No. 02-10168-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TONY GOODMAN,

Plaintiff - Appellant

v.

O.T. RAY, J. WAYNE GARNER, A.G. THOMAS, JOHNNY SIKES,
J. BRADY, MARGARET PATTERSON, WHIMBLY, R. KING,
GEORGIA DEPARTMENT OF CORRECTIONS

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS INTERVENOR

RALPH F. BOYD, JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave. NW, PHB 5020
Washington, DC 20530
(202) 305-7999

Goodman v. *Ray, et al.*
No. 02-10168-GG

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Counsel for Intervenor United States of America hereby certifies, in accordance with F.R.A.P. 26.1 and 11th Cir. R.26.1-1, that the following persons may have an interest in the outcome of this case:

Association For Disabled Americans, Inc., Plaintiff in appeal No. 02-10360

Thurbert E. Baker, Attorney General of Georgia

Bilzin Sumberg Dunn Baena Price & Axelrod, Counsel for Defendant in appeal No. 02-10360

Ralph F. Boyd, Jr., Counsel for United States

Lawrence L. Bracken II, Counsel for Plaintiff

J. Brady, Defendant, Georgia Department of Corrections

Steve Brother, Plaintiff in appeal No. 02-10360

Michelle Calderon, Plaintiff in appeal No. 02-10360

Phil Cannon, Special Assistant Attorney General for Georgia

William Nicholas Charouhis, William N. Charouhis & Associates, Counsel for Plaintiffs in appeal No. 02-10360

Sherril May Colombo, Counsel for Defendant in appeal No. 02-10360

Avant Edenfield, Judge, United States District Court for the Southern District of Georgia

Florida International University, Defendant in appeal No. 02-10360

Seth M. Galanter, formerly Counsel for United States in appeal No. 02-10360

Wayne Garner, Defendant, Georgia Department of Corrections

Georgia Department of Corrections

Tony Goodman, Plainitff

James Ellis Graham, U.S. Magistrate Judge, Southern District of Georgia

Sarah E. Harrington, Counsel for United States

Sgt. Lionel Harris, Defendant, Georgia Department of Corrections

John C. Jones, Senior Assistant Attorney General for Georgia

The Honorable Adalberto Jordan, Judge in appeal No. 02-10360, United States District Court for the Southern District of Florida

Ofc. R. King, Defendant, Georgia Department of Corrections

David E. Langford, Assistant Attorney General for Georgia

Kathleen Pacious, Deputy Attorney General for Georgia

Margaret Patterson, Defendant, Georgia Department of Corrections

O.T. Ray, Defendant, Georgia Department of Corrections

Jorge Luis Rodriguez, Plaintiff in appeal No. 02-10360

Johnny Sikes, Defendant, Georgia Department of Corrections

Jessica Dunsay Silver, Counsel for United States

Officer Whimbly, Defendant, Georgia Department of Corrections

Mitchell Edward Widom, Counsel for Defendant in appeal No. 02-10360

TABLE OF CONTENTS

PAGE

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT:

Because It Combats An Enduring Problem Of Unconstitutional Mistreatment And Discrimination Against Individuals With Disabilities, Title II Of The Americans With Disabilities Act Is Valid Section 5 Legislation 7

A. *Title II Of The Disabilities Act Is Valid Section 5 Legislation Because It Targets Distinctly Governmental Activities That Often Burden Fundamental Rights* 8

B. *After An Exhaustive Investigation, Congress Found Ample Evidence Of A Long History And A Continuing Problem Of Unconstitutional Treatment Of Individuals With Disabilities* 16

TABLE OF CONTENTS (continued): PAGE

1. *Congress Exhaustively Investigated Governmental Discrimination On The Basis Of Disability* 16

2. *Congress Amassed Voluminous Evidence Of Historic And Enduring Discrimination And Deprivation Of Fundamental Rights By States* 19

a. *Historic Discrimination* 19

b. *Enduring Discrimination and Deprivation of Fundamental Rights* 21

(i) *Education* 24

(ii) *Voting* 27

(iii) *Access to the Courts* 29

(iv) *Access to Government Officials and Proceedings* . 30

(v) *Law Enforcement* 31

(vi) *Child Custody* 32

(vii) *Institutionalization* 33

(viii) *Zoning* 35

(ix) *Licensing* 35

TABLE OF CONTENTS (continued): PAGE

(x) *Public Transportation* 36

(xi) *Prison Conditions* 37

(xii) *Other Public Services* 38

3. *Other Evidence Confirms The Problem* 39

4. *Special Significance Of Discrimination In Government Services* 41

5. *State Laws Provided Insufficient Protection* 43

C. *The Americans With Disabilities Act Is Reasonably Tailored To Remedying And Preventing Unconstitutional Discrimination Against Persons With Disabilities* 46

1. *Title II's Terms Are Tailored To The Constitutional Problems It Remedies* 47

2. *Title II Is As Broad As Necessary* 52

CONCLUSION 54

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

CASES: **PAGE**

Alden v. *Maine*, 527 U.S. 706 (1999) 9

Alexander v. *Choate*, 469 U.S. 287 (1985) 20

Armstrong v. *Davis*, 275 F.3d 849 (9th Cir. 2001),

cert. denied, 123 S. Ct. 72 (2002) 39

Atkin v. *Kansas*, 191 U.S. 207 (1903) 13

Baird v. *Rose*, 192 F.3d 462 (4th Cir. 1999) 39

Board of Educ. v. *Rowley*, 458 U.S. 176 (1982) 21

* *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001) . . . . *passim*

Bradley v. *Puckett*, 157 F.3d 1022 (5th Cir. 1998) 39

Brown v. *Board of Educ.*, 347 U.S. 483 (1954) 24

Buck v. *Bell*, 274 U.S. 200 (1927) 21

Carrington v. *Rash*, 380 U.S. 89 (1965) 50

City of Boerne v. *Flores*, 521 U.S. 507 (1997) . . . . *passim*

* *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985) . . . . . *passim*

City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989) 7

Clark v. *Jeter*, 486 U.S. 456 (1988) 42

CASES (continued): **PAGE**

College Sav. Bank v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) 9

Delano-Pyle v. *Victoria County*, 302 F.3d 567 (5th Cir. 2002), petition for cert. pending, No. 02-1223 39

EEOC v. *Wyoming*, 460 U.S. 226 (1983) 12

Employment Div. v. *Smith*, 494 U.S. 872 (1990) 41

Ex parte Young, 209 U.S. 123 (1908) 12

Farmer v. *Brennan*, 511 U.S. 825 (1994) 37

Florida v. *Rendon*, 832 So. 2d 141 (Fla. 3 Dist. Ct. App. 2002) 12

* *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627 (1999) . . . . *passim*

Fullilove v. *Klutznick*, 448 U.S. 448 (1980) 16

Gaston County v. *United States*, 395 U.S. 285 (1969) 49

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 32-33

Hooper v. *Bernalillo County Assessor*, 472 U.S. 612 (1985) 43

In re Marriage of Carney, 598 P.2d 36 (Cal. 1979) 33

Innovative Health Sys., Inc., v. *City of White Plains*, 117 F.3d 37 (2d Cir. 1997) 39-40

CASES (continued): **PAGE**

Key v. *Grayson*, 179 F.3d 996 (6th Cir. 1999),

cert. denied, 528 U.S. 1120 (2000) 39

Kimel v. *Florida Bd. of Regents*, 528 U.S. 62 (2000) . . . . *passim*

Kiman v. *New Hampshire Dep't of Corrs.*, 301 F.3d 13, reh'g en banc

granted, 310 F.3d 785 (1st Cir. 2002) 39

Koehl v. *Dalsheim*, 85 F.3d 86 (2d Cir. 1996) 40

Lane v. *Tennessee*, 315 F.3d 680 (6th Cir. 2003) 29

Lawrence County v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985) 13

Little v. *Streater*, 452 U.S. 1 (1981) 50

M.L.B. v. *S.L.J.*, 519 U.S. 102 (1996) 50

Memorial Hosp. v. *Maricopa County*, 415 U.S. 250 (1974) 50

NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) 30

Olmstead v. *L.C.*, 527 U.S. 581 (1999) 19, 49, 50

Parrish v. *Johnson*, 800 F.2d 600 (6th Cir. 1986) 37

Plyler v. *Doe*, 457 U.S. 202 (1982) 43

Popovich v. *Cuyahoga County Ct. Com. Pl.*, 276 F.3d 808 (6th Cir.)

(en banc), cert. denied, 123 S. Ct. 72 (2002) 39

Reynolds v. *Sims*, 377 U.S. 533 (1964) 27

CASES (continued): **PAGE**

Rhodes v. *Chapman*, 452 U.S. 337 (1981) 37

Rice v. *Cayetano*, 528 U.S. 495 (2000) 48

Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980) 29

Saenz v. *Roe*, 526 U.S. 489 (1999) 8

Shapiro v. *Thompson*, 394 U.S. 618 (1969); 42

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) . . . . *passim*

Stanley v. *Illinois*, 405 U.S. 645 (1972) 32, 51

State v. *Board of Educ.*, 172 N.W. 153 (Wis. 1919) 21

Stump v. *Sparkman*, 435 U.S. 349 (1978) 23

Thompson v. *Colorado*, 278 F.3d 1020 (10th Cir. 2001),

cert. denied, 535 U.S. 1077 (2002) 12

Troxel v. *Granville*, 530 U.S. 57 (2000) 32, 42

United States v. *Cruikshank*, 92 U.S. 542 (1875) 30

Weeks v. *Chaboudy*, 984 F.2d 185 (6th Cir. 1993) 40

Youngberg v. *Romeo*, 457 U.S. 307 (1982) 33

Zobel v. *Williams*, 457 U.S. 55 (1982) 43

CONSTITUTION & STATUTES: **PAGE**

United States Constitution:

Art. I, § 8, Commerce Clause 12

Fourth Amendment 6, 11

Eighth Amendment . . . . *passim*

Eleventh Amendment 1, 5, 8, 54

Fourteenth Amendment . . . . *passim*

Section 1 13

Due Process Clause 32

Equal Protection Clause 11, 43, 52

Section 5 . . . . *passim*

Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* . . . . *passim*

42 U.S.C. 12101(a)(2) 2, 23

42 U.S.C. 12101(a)(3) 2, 10, 23, 27

42 U.S.C. 12101(a)(5) 2

42 U.S.C. 12101(a)(6) 2

42 U.S.C. 12101(a)(7) 3, 10, 27

42 U.S.C. 12101(a)(9) 10

STATUTES (continued): **PAGE**

42 U.S.C. 12101(b)(1) 2

42 U.S.C. 12101(b)(4) 3

42 U.S.C. 12102(2) 4

42 U.S.C. 12111-12117 (Title I) 3, 8, 11

42 U.S.C. 12111(10) 50

42 U.S.C. 12112(b)(5)(A) 50

42 U.S.C. 12131-12165 (Title II) . . . . *passim*

42 U.S.C. 12131(1)(A) 3, 9

42 U.S.C. 12131(1)(B) 3, 9

42 U.S.C. 12131(2) 47, 48, 50

42 U.S.C. 12132 . . . . 3, 48

42 U.S.C. 12133 5

42 U.S.C. 12134 4

42 U.S.C. 12181-12189 (Title III) 3

42 U.S.C. 12202 5

Rehabilitation Act of 1973, 29 U.S.C. 794 *et seq.* 4

29 U.S.C. 794 (Section 504) 4

STATUTES (continued): **PAGE**

Rehabilitation Amendments of 1984, Pub. L. No. 98-221,

Title I, § 141(a), 98 Stat. 26 17

Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506,

Title V, § 502(b), 100 Stat. 1829 17

42 U.S.C. 1400(c)(2)(C) 24

Ariz. Rev. Stat. § 36-551(11)(b) (1986) 44

N.H. Rev. Stat. Ann. § 354-A:3(XIII) (1984) 44

REGULATIONS:

28 C.F.R. 35.130(b)(1)(i) 4

28 C.F.R. 35.130(b)(1)(iii) 4

28 C.F.R. 35.130(b)(1)(vii) 4

28 C.F.R. 35.130(b)(7) 4, 50

28 C.F.R. 35.140 4

28 C.F.R. 35.150(a) 5

28 C.F.R. 35.150(a)(1) 5

28 C.F.R. 35.150(a)(3) 50

REGULATIONS (continued): **PAGE**

28 C.F.R. 35.151 5

28 C.F.R. 35.164 50

LEGISLATIVE HISTORY:

Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped and the Senate Comm. on Labor & Human Res., 101st Cong., 1st Sess. (1989) . . . . *passim*

Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) 34

Civil Rights of Institutionalized Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) 34

Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) 34

LEGISLATIVE HISTORY (continued): **PAGE**

Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Pub. Welfare, 93d Cong., 1st Sess. (1973) 25

Employment Discrimination Against Cancer Victims and the Handicapped: Hearing Before the Subcomm. on Employment Opportunity of the House Comm. on Educ. & Labor, 99th Cong., 1st Sess. (1985) 45

Equal Access to Voting for Elderly & Disabled Persons: Hearing Before the Task Force on Elections of the House Comm. on House Admin., 98th Cong., 1st Sess. (1984) 27, 28

GAO, *Briefing Report on Cost of Accommodations, Americans with Disabilities Act: Hearing Before the House Comm. on Small Business*, 101st Cong., 2d Sess. (1990) 51

H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965) 15

H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990):

Pt. 2 . . . . *passim*

Pt. 3 32

LEGISLATIVE HISTORY (continued): **PAGE**

Help America Vote Act of 2001: Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. (2001) 28

S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3 (1965) 15

S. Rep. No. 415, 92d Cong., 1st Sess. (1971) 45

S. Rep. No. 116, 101st Cong., 1st Sess. (1989) . . . . *passim*

Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* (Comm. Print 1990):

Vol. 2 . . . . *passim*

Vol. 3 . . . . *passim*

Voting Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. (1965) 15

Voting Rights: Hearings Before the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. (1965) 15

132 Cong. Rec. 10589 (1986) 34

134 Cong. Rec. 9384-9385 (1988) 43

LEGISLATIVE HISTORY (continued): **PAGE**

136 Cong. Rec. (1990):

p. 10913 25

p. 11455 43

p. 11461 43

MISCELLANEOUS:

Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* (Apr. 1989) 44

B. Hoffman, *Employment Discrimination Based on Cancer History*, 59 Temple L. Q. (1986) 44-45

California Att'y Gen., *Commission on Disability: Final Report* (Dec. 1989) . . . . *passim*

Compendium of State Laws 20

Department of Health & Human Servs., *Visions of Independence, Productivity, Integration for People with Developmental Disabilities* (1990) 44

Enforcing the ADA: A Status Report from the Department of Justice

http://www.usdoj.gov/crt/ada:

Oct.-Dec. 1994 40

Apr.-June 1997 40

July-Sept. 1997 40

Apr.-June 1998 40

Oct.-Dec. 2001 40

Enforcing the ADA: Looking Back on a Decade of Progress (July 2000) 40

FEC, *Polling Place Accessibility in the 1998 General Election* (1989) 28

Governor J. Kitzhaber, *Proclamation of Human Rights Day, and Apology for Oregon's Forced Sterilization* (Dec. 2, 2002) 23, 34

J. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 Ark. L. Rev. 261 (1986) 44, 45

J. Shapiro, *No Pity* (1994) 26

Louis Harris & Assocs., *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (1986) 19

MISCELLANEOUS (continued): **PAGE**

Louis Harris & Assocs., *The ICD Survey II: Employing Disabled Americans* (1987) 19

M. Burgdorf & R. Burgdorf, *A History of Unequal Treatment*, 15 Santa Clara Lawyer 855 (1975) 21

National Council on the Handicapped, *On the Threshold of Independence* (1988) 17, 18

National Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disablities* (1986) 17

National Public Radio, *Look Back at Oregon's History of Sterilizing Residents of State Institutions* (Dec. 2, 2002) 22

New Mexico, *Official 2002 General Election Results by Office* (Dec. 2002) 23

Notice of Findings Regarding Los Lunas Hosp. & Training Sch. 35

Notice of Findings Regarding Hinds County Detention Ctr. 37

Mental Disability and the Right to Vote, 88 Yale L.J. 1644 (1979) 20

P. Reilly, *The Surgical Solution* (1991) 22, 23

Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988) 19

MISCELLANEOUS (continued): **PAGE**

T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393 (1991) 21

Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* (1990) 18, 32, 51

United States Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* (1983) . . . . *passim*

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

———————————

No. 02-10168-GG

TONY GOODMAN,

Plaintiff - Appellant

v.

O.T. RAY, J. WAYNE GARNER, A.G. THOMAS, JOHNNY SIKES,
J. BRADY, MARGARET PATTERSON, WHIMBLY, R. KING,
GEORGIA DEPARTMENT OF CORRECTIONS

Defendants - Appellees

———————————

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

———————————

BRIEF FOR THE UNITED STATES AS INTERVENOR

———————————

STATEMENT OF JURISDICTION

The United States concurs with plaintiff's statement of jurisdiction.

STATEMENT OF THE ISSUE

The United States will address the following question:

Whether the statutory provision removing Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.*, is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

STATEMENT OF THE CASE

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

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

42 U.S.C. 12101(a)(5). As a result, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6). Congress concluded that persons with disabilities

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

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

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

This case involves a suit filed under Title II. That Title provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B). The term

"disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual"; "a record of such an impairment"; or "being regarded as having such an impairment." 42 U.S.C. 12102(2). A "qualified individual with a disability" is a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service. 42 U.S.C. 12131(2); 28 C.F.R. 35.140.[1]

The discrimination prohibited by Title II of the Disabilities Act includes, among other things, denying a government benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii), (vii). In addition, a public entity must make reasonable modifications in policies, practices, or procedures if the accommodation is necessary to avoid the exclusion of individuals with disabilities and can be accomplished without imposing an undue financial or administrative burden on the government, or fundamentally altering the nature of the service. See 28 C.F.R. 35.130(b)(7). The Disabilities Act does not normally require a public entity to make its existing physical facilities accessible. Public entities need only ensure that "each service, program or activity, * * * when viewed in its entirety, is

---

[1] Congress instructed the Attorney General to issue regulations to implement Title II, based on prior regulations promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. See 42 U.S.C. 12134.

readily accessible to and usable by individuals with disabilities," unless to do so would fundamentally alter the program or impose an undue financial or administrative burden. 28 C.F.R. 35.150(a). However, facilities altered or constructed after the effective date of the Act must be made accessible. 28 C.F.R. 35.150(a)(1), 35.151.

Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

SUMMARY OF ARGUMENT

Application of Title II of the Americans with Disabilities Act to States and their subdivisions falls squarely within Congress's comprehensive legislative power under Section 5 of the Fourteenth Amendment to prohibit, remedy, and prevent violations of the rights secured by that Amendment. In enacting Title II, Congress focused its legislative attention on the specific problem of discriminatory access to state and local government services; it did not simply extend a policy focused on the private sector to the government. After decades of legislative experience in the field, years of hearings and study, countless submissions and testimonials by citizens across the Nation, and thoroughgoing congressional review, Congress determined that persons with disabilities had suffered from a virulent history of official governmental discrimination, isolation, and segregation. Congress found,

moreover, that such discrimination and segregation, like race and gender discrimination, have repercussions that have persisted over the years and that continue to be manifested in decisionmaking by state and local government officials across the span of governmental operations. That official discrimination results not just in the denial of the equal protection of the laws and equal access to governmental benefits, but also in the deprivation of fundamental rights, such as voting, access to the courts, substantive and procedural due process, the ability to petition government officials, and Fourth and Eighth Amendment protections.

In Title II, Congress formulated a statute that, much like federal laws combating racial and gender discrimination, is carefully designed to root out present instances of unconstitutional discrimination, to undo the effects of past discrimination, and to prevent future unconstitutional treatment by prohibiting discrimination and promoting integration where reasonable. At the same time, the Disabilities Act preserves the latitude and flexibility States legitimately require in the administration of their programs and services. The Disabilities Act accomplishes those objectives by requiring States to afford persons with disabilities genuinely equal access to services and programs, while at the same time confining the statute's protections to "qualified individual[s]," who by definition meet all of the States' legitimate and essential eligibility requirements. The Act simply requires "reasonable" modifications for individuals with disabilities that do not impose an

undue burden and do not fundamentally alter the nature or character of governmental programs. The statute is thus carefully tailored to prohibit only state conduct that presents a substantial risk of violating the Constitution or that unreasonably perpetuates the exclusionary effects of the prior unconstitutional isolation and broad denial of rights of persons with disabilities.

ARGUMENT

Because It Combats An Enduring Problem Of Unconstitutional Mistreatment And Discrimination Against Individuals With Disabilities, Title II Of The Americans With Disabilities Act Is Valid Section 5 Legislation

Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power to Congress, see *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 80 (2000), that gives Congress the "authority both to remedy and to deter violation of [Fourteenth Amendment] rights * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001); see also *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (opinion of O'Connor, J.) ("[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress" when enforcing the Fourteenth Amendment.) (citation & emphasis omitted). Section 5 thus "gives Congress broad power indeed," *Saenz* v. *Roe*, 526 U.S. 489, 508 (1999) (citation

omitted), including the power to abrogate the States' Eleventh Amendment immunity, *Garrett*, 531 U.S. at 364.

Although Section 5 empowers Congress to enact prophylactic and remedial legislation to enforce Fourteenth Amendment rights, it also requires a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). Title II of the Disabilities Act is appropriate Section 5 legislation because it responds to a history of pervasive discrimination and deprivation of constitutional rights by States, which has spawned continuing discrimination and the denial of rights in the daily decisions of officials, and because the legislation is reasonably designed to prevent and remedy those constitutional violations.

A. *Title II Of The Disabilities Act Is Valid Section 5 Legislation Because It Targets Distinctly Governmental Activities That Often Burden Fundamental Rights*

In *Garrett*, *supra*, the Supreme Court held that Title I of the Disabilities Act, 42 U.S.C. 12111 to 12117, which prohibits public and private employers from discriminating in employment on the basis of disability, was not valid Section 5 legislation. The arguments of the defendants largely assert that the invalidity of Title II's abrogation follows ineluctably from *Garrett*. But, if Titles I and II were constitutionally indistinguishable, the Supreme Court would have had no reason to

limit its holding in *Garrett*, 531 U.S. at 360 n.1. Moreover, the defendants' argument overlooks three critical distinctions between the two Titles.

First, in enacting Title I, Congress simply included States as employers within a general ban on employment discrimination by private employers, without considering sufficiently whether there was a distinctive problem of unconstitutional employment discrimination by the States. *Id.* at 369-371.[2] Title II, by contrast, is a law that Congress enacted specifically and deliberately to regulate the conduct of state and local governments *qua* governments. Congress thus was singularly focused on the historic and enduring problem of official discrimination and unconstitutional treatment on the basis of disability by "any State or local government," 42 U.S.C. 12131(1)(A) and (B).

For that reason, as *Garrett* acknowledged, Title II is predicated on a more substantial legislative record pertaining to "discrimination by the States in the provision of public services." 531 U.S. at 371 n.7; see also Section B(2)(b), *infra*. That legislative record, in turn, led Congress to make specific findings about the historic and enduring problem of discrimination by States and their subdivisions.

---

[2] In other recent federalism cases, Congress likewise sought to "place States on the same footing as private parties." *Kimel,* 528 U.S. at 82 (citation omitted); see *Alden* v. *Maine*, 527 U.S. 706 (1999) (Fair Labor Standards Act of 1968); *Florida Prepaid Postsec. Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 631-632 (1999) (patent infringement); *College Sav. Bank* v. *Florida Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666 (1999) (Lanham Act liability).

Contrast *Garrett*, 531 U.S. at 371 (no findings about state employment discrimination). In particular, Congress found that "discrimination against individuals with disabilities persists in such critical areas as * * * education, transportation, * * * institutionalization, * * * voting, and access to public services." 42 U.S.C. 12101(a)(3). Those are areas for which States and their subdivisions are either exclusively or predominantly responsible. And the same Committee Reports that the Supreme Court in *Garrett* found lacking with regard to public employment, 531 U.S. at 371-372, are directly on point here, declaring that "there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the area[] of * * * public services." H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 28 (1990); see also S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989) ("Discrimination still persists in such critical areas as * * * public services.").

Congress thus specifically concluded, on the basis of a weighty legislative record, that States were contributors to the "history of purposeful unequal treatment" and participants in "the continuing existence of unfair and unnecessary discrimination and prejudice" against individuals with disabilities, 42 U.S.C. 12101(a)(7) and (9). When Congress focuses in that manner on the problem of unconstitutional conduct by States and their subdivisions and determines that "legislation is needed to secure the guarantees of the Fourteenth Amendment,"

Congress's "conclusions are entitled to much deference." *Kimel*, 528 U.S. at 81 (citation omitted).

Second, because Title I pertains only to employment, decisions made by state employers concerning individuals with disabilities implicate only the Equal Protection Clause's guarantee against irrational employment decisions. *Garrett*, 531 U.S. at 366-368. Like *Flores*, 521 U.S. at 512-514, and *Kimel*, 528 U.S. at 83, Title I thus addressed state conduct in an area where the States, as sovereigns, are given an extraordinarily wide berth and constitutional violations are infrequently found.

In many applications, Title II enforces not only the Equal Protection Clause, but also a wide array of fundamental constitutional rights – the right to petition the government, the right of access to the courts, the right to vote, Fourth and Eighth Amendment protections, and procedural and substantive due process. Indeed, Title I dealt only with the States' denial of an opportunity – state employment – to individuals who equally could pursue employment in the private sector. Title II, by contrast, regulates state and local governments when they intervene in and regulate the activities of private citizens, or deprive them of their liberty, property, or parental rights. Title II also regulates a State's ability to deny a class of citizens access to government services upon which all citizens must rely for basic opportunities (and sometimes the necessities) of modern life. The private sector

cannot furnish the ability to cast a ballot, file a lawsuit, secure the protection of the police, or seek the enactment of legislation. Title II thus legislates in an area where the States' conduct often is subject to heightened scrutiny, and where its ability to infringe those rights generally, let alone to deny them disparately to one particular segment of the population based on stereotypes, fears, economics, or administrative convenience, is constitutionally curtailed.

Third, unlike *Kimel* and *Garrett*, this case potentially implicates concerns beyond abrogation and the ability of individuals to sue the States for money damages. Because both *Kimel* and *Garrett* targeted *employment* discrimination, those decisions only invalidated the statutes' abrogation provisions; the substantive prohibitions of those laws remain applicable to the States under Congress's Commerce Clause power and can be enforced against state officials under *Ex parte Young*, 209 U.S. 123 (1908). See *Garrett*, 531 U.S. at 374 n.9; *EEOC* v. *Wyoming*, 460 U.S. 226, 235-243 (1983). While the defendants do not challenge the validity of Title II's substantive provisions (Def. Br. 14 n.3), state defendants in other cases have emphasized Title II's coverage of public services and operations regardless of their nexus to commerce, and its direct regulation of the government *qua* government.[3] Accordingly, unless Title II is appropriate Commerce Clause

---

[3] See *Thompson* v. *Colorado*, 278 F.3d 1020, 1025 n.2 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002); *Florida* v. *Rendon*, 832 So. 2d 141, 146 n.5 (Fla. 3 Dist. Ct. App. 2002); *Meyers* v. *Texas*, No. 02-50452 (5th Cir.) (pending).

legislation, this case implicates concerns well beyond the narrow question of abrogation in licensing cases.

For all of those reasons, and especially because this case may implicate the constitutional authority for enactment of Title II's substantive prohibitions as applied to all levels of government, the Supreme Court is not constrained, as it was in *Garrett*, to consider only the legislative evidence of unconstitutional conduct by the States. When Congress specifically focuses the substantive provisions of Section 5 legislation jointly on the operations of state and local governments *qua* governments, its enforcement powers under Section 5, like the substantive protections of Section 1, can charge the States with some responsibility for the unconstitutional conduct of the subdivisions of government that the States themselves create and empower to act.[4] That is, in part, because the line between state and local government is much harder to discern in the context of public services than it is in employment. While state and local employment decisions can be made independently, the operations of state and local governments in the provision of government services, such as voting, education, welfare benefits, zoning, licensing, and the administration of justice are often inextricably intertwined. In education, for example, the State plays a substantial role in

---

[4] See *Atkin* v. *Kansas*, 191 U.S. 207, 220-221 (1903); see also *Lawrence County* v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 270-271 (1985) (Rehnquist, J., dissenting).

directing, supervising and limiting the discretion of local agencies, either by administrative supervision or by statutory direction. The complexity of the relationship between state and local governments in the administration of public services often raises difficult, state-by-state questions regarding whether a particular entity is operating as an "arm of the state." In some cases, the local government officials act at the direct behest of the state government pursuant to state mandates. And in all cases, the local government is able to discriminate only because it exercises power delegated to it by the State. The record of historic and pervasive discrimination and unconstitutional treatment by all levels of government further blurs the line between state and local governmental action, because the conduct of local officials is traceable, at least in part, to the rules of state-mandated discrimination and segregation under which they operated for years.

Indeed, under similar circumstances, the Supreme Court has recognized the relevance of local governmental conduct in assessing the validity of Section 5 legislation as applied to the States. In *Garrett*, the Court cited the substantive provisions of the Voting Rights Act of 1965, which were upheld in *South Carolina* v. *Katzenbach* as "appropriate" Section 5 legislation regulating the States because it was predicated upon a documented "problem of racial discrimination in voting." *Garrett*, 531 U.S. at 373 (citing 383 U.S. at 312-313). Much of the evidence of unconstitutional conduct described in *South Carolina* v. *Katzenbach*, 383 U.S. 301,

312-314 (1966), however, involved the conduct of *county* and *city* officials.[5] Indeed, almost all of the evidence of specific instances of discrimination underlying the Voting Rights Act of 1965 concerned local officials rather than state officials; the rest of the evidence was either statistical evidence or lists of state laws.[6] See also *Flores*, 521 U.S. at 530-531 (in analyzing Section 5 as a source of power for substantive provisions of a law, the Supreme Court did not distinguish between evidence of state and local governmental conduct). In sum, while Congress compiled ample evidence of unconstitutional conduct by the States themselves in

---

[5] See 383 U.S. at 312 n.12 (discussing discrimination by Montgomery County Registrar); *id*. at 312 n.13 (discussing discrimination by Panola County registrar and Forrest County registrar); *id*. at 313 n.14 (citing a case that documents discrimination by the Dallas County Board of Registrars); *id*. at 313 n.15 (citing a case that documents discrimination by the Walker County registrar); *id*. at 314 ("certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls"); *id*. at 314-315 (discussing discrimination in Selma, Alabama and Dallas County).

[6] See, *e.g.*, *Voting Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 5-8 (1965) (extensive voting discrimination by local officials in Selma, Alabama, and Dallas County); *id*. at 8 (local sheriff and deputy sheriff in Mississippi, beat three black men when they attempted to register to vote); *id*. at 36 (21 of 22 voting discrimination lawsuits filed by the Department of Justice in Mississippi were against counties); *Voting Rights: Hearings Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 12 (1965) (discrimination in Clarke County, Mississippi, and Wilcox County, Alabama); H.R. Rep. No. 439, 89th Cong., 1st Sess. 16 (1965) (resistance of parish registrars to registration of black citizens); S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3, at 7-9 (1965) (discrimination and litigation in Dallas County, Alabama); *id*. at 12 (counties' discriminatory use of "good moral character" test); *id*. at 33 (county officials' discriminatory use of poll tax).

enacting Title II, the constitutional question presented here, unlike *Garrett*, compels consideration of the evidence of local government discrimination as well.

B. *After An Exhaustive Investigation, Congress Found Ample Evidence Of A Long History And A Continuing Problem Of Unconstitutional Treatment Of Individuals With Disabilities*

1. *Congress Exhaustively Investigated Governmental Discrimination On The Basis Of Disability*

Congress's "special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue." *Fullilove* v. *Klutznick*, 448 U.S. 448, 502-503 (1980) (Powell, J., concurring). Indeed, in *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Supreme Court acknowledged the superior expertise of legislatures in addressing the problem of disability discrimination. *Id.* at 445. "One appropriate source" of evidence for Congress to consider in combating disability discrimination

> is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Fullilove, 448 U.S. at 503 (Powell, J., concurring); see also *Katzenbach*, 383 U.S. at 330 ("In identifying past evils, Congress obviously may avail itself of information from any probative source.").

The Congress that enacted Title II of the Disabilities Act brought to that legislative process more than forty years of experience studying the scope and nature of discrimination against persons with disabilities and testing incremental legislative steps to combat that discrimination. See *Garrett*, 531 U.S. at 390-391 (Breyer, J., dissenting) (listing prior legislation). Building on that expertise, Congress commissioned two reports from the National Council on the Handicapped, an independent federal agency, to report on the adequacy of existing federal laws and programs addressing discrimination against persons with disabilities.[7] That study revealed that "the most pervasive and recurrent problem faced by disabled persons appeared to be unfair and unnecessary discrimination." National Council on the Handicapped, *On the Threshold of Independence* 2 (1988) (*Threshold*); see National Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities* (1986). Persons with disabilities reported "denials of educational opportunities, lack of access to public buildings and public bathrooms, [and] the absence of accessible transportation." *Threshold* 20-21, 41. Congress also learned of an "alarming rate of poverty," a dramatic educational gap, a "Great Divide" in employment, and a life of social "isolat[ion]" for persons with disabilities. *Id.* at

---

[7] See Rehabilitation Amendments of 1984, Pub. L. No. 98-221, Title I, § 141(a), 98 Stat. 26; Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Title V, § 502(b), 100 Stat. 1829.

14.[8]

Congress itself engaged in extensive study and fact-finding concerning the problem of discrimination against persons with disabilities, holding 13 hearings devoted specifically to consideration of the Disabilities Act. See *Garrett*, 531 U.S. at 389-390 (Breyer, J., dissenting) (listing hearings). In addition, a congressionally designated Task Force held 63 public forums across the country that were attended by more than 30,000 individuals. Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 16 (1990) (Task Force Report). The Task Force also presented to Congress evidence submitted by nearly 5,000 individuals documenting the discrimination persons with disabilities face daily – often at the hands of state and local governments. See 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legis. History of Pub. L. No. 101-336: The Americans with Disabilities Act* 1040 (Comm. Print 1990) (*Legis.*

---

[8] Twenty percent of persons with disabilities – more than twice the percentage for the general population – live below the poverty line, and 15% of disabled persons had incomes of $15,000 or less. *Threshold* 13-14. Forty percent of persons with disabilities – triple the rate for the general population – did not finish high school. Only 29% of persons with disabilities had some college education, compared with 48% for the general population. *Id*. at 14. Two-thirds of all working-age persons with disabilities were unemployed; only one in four worked full-time. *Ibid*. Two-thirds of persons with disabilities had not attended a movie or sporting event in the past year; three-fourths had not seen live theater or music performances; persons with disabilities were three times more likely not to eat in restaurants; and 13% of persons with disabilities never go to grocery stores. *Id*. at 16-17.

Hist.).[9] Congress also considered several reports and surveys. See S. Rep. No. 116, *supra*, at 6; H.R. Rep. No. 485, *supra*, Pt. 2, at 28; Task Force Report 16.[10]

2. *Congress Amassed Voluminous Evidence Of Historic And Enduring Discrimination And Deprivation Of Fundamental Rights By States*

a. *Historic Discrimination*: The "propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.'" *Florida Prepaid Postsec. Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 640 (1999) (quoting *Flores*, 521 U.S. at 525). Congress and the Supreme Court have long acknowledged the Nation's "history of unfair and often grotesque mistreatment" of persons with disabilities. *Cleburne*, 473 U.S. at 454 (Stevens, J., concurring); see also *Olmstead* v. *L.C.*, 527 U.S. 581, 608 (1999) (Kennedy, J., concurring) ("[O]f

---

[9] See also Task Force Report 16. The Task Force submitted those "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" to Congress, 2 *Legis. Hist.* 1324-1325, as part of the official legislative history of the Disabilities Act. See *id*. at 1336, 1389. In *Garrett*, the United States lodged with the Supreme Court a complete set of those submissions. See 531 U.S. at 391-424 (Breyer, J., dissenting). Those submissions are cited herein by reference to the State and Bates stamp number, which is how the submissions were lodged in *Garrett*.

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

course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility."); *Alexander* v. *Choate*, 469 U.S. 287, 295 n.12 (1985) ("well-cataloged instances of invidious discrimination against the handicapped do exist").

From the 1920s to the 1960s, the eugenics movement labeled persons with mental and physical disabilities as "sub-human creatures" and "waste products" responsible for poverty and crime. *Id.* at 20. Every single State, by law, provided for the segregation of persons with mental disabilities and, frequently, epilepsy, and excluded them from public schools and other state services and privileges of citizenship.[11] States also fueled the fear and isolation of persons with disabilities by requiring public officials and parents, sometimes at risk of criminal prosecution, to report and segregate into institutions the "feebleminded."[12]

Almost every State accompanied forced segregation with compulsory sterilization and prohibitions of marriage. See *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) ("It is better for all the world, if * * * society can prevent those who are manifestly unfit from continuing their kind. * * * Three generations of imbeciles

---

[11] See App. A, *Alsbrook* v. *City of Maumelle*, No. 99-423 (*Compendium of State Laws*); see also Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979).

[12] *Spectrum* 20, 33-34; *Compendium of State Laws* A5, A21-A22, A25, A28-A29, A40, A44, A46-A49, A50-A51, A56, A61-A63, A65-A66, A71, A74-A75.

are enough."); 3 *Legis. Hist.* 2242 (James Ellis); M. Burgdorf & R. Burgdorf, *A History of Unequal Treatment*, 15 Santa Clara Lawyer 855, 887-888 (1975) (*Unequal Treatment*). Children with mental disabilities "were excluded completely from any form of public education." *Board of Educ.* v. *Rowley*, 458 U.S. 176, 191 (1982). Numerous States also restricted the rights of physically disabled people to enter into contracts, *Spectrum* 40, while a number of large cities enacted "ugly laws," which prohibited the physically disabled from appearing in public. Chicago's law provided:

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

Unequal Treatment 863 (quoting ordinance). Such laws were enforced as recently as 1974. *Id.* at 864.[13]

b. *Enduring Discrimination and Deprivation of Fundamental Rights*: Congress specifically found that "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully

---

[13] See also *State* v. *Board of Educ.*, 172 N.W. 153, 153 (Wis. 1919) (approving exclusion of a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children") (noted at 2 *Legis. Hist.* 2243); see generally T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 399-407 (1991).

human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination." S. Rep. No. 116, *supra*, at 8-9.[14]

That is because the process of changing discriminatory laws, policies, practices, and stereotypical conceptions and prejudices did not even *begin* until the 1970s and 1980s. Even then, "out-dated statutes [were] still on the books, and irrational fears or ignorance, *traceable to the prolonged social and cultural isolation*" of those with disabilities "continue[d] to stymie recognition of the[ir] dignity and individuality." *Cleburne*, 473 U.S. at 467 (Marshall, J., concurring) (emphasis added). The involuntary sterilization of the disabled is not distant history; it continued into the 1970s, and occasionally even into the 1980s – well within the lifetime of many current governmental decisionmakers. P. Reilly, *The Surgical Solution* 2, 148 (1991); National Public Radio, "Look Back at Oregon's History of Sterilizing Residents of State Institutions" (Dec. 2, 2002). As recently as 1983, fifteen States continued to have compulsory sterilization laws on the books.

---

[14] See also 3 *Legis. Hist.* 2020 (Att'y Gen. Thornburgh) ("But persons with disabilities are all too often not allowed to participate because of stereotypical notions held by others in society – notions that have, in large measure, been created by ignorance and maintained by fear."); 2 *Legis. Hist.* 1606 (Arlene Mayerson) ("Most people assume that disabled children are excluded from school or segregated from their non-disabled peers because they cannot learn or because they need special protection. Likewise, the absence of disabled co-workers is simply considered confirmation of the obvious fact that disabled people can't work. These assumptions are deeply rooted in history.").

Spectrum 37; see also *Stump* v. *Sparkman*, 435 U.S. 349, 351 (1978) (Indiana judge ordered the sterilization of a "somewhat retarded" 15 year old girl); Reilly, *supra*, at 148-160.

Until the late 1970s, "peonage was a common practice in [Oregon] institutions." Governor J. Kitzhaber, "Proclamation of Human Rights Day, and Apology for Oregon's Forced Sterilization" (Dec. 2, 2002). As of 1979, "most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials." *Cleburne*, 473 U.S. at 464 (Marshall, J., concurring). New Mexico recently reaffirmed its unqualified exclusion of "idiots [and] insane persons" from voting. New Mexico, Official 2002 General Election Results by Office (Dec. 2002).

Based on the evidence it amassed, Congress found, as a matter of present reality and historical fact, that persons with disabilities have been and are subjected to "widespread and persisting deprivation of [their] constitutional rights." *Florida Prepaid*, 527 U.S. at 645 (citation omitted); see also 42 U.S.C. 12101(a)(2) and (a)(3). In particular, Congress discerned a substantial risk that persons with disabilities will be unconstitutionally denied an equal opportunity to obtain vital services and to exercise fundamental rights, and will be subjected to unconstitutional treatment in the form of arbitrary or irrational distinctions and

exclusions, and disparity in treatment as compared to other similarly situated groups, *Garrett*, 531 U.S. at 366 n.4.

(i) *Education*: "[E]ducation is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Accordingly, where the State provides a public education, that right "must be made available to all on equal terms." *Ibid*. But Congress heard that irrational prejudices, fears, ignorance, and animus still operate to deny persons with disabilities an equal opportunity for public education. As recently as 1975, approximately 1 million disabled students were "excluded entirely from the public school system." 42 U.S.C. 1400(c)(2)(C). A quadriplegic woman with cerebral palsy and a high intellect, who scored well in school, was branded "retarded" by educators, denied placement in a regular school setting, and placed with emotionally disturbed children, where she was told she was "not college material." VT 1635. Other school districts also simply labeled as mentally retarded a blind child and a child with cerebral palsy. NB. 1031; AK 38 (child with cerebral palsy subsequently obtained a Masters Degree). "When I was 5," another witness testified, "my mother proudly pushed my wheelchair to our

local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard." S. Rep. No. 116, *supra*, at 7.[15]

State institutions of higher education acted on the same stereotypes and prejudices. Indeed, the "higher one goes on the education scale, the lower the proportion of handicapped people one finds." *Spectrum* 28; see also note 10, *supra*. A person with epilepsy was asked to leave a state college because her seizures were "disrupt[ive]" and, officials said, created a risk of liability. 2 *Legis. Hist.* 1162 (Barbara Waters). A doctor with multiple sclerosis was denied admission to a psychiatric residency program because the state admissions committee "feared the negative reactions of patients to his disability." *Id.* at 1617 (Arlene Mayerson). Another witness explained that, "when I was first injured, my

---

[15] See also 136 Cong. Rec. 10913 (1990) (Rep. McDermott) (school board excluded Ryan White, who had AIDS, not because the board "thought Ryan would infect the others" but because "some parents were afraid he would"); UT 1556 (disabled student refused admission to first grade because teacher refused to teach student with a disability); NY 1123 (three elementary schools had practice of locking mentally disabled children in a 3'x 3'x 7' box for punishment); *Spectrum* 28, 29 ("a great many handicapped children" are "excluded from the public schools" or denied "recreational, athletic, and extracurricular activities provided for non-handicapped students"); *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Pub. Welfare*, 93d Cong., 1st Sess. 793 (1973) (Christine Griffith) (first-grade student "was spanked every day" because her deafness prevented her from following instructions); *id.* at 400 (Mrs. R. Walbridge) (student with spina bifida barred from the school library for two years "because her braces and crutches made too much noise"). For additional examples, see *id.* at 384 (Peter Hickey); 2 *Legis. Hist.* 989 (Mary Ella Linden); PA 1432; NM 1090; OR 1375; AL 32; SD 1481; MO 1014; NC 1144; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

college refused to readmit me" because "it would be 'disgusting' to my roommates to have to live with a woman with a disability." WA 1733. Similarly, an Education student was denied a student teaching assignment because administrators thought the students would react badly to her appearance. OR 1384.[16]

For both good and ill, "the law can be a teacher." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). As with race discrimination, few governmental messages more profoundly affect individuals and their communities than the message that individuals with disabilities should be segregated in education:

> Segregation in education impacts on segregation throughout the community. Generations of citizens attend school with no opportunity to be a friend with persons with disabilities, to grow together, to develop an awareness of capabilities – all in the name of benevolence! Awareness deficits in our young people who become our community leaders and employers perpetuate the discrimination fostered in the segregated educational system.

MO 1007 (Pat Jones).

---

[16] See also 2 *Legis. Hist.* 1224 (Denise Karuth) (state university professor asked a blind student enrolled in his music class "What are you doing in this program if you can't see"; student was forced to drop class); *id.* at 1225 (state commission refused to sponsor legally blind student for masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors, '[s]ince,' and this is a quote: 'they could not drive to see their clients'"); J. Shapiro, *No Pity* 45 (1993) (Dean of the University of California at Berkeley told a prospective student that "[w]e've tried cripples before and it didn't work"). For additional examples, see SD 1476; LA 999; MO 1010; WIS 1757; CO 283; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting); California Att'y Gen., *Commission on Disability: Final Report* 138 (Dec. 1989) (*Cal. Report*).

(ii) *Voting*: Because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U.S. 533, 561-562 (1964). But Congress found that persons with disabilities have been "relegated to a position of political powerlessness," 42 U.S.C. 12101(a)(7), and continue to be subjected to discrimination in voting, 42 U.S.C. 12101(a)(3). Congress made that finding after hearing that "people with disabilities have been turned away from the polling places after they have been registered to vote because they did not *look* competent." 2 *Legis. Hist.* 1220 (Nancy Husted-Jensen) (emphasis added). When one witness turned in the registration card of a voter who has cerebral palsy and is blind, the "clerk of the board of canvassers looked aghast * * * and said to me, 'Is that person competent? Look at that signature,'" and then invented a reason to reject the registration. *Id.* at 1219. A deaf voter was told that "you still have to be able to use your voice" to vote. *Equal Access to Voting for Elderly and Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin.*, 98th Cong., 1st Sess. 94 (1984) (*Equal Voting Hearings*).[17]

---

[17] One voter with a disability was "told to go home once when I came to the poll and found the voting machines down a flight of stairs with no paper ballots available"; on another occasion that voter "had to shout my choice of candidates over the noise of a crowd to a precinct judge who pushed the levers of the machine for me, feeling all the while as if I had to offer an explanation for my decisions."

The legislative record also documented that many persons with disabilities "cannot exercise one of your most basic rights as an American" because polling places or voting machines are inaccessible. S. Rep. No. 116, *supra*, at 12. As a consequence, persons with disabilities "were forced to vote by absentee ballot before key debates by the candidates were held." *Ibid.*; see also *Americans with Disabilities Act 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped and the Senate Comm. on Labor & Human* Res., 101st Cong., 1st Sess. 76 (1989) (*May 1989 Hearings*) (Ill. Att'y Gen. Hartigan) (same). Voting by absentee ballot also "deprives the disabled voter of an option available to other absentee voters, the right to change their vote by appearing personally at the polls on election day." 2 *Legis. Hist.* 1745 (Nanette Bowling).[18] "How can disabled

---

Equal Voting Hearings 45. "A blind woman, a new resident of Alabama, went to vote and was refused instructions on the operation of the voting machine." AL 16; see also *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (citing additional examples); *Help America Vote Act of 2001: Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 13 (Dec. 5, 2001) (James Dickson) ("I am blind, and I have never cast a secret ballot."); *id.* at 15 ("Twice in Massachusetts and once in California, while relying on a poll worker to cast my ballot, the poll worker attempted to change my mind about whom I was voting for. * * * [T]o this day I really do not know if they cast my ballot according to my wishes.").

[18] See also *Equal Voting Hearings* 17, 461 (criticizing States' imposition of special absentee voting requirements on persons with disabilities). For examples of inaccessible polling places, see 2 *Legis. Hist.* 1767 (Rick Edwards); WIS 1756; MT 1024, 1026-1027; MI 922; ND 1185; DE 307; WIS 1756; AL 16; *Garrett*, 531 U.S. at 395-424 (Breyer, J., dissenting); FEC, *Polling Place Accessibility in the 1988 General Election* 7 (1989) (21% of polling places inaccessible; 27% were inaccessible in 1986 elections).

people have clout with our elected officials when they are aware that many of us are prevented from voting?" ARK 155.

(iii) *Access to the Courts*: The Fourteenth Amendment protects the rights of civil litigants, criminal defendants, and members of the public to have access to the courts. See, *e.g.*, *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980). Yet Congress learned that "[t]he courthouse door is still closed to Americans with disabilities" – literally. 2 *Legis. Hist.* 936 (Sen. Harkin).

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

Id. at 1070-1071 (Emeka Nwojke). Such differential treatment affects not only the ability to get into the courthouse, but also the ability to be heard and participate effectively and meaningfully in judicial proceedings.[19]

---

[19] See ID 506 (adult victims of abuse with developmental disabilities denied equal rights to testify in court); *Lane* v. *Tennessee*, 315 F.3d 680 (6th Cir. 2003) (Lane arrested for two misdemeanors and ordered to report for hearing at inaccessible courthouse; the first day he crawled up the stairs to the courtroom; the second day he was arrested for failure to appear when he refused to crawl or be carried up the stairs; hearing later held with defendant forced to remain outside while counsel

(iv) *Access to Government Officials and Proceedings*: "The very idea of a government, republican in form, implies a right on the part of its citizens to * * * petition for a redress of grievances," *United States* v. *Cruikshank*, 92 U.S. 542, 552-554 (1875), and that right cannot be denied to an entire class of citizens without compelling justification, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982). State governments must "act as neutral entities, ready to take instruction and to enact laws when their citizens so demand." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). But government cannot take instruction from those whom it cannot see or hear. The Illinois Attorney General testified that he "had innumerable complaints regarding lack of access to public services – people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building," and that "individuals who are deaf or hearing impaired call[] our office for assistance because the arm of government they need to reach is not accessible to them." *May 1989 Hearings* 488, 491. Another individual, "who has been in a wheelchair for 12 years, tried three times last year to testify before state legislative committees. And three times, he was thwarted by a narrow set of

---

shuttled between him and the courtroom). For additional examples of inaccessible courthouses and court proceedings, see AL 15; WV 1745; MA 812; CA 254; CO 273; ID 528; PA 1394; LA 998; WA 1690; MS 990; SD 1475; NC 1161-1164; AL 5; DE 345; GA 374; HI 455; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

Statehouse stairs, the only route to the small hearing room." IN 626. Access to other important government buildings and officials depended upon the individual's willingness to crawl or be carried.[20]

(v) *Law Enforcement*: Persons with disabilities have also been victimized in their dealings with law enforcement, in violation of their Fourteenth Amendment right to due process and protection from unreasonable searches and seizures. When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." 2 *Legis. Hist.* 1005 (Belinda Mason). Police refused to accept a rape complaint from a blind woman because she could not make a visual identification. NM 1081. A person in a wheelchair was given a ticket and six-months' probation for obstructing traffic on the street, even though the person could not use the sidewalk because it lacked curb cuts. VA 1684. Task Force Chairman Justin Dart testified, moreover, that persons

---

[20] See *Spectrum* 39 (76% of State-owned buildings offering services and programs for the general public are inaccessible and unusable for persons with disabilities); *May 1989 Hearings* 663 (Dr. Mary Lynn Fletcher) (to attend town meetings, "I (or anyone with a severe mobility impairment) must crawl up three flights of circular stairs to the 'Court Room.' In this room all public business is conducted by the county government whether on taxes, zoning, schools or any type of public business."); AK 73 ("We have major problems in Seward, regarding accessibility to City and State buildings for the handicapped and disabled."; City Manager responded that "[H]e runs this town * * * and no one is going to tell him what to do."). For additional examples of inaccessible government officials and offices, see H.R. Rep. No. 485, *supra*, Pt. 2, at 40; *May 1989 Hearings* 76; IN 651; WIS 1758; NY 1119; *Cal. Report* 70; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

with hearing impairments "have been arrested and held in jail over night without ever knowing their rights nor what they are being held for." 2 *Legis. Hist.* 1331. A parole agent "sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though * * * he could not make the appointments because he was unable to get accessible transportation." *Cal. Report* 103.[21]

(vi) *Child Custody*: The Supreme Court has long recognized that the Constitution protects and respects the sanctity of the parent-child relationship. See, *e.g.*, *Troxel* v. *Granville*, 530 U.S. 57 (2000); *Stanley* v. *Illinois*, 405 U.S. 645 (1972). In addition, the Due Process Clause requires States to afford individuals with disabilities fair child custody proceedings, including the opportunity to be heard "at a meaningful time and in a meaningful manner." *Goldberg* v. *Kelly*, 397

---

[21] See also 2 *Legis. Hist.* 1115 (Paul Zapun) (sheriff threatens persons with disabilities who stop in town due to car trouble); *id.* at 1197 (police officer taunted witness by putting a gun to her head and pulling the trigger on an empty barrel, "because he thought it would be 'funny' since I have quadraparesis and couldn't flee or fight"); Task Force Report 21 (six wheelchair users *arrested* for failing to leave restaurant after manager complained that "they took up too much space"); TX 1541 (police refused to take an assault complaint from a person with a disability); LA 748 (police called to Burger King because staff believed disabled customer was acting strangely, and made the customer leave town); AL 6, DE 345, KS 673, WV 1746, IL 572 (all: lack of interpreter for deaf arrestee). For additional examples of harassment and inappropriate treatment, see 2 *Legis. Hist.* 1196 (Cindy Miller); IL 569-570, 583; *Cal. Report* 101-104; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting). In addition, persons with disabilities, like epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, *supra*, Pt. 3, at 50.

U.S. 254, 267 (1970) (citation and quotation marks omitted). But the Task Force Chairman testified that "clients whose children have been taken away from them a[re] told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?" 2 *Legis. Hist.* 1331 (Justin Dart). Another government agency refused to authorize a couple's adoption of a child solely because the woman had muscular dystrophy. MA 829.[22]

(vii) *Institutionalization*: The Constitution protects individuals with disabilities from unjustified institutionalization and from unduly severe treatment while institutionalized. *Youngberg* v. *Romeo*, 457 U.S. 307, 315, 322 (1982). Yet unconstitutional denials of appropriate treatment and unreasonable institutionalization of persons in state mental hospitals were commonplace. See 2 *Legis. Hist.* 1203 (Lelia Batten) (state law ineffective; state hospitals are "notorious

---

[22] See also H.R. Rep. No. 485, *supra*, Pt. 3, at 25 ("These discriminatory polices and practices affect people with disabilities in every aspect of their lives * * * [including] securing custody of their children."); *id.*, Pt. 2, at 41 ("[B]eing paralyzed has meant far more than being unable to walk – it has meant being * * * deemed an 'unfit parent'" in custody proceedings.); 2 *Legis. Hist.* 1611 n.10 (Arlene Mayerson) ("Historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent."); *Spectrum* 40; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (citing additional examples); *No Pity*, *supra*, at 26 (woman with cerebral palsy denied custody of her two sons; children placed in foster care instead); *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979) (lower court "stereotype[d] William as a person deemed forever unable to be a good parent simply because he is physically handicapped").

for using medication for controlling the behavior of clients and not for treatment alone. Seclusion rooms and restraints are used to punish clients."); *id*. at 1262-1263 (Eleanor C. Blake) (detailing the "minimal, custodial, neglectful, abusive" care received at state mental hospital, and willful indifference resulting in rape); *Spectrum* 34-35.[23]

Indeed, in the years immediately preceding enactment of the Disabilities Act, the Department of Justice found unconstitutional treatment of individuals with disabilities in state institutions for the mentally retarded or mentally ill in more than half of the States. One facility forced mentally retarded residents to inhale

---

[23] See also Governor Kitzhaber, *supra* (admitting the use of "inhumane devices to restrain and control patients" until "the mid 1980's"); *Cal. Report* 114; 132 Cong. Rec. 10589 (1986) (Sen. Kerry) (findings of investigation of State-run mental health facilities "were appalling. The extent of neglect and abuse uncovered in their facilities was beyond belief."); *Civil Rights of Instit. Persons: Hearings on S. 1393 Before the Subcomm. on the Const. of the Sen. Comm. on the Judiciary*, 95th Cong., 1st Sess. 127 (1977) (Michael D. McGuire, M.D.) ("it became quite clear * * * that the personnel regarded patients as animals, * * * and that group kicking and beatings were part of the program"); *id.* at 191-192 (Dr. Philip Roos); *Civil Rights for Instit. Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 239 (1977) (Stanley C. Van Ness) (describing "pattern and practice of physical assaults and mental abuse of patients, and of unhealthy, unsanitary, and anti-therapeutic living conditions" in New Jersey state institutions); *Civil Rights of Instit. Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 34 (1979) (Paul Friedman) ("[A] number of the residents were literally kept in cages. A number of those residents * * * had lost the ability to walk, had become incontinent, and had regressed because of these shockingly inhumane conditions of confinement."); *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (citing additional examples).

ammonia fumes as a form of punishment. See Notice of Findings Regarding Los Lunas Hosp. & Training Sch. 2. Residents in other facilities lacked adequate food, clothing, and sanitation. Many state facilities failed to provide basic safety to individuals with mental illness or mental retardation, resulting in serious physical injuries, sexual assaults, and deaths.

(viii) *Zoning*: Congress knew that *Cleburne*, where the Supreme Court found unconstitutional discrimination in a zoning decision based on irrational fears and stereotypes, was not an isolated incident. In Wyoming, a zoning board declined to authorize a group home because of "local residents' unfounded fears that the residents would be a danger to the children in a nearby school." WY 1781. In New Jersey, a group home for those who had suffered head injuries was barred because the public perceived such persons as "totally incompetent, sexual deviants, and that they needed 'room to roam.' * * * Officially, the application was turned down due to lack of parking spaces, even though it was early established that the residents would not have automobiles." NJ 1068.[24]

(ix) *Licensing*: The House Report also discussed a woman who was denied a teaching credential, not because of her substantive teaching skills, but because of her paralysis. H.R. Rep. No. 485, *supra*, Pt. 2, at 29. See also 2 *Legis. Hist.* 1611

---

[24] For additional examples, see 2 *Legis. Hist.* 1230 (Larry Urban); AL 2, 31; CO 283; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

n.9 (Arlene Mayerson) (teaching license denied "on the grounds that being confined to a wheelchair as a result of polio, she was physically and medically unsuited for teaching"); WY 1786 (individual unable to get a marriage license because the county courthouse was not wheelchair accessible).[25]

(x) *Public Transportation*: Individuals reported discriminatory treatment on public transportation that lacked any rational basis and that "made no sense in light of how the [government] treated other groups similarly situated in relevant respects." *Garrett*, 531 U.S. at 366 n.4. One student testified:

> Some of the drivers are very rude and get mad if I want to take the bus. Can you believe that? I work and part of my taxes pay for public buses and then they get mad just because I am using a wheelchair. * * * It is hard for people to feel good about themselves if they have to crawl up the stairs of a bus, or if the driver passes by without stopping.

2 *Legis. Hist.* 993 (Jade Calegory); MA 831 ("Blacks wanted to ride in the front of the bus. Disabled people just want[] on."). A high-level Connecticut transportation official responded to requests for accessibility by asking, "Why can't all the

---

[25] See also CA 261 (discrimination in licensing teachers); HI 479 (discrimination in licensing); TX 1549 (state licensing requirements for teaching deaf students require the ability to hear); TX 1528 & 1542 (interpreters and readers not allowed for licensing exams); TX 1543 (blind applicant not allowed to take state chiropractor's exam because she could not read x-ray without assistance); *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (citing additional examples).

handicapped people live in one place and work in one place? It would make it easier for us." 2 *Legis. Hist.* 1085 (Edith Harris).[26]

(xi) *Prison Conditions*: The Eighth Amendment protects inmates with disabilities against treatment that is deliberately indifferent to their serious medical needs and safety or imposes wanton suffering. *Farmer* v. *Brennan*, 511 U.S. 825 (1994); *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981). But Congress heard that "their jailers rational[ize] taking away their wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs." 2 *Legis. Hist.* 1190 (Cindy Miller). Another prison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead." *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986).[27]

---

[26] For additional examples, see 2 *Legis. Hist.* 1097 (Bill Dorfer); *id.* at 1190 (Cindy Miller); WA 1716; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

[27] See also *Spectrum* 168 (discrimination in treatment and rehabilitation programs available to inmates with disabilities; inaccessible jail cells and toilet facilities); NM 1091 (prisoners with developmental disabilities subjected to longer terms of imprisonment). The Attorney General's enforcement activities revealed that individuals awaiting placement in State mental institutions in Mississippi were held in a county jail and routinely left for days shackled in a "drunk tank" without any mental health treatment or supervision. Notice of Findings Regarding Hinds County Detention Ctr. 3 (1986).

(xii) *Other Public Services*: The scope of the testimony offered to Congress regarding unconstitutional treatment swept so broadly, touching virtually every aspect of individuals' encounters with their government, as to defy isolating the problem into select categories of state action. Services and programs as varied as the operation of public libraries,[28] public swimming pools and park programs,[29]

---

[28] See 2 *Legis. Hist.* 1100 (Shelley Teed-Wargo) (town library refused to let person with mental retardation check out a video "because he lives in a group home," unless he was accompanied by a staff person or had a written permission slip); PA 1391 (same rule for library cards for "those having physical as well as mental disabilities").

[29] A paraplegic Vietnam veteran was forbidden to use a public pool; the park commissioner explained that "[i]t's not my fault you went to Vietnam and got crippled." 3 *Legis. Hist.* 1872 (Peter Addesso); see also *id*. at 1995 (Rev. Scott Allen) (woman with AIDS and her children denied entry to a public swimming pool); WIS 1752 (deaf child denied swimming lessons); NC 1156 (mentally retarded child not allowed in pool because of "liability risk"); CA 166 (inaccessible public recreation site); MISS 855 (same); *May 1989 Hearings* 76 (Ill. Att'y Gen. Hartigan) (visually impaired children with guide dogs "cannot participate in park district programs when the park has a 'no dogs' rule"); NC 1155 (blind people told not to participate in regular parks and recreation programs).

homeless shelters,[30] and benefit programs[31] exposed the discriminatory attitudes of officials.

3. *Other Evidence Confirms The Problem*

In *Garrett*, Justice Kennedy suggested that, if a widespread problem of disability discrimination existed, "one would have expected to find * * * extensive litigation and discussion of the constitutional violations." 531 U.S. at 968. Courts across the nation have found discrimination and the deprivation of fundamental rights on the basis of disability.[32] Many of the cases specifically found

---

[30] CA 216 (wheelchair users not allowed in homeless shelter); CA 223 (same); DE 322 (same for mentally ill).

[31] See 2 *Legis. Hist.* 1078 (Ellen Telker) ("State and local municipalities do not make many materials available to a person who is unable to read print."); *id.* at 1116 (Virginia Domini) (persons with disabilities "must fight to function in a society where * * * State human resources [sic] yell 'I can't understand you,' to justify leaving a man without food or access to food over the weekend."); IA 664 (person with mild mental retardation denied access to literacy program); KS 713 (discrimination in state job training program); IL 533 (female disability workshop participants advised to get sterilized); AK 72 (no interpreter for deaf at state motor vehicles department). For examples of inaccessible social service agencies, see AK 145; OH 1218; AZ 116; AZ 127; HI 456; ID 541; see generally *Spectrum* App. A (identifying 20 broad categories of state-provided or supported services and programs in which discrimination against persons with disabilities arises).

[32] See, *e.g.*, *Delano-Pyle* v. *Victoria County*, 302 F.3d 567, 575-576 (5th Cir. 2002) (affirming a jury verdict that included evidence of a police officer giving a sobriety test and *Miranda* warnings to a deaf plaintiff who could not understand him, and then arresting the plaintiff), petition for cert. pending, No. 02-1223; *Kiman* v. *New Hampshire Dep't of Corrs.*, 301 F.3d 13, 15-16 (disabled inmate stated Eighth Amendment claims for denial of accommodations needed to protect his health and safety due to his degenerative nerve disease), reh'g en banc granted, 310 F.3d 785

constitutional violations. In others, the facts support that conclusion, but the existence of statutory relief allowed the court to avoid the constitutional question. Federal efforts to enforce the rights of individuals with disabilities offer still more evidence. See *Katzenbach*, 383 U.S. at 312 (considering evidence collected in Department of Justice investigations). In public reports, the Department of Justice has either litigated or settled dozens of cases to ensure access to the courts and other government buildings, reasonable treatment by law enforcement officials, and protection against other forms of discrimination that implicate important

---

(1st Cir. 2002); *Popovich* v. *Cuyahoga County Ct. of Common Pleas*, 276 F.3d 808, 816 (6th Cir.) (en banc) (deaf parent denied communication assistance in child custody proceeding), cert. denied, 123 S. Ct. 72 (2002); *Armstrong* v. *Davis*, 275 F.3d 849, 861-863 (9th Cir. 2001) (failure to conduct parole and parole revocation proceedings in a manner that disabled inmates can understand and in which they can participate), cert. denied, 123 S. Ct. 72 (2002); *Baird* v. *Rose*, 192 F.3d 462, 464-466 (4th Cir. 1999) (seventh-grader suffering from clinical depression prohibited from singing in school choir); *Key* v. *Grayson*, 179 F.3d 996, 998 (6th Cir. 1999) (deaf inmate denied access to sex offender program required as precondition for parole), cert. denied, 528 U.S. 1120 (2000); *Bradley* v. *Puckett*, 157 F.3d 1022, 1025-1026 (5th Cir. 1998) (failure for several months to provide means for amputee to bathe lead to infection); *Innovative Health Sys., Inc.*, v. *City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997) (building permit denied for drug and alcohol treatment center "based on stereotypes and general, unsupported fears"); *Koehl* v. *Dalsheim*, 85 F.3d 86, 87-88 (2d Cir. 1996) (Eighth Amendment violated when inmate with serious vision problem denied glasses and treatment); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) ("squalor in which [prisoner] was forced to live as a result of being denied a wheelchair" violated the Eighth Amendment).

constitutional rights.[33] In addition, the Department of Justice has found unconstitutional treatment of individuals with disabilities in institutions or prisons in more than 30 States.

4. *Special Significance Of Discrimination In Government Services*

The foregoing record of extensive state and local discrimination in the provision of government services provides a solid predicate for exercise of Congress's Section 5 enforcement power, for three reasons. *First*, in *Garrett*, the Supreme Court held that evidence of "hardheaded[] – and perhaps hardhearted[]" – employment discrimination based on disability did not violate the Constitution if it could be justified by "any reasonably conceivable state of facts that could provide a rational basis for the classification." 531 U.S. at 367-368. The constitutional balance under Title II, however, is quite different. Much of the identified state

---

[33] Many of these reports, "Enforcing the ADA: A Status Report from the Department of Justice," are available at www.usdoj.gov/crt/ada. See, *e.g.*, Oct.-Dec. 2001 Report 9 (candidate for city council who uses a wheelchair unable to access a city council platform to address constituents); Apr.-June 1998 Report 8-10 (absence of communication assistance results in longer pre-trial detention for detainees with disabilities and denial of medical treatment and communication with family members); July-Sept. 1997 Report 7-9 (state general assembly inaccessible for lobbyists with mobility impairments; lack of effective participation in court proceedings); Apr.-June 1997 Report 5-7 (blind voters; inaccessible courts; unreasonable treatment during traffic stop of deaf motorist); Oct.-Dec. 1994 Report 4-6 (access to town hall; effective participation in court proceedings; inaccessible polling places); "Enforcing the ADA: Looking Back on a Decade of Progress" 4-8 (July 2000) (access to public meetings and public offices, to courts and court proceedings; fair treatment by law enforcement).

conduct interferes with or threatens the fundamental rights of individuals with disabilities, or occurs where the right to equal protection intersects with other constitutional rights, see *Employment Div.* v. *Smith*, 494 U.S. 872, 881 (1990). Such violations are subject to more intense scrutiny and cannot be justified by any conceivable rationale. A particular class of individuals cannot be excluded from voting, participating in court proceedings, accessing public meetings and services, or raising their children based on nothing more than administrative convenience. Rather, such infringements are unconstitutional "unless shown to be necessary to promote a compelling governmental interest." *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969); see also *Troxel*, 530 U.S. at 65; *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988).

Second, much of the identified conduct fails rational basis scrutiny. Even that low constitutional threshold cannot justify beating a deaf student for failure to follow spoken instructions, refusing to let individuals with disabilities on buses, excluding a paralyzed veteran from a public swimming pool, or denying a disabled student a college education either because "it would be 'disgusting' to [her] roommates to have to live with a woman with a disability," or because of groundless stereotypes that blind people cannot teach, provide competent rehabilitation counseling, or succeed in a music course. The *Garrett* Court reaffirmed that "mere negative attitudes, or fear," alone cannot justify disparate treatment of those with disabilities. 531 U.S. at 367. Many of the instances of

discriminatory treatment reported to Congress arose in contexts, like education and zoning, where state actors already make accommodations for other groups, but are selectively resistant to doing so for those with disabilities.

Third, based on the record before it, Congress could reasonably conclude that the aggregate effect of consistently excluding individuals with disabilities from a broad range of important government services caused a constitutional problem that is greater than the sum of its parts. The consistent distribution of benefits and services in a way that maintains a permanent subclass of citizens is inimical to the core purposes of the Equal Protection Clause. See *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612, 623 (1985); *Plyler* v. *Doe*, 457 U.S. 202, 213 (1982). States cannot balance their budgets or allocate their resources in a manner that "divide[s] citizens into * * * permanent classes" and apportions "rights, benefits and services according to" their class. *Zobel* v. *Williams*, 457 U.S. 55, 64 (1982).

5. *State Laws Provided Insufficient Protection*

Evidence before Congress also demonstrated that state laws were "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." S. Rep. No. 116, *supra*, at 18; see also *ibid*. (section of report entitled

"CURRENT FEDERAL AND STATE LAWS ARE INADEQUATE"); H.R. Rep. No. 485, *supra*, Pt. 2, at 47 (same).[34]

State officials themselves broadly agreed with that assessment. The 50 State Governors' Committees "report[ed] that existing State laws do not adequately counter * * * discrimination." S. Rep. No. 116, *supra*, at 18; H.R. Rep. No. 485, *supra*, Pt. 2, at 47. California noted that "gaps" and "contradictions" in state law justified enactment of the Disabilities Act. *Cal. Report* 22-23. The Illinois Attorney General testified that "[p]eople with disabilities should not have to win these rights on a State-by-State basis," and that "[i]t is long past time * * * [for] a national policy that puts persons with disabilities on equal footing with other Americans." *May 1989 Hearings* 77.[35]

---

[34] See also 136 Cong. Rec. 11455 (1990) (Rep. Wolpe); *id*. at 11461 (Rep. Levine); 134 Cong. Rec. 9384-9385 (1988) (Sen. Simon); 2 *Legis. Hist.* 963 (Sandra Parrino); *id*. at 967 (Adm. James Watkins) ("Too many States, for whatever reason, still perpetuate confusion. It is time for Federal action."); *id*. at 1642-1643 (Arlene Mayerson) (noting variations and gaps in coverage of state statutes); 3 *Legis. Hist.* 2245 (Robert Burgdorf); AL 24 (failure to enforce laws protecting persons with disabilities); AK 52 (same).

[35] Other state and local officials echoed those sentiments. See Dep't of Health & Human Servs., *Visions of: Independence, Productivity, Integration for People with Developmental Disabilities* 29 (1990) (19 States strongly recommended passage of the Disabilities Act); 2 *Legis. Hist.* 1050 (Elmer Bartels, Mass. Rehab. Comm'n); *id*. at 1455-1456 (Nikki Van Hightower, Treas., Harris Co., Tex.); *id*. at 1473-1474 (Robert Lanier, Chair, Metro. Transit Auth. of Harris Co., Tex.); *id*. at 1506 (Texas State Sen. Chet Brooks) ("We cannot effectively piece these protections together state by state."); *id*. at 1508; *May 1989 Hearings* 778 (Ohio Governor). Indeed, state officials themselves had "pointed to negative attitudes and misconceptions as

Prior to 1990, nearly half of the States did not protect persons with mental illness and/or mental disabilities. See J. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 Ark. L. Rev. 261, 278-280 (1986). New Hampshire excluded disabilities caused by illness, N.H. Rev. Stat. Ann. § 354-A:3(XIII) (1984), while Arizona excluded disabilities which were first manifested after the age of 18, Ariz. Rev. Stat. § 36-551(11)(b) (1986). Flaccus, *supra*, at 285. Few States protected against discrimination based on either a perceived disability or a history of illness such as cancer. See B. Hoffman, *Employment Discrimination Based on Cancer History*, 59 Temple L. Q. 1 (1986). Many States failed to provide for private rights of action and compensatory damages, effectively leaving victims of discrimination without enforceable remedies. *Id.* at App. B; Flaccus, *supra*, at 300-310, 317-321.[36]

---

potent impediments to [their own] barrier removal policies." Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* 87 (Apr. 1989).

[36] See also *May 1989 Hearings* 386-394 (lengthy analysis of state laws); 3 *Legis. Hist.* 2245 (James Ellis) ("state laws have not provided substantial protection to people with disabilities"); *Employment Discrim. Against Cancer Victims and the Handicapped: Hearing Before the Subcomm. on Employment Opp. of the House Comm. on Educ. & Labor*, 99th Cong., 1st Sess. 62 (1985) (Rep. Moakley) ("[O]ne-fourth of the states have no protection for the handicapped. Additionally, even those states with laws differ greatly in their regulations.") (attaching ten-state survey showing gaps in coverage of laws).

Although there may be specific contexts, such as Section 5 legislation designed to remedy violations of the Takings Clause or the privilege against self-incrimination, in which the lack of a state remedy may be relevant to the existence of a constitutional violation, cf. *Florida Prepaid*, 527 U.S. at 642-643, the *possibility* of a state remedy for discrimination does not make the underlying conduct constitutional. Just as state laws against race discrimination have neither eradicated the problem nor undermined the basis for subjecting state employers to federal prohibitions,[37] Congress was equally justified in concluding that state laws against disability discrimination had generally been ineffective in combating the lingering effects of prior official discrimination and exclusionary laws and policies and, more importantly, in changing the behavior of individual state actors.

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

While Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified, *Florida Prepaid*, 527 U.S. at 639, "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies,"

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

Flores, 521 U.S. at 519-520. Thus, the relevant inquiry is not whether Title II "prohibit[s] a somewhat broader swath of conduct," *Garrett*, 531 U.S. at 365, than would the courts. "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Ibid.* Rather, the question is whether, in light of the scope of the problem identified by Congress, the enactment "is so out of proportion to the supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Kimel*, 528 U.S. at 86 (quoting *Flores*, 521 U.S. at 532). Title II is not.

1. *Title II's Terms Are Tailored To The Constitutional Problems It Remedies*

Because Title II targets discrimination that threatens fundamental rights, much of Title II's operation targets conduct outlawed by the Constitution itself. As applied to discrimination in voting, child custody proceedings, criminal cases, institutionalization, conditions of confinement, interactions with law enforcement, judicial proceedings, access to public officials and offices, and other areas implicating fundamental rights, Title II tracks the Fourteenth Amendment when it prevents the disparate deprivation of those rights for invidious or insubstantial reasons.

Furthermore, Title II's statutory scheme ensures (as the Supreme Court did in *Cleburne*, 473 U.S. at 447-450), that the government's articulated rationale for

differential treatment does not mask impermissible animus and does not result in the differential treatment of similarly situated groups. The States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all. The Disabilities Act does not require preferences and permits the denial of benefits or services if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service, 42 U.S.C. 12131(2). But once an individual proves that he can meet all the essential eligibility requirements of a program or service, especially those programs and services that implicate fundamental rights, the government's interest in excluding that individual solely "by reason of such disability," 42 U.S.C. 12132, is both minimal and, in light of history, constitutionally circumscribed. At the same time, permitting the States to retain and enforce their essential eligibility requirements protects their legitimate interests in selecting and structuring governmental activities. The Disabilities Act thus balances a State's legitimate operational interests against the right of a person with a disability to be judged "by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 528 U.S. 495, 517 (2000).

The Disabilities Act requires "reasonable modifications" in public services, 42 U.S.C. 12131(2). That requirement, however, is precisely tailored to the unique features of disability discrimination in two ways. *First*, given the history of

segregation and isolation and the resulting entrenched stereotypes, fear, prejudices, and ignorance about persons with disabilities, Congress reasonably determined that a simple ban on overt discrimination would be insufficient. Therefore, the Disabilities Act both prevents difficult-to-prove discrimination and affirmatively promotes the integration of individuals with disabilities in order to remedy past unconstitutional conduct and to prevent future discrimination.

Congress further concluded that the demonstrated refusal of state and local governments to undertake reasonable efforts to accommodate and integrate persons with disabilities within their programs, services, and operations would freeze in place the effects of those governments' prior official exclusion and isolation of individuals with disabilities, creating a self-perpetuating spiral of segregation, stigma, ill treatment, neglect, and degradation. See *Gaston County* v. *United States*, 395 U.S. 285, 296-297 (1969) (constitutionally administered literacy test banned because it perpetuates the effects of past discrimination). Congress also concluded that, by reducing stereotypes and misconceptions, integration reduces the likelihood that constitutional violations will recur. Cf. *Olmstead*, 527 U.S. at 600 (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life"). Moreover, given the record of discrimination and unconstitutional treatment of the disabled, Congress reasonably concluded that the failure to make reasonable accommodations to the

rigid enforcement of seemingly neutral criteria can often mask invidious, but difficult to prove, discrimination. Congress's Section 5 power includes the ability to ensure that constitutional violations are not left unremedied because of difficulties of proof. See, *e.g.*, *Katzenbach*, 383 U.S. at 314-315.

Second, the Constitution itself already requires individualized consideration and modification of practices or programs, when necessary to avoid infringing on fundamental rights.[38] Beyond that, States may not justify infringement on fundamental rights by pointing to the administrative convenience or cost savings achieved by maintaining barriers to the enjoyment of those rights.[39]

The statute, moreover, requires modifications only where "reasonable," 42 U.S.C. 12131(2). Governments need not make modifications that "impose an undue hardship" or require "fundamental alterations in the nature of a service, program, or activity," in light of their nature or cost, agency resources, and the operational practices and structure of the program. 42 U.S.C. 12111(10),

---

[38] See, *e.g.*, *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 121-122 (1996) (transcript fee modified in appeal of parental termination, where it was "not likely to impose an undue burden on the State"); *Stanley*, 405 U.S. at 651-658 (State must provide individualized determination of father's fitness to raise his children).

[39] See, *e.g.*, *Little* v. *Streater*, 452 U.S. 1, 13-17 (1981) (State must pay for blood test for indigent defendant in paternity suit); *Memorial Hosp*. v. *Maricopa County*, 415 U.S. 250, 263 (1974); *Carrington* v. *Rash*, 380 U.S. 89, 95 (1965) ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State.").

12112(b)(5)(A); 28 C.F.R. 35.130(b)(7), 35.150(a)(3), 35.164; *Olmstead*, 527 U.S. at 606 n.16 (plurality opinion). Furthermore, based on the consistent testimony of witnesses and expert studies, Congress determined that the vast majority of modifications entail little or no cost. One local government official stressed that "[t]his bill will not impose great hardships on our county governments" because "the majority of accommodations for employees with disabilities are less than $50" and "[t]he cost of making new or renovated structures accessible is less than 1 percent of the total cost of construction." 2 *Legis. Hist.* 1443 (Nikki Van Hightower, Treasurer, Harris Co., Tex.).[40]

Title II, then, goes further than the Constitution itself only to the extent that some disability discrimination may have no impact on fundamental rights and may be rational for constitutional purposes, but still be unreasonable under the accommodation provision of the Disabilities Act. That margin of statutory protection does not exceed Congress's authority for two reasons. *First*, like Title VII on which it was modeled, that statutory protection is necessary to enforce the Supreme Court's constitutional standard by reaching unconstitutional conduct that

---

[40] See also S. Rep. No. 116, *supra*, at 10-12, 89, 92; H.R. Rep. No. 485, *supra*, Pt. 2, at 34; 2 *Legis. Hist.* 1552 (EEOC Comm'r Evan Kemp); *id*. at 1077 (John Nelson); *id*. at 1388-1389 (Justin Dart); *id*. at 1456-1457; *id*. at 1560 (Jay Rochlin); 3 *Legis. Hist.* 2190-2191 (Robert Burgdorf); Task Force Report 27; *Spectrum* 2, 30, 70; GAO, Briefing Report on Costs of Accommodations, *Americans with Disabilities Act: Hearing Before the House Comm. on Small Bus.*, 101st Cong., 2d Sess. 190 (1990).

would otherwise escape detection in court and to deter future constitutional violations.

Second, a proper remedy for an unconstitutional exclusion aims to "eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Louisiana*, 380 U.S. 145, 154 (1965). Section 5 thus empowers Congress to do more than simply prohibit the creation of new barriers to equality; it can require States to tear down the walls they erected during decades of discrimination and exclusion. See *id*. at 550 n.19 (Equal Protection Clause itself can require modification of facilities and program to ensure equal access). Title II's accommodation requirements eliminate the effects of past discrimination by ensuring that persons previously invisible to program and building designers are now considered part of the government's service constituency. "Just as it is unthinkable to design a building with a bathroom only for use by men, it ought to be just as unacceptable to design a building that can only be used by able-bodied persons. It is exclusive *designs*, and not any inevitable consequence of a disability that results in the isolation and segregation of persons with disabilities in our society." 3 *Legis. Hist.* 1987 n.4 (Laura Cooper).**[41]**

---

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

2. *Title II Is As Broad As Necessary*

Moreover, Title II is not broader than necessary to effectuate its legitimate aims. Congress found that the history of unconstitutional treatment and the risk of future discrimination found by Congress pertain to all aspects of governmental operations. It determined that only a comprehensive effort to integrate persons with disabilities would end the cycle of isolation, segregation, and second-class citizenship, and deter further discrimination. Integration in education alone, for example, would not suffice if there were not going to be jobs and professional licenses for those who received the education. Integration in employment and licensing would not suffice if persons with disabilities lacked transportation. Integration in transportation is insufficient unless persons with disabilities can get into the facilities to which they are traveling. Ending unnecessary institutionalization is of little gain if neither government services nor the social activities of public life (libraries, museums, parks, and recreational services) are accessible to bring persons with disabilities into the life of the community. And none of those efforts would suffice if persons with disabilities continued to lack equivalent access to government officials, courthouses, and polling places. In short, Congress chose a comprehensive remedy because it confronted an all-encompassing, interconnected problem. To do less would be as ineffectual as

"throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway," S. Rep. No. 116, *supra*, at 13.

CONCLUSION

The Eleventh Amendment is no bar to the plaintiff's claims under Title II of the Americans with Disabilities Act.

Respectfully submitted,

RALPH F. BOYD, JR.
Assistant Attorney General

____
JESSICA DUNSAY SILVER
SARAH E. HARRINGTON
Attorneys
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave. NW, PHB 5020
Washington, DC 20530
(202) 305-7999

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief for the United States as Intervenor is proportionally spaced, has a typeface of 14 points, and contains 13, 891 words.

May 13, 2003

SARAH E. HARRINGTON
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2003, one copy of the foregoing Brief for the United States as Intervenor were served by overnight mail, postage prepaid, on the following counsel:

Lawrence J. Bracken, II
W. Christopher Arbery
Hunton & Williams
600 Peachtree St. NW, Suite 4100
Atlanta, GA 30308-2216

David E. Langford
State of Georgia Dept. of Law
40 Capitol Square, SW
Atlanta, GA 30334

William Nicholas Charouhis
William N. Charouhis & Associates
Alfred I. Dupont Building
169 E. Flagler Street, Suite 1200
Miami, FL 33131

Mitchell Edward Wisdom
Sherril May Colombo
Bilzin Sumberg Dunn Baena Price & Axelrod
200 S. Biscayne Boulevard
Suite 2500
Miami, FL 33131-2336

____

SARAH E. HARRINGTON
Attorney