Nos. 97-3541, 97-3544

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

_____

DENISE DEBOSE, et al.

Plaintiffs-Appellees

v.

STATE OF NEBRASKA

Defendant-Appellant

_____

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

_____

BRIEF FOR THE UNITED STATES AS INTERVENOR

_____

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

These appeals involve the jurisdiction of the federal courts to adjudicate claims against States for violations of the Americans with Disabilities Act. This question is also currently pending in Alsbrook v. City of Maumelle, No. 97-1825, Autio v. Minnesota, No. 97-3145, and Moore v. Arkansas Department of Correction & Community Punishment, No. 97-4158. A panel of this Court heard oral argument in Alsbrook on November 21, 1997. The United States participated in that case as intervenor and appeared at oral argument to defend the constitutionality of the ADA. If the Court determines that oral argument would be proper in this case as well, the United States believes that its presence would be appropriate. See 28 U.S.C. 2403(a).

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PRELIMINARY STATEMENT

1. The judgment was rendered by the Honorable Richard G. Kopf of the United States District Court for the District of Nebraska. The judgment is unreported.

2. Plaintiffs-appellees each filed a complaint in the United States District Court for the District of Nebraska alleging, inter alia, that the defendant State of Nebraska

violated the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq. For the reasons discussed in this brief, the district court had jurisdiction over the ADA claim pursuant to 28 U.S.C. 1331.

3. These appeals are from a final judgment entered on August 27, 1997. The State of Nebraska filed timely notices of appeal on September 12 and 15, 1997. This Court has jurisdiction over the Eleventh Amendment issues raised in these appeals pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

The United States will address the following question:

Whether the statutory abrogation of Eleventh Amendment immunity for suits under the Americans with Disabilities Act is a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment.

Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996)

City of Boerne v. Flores, 117 S. Ct. 2157 (1997)

Crawford v. Indiana Dep't of Corrections, 115 F.3d 481 (7th Cir. 1997)

Clark v. California, 123 F.3d 1267 (9th Cir.), petition for cert. filed, 66 U.S.L.W. 3308 (Oct. 20, 1997) (No. 97-686)

Sections 1 and 5 of the Fourteenth Amendment

42 U.S.C. 12101, 12202

STANDARD OF REVIEW

The district court did not address this question. Because the question of Eleventh Amendment immunity in this case is purely a question of law, this Court may determine the issue de

novo. See United States v. Monteleone, 77 F.3d 1086, 1091 (8th Cir. 1996).

STATEMENT OF THE CASE

This suit is a private action brought by two employees against their employer, the State of Nebraska (the defendant) and others for injunctive and monetary relief under Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12111 et seq. They alleged (and the jury later found) that they were discriminated against on the basis of disability. The jury awarded damages and back pay, and the district court awarded equitable relief. This timely appeal followed.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by private plaintiffs under the ADA against a State because the ADA contains a valid statutory abrogation of Eleventh Amendment immunity. The abrogation in the ADA is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment, which authorizes Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. In exercising that power, Congress is not limited to legislating in regard to classifications that the courts have found are "suspect." To the contrary, Congress has broad discretion to enact whatever legislation it determines is appropriate to secure to all persons "the enjoyment of perfect equality of civil rights and the equal protection of the laws." Ex parte Virginia, 100 U.S. (10 Otto) 339, 346 (1879).

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

ARGUMENT

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

Citing the Supreme Court's recent decisions in Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996), and City of Boerne v. Flores, 117 S. Ct. 2157 (1997), the defendant contends

(Br. 15-32) that Congress did not have the constitutional authority to abrogate Eleventh Amendment immunity for suits brought by private plaintiffs under Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12111 et seq. The Eleventh Amendment is no bar to this action because the abrogation is a constitutional exercise of Congress' power under Section 5 of the Fourteenth Amendment.[1/]

In Seminole Tribe, the Supreme Court articulated a two-part test to determine whether Congress has properly abrogated States' Eleventh Amendment immunity:

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

116 S. Ct. at 1123 (citations, quotations, and brackets omitted).

Section 12202 of Title 42 provides that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter." This language exceeds that necessary to constitute an abrogation. See Seminole Tribe, 116 S. Ct. at 1124; Pennsylvania v. Union Gas Co., 491 U.S. 1, 13-14 (1989); id. at 29-30 (Scalia, J., concurring in part and dissenting in part). Indeed, defendant

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[1/] We note that the constitutional validity of the abrogation of Eleventh Amendment immunity in the ADA is also currently before this Court in Alsbrook v. City of Maumelle, No. 97-1825, Autio v. Minnesota, No. 97-3145, and Moore v. Arkansas Department of Correction & Community Punishment, No. 97-4158.

concedes (Br. 16) that Section 12202 satisfies the first requirement.

The second inquiry under Seminole Tribe is whether "Congress has the power to abrogate unilaterally the States' immunity from suit." 116 S. Ct. at 1125. Here the Fourteenth Amendment provides that authority. Section 5 of the Fourteenth Amendment empowers Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. As the Supreme Court explained over a hundred years ago:

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

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

In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court upheld the abrogation of States' Eleventh Amendment immunity in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., as "appropriate" legislation under Section 5. It explained that "[w]hen Congress acts pursuant to § 5, not only is it

exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." Id. at 456. In Seminole Tribe, the Court reaffirmed the holding of Fitzpatrick. See 116 S. Ct. at 1125, 1128, 1131 n.15. Thus, even after Seminole Tribe, "§ 5 of the Fourteenth Amendment [preserves] the authority of Congress to abrogate the states' Eleventh Amendment immunity." Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997).

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

Although Congress need not announce that it is legislating pursuant to its Section 5 authority, see Crawford, 109 F.3d at 1283, Congress declared that its intent in enacting the ADA was "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment * * *, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4). Nonetheless, the defendant suggests (Br. 25-27) that because classifications on the basis of disability are not subject to strict scrutiny, the ADA may not be regarded as legislation to enforce the Fourteenth Amendment.

But neither the prohibitions of the Equal Protection Clause nor Congress' Section 5 authority is limited to suspect classifications. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the

State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352 (1918). Thus "arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988); see, e.g., Romer v. Evans, 116 S. Ct. 1620, 1627-1628 (1996); Mills v. Maine, 118 F.3d 37, 46 (1st Cir. 1997) (collecting cases); Nash v. Black, 781 F.2d 665, 668-669 (8th Cir. 1986). And the Court in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 450 (1985), made clear that government discrimination on the basis of disability is prohibited by the Equal Protection Clause when it is arbitrary. Although a majority declined to deem classifications on the basis of mental retardation as "quasi-suspect," it held that this did not leave persons with such disabilities "unprotected from invidious discrimination." Id. at 446.

The only two courts of appeals to date to address the validity of the ADA's abrogation have affirmed Congress' power to prohibit discrimination against persons with disabilities pursuant to Section 5. As the Seventh Circuit explained, "[i]nvidious discrimination by governmental agencies * * * violates the equal protection clause even if the discrimination is not racial, though racial discrimination was the original focus of the clause. In creating a remedy against such discrimination, Congress was acting well within its powers under

section 5 * * *." Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997); see also Clark v. California, 123 F.3d 1267, 1270-1271 (9th Cir.), petition for cert. filed, 66 U.S.L.W. 3308 (Oct. 20, 1997) (No. 97-686).

Courts have reached a similar conclusion in cases involving the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq., which requires "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982). The four courts of appeals to address the question have held that Congress validly exercised its Section 5 authority in enacting the IDEA. See Mitten v. Muscogee County Sch. Dist., 877 F.2d 932, 937 (11th Cir. 1989), cert. denied, 493 U.S. 1072 (1990); Counsel v. Dow, 849 F.2d 731, 737 (2d Cir.), cert. denied, 488 U.S. 955 (1988); David D. v. Dartmouth Sch. Comm., 775 F.2d 411, 421 n.7 (1st Cir. 1985), cert. denied, 475 U.S. 1140 (1986); Crawford v. Pittman, 708 F.2d 1028, 1036-1038 (5th Cir. 1983); see also Lake v. Arnold, 112 F.3d 682, 688 (3d Cir. 1997) (finding that animus against people with mental retardation constitutes "'class-based invidiously discriminatory' motivation" for purposes of 42 U.S.C. 1985(3)).[2/]

[2/] The courts of appeals have also unanimously upheld the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 et seq., as a valid exercise of Congress' Section 5 authority, despite the fact that age is not a suspect classification. See, e.g., Hurd v. Pittsburg State Univ., 109 F.3d 1540, 1546 (10th Cir. 1997); Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 698-700 (1st Cir. 1983); EEOC v. County of Calumet, 686 F.2d 1249, 1251-1252 (7th Cir. 1982); Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); see also Santiago v. New York State Dep't of Correctional

(continued...)

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

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

The defendant next argues (Br. 17-31) that the ADA is not "plainly adapted" to enforcing the Equal Protection Clause because it prohibits more than what a court might declare unconstitutional in any individual case. The Supreme Court's recent decision in City of Boerne v. Flores, 117 S. Ct. 2157 (1997), addressed the question of what constitutes "plainly adapted" enforcement. It concluded that even statutes that prohibit more than does the Equal Protection Clause on its own can be "appropriate remedial measures" when there is "a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented." Id. at 2169.

[2/] (...continued)
Servs., 945 F.2d 25, 30 (2d Cir. 1991) (dictum), cert. denied, 502 U.S. 1094 (1992). The constitutional validity of the abrogation of Eleventh Amendment immunity in the ADEA is currently before this Court in Humenansky v. Regents of the Univ. of Minn., No. 97-2302.

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

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

First, the evidence before Congress demonstrated that persons with disabilities were sometimes excluded from public services for no reason other than distaste for or fear of their

disabilities. See S. Rep. No. 116, 101st Cong., 1st Sess. 7-8 (1989) (citing instances of discrimination based on negative reactions to sight of disability) (Senate Report); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28-31 (1990) (same) (House Report). The legislative record contained documented instances of exclusion of persons with disabilities from hospitals, theaters, restaurants, bookstores and auction houses simply because of prejudice. See Cook, supra, at 408-409 (collecting citations). Indeed, the United States Commission on Civil Rights, after a thorough survey of the available data, documented that prejudice against persons with disabilities manifested itself in a variety of ways, including "reaction[s] of aversion," reliance on "false" stereotypes, and stigma associated with disabilities that lead to people with disabilities being "thought of as not quite human." U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 23-26 (1983); see also Senate Report, supra, at 21. The negative attitudes, in turn, produced fear and reluctance on the part of people with disabilities to participate in society. See Senate Report, supra, at 16; House Report, supra, at 35, 41-43; Cook, supra, at 411. Congress thus concluded that persons with disabilities were "faced with restrictions and limitations * * * resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. 12101(a)(7).

These decades of ignorance, fear and misunderstanding created a tangled web of discrimination, resulting in and being reinforced by isolation and segregation. The evidence before Congress demonstrated that these attitudes were linked more generally to the segregation of people with disabilities. See Senate Report, supra, at 11; U.S. Commission on Civil Rights, supra, at 43-45. This segregation was in part the result of government policies in "critical areas [such] as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). For example, in enacting the IDEA, Congress had determined that millions of children with disabilities were either receiving no education whatsoever, an inadequate education, or receiving their education in an unnecessarily segregated environment. See 20 U.S.C. 1400(b)(2)-(4); see also Rowley, 458 U.S. at 191-203 (surveying legislative findings); Cook, supra, at 413-414.

Similarly, there was evidence before Congress that, like most public accommodations, government buildings were not accessible to people with disabilities. For example, a study conducted in 1980 of state-owned buildings available to the general public found 76 percent of them physically inaccessible and unusable for providing services to people with disabilities. See 135 Cong. Rec. 8,712 (1989) (remarks of Rep. Coelho); U.S. Commission on Civil Rights, supra, at 38-39. In another survey, 40 percent of persons with disabilities reported that an

important reason for their segregation was the inaccessibility of buildings and restrooms. See Americans with Disabilities Act of 1989: Hearings on H.R. 2273 before the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 334 (1989) (House Hearings).

Of course, even when the buildings were accessible, persons with disabilities were often excluded because they could not reach the buildings. The evidence before Congress showed that, in fact, public streets and sidewalks were not accessible. See House Report, supra, at 84; House Hearings, supra, at 248, 271. And even when they could navigate the streets, people with disabilities were shut out of most public transportation. See H.R. Rep. No. 485, Pt. 1, 101st Cong., 2d Sess. 24 (1990); National Council on the Handicapped, Toward Independence 32-33 (1986); U.S. Commission on Civil Rights, supra, at 39. Some transit systems offered paratransit services (special demand responsive systems for people with disabilities) to compensate for the absence of other means of transportation, but those services were often too limited and further contributed to the segregation of people with disabilities from the general public. See Senate Report, supra, at 13, 45; House Report, supra, at 38, 86; Toward Independence, supra, at 33; U.S. Commission on Civil Rights, supra, at 39. As Congress reasoned, "[t]ransportation plays a central role in the lives of all Americans. It is a veritable lifeline to the economic and social benefits that our Nation offers its citizens. The absence of effective access to

the transportation network can mean, in turn, the inability to obtain satisfactory employment. It can also mean the inability to take full advantage of the services and other opportunities provided by both the public and private sectors." H.R. Rep. No. 485, Pt. 4, 101st Cong., 2d Sess. 25 (1990); see House Report, supra, at 37, 87-88; Senate Report, supra, at 13.

Finally, even when people with disabilities had access to generally available goods and services, often they could not afford them due to poverty. Over twenty percent of people with disabilities of working age live in poverty, more than twice the rate of other Americans. See National Council on the Handicapped, On the Threshold of Independence 13-14 (1988). Congress found this condition was linked to the extremely high unemployment rate among people with disabilities, which in turn was a result of discrimination in employment combined with inadequate education and transportation. See Senate Report, supra, at 47; House Report, supra, at 37, 88; Toward Independence, supra, at 32; U.S. Commission on Civil Rights, supra, at 80. Thus Congress concluded that even when not barred by "outright intentional exclusion," people with disabilities "continually encounter[ed] various forms of discrimination, including * * * the discriminatory effects of architectural, transportation, and communication barriers." 42 U.S.C. 12101(a)(5).

People with disabilities who were able to overcome these barriers proved to be excellent workers. "[T]here is consistent

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

Given these facts, it is not surprising that surveys of both people with disabilities and employers revealed that discrimination was one of the primary reasons many people with disabilities did not have jobs. See Senate Report, supra, at 9; House Report, supra, at 33, 37; On the Threshold of Independence, supra, at 15. "[R]ecent studies suggest that prejudice against impaired persons is more intense than against other minorities. [One study] concludes that employer attitudes toward impaired workers are 'less favorable than those . . . toward elderly individuals, minority group members, ex-convicts, and student radicals,' and [another study] finds that handicapped persons are victims of 'greater animosity and rejections than many other groups in society.'" William G. Johnson, The Rehabilitation Act and Discrimination Against Handicapped Workers, in Disability and the Labor Market 242, 245, supra. And even when employed, people

with disabilities received lower wages that could not be explained by any factor other than discrimination. See U.S. Commission on Civil Rights, supra, at 31-32; Equal Employment Opportunities for Individuals with Disabilities, 56 Fed. Reg. 8,581 (1991) (citing studies); Johnson, supra, at 245 (same).

Evidence at congressional hearings suggested that similar discrimination may exist in government employment. See Stephen L. Mikochik, The Constitution and the Americans with Disabilities Act: Some First Impressions, 64 Temp. L. Rev. 619, 624 n.33 (1991) (collecting relevant testimony). Nor does the defendant suggest any reason to believe that governmental entities were immune from the unfortunate reality that "[f]requently, employer prejudices exclude[d] handicapped persons from jobs." U.S. Commission on Civil Rights, supra, at 29. Indeed, since many government buildings were inaccessible, there may have been reduced opportunity for such employment to begin with.[3/]

[3/] Defendant criticizes Congress (Br. 21-22) for failing to make a sufficient record of discrimination, as if Congress were a lower court that must make detailed findings of facts which this Court reviews for clear error. But "'Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.'" Turner Broad. Sys., Inc. v. FCC, 117 S. Ct. 1174, 1197 (1997); see also Fullilove v. Klutznick, 448 U.S. 448, 502-503, 506 (1980) (opinion of Powell, J., concurring). Rather, so long as this Court can "perceive[] a factual basis on which Congress could have concluded" that there was "'invidious discrimination in violation of the Equal Protection Clause,'" then this Court must uphold the ADA as valid Section 5 legislation. City of Boerne, 117 S. Ct. at 2168; see also Oregon v. Mitchell, 400 U.S. 112, 216 (1970) (opinion of Harlan, J.).

These government policies and practices, in tandem with similar private discrimination, produced a situation in which people with disabilities were largely poor, isolated and segregated. As Justice Marshall explained, "lengthy and continuing isolation of [persons with disabilities] perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them." Cleburne, 473 U.S. at 464; see also U.S. Commission on Civil Rights, supra, at 43-45. Congress could reasonably have found government discrimination to be a root cause of "people with disabilities, as a group, occupy[ing] an inferior status in our society, and [being] severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6).[4/]

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

Section 5 of the Fourteenth Amendment vests in Congress broad power to address the "continuing existence of unfair and

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

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

"Prejudice, once let loose, is not easily cabined." Cleburne, 473 U.S. at 464 (Marshall, J.). After extensive investigation (and long experience with the analogous nondiscrimination requirement contained in Section 504), Congress found that the exclusion of persons with disabilities from government facilities, programs and benefits was a result of past and on-going discrimination. In the ADA, Congress sought to remedy the effects of past discrimination and prevent like discrimination in the future by mandating that "qualified handicapped individual[s] must be provided with meaningful access to the benefit that the [entity] offers." Alexander v. Choate, 469 U.S. 287, 301 (1985) (emphasis added).[5/] Thus Title I of the ADA requires that employers, including government employers, not unnecessarily exclude persons with disabilities, either

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[5/] Alexander was discussing Section 504 of the Rehabilitation Act. This Court, however, has held that the ADA imposes substantive requirements similar to Section 504. See, e.g., DeBord v. Board of Educ., 126 F.3d 1102, 1104-1105 (8th Cir. 1997).

intentionally or unintentionally, and that they make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. 12112(b)(5)(A) (emphasis added). While this requirement imposes some burden on the States, the statutory scheme created by Congress acknowledges the importance of other interests as well. The ADA does not require governmental employers to articulate a "compelling interest," but only requires "reasonable accommodations" that do not entail an "undue hardship" on the State. Ibid.; see also 42 U.S.C. 12111(10) (defining "undue hardship" to mean "an action requiring significant difficulty or expense" in light of "the overall financial resources" and "type of operation" of the covered entity).

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

In enacting the ADA, Congress was acting within the constitutional framework that has been laid out by the Supreme Court. As discussed above, the Equal Protection Clause prohibits invidious discrimination, that is "a classification whose relationship to [a legitimate] goal is so attenuated as to render the distinction arbitrary or irrational." Cleburne, 473 U.S. at 446. In Cleburne, the Supreme Court unanimously declared unconstitutional as invidious discrimination a decision by a city to deny a special use permit for the operation of a group home for people with mental retardation. A majority of the Court recognized that "through ignorance and prejudice [persons with

disabilities] 'have been subjected to a history of unfair and often grotesque mistreatment.'" Id. at 454 (Stevens, J., concurring); see id. at 461 (Marshall, J., concurring in the judgment in part). The Court acknowledged that "irrational prejudice," id. at 450, "irrational fears," id. at 455 (Stevens, J.), and "impermissible assumptions or outmoded and perhaps invidious stereotypes," id. at 465 (Marshall, J.), existed against people with disabilities in society at large and sometimes inappropriately infected government decision making.

While a majority of the Court declined to deem classifications based on disability as suspect or "quasi-suspect," it elected not to do so, in part, because it would unduly limit legislative solutions to problems faced by the disabled. The Court reasoned that "[h]ow this large and diversified group is to be treated under the law is a difficult and often technical matter, very much a task for legislators guided by qualified professionals." Id. at 442-443. It specifically noted with approval legislation such as Section 504, which aimed at protecting persons with disabilities, and openly worried that requiring governmental entities to justify their efforts under heightened scrutiny might "lead [governmental entities] to refrain from acting at all." Id. at 444.

Nevertheless, it did affirm that "there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms," id.

at 446, and found the actions at issue in that case unconstitutional. In doing so, it articulated several criteria for making such determinations in cases involving disabilities. First, the Court held that the fact that persons with mental retardation were "indeed different from others" did not preclude a claim that they were denied equal protection; instead, it had to be shown that the difference was relevant to the "legitimate interests" furthered by the rules. Id. at 448. Second, in measuring the government's interest, the Court did not examine all conceivable rationales for the differential treatment of the mentally retarded; instead, it looked to the record and found that "the record [did] not reveal any rational basis" for the decision to deny a special use permit. Ibid.; see also id. at 450 (stating that "this record does not clarify how * * * the characteristics of [people with mental retardation] rationally justify denying" to them what would be permitted to others). Third, the Court found that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable * * * are not permissible bases" for imposing special restrictions on persons with disabilities. Id. at 448. Thus, the Equal Protection Clause of its own force already proscribes treating persons with disabilities differently when the government has not put forward evidence justifying the difference or where the justification is based on mere negative attitudes.

The Supreme Court has also recognized that the principle of equality is not an empty formalism divorced from the realities of

day-to-day life, and thus the Equal Protection Clause is not limited to prohibiting unequal treatment of similarly situated persons. The Equal Protection Clause also guarantees "that people of different circumstances will not be treated as if they were the same." United States v. Horton, 601 F.2d 319, 324 (7th Cir.), cert. denied, 444 U.S. 937 (1979) (quoting Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law 520 (1978)). By definition, persons with disabilities have "a physical or mental impairment that substantially limits one or more * * * major life activities." 42 U.S.C. 12102(2)(A). Thus, as to that life activity, "the handicapped typically are not similarly situated to the nonhandicapped." Alexander, 469 U.S. at 298. The Constitution is not blind to this reality and instead, in certain circumstances, requires equal access rather than simply identical treatment. For "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." Jenness v. Fortson, 403 U.S. 431, 442 (1971).[6/]

[6/] In a series of Supreme Court cases beginning with Griffin v. Illinois, 351 U.S. 12 (1956), and culminating in M.L.B. v. S.L.J., 117 S. Ct. 555 (1996), the Court has held that principles of equality are sometimes violated by treating unlike persons alike. In these cases, the Supreme Court has held that a State violates the Equal Protection Clause in treating indigent parties appealing from certain court proceedings as if they were not indigent. Central to these holdings is the acknowledgment that "a law nondiscriminatory on its face may be grossly discriminatory in its operation." 117 S. Ct. at 569 (quoting Griffin, 351 U.S. at 17 n.11). The Court held in these cases that even though States are applying a facially neutral policy by charging all litigants equal fees for an appeal, the Equal Protection Clause requires States to waive such fees in order to

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Thus, there is a basis in constitutional law for recognition that discrimination exists not only by treating people with disabilities differently for no legitimate reason, but also by treating them identically when they have recognizable differences. As the Sixth Circuit has explained in a case involving gender classifications, "in order to measure equal opportunity, present relevant differences cannot be ignored. When males and females are not in fact similarly situated and when the law is blind to those differences, there may be as much a denial of equality as when a difference is created which does not exist." Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 657 (6th Cir. 1981); see also Lau v. Nichols, 483 F.2d 791, 806 (9th Cir. 1973) (Hufstedler, J., dissenting from the denial of reh'g en banc), rev'd, 414 U.S. 563 (1974). Similarly, it is also a denial of equality when access to facilities, benefits and services is denied because the State refuses to acknowledge the "real and undeniable differences between [persons with disabilities] and others." Cleburne, 473 U.S. at 444.

(...continued)
ensure equal "access" to appeal. Id. at 560. Nor is it sufficient if a State permits an indigent person to appeal without charge, but does not provide free trial transcripts. The Court has declared that the State cannot "extend to such indigent defendants merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.'" Id. at 569 n.16 (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)); see also Lewis v. Casey, 116 S. Ct. 2174, 2182 (1996) (holding that State has not met its obligation to provide illiterate prisoners access to courts simply by providing a law library).

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

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

Congress' decision to follow the teachings of Cleburne in enacting the ADA distinguishes this case from City of Boerne. The Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb et seq. (the statute at issue in City of Boerne) was enacted by Congress in response to the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990). Smith held that the Free Exercise Clause did not require States to provide exceptions to neutral and generally applicable laws even when those laws significantly burdened religious practices. See id. at 887. In RFRA, Congress attempted to overcome the effects of Smith by imposing through legislation a requirement that laws substantially burdening a person's exercise of religion be justified as in furtherance of a compelling state interest and as the least restrictive means of furthering that interest. See 42

U.S.C. 2000bb-1. The Court found that in enacting this standard, Congress was not acting in response to a history of unconstitutional activity. Indeed, "RFRA's legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry." City of Boerne, 117 S. Ct. at 2169. The Court found that Congress was "attempt[ing] a substantive change in constitutional protections," id. at 2170, rather than attempting to "enforce" a recognized Fourteenth Amendment right.

As such, the Court found RFRA to be an unconstitutional exercise of Section 5. It explained that the authority to enforce the Fourteenth Amendment is a broad power to remedy past and present discrimination and to prevent future discrimination. Id. at 2163, 2172. And it reaffirmed that Congress can prohibit activities that themselves were not unconstitutional in furtherance of its remedial scheme. Id. at 2163, 2167, 2169. It stressed, however, that Congress' power had to be linked to constitutional injuries, and that there must be a "congruence and proportionality" between the identified harms and the statutory remedy. Id. at 2164.

In City of Boerne the Court found that RFRA was "out of proportion" to the problems identified so that it could not be viewed as preventive or remedial. Id. at 2170. First, it found that there was no "pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith." Id. at 2171; see also id. at 2169 (surveying legislative record).

It also found that RFRA's requirement that the State prove a compelling state interest and narrow tailoring imposed "the most demanding test known to constitutional law" and thus possessed a high "likelihood of invalidat[ing]" many state laws. Id. at 2171. While stressing that Congress was entitled to "much deference" in determining the need for and scope of laws to enforce Fourteenth Amendment rights, id. at 2172, the Court found that Congress had simply gone so far in attempting to regulate local behavior that, in light of the lack of evidence of a risk of unconstitutional conduct, it could no longer be viewed as remedial or preventive. Id. at 2169-2170.

As we have shown above, none of the specific concerns articulated by the Court apply to the ADA.[7/] But the ADA differs from RFRA in a more fundamental way. RFRA was attempting to expand the substantive meaning of the Fourteenth Amendment by imposing a strict scrutiny standard on the States in the absence of evidence of widespread use of constitutionally improper criteria. The ADA, on the other hand, is simply seeking to make effective the right to be free from invidious discrimination by

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[7/] First, there was substantial evidence by which Congress could have determined that there was a "pattern or practice of unconstitutional conduct." Second, the statutory scheme imposed by Congress did not attempt to impose a compelling interest standard, but a more flexible test that requires "reasonable accommodations." This finely-tuned balance between the interests of persons with disabilities and public entities plainly manifests a "congruence" between the "means used" and the "ends to be achieved." See City of Boerne, 117 S. Ct. at 2169. Moreover, there is no problem regarding judicially manageable standards, as the courts have regularly applied the "reasonable accommodation" test under Section 504 to recipients of federal funds for the past 20 years.

establishing a remedial scheme tailored to detecting and preventing those activities most likely to be the result of past or present discrimination.

Viewed in light of the underlying Equal Protection principles, the ADA is appropriate preventive and remedial legislation. First, it is preventive in that it established a statutory scheme that attempts to detect government activities likely tainted by discrimination. By requiring the State to show on the record that distinctions it makes based on disability, or refusals to provide meaningful access to facilities, programs and services, are not the result of prejudice or stereotypes, but rather based on legitimate governmental objectives, it attempts to ensure that inaccurate stereotypes or irrational fear are not the true cause of the decision. Cf. School Bd. of Nassau County v. Arline, 480 U.S. 273, 284-285 (1987). This is similar to the standards articulated by the Court in Cleburne.

Second, the ADA is remedial in that it attempts to ensure that the interests of people with disabilities are given their due. Not surprisingly, given their profound segregation from the rest of society, see 42 U.S.C. 12101(a)(2), the needs of persons with disabilities were not taken into account when buildings were designed, standards were set, and rules were promulgated. Thus, for example, sidewalks and buildings were often built based on the standards for those who are not disabled. The ability of people in wheelchairs to use them or of people with visual impairments to navigate within them was not likely considered.

See U.S. Commission on Civil Rights, supra, at 21-22, 38. Even when considered, their interests may not have been properly weighed, since "irrational fears or ignorance, traceable to the prolonged social and cultural isolation of [persons with disabilities] continue to stymie recognition of [their] dignity and individuality." Cleburne, 473 U.S. at 467 (Marshall, J.).

Policies and criteria restricting access to government programs and services are just as much a barrier to some as physical barriers are to others. As Congress and the Supreme Court recognized, many of the problems faced today by persons with disabilities are a result of "thoughtlessness or indifference -- of benign neglect" to the interaction between those purportedly "neutral" rules and persons with disabilities.[8/] As a result, Congress determined that for an entity to treat persons with disabilities as it did those without disabilities was not sufficient to eliminate the effects of years of segregation and to give persons with disabilities equally meaningful access to every aspect of society. See 42 U.S.C. 12101(a)(5); see also U.S. Commission on Civil Rights, supra, at 99. When persons with disabilities have been segregated, isolated, and denied effective participation in society, Congress may conclude that affirmative measures are necessary to bring them into the mainstream. Cf. Fullilove, 448 U.S. at 477-478.

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

The ADA thus falls neatly in line with other statutes that have been upheld as valid Section 5 legislation. For when there is evidence of a history of extensive discrimination, as here, Congress may prohibit or require modifications of rules, policies and practices that tend to have a discriminatory effect on a class or individual, regardless of the intent behind those actions. In South Carolina v. Katzenbach, 383 U.S. 301, 325-337 (1966), and again in City of Rome v. United States, 446 U.S. 156, 177 (1980), both cited with approval in City of Boerne, the Supreme Court upheld the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect. Similarly, the courts of appeals have unanimously upheld the application of Title VII's disparate impact standard to States as a valid exercise of Congress' Section 5 authority. See Grano v. Department of Dev., 637 F.2d 1073, 1080 n.6 (6th Cir. 1980) (collecting cases); see also City of Boerne, 117 S. Ct. at 2169 (agreeing that "Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause"); United States v. City of Black Jack, 508 F.2d 1179, 1184-1185 (8th Cir. 1974) (stating that the discriminatory effects standard of the Fair Housing Act is a valid exercise of

Congress' power under enforcement provision of Thirteenth Amendment), cert. denied, 422 U.S. 1042 (1975).[9/]

In exercising its broad power under Section 5 to remedy the on-going effects of past discrimination and prevent present and future discrimination, Congress is afforded "wide latitude." City of Boerne, 117 S. Ct. at 2164. As the Supreme Court reaffirmed in City of Boerne, "[i]t is for Congress in the first instance to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." Id. at 2172 (quoting Katzenbach, 384 U.S. at 651).

Following this tradition, in the first appellate opinion on the subject since City of Boerne, the Ninth Circuit recently held that "the purpose of both the ADA and section 504 of the Rehabilitation Act is to prohibit discrimination against the disabled. In both acts, Congress explicitly found that persons with disabilities have suffered discrimination. Both the ADA and the Rehabilitation Act therefore are within the scope of

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[9/] The third prong of the Katzenbach test -- whether the legislation "is not prohibited by but is consistent with 'the letter and spirit of the constitution,'" 384 U.S. at 651 -- was not separately argued by the defendant. To the extent the defendant might argue that the ADA as applied to government employment is inconsistent with principles of federalism and thus violates the spirit of the Constitution, it is simply incorrect. The Fourteenth Amendment "fundamentally altered the balance of state and federal power struck by the Constitution." Seminole Tribe, 116 S. Ct. at 1125. Thus a long "line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States." Fitzpatrick, 427 U.S. at 455.

appropriate legislation under the Equal Protection Clause as defined by the Supreme Court. At the same time, neither act provides remedies so sweeping that they exceed the harms that they are designed to redress." Clark v. California, 123 F.3d 1267, 1270 (9th Cir.) (citations omitted), petition for cert. filed, 66 U.S.L.W. 3308 (Oct. 20, 1997) (No. 97-686). This holding is consistent with virtually all the other courts that have considered the issue since Seminole Tribe, most of which are in agreement that Congress' abrogation of Eleventh Amendment immunity for suits under the ADA is "appropriate legislation" to enforce the Fourteenth Amendment. See Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997); Martin v. Kansas, 978 F. Supp. 992 (D. Kan. 1997); Williams v. Ohio Dep't of Mental Health, 960 F. Supp. 1276 (S.D. Ohio 1997); Hunter v. Chiles, 944 F. Supp. 914 (S.D. Fla. 1996); Armstrong v. Wilson, 942 F. Supp. 1252 (N.D. Cal. 1996), aff'd on other grounds, 124 F.3d 1019 (9th Cir.), petition for cert. filed, 66 U.S.L.W. 3308 (Oct. 20, 1997) (No. 97-686); Niece v. Fitzner, 941 F. Supp. 1497 (E.D. Mich. 1996); Mayer v. University of Minn., 940 F. Supp. 1474 (D. Minn. 1996).[10/] Although some of these decisions pre-

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[10/] But see Garrett v. Board of Trustees, Nos. Civ.A. 97-AR-0092, Civ.A. 97-AR-2179-S, 1998 WL 21879 (N.D. Ala. Jan. 13, 1998); Brown v. North Carolina Div. of Motor Vehicles, No. 5:96-CV-689, 1997 WL 755010 (E.D.N.C. Nov. 28, 1997), appeal pending, No. 97-2784 (4th Cir.); Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168 (S.D. Ohio 1997), appeal pending, No. 97-3933 (6th Cir.); Pierce v. King, 918 F. Supp. 932 (E.D.N.C. 1996) (dictum), aff'd on other grounds, 131 F.3d 136 (Table), 1997 WL 770564 (4th Cir. Dec. 11, 1997).

date City of Boerne, for the reasons discussed above they remain good law.

CONCLUSION

The district court had jurisdiction over the plaintiffs' ADA claims, and this Court has jurisdiction to address these appeals on the merits.

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 1998, two copies of the foregoing Brief for the United States as Intervenor were served by first-class mail, postage prepaid, on the following counsel:

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