UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL ANDERSON and JOSEPH GARRISON, DISABLED IN ACTION OF PENNSYLVANIA, individually and on behalf of all persons similarly situated, **Plaintiffs,** **v.** **PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE,** **Defendant.**	**Civil Action No. 97-VC-3808** **CLASS ACTION**

MEMORANDUM OF INTERVENOR UNITED STATES IN OPPOSITION TO DEFENDANT'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

INTEREST OF THE UNITED STATES

The United States appears as intervenor to defend the constitutionality of Congress' statutory abrogation of the states' Eleventh Amendment immunity for private suits under Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12131 et seq. The United States has a statutory right to intervene to defend the constitutionality of its statutes, 28 U.S.C. § 2403(a), giving it an interest distinct from the private parties' claims of injury. See, e.g., Diamond v. Charles, 476 U.S. 54, 64-65 (1986). Moreover, because of the inherent limitations on administrative enforcement mechanisms and on the

litigation resources of the United States, the United States has an interest in ensuring that the intended scope of this statute may be enforced against states by private parties acting as private attorneys general.

STATEMENT OF THE ISSUE

Whether the statutory abrogation of Eleventh Amendment immunity for suits brought under the ADA is a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment, as applied to suits brought under Title II of that Act in which the conduct alleged to be discriminatory is not intentional.

STATEMENT OF THE CASE

1. On June 3, 1997, the Plaintiffs filed suit in this Court alleging that they and a class of similarly situated individuals with disabilities have been discriminated against by the Defendant in violation of Title II of the ADA. This suit alleges, in sum, that the Defendant has violated Title II by: (1) failing to ensure that the Health Maintenance Organizations ("HMOs") with whom it has contracted to provide medical services for eligible citizens offer facilities that are accessible to individuals with mobility impairments, Complaint at 9-10; and (2) failing to ensure that, when rendering such services, necessary medical information is provided by those HMOs to individuals with visual impairments in appropriate alternative formats. Complaint at 10. In response to the Complaint, the Defendant alleges that it has ensured that there are a number of accessible medical providers available to render services to

eligible citizens, and that it already provides necessary medical information to individuals with visual impairments, sufficient to meet the requirements of Title II. Answer at 7-8.

2. On September 4, 1997, the Defendant filed its Cross Motion for Partial Summary Judgment, wherein it asserted, inter alia, that Title II cannot be enforced against the Defendant to the extent that the Complaint alleges that the Defendant has engaged in discriminatory conduct that is neither "intentional" nor the result of "deliberate indifference." Def.'s Brief at 22-25. The Defendant argues that Congress did not have the constitutional authority to legislate with regard to such conduct. For these reasons, the United States moved to intervene pursuant to 28 U.S.C. § 2403(a) to defend the constitutionality of the scope of this federal statute as it relates to the challenges raised in this suit and to file this brief.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by the Plaintiffs under Title II of the ADA to remedy discrimination against individuals with disabilities. The ADA's statutory abrogation of Eleventh Amendment immunity is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment, which authorizes Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause.

In exercising its power under Section 5, Congress' remedial authority is not limited to prohibiting discrimination against individuals with disabilities that only is either "intentional"

or the result of "deliberate indifference." Congress found that the pervasiveness of discriminatory exclusion of individuals with disabilities has resulted from a history of discrimination based upon irrational fears and inaccurate stereotypes as well as from purportedly "neutral" rules and practices. The continuing effects of this past exclusion, combined with present discrimination, has resulted in persons with disabilities being excluded from full participation in society. In light of these findings, Congress through Title II has required public entities to take reasonable steps to modify their practices and physical facilities so that individuals with disabilities would have meaningful access to all the services, programs, or activities of those entities. This finely-tuned mandate is plainly adapted to the underlying purpose of the Equal Protection Clause: "the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." Plyler v. Doe, 457 U.S. 202, 222 (1982).

ARGUMENT

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

In Seminole Tribe v. Florida, __ U.S. __, 116 S.Ct 1114 (1996) the Supreme Court articulated a two-part test to determine whether Congress has abrogated properly the states' Eleventh Amendment immunity:

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

Id. at 1123 (citations, quotations, and brackets omitted).

With respect to the first inquiry under Seminole Tribe, Section 502 of the ADA provides that "[a] state shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this Act." 42 U.S.C. § 12202. This language clearly exceeds that necessary to constitute an abrogation. See, e.g., Clark v. California, 123 F.3d 1267, 1269 (9th Cir, 1997)("...Congress has unequivocally expressed its intent to abrogate the State's immunity under both the ADA and the Rehabilitation Act.").

The second inquiry is addressed by considering initially whether "Congress has the power to abrogate unilaterally the States' immunity from suit." Seminole Tribe at 1125. It is clear that the Fourteenth Amendment provides that authority. Section 5 of the Fourteenth Amendment empowers Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. As the Supreme Court explained over one hundred years ago:

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

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

In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Supreme Court upheld the abrogation of the states' Eleventh Amendment immunity in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as "appropriate" legislation under Section 5 of the Fourteenth Amendment. It explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." Id. at 456. In Seminole Tribe, the Court reaffirmed its holding in Fitzpatrick. See Seminole Tribe at 1125, 1128, 1131 n.15. Therefore, the Fourteenth Amendment continues to remain a provision that vests Congress with the power to abrogate properly Eleventh Amendment immunity.

I. TITLE II OF THE ADA IS AN ENACTMENT TO ENFORCE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Title II of the ADA provides that:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Our analysis of the constitutionality of Title II under the Fourteenth Amendment must begin by considering whether Title II is properly "regarded as an enactment to enforce the Equal Protection Clause." Morgan at 651.

The simplest (but not the only) way for Congress to express its intent is to declare explicitly that the legislation is passed to enforce Fourteenth Amendment rights. See, e.g., Mills v. Maine, 118 F.3d 37, 42 (1st Cir. 1997)(language of Fair Labor Standards Act includes a "...necessary clear statement of congressional intent to abrogate state sovereign immunity."); Muth v. Central Bucks Sch. Distr., 839 F.2d 113, 128 (3rd Cir. 1988), rev. on other grounds, 491 U.S. 223 (1989). Here Congress did just that, declaring that its intent in enacting the ADA, including Title II, was "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment..., in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). This is more than sufficient. Congress is not required to incorporate a legal brief in a statute explaining its legal theories. As one district court recently acknowledged,

"...the ADA may be viewed as a measure to enforce the Equal Protection Clause by securing non-discriminatory treatment for a discrete and identifiable class of persons -- individuals with disabilities -- who have faced a historical pattern of unequal treatment." Autio v. Minnesota, 968 F.Supp. 1366, 1370 (D.Minn. 1997), appeal pending, No. 97-3145 (8th Cir.)(acknowledging constitutionality of Title I of the ADA).

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

II. TITLE II OF THE ADA IS PLAINLY ADAPTED TO ENFORCING THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The Defendant's constitutional challenge lies in an assertion that Section 5 of the Fourteenth Amendment does not provide to Congress the authority to proscribe conduct that itself is not a direct violation of that Amendment. In its brief, the Defendant states, "[a]s clarified by the City of Boerne [v. Flores, __ U.S. __, 117 S.Ct. 2157 (1997)] Court, Congress must confine its enforcement of the protections of the

equal protection clause to the substance of those protections as interpreted by the Court....the contours of the equal protection clause must define the contours of statutory provisions enacted to enforce the rights conferred by that clause." Def.'s Brief at 19. In this regard, the Defendant cites the Supreme Court case of Washington v. Davis, 426 U.S. 229 (1976) which stands for the proposition that a valid cause of action for a violation of the Equal Protection Clause must allege "a purpose to discriminate...." Id. at 238 (quoting Akins v. Texas, 325 U.S. 393, 403-04 (1945)). The Defendant then makes its central argument that, "[i]n order for the ADA to be an appropriate exercise of congressional enforcement authority, therefore, it must be interpreted to similarly require a showing of intentional discrimination." Def.'s Brief at 20.

As will be explained infra, there is no basis in constitutional jurisprudence to assert that Congress' Section 5 powers are limited in the manner suggested by the Defendant, and the Defendant misapprehends the recent holding in Flores as it relates to those powers. The ADA is constitutional, in part, because it is plainly adapted to addressing the discrimination that Congress found existed against individuals with disabilities.

A. Under Its Section 5 Powers, Congress May Proscribe Conduct That Is Not A Direct Violation Of The Constitution

In Katzenbach v. Morgan, 384 U.S. 641, 651 (1966), the Supreme Court explained that Congress' powers under Section 5 are

not limited to proscribing only those instances of discrimination that would constitute a direct violation of the Constitution. The Court stated that:

> Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion and determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment...a construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the Congressional enactment, would depreciate both Congressional resources and congressional responsibility for implementing the Amendment."

Id. at 648-49, 651 (footnotes omitted). Thus, Section 5 grants to Congress the broad power to identify and to remedy the discrimination it has determined has occurred in order to secure the equal protections of the laws for all citizens as required by the Fourteenth Amendment. The Court made it clear that this power allows Congress to enact legislation appropriate to address such concerns, including the power to proscribe certain conduct that on its own may not give rise to a constitutional violation.

In this spirit, the Supreme Court's recent decision in Flores again addressed directly the question of the purpose and extent of Congress' powers to legislate pursuant to Section 5, and it reaffirmed the reasoning of the Court in Morgan. The Court acknowledged settled jurisprudence in concluding that even statutes that prohibit more than does the Equal Protection Clause on its own can be "appropriate remedial measures" when there is "...a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented." Id. at 2169. The

Court further explained that:

> Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States."

Flores at 2163 (quoting Fitzpatrick at 455)(emphasis added).

It is for this reason that the Defendant's reliance upon the Supreme Court's decision in Washington v. Davis confuses different legal standards. In Davis, the Court explained that an allegation of a direct violation of the equal protection guarantees found in the Fifth and Fourteenth Amendments generally requires a showing of a "purpose" or an intent to discriminate. Id. at 245. However, the Court had no occasion to consider the different question of the extent to which Congress may legislate under its powers arising from Section 5 of the Equal Protection Clause. As highlighted supra, the standards governing what constitutes a direct violation of the Equal Protection Clause of the Fourteenth Amendment giving rise to a constitutionally-based cause of action do not govern Congress' broad powers under Section 5 to enact appropriate legislation necessary to address equal protection concerns. The standards governing the extent to which Congress can legislate under Section 5 already are established in settled jurisprudence and were clarified recently in Flores.[1/]

[1/] In addition, the Defendant's reliance upon the decision in Pierce v. King, 918 F.Supp. 932 (E.D.N.C. 1996) is not

(continued...)

In South Carolina v. Katzenbach, 383 U.S. 301, 325-337 (1966), and again in City of Rome v. United States, 446 U.S. 156, 177 (1980), both cited with approval in Flores, the Supreme Court upheld the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect, regardless of an intent to discriminate. Similarly, the courts of appeals have unanimously upheld the application of Title VII's disparate impact standard to states as a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment. See, e.g., Grano v. Department of Dev., 637 F.2d 1073, 1080 n.6 (6th Cir. 1980); United States v. Comm. of Va., 620 F.2d 1018 (4th Cir. 1980); DPOA v. Young, 608 F.2d 671, 689 n.7 (6th Cir. 1979); Scott v. City of Anniston, 597 F.2d 897, cert. denied, 446 U.S. 917 (1979); Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980); United States v. City of Chicago, 573 F.2d 416 (7th Cir. 1978); see also Flores at 2169 (agreeing that "Congress can prohibit

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[1](...continued)
persuasive. In this case, the district court held that the Fourteenth Amendment does not permit Congress to impose the ADA upon state prisons. Id. at 939. The court failed to engage in any meaningful analysis to determine whether Title II validly was enacted by Congress pursuant to its Section 5 powers, and its holding is in square opposition to the decisions of other courts addressing virtually the same issue concerning prisons, including the Third Circuit. See, e.g., Yeskey v. Pennsylvania Dep't of Corrections, 118 F.3d 168 (3rd Cir. 1997); Armstrong v. Wilson, 1997 WL 525521 (9th Cir. 1997); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481 (7th Cir. 1997); Clark, supra; Niece v. Fitzer, 941 F.Supp. 1497 (E.D.Mich. 1996). An appeal in Pierce currently is pending before the Fourth Circuit. No. 96-6450.

laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause"); Muth v. Central Bucks Sch. Distr., 839 F.2d 113, 129 (3rd Cir. 1988)(holding that the Education for the Handicapped Act, which proscribes certain non-intentional discrimination, abrogates states' immunity in federal court), rev. on other grounds, 491 U.S. 223 (1989); United States v. City of Black Jack, 508 F.2d 1179, 1184-1185 (8th Cir. 1974)(stating that the discriminatory effects standard of the Fair Housing Act is a valid exercise of Congress' power under enforcement provision of Thirteenth Amendment), cert. denied, 422 U.S. 1042 (1975).

As one court of appeals recently acknowledged when called upon to consider whether Title II is constitutional under Congress' Section 5 authority:

> The Fourteenth Amendment gives Congress the same broad powers as does the Necessary and Proper Clause....Congress' powers under the Fourteenth Amendment extend beyond conduct which is unconstitutional, and Congress may create broader equal protection rights than the Constitution itself mandates.

Clark v. California, 123 F.3d 1267, 1270 (9th Cir. 1997) (citations omitted). In light of settled jurisprudence, there is no basis for the Defendant to assert that Congress' Section 5 powers are restricted in such an unprecedented manner.

B. Congress Found That Discrimination Against Individuals With Disabilities Was Severe, Extended To Every Aspect Of Society And Resulted From Both Intentional And Non-Intentional Conduct

In exercising its authority under Section 5 when enacting the ADA, Congress engaged in extensive fact-finding. The facts

amassed by Congress are replete with proof of the severe and systemic nature of discrimination against individuals with disabilities, ranging from that which is the result of facially neutral practices but discriminatory in application to intentional and/or animus-based conduct.

In enacting the ADA, Congress found that individuals with disabilities have been "faced with restrictions and limitations ...resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society," 42 U.S.C. § 12101(a)(7), and that such discrimination "persists in such critical areas as...access to public services," id. at 12101(a)(3). Congress also found that:

> individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs or other opportunities.

Id. at 12101(a)(5).

The scope of the protections afforded by Title II is "plainly adapted" to eliminating the many forms of discrimination that Congress determined has been suffered by individuals with disabilities. Congress made express findings about the status of individuals with disabilities in our society, and determined that they were subject to continuing "serious and pervasive" discrimination that "tended to isolate and segregate individuals with disabilities." 42 U.S.C. § 12101(a)(2). We need not repeat

these findings here in toto. (They are attached as an addendum to this brief.) Nor can we provide a complete summary of the fourteen hearings held by Congress at the Capitol, the sixty-three field hearings, the lengthy floor debates, and the myriad of reports submitted to Congress by the Executive Branch in the three years prior to the enactment of the ADA, see Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp.L.Rev. 393, 393-394 n. 1-4, 412 n.133 (1991)(collecting citations), as well as Congress' thirty years of experience with other statutes aimed at preventing discrimination against individuals with disabilities. See Lowell P. Weicker, Jr., Historical Background of the Americans with Disabilities Act, 64 Temp.L.Rev. 387, 387-389 (1991)(discussing other laws enacted to redress discrimination against individuals with disabilities). However, we will sketch briefly some of the major areas of discrimination that Congress uncovered and was endeavoring to redress that are relevant to the constitutional challenge posed in the instant case.

The evidence before Congress demonstrated that persons with disabilities were sometimes excluded from public services for no reason other than a distaste for or fear of their disabilities. See S. Rep. No. 116, 101st Cong., 1st Sess. 7-8 (1989)(citing instances of discrimination based on negative reactions to sight of disability)(Senate Report); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28-31 (1990)(same)(House Report). The legislative record contained documented instances of exclusion of

individuals with disabilities from hospitals, theaters, restaurants, bookstores, and auction houses simply because of prejudice. See Cook at 408-409 (collecting citations). Indeed, the United States Commission on Civil Rights, after a thorough survey of the available data, documented that prejudice against individuals with disabilities manifested itself in a variety of ways, including "reaction[s] of aversion," reliance on "false" stereotypes, and stigma associated with disabilities that lead to individuals with disabilities being "thought of as not quite human." U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 23-26 (1983); see also Senate Report, supra, at 21. The negative attitudes, in turn, produced fear and reluctance on the part of individuals with disabilities to participate in society. See Senate Report, supra, at 16; House Report, supra, at 35, 41-43; Cook at 411. Congress thus concluded that individuals with disabilities were "faced with restrictions and limitations...resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a)(7).

The decades of ignorance, fear and misunderstanding created a tangled web of discrimination that resulted in and reinforced isolation and segregation. The evidence before Congress demonstrated that these attitudes were linked more generally to the segregation of individuals with disabilities. See Senate Report, supra, at 11; U.S. Commission on Civil Rights, supra, at

43-45. This segregation was in part the result of seemingly neutral government policies in "critical areas [such] as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3).[2] Congress found that the exclusion of persons with disabilities from programs and benefits was not just the result of discriminatory intent or animus; it was also a result of "thoughtlessness or indifference -- of benign neglect" through the interaction between "neutral" rules and individuals with disabilities.[3] As a result, Congress determined that for an entity to treat individuals with disabilities as it did those without disabilities was not sufficient to eliminate discrimination. See 42 U.S.C. § 12101(a)(5); see also U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 99 (1983); Helen L. v. Didario, 46 F.3d 325, 334 (3rd Cir. 1995)("Because the ADA evolved from an attempt to remedy the effects of 'benign neglect' resulting from the "invisibility" of the disabled, Congress would not have intended

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[2] For example, in enacting the Individuals with Disabilities in Education Act, Congress had determined that millions of children with disabilities were either receiving no education whatsoever, an inadequate education, or receiving their education in an unnecessarily segregated environment. See 20 U.S.C. § 1400(b)(2)-(4); see also Bd. of Educ. v. Rowley, 458 U.S. 176, 191-203 (1982)(surveying legislative findings); Cook at 413-414.

[3] S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989)(quoting without attribution Alexander v. Choate, 469 U.S. 287, 295 (1985); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 29 (1990) (same); 136 Cong. Rec. 10,870 (1990)(Rep. Fish); id. at 11,467 (Rep. Dellums).

to limit the Act's protections and prohibitions to circumstances involving deliberate discrimination."), cert. denied, 116 S.Ct. 64 (1995); Crowder v. Kitagawa, 81 F.3d 1480, 1483-1484 (9th Cir. 1996); United States v. California Mobile Home Park Management Co., 29 F.3d 1413, 1417 (9th Cir. 1994); Smith v. Barton, 914 F.2d 1330, 1339 & n.13 (9th Cir. 1990), cert. denied, 501 U.S. 1217 (1991).[4]

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

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[4] "For example, under [the ADA], local and state governments are required to provide curb cuts on public streets. The employment, transportation, and public accommodation sections of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets." H.R. Rep. No. 485, Pt. 2, supra, at 84. Similarly, Congress intended "that the telephone emergency services operated by local and state governments be accessible to [hearing impaired and speech impaired] individuals. This means that such telephone emergency systems must be equipped with technology that gives these individuals direct access to emergency services." H.R. Rep. No. 558, 101st Cong., 2d Sess. 63 (1990); S. Rep. No. 596, 101st Cong., 2d Sess. 67-68 (1990); see also H.R. Rep. No. 485, Pt. 2, supra, at 39, 85. These are clear examples of government practices that while neutral on their face and perhaps not intended to discriminate, are nevertheless grossly discriminatory in effect.

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

Of course, even when the buildings were accessible, individuals with disabilities were often excluded because they could not reach the buildings. The evidence before Congress showed that, in fact, public streets and sidewalks were not accessible. See House Report, supra, at 84; House Hearings, supra, at 248, 271. And even when they could navigate the streets, individuals with disabilities still were shut out of most public transportation. See H.R. Rep. No. 485, Pt. 1, 101st Cong., 2d Sess. 24 (1990); National Council on the Handicapped, Toward Independence 32-33 (1986); U.S. Commission on Civil Rights, supra, at 39. Some transit systems offered paratransit services (special demand responsive systems for individuals with disabilities) to compensate for the absence of other means of transportation, but those services were often too limited and further contributed to the segregation of individuals with disabilities from the general public. See Senate Report, supra, at 13, 45; House Report, supra, at 38, 86; Toward Independence, supra, at 33; U.S. Commission on Civil Rights, supra, at 39. As Congress reasoned:

> Transportation plays a central role in the lives of all Americans. It is a veritable lifeline to the economic and social benefits that our Nation offers its citizens. The absence of effective access to the transportation network can mean, in turn, the inability to obtain satisfactory employment. It can also mean the inability to take full

> advantage of the services and other opportunities provided by both the public and private sectors.

H.R. Rep. No. 485, Pt. 4, 101st Cong., 2d Sess. 25 (1990); see House Report, supra, at 37, 87-88; Senate Report, supra, at 13.

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

Given these facts, it is not surprising that surveys of both individuals with disabilities and employers revealed that intentional and unintentional discrimination were some of the reasons many individuals with disabilities were unemployed. See Senate Report, supra, at 9; House Report, supra, at 33, 37; On

the Threshold of Independence, supra, at 15. "[R]ecent studies suggest that prejudice against impaired persons is more intense than against other minorities. [One study] concludes that employer attitudes toward impaired workers are 'less favorable than those...toward elderly individuals, minority group members, ex-convicts, and student radicals,' and [another study] finds that handicapped persons are victims of 'greater animosity and rejections than many other groups in society.'" William G. Johnson, The Rehabilitation Act and Discrimination Against Handicappped Workers, in Disability and the Labor Market 196, 242, 245, (Monroe Berkowitz and M. Anne Hill eds., 1986). Evidence at congressional hearings suggested that similar discrimination may exist in government employment. See Stephen L. Mikochik, The Constitution and the Americans with Disabilities Act: Some First Impressions, 64 Temp.L.Rev. 619, 624 n.33 (1991)(collecting relevant testimony). And even when employed, individuals with disabilities received lower wages that could not be explained by any factor other than discrimination. See U.S. Commission on Civil Rights, supra, at 31-32; Equal Employment Opportunities for Individuals with Disabilities, 56 Fed. Reg. 8,581 (1991)(citing studies); Johnson at 245 (same).

A variety of policies and practices found in both public and private entities thus produced a situation in which individuals with disabilities were largely poor, isolated and segregated. As Justice Marshall explained, "lengthy and continuing isolation of [individuals with disabilities] perpetuated the ignorance,

irrational fears, and stereotyping that long have plagued them." City of Cleburne v. Cleburne Living Cntr., 473 U.S. 432, 464 (1985); see also U.S. Commission on Civil Rights, supra, at 43-45. In fact, Congress could reasonably have found government discrimination a root cause of "people with disabilities, as a group, occupy[ing] an inferior status in our society, and [being] severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. § 12101(a)(6).[5/]

Because Congress bears primary responsibility for enforcing the Fourteenth Amendment, see South Carolina v. Katzenbach, 383 U.S. at 326, "[s]ignificant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." United States v. Gainey, 380 U.S. 63, 67 (1965); see City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989); Fullilove v. Klutznick, 448 U.S. 448, 483 (1980); Morgan at 652-653; Blake v. City of Los Angeles, 595 F.2d 1367, 1373 (9th Cir. 1979)(congressional finding that "widespread discrimination against minorities exists

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

in State...employment" sufficient to extend Title VII disparate impact standard to the states under Section 5).

C. Title II Of The ADA Redresses Constitutionally Cognizable Injuries

In enacting the various provisions of the ADA, including Title II, Congress was acting within the constitutional framework that has been laid out by the Supreme Court. The Equal Protection Clause prohibits invidious discrimination, that is "a classification whose relationship to [a legitimate] goal is so attenuated as to render the distinction arbitrary or irrational." City of Cleburne v. Cleburne Living Cntr., 473 U.S. 432, 446 (1985). In Cleburne, the Supreme Court unanimously declared unconstitutional as invidious discrimination a decision by a city to deny a special use permit for the operation of a group home for individuals with mental retardation. A majority of the Court recognized that "through ignorance and prejudice [individuals with disabilities] 'have been subjected to a history of unfair and often grotesque mistreatment.'" Id. at 454 (Stevens, J., concurring); see id. at 461 (Marshall, J., concurring in the judgment in part). The Court acknowledged that "irrational prejudice," id. at 450, "irrational fears," id. at 455 (Stevens, J.), and "impermissible assumptions or outmoded and perhaps invidious stereotypes," id. at 465 (Marshall, J.), existed against individuals with disabilities in society at large and sometimes inappropriately infected government decision making.

It is significant that, while a majority of the Court declined to deem classifications based on disability as suspect

or "quasi-suspect," it elected not to do so, in part, because it would unduly limit legislative solutions to problems faced by the disabled. The Court reasoned that, "[h]ow this large and diversified group is to be treated under the law is a difficult and often technical matter, very much a task for legislators guided by qualified professionals." Id. at 442-443. It specifically noted with approval legislation such as Section 504 of the Rehabilitation Act, which is aimed at protecting persons with disabilities, and openly worried that requiring governmental entities to justify their efforts under heightened scrutiny might "lead [governmental entities] to refrain from acting at all." Id. at 444.[6]

Nevertheless, it did affirm that "there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms," id. at 446, and found the actions at issue in that case

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[6] As Congress's power to craft appropriate legislation under the Equal Protection Clause is not limited to conduct that is intentional, neither is it so limited with regard to whether a victim of discrimination protected by the Act is a member of a "suspect class." "The fact that the Supreme Court has subjected governmental classifications involving suspect classes to a higher level of scrutiny than other classifications does not prevent Congress from finding that another class of persons has been subjected to a history of unequal treatment and legislating pursuant to its enforcement powers under the Fourteenth Amendment to protect that class of persons from arbitrary discrimination." Mayer v. University of Minn., 940 F.Supp. 1474, 1479 (D.Minn. 1996); see also Clark at 1271 ("We reject [the defendant's] argument that Congress' power must be limited to the protection of those classes found by the Court to deserve "special protection" under the Constitution.").

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

There is a sound basis in constitutional law for the recognition that discrimination exists not only by treating individuals with disabilities differently for no legitimate

reason, but also by treating them identically when they have recognizable differences. It is this recognition that has given rise to the prohibition of certain devices that are discriminatory because such devices have an unlawfully disparate impact on members of a certain class. See, e.g., all Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Sixth Circuit has explained in a case involving gender classifications, "in order to measure equal opportunity, present relevant differences cannot be ignored. When males and females are not in fact similarly situated and when the law is blind to those differences, there may be as much a denial of equality as when a difference is created which does not exist." Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 657 (6th Cir. 1981). Similarly, it is also a denial of equality when access to facilities, benefits and services is denied because the state refuses to acknowledge the "real and undeniable differences between [persons with disabilities] and others." Cleburne at 444. Title II is designed to remedy the denial of such services.

Indeed, the Supreme Court has recognized that the principle of equality is not an empty formalism divorced from the realities of day-to-day life, and thus the Equal Protection Clause is not limited to prohibiting unequal treatment of similarly situated persons. The Equal Protection Clause guarantees "that people of different circumstances will not be treated as if they were the same." United States v. Horton, 601 F.2d 319, 324 (7th Cir.),

cert. denied, 444 U.S. 937 (1979) (quoting Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law 520 (1978)). By definition, persons with disabilities have "a physical or mental impairment that substantially limits one or more...major life activities." 42 U.S.C. § 12102(2)(A). Thus, as to that life activity, "the handicapped typically are not similarly situated to the nonhandicapped." Alexander v. Choate, 469 U.S. 287, 298 (1985).[7] The Constitution takes this reality into account and instead, in certain circumstances, requires equal access rather than simply identical treatment. For "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." Jenness v. Fortson, 403 U.S. 431, 442 (1971). The Fourteenth Amendment grants to Congress the "discretion in determining whether and what legislation is needed" to address such discrimination. Morgan at 651. In enacting the ADA, Congress recognized that individuals with disabilities encounter "various forms" of discrimination, among them being the prejudicial barriers to equal opportunity that arise when individuals with disabilities are treated the same as

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[7] Alexander was discussing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The Third Circuit has acknowledged the relevance and applicability of case law interpreting the Rehabilitation Act, when considering matters arising under Title II. See Helen L. v. Didario,, 46 F.3d 325, 333-34 (3rd Cir. 1995), cert. denied, 116 S.Ct. 64 (1995). See also McPherson v. Michigan High Sch. Athletic Ass'n, Inc., 119 F.3d 453, 460 (6th Cir. 1997)(en banc); Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006, 1016 n.13 (6th Cir. 1997)(en banc)("Over sixteen years after the Rehabilitation Act was enacted, Congress, concerned that the Rehabilitation Act alone was inadequate to eradicate discrimination against the disabled, signed into law the ADA, which has a broader scope than the Rehabilitation Act.").

non-disabled individuals. 42 U.S.C. § 12101(a)(5). "Legislation...singling out the [disabled] for special treatment reflects the real and undeniable differences between the [disabled] and others...and is a proper measure to vindicate equal protection principles in the face of arbitrary discrimination." Autio at 1372 (citing Cleburne at 444).

In Title II of the ADA, Congress attempted to redress this discrimination by mandating that "qualified handicapped individual[s] must be provided with meaningful access to the benefit that the [entity] offers." Alexander at 301 (emphasis added). Congress' mandate is consistent with the principles of equality embodied in the Equal Protection Clause. "The power to 'enforce' [the Equal Protection Clause] may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." J.A. Croson Co. at 490 (opinion of O'Connor, J.).[8/]

[8/] Moreover, in a series of Supreme Court cases beginning with Griffin v. Illinois, 351 U.S. 12 (1956), and culminating in M.L.B. v. S.L.J., __ U.S. __, 117 S.Ct. 555 (1996), the Court instructed that principles of equality are sometimes violated by treating unlike persons alike. In these cases, the Court held that a state violates the Equal Protection Clause in treating indigent parties appealing from certain court proceedings as if they were not indigent. Central to these holdings is the acknowledgment that "a law nondiscriminatory on its face may be grossly discriminatory in its operation." M.L.B. at 569 (quoting Griffin at 17 n.11). The Court held in these cases that even though states are applying a facially neutral policy by charging all litigants equal fees for an appeal, the Equal Protection Clause requires states to waive such fees in order to ensure equal "access" to appeal. Id. at 560. Nor is it sufficient if a state permits an indigent person to appeal without charge, but

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Congress' Section 5 powers are thus not limited to prohibiting types of discrimination that may be labeled as “intentional,” “purposeful” or “animus-based” discrimination. "Congress is not circumscribed by any such artificial rules." Katzenbach at 327. Pursuant to Section 5, Congress may enact "[w]hatever legislation is appropriate...to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion." Ex parte Virginia at 345-346. This includes the power, such as that contained in Title II, to prohibit or modify rules, policies and practices that have a disparate effect on a class or individual, regardless of the intent behind those actions.

D. Unlike The Statute Found Unconstitutional In Flores, Title II Of The ADA Is A Remedial And Preventive Scheme Proportional To The Injury That Congress Discovered

The ADA, including Title II, is a proportionate response by Congress to remedy and prevent the pervasive discrimination it discovered. Section 5 of the Fourteenth Amendment vests in Congress broad power to address the “continuing existence of unfair and unnecessary discrimination and prejudice [that] denies individuals with disabilities the opportunity...to pursue those opportunities for which our free society is justifiably famous.” 42 U.S.C. § 12101(a)(9). “It is fundamental that in no organ of

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does not provide free trial transcripts. The Court has declared that the State cannot "extend to such indigent defendants merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.'" Id. at 569 n.16 (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)).

government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." Fullilove at 483 (opinion of Burger, C.J.). As acknowledged by the Ninth Circuit in Clark, in rejecting a challenge that the ADA and Section 504 of the Rehabilitation Act are not a proper exercise of Congress' powers under Section 5, "neither act provides remedies so sweeping that they exceed the harms that they were designed to redress." Id. at 1270.

As discussed supra, after extensive investigation (and long experience with the analogous nondiscrimination requirement contained in Section 504 of the Rehabilitation Act), Congress found that the exclusion of individuals with disabilities from government facilities, programs and benefits was a result of past and on-going discrimination arising in a variety of contexts. In Title II, Congress sought to remedy the effects of past discrimination and prevent like discrimination in the future by mandating that "qualified handicapped individual[s] must be provided with meaningful access to the benefit that the [entity] offers." Alexander at 301 (emphasis added).

Viewed in light of the underlying equal protection principles, the ADA, including Title II, is appropriate preventive and remedial legislation under the Section 5 powers granted to Congress by the Constitution. First, it is preventive in that it established a statutory scheme that attempts to detect

government activities likely tainted by discrimination. By requiring the entity through Title II to show on the record that distinctions it makes based on disability, or refusals to provide meaningful access to facilities, programs and services, are not the result of prejudice or stereotypes, but rather based on legitimate governmental objectives, it attempts to ensure that inaccurate stereotypes or irrational fear are not the true cause of the decision. See, e.g., Pesterfield v. TVA, 941 F.2d 437, 443 n.2 (6th Cir. 1991). This is similar to the standards articulated by the Court in Cleburne.

Second, the ADA is remedial in that it attempts to ensure that the interests of individuals with disabilities are given their due. Not surprisingly, given their profound segregation from the rest of society, see 42 U.S.C. § 12101(a)(2), the needs of individuals with disabilities were not taken into account when buildings were designed, standards were set, and rules were promulgated. Thus, for example, sidewalks and buildings were often built based on the standards for those who are not disabled. The ability of individuals in wheelchairs to use them or of individuals with visual impairments to navigate within them was not likely considered. See U.S. Commission on Civil Rights, supra, at 21-22, 38. Even when considered, their interests may not have been properly weighed, since "irrational fears or ignorance, traceable to the prolonged social and cultural isolation of [individuals with disabilities] continue to stymie recognition of [their] dignity and individuality." Cleburne at

467. Congress may conclude that affirmative measures are necessary to bring them into the mainstream. Cf. Fullilove at 477-478.

Furthermore, Title II requires generally that in certain situations state and local government programs not unnecessarily exclude individuals with disabilities, either intentionally or unintentionally, and that government entities make "reasonable modifications to rules, policies, or practices" for a "qualified individual with a disability," 42 U.S.C. § 12131(2), when the modifications are "necessary to avoid discrimination on the basis of disability," 28 C.F.R. § 35.130(b)(7)(emphasis added). Furthermore, the regulations implementing Title II include a prohibition against the failure to make a public entity's programs accessible to individuals with disabilities. 28 C.F.R. § 35.149 provides that, "...no qualified individual with a disability shall, because of a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity...." While these requirements impose some burden on the states, the statutory scheme created by Congress acknowledges the importance of other interests as well. For example, the Act does not require governmental entities to articulate a "compelling interest," but only requires "reasonable modifications" that do not entail a "fundamental alteration in the nature of a service, program, or activity." 28 C.F.R. § 35.130(b)(7). In general,

governmental entities need not provide accommodations if they can show "undue financial and administrative burdens." 28 C.F.R. §§ 35.150(a)(3), 35.164 (emphasis added).

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

The Defendant's constitutional challenge in the instant case misstates the relevance of the recent holding in Flores to Congress' power to remedy discrimination against individuals with disabilities through enactment of the ADA. The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq. (the statute at issue in Flores) was enacted by Congress in response to the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990). Smith held that the Free Exercise Clause did not require states to provide exceptions to neutral and generally applicable laws even when those laws significantly burdened religious practices. See id. at 887. In RFRA, Congress attempted to overcome the effects of Smith by imposing through legislation a requirement that laws substantially burdening a person's exercise of religion be justified as in furtherance of a

compelling state interest and as the least restrictive means of furthering that interest. See 42 U.S.C. § 2000bb-1. The Court found that in enacting this standard, Congress was not acting in response to a history of unconstitutional activity. Indeed, "RFRA's legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry." Flores at 2169. Rather, the Court found that Congress simply disagreed with the Court's decision about the substance of the Free Exercise Clause and was "attempt[ing] a substantive change in constitutional protections." Id. at 2170.

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

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

also id. at 2169 (surveying legislative record). It also found that RFRA's requirement that the state prove a compelling state interest and narrow tailoring imposed "the most demanding test known to constitutional law" and thus possessed a high "likelihood of invalidat[ing]" many state laws. Id. at 2171. While stressing that Congress was entitled to "much deference" in determining the need for and scope of laws to enforce Fourteenth Amendment rights, id. at 2172, the Court found that Congress had simply gone too far in attempting to regulate local behavior that the statute could no longer be viewed as remedial. Indeed, the failings of RFRA were not based on the Court's disagreement with facts found by Congress, but with a determination that those facts did not justify the alterations proposed by RFRA: "In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years." Flores at 2169.

As we have shown above, none of the specific concerns articulated by the Court in Flores apply to the ADA, including Title II.[9/] However, the ADA differs from RFRA in an even more

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[9/] First, there was substantial evidence by which Congress could have determined that there was a "pattern or practice of unconstitutional conduct." Second, the statutory scheme imposed by Congress did not attempt to impose a compelling interest standard, but a more flexible test that requires "reasonable modifications." This finely-tuned balance between the interests

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fundamental way. Through RFRA, Congress was attempting to expand the substance of individual rights at the expense of the states. The ADA, on the other hand, is simply seeking to protect the equal protection rights of individuals with disabilities by establishing a remedial scheme tailored to detecting and preventing those activities most likely to be the result of past or present discrimination.

III. TITLE II OF THE ADA IS CONSISTENT WITH THE LETTER AND SPIRIT OF THE CONSTITUTION

Not only is Congress institutionally better suited to making determinations regarding the extent to which a class of individuals has been discriminated against and the appropriate remedies, it is also charged by the Constitution with the responsibility for making such determinations. Although federal courts have an important role to play in protecting individuals from state infringement of equal protection rights, Section 5 of the Fourteenth Amendment has vested in Congress the authority to enact legislation it believes necessary to enforce those rights -- giving it power over the states greater than that entrusted in the judiciary. "It is not said that the judicial power of the general government shall extend to enforcing the prohibition and protecting the rights and immunities guaranteed....It is the

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[9](...continued)
of individuals with disabilities and public entities plainly manifests a "congruence" between the "means used" and the "ends to be achieved." See Flores at 2169. Moreover, there is no problem regarding judicially manageable standards, as the courts have regularly applied the "reasonable accommodation" test under Section 504 to recipients of federal funds for the past 20 years.

power of Congress which has been enlarged." Ex parte Virginia at 345.

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

Following this tradition, all of the appellate courts that have considered the issue are in agreement that Congress' abrogation of Eleventh Amendment immunity for suits under the ADA, including Title II, is "appropriate legislation" to enforce the Fourteenth Amendment. See, e.g., Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997)("invidious discrimination by governmental agencies...violates the equal protection clause even if the discrimination is not racial, though racial discrimination was the original focus of the clause. In creating a remedy against such discrimination, Congress was acting well within its powers under section 5.... Clark v. California, 123 F.3d 1267, 1270 (9th Cir. 1997)("[t]he Supreme Court has previously held that discrimination against the disabled is a form of discriminated protected under the Equal Protection Clause....the ADA [is]...within the scope of appropriate legislation under the Equal Protection Clause.");

Armstrong v. Wilson, 942 F.Supp. 1252 (N.D.Cal. 1996), aff'd on other grounds, 124 F.3d 1019 (9th Cir, 1997); see also Autio v. Minnesota, 968 F.Supp. 1366, 1370 (D.Minn. 1997), appeal pending, No. 97-3145 (8th Cir.)("Congress enacted the Americans With Disabilities Act to secure the equal protection rights of individuals with disabilities pursuant to a valid exercise of its enforcement rights under Section Five of the Fourteenth Amendment."); Wallin v. Minnesota Dep't of Corrections, 1997 WL 456582, at *9 (D.Minn. 1997)("This Court has recently held, and now reaffirms, that ADA claims are not subject to Eleventh Amendment immunity."); Williams v. Ohio Dep't of Mental Health, 960 F.Supp. 1276, 1282 (S.D.Ohio 1997) ("Congress has lawfully enacted the ADA pursuant to its authority under Section 5 of the Fourteenth Amendment."); Hunter v. Chiles, 944 F.Supp. 914 (S.D.Fla. 1996), appeal pending, No. 96-5388 (11th Cir.); Niece v. Fitzner, 941 F. Supp. 1497, 1504 (E.D.Mich. 1996)("[b]ecause both the Rehabilitation Act of 1973 and the ADA are proper exercises of Congress' power to enforce the provisions of the Fourteenth Amendment, and because in both acts Congress has indicated in clear, unequivocal language its intent to abrogate states' Eleven Amendment immunity, the Court should conclude that the Eleventh Amendment does not bar the plaintiffs' suit."); Mayer v. University of Minnesota, 940 F.Supp. 1474 (D.Minn. 1996); Doe v. Judicial Nominating Convention, 906 F.Supp. 1534, 1539 (S.D.Fla. 1995)(noting that ADA was passed under the Congress' powers under Fourteenth Amendment in rejecting argument

that ADA violated Tenth Amendment); Ellen S. v. Florida Bd. Of Bar Examiners, 859 F.Supp. 1489, 1494-1495 (S.D.Fla. 1995)(same); Eisfelder v. Michigan Dep't of Natural Resources, 847 F.Supp. 78, 82 (W.D.Mich. 1993); but see Nihiser v. Ohio Envtl. Protection Agency, 1997 WL 627071 (S.D. Ohio 1997), appeal pending, No. 97-3933 (6th Cir.); Pierce v. King, 918 F.Supp 932 (E.D.N.C. 1996)(dictum), appeal pending, No. 96-6450 (4th Cir.). (Although some of these decisions pre-date Flores, for the reasons discussed above they remain good law.)

CONCLUSION

The Eleventh Amendment is no bar to this Court's jurisdiction over this action. Title II of the ADA may be construed to proscribe conduct that is not intentional.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Because the constitutionality of federal statutes is at issue, the United States believes that its presence at oral argument would be appropriate. See 28 U.S.C. § 2403(a).

Respectfully Submitted,

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Americans with Disabilities Act
42 U.S.C. 12101

§ 12101. Findings and purpose

(a) Findings

The Congress finds that--

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

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

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

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

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

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

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

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

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

(b) Purpose

It is the purpose of this chapter -

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

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

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

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

Rehabilitation Act of 1973
29 U.S.C. 701

§ 701. Findings; purpose; policy

(a) Findings

Congress finds that-

(1) millions of Americans have one or more physical or mental disabilities and the number of Americans with such disabilities is increasing;

(2) individuals with disabilities constitute one of the most disadvantaged groups in society;

(3) disability is a natural part of the human experience and in no way diminishes the right of individuals to-

(A) live independently;

(B) enjoy self-determination;

(C) make choices;

(D) contribute to society;

(E) pursue meaningful careers; and

(F) enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society;

(4) increased employment of individuals with disabilities can be achieved through the provision of individualized training, independent living services, educational and support services, and meaningful opportunities for employment in integrated work settings through the provision of reasonable accommodations;

(5) individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services: and

(6) the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to-

(A) make informed choices and decisions: and

(B) achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency, for such individuals.

(b) Purpose

The purposes of this chapter are-

(1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through-

(A) comprehensive and coordinated state-of-the-art programs of vocational rehabilitation:

(B) independent living centers and services;

(C) research;

(D) training;

(E) demonstration projects; and

(F) the guarantee of equal opportunity; and

(2) to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with severe disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living.

(C) Policy

It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter shall be carried out in a manner consistent with the principles of-

(1) respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities;

(2) respect for the privacy, rights, and equal access (including the use of accessible formats), or the individuals;

(3)inclusion, integration, and full participation of the individuals;

(4) support for the involvement of a parent, a family member, a guardian, an advocate, or an authorized representative if an individual with a disability requests, desires, or needs such support; and

(5) support for individual and systematic advocacy and community involvement.

Individuals with Disabilities Education Act
20 U.S.C. 1400

§ 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Findings

The Congress that-

(1) there are more than eight million children with disabilities in the United States today:

(2) the special educational needs of such children are not being fully met;

(3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity:

(4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of children with disabilities;

(8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasized special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 1997, a copy of the foregoing Brief for the United States as Intervenor, Opposition to Defendant's Cross Motion for Partial Summary Judgment, was served via Federal Express overnight delivery on the following counsel:

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