but they are obliged to provide "equal protection." "A state denies equal protection where it fails to give it. Denying includes inaction as well as action. A State denies protection as effectively by not executing as by not making laws." *Id.* at 501 (statement of Sen. Frelinghuysen). *Accord id.* at App. 182 (statement of Rep. Mercur) (deny means "to refuse, or to persistently neglect or omit to give" equal protection). To deny equal protection meant both the failure to enforce the laws and the failure to ensure that the benefits provided by law were provided equally; *id.* at App. 314 (statement of Rep. Burchard) ("the protection must be extended equally to all citizens. This duty must be performed through the legislative, executive, and judicial departments of its government. If the law-making power neglects to provide the necessary statute, or the judicial authorities wrongfully enforce the law so as to neutralize its beneficial provisions, or the executive allows it to be defied and disregarded, has not the State denied the enjoyment of that right?"); *id.* at 368 (statement of Rep. Sheldon) (clause embraces cases where state "refuses or neglects to discharge" its duty); *id.* at 459 (statement of Rep. Coburn) ("Affirmative action or legislation is not the only method of a denial of protection by the State").

Thus, when the states regularly fail to protect discrete classes of citizens from acts of oppression or discrimination, they fail to provide the "equal protection of the laws." "If a State fails to secure to a certain class of people the equal protection of the laws, it is exactly equivalent to denying such protection. Whether that failure is willful or the result of inability can make no difference, and is a question into which it is not important that Congress should enter." *Id.* at App. 251 (statement of Sen. Morton); *accord id.* at 321 (statement of Rep. Stoughton); *id* at 375 (statement of Rep. Lowe) ("It is said that the States are not doing the objectionable acts. This argument is more specious than real. Constitutions and laws are made for practical operation and effect . . . What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislations of a State?"); Cong. Globe, 43d Cong., 1st Sess. 412 (1871) (statement of Rep.

Lawrence) ("If a State permits inequality in rights to be created or meted out by citizens or corporations enjoying its protection it denies the equal protection of the laws. What the State permits by its sanction, having the power to prohibit, it does in effect itself").

Congress, as a corollary, was empowered to provide the protection that the states fail to afford. "The State, from lack of power or inclination, practically denied the equal protection of the law . . . And if [Congress] finds that a citizen's constitutional rights are in jeopardy from any cause, that they have been ruthlessly stricken down or wrongfully denied, and existing laws are inadequate for his relief, it is bound to make such appropriate legislation as shall be sufficient for his protection and redress." Cong. Globe, 42d Cong., 1st Sess. 428 (1871) (statement of Rep. Beatty); *id.* at 71 (statement of Rep. Shellabarger) ("Two things are provided--equal laws and protection for all; and whenever a State denies that protection Congress may by law enforce protection"); *id.* at 370 (statement of Rep. Monroe) ("we shall have no difficulty in finding sufficient grants of power in the Constitution to enable us to protect the lives and property of our fellow citizens when the State governments fail to protect them. We should go to the Constitution expecting to find weapons to defend the weak and the poor, not weapons to strike them down"). And at times, the only sufficient protection--the only "appropriate legislation"--would be in part prophylactic: legislation designed to prevent the abuses permitted or perpetuated by the states. "The true construction of the [equal protection] provision is: `No State shall fail or refuse to provide for the equal protection of the laws.' . . .Is it meant that Congress may enforce a denial? No; it means that Congress may prevent a denial." *Id.* at 482 (statement of Rep. Shellabarger). Only thus could Congress realize the promise of equality envisioned when the Amendment was adopted.

II. *Congress' Power Under Section 5 to Enforce the Fourteenth Amendment is not Limited to Protection of Suspect or Quasi-Suspect Classes*

It is clear from the historical record that Congress intended the guarantees of the Fourteenth Amendment to secure equal rights to all citizens. Although the Court extends particular solicitude to

certain groups of persons by examining legislative classifications relating to them with heightened scrutiny, variations in the level of review are not equivalent to variations in the right at issue. The level of scrutiny afforded by a court neither defines the substance of the right under the Fourteenth Amendment nor diminishes it; "no one has or would argue that the value of liberty varies somehow depending on whether one is alleged to be ill or retarded," *Heller v. Doe,* 509 U.S. 312, 341 (1993)(Souter, J. dissenting).

As recent decisions of the Court reflect, the fact that a legislative classification is subject to rational basis review does not mean that the citizens so classified lose equal protection rights under the Fourteenth Amendment. *City of Cleburne*, 473 U.S. at 432; *Vill. of Willowbrook v. Olech*, 120 S.Ct. 1073, 1074-75 (2000). By its very text, the equal protection clause belongs to all persons.

Rather, if Congress acts to prohibit recognized constitutional violations by the States, or if it acts to prevent those violations through prophylactic legislation and assembles a record of a pattern of violation of constitutional rights to justify such prophylactic action, both historical understanding and the Court's current framework permit Congress to enforce the guarantees of the Fourteenth Amendment, so long as the legislation is congruent and proportional to the identified injuries. Although it has occasionally been suggested that Section 5 power is limited to protected classes, *EEOC v. Wyoming*, 460 U.S. 226, 262 (1983)(Burger, C.J.), the idea that Congress can only legislate under Section 5 to protect certain classes of citizens has never commanded a majority of this Court or of any Court of Appeals, even those which have held the ADA invalid. *See, e.g., City of Maumelle v. Alsbrook*, 184 F.3d 999, 1008 (8th Cir. 1999)(*en banc*)("We agree that Congressional enforcement of equal protection rights under Section 5 is not limited to suspect classifications"); *Brown v. North Carolina Div. of Motor Vehicles*, 166 F.3d 698, 706 (4th Cir. 1999), *pet. for cert. filed*, 68 U.S.L.W. 3164 (U.S. Sept. 8, 1999) (No. 99-424) (""It is true, of course, that even rational basis review places limits on the States that Congress may seek to enforce").

III. *The Americans with Disabilities Act is Appropriate Legislation to Enforce Section 1 of the Fourteenth Amendment*

Although Congress' power to legislate under Section 5 is not limited to any particular class or category of persons, it *is* limited to remedying and preventing violations of the Fourteenth Amendment rather than substantive redesign of its meaning. *City of Boerne*, 521 U.S. at 519. The Court's recent decisions in the Eleventh Amendment area, however, have not purported to limit Congress's role in gathering facts and reaching conclusions as to violations of those rights. Moreover, the Court has also reaffirmed its deference to Congressional conclusions that legislation is necessary to remedy or prevent those violations. This Court has in fact gone out of its way to repeatedly underscore that "[i]t is for Congress in the first instance to determine 'whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,'" *Kimel*, 120 S.Ct. at 644 (quoting *City of Boerne*, 521 U.S. at 536 (quoting *Katzenbach v. Morgan*, 348 U.S. 641, 651 (1966))).

To be sure, the Court has also insisted that Congress respect the principles of federalism in this process. Thus, even when acting pursuant to Section Five, Congress must clearly state its intent to override the Eleventh Amendment immunity of the states, *Atascadero State Hospital v. Scanlon*, 473 U.S. 274 (1985), and must target State action, *United States v. Morrison*, 120 S.Ct. 1740, 1758 (2000). When Congress enacts legislation to enforce the Fourteenth Amendment, it must be congruent and proportional to the underlying constitutional problem. At the very least, this Court's own cases hold that this burden can be met in two ways, both of which apply in the case of the Americans with Disabilities Act. First, ostensibly neutral rules sometimes disguise discrimination, and Congressional action against those rules may be justified by a showing that the constitutional violation is likely to go undetected without a prophylactic rule, as in the Voting Rights Act. Second, Congress may have "identified . . . [a] pattern of constitutional violations," *Kimel*, 120 S.Ct. at 645, that more targeted legislation has been unable to remedy. Although Congress responded to both of these problems in enacting the ADA, this brief will focus on the second, demonstrating that Congress passed the ADA after decades of more targeted federal legislation failed to

remedy State violations of the constitutional rights of people with disabilities.

A. *Congress Passed the ADA After Twenty Years of Targeted, Discrete Legislation Failed to End State Discrimination Against People with Disabilities*

Congress passed more than twenty years of legislation against disability discrimination in a number of discrete areas, including architectural barriers to government buildings and courthouses, education, transportation, voting, and housing. Beginning in 1968, with the Architectural Barriers Act of 1968, 42 U.S.C. § 4151; the Urban Mass Transportation Act of 1970, 49 U.S.C. § 1612; the Education for Handicapped Children Act, 20 U.S.C. § 1401 (current version titled the Individuals with Disabilities in Education Act); and continuing through statutes such as the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000, the Voting Accessibility for the Elderly and Handicapped Act of 1984, 42 U.S.C.A. § 1973ee-1, and the Fair Housing Amendments Act, 42 U.S.C. § 3602 *et seq*, Congress combined carrots and sticks in a variety of ingenious ways to try to end State discrimination against disabled citizens in specific areas of the law. It offered States federal funds to cease discrimination in education, gave the Department of Justice standing to sue States to prevent discrimination in institutions, mandated that state buildings and transportation systems which received federal funds must be accessible to people with disabilities, and insisted that polling places in federal elections be accessible (thus effectively requiring polling places to be accessible for all elections).

One year after passing Section 504 of the Rehabilitation Act, the first major federal prohibition of discrimination against people with disabilities, Congress amended the act to make the prohibitions stronger, motivated in part by findings of widespread discrimination by the States:

> [i]ndividuals with handicaps are all too often excluded from schools and educational programs, barred from employment or are underemployed because of archaic attitudes and laws, denied access to transportation,

> buildings and housing because of architectural barriers and lack of planning, and are discriminated against by public laws which frequently exclude citizens with handicaps or fail to establish appropriate enforcement mechanisms.

S. Rep. No. 93-1297 (1974), at 28, *reprinted in* 1974 U.S.C.C.A.N. 6373, 6400.

The Education for All Handicapped Children Act was passed as a result of the unconstitutional exclusion by States of eight million children from school. *Smith v. Robinson,* 468 U.S. 992, 1009 (1984). The Developmental Disabilities Assistance and Bill of Rights Act contained a bill of rights section for developmentally disabled citizens aimed at the States because "[t]he Committee is well aware that our disabled and handicapped citizens are often unreasonably and unnecessarily deprived of their rights and relegated to second class status." H.R. Rep. No. 94-58, at 13 (1975), *reprinted in* 1975 U.S.C.C.A.N. 919, 925.[4]

In the years prior to the ADA hearings, Congress heard voluminous reports of State violations of the constitutional rights of their institutionalized citizens. For example, the House Conference Report on the Civil Rights of Institutionalized Persons Act noted:

> Since 1971, the Attorney General has participated in a series of civil actions seeking to redress widespread violations of constitutional and federal statutory rights of persons residing in state institutions. [Because two federal courts had held that the Attorney General did not have standing to participate in such litigation, Congress enacted this legislation to explicitly confer such standing]... H.R. 10 ensures that institutionalized people will be

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[4] Although this Court held that the Bill of Rights was unenforceable in *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 19 (1981), what matters here is that Congress found out that States unreasonably deprived disabled citizens of their rights and relegated them to second-class status, a factual finding that Congress attempted to remediate through the provisions of the statute, including the Bill of Rights.

> afforded the full measure of protections guaranteed to them by the Constitution of the United States.

H.R. Conf. Rep. No. 96-897 (1980), *reprinted in* 1980 U.S.C.C.A.N. 832. Congress passed the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997, specifically to permit the Attorney General to sue States for violating the constitutional and federal rights of persons in institutions, many of whom were severely disabled.

Despite the hopes expressed in the House Report, violations of the constitutional rights of institutionalized citizens continued unabated on a national scale. In April 1985, Senate staff presented a report to the Senate Committee on Labor and Human Resources summarizing the results of their visits to thirty-one state institutions in twelve states. After conducting approximately 600 interviews, the Report documented deaths and beatings, sometimes of patients in seclusion or restraints, across the nation from South Carolina to California. The Report summarized that "residents are vulnerable to abuse and serious physical injury...sexual advances and rape," and concluded that neither the States nor the Federal government were successful in controlling these conditions. S. Rep. No. 99-50, pt. 2, App. at 2, 20-25, 76-82 (1985) (Staff Report on the Institutionalized Mentally Disabled). Many of the conditions reported to Congress clearly implicated the constitutional right to safety and freedom from harm in institutional settings. *Youngberg v. Romeo*, 457 U.S. 307 (1982). After extensive hearings and receiving this report, Congress passed the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. 10801, yet another Congressional response to State violations of the constitutional rights of persons with disabilities. While the Civil Rights of Institutionalized Persons Act gave the Justice Department standing to sue to protect institutionalized persons' rights, the Protection and Advocacy for Mentally Ill Individuals Act gave the States money to create programs to prevent and remedy the violations of institutionalized disabled persons' rights—but only while they were in the institutions and for ninety days following discharge, 42 U.S.C. §§ 10805(a)(1)(B) & (C).

Despite the passage of these more narrow statutes, testimony before Congress in support of the

ADA revealed that little had changed. The prior laws had not resolved the unconstitutional injuries. This truth was reflected in the national reports before Congress and in the testimony of both disabled witnesses and federal and state officials. Then-Attorney General Thornburgh noted that:

> [o]ver the last twenty years, civil rights laws protecting disabled persons have been enacted in a piecemeal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections.

H.R. Rep. No. 101-485, pt. II, at 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 330.

The Attorney General of Illinois, Neil Hartigan, Dr. Mary Lynn Fletcher, and numerous other witnesses confirmed that neither federal legislation nor state legislation aimed at protecting people with disabilities was accomplishing that goal. Mr. Hartigan testified that imposing a non-discrimination mandate only upon recipients of federal funds under the Rehabilitation Act resulted in "total confusion" and "inability to expect consistent treatment." *See* S. Rep. No. 101-116, at 12 (1989). Fletcher testified that because Federal assistance often didn't reach rural areas, there was no protection from discrimination for people with disabilities who lived there. *Id.* at 12-13. Harold Russell, Chairman of the President's Committee on Employment of People with Disabilities, reported that "the fifty State Governors' Committees, with whom the President's Committee works, report that existing State laws do not adequately counter such acts of discrimination." *Id.* at 18.

After hearing this testimony, Congress explicitly concluded in the language of the ADA itself: "current federal and state laws are inadequate to address the discrimination faced by people with disabilities . . . " 42 U.S.C. § 12101(a)(3). When "previous legislation has proved ineffective," broader prophylactic legislation is justified, *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966). In assessing the congruence and proportionality of the ADA, it is appropriate for this Court to consider the years of evidence of State

discrimination before Congress as it enacted discrete statute after discrete statute, which federal, state and individual witnesses testified had failed to end discrimination against people with disabilities. In this context, "[w]hen Congress enacts appropriate legislation to enforce [the Fourteenth Amendment], federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution." *Alden v. Maine*, 527 U.S. 706, 756 (1999)(citations omitted).

In passing the Americans with Disabilities Act, Congress was not acting on a blank legislative slate, nor did it seek to overturn existing Equal Protection jurisprudence, as in *City of Boerne*; it met its responsibility to present a fully developed evidentiary record of discrimination, unlike *Kimel*, and clearly targeted State actors, unlike *Morrison*.

It would not, of course, be constitutionally sufficient had Congress acted to protect people with disabilities from adverse State action that was rationally related to legitimate state objectives. State deprivations of the rights of disabled people must rise to the level of constitutional violations to support corrective action such as Title II of the ADA. Amici contend that even under rational basis review, the earlier statutes and then the ADA targeted widespread State violations of fundamental rights such as the right to vote and the right to safety in institutional settings, as well as arbitrary and irrational exclusion from school, employment and transportation. These continuing actions and policies by the States constituted violations of disabled people's right to equal protection of the laws. The result in *City of Cleburne* itself demonstrates that government entities do violate the constitutional rights of disabled individuals under the rational basis standard.

B. *Rational Basis Review is Not a Reflection of the Severity or Pervasiveness of Constitutional Injuries, but Rather of the Appropriate Branch of Government to Redress Such Injuries*

The Court's holding in *City of Cleburne* establishes rational basis review as the standard for determining whether States have violated the constitutional rights of their disabled citizens, although

the Court also explicitly stated that it was making the rational basis finding "absent controlling Congressional direction." 473 U.S. at 440. The reasons cited by the Court for selecting rational basis review in *City of Cleburne* argue strongly for upholding Congressional action in passing the ADA, a law which concededly prohibits some behavior that the Constitution alone would not condemn. The Court cited two reasons for choosing rational basis review. First, because disability is not simply a matter of physical or mental impairment but of the degree to which that impairment interferes with, or is regarded as interfering with, one's functional abilities, it raises complex questions of definition. *See, e.g. Albertson's v. Kirkingburg*, 527 U.S. 555, n. 12 (1999)(some people with monocular vision are disabled and others are not). The Court's observation in *City of Cleburne* with regard to mentally retarded people is even more true of people with disabilities in general: they are "a large and diversified group" more difficult to define than categories such as alienage and illegitimacy. 473 U.S. at 442. Second, unlike race or gender, which were recognized as rarely presenting relevant considerations in any principled decision making, disability is sometimes relevant to decisionmaking. Disability has significant consequences in the world that a rational legislature can take into account. Notably, disability has been the basis on which legislatures have passed beneficial legislation. The rational basis standard of review gives both States and the federal government the flexibility to take the complex nature of disabilities into account where they are relevant, and to act to benefit groups of people with disabilities. If this Court had chosen a higher level of scrutiny against which to evaluate differential treatment of people with disabilities, programs such as disability benefits for severely disabled people might have fallen under challenge by non-disabled people. *See Adarand v. Pena*, 515 U.S. 200 (1995)(subjecting affirmative action programs to strict scrutiny review).

However, as the Court's decision in *City of Cleburne* shows, the rational basis standard of review does not give States a free pass to engage in widespread invidious and arbitrary discrimination. The fact that some classifications based on disability are rational does not mean that people with disabilities are not also subject to irrational, widespread and persistent discrimination in violation of the Fourteenth

Amendment. The Court's selection of rational basis review in *City of Cleburne* could not be (and did not purport to be) a factual finding about the pervasiveness and persistence of unconstitutional discrimination by the States in general against people with mental retardation, much less people with disabilities. After hearing written and oral testimony from hundreds of witnesses, and studying hundreds of pages of research and reports submitted to it, Congress did make such findings. It found that much state legislation, policy and practices toward people with disabilities was neither remedial nor even rational, but exclusionary, arbitrary, segregationist, irrational, based on myths and stereotypes, and springing from ignorance and even hostility. Unlike the record before Congress in *Kimel*, the massive record compiled by Congress in passing the ADA implicated a broad range of State statutes, policies, and customs that violated even the rational basis standard of review.

When Congress passed the ADA, it was aware that State statutes providing protection to people with disabilities existed on paper but were not meaningfully enforced. Even in *City of Cleburne*, the Court's reference to a Texas statute giving Texas citizens the right to live in group homes as protective was undermined by the recognition that plaintiffs in *City of Cleburne* dropped their claim under that statute--which had been in force for almost ten years at the time of the litigation--because "[t]he Act had never been construed by the Texas courts," *City of Cleburne* at 444, n.11.

In fact, what Congress learned in the ADA hearings was that the very presence of these well-intentioned but unenforced statutes served to shield the State's more invidious actions:

> The discriminatory nature of policies and practices that exclude and segregate disabled people has been obscured by the unchallenged equation of disability with incapacity and by the gloss of 'good intentions.' ...The social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability. For example, being paralyzed has meant far more than being unable to walk-it

> has meant being excluded from public schools, being denied employment opportunities, and being deemed an 'unfit parent.' These injustices coexist with an atmosphere of charity and concern for disabled people.

H.R. Rep. 101-485, pt. II, at 41 (1990) (testimony of Arlene Mayerson).

At the time Congress was considering the ADA, the record of states towards people with disabilities bristled with contradictions - pity and antipathy, overprotection and outright brutality - resulting in a complicated mixture of legislation, policy and practice that occasionally protected the disabled, sometimes used protection as an excuse for invidious discrimination (as in *City of Cleburne*), and sometimes simply discriminated in a harsh and unambiguous manner. What Ms. Mayerson's testimony underscores--and what supports both rational basis review by the courts *and* deference to congressional judgment in crafting the Americans with Disabilities Act--is that while there is a record of a core of hostility, irrationality, and failure to protect people with disabilities by the States, much of the discrimination is more subtle but just as damaging, and intentional discrimination is more difficult to see in the individual case than in the composite portrait presented by the voluminous testimony heard by Congress when it considered the ADA.

The meaning of discrimination itself as a legal concept is more difficult in the case of people with disabilities. Although Congress recognized that certain patterns of discrimination against people with disabilities strongly resembled patterns of discrimination on the basis of race, including the emphasis on state-imposed segregation, widespread exclusion from the public school system and from voting, it was equally clear that traditional concepts of discrimination developed in the context of race discrimination were not completely suited as a mode of analysis for people with disabilities.

For example, it is crucial to understand that applying traditional concepts of equal protection to people with disabilities would simply maintain a discriminatory status quo. Society can rationally aspire to be "color-blind" in a way that it cannot and should

not wish to be "disability-blind." Giving a person who is mobility-impaired an equal right to vote or be a juror, without concomitant changes in polling places or courtrooms, may accomplish nothing practical, and the framers of the Fourteenth Amendment wanted nothing if not to make equal protection real. They were not content with the equality on paper that existed in some states, when contrasted with the actual conditions reported by General Schurz and the Committee of Fifteen. Neither equality nor intentional discrimination mean the same thing in the context of disability discrimination. If police put a paraplegic arrestee in a paddy wagon in exactly the same way as they would put an able-bodied arrestee into the wagon, they are not providing equal protection, *see Gorman v. Bartch,* 152 F.3d 907 (8th Cir. 1998). If a ramp into a courthouse or an interpreter at a town meeting is considered "something extra," beyond the bounds of equal protection, then equal protection will be meaningless for people who cannot climb the steps or hear the speakers. "Reasonable accommodation" that requires a ramp to the polling booth or an elevator to the courtroom is not something "extra"--it is the only way to ensure equal protection of the laws for people with mobility impairments. If state-operated transportation systems are not equipped with lifts, they are more segregated on the basis of disability than the buses of Montgomery were on the basis of race.

Thus, both the nature of disability and the nature of discrimination based on disability is complex, and it is in these circumstances that the legislative process is particularly well suited to remediation. The Court's rationale for its decision in *City of Cleburne* applies equally well to upholding the Americans with Disabilities Act:

> [h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.

473 U.S. at 442-43.

Just as the complexity of disability and of the ways that discrimination on the basis of disability manifests itself were reasons for the Court not to step out in front of the legislative process in *City of Cleburne*, they are reasons for the Court not to overturn the laborious fact-gathering, negotiations and compromises Congress went through in passing the ADA. They also serve as reasons for this Court to defer to Congress's conclusion that prohibition of a concededly broader swath of constitutional behavior was required to guarantee equal protection of the laws for persons with disabilities. In the case of people with disabilities, if legislation "merely parrots the precise wording of the Fourteenth Amendment," *Kimel*, 120 S.Ct. at 644, it would be virtually useless to enforce equal protection. The ADA itself concededly prohibits States from engaging in constitutional behavior as a means of deterring unconstitutional behavior. However, as the Court recently reaffirmed in *Kimel*, "that [a statute] prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry. Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation." *Id.* at 648.

Disability discrimination is the classic example of an extremely difficult and intractable problem. The ADA represents an example of what Congress is best suited to do in dealing with such problems, and is the product of negotiations, amendments, line-drawing, and compromise before passage by Congress. Its numerous provisions, including safe harbor exclusions for insurance companies, elimination of damage actions under Title III, and a number of qualifications and defenses, reflect a struggle by hundreds of legislators to reconcile the twin realities of discrimination and difference. That struggle, which took several years and was the culmination of twenty years of more limited federal efforts to entice, exhort and coerce the States to cease discriminating against their disabled citizens, is entitled to respect by this Court.

IV. *Lower Courts are Increasingly Confused and in Conflict as to the Scope of Congressional*

Power to Protect the Civil Rights of Individuals Against Violations by the States

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood v. Casey*, 505 U.S. 833, 843 (1992). The federal statutory framework protecting the civil rights of people in this country against violations by the States is undermined by doubt and uncertainty. Despite this Court's repeated recognition of Congress' power to enforce Section 5 of the Fourteenth Amendment, its recent cases have created substantial uncertainty in the lower courts and among litigants as to the scope of Congressional power to protect the civil rights of citizens against encroachments by the States. The decision in *City of Boerne* has led States to challenge their obligations under virtually the entire structure of federal civil rights protection. *In re Employment Discrimination Litigation*, 198 F.3d 1305 (11th Cir. 1999)(challenging Title VII); *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 1999)(challenging Title VII); *Fitzwater v. First Judicial District of Pennsylvania*, No. Civ.A. 99-3274, 2000 U.S. Dist.LEXIS 4931 (E.D. Pa. April 11, 2000)(challenging Title VII); *Sandoval v. Hogan*, 197 F.3d 484 (11th Cir. 1999)(challenging Title VI); *Lesage v. Texas*, 158 F.3d 213 (5th Cir. 1998)(challenging Title VI); *Litman v. George Mason University*, 186 F.3d 544 (4th Cir. 1999)(challenging Title IX), *cert. denied* 120 S.Ct. 1220 (2000). One court even reassessed whether the Voting Rights Act was a constitutional abrogation, *Mixon v. Ohio and Michael White*, 193 F.3d 389, 398-99 (6th Cir. 1999). A significant array of other federal statutes have also been challenged as violative of States' Eleventh Amendment rights. *Union Pacific v. State of Utah*, 198 F.3d 1201 (1999)(challenging Railroad Revitalization and Regulatory Reform Act); *Burnette v. Carothers*, 192 F.3d 52 (2d Cir. 1999)(challenging CERCLA); *Bell South Telcoms v. MCIMetro Access Transmission Services*, 97 F.Supp.2d 1363 (N.D. Ga. 2000)(challenging Telecommunications Act of 1996). The circuit courts are in disarray and conflict about the constitutionality of most federal antidiscrimination statutes.

This case, markedly different from the cases in which the Court has invalidated Congressional legislation to date, is an opportunity to reaffirm that this Court is not intent on radically rearranging the separation of powers or undermining the federal government's power to protect against State

violations of civil rights. Unlike *City of Boerne* and *Kimel*, Congress assembled a voluminous record of hundreds of individual testimonies, as well as reports and statistics based on national studies. It acted after two decades of more narrowly tailored legislation failed to end discrimination against people with disabilities. Congress took its role seriously in enacting the ADA. The Court can use this opportunity to reaffirm its own expressed commitment that when Congress responsibly carries out the mandate of Section 5 to correct identified State violations of constitutional rights, the Court will give Congress "wide latitude in determining where [the line between appropriate remedial legislation and redefinition of constitutional rights] lies." *City of Boerne*, 521 U.S. at 520. In the process, the Court can give direction and clarity to lower courts and litigants.

V. *Conclusion*

Where Congress carefully assembles a record replete with factual support for its conclusion that people with disabilities are being subjected to unconstitutional discrimination by the States, and engages in over two years of negotiations, amendments, and redrafting to accommodate the parties' differing interests, it has acted precisely as a legislature in a democratic nation should act in addressing a difficult and complex social problem. "Our national experience teaches us that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches." *City of Boerne*, 521 U.S. at 535-36. In this case Congress has acted within its proper role in abrogating the States' Eleventh Amendment rights. This Court should defer to its well-documented findings as to the extent and urgency of discrimination against people with disabilities, and the need for sweeping remedial legislation to correct it. *Amici* urge the Court to affirm the Court of Appeals' decision.

Respectfully Submitted,

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APPENDIX I

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No. 99-1240

IN THE
SUPREME COURT OF THE UNITED STATES

The University of Alabama at Birmingham,
Board of Trustees, et al.,

Petitioners,

v.

Patricia Garrett And Milton Ash,

Respondents.

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

BRIEF OF THE STATES OF MINNESOTA, ARIZONA, CONNECTICUT, ILLINOIS, IOWA, KENTUCKY, MARYLAND, MASSACHUSETTS, MISSOURI, NEW MEXICO, NEW YORK, NORTH DAKOTA, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE* STATES

This *amici curiae* brief is submitted on behalf of fourteen (14) states: Minnesota, Arizona, Connecticut, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Missouri, New Mexico, New York, North Dakota, Vermont, and Washington. The *amici curiae* States strongly support affirmance of the Eleventh Circuit Court of Appeals' decision and the resulting use of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994 and Supp. III 1997) ("ADA"), by their citizens without limitation. Although the States more typically advocate the application of Eleventh Amendment immunity, this case is different. The extremely important public policy underlying the landmark ADA legislation and the Eleventh Amendment jurisprudence as applied to the ADA, cause the *amici curiae* States, consistent with the obligation of their respective attorneys general to protect the public interest, to file this *amici curiae* brief.

Where, as here, a legislative enactment constitutes a valid exercise of Congress's Section 5 powers under the Fourteenth Amendment, the States have a compelling interest in the full implementation of the law. As such, to eradicate the effects of the extensively documented, long-term, pervasive and invidious discrimination against people with disabilities, it is critical that the States be leaders in facilitating this duly enacted Section 5 legislation. Allowing state employees and other citizens to enforce their ADA rights without restriction furthers the ADA's important equal protection-based purpose and the *amici curiae* States' desire to eliminate discrimination against the members of our society with disabilities. Under these circumstances, the *amici curiae* States believe it is imperative to support the validity of the ADA in its entirety.[1]

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[1]An individual state undoubtedly could waive its Eleventh Amendment immunity. *See Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 267 (1997). The applicability of the ADA, however, should not depend on the fortuity of the state of residency of a particular person with a disability. Such a result would severely undermine the important purpose of this national legislation and the proper application of Congress's Section 5 authority. *See supra* pp. 1-2.

SUMMARY OF ARGUMENT

This Court should affirm the Eleventh Circuit's decision and hold that the ADA's express abrogation of the States' Eleventh Amendment immunity was proper. The Eleventh Circuit's decision correctly applies well-settled principles of constitutional law.

The Court has often recognized that people with disabilities suffer culturally-based discrimination resulting from irrational fears, prejudices and ignorance. *See, e.g., Alexander v. Choate,* 469 U.S. 287 (1985); *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985); *School Bd. of Nassau County v. Arline,* 480 U.S. 273 (1987). Consistent with this judicial precedent, Congress had overwhelming evidence of widespread and invidious discrimination against individuals with disabilities, including such discrimination by the States, to properly invoke its Section 5 powers. Both the record before Congress and common sense shows that this pervasive, societal discrimination against people with disabilities undoubtedly impacted state decisions. Indeed, State officials were not immune from the negative attitudes and unfair stereotypes about people with disabilities that pervaded our society, and thus States unfortunately engaged in numerous activities that unconstitutionally discriminated against individuals with disabilities. Congress's unequivocal and unqualified findings of rampant discrimination against people with disabilities, including activities engaged in by the States, are soundly based.

Congress also provided for a congruent and proportional remedy for the widespread constitutional violations it found. In accordance with the decision in *City of Cleburne*, 473 U.S. at 442-443, where this Court recognized that the legislative branch is in a better position than the judiciary to address disability discrimination, Congress tailored appropriate and balanced legislation to remedy and deter continued discrimination against people with disabilities. The legislative response was commensurate with the Congressional record and findings establishing pervasive, culturally-based disability discrimination. As authorized by Section 5 of the Fourteenth Amendment, the ADA not only proscribes future discrimination prohibited by the Equal Protection Clause, but also seeks to deter such discrimination.

The important limitations to the ADA's remedial scheme provide further evidence of Congress's proportionate and congruent response to the endemic, nationwide problem of discrimination based on disability. By imposing significant restrictions on the law's applicability, the ADA appropriately balances the needs of the States with meaningful protection against disability discrimination. Accordingly, Congress's enactment of the ADA's comprehensive remedial scheme, including its abrogation of the States' Eleventh Amendment immunity, was a proper exercise of its power to enforce the Equal Protection Clause of the Fourteenth Amendment and protect people with disabilities from discrimination.

ARGUMENT

IN ENACTING THE ADA, CONGRESS PROPERLY ABROGATED THE STATES' ELEVENTH AMENDMENT IMMUNITY.

Congress may abrogate the States' Eleventh Amendment immunity from suit in federal court if two requirements are met. First, Congress must make its intention to abrogate "unmistakably clear in the language of the statute." *Kimel v. Florida Bd. of Regents,* 120 S. Ct. 631, 640 (2000) (citations omitted). Second, Congress must act pursuant to its Section 5 enforcement powers of the Fourteenth Amendment. *See id.*, 120 S. Ct. at 644; *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 59 (1996).

It is undisputed that Congress clearly stated its intention to abrogate the States' Eleventh Amendment immunity.[2] Thus, the issue before the Court is whether the ADA constitutes a proper exercise of Congress's Section 5 powers. Supreme Court precedent establishes that the ADA was a valid Section 5 legislative enactment.

A. Congress Properly Invoked Its Section 5 Powers Under The Fourteenth Amendment.

The Court recently re-affirmed that Section 5 of the Fourteenth Amendment is a broad affirmative grant of power to Congress "both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel,* 120 S. Ct. at 644. Moreover, the Court acknowledged that "[i]t is for

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[2]*See* 42 U.S.C. § 12202 (1994) ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Id.* at 644 *(quoting City of Boerne v. Flores,* 521 U.S. 507, 536 (1997)).

To be valid, Congressional enactments pursuant to Section 5 must have a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* In this regard, "difficult and intractable problems often require powerful remedies," and Section 5 does not preclude Congress from enacting reasonable prophylactic legislation, *id.* at 648, even when the legislation prohibits substantially more state "decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Id.* at 647. Because Congress had overwhelming evidence that people with disabilities had been subjected to long-standing, pervasive and invidious discrimination that denied them the opportunity to participate fully in nearly every aspect of modern life, including government employment and public services, the ADA's remedial and preventative provisions are both a congruent and proportional response to this nationwide problem.

1. The ADA is supported by compelling evidence of a widespread pattern of culturally-based discrimination against people with disabilities, including discrimination by the States.

This Court has acknowledged that "[t]o be sure, well-cataloged instances of invidious discrimination against the handicapped do exist." *Alexander v. Choate,* 469 U.S. 287, 295 n.12 (1985). In *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), members of the Court recognized that people with disabilities had suffered "a history of unfair and often grotesque mistreatment" due to pervasive ignorance and prejudice, *id.* at 454 (Stevens, J., concurring), and that decisions concerning people with disabilities were often the result of "impermissible assumptions" and "irrational fears or ignorance," *id.* at 465, 467 (Marshall, J., concurring and dissenting). The Court in *City of Cleburne* unanimously determined that the city's action at issue had rested upon irrational prejudices against people with mental retardation and was, therefore, violative of the Fourteenth Amendment. *See id.* at 450. The Court subsequently referred to "irrational fears" regarding people with disabilities and noted that "Congress acknowledged that society's accumulated myths and fears about disability . . . are as handicapping as the physical limitations that flow from actual impairment." *School Bd. of Nassau County v. Arline,* 480 U.S. 273, 284 (1987). In *Olmstead v. L.C. ex rel. Zimring,* 119 S. Ct. 2176, 2187 (1999), the Court again referenced the "unwarranted assumptions" that impact decisions made with respect to people with disabilities.

It is not surprising that, consistent with the Court's own analysis, Congress found systematic and widespread culturally-based discrimination against people with disabilities. Congress's thorough review resulted in the unequivocal conclusions that

"historically, society has tended to isolate and segregate individuals with disabilities," and individuals with disabilities had been "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society." 42 U.S.C. §§ 12101(a)(2), (a)(7) (1994). Further, as determined by Congress, this discrimination affected every significant life activity, including "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3) (1994).[3]

The Congressional record is replete with evidence of pervasive societal discrimination against individuals with disabilities. *See, e.g., Coolbaugh v. Louisiana,* 136 F.3d 430, 437-38 & n.4 (5th Cir.), *cert. denied,* 525 U.S. 819 (1998) (chronicling the massive and compelling Congressional record that preceded passage of the ADA). An example of this powerful evidence is the testimony of Justin Dart, the Chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities. After chairing 63 public forums involving every state in the country, Mr. Dart testified that:

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[3]Other Congressional findings included that people with disabilities "continually encounter various forms of discrimination, including outright intentional exclusion, . . . segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a)(5) (1994).

> Although America has recorded great progress in the area of disability during the past few decades, *our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human* and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. *The result is massive, society-wide discrimination.*

S. Rep. No. 101-116, at 8-9 (1989); H. Rep. 101-485, pt. 2, at 31-32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 313 (citing Testimony before House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101-37, July 18, 1989, p. 62) (emphasis added).

Likewise, Arlene Mayerson, the directing attorney of the Disability Rights Education and Defense Fund, detailed the many studies that established the "misconceptions and generalizations about disabilities, unfounded fears about increased cost and decreased productivity and outright prejudice towards disabled people." *Americans With Disabilities Act of 1989: Hearings on H.R. 2273 Before the Subcomms. on Employment Opportunities and Select Educ. of House Comm. on Educ. and Labor,* 101st Cong. 69 (1989). She further testified that "[n]umerous studies have been conducted that conclude that disabled people are subject to the same type of prejudices and discrimination as members of racial and ethnic minorities." *Id.* at 84. This comprehensive record of pervasive societal discrimination against people with disabilities is not disputed. *See, e.g.,* Brief of Petitioners at 34 (acknowledging "history of societal discrimination against the disabled").

Congress also had substantial and credible evidence from which it reasonably concluded that the States had been part of the widespread pattern of societal discrimination against people with disabilities. This fact distinguishes the ADA from the nearly non-existent record of unconstitutional state action that undermined the validity of both the Religious Freedom Restoration Act[4] and Congress's abrogation of the States' Eleventh Amendment immunity under the Age Discrimination in Employment Act.[5]

a. The conclusion that the States unconstitutionally discriminated against people with disabilities has substantial factual support.

The ADA legislative record documents State actions that were based on irrational stereotypes against people with disabilities and, therefore, unconstitutional under *City of Cleburne*. *See* 473 U.S. at 450. For example, the record before Congress included the United States Commission on Civil Rights report, *Accommodating the Spectrum of Individual Abilities* (1983), which details the history of State institutionalization and other policies that were applied in a discriminatory manner against people with disabilities. *Id.* at 32-37. These State practices often were unconstitutionally based on "irrational fears or ignorance, traceable to the prolonged social and cultural isolation" of people with disabilities. *City of Cleburne*,

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[4]*See City of Boerne v. Flores,* 521 U.S. 507, 531 (1997).
[5]*See Kimel*, 120 S. Ct. at 649.

473 U.S. at 467 (Marshall, J., concurring and dissenting). As Justice Marshall declared: "A regime of state-mandated segregation . . . emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Id.* at 462. Even recently, the Court stated that "institutional placement of persons who can handle and benefit from community settings perpetrates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Olmstead,* 119 S. Ct. at 2187.

Similarly instructive is the report of the Advisory Commission on Intergovernmental Relations (ACIR), *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* (Apr. 1989), that was issued approximately one year prior to the enactment of the ADA.[6] The document contains the results of a comprehensive survey of state officials on

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[6]Six members of Congress participated in this bipartisan commission that studied relations among governmental entities. *See* 42 U.S.C. §§ 4271-4273 (1988). Two of the Congressional participants, one from the Senate and one from the House of Representatives, were also members of Congressional committees that considered the ADA legislation. *See Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. ii (1989) (committee and subcommittee membership); *Americans With Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 101st Cong. ii (1989) (committee and subcommittee membership). The Commission's draft report was referenced on May 9, 1989 in testimony before Congress regarding the ADA. *See Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 306-307 (1989) (statement of Arlene Mayerson).

impediments to employment of people with disabilities in state governments. *Id.* at 70-74. The report shows that thirty-five percent (35%) of state officials considered negative attitudes and misconceptions to be strong impediments to employment of people with disabilities, and that forty-eight percent (48%) considered those reasons to be moderate impediments. *Id.* at 72. In other words, the survey reveals that a total of **eighty-three percent (83%)** of state officials acknowledged that negative attitudes and misconceptions about individuals with disabilities influenced employment decisions of state governments.[7] *Id.* at 72-73.

The ACIR report concluded that even when States had appropriate written disability employment policies, they were often ignored due to "negative attitudes and misconceptions about persons with disabilities and their performance capabilities." *Id.* at 75. The report noted that the reasons underlying state officials' negative attitudes and misconceptions about people with disabilities included "feelings of discomfort in associating with disabled individuals, inaccurate assessments of their productivity, and concerns about the costs that might be associated with work place accommodations." *Id.* at 73.

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[7] *See also Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 312-313 (statement of Arlene Mayerson) (describing evidence that most government agencies in California refused to hire people with cancer).

The record before Congress also demonstrated that the cultural biases and arbitrary stereotypes regarding individuals with disabilities resulted in the systematic unconstitutional denial of basic educational opportunities. Although Congress had previously enacted legislation to promote educational opportunities for people with disabilities,[8] the 1983 Civil Rights Commission report determined that children with disabilities still were being deprived an appropriate education. *See* U.S. Comm'n on Civil Rights, *supra,* at 28. Based on societal prejudices, many children with disabilities were simply segregated in separate public educational facilities. *See id.* at 29. Other children with disabilities were excluded altogether from public schools. *Id.* at 27. Congress heard numerous examples of children with disabilities who were precluded from attending public schools for a variety of reasons, including that the children used wheelchairs, had epilepsy, and had cerebral palsy that allegedly produced a "nauseating effect" on fellow students and teachers.[9] These widespread practices necessarily had a tremendous adverse impact on the victims of the discrimination. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (noting the importance

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[8]*See* 20 U.S.C. §§ 1400-1491 (1994 and Supp. IV 1998) (originally enacted as the Education of the Handicapped Act, Pub. L. 91-230, Title VI, 84 Stat. 121, 175-188 (1970) and subsequently amended).

[9]*See, e.g.,* S. Rep. No. 101-116, at 7 (1989) (quoting testimony of Judith Heumann, World Institute on Disability); *Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on Select Educ. of House Comm. on Educ. and Labor*, 100th Cong. 132-133 (1988) (testimony of Barbara Waters).

of education in maintaining our civic institutions and "the lasting impact of its deprivation on the life of the child").[10]

In addition, Congress was aware that people with disabilities were denied access to public facilities because their needs were rarely taken into account when public buildings and sidewalks were designed and built. Little or no consideration was given, for example, to the ability of people in wheelchairs or with visual impairments to use those public facilities. *See* U.S. Comm'n on Civil Rights, *supra,* at 21-22, 38-39; *see also Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong., 662-664 (1989) (testimony of Mary Lynn Fletcher). This lack of access adversely impacted the ability of people with disabilities to effectively participate in the state governmental process, including the ability to exercise their right to vote[11] and to utilize the state judicial system.[12]

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[10]As this Court reasoned in *Plyler*: "The inestimable toll of that deprivation [education] on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause." 457 U.S. at 222.

[11]*See, e.g., Hearing on H.R. 2273, Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong. 41, 45 (1989) (testimony of Nanette Bowling, staff liaison to mayor of Kokomo, Indiana) (describing "devastating disincentives to voting" faced by people with disabilities).

[12]See, e.g., *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on Select Educ. of the House Comm. on Educ. and*

Illinois Attorney General Neil Hartigan also provided persuasive testimony based on the six years he had served as a state Attorney General. He testified regarding the persistent and widespread discrimination against people with disabilities involving, for example, public transportation, public services, public parks, publicly owned facilities, special education and elections. *See Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 75-78 (1989). Attorney General Hartigan urged passage of a uniform national standard to free people with disabilities from having to win their rights on a state-by-state basis.[13] *See*

Labor, 100th Cong. 40-41 (1988) (statement of Emeka Nwojke) (describing barriers faced by persons with disabilities that impeded their access to court).

[13]The legislative record shows that although some states had enacted disability laws, the state statutes varied greatly and many provided little meaningful protection against disability discrimination. *See, e.g., Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 334-337 (1989) (statement of Arlene Mayerson) (describing limitations and ineffectiveness of existing State statutes); *Field Hearing on Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor,* 101st Cong. 89 (1989) (statement of Hon. Chet Brooks, Texas State Senate) ("Just as with other major civil rights issues addressed by our nation in the past, basic rights for people with disabilities have to be addressed at a national level. We cannot effectively piece these protections together state by state, person by person."). *See also* H. Rep. 101-485, pt. 2, at 47 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 329 ("State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing. . . .'Too many States, for whatever reason, still perpetuate confusion.'") (quoting testimony of Admiral James Watkins before the House Subcommittee on Select Education and the Senate Subcommittee on the Handicapped).

id. at 77. He further explained that any meaningful legislation to combat disability discrimination must include a remedial provision. *See id.* at 80-81.

It is also significant that there was no opposition from the States to Congress's abrogation of their Eleventh Amendment immunity with respect to the ADA. In fact, the ADA was affirmatively endorsed by the National Association of Attorneys General and the National Association of Counties. *See* 135 Cong. Rec. 19,799 (1989).

Based on the foregoing, Congress clearly had compelling evidence of discrimination against people with disabilities, including unconstitutional discrimination by the States. Accordingly, the findings of Congress that underlie the enactment of the ADA, including those specifically relating to State actions, are soundly based. [14]

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[14] *See* 42 U.S.C. § 12101(a)(3) (noting persistent discrimination in activities involving States, such as employment, housing, public accommodations, education, transportation, institutionalization, health services, voting, and access to public services). This and the other Congressional ADA findings are entitled to great deference by this Court. "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." *Radice v. People of the State of New York*, 264 U.S. 292, 294 (1924). Moreover, "[g]iven the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government,'" a court does "not lightly second-guess such legislative judgments." *Board of Educ. of Westside Com. Sch. v. Mergens*, 496 U.S. 226, 251 (1990).

b. Common sense shows that the States were participants in the pervasive culturally-based discrimination against people with disabilities.

Finally, beyond the legislative record,[15] it defies common sense to suggest that the perpetrators of pervasive discrimination against people with disabilities did not include agents of the States. As this Court has determined, discrimination against individuals with disabilities, which was widespread and based on irrational "myths" and "stereotypes," impacted our society's very culture. *See City of Cleburne,* 473 U.S. at 446; *Arline,* 480 U.S. at 279-85; and *Alexander,* 469 U.S. at 295 n.12. Under these circumstances, one cannot credibly argue that only non-state entities discriminated against people with disabilities, but state officials, when making employment and other decisions on behalf of states, miraculously were not subject to the same cultural biases and irrational fears about individuals with disabilities.

Although in *Kimel* the Court refused to "extrapolate" conclusions with respect to the public sector, *see* 120 S. Ct. at 649, such an "extrapolation" is appropriate here. In *Kimel,* there was no record of pervasive societal age discrimination from which to extrapolate conduct to the States. *See id.* In this case, unlike *Kimel,* there is overwhelming evidence of invidious disability discrimination that was engrained in this country's culture. *See supra* pp. 10-15. *See also, e.g.,* S. Rep. No. 101-116, at 5-16 (1989); H.R. Rep. 101-485, pt. 2, at 28-43 (1990), *reprinted in* 1990

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[15] *See Kimel,* 120 S. Ct. at 648 (indicating that review of the legislative record is but "one means" this Court has employed to determine the validity of Congressional enactments pursuant to Section 5 of the Fourteenth Amendment).

U.S.C.C.A.N. 267, 310-325. As the House Report on the ADA concluded, people with disabilities "have been subjected to unequal and discriminatory treatment in a range of areas, based on characteristics that are beyond the control of individuals and resulting from stereotypical assumptions, fears and myths not truly indicative of the ability of such individuals to participate in and contribute to society." H.R. Rep. 101-485, pt. 2, at 40 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 322. The Senate Report made a similar determination. *See* S. Rep. 101-116, at 15 (1989). Of course, the conclusions reached by both the House and Senate are consistent with the Court's own statements on the subject. *See supra* pp. 6-7.

Due to this pervasive discrimination it is reasonable to conclude that the States were also participants in widespread discriminatory conduct against people with disabilities. This conclusion reflects human nature and reality where a society-wide discriminatory bias has been established against individuals with disabilities. *See supra* pp. 11-12 (report of the Advisory Commission on Intergovernmental Relations documenting that 83% of state officials acknowledge that negative biases and stereotypes are impediments to States' hiring of people with disabilities). Indeed, Congress's findings of widespread discrimination were unqualified, including various activities engaged in by the States. *See supra* note 14. It properly determined that this pervasive disability discrimination infected state governments like all other parts of our society.

2. Given the substantial evidence of widespread culturally-based discrimination against people with disabilities, the ADA is a very measured and balanced response to remediate and deter disability discrimination.

The ADA's comprehensive response to the intractable and difficult problems facing people with disabilities is both congruent and proportional to the evils found by Congress. Section 5 of the Fourteenth Amendment authorizes Congress to take this remedial and preventative action to counter pervasive societal discrimination.

a. The ADA proscribes conduct that violates the Equal Protection Clause.

The ADA proscribes irrational discrimination on the basis of disability.[16] In so doing, the ADA seeks to ensure that decisions regarding employment or access to facilities, programs and services are rationally based and unaffected by arbitrary stereotypes or fears. *Cf. Arline*, 480 U.S. at 284-285 (noting that Rehabilitation Act aims to eliminate decisions affecting individuals with disabilities that are based on "prejudiced attitudes," "ignorance," "accumulated myths and fears" and to replace such reflexive actions with reasoned and sound judgments). This proscription falls squarely within the scope of the equal protection guarantees of the Fourteenth

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[16]ADA Title I prohibits employment discrimination against "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. §§ 12111(8), 12112(a) (1994). ADA Title II prohibits public entities from discriminating against "an individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. §§ 12131(2), 12132 (1994).

Amendment. *See City of Cleburne,* 473 U.S. at 446-48 (holding that arbitrary treatment of people with disabilities violates the Fourteenth Amendment).

b. The provisions of the ADA deter and prevent unconstitutional discrimination against people with disabilities.

Given the pervasiveness of past prejudices and inequitable actions directed toward individuals with disabilities, Congress determined in its legislative judgment that it was not enough to merely prohibit future unconstitutional discriminatory conduct. Rather, to deter and prevent pervasive culturally-based discrimination against people with disabilities, and further implement its Section 5 powers, Congress required a "reasonable accommodation"[17] or "modification"[18] under Title I and II of the ADA, respectively, for qualified individuals with disabilities. A national problem of the magnitude documented by Congress and recognized by this Court, *see, e.g., City of Cleburne,* 473 U.S. at 454, 464-465, demands a solution that affirmatively prevents widespread societal disability discrimination and thus integrates individuals with disabilities into our society.

In this regard, the ADA exemplifies the kind of remedial legislation contemplated by this Court that "can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"

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[17]42 U.S.C. § 12112(b)(5)(A)-(B) (1994).
[18]42 U.S.C. § 12131 (1994).

City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (*quoting Fitzpatrick v. Bitzer,* 427 U.S. 445, 455 (1976)). In light of the extensive Congressional record and judicial acknowledgment of widespread and persistent culturally-based discrimination against people with disabilities, Congress was able to exercise its Section 5 powers with some latitude and respond to this very serious public concern. *See South Carolina v. Katzenbach,* 383 U.S. 301, 308 (1966) (stating that "[t]he constitutional propriety of [section 5 legislation] must be judged with reference to the historical experience . . . it reflects").

As part of this legislative discretion, Congress chose to proactively require certain reasonable accommodations to better ensure that people with disabilities will be afforded equal protection of the law. Requiring such an accommodation prevents, for example, an employer from relying on societal biases and stereotypes to arbitrarily deny an individual with a disability an employment opportunity.[19] Under the ADA framework the employer must affirmatively consider reasonable ways in which the disability can be accommodated so that irrational assumptions about people with disabilities do not control the decisionmaking process. Even the dialogue between an employer and employee regarding a particular accommodation will foster the kind of rational discussion and understanding of disabilities that society has avoided in the

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[19]Similarly, requiring an employer to eliminate unnecessary employment standards or practices that have a discriminatory effect on persons with disabilities, *see* 42 U.S.C. § 12112(b)(3)(A) (1994), further deters reflexive discrimination based on decades of engrained irrational fears and prejudices.

past, and thereby deter continued discrimination.[20] This reasoned legislative approach to uproot a history of culturally-based disability discrimination enhances the prospect that people with disabilities will enjoy the protections afforded them under the Fourteenth Amendment.

The ADA, therefore, is similar to the ban on voting literacy tests imposed by the Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437, which *Katzenbach v. Morgan,* 384 U.S. 641 (1966), upheld as a proper Section 5 enactment even though such literacy tests themselves do not violate the Fourteenth Amendment.[21] In *Morgan,* the Voting Rights Act was used to invalidate a state literacy test requirement which directly impacted New York City's Puerto Rican community. *See* 384 U.S. at 644-647. The Court concluded that the literacy test ban "enables the Puerto Rican minority better to obtain 'perfect equality of civil rights and the equal protection of the laws,'" *id.* at 653, and the Court deferred to Congress's judgment regarding the need for the legislation.[22]

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[20]*See, e.g.,* 29 C.F.R. § 1630, app. § 1630.9 (1999) (Equal Employment Opportunity Commission interpretive guideline regarding ADA states that "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and [employee] with a disability").

[21]*See Lassiter v. Northampton County Bd. of Elections,* 360 U.S. 45, 50, 53 (1959).

[22]As the Court reasoned in *Morgan*:

> It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations -- the risk or pervasiveness of the discrimination in

Like the Voting Rights Act, the ADA, including the "reasonable accommodation" and "modification" provisions, places people with disabilities in a position where they are better able to obtain their constitutionally guaranteed rights to equal protection. As discussed above, *see supra* pp. 21-22, the ADA creatively discourages the use of culturally-based biases and stereotypes which otherwise lead to unconstitutional discrimination against people with disabilities. This, in turn, results in a greater likelihood that people with disabilities will not be subjected to unconstitutional discrimination. The compelling evidence before Congress of pervasive societal discrimination against people with disabilities provided Congress, similar to the Voting Rights Act, with considerable leeway in adopting this legislative approach to deter and prevent continued disability discrimination.

c. Congress imposed important limitations in the ADA which evidence the congruent and proportional nature of the legislation.

In crafting the ADA, Congress carefully considered the needs of state governments, businesses, etc., and included important limitations in the law. *See City of Boerne*, 521 U.S. at 533 (stating that limiting provisions in legislation "tend to ensure Congress's means are proportionate to ends legitimate under Section 5"). For

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> governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. *It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.*

384 U.S. at 653 (emphasis added).

example, under Title I of the ADA, a "reasonable accommodation" of a person with a disability is not required if the accommodation would cause an "undue hardship"[23] or if the individual with the disability poses a "direct threat" to the health or safety of other people in the workplace.[24] Under Title II of the ADA, Congress required that a "reasonable modification" be made if it does not "fundamentally alter the nature of the public service, program, or activity."[25] In addition, the ADA does not apply to all individuals with physical or mental impairments, but rather, only to those whose impairments substantially limit their major life activities.[26]

These limitations moderate the effect of the law on the States. They give real balance to the legislation by providing for the proper functioning of state government, but without sacrificing meaningful protection against disability discrimination. *See, e.g., Olmstead v. L.C. ex rel. Zimring,* 119 S. Ct. 2176 (1999).[27] As such, the

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[23]42 U.S.C. §§ 12111(10), 12112(b)(5)(A) (1994).

[24]42 U.S.C. §§ 12111(3), 12113(b) (1994).

[25]42 U.S.C. § 12131(2) (1994); 28 C.F.R. § 35.130(b)(7) (1999).

[26]42 U.S.C. § 12102(2) (1994). Last term, for example, this Court held that measures that correct for, or mitigate, a physical or mental impairment must be taken into account when judging whether a person is substantially limited in a major life activity and thus covered by the law. *See Sutton v. United Airlines, Inc.,* 527 U.S. 471 (1999).

[27]In *Olmstead,* the Court interpreted the "fundamental alteration" provision to give the States considerable latitude to administer their programs for people with mental disabilities. 119 S. Ct. at 2189. As reasoned by the Court:

> Sensibly construed, the fundamental alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.

limitations in the ADA are a significant part of the law's congruence and proportionality.

In summation, the ADA's uniform, national approach to substantial nationwide discrimination is a proper use of Congress's Fourteenth Amendment authority.[28] The "reasonable accommodation" and "modification" provisions certainly will deter invidious discrimination against people with disabilities, *see supra* pp. 20-22, a permissible use of Congress's Section 5 powers. *See City of Boerne*, 521 U.S. at 518. At the same time, the limits Congress imposed in the ADA mitigate significantly the impact of this remedial legislation on the States. Consequently, the ADA represents a "congruent and proportional" legislative response to an extensively documented and very serious problem, rampant culturally-based discrimination against members of our society with disabilities.[29] Congress therefore acted well within its Section 5 powers in crafting the ADA.

Id.

[28]*See Oregon v. Mitchell,* 400 U.S. 112 (1970) which states:

> In imposing a nationwide ban on literacy tests, Congress has recognized a national problem for what it is-a serious national dilemma that touches every corner of our land. In this legislation Congress has recognized that discrimination on account of color and racial origin is not confined to the South, but exists in various parts of the country. Congress has decided that the way to solve the problems of racial discrimination is to deal with nationwide discrimination with nationwide legislation.

Id. at 133-34 (citations omitted).

[29]The ADA is in stark contrast to the legislation considered by the Court in *City of Boerne* and *Kimel,* where the legislative record contained no evidence of widespread societal discrimination and Congress made no such findings. Also, unlike the Religious Freedom Restoration Act considered in *City of Boerne* and the Age Discrimination Employment Act analyzed in *Kimel*, the ADA's remedial provisions are commensurate with the substantial public concerns identified by Congress's comprehensive review of the culturally-based unequal treatment of people with disabilities.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Eleventh Circuit Court of Appeals and hold that Congress, in enacting the ADA, validly abrogated the States' Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment.

Respectfully submitted,

Dated: August 11, 2000

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No. 99-1240

In the Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA, ET AL., PETITIONERS

v.

PATRICIA GARRETT, ET AL.

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Titles I and II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12111 to 12117, 12131 to 12165 (1994 & Supp. IV 1998), are proper exercises of Congress's power under Section 5 of the Fourteenth Amendment.

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The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 193 F.3d 1214. The opinion of the district court (Pet. App. 49a-55a) is reported at 989 F. Supp. 1409.

JURISDICTION

The court of appeals entered its judgment on October 26, 1999. The petition for a writ of certiorari was filed on January 24, 2000, and was granted, limited to Question 1, on April 17, 2000. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory Framework*: The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Discrimination against persons 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." 42 U.S.C. 12101(a)(3). In addition, persons 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.

42 U.S.C. 12101(a)(5).

Furthermore, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6). "[T]he continuing existence of unfair and unnecessary discrimination and prejudice," Congress concluded, "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." 42 U.S.C. 12101(a)(9). In short, Congress found that persons with disabilities

> 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.

42 U.S.C. 12101(a)(7).

Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" as authority for its passage of the Disabilities Act. 42 U.S.C. 12101(b)(4). The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189 (1994 & Supp. IV 1998), addresses discrimination in public accommodations operated by private entities. The term "disability" is defined

as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual"; "a record of such an impairment"; or "being regarded as having such an impairment." 42 U.S.C. 12102(2).

This case involves suits filed under Titles I and II. Title I provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). A "covered entity" is defined to include state and local governments, 42 U.S.C. 12111(2), (5)(A) and (7); see *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 449 & n.2 (1976). "Discriminate" is defined to include "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of [a] disability," as well as the use of employment criteria that "screen out or tend to screen out" persons with disabilities, unless the criteria are "job-related for the position in question and [are] consistent with business necessity." 42 U.S.C. 12112(b)(1) and (b)(6). In addition, unlawful discrimination includes the failure to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," unless the accommodation "would impose an undue hardship" on the employer. 42 U.S.C. 12112(b)(5)(A). A "qualified individual with a disability" is a person who "can perform the essential functions of the job" with or without reasonable accommodation. 42 U.S.C. 12111(8).

Title II of the Disabilities Act provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C.

12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B).[1] A "[q]ualified individual with a disability" is a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service, including employment. 42 U.S.C. 12131(2); 28 C.F.R. 35.140.[2] Title II does not normally require a public entity to make its existing physical facilities accessible, although alterations of those facilities and any new facilities must be made accessible. 28 C.F.R. 35.150(a)(1), 35.151. Department of Justice regulations provide that, except for new construction and alterations, public entities need not take any steps that would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. 35.150(a)(3); see also 28 C.F.R. 35.130(b)(7), 35.164; *Olmstead* v. *L.C.*, 527 U.S. 581, 606 n.16 (1999).

Both Title I and Title II may be enforced through private suits against public entities. 42 U.S.C. 12117(a), 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

2. *Factual and Procedural Background:* Respondent Patricia Garrett alleges that, after working for the University of Alabama for 17 years, she was diagnosed with breast cancer. Garrett's supervisor made negative comments regarding Garrett's illness and "repeatedly threatened to transfer her to a less demanding job due to her condition." J.A. 38; Pet. App. 9a. Upon returning from medical leave, Garrett was advised that she would continue in her position. J.A. 39. However, a week later, the University demoted her even though she was able to perform the essential functions of her job. *Ibid;* Pet. App. 9a.

Respondent Ash alleges that he has worked for petitioner Alabama Department of Youth Services since 1993. He has diabetes and several respiratory impairments, including chronic asthma. Ash requested that the Department enforce its existing non-smoking policy and not require him to drive cars that leaked carbon monoxide fumes into the passenger compartment. The accommodations were denied, and, after respondent filed a complaint, petitioner took adverse employment action against him. J.A. 7-10.

Respondents filed separate suits in the same district court, alleging, as relevant here, that petitioners had violated Titles I and II of the Disabilities Act. Petitioners filed motions to dismiss on Eleventh Amendment grounds, which the district court granted. Pet. App. 49a-55a. The United

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[1] Congress extended the obligations of the Disabilities Act to itself and its instrumentalities in 1990. See Pub. L. No. 101-336, Title V, § 509, 104 Stat. 373, superseded by Pub. L. No. 104-1, Title II, §§ 201, 210, 109 Stat. 7, 13, currently codified at 2 U.S.C. 1311(a)(3), 1331(b)(1) (Supp. IV 1998); 42 U.S.C. 12209 (1994 & Supp. IV 1998). While the Disabilities Act does not apply to the executive branch of the federal government, virtually identical prohibitions are imposed by Sections 501, 504, and 505 of the Rehabilitation Act, which, since 1978, has governed "any program or activity conducted by any Executive agency," 29 U.S.C. 794(a) (1994 & Supp. IV 1998), and which subjects the federal government to Title I's standards, 29 U.S.C. 791(g), and remedies, 29 U.S.C. 794a(a)(1); 42 U.S.C. 1981a(a)(2). The principal distinction (see Pet. Br. 40) between the coverage of the States and the federal government is that, in the context of government programs other than employment, damages are available against the States under Title II of the Disabilities Act but are not available against the federal government. That is presumably because Congress believed it had greater direct authority over federal programs, through the use of its appropriations and oversight power, and thus less need of additional enforcement through private damages actions.

[2] Whether Title II covers the employment decisions of state and local governments is a question on which the circuits are divided. See *Davoll* v. *Webb*, 194 F.3d 1116, 1130 (10th Cir. 1999) (collecting cases). For purposes of the jurisdictional question currently before the Court, however, this Court may assume that the respondents have properly stated a claim under Title II. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the Disabilities Act's abrogation of Eleventh Amendment immunity. Following circuit precedent, the court of appeals upheld the Disabilities Act's abrogation of Eleventh Amendment immunity. Pet. App. 6a.

SUMMARY OF ARGUMENT

Application of the Americans with Disabilities Act to States and their subdivisions falls squarely within Congress's comprehensive legislative power under Section 5 of the Fourteenth Amendment to prohibit, remedy, and prevent violations of the rights secured by that Amendment. After decades of legislative experience in the field, years of hearings and study, multitudinous submissions and testimonials by citizens across the Nation, and thoroughgoing congressional review, Congress determined that persons with disabilities faced a virulent history of official governmental discrimination, isolation, and segregation. Indeed, this Court's decisions have long acknowledged the pernicious history of mistreatment and discrimination suffered by persons with disabilities. Congress found, moreover, that, like race and gender discrimination, official segregation and discrimination against persons with disabilities have consequences that persist and have been perpetuated by state and local governmental decisionmaking, across the span of governmental operations.

Congress formulated a statute that, much like federal laws combating racial and gender discrimination, is carefully designed to root out present instances of unconstitutional discrimination, to undo the effects of past discrimination, and to prevent future unconstitutional treatment by prohibiting discrimination and promoting integration where reasonable. At the same time, the Disabilities Act preserves the latitude and flexibility States legitimately require in the administration of their programs and services. The Disabilities Act accomplishes those objectives by requiring States to afford

persons with disabilities genuinely equal access to employment opportunities, services, and programs, while at the same time confining the statute's protections to "qualified individual[s]," who by definition meet all of the States' legitimate and essential eligibility requirements. The Act simply requires "reasonable" accommodations for individuals with disabilities that do not impose an undue burden and do not fundamentally alter the nature or character of the governmental program. The statute is thus carefully tailored to prohibit only state conduct that presents a substantial risk of violating the Constitution or that unreasonably perpetuates the exclusionary effects of the prior irrational political, economic, and social segregation of persons with disabilities.

ARGUMENT

BECAUSE IT COMBATS AN ENDURING LEGACY OF UNCONSTITUTIONAL DISCRIMINATION AND SEGREGATION, THE AMERICANS WITH DISABILITIES ACT AS APPLIED TO THE STATES IS A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power to Congress, see *Kimel* v. *Florida Bd. of Regents*, 120 S. Ct. 631, 644 (2000), and encompasses all legislation reasonably designed to enforce the Fourteenth Amendment's guarantees, *Ex parte Virginia*, 100 U.S. 339, 345-346 (1880). Section 5 thus "gives Congress broad power indeed," *Saenz* v. *Roe*, 526 U.S. 489, 508 (1999), including the power to abrogate the States' Eleventh Amendment immunity, *Kimel*, 120 S. Ct. at 644. While, under Section 5, Congress may enact prophylactic and remedial legislation designed to enforce Fourteenth Amendment rights, there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to

that end." *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). The Disabilities Act is appropriate Section 5 legislation because it is predicated on a pervasive history of unconstitutional conduct by the States, which continues to infect contemporary governmental decisionmaking, and because the legislation is reasonably designed to remedy and prevent those constitutional violations.

A. Congress Found, After Exhaustive Investigation, Ample Evidence Of A Long History And A Continuing Problem Of Unconstitutional Treatment Of Persons With Disabilities By States And Their Subdivisions

At the core of the Equal Protection Clause is the principle that, in legislating or administering government programs, a "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). The Equal Protection Clause thus prohibits state action predicated on "mere negative attitudes" and "vague, undifferentiated fears," *id.* at 448-449, "divorced from any factual context from which we could discern a relationship to legitimate state interests," *Romer* v. *Evans*, 517 U.S. 620, 635 (1996). Petitioners draw from that standard the conclusion that the power of courts—and of Congress—to secure the constitutional rights of persons with disabilities is "virtually non-existent" (Pet. Br. 17); accordingly, petitioners characterize (*id.* at 30-39) the Disabilities Act as little more than the byproduct of an uninformed Congress overreaching to address a nonexistent problem of governmental discrimination against persons with disabilities, when "[t]he only real evidence" before Congress "was of States *overprotecting* the constitutional rights of the disabled" (*id.* at 38-39) (emphasis added). Nothing could be further from the truth.

1. Congress exhaustively studied the problem

The Congress that enacted the Disabilities Act brought to that legislative process more than 40 years of experience studying the scope and nature of discrimination against persons with disabilities and testing incremental legislative steps to combat that discrimination.[3] See *Fullilove* v. *Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring) ("One appropriate source [of evidence for Congress] is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.").

Building on that expertise, Congress commissioned two reports from the National Council on the Handicapped, an independent federal agency, to report on the adequacy of existing federal laws and programs addressing discrimination against persons with disabilities.[4] Those reports revealed that "the most pervasive and recurrent problem faced by disabled persons appeared to be unfair and unneces-

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[3] See, *e.g.*, Act of June 10, 1948, ch. 434, 62 Stat. 351 (prohibiting employment discrimination by the United States Civil Service against World War II veterans with disabilities); Architectural Barriers Act of 1968, 42 U.S.C. 4151 *et seq.*; Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*; Education of the Handicapped Act, Pub. L. No. 91-230, Title VI, 84 Stat. 175 (reenacted in 1990 as the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*); Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq.*; Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. 1973ee; Air Carrier Access Act of 1986, 49 U.S.C. 41705; Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. 10801; Fair Housing Amendments of 1988, 42 U.S.C. 3604.

[4] See Rehabilitation Act Amendments of 1984, Pub. L. No. 98-221, Title I, § 141(a), 98 Stat. 26; Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 502(b), 100 Stat. 1807.

sary discrimination." Nat'l Council on the Handicapped, *On the Threshold of Independence* 2 (1988) (*Threshold*). Persons with disabilities reported discrimination in the workplace, "denials of educational opportunities, lack of access to public buildings and public bathrooms, [and] the absence of accessible transportation." *Id.* at 20-21, 41. Extensive surveys also revealed an "alarming rate of poverty,"[5] a dramatic educational gap,[6] a "Great Divide" in employment,[7] and a life of social "isolat[ion]"[8] for persons with disabilities. *Id.* at 14. The reports further found that "[c]omplexities, inconsistencies, and fragmentation in the various Federal laws and programs" had created a confused and ineffective "patchwork quilt of existing policies and programs," Nat'l Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities* 7 (1986), and called for national legislation comprehensively prohibiting discrimination on the basis of disability, *id.* at 18-19; *Threshold* 19-21.

Congress itself engaged in extensive study and fact-finding concerning the problem of discrimination against persons with disabilities, holding 13 hearings devoted specifically to the consideration of the Disabilities Act.[9] In addition, a congressionally designated Task Force held 63 public forums across the country, which were attended by more than 7,000 individuals. Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 18 (1990) (Task Force Report). The Task Force also presented to Congress evidence submitted by

[5] Twenty percent of persons with disabilities had family incomes below the poverty line (more than twice the percentage of the general population), and 15% of persons with disabilities had incomes of $15,000 or less. *Threshold* 13-14.

[6] Forty percent of persons with disabilities did not finish high school (triple the rate for the general population). Only 29% of persons with disabilities had some college education, compared with 48% for the general population. *Threshold* 14.

[7] Two-thirds of all working-age persons with disabilities were unemployed; only one in four worked full-time. *Threshold* 14.

[8] Two-thirds of persons with disabilities had not attended a movie or sporting event in the past year; three-fourths had not seen live theater or music performances; persons with disabilities were three times more likely not to eat in restaurants; and 13% of persons with disabilities never go to grocery stores. *Threshold* 16-17.

[9] See *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary and the Subcomm. on Civil and Const. Rights*, 101st Cong., 1st Sess. (1989); *Americans with Disabilities Act: Hearing on H.R. 2273 and S. 933 Before the Subcomm. on Transp. and Haz. Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities Act: Hearings on H.R. 2273 Before the Subcomm. on Surface Transp. of the House Comm. on Pub. Works and Transp.*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities: Telecomm. Relay Servs., Hearing on Title V of H.R. 2273 Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (1989); *Field Hearing on Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (1989); *Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: Joint Hearing Before the Subcomm. on Employment Opps. and Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (July 18 & Sept. 13, 1989) (two hearings); *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2d Sess. (1989); *Americans with Disabilities Act: Hearing Before the House Comm. on Small Bus.*, 101st Cong., 2d Sess. (1990); *Americans with Disabilities Act of 1989: Hearings on S.933 Before the Senate Comm. on Labor and Human Res. and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. (1989) (*May 1989 Hearings*); *Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Res. and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2nd Sess. (1989); see also T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 393 & nn.1-3 (1991) (*Move to Integration*).

nearly 5,000 individuals documenting the problems with discrimination faced daily by persons with disabilities—often at the hands of state and local governments. See 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act*, 100th Cong., 2d Sess. 1040 (Comm. Print 1990) (*Leg. Hist.*); Task Force Report 16. Congress also considered several reports and surveys. See S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 28 (1990); Task Force Report 16.[10]

2. Congress amassed voluminous evidence of historic and enduring discrimination by state and local governments against persons with disabilities and deprivation of their fundamental rights

a. ***Historic Discrimination:*** The "propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.'" *Florida Prepaid Postsec. Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 640 (1999). While petitioners and their amici ignore it, Congress and this Court have long acknowledged the Nation's "history of unfair and often grotesque mistreatment" of persons with disabilities. *Cleburne*, 473 U.S. at 454 (Stevens, J., concurring); see *id.* at 461 (Marshall, J., concurring in the judgment in part (hereinafter cited as (Marshall, J.))); see also *Olmstead* v. *L.C.*, 527 U.S. 581, 608 (Kennedy, J., concurring) ("[O]f course, persons with mental disabilities have been subject to historic mistreatment, indifference, and

[10] These included the two reports of the National Council on the Handicapped; the Civil Rights Commission's *Accommodating the Spectrum of Individual Abilities* (1983) (*Spectrum*); two polls conducted by Louis Harris & Associates: *The ICD Survey Of Disabled Americans: Bringing Disabled Americans into the Mainstream* (1986), and *The ICD Survey II: Employing Disabled Americans* (1987); a report by the Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988); and eleven interim reports submitted by the Task Force.

hostility."); *Alexander* v. *Choate*, 469 U.S. 287, 295 n.12 (1985) ("well-cataloged instances of invidious discrimination against the handicapped do exist").[11]

That "lengthy and tragic history," *Cleburne*, 473 U.S. at 461 (Marshall, J.), of discrimination, segregation, and denial of basic civil and constitutional rights for persons with

[11] Courts have found unconstitutional treatment of persons with disabilities in a wide variety of contexts, including violations of the Equal Protection Clause, the Due Process Clause, and the Eighth Amendment, as incorporated into Section 1 of the Fourteenth Amendment. See, *e.g.*, *Youngberg* v. *Romeo*, 457 U.S. 307 (1982) (unconstitutional conditions of confinement); *O'Connor* v. *Donaldson*, 422 U.S. 563, 567-575 (1975) (impermissible confinement); *Chalk* v. *United States Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701 (9th Cir. 1988) (certified teacher barred from teaching after diagnosis of AIDS); *LaFaut* v. *Smith*, 834 F.2d 389 (4th Cir. 1987) (Powell, J.) (failure to provide paraplegic inmate with an accessible toilet is cruel and unusual punishment); *Pushkin* v. *Regents of the Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981) (doctor with multiple sclerosis denied residency out of concern about patients' reactions); *Gurmankin* v. *Costanzo*, 556 F.2d 184 (3d Cir. 1977) (irrebuttable presumption that blind teacher cannot instruct sighted students); *Garrity* v. *Gallen*, 522 F. Supp. 171, 214 (D.N.H. 1981) ("blanket discrimination against the handicapped * * * is unfortunately firmly rooted in the history of our country"); *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, 466 F. Supp. 487 (E.D.N.Y. 1979); *Smith* v. *Fletcher*, 393 F. Supp. 1366, 1368 (S.D. Tex. 1975) (government assigned paraplegic, who had a Master's degree in physiology, to menial clerical tasks based on "arbitrary and unfounded decision as to her physical capabilities"), aff'd as modified, 559 F.2d 1014 (5th Cir. 1977); *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971); *Connecticut Inst. for the Blind* v. *Connecticut Comm'n on Human Rights & Opps.*, 405 A.2d 618, 621 (Conn. 1978) (blanket exclusion from state jobs of persons with visual impairments), modified, 355 N.Y.S.2d 185 (App. Div. 1974); *Bevan* v. *New York State Teachers' Retirement Sys.*, 345 N.Y.S.2d 921 (Sup. Ct. 1973) (statute allowing forced retirement of teacher who became blind); *Spectrum* 62-66, 131-133, 141 (citing additional cases); M. Burgdorf & R. Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 Santa Clara Lawyer 855, 863 (1975) (*Unequal Treatment*) (citing additional cases).

disabilities assumed an especially pernicious form in the early 1900s, when the eugenics movement and Social Darwinism labeled persons with mental and physical disabilities "a menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems." *Cleburne*, 473 U.S. at 462 (Marshall, J.); see also Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* 19 (1983) (*Spectrum*). Persons with disabilities were portrayed as "sub-human creatures" and "waste products" responsible for poverty and crime. *Spectrum* 20. "A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Cleburne*, 473 U.S. at 462 (Marshall, J.). Every single State, by law, provided for the segregation of persons with mental disabilities and, frequently, epilepsy, and excluded them from public schools and other state services and privileges of citizenship.[12] States also fueled the fear and isolation of persons with disabilities by requiring public officials and parents, sometimes at risk of criminal prosecution, to report the "feeble-minded" and segregate them into institutions. *Spectrum* 20, 33-34.[13]

With the aim of halting reproduction and "nearly extinguish[ing] their race," *Cleburne*, 473 U.S. at 462 (Marshall, J.), almost every State accompanied forced segregation with compulsory sterilization and prohibitions of marriage, see *id.* at 463. See also *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) (upholding compulsory sterilization law "in order to prevent our being swamped with incompetence"; "It is

[12] See People First Cert. Amicus Br., *Alsbrook* v. *City of Maumelle*, No. 99-423, App. A (*Compendium of State Laws*); see also *Cleburne*, 473 U.S. at 463 (Marshall, J.) (state laws deemed persons with mental disorders "unfit for citizenship"); Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979).

[13] See *Compendium of State Laws* A5, A21-A22, A25, A28-A29, A40, A44, A46-A49, A50-A51, A56, A61-A63, A65-A66, A71, A74-A75.

better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. * * * Three generations of imbeciles are enough.").[14]

Children with mental disabilities were labeled "ineducable" and categorically excluded from public schools to "protect nonretarded children from them." *Cleburne*, 473 U.S. at 463 (Marshall, J.); see also *Board of Educ.* v. *Rowley*, 458 U.S. 176, 191 (1982) ("many of these children were excluded completely from any form of public education"). Numerous States also restricted the rights of physically disabled people to enter into contracts, *Spectrum* 40, while a number of large cities enacted "ugly laws," which prohibited the physically disabled from appearing in public:

> No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in this city, shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense.

Unequal Treatment 863 (quoting Chicago ordinance). Such laws were enforced as recently as 1974. *Id.* at 864.[15]

b. ***The Enduring Legacy of Governmental Discrimination*****:** "Prejudice, once let loose, is not easily cabined." *Cleburne*, 473 U.S. at 464 (Marshall, J.). "[O]ut-dated statutes are still on the books, and irrational fears or ignorance, *traceable to the prolonged social and cultural isolation*" of

[14] See also 3 *Leg. Hist.* 2242 (James Ellis); *Unequal Treatment* 887-888.

[15] See also *State ex rel. Beattie* v. *Board of Educ.*, 172 N.W. 153, 153 (Wis. 1919) (approving exclusion of a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children") (noted at 2 *Leg. Hist.* 2243); see generally *Move to Integration* 399-407.

those with disabilities "continue to stymie recognition of the[ir] dignity and individuality." *Id.* at 467 (emphasis added).[16] Consequently, "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination." S. Rep. No. 116, *supra*, at 8-9.[17]

Moreover, as we detail below (pp. 18-30, *infra*), based on the testimony of hundreds of witnesses before Congress and at the Task Force's forums,[18] Congress found, as a matter of

[16] For example, as recently as 1983, 15 States continued to have compulsory sterilization laws on the books, four of which included persons with epilepsy. *Spectrum* 37; see also *Stump* v. *Sparkman*, 435 U.S. 349, 351 (1978) (Indiana judge ordered the sterilization of a "somewhat retarded" 15 year old girl). As of 1979, "most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials." *Cleburne*, 473 U.S. at 464 (Marshall, J.).

[17] See also 3 *Leg. Hist.* 2020 (Att'y Gen. Thornburgh) ("But persons with disabilities are all too often not allowed to participate because of stereotypical notions held by others in society—notions that have, in large measure, been created by ignorance and maintained by fear."); 2 *Leg. Hist.* 1606 (Arlene Mayerson) ("Most people assume that disabled children are excluded from school or segregated from their non-disabled peers because they cannot learn or because they need special protection. Likewise, the absence of disabled co-workers is simply considered confirmation of the obvious fact that disabled people can't work. These assumptions are deeply rooted in history."); 134 Cong. Rec. E1311 (daily ed. Apr. 28, 1988) (Rep. Owens) ("The invisibility of disabled Americans was simply taken for granted. Disabled people were out of sight and out of mind.").

[18] The Task Force submitted to Congress "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" and "the most extreme isolation, unemployment, poverty, psychological abuse and physical deprivation experienced by any segment of our society." 2 *Leg. Hist.* 1324-1325. Those documents—mostly handwritten letters and commentary collected during the Task Force's forums—were part of the official legislative history of the Disabilities Act. See *id.* at 1336, 1389. Because the handwritten submissions were never formally indexed by Congress, we cite to them by State and Bates stamp number. Although the Task Force presented 5,000 such submissions to Congress—approximately 600 of which alleged discrimination by state actors—we are lodging with the Clerk of the Court only those testimonials that we cite; the balance will be provided to the Court upon request.

present reality and historical fact, that discrimination pervaded state and local governmental operations and that persons with disabilities have been and are subjected to "widespread and persisting deprivation of [their] constitutional rights." *Florida Prepaid*, 527 U.S. at 645; see also 42 U.S.C. 12101(a)(2) and (a)(3). In particular, Congress reasonably discerned a substantial risk that persons with disabilities will be subjected to unconstitutional discrimination by state and local governments in the form of (i) "arbitrary or irrational" distinctions and exclusions, *Cleburne*, 473 U.S. at 446; (ii) governmental decisions grounded in "mere negative attitudes," "vague, undifferentiated fears," *id.* at 448-449, "animosity," *Romer*, 517 U.S. at 634, paternalism, *United States* v. *Virginia*, 518 U.S. 515, 541-544 (1996), and false or overly broad stereotypes about ability, *Olmstead*, 527 U.S. at 611 (Kennedy, J., concurring) ("[T]he line between animus and stereotype is often indistinct."); and (iii) governmental effectuation of private biases, *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

In addition, the evidence before Congress established that States and their subdivisions structure governmental programs and operations in a manner that has the effect of denying persons with disabilities the equal opportunity to obtain vital services and to exercise fundamental rights (such as the rights to vote, to petition government officials, to adequate custodial treatment, and to equal access to the courts and public education). Such conduct falls within Congress's enforcement power for two reasons. First, there is a substantial risk that those decisions result from invidious intent and therefore violate the Constitution. Second, those

decisions impermissibly carry forward the effects of prior unconstitutional policies of segregation and isolation. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.) (Congress's Section 5 power "include[s] the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations").

(i) Employment: Substantial evidence of employment discrimination by state governments and their subdivisions was adduced. One witness "was told by the Essex Junction School System that they were not hiring me because I used a wheelchair. I suspected it in other situations, but in that one, they actually said this was the reason." 2 *Leg. Hist.* 1076 (John Nelson). A woman "'crippled by arthritis' was denied a job, *not* because she could not do the work but because 'college trustees [thought] 'normal students shouldn't see her.'" S. Rep. No. 116, *supra*, at 7; see also *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 282-283 n.9 (1987). Another witness "applied for a job [at a public library] and was told they had already hired someone with a disability and they had met their quota." Wis. 1759.[19]

[19] See also H. R. Rep. No. 485, *supra*, Pt. 2, at 29 (woman denied teaching credential because of her paralysis); 2 *Leg. Hist.* 1174-1175 (Susan Downie) (state facility asks person with disability during job interview "humiliating, unethical, and illegal questions about my disability * * * [such as] if my mother had taken drugs while she was pregnant with me" and then denied her the job); *id.* at 1169-1170 (Sara Bloor) (epileptic denied teaching position even though seizure free); *id.* at 1611 n.9 (Arlene Mayerson) (teaching license denied "on the grounds that being confined to a wheelchair as a result of polio, she was physically and medically unsuited for teaching"); *id.* at 1005 (Belinda Mason) (woman fired from school cafeteria management position when her son contracted AIDS); *May 1989 Hearings* 404 (Nat'l Orgs. Responding to AIDS) (professor of veterinary medicine at state university in Kansas fired when it was learned that he had AIDS); Task Force Report 21 (employee with mental retardation [illegible] and ridicule by superior in the

Of particular relevance to the present case, "[t]estimony before the Committee indicated that there still exists widespread irrational prejudice against persons with cancer." S. Rep. No. 116, *supra*, at 39-40; H.R. Rep. No. 485, *supra*, Pt. 2, at 75. Indeed, a study before Congress revealed that "most corporations and governmental agencies in [California] discriminated in hiring against job applicants for an

portation fired me "for the stated reason that I have epilepsy," even though performance surpassed established expectations); S.D. 1472 ("[A]s a state employee, I daily see covert discrimination in hiring or not hiring people with disabilities."); N.C. 1157, 1159 (department head at University of North Carolina told interviewee "[I]f I knew you were blind I wouldn't have bothered bringing you in for an interview"); Ill. 550 (teacher told "point blank" that she was not hired to work with children because "the way my eyes were [the left eye doesn't always move with the right], that the children would, 'try to imitate me'"); Haw. 478 (school board did not want to interview an individual with a deformed hand to teach language because of feared reactions of parents); Mass. 836 ("For the job of persuading employers to hire disabled people, [state] Voc-Rehab had hired an able-bodied person over a disabled one."); Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates* (1989) (survey of state officials on the perceived impediments to employment of persons with disabilities in state governments); Tex. Rehab. Comm'n, *Placement of the Handicapped in State Gov't Serv.* (1972) (*Texas Report*) (documenting reluctance of state employers to hire and promote persons with disabilities); Greenleigh Assoc., *A Study to Develop a Model for Employment Servs. for the Handicapped* 122 (1969) (in one State's civil service system, "[f]or each 'clerk-typist, Grade X,' there is also a 'clerk-typist, Grade X, visually handicapped,' with a lower salary range"); *Civil Rights Restoration Act of 1987: Hearings Before the Sen. Comm. on Labor & Human Res.*, 100th Cong., 1st Sess. 80 (1987) (Ted Kennedy, Jr.) (none of 23 California jurisdictions was willing to hire blind applicants; many excluded applicants with a history of cancer; one county will not hire an applicant for any job if he or she has lost a leg, regardless of the job-relatedness of the impairment; and another jurisdiction prohibits the hiring of an amputee for any job unless he or she makes use of a prosthesis, even though it may not be required for success on the job).

average period of five years after treatment for cancer." 2 *Leg. Hist.* 1619 (Arlene Mayerson).[20]

(ii) Education: "[E]ducation is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Accordingly, where the State undertakes to provide a public education, that right "must be made available to all on equal terms." *Ibid.* But Congress learned that irrational prejudices, fears, ignorance, and animus still operate to deny persons with disabilities an equal opportunity for public education. For example, a quadriplegic woman with cerebral palsy and a high intellect, who scored well in school, was branded "retarded" by educators, denied placement in a regular school setting, and placed with emotionally disturbed children, where she was told she was "not college material." Vt. 1635. Other school districts also simply labeled as mentally retarded a blind child and a child with cerebral palsy. Neb. 1031; Alaska 38 (noting that child with cerebral palsy subsequently obtained a Masters Degree). "When I was 5," another witness testified, "my mother proudly pushed my wheelchair to our local public school, where I was

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[20] See also S. Rep. No. 116, *supra*, at 7 ("Discrimination also includes harms affecting individuals with a history of disability, and those regarded by others as having a disability as well as persons associated with such individuals."); *Arline*, 480 U.S. at 284 & n.13; 2 *Leg. Hist.* 1551 (EEOC Comm'r Evan Kemp) (people who "had cancer 30 years ago * * * are discriminated [against] because of that cancer"); *May 1989 Hearings* 24 ("Cancer survivors are discriminated against by the outside world in both the public and in the private sectors."); *Burris* v. *City of Phoenix*, 875 P.2d 1340, 1343 (Ariz. Ct. App. 1993) (applicant denied firefighter position even though he "was completely cured" of cancer).

promptly refused admission because the principal ruled that I was a fire hazard." S. Rep. No. 116, *supra*, at 7.[21]

State institutions of higher education suffered from the same stereotypes and prejudices. A person with epilepsy was asked to leave a state college because her seizures were "disrupt[ive]" and, officials said, created a risk of liability. 2 *Leg. Hist.* 1162 (Barbara Waters). A doctor with multiple sclerosis was denied admission to a psychiatric residency program because the state admissions committee "feared the negative reactions of patients to his disability." *Id.* at 1617 (Arlene Mayerson). Another witness explained that, "when I was first injured, my college refused to readmit me"

[21] See also 136 Cong. Rec. H2480 (daily ed. May 17, 1990) (Rep. McDermott) (school board excluded Ryan White, who had AIDS, not because the board "thought Ryan would infect others" but because "some parents were afraid he would"); 2 *Leg. Hist.* 989 (Mary Ella Linden) ("I was considered too crippled to compete by both the school and my parents. In fact, the [segregated] school never even took the time to teach me to write! * * * The effects of the school's failure to teach me are still evident today."); Or. 1375 (child with cerebral palsy was "given cleaning jobs while other[] [non-disabled students] played sports"); *Spectrum* 28, 29 ("a great many handicapped children" are "excluded from the public schools" or denied "recreational, athletic, and extracurricular activities provided for non-handicapped students"); see also *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Pub. Welfare*, 93d Cong., 1st Sess. 384 (1973) (Peter Hickey) (student in Vermont was forced to attend classes with students two years behind him because he could not climb staircase to attend classes with his peers); *id.* at 793 (Christine Griffith) (first-grade student "was spanked every day" because her deafness prevented her from following instructions); *id.* at 400 (Mrs. Richard Walbridge) (student with spina bifida barred from the school library for two years "because her braces and crutches made too much noise"); Calif. Att'y Gen., *Commission on Disability: Final Report* 17 (Dec. 1989) (*Calif. Report*) ("A bright child with cerebral palsy is assigned to a class with mentally retarded and other developmentally disabled children solely because of her physical disability."); *id.* at 81 (in one town, all disabled children are grouped into a single classroom regardless of individual ability).

because "it would be 'disgusting' to my roommates to have to live with a woman with a disability." Wash. 1733.[22]

(iii) Voting and Political Access: Voting is the right that is "preservative of all rights," *Katzenbach* v. *Morgan*, 384 U.S. 641, 652 (1966), and the Equal Protection Clause guarantees "the opportunity for equal participation by all voters" in elections, *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966). But "in the past years people with disabilities have been turned away from the polling places after they have been registered to vote because they did not look competent." 2 *Leg. Hist.* 1220 (Nancy Husted-Jensen). When one witness turned in the registration card of a voter who has cerebral palsy and is blind, the "clerk of the board of canvassers looked aghast * * * and said to me, 'Is that person competent? Look at that signature." The clerk then arbitrarily invented a reason to reject the registration. *Id.* at 1219. Congress was also aware that a deaf voter was told that "you have to be able to use your voice" to vote. *Equal Access to Voting for Elderly and Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin.*, 98th Cong., 1st Sess. 94 (1984) (*Equal Access to Voting Hearings*). "How can disabled people have

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[22] See also 2 *Leg. Hist.* 1224 (Denise Karuth) (state university professor asked a blind student enrolled in his music class "'What are you doing in this program if you can't see'"; student was forced to drop class); *id.* at 1225 (state commission refuses to sponsor legally blind student for masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors, '[s]ince,' and this is a quote: 'they could not drive to see their clients'"); Wis. 1757 (a doctoral program would not accept a person with a disability because "it never worked out well"); S.D. 1476 (University of South Dakota dean and his successor were convinced that blind people could not teach in the public schools); *Calif. Report* 138; J. Shapiro, *No Pity* 45 (1994) (Dean of the University of California at Berkeley told a prospective student that "[w]e've tried cripples before and it didn't work").

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ɪat signature." The clerk then
ɔo reject the registration. *Id.*
'are that a deaf voter was told
ɜe your voice" to vote. *Equal*
ɪnd Disabled Persons: Hear-
Elections of the House Comm.
., 1st Sess. 94 (1984) (*Equal*
How can disabled people have

ɪise Karuth) (state university pro-
in his music class "'What are you
'; student was forced to drop class);
ɔo sponsor legally blind student for
eling because "the State would not
[s]ince,' and this is a quote: 'they
Vis. 1757 (a doctoral program would
ɘcause "it never worked out well");
ɔta dean and his successor were
ɵeach in the public schools); *Calif.*
1994) (Dean of the University of
ɛtive student that "[w]e've tried

clout with our elected officials when they are aware that many of us are prevented from voting?" Ark. 155.[23]

The denial of access to political officials and vital governmental services also featured prominently in the testimony. For example, "[t]he courthouse door is still closed to Ameri-

[23] "A blind woman, a new resident of Alabama, went to vote and was refused instructions on the operation of the voting machine." Ala. 16. Another voter with a disability was "told to go home once when I came to the poll and found the voting machines down a flight of stairs with no paper ballots available"; on another occasion that voter "had to shout my choice of candidates over the noise of a crowd to a precinct judge who pushed the levers of the machine for me, feeling all the while as if I had to offer an explanation for my decisions." *Equal Access to Voting Hearings* 45. The legislative record also documented that many persons with disabilities "cannot exercise one of your most basic rights as an American" because polling places were frequently inaccessible. S. Rep. No. 116, *supra*, at 12. As a consequence, persons with disabilities "were forced to vote by absentee ballot before key debates by the candidates were held." *Ibid.*; see also *May 1989 Hearings* 76 (Ill. Att'y Gen. Hartigan) (similar). And even when persons with disabilities have voted absentee, they have been treated differently from other absentee voters. See 2 *Leg. Hist.* 1745 (Nanette Bowling) ("[S]ome jurisdictions merely encouraged persons with disabilities to vote by absentee ballot * * * [which] deprives the disabled voter of an option available to other absentee voters, the right to change their vote by appearing personally at the polls on election day."); *Equal Access to Voting Hearings* 17 & 461 (criticizing States' imposition of special certification requirements on persons with disabilities for absentee voting); see generally 2 *Leg. Hist.* 1767 (Rick Edwards) ("The Twenty-sixth Amendment to the Constitution gives me the right to vote, yet until last year my polling place was inaccessible."); Wis. 1756 (alleging that 37%-40% of Milwaukee polling places are inaccessible to wheelchair users); Mont. 1024, 1027 (Cascade County's polling place is completely inaccessible); Mich. 922 (alleging that 65% of Detroit voting precincts are inaccessible); N.D. 1185 ("In rural North Dakota many voting sites are inaccessible."); Del. 307, Pa. 1436, Okla. 1280, Colo. 277 (all: polling places inaccessible); FEC, *Polling Place Accessibility in the 1988 General Election* 7 (1989) (21% of polling places inaccessible; 27% were inaccessible in 1986 elections).

cans with disabilities"—literally. 2 *Leg. Hist.* 936 (Sen. Harkin).

> I went to the courtroom one day and * * * I could not get into the building because there were about 500 steps to get in there. Then I called for the security guard to help me, who * * * told me there was an entrance at the back door for the handicapped people. * * * I went to the back door and there were three more stairs for me to get over to be able to ring a bell to announce my arrival so that somebody would come and open the door and maybe let me in. I was not able to do that. * * * This is the court system that is supposed to give me a fair hearing. It took me 2 hours to get in. * * * And when [the judge] finally saw me in the courtroom, he could not look at me because of my wheelchair. * * * The employees of the courtroom came back to me and told me, "You are not the norm. You are not the normal person we see every day.

Id. at 1071 (Emeka Nwojke). Numerous other witnesses explained that access to the courts[24] and other important government buildings and officials[25] depended upon their willingness to crawl or be carried.

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[24] See, *e.g.*, Ala. 15 ("A man, called to testify in court, had to get out of his wheelchair and physically pull himself up three flights of stairs to reach the courtroom."); W. Va. 1745 (witness in court case had to be carried up two flights of stairs because sheriff would not let him use the elevator); Consol. Gov't C.A. Br. at 3, *Lane* v. *Tennessee*, No. 98-6730 (6th Cir.) (Lane arrested for two misdemeanors and ordered to report for hearing at inaccessible courthouse; the first day he crawled up the stairs to the courtroom; the second day he was arrested for failure to appear when he refused to crawl or be carried up the stairs; hearing later held with defendant forced to remain outside while counsel shuttled between him and the courtroom).

[25] See, *e.g.*, H.R. Rep. No. 485, *supra*, Pt. 2, at 40 (town hall and public schools inaccessible); 2 *Leg. Hist.* 1331 (Justin Dart) ("We have clients whose children have been taken away from them and told to get parent

rally. 2 *Leg. Hist.* 936 (Sen.

ne day and * * * I could not use there were about 500 steps alled for the security guard to d me there was an entrance at licapped people. * * * I went were three more stairs for me ring a bell to announce my would come and open the door as not able to do that. * * * that is supposed to give me a hours to get in. * * * And saw me in the courtroom, he ise of my wheelchair. * * * rtroom came back to me and norm. You are not the normal

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z, Pt. 2, at 40 (town hall and public l (Justin Dart) ("We have clients from them and told to get parent

(iv) Public Transportation: Individuals also reported discriminatory treatment on public transportation.

> Some of the drivers are very rude and get mad if I want to take the bus. Can you believe that? I work and part of my taxes pay for public buses and then they get mad just because I am using a wheelchair. * * * Maybe another person using a wheelchair is trying to go to work

information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?"); *Spectrum* 39 (76% of state-owned buildings offering services and programs for the general public are inaccessible and unusable for persons with disabilities); *May 1989 Hearings* 488, 491 (Ill. Att'y Gen. Hartigan) ("I have had innumerable complaints regarding lack of access to public services—people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building"; "individuals who are deaf or hearing impaired call[] our office for assistance because the arm of government they need to reach is not accessible to them"); *id.* at 76 ("[Y]ou cannot attend town council meetings on the second story of a building that does not have an elevator."); *id.* at 663 (Dr. Mary Lynn Fletcher) (to attend town meetings, "I (or anyone with a severe mobility impairment) must crawl up three flights of circular stairs to the 'Court Room.' In this room all public business is conducted by the county government whether on taxes, zoning, schools or any type of public business."); Alaska 73 ("We have major problems in Seward, regarding accessibility to City and State buildings for the handicapped and disabled."; City Manager responded that "[H]e runs this town * * * and no one is going to tell him what to do."); Ind. 626 ("Raney, who has been in a wheelchair for 12 years, tried three times last year to testify before state legislative committees. And three times, he was thwarted by a narrow set of Statehouse stairs, the only route to the small hearing room."); Ind. 651 (person with disabilities could not attend government meetings or court proceedings because entrances and locations were inaccessible); Wis. 1758 (lack of access to City Hall); Wyo. 1786 (individual unable to get a marriage license because the county courthouse was not wheelchair accessible); *Calif. Report* 70 ("People with disabilities are often unable to gain access to public meetings of governmental and quasi-governmental agencies to exercise their legal right to comment on issues that impact their lives.").

> or school and they should not have to crawl up the stairs and get dirty. * * * It is hard for people to feel good about themselves if they have to crawl up the stairs of a bus, or if the driver passes by without stopping. * * * I learned in school that black people had problems with buses, too.

2 *Leg. Hist.* 993 (Jade Calegory).[26] A "key" Connecticut transportation official responded to requests for accessibility by asking "Why can't all the handicapped people live in one place and work in one place? It would make it easier for us." *Id.* at 1085 (Edith Harris).[27]

(v) Law Enforcement: Persons with disabilities have also been victimized in their dealings with law enforcement. When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." 2 *Leg. Hist.* 1005 (Belinda Mason). Police refused to accept a rape complaint from a blind woman because she could not make a visual identification, ignoring the possibility of alternative means of identifying the perpetrator. N.M. 1081. A person in a wheelchair was given a ticket and six-months of probation for obstructing traffic on the street, even though the person could not use the sidewalk because it lacked curb cuts. Va. 1684. Task Force Chairman Justin Dart testified, moreover, that persons with hearing impairments "have been arrested and held in jail over night without ever know-

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[26] See also 2 *Leg. Hist.* 1257 (Speed Davis) (similar); Mass. 831 ("Blacks wanted to ride in the front of the bus. Disabled people just want[] on.").

[27] See also 2 *Leg. Hist.* 1097 (Bill Dorfer) ("And many of these buses quite often bypass men and women in wheelchairs or with crutches, walkers, because they do not want to take the time, quite frankly, to stop and to assist these people on the buses"); *id.* at 1190 (Cindy Miller) ("It is a 20-minute bus ride [to work], but I have to leave an hour and a half early because the bus lifts are not maintained. * * * But sometimes, like this morning, the bus with the lift just does not stop for me."); Wash. 1716 (person with service dog not allowed to board bus).

ing their rights nor what they are being held for." 2 *Leg. Hist.* 1331.[28] The discrimination continues in correctional institutions. "I have witnessed their jailers rational[ize] taking away their wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs." 2 *Leg. Hist.* 1190 (Cindy Miller).[29]

(vi) Institutionalization: Unconstitutional denials of appropriate treatment and unreasonable institutionalization of persons in state mental hospitals were also catalogued. See 2 *Leg. Hist.* 1203 (Lelia Batten) (state law ineffective; state hospitals are "notorious for using medication for controlling the behavior of clients and not for treatment alone. Seclusion rooms and restraints are used to punish clients."); *id.* at

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[28] See also 2 *Leg. Hist.* 1115 (Paul Zapun) (sheriff threatens persons with disabilities who stop in town due to car trouble); *id.* at 1196 (Cindy Miller) (police "do not provide crime prevention, apprehension or prosecution because they see it as fate that Americans with disabilities will be victims"); *id.* at 1197 (police officer taunted witness by putting a gun to her head and pulling the trigger on an empty barrel, "because he thought it would be 'funny' since I have quadraparesis and couldn't flee or fight"); Tex. 1541 (police refused to take an assault complaint from a person with a disability); *Calif. Report* 101-104 (additional examples). In addition, persons with disabilities, such as epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, *supra*, Pt. 3, at 50; see also 136 Cong. Rec. H2633 (daily ed. May 22, 1990) (Rep. Levine); Wyo. 1777; Idaho 517.

[29] See also *Spectrum* 168 (noting discrimination in treatment and rehabilitation programs available to inmates with disabilities and inaccessible jail cells and toilet facilities); *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986) (prison guard repeatedly assaulted paraplegic inmates with knife, forced them to sit in own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead"); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1466 (M.D. Ala. 1994) (paraplegic prisoner denied use of a wheelchair and forced to crawl around his cell); *Calif. Report* 103 ("[A] parole agent sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though he explained that he could not make the appointments because he was unable to get accessible transportation.").

1262-1263 (Eleanor C. Blake) (detailing the "minimal, custodial, neglectful, abusive" care received at state mental hospital, and willful indifference resulting in rape); *Spectrum* 34-35.[30]

(vii) Other Public Services: The scope of the testimony offered to Congress regarding unconstitutional treatment swept so broadly, touching virtually every aspect of individuals' encounters with their government, as to defy iso-

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[30] See also *Calif. Report* 114. Congress also brought to bear the knowledge it had acquired of this problem in enacting the Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96-247, 94 Stat. 349, codified at 42 U.S.C. 1997 *et seq.*, and the Developmental Disabilities Act of 1984, 42 U.S.C. 6000 *et seq.* See, *e.g.*, 132 Cong. Rec. S5914-01 (daily ed. May 14, 1986) (Sen. Kerry) (findings of investigation of state-run mental health facilities "were appalling. The extent of neglect and abuse uncovered in their facilities was beyond belief."); *Civil Rights of Instit. Persons: Hearings on S. 1393 Before the Subcomm. on the Const. of the Sen. Comm. on the Judiciary*, 95th Cong., 1st Sess. 127 (1977) (Michael D. McGuire, M.D.) ("it became quite clear * * * that the personnel regarded patients as animals, * * * and that group kicking and beatings were part of the program"); *id.* at 191-192 (Dr. Philip Roos) (characterizing institutions for persons with mental retardation throughout the nation as "dehumanizing," "unsanitary and hazardous conditions," "replete with conditions which foster regression and deterioration," "characterized by self-containment and isolation, confinement, separation from the mainstream of society"); *Civil Rights for Instit. Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 239 (1977) (Stanley C. Van Ness) (describing "pattern and practice of physical assaults and mental abuse of patients, and of unhealthy, unsanitary, and anti-therapeutic living conditions" in New Jersey state institutions); *Civil Rights of Instit. Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 34 (1979) (Paul Friedman) ("[A] number of the residents were literally kept in cages. A number of those residents who had been able to walk and who were continent when they were committed had lost the ability to walk, had become incontinent, and had regressed because of these shockingly inhumane conditions of confinement.").

lating the problem into select categories of state action. Services and programs as varied as zoning[31]; the operation of zoos,[32] public libraries,[33] public swimming pools and park programs[34]; and child custody proceedings[35] exposed the dis-

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[31] Congress knew that *Cleburne* was not an isolated incident. See 2 *Leg. Hist.* 1230 (Larry Urban); see also People First Cert. Amicus Br., *supra*, at 20 n.94; Wyo. 1781 (zoning board declined to authorize group home because of "local residents' unfounded fears that the residents would be a danger to the children in a nearby school"); Nev. 1050 (Las Vegas has passed an ordinance that disallows the mentally ill from living in residential areas); N.J. 1068 (group home for those with head injuries barred because public perceived such persons as "totally incompetent, sexual deviants, and that they needed 'room to roam'"; "Officially, the application was turned down due to lack of parking spaces, even though it was early established that the residents would not have automobiles.").

[32] A zoo keeper refused to admit children with Down Syndrome "because he feared they would upset the chimpanzees." S. Rep. No. 116, *supra*, at 7; H. R. Rep. No. 485, *supra*, Pt. 2, at 30.

[33] See 2 *Leg. Hist.* 1100 (Shelley Teed-Wargo) (town library refused to let person with mental retardation check out a video "because he lives in a group home," unless he was accompanied by a staff person or had a written permission slip); Pa. 1391 (public library will not issue library cards to residents of group homes without the countersignature of a staff member—this rule applies to "those having physical as well as mental disabilities").

[34] A paraplegic Vietnam veteran was forbidden to use a public pool in New York; the park commissioner explained that "[i]t's not my fault you went to Vietnam and got crippled." 3 *Leg. Hist.* 1872 (Peter Addesso); see also *id.* at 1995 (Rev. Scott Allen) (woman with AIDS and her children denied entry to a public swimming pool); *May 1989 Hearings* 76 (Ill. Att'y Gen. Hartigan) (visually impaired children with guide dogs "cannot participate in park district programs when the park has a 'no dogs' rule").

[35] See H.R. Rep. No. 485, *supra*, Pt. 3, at 25 ("These discriminatory polices and practices affect people with disabilities in every aspect of their lives * * * [including] securing custody of their children."); *id.*, Pt. 2, at 41 ("[B]eing paralyzed has meant far more than being unable to walk—it has meant being excluded from public schools * * * and being deemed an 'unfit parent'" in custody proceedings.); 2 *Leg. Hist.* 1611 n.10 (Arlene Mayerson) ("Historically, child-custody suits almost always have ended

criminatory attitudes of officials.[36]

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with custody being awarded to the non-disabled parent."); Mass. 829 (government refuses to authorize couple's adoption solely because woman had muscular dystrophy); *Spectrum* 40; *No Pity*, *supra*, at 26 (woman with cerebral palsy denied custody of her two sons; children placed in foster care instead); *Carney* v. *Carney*, 598 P.2d 36, 42 (Cal. 1979) (lower court "stereotype[d] William as a person deemed forever unable to be a good parent simply because he is physically handicapped").

[36] See also H.R. Rep. No. 485, *supra*, Pt. 2, at 46 ("How many well educated and highly capable people with disabilities must sit down at home every day, not because of their lack of ability, but because of the attitudes of employers, service providers, and government officials?"); 2 *Leg. Hist.* 1061 (Eric Griffin) ("I come to you as one of those * * * who was denied a public education until age 18, one who has been put through the back door, and kept out of the front door and segregated even if you could get in."); *id.* at 1078 (Ellen Telker) ("State and local municipalities do not make many materials available to a person who is unable to read print."); *id.* at 1116 (Virginia Domini) (persons with disabilities "must fight to function in a society where busdrivers start moving before I have my balance or State human resources [sic] yell 'I can't understand you,' to justify leaving a man without food or access to food over the weekend."); *id.* at 1017 (Judith Heumann) ("Some of these people are in very high places. In fact, one of our categories of great opposition is local administrators, local elected officials."); 3 *Leg. Hist.* 2241 (James Ellis) ("Because of their disability, people with mental retardation have been denied the right to marry, the right to have children, the right to vote, the right to attend public school, and the right to live in their own community, with their own families and friends."); 2 *Leg. Hist.* 1768 (Rick Edwards) ("Why are the new drinking fountains in our State House erected out of reach of persons in wheelchairs? And why were curb cuts at the Indianapolis Airport filled in with concrete?); Task Force Report 21 (six wheelchair users *arrested* for failing to leave restaurant after manager complained that "they took up too much space"); see generally *Spectrum* App. A (identifying 20 broad categories of state-provided or supported services and programs in which discrimination against persons with disabilities arises); *Unequal Treatment*, *supra*.

3. The existence of state laws against disability discrimination does not negate Congress's finding of widespread discrimination by state governments and their subdivisions

Entirely ignoring the real-life experiences with disability discrimination that hundreds of witnesses related at the congressional hearings and Task Force forums, petitioners tell this Court that the only "real evidence" (Pet. Br. 38) of state action it should consider is the fact that States have enacted laws against disability discrimination, and that Congress was aware of that. Petitioners' argument is entirely mistaken.

First, substantial information and testimony before Congress demonstrated that state laws were "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." S. Rep. No. 116, *supra*, at 18; see also *ibid.* (section of report entitled "CURRENT FEDERAL AND STATE LAWS ARE INADEQUATE"); H.R. Rep. No. 485, *supra*, Pt. 2, at 47 (same). The 50 State Governors' Committees "report[ed] that existing state laws do not adequately counter * * * discrimination." *Ibid.*[37] The Illinois Attorney General testified that "[p]eople with disabilities should not have to win these rights on a State-by-State basis" and that "[i]t is long past time * * * [for] a national policy that puts persons with disabilities on equal footing with other Americans." *May 1989 Hearings* 77. And, although Ohio now tells this Court that application of the Disabilities Act to the States is unnecessary, that is not what Ohio's Governor told Congress at the time. *May 1989*

[37] See also 136 Cong. Rec. H2627 (May 22, 1990) (Rep. Wolpe), *id.* at H2633 (Rep. Levine); 134 Cong. Rec. S5116 (Apr. 28, 1988) (Sen. Simon); 2 *Leg. Hist.* 963 (Sandra Parrino); *id.* at 967 (Adm. James Watkins) ("Too many States, for whatever reason, still perpetuate confusion. It is time for Federal action."); *id.* at 1642-1643 (Arlene Mayerson) (noting variations and gaps in coverage of state statutes); 3 *Leg. Hist.* 2245 (Robert Burgdorf).

Hearings 778 ("[S]tate and local governments must also be held to the same standards" of ensuring "that there is no discrimination against people with disabilities in any program under their jurisdiction.").[38]

Second, petitioners' appendix of state laws (Br. App. A) neither establishes the effectiveness of those laws nor disproves the existence of official discrimination. As an initial matter, petitioners grossly exaggerate the coverage of those laws. See generally Nat'l Ass'n of Protection & Advocacy Servs. Amicus Br.; J. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 Ark. L.

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[38] Other state officials echoed those sentiments. See Dep't of Health & Human Servs., *Visions of: Independence, Productivity, Integration for People with Developmental Disabilities* 29 (1990) (19 States strongly recommended passage of the Disabilities Act); 2 *Leg. Hist.* 1050 (Elmer Bartels, Mass. Rehab. Comm'n); *id.* at 1455-1456 (Nikki Van Hightower, Treas., Harris Co., Tex.); *id.* at 1473-1474 (Robert Lanier, Chair, Metro. Transit Auth. of Harris Co., Tex.); *id.* at 1506 (Texas State Sen. Chet Brooks) ("We cannot effectively piece these protections together state by state, person by person."); *id.* at 1508.

Congress likewise recognized that the prior piecemeal approach of federal legislation had not succeeded and, in fact, had created "a patchwork quilt in need of repair * * * [with] holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections." S. Rep. No. 116, *supra*, at 19 (quoting Att'y Gen. Thornburgh). Similarly, the Illinois Attorney General testified that the Rehabilitation Act's scheme of prohibiting discrimination by entities receiving federal funds "[u]nfortunately * * * translates [into] total confusion for the disabled community and the inability to expect consistent treatment." *May 1989 Hearings* 77-78; see also 26 Weekly Comp. Pres. Doc. 1165 (July 26, 1990) (President Bush's signing statement observes that "[e]xisting laws and regulations * * * have left broad areas of American life untouched or inadequately addressed"); H.R. Rep. No. 485, *supra*, Pt. 4, at 24; 134 Cong. Rec. S5116 (daily ed. Apr. 28, 1988) (Sen. Simon); *id.* at S5107 (Sen. Weicker); 2 *Leg. Hist.* 1272 (Rep. Owens); 3 *Leg. Hist.* 2015 (Att'y Gen. Thornburgh); *id.* at 2244-2245 (Robert Burgdorf).

Rev. 261 (1986) (detailing gaps in coverage of state laws). Prior to 1990, nearly half of the States did not protect persons with mental illness and/or mental disabilities. See Flaccus, *supra*, at 278-280. New Hampshire excluded disabilities caused by illness, N.H. Rev. Stat. Ann. § 354-A:3(XIII) (1984), while Arizona excluded disabilities which were first manifested after the age of 18, Ariz. Rev. Stat. § 36-551(11)(b) (1986). Flaccus, *supra*, at 285. Of particular relevance here, few States protected against discrimination based on either a perceived disability or a history of illness such as cancer. See B. Hoffman, *Employment Discrimination Based on Cancer History*, 1986 Temple L.Q. 1 (1986). Many States failed to provide for private rights of action and compensatory damages, effectively leaving victims of discrimination without enforceable remedies. *Id.* at App. B; Flaccus, *supra*, at 300-310, 317-321.

Furthermore, petitioners' surmise about the effectiveness of those laws cannot supplant the first-hand testimony of witness after witness about the instances of discrimination they faced and the ineffectiveness of state laws. Just as state laws against race discrimination have neither eradicated the problem nor undermined the basis for subjecting state employers to federal prohibitions,[39] Congress was equally justified in concluding that state laws against disability discrimination had generally been ineffective in combating the lingering effects of prior official discrimination and exclusionary laws and policies. Indeed, while the Disabilities Act was before Congress, the Advisory Commission on Intergovernmental Relations (ACIR)[40] surveyed state compliance with prohibitions on employment

[39] See, *e.g.*, S. Rep. No. 415, 92d Cong., 1st Sess. 19 (1971) (37 States had equal employment laws at the time Title VII was extended to the States).

[40] The Commission's membership included six Members of Congress and 11 representatives from state and local governments.

discrimination and reported that 35% of responding state and local governments had *no* employees with disabilities, and half had only "one or two." ACIR, *Disability Rights Mandates* 64 (1989). Further, 82% of state and local government employers harbored moderate to strong negative attitudes and misconceptions about hiring persons with disabilities, based on stereotypes, prejudice, and "feelings of discomfort in associating with disabled individuals." *Id.* at 72-73. That, unfortunately, "is the pervasive backdrop against which regulatory mandates are carried out." *Id.* at 96.[41]

Third, petitioners fail in their effort to show that Congress considered state disability discrimination laws to be effective. While petitioners correctly note (Br. 32) that the Senate Report stated that "[v]irtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life," that statement referred not to state anti-discrimination laws, but rather to state regulation of unfair insurance practices. See S. Rep. No. 116, *supra*, at 84. Similarly, while it is true that Attorney General Thornburgh noted that federal action should take account of existing state laws (Pet. Br. 32), that statement referred to state laws prohibiting only private-sector discrimination. Likewise, the National Coalition of Cancer Survivorship did note that every State had laws regulating disability dis-

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[41] See also Ala. 17 (every day at her job, the Director of Alabama's Disabled Persons Protection Commission "ha[d] to drive home to use the bathroom or call my husband to drive in and help me because the newly renovated State House" lacked accessible bathrooms); *Calif. Report* 22-23 (noting "gaps" and "contradictions" in state law); *Texas Report* 9 (noting that commitment of high-level policymakers to non-discrimination not alone sufficient because "it comes down to the choice made by an immediate supervisor * * * [and] [i]f this person does not share the philosophy that hiring the handicapped is good business it is all over for that person. Then what we are doing actually is, we are giving lip service to it but it is not going to happen.").

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[i]f this person does not share the
d is good business it is all over for
ctually is, we are giving lip service

crimination (Pet. Br. 33), but went on to explain that "[t]he scope of these [state] laws, however, varies widely," and provided a lengthy and detailed critique (complete with chart) of the limitations of state laws such as Alabama's. *May 1989 Hearings* 386-394. Indeed, as noted earlier, many witnesses testified, without contradiction, that "state laws have not provided substantial protection to people with disabilities." 3 *Leg. Hist.* 2245 (James Ellis) (cited at Pet. Br. 34, 37).[42]

4. Disability discrimination does not fall beyond Congress's Section 5 enforcement power simply because it is subject to rational-basis review by courts

Petitioners contend (Br. 44-48) that, notwithstanding the voluminous evidence of discrimination before it, Congress's hands are tied because disability discrimination is subject to rational-basis review by the courts. In petitioners' view, Section 5 permits Congress only to prohibit disability discrimination that would be declared unconstitutional by a court,

[42] Petitioners' repeated reliance (Br. 4, 33) on Rep. Moakley's comment that state laws are "out in front" of federal law ignores that Rep. Moakley had earlier decried the weaknesses of state laws. *Employment Discrim. Against Cancer Victims and the Handicapped: Hearing Before the Subcomm. on Employment Opp. of the House Comm. on Educ. & Labor*, 99th Cong., 1st Sess. 62 (1985) (Rep. Moakley) ("[O]ne-fourth of the states have no protection for the handicapped. Additionally, even those states with laws differ greatly in their regulations.") (attaching ten-state survey showing gaps in coverage of laws like Alabama's). Placed in context, then, the quotation petitioners rely so heavily upon is more fairly read as a complaint about the deficiencies and gaps in federal law, rather than an assertion of the sufficiency of state law. Compare also Pet. Br. 31 (quoting Barbara Hoffman), with *Discrimination Against Cancer Victims and the Handicapped: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. & Labor*, 100th Cong., 1st Sess. 86 (1987) (Barbara Hoffman) ("most [state] laws do not clearly protect cancer survivors" from discrimination; for those few that do, the "State agency which enforces that law still will not strike down the civil service regulations which blatantly are violative of the act").

and not to identify or prevent Fourteenth Amendment violations that might elude judicial review, because "the use of prophylactic authority under Section 5 in the context of rights that warrant rational-basis review" (Pet. Br. 44-45) is impermissible. Of course, to the extent that the Disabilities Act enforces the Due Process Clause of the Fourteenth Amendment by remedying and preventing governmental conduct that burdens the fundamental rights of persons with disabilities—such as the right to vote, to access the courts, to petition officials for the redress of grievances, to be accorded due process by law enforcement officials, and to humane conditions of confinement—petitioners' argument is misplaced. See, *e.g.*, *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988) ("the most exacting scrutiny" applies to infringements of fundamental rights). And even where rational-basis review applies, petitioners' theory finds no basis in the Constitution's text, this Court's precedents, or logic.

First, petitioners' proposed restriction appears nowhere in the text of Section 5, which gives Congress the power to enforce the entire Fourteenth Amendment. See *Flores*, 521 U.S. at 519. Nor could it be grounded in the history of Section 5, because the tiers of judicial scrutiny were unknown to the Framers of the Fourteenth Amendment and, in fact, did not appear until a century later.

Second, petitioners' attempt to exclude select categories of discrimination from Congress's enforcement power cannot be reconciled with this Court's precedents. In *Cleburne*, this Court held that disability discrimination should receive rational-basis review by the courts, not because persons with disabilities lack the traditional indicia of a suspect class—they in fact possess many of those criteria—but because heightened scrutiny would unduly limit legislative solutions. "How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals." 473 U.S. at 442-443. While the Court in *Cleburne* acknowledged

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the important role of state legislators in that process, *id.* at 442, it also recognized the appropriateness of congressional legislation, see *id.* at 439 (rational-basis scrutiny applies only "absent controlling congressional direction"); *id.* at 443-444. Thus, the judiciary's application of rational-basis scrutiny is premised upon the enhanced—not diminished—capacity of Congress to address the problem.[43]

Indeed, if petitioners were correct, this Court likely would have mentioned that categorical limitation in either *Kimel*, *supra*, or *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). In each of those cases, the Court invalidated Section 5 legislation concerning age discrimination—subject only to rational-basis review—without hinting at, let alone endorsing, petitioners' constitutional fault line. Moreover, petitioners' theory is directly contradicted by this Court's ruling in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), sustaining under Section 5 the extension of Title VII's ban on gender discrimination to the States at a time when a majority of the Court had not yet concluded that gender discrimination warrants heightened scrutiny.[44] In fact, any classification that is subject to judicial review for arbitrariness under the Equal Protection Clause must also be subject to congressional legislation under Section 5, because "[i]t is not * * * the *judicial*

[43] The Disabilities Act does not affect or impair the ability of the States to "provide[] greater or equal protection for the rights of individuals with disabilities." 42 U.S.C. 12201(b).

[44] Not until the Term after *Fitzpatrick* did the Court hold that gender discrimination warrants heightened scrutiny. *Craig* v. *Boren*, 429 U.S. 190, 197-199 (1976). A year *after* the 1972 amendments, a plurality of this Court had expressed its view that gender distinctions merit enhanced scrutiny, *Frontiero* v. *Richardson*, 411 U.S. 677, 682-688 (1973) (opinion of Brennan, J.), but the constitutionality of Title VII's abrogation did not turn upon that fact. *Fitzpatrick* did not cite *Frontiero* or discuss the applicable equal protection standard. See also *Maher* v. *Gagne*, 448 U.S. 122, 132 (1980) (Section 5 power validly abrogated Eleventh Amendment immunity for attorney's fees even where constitutional claims at issue were subject to rational-basis review).

power" but "the power of Congress which has been enlarged" by Section 5. *Ex parte Virginia*, 100 U.S. at 345.[45]

Third, the reasons for restricting courts to rational-basis review do not disqualify Congress from providing appropriate enforcement measures. Rational-basis scrutiny "is a paradigm of *judicial* restraint," *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (emphasis added), designed to cabin the exercise of judicial power to invalidate duly-enacted state and federal legislation. It reflects the notion that stringent judicial review should largely be reserved for the protection of those groups with limited access to the political process.[46] Thus, generally when courts entertain equal protection challenges, they must be exceedingly deferential to the underlying legislative judgments and factfinding, requiring those challenging the laws to show that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979); see also *Heller* v. *Doe*, 509 U.S. 312, 320-321 (1993).

By contrast, because congressional enforcement does not share either the anti-democratic character of judicial review or the limited capacity of courts to collect and review relevant information, Congress has "wide latitude" and a markedly different role from the courts when performing its

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[45] Petitioners' concern that sustaining the Disabilities Act as an exercise of the Section 5 power will open the floodgates to federal legislation is misplaced. This Court has devised a test for evaluating the propriety of Section 5 legislation that has proven perfectly capable of policing congressional overreaching. See *United States* v. *Morrison*, 120 S. Ct. 1740 (2000); *Kimel*, *supra*; *Flores*, *supra*.

[46] See *Cleburne*, 473 U.S. at 441 ("courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices"); see also *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

"duty to make its own informed judgment on the meaning and force of the Constitution," *Flores*, 521 U.S. at 520, 535.

> The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue.

Fullilove, 448 U.S. at 502-503 (Powell, J., concurring).[47]

Accordingly, Congress's enforcement power under Section 5 extends to the full spectrum of conduct that violates the Equal Protection Clause, and not merely to the class of governmental actions that this Court stands ready to invalidate under heightened scrutiny.[48] Rather, by drawing on a

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[47] See also *Heller*, 509 U.S. at 320 ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."); *Bush* v. *Lucas*, 462 U.S. 367, 389 (1983) (Congress "may inform itself through factfinding procedures such as hearings that are not available to the courts."); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 330 (1966) ("In identifying past evils, Congress obviously may avail itself of information from any probative source.").

[48] To hold otherwise would "depreciate both congressional resourcefulness and congressional responsibility for implementing the [Fourteenth] Amendment" and would, contrary to this Court's rulings, consign Congress "to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment." *Morgan*, 384 U.S. at 648-649; see also *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part & concurring in the judgment) ("[I]t diminishes the constitutional responsibilities of the political branches to say they must wait to act until ordered to do so by a court."); *Oregon*, 400 U.S. at 296 (opinion of Stewart, J.) (Congress can find invidious discrimination in state action "even though a court in an individual lawsuit might not have reached that factual conclusion").

broad base of knowledge and experience, Congress is able to apply this Court's definition of equal protection to a set of legislatively determined facts and ascertain, in a way that courts cannot, whether and how often governmental action entails the "indiscriminate imposition of inequalities," *Romer*, 517 U.S. at 633, or is the likely outgrowth of prior governmental discrimination and exclusion, and the "negative attitudes" and "vague, undifferentiated fears," *Cleburne*, 473 U.S. at 448-449, that official segregation spawned.

B. The Americans With Disabilities Act Is Reasonably Tailored To Remedying And Preventing Unconstitutional Discrimination Against Persons With Disabilities

When enacting Section 5 legislation, Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified. *Florida Prepaid*, 527 U.S. at 639. Congress, however, may "paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." *Fullilove*, 448 U.S. at 501-502 n.3. Accordingly, "Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." *Kimel*, 120 S. Ct. at 644. Rather, "[l]egislation 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." *Lopez* v. *Monterey County*, 525 U.S. 266, 282 (1999); see also *United States* v. *Morrison*, 120 S. Ct. 1740, 1755 (2000). The operative question thus is not whether the Disabilities Act "prohibit[s] a somewhat broader swath of conduct," *Kimel*, 120 S. Ct. at 644, than would the courts, but whether the Disabilities Act sweeps more broadly than Congress could reasonably have deemed necessary to combat the historic

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and enduring legacy of discrimination, segregation, and isolation faced by persons with disabilities. It does not.

1. Discrimination on the basis of disability violates the Constitution more frequently than most classifications subject only to rational-basis review

Petitioners assert (Br. 40-44) that the Disabilities Act is not proper enforcement legislation because, like the age discrimination statute at issue in *Kimel*, it prohibits significant amounts of conduct that the Constitution does not. They are mistaken, because the gap between what the Constitution and this legislation proscribes is far narrower than it was in *Kimel*. While both age and disability discrimination are subject to rational-basis judicial review, courts have far more readily found a rational basis for age discrimination, see *Kimel*, 120 S. Ct. at 646-647, than for disability discrimination, see Section A.2, *supra*. The reason for that difference is, as *Cleburne* and *Romer* demonstrate, that the determination whether governmental conduct lacks a rational basis for purposes of the Equal Protection Clause is a contextual one, sensitive to the historical and social environment in which governmental decisionmaking arises. *Heller*, 509 U.S. at 321 (basis for governmental action "must find some footing in the realities of the subject addressed by the legislation"); see also *Plyler* v. *Doe*, 457 U.S. 202, 223 (1982). Because persons with disabilities, unlike older persons (*Kimel*, *supra*) or opticians (*Williamson* v. *Lee Optical*, 348 U.S. 483 (1955)), have been "subjected to a 'history of purposeful unequal treatment,'" *Kimel*, 120 S. Ct. at 645, disability discrimination is more likely in fact to result from false stereotypes and unconstitutional animus.[49] "Because

[49] For example, while government generally may use age as a proxy for employment decisionmaking regardless of the nexus to actual ability, *Kimel*, 120 S. Ct. at 646, a governmental policy of refusing to hire all persons with disabilities or requiring the retirement of all wheelchair

prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure." *Cleburne*, 473 U.S. at 473 n.24 (Marshall, J.).

2. The Disabilities Act reaches no further than Congress reasonably deemed necessary to remedy and prevent unconstitutional discrimination

The Disabilities Act targets discrimination that is unreasonable. The States retain their discretion to exclude persons from employment programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all.[50] The Disabilities Act also permits discrimination if a person cannot "perform the essential functions of the employment position," 42 U.S.C. 12111(8), or "meet[] the essential eligibility requirements" of the governmental program or service, 42 U.S.C. 12131(2). But once an individual proves that she can perform all but the non-essential tasks of a job or can meet all but the non-essential eligibility requirements of a program or service, the government's interest in excluding that individual solely "by reason of such disability," 42 U.S.C. 12132, is both minimal and, in light of history, constitutionally circumscribed. At the same time, permitting the States to retain and enforce their essential eligibility requirements protects their legitimate interests in selecting and structuring governmental activities.[51] The

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users even where the disability bears no relation to job functions, would likely meet a different constitutional fate.

[50] The types of disabilities covered by the Act, moreover, are generally confined to those substantially limiting conditions that have given rise to discriminatory treatment in the past. See *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy* v. *United Parcel Serv.*, 527 U.S. 516 (1999); *Albertsons, Inc.* v. *Kirkingburg*, 527 U.S. 555 (1999).

[51] Cf. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 406-407, 409-410 (1979) (under Section 504 of the Rehabilitation Act, State

Disabilities Act thus carefully balances a State's legitimate operational interests against the right of a person with a disability to be judged "by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 120 S. Ct. 1044, 1057 (2000).[52]

The statute thus requires more than the Constitution only to the extent that some disability discrimination may be rational for constitutional purposes, but unreasonable under the standards of the Disabilities Act. That margin of statutory protection does not redefine the constitutional right at issue (see Pet. Br. 39). Instead, like Title VII on which the Disabilities Act was modeled, the enhanced statutory protection is necessary to enforce this Court's constitutional standard by reaching unconstitutional conduct that would otherwise escape detection in court, remedying the continuing effects of prior unconstitutional discrimination, and deterring future constitutional violations. "While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern," *Flores*, 521 U.S. at 519, the Disabilities Act is on the remedial and prophylactic side of that line.

a. ***Disparate Impact:*** Petitioners thrice object (Pet. Br. 42-43 ¶¶ 4, 7, 9) that the Disabilities Act prohibits practices that have an unjustified disparate impact on persons with disabilities. However, prohibiting or requiring modifications of rules, policies, and practices that have a discriminatory impact is a traditional and appropriate exercise of the Section 5 power to combat a history of invidious discrimination.[53] By proscribing governmental practices with a dis-

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need not abandon essential requirements of its nursing program or fundamentally alter the nature of the program).

[52] See also *Plyler*, 457 U.S. at 221-222 ("[O]ne of the goals of the Equal Protection Clause [is] the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.").

[53] See *Fullilove*, 448 U.S. at 477 (opinion of Burger, C.J.) ("[C]ongressional authority [under Section 5] extends beyond the prohibition of

criminatory impact, 42 U.S.C. 12112(b)(6), the Disabilities Act eliminates "built-in headwinds" for persons with disabilities, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971), and fleshes out "subconscious stereotypes and prejudices," *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988). At the same time, the Act protects the States' use of rules and practices that are necessary and reasonably related to the job or program, 42 U.S.C. 12112(b)(6).

b. ***Reasonable Accommodation:*** As petitioners note (Br. 43 ¶¶ 5, 6), the Disabilities Act requires "reasonable accommodation" in employment, 42 U.S.C. 12111(8), 12111(b)(5)(A), and "reasonable modifications" in public services, 42 U.S.C. 12131(2). Those requirements, however, are precisely tailored to the unique features of disability discrimination in two ways.

First, given the history of segregation and isolation and the resulting entrenched stereotypes, fear, prejudices, and ignorance about persons with disabilities, Congress reasonably determined that a simple ban on future discrimination would be insufficient to purge the stain of past discrimination. Therefore, the Disabilities Act affirmatively promotes the integration of individuals with disabilities—both in order to remedy past unconstitutional conduct and to prevent future discrimination. Congress could reasonably

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purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination."); *id.* at 502 (Powell, J., concurring) ("It is beyond question * * * that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects."); *City of Rome* v. *United States*, 446 U.S. 156, 176-177 (1980) (under its Civil War Amendment powers, Congress may prohibit conduct that is constitutional if it perpetuates the effects of past discrimination); *South Carolina* v. *Katzenbach*, 383 U.S. at 325-333; see also *Thornburg* v. *Gingles*, 478 U.S. 30, 35 (1986) (discriminatory effects test for voting); cf. *Washington* v. *Davis*, 426 U.S. 229, 242 (1976) ("an invidious discriminatory purpose may often be inferred from * * * the fact, if it is true, that the law bears more heavily on one race than another").

conclude that the demonstrated failure of state and local governments to undertake reasonable efforts to accommodate and integrate persons with disabilities within their programs, services, and operations would freeze in place the effects of their prior exclusion and isolation of individuals with disabilities, creating a self-perpetuating spiral of segregation, stigma, ill treatment, neglect, and degradation. Congress also correctly concluded that, by reducing stereotypes and misconceptions, integration reduces the likelihood that constitutional violations will recur. Cf. *Olmstead*, 527 U.S. at 600 (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life").

Second, to the extent that the accommodation requirement necessitates alterations in some governmental policies and practices, it is an appropriate enforcement mechanism for many of the same reasons that a prohibition on disparate impact is. Like practices with a disparate impact and literacy tests for voting,[54] governmental refusals to make even reasonable accommodations for persons with disabilities often perpetuate the consequences of prior unconstitutional discrimination, and thus fall within Congress's Section 5 power.[55]

Moreover, failure to accommodate the needs of qualified persons with disabilities may often result directly from

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[54] See *Oregon* v. *Mitchell*, 400 U.S. 112 (upholding nationwide ban on literacy tests even though they are not unconstitutional *per se*); *Gaston County* v. *United States*, 395 U.S. 285, 293, 296-297 (1969) (Congress can proscribe constitutional action, such as literacy tests, to combat ripple effects of earlier discrimination in other governmental activities); *South Carolina* v. *Katzenbach*, 383 U.S. at 333-334.

[55] Of course, the obligation to accommodate is less intrusive than the traditional disparate impact remedy because the government is not required to abandon the practice *in toto*, but may simply modify it to accommodate those otherwise qualified individuals with disabilities who are excluded by the practice's effect.

hidden unconstitutional animus and false stereotypes. As petitioners' amicus recognizes (Crim. Justice Legal Found. Br. 7), employers regularly adjust the schedules and work functions of employees to accommodate family needs, civic and charitable activities, union demands, and personal emergencies. The Disabilities Act simply makes certain that the refusal to accommodate an employee with a disability is genuinely based on unreasonable cost or actual inability to accommodate, rather than on discomfort with or false stereotypes about the disability or unfounded concern about the costs of accommodation. Likewise, building and program designs generally are structured to accommodate the target population. The Disabilities Act simply ensures that persons previously invisible to designers are now considered part of government's service constituency. "Just as it is unthinkable to design a building with a bathroom only for use by men, it ought to be just as unacceptable to design a building that can only be used by able-bodied persons. It is exclusive *designs*, and not any inevitable consequence of a disability that results in the isolation and segregation of persons with disabilities in our society." 3 *Leg. Hist.* 1987 n.4 (Laura Cooper).[56]

Third, Congress tailored the accommodation requirement to the unconstitutional governmental conduct it seeks to repair and prevent. The statute requires accommodations and modifications only where "reasonable," 42 U.S.C. 12112(b)(5)(A), 12131(2). Governments need not make accommodations or modifications that "impose an undue hardship" or require "fundamental alterations in the nature of a service, program, or activity," in light of their nature or

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[56] Likewise, child-size and adult-size water fountains routinely appear in buildings; requiring accessible fountains just expands that routine design process. 2 *Leg. Hist.* 993-994 (Jade Calegory) ("Black people had to use separate drinking fountains and those of us using wheelchairs cannot even reach some drinking fountains. We get thirsty, too.").

cost, agency resources, and the operational practices and structure of the position. 42 U.S.C. 12111(10), 12112(b)(5)(A); 28 C.F.R. 35.130(b)(7), 35.150(a)(3), 35.164; *Olmstead*, 527 U.S. at 606 n.16.

Further, based on the consistent testimony of witnesses and expert studies, Congress determined that the vast majority of accommodations entail little or no cost. For example, over 50% of accommodations in employment settings cost nothing; another 30% cost less than $500.[57] One local government official stressed that "[t]his bill will not impose great hardships on our county governments" because "the majority of accommodations for employees with disabilities are less than $50" and "[t]he cost of making new or renovated structures accessible is less than 1 percent of the total cost of construction." 2 *Leg. Hist.* 1443 (Nikki Van Hightower, Treasurer, Harris Co., Tex.).[58] Indeed, petitioners do not allege that enforcing an existing no-smoking policy for Ash or permitting Garrett to retain a job that she was fully capable of performing would entail unreasonable cost. And any costs are further diminished when measured

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[57] GAO, Briefing Report on Costs of Accommodations, *Americans with Disabilities Act: Hearing Before the House Comm. on Small Business*, 101st Cong., 2d Sess. 190 (1990); 2 *Leg. Hist.* 1638.

[58] See, *e.g.*, S. Rep. No. 116, *supra*, at 10-12, 89, 92; H.R. Rep. No. 485, *supra*, Pt. 2, at 34; 2 *Leg. Hist.* 1552 (EEOC Comm'r Evan Kemp); *id.* at 1077 (John Nelson); *id.* at 1388-1389 (Justin Dart); *id.* at 1456-1457; *id.* at 1560 (Jay Rochlin); 3 *Leg. Hist.* 2190-2191 (Robert Burgdorf); Task Force Report 27; *Spectrum* 2, 30, 70. The federal government, moreover, provides substantial funding to cover many of those costs. The Department of Transportation will pay 90% of the costs of purchasing accessible busses and transit systems, 49 U.S.C. 5323(i), and will pay 100% of the cost of curb cuts and ramps designed, as part of a federal-aid project, to make public sidewalks accessible. Transp. Equity Act, Pub. L. No. 105-178, § 1108(a)(3)(B), 112 Stat. 139. Congress has also authorized grants for the removal of architectural barriers, 42 U.S.C. 5305(a)(5), and, in the last two fiscal years, has provided States $10.1 billion to assist in the education of students with disabilities.

against the financial and human costs of denying persons with disabilities an education or consigning them to unemployment or low-paying jobs and excluding them from needed government services or the equal exercise of fundamental rights, thereby rendering them a permanent underclass. *Plyler*, 457 U.S. at 223-224, 227.

In short, "[a] proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *Virginia*, 518 U.S. at 547. Section 5 thus empowers Congress to do more than simply prohibit the creation of new barriers to equality; it can require States to tear down the walls they erected during decades of discrimination and exclusion. See *id.* at 550 n.19 (Equal Protection Clause itself can require modification of facilities and program to ensure equal access). The remedy for segregation is integration, not inertia.

c. ***Burden of Justification:*** Petitioners point to features of the Disabilities Act (Br. 42-43 ¶¶ 1, 2, 3, 8), which impose on States a burden of justifying disability discrimination under the statute that is greater than what a court would require under Section 1 of the Fourteenth Amendment. They claim that, as a result, the Disabilities Act, like the Age Discrimination in Employment Act at issue in *Kimel*, unjustifiably "replaces one level of judicial scrutiny with another" (*id.* at 44) and is for that reason alone beyond Congress's enforcement authority under Section 5 of the Fourteenth Amendment. But in this respect the Disabilities Act is quite unlike the statutes at issue in *Kimel* and *Flores*, which, upon a minimal showing by a plaintiff, subjected constitutional state action to a level of rigid and probing review that this Court characterized as tantamount to strict scrutiny. See *Kimel*, 120 S. Ct. at 648; *Flores*, 521 U.S. at 534. The Disabilities Act requires a more substantial showing by the plaintiff and offers the defendant a less stringent standard of justification, thus preserving the States' capacity

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to draw reasoned—and thus presumptively constitutional—distinctions based on disability or the genuine difficulty of accommodation. Nor is an elevated burden of justification necessarily an impermissible effort to redefine constitutional rights, as in *Flores*; it can be, as it is here and under Title VII, an appropriate means of rooting out hidden animus, and remedying and preventing discrimination that is unconstitutional under judicially defined standards.

3. The Disabilities Act's coverage is as broad as necessary

Finally, petitioners object (Br. 40-41) to the Disabilities Act's broad coverage. The operative question, however, is not whether Section 5 legislation is broad, but whether it is broader than necessary. The Disabilities Act is not. The history of unconstitutional treatment and the risk of future discrimination found by Congress pertained to all aspects of governmental operations. Only a comprehensive effort to integrate persons with disabilities would end the cycle of isolation, segregation, and second-class citizenship, and deter further discrimination. Integration in education alone, for example, would not suffice if there were not going to be jobs for those who received the education. Integration in employment would not suffice if persons with disabilities lacked transportation. Ending unnecessary institutionalization is of little gain if neither government services nor the social activities of public life (libraries, museums, parks, and recreation services) are accessible to bring persons with disabilities into the life of the community. And none of those efforts would suffice if persons with disabilities continued to lack equivalent access to government officials, courthouses, and polling places. In short, Congress chose a comprehensive remedy because it confronted an all-encompassing, inter-connected problem; to do less would be as ineffectual as "throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway,"

S. Rep. No. 116, *supra*, at 13. "Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation." *Kimel*, 120 S. Ct. at 648. That describes the Disabilities Act to its very core.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTION OF THE UNITED STATES

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

THE AMERICANS WITH DISABILITIES ACT OF 1990

§ 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

ISABILITIES ACT OF 1990

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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.

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Title I of The Americans With Disabilities Act

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

§ 12111. Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include-

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care

professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

(7) Person, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an

employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of

individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

§ 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability[1] to the general public.

Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

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[1] So in original. Probably should be "transmissibility".

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability[1] published by the Secretary of Health and Human Services.

§ 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

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[1] So in original. Probably should be "transmissibility".

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to—

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

§ 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered

under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

§ 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5.

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C. § 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney

General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

Title II, Part A, of The Americans With Disabilities Act

§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 2410(4) of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of

the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

Title IV of The Americans With Disabilities Act

§ 12201. Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) Relationship to other laws

Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II or III of this chapter, or in places of public accommodation covered by subchapter III of this chapter.

(c) Insurance

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter [2] I and III of this chapter.

(d) Accommodations and services

Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

§ 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in[3] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

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[2] So in original. Probably should be "subchapters".

[3] So in original. Probably should be "in a".

§ 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

§ 12204. Regulations by Architectural and Transportation Barriers Compliance Board

(a) Issuance of guidelines

Not later than 9 months after July 26, 1990, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible

Design for purposes of subchapters II and III of this chapter.

(b) Contents of guidelines

The supplemental guidelines issued under subsection (a) of this section shall establish additional requirements, consistent with this chapter, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

(c) Qualified historic properties

(1) In general

The supplemental guidelines issued under subsection (a) of this section shall include procedures and requirements for alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in 4.1.7(1)(a) of the Uniform Federal Accessibility Standards.

(2) Sites eligible for listing in National Register

With respect to alterations of buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act (16 U.S.C. 470 et seq.), the guidelines described in paragraph (1) shall, at a minimum, maintain the procedures and requirements established in 4.1.7(1) and (2) of the Uniform Federal Accessibility Standards.

(3) Other sites

With respect to alterations of buildings or facilities designated as historic under State or local law, the guidelines described in paragraph (1) shall establish procedures equivalent to those established by 4.1.7(1)(b) and (c) of the Uniform Federal Accessibility Standards, and shall require, at a minimum, compliance with the requirements established in 4.1.7(2) of such standards.

§ 12205. Attorney's fees

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

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§ 12208. Transvestites

For the purposes of this chapter, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

§ 12209. Instrumentalities of the Congress

The General Accounting Office, the Government Printing Office, and the Library of Congress shall be covered as follows:

(1) In general

The rights and protections under this chapter shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) Establishment of remedies and procedures by instrumentalities

The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1).

(3) Report to Congress

The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) Definition of instrumentality

For purposes of this section, the term "instrumentality of the Congress" means the following:,[1] the General Accounting Office, the Government Printing Office, and the Library of Congress,.[2]

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[1] So in original.

[2] So in original.

(5) Enforcement of employment rights

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any employee of an instrumentality of the Congress who alleges a violation of the rights and protections under sections 12112 through 12114 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

(6) Enforcement of rights to public services and accommodations

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any qualified person with a disability who is a visitor, guest, or patron of an instrumentality of Congress and who alleges a violation of the rights and protections under sections 12131 through 12150 or section 12182 or 12183 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

(7) Construction

Nothing in this section shall alter the enforcement procedures for individuals with disabilities provided in the General Accounting Office Personnel Act of 1980 and regulations promulgated pursuant to that Act.

§ 12210. Illegal use of drugs

(a) In general

For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as an individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(c) Health and other services

Notwithstanding subsection (a) of this section and section 12211(b)(3) of this title, an individual shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

(d) "Illegal use of drugs" defined

(1) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or other provisions of Federal law.

(2) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

§ 12211. Definitions

(a) Homosexuality and bisexuality

For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

(b) Certain conditions

Under this chapter, the term "disability" shall not include–

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

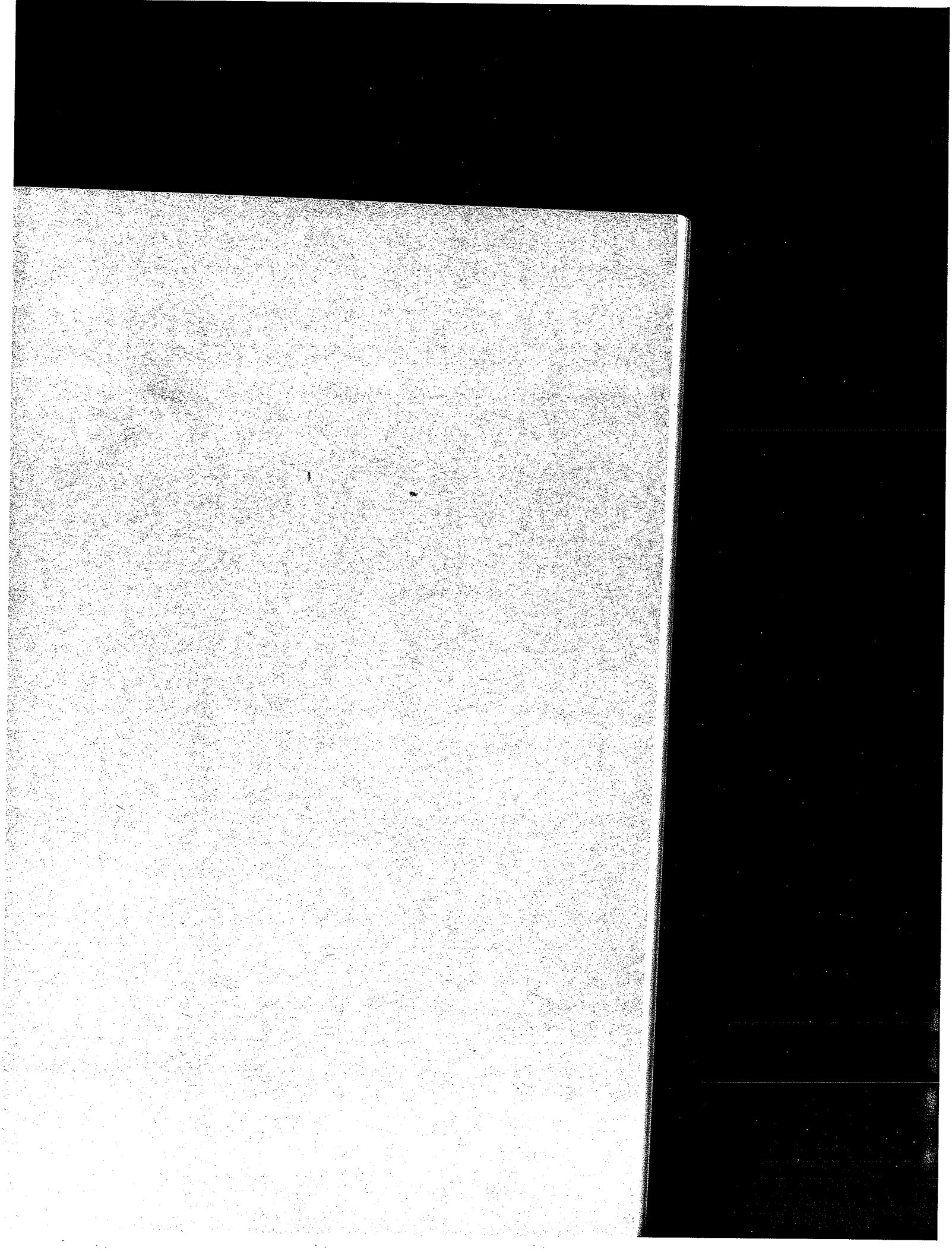
(3) psychoactive substance use disorders resulting from current illegal use of drugs.

§ 12212. Alternative means of dispute resolution

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

§ 12213. Severability

Should any provision in this chapter be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of this chapter and such action shall not affect the enforceability of the remaining provisions of this chapter.



IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 98-6069
D.C. Docket No. 97-00092-CV-AR-S

PATRICIA GARRETT,
Plaintiff,

v.

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM BOARD OF TRUSTEES,
Defendant-Appellee,

THE UNITED STATES OF AMERICA,
Intervenor.

Case No. 98-6070
D.C. Docket No. 97-02179-CV-AR-S

MILTON ASH,
Plaintiff,

v.

ALABAMA DEPARTMENT OF YOUTH SERVICES,
Defendant-Appellee,

THE UNITED STATES OF AMERICA,
Intervenor.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF ON BEHALF OF THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, ET AL., IN SUPPORT OF PLAINTIFFS' PETITION FOR REHEARING

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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D.C. Docket No. 97-00092-CV-AR-S

PATRICIA GARRETT,
Plaintiff-Appellant,

v.

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM BOARD OF TRUSTEES,
Defendant-Appellee,

THE UNITED STATES OF AMERICA,
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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for the *Amici Curiae* identified herein, in accordance with Eleventh Circuit Rule 26.1, certifies that the following listed persons and organizations have an interest in the outcome of this case:

Amici Curiae Joining this Brief in Support of Rehearing Petition

The American Association of People with Disabilities

American Association of Retired People

The American Council of the Blind

American Diabetes Association

The Arc of the United States

The Association on Higher Education and Disability

Employment Law Center

HalfthePlanet Foundation

Lambda Legal Defense and Education Fund, Inc.

The National Association of Developmental Disabilities Councils

The National Association of Protection and Advocacy Systems

The National Association of Rights Protection and Advocacy

The National Health Law Program

The National Mental Health Consumers' Self-Help Clearinghouse

The National Multiple Sclerosis Society

The National Senior Citizens Law Center

The Texas Civil Rights Project

Other Interested Persons

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Addison, Elizabeth: Counsel for Alabama Dept. of Youth Services

Alabama Department of Youth Services: Defendant/Appellee

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Pacific Legal Foundation

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State of Hawaii

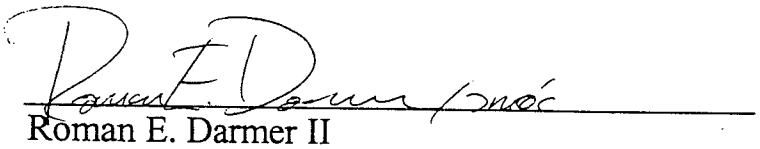
State of Idaho

State of Nebraska

State of Nevada

State of Ohio

State of Tennessee



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Counsel for Amici Curiae,
AMERICAN ASSOCIATION OF PEOPLE
WITH DISABILITIES, ET AL.

Dated: September 27, 2001

THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES AND 16 OTHER NATIONAL ORGANIZATIONS SUPPORTING THE INTERESTS OF PEOPLE WITH DISABILITIES ("*Amici Curiae*"), by and through their undersigned counsel, move this Court pursuant to Fed. R. App. P. 29 and 11th Cir. Rules 27-1 and 29-1 for leave to file the accompanying proposed *amici curiae* brief in support of plaintiffs' petition for rehearing, and respectfully state as follows:

1. *Amici Curiae* include seventeen national organizations that are composed of and/or represent people with disabilities. *Amici* include:

INTEREST OF *AMICI CURIAE*

The American Association of People with Disabilities

The American Association of People with Disabilities (AAPD) is a national, nonprofit membership organization promoting the political and economic empowerment of children and adults with disabilities in the U.S. Founded on the fifth anniversary of the Americans with Disabilities Act (ADA), AAPD has a strong interest in promoting the implementation and enforcement of the ADA, Section 504 of the Rehabilitation Act and other federal disability rights laws.

American Association of Retired People

AARP is a nonprofit membership organization serving more than thirty-four million persons age 50 and older that is dedicated to addressing the needs and

interests of older Americans. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards work and retirement. In pursuit of this objective, AARP has since 1985 filed more than 200 amicus briefs before the Supreme Court and federal appellate and district courts. More than forty percent of AARP's members are employed, and many of those with disabilities rely on the Rehabilitation Act to create a work place free from discrimination. The protections of the Rehabilitation Act are especially important to AARP members because older persons have a higher incidence of disabilities than other populations.

The American Council of the Blind

The American Council of the Blind ("ACB") is a leading national consumer organization of the blind, which strives to improve the quality of life, equality of opportunity, and independence of all persons who are blind. To that end, ACB seeks to educate policy makers about the needs and capabilities of people who are blind, to assist individuals and organizations wishing to advocate for the needs of people who are blind, and to disseminate information to both the blind and sighted public. ACB was at the forefront of the activities which led to the enactment of both the Rehabilitation Act of 1973, and the Americans with Disabilities Act. Our efforts to preserve and strengthen the civil rights gained through these statutes continue through our legislative and advocacy work aimed at increasing the

accessibility of employment, information, public transportation, and programs and services of state and local governments. ACB is deeply concerned that these rights may now be in jeopardy. Further, we are concerned that, if the ADA, and provisions of the Rehabilitation Act, such as Section 504, are undermined, there will be a return to previous patterns of consistent and pervasive discrimination against persons with disabilities, and particularly persons who are blind, by state and local government entities. Therefore, we believe that efforts to preserve and vigorously enforce both Section 504 of the Rehabilitation Act and the ADA are of paramount importance.

American Diabetes Association

American Diabetes Association (ADA) is the nation's leading nonprofit health organization providing diabetes research, information and advocacy. The mission of the organization is to prevent and cure diabetes, and to improve the lives of all people affected by diabetes. As part of its mission, ADA advocates for the rights of people with diabetes and supports strong public policies and laws to protect persons with diabetes against discrimination. ADA has over 400,000 general members and over 17,000 professional members.

The Arc of the United States

The Arc of the United States (The Arc), through its nearly 1,000 state and local chapters, is the largest national voluntary organization in the United States

devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, that have authorized or encouraged segregation of people with mental retardation in virtually all areas of life. The Arc was one of the leaders in supporting enactment of the 1973 Amendments to the Rehabilitation Act which included Section 504.

The Association on Higher Education and Disability

The Association on Higher Education and Disability ("AHEAD") is a non-profit organization committed to full participation in higher education and equal access to all opportunities for persons with disabilities. Its membership includes approximately 2,000 institutions (including state colleges and universities, not-for-profit service providers and standardized testing organizations), professionals, and college and graduate students planning to enter the field of disability practice. Since its founding in 1977, AHEAD (formerly Association of Handicapped Student Service Programs in Postsecondary Education) members have been leaders in assuring Section 504 compliance and in providing reasonable accommodations to both students and employees at institutions of higher education, especially at state college and university systems. In addition, AHEAD members actively work with students in establishing vocational plans and job

readiness. AHEAD publishes numerous resources on the implementation of Section 504 by postsecondary educational institutions.

Employment Law Center

The Employment Law Center (ELC) is a project of the Legal Aid Society of San Francisco, a private, non-profit organization. The primary goal of the ELC is to improve the working lives of disadvantaged people. Since 1970, the Center has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy, and national origin. The Center's interest in the rights of those with disabilities is longstanding. The ELC has and is representing clients faced with discrimination on the basis of their disabilities, including clients with claims brought under Title II of the Americans with Disabilities Act. The Center has also filed *amicus* briefs in cases of importance to disabled persons.

HalfthePlanet Foundation

HalfthePlanet Foundation is a non-profit organization that offers comprehensive, reliable information, products and services to people with disabilities, their families and friends. The Foundation administers the well known website - halftheplanet.com - the most comprehensive disability resource on the Web, created by people with disabilities for people whose lives are touched

by disability. HalfthePlanet Foundation supports the application of technology to promote the values of the Rehabilitation Act - independent living, social inclusion, equality of opportunity, economic self-sufficiency, and empowerment.

Lambda Legal Defense and Education Fund, Inc.

Lambda Legal Defense and Education Fund, Inc. ("Lambda") is a national public interest legal organization dedicated to the civil rights of lesbians, gay men and people with HIV/AIDS through impact litigation, education and public policy work. Founded in 1973, Lambda is the oldest and largest legal organization addressing these concerns. Lambda has appeared as counsel or *amicus curiae* in scores of cases in state and federal courts on behalf of people living with HIV or other disabilities. Lambda is particularly concerned with the unique barriers confronting persons with HIV and other stigmatized disabilities whose hopes for equal opportunity instate employment hinge on the availability of the remedies provided under Section 504 of the Rehabilitation Act of 1973.

The National Association of Developmental Disabilities Councils

The National Association of Developmental Disabilities Councils (NADDC) is a national organization representing Developmental Disabilities Councils that work for change on behalf of people with developmental disabilities and their families. It promotes national policy to enhance the quality of life for all people with developmental disabilities. State Councils on Developmental

Disabilities engage in advocacy, capacity building and systemic change activities and contribute to a coordinated system of consumer and family centered and directed community services, individualized supports and other assistance to enable individuals with developmental disabilities to exercise self-determination, be independent, be productive and be integrated and included in all facets of community life. NADDC takes great interest in protecting and strengthening the civil rights protections for people with developmental disabilities. Laws such as the Rehabilitation Act of 1973 and the Americans with Disabilities Act and others are essential for enabling people with developmental disabilities to live free and independent lives as valued participants in the community.

The National Association of Protection and Advocacy Systems

The National Association of Protection and Advocacy Systems (NAPAS) is the membership organization for the nationwide system of protection and advocacy (P&A) agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities; NAPAS facilitates coordination of P&A activities and provides

training and technical assistance to the P&A network. NAPAS filed an amicus brief in this case when it was before the Supreme Court.

The National Association of Rights Protection and Advocacy

The National Association of Rights Protection and Advocacy (NARPA) was formed in 1981 to provide support and education for advocates working in the mental health arena. It monitors developing trends in mental health law and identifies systemic issues and alternative strategies in mental health service delivery on a national scale. Members are attorneys, people with psychiatric histories, mental health professionals and administrators, academics, and non-legal advocates -- with many people in roles that overlap. Central to NARPA's mission is the promotion of those policies and strategies that represent the preferred options of people who have been diagnosed with mental disabilities. Approximately 40% of NARPA's members are current or former patients of the mental health system. NARPA members were key advocates for the passage of Federal legislation such as the Rehabilitation Act of 1973.

The National Health Law Program

The National Health Law Program (NHeLP) is a public interest law firm that engages in legal and policy advocacy on behalf of poor and working poor people, people with disabilities, children, and people of color. NHeLP has litigated several cases on behalf of people with disabilities who depend on private

enforcement of section 504 to address discrimination by federal fund recipients. As such, NHeLP has a considerable interest in the outcome of this case.

The National Mental Health Consumers' Self-Help Clearinghouse

The National Mental Health Consumers' Self-Help Clearinghouse is a national technical assistance center established in 1986. It is run by and for people who are consumers of mental health services and survivors of psychiatric illness (known as consumers/survivors). Its mission is to promote consumer/survivor participation in planning, providing and evaluating mental health and community support services, to provide technical assistance and information to consumers/survivors interested in developing self-help services, and advocating to make traditional services more consumer/survivor-oriented. The Clearinghouse has an interest in helping people with mental illness live to their full potential as active members of the community.

The National Multiple Sclerosis Society

The National Multiple Sclerosis Society is dedicated to ending the devastating effects of multiple sclerosis. Through its 50-state network of chapters, the Society funds research, furthers education, advocates for people with disabilities, and provides a variety of empowering programs for the third of a million Americans who have MS and their families.

The National Multiple Sclerosis Society believes that every individual should be able to lead a full, productive life and participate in activities. However, for people with MS and other disabilities, there are many obstacles to full participation. The Society is dedicated to the removal of these barriers so that people with disabilities can live with as much independence and self-sufficiency as possible.

The Society supports legislative, regulatory and judicial efforts to increase accessibility and independence, prevent discrimination, and protect the general well being of people with disabilities. The Society has concerns with any judicial or legislative efforts to weaken the Rehabilitation Act.

The National Senior Citizens Law Center

The National Senior Citizens Law Center advocates for the independence and well-being of low-income, elderly individuals, as well as persons with disabilities. Due to the high incidence of disability among the elderly population, enforcement of Section 504 of the Rehabilitation Act is of particular concern to this organization.

The Texas Civil Rights Project

The Texas Civil Rights Project ("TCRP") is a non-profit public interest law organization that promotes racial, economic, and social justice, as well as civil liberty under the Bill of Rights of the Texas and United States Constitutions.

TCRP, with membership base of approximately 800 Texans, works toward these goals primarily through education and litigation involving civil rights violations. TCRP maintains a vigorous litigation and education campaign on behalf of members of the State's disability community and disability rights organizations, utilizing the Americans with Disabilities Act and Section 504 (Rehabilitation Act of 1973).

2. Plaintiffs have filed a petition seeking rehearing of that portion of the Court's opinion of August 16, 2001, No. 98-6069 and 98-6070, asking the Court to rehear its decision dismissing plaintiffs' claims under the Rehabilitation Act of 1973 and to remand those claims for trial on the grounds that Alabama has waived its Eleventh Amendment immunity from suits alleging violations of the rehabilitation Act based on the state's acceptance of Federal funds.

3. *Amici* respectfully seek permission to file the attached proposed brief in support of plaintiffs' petition for rehearing. As national associations who are composed of and/or represent people with disabilities, *amici* have direct knowledge and experience regarding the importance of remedies provided by the Rehabilitation Act of 1973 in ensuring that people with disabilities are not subjected to discrimination by states and private actors. Now that the Supreme Court has held in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), that states are

immune from suit under Title I of the Americans With Disabilities Act, the independent remedies provided by the Rehabilitation Act are even more critical, and *amici curiae* are uniquely capable of providing this Court with information on relevant to its consideration of the petition.

4. *Amici* understand that counsel for defendants-appellees The University of Alabama at Birmingham Board of Trustees and the Alabama Department of Youth Services will not object to *amici*'s motion for permission to file this attached brief.

WHEREFORE, *amici curiae* respectfully request that this Court grant them leave to file the accompanying brief in support of the petition for rehearing.

Respectfully SUBMITTED this 27th day of September, 2001.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 27th day of September served the foregoing **MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF ON BEHALF OF THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, ET AL., IN SUPPORT OF PLAINTIFFS' PETITION FOR REHEARING** by First Class United States mail, postage prepaid, addressed as follows:

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IN THE

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEES, and THE ALABAMA DEPARTMENT OF YOUTH SERVICES,

Petitioners,

—v.—

PATRICIA GARRETT and MILTON ASH,

Respondents.

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

AMICUS CURIAE BRIEF OF THE VOICE OF THE RETARDED, ET AL., IN SUPPORT OF AFFIRMANCE*

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AMRA (formerly Association for the Mentally Retarded at Agnews) (CA)
Advocates for Human Development Center Residents (AR)
Advocates United (IL)
Allegheny Valley School (PA)
Alliance of Louisiana Schools for the Mentally Retarded
Altoona-Cresson-Ebensburg Centers' Association (PA)
Association for Hunterdon Developmental Center (NJ)
Association for Retarded Citizens of Missouri
Austin State School Parent Association (TX)
Beverly Farm Foundation (IL)
Bonneville Human Development Center Parent Association (AR)
California Association for the Retarded
California Association State Hospital and Parent Councils for the Retarded
Caswell Center Parents and Friends Association (NC)
Central State ICF/MR Bingham Center Family Group (KY)
Clover Bottom Developmental Center Parent-Guardian Association (TN)
Colorado Affiliates for the Developmentally Disabled (CO)
Common Thread (AR)
Concerned Families of Hazelwood Hospital (KY)
Conway Human Development Center Parents' Association (AR)
Denton State School Family Association (TX)
Developmental Disabilities Health Alliance, Inc. (NJ)
Dixon Association for Retarded Citizens (IL)
Exceptional Children's Foundation (CA)
Fairview Families and Friends (CA)

Families and Friends United for Central Virginia Training Center (VA)
Families United Incorporated (OH)
Fernald League for the Retarded (MA)
Florida's Voice of the Retarded
Fox Center Families and Friends (IL)
Friends and Families of the Black Mountain Center (NC)
Friends of Choate (IL)
Friends of Fircrest (WA)
Friends of Rainier, Inc. (WA)
Friends of Retarded Citizens of Connecticut
Friends of the Jacksonville Developmentally Disabled (IL)
Glenwood Parent/Family Group (IA)
Green Line Parent Group (CA)
Greentree Applied Systems, Inc. (KY)
Home and School Association of the Southbury Training School (CT)
Howe Association for Retarded Citizens (IL)
Idaho State School and Hospital Parent-Guardian Association
Illinois League of Advocates for the Developmentally Disabled
Kankakee Association for the Mentally Retarded (IL)
Lakeland Village Associates (WA)
Lincoln Parents' Association (IL)
Lubbock State School Parent Association (TX)
Maine Parents and Friends Association, Inc.
Maryland Parents Association of Disabled Citizens
Massachusetts Coalition of Families and Advocates for the Retarded, Inc.
Meadows Parents Association (IL)
Mental Retardation Association of Nebraska
Mental Retardation Association of North Carolina, Inc.
Mental Retardation Association of Utah
Mexia State School Parents Association (TX)

Misericordia Family Association (IL)
Murray Parents Association (IL)
National Alliance Of The DisAbled
New Lisbon Developmental Center Family and Friends Association (NJ)
North Jersey Developmental Center Parents Council (NJ)
Northern Wisconsin Center Parents Group
Ohio League for the Mentally Retarded
Ohio MRDD Parents Speak
Oregon Voice of the Retarded
Parent Association for the Retarded of Texas, Inc.
Parents and Associates of the Institutionalized Retarded of Virginia
Parents and Associates of Northern Virginia Training Center
Parents and Friends of Hammond Developmental Center Association (LA)
Parents and Friends of Ludeman Center (IL)
Parents and Friends Volunteer Association (OH)
Parents Association of Northwest Louisiana Developmental Center
Parents Coordinating Council and Friends (CA)
Parents of Adult Children Concerned for Tomorrow (IL)
Parents of Woodhaven, Inc. (PA)
Parent-Relative Organization for Oakwood Facilities, Inc. (KY)
Parents, Relatives and Friends of Polk (PA)
Patrons of Partlow (AL)
Porterville Developmental Center Parents Group, Inc. (CA)
Richmond State School Parents Association (TX)
Rosewood Center Auxiliary, Inc. (MD)
Save Agnews Now (CA)
Sonoma Development Center Parent Hospital Association

South Mississippi Regional Center Parents' Association
Southern Wisconsin Center Parent Committee
Southwest Developmental Center Parents Association (LA)
Taxpayers and Taxpaying Clients United (CA)
Tennessee Family Solutions
Valley Association for Retarded Children and Adults (CT)
Waukegan Developmental Center Association for Retarded Citizens (IL)
Wendell Foster Center, Inc. (KY)
Wisconsin Parents Coalition for the Retarded, Inc.
Woodbridge Development Center Parents Association (NJ)
Wrentham Association for the Retarded (MA)

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Preliminary Statement

This is an *amicus curiae* brief on the merits submitted, on consent, by Voice of the Retarded ("VOR")[1] in support of the Americans With Disabilities Act, 42 USC §§ 12101 *et seq.* ("ADA"). 93 *amici*, disability rights organizations, join in this brief.[2]

Interest of the VOR Amici

A frequent critic of how the ADA is applied, VOR and its *amici* nevertheless defend the constitutionality of the statute here. We offer a unique perspective in this brief.

VOR is an advocacy organization incorporated in Illinois, dedicated to insuring that individuals with mental retardation receive the care and support they require in a setting appropriate to their needs. Depending on the unique condition of each person, that appropriate setting could be community placement or institutional treatment. A spectrum of choices must be available.

VOR most recently offered its views to this Court, on behalf of 142 *amici*, in *Olmstead* v. *L.C.*, 527 US ___; 119 S. Ct. 2176; 144 L. Ed. 2d 540 (1999), arguing that the ADA contemplated institutional care as the most integrated setting for some people with mental retardation. The Court accepted and quoted VOR's position in its opinion. (527 US at ___; 144 L. Ed. 2d at 561; 119 S. Ct. at 2189.)

VOR has also filed an *amicus* brief here in *Heller* v. *Doe*, 509 US 312 (1993), and a petition for *certiorari* in

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[1] Pursuant to this Court's Rule 37.6, VOR represents that no counsel to any party authored this brief, in whole or in part. VOR has paid disbursements and its counsel's fee.

[2] Their names begin at p. i, *supra*.

Parent-Guardian Association of Arlington Developmental Center v. *People First of Tennessee*, *cert. denied*, 119 S. Ct. 510 (1998)[3], arguing in each case for the primacy of the decisions of the person with disabilities and her family. This position was enacted as a statement of policy in the Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1994, 42 USC § 6000(c)(3).

From VOR's perspective, the ADA means well, but has been interpreted badly whenever wielded as a sword to dismantle the institutional option.[4] The proper application of the statute was well illustrated by a question from the bench during the *Olmstead* oral argument:

> ". . . I'm also concerned about the possibility that if we adopt the [integration] rule in its strongest form . . . the States, in order to avoid the risk of liability, would have a motive and incentive to push people out into the community [who] should not go in that direction. . .". (Oral argument tr. at p. 38; see, also, 527 US at ___; 144 L. Ed. 2d at 563-4; 119 S. Ct. at 2191-2; Kennedy, J., concurring.)

[3] Opinion below, 145 F. 3d 1332 (6 Cir. 1998).

[4] In VOR's view, *Olmstead* is properly interpreted to provide community placement when, on the facts of each case, such placement is medically appropriate; is endorsed by the disabled person, or her proper representative, and can be reasonably accommodated. VOR also argues that the converse is true: when, on the facts of each case, institutional placement is found to be medically appropriate; is endorsed by the disabled person, or her proper representative, and can be reasonably accommodated. To our surprise, this "converse" proposition has been strenuously resisted. See, *e.g.*, *Richard C.* v. *Snider*, No. 99-3841, slip op, pp. 8-9 (3 Cir.; July 25, 2000, directed to be unreported; *dictum*), and letter of Hon. Donna E. Shalala, Secretary of the Department of Health and Human Services, to all U.S. Governors, dated 14 January 2000, and enclosures directed to each state's "Medicaid Director".

VOR urges this Court to sustain the constitutionality of a good and helpful statute, and to reiterate that institutional placement, in a factually proper case, remains an option and a right.

Summary of Argument

In this submission, we remind the Court that federal protection of people with disabilities against state action began 135 years ago, as part of the Fourteenth Amendment process.

To the extent the intent of the framers of the Fourteenth Amendment is pertinent to authorization of the ADA under Amdt. XIV, § 5, protection of people with disabilities was included (*A*, below), and state sovereign immunity under the Eleventh Amendment was repealed (*B*, below).

We also fully support the views of respondents and other *amici* that the ADA is a congruent and proportional remedy for the evil of invidious discrimination.

ARGUMENT

I. THE ORIGINAL INTENT AND COVERAGE OF THE FOURTEENTH AMENDMENT:

A. AUTHORIZES THE ADA, AND

B. REPEALS ELEVENTH AMENDMENT SOVEREIGN IMMUNITY FOR STATE ACTION WITHIN ADA COVERAGE.

A 5-4 majority of this Court has recently cautioned against "a substantive redefinition of the Fourteenth Amendment right at issue". *Kimel* v. *Florida Board of Regents*, ___ US ___, at ___; 120 S. Ct. 631, at 644;

___ L. Ed. 2d. ___, at ___ (Jan. 11, 2000). As Justice Kennedy put it for the Court in *City of Boerne* v. *Flores*, 521 US 507 (1997):

> "Congress does not enforce a constitutional right by changing what the right is." (521 US at 519.)

In this submission, VOR examines "what the right is" by revisiting the original concept of the framers of the Fourteenth Amendment.[5] See *City of Boerne, supra*, 521 US at 525; *City of Newport* v. *Fact Concepts, Inc.*, 453 US 247, at 263-4 (1981).

A. Original Intent: Disability Coverage

The Fourteenth Amendment was one of three addressing post-Civil War remedies. Two were "single-issue" amendments: the Thirteenth, abolishing slavery, and the Fifteenth, creating voting rights. A broader sweep was given to the Fourteenth, with multiple issues presented in the four-section substantive text; the standard enabling clause became its fifth. (Amdt. XIV, § 5.).[6]

The scope of the problem addressed by the three amendments encompassed wounded Union Army survivors. Included in "gross [casualty] totals that staggered the mind" was:

[5] The Court need not reach this issue if it concludes, as VOR does, that the ADA satisfies this Court's tests of specific legislative intent to waive Eleventh Amendment immunity, and the "congruence and proportionality" of the ADA remedy.

[6] In the other two post-Civil War amendments, the legislative enabling clause was § 2. (Amdt. XIII, § 2; Amdt. XV, § 2.) So it has been five times since, for prohibition (Amdt. XVIII, § 2); voting by gender (Amdt. XIX, § 2); District of Columbia electors (Amdt. XXIII, § 2); elimination of the poll tax (Amdt. XXIV, § 2), and voting by age (Amdt. XXVI, § 2).

> "the list of [Union] wounded who recovered, two hundred and seventy-five thousand more."[7]

A Thomas Nast cartoon captured the spirit of the three amendments: a uniformed Union black veteran, freed from slavery, appears at the polling place as the figure of Liberty asks, "And Not This Man?"[8] (App. 1a.) Notably, the solider's right leg is amputated.

While case law has properly focused on the sweeping general provisions of the first clause of the Fourteenth Amendment, the balance of the substantive clauses reflect the national concerns of the time: loss of representation upon resistance to emancipation or denial of voting rights (Amdt. XIV, § 2); denial of federal office to certain former Confederates (Amdt. XIV, § 3); illegality of assumption of Confederate debts (Amdt. XIV,§ 4, second sentence), and elimination of a claim for loss or emancipation of a slave (*ibid.*). Expressly included was a clause protecting pensions of Union Civil War veterans. (Amdt. XIV, § 4, first sentence.)

VOR respectfully submits that this reading of the full Fourteenth Amendment, in view of the crucible through which the nation had just passed, would include a rudimentary protection of disabled soldiers, and a concern for their nondiscriminatory treatment. The Fourteenth Amendment enabled a great range of legislation for a great many legislative objects. These 1865 goals are perfectly consistent with the ADA, and would include that

[7] Charles and Mary Beard, *The Rise of American Civilization* (MacMillan, 1933), II, p. 99. Accurate Confederate records of their wounded were unavailable. *Ibid.*

[8] Harper's Weekly, Aug. 5, 1865, as reproduced in Eric Foner, *A Short History of Reconstruction* (Harper & Row, 1990), facing p. 145.

statute within the legislation authorized by Amdt. XIV, § 5.

B. Original Intent: Repeal of Eleventh Amendment Sovereign Immunity

An inquiry into the enactment of the Fourteenth Amendment revisits the painful history of Reconstruction, and the fascinating historical record created by the joint Senate-House "Committee of Fifteen".

We outline one portion of this record: the expressed intent of the drafters of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity, in order to effectuate the goals of Congressional Reconstruction.

Representative John A. Bingham (R-Ohio) drafted the broad protections involved in this litigation (Amdt. XIV, § 1). He later advised Congress that his intent was to reverse the result of *Barron* v. *Mayor and Council of Baltimore*, 7 Peters 243 (1833), which held that the Bill of Rights offered no protection against confiscation by a state or its subdivisions. "Word for word and syllable for syllable", Rep. Bingham copied Fifth Amendment protections against the national government into the final draft of the proposed Fourteenth. The goal was to create state responsibility by removing Eleventh Amendment immunity[9]—a view endorsed by this Court in, *e.g.*, *Fitzpatrick* v. *Bitzer*, 427 US 445 (1976), and *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 US 627, at ___; 119 S. Ct. 2199, at 2205-6; 144 L. Ed. 2d 636, at ___ (1999).[10]

[9] Charles and Mary Beard, *supra*, pp. 111-3, *passim*. The pertinent portions of Amdt. XIV, § 1, read "No State shall. . .."; "nor shall any State deprive . . . nor deny. . .".

[10] For the earlier drafting history of the Fourteenth Amendment, see Point III(A)(1) of this Court's opinion in *City of Boerne* v. *Flores*, *supra*, 521 US at 520-3.

C. Summary

Whatever this Court's result may be, it should not violate the historical record of the concerns prompting enactment of the Fourteenth Amendment.

Over a quarter million wounded Union troops were included in the post-war remedy, a factor which enfolds disability within the scope of the Fourteenth Amendment. (*A*, above.) Repeal of state sovereign immunity, to the extent necessary for the effectiveness of the Fourteenth Amendment, was clearly intended. (*B*, above.)

As we understand *City of Boerne*, *supra*, and its progeny, a showing of nineteenth-century intent to include people with disabilities within the scope of the Fourteenth Amendment, and to repeal Eleventh Amendment immunity to the extent necessary for the Civil War Amendments, will support the constitutionality of the ADA. From VOR's unique perspective as an advocate for some of today's most severely disabled people, we are pleased to offer the Court our views as an alternate or additional ground for affirmance.

Conclusion

For the reasons advanced above; in the other *amici* submissions in favor of respondents, and in respondents' own submissions, VOR and its *amici* submit that the Court of Appeals should be affirmed.

Dated: New York, New York
August 10, 2000

Respectfully submitted,

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APPENDIX

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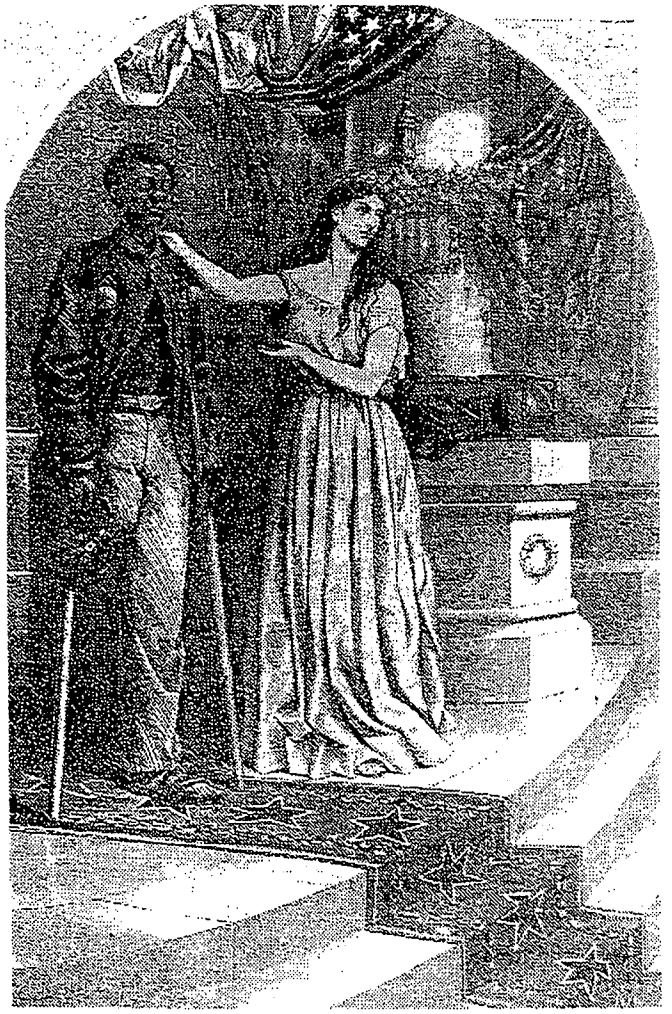
RETREAT FROM RECONSTRUCTION



"And Not This Man?" (*Harper's Weekly*, August 5, 1865)