IN THE SUPREME COURT OF THE UNITED STATES

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BOARD OF TRUSTEES OF UNIVERSITY :

OF ALABAMA, ET AL., :

Petitioners :

v. : No. 99-1240

PATRICIA GARRETT, ET AL., :

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Washington, D.C.

Wednesday, October 11, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JEFFREY S. SUTTON, ESQ., Columbus, Ohio; on behalf of the Petitioners.

MICHAEL GOTTESMAN, ESQ., Washington, D.C.; on behalf of the Respondents.

SETH P. WAXMAN, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 99-1240, the Board of Trustees of the University of Alabama v. Patricia Garrett.

Mr. Sutton.

ORAL ARGUMENT OF JEFFREY S. SUTTON

ON BEHALF OF THE PETITIONERS

MR. SUTTON: Thank you, Mr. Chief Justice, may it please the Court:

In enacting the Americans with Disabilities Act in 1990, Congress invoked its powers to regulate interstate commerce and to enforce the Fourteenth Amendment. We do not challenge Congress' authority to pass the ADA under the Commerce Clause and, indeed, doubt anyone ever would bring such an across-the-board attack on the law, yet it is precisely the virtues of the ADA as a matter of Commerce Clause legislation, its breadth of coverage, its exacting accommodation requirements, that make it unsustainable as a section 5 law.

Now, before this Court has authorized Congress to impose extra constitutional duties on the States, it has required the Congress to show that the States brought this loss of authority upon themselves first by engaging in a widespread pattern and practice of unconstitutional

conduct and, second, by showing that the remedial legislation is proportionate and congruent in nature.

QUESTION: Let's --

QUESTION: Mr. Sutton, there were congressional findings that there has been discrimination against the disabled in voting, health services, transportation, education, and so on, and there are numerous examples in the legislative record, and those are areas of traditional State control. Do you think that those findings are somehow false, or not relevant in some way, or that the discrimination is just not unconstitutional, or what?

MR. SUTTON: Your Honor, they're exceedingly relevant, and they certainly sustain the ADA as matter of Commerce Clause legislation, but just as with Kimel and the age laws they refer only to discrimination in general. They don't establish constitutional violations.

QUESTION: Well, that's what I'm trying to press you on a little bit, because the findings in some instances are in areas that are under traditional State control.

MR. SUTTON: That's true, Your Honor, and there's no doubt if we had a situation where Congress had actually identified constitutional violations in these areas of State control, Congress would have section 5 authority.

QUESTION: Did the findings distinguish at all between discrimination that was the result of the State as opposed to, say, the county or the city?

MR. SUTTON: Not at all, Your Honor. There's no distinction whatsoever between State, city and county when it comes to constitutional violations. It's usually just local government and State government generically put together, but the key point is in the ADA the age laws, in the statement of purpose and findings, it was exactly the same. In fact, in the age --

QUESTION: Why isn't it a constitutional violation when one witness said, the Essex Junction School System said they were not hiring me because I was using a wheelchair?

MR. SUTTON: Well, Your Honor, it might well be a constitutional violation, but the fact of the matter is that particular allegation was won by just one side of the dispute.

QUESTION: Well, I mean, I pick that out because the SG's brief is filled with references, and we have all these amicus briefs that are filled with references along the lines I just said.

Now, if I -- is it that I'm supposed to count all those, and they have a whole lot here in a huge stack of briefs, and count them all and then say, well, they're

just not enough, or there are enough? Why wouldn't, say, 200 instances like that be enough?

MR. SUTTON: Well, the first problem, Your Honor, is that it wouldn't be a remedial section 5 problem because, if those allegations are true, if there's no rational explanation for what was done they all violate State law. They would -- all 50 States by 19 --

QUESTION: Well, they tell us, for example, that a lot of States didn't have laws, to use this case, involving cancer, or perceptions of handicap which really weren't, and then they list all kinds of flaws in those laws in these briefs, and I suppose they're probably right in terms of the facts here.

MR. SUTTON: But Your Honor, the risk is one of constitutional violation.

QUESTION: Well, I mean, that's what I'm asking. That's what I'm trying to get to. Why isn't it a constitutional violation where Congress has lots and lots of instances of States that seem to discriminate against handicapped people under instances where, given the information in front of them, for some reason or other, these handicapped people have not been able successfully to avail themselves of State law.

MR. SUTTON: Your Honor, those would be relevant if Congress had made a second finding, which is just

critical and is what is exactly missing here, and that finding had been, despite this conduct by States in local areas of local control, the States weren't enforcing the very antidiscrimination laws they had on the books.

Let's draw an analogy to the race cases. If in the early sixties every State in the country banned literacy tests, all right, banned the very thing Congress was trying to get at, it would not be enough for Congress to say literacy tests are causing problems. They would have to make a second showing which is, the States are not enforcing their laws on the books.

QUESTION: So if, in fact, in the sixties, there had been discrimination in the South, and we discovered there was a State law banning racial discrimination, Congress would not have been able to pass laws against racial discrimination in your view without --

MR. SUTTON: In the early sixties they would have been, because I think in the early sixties you would have been able to show that the States, those were shams. They were statutory Potemkin villages. They meant nothing.

QUESTION: And today? What about today?

MR. SUTTON: There's no showing on that front, not at all, Your Honor. There's no -- Congress did not even look in the direction. It's true they looked in the

direction of -- excuse me.

QUESTION: Let me ask you, suppose we have a real case or a hypothetical case along the lines described by Justice Breyer, a very egregious case, a person absolutely confined to a wheelchair. That person can't get into the court hearing on time, or can't get into a voting booth, and you have an insensitive State official. In that single discrete case, could there be an action brought under the Equal Protection Clause to compel the access, compel access to the court, compel access to the building?

MR. SUTTON: Well, I think you've got two possible issues there, one what type of review, would that be a rational basis setting, or because it's a --

QUESTION: That's why I'm asking.

MR. SUTTON: -- fundamental right, and so therefore would you have heightened review.

I think there would be situations in which you might bring a constitutional claim, but -- and I hope I'm getting to your point --

QUESTION: Would the court be wrong to say that there's a quasi -- would the court be wrong to say there's a quasi-suspect class here, or suspect class?

MR. SUTTON: I don't think the issue would be changing rational basis scrutiny. The issue would be

whether it's a voting rights problem which gets heightened review, but Your Honor, the key point on voting, access to courthouses and access to voting booths, the ADA does not correct that problem.

To the extent you think that was the constitutional problem the ADA was getting at, it exempted all --

QUESTION: Well, what I'm trying to find out --

QUESTION: Mr. --

QUESTION: -- is if there's ever an equal protection violation on a stand-alone discrete case --

MR. SUTTON: Mm-hmm.

QUESTION: -- where a State discriminates against a person by reason of a severe handicap.

MR. SUTTON: That --

QUESTION: Does that state an equal protection violation, and if it does, why is it that the courts can do what Congress cannot? That's the line of inquiry I --

MR. SUTTON: Why is it that the courts have more authority here to limit that type of State conduct than Congress?

QUESTION: Yes. It would seem that that's one consequence of your argument, and I want you to address it.

MR. SUTTON: Well, Your Honor, I think if it

were -- if I were in the situation where I was saying the courts had more remedial authority than the Congress I'd have a real problem, because of course that's not what's going on. The point of section 5 is to give Congress remedial authority.

But the point I'm trying to make on the courthouse access to buildings point is that that's not something the ADA addresses. The Congressional Record shows that by 1990 every State in the country had an architectural barriers law that precluded the building of new buildings that didn't have access.

QUESTION: But you're willing to concede, apparently, that it is a constitutional violation not to make special provision in public buildings for those who are handicapped.

MR. SUTTON: Well --

QUESTION: That is a denial of equal protection of the laws.

MR. SUTTON: I'm not willing to concede that, Your Honor, because --

QUESTION: Do you know of any case that has held that?

MR. SUTTON: I don't, Your Honor and I would, in fact, point the Court to Alexander --

QUESTION: When Congress was speaking of

discrimination could it possibly have been referring to the statutory definition of discrimination?

MR. SUTTON: Absolutely, and there's no doubt that's what they were referring to.

QUESTION: Is there any compatibility between that and the constitutional requirement of equal protection?

MR. SUTTON: There's not. In fact, of all the Federal --

QUESTION: I don't know why you're running away from it. It seems to me that's the core issue in this case.

QUESTION: Mr. Sutton --

QUESTION: Whether, in fact -- whether, in fact, making special accommodation for those who are handicapped, or the failure to do so, is a violation of the Constitution. I think if it is your case is a hard one.

MR. SUTTON: It's not, and there's no Federal civil rights statute --

QUESTION: But Mr. Sutton, isn't this an employment case rather than an access case?

MR. SUTTON: Well, Your Honor, it's a challenge to the ADA across the board. There's just one abrogation --

QUESTION: But the particular claims are employment claims, and is it not at least theoretically possible that refusal of employment to a person because of a handicap would be an equal protection violation, regardless of whether the access provision was?

MR. SUTTON: Well, if there were only arbitrary justifications for a decision --

QUESTION: Should they have ruled --

MR. SUTTON: -- you have no problem.

QUESTION: -- that nobody with an artificial limb can ever have a job of a certain character? You could say that wouldn't pass the rational basis test, couldn't you?

MR. SUTTON: There's no evidence, Your Honor, that there are any such State laws --

QUESTION: No, but in that kind of a hypothetical you would agree that that could be a constitutional violation?

MR. SUTTON: If there were -- no -- if all you had were arbitrary justifications for that law, of course you would. That's City of Cleburne, and that's all of the equal protection cases.

QUESTION: If there were no rational basis for it, in other words.

MR. SUTTON: Absolutely, Your Honor.

QUESTION: But there might be a rational basis for refusing to hire a teacher who was in a wheelchair --

MR. SUTTON: If this Court's --

QUESTION: -- if only that the school is not properly equipped to accommodate such a teacher.

MR. SUTTON: This Court said that very thing in a case involving the Federal Government, where it said budgetary constraints alone can state a rational basis.

QUESTION: How about Justice Stevens' hypothesis, a man with an artificial limb turned down for a teacher, just without any real basis for it, you know, we're just afraid we might not be able to handle you.

MR. SUTTON: Well, if there --

QUESTION: That would be arbitrary.

MR. SUTTON: I think that is arbitrary, and I think that would be a problem. The question, though, is whether there was evidence of that going on in the eighties, number 1, and number 2, were State laws against that very thing not being enforced.

QUESTION: Well, assuming there was evidence of that kind of discrimination, I really don't understand the argument that the fact that there are State remedies also available makes it impermissible for there to be a Federal remedy.

MR. SUTTON: Oh, there can be a Federal remedy,

and that's why the Commerce Clause legislation is fine. The question is whether you can trump --

QUESTION: No, I --

MR. SUTTON: -- the Tenth or Eleventh Amendment.

QUESTION: Why couldn't there be a Fourteenth Amendment Federal remedy, even though there also was a State remedy? I don't quite understand the thrust of your main argument.

MR. SUTTON: Because the very point of section 5 is to correct State conduct that violates the Constitution, and if the States aren't violating the Constitution, one --

QUESTION: Yes, but the fact that a State remedy exists does not necessarily mean that discrimination is not taking place.

MR. SUTTON: I agree entirely, and that's why one has to look at whether the State laws are being enforced.

QUESTION: So I take it if you went back to Justice Breyer's example and used the hypothesis of maybe 200 examples -- I don't know how many we've got, but maybe that many were adduced -- and in each of those instances Congress had said not only, we find here is an example of an instance of discrimination, but Congress had also expressly said, and we find that in this example there was

no enforcement of State law to correct it, and it had matched its 200 examples with 200 examples of State failure to enforce, do I understand your position to be that then there would be an adequate legislative predicate under section 5?

MR. SUTTON: Yes, and I -- the answer is yes, but I just want to --

QUESTION: So that if you win this case, Congress could go back and dredge up from its record its 200 examples and, if Congress said well, we now -- you know, we've checked into this, and in each of these examples there was no State enforcement, Congress could then pass the act again under section 5 and it would -- on your view would be valid?

MR. SUTTON: No. Yes to the first, but no to the second.

QUESTION: Okay.

MR. SUTTON: The second problem with the ADA is, it's unlike any section 5 law to my knowledge ever enacted, and certainly ever upheld by the Court, in the sense that it truly is a constitutional amendment in section 5 clothing. It applies not just to every State, but every form of Government service that ever existed or ever will exist.

That truly is evading Article 5 and the

requirement that two-thirds of each House approve a constitutional amendment and, most importantly, the States, three-fourths of them, get an opportunity to change it, and that's exactly what would happen, and that's what would be very risky about allowing that hypothetical to justify the ADA.

QUESTION: Mr. Sutton, would you -- I thought we were talking just about the employment section, those of the ADA, but you're saying no, it's broader than that.

MR. SUTTON: Your Honor, we've briefed the case that it is all of the ADA. There's just one abrogation provision that applies to, you know, title I, title II, and title IV, so I'm not sure how you could slice it that we're just dealing with employment, but if, Your Honor, we were dealing with employment, and you had Justice Souter's hypothetical, 200 instances, just employment, States refusing to enforce, sure, you would have a problem.

QUESTION: Well, you would want to know, wouldn't you, Mr. Sutton, whether these 200 instances were, quote, discrimination, close quote, in the sense that Congress used it, or discrimination in the sense that it's used in the City of Cleburne --

MR. SUTTON: Well, I --

QUESTION: -- as that's different.

MR. SUTTON: Well, I assume, Justice Souter,

that's what you were saying. Yes. I mean, absolutely.

But my -- if we're going to talk about this solely as an employment case, which is fine by us, we're perfectly agnostic about the issue, this case is Kimel. I mean, it's exactly like Kimel. It's employment. You've got, in fact, a greater gap between a statutory standard and a constitutional standard, and an equally anemic record when it comes to constitutional violations. I mean, even --

QUESTION: Well, the difference that I wondered about is, Kimel I thought was ambiguous as to whether or not a rational basis test applies, and I'd be interested -- I know you're probably aware of the argument, the SG makes it, that rational basis is a test that courts have created in order not to intrude upon the province of the legislature.

But there is no reason to have the province of the legislature not intruding upon the province of the legislature and, therefore, you don't need to apply that strict a matter and should respect the congressional judgment that, in fact, there is unreasonable discrimination being exhibited in these States against handicapped people.

I would like to get your response to that kind of an argument.

MR. SUTTON: Yes, Your Honor. It's an important point. There's no doubt that when it comes to run-of-the-mill legislation, City of Cleburne is right. We need that authority to enact these 50 State laws and the 30 Federal laws that protect the rights of the disabled, so there's just no doubt about that at all.

But in the section 5 context you've got two other issues, the relationship between this Court and its final Marbury power and the relationship between the Congress and the States, and that's why the section 5 inquiries are always different. You've got a zero sum game. Congress' gain is invariably the State's loss, and just as Congress gets a presumption of constitutionality in enacting these 30 Federal disability laws, so do the States get a presumption of constitutionality that when they pass these 50 State laws, 1) they're presumptively good and 2) they're enforcing them.

Now, that can -- you know, that's not dispositive, of course. Ultimately, if it turns out the States aren't enforcing them, they're just shams, well then they're got a problem and, you know, that's why the voting rights laws are --

QUESTION: I don't think the issue is one that is encompassed by getting into presumptions of constitutionality. The issue, I think, that's getting

raised is one about, let's say the competence of the courts to make judgments, particularly when we get into the rational basis area to make sound judgments and it seems that the courts are not as good second-guessers there, perhaps, as legislatures may be.

But the fact is, Congress is a legislature, and it is not laboring under the judicial disability as a second-guesser, so why do we -- I mean, I go back to the question raised. Why should we apply the same standard that we would if we were dealing with a court's review?

MR. SUTTON: Well, I hope I'm answering both questions. If one is concerned about the institutional capacity of the courts versus Congress in this area, the last thing this Court should be doing in this case is making ultimately these section 5 findings itself, okay.

So if you're going to agree with Justice Breyer and the suggestion in your question, Justice Souter, that there has to be a little more deference to Congress in this area, the last thing the Court should be doing is in a situation where they don't ask the right questions, constitutional violations as opposed to violating a statutory standard, number 1, number 2, are the State laws, all 50 of them on the books being enforced, the last thing anyone's --

QUESTION: You're right, but this is just a

question of standard, and you're saying, look, whatever standard you apply, be careful to realize that you don't have, on your view, a sufficient predicate in the record to pass muster on any standard. That's one argument, and I think we understand that, but why should the standard be the same?

MR. SUTTON: Because, Your Honor, it's not easy being the Supreme Court and deciding what the Constitution means in all these cases, but the bottom line is the Marbury power rests here in this building. It doesn't rest anywhere else, and clever arguments about how Congress needs more deference to find out when constitutional violations really exist is just a nice way, a polite way of putting the fact that they across the street get to decide what the Constitution means.

I don't know how else to divide it, but that is what's going on, if they can enact a law that applies to every Government services --

QUESTION: Can I ask you, on this very -- the SG has headlined in his brief, S report number 116, at page 18, and in big letters, current Federal and State laws are inadequate. That was right out of the Senate report, so why wouldn't that be a finding that current Federal and State laws are inadequate?

MR. SUTTON: It is a finding, it's entitled to

deference, and it applies to the Commerce Clause Article I justification for passing this law. That does not suffice to show there are constitutional violations, and certainly --

QUESTION: The question is, I suppose, inadequate to do what, inadequate to do the good things that need doing?

MR. SUTTON: Absolutely.

QUESTION: Or inadequate to assure compliance with the Constitution of the United States?

MR. SUTTON: Absolutely.

QUESTION: And the report doesn't say the latter.

MR. SUTTON: No, it does not and I invite everyone to read it. That's exactly what's going on.

QUESTION: All right. That's the other question, but that's what you were answering. Why isn't this a constitutional -- if Congress finds that there are all these problems going on with the States, and the current State laws are inadequate to help these handicapped people who are discriminated against, why isn't that sufficient to show the problem that permits them to act under section 5?

MR. SUTTON: I hope -- I'm fearful that I'm not -- I didn't hear the question, but let me try to

answer. You can cut me off as soon as it appears I didn't hear what you were saying.

But they've got to be constitutional violations, Your Honor, and if they're not constitutional violations, they haven't asked the right question.

QUESTION: And they are not constitutional violations because --

MR. SUTTON: That's not the question they were asking. The question they were asking is precisely the one Justice Scalia asked, which is, isn't -- is this adequate, can we do a better job. Of course we can do a better job.

You know, I think in 1985 the Court issued two decisions which seemed to me to get right to the heart of the matter. Not only was it --

QUESTION: Why weren't they asking about the constitutionality if they explicitly abrogate the State's immunity?

MR. SUTTON: I've no idea, Your Honor. I've looked through the --

QUESTION: They could only do that under the Fourteenth Amendment.

MR. SUTTON: That's exactly right.

QUESTION: So then they must have been talking about the Fourteenth Amendment.

MR. SUTTON: Not necessarily, Your Honor. That doesn't follow necessarily at all. I mean, one you could have an abrogation provision, and States are free to waive on their own.

QUESTION: Well, Seminole wasn't decided until 1997.

MR. SUTTON: No, until 7 years afterwards, that's exactly right, but I've looked to the Congressional Record trying to find instances where Congress was aware of the section 5 inquiry. I found two. One of them cites Fullilove, Representative Dellums saying there's a broad section 5 power. Fullilove is no longer good law.

The second cites Morgan v. Katzenbach and just has a sentence that says, embracing the broader version of Morgan saying that if there's an antidiscrimination issue out there, Congress can remedy under section 5, but that's not the inquiry, and as early as 1970 it was clear that was not the inquiry in Oregon v. Mitchell, when the Court invalidated Congress' effort to lower the voting age from 21 to 18 in all States in the country.

MR. SUTTON: Mr. Sutton, you've made something in your brief of the absence of a congressional provision to treat the Federal Government, or Federal employment on a par with private sector employment. You emphasized that, but I didn't see the connection between that and the

section 5 inquiry that's before us.

MR. SUTTON: Yes, Your Honor. It goes to the second question, not the record issue but the proportionality issue.

Congress purported to be remedying, in their words, a national epidemic regarding disability discrimination, and they decided that in order to do that you needed money damages actions, which is really all that is at stake here in light of Ex parte Young. How can they say that it's a proportionate and necessary tailored remedy when they're not only not imposing it on private business in many instances, but on themselves?

That just doesn't stand. It's not only the failure to lead by example, just direction, but it doesn't show proportionality. I mean, it proves our very point. This was not needed. It's not proportionate to the very problem they were trying to correct.

QUESTION: What is being imposed on State governments that's not being imposed on private employers?

MR. SUTTON: Money damages actions in public accommodations requirement. Title II applies to any form of discrimination plus access to public services. Under title III those provisions, most of those provisions are extended to private businesses, and there are no money damages remedies there, which really proves the difference

between the State's ability to lobby, and private businesses.

QUESTION: But with respect to the kinds of cases that we're dealing with, with employment, there are money damages against individuals.

MR. SUTTON: That's true, Your Honor. I mean, again -- but if this is an employment case, which is fine by us, it really is controlled by Kimel, because the gap between the statutory standard and the constitutional standard is even broader in this case than it was in Kimel, and then --

QUESTION: Well, your -- I'm sorry.

QUESTION: That's a proposition a little hard to maintain, because in the age discrimination area this Court has never found a violation of the rational basis test, but in the handicapped area we've found a bunch of violations.

MR. SUTTON: This Court has never found one against employment, Your Honor. If we're going to stick with employment, there are none with respect to employment, zero.

QUESTION: But there are a number of other areas where there have been constitutional violations, but none in the age area.

MR. SUTTON: Well, I suspect, Your Honor, if we

reviewed all of the Court's constitutional findings there would be cases in which an elderly person was a plaintiff and won a constitutional case.

QUESTION: Yes, but not that it was unconstitutional to place the discrimination on the basis of that person's age.

MR. SUTTON: I think that's true, Your Honor, but I mean, if you can remedy constitutional violations in one area by transferring it to another area, then we really should talk about the entire ADA, and talk about its biggest flaw. Its biggest flaw that it is a section -- it is a constitutional amendment in section 5 clothing. It applies to every single form of Government service, and if they're allowed to do this, they'll do it in every area, rational basis scrutiny of all sorts.

QUESTION: May I ask you if you think the congressional findings might have been phrased a little differently if they'd been made after the Seminole decision?

MR. SUTTON: It's certainly possible, Your Honor, and one of the best things I think that can be done here is, instead of the Court having to engage in this section 5 inquiry on the basis of the Government lawyers after the fact, let them do it again.

But I will suggest this, Your Honor. It is not

going to be as easy as one submits to say --

QUESTION: It seems to me you're suggesting that we treat the Congress of the United States as a trial court and remand the case to them to prepare better findings.

(Laughter.)

MR. SUTTON: No, Your Honor. No, Your Honor, not at all. The ADA would be invalid. 12202, Section 12202 would be invalid, and it would be up to them to decide what they wanted to do. In fact, in City of Boerne this Court invalidated the RFRA. They're back at it again. They're entitled to do that.

I will submit that there is a bright line here. It's constitutional violations. U.S. Senators, U.S. House of Representatives Members are not going to lightly find States are violating the Constitution, but we want them to ask that question. That's the very point of section 5. We want them to look out, root out this type of invidious discrimination, and if it's going on, have them ask the right question, identify it, and end it.

QUESTION: May I go back to the remedy question that Justice Ginsburg raised? Is it your position that with respect to the damages remedy that you zeroed in on, that that would fail the proportionality test unless the same remedy were applied to the National Government and to

private employers generally? Is that the position that you're taking?

MR. SUTTON: Your Honor, it certainly helps our case and it makes it a lot easier, but to be candid with you, if they imposed this same remedy on the Federal Government, I think they would still have problem, precisely because it applies to every Government service, but it just makes it --

QUESTION: Well, it may not be sufficient, but is it your position that it would be necessary to survive the proportionality --

MR. SUTTON: Not in this case, Your Honor. The breadth of coverage and the gap between the statutory and constitutional standards are enough in this case.

If I could reserve the rest of my time for rebuttal.

QUESTION: Very well, Mr. Sutton.

MR. SUTTON: Thank you.

QUESTION: Mr. Gottesman, we'll hear from you.

ORAL ARGUMENT OF MICHAEL GOTTESMAN

ON BEHALF OF THE RESPONDENTS

MR. GOTTESMAN: Thank you, Mr. Chief Justice, and may it please the Court:

I want to begin by responding to what Mr. Sutton said in his opening, that the ADA rests securely on the

Commerce Clause. No State would ever challenge that, and so what's at issue here is quite narrow.

Indeed, States are challenging in the lower courts the Commerce Clause predicate for title II of the ADA, and they are arguing that in light of this Court's decisions in Lopez and Morrison that so many State activities and programs are not commercial in character and, thus, cannot be reached by the Commerce Clause, so that were this Court to hold that the ADA is not proper Fourteenth Amendment legislation, there is significant danger that the ADA would be without a constitutional --

QUESTION: But has -- Mr. Gottesman, has any court bought that argument? After all, there is the Garcia case to deal with, and --

MR. GOTTESMAN: So far there is one district court that has bought the argument, Pierce v. King, 918 F.Supp. 932. The issue is now pending in several courts of appeals on appeals by the State.

QUESTION: This would be an argument that could be made only by the State, not by a county or a city, I take it.

MR. GOTTESMAN: Well, no, because a county or a city -- if you take the Fourteenth Amendment away, the Fourteenth Amendment argument -- the Eleventh Amendment argument is available, of course, only to a State, but if

you say that the ADA is not grounded in the Fourteenth Amendment and courts later hold that it is not grounded in the Commerce Clause, then it is not appropriate legislation directed to either, as we understand it.

QUESTION: I would think that if you lose the Commerce Clause challenge the least of your worries is the States. You're going to have many more businesses who employ people, that they're going to be exempt.

MR. GOTTESMAN: Well, except only -- title II applies only to the States, and so it, losing title II is losing -- I'm sorry. In that sense it applies to State and local governments, and if it goes down under the Commerce Clause then State and local governments will not be governed by title II.

QUESTION: Mr. Gottesman, I'm not sure that the record here presents much in the way of a title II claim. I know the Ninth Circuit has said that all employment disputes under the ADA are covered only by title I, not title II, that title II addresses public services, and I know the grant of certiorari covered both, ostensibly, because the plaintiffs' cause of action appeared to address both, and I think this Court probably hasn't decided whether all employment cases fall under title I, but if we thought they did, do we have to address the title II issue?

MR. GOTTESMAN: Well, no. If you resolved in this case, although the question is not presented, the conflict among the circuits as to whether employment discrimination also violates title II, and if you decided, adversely to our position, that it does, the position we advanced in the lower courts, then yes, only title I would apply to employment, and only it would be at issue.

But we would hope that before this Court resolved that important issue that has divided the courts of appeals, that there would be an opportunity for briefing.

In this case, the petitioners never raised an objection to title II's application to employment, so it never became an issue in this case.

Now, I want to turn to the merits of the Fourteenth Amendment argument and we want to suggest as a preliminary petitioners have never really acknowledged an important body of Fourteenth Amendment decisional law, which is that even when we're dealing with groups or classifications that are covered by the rational basis standard, it is irrational for a State to act with a purpose that is irrational.

A number of Supreme Court decisions have held that State action that rests on invidious prejudice, irrational fear, false stereotypes that have evolved from

those prejudices and fears, desires not to be discomforted by association with disfavored classes, patronization, if that's what actually motivates a State decision, that itself provides the irrationality which violates the Fourteenth Amendment.

QUESTION: And how does one usually determine that? I mean, I would usually consider it to be irrational and motivated by prejudice when there's no practical reason for it. Doesn't it boil down to the same thing? You look to see whether, indeed, there's a rational basis for what's been done. If there's no rational basis, you say it must be motivated by, you know, irrational prejudice or stereotyping, or whatever.

MR. GOTTESMAN: Well, surely it's the case that when we see that there could be no rational basis, that will fuel our conclusion.

QUESTION: I'm not sure it advances the ball. I think the two boil down to the same.

MR. GOTTESMAN: But the irrational purpose prong of Fourteenth Amendment jurisprudence is not limited only to those cases where it is irrational, where the decision itself would have to be irrational.

That is to say, it's a well-developed concept that a State may take an action where there could be some rational reason for the action, but we determined that

reason is a pretext --

QUESTION: I understand.

MR. GOTTESMAN: -- that what really motivated them was hostility to the class.

QUESTION: I just don't know how you prove that, except by looking at whether there is, in fact, a rational basis. How do you prove that --

MR. GOTTESMAN: Well, that problem of proof, Your Honor, is precisely why Congress found the need to adopt prophylaxis here, and -- but I want to, before I get to that, to lay out just what Congress --

QUESTION: That puts the cart before the horse. They have to have shown unconstitutional State action before they can use the prophylaxis.

MR. GOTTESMAN: Correct, so --

QUESTION: And you're saying the unconstitutional State action is going to be based upon not the realities out there, whether there was a rational basis, but whether, even though there was a rational basis, the States somehow were acting out of irrational hatred of the disabled. How do you establish that?

MR. GOTTESMAN: Well --

QUESTION: Did Congress establish it?

MR. GOTTESMAN: Yes, it did.

QUESTION: Tell me how.

MR. GOTTESMAN: What it did was find that these kinds of motivated actions are widespread. Let's just --

QUESTION: I didn't catch the last word, Mr. -- are what?

MR. GOTTESMAN: Widespread.

QUESTION: Widespread.

MR. GOTTESMAN: Pervasive was their word. What they said in the findings on the face of this statute is that there is pervasive prejudice, still, today, or still in 1990, when they enacted this statute, there is pervasive prejudice against persons with disabilities, a history of purposeful unequal treatment, outright intentional exclusion, stereotypical assumptions that are wholly false and linked to prejudice, and they said these animuses, or animi, have been aimed at a group which has been historically disfavored and which constitutes a discrete and insular minority.

There is a we they way in which people think about persons --

QUESTION: That proves that prejudice exists. Does it prove that State action has been taken on the basis of that prejudice when there is rational basis for the State action?

MR. GOTTESMAN: Yes, because Congress went through enormous volumes of material that showed that

State action had been taken on the basis of that prejudice.

QUESTION: Let's not talk about State action for a minute, Mr. Gottesman. Let's talk about the States and the Eleventh Amendment section. What findings did Congress make, what examples did it use to tie in the States with this sort of irrational discrimination?

MR. GOTTESMAN: Fair enough, Your Honor. Here, I will talk only about States and only about employment, because that is the narrowest focus.

As the Government's brief shows, there was an enormous volume of State discrimination across wide sectors, really everywhere, which is not surprising if you accept the premise that there are pervasive, widely held prevalent views that stigmatize and disadvantage persons with disabilities.

QUESTION: Now, when you say discrimination in answer to this question, you mean --

MR. GOTTESMAN: Fourteenth Amendment --

QUESTION: -- unconstitutional --

MR. GOTTESMAN: Correct.

QUESTION: Unconstitutional action.

MR. GOTTESMAN: Correct. Congress had two -- three kinds of evidence. Number 1, it had individual incidents, and it had them in substantial number.

QUESTION: By people who were acting for the State?

MR. GOTTESMAN: Yes. I'll give you -- here's a couple of examples. A woman crippled by arthritis is denied a job as a teacher in a university because they don't want the students to have to look at her. That is prejudice of a kind that would violate the Fourteenth Amendment.

QUESTION: What was the basis for that finding?

MR. GOTTESMAN: Testimony of the teacher.

QUESTION: Was there -- of the teacher?

MR. GOTTESMAN: Yes.

QUESTION: Was there any testimony on the other side?

MR. GOTTESMAN: No, because the State --

QUESTION: Just hear one side and make a finding?

MR. GOTTESMAN: Well, the States were -- the States spoke about this statute. They spoke in favor of this statute. The States told Congress, a) we have this problem, and b) State laws are inadequate to deal with it. That's why we support the enactment of this statute. We need the remedies.

QUESTION: One witness who says, the reason I didn't get promoted was my arthritis, and Congress says

State -- unconsitutional state discrimination.

MR. GOTTESMAN: There are hundreds of these, Your Honor, not one, hundreds. But broader than that -- if Your Honor wants, I'll give you some more. A microfilmer at the Kansas Department of Transportation is fired, and he is told, the reason you are being fired is that we have now discovered that you have epilepsy. He has throughout his tenure there been performing above the standards required for employment there. Now, Your Honor can say --

QUESTION: That is unconstitutional discrimination?

MR. GOTTESMAN: Yes.

QUESTION: That is irrational discrimination?

MR. GOTTESMAN: Yes.

QUESTION: Whether it's good or bad --

MR. GOTTESMAN: Yes.

QUESTION: -- maybe it shouldn't exist, but you think there is no rational basis.

MR. GOTTESMAN: That is correct, and Congress thought that --

QUESTION: On the facts of this case, could the plaintiffs have gone to a court of competent jurisdiction and established an equal protection violation?

MR. GOTTESMAN: They could if they could prove

the motivation. They would have to prove the motivation. They would have the burden of proving the motivation, but yes, if Pat Garrett was demoted from her position as director of nursing because of some antipathy on the part of the person who made that decision, or some irrational, erroneous stereotype, that would be a case --

QUESTION: Are there cases in the State courts, or in the lower Federal courts which have accepted this rationale?

MR. GOTTESMAN: Well, there are cases -- because of the prior existence of section 504, we've cited in our briefs some cases that were brought. Understandably courts don't reach constitutional questions, so they can find it violates the statute, but the findings made in those cases are that employees were denied jobs out of irrational antipathy.

QUESTION: But if this is so evidently an equal protection violation, why haven't courts for the last 30, 40, 50 years routinely entertained these challenges and given relief?

MR. GOTTESMAN: Because it is the burden on the plaintiffs -- first of all there have not been that many cases -- we -- let me back up for a minute. We would not expect to see reported decisions of that. If a plaintiff comes in and has the kind of evidence that would win an

Equal Protection Clause, the odds are that case is going to get resolved before you ever see a --

QUESTION: You're telling me that over the last 30 or 40 or 50 years there have been numerous cases in the courts where handicapped and disabled people have routinely made equal protection claims and prevailed?

MR. GOTTESMAN: No, that they have made claims and have prevailed under section 504, with the court not reaching, as it should not reach, a constitutional question if it finds that the statute was violated, but I --

QUESTION: Mr. Gottesman, what are your other two arguments? You had three, I believe.

MR. GOTTESMAN: Yes, the three prongs. One was the individual cases. Second is the studies. Congress had a number of studies of State employment. They're all cited in our brief. One of those studies was performed by a congressionally created committee, the Advisory Committee on Intergovernmental Relations, whose very function was to police whether Congress was overregulating the States, unnecessarily regulating the States.

Its membership consisted predominantly of State and local governmental officials, and it submitted a report to every Member of Congress while the ADA was under consideration recounting the findings of its own inquiries

of State officials in which it asked State officials, can you explain why there is such a low percentage of persons with disabilities working for you?

And overwhelmingly those State officials responded, yes, the problem is that middle managers, the people who make these kinds of decisions, the personnel decisions in our State, are afflicted with negative attitudes about persons with disabilities, discomfort about working among them, myths and stereotypes about the incapacity of people with disabilities to perform jobs, things that have been -- and the report goes on to say this. Empirical studies over and over and over again have shown that these myths are false, that there is not a higher turnover rate among persons with disabilities.

QUESTION: Were these findings by Congress?

MR. GOTTESMAN: Yes. Congress -- you say are these findings by Congress. Congress made extensive findings that these things are true, that all of these things are animating decisions.

QUESTION: This report that you're now describing was a report made to Congress by --

MR. GOTTESMAN: That's correct. This was a report to Congress, and we cite six other reports by various -- many of them conducted by the States themselves, saying we have a terrible problem. Our

supervisors have qualms about hiring people with disabilities. They're uncomfortable with it.

So that's the second body of evidence, and the third body of evidence is the evidence that Congress had about the reality of the psychological attitudes in our society about people with disabilities. In accommodating the spectrum, which was the report of the Civil Rights Commission, they relied upon extensive bodies of professional evidence that showed that there were four crippling attitudes that many people in our society have about people with disabilities.

They are discomforted about being around them. They have stigmatic attitudes about them. They think they are inferior, less than normal human beings, that they hold all kinds of erroneous stereotypes about them, that cancer is contagious, that epilepsy --

QUESTION: Do you think it is proper to leap from these general psychological generalizations about the society at large, and State employers in particular, to the conclusion that the States have been acting unconstitutionally?

MR. GOTTESMAN: My light is on, Your Honor.

QUESTION: You may answer, Mr. Gottesman, briefly.

MR. GOTTESMAN: The point is that --

QUESTION: The answer is yes.

MR. GOTTESMAN: No, the answer is --

(Laughter.)

MR. GOTTESMAN: No, the answer is, they have all three together. It's not just, should we rely on psychiatrists. We have the evidence of what actually is happening. We have the acknowledgements of the State in these studies, and we have the understanding of why this is happening from the psychological studies.

QUESTION: Thank you, Mr. Gottesman.

General Waxman, we'll hear from you.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE UNITED STATES

GENERAL WAXMAN: Mr. Chief Justice, and may it please the Court:

The question was -- reference was made to the caption in the Senate report, and it also appears in the House report, of Congress' conclusion that the State remedies were inadequate, a conclusion that was also supported by the 50 State Governors' committees that examined this issue, and the question I think that Justice Scalia asked was, inadequate to do what, because that, after all, is the issue.

Now, this is a case where a statute was enacted before Seminole Tribe and before Boerne, and therefore the

paradigm that this Court has created for the words, the precise magic words that we would now expect Congress to use didn't -- can't, I think, fairly be imposed on a coordinate branch of Government.

But the answer, Justice Scalia, to the question, I think, is determined by reference to what the legislative record before Congress, not only when it conducted its eighteen hearings and amassed seven separate complete reports in enacting the ADA, but also when it investigated the problems that led it to create the CRIPA statute, the Constitutional Rights of Institutionalized Persons, and IDEA, and others, but looking just -- looking --

QUESTION: But General Waxman, it's not magic words. The whole point of City of Boerne is that when Congress alters the Federal balance it must consider very carefully the consequences of doing so, and to say that it's simply magic words does not do justice or respect to that very fundamental principle, and the Federal --

GENERAL WAXMAN: I absolutely --

QUESTION: And the Federal balance is altered far more under the Fourteenth Amendment than it is under the Commerce Clause.

GENERAL WAXMAN: Justice Kennedy, I agree, and I would say therefore that the question fairly put is

whether the Disabilities Act sweeps more broadly than Congress could reasonably have deemed necessary to remedy and prevent the constitutional problem it found applying this Court's definition of the standard, and what it found were four things.

It found, first, that there is pervasive and widespread discrimination against the disabled, which is often the product of hostility, overbroad and irrational stereotypes, and deliberate selective indifference, the hallmarks of unconstitutional intent.

QUESTION: General Waxman, do you agree with Mr. Gottesman that if the -- supposing there emerged a 55-year retirement law, rational basis, relied on in Kimel, do you agree with Mr. Gottesman's suggestion that if a court could be persuaded that when the legislature acted, that they really had it in for people over 55, that that would be invalid?

GENERAL WAXMAN: No, I -- well, I don't think a court would -- a court would not find that invalid, applying a rational basis standard, because this Court has had -- has held that under rational basis review of legislation one looks at whether there is a conceivable rational basis that would support a distinction, and that, in fact --

QUESTION: Well, but now, I don't want to put

words in Mr. Gottesman's mouth, but I understood him to say that sure, rational basis, but if you could prove that although there was a rational basis for requiring people to retire at 55, if the legislature that enacted that had really been motivated by a dislike for people over 55, then it would -- there would be a violation of equal protection.

GENERAL WAXMAN: Well, Justice -- Mr. Chief Justice, this Court has made clear that as a paradigm of --

QUESTION: Are you in the process of answering my question?

(Laughter.)

GENERAL WAXMAN: Was -- if your question was whether I also understood Mr. Gottesman to say that, I --

(Laughter.)

QUESTION: No, no, no.

(Laughter.)

QUESTION: Do you agree with Mr. Gottesman?

GENERAL WAXMAN: I do not agree that a legislature that could have had a -- a legislature that could have had a rational reason for doing something which, in fact, was motivated by invidious discrimination would be struck down if this Court applied rational basis review, but Cleburne, it seems to me, and the other cases

in which this Court has dealt with and remarked on discrimination against the disabled points the way to the correct resolution of this case, and before I -- I do want to address that, but first I'll finish --

QUESTION: Well, do you think it provided rational basis as the foundation of review in Cleburne?

GENERAL WAXMAN: In Cleburne --

QUESTION: Or something more?

GENERAL WAXMAN: Well, there is a great debate about the answer to that question, but I will answer the question on the assumption that the Court in fact applied rational basis review, but what the Court explained was that rational basis review is contextual, and context, just like applying the proportionate and congruence test, is contextual, and it requires a reference to the historical context in which it arises.

And what this Court said in Cleburne is, we are not going to look first at the facial constitutionality or unconstitutionality of this statute. We're going to require, in the unique context of a history of pervasive invidious discrimination against the disabled, what this municipality's reasons were. And having looked at that, it concluded that the -- that it must have been motivated by an invidious intent, because the proferred reasons were not, in fact, rational.

Now, Cleburne, in the context of many other cases in which this Court and Justices of this Court have remarked on the history of pervasive invidious discrimination against the disabled, provided -- essentially gave Congress the blueprint in which it acted in this case, and here's why.

QUESTION: Do you think Congress can by law establish that the disabled are a discrete minority entitled to heightened scrutiny in reviewing legislation, or action by States?

GENERAL WAXMAN: Our argument doesn't depend on it, but I think the answer from Cleburne is yes, because in Cleburne what this Court said -- and I don't have the exact words in front of me -- was that because discrimination against the disabled is such a complicated issue, that is, because there are reasons why differential treatment is sometimes permitted and, indeed, perhaps the Constitution sometimes requires it, that we have to give broad deference to the legislatures, and we have to let legislatures deal, as they more competently can, with this difficult problem, unless --

QUESTION: We said the same thing in Kimel. We said, rational basis scrutiny, much legislative latitude.

GENERAL WAXMAN: Yes, Mr. Chief Justice, but what this Court said in Cleburne is, because of that

unique history, absent congressional direction, we will apply, as a paradigm of judicial restraint, rational basis review.

QUESTION: Well, but -- I'll reread Cleburne, but Cleburne said that in order to defer to the authority of the legislature to pass a zoning law, that did not have to do with the authority of the legislature to declare a suspect class.

GENERAL WAXMAN: That --

QUESTION: That's quite different.

GENERAL WAXMAN: And I'm not suggesting to the contrary, Justice Kennedy. I was responding to Justice O'Connor's question about whether a legislature could instruct a court to apply a different level of scrutiny, and the language in Cleburne that says access --

QUESTION: And you think Congress can do that?

GENERAL WAXMAN: We -- I believe, as Cleburne says, absent congressional direction we apply rational basis for review.

QUESTION: But I persist in the point that that did not address Congress' authority and scope and prerogatives under section 5 of the Fourteenth Amendment. That's quite different.

GENERAL WAXMAN: I agree that that's not necessarily the case, but if I can simply point out,

Justice Kennedy -- this actually does go back to Justice Scalia's original question -- that not only was -- I mean, it is important, it is critical here to understand that not only does the Congress find a massive record of discrimination based on states of mind that are the hallmarks of constitutional intent, but also that this discrimination is the legacy of a not-too-distant past in which Government practices deliberately isolated, segregated, and withheld from the disabled fundamental rights and the chance to participate in mainstream life.

When Justice Marshall wrote, in his separate opinion in Cleburne, a statement that no Justice contradicted, that a regime of State-mandated segregation and degradation that in its virulence and bigotry rivaled and, indeed, paralleled the worst excesses of Jim Crow --

QUESTION: Well now, General Waxman, are we then to look through separate opinions, dissenting opinions, and say if the majority didn't contradict them they must have been subscribed to by the whole Court? We've never done that.

GENERAL WAXMAN: Not at all, Justice --

QUESTION: I'm surprised that you would simply cite an opinion like that, as if -- unless the majority said, gee, we don't agree with that statement, it suggests the majority did agree with it.

GENERAL WAXMAN: Mr. Chief Justice, the point I'm making is more broadly that Congress itself had before it a record not only of what was going on currently, but what had produced it. The Civil Rights Commission prepared a report --

QUESTION: What you were citing was Justice Marshall's opinion, and are you saying that Congress could rely on that?

GENERAL WAXMAN: I'm -- as an observation of historical fact, Congress could certainly rely on it, and he was not the only one in Cleburne to make that observation. Justice Stevens, writing for himself and the Chief Justice, said that through ignorance and prejudice the mentally retarded have been subjected to a history of unfair and often grotesque mistreatment.

QUESTION: Well then, one -- Congress could make its record, I take it, out of statements in dissenting opinions from this Court.

QUESTION: I have to write more dissents and concurring opinions, I guess, if I want to be really influential.

(Laughter.)

GENERAL WAXMAN: Mr. Chief Justice, so that I am not -- I don't want to be misunderstood. This is not an -- I'm using the -- Justice Marshall's categorization

because I think it well-reflects the evidence that Congress itself heard. The Civil Rights Commission report accommodating the spectrum which was submitted to Congress at its request details at great length, and was decided -- and was issued before Cleburne, the history of State-sponsored intentional, pervasive isolation and segregation and --

QUESTION: Unconstitutional. Did they use the words --

GENERAL WAXMAN: Yes.

QUESTION: -- unconstitutional?

GENERAL WAXMAN: Yes. Forced -- yes, it does. Forced sterilization, refusal to allow --

QUESTION: What does? What does?

GENERAL WAXMAN: The --

QUESTION: The congressional findings here?

GENERAL WAXMAN: The Civil Rights Commission report uses the word, unconstitutional, but whether it does or not, the practices -- I don't think anybody -- I don't think that Mr. Sutton would conclude that the historical practices -- and I'm not suggesting they persist, but we're talking here about a section 5 authority not only to deal with a pervasive current problem, but to remedy the effects of past intentional unconstitutional discrimination.

The remedy for past segregation and isolation is integration, and that explains in part why the Disabilities Act admittedly reaches some conduct that a court applying rational basis review would not deem unconstitutional. It's both. It's that --

QUESTION: Mr. Waxman, is it really rational basis review? I mean, Cleburne does -- the result seems at odds with the -- with just anything goes, which had been what rational basis meant.

I thought that the Cleburne decision was very much like Reed v. Reed in the gender area. That is, the Court purported to apply rational basis, but came to a result that didn't square with any prior rational basis decision.

GENERAL WAXMAN: The one thing one can certainly say, whatever words one uses, and Justice Stevens in his concurrence in Cleburne, as I recall it, basically says, I don't really know whether we have three distinct typologies. I consider all of this rational basis review. It just depends on how high the justification is and how great the reason there is to suspect that something unconstitutional may be going on.

But it is clear that what Cleburne did was, in looking at the actual administrative bureaucratic decision, as opposed to the legislative choice, require an

articulation of the actual reasons in the context of alleged discrimination in this unique historical area.

And what Congress did essentially was to generalize what this Court did in Cleburne. It took this Court's specific inquiry in Cleburne in the light of the Court, many instances in which the majority of this Court has remarked about the history of discrimination in Choate, Alexander v. Choate and other cases, and it applied it to what Congress had in front of it, which was on the one hand a body of half-a-dozen or a dozen comprehensive studies detailing a widespread problem and historic unconstitutional practices, and over 5,000 narrative accounts that the congressional task force accumulated of individual instances of discrimination against the handicapped, 600 of which addressed State or local governments which for purposes of the Fourteenth Amendment and State action have to be considered as one.

QUESTION: What about judicial findings, a question posed to your colleague. One would really have expected, if this was a massive constitutional problem, that there would have been a large number of cases that had found the States guilty of unconstitutional action.

GENERAL WAXMAN: May I --

QUESTION: Yes.

GENERAL WAXMAN: May I answer?

QUESTION: Yes.

GENERAL WAXMAN: At footnote 11 in our brief we cite some of those decisions but, as this Court recognized in Watson v. Forth Worth Bank & Trust there are many, many instances in which subconscious attitudes and prejudices cannot be proved to a judicial exactitude.

Thank you very much.

QUESTION: Thank you, General Waxman.

Mr. Sutton, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF JEFFREY S. SUTTON

ON BEHALF OF THE PETITIONERS

MR. SUTTON: Three brief points, Your Honor. I certainly hope City of Cleburne applied rational basis, because if it didn't the ADA has many constitutional problems.

If the -- if in the area of discrimination against the disabled you apply heightened review, just consider the very problem of defining who is disabled and who is not under the law. You're going to have underinclusiveness and overinclusiveness problems that would never survive heightened review, so let's hope it's rational basis scrutiny. That was the very point of the law.

Second, I've not heard anything today from the other side --

QUESTION: And how do you explain the results? I mean, one could conceive of many bases that would uphold that zoning provision, and yet the court not only didn't attempt to justify the legislation, but held the legislation to a rather stringent burden of justification.

MR. SUTTON: Your Honor, I would disagree respectfully. When a Government lawyer comes before a court, whether at the trial level or this Court, and offers five explanations for a law that they all say are rational, it turns out they're not, they're irrational and driven by animus, they lose.

QUESTION: I thought under classic rational basis review the court was not only to listen to the Government's argument, but if there's any basis it could conceive -- and surely there were bases that could be conceived --

MR. SUTTON: I --

QUESTION: -- that were not driven by animus --

MR. SUTTON: To be honest with you, I've never -- I'm not aware that that is the Court's rule, that the Court's job is to conceive of rational basis. I always thought that was the job of the Government lawyer to come before the court -- the inquiry is not exactly what the Government did. It's whether there's any rational explanation after the fact.

And, as this Court's decisions prove, there are probably a dozen to two dozen of them. There are some instances where they can't come up with anything, and that's exactly what happened there. Whether it was good lawyering, bad lawyering, the end result, everything they identified was not rational.

The second thing, I've not heard anything from the Government or the private respondents in their briefs or today about the second half of the City of Boerne inquiry. There's nothing about proportionality and, as the Court said in Kimel, Florida Prepaid, and City of Boerne itself, the issue on proportionality is whether the statutory standard covers, quote, substantially more conduct than would be found unconstitutional. That itself invalidates this law.

Now, the question of discrimination, whether it exists at the society or the Government level, I think this Court's decisions from 1985, one of them written, by the way, by Justice Marshall in Alexander v. Choate, Justice Marshall says in a 9-0 decision, the main problem with disability discrimination is not one of intent. It's one of either trying too hard, needless paternalism, or not trying hard enough, unintentional neglect. That's the problem.

That's an Article I problem, and we're happy the

ADA was enacted. The only challenges that have been made to it to our knowledge are in the prison setting, and it's about inmates and, if there's one area where maybe interstate commerce doesn't go, it's to a prison, where the very point of a prison is to keep people out of interstate commerce, so --

(Laughter.)

MR. SUTTON: And I don't think that's a very good example.

Unless there are any other questions --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sutton.

QUESTION: Well, if you have a minute, I would like to go back to equal protection of the law.

Equal protection of the law might be violated where a State official has a bad reason for doing something, though he might have a good one. As you point out, a court probably wouldn't catch that violation, because a court has to apply a rational basis test, but that's for institutional reasons, so why should we apply such a test where the institution is Congress?

So do you see what I'm -- I'm trying to get --

MR. SUTTON: I understand exactly what you're saying, Your Honor.

QUESTION: Yes.

MR. SUTTON: But to apply the test you're

suggesting is one that requires the overruling of City of Boerne. The very point of City of Boerne --

QUESTION: City of Boerne, if I find City of Boerne ambiguous on this point, on the point of whether it's going to -- whether a court would find a violation, or whether there is a violation, if I find it ambiguous on that point, can't I pre-crank in my institutional considerations?

MR. SUTTON: No, Your Honor. I would suggest that's just the power to use section 5 to redefine section 1, and that is what City of Boerne says, and that's what Kimel says, also a rational basis case. But at the most, Your Honor, if you're going to talk about individual decisions by Government officials, that's why you need a pattern and practice. It's a very big distinction between individual officials doing something and State laws that discriminate invidiously. That's the Voting Rights Act cases, versus City of Boerne, versus Kimel.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sutton. The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)