IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-6475

RANDY L. JOHNSON, Sr.,

Plaintiff-Appellee

v.

TENNESSEE TECHNICAL CENTER AT MEMPHIS,

Defendant-Appellant

No. 98-6701

LORI ANN PARR,

Plaintiff-Appellee

v.

MIDDLE TENNESSEE STATE UNIVERSITY, et al.,

Defendant-Appellant

No. 98-6730

GEORGE LANE and BEVERLY JONES,

Plaintiffs-Appellees

v.

STATE OF TENNESSEE

Defendant-Appellant

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS
FOR THE MIDDLE AND WESTERN DISTRICTS OF TENNESSEE

CONSOLIDATED FINAL BRIEF FOR THE UNITED STATES AS INTERVENOR

STATEMENT OF THE ISSUES

1. Whether the statutory abrogation of Eleventh Amendment immunity for suits under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., is a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment.

In Johnson: 2. Whether the statutory abrogation of Eleventh Amendment immunity for suits under Section 504 of the Rehabilitation Act, 29 U.S.C. 794, is a valid exercise of Congress' authority under the Spending Clause or Section 5 of the Fourteenth Amendment.

STATEMENT OF THE CASE

1. Parr v. Middle Tennessee State University: According to the allegations of the complaint, Lori Parr was a student at Middle Tennessee State University getting her masters in Accounting and Computer Information Systems (R. 1: Complaint at 1, 3, Apx. at 6, 8). She has two disabilities: a rare non-epileptic seizure disorder that causes her to black-out when under high stress; and carpal tunnel syndrome (R. 1 at 3, Apx. at 8). She alleges that she was denied an accommodation by one of her professors and, in response to her complaint, was subjected to retaliation in the form of less favorable treatment than less qualified students (R. 1 at 4-10, Apx. at 9-15).

Plaintiff filed a pro se complaint alleging that the University violated Title II of the ADA and seeking damages and injunctive relief (R. 1: Complaint, Apx. at 6-17). The University moved to dismiss the complaint on the grounds of

Eleventh Amendment immunity (R. 7: Motion to Dismiss, Apx. at 26), and then filed an interlocutory appeal of the district court's denial of its motion (R. 22: Notice of Appeal, Apx. at 24).

2. Lane v. Tennessee: According to the allegations of the complaint, George Lane and Beverly Jones are both paraplegics who use wheelchairs to ambulate (R. 1: Complaint at 1-2, Apx. at 14-15). Lane was charged with two misdemeanor offenses (R. 1 at 3, Apx. at 16). The summons required him to appear in the Polk County Courthouse in Benton, Tennessee to answer the charges (R. 1 at 3, Apx. at 16). All court proceedings take place on the second floor of the courthouse (R. 1 at 3, Apx. at 16). On his first visit, Lane crawled up two flights of stairs to get to the courtroom (R. 1 at 3, Apx. at 16). In his second visit, he was arrested after he refused to crawl or be carried up the stairs (R. 1 at 3, Apx. at 16). Upon retaining counsel, Lane was permitted to remain on the ground floor while his counsel shuttled back and forth between his client and the courtroom (R. 1 at 3, Apx. at 16). Some later proceedings were held on the ground floor, but in locations not open to the public (R. 1 at 3, Apx. at 16).

Jones is a certified court reporter (R. 1 at 2, Apx. at 15). As part of her job, she is required to attend court proceedings (R. 1 at 2, Apx. at 15). Because many courtrooms in Tennessee are inaccessible to people in wheelchairs, she has been unable to complete a number of jobs (R. 1 at 5, Apx. at 18).

Plaintiffs sued Tennessee, and a number of Tennessee counties, alleging that they were in violation of Title II of the ADA by conducting judicial proceedings in places that were not accessible to persons with mobility impairments (R. 1 at 7-8, Apx. at 20-21). Plaintiffs sought to represent a class of persons who, because of their physical disabilities, cannot climb stairs (R. 1 at 9, Apx. at 22). They sought injunctive relief and damages (R. 1 at 9-10, Apx. at 22-23). Tennessee moved to dismiss on the grounds of Eleventh Amendment immunity (R. 36: Motion to Dismiss, Apx. at 24-25), and then filed an interlocutory appeal of the district court's denial of its motion (R. 73: Notice of Appeal, Apx. at 29-30).

3. Johnson v. Tennessee Technical Center at Memphis: Johnson, a paraplegic, was enrolled in a commercial truck driving course (R. 25: Order at 2). The school refused to make modifications to the truck so that he could operate it (R. 25 at 4). Plaintiff filed a complaint alleging that the school violated Title II of the ADA and Section 504 of the Rehabilitation Act (R. 1: Complaint). The district court denied the school's motion to dismiss the complaint on the grounds of Eleventh Amendment immunity and for summary judgment on the merits (R. 25: Order). The school then filed an interlocutory appeal of the district court's denial of its motion (R. 28: Notice of Appeal).

4. On March 1, 1999, this Court ordered Parr, Lane, and Johnson consolidated for purposes of submission.

STANDARD OF REVIEW

Because the question of Eleventh Amendment immunity in these cases is purely one of law, this Court reviews the issue de novo. See Timmer v. Michigan Dep't of Commerce, 104 F.3d 833, 836 (6th Cir. 1997).

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to these actions brought by private plaintiffs under the Americans with Disabilities Act (ADA) to remedy discrimination against persons with disabilities. The abrogation of Eleventh Amendment immunity in the ADA is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment, which authorizes Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause.

Four other appeals raising the constitutional validity of the ADA's abrogation have been fully briefed and are currently awaiting placement on the oral argument calendar. The United States has intervened in all four of those cases to defend the abrogation in the ADA. In the interests of economy, we will not repeat those arguments in full.

In addition, the Johnson appeal presents the question whether Congress has validly removed States' immunity to claims under Section 504 of the Rehabilitation Act. 42 U.S.C. 2000d-7 contains an express statutory abrogation of Eleventh Amendment immunity for Section 504 suits. This abrogation is a valid exercise of Congress' power under the Spending Clause to impose

unambiguous conditions on States receiving federal funds. By enacting Section 2000d-7, Congress put States on notice that accepting federal funds waived their Eleventh Amendment immunity to discrimination suits under Section 504. In addition, Section 2000d-7 is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment.

ARGUMENT

I

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

The United States has intervened and briefed the constitutionality of the ADA in four other cases currently pending before this Court.[1/] As we have explained in our briefs in those cases, the Supreme Court's decision in City of Boerne v. Flores, 521 U.S. 507 (1997), confirmed that Congress has broad discretion to enact legislation to redress what it rationally perceived to be widespread constitutional injuries against individuals with disabilities.

In Boerne, the Court explained that the authority to enforce the Fourteenth Amendment is a broad power to remedy past and present discrimination and to prevent future discrimination. Id. at 517-518. And it reaffirmed that Congress can prohibit activities that themselves were not unconstitutional in furtherance of its remedial scheme. Id. at 518, 525-527, 532. It stressed, however, that Congress' power had to be linked to constitutional injuries and that there must be a "congruence and proportionality" between the identified harms and the statutory remedy. Id. at 520. The Court acknowledged that "the line between measures that remedy or prevent unconstitutional actions

---

[1/] See Pomeroy v. Western Michigan University, No. 97-1751; Nihiser v. Ohio Environmental Protection Agency, No. 97-3933; Wright v. Lima Correctional Institution, No. 97-3587; Satterfield v. Tennessee, No. 98-5765.

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." Id. at 519-520.

1. This Court's post-Boerne decision in Coger v. Board of Regents, 154 F.3d 296 (1998), petition for cert. filed, 67 U.S.L.W. 3364 (Nov. 16, 1998) (No. 98-821), is helpful in framing the inquiry and resolves several of the defendants' arguments.

First, this Court specifically held that Congress' power to enforce the Equal Protection Clause extended to those classifications that are not subject to heightened scrutiny (such as age or disability). "[T]he fact that age is not a suspect classification does not eliminate the Equal Protection Clause as a source authorizing Congress to prohibit age-based discrimination." Id. at 305.

Second, in applying the Boerne "congruence and proportionality" test, Congress' findings (embodied in both the text of the statute and the legislative history) are not to be ignored. To the contrary, they are "helpful in determining the extent of the threatened constitutional violations." Id. at 306.

Finally, a statutory scheme that "attempts to prevent discrimination" by requiring "case-by-case determinations based on facts" is not a disproportionate remedy. Id. at 307. Even though rational-basis review would permit the use of generalizations, requiring individualized assessments "does not

render the statute so disproportionate to its purpose that it represents an invalid exercise of Congress's enforcement power." Ibid.

2. This understanding of Boerne has been followed by a majority of the circuits. Following the Seventh Circuit's pre-Boerne opinion upholding the ADA, see Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (1997) (Posner, J.), three courts of appeals have found that the ADA is a "congruent and proportional" response to the pervasive discrimination Congress discovered and thus was "appropriate" Section 5 legislation. See Clark v. California, 123 F.3d 1267, 1270-1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998); Seaborn v. Florida, 143 F.3d 1405, 1406 (11th Cir. 1998), cert. denied, 119 S. Ct. 1038 (1999); Kimel v. Board of Regents, 139 F.3d 1426, 1433, 1442-1443 (11th Cir. 1998), petition for cert. filed on ADA issue, 67 U.S.L.W. 3364 (Nov. 16, 1998) (No. 98-829).[2/]

[2/] Although two panels of the Eighth Circuit have also upheld the constitutionality of the ADA's abrogation, there is currently no binding law in that circuit on the issue. In Autio v. Minnesota, 140 F.3d 802, 804-806 (8th Cir. 1998), a panel unanimously affirmed the district court's judgment that the ADA's abrogation was valid. The panel opinion was vacated when the court granted rehearing en banc, see id. at 806, and an equally divided court subsequently affirmed the judgment of the district court without opinion, see 157 F.3d 1141 (1998). More recently, the Eighth Circuit has granted rehearing en banc in Alsbrook v. City of Maumelle, 156 F.3d 825, 829-831 (1998), another panel opinion upholding the validity of the ADA's abrogation as valid Section 5 legislation. Oral argument before the en banc court was heard on January 11, 1999.

In Coger, this Court cited with approval the Fifth Circuit's analysis in Coolbaugh. In that case, the Fifth Circuit noted that unlike the statute of Boerne, the ADA was accompanied by express factual findings by Congress based on an extensive legislative record. The Court did not hold the findings dispositive, but accorded them "substantial deference" in determining the scope of the constitutional violations. 136 F.3d at 435. Given those findings, the Fifth Circuit held:

> Because Congress found a significant likelihood of unconstitutional actions and therefore a significant "evil" to be addressed, the only remaining inquiry is whether the scope of the ADA is so "sweeping" that the statute cannot be seen as proportional to the evil Congress sought to address.
>
> We are persuaded that Congress' scheme in the ADA to provide a remedy to the disabled who suffer discrimination and to prevent such discrimination is not so draconian or overly sweeping to be considered disproportionate to the serious threat of discrimination Congress perceived. The ADA first sets forth broad provisions generally outlawing discrimination. In addition to these general provisions outlawing discrimination, Congress made specific judgments in particular circumstances as to what it perceived to be reasonable and appropriate to prevent unconstitutional discrimination. * * * Congress made these particularized judgments after hearing testimony on the reasonableness and feasibility of these provisions.
>
> In sum, the ADA represents Congress' considered efforts to remedy and prevent what it perceived as serious, widespread discrimination against the disabled. We recognize that in some instances, the provisions of the ADA will "prohibit[] conduct which is not itself unconstitutional and intrude[] into 'legislative spheres of autonomy previously reserved to the States.'" We cannot say, however, in light of the extensive findings of unconstitutional discrimination made by Congress, that these remedies are too sweeping to survive the Flores proportionality test for legislation that provides a remedy for unconstitutional discrimination or prevents threatened unconstitutional actions.

Id. at 437-438 (footnote and citations omitted).

3. In Brown v. North Carolina Division of Motor Vehicles, 166 F.3d 698 (1999), petition for reh'g en banc filed (March 29, 1999), a divided panel of the Fourth Circuit found that the ADA's abrogation was unconstitutional as applied to a specific regulatory provision (not at issue in any of these cases) that prohibited imposing surcharges for services required to be provided by the ADA. The Court expressly disclaimed the intent to address Congress' power to enact other provisions of the ADA. Id. at 704-705, 708 n.*. Nonetheless, defendant in Johnson relies on some of the reasoning in Brown to argue that the ADA as a whole is unconstitutional. Brown should not be followed, in whole or in part.

First, contrary to the Fourth Circuit's suggestion, the ADA is not an attempt to overrule City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), in which the Court unanimously declared unconstitutional as invidious discrimination a decision by a city to deny a special use permit for the operation of a group home for people with mental retardation. The ADA is simply seeking to make effective the right to be free from invidious discrimination by establishing a remedial scheme tailored to detecting and preventing those activities most likely to be the result of past or present discrimination. Moreover, unlike the background to Boerne -- which demonstrated that Congress acted out of displeasure with the Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990) -- there is no evidence that Congress enacted the ADA because of its disagreement with

any decision of the Court. "In the ADA, Congress included no language attempting to upset the balance of powers and usurp the Court's function of establishing a standard of review by establishing a standard different from the one previously established by the Supreme Court." Coolbaugh, 136 F.3d at 438.

The Fourth Circuit also employed an improper standard in measuring the constitutionality of the ADA. The court demanded "support in the legislative record for the proposition that state surcharges for handicapped programs are motivated by animus toward the class." Brown, 166 F.3d at 707. The Fourth Circuit erred in requiring a "legislative record" at all, much less at the level of specificity it demanded. "If evidence was required [in order for a statute to be constitutional], it must be supposed that it was before the legislature when the act was passed; and, if any special finding was required to warrant the passage of the special act, it would seem that the passage of the act itself might be held to be equivalent to such finding." United States v. Des Moines Nav. & Ry., 142 U.S. 510, 544 (1892) (quoting Thomas M. Cooley, A Treatise on Constitutional Limitations (5th ed.)); see also FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) ("a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"). Indeed, that court completely ignored the Court's admonition in Boerne, 521 U.S. at 531, that "[j]udicial deference, in most cases, is based not on the state of the legislative record Congress

compiles, but 'on due regard for the decision of the body constitutionally appointed to decide.'"

The court's insistence that Congress compile a record for judicial review before it legislates turns the presumption of constitutionality on its head. "Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated." United States v. Harris, 106 U.S. 629, 635 (1883); see also Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 319 (1985) ("we begin our analysis here with no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government").

Finally, the Fourth Circuit improperly denigrated the findings that Congress made. While Congress is not obliged to make findings, when it does so those findings are "of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." Walters, 473 U.S. at 331 n.12; Board of Educ. v. Mergens, 496 U.S. 226, 251 (1990). Although the Brown court suggested that none of Congress' discrimination findings involved States, 166 F.3d at 706, it is hard to envision who else Congress thought responsible for discrimination persisting in areas such as "education, * * *

institutionalization, * * * voting, and access to public services." 42 U.S.C. 12101(a)(3). As we explained in our briefs in the four other appeals raising the Eleventh Amendment issue, Congress had before it a vast array of information from which it made express findings of systemic and pervasive intentional and exclusionary discrimination against people with disabilities. See 42 U.S.C. 12101(a)(2) ("society has tended to isolate and segregate individuals with disabilities"), (a)(5) ("individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, * * * segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities"), (a)(7) ("individuals 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").

4. While we have discussed in our previous briefs the evidence before Congress about government discrimination in general and particularly in employment, these appeals involve two other areas governed by the ADA: education and access to the courts. We think it appropriate, therefore, to recite briefly the facts before Congress in these two areas as well.

Education: Congress' experience with government discrimination against persons with disabilities in education is manifest in the history of the Individuals with Disabilities

Education Act (IDEA), 20 U.S.C. 1401 et seq. In enacting IDEA's predecessor in 1975, Congress found that one million disabled children were "excluded entirely from the public school system." 20 U.S.C. 1400(c)(2)(C). But outright exclusion was not the only injury suffered by children with disabilities. Some children were given permission to enter the schoolhouse, but were learning nothing because the schools failed to account for their disabilities. See Board of Educ. v. Rowley, 458 U.S. 176, 191 (1982); id. at 213 n.1 (White, J., dissenting). Congress was acting in response to its finding that "millions of handicapped children 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to "drop out."'" Id. at 191 (quoting H.R. Rep. No. 332, 94th Cong., 1st Sess. 2 (1975)). This state of affairs was rooted in decades of unwarranted discrimination against children with disabilities. See Marcia Pearce Burgdorf & Robert Burgdorf, Jr., A History of Unequal Treatment, 15 Santa Clara Lawyer 855, 870-875 (1975).[3/]

[3/] Because the impetus for IDEA included two federal cases establishing that the States' failures to provide children with disabilities a public education appropriate to their needs was a constitutional violation, see Rowley, 458 U.S. at 180 n.2, 192-200, the Supreme Court has concluded that Congress intended IDEA to be the "vehicle for protecting the constitutional right of a handicapped child to a public education," Smith v. Robinson, 468 U.S. 992, 1013 (1984), and every court of appeals to address the issue has upheld IDEA as valid Section 5 legislation. See Mitten v. Muscogee County Sch. Dist., 877 F.2d 932, 937 (11th Cir. 1989), cert. denied, 493 U.S. 1072 (1990); Counsel v. Dow, 849 F.2d 731, 737 (2d Cir.), cert. denied, 488 U.S. 955 (1988); David D. v. Dartmouth Sch. Comm., 775 F.2d 411, 421 n.7 (1st Cir. 1985), cert. denied, 475 U.S. 1140 (1986); Crawford v. Pittman, 708 F.2d 1028, 1036-1038 (5th Cir. 1983).

Not surprisingly, similar government practices were found to exist in higher education. See S. Rep. No. 116, 101st Cong., 1st Sess. 7 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 29 (1990). This is consistent with the conclusion of the United States Commission on Civil Rights, also before Congress, that the "higher one goes on the education scale, the lower the proportion of handicapped people one finds." U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 28 (1983); see also National Council on the Handicapped, On the Threshold of Independence 14 (1988) (29% of disabled persons had attended college, compared to 48% of the non-disabled population). Although such a finding does "not indicate what percentage of the disabled population have conditions such as mental retardation that might affect skills involved in higher education levels, they nonetheless are evidence of a substantial disparity." U.S. Commission on Civil Rights, supra, at 28. Given the extensive discrimination by government actors in educating children, Congress had sufficient evidence from which it could infer similar discrimination in higher education, and thus that "discrimination against individuals with disabilities persists in such critical areas as * * * education." 42 U.S.C. 12101(a)(3) (emphasis added); accord 29 U.S.C. 701(a)(5).

Physical Access to the Courts: Similarly, there was evidence before Congress that, like most public accommodations, government buildings were not accessible to people with disabilities. For example, a study conducted in 1980 of state-owned buildings available to the general public found 76% of them

physically inaccessible and unusable for providing services to people with disabilities. See 135 Cong. Rec. 8,712 (1989) (remarks of Rep. Coelho); U.S. Commission on Civil Rights, supra, at 38-39; Oversight Hearing on H.R. 4498, Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. & Labor, 100th Cong., 2d Sess. 40-41 (1988) (testimony of Emeka Nwojke discussing courthouse access).

It was not unreasonable for Congress to infer from its findings of negative attitudes and intentional exclusion generally, that a factor in designing and constructing inaccessible public buildings was discrimination. Indeed, a study issued by a federal commission composed of representatives from federal, state, and local governments reported that state officials "pointed to negative attitudes and misconceptions as potent impediments to [their own] barrier removal policies." Advisory Commission on Intergovernmental Relations, Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal 87 (Apr. 1989).[4/]

This physical exclusion of people with disabilities from public buildings has special constitutional import when court proceedings are taking place inside. For criminal defendants,

---

[4/] This same report noted that 35% of state officials identified "negative attitudes about person with disabilities" as a "serious impediment" to employing persons with disabilities in state government. Id. at 73. The report concluded that even when States had good policies on paper, "implementation has sometimes been impeded by negative attitudes and misconceptions about persons with disabilities and their performance capabilities" by "those who actually make hiring and promotion decisions." Id. at 75.

the Due Process Clause has been interpreted to provide that "an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." Faretta v. California, 422 U.S. 806, 819 n.15 (1975). The Sixth Amendment "grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'" Id. at 819. Parties in civil litigation have an analogous Due Process right to be present in the courtroom unless their exclusion furthers important government interests. See Helminski v. Ayerst Labs., 766 F.2d 208, 213 (6th Cir.), cert. denied, 474 U.S. 981 (1985). When a judge sits in a courtroom that is not physically accessible to a person with a disability, the disabled person is denied the right to be present for his own legal proceedings just as if the court had issued an order excluding that person.

Even when not parties to a particular case, people with disabilities, like the rest of the public, have a constitutional right to view the court's public proceedings. See Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165 (6th Cir. 1983) (public has constitutionally-grounded common law right to view civil proceedings), cert. denied, 465 U.S. 1100 (1984). This

right is denied to persons with disabilities when the public proceedings are held in inaccessible facilities or, as alleged in plaintiff Lane's complaint, when the proceedings are moved to an accessible room that is not open to the public. In either case, both the public at large and people with disabilities are denied a right rooted in the Constitution.

This Court need not reach the question whether plaintiff Lane's allegations rise to the level of a constitutional violation in order to uphold as valid Section 5 legislation the ADA's requirement that public buildings in general (and courtrooms in particular) be accessible. So long as Congress, exercising it superior factfinding power, could have rationally concluded that there were a substantial number of extant and incipient constitutional violations regarding people with disabilities, it is free to enact a prophylactic remedial scheme. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." City of Boerne, 521 U.S. at 518.

II

42 U.S.C. 2000d-7 VALIDLY REMOVES ELEVENTH AMENDMENT IMMUNITY FOR CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

Plaintiff Johnson also alleged a violation of Section 504 of the Rehabilitation Act, 29 U.S.C. 794(a), which prohibits discrimination against persons with disabilities under "any program or activity receiving Federal financial assistance." Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." This Court has held that Section 2000d-7 meets the requirement that Congress must unambiguously express in the text of the statute its intent to remove the Eleventh Amendment bar to private suits against States in federal court. See Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998). As with the ADA, the only question is whether it is a valid exercise of any of Congress' powers.

As explained more fully below (and as we also argued in our brief in Nihiser), the State waived its Eleventh Amendment immunity to Section 504 suits when it elected to accept federal funds after the effective date of Section 2000d-7. Moreover, Congress properly abrogated Eleventh Amendment immunity from Section 504 claims pursuant to its authority under Section 5 of the Fourteenth Amendment.

1. Congress may condition the receipt of federal funds on a waiver of Eleventh Amendment immunity so long as, as here, the

statute provides unequivocal notice to the States of this condition. Section 2000d-7 may thus be upheld as a valid exercise of Congress' power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for States that voluntarily accept federal financial assistance.

States may waive their Eleventh Amendment immunity. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 65 (1996); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276 (1959); Marine Management, Inc. v. Kentucky, 723 F.2d 13, 14-15 (6th Cir. 1983); Soni v. Board of Trustees, 513 F.2d 347, 352-353 (6th Cir. 1975), cert. denied, 426 U.S. 919 (1976). It is well-settled that a State may "by its participation in the program authorized by Congress * * * in effect consent[] to the abrogation of that immunity." Edelman v. Jordan, 415 U.S. 651, 672 (1974); see also Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985) ("[a] State may effectuate a waiver of its constitutional immunity by * * * waiving its immunity to suit in the context of a particular federal program").

Atascadero held that Congress had not provided a sufficiently clear statutory language to abrogate States' Eleventh Amendment immunity for Section 504 claims. But the Court stated that if a statute "manifest[ed] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds. 473 U.S. at 247; see also Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n, 450 U.S.

147, 153 (1981) (Stevens, J., concurring). Section 2000d-7 was a direct response to the Supreme Court's decision in Atascadero. See 131 Cong. Rec. 22,344-22,345 (1985). And Section 2000d-7 makes unambiguously clear that Congress intended the States to be amenable to suit in federal court under Section 504 if they accepted federal funds. See Lane v. Pena, 518 U.S. 187, 200 (1996) (acknowledging "the care with which Congress responded to our decision in Atascadero by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7).

Section 2000d-7 thus embodies exactly the type of unambiguous condition discussed by the Court in Atascadero, by putting States on express notice that part of the "contract" for receiving federal funds was the requirement that they consent to suit in federal court for alleged violations of Section 504. As the Department of Justice explained to Congress at the time the statute was being considered, "[t]o the extent that the proposed amendment is grounded on congressional spending powers, [it] makes it clear to states that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). The Ninth Circuit has thus held that Section 2000d-7 "manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity." Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998).

Nor does Seminole Tribe preclude Congress from using its Spending Clause power to remove a State's Eleventh Amendment immunity. Although the effect is the same, when Congress acts

under the Spending Clause it does not abrogate Eleventh Amendment immunity. Instead, Congress conditions the receipt of federal funds on a waiver of that immunity by the States themselves. To the extent the defendant in Johnson may suggest that Congress may not require the waiver of Eleventh Amendment immunity as a condition for receiving federal funds because it could not directly abrogate immunity under the Spending Clause, it would be mistaken. The Supreme Court has explained that when exercising its Spending Clause power, there is no constitutional "prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." South Dakota v. Dole, 483 U.S. 203, 210 (1987). Indeed, the Court held that even "a perceived [constitutional] limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants." Ibid. (citing Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947)).

This is because, as this Court explained, "[h]ere, as in the typical spending power case, the states are not forced to accept the congressional restrictions imposed. Rather, they are free to accept the * * * grants and the concomitant regulations and liability, or forego the federal funding and remain free of regulation." Kentucky v. Donovan, 704 F.2d 288, 299 (6th Cir. 1983); see Massachusetts v. Mellon, 262 U.S. 447, 480 (1923) ("[T]he powers of the State are not invaded, since the statute imposes no obligation [to accept the funds] but simply extends an option which the State is free to accept or reject.").

Since the defendant has accepted federal funds after the

effective date of Section 2000d-7, it has waived its Eleventh Amendment immunity to a Section 504 suit in Johnson. See Clark, 123 F.3d at 1271; Beasley v. Alabama State Univ., 3 F. Supp. 2d 1304, 1311-1315 (M.D. Ala. 1998); Litman v. George Mason Univ., 5 F. Supp. 2d 366, 375-376 (E.D. Va. 1998). "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." Bell v. New Jersey, 461 U.S. 773, 790 (1983).

2. As this Court has consistently recognized, a statute may be enacted pursuant to more than one congressional power. See Franks, 142 F.3d at 363; Timmer v. Michigan Dep't of Commerce, 104 F.3d 833, 839 n.7 (6th Cir. 1997). Thus, for the reasons discussed in Part I, Section 2000d-7 is also a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment to permit private suits against States for discriminating against individuals with disabilities in violation of federal law. See Franks, 142 F.3d at 363 (so holding as to Section 2000d-7's application to Title IX). Accord Clark, 123 F.3d at 1269-1271 (Section 504); Lesage v. Texas, 158 F.3d 213, 217-219 (5th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3469 (Jan. 11, 1999) (No. 98-1111) (Title VI); Doe v. University of Ill., 138 F.3d 653, 660 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3083 (July 13, 1998) (No. 98-126) (Title IX); see also Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472 n.2 (1987) (stating in dictum that "[t]he Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment").

CONCLUSION

The Eleventh Amendment was no bar to the district courts' jurisdiction over these actions, and the district courts' judgments should be affirmed.

Respectfully submitted,

BILL LANN LEE
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
SETH M. GALANTER
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 307-9994

STATEMENT IN SUPPORT OF ORAL ARGUMENT

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

CERTIFICATE OF COMPLIANCE

This brief complies with the Federal Rule of Appellate Procedure 32(a)(7)(B). It contains 5,835 words.

SETH M. GALANTER
Attorney