No. 99-1240

In the Supreme Court of the United States

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

v.

PATRICIA GARRETT, ET AL.

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

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

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OPINIONS BELOW

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

JURISDICTION

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

STATEMENT

1. *Statutory Framework*: The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services,

> programs, activities, benefits, jobs, or other opportunities.

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

Furthermore, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6). "[T]he continuing existence of unfair and unnecessary discrimination and prejudice," Congress concluded, "denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. 12101(a)(9). In short, Congress found that persons with disabilities

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

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

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

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

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

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

12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B).[1] A "[q]ualified individual with a disability" is a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service, including employment. 42 U.S.C. 12131(2); 28 C.F.R. 35.140.[2] Title II does not normally require a public entity to make its existing physical facilities accessible, although alterations of those facilities and any new facilities must be made accessible. 28 C.F.R. 35.150(a)(1), 35.151. Department of Justice regulations provide that, except for new construction and altera-

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

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

tions, public entities need not take any steps that would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. 35.150(a)(3); see also 28 C.F.R. 35.130(b)(7), 35.164; *Olmstead* v. *L.C.*, 527 U.S. 581, 606 n.16 (1999).

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

ARGUMENT

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

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

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

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

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

1. Congress exhaustively studied the problem

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

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

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

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

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

Congress itself engaged in extensive study and fact-finding concerning the problem of discrimination against persons with disabilities, holding 13 hearings devoted speci-

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

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

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

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

fically to the consideration of the Disabilities Act.[9] In addition, a congressionally designated Task Force held 63 public forums across the country, which were attended by more than 7,000 individuals. Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 18 (1990) (Task Force Report). The Task Force also presented to Congress evidence submitted by

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[18] The Task Force submitted to Congress "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" and "the most extreme isolation, unemployment, poverty, psychological abuse and physical deprivation experienced by any segment of our society." 2 *Leg. Hist.* 1324-1325. Those documents—mostly handwritten letters and commentary collected during the Task Force's forums—were part of the official legislative history of the Disabilities Act.

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

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

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See *id.* at 1336, 1389. Because the handwritten submissions were never formally indexed by Congress, we cite to them by State and Bates stamp number. Although the Task Force presented 5,000 such submissions to Congress—approximately 600 of which alleged discrimination by state actors—we are lodging with the Clerk of the Court only those testimonials that we cite; the balance will be provided to the Court upon request.

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

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

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[19] See also H. R. Rep. No. 485, *supra*, Pt. 2, at 29 (woman denied teaching credential because of her paralysis); 2 *Leg. Hist.* 1174-1175 (Susan Downie) (state facility asks person with disability during job interview "humiliating, unethical, and illegal questions about my disability * * * [such as] if my mother had taken drugs while she was pregnant with me" and then denied her the job); *id.* at 1169-1170 (Sara Bloor) (epileptic denied teaching position even though seizure free); *id.* at 1611 n.9 (Arlene Mayerson) (teaching license denied "on the grounds that being confined to a wheelchair as a result of polio, she was physically and medically unsuited for teaching"); *id.* at 1005 (Belinda Mason) (woman fired from school cafeteria management position when her son contracted AIDS); *May 1989 Hearings* 404 (Nat'l Orgs. Responding to AIDS) (professor of veterinary medicine at state university in Kansas fired when it was learned that he had AIDS); Task Force Report 21 (employee with mental retardation forced to quit job due to harassment and ridicule by superior in the California Conservation Corps); Kan. 676 (Kansas Department of Trans-

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

criminatory attitudes of officials.[36]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2000

APPENDIX

CONSTITUTION OF THE UNITED STATES

AMENDMENT XI

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

AMENDMENT XIV

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

* * * * *

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

THE AMERICANS WITH DISABILITIES ACT OF 1990

§12101. Findings and purpose

(a) Findings

The Congress finds that—

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

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

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

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

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards

and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

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

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

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

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

(b) Purpose

It is the purpose of this chapter—

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

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

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

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

Title I of The Americans With Disabilities Act

§12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes—

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

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

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

(D) other similar services and actions.

(2) Disability

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

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

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

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

§12111. Definitions

As used in this subchapter:

(1) Commission

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

(2) Covered entity

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

(3) Direct threat

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

(4) Employee

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

(5) Employer

(A) In general

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

(B) Exceptions

The term "employer" does not include-

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

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

(6) Illegal use of drugs

(A) In general

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

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

(B) Drugs

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

(7) Person, etc.

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

(8) Qualified individual with a disability

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

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

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

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

(10) Undue hardship

(A) In general

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

(B) Factors to be considered

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

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

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

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

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

§ 12112. Discrimination

(a) General rule

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

(b) Construction

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Covered entities in foreign countries

(1) In general

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

(2) Control of corporation

(A) Presumption

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

(B) Exception

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

(C) Determination

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

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

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

(d) Medical examinations and inquiries

(1) In general

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

(2) Preemployment

(A) Prohibited examination or inquiry

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

(B) Acceptable inquiry

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

(3) Employment entrance examination

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

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

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

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

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

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

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

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

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

(B) Acceptable examinations and inquiries

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

(C) Requirement

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

§12113. Defenses

(a) In general

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

(b) Qualification standards

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

(c) Religious entities

(1) In general

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

(2) Religious tenets requirement

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

(d) List of infectious and communicable diseases

(1) In general

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

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

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

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

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

Such list shall be updated annually.

(2) Applications

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

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

(3) Construction

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

§12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

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

(b) Rules of construction

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

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

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

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

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

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

(c) Authority of covered entity

A covered entity—

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

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

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

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

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

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

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

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

(d) Drug testing

(1) In general

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

(2) Construction

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

(e) Transportation employees

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

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

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

§12115. Posting notices

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

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

§12116. Regulations

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

§12117. Enforcement

(a) Powers, remedies, and procedures

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

(b) Coordination

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

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

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

§12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

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

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

(2) Qualified individual with a disability

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

§12132. Discrimination

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

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

§12133. Enforcement

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

§12134. Regulations

(a) In general

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

(b) Relationship to other regulations

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

(c) Standards

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

Title IV of The Americans With Disabilities Act

§12201. Construction

(a) In general

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

(b) Relationship to other laws

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

(c) Insurance

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

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

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

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

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

(d) Accommodations and services

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

§12202. State immunity

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

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

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

§12203. Prohibition against retaliation and coercion

(a) Retaliation

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

(b) Interference, coercion, or intimidation

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

(c) Remedies and procedures

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

§12204. Regulations by Architectural and Transportation Barriers Compliance Board

(a) Issuance of guidelines

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

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

(b) Contents of guidelines

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

(c) Qualified historic properties

(1) In general

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

(2) Sites eligible for listing in National Register

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

(3) Other sites

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

§12205. Attorney's fees

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

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§12208. Transvestites

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

§12209. Instrumentalities of the Congress

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

(1) In general

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

(2) Establishment of remedies and procedures by instrumentalities

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

(3) Report to Congress

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

(4) Definition of instrumentality

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

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[1] So in original.

[2] So in original.

(5) Enforcement of employment rights

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

(6) Enforcement of rights to public services and accommodations

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

(7) Construction

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

§12210. Illegal use of drugs

(a) In general

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

(b) Rules of construction

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

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

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

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

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

(c) Health and other services

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

(d) "Illegal use of drugs" defined

(1) In general

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

(2) Drugs

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

§ 12211. Definitions

(a) Homosexuality and bisexuality

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

(b) Certain conditions

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

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

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

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

§12212. Alternative means of dispute resolution

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

§12213. Severability

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