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IN THE SUPREME COURT OF THE UNITED STATES

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TENNESSEE, :

Petitioner :

v. : No. 02- 1667

GEORGE LANE, ET AL. :

- - - - -X

Washington, D. C.

Tuesday, January 13, 2004

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:18 a.m

APPEARANCES:

MICHAEL E. MOORE, ESQ., Solicitor General, Nashville,
Tennessee; on behalf of the Petitioner.

WILLIAM J. BROWN, ESQ., Cleveland, Tennessee; on behalf of
Respondents Lane and Jones.

PAUL D. CLEMENT, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D. C. ; on behalf of
Respondent United States.

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P R O C E E D I N G S

(10: 18 a. m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in No. 02-1667, Tennessee v. George Lane.

Mr. Moore.

ORAL ARGUMENT OF MICHAEL E. MOORE
ON BEHALF OF THE PETITIONER

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

Whether the Court chooses to view Title II of
the Americans with Disabilities Act in the entirety of its
indiscriminate application through every facet of every
state program, activity, and service, or in the
alternative, as the private respondents urge, in the
narrow courthouse access context, presented by the
particular allegations of the complaint they have filed in
this case, the Court should conclude that Title II exceeds
Congress' enforcement authority under section 5 of the
Fourteenth Amendment for essentially two reasons.

First, because there was no evidence before
Congress that the states were involved in a widespread
pattern of violations of the Fourteenth Amendment rights
of disabled persons when the ADA was enacted in 1990. And
second, because Title II shares all of the incongruent and
disproportionate features that proved fatal to Title I of

1 the same statute in the Garrett case and then some.

2 Title II's lack of congruence and
3 proportionality to any identified constitutional injury
4 inflicted upon disabled persons by the states is apparent,
5 we say, on the face of the statute. Congress made no
6 effort to tailor its provisions to those contexts which
7 might conceivably pose a threat to the exercise of
8 fundamental constitutional rights by individuals with
9 disabilities. Instead, Title II applies indiscriminately
10 to every service, program, or activity of the states.

11 QUESTION: Let's assume that the - that the state
12 - and it's just an assumption - would concede that
13 sovereign immunity could be abrogated insofar as access to
14 courthouses for handicapped people, so that Congress could
15 have drafted a congruent and proportional statute. The
16 fact that this injury comes within a statute which has a
17 much larger coverage is grounds for striking the statute
18 down, even though this case involves what we will assume
19 to be a - an injury that could be remedied under the
20 Fourteenth Amendment with money damages?

21 MR. MOORE: Your Honor's question focuses on a
22 debate that we really haven't engaged in. It's - it's one
23 between the respondents and the United States, because in
24 our view, whether the Court views the statute in its - in
25 overall operation, or as focused narrowly on the

1 courthouse access context, either analysis leads to the
2 same conclusion.

3 Having said that, I would say that the
4 prohibition of Title II is a single, unitary, very elegant
5 one-sentence prohibition in section 12132 of Title 42. It
6 doesn't purport to subdivide the statute - the statute's
7 prohibitions into particular subject matter areas. And as
8 the United States points out in its brief, this Court's
9 prior congruence and proportionality cases in - in the
10 abrogation context suggest that the Court looks usually at
11 the overall operation of the statute.

12 If the Court chooses that perspective on this
13 problem, we think yes indeed, even if the statute,
14 assuming the statute, a narrowly-tailored statute could
15 have been drafted that would validly abrogate sovereign
16 immunity in the courthouse access context, Title II's flaw
17 is that it is not so targeted. In fact, of the myriad
18 activities it covers, Your Honor, a very small percentage
19 conceivably implicate the exercise of any constitutional
20 right.

21 QUESTION: Mr. Moore, does Tennessee provide any
22 cause of action for the alleged violations here, the lack
23 of access to the courthouse?

24 MR. MOORE: No private right of action under our
25 State Public Buildings Act. Our State Public Buildings

1 Act, Your Honor, was enacted in 1970. It applied to all
2 buildings constructed on or after that date.

3 QUESTION: So you're satisfied that under
4 Tennessee law, there would be no monetary relief
5 available?

6 MR. MOORE: I think that is - I think that is
7 right.

8 QUESTION: And would there be any enforcement
9 action at all available to compel under Tennessee law the
10 courthouses to be accessible?

11 MR. MOORE: No, Your Honor, because under
12 Tennessee law, the - the injunction to build fully
13 accessible buildings applies to buildings constructed
14 after the enactment of the Public Buildings Act in 1970.
15 There is no provision in the Public Buildings Act
16 requiring retrofitting. But, of course, in this case,
17 Tennessee does not dispute its obligation to comply with
18 Title II, and we do not dispute that our state officials
19 can be called to account for a failure to comply with the
20 provisions of Title II in an Ex parte Young action.

21 QUESTION: Well, do you take the position that
22 Title II, even if this Court were to find monetary damages
23 are not available, is there a way to enforce Title II by
24 the Federal Government against the State of Tennessee?

25 MR. MOORE: Yes, Your Honor, there is, in an

1 enforcement action by the United States, injunctive relief
2 and monetary damages would be available against the state.

3 In addition -

4 QUESTION: Under what power? I guess - I guess
5 you're arguing that there's no section 5 authority -

6 MR. MOORE: Yes, Your Honor.

7 QUESTION: - for enactment of this provision.

8 And that would leave what, the Commerce Clause?

9 MR. MOORE: Yes, Your Honor.

10 QUESTION: And you think it would survive the
11 Commerce Clause challenge, do you, as applied to states?

12 MR. MOORE: Your - Your Honor, of course, this -
13 this case doesn't present that question.

14 QUESTION: Right.

15 MR. MOORE: But -

16 QUESTION: But I'm asking.

17 MR. MOORE: But we have not challenged and do not
18 question Congress' -

19 QUESTION: Other states have though, have they
20 not?

21 MR. MOORE: I - it's my understanding that that
22 claim has been raised in certain lower Federal courts,
23 yes.

24 QUESTION: How about an action under Ex parte
25 Young -

1 MR. MOORE: Absolutely, Your Honor.

2 QUESTION: - against a state official, not for
3 money damages, but for compliance?

4 MR. MOORE: Absolutely, Your Honor.

5 QUESTION: Well, I can understand that if the
6 state official was standing at the door saying, no, you
7 cannot bring a wheelchair in here. But if the building
8 itself simply does not allow for - for - for ready access,
9 how would an Ex parte Young action be a source of remedy?

10 MR. MOORE: Well, of course, Your Honor, Title II
11 doesn't really apply to buildings. It applies to
12 services, programs, and activities, and so long as they -

13 QUESTION: Well, if the - if the activity - the -
14 the conduct of - of the business of courts is taking
15 place in a courthouse, I think that gets us to focus on
16 the building, doesn't it?

17 MR. MOORE: But so long as the - so long as the
18 court in question offers the service in - in a - in
19 another venue, for example, as occurred in this case, Mr.
20 - at every step of Mr. Lane's interaction with the Polk
21 County criminal court, an accommodation was offered to
22 him, albeit it was rejected.

23 QUESTION: So they're - they're saying, look, you
24 - you could have an Ex parte order - Young order - saying
25 hold court on the first floor. That's - that's what

1 you're getting at? Okay.

2 MR. MOORE: Yes, Your Honor. I mean, the - I - I
3 should think a - a court could fashion whatever remedy is
4 - is deemed appropriate to ensure that a - a person in Mr.
5 Lane's circumstance enjoys the full panoply of his - of
6 his constitutional rights in - in -

7 QUESTION: But I - I take it your position would
8 be that under Ex parte Young, a court could not say to a
9 state official, build an elevator?

10 MR. MOORE: Well, I think courts have wide
11 discretion to fashion injunctive relief in Ex parte Young
12 actions, and if, in a particular circumstance, that were
13 the only reasonable way of delivering the service, I - I
14 think that would be inappropriate.

15 QUESTION: So you would as - as a last ditch, you
16 would concede that?

17 MR. MOORE: Yes. I think - I think in an Ex
18 parte Young action, courts have enormous discretion to
19 fashion equitable relief that is appropriate to - to
20 whatever the particular facts and circumstances are
21 presented -

22 QUESTION: But that would still be Commerce
23 Clause-based, right? Because you're excluding the
24 Fourteenth Amendment altogether.

25 MR. MOORE: That would be true, Your Honor, yes.

1 QUESTION: And there is something strange about
2 that, given that it was Congress' purpose to enable people
3 to exercise the rights - the full rights of citizenship.
4 I mean, it's a kind of a dignity right that Congress was
5 recognizing, and it doesn't fit as comfortably under the
6 Commerce Clause, does it, as it would under the Fourteenth
7 Amendment?

8 MR. MOORE: I think it fits quite comfortably
9 under - under the Commerce Clause, Your Honor. But, of
10 course, under this Court's case law, in order to invoke
11 its Section 5 power, Congress had to have evidence before
12 it or some reason to believe that the states were engaged
13 in a widespread pattern of violating the constitutional
14 rights of disabled or - or - of - of whatever group is
15 involved, and here there was no such evidence, certainly
16 not in the courthouse access context.

17 QUESTION: Well, what about the - that's what I
18 want to get to. I - I mean, to put the whole question to
19 you, I'm assuming we're talking here to use the statute
20 about judicial or courthouse-related services, programs,
21 or activities. So I was seeing this as a kind of as-
22 applied challenge, and if it's constitutional in this
23 area, maybe we leave the other areas for a later time.

24 Now, on that assumption, as you well know and I
25 do, the majority criticized my appendix in Garrett -

1 (Laughter.)

2 MR. MOORE: Yes, Your Honor.

3 QUESTION: - for certain inadequacies. And among
4 those inadequacies which it highlighted was, one, the
5 inadequacy that it talked about public employment instead
6 of, says the majority, public accommodations and public
7 services. Here we're talking about public accommodations
8 and public services. Second, the majority criticized it -
9 I'm, you know, aware of these criticisms, I read them
10 carefully.

11 (Laughter.)

12 QUESTION: The - the - the - criticized it
13 because the Senate reports hadn't said anything. Well,
14 here the committee report talks - says discrimination
15 still persists in such critical areas as public
16 accommodations and public services. And third, the - the
17 concurring opinion says there is no record of litigation
18 on this point and the SG has filed a whole brief with
19 loads of - and fourth, the majority made a major point of
20 there being a relaxed, rational basis standard of judicial
21 review, but here we have access to a courthouse, something
22 that would seem to call for more strict scrutiny than
23 that.

24 All right. Those are the four things that I
25 could see as distinguishing this case, and I think it's

1 reasonable to ask you, why don't they?

2 MR. MOORE: They don't, Your Honor. Let me take
3 each one in turn. First of all, in the appendix to the
4 Solicitor General's brief, indeed, if the Court will look
5 at all of the hundreds of pages of briefs filed in this
6 case by respondents and their amici, the Court will not
7 find a single case from a single jurisdiction that has
8 held that anytime, anywhere in the United States, a
9 person's fundamental constitutional rights of access to
10 the courts has been denied as the result of architectural
11 barriers at courthouses. And if there's one context in
12 which one would expect to find case law, it is in the
13 courthouse access context, because after all, the business
14 that takes place there is litigation. We think that is a
15 particularly telling point.

16 Similarly, in - we find in the Government's
17 brief, who has - the Government has called from Your
18 Honor's appendix the pertinent entries, and we find eight
19 of them that have sufficient detail that would permit one
20 to actually ask the question, was a constitutional
21 violation involved? And we say that under the - even the
22 most creative interpretation of any of them, they don't
23 make out a constitutional violation. All of the other
24 references to courthouses in appendix C to Your Honor's
25 opinion, we've pulled every single one of them, and they

1 simply - they simply label courthouse facilities as
2 inaccessible.

3 But, of course, under the ADA, inaccessible is a
4 term of art. It doesn't mean there's literally a wall
5 around the building and no one can get in. It means that
6 they are inaccessible in the sense that the - the
7 amenities required by the ADA are not present, so that
8 there are not - there is no evidence before this Court,
9 and there was no evidence before Congress, that anyone's
10 constitutional rights, rights of access to the courts,
11 were being violated as the result of the existence of
12 these architectural barriers. And for those reasons, we
13 don't think the - the so-called task force report, which
14 is summarized in the appendix to Your Honor's dissent in
15 Garrett, helps the respondents.

16 There is no mention in the text of the act
17 itself, of course, of courthouse access, and if one looks
18 at the Senate and House reports on the legislation, one
19 will discover that there is not a single mention of the
20 subject anywhere and no other indication that Congress
21 thought courthouse access was a matter of particular
22 concern.

23 QUESTION: Mr. Moore, I'm sort of concerned about
24 this. Our prior cases dealing with this issue of - of the
25 scope of Congress' - whether Congress' power under the

1 Fourteenth Amendment has been properly exercised, none of
2 our prior cases parse it out issue by issue. Boerne, for
3 example, doesn't - doesn't just limit it to, you know, to
4 - to whether, given that there was no - no discrimination
5 in this case, Congress could move. You're - what you're -
6 the State of Tennessee is entirely happy to have us
7 change course and begin to rule upon congressional
8 legislation of this sort, case by case -

9 MR. MOORE: No, Your Honor.

10 QUESTION: - whether there was enough evidence on
11 courthouses, whether there was enough evidences - enough
12 evidence on each of the other innumerable state functions
13 that - that were covered by this bill. But, I mean,
14 that's the argument you're making. You - you just want us
15 to - to say there's not enough evidence about courthouses,
16 and therefore, in this case, they can't do it. And we'll
17 hear - we'll hear another case further down the line
18 about, you know, any of the other innumerable state
19 functions that are impinged upon by this law.

20 MR. MOORE: I would agree with Your Honor that -
21 that the Court's prior abrogation cases, each one of them
22 looks at the overall operation of the statutory scheme and
23 does not look at its application in a context-by-contact -
24 context basis. And we would agree that if the Court
25 chooses to continue that practice and - and for many of

1 the reasons discussed in the United States brief, we think
2 that is probably the better view of it, this statute
3 clearly falls, because under no circumstances can - can
4 one say that it - it - it is congruent and proportional to
5 a valid, remedial objective.

6 QUESTION: How - how do you do that? Because if
7 I think of the antitrust laws, for example, or other
8 congressional statutes in olden days when the Court, you
9 know, was worried about the scope of the Commerce Clause,
10 what would happen is they would say, of course the
11 antitrust law is valid, the statute's valid, but it's not
12 valid to apply it to baseball, because baseball's not an
13 interstate commerce, or it's not valid to apply it to
14 insurance. Well, why wouldn't the Court take the same
15 approach here, that this statute may be valid as applied
16 to X, Y, and Z, where they did have enough evidence, but
17 not A, B, and C, where they didn't?

18 MR. MOORE: I - because I think the abrogation
19 inquiry is fundamentally different. The abrogation
20 inquiry focuses on whether Congress invoked its power
21 under Section 5 in a fashion that is congruent and
22 proportional with a valid, remedial objective, that being
23 a - a - an identified pattern of unconstitutional
24 behavior.

25 QUESTION: In City of -

1 MR. MOORE: And in order to - excuse me, Mr.
2 Chief Justice.

3 QUESTION: In City of Boerne, we certainly did
4 not go in and analyze whether the church has a claim under
5 the Constitution or not.

6 MR. MOORE: That's true. That's true, and - and
7 the same can be said of the Kimel case. The Court didn't
8 focus on the peculiar allegations of the complaint in that
9 case.

10 QUESTION: Justice Breyer's question, how can you
11 do that, reminds me of, you know, there's a story about
12 the Baptist minister who was asked whether he believed in
13 total immersion baptism, and he said, believe in it, I've
14 seen it done.

15 (Laughter.)

16 QUESTION: And that - that is surely the
17 situation here. We've done it before in - in each of the
18 other cases involving this area.

19 MR. MOORE: Yes, Your Honor. The statute lacks
20 congruence and proportionality also, not just because of
21 its sheer breadth, which Justice Scalia's question
22 highlights, but also because in the myriad contexts to
23 which it applies, it imposes obligations on the state that
24 go far beyond what the Constitution itself commands.

25 It really does so in two ways generally. First,

1 most of the rules under Title II promulgated by the
2 Justice Department to enforce its provisions require
3 states to modify otherwise disability-neutral policies and
4 practices in order to eliminate adverse, disparate effects
5 those policies may have on the interests of disabled
6 persons, whereas, as this Court noted in the Garrett case
7 itself, under the Fourteenth Amendment, disparate -
8 disparate effects of that - those sorts, without more, do
9 not make out any sort of constitutional violation. Second
10 - yes, Your Honor?

11 QUESTION: I was going to ask you to get out of
12 the courthouse area of the case for a minute. The
13 Government's brief contains a statement that in 1975,
14 approximately one million disabled students were excluded
15 entirely from the public school system. If that were
16 true, and if - because of their disability, if that were
17 true, would that constitute a constitutional violation?

18 MR. MOORE: I don't think we have enough facts to
19 draw any conclusion.

20 QUESTION: And then my next question is, there's
21 nothing in the record - suppose you had several
22 Congressmen who said, I'm going to vote for this statute
23 because I'm convinced that this fact is true, but there's
24 nothing in the hearings, but - but it definitely motivated
25 the voting of people who voted for this statute, could -

1 would it be valid in that fact, that situation? Or do we
2 have to have evidence in a - in a congressional hearing in
3 order to justify a congressional decision?

4 MR. MOORE: I think there must be evidence of a
5 pattern of constitutional violations, and merely saying
6 that a particular class of persons is excluded from public
7 schools, for example -

8 QUESTION: Is it - is it -

9 MR. MOORE: - without more information doesn't
10 permit a conclusion necessarily that a constitutional
11 violation is going on.

12 QUESTION: Is it true then that in a case like
13 this, we must examine legislative history in order to
14 determine the validity of the statute?

15 MR. MOORE: Unless - I mean, there are certain
16 contexts where - where the - the history of discrimination
17 is so well known and has been documented in this Court's
18 own opinions, that perhaps that's unnecessary.

19 QUESTION: Well, it hasn't been - I'm assuming it
20 hasn't, but it's just clear that the Congressmen who voted
21 for the statute thought it was true. They got letters
22 from their constituents and acted on that sort of
23 information, and that - but that can never be sufficient
24 under your understanding of our cases? It must be
25 something in the congressional record?

1 MR. MOORE: I think there must be something in
2 the - in the record that establishes a state - state
3 participation in a widespread pattern of unconstitutional
4 behavior, yes, Your Honor.

5 QUESTION: Mr. Moore, you - you don't concede, I
6 assume, that the Constitution is violated by not - not
7 providing educational - public educational facilities that
8 will be accessible to all handicapped persons? You don't
9 concede that that's a constitutional violation, do you?

10 MR. MOORE: No, I do not. No, I do not.

11 QUESTION: I didn't think it was.

12 MR. MOORE: The - the - and in fact -

13 QUESTION: I mean, you - you need a rational
14 basis.

15 MR. MOORE: That's right.

16 QUESTION: And - and if - if the - the additional
17 expense for constructing the buildings in - in a manner
18 that would render them accessible to all handicapped
19 persons is excessive, it's not a constitutional violation.
20 Now, it may be a very bad idea, but we've never held that
21 that's a constitutional violation.

22 MR. MOORE: I - I think that's right, Your Honor.
23 The only -

24 QUESTION: So saying that so many handicapped
25 persons couldn't get into public schools would prove

1 nothing at all, would it?

2 MR. MOORE: I think you're absolutely right, Your
3 Honor. The only context in which this Court has applied
4 heightened scrutiny in - in the education context is where
5 there was a - a - a punitive class-based exclusion, and -
6 and there only in the K through 12 context, and so merely
7 reciting that a certain number of students were being
8 excluded without more information, Your Honor, I think
9 would not make out a constitutional violation.

10 QUESTION: Just out of curiosity, in your view,
11 is the requirement that Congress have a kind of
12 legislative - I've called it an administrative or court
13 record - to document the evidence of unconstitutionality
14 of practices applicable only in Section 5 of the - of the
15 Fourteenth Amendment, or is something - is it a
16 constitutional requirement that applies to all the
17 provisions of Article I, including the Commerce Clause and
18 other provisions?

19 MR. MOORE: Quite frankly, I focused only on this
20 Court's cases construing Section 5 requirements in this
21 context. But I - I think - I think Congress - when
22 Congress invokes one of its powers in a way that intrudes
23 upon the sovereignty of the states, it must document that
24 it has an adequate basis in fact for concluding that that
25 power exists.

1 QUESTION: It's like - it's like a mean question,
2 because if you - if you answered the question that they
3 had to be different, I'd said why, and if you answered the
4 question they'd have to be the same, each of us can cast
5 our minds over dozens of pieces of important legislation
6 where, let's say, the underpinning - let's take the
7 Copyright Clause or let's take any one of a dozen where
8 there isn't really much of a legislative record. I mean,
9 that's - do you want to say anything about that? I mean,
10 that's the problem I see there.

11 MR. MOORE: Well, of course, here, this case
12 deals with a specific context, the - the - the invocation
13 of Congress' power to - to abrogate the state's sovereign
14 immunity, and it seems entirely reasonable for the Court
15 to construe section 5 as requiring that before the
16 Congress alters the Federal-state balance in such a grave
17 way, that it document very carefully its basis for doing
18 so.

19 QUESTION: Of course, the - the commerce power
20 exists whether or not other - other facts are - are
21 established. It is a power that Congress always and
22 everywhere possesses. Congress does not always and
23 everywhere possess the power to subject the states to - to
24 - to lawsuits.

25 QUESTION: Yes, but -

1 QUESTION: That power exists only - only when, as
2 - as we - we found was not well-enough established in
3 Boerne, only when there has been a constitutional
4 violation by the states, so why isn't that an adequate
5 reason for the difference?

6 QUESTION: But is that quite correct? Isn't it
7 true that under section 5 they prohibited the poll tax and
8 literacy tests, even though they'd been held permissible?
9 They were not unconstitutional, they were prophylactic
10 measures.

11 MR. MOORE: But that was, Your Honor, only after
12 a - a well-documented history of discrimination and
13 discriminatory application of those -

14 QUESTION: But you would agree that it's not
15 essential that there be a constitutional violation?

16 MR. MOORE: I - I think there must be evidence of
17 a pattern of a unconstitutional behavior.

18 QUESTION: The answer is no. The answer is no.
19 (Laughter.)

20 QUESTION: You don't agree with that. There has
21 to be a constitutional violation.

22 MR. MOORE: There has to be -

23 QUESTION: The remedy may go beyond the
24 constitutional violation, but there has to be a
25 constitutional violation, does there not?

1 MR. MOORE: I agree with you, Your Honor, 100
2 percent, and I would like, Mr. Chief Justice, to reserve
3 the rest of my time for rebuttal.

4 QUESTION: Very well, Mr. Moore.

5 Mr. Brown, we'll hear from you.

6 ORAL ARGUMENT OF WILLIAM J. BROWN

7 ON BEHALF OF RESPONDENTS LANE AND JONES

8 MR. BROWN: Mr. Chief Justice, and may it please
9 the Court:

10 Unlike Garrett and Kimel, and entirely
11 consistent with this Court's opinion in Hibbs, Title II as
12 applied to the case that is before the Court today
13 presents a constitutional application of the powers of
14 Congress under section 5 of the Fourteenth Amendment.

15 QUESTION: When you say, Mr. Brown, as applied to
16 the case that's before the Court, you're suggesting that
17 it can be kind of sliced up and just, say, address
18 courthouses?

19 MR. BROWN: Your Honor, please, I think the
20 history that this Court has used in the past is to focus
21 on the case and the circumstance and the issue that's
22 before the Court. The case that's before the Court
23 involves the fundamental right of access to the court.

24 QUESTION: Well, but in - in our other cases
25 dealing with Congress' section 5 power, I don't think

1 we've taken that position. We have said, particularly in
2 the City of Boerne, the Government response must be
3 congruent and proportional, which suggests that there may
4 be constitutional violations, but they're simply not
5 sufficient to justify what Congress did. That's the
6 meaning of - I understood - of the term, congruence
7 proportionality.

8 Now, if you - if you simply focus down narrowly
9 enough and say, was there a constitutional violation in
10 denying the church the zoning, the - that really
11 eliminates the idea of proportionality entirely.

12 MR. BROWN: Respectfully, Chief Justice, the way
13 that I took Boerne was that this Court made a direct
14 statement to Congress that they had overstepped their
15 bounds in interpreting the First Amendment and the
16 Fourteenth Amendment and its applications. The Court
17 looked directly at Congress and said not that in these
18 particular circumstances, but on this particular
19 constitutional issue, you went too far.

20 Now, what we're talking about in this case today
21 is not about whether or not Congress dealt with a
22 fundamental right. That's unquestionable. Today what
23 we're talking about here is what I would suggest to the
24 Court the quintessential element of the Fourteenth
25 Amendment, and that is the right of each of us as

1 individuals to due process of law, to life, liberty, and
2 property.

3 QUESTION: The legislation doesn't deal with that
4 constitutional right. It doesn't - doesn't mention, you
5 know, due process and - and - and courthouses
6 specifically. It - it embraces innumerable things. And
7 what you're saying is, because one of the innumerable
8 things that it embraces happens to involve a
9 constitutional right, the legislation is a valid exercise
10 of - of section 5 power as to that particular
11 constitutional right.

12 And I - that doesn't strike me as - as accurate.
13 If Congress wants to enact such a sweeping statute, a
14 statute that - that, in effect, as we said in Boerne --
15 what was going on in Boerne was that Congress was
16 rewriting the First Amendment, and here Congress is
17 rewriting the Equal Protection Clause essentially, saying
18 that - that - that there must be constitutionally or by
19 virtue of this - of this supposedly constitutionally
20 remedially statute, there must be equal treatment of - of
21 handicapped people.

22 And it - it seems to me it's exactly parallel to
23 what was going on in - in Boerne, rewriting the First
24 Amendment versus rewriting the Equal Protection Clause,
25 and we looked at the whole sweep of - of Congress' action,

1 not just at the particular First Amendment claim

2 MR. BROWN: Justice Scalia, respectfully,
3 Congress does not have a real good record of writing
4 memorandum opinions. What it said specifically was, this
5 law deals with the Fourteenth Amendment, and what the
6 statute says is that citizens, qualified citizens for
7 programs and services and activities of the state, have a
8 right to participate in those activities without having
9 the onerous issue of their disability come into play.

10 QUESTION: Mr. Brown, are you saying that these -
11 what fits within this statute would independently violate
12 the Constitution, and all that the statute does is
13 provide, in this case, a damage remedy?

14 MR. BROWN: I think it does.

15 QUESTION: So that in - in all the cases that
16 would fit under this legislation, someone could come in,
17 say, and seek injunctive relief -

18 MR. BROWN: Well, absolutely.

19 QUESTION: - for a violation of a constitutional
20 right?

21 MR. BROWN: Well, the beauty of Title II is that
22 we don't have to chase all those rabbits. I mean, Title
23 II gave me the benefit of a trial lawyer in Tennessee
24 whose sole purpose and interest was, one, to make sure
25 that our courthouses in Tennessee were accessible, and

1 two, that individuals that were harmed, that suffered
2 pain, embarrassment, humiliation, as they individually, on
3 their own, by virtue of their right under the Fourteenth
4 Amendment to represent themselves had to crawl up the
5 stairs of one of our courthouses -

6 QUESTION: But let's take, say, it's a - it's a
7 seat in - in a public stadium, which is also covered, or a
8 theater, and it's inaccessible to certain people with
9 disabilities, would that be a violation of the
10 Constitution, for which this statute provides a remedy?

11 MR. BROWN: It may not provide or deal with a
12 constitutional violation, but it certainly deals with a
13 prophylaxis issue. And - and let me give you this
14 example. Suppose there was a political rally in that
15 stadium, suppose the President came to address a large
16 audience of individuals in that particular stadium, and
17 those individuals who have mobility disabilities decided
18 that they wanted to go and hold up a sign that says, Mr.
19 President, make our buildings accessible. Is that not
20 really a fundamental First Amendment right, and the fact
21 that they can't get there implicates their right to
22 petition their government?

23 The concept that we as individuals have a right
24 under the Fourteenth Amendment to be citizens in all of
25 its aspects, not just simply in one context that may or

1 might - may not ever come, surely today in the year 2004,
2 Congress has the power to ensure that we as individuals
3 have all the rights of citizenship without reference to
4 any individual context.

5 QUESTION: Then - then would you -

6 MR. BROWN: That doesn't make any sense.

7 QUESTION: Would you explain to me the difference
8 between your position and the Government's position then?
9 Because you've - you've gone beyond - at least, as I
10 understand your answer, you've gone beyond a - a kind of a
11 strict, as-applied argument, and - and I'm not sure where
12 you and the - and the Government part company at this
13 point, if you do.

14 MR. BROWN: Your Honor, I represent six people in
15 Tennessee who are trying to get access to the courts of
16 our state. If I can win their cause, then I will be
17 satisfied with the results that I initiated in 1998 when I
18 filed this lawsuit. If I have a responsibility to go
19 broader and to defend all the other aspects of Title II,
20 but lose my clients' case, then I have not done them a
21 service, nor have I done a service to other individuals
22 who are seeking access.

23 QUESTION: Is - is your argument still that what
24 you are complaining of would independently be a
25 constitutional violation, so that the virtue of this act,

1 in effect, is to provide a remedy, and that's all we need
2 to consider?

3 MR. BROWN: Absolutely, Your Honor.

4 QUESTION: Okay.

5 QUESTION: You - we don't have to just say this
6 one individual, do we? I mean, there is a pretty good
7 record here. I - well, I better not characterize it,
8 because I come from a certain point of view on this, but
9 there's a pretty good record, and I felt the Chief
10 Justice's question was getting to this. I mean, are you
11 arguing that if this - this statute could constitutionally
12 be written giving you constitutionally this lawsuit as a
13 remedy, in respect to your client that's good enough, that
14 is a harder argument possibly than to say, well, if it's
15 valid in respect to the general problem of providing
16 judicial services, which is a big category, one whole
17 branch of the state. I mean, that category might be
18 valid.

19 MR. BROWN: Let me say, Your Honor, respectfully,
20 I think we do have to establish a category. I don't think
21 that Title II nor this Court would ever suggest that
22 literally every person who comes in with a Title II claim
23 has to state a constitutional violation, because then it
24 takes away from the prophylaxis benefits of Title II.

25 What it says, what Title II fundamentally says,

1 and literally adopts what I think is the fundamental
2 purpose of the Fourteenth Amendment, is back to what I
3 said before. We as individuals have a right to be there
4 where our government works and where it operates. And
5 George Lane is a classic example of that. George Lane
6 confronted as an individual with a misdemeanor charge, a
7 driving on a revoked license case, the proposition that
8 the only way he could get to the courtroom where his
9 liberty was at stake was by crawling. The state suggests
10 there were alternatives. Where were the people offering
11 to carry him up the stairs the first time? Where were
12 they?

13 QUESTION: There has to be an affirmative offer?
14 He could not have asked for assistance getting up the
15 stairs?

16 MR. BROWN: Your Honor -

17 QUESTION: It's a constitutional violation not to
18 offer it as opposed to refuse it when he asks for it?

19 MR. BROWN: Your Honor, please.

20 QUESTION: I mean, he appears downstairs and -
21 and he sees one of the constables there and says, you
22 know, I can't make it upstairs in my wheelchair, could I
23 have assistance get - getting upstairs? Now, is that a -
24 is that a constitutional violation not to have an
25 elevator for him, but to say, you know, we'll - we'll see

1 that you are carried up by - by constables? Is that a
2 constitutional violation?

3 MR. BROWN: I think that it is, Your Honor,
4 because the presumption is that somebody would be there to
5 carry him

6 QUESTION: I - I don't understand that. It is
7 because the presumption is that somebody -

8 MR. BROWN: There is no constitutional right - if
9 he doesn't have a constitutional right generally to get
10 there, what gives him the constitutional right to have
11 somebody carry him up there? You're asking what George
12 Lane to rely on -

13 QUESTION: He has a constitutional right for the
14 state to provide him the means of being present at his
15 trial. Now, does the means have to be an elevator or
16 could it be someone assisting up the stairs? Now, there -
17 it - it may be less dignified in the latter - in the
18 latter situation, and that's a proper subject for
19 statutory activity, but is it a constitutional violation,
20 so long as the state assures that he can - he can be
21 present at his trial?

22 MR. BROWN: His safety, Your Honor, is a critical
23 issue. Ralph Ramsey, who is one of my clients, weighs 350
24 pounds. To say that he has a constitutional expectation
25 that one or two or five or the whole battalion of deputy

1 sheriffs in Cocke County would and could carry him up
2 those stairs, I mean, what's he going to do, file a
3 Federal lawsuit to make sure that somebody will carry him
4 up there? I don't think he has that right.

5 What he has is the prophylaxis benefit of a law
6 that says we're going to create buildings where people can
7 gain access to their rights as citizens. That is as
8 important to say as it is to say that we all have a right,
9 no matter what our circumstances, our background, our
10 class, to get to the civic center of life, public life in
11 our communities, and that should be done, Your Honor, and
12 I don't know that you all have ever said that, but that
13 should be done with dignity and respect that the
14 Fourteenth Amendment speaks about all of us as
15 individuals. And today I think that is what is so
16 important and at stake. This case is not just about
17 individuals with disabilities.

18 QUESTION: Probably this is universally accepted
19 what you're saying, and what I wonder is, is why, if you
20 could explain it, what your opponent is saying is that to
21 give people a remedy for the violation of that principle,
22 it is adequate to have the Federal Government bring a
23 lawsuit or they bring an Ex parte Young, et cetera,
24 action. Now, why isn't that sufficient?

25 MR. BROWN: Your Honor, please, the Federal

1 Government was not there the day George Lane confronted
2 those stairs. George Lane could not call upon the Federal
3 Government that day to ensure that he didn't go to jail
4 because he refused to crawl those stairs.

5 QUESTION: Neither was a Federal judge who could
6 hear his lawsuit.

7 MR. BROWN: And that's why the -

8 QUESTION: I mean, the Federal Government brings
9 a lawsuit or he brings a lawsuit.

10 MR. BROWN: That's -

11 QUESTION: Neither one of them is there
12 instanter.

13 MR. BROWN: Respectfully, Your Honor, that is why
14 Title II is there, to make the State of Tennessee
15 anticipate that problem, solve that problem, so our
16 citizens don't have to confront those obstacles and face
17 pain, suffering, and public humiliation as a condition of
18 citizenship.

19 Respectfully, Your Honor, please, this deals
20 again, as I have said, not just with the rights of
21 disability individuals, but the rights of all of us to go,
22 to petition our government, to have a right to represent
23 ourselves in a court of law.

24 QUESTION: There is a difference, though, if you
25 talk about non-discrimination, say, with respect to race

1 or religion, you - you use the word dignity to say the
2 state has to respect the dignity of every human being, but
3 to respect the dignity of certain people with disability,
4 the state has to do more than not harm them, not
5 discriminate against them. It has to have a kind of
6 affirmative action that's permanent, isn't that so?

7 MR. BROWN: Respectfully, Justice Ginsburg, an
8 elevator to an individual with disabilities is no
9 different than stairs are to me as a person without
10 disabilities. It's the way I get there. The fact that I
11 happen to have an opportunity to walk upstairs doesn't
12 make those accommodations any different to me than it is
13 with an individual with disabilities. The point of the
14 matter is, suppose as in Meigs County, where you've got a
15 stairway getting to the second floor that barely one
16 person can climb up, it's creaky, I mean, are we going to
17 say if they shut down those stairs, we can haul people up
18 with a pulley and a rope?

19 QUESTION: That's not the point that I'm making.

20 MR. BROWN: I'm sorry, Your Honor.

21 QUESTION: The point is that sometimes to respect
22 the equal dignity of a person, we have to treat them
23 specially, and I think that that's what the elevator is.
24 It is special for a class. It isn't the same as everybody
25 else has.

1 MR. BROWN: Your Honor, I think the word special
2 accommodation is something that is a problem I - I hope
3 the Court will understand that -

4 QUESTION: Thank you, Mr. Brown.

5 MR. BROWN: I'm sorry, Your Honor.

6 QUESTION: Mr. Clement, we'll hear from you.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF RESPONDENT UNITED STATES

9 MR. CLEMENT: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 Unlike Title I of the ADA, which regulates
12 states as employers and treats public and private
13 employers alike, Title II of the ADA focuses on states and
14 state governments as governments in their distinct role as
15 providers of public services. As a result, Congress
16 focused specifically on the conduct of state and local
17 officials rather than simply extrapolating from the
18 experience of private employers.

19 Equally important, Congress in the statutory
20 findings and legislative reports, the same reports this
21 Court found lacking in the Garrett case because they did
22 not include specific findings of public sector
23 discrimination in employment, those same findings and
24 reports found persistent discrimination in such critical
25 areas as access to public services and voting. Moreover,

1 as this Court -

2 QUESTION: That - that - that's persuasive or
3 not, depending on what was meant by the term
4 discrimination. If it simply meant that - that the
5 handicapped were not accommodated by special provisions,
6 such as elevators, that might be quite true, but it would
7 also not be a constitutional violation, would it?

8 MR. CLEMENT: Well, Justice Scalia, I think that
9 brings us to the second important distinction between
10 Title I and Title II, which is because -

11 QUESTION: Well, let - let's stay on your first
12 one. I'm - I'm - I'm waiting to hear what - what findings
13 Congress made that has anything to do with constitutional
14 violations by the states -

15 MR. CLEMENT: Well, and - and -

16 QUESTION: - which is the premise for this
17 legislation.

18 MR. CLEMENT: And again, Justice Scalia, I think
19 the problem in Garrett, when this Court saw findings of
20 discrimination in an area like employment discrimination,
21 that's governed by rational basis review, then there's
22 very little reason to think that the small "d", if you
23 will, discrimination Congress found resulted in
24 unconstitutional discrimination. But because Title II
25 focuses on government services, many of which implicate

1 fundamental rights, there's every reason to believe that
2 when government - when - when the Congress found - take
3 voting for example - discrimination in voting, that they
4 were actually finding unconstitutional discrimination in
5 voting, because voting and access to polling places
6 triggers fundamental rights and heightened scrutiny. And
7 as this Court recognized in -

8 QUESTION: Well -

9 MR. CLEMENT: - in the Hibbs case, when -

10 QUESTION: These two sections - these - these two
11 things were debated and - and passed simultaneously, or at
12 very different times?

13 MR. CLEMENT: Title I and Title II?

14 QUESTION: Right.

15 MR. CLEMENT: They - they passed at the same
16 time.

17 QUESTION: And - and they're - they're using
18 discrimination to mean one thing in - in one half and
19 another thing in the other half? That's - that's what you
20 want to argue to the Court?

21 MR. CLEMENT: I think whatever way they were
22 using discrimination, I think that that finding of
23 discrimination is going to be much more likely to be
24 correlated with actual constitutional violations in an
25 area that implicates fundamental rights. And I think when

1 there's a specific finding in the text of the legislation
2 itself of discrimination in voting, I think it's very
3 likely, given the heightened scrutiny that applies to
4 voting -

5 QUESTION: Okay. You said - but now what - what
6 does it mean to say discrimination in voting? Does that
7 mean that a person was actually not allowed to vote?

8 MR. CLEMENT: In - in some cases, Mr. Chief -

9 QUESTION: How - how many cases do they - do you
10 have where the person was not actually allowed to vote
11 instead of not being facilitated in the ability to vote?

12 MR. CLEMENT: Well, Mr. Chief Justice, let me say
13 the - the relevant congressional committee heard testimony
14 of individuals that were turned away from the voting place
15 on - on election day, so there is that kind of evidence.
16 Now, I can't articulate for you how many instances of that
17 there were.

18 QUESTION: What - what do you mean by turned
19 away? Turned away because there was no elevator?

20 MR. CLEMENT: Turned away because there was no
21 elevator, turned away because -

22 QUESTION: Is - is that a constitutional
23 violation?

24 MR. CLEMENT: If - if the voting official tells
25 the individual, we - you can't vote here, because this -

1 QUESTION: He tells them -

2 MR. CLEMENT: - this is not accessible -

3 QUESTION: - we - we don't have an - we don't
4 have an elevator.

5 MR. CLEMENT: Right. If he tells them -

6 QUESTION: So if you want to get up to vote, you
7 have to find assistance to get up there. It's very bad,
8 and this legislation is directed against it, and can
9 remedy it upon a suit by the United States, but is it a
10 constitutional violation?

11 MR. CLEMENT: With respect, I think maybe you'd
12 need to know more, but if the individual in the polling
13 place is turning people away because of their disability
14 and they're not offering, don't worry, we have a school
15 down the road that is accessible, that's not the facts.
16 They're saying, you can't vote, I'm sorry, we don't have
17 the facilities. I think that would state a constitutional
18 violation.

19 QUESTION: How - how many of these instances did
20 Congress find of people who were actually refused the
21 right to vote?

22 MR. CLEMENT: Well, Mr. Chief Justice, there was
23 testimony of individuals, I don't have the exact number,
24 and -

25 QUESTION: What - what order of magnitude?

1 MR. CLEMENT: I - I think it was anecdotal
2 evidence, and I would say - I mean, to give you a feel for
3 the - the - the sort of order of magnitude, in the state
4 task force reports that Congress authorized, there were 35
5 instances of inaccessible voting places. Now, I can't
6 tell you the breakdown of how many of those involved
7 people refused at the door and how many of those involved
8 simply physical barriers. But I do think it shows that
9 there was a significant problem in this area.

10 QUESTION: I don't think it does at all.
11 Inaccessible voting place proves nothing at all. It just
12 proves that the state did not go out of its way to make it
13 easy for the handicapped to vote, as it should, but as it
14 is not constitutionally required to do. To simply say
15 many voting places are inaccessible proves nothing at all.

16 MR. CLEMENT: And again, Justice Scalia, I think
17 that when you couple an inaccessible voting place with
18 local officials who are saying, you can't vote today, we
19 don't have any facilities for you, that does violate the
20 Constitution.

21 QUESTION: They're not saying you can't vote,
22 they're saying we don't have facilities for you to get to
23 the voting place.

24 MR. CLEMENT: I - I guess I fail to understand
25 the difference in that in a practical way.

1 QUESTION: I do too.

2 MR. CLEMENT: And I think this Court has said on
3 a number of occasions, in areas of fundamental rights, it
4 is simply not true that only intentional discrimination of
5 the kind you have in mind would violate the Constitution.
6 In the access to court context, in particular, this
7 Court's decision in M L B against S. L. J. suggests that in
8 many instances in order to avoid unconstitutional
9 discrimination, the courts have to waive filing fees of
10 indigent defendants or indigent individuals trying to
11 provide their constitutional right.

12 If that's true in areas of fundamental rights,
13 it's not clear why - why state officials don't have some
14 obligations under the Constitution itself to make
15 accommodations for individuals with disabilities.

16 QUESTION: I'm not under - I really don't
17 understand one - one argument that's going on. I don't
18 know why one violation wouldn't be enough to justify
19 congressional action. It often is that one - one incident
20 triggers a legislative response. Why wouldn't one - one
21 example be enough?

22 MR. CLEMENT: Justice Stevens, I think one
23 example might be enough, especially when coupled by other
24 evidence in the record that is reinforcing and suggestive
25 of the problem, especially when coupled with judicial

1 decisions that we provide in appendix A of our brief. If
2 you put all that evidence together, it's clear that
3 Congress was reacting to a real problem in this context.

4 QUESTION: And solve that problem by requiring
5 access to - to state-owned hockey rinks or any state-
6 owned buildings, whether it's a courthouse or anything
7 else. I mean, you're - you're talking about it as though
8 all Congress was directing this legislation at was - was
9 the problem of people getting to the voting place or the
10 problem of people getting to - to courthouses. That's not
11 how the legislation reads. It's all public facilities run
12 by the state, hockey rinks, whatever.

13 MR. CLEMENT: That's true, Justice Scalia. And
14 let me say two things in response. First of all, I think
15 Congress was entitled, once it found a problem in areas of
16 fundamental rights, to say that it's permissible
17 prophylaxis to - to provide a remedy for a broader array
18 of government services.

19 QUESTION: Well, there - do -

20 QUESTION: Where there are no conceivable
21 constitutional rights involved.

22 MR. CLEMENT: Well, if I could respond to that, I
23 don't think it's that there's no conceivable
24 constitutional rights involved. Even in areas that don't
25 implicate fundamental rights, this Court itself has found

1 a constitutional violation in the disability context in a
2 case like Cleburne. And I think if Congress finds that
3 states are engaging in unconstitutional discrimination in
4 areas implicating fundamental rights, that may lead to an
5 inference that they're simply not turning off the switch
6 when they get into other areas.

7 QUESTION: Well, would it - would it be a
8 violation - a constitutional violation to refuse to afford
9 special access to a hockey rink?

10 MR. CLEMENT: I - I don't think standing alone,
11 Mr. Chief Justice, it would, and I think I would defend
12 that in part as part of the permissible prophylaxis of the
13 statute. If I could say -

14 QUESTION: This is what I'd like to get at. I -
15 I have the impression from your brief that you were
16 suggesting that we could just address the fundamental
17 rights aspect of this case and forget about the rest, but
18 you seem to be saying now that we should consider the
19 whole thing and consider it all valid as a prophylaxis
20 proposition. Which is it -

21 MR. CLEMENT: Well, I guess -

22 QUESTION: - that you're proposing?

23 MR. CLEMENT: In fairness, Justice O'Connor, it's
24 both. I mean, I'm here defending the constitutionality of
25 the statute as a whole, but I also think it would be fair

1 for this Court to follow the practice that I think was
2 suggested in a case it decided called United States
3 against Raines, and focus in on the aspect of the statute
4 that is constitutional, that is valid, and that would be
5 fundamental rights.

6 QUESTION: Well, we haven't really done that in
7 other cases of this type, of the sovereign immunity of the
8 states, have we?

9 MR. CLEMENT: You have not, Justice O'Connor.

10 QUESTION: No.

11 MR. CLEMENT: And we pointed that out, and I
12 think there is some tension between the proportionality
13 and congruence test in this as-applied mode of analysis.
14 But I do think the Raines case points out - .

15 QUESTION: It was decided maybe 50 years ago,
16 before any of our more recent cases.

17 MR. CLEMENT: I think that's fair, Mr. Chief
18 Justice. I simply point to Raines because Raines shows
19 that there's nothing inherently inconsistent between
20 analyzing a section 2 of the Fifteenth Amendment or
21 section 5 of the Fourteenth Amendment piece of
22 legislation, an as-applied analysis. And I think there's
23 an important relationship between this Court and Raines,
24 because in Raines, this Court in a sense identified a
25 fault line in a statute that was broadly applicable. It

1 applied both to state actors and private individuals. And
2 in a case in which it applied to state actors, they said,
3 we may have some concerns about whether it can validly
4 apply to private actors, but we're going to uphold the
5 statute as applied to state actors.

6 And in the same way, I think if this Court
7 thinks that the statute is constitutional as applied to
8 fundamental rights, but has concerns in its applications
9 to non-fundamental rights, that it could, in effect,
10 decide the case along the same lines. And, of course, the
11 narrowest ground this Court could decide the case on would
12 be to simply focus on access to the courts.

13 QUESTION: Suppose the state is building a new
14 stadium, a new hockey rink. Does it have a constitutional
15 obligation to make it accessible to the handicapped?

16 MR. CLEMENT: I'm not sure that it does, Justice
17 Kennedy. I think that if you isolate the example of the
18 non-fundamental right and ask the question of whether or
19 not that standing alone violates the Constitution -

20 QUESTION: So - so the Government - the
21 Government's position is citizens don't have some rights
22 of access to public facilities as a matter of the
23 Constitution?

24 MR. CLEMENT: I think they have - they might have
25 some access under the Constitution and some right. I'm

1 not sure though that I'd be able to make an argument that
2 that constitutional right is protected by something more
3 than that rational basis review. I think that -

4 QUESTION: You're - you're saying that if the
5 only public facility without a ramp was a hockey rink,
6 you'd have a tough row to hoe, but if every public
7 facility, courthouses, schools, et cetera, have no ramps,
8 then you've got a broader context and you've got a
9 different argument?

10 MR. CLEMENT: That's exactly right, Justice
11 Souter. And one other thing I think that's worth bearing
12 in mind is that -

13 QUESTION: And what is - what is the
14 constitutional right? Freedom of movement? .

15 MR. CLEMENT: In - in - in the hockey ring
16 context?

17 QUESTION: What is the - what is the basis for
18 the constitutional right that you accepted in your
19 response to your question - in response to Justice
20 Souter's question?

21 MR. CLEMENT: Well, I think it would depend on
22 the facility in particular. I think in the access to the
23 - in - in trying to get access to a court, it would be
24 access to the courts. In trying to get access to a
25 polling place, it would be the right to vote. I think one

1 thing I'd like to emphasize though is that the - that
2 Title II -

3 QUESTION: There's - there's no - there's no
4 greater right to freedom of movement or general - on the
5 part of citizens, freedom of access to all governmental
6 facilities?

7 MR. CLEMENT: I - I'm not sure that - that this
8 Court has said that yet. If it's interested in -

9 QUESTION: I'm asking your position whether or
10 not in your view there is such a right.

11 MR. CLEMENT: It's certainly not one that this
12 Court has ever articulated, and - and - what I would say
13 though is that -

14 QUESTION: So you don't have a position on the
15 point?

16 MR. CLEMENT: I have - it's not - it's not a
17 matter I've really given any thought, Justice Kennedy. I
18 apologize for that. I think the one thing I would like to
19 emphasize is that Title II does not just give an access to
20 buildings, it doesn't give an access to hockey rinks. It
21 gives an access to programs, services, and activities, and
22 in many cases, it's going to be the same municipal
23 building that has the courthouse in it as well as other
24 non-fundamental rights, and that's exactly a good
25 illustration of why Title II is appropriate prophylaxis,

1 because by making the municipal building accessible, even
2 for something like a kiddie concert that might not
3 implicate fundamental rights, you're also making the
4 courtroom in the same building accessible to individuals
5 who have a constitutional right to access to that
6 building.

7 One other point I'd like to make is with respect
8 to the damages remedy, which is precisely what seems to be
9 the gravamen of the concern of the state here. As Justice
10 O'Connor pointed out, this is not a situation like other
11 cases, where, if the Court strikes this down as
12 inappropriate section 5 legislation, there's going to be
13 lots of other remedies. The state provides none and
14 people are raising constitutional challenges to the
15 Commerce Clause legislation.

16 The damages remedy that's particularly provided
17 in Title II of the ADA is provided by double cross-
18 reference. Title II incorporates the remedies available
19 under the Rehabilitation Act, which in turn incorporates
20 the remedies available under Title VI. Those remedies are
21 entirely judge-made, and as the Thornburgh amicus briefs
22 points out, to the extent that those remedies are the
23 gravamen of the constitutional concern, their judge-made
24 origins gives this Court unique flexibility to interpret
25 the compensatory damages remedy in a way that renders the

1 statute as a whole constitutional.

2 Broadly speaking, Congress, in passing this
3 statute, found a real problem with the individuals and the
4 entities that are responsible for protecting the civil
5 rights of everyone, denying the rights of individuals with
6 disabilities. One element of its solution was the element
7 of compensatory damages. Those compensatory damages are
8 an appropriate response, but it would be very sad if that
9 one element of the statute was used to bring down the
10 entirety of Title II, given that it remains vitally
11 necessary to make the promise of the Fourteenth Amendment
12 a reality for individuals with disabilities.

13 QUESTION: Is there a reason why there's a damage
14 remedy in Title II and not in Title III?

15 MR. CLEMENT: I think there is, Justice Ginsburg.
16 I think that one thing, I think, is that Congress - the
17 difference in remedies between Title II and Title III
18 reflects two things. One, it reflects a judgment that -
19 that unconstitutional action by a state is worse than
20 unconstitutional action by a private entity.

21 QUESTION: Thank you, Mr. Clement.

22 Mr. Moore, you have four minutes remaining.

23 REBUTTAL ARGUMENT OF MICHAEL E. MOORE

24 ON BEHALF OF THE PETITIONER

25 MR. MOORE: Thank you, Mr. Chief Justice. Very

1 briefly, the type of discrimination Congress was referring
2 to in the statement of findings of - and purpose of the
3 act itself is made clear if the Court examines the fifth
4 finding, which - which tells us what sort - what - what
5 concept of discrimination was in Congress' mind when they
6 used the term throughout those findings. And it talks
7 about not just outright intentional exclusion, but it
8 talks about discriminatory effects of architectural,
9 transportation, and communication barriers. It talks
10 about overprotective rules and policies and their effects.
11 It talks about failures to make modifications to existing
12 facilities and practices, and exclusionary standards that
13 screen people out, in other words, an another disparate
14 impact sort of conception of discrimination.

15 And I think for that reason one can reliably
16 conclude that - that - that Congress was not using
17 discrimination in the sense of completely arbitrary and
18 irrational discrimination of the sort that's prohibited by
19 section 1 of the Fourteenth Amendment with respect to
20 disabled persons, but rather, in the findings and purpose,
21 Congress makes clear that it is addressing a very real
22 social problem, one that needs addressing, but one that
23 does not arise to the level of a - a widespread pattern of
24 constitutional violations on the part of the state.

25 QUESTION: But it begins section 5 by saying,

1 individuals with disabilities continually encounter
2 various forms of discrimination, including outright
3 intentional exclusion. So it seems to want to deal with
4 it all.

5 MR. MOORE: Right, but out - of course, outright
6 intentional exclusion is not necessarily unconstitutional
7 either if it is rationally based, with respect to disabled
8 persons. So one - the use of the term discrimination -

9 QUESTION: What - what's your authority for that
10 proposition?

11 MR. MOORE: The City of Cleburne case, Your
12 Honor. Action by the state that intentionally and
13 expressly classifies on the basis of disability is subject
14 to minimum rational basis scrutiny, and in the examples
15 discussed during the Solicitor General's argument, for
16 example, the hockey rink example, I mean, one impact of a
17 lack of ramps or - or -

18 QUESTION: May I ask you about the hockey
19 example? Supposing building a new hockey example, the
20 architect said you could do it with equal cost, providing
21 access and not providing access. Would it be
22 constitutional assuming there's no extra expense to
23 provide no access?

24 MR. MOORE: I - I think so, depending upon if
25 there were other reasons for doing it. If - cost isn't

1 the only factor that dictates the design of a building.

2 It might be that the site -

3 QUESTION: Well, supposing the general manager of
4 the hockey team doesn't like handicapped people. Would
5 that be a sufficient reason?

6 MR. MOORE: Your - your hypothetical is that the
7 architect expressly designs the building to spite disabled
8 people?

9 QUESTION: No, the - he has two - two plans, one
10 lets them in and one doesn't, and the manager says, oh, we
11 don't want these people, they're too much trouble to
12 handle for the ushers when they get them in their seats
13 and so forth.

14 MR. MOORE: Your Honor's question posits a
15 rational basis for that decision.

16 QUESTION: And that would be a sufficient
17 rational basis in your view?

18 MR. MOORE: That - under this Court's minimum
19 rational basis jurisprudence, yes, it would.

20 QUESTION: Do you think the Cleburne case was a
21 minimal rational basis case?

22 MR. MOORE: I - I know, Your Honor, there - there
23 has been a lot of scholarly debate about that, but as a
24 lawyer for a state, we must take what the Court said at
25 face value. Thank you very much.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Moore.

2 The case is submitted.

3 (Whereupon, at 11:19 a.m., the case in the
4 above-entitled matter was submitted.)

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