No. 96-6213

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

_____

LYDIA K. ONISHEA, et al.,

Plaintiff-Appellant

v.

JOE S. HOPPER, et al.,

Defendants-Appellees

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

_____

BRIEF FOR THE UNITED STATES AS INTERVENOR

_____

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CASE NO. 96-6213

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument before the en banc court is currently scheduled for October 20, 1998.

CERTIFICATE OF TYPE SIZE AND STYLE

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STATEMENT OF JURISDICTION

Plaintiffs-appellants filed a complaint in the United States District Court for the Middle District of Alabama, alleging the state officials who administer the state prison system violated, inter alia, Section 504 of the Rehabilitation Act, 29 U.S.C. 794. The district court had jurisdiction over the case pursuant to 28 U.S.C. 1331.

This appeal is from a judgment entered on December 29, 1995, granting judgment for defendants-appellees. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether Section 504 of the Rehabilitation Act, which prohibits recipients of federal financial assistance from discriminating against otherwise qualified individuals with disabilities, is a valid exercise of Congress' authority under the Spending Clause or Section 5 of the Fourteenth Amendment.

STATEMENT OF THE CASE

1. This appeal involves an action between private plaintiffs and state officials sued in their official capacities under Section 504 of the Rehabilitation Act, 29 U.S.C. 794. In the first appeal, this Court remanded the district court's dismissal of plaintiffs' Section 504 claim. In doing so, it held that it was "clear" that the defendants' prisons were recipients of federal financial assistance, and was "concede[d]" that Section 504 applied to state prisons. See Harris v. Thigpen, 941 F.2d 1495, 1522 (11th Cir. 1991).

2. On appeal from the district court's renewed entry of judgment for the defendants, this Court again remanded, holding that the district court had applied an incorrect legal standard. It noted that the question whether Section 504 applies to prisons was conceded by defendants and was law of the case. See Onishea v. Hopper, 126 F.3d 1323, 1334-1335 n.18 (11th Cir. 1997). Judge Cox, dissenting in part, noted that although the applicability of Section 504 to state prisons was law of the case, "the issue may merit en banc attention." Id. at 1351 n.61.

3. On January 23, 1998, this Court agreed to hear the case en banc. See Onishea v. Hopper, 133 F.3d 1377 (11th Cir. 1998). In a June 10, 1998, briefing order, it asked the parties to brief all the issues presented to the panel, along with the question whether Section 504 applies to state prisons, and whether the question could be addressed in light of the law-of-the-case doctrine and defendants' concession that it did so apply.

4. In their en banc brief, defendants do not press the argument that Section 504 should be interpreted not to apply to prisons. Instead they challenge the constitutionality of applying Section 504 to prisons, arguing that it is an invalid exercise of Congress' power under Section 5 of the Fourteenth Amendment.

5. On September 3, 1998, this Court issued an order stating that the question whether the constitutional issue was properly presented to the en banc court "is carried with the case, to be decided by the en banc court;" that plaintiffs could file a second reply brief addressing the constitutional argument; and that the Clerk should certify to the Attorney General that Section 504's constitutionality has been questioned.

SUMMARY OF ARGUMENT

On June 15, 1998, the Supreme Court issued its opinion in Pennsylvania Department of Corrections v. Yeskey, 118 S. Ct. 1952 (1998), holding that the plain language of Title II of the Americans with Disabilities Act extends to state-operated prisons. In their en banc brief, defendants do not attempt to distinguish Yeskey or otherwise press the argument that Section 504 should be interpreted not to apply to prisons. Instead they challenge the constitutionality of applying Section 504 to prisons, arguing that it is an invalid exercise of Congress' power under Section 5 of the Fourteenth Amendment.

But this Court need not address in this case the scope of Congress' power under Section 5 of the Fourteenth Amendment to prohibit disability discrimination in state-operated prisons. Section 504 applies only to those programs or activities that receive federal financial assistance. By accepting federal funds for their prisons, defendants agreed to the condition clearly laid out in Section 504 -- not to discriminate against any "otherwise qualified individual with a disability." As an exercise of Congress' Spending Power, Section 504 may require recipients of federal money to comply with this condition, even assuming (as defendants argue) that Congress would not have to power to impose such a requirement unilaterally.

If this Court finds it appropriate to reach the question, Section 504 is also a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment, which authorizes Congress

to enact "appropriate legislation" to "enforce" the Equal Protection Clause. In exercising that power, Congress is not limited to legislating in regard to classifications that the courts have found are "suspect." To the contrary, Congress has broad discretion to enact whatever legislation it determines is appropriate to secure to all persons "the enjoyment of perfect equality of civil rights and the equal protection of the laws." Ex parte Virginia, 100 U.S. (10 Otto) 339, 346 (1879).

Congress found that persons with disabilities -- including HIV-positive individuals -- were subject to pervasive discrimination based on irrational fears and inaccurate stereotypes. The continuing effects of this past exclusion, combined with present discrimination, has resulted in persons with disabilities being excluded from full participation in all aspects of society. In light of these findings, Congress required public entities to take reasonable steps to modify their practices and physical facilities so that persons with disabilities would have meaningful access to all the services, programs, or activities of those entities. This finely tuned mandate is plainly adapted to the underlying purpose of the Equal Protection Clause: "the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." Plyler v. Doe, 457 U.S. 202, 222 (1982). There is nothing about the operation of state prisons that precludes application of this otherwise valid remedial statute.

ARGUMENT

I

SECTION 504 IS A CONSTITUTIONAL EXERCISE OF THE SPENDING CLAUSE

Defendants argue (Br. 28-35) that Section 504 is an unconstitutional exercise of Congress' power under Section 5 of the Fourteenth Amendment as applied to prisons.[1] But there is no need to address that question, as Section 504 can 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.

Section 504 applies only to those programs or activities that receive federal financial assistance. By accepting federal funds, defendants agreed to the condition clearly laid out in

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[1/] "Br. __" refers to the En Banc Brief of the Appellees.

Alabama has recently mounted constitutional challenges to a number of other civil rights statutes. See Reynolds v. Alabama Dep't of Transp., 4 F. Supp.2d 1092 (M.D. Ala. 1998), appeal pending, No. 98-6600 (11th Cir.) (Title VII of the Civil Rights Act of 1964); Larry v. Board of Trustees, 975 F. Supp. 1447 (N.D. Ala. 1997), aff'd on reconsideration, 996 F. Supp. 1366 (1998), appeal pending, No. 98-6532 (11th Cir.) (Equal Pay Act); Beasley v. Alabama State Univ., 3 F. Supp.2d 1304 (M.D. Ala. 1998), appeal pending, No. 98-6300 (11th Cir.) (Title IX of the Education Amendments of 1972); Sandoval v. Hagan, 7 F. Supp.2d 1234 (M.D. Ala. 1998), appeal pending, No. 98-6598 (11th Cir.) (Title VI of the Civil Rights Act of 1964).

Section 504 -- not to discriminate against any "otherwise qualified individual with a disability." 29 U.S.C. 794(a). As the Court explained in School Board of Nassau County v. Arline, 480 U.S. 273 (1987), Section 504 contains an "antidiscrimination mandate" that "enlist[s] all programs receiving federal funds" in Congress' attempt to eliminate discrimination against individuals with disabilities. Id. at 286 n.15, 277; United States v. Board of Trustees, 908 F.2d 740, 750 (11th Cir. 1990). As an exercise of Congress' Spending Power, Section 504 may require defendants that voluntarily take federal money to comply with this provision, even assuming, arguendo, that Congress would not have to power to impose such obligations unilaterally. For 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).

Defendants do not argue that Congress exceeded its power under the Spending Clause in prohibiting recipients of federal funds from discriminating against persons with disabilities. Indeed, "[c]ourts have held innumerable times that the federal government may impose conditions on the receipt and use of federal funds." Alabama v. Lyng, 811 F.2d 567, 568 (11th Cir.), cert. denied, 484 U.S. 821 (1987) (collecting cases). To the extent defendants' argument that prison administration is a "core state function" (Br. 43) can be read to suggest that there is some Tenth Amendment or federalism-based limitation on Congress'

power when the fund recipient is a prison, that would be mistaken. The Supreme Court has held that even "a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants." South Dakota v. Dole, 483 U.S. at 210 (citing Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947)). Similarly, this Court has consistently rejected claims that conditions attached to the acceptance of federal funds implicate Tenth Amendment concerns. See, e.g., Chiles v. United States, 69 F.3d 1094, 1097 (11th Cir. 1995) (requirement that States receiving federal funds provide benefits to illegal immigrants does not violate Tenth Amendment), cert. denied, 517 U.S. 1188 (1996); Lyng, 811 F.2d at 570 (prohibition on States receiving federal funds for food stamps from taxing food stamp purchases does not violate Tenth Amendment); Florida v. Mathews, 526 F.2d 319, 326 (5th Cir. 1976) (requirement that States receiving federal funds for nursing homes license such homes in a manner specified by federal law does not violate Tenth Amendment).

The Tenth Amendment is not implicated in statutes involving the Spending Clause because no State is obliged to accept federal funds. But having applied for and taken federal funds, a State cannot be heard to complain when it is required to abide by the terms of the "contract." See Board of Educ. v. Mergens, 496 U.S. 226, 241 (1990); Georgia Ass'n of Retarded Citizens v. McDaniel,

716 F.2d 1565, 1578 (11th Cir. 1983).[2] "[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." Massachusetts v. Mellon, 262 U.S. 447, 480 (1923); see Doe v. Chiles, 136 F.3d 709, 722 (11th Cir. 1998). For these reasons, Section 504 can be upheld as valid Spending Clause legislation.[3]

[2/] While it must be clear that the money comes with "strings" attached, the scope of the attendant obligations is determined by normal rules of statutory construction. See Arline, 480 U.S. at 286 n.15; Bennett v. Kentucky Dep't of Educ., 470 U.S. 656, 665-666 (1985); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891 n.8 (1984); United States v. Board of Trustees, 908 F.2d at 749-750; Georgia Ass'n of Retarded Citizens, 716 F.2d at 1577-1578.

[3/] Defendants raise (Br. 26, 28-29, 30-31) the issue of Eleventh Amendment immunity. But since the defendants in this action are state officials sued for prospective injunctive relief in their official capacities, this suit falls within the doctrine of Ex parte Young. See Lussier v. Dugger, 904 F.2d 661, 670 n.10 (11th Cir. 1990); Helms v. McDaniel, 657 F.2d 800, 806 n.10 (5th Cir. 1981), cert. denied, 455 U.S. 946 (1982); see also Doe, 136 F.3d at 719-720; Earles v. State Bd. of Certified Pub. Accountants, 139 F.3d 1033, 1039 (5th Cir. 1998).

In addition, 42 U.S.C. 2000d-7 contains a clear statement of Congress' intent to remove States' Eleventh Amendment immunity

(continued...)

II

SECTION 504 IS A CONSTITUTIONAL EXERCISE OF CONGRESS' POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

In Kimel v. Board of Regents, 139 F.3d 1426 (11th Cir. 1998), and Seaborn v. Florida, 143 F.3d 1405 (11th Cir. 1998), this Court upheld the constitutionality of the Americans with Disabilities Act (ADA) as valid Section 5 legislation in cases involving prison employees. This is in accord with every other court of appeals to address the question. See Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997); Clark v. California, 123 F.3d 1267, 1270-1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); Coolbaugh v. Louisiana, 136

[3/](...continued)
for Section 504 suits. See Lussier, 904 F.2d at 669. Like Section 504 itself, Section 2000d-7 is a valid exercise of Congress' Spending Power -- conditioning the receipt of federal funds on the waiver of Eleventh Amendment immunity. See Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); Beasley, 3 F. Supp.2d at 1310-1312; Sandoval, 7 F. Supp.2d at 1269, 1271-1272; Litman v. George Mason Univ., 5 F. Supp.2d 366, 375-376 (E.D. Va. 1998).

Alternatively, if this Court elects to uphold Section 504 as valid Section 5 authority, as discussed in the next part, defendants would also not be entitled to Eleventh Amendment immunity because Congress has the power to abrogate immunity under Section 5 of the Fourteenth Amendment. See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 59, 65, 71 n.15 (1996).

cert. denied, 118 S. Ct. 2340 (1998); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir.), cert. denied, 1998 WL 289414 (U.S. Oct. 5, 1998) (No. 97-1941); Alsbrook v. City of Maumelle, No. 97-1825, 1998 WL 598793, at *3-*5 (8th Cir. Sept. 11, 1998).

Given the close relationship between the substantive requirements of the ADA and Section 504, defendants do not suggest that the holding of Kimel and Seaborn is inapplicable to Section 504. Nor do defendants ask this Court to reconsider the holding of Kimel and Seaborn. (Indeed this Court declined to rehear Kimel en banc on August 17, 1998.) Instead, defendants ask this Court (Br. 30, 33) to limit the scope of those decisions to cases not involving prisoners. But there is nothing about prisons that exempts them from the scope of Congress' Section 5 authority to deter and remedy irrational and invidious discrimination against individuals with disabilities.

Before addressing prisons in particular, however, we think it important to explain in some detail why this Court and the four other courts of appeals reached the correct result in upholding the ADA as valid Section 5 legislation.

Section 5 of the Fourteenth Amendment empowers Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. As the Supreme Court explained over a hundred years ago:

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

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

A. Section 504 Is An Enactment To Enforce The Equal Protection Clause

Neither the prohibitions of the Equal Protection Clause nor Congress' Section 5 authority is limited to suspect or quasi-suspect classifications. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352 (1918). Thus "arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988); see, e.g., Romer v. Evans, 517 U.S. 620, 631-634 (1996); Mills v. Maine, 118 F.3d 37, 46 (1st Cir. 1997) (collecting cases). And the Court in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 450 (1985), made clear that government discrimination on the basis of disability is prohibited by the Equal Protection Clause when it is arbitrary.

Although a majority declined to deem classifications on the basis of mental retardation as "quasi-suspect," it held that this did not leave persons with such disabilities "unprotected from invidious discrimination." Id. at 446.

As the Seventh Circuit explained, "[i]nvidious discrimination by governmental agencies * * * violates the equal protection clause even if the discrimination is not racial, though racial discrimination was the original focus of the clause. In creating a remedy against [disability] discrimination, Congress was acting well within its powers under section 5 * * *." Crawford, 115 F.3d at 487. This is consistent with this Court's holding in Mitten v. Muscogee County School District, 877 F.2d 932 (11th Cir. 1989), cert. denied, 493 U.S. 1072 (1990), involving the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq. IDEA requires "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982). This Court in Mitten has held that Congress validly exercised its Section 5 authority in enacting the IDEA. 877 F.2d at 937; accord Counsel v. Dow, 849 F.2d 731, 737 (2d Cir.) (collecting cases), cert. denied, 488 U.S. 955 (1988).[4] Like

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[4/] Although the Court in Kimel held that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 et seq., did not contain a valid abrogation of Eleventh Amendment immunity, only Judge Cox

(continued...)

these statutes, Section 504 can be regarded as legislation to enforce the Equal Protection Clause.[5]

[4/](...continued)
would have held that Congress did not have the power to prohibit age discrimination under Section 5. See 139 F.3d at 1447-1448. A majority of the courts of appeals have taken the opposite view and held that the ADEA can be upheld as valid Section 5 legislation. See, e.g., Coger v. Board of Regents, No. 97-5134, 1998 WL 476164, at *5-*11 (6th Cir. Aug. 17, 1998); Scott v. University of Miss., 148 F.3d 493, 501-503 (5th Cir. 1998); Keeton v. University of Nev. Sys., 150 F.3d 1055, 1058 (9th Cir. 1998); Goshtasby v. Board of Trustees, 141 F.3d 761, 770-772 (7th Cir. 1998).

[5/] There is of course no requirement that Congress expressly invoke its Section 5 authority in the text or legislative history. See EEOC v. Wyoming, 460 U.S. 226, 243-244 n.18 (1983); see also, e.g., Mills v. Maine, 118 F.3d 37, 43-44 (1st Cir. 1997); Wheeling & Lake Erie Ry. Co. v. Public Utility Comm'n, 141 F.3d 88, 92 (3d Cir. 1998); Abril v. Virginia, 145 F.3d 182, 186 (4th Cir. 1998); Ussery v. Louisiana, 150 F.3d 431, 436 (5th Cir. 1998); Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998); Goshtasby v. Board of Trustees, 141 F.3d 761, 767-768 (7th Cir. 1998); Doe v. University of Ill., 138 F.3d 653, 658 (7th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3083 (July 13, 1998) (No. 98-126); Crawford v. Davis, 109 F.3d 1281, 1283 (8th Cir. 1997); Oregon Short Line R.R. Co. v. Department of
(continued...)

B. Section 504 Is Plainly Adapted To Enforcing The Equal Protection Clause

The Supreme Court's recent decision in City of Boerne v. Flores, 117 S. Ct. 2157 (1997), addressed the question of what constitutes "plainly adapted" enforcement. It concluded that even statutes that prohibit more than does the Equal Protection Clause on its own can be "appropriate remedial measures" when there is "a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented." Id. at 2169.

The "evil" targeted by Section 504 is that "individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services." 29 U.S.C. 701(a)(5). The question, then, is whether Congress erred in determining that Section 504 is an appropriate response to this "evil."

1. Congress Found That Discrimination Against People With Disabilities Was Severe And Extended To Every Aspect Of Society

Plaintiffs-appellants in their Supplemental En Banc Reply Brief have surveyed the history of Section 504 and its amendments. Because Section 504 and the ADA target the same

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[5/] (...continued)
Revenue, 139 F.3d 1259, 1265-1266 (9th Cir. 1998).

"evil," see 42 U.S.C. 12101(a)(5), and because Congress intended the substantive standards of the two statutes to be substantially identical,[6] we believe an examination of the findings and legislative record compiled by Congress in enacting the ADA after 15 years experience with Section 504 can be instructive in evaluating Section 504's constitutionality. Cf. Fullilove v. Klutznick, 448 U.S. 448, 503 (1980) (opinion of Powell, J.); United States v. Lopez, 514 U.S. 549, 612 n.2 (1995) (Souter, J., dissenting).

In enacting the ADA in 1990, Congress made express findings about the status of people with disabilities in our society and determined that they were subject to continuing "serious and pervasive" discrimination that "tended to isolate and segregate individuals with disabilities." 42 U.S.C. 12101(a)(2).

[6/] See Bragdon v. Abbott, 118 S. Ct. 2196, 2202 (1998); Holbrook v. City of Alpharetta, 112 F.3d 1522, 1526 n.2 (11th Cir. 1997); Gordon v. E.L. Hamm & Assocs., 100 F.3d 907, 913 n.3 (11th Cir. 1996), cert. denied, 118 S. Ct. 630 (1997). Congress required the Attorney General to promulgate regulations under Title II of the ADA that were "consistent" with existing Section 504 regulations, 42 U.S.C. 12134(b), and provided that nothing in the ADA "shall be construed to apply a lesser standard than the standards applied under" Section 504, 42 U.S.C. 12201(a). Congress also amended Section 504 to provide that its standards for employment discrimination shall be the same as the standards under Title I of the ADA. 29 U.S.C. 794a(d).

We cannot provide a complete summary of the 14 hearings held by Congress at the Capitol, the 63 field hearings, the lengthy floor debates, and the myriad of reports submitted to Congress by the Executive Branch in the three years prior to the enactment of the ADA, see Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 393-394 nn.1-4, 412 n.133 (1991) (collecting citations), or Congress' thirty years of experience with other statutes aimed at preventing discrimination against persons with disabilities, see Lowell P. Weicker, Jr., Historical Background of the Americans with Disabilities Act, 64 Temp. L. Rev. 387, 387-389 (1991) (discussing other laws enacted to redress discrimination against persons with disabilities). However, in the next few pages we will briefly sketch some of the major areas of discrimination Congress discovered.

First, the evidence before Congress demonstrated that persons with disabilities were sometimes excluded from public services for no reason other than distaste for or fear of their disabilities. See S. Rep. No. 116, 101st Cong., 1st Sess. 7-8 (1989) (citing instances of discrimination based on negative reactions to sight of disability) (Senate Report); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28-31 (1990) (same) (House Report). The legislative record contained documented instances of exclusion of persons with disabilities from hospitals, theaters, restaurants, bookstores, and auction houses simply because of prejudice. See Cook, supra, at 408-409 (collecting

citations). Indeed, the United States Commission on Civil Rights, after a thorough survey of the available data, documented that prejudice against persons with disabilities manifested itself in a variety of ways, including "reaction[s] of aversion," reliance on "false" stereotypes, and stigma associated with disabilities that lead to people with disabilities being "thought of as not quite human." U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 23-26 (1983); see also Senate Report, supra, at 21. The negative attitudes, in turn, produced fear and reluctance on the part of people with disabilities to participate in society. See Senate Report, supra, at 16; House Report, supra, at 35, 41-43; Cook, supra, at 411.

Congress was aware that fears and stereotypes unsupported by objective fact often predominated in situations involving contagious diseases such as HIV infection. See Arline, 480 U.S. at 284-285. Congress credited the Report of the President's Commission on the Human Immunodeficiency Virus Epidemic, which "concluded that discrimination against individuals with HIV infection is widespread and has serious repercussions for both the individual who experiences it and for this nation's efforts to control the epidemic." Senate Report, supra, at 8; House Report, supra, at 31; Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic 120 (June 1988) ("One of the primary causes of discriminatory responses to an individual with HIV infection is fear, based on ignorance or

misinformation about the transmission of the virus."). Congress thus concluded that persons with disabilities, including HIV-positive individuals, were "faced with restrictions and limitations * * * resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. 12101(a)(7).[7]

[7/] See, e.g., 136 Cong. Rec. 17,377 (1990) (Sen. Kennedy) ("Discrimination against people with HIV disease has, unfortunately, been one of the tragic hallmarks of this epidemic."); id. at 17,293 (Rep. Waxman) ("The public accommodations title of the ADA will also offer necessary protection for people with HIV disease. Such individuals, unfortunately, continue to face discrimination in doctors' offices, lawyers' offices, and various other service providers."); id. at 17,290 (Rep. Edwards) ("Without a doubt, there is fear and misperception regarding the threat posed by people with acquired immune deficiency syndrome [AIDS] and other forms of human immunodeficiency virus [HIV] disease."); id. at 17,289 (Rep. Owens) ("It is tragic and wrong that people with HIV disease should experience medically unjustified discrimination on the basis of their disability. Unfortunately, such discrimination occurs across our country."); id. at 17,043 (Sen. Cranston) (describing a study on AIDS discrimination that found 13,000 formal AIDS discrimination complaints filed between 1983

(continued...)

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

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7/(...continued)
and 1988, and concluding that "this Nation pays a heavy price for its unfounded fears of AIDS"); id. at 11,454 (Rep. McDermott) ("many" Americans "react out of ignorance and fear" to individuals with HIV disease); id. at 10,872 (Rep. Weiss) ("Persons living with HIV disease suffer from all the forms of discrimination found in our society."); 135 Cong. Rec. 22,445 (1989) (Sen. Inouye) ("The AIDS epidemic has produced fear--both nationally and internationally. The fear has generated emotional and sometimes irrational responses by the public."); id. at 19,900 (Sen. Simon) (people with HIV infection "will no longer be unjustly denied jobs or unjustly be prevented from receiving services or benefits. Actions with regard to people with AIDS and HIV infection will no longer be allowed to be governed by myths, stereotypes, and misperceptions, but rather will be governed by objective medical evidence and facts."); id. at 19,812 (Sen. Cranston) ("Over the last 8 years I have heard countless tragic stories of people with AIDS losing their jobs and their homes, being refused services, and being made to feel like outcasts. * * * The discrimination is predominantly the result of fear--unfounded fear--about AIDS.").

Senate Report, supra, at 11; U.S. Commission on Civil Rights, supra, at 43-45. This segregation was in part the result of government policies in "critical areas [such] as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). For example, in enacting the IDEA, Congress had determined that millions of children with disabilities were either receiving no education whatsoever, an inadequate education, or receiving their education in an unnecessarily segregated environment. See 20 U.S.C. 1400(c)(2)-(c)(4) (as amended, 1997); see also Rowley, 458 U.S. at 191-203 (surveying legislative findings); Cook, supra, at 413-414.

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 percent 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. In another survey, 40 percent of persons with disabilities reported that an important reason for their segregation was the inaccessibility of buildings and restrooms. See Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the Subcomm. on Civil &

Const. Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 334 (1989) (House Hearings).

Of course, even when the buildings were accessible, persons with disabilities were often excluded because they could not reach the buildings. The evidence before Congress showed that, in fact, public streets and sidewalks were not accessible. See House Report, supra, at 84; House Hearings, supra, at 248, 271. And even when they could navigate the streets, people with disabilities were shut out of most public transportation. See H.R. Rep. No. 485, Pt. 1, 101st Cong., 2d Sess. 24 (1990); National Council on the Handicapped, Toward Independence 32-33 (1986); U.S. Commission on Civil Rights, supra, at 39. Some transit systems offered paratransit services (special demand responsive systems for people with disabilities) to compensate for the absence of other means of transportation, but those services were often too limited and further contributed to the segregation of people with disabilities from the general public. See Senate Report, supra, at 13, 45; House Report, supra, at 38, 86; Toward Independence, supra, at 33; U.S. Commission on Civil Rights, supra, at 39. As Congress reasoned, "[t]ransportation plays a central role in the lives of all Americans. It is a veritable lifeline to the economic and social benefits that our Nation offers its citizens. The absence of effective access to the transportation network can mean, in turn, the inability to obtain satisfactory employment. It can also mean the inability to take full advantage of the services and other opportunities

provided by both the public and private sectors." H.R. Rep. No. 485, Pt. 4, 101st Cong., 2d Sess. 25 (1990); see House Report, supra, at 37, 87-88; Senate Report, supra, at 13.

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

People with disabilities who were able to overcome these barriers proved to be excellent workers. "[T]here is consistent * * * empirical evidence to back up the claims * * * that handicapped persons are more stable workers, with lower turnover, less absenteeism, lower risks of accident, and more loyalty to

and satisfaction with their jobs and employers than other workers of similar characteristics in similar jobs." Frederick C. Collignon, The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry, in Disability and the Labor Market 196, 208 (Monroe Berkowitz & M. Anne Hill eds., 1986); see also Senate Report, supra, at 28-29 (discussing studies that show job performance of employees with disabilities was as good as others); House Report, supra, at 58-59 (same).

Given these facts, it is not surprising that surveys of both people with disabilities and employers revealed that discrimination was one of the primary reasons many people with disabilities did not have jobs. See Senate Report, supra, at 9; House Report, supra, at 33, 37; On the Threshold of Independence, supra, at 15. "[R]ecent studies suggest that prejudice against impaired persons is more intense than against other minorities. [One study] concludes that employer attitudes toward impaired workers are 'less favorable than those . . . toward elderly individuals, minority group members, ex-convicts, and student radicals,' and [another study] finds that handicapped persons are victims of 'greater animosity and rejections than many other groups in society.'" William G. Johnson, The Rehabilitation Act and Discrimination Against Handicapped Workers, in Disability and the Labor Market 242, 245, supra. And even when employed, people with disabilities received lower wages that could not be explained by any factor other than discrimination. See U.S. Commission on Civil Rights, supra, at 31-32; Equal Employment

Opportunities for Individuals with Disabilities, 56 Fed. Reg. 8,581 (1991) (citing studies); Johnson, supra, at 245 (same).

These government policies and practices, in tandem with similar private discrimination, produced a situation in which people with disabilities were largely poor, isolated, and segregated. As Justice Marshall explained, "lengthy and continuing isolation of [persons with disabilities] perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them." Cleburne, 473 U.S. at 464; see also U.S. Commission on Civil Rights, supra, at 43-45. Congress could reasonably have found government discrimination to be a root cause of "people with disabilities, as a group, occupy[ing] an inferior status in our society, and [being] severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6).

2. Section 504 Is A Proportionate Response By Congress To Remedy And Prevent The Pervasive Discrimination It Discovered

Section 5 of the Fourteenth Amendment vests in Congress broad power to address the "continuing existence of unfair and unnecessary discrimination and prejudice [that] denies people with disabilities the opportunity * * * to pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. 12101(a)(9). "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly

charged by the Constitution with competence and authority to enforce equal protection guarantees." Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) (opinion of Burger, C.J.).

"Prejudice, once let loose, is not easily cabined." Cleburne, 473 U.S. at 464 (Marshall, J.). After extensive investigation, Congress found that the exclusion of persons with disabilities from government facilities, programs, and benefits was a result of past and on-going discrimination. In Section 504, Congress sought to remedy the effects of past discrimination and prevent like discrimination in the future by mandating that "qualified handicapped individual[s] must be provided with meaningful access to the benefit that the [entity] offers." Alexander v. Choate, 469 U.S. 287, 301 (1985) (emphasis added). Thus Section 504 requires that programs not unnecessarily exclude persons with disabilities, either intentionally or unintentionally, and that government entities make "reasonable accommodations" to rules, policies, or practices" for an "otherwise qualified" individual with a disability, when the modifications are necessary to avoid discrimination on the basis of disability. Arline, 480 U.S. at 287 n.17 (emphasis added). While this requirement imposes some burden on the States, the statutory scheme created by Congress acknowledges the importance of other interests as well. Section 504 does not require governmental entities to articulate a "compelling interest," but only requires "reasonable accommodations" that do not entail a "fundamental alteration in the nature of the program." Ibid. In

general, governmental entities need not provide accommodations if they can show "undue financial and administrative burdens." Ibid. (emphasis added).

3. In Enacting Section 504, Congress Was Redressing Constitutionally Cognizable Injuries

In enacting Section 504, Congress was acting within the constitutional framework laid out by the Supreme Court. As discussed above, the Equal Protection Clause prohibits invidious discrimination, that is "a classification whose relationship to [a legitimate] goal is so attenuated as to render the distinction arbitrary or irrational." Cleburne, 473 U.S. at 446. In Cleburne, the Supreme Court unanimously declared unconstitutional as invidious discrimination a decision by a city to deny a special use permit for the operation of a group home for people with mental retardation. A majority of the Court recognized that "through ignorance and prejudice [persons with disabilities] 'have been subjected to a history of unfair and often grotesque mistreatment.'" Id. at 454 (Stevens, J., concurring); see id. at 461 (Marshall, J., concurring in the judgment in part). The Court acknowledged that "irrational prejudice," id. at 450, "irrational fears," id. at 455 (Stevens, J.), and "impermissible assumptions or outmoded and perhaps invidious stereotypes," id. at 465 (Marshall, J.), existed against people with disabilities in society at large and sometimes inappropriately infected government decision making.

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

Nevertheless, it did affirm that "there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms," id. at 446, and found the actions at issue in that case unconstitutional. In doing so, it articulated several criteria for making such determinations in cases involving disabilities. First, the Court held that the fact that persons with mental retardation were "indeed different from others" did not preclude a claim that they were denied equal protection; instead, it had to be shown that the difference was relevant to the "legitimate interests" furthered by the rules. Id. at 448. Second, in measuring the government's interest, the Court did not examine

all conceivable rationales for the differential treatment of the mentally retarded; instead, it looked to the record and found that "the record [did] not reveal any rational basis" for the decision to deny a special use permit. Ibid.; see also id. at 450 (stating that "this record does not clarify how * * * the characteristics of [people with mental retardation] rationally justify denying" to them what would be permitted to others). Third, the Court found that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable * * * are not permissible bases" for imposing special restrictions on persons with disabilities. Id. at 448. Thus, the Equal Protection Clause of its own force already proscribes treating persons with disabilities differently when the government has not put forward evidence justifying the difference or where the justification is based on mere negative attitudes.

The Supreme Court has also recognized that the principle of equality is not an empty formalism divorced from the realities of day-to-day life, and thus the Equal Protection Clause is not limited to prohibiting unequal treatment of similarly situated persons. The Equal Protection Clause also guarantees "that people of different circumstances will not be treated as if they were the same." United States v. Horton, 601 F.2d 319, 324 (7th Cir.), cert. denied, 444 U.S. 937 (1979) (quoting Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law 520 (1978)). By definition, persons with disabilities have "a physical or mental impairment that substantially limits one or

more * * * major life activities." 29 U.S.C. 706(8)(B). Thus, as to that life activity, "the handicapped typically are not similarly situated to the nonhandicapped." Alexander, 469 U.S. at 298. The Constitution is not blind to this reality and instead, in certain circumstances, requires equal access rather than simply identical treatment. While it is true that the "'Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same,'" Plyler v. Doe, 457 U.S. 202, 216 (1982), it is also true that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." Jenness v. Fortson, 403 U.S. 431, 442 (1971).[8]

[8/] In a series of Supreme Court cases beginning with Griffin v. Illinois, 351 U.S. 12 (1956), and culminating in M.L.B. v. S.L.J., 117 S. Ct. 555 (1996), the Court has held that principles of equality are sometimes violated by treating unlike persons alike. In these cases, the Supreme Court has held that a State violates the Equal Protection Clause when it treats indigent parties appealing from certain court proceedings as if they were not indigent. Central to these holdings is the acknowledgment that "a law nondiscriminatory on its face may be grossly discriminatory in its operation." 117 S. Ct. at 569 (quoting Griffin, 351 U.S. at 17 n.11). The Court held in these cases that even though States are applying a facially neutral policy by charging all litigants equal fees for an appeal, the Equal

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Thus, there is a basis in constitutional law for recognition that discrimination exists not only by treating people with disabilities differently for no legitimate reason, but also by treating them identically when they have recognizable differences. As the Sixth Circuit has explained in a case involving gender classifications, "in order to measure equal opportunity, present relevant differences cannot be ignored. When males and females are not in fact similarly situated and when the law is blind to those differences, there may be as much a denial of equality as when a difference is created which does not exist." Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 657 (6th Cir. 1981); see also Lau v. Nichols, 483 F.2d 791, 806 (9th Cir. 1973) (Hufstedler, J., dissenting from the denial of reh'g en

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Protection Clause requires States to waive such fees in order to ensure equal "access" to appeal. Id. at 560. Nor is it sufficient if a State permits an indigent person to appeal without charge, but does not provide free trial transcripts. The Court has declared that the State cannot "extend to such indigent defendants merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.'" Id. at 569 n.16 (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)); see also Lewis v. Casey, 518 U.S. 343, 356-357 (1996) (holding that State has not met its obligation to provide illiterate prisoners access to courts simply by providing a law library).

banc), rev'd, 414 U.S. 563 (1974). Similarly, it is also a denial of equality when access to facilities, benefits, and services is denied because the State refuses to acknowledge the "real and undeniable differences between [persons with disabilities] and others." Cleburne, 473 U.S. at 444.

4. Unlike The Statute Found Unconstitutional In City Of Boerne, Section 504 Is A Remedial And Preventive Scheme Proportional To The Injury

Of course, there is no need for this Court to decide whether every requirement of Section 504 could be ordered by a court under the authority of the Equal Protection Clause. It is sufficient that Congress found Section 504 was appropriate legislation to redress the rampant discrimination it discovered and continued to find in its decades-long examination of the question. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." City of Boerne, 117 S. Ct. at 2163.

Congress' decision to follow the teachings of Cleburne distinguishes this case from City of Boerne. The Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb et seq. (the statute at issue in City of Boerne) was enacted by Congress in response to the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990). Smith held that the Free Exercise Clause did not require States to provide exceptions to neutral and generally applicable laws even when those laws significantly

burdened religious practices. See id. at 887. In RFRA, Congress attempted to overcome the effects of Smith by imposing through legislation a requirement that laws substantially burdening a person's exercise of religion be justified as in furtherance of a compelling state interest and as the least restrictive means of furthering that interest. See 42 U.S.C. 2000bb-1. The Court found that in enacting this standard, Congress was not acting in response to a history of unconstitutional activity. Indeed, "RFRA's legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry." City of Boerne, 117 S. Ct. at 2169. The Court found that Congress was "attempt[ing] a substantive change in constitutional protections," id. at 2170, rather than attempting to "enforce" a recognized Fourteenth Amendment right.

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

In City of Boerne the Court found that RFRA was "out of proportion" to the problems identified so that it could not be viewed as preventive or remedial. Id. at 2170. First, it found that there was no "pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith." Id. at 2171; see also id. at 2169 (surveying legislative record). It also found that RFRA's requirement that the State prove a compelling state interest and narrow tailoring imposed "the most demanding test known to constitutional law" and thus possessed a high "likelihood of invalidat[ing]" many state laws. Id. at 2171. While stressing that Congress was entitled to "much deference" in determining the need for and scope of laws to enforce Fourteenth Amendment rights, id. at 2172, the Court found that Congress had simply gone so far in attempting to regulate local behavior that, in light of the lack of evidence of a risk of unconstitutional conduct, it could no longer be viewed as remedial or preventive. Id. at 2169-2170.

As we have shown above, none of the specific concerns articulated by the Court apply to Section 504.[9] But Section 504

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

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differs from RFRA in a more fundamental way. RFRA was attempting to expand the substantive meaning of the Fourteenth Amendment by imposing a strict scrutiny standard on the States in the absence of evidence of widespread use of constitutionally improper criteria. Section 504, on the other hand, 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 RFRA -- which demonstrated that Congress acted out of displeasure with the Court's decision in Smith -- there is no evidence that Congress enacted Section 504 because of its disagreement with any decision of the Court. "In the ADA [and Section 504], 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.

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of persons with disabilities and public entities plainly manifests a "congruence" between the "means used" and the "ends to be achieved." See City of Boerne, 117 S. Ct. at 2169. Moreover, there is no problem regarding judicially manageable standards, as the courts have regularly applied the "reasonable accommodation" test under Section 504 to recipients of federal funds for the past 20 years.

Viewed in light of the underlying Equal Protection principles, Section 504 is appropriate preventive and remedial legislation. First, it is preventive in that it established a statutory scheme that attempts to detect government activities likely tainted by discrimination. By requiring the State to show on the record that distinctions it makes based on disability, or refusals to provide meaningful access to facilities, programs, and services are not the result of prejudice or stereotypes, but rather based on legitimate governmental objectives, it attempts to ensure that inaccurate stereotypes or irrational fear are not the true cause of the decision. Cf. School Bd. of Nassau County v. Arline, 480 U.S. 273, 284-285 (1987). This is similar to the standards articulated by the Court in Cleburne.

Second, Section 504 is remedial in that it attempts to ensure that the interests of people with disabilities are given their due. Not surprisingly, given their profound segregation from the rest of society, see 42 U.S.C. 12101(a)(2), the needs of persons with disabilities were not taken into account when buildings were designed, standards were set, and rules were promulgated. Thus, for example, sidewalks and buildings were often built based on the standards for those who are not disabled. The ability of people in wheelchairs to use them or of people with visual impairments to navigate within them was not likely considered. See U.S. Commission on Civil Rights, supra, at 21-22, 38. Even when considered, their interests may not have been properly weighed, since "irrational fears or ignorance,

traceable to the prolonged social and cultural isolation of [persons with disabilities] continue to stymie recognition of [their] dignity and individuality." Cleburne, 473 U.S. at 467 (Marshall, J.).

Policies and criteria restricting access to government programs and services are just as much a barrier to some as physical barriers are to others. As Congress and the Supreme Court recognized, many of the problems faced today by persons with disabilities are a result of "thoughtlessness or indifference -- of benign neglect" to the interaction between those purportedly "neutral" rules and persons with disabilities.[10] As a result, Congress determined that for an entity to treat persons with disabilities as it did those without disabilities was not sufficient to eliminate the effects of years of segregation and to give persons with disabilities equally meaningful access to every aspect of society. See 29 U.S.C. 701(a)(5); 42 U.S.C. 12101(a)(5); see also U.S. Commission on Civil Rights, supra, at 99. When persons with disabilities have been segregated, isolated, and denied effective participation in society, Congress may conclude that affirmative measures are necessary to bring them into the mainstream. Cf. Fullilove, 448 U.S. at 477-478.

[10/] Senate Report, supra, at 6 (quoting without attribution Alexander v. Choate, 469 U.S. 287, 295 (1985)); House Report, supra, at 29 (same); 136 Cong. Rec. 10,870 (1990) (Rep. Fish); id. at 11,467 (Rep. Dellums).

Section 504 thus falls neatly in line with other statutes that have been upheld as valid Section 5 legislation. For when there is evidence of a history of extensive discrimination, as here, Congress may prohibit or require modifications of rules, policies, and practices that tend to have a discriminatory effect on a class or individual, regardless of the intent behind those actions. In South Carolina v. Katzenbach, 383 U.S. 301, 325-337 (1966), and again in City of Rome v. United States, 446 U.S. 156, 177 (1980), both cited with approval in City of Boerne, the Supreme Court upheld the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect. Similarly, this Court in Scott v. City of Anniston, 597 F.2d 897, 899-900 (5th Cir. 1979), cert. denied, 446 U.S. 917 (1980), upheld the application of Title VII's disparate impact standard to States as a valid exercise of Congress' Section 5 authority. See also City of Boerne, 117 S. Ct. at 2169 (agreeing that "Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause").

C. Section 504 Is Consistent With The Letter And Spirit Of The Constitution

Finally, applying Section 504 to prisoners in state prisons is not inconsistent with federalism or notions of State sovereignty. The Fourteenth Amendment "fundamentally altered the balance of state and federal power struck by the Constitution."

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 59 (1996). Thus a long "line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States." Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976). For example, in Ex parte Virginia, the Supreme Court upheld legislation that made it a federal crime for state judges to exclude jurors on the basis of race. The Court rejected the State's claim that "the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights." 100 U.S. (10 Otto) at 346. Instead, it explained, a State cannot "deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them." Ibid.

Similarly, in South Carolina v. Katzenbach, the Supreme Court upheld Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, which requires States subject to its provisions to obtain approval from the Attorney General or the District Court for the District of Columbia before implementing any law or regulation affecting voting. Although Justice Black, dissenting on this

point, claimed that federalism "mean[s] at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them," 383 U.S. at 359 (Black, J., concurring and dissenting), the Court upheld the provision as a permissible exercise of Congress' enforcement powers under the Fifteenth Amendment. See id. at 334-335; see also City of Rome, 446 U.S. at 178-180 (reaffirming the constitutionality of Section 5 against federalism challenge).

Thus even accepting, as defendants argue (Br. 43), that the operation of prisons is a "core state function" (a term they do not define), there is nothing talismanic about state prison operation that places it outside the legitimate scope of Congress' Fourteenth Amendment power. Certainly it is not more (and possibly less) integral than enacting laws and holding jury trials, yet the Court held that the spirit of the Constitution was not violated by federal involvement (including the threat of criminal penalties) in such state affairs.

Even though prisoners give up many of their civilian rights when they are incarcerated, and courts accord deference to the appropriate prison authorities' security judgments in addressing prisoners' claims of constitutional violations, the Court has made clear that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." Turner v. Safley, 482 U.S. 78, 84 (1987). "Rights against

discrimination are among the few rights that prisoners do not park at the prison gates. Although the special conditions of the prison setting license a degree of discrimination that would not be tolerated in a free environment, there is no general right of prison officials to discriminate against prisoners on grounds of race, sex, religion, and so forth." Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 486 (7th Cir. 1997).

Prisoners with disabilities are therefore protected from irrational and invidious discrimination by the Equal Protection Clause, and just as "prisoners do not shed all constitutional rights at the prison gate," Sandin v. Conner, 515 U.S. 472, 485 (1995), Congress is not barred by prison gates from enacting legislation under Section 5 of the Fourteenth Amendment to deter and remedy such discrimination. In our view, Congress' conclusions about the need for deterrence and remedies against discrimination against disabled persons generally is sufficient to bring prisons within the legitimate scope of Section 504. In any event, evidence was also brought to Congress' attention in enacting the ADA that identified as a problem the continuing irrational discrimination against disabled persons in the law enforcement system.[11] Indeed, there was specific reference to

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[11/] See H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 50 (1990) (noting that persons with disabilities, including those with epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail," and stating that

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the very subject at issue here: the Presidential Commission on the Human Immunodeficiency Virus Epidemic found that "[m]isinformation is common among inmates and correctional system staff regarding modes of HIV transmission" and that ignorance and "unwarranted fears about the disease" led to "discrimination against and rights regularly accorded prisoners (e.g., parole and furlough) being denied on the basis of HIV antibody status." Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic 134 (June 1988); see also Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Human Resources & the Subcomm. on Select Educ. of the House Comm. on Educ. & Labor, 100th Cong., 2d Sess. 77

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"[s]uch discriminatory treatment based on disability can be avoided by proper training"); U.S. Commission on Civil Rights, supra, at 168 (describing "major types of areas of discrimination" against disabled in criminal justice system, including "inadequate ability to deal with physically handicapped accused persons and convicts (e.g. accessible jail cells and toilet facilities)"); Joint Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: Joint Hearing Before the Subcomm. on Select Educ. & Employment Opportunities of the House Comm. on Educ. & Labor, 101st Cong., 1st Sess. 63 (1989) (testimony of Justin Dart, describing experience of disabled persons arrested and held in jail).

(1988) (testimony of Belinda Mason, describing incident in which arrestee with HIV was locked inside his car overnight).

Moreover, nothing in Section 504 is inconsistent with the need to consider an inmate's status as a prisoner, or the legitimate penological needs of the institution in which the inmate is incarcerated. Protections under Section 504 are limited to individuals who can meet the "essential" eligibility requirements of the relevant program or activity, with or without "reasonable accommodations." Arline, 480 U.S. at 287 n.17. Section 504 gives inmates with disabilities the right not to be impermissibly excluded from such programs or services on the basis of their disability. Cf. Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283-284 (1977) (even though plaintiff could be fired for no reason at all, he may not be fired for an unconstitutional reason).

Defendants do not dispute that "well-cataloged instances of invidious discrimination against the handicapped do exist." Alexander, 469 U.S. at 295 n.12. In exercising its broad power under Section 5 to remedy the on-going effects of past discrimination and prevent present and future discrimination, Congress is afforded "wide latitude." City of Boerne, 117 S. Ct. at 2164. As the Supreme Court reaffirmed in City of Boerne, "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to

much deference." Id. at 2172 (quoting Katzenbach, 384 U.S. at 651).

Following this tradition, this Court in Kimel properly held that the ADA was valid Section 5 legislation. As Chief Judge Hatchett explained, "viewing the remedial measures in light of the evils presented," the ADA is a "valid enactment[] of Congress to redress discrimination pursuant to its enforcement power under Section 5 of the Fourteenth Amendment." 139 F.3d at 1443. This holding is consistent with all the other courts of appeals that have considered the issue under Section 504 and the ADA. See Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997); 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, 1998 WL 289414 (U.S. Oct. 5, 1998) (No. 97-1941); Alsbrook v. City of Maumelle, No. 97-1825, 1998 WL 598793, at *3-*5 (8th Cir. Sept. 11, 1998).[12] We urge this Court to follow these opinions and uphold Section 504 for the same reasons.

[12/] But see Brown v. North Carolina Div. of Motor Vehicles, 987 F. Supp. 451 (E.D.N.C. 1997), appeal pending, No. 97-2784 (4th Cir.); Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168 (S.D. Ohio 1997), appeal pending, No. 97-3933 (6th Cir.); Pierce v. King, 918 F. Supp. 932 (E.D.N.C. 1996) (dictum), aff'd on other grounds, 131 F.3d 136 (Table), Nos. 96-6450, 96-7061, 1997 WL 770564 (4th Cir. Dec. 11, 1997), vacated and remanded, 1998 WL 174824 (U.S. Oct. 5, 1998) (No. 97-8592).

CONCLUSION

Section 504 of the Rehabilitation Act is constitutional.

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CERTIFICATE OF SERVICE

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