No. 02-1318

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LESLIE N. BIGGS, a minor, by her parents and next friends, Nancy and Allen Biggs, Jr.; NANCY BIGGS; ALLEN BIGGS, JR.,

Plaintiff-Appellants

v.

BOARD OF EDUCATION OF CECIL COUNTY, MARYLAND,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF JURISDICTION

The United States concurs with plaintiffs' statement of jurisdiction.

STATEMENT OF THE ISSUES

The United States will address the following questions:

1. Whether the statutory provision removing Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq*., is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

2. Whether conditioning the receipt of federal financial assistance on waiver of States' Eleventh Amendment immunity for suits under Section 504 of the

Rehabilitation Act, 29 U.S.C. 794, is a valid exercise of Congress's authority under the Spending Clause.

STATEMENT OF THE CASE

1. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, contains an "antidiscrimination mandate" that was enacted to "enlist[] all programs receiving federal funds" in Congress's attempt to eliminate discrimination against individuals with disabilities. *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15, 277 (1987). Congress found that "individuals with disabilities constitute one of the most disadvantaged groups in society," and that they "continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services." 29 U.S.C. 701(a)(2) & (a)(5).

2. Finding that Section 504 was not sufficient to bar discrimination against individuals with disabilities, Congress enacted the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, to establish 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 ADA. 42 U.S.C. 12101(b)(4).

The ADA 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, addresses discrimination in public accommodations operated by private entities.

2. This appeal involves a suit filed under Title II of the ADA and Section 504. Title II 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). 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. 42 U.S.C. 12131(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). Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

4. Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). A "program or activity" is defined to include "all of the operations" of a state agency, university, or public system of higher education "any part of which is extended Federal financial assistance." 29 U.S.C. 794(b). Protections under Section 504 are limited to "otherwise qualified" individuals, that is those persons who can meet the "essential" eligibility requirements of the relevant program or activity with or without "reasonable accommodation[s]." *Arline*, 480 U.S. at 287 n.17. An accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on the grantee or requires "a fundamental alteration in the nature of [the] program." *Ibid*. Section 504 may be enforced through private suits against programs or activities receiving federal funds. See *Pandazides* v. *Virginia Bd. of Educ.*, 13 F.3d 823, 827-828 (4th Cir. 1994). Congress expressly conditioned receipt of federal funds on waiver of the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 2000d-7.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by private plaintiffs under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act to remedy discrimination against persons with disabilities.

The Supreme Court in *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), reaffirmed that Congress had the power to abrogate States' Eleventh Amendment immunity to private damage actions under Section 5 of the Fourteenth Amendment, which authorizes Congress to enact "appropriate legislation" to "enforce" the rights protected by Section 1 of the Fourteenth Amendment. *Garrett* held that Congress's abrogation for Title I of the ADA was not "appropriate" because Congress had only identified six examples of potentially unconstitutional discrimination by States against people with disabilities in employment and there was no evidence that Congress had made a legislative judgment that such discrimination by States was pervasive. The record before Congress of constitutional violations in employment did not provide a sufficient basis for Congress to abrogate immunity for a statutory scheme that was designed to remedy and deter constitutional violations.

In contrast, the record before Congress supported Congress's decision to abrogate Eleventh Amendment immunity for Title II. Congress assembled a record of constitutional violations by States – violations not only of the Equal Protection Clause but also of the full spectrum of constitutional rights the Fourteenth Amendment incorporates – which Congress in its findings determined "persist[ed]"

in areas controlled exclusively or predominantly by States, such as education, voting, institutionalization, and public services. These well-supported findings justify the tailored remedial scheme embodied in Title II. Congress formulated a statute that 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, Title II preserves the latitude and flexibility States legitimately require in the administration of their programs and services. Title II accomplishes those objectives by requiring States to afford persons with disabilities genuinely equal access to 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. Title II simply requires "reasonable" modifications 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 governmental segregation of persons with disabilities.

The Eleventh Amendment is also no bar to this action brought by a private plaintiff to enforce Section 504 of the Rehabilitation Act. Congress validly conditioned receipt of federal financial assistance on waiver of States' immunity to private suits brought to enforce Section 504 of the Rehabilitation Act. By enacting

42 U.S.C. 2000d-7, Congress put state agencies on clear notice that acceptance of federal financial assistance was conditioned on a waiver of their Eleventh Amendment immunity to discrimination suits under Section 504. By accepting the funds, a state agency agreed to the terms. Section 504 itself is a valid exercise of the Spending Clause because it furthers the federal government's interest in assuring that federal funds, provided by all taxpayers, do not support recipients that discriminate.

ARGUMENT

I

CONGRESS VALIDLY REMOVED STATES' ELEVENTH AMENDMENT IMMUNITY TO PRIVATE SUITS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT

Defendant did not challenge and the district court did not address the constitutionality of Title II of the Americans with Disabilities Act. This appeal involves only questions of States' Eleventh Amendment immunity.[1] In *University of Alabama* v. *Garrett*, 531 U.S. 356, 363 (2001), the Supreme Court reaffirmed that Section 5 of the Fourteenth Amendment grants Congress the power to abrogate the States' Eleventh Amendment immunity to private damage suits. In assessing the validity of "§ 5 legislation reaching beyond the scope of § 1's actual guarantees," the legislation "must exhibit 'congruence and proportionality between

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[1] The United States expresses no view on whether defendant is an "arm of the State" entitled to share the State's immunity. See *Alden* v. *Maine*, 527 U.S. 706, 756 (1999).

the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 531 U.S. at 365 (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)). This requires a three-step analysis: first, a court must "identify with some precision the scope of the constitutional right at issue," *ibid.*; second, the court must "examine whether Congress identified a history and pattern of unconstitutional * * * discrimination by the States against the disabled," *id.* at 368; finally, the Court must assess whether the "rights and remedies created" by the statute were "designed to guarantee meaningful enforcement" of the constitutional rights that Congress determined the States were violating, *id.* at 372, 373.

Applying these "now familiar principles," *id.* at 365, the Court in *Garrett* held that Congress did not validly abrogate States' Eleventh Amendment immunity to suits by private individuals for money damages under Title I of the ADA. The Court concluded that Congress had identified only "half a dozen" incidents of relevant conduct (*i.e.*, potentially unconstitutional discrimination by States as *employers* against people with disabilities), *id.* at 369, and had not made a specific finding that discrimination in public sector employment was pervasive, *id.* at 371-372. Thus, the Court held, Congress did not assemble a sufficient basis to justify Title I's abrogation of Eleventh Amendment immunity for its prophylactic statutory remedies. *Id.* at 372.

The Supreme Court did not address and expressly reserved the question that the district court addressed, whether the abrogation for Title II suits can be upheld as valid Section 5 legislation. The Supreme Court noted that Title II "has

somewhat different remedial provisions from Title I," *id*. at 360 n.1, and that the legislative record for those activities governed by Title II was more extensive, see *id*. at 372 n.7. Less than a week after deciding *Garrett*, the Supreme Court denied a petition for certiorari filed by California and let stand the Ninth Circuit's holding that the abrogation for Title II suits was valid Section 5 legislation. See *Dare* v. *California*, 191 F.3d 1167 (1999), cert. denied, 531 U.S. 1190 (2001).

As the Court's disposition of *Dare* indicates, *Garrett* does not imply that abrogation exceeds Congress's power under Section 5 for suits under Title II. For Title II differs from Title I in four significant respects. First, unlike Title I, which was intended simply to redress violations of the Equal Protection Clause as applied to a non-suspect class in an area (employment) not otherwise subject to heightened scrutiny, the range of constitutional violations implicated by Title II extends to areas where heightened judicial scrutiny is appropriate and where even policies subject to rational-basis review cannot always be justified by cost or administrative efficiency alone. Second, Congress made express findings of persistent discrimination in "public services" generally, including services provided by States, as well as specific areas of traditional state concern, such as voting, education, and institutionalization. Third, Congress's findings were based on an extensive record of unconstitutional state conduct regarding people with disabilities in the areas covered by Title II, a record more extensive than existed for employment alone. Finally, the remedy enacted by Congress is more proportional and congruent to this record of violations than the record discussed in *Garrett*. We

address each point in turn.

A. *The Actions Covered By Title II Implicate Both Equal Protection And Other Substantive Constitutional Rights*

Garrett instructs that in assessing the validity of Congress's Section 5 legislation, it is important to identify the constitutional rights at stake. See 531 U.S. at 365. Since there is no constitutional right to state employment, the Court looked to the Equal Protection Clause as the sole constitutional provision that Congress sought to enforce. *Ibid.* And because classifications based on disability are not subject to heightened scrutiny, the Court faulted Congress for failing to identify incidents when state action did not satisfy the "minimum 'rational-basis' review applicable to general social and economic legislation." *Ibid.*

By contrast, Title II governs all the operations of a State, which plainly encompasses state conduct subject to a number of other constitutional limitations embodied in the First, Fourth, Fifth, Sixth, Seventh, and Eighth Amendments and incorporated and applied to the States through the Fourteenth Amendment. Those rights include the right to vote, to access the courts, to petition officials for redress of grievances, to receive due process from law enforcement officials, and to be confined where conditions are humane. To the extent that Title II enforces the Fourteenth Amendment by remedying and preventing government conduct that burdens these constitutional provisions and discriminates against persons with disabilities in their exercise of these rights, Congress did not need to identify *irrational* government action in order to identify and address *unconstitutional*

government action. See *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 813-814 (6th Cir. 2002) (en banc), petitions for cert. filed, Nos. 01-1503, 01-1517 (Apr. 10, 2002); *id.* at 820 (Moore, J., concurring) ("The fact that Title II implicates constitutional violations in areas ranging from education to voting also suggests that heightened judicial scrutiny under both the Due Process and Equal Protection Clauses is appropriate.").

Moreover, where a State is providing generally-available public services, justifications that would be sufficient to uphold policies in an employment setting often will not suffice to justify exclusion from government services. When a government interacts with its citizens as sovereign, the core purpose of the Constitution in protecting its citizens *qua* citizens is implicated in a way that it is not where the government is acting as employer. Thus, as the Supreme Court has explained in the First Amendment context, "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 676 (1996); cf. *O'Connor* v. *Ortega*, 480 U.S. 709, 724 (1987) (holding that Fourth Amendment protects government employees, but declining to impose "probable cause" requirement on searches because of special needs of government as employer).

Therefore, the Supreme Court's statement in *Garrett* that the Equal Protection Clause does not require States to accommodate people with disabilities

if it involves additional expenditures of funds, see 531 U.S. at 372, is best understood as limited to government actions in its capacity as an employer. That statement certainly would not permit States to deny persons with disabilities their right to vote on the ground that providing access to the polling place is costly. Even outside the arena of fundamental rights, the Supreme Court has made clear that 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). Under this standard, reducing costs or increasing administrative efficiency will not always suffice as justification outside the employment context. See, *e.g.*, *Plyler* v. *Doe*, 457 U.S. 202, 229 (1982); *Jimenez* v. *Weinberger*, 417 U.S. 628, 636-637 (1974). Indeed, the Supreme Court has held that in order to comply with the Equal Protection Clause a State may be required to provide costly services free of charge where necessary to provide a class of persons meaningful access to important services offered to the public at-large. See *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 110, 127 n.16 (1996).

In addition, courts have found unconstitutional treatment of persons with disabilities in a wide variety of public services, including violations of the Equal Protection Clause, the Due Process Clause, and the Eighth Amendment, as incorporated into Section 1 of the Fourteenth Amendment.[2] These cases provide

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[2] 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)

(continued...)

the "confirming judicial documentation," *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring), of unconstitutional disability discrimination by States that the Court found lacking in the employment context.

B. *Congress Identified Ample Evidence Of A Long History And A Continuing Problem Of Unconstitutional Treatment Of Persons With Disabilities By States And Made Express Findings On The Subject*

Congress engaged in extensive study and fact-finding concerning the problem of unconstitutional discrimination against persons with disabilities,

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[2](...continued)
(impermissible confinement); *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); *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"); *Flakes* v. *Percy*, 511 F. Supp. 1325 (W.D. Wis. 1981)*; New York State Ass'n for Retarded Children* v. *Carey*, 466 F. Supp. 487 (E.D.N.Y. 1979); *Lora* v. *Board of Educ.*, 456 F. Supp. 1211, 1275 (E.D.N.Y. 1978); *Hairston* v. *Drosick*, 423 F. Supp. 180 (S.D. W. Va. 1976); *Frederick L.* v. *Thomas*, 408 F. Supp. 832, 836 (E.D. Pa. 1976); *Panitch* v. *Wisconsin*, 444 F. Supp. 320 (E.D. Wis. 1977); *Aden* v. *Younger*, 129 Cal. Rptr. 535 (Ct. App. 1976); *In re Downey*, 340 N.Y.S.2d 687 (Fam. Ct. 1973); *Fialkowski* v. *Shapp*, 405 F. Supp. 946, 958-959 (E.D. Pa. 1975); *In re G.H.*, 218 N.W.2d 441, 447 (N.D. 1974); *Stoner* v. *Miller*, 377 F. Supp. 177, 180 (E.D.N.Y. 1974); *Vecchione* v. *Wohlgemuth*, 377 F. Supp. 1361, 1368 (E.D. Pa. 1974), aff'd, 558 F.2d 150 (3d Cir.), cert. denied, 434 U.S. 943 (1977); *Welsch* v. *Likins*, 373 F. Supp. 487 (D. Minn. 1974), aff'd in part, 550 F.2d 1122 (8th 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); *Wyatt* v. *Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), aff'd in part, 503 F.2d 1305 (5th Cir. 1974).

holding 13 hearings devoted specifically to the consideration of the ADA.[3] 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

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[3] 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); *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).

Congress evidence submitted by nearly 5,000 individuals documenting the problems with discrimination faced daily by persons with disabilities – often at the hands of state 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, Pt. 2, 101st Cong., 2d Sess. 28 (1990); Task Force Report 16.[4]

1. *Congressional Findings*: As the Supreme Court in *Garrett* acknowledged, 531 U.S. at 372 n.7, the record of adverse conduct by States toward people with disabilities was both broader and deeper than the six incidents Congress identified with regard to state employment. Equally important, after amassing the record we discuss below, Congress brought its legislative judgment to bear on the issue and expressly found that discrimination was pervasive in these areas. In the area of employment, Congress made a finding about discrimination in private employment, but no analogous finding for public employment. *Id*. at 371-372. In contrast, Congress made express findings in the text of the statute itself of

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[4] 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 & Assoc., *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.

persisting discrimination in "education, * * * institutionalization, * * * voting, and access to public services." 42 U.S.C. 12101(a)(3). The first three areas are fields predominately operated by States and the last is, under the terms of the statute, the exclusive domain of state and local governments. See 104 Stat. 337 (title of Title II is "Public Services"); 42 U.S.C. 12131(1) (limiting term "public entity" to state and local governments, and Amtrak).

Again, the same Committee Reports that the Court in *Garrett* found lacking with regard to public employment are directly on point with regard to public services, declaring that "there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of employment in the private sector, public accommodations, *public services*, transportation, and telecommunications." H.R. Rep. No. 485, *supra*, Pt. 2, at 28 (emphasis added); see also S. Rep. No. 116, *supra*, at 6 ("Discrimination still persists in such critical areas as employment in the private sector, public accommodations, *public services*, transportation, and telecommunications." (emphasis added)). The judgment of a co-equal branch of government – embodied in the text of the statute and its committee reports – that a pattern of State discrimination persists and requires a federal remedy is entitled to "a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985); see also *Board of*

Educ. v. *Mergens*, 496 U.S. 226, 251 (1990). This judgment was supported by ample evidence.

2. *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). Congress and the Supreme Court have long acknowledged the Nation's "history of unfair and often grotesque mistreatment" of persons with disabilities. *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 454 (1985) (Stevens, J., concurring); see *id.* at 461 (Marshall, J., concurring in the judgment in part); 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 hostility."); *Alexander* v. *Choate*, 469 U.S. 287, 295 n.12 (1985) ("well-cataloged instances of invidious discrimination against the handicapped do exist").

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 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." *Id.* 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.[5] 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 and segregate into institutions the "feeble-minded." *Spectrum* 20, 33-34. 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 state compulsory sterilization law "in order to prevent our being swamped with incompetence"); 3 *Leg. Hist.* 2242 (James Ellis).

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

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[5] 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).

completely from any form of public education").[6] Numerous States also restricted the rights of physically disabled people to enter into contracts. See *Spectrum* 40.

3. *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 those with disabilities "continue to stymie recognition of the[ir] dignity and individuality." *Id*. at 467 (emphasis added).[7] 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.[8]

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[6] 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 T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 399-407 (1991) .

[7] 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).

[8] 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)

(continued...)

Moreover, as we detail below based on the testimony of hundreds of witnesses before Congress and at the Task Force's forums,[9] Congress found, as a matter of present reality and historical fact, that discrimination pervaded state 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 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 governments in the form of "arbitrary or irrational" distinctions and exclusions, *Cleburne*, 473 U.S. at 446. In addition, the evidence before Congress established

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[8](...continued)
("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. 1988) (Rep. Owens) ("The invisibility of disabled Americans was simply taken for granted. Disabled people were out of sight and out of mind.").

[9] 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 commentaries collected during the Task Force's forums – were part of the official legislative history of the ADA. See *id*. at 1336, 1389. Both the majority and dissent in *Garrett* relied on these documents, see 531 U.S. at 369-370, with the dissent citing to them by State and Bates stamp number, *id*. at 389-424 (Breyer, J., dissenting), a practice we follow.

that States 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 contract, to receive adequate custodial treatment, and to achieve equal access to the courts and public education) protected by the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments. 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 isolating the problem into select categories of state action. For ease of understanding, we have organized the evidence into sections touching on various areas of constitutional import.

(a) *Voting, Petitioning, and Access to Courts*: Voting is the right that is "preservative of all rights," *Katzenbach* v. *Morgan*, 384 U.S. 641, 652 (1966), and the Equal Protection Clause subjects voting classifications to strict scrutiny to guarantee "the opportunity for equal participation by all voters" in elections, *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966).

Congress heard that "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 clout with our elected officials when they are aware that many of us are prevented from voting?" Ark. 155.[10]

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[10] "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 FEC, *Polling Place Accessibility in the 1988 General Election* 7 (1989) (21% of polling places inaccessible; 27% were inaccessible in 1986 elections).

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 Americans 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[11] and other important government buildings and officials[12] depended upon their willingness to

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[11] 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 the sheriff would not let him use the elevator).

[12] 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 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)

(continued...)

crawl or be carried. And Congress was told that state officials *themselves* had "pointed to negative attitudes and misconceptions as potent impediments to [their own] barrier removal policies." Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates: Federal and State Compliance with*

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[12](...continued)
("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."); 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); Alaska 73 ("We have major problems in Seward, regarding accessibility to City and State buildings for the handicapped." 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. Att'y Gen., *Commission on Disability: Final Report* 70 (Dec. 1989) ("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.").

Employment Protections and Architectural Barrier Removal 87 (Apr. 1989).

The physical exclusion of people with disabilities from public buildings has special constitutional import when court proceedings are taking place inside. For criminal defendants, the Due Process Clause has been interpreted to provide that "an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975). The Sixth Amendment "grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'" *Id*. at 819. Parties in civil litigation have an analogous Due Process right to be present in the courtroom and to meaningfully participate unless their exclusion furthers important government interests. See, *e.g.*, *Popovich*, 276 F.3d at 813-814 (en banc); *Helminski* v. *Ayerst Labs.*, 766 F.2d 208, 213 (6th Cir.), cert. denied, 474 U.S. 981 (1985).

(b) *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, California reported that in its school districts (which are covered by the Eleventh Amendment, see n.28, *infra*), "[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" and that in one California town, all disabled children are grouped into a single classroom regardless of individual ability. Calif. Att'y Gen., *Commission on Disability: Final Report* 17, 81 (Dec. 1989) (*Calif. Report*). "When I was 5," a witness testified to Congress, "my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard." S. Rep. No. 116, *supra*, at 7.[13]

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[13] 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."); Alaska 38 (school district labeled child with cerebral palsy who subsequently obtained a Masters Degree as mentally retarded); Neb. 1031 (school district labeled as mentally retarded a blind child); Or. 1375 (child with cerebral palsy was "given cleaning jobs while other[] [non-disabled students] played sports"); Vt. 1635 (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"); *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*

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State institutions of higher education also demonstrated prejudices and stereotypical thinking. 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" because "it would be 'disgusting' to my roommates to have to live with a woman with a disability." Wash. 1733.[14] This evidence is

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[13](...continued)
Labor and 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").

[14] 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
(continued...)

consistent with the finding of the Commission on Civil Rights, also before Congress, that the "higher one goes on the education scale, the lower the proportion of handicapped people one finds." *Spectrum* 28; see also National Council on the Handicapped, *On the Threshold of Independence* 14 (1988) (29% of disabled persons had attended college, compared to 48% of the non-disabled population). Although such a finding does not indicate what percentage of the population have conditions such as mental retardation that might affect skills required for higher education, "they nonetheless are evidence of a substantial disparity." *Spectrum* 28.

(c) *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 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 knowing their rights nor what they

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[14](...continued)
work").

are being held for." 2 *Leg. Hist.* 1331.[15] 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).[16] These problems implicate the entire array of constitutional protections for those in state custody for alleged or proven criminal behavior (including the Fourth Amendment right to be free from unreasonable seizures, the substantive due process rights of

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[15] 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.

[16] 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.").

pre-trial detainees, the procedural due process and Sixth Amendment rights to fair and open criminal proceedings, and the Eighth Amendment right to be free from cruel and unusual punishment upon conviction).

(d) *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 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.[17] Unnecessary institutionalization and mistreatment within state-run facilities may violate substantive due process. See *Youngberg* v. *Romeo*, 457 U.S. 307 (1982) (unconstitutional conditions of confinement); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) (impermissible confinement); *Thomas S. by Brooks* v. *Flaherty*, 902 F.2d 250 (4th Cir.) (confinement when appropriate community placement available), cert. denied, 498 U.S. 951 (1990); *Clark* v. *Cohen*, 794 F.2d 79 (3d Cir.) (same), cert. denied, 479

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[17] 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, 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.").

U.S. 962 (1986) .

(e) *Other Public Services*: Congress heard evidence that irrational discrimination permeated the entire range of services offered by governments. Programs as varied as zoning[18]; the operation of zoos,[19] public libraries,[20] public swimming pools and park programs[21]; and child custody proceedings[22] exposed the

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[18] Congress knew that *Cleburne* was not an isolated incident. See 2 *Leg. Hist.* 1230 (Larry Urban); 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.").

[19] 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.

[20] 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").

[21] 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

(continued...)

discriminatory actions and attitudes of officials.[23]

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[21](...continued)
'no dogs' rule").

[22] See H.R. Rep. No. 485, *supra*, Pt. 3, at 25 ("These discriminatory policies 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 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").

[23] 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

(continued...)

C. *Title II 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 Postsec. Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999). 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* v. *Klutznick*, 448 U.S. 448, 501-502 n.3 (1980) (Powell, J., concurring). Accordingly, in exercising its power, "Congress is not limited to mere legislative repetition of [the] Court's constitutional jurisprudence." *Garrett*, 531 U.S. at 365. 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, 282-283 (1999). The operative question thus is not whether Title II "prohibit[s] a somewhat

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[23](...continued)
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).

broader swath of conduct," *Garrett*, 531 U.S. at 365, than would the courts, but whether in response to the historic and enduring legacy of discrimination, segregation, and isolation faced by persons with disabilities at the hands of States, Title II was "designed to guarantee meaningful enforcement" of their constitutional rights, *id*. at 373.

Title II fits this description.[24] Title II targets discrimination that is unreasonable. The States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all.[25] Title II also permits exclusion if a person cannot "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 meet all but the non-essential eligibility requirements of a program or service, the government's interest

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[24] This Court in *Brown* v. *North Carolina Division of Motor Vehicles*, 166 F.3d 698, 705 (4th Cir. 1999), cert. denied, 531 U.S. 1190 (2001), held that it was appropriate to focus on "the specific statute and regulation whose asserted violation by state government gave rise to the claim for relief in federal court," rather than passing on the constitutionality of Title II as a whole. Plaintiffs in this case appear to be claiming (R. 29 at 16-18) that defendant has violated 28 C.F.R. 35.130(b)(1)(i), (ii), and (vii) by failing to address conduct (*i.e.* harassment on the basis of disability) that limited her ability to participate in or benefit from defendant's educational programs. We discuss these obligations in the text.

[25] 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).

in excluding that individual "by reason of such disability," 42 U.S.C. 12132, is both minimal and, in light of history, constitutionally problematic. 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. Title II 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*, 528 U.S. 495, 517 (2000).

Title II thus requires more than the Constitution only to the extent that some disability discrimination may be rational for constitutional purposes, but unreasonable under the statute. That margin of statutory protection does not redefine the constitutional right at issue. Instead, the statutory protection is necessary to enforce the courts' 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," *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997), Title II is on the remedial and prophylactic side of that line.

Title II requires "reasonable modifications" in public services. 42 U.S.C. 12131(2). That requirement, however, is carefully tailored to the unique features of disability discrimination that Congress found persisted in public services 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 discrimination would be insufficient to erase the stain of discrimination. Cf. *Green* v. *County Sch. Bd.*, 391 U.S. 430, 437-438 (1968) (after unconstitutional segregation, government is "charged with the affirmative duty to take whatever steps might be necessary" to eliminate discrimination "root and branch"). Therefore, Title II affirmatively promotes the integration of individuals with disabilities – both in order to remedy past unconstitutional conduct and to prevent future discrimination. Congress could reasonably conclude that if it did not intercede the demonstrated failure of state 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").

Moreover, failure to accommodate the needs of qualified persons with disabilities may often result directly from hidden unconstitutional animus and false stereotypes. Title II simply makes certain that the refusal to accommodate an individual with a disability is genuinely based on unreasonable cost or actual

inability to accommodate, rather than on nothing but the discomfort with the disability or unfounded concern about the costs of accommodation. Such a prophylactic response is commensurate with the problem of irrational state discrimination that denies access to benefits and services for which the State has otherwise determined individuals with disabilities to be qualified or which the State provides to all its citizens (such as education, police protection, and civil courts). It makes particular sense in the context of public services, where a *post hoc* judicial remedy may be of limited utility to an individual given the difficulty in remedying unconstitutional denials of intangible but important rights, such as the right to vote, to a fair trial, or to educational opportunity. By establishing prophylactic requirements, Congress provided additional mechanisms for individuals to avoid irreparable injuries and to ensure that constitutional rights were fully vindicated.

Further, Congress tailored the modification requirement to the unconstitutional governmental conduct it seeks to repair and prevent. The statute requires modifications only where "reasonable." 42 U.S.C. 12131(2). Governments need not make modifications that require "fundamental alterations in the nature of a service, program, or activity," in light of their nature or cost, agency resources, and the operational practices and structure of the position. 28 C.F.R. 35.130(b)(7), 35.150(a)(3), 35.164; *Olmstead*, 527 U.S. at 606 n.16. And Congress determined, based on the consistent testimony of witnesses and expert studies, that contrary to the misconceptions of many, the vast majority of accommodations

entail little or no cost.[26] And any costs are further diminished when measured against the financial and human costs of denying persons with disabilities an education or excluding them from needed government services or the equal exercise of fundamental rights, thereby rendering them a permanent underclass. See *Plyler* v. *Doe*, 457 U.S. 202, 223-224, 227 (1982).

Title II's elevated burden of justification is not an impermissible effort to redefine constitutional rights; it is, instead, an appropriate means of rooting out hidden animus and remedying and preventing pervasive discrimination that is unconstitutional under judicially defined standards. 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." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996). 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 programs to ensure equal access).

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[26] See 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.

D. *In Light Of The Legislative Record And Findings And The Tailored Statutory Scheme, Title II And Its Abrogation Are Appropriate Section 5 Legislation*

The record Congress compiled and the findings it made suffice to support Title II's substantive standard as appropriate Fourteenth Amendment legislation applicable to States and localities.[27] As such, it is one in a line of civil rights statutes, authorized by Civil War Amendments, that apply to States *and* local governments. See, *e.g.*, Titles III, IV, VI and VII of the Civil Rights Act of 1964,42 U.S.C. 2000b-2000e *et seq*.; Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq*.; Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq*.; Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*

Aside from the substantive provisions of Title II, *Garrett* held that to sustain an *abrogation* of Eleventh Amendment immunity as appropriate Section 5 legislation, only constitutional misconduct committed by those who are "beneficiaries" of the Eleventh Amendment can be relied upon. 531 U.S. at 369. The line between those government entities entitled to Eleventh Amendment immunity and those which are not is not always easy to identify. For example,

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[27] The Interstate Commerce Clause is also the basis for these substantive obligations. See *Walker* v. *Snyder*, 213 F.3d 344, 346 (7th Cir. 2000), cert. denied *sub nom. United States* v. *Snyder*, 531 U.S. 1190 (2001). Under either basis, suits against state officials for injunctive relief under *Ex parte Young* can proceed regardless of the validity of the abrogation. See *Garrett*, 531 U.S. at 374 n.9; *Carten* v. *Kent State Univ.*, 282 F.3d 391, 395-396 (6th Cir. 2002); *Randolph* v. *Rodgers*, 253 F.3d 342, 346-348 (8th Cir. 2001); *Roe No. 2* v. *Ogden*, 253 F.3d 1225, 1233 (10th Cir. 2001).

while school districts are generally found not to be "arms of the state" protected by the Eleventh Amendment, see *Mt. Healthy City Sch. Dist. Bd.* v. *Doyle*, 429 U.S. 274, 280–281 (1977), there are some significant exceptions to this rule.[28] Similar state-by-state inquiries are required in the law enforcement arena. See *McMillian* v. *Monroe County*, 520 U.S. 781, 795 (1997) (holding that county sheriff in Alabama is a state official and noting "there is no inconsistency created by court decisions that declare sheriffs to be county officers in one State, and not in another"). In other situations, such as voting, local officials are simply administering state policies and programs. While nominally the action of a local government, the discrimination individuals with disabilities endure is directly attributable to the State. Cf. *Railroad Co.* v. *County of Otoe*, 83 U.S. 667, 676 (1872) ("Counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will. When they are authorized or directed to levy a tax, or to appropriate its proceeds, the State through them is doing indirectly what it might do directly.").

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[28] See *Belanger* v. *Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992), cert. denied, 507 U.S. 919 (1993) (California school districts protected by Eleventh Amendment). The law in other States remains in flux. Cf. *Martinez* v. *Board of Educ. of Taos Mun. Sch. Dist.*, 748 F.2d 1393 (10th Cir. 1984) (New Mexico school districts protected by Eleventh Amendment), overruled, *Duke* v. *Grady Mun. Schs.*, 127 F.3d 972 (10th Cir. 1997); *Harris* v. *Tooele County Sch. Dist.*, 471 F.2d 218 (10th Cir. 1973) (Utah school districts protected by Eleventh Amendment), overruled, *Ambus* v. *Granite Bd. of Educ.*, 995 F.3d 992 (10th Cir. 1992) (en banc).

Thus, as *Garrett* makes clear, actions of such local officials can be attributed to the States for purposes of the "congruence and proportionality" inquiry. See 531 U.S. at 373 (attributing to "States" and "State officials" conduct regarding voting that was done by county "registrar[s]" and "voting officials" in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 312 (1966)).

Given the fact that some school districts and law enforcement officials are "beneficiaries of the Eleventh Amendment," *Garrett*, 531 U.S. at 369, and that some local practices are done at the States' behest, the evidence before Congress regarding the treatment of people with disabilities by education, law enforcement, voting, and other officials is relevant in assessing Congress's legislative record about State violations. Because the demarcation is unclear at the margins, we have in this brief provided the evidence before Congress concerning both state and local governments. But even limited to the evidence concerning States acting through their own agencies, there was a sufficient basis to sustain Congress's determination that States engaged in a pattern of unconstitutional conduct.

We acknowledge that the Tenth Circuit in *Thompson* v. *Colorado*, 278 F.3d 1020 (2001), cert. denied, 122 S. Ct. 1960 (2002), reached the contrary conclusion. After surveying the record before Congress, *Thompson* concluded that there *was* "some evidence in the congressional record that unconstitutional discrimination against the disabled exists in government 'services, programs, or activities.'" *Id*. at 1033. The panel found even a larger number of incidents involved "refusals by public entities to make accommodations," *ibid*., which would be unconstitutional if

invidiously motivated and, the court determined, could also sometimes rise to the level of constitutional violations regardless of intent. Nonetheless, the panel determined that it could not sustain the abrogation for Title II suits as valid Fourteenth Amendment legislation because "[b]ased on the 'minimal evidence of unconstitutional state discrimination' against the disabled, Title II's accommodation requirement appears to be an attempt to prescribe a new federal standard for the treatment of the disabled rather than an attempt to combat unconstitutional discrimination." *Id*. at 1034 (citation omitted). The Fifth Circuit appears to have reached a similar conclusion in *Reickenbacker* v. *Foster*, 274 F.3d 974, 981-983 (2001).

Thompson and *Reickenbacker* were based on the legal misapprehension that the burden is on the United States to prove that the statute was constitutional and that Congress was obligated to compile a detailed record to support its findings. To the contrary, it is well-established that Congressional legislation is entitled to a strong presumption of constitutionality. See *United States* v. *Morrison*, 529 U.S. 598, 607 (2000); *Reno* v. *Condon*, 528 U.S. 141, 147 (2000). Thus, a court should declare a statute beyond Congress's authority "only upon a *plain showing* that Congress has exceeded its constitutional bounds." *Morrison*, 529 U.S. at 607 (emphasis added). This is particularly true when the constitutional question is predicated on empirical questions regarding the existence and scope of a problem. "We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing

upon legislative questions." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195 (1997) (*Turner II*) (collecting cases) (internal quotation marks omitted).

Of course, when heightened scrutiny is involved, a legislature may be required to point to some factual predicate indicating that its determination that there is a problem meriting infringement on constitutional rights is reasonable. But even then a legislature need not show that it reached the correct conclusion, see *Turner II*, 520 U.S. at 211, and may rely on facts outside the "record" in making its determination, see *id*. at 212-213 (relying on post-enactment evidence); cf. *Erie* v. *Pap's A.M.*, 529 U.S. 277, 297-298 (2000) ("The city council members, familiar with commercial downtown Erie, are the individuals who would likely have had firsthand knowledge of what took place * * * and can make particularized, expert judgments about the resulting harmful secondary effects [of the expressive conduct].").

Indeed, when the Supreme Court has reviewed legislation under a heightened scrutiny standard and required some evidence to sustain legislation, it has permitted a statute to be upheld on the basis of less persuasive and voluminous evidence than was before Congress. In *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377 (2000), for example, the Court held that it was not even "a close call" that the State had sustained its burden of showing that "sometimes large contributions will work actual corruption of our political system," thus justifying infringement on First Amendment rights, by pointing to an affidavit by a state legislator, two newspaper articles, and four incidents discussed in another judicial

opinion. *Id*. at 393, 395. In *Burson* v. *Freeman*, 504 U.S. 191 (1992), likewise, the Court held that a statute prohibiting campaigning near polling places survived strict scrutiny analysis based on history, consensus, and "simple common sense." *Id*. at 211; see also *Florida Bar* v. *Went for It, Inc*., 515 U.S. 618, 628 (1995) (upholding regulation of commercial speech based on a single study and noting that "we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information"). Thus, *Thompson* and *Reickenbacker* held Congress to an improper standard of proof.

In assessing Congress's exercise of its power to enforce the Fourteenth Amendment, the Supreme Court has reiterated that the volume of evidence in the record is "not determinative." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 91 (2000); *Florida Prepaid*, 527 U.S. at 646; see also *Boerne*, 521 U.S. at 531 ("Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.'"). It is true that the Supreme Court in *Garrett* looked to the underlying legislative record in an effort to determine whether there was a basis for upholding the legislation as an appropriate prophylactic remedy. But in that case the Court found (contrary to the situation here) that Congress had made *no* relevant findings regarding States and further determined (again, contrary to the situation here) that the only relevant evidence in the legislative record, involving six examples of unconstitutional conduct, was equivalent to no record at all.

But here there are findings reflecting Congress's determination that States engaged in forms of discrimination that can rise to the level of unconstitutional conduct: "outright intentional exclusion, * * * failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services." 42 U.S.C. 12101(a)(5). Given the deference to Congress's preeminent fact-finding role, the evidence in the "record" mandates a judicial holding that Congress could have reasonably reached the conclusion (expressed in statutory findings) that States were unconstitutionally discriminating against persons with disabilities. See *Popovich*, 276 F.3d at 820 (Moore, J., concurring). While the record may not have been as extensive as the courts in *Thompson* and *Reickenbacker* would have liked, it was constitutionally sufficient.

Congress's finding, in turn, is sufficient to support the statute as valid Fourteenth Amendment legislation. Once Congress's determination regarding the existence of constitutional violations has been confirmed, the scope of the remedy is purely a matter of legislative choice. Cf. *M'Culloch* v. *Maryland*, 17 U.S. 316, 423 (1819) ("But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."). There is no requirement that the solution Congress adopts be the least-restrictive legislation to remedy and prevent the unconstitutional state conduct it has identified. Instead, as the Supreme Court

explained in *City of Boerne* v. *Flores*, 521 U.S. at 536, and reiterated in *Kimel*, 528 U.S. at 80-81: "It is for 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." But see *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 109-110 (2d Cir. 2001) (holding, without discussing the constitutional violations or findings, that Title II's reasonable modification requirement was not valid Section 5 legislation); cf. *Popovich*, 276 F.3d at 812 (holding that Title II's obligations could not be upheld in their entirety under the Equal Protection Clause).

It is true that Title II's broad coverage contrasts with that of Section 5 of the Voting Rights Act of 1965, which the Court noted approvingly in *Garrett*, 531 U.S. at 373-374. The operative question, however, is not whether Title II is broad, but whether it is broader than necessary. It 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 persons with disabilities were relegated to institutions or trapped in their homes by lack of transportation or inaccessible sidewalks. 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 * * * ." *Kimel*, 528 U.S. at 88. It is in such cases that Congress is empowered by Section 5 to enact "reasonably prophylactic legislation." *Ibid*. Title II is just such a powerful remedy for a problem which Congress found to be intractable. The ADA's abrogation is thus effective in removing defendant's immunity from suit under Title II. See *Hason* v. *Medical Bd. of Cal.,* 279 F.3d 1167, 1171 (9th Cir. 2002) (upholding constitutionality of abrogation for Title II).

II

CONGRESS VALIDLY CONDITIONED FEDERAL FUNDING ON A WAIVER OF ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), prohibits discrimination against persons with disabilities under "any program or activity receiving Federal financial assistance." Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments

of 1972 * * * [and] title VI of the Civil Rights Act of 1964." In *Litman* v. *George Mason University*, 186 F.3d 544 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000), this Court held that Section 2000d-7 may be upheld as a valid exercise of Congress's power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for States that voluntarily accept federal financial assistance.[29] As we explain below, this decision, which is binding on this Court, see *Industrial TurnAround Corp.* v. *NLRB*, 115 F.3d 248, 254 (4th Cir. 1997), applies with equal force to claims brought under Section 504. Thus, the defendant, by accepting federal financial assistance,[30] has waived its Eleventh Amendment immunity to Section 504 claims.

A. *Section 2000d-7 Is A Clear Statement That Accepting Federal Financial Assistance Would Constitute A Waiver To Private Suits Brought Under Section 504*

Section 2000d-7 was enacted in response to the Supreme Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985). In *Atascadero*, the Court held that Congress had not provided sufficiently clear statutory language to condition receipt of federal financial assistance on waiver of States' Eleventh Amendment immunity for Section 504 claims and reaffirmed that "mere receipt of

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[29] Although not addressed by the district court, this argument was discussed by the parties below (R. 29 at 13; R. 30 at 11-13), and thus can be addressed on appeal. In any event, the right of the United States to intervene for "argument on the question of constitutionality," 28 U.S.C. 2403(a), is not limited by the arguments made by plaintiff in defense of the statute.

[30] Defendant admitted (R. 30 at 13, 19) accepting federal financial assistance.

federal funds" was insufficient to constitute a waiver. 473 U.S. at 246. But the Court stated that if a statute "manifest[ed] a clear intent to condition participation in the programs funded under the Act on a State's waiver of its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds. *Id*. at 247.

Section 2000d-7 was a direct response to the Supreme Court's decision in *Atascadero*. See *Lane* v. *Pena*, 518 U.S. 187, 200 (1996). Congress recognized that the holding of *Atascadero* implicated not only Section 504, but also Title VI of the Civil Rights Act and Title IX of the Education Amendments, each of which applied to those "program[s] or activit[ies] receiving Federal financial assistance." See S. Rep. No. 388, 99th Cong., 2d Sess. 28 (1986); 131 Cong. Rec. 22,346 (1985) (Sen. Cranston); see also *NCAA* v. *Smith*, 525 U.S. 459, 467 (1999) (Section 504 "prohibits discrimination on the basis of disability in substantially the same terms that Title IX uses to prohibit sex discrimination."); *United States Dep't of Transp.* v. *Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986) ("Under * * * Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision.").

This Court, after an extensive analysis of the text and structure of the Act, held in *Litman*, 186 F.3d at 554, that "Congress succeeded in its effort to codify a clear, unambiguous, and unequivocal condition of waiver of Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a)(1)." This holding, arising in an action in

which the underlying claim was brought under Title IX, is equally applicable to suits brought to enforce Section 504.[31]

B. *Congress Has Authority To Condition The Receipt Of Federal Financial Assistance On The State Waiving Its Eleventh Amendment Immunity*

This Court also held in *Litman*, 186 F.3d at 554-555, that Congress may condition its spending on a waiver of Eleventh Amendment immunity. Indeed, in *Alden* v. *Maine*, 527 U.S. 706, 755 (1999), the Court cited *South Dakota* v. *Dole*, 483 U.S. 203 (1987), a case involving Congress's Spending Clause authority, when it noted that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits." Similarly, in *College Savings Bank* v. *Florida Prepaid Postsecondary Educational Expense Board*, 527 U.S. 666 (1999), the Court reaffirmed the holding of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), where the Court held that Congress could condition the exercise of one of its Article I powers (there, the approval of

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[31] Accord *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001) (Section 504); *Nihiser* v. *Ohio E.P.A.*, 269 F.3d 626 (6th Cir. 2001) (Section 504), petition for cert. pending, No. 01-1357; *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) (Section 504), cert. denied, 533 U.S. 949 (2001); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) (Section 504); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000) (Title IX); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999) (Title VI), rev'd on other grounds, 532 U.S. 275 (2001); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504), cert. denied, 524 U.S. 937 (1998); cf. *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001).

interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. 527 U.S. at 686. At the same time, the Court suggested that Congress had the authority under the Spending Clause to condition the receipt of federal funds on the waiver of immunity. *Ibid.*; see also *id.* at 678-679 n.2. The Court explained that unlike Congress's power under the Commerce Clause to regulate "otherwise lawful activity," Congress's power to authorize interstate compacts and spend money was the grant of a "gift" on which Congress could place conditions that a State was free to accept or reject. *Id.* at 687.

C. *Section 504 Is A Valid Exercise Of The Spending Power*

The Supreme Court has held that "a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants." *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987). This is because the federal government has not unilaterally intruded into a recipient's operations. A recipient incurs these obligations only because it applies for and receives federal funds. "[T]he powers of the State are not invaded, since the statute imposes no obligation [to accept the funds] but simply extends an option which the State is free to accept or reject." *Massachusetts* v. *Mellon*, 262 U.S. 447, 480 (1923).

The Supreme Court in *Dole* identified four limitations on Congress's Spending Power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." 483 U.S. at 207. Second, if Congress conditions the States' receipt of federal funds, it "'must do so unambiguously

* * *, enabling the States to exercise their choice knowingly, cognizant of the consequence of their participation.'" *Ibid*. (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, the Supreme Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Ibid*. And fourth, the obligations imposed by Congress may not violate any independent constitutional provisions. *Id*. at 208.

As in *Litman*, 186 F.3d at 553, defendant did not challenge the validity of Section 504 as Spending Clause legislation in the district court. Thus, as this case comes before this Court, there is no dispute that (1) the general welfare is served by prohibiting discrimination against persons with disabilities, see *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 443-444 (1985) (discussing Section 504 with approval); *Dole*, 483 U.S. at 207 n.2 (noting substantial judicial deference to Congress on this issue); (2) the language of Section 504 makes clear that the obligations it imposes are a condition on the receipt of federal financial assistance, see *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15 (1987) (contrasting "the antidiscrimination mandate of § 504" with the statute in *Pennhurst*); (3) the condition is related in the federal government's overarching interest in not supporting or subsidizing discrimination, cf. *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974) (Title VI is valid Spending Clause legislation); *Grove City Coll*. v. *Bell*, 465 U.S. 555, 575 (1984) (same for Title IX); and (4) neither providing meaningful access to people with disabilities nor waiving sovereign

immunity violates anyone's constitutional rights.

Instead, defendant argued below (R. 30 at 11-13) that Section 504's non-discrimination condition was unconstitutionally coercive, relying solely on the dissent in *Jim C.* v. *Arkansas Department of Education*, 235 F.3d 1079 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001). But the majority's opinion in *Jim C.*, holding that Section 504 is not coercive, is the correct application of the law. While the Supreme Court in *Dole* recognized that the financial inducement of federal funds "might be so coercive as to pass the point at which 'pressure turns into compulsion,'" 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)), it saw no reason generally to inquire into whether a State was coerced. Noting that every congressional spending statute "is in some measure a temptation," the Court recognized that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid*. The Court in *Dole* thus reaffirmed the assumption, founded on "a robust common sense," that the States are voluntarily exercising their power of choice in accepting the conditions attached to the receipt of federal funds. *Ibid*. (quoting *Steward Mach.*, 301 U.S. at 590). Accordingly, the Ninth Circuit has properly recognized "that it would only find Congress' use of its spending power impermissibly coercive, if ever, in the most extraordinary circumstances." *California* v. *United States*, 104 F.3d 1086, 1092 (9th Cir.), cert. denied, 522 U.S. 806 (1997).

Any argument that Section 504 is coercive would be inconsistent with Supreme Court decisions that demonstrate that States may be put to difficult or even "unrealistic" choices about whether to take federal benefits without the conditions becoming unconstitutionally "coercive." In *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), aff'd mem., 435 U.S. 962 (1978), a State challenged a federal law that conditioned the right to participate in "some forty-odd federal financial assistance health programs" on the creation of a "State Health Planning and Development Agency" that would regulate health services within the State. *Id*. at 533. The State argued that the Act was a coercive exercise of the Spending Clause because it conditioned money for multiple pre-existing programs on compliance with a new condition. The three-judge court rejected that claim, holding that the condition "does not impose a mandatory requirement * * * on the State; it gives to the states an *option* to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of federal grants to the states and is not 'coercive' in the constitutional sense." *Id*. at 535-536 (footnote omitted). The Supreme Court summarily affirmed, thus making the holding binding on this Court.[32]

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[32] The State's appeal to the Supreme Court presented the questions: "Whether an Act of Congress requiring a state to enact legislation * * * under penalty of forfeiture of all benefits under approximately fifty long-standing health care programs essential to the welfare of the state's citizens, violates the Tenth

(continued...)

Similarly, in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), the Court interpreted the scope of the Equal Access Act, 20 U.S.C. 4071 *et seq*., which conditions federal financial assistance for those public secondary schools that maintain a "limited open forum" on the schools not denying "equal access" to students based on the content of their speech. In rejecting the school's argument that the Act as interpreted unduly hindered local control, the Court noted that "because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this *may be an unrealistic option*, [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups." 496 U.S. at 241 (emphasis added, citation omitted).[33]

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[32](...continued)
Amendment and fundamental principles of federalism;" and "Whether use of the Congressional spending power to coerce states into enacting legislation and surrendering control over their public health agencies is inconsistent with the guarantee to every state of a republican form of government set forth in Article IV, § 4 of the Constitution and with fundamental principles of federalism." 77-971 Jurisdictional Statement at 2-3. Because the "correctness of that holding was placed squarely before [the Court] by the Jurisdictional Statement that the appellants filed * * * [the Supreme] Court's affirmance of the District Court's judgment is therefore a controlling precedent, unless and until re-examined by [the Supreme] Court." *Tully* v. *Griffin, Inc*., 429 U.S. 68, 74 (1976).

[33] The Supreme Court has also upheld the denial of all welfare benefits to individuals who refused to permit in-home inspections. See *Wyman* v. *James*, 400
(continued...)

These cases demonstrate that the federal government can place conditions on federal funding that require States to make the difficult choice of losing federal funds from many different longstanding programs (*North Carolina*), or even losing all federal funds (*Mergens*), without crossing the line to coercion. Thus, the choice imposed by Section 504 is not "coercive" in the constitutional sense. See *Jim C.*, 235 F.3d at 1081-1082 (en banc).

State officials are constantly forced to make difficult decisions regarding competing needs for limited funds. While it may not always be easy to decline federal funds, each department or agency of the State, under the control of state officials, is free to decide whether it will accept the federal funds with the Section 504 and waiver "string" attached, or simply decline the funds. See *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984); *Kansas* v. *United States*, 214 F.3d 1196, 1202 (10th Cir.) ("In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the * * * requirements so

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[33](...continued)
U.S. 309, 317-318 (1971) ("We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be."). Similarly, in cases involving challenges by private groups claiming that federal funding conditions limited their First Amendment rights, the Court has held that where Congress did not preclude an entity from restructuring its operations to separate its federally-supported activities from other activities, Congress may constitutionally condition federal funding to a recipient on the recipient's agreement not to engage in conduct Congress does not wish to subsidize. See *Rust* v. *Sullivan*, 500 U.S. 173, 197-199 (1991); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 544-545 (1983).

disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be." (citation omitted)), cert. denied, 531 U.S. 1035 (2000).

Because one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," *Alden*, 527 U.S. at 750, it is perfectly appropriate to permit each State to make its own cost-benefit analysis and determine whether it will, for any given state agency, accept the federal money with the condition that that agency waive its immunity to suit in federal court, or forgo the federal funds available to that agency. See *New York* v. *United States*, 505 U.S. 144, 168 (1992). But once defendant has accepted federal financial assistance, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983). For all these reasons, Section 504 and Section 2000d-7 can be upheld under the Spending Clause.

CONCLUSION

The Eleventh Amendment was no bar to the district court's jurisdiction over this action. The district court's judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The constitutionality of the ADA's abrogation for suits under Title II is also at issue in *Wessel* v. *Glendening*, No. 00-6634 (oral argument heard June 5, 2002).

CERTIFICATE OF COMPLIANCE

I hereby certify that the brief does *not* comply with the type-volume limitations set out in Fed. R. App. P. 32(a)(7)(B). The brief is proportionately spaced, has a typeface of 14 points, was prepared using WordPerfect 9.0, and contains 16,340 words. Concurrent with the brief's submission, the United States has filed a motion to accept the brief for filing which notes that the brief does not comply with Rule 32(a)(7)(B) and provided reasons why the brief should nevertheless be accepted.

June 14, 2002

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2002, two copies of the foregoing Brief for the United States as Intervenor were served by first -class mail, postage prepaid, on the following counsel:

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