No. 00-14751

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REBECCA W. ROOT,

Plaintiff-Appellee

v.

GEORGIA STATE BOARD OF VETERINARY MEDICINE,

Defendant-Appellant

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

PETITION FOR REHEARING AND REHEARING EN BANC FOR THE UNITED STATES AS INTERVENOR

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Counsel for Intervenor United States of America hereby certifies, in accordance with F.R.A.P. 26.1 and 11th Cir. R.26.1-1 and R.35-6(b), that the following persons may have an interest in the outcome of this case:

1. The Honorable Clarence Cooper, Judge, United States District Court
2. Attorney General's Office for the State of Georgia
3. Thurbert E. Baker, Esq., Attorney General
4. Robert S. Bomar, Esq., Attorney General
5. Max Changus, Esq., Counsel for Defendant-Appellant
6. Bruce Edenfield, Esq., Counsel for Defendant-Appellant
7. Julia J. Yoffee, Esq., Counsel for Defendant-Appellant
8. Georgia State Board of Veterinary Medicine, Defendant-Appellant
9. Rebecca W. Root, Plaintiff
10. Howell W. Ragsdale, Jr., Esq., Counsel for Plaintiff-Appellee
11. Jo Anne Simon, Esq., Counsel for Plaintiff-Appellee
12. Department of Administrative Services of the State of Georgia
13. Seth M. Galanter, Esq., Counsel for United States
14. Jessica Dunsay Silver, Esq., Counsel for United States
15. William R. Yeomans, Esq., Counsel for United States

I express a belief, based on a reasoned and studied professional judgment, that the panel decision conflicts with the decisions of this Court in *Garrett* v. *University of Alabama*, 93 F.3d 1214 (1999), rev'd in part and cert. dismissed in relevant part, 121 S. Ct. 955, 960 n.1 (2001), and that consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions.

I express a belief, based on reasoned and studied professional judgment, that this appeal involves a question of exceptional importance:

Whether Congress had the power to abrogate State's Eleventh Amendment immunity to private suits for money damages brought to enforce Title II of the Americans with Disabilities Act.

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SETH M. GALANTER
ATTORNEY OF RECORD FOR
THE UNITED STATES

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STATEMENT OF THE ISSUE

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

STATEMENT OF THE COURSE OF THE PROCEEDINGS AND DISPOSITION OF THE CASE AND STATEMENT OF THE FACTS

The United States concurs with plaintiff's statements.

ARGUMENT AND AUTHORITIES

The Americans with Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities. This case is brought under Title II.

In *University of Alabama* v. *Garrett*, 121 S. Ct. 955 (2001), the Court held that Congress did not validly abrogate States' Eleventh Amendment immunity to suits by private individuals for money damages under Title I of the ADA. The Court concluded that Congress had identified only "half a dozen" incidents of relevant conduct (*i.e.*, potentially unconstitutional discrimination by States as *employers* against people with disabilities), *id*. at 965, and had not made a specific finding that discrimination in public sector employment was pervasive, *id*. at 966. Thus, the Court held, Congress did not assemble a sufficient basis to justify Title I's abrogation of Eleventh Amendment immunity for its prophylactic statutory remedies. *Id*. at 967.

The Supreme Court specifically reserved the question currently before this Court, whether Title II's abrogation can be upheld as valid Section 5 legislation, noting that

Title II "has somewhat different remedial provisions from Title I," *id*. at 960 n.1, and that the legislative record for those activities governed by Title II was more extensive, see *id*. at 966 n.7. Less than a week after deciding *Garrett*, the Supreme Court denied a petition for certiorari filed by California and let stand the Ninth Circuit's holding that Title II's abrogation was valid Section 5 legislation. See *Dare* v. *California*, 191 F.3d 1167 (9th Cir. 1999), cert. denied, 121 S. Ct. 1187 (2001).

As the Court's disposition of *Dare* indicates, *Garrett* does not imply that Title II's abrogation exceeds Congress's power under Section 5. For Title II differs from Title I in four significant respects. First, Congress made express findings of persistent discrimination in "public services" generally, including services provided by States, as well as specific areas of traditional state concern, such as voting, education, and institutionalization. Second, Congress's findings were based on an extensive record of unconstitutional state conduct regarding people with disabilities in the areas covered by Title II, a record more extensive than existed for employment alone. Third, unlike Title I, which was intended simply to redress violations of the Equal Protection Clause as applied to a non-suspect class in an area (employment) not otherwise subject to heightened scrutiny, the range of constitutional violations implicated by Title II extends to areas where heightened judicial scrutiny is appropriate and where even policies subject to rational-basis review cannot always be justified by cost or administrative efficiency alone. Finally, the remedy enacted by Congress is more proportional and congruent to this record of violations than the record discussed in *Garrett*. We address each point in turn.

1. *Findings And Record*: As the Supreme Court in *Garrett* acknowledged, 121 S. Ct. at 966 n.7, the record of adverse conduct by States toward people with

disabilities was both broader and deeper than the six incidents Congress identified with regard to state employment. Equally important, after amassing its record, Congress brought its legislative judgment to bear on the issue and expressly found that discrimination was pervasive in these areas. Unlike state employment, where Congress made a finding about private employment, but no analogous finding for public employment, *id*. at 966, in the text of statute itself Congress made express findings that discrimination "persists in such critical areas as * * * education, * * * institutionalization, * * * voting, and access to public services." 42 U.S.C. 12101(a)(3). The first three areas are fields predominated by States and the last is, under the terms of the statute, the exclusive domain of state and local governments. See 104 Stat. 337 (title of Title II is "Public Services"); 42 U.S.C. 12131(1) (limiting term "public entity" to state and local governments and Amtrak).

Similarly, the same Committee Reports that the Court in *Garrett* found lacking with regard to public employment are directly on point with regard to public services, declaring that "there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of employment in the private sector, public accommodations, *public services*, transportation, and telecommunications." H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28 (1990) (emphasis added); see also S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989) ("Discrimination still persists in such critical areas as employment in the private sector, public accommodations, *public services*, transportation, and telecommunications." (emphasis added)). The judgment of a co-equal branch of government – embodied in the text of the statute and its committee reports – that a pattern of State discrimination persists and requires a federal remedy is 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* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985); see also *Board of Educ.* v. *Mergens*, 496 U.S. 226, 251 (1990). As we document in the addendum to this petition, this judgment was supported by ample evidence garnered after exhaustive study.

2. *Rights Implicated*: *Garrett* instructs that in assessing the validity of Congress's Section 5 legislation, it is important to identify the constitutional rights at stake. See 121 S. Ct. 963. Since there is no constitutional right to state employment, the Court looked to the Equal Protection Clause as the sole constitutional provision that Congress sought to enforce. *Ibid*. And because classifications based on disability are not subject to heightened scrutiny, the Court faulted Congress for failing to identify incidents when state action did not satisfy the "minimum 'rational-basis' review applicable to general social and economic legislation." *Ibid*.

By contrast, Title II governs all the operations of a State, which plainly encompasses state conduct subject to a number of other constitutional limitations embodied in the First, Fourth, Fifth, Sixth, Seventh, and Eighth Amendments and incorporated and applied to the States through the Fourteenth Amendment. To the extent that Title II enforces the Fourteenth Amendment by remedying and preventing government conduct that burdens these constitutional provisions and discriminates against persons with disabilities in their exercise of these rights, Congress did not need to identify *irrational* government action in order to identify and address *unconstitutional* government action. Those rights include the right to vote, to access the courts, to petition officials for redress of grievances, to due process by law

enforcement officials, and to humane conditions of confinement.

Moreover, in evaluating generally-available public services that do not implicate fundamental rights, the same justifications that would be sufficient in an employment setting often will not suffice when the classification involves the exclusion from generally available government services. This is because when a government interacts with its citizens as employer, rather than sovereign, the core purpose of the Constitution in protecting its citizens *qua* citizens is not directly implicated. Thus, as the Supreme Court has explained in the First Amendment context, "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 676 (1996); cf. *O'Connor* v. *Ortega*, 480 U.S. 709, 724 (1987). Conversely, then, interests that are sufficient to justify government employment policies may not be sufficient when the government is acting in its sovereign capacity.

Therefore, the Court's statement in *Garrett* that the Equal Protection Clause does not require States to accommodate people with disabilities if it involves additional expenditures of funds, see 121 S. Ct. at 966, is best understood as limited to government actions in its capacity as an employer. That statement certainly would not permit States to deny persons with disabilities their right to vote on the ground that providing access to the polling place is costly. Even outside the arena of fundamental rights, the Supreme Court has made clear that a "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Under this standard, reducing costs or increasing administrative efficiency will

not always suffice as justification outside the employment context. See, *e.g.*, *Plyler* v. *Doe*, 457 U.S. 202, 229 (1982); *Jimenez* v. *Weinberger*, 417 U.S. 628, 636-637 (1974). Indeed, the Supreme Court has held that in order to comply with the Equal Protection Clause a State may be required to provide costly services free of charge where necessary to provide a class of persons meaningful access to important services offered to the public at-large. See *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 110, 127 n.16 (1996).

In addition, courts have found unconstitutional treatment of persons with disabilities in a wide variety of public services, including violations of the Equal Protection Clause, the Due Process Clause, and the Eighth Amendment, as incorporated into Section 1 of the Fourteenth Amendment.[1] These cases provide the "confirming

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[1] See, *e.g.*, *Youngberg* v. *Romeo*, 457 U.S. 307 (1982) (unconstitutional conditions of confinement); *O'Connor* v. *Donaldson*, 422 U.S. 563, 567-575 (1975) (impermissible confinement); *LaFaut* v. *Smith*, 834 F.2d 389 (4th Cir. 1987) (Powell, J.) (failure to provide paraplegic inmate with an accessible toilet is cruel and unusual punishment); *Pushkin* v. *Regents of Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981) (doctor with multiple sclerosis denied residency out of concern about patients' reactions); *Garrity* v. *Gallen*, 522 F. Supp. 171, 214 (D.N.H. 1981) ("blanket discrimination against the handicapped * * * is unfortunately firmly rooted in the history of our country"); *Flakes* v. *Percy*, 511 F. Supp. 1325 (W.D. Wis. 1981); *New York State Ass'n for Retarded Children* v. *Carey*, 466 F. Supp. 487 (E.D.N.Y. 1979); *Lora* v. *Board of Educ.*, 456 F. Supp. 1211, 1275 (E.D.N.Y. 1978); *Hairston* v. *Drosick*, 423 F. Supp. 180 (S.D. W. Va. 1976); *Frederick L.* v. *Thomas*, 408 F. Supp. 832, 836 (E.D. Pa. 1976); *Panitch* v. *Wisconsin*, 444 F. Supp. 320 (E.D. Wis. 1977); *Aden* v. *Younger*, 129 Cal. Rptr. 535 (Ct. App. 1976); *In re Downey*, 340 N.Y.S. 2d 687 (Fam. Ct. 1973); *Fialkowski* v. *Shapp*, 405 F. Supp. 946, 958-959 (E.D. Pa. 1975); *In re G.H.*, 218 N.W. 2d 441, 447 (N.D. 1974); *Stoner* v. *Miller*, 377 F. Supp. 177, 180 (E.D.N.Y. 1974); *Vecchione* v. *Wohlgemuth*, 377 F. Supp. 1361, 1368 (E.D. Pa. 1974), aff'd, 558 F.2d 150 (3rd Cir.), cert. denied, 434 U.S. 943 (1977); *Welsch* v. *Likins*, 373 F. Supp. 487 (D. Minn. 1974), aff'd in part, 550 F.2d 1122 (8th Cir. 1977); *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania*, 334 F.

(continued...)

judicial documentation," *Garrett*, 121 S. Ct. at 968 (Kennedy, J., concurring), of unconstitutional disability discrimination by States that the Court found lacking in the employment context.

3. *Tailored Remedy*: When enacting Section 5 legislation, Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified. *Florida Prepaid Postsec. Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 639 (1999). Congress, however, may "paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." *Fullilove* v. *Klutznick*, 448 U.S. 448, 501-502 n.3 (1980) (Powell, J., concurring). In exercising its power, "Congress is not limited to mere legislative repetition of [the] Court's constitutional jurisprudence." *Garrett*, 121 S. Ct. at 963. Rather, "[l]egislation 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." *Lopez* v. *Monterey County*, 525 U.S. 266, 282-283 (1999). The operative question is thus not whether Title II "prohibit[s] a somewhat broader swath of conduct" *Garrett*, 121 S. Ct. at 963, than would the courts, but whether in response to the historic and enduring legacy of discrimination and segregation faced by persons with disabilities at the hands of States, Title II was "designed to guarantee meaningful enforcement" of their constitutional rights, *id*. at 967.

Title II fits this description. Title II targets discrimination that is unreasonable. The States retain their discretion to exclude persons from programs, services, or

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[1](...continued)
Supp. 1257 (E.D. Pa. 1971); *Wyatt* v. *Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), aff'd in part, 503 F.2d 1305 (5th Cir. 1974).

benefits for any lawful reason unconnected with their disability or for no reason at all. Title II also permits exclusion if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service. 42 U.S.C. 12131(2). But once an individual proves that she can meet all but the non-essential eligibility requirements of a program or service, the government's interest in excluding that individual "by reason of such disability," 42 U.S.C. 12132, is both minimal and, in light of history, constitutionally problematic. At the same time, permitting the States to retain and enforce their essential eligibility requirements protects their legitimate interests in selecting and structuring governmental activities. Title II thus carefully balances a State's legitimate operational interests against the right of a person with a disability to be judged "by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 120 S. Ct. 1044, 1057 (2000).

Title II thus requires more than the Constitution only to the extent that some disability discrimination may be rational for constitutional purposes, but unreasonable under the statute. That margin of statutory protection does not redefine the constitutional right at issue. Instead, the statutory protection is necessary to enforce the courts' constitutional standard by reaching unconstitutional conduct that would otherwise escape detection in court, remedying the continuing effects of prior unconstitutional discrimination, and deterring future constitutional violations. "While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern," *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997), Title II is on the remedial and prophylactic side of that line.

Title II requires "reasonable modifications" in public services. 42 U.S.C.

12131(2). That requirement, however is carefully tailored to the unique features of disability discrimination that Congress found persisted in public services in two ways. First, given the history of segregation and isolation and the resulting entrenched stereotypes, fear, prejudices, and ignorance about persons with disabilities, Congress reasonably determined that a simple ban on discrimination would be insufficient to erase the stain of discrimination. Cf. *Green* v. *County Sch. Bd.*, 391 U.S. 430, 437-438 (1968) (after unconstitutional segregation, government is "charged with the affirmative duty to take whatever steps might be necessary" to eliminate discrimination "root and branch"). Therefore, Title II affirmatively promotes the integration of individuals with disabilities – both to remedy past unconstitutional conduct and to prevent future discrimination. Congress could reasonably conclude that the demonstrated failure of state governments to undertake reasonable efforts to accommodate and integrate persons with disabilities within their programs, services, and operations, would freeze in place the effects of their prior exclusion and isolation of individuals with disabilities, creating a self-perpetuating spiral of segregation, stigma, ill treatment, neglect, and degradation. Congress also correctly concluded that, by reducing stereotypes and misconceptions, integration reduces the likelihood that constitutional violations will recur. Cf. *Olmstead* v. *L.C.*, 527 U.S. 581, 600 (1999) (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life").

Second, to the extent that the accommodation requirement necessitates alterations in some governmental policies and practices, it is an appropriate enforcement mechanism for many of the same reasons that a prohibition on disparate

impact is.[2] Like practices with a disparate impact and literacy tests for voting,[3] governmental refusals to make even reasonable accommodations for persons with disabilities often perpetuate the consequences of prior unconstitutional discrimination, and thus fall within Congress's Section 5 power.[4]

Moreover, failure to accommodate the needs of qualified persons with disabilities may often result directly from hidden unconstitutional animus and false stereotypes. Title II simply makes certain that the refusal to accommodate an individual with a disability is genuinely based on unreasonable cost or actual inability

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[2] Legislation prohibiting or requiring modifications of rules, policies, and practices that have a discriminatory impact is a traditional and appropriate exercise of the Section 5 power to combat a history of invidious discrimination. See *Fullilove*, 448 U.S. at 477 (opinion of Burger, C.J.) ("[C]ongressional authority [under Section 5] extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination."); *id.* at 502 (Powell, J., concurring) ("It is beyond question * * * that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects."); *City of Rome* v. *United States*, 446 U.S. 156, 176-177 (1980) (Congress may prohibit conduct that is constitutional if it perpetuates the effects of past discrimination); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325-333 (1966); see also *Washington* v. *Davis*, 426 U.S. 229, 242 (1976) ("an invidious discriminatory purpose may often be inferred from * * * the fact, if it is true, that the law bears more heavily on one race than another").

[3] See *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding nationwide ban on literacy tests even though they are not unconstitutional per se); *Gaston County* v. *United States*, 395 U.S. 285, 293, 296-297 (1969) (Congress can proscribe constitutional action, such as literacy test, to combat ripple effects of earlier discrimination in other governmental activities); *South Carolina* v. *Katzenbach*, 383 U.S. at 333-334.

[4] Of course, the obligation to accommodate is less intrusive than the traditional disparate impact remedy because the government is not required to abandon the practice *in toto*, but may simply modify it to accommodate those otherwise qualified individuals with disabilities who are excluded by the practice's effect.

to accommodate, rather than on nothing but the discomfort with the disability or unfounded concern about the costs of accommodation. Such a prophylactic response is commensurate with the problem of irrational state discrimination that denies access to benefits and services for which the State has otherwise determined individuals with disabilities to be qualified or which the State provides to all its citizens (such as education, police protection, and civil courts). It makes particular sense in the context of public services, where a *post hoc* judicial remedy may be of limited utility to an individual given the difficulty in remedying unconstitutional denials of intangible but important rights, such as the right to vote, to a fair trial, or to educational opportunity. By establishing prophylactic requirements, Congress provided additional mechanisms for individuals to avoid irreparable injuries and to ensure that constitutional rights were fully vindicated.

Further, Congress tailored the modification requirement to the unconstitutional governmental conduct it seeks to repair and prevent. The statute requires modifications only where "reasonable." 42 U.S.C. 12131(2). Governments need not make modifications that require "fundamental alterations in the nature of a service, program, or activity," in light of their nature or cost, agency resources, and the operational practices and structure of the position. 28 C.F.R. 35.130(b)(7), 35.150(a)(3), 35.164; *Olmstead*, 527 U.S. at 606 n.16. And Congress determined, based on the consistent testimony of witnesses and expert studies, that contrary to the misconceptions of many, the vast majority of accommodations entail little or no cost.[5] And any costs are further diminished when measured against the financial and human costs of denying persons with disabilities an education or excluding them from needed government services or

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[5] See S. Rep. No. 116, *supra*, at 10-12, 89, 92; H.R. Rep. No. 485, *supra*, Pt. 2, at 34.

the equal exercise of fundamental rights, thereby rendering them a permanent underclass. See *Plyler*, 457 U.S. at 223-224, 227.

In short, "[a] proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996). Section 5 thus empowers Congress to do more than simply prohibit the creation of new barriers to equality; it can require States to tear down the walls they erected during decades of discrimination and exclusion. See *id*. at 550 n.19 (Equal Protection Clause itself can require modification of facilities and programs to ensure equal access). The remedy for segregation is integration, not inertia.

It is true that Title II imposes on States a burden of justifying disability discrimination under the statute that is sometimes greater than what a court would require under the Fourteenth Amendment. But an elevated burden of justification is not necessarily an impermissible effort to redefine constitutional rights; it can be, as it is here and under Title VII, an appropriate means of rooting out hidden animus and remedying and preventing pervasive discrimination that is unconstitutional under judicially defined standards.

4. *Title II And Its Abrogation Are Appropriate Section 5 Legislation:* The record Congress compiled and the findings it made suffice to support Title II's substantive standard as appropriate Fourteenth Amendment legislation applicable to States and localities.[6] As such, it is one in a line of civil rights statutes, authorized by Civil War Amendments, that apply to States *and* local governments. See, *e.g.*, Titles

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[6] The Interstate Commerce Clause is also the basis for these substantive obligations. See *Walker* v. *Snyder*, 213 F.3d 344, 346 (7th Cir. 2000), cert. denied *sub nom. United States* v. *Snyder*, 121 S. Ct. 1188 (2001).

III, IV, VI and VII of the Civil Rights Act of 1964, 42 U.S.C. 2000b-2000e *et seq.*; Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*; Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*; Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq*.

Aside from the substantive provisions of Title II, *Garrett* held that to sustain an *abrogation* of Eleventh Amendment immunity as appropriate Section 5 legislation, only constitutional misconduct committed by those who are "beneficiaries" of the Eleventh Amendment can be relied upon. 121 S. Ct. at 965. The line between those government entities entitled to Eleventh Amendment immunity and those which are not is not always easy to identify. For example, while school districts are generally found not to be "arms of the state" protected by the Eleventh Amendment, see *Mt. Healthy City Sch. Dist. Bd.* v. *Doyle*, 429 U.S. 274, 280–281 (1977), there are some significant exceptions to this rule.[7] Similar state-by-state inquiries are required in the law enforcement arena. See *McMillian* v. *Monroe County*, 520 U.S. 781, 795 (1997) (holding that county sheriff in Alabama is state official). In other situations, such as voting, local officials are simply administering state policies and programs. While nominally the action of a local government, the discrimination individuals with

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[7] See *Belanger* v. *Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992), cert. denied, 507 U.S. 919 (1993) (California school districts protected by Eleventh Amendment); *Rosenfeld* v. *Montgomery County Pub. Schs.*, 41 F. Supp. 2d 581 (D. Md. 1999) (Maryland school districts protected by Eleventh Amendment). The law in other States remains in flux. Cf. *Martinez* v. *Board of Educ. of Taos Mun. Sch. Dist.*, 748 F.2d 1393 (10th Cir. 1984) (New Mexico school districts protected by Eleventh Amendment), overruled, *Duke* v. *Grady Mun. Schs.*, 127 F.3d 972 (10th Cir. 1997); *Harris* v. *Tooele County Sch. Dist.*, 471 F.2d 218 (10th Cir. 1973) (Utah school districts protected by Eleventh Amendment), overruled, *Ambus* v. *Granite Bd. of Educ.*, 995 F.3d 992 (10th Cir. 1992) (en banc).

disabilities endure is directly attributable to the State. Cf. *Railroad Co.* v. *County of Otoe*, 83 U.S. 667, 676 (1872) ("Counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will. When they are authorized or directed to levy a tax, or to appropriate its proceeds, the State through them is doing indirectly what it might do directly."). Thus, as *Garrett* makes clear, actions of such local officials can be attributed to the States for purposes of the "congruence and proportionality" inquiry. See 121 S. Ct. at 967 (attributing to "States" and "State officials" conduct regarding voting that was done by county "registrar[s]" and "voting officials" in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 312 (1966)).

Given the fact that some school districts and law enforcement officials are "beneficiaries of the Eleventh Amendment," *Garrett*, 121 S. Ct. at 965, and that some local practices are done at the States' behest, the evidence before Congress regarding the treatment of people with disabilities by education, law enforcement, voting, and other officials is relevant in assessing Congress's legislative record about State violations. Because the demarcation is unclear at the margins, we have in the addendum provided the evidence before Congress concerning both state and local governments. But even limited to the evidence concerning States acting through their own agencies, there was a sufficient basis to sustain Congress's determination that States engaged in a pattern of unconstitutional conduct.

Congress found that only a comprehensive effort to integrate persons with disabilities would end the cycle of isolation, segregation, and second-class citizenship, and deter further discrimination. Integration in education alone, for example, would not suffice if persons with disabilities were relegated to institutions or trapped in their

homes by lack of transportation or inaccessible sidewalks. Ending unnecessary institutionalization is of little gain if neither government services nor the social activities of public life (libraries, museums, parks, and recreation services) are accessible to bring persons with disabilities into the life of the community. And none of those efforts would suffice if persons with disabilities continued to lack equivalent access to government officials, courthouses, and polling places. In short, Congress chose a comprehensive remedy because it confronted an all-encompassing, inter-connected problem; to do less would be as ineffectual as "throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway," S. Rep. No. 116, *supra*, at 13. "Difficult and intractable problems often require powerful remedies * * * ." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 88 (2000). It is in such cases that Congress is empowered by Section 5 to enact "reasonably prophylactic legislation." *Ibid.* Title II is just such a powerful remedy for a problem which Congress found to be intractable.

CONCLUSION

This Court should grant rehearing or rehearing en banc and uphold the constitutionality of Title II's abrogation as valid Section 5 legislation.

Respectfully submitted,

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ADDENDUM

Congress engaged in extensive study and fact-finding concerning the problem of discrimination against persons with disabilities, holding 13 hearings devoted specifically to the consideration of the ADA.[1] In addition, a congressionally designated Task Force held 63 public forums across the country, which were attended by more than 7,000 individuals. Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 18 (1990) (Task Force Report). The

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[1] See *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary and the Subcomm. on Civil and Const. Rights*, 101st Cong., 1st Sess. (1989); *Americans with Disabilities Act: Hearing on H.R. 2273 and S. 933 Before the Subcomm. on Transp. and Haz. Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities Act: Hearings on H.R. 2273 Before the Subcomm. on Surface Transp. of the House Comm. on Pub. Works and Transp.*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities: Telecomm. Relay Servs., Hearing on Title V of H.R. 2273 Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (1989); *Field Hearing on Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (1989); *Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: Joint Hearing Before the Subcomm. on Employment Opps. and Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (July 18 & Sept. 13, 1989); *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2d Sess. (1989); *Americans with Disabilities Act: Hearing Before the House Comm. on Small Bus.*, 101st Cong., 2d Sess. (1990); *Americans with Disabilities Act of 1989: Hearings on S.933 Before the Senate Comm. on Labor and Human Res. and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. (1989) (*May 1989 Hearings*); *Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Res. and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2nd Sess. (1989).

Task Force also presented to Congress evidence submitted by nearly 5,000 individuals documenting the problems with discrimination faced daily by persons with disabilities – often at the hands of state governments. See 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act*, 100th Cong., 2d Sess. 1040 (Comm. Print 1990) (*Leg. Hist.*); Task Force Report 16.[2] Congress also considered several reports and surveys. See S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28 (1990); Task Force Report 16.[3]

Congress reasonably discerned a substantial risk that persons with disabilities will be subjected to unconstitutional discrimination by state governments in the form of "arbitrary or irrational" distinctions and exclusions, *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). In addition, the evidence before Congress

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[2]The Task Force submitted to Congress "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" and "the most extreme isolation, unemployment, poverty, psychological abuse and physical deprivation experienced by any segment of our society." 2 *Leg. Hist.* 1324-1325. Those documents – mostly handwritten letters and commentaries collected during the Task Force's forums – were part of the official legislative history of the ADA. See *id*. at 1336, 1389. Both the majority and dissent in *Garrett* relied on these documents, see 121 S. Ct. at 965, with the dissent citing to them by State and Bates stamp number, *id*. at 976-993 (Breyer, J., dissenting), a practice we follow herein.

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

established that States structure governmental programs and operations in a manner that has the effect of denying persons with disabilities the equal opportunity to obtain vital services and to exercise fundamental rights (such as the rights to vote, to petition government officials, to contract, to adequate custodial treatment, and to equal access to the courts and public education) in violation of the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments. The scope of the testimony offered to Congress regarding unconstitutional treatment swept so broadly, touching virtually every aspect of individuals' encounters with their government, as to defy isolating the problem into select categories of state action. Nonetheless, by necessity, we have divided the evidence into sections touching on various areas of constitutional import.

(a) *Voting, Petitioning and Access to Courts*: Voting is the right that is "preservative of all rights," *Katzenbach* v. *Morgan*, 384 U.S. 641, 652 (1966), and the Equal Protection Clause subjects voting classifications to strict scrutiny to guarantee "the opportunity for equal participation by all voters" in elections, *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966).

Congress heard that "in the past years people with disabilities have been turned away from the polling places after they have been registered to vote because they did not look competent." 2 *Leg. Hist.* 1220 (Nancy Husted-Jensen). When one witness turned in the registration card of a voter who has cerebral palsy and is blind, the "clerk of the board of canvassers looked aghast * * * and said to me, 'Is that person competent? Look at that signature." The clerk then arbitrarily invented a reason to reject the registration. *Id*. at 1219. Congress was also aware that a deaf voter was told

that "you have to be able to use your voice" to vote. *Equal Access to Voting for Elderly and Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin.*, 98th Cong., 1st Sess. 94 (1984) (*Equal Access to Voting Hearings*). "How can disabled people have clout with our elected officials when they are aware that many of us are prevented from voting?" Ark. 155.[4]

The denial of access to political officials and vital governmental services also featured prominently in the testimony. For example, "[t]he courthouse door is still closed to Americans with disabilities" – literally. 2 *Leg. Hist.* 936 (Sen. Harkin).

> I went to the courtroom one day and * * * I could not get into the building because there were about 500 steps to get in there. Then I called for the security

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[4] "A blind woman, a new resident of Alabama, went to vote and was refused instructions on the operation of the voting machine." Ala. 16. Another voter with a disability was "told to go home once when I came to the poll and found the voting machines down a flight of stairs with no paper ballots available"; on another occasion that voter "had to shout my choice of candidates over the noise of a crowd to a precinct judge who pushed the levers of the machine for me, feeling all the while as if I had to offer an explanation for my decisions." *Equal Access to Voting Hearings* 45. The legislative record also documented that many persons with disabilities "cannot exercise one of your most basic rights as an American" because polling places were frequently inaccessible. S. Rep. No. 116, *supra*, at 12. As a consequence, persons with disabilities "were forced to vote by absentee ballot before key debates by the candidates were held." *Ibid.*; see also *May 1989 Hearings* 76 (Ill. Att'y Gen. Hartigan) (similar). And even when persons with disabilities have voted absentee, they have been treated differently from other absentee voters. See 2 *Leg. Hist.* 1745 (Nanette Bowling) ("[S]ome jurisdictions merely encouraged persons with disabilities to vote by absentee ballot * * * [which] deprives the disabled voter of an option available to other absentee voters, the right to change their vote by appearing personally at the polls on election day."); *Equal Access to Voting Hearings* 17, 461 (criticizing States' imposition of special certification requirements on persons with disabilities for absentee voting); see generally FEC, *Polling Place Accessibility in the 1988 General Election* 7 (1989) (21% of polling places inaccessible; 27% were inaccessible in 1986 elections).

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

Id. at 1071 (Emeka Nwojke).

Numerous other witnesses explained that access to the courts[5] and other important government buildings and officials[6] depended upon their willingness to crawl

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[5] See, *e.g.*, Ala. 15 ("A man, called to testify in court, had to get out of his wheelchair and physically pull himself up three flights of stairs to reach the courtroom."); W. Va. 1745 (witness in court case had to be carried up two flights of stairs because the sheriff would not let him use the elevator).

[6] See, *e.g.*, H.R. Rep. No. 485, *supra*, Pt. 2, at 40 (town hall and public schools inaccessible); 2 *Leg. Hist.* 1331 (Justin Dart) ("We have clients whose children have been taken away from them and told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?"); *Spectrum* 39 (76% of State-owned buildings offering services and programs for the general public are inaccessible and unusable for persons with disabilities); *May 1989 Hearings* 488, 491 (Ill. Att'y Gen. Hartigan) ("I have had innumerable complaints regarding lack of access to public services – people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building"; "individuals who are deaf or hearing impaired call[] our office for assistance because the arm of government they need to reach is not accessible to them"); *id*. at 76 ("[Y]ou cannot attend town council meetings on the second story of a building that does not have an elevator."); *id*. at 663 (Dr. Mary Lynn Fletcher) (to attend town meetings, "I (or anyone with a severe mobility impairment) must crawl up three flights of circular stairs to the 'Court Room.' In this room all public business is conducted by the county government whether on taxes, zoning, schools or any type of public (continued...)

or be carried. And Congress was told that state officials *themselves* had "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).

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

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[6](...continued)
business."); Ala. 17 (every day at her job, the Director of Alabama's Disabled Persons Protection Commission "ha[d] to drive home to use the bathroom or call my husband to drive in and help me because the newly renovated State House" lacked accessible bathrooms); Alaska 73 ("We have major problems in Seward, regarding accessibility to City and State buildings for the handicapped." City Manager responded that "[H]e runs this town * * * and no one is going to tell him what to do."); Ind. 626 ("Raney, who has been in a wheelchair for 12 years, tried three times last year to testify before state legislative committees. And three times, he was thwarted by a narrow set of Statehouse stairs, the only route to the small hearing room."); Ind. 651 (person with disabilities could not attend government meetings or court proceedings because entrances and locations were inaccessible); Wis. 1758 (lack of access to City Hall); Wyo. 1786 (individual unable to get a marriage license because the county courthouse was not wheelchair accessible); *Calif. Report* 70 ("People with disabilities are often unable to gain access to public meetings of governmental and quasi-governmental agencies to exercise their legal right to comment on issues that impact their lives.").

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, *e.g.*, *Helminski* v. *Ayerst Labs.*, 766 F.2d 208, 213 (6th Cir.), cert. denied, 474 U.S. 981 (1985).

(b) *Education:* "[E]ducation is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Accordingly, where the State undertakes to provide a public education, that right "must be made available to all on equal terms." *Ibid.* But Congress learned that irrational prejudices, fears, ignorance, and animus still operate to deny persons with disabilities an equal opportunity for public education. For example, California reported that in its school districts (which are covered by the Eleventh Amendment), "[a] bright child with cerebral palsy is assigned to a class with mentally retarded and other developmentally disabled children solely because of her physical disability" and that in one California town, all disabled children are grouped into a single classroom regardless of individual ability. Calif. Att'y Gen., *Commission on Disability: Final Report* 17, 81 (Dec. 1989) (*Calif. Report*). "When I was 5," a witness testified to Congress, "my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that

I was a fire hazard." S. Rep. No. 116, *supra*, at 7.[7]

State institutions of higher education demonstrated the prejudices and stereotypical thinking. A person with epilepsy was asked to leave a state college because her seizures were "disrupt[ive]" and, officials said, created a risk of liability. 2 *Leg. Hist.* 1162 (Barbara Waters). A doctor with multiple sclerosis was denied admission to a psychiatric residency program because the state admissions committee "feared the negative reactions of patients to his disability." *Id*. at 1617 (Arlene

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[7] See also 136 Cong. Rec. H2480 (daily ed. May 17, 1990) (Rep. McDermott) (school board excluded Ryan White, who had AIDS, not because the board "thought Ryan would infect others" but because "some parents were afraid he would"); 2 *Leg. Hist.* 989 (Mary Ella Linden) ("I was considered too crippled to compete by both the school and my parents. In fact, the [segregated] school never even took the time to teach me to write! * * * The effects of the school's failure to teach me are still evident today."); Alaska 38 (school district labeled child with cerebral palsy who subsequently obtained a Masters Degree as mentally retarded); Neb. 1031 (school district labeled as mentally retarded a blind child); Or. 1375 (child with cerebral palsy was "given cleaning jobs while other[] [non-disabled students] played sports"); Vt. 1635 (quadriplegic woman with cerebral palsy and a high intellect, who scored well in school, was branded "retarded" by educators, denied placement in a regular school setting, and placed with emotionally disturbed children, where she was told she was "not college material"); *Spectrum* 28, 29 ("a great many handicapped children" are "excluded from the public schools" or denied "recreational, athletic, and extracurricular activities provided for non-handicapped students"); see also *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Pub. Welfare*, 93d Cong., 1st Sess. 384 (1973) (Peter Hickey) (student in Vermont was forced to attend classes with students two years behind him because he could not climb staircase to attend classes with his peers); *id*. at 793 (Christine Griffith) (first-grade student "was spanked every day" because her deafness prevented her from following instructions); *id*. at 400 (Mrs. Richard Walbridge) (student with spina bifida barred from the school library for two years "because her braces and crutches made too much noise").

Mayerson). Another witness explained that, "when I was first injured, my college refused to readmit me" because "it would be 'disgusting' to my roommates to have to live with a woman with a disability." Wash. 1733.[8] This evidence is consistent with the finding of the 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." *Spectrum* 28; 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 population have conditions such as mental retardation that might affect skills required for higher education, "they nonetheless are evidence of a substantial disparity." *Spectrum* 28. Such gross statistical disparities can be sufficient to show unconstitutional conduct. See *Garrett*, 121 S. Ct. at 967 (discussing with approval reliance on "50-percentage point gap" between white and black registration rates in finding discrimination by States in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966)).

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[8] See also 2 *Leg. Hist.* 1224 (Denise Karuth) (state university professor asked a blind student enrolled in his music class "What are you doing in this program if you can't see"; student was forced to drop class); *id*. at 1225 (state commission refuses to sponsor legally blind student for masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors, '[s]ince,' and this is a quote: 'they could not drive to see their clients'"); Wis. 1757 (a doctoral program would not accept a person with a disability because "it never worked out well"); S.D. 1476 (University of South Dakota dean and his successor were convinced that blind people could not teach in the public schools); *Calif. Report* 138; J. Shapiro, *No Pity* 45 (1994) (Dean of the University of California at Berkeley told a prospective student that "[w]e've tried cripples before and it didn't work").

(c) *Law Enforcement*: Persons with disabilities have also been victimized in their dealings with law enforcement. When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." 2 *Leg. Hist.* 1005 (Belinda Mason). Police refused to accept a rape complaint from a blind woman because she could not make a visual identification, ignoring the possibility of alternative means of identifying the perpetrator. N.M. 1081. A person in a wheelchair was given a ticket and six-months probation for obstructing traffic on the street, even though the person could not use the sidewalk because it lacked curb cuts. Va. 1684. Task Force Chairman Justin Dart testified, moreover, that persons with hearing impairments "have been arrested and held in jail over night without ever knowing their rights nor what they are being held for." 2 *Leg. Hist.* 1331.[9] The discrimination continues in correctional institutions. "I have witnessed their jailers rational[ize] taking away their wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs." 2

[9] See also 2 *Leg. Hist.* 1115 (Paul Zapun) (sheriff threatens persons with disabilities who stop in town due to car trouble); *id*. at 1196 (Cindy Miller) (police "do not provide crime prevention, apprehension or prosecution because they see it as fate that Americans with disabilities will be victims"); *id*. at 1197 (police officer taunted witness by putting a gun to her head and pulling the trigger on an empty barrel, "because he thought it would be 'funny' since I have quadraparesis and couldn't flee or fight"); Tex. 1541 (police refused to take an assault complaint from a person with a disability); *Calif. Report* 101-104 (additional examples). In addition, persons with disabilities, such as epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, *supra*, Pt. 3, at 50; see also 136 Cong. Rec. H2633 (daily ed. May 22, 1990) (Rep. Levine); Wyo. 1777; Idaho 517.

Leg. Hist. 1190 (Cindy Miller).[10] These problems implicate the entire array of constitutional protections for those in state custody for alleged or proven criminal behavior (including the Fourth Amendment right to be free from unreasonable seizures, the substantive due process rights of pre-trial detainees, the procedural due process and Sixth Amendment rights to fair and open criminal proceedings, and the Eighth Amendment right to be free from cruel and unusual punishment upon conviction).

(d) *Institutionalization*: Unconstitutional denials of appropriate treatment and unreasonable institutionalization of persons in state mental hospitals were also catalogued. See 2 *Leg. Hist.* 1203 (Lelia Batten) (state law ineffective; state hospitals are "notorious for using medication for controlling the behavior of clients and not for treatment alone. Seclusion rooms and restraints are used to punish clients."); *id.* at 1262-1263 (Eleanor C. Blake) (detailing the "minimal, custodial, neglectful, abusive" care received at state mental hospital, and willful indifference resulting in rape); *Spectrum* 34-35.[11] Unnecessary institutionalization and mistreatment within state-run

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[10] See also *Spectrum* 168 (noting discrimination in treatment and rehabilitation programs available to inmates with disabilities and inaccessible jail cells and toilet facilities); *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986) (prison guard repeatedly assaulted paraplegic inmates with knife, forced them to sit in own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead"); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1466 (M.D. Ala. 1994) (paraplegic prisoner denied use of a wheelchair and forced to crawl around his cell); *Calif. Report* 103 ("[A] parole agent sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though he explained that he could not make the appointments because he was unable to get accessible transportation.").

[11] See also *Calif. Report* 114. Congress also brought to bear the knowledge it had (continued...)

facilities may violate substantive due process. See *Youngberg* v. *Romeo*, 457 U.S. 307 (1982) (unconstitutional conditions of confinement); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) (impermissible confinement); *Thomas S. by Brooks* v. *Flaherty*, 902 F.2d 250 (4th Cir.) (confinement when appropriate community placement available), cert. denied, 498 U.S. 951 (1990); *Clark* v. *Cohen*, 794 F.2d 79 (3d Cir.) (same), cert. denied, 479 U.S. 962 (1986) .

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[11](...continued)
acquired of this problem in enacting the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349, codified at 42 U.S.C. 1997 *et seq.*, and the Developmental Disabilities Act of 1984, 42 U.S.C. 6000 *et seq.* See, *e.g.*, 132 Cong. Rec. S5914-01 (1986) (Sen. Kerry) (findings of investigation of State-run mental health facilities "were appalling. The extent of neglect and abuse uncovered in their facilities was beyond belief."); *Civil Rights of Instit. Persons: Hearings on S. 1393 Before the Subcomm. on the Const. of the Sen. Comm. on the Judiciary*, 95th Cong., 1st Sess. 127 (1977) (Michael D. McGuire, M.D.) ("it became quite clear * * * that the personnel regarded patients as animals, * * * and that group kicking and beatings were part of the program"); *id.* at 191-192 (Dr. Philip Roos) (characterizing institutions for persons with mental retardation throughout the nation as "dehumanizing," "unsanitary and hazardous conditions," "replete with conditions which foster regression and deterioration," "characterized by self-containment and isolation, confinement, separation from the mainstream of society"); *Civil Rights for Instit. Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 239 (1977) (Stanley C. Van Ness) (describing "pattern and practice of physical assaults and mental abuse of patients, and of unhealthy, unsanitary, and anti-therapeutic living conditions" in New Jersey state institutions); *Civil Rights of Instit. Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 34 (1979) (Paul Friedman) ("[A] number of the residents were literally kept in cages. A number of those residents who had been able to walk and who were continent when they were committed had lost the ability to walk, had become incontinent, and had regressed because of these shockingly inhumane conditions of confinement.").

(e) *Other Public Services*: Congress heard evidence that irrational discrimination permeated the entire range of services offered by governments. Programs as varied as zoning[12]; the operation of zoos,[13] public libraries,[14] public swimming pools and park programs[15]; and child custody proceedings[16] exposed the

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[12] Congress knew that *Cleburne* was not an isolated incident. See 2 *Leg. Hist.* 1230 (Larry Urban); Wyo. 1781 (zoning board declined to authorize group home because of "local residents' unfounded fears that the residents would be a danger to the children in a nearby school"); Nev. 1050 (Las Vegas has passed an ordinance that disallows the mentally ill from living in residential areas); N.J. 1068 (group home for those with head injuries barred because public perceived such persons as "totally incompetent, sexual deviants, and that they needed 'room to roam'"; "Officially, the application was turned down due to lack of parking spaces, even though it was early established that the residents would not have automobiles.").

[13] A zoo keeper refused to admit children with Down Syndrome "because he feared they would upset the chimpanzees." S. Rep. No. 116, *supra*, at 7; H.R. Rep. No. 485, *supra*, Pt. 2, at 30.

[14] See 2 *Leg. Hist.* 1100 (Shelley Teed-Wargo) (town library refused to let person with mental retardation check out a video "because he lives in a group home," unless he was accompanied by a staff person or had a written permission slip); Pa. 1391 (public library will not issue library cards to residents of group homes without the countersignature of a staff member – this rule applies to "those having physical as well as mental disabilities").

[15] A paraplegic Vietnam veteran was forbidden to use a public pool in New York; the park commissioner explained that "[i]t's not my fault you went to Vietnam and got crippled." 3 *Leg. Hist.* 1872 (Peter Addesso); see also *id*. at 1995 (Rev. Scott Allen) (woman with AIDS and her children denied entry to a public swimming pool); *May 1989 Hearings* 76 (Ill. Att'y Gen. Hartigan) (visually impaired children with guide dogs "cannot participate in park district programs when the park has a 'no dogs' rule").

[16] See H.R. Rep. No. 485, *supra*, Pt. 3, at 25 ("These discriminatory policies and practices affect people with disabilities in every aspect of their lives * * * [including] (continued...)

discriminatory actions and attitudes of officials.[17]

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[16](...continued)
securing custody of their children."); *id*., Pt. 2, at 41 ("[B]eing paralyzed has meant far more than being unable to walk – it has meant being excluded from public schools * * * and being deemed an 'unfit parent'" in custody proceedings.); 2 *Leg. Hist.* 1611 n.10 (Arlene Mayerson) ("Historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent."); Mass. 829 (government refuses to authorize couple's adoption solely because woman had muscular dystrophy); *Spectrum* 40; *No Pity*, *supra*, at 26 (woman with cerebral palsy denied custody of her two sons; children placed in foster care instead); *Carney* v. *Carney*, 598 P.2d 36, 42 (Cal. 1979) (lower court "stereotype[d] William as a person deemed forever unable to be a good parent simply because he is physically handicapped").

[17] See also H.R. Rep. No. 485, *supra*, Pt. 2, at 46 ("How many well educated and highly capable people with disabilities must sit down at home every day, not because of their lack of ability, but because of the attitudes of employers, service providers, and government officials?"); 2 *Leg. Hist.* 1061 (Eric Griffin) ("I come to you as one of those * * * who was denied a public education until age 18, one who has been put through the back door, and kept out of the front door and segregated even if you could get in."); *id*. at 1078 (Ellen Telker) ("State and local municipalities do not make many materials available to a person who is unable to read print."); *id*. at 1116 (Virginia Domini) (persons with disabilities "must fight to function in a society where busdrivers start moving before I have my balance or State human resources [sic] yell 'I can't understand you,' to justify leaving a man without food or access to food over the weekend."); *id*. at 1017 (Judith Heumann) ("Some of these people are in very high places. In fact, one of our categories of great opposition is local administrators, local elected officials."); 3 *Leg. Hist.* 2241 (James Ellis) ("Because of their disability, people with mental retardation have been denied the right to marry, the right to have children, the right to vote, the right to attend public school, and the right to live in their own community, with their own families and friends."); 2 *Leg. Hist.* 1768 (Rick Edwards) ("Why are the new drinking fountains in our State House erected out of reach of persons in wheelchairs? And why were curb cuts at the Indianapolis Airport filled in with concrete?); Task Force Report 21 (six wheelchair users *arrested* for failing to leave restaurant after manager complained that "they took up too much space"); see generally *Spectrum* App. A (identifying 20 categories of state-provided or supported services and programs in which discrimination against persons with disabilities arises).

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2001, two copies of the foregoing Petition for the United States as Intervenor were served by Federal Express, next business day delivery on the following counsel of record:

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