No. 99-1045

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PHOEBE THOMPSON, DEAN ECOFF, and MARCIA E. WADE,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees

UNITED STATES OF AMERICA,

Intervenor

v.

STATE OF COLORADO,

Defendant-Appellant

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

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RULE 35(b)(1) STATEMENT

I express a belief, based on reasoned and studied professional judgment, that this appeal involves a question of exceptional importance concerning the constitutionality of a provision of federal law:

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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THE UNITED STATES

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.

INTRODUCTION

The panel in this case held that Congress did not have the power to abrogate States' Eleventh Amendment immunity to private suits for violations of Title II of the Americans with Disabilities Act. Its conclusion was based on a significant legal error. It held that there was "some evidence" to support Congress's legislative finding that "various forms of discrimination, including outright intentional exclusion, * * * failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services" were visited upon people with disabilities and that such discrimination "persists in such critical areas as * * * education, transportation, * * * institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(5) & (3). Nonetheless, it held that Congress had not compiled a sufficiently numerous collection of examples on the "record" to sustain the legislation's abrogation of immunity. This on-the-record review of congressional enactments contravenes longstanding rules of judicial review and merits en banc consideration.

STATEMENT OF THE CASE

1. *Statutory Background*

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.

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. We agree with the panel (slip op. 16-20) that Title II prohibits more than simply disparate treatment of persons with disabilities. For the statute defines the term "[q]ualified individual with a disability" as a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service. 42 U.S.C. 12131(2). Department of Justice regulations provide that, except for new construction and alterations, public entities need not take any steps that would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. 35.150(a)(3); see also 28 C.F.R. 35.130(b)(7), 35.164; *Olmstead* v. *L.C.*, 527 U.S. 581, 606 n.16 (1999). Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

2. *University of Alabama* v. *Garrett*

In *University of Alabama* v. *Garrett*, 121 S. Ct. 955, 962 (2001), the Supreme Court reaffirmed that Section 5 of the Fourteenth Amendment grants Congress the

power to abrogate the State's Eleventh Amendment immunity to private damage suits. In assessing the validity of "§ 5 legislation reaching beyond the scope of § 1's actual guarantees," the legislation "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 121 S. Ct. at 963 (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)). This requires a three-step analysis: first, a court must "identify with some precision the scope of the constitutional right at issue," *id*. at 963; second, the court must "examine whether Congress identified a history and pattern of unconstitutional * * * discrimination by the States against the disabled," *id*. at 964; finally, the Court must assess whether the "rights and remedies created" by the statute were "designed to guarantee meaningful enforcement" of the constitutional rights that Congress determined the States were violating, *id*. at 966, 967.

In *Garrett*, 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 decision 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).

3. *The Panel Opinion*

The panel acknowledged (slip op. 13) that the *Garrett* decision had specifically reserved the question before it regarding the constitutionality of Title II's abrogation. Relying on the framework outlined in *Garrett*, the panel examined the constitutional rights at issue. After surveying the various constitutional rights implicated (including the Equal Protection Clause and the substantive rights incorporated in the Due Process Clause), the panel concluded that States can violate Fourteenth Amendment rights in three different ways:

> First, facial distinctions between the disabled and nondisabled are unconstitutional unless rationally related to a legitimate state interest. Second, invidious state action against the disabled is unconstitutional, even if facially neutral toward the disabled (such as neutral statutory language). Finally, in certain limited circumstances such as those involving voting rights and prison conditions, states are required to make at least some accommodations for the disabled.

Slip op. 25.

The panel recognized that Congress had made statutory findings that discrimination by States against individuals with disabilities persists and that such findings are "[n]ormally" entitled to "much deference." Slip op. 26. And, after surveying the record before Congress, the panel concluded that there *was* "some evidence in the congressional record that unconstitutional discrimination against the

disabled exists in government 'services, programs, or activities.'" Slip op. 27. The panel found even a larger number of incidents involved "refusals by public entities to make accommodations," *ibid.*, which would be unconstitutional if invidiously motivated and, the panel determined, could also sometimes rise to the level of constitutional violations regardless of intent.

Nonetheless, the panel determined that it could not sustain Title II as valid Fourteenth Amendment legislation because "[w]ithout numerous documented occurrences of unconstitutional state discrimination against the disabled, Title II's accommodation requirement appears to be an attempt to prescribe a new federal standard for the treatment of the disabled rather than an attempt to combat unconstitutional discrimination." Slip. op. 29.

ARGUMENT

The panel committed legal error in holding that even though Congress had found that States persisted in discriminating against persons with disabilities in the areas governed by Title II, slip op. 26, and even though there was "some evidence in the congressional record" to support this finding, slip op. 27, Title II's abrogation could not be sustained as valid legislation to enforce the Fourteenth Amendment because the legislative record did not contain "numerous documented occurrences of unconstitutional state discrimination," slip op. 29. The panel's insistence that Congress place on the record voluminous evidence in order to sustain the constitutionality of a federal statute is contrary to the longstanding tenet of deference to acts of Congress as well as to Supreme Court cases applying heightened scrutiny in other areas of law.

1. It is well-established that Congressional legislation is entitled to a strong presumption of constitutionality. See *United States* v. *Morrison*, 529 U.S. 598, 607 (2000); *Reno* v. *Condon*, 528 U.S. 141, 147 (2000); *Union Pac. Ry. Co.* v. *United States*, 99 U.S. (9 Otto) 700, 718 (1878) ("Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."). "The Congress is a coequal branch of government whose Members take the same oath [judges] do to uphold the Constitution of the United States. As Justice Frankfurter noted in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 164 (1951) (concurring opinion), we must have 'due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.'" *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). Thus, a court should declare a statute beyond Congress's authority "only upon a *plain showing* that Congress has exceeded its constitutional bounds." *Morrison*, 529 U.S. at 607 (emphasis added).

This is particularly true when the constitutional question is predicated on empirical questions regarding the existence and scope of a problem. See *Board of Educ.* v. *Mergens*, 496 U.S. 226, 251 (1990) ("we do not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations"). "We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180, 195 (1997) (*Turner II*) (collecting cases) (internal quotation marks omitted).

Of course, when heightened scrutiny is involved, a legislature may be required to point to some factual predicate indicating that its determination that there is a problem meriting infringement on constitutional rights is reasonable. But even then a legislature need not show that it reached the correct conclusion, see *Turner II*, 520 U.S. at 211, and may rely on facts outside the "record" in making its determination, see *id*. at 212-213 (relying on post-enactment evidence); cf. *Erie* v. *Pap's A.M.*, 529 U.S. 277, 297-298 (2000) ("The city council members, familiar with commercial downtown Erie, are the individuals who would likely have had firsthand knowledge of what took place * * * and can make particularized, expert judgments about the resulting harmful secondary effects [of the expressive conduct]. Analogizing to the administrative agency context, it is well established that, as long as a party has an opportunity to respond, an administrative agency may take official notice of such 'legislative facts' within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment.").

Indeed, when the Supreme Court has reviewed legislation under a heightened scrutiny standard and required some evidence to sustain legislation, it has permitted a statute to be upheld on the basis of less persuasive and voluminous evidence than the panel in this case acknowledged was before Congress. In *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377 (2000), for example, the Court held that it was not even "a close call" that the State had sustained its burden of showing that "sometimes large contributions will work actual corruption of our political system," thus justifying infringement on First Amendment rights, by pointing to an affidavit by a state legislator, two newspaper articles, and four incidents discussed in another judicial opinion. *Id*. at 393, 395. In *Burson* v. *Freeman*, 504 U.S. 191 (1992),

likewise, the Court held that a statute prohibiting campaigning near polling places survived strict scrutiny analysis based on history, consensus, and "simple common sense." *Id*. at 211; see also *Florida Bar* v. *Went for It, Inc*., 515 U.S. 618, 628 (1995) (upholding regulation of commercial speech based on a single study and noting that "we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information"). Thus, the panel held Congress to an improper standard of proof.

2. In assessing Congress's exercise of its power to enforce the Fourteenth Amendment, the Supreme Court has reiterated that the volume of evidence in the record is "not determinative." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 91 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 646 (1999); see also *City of Boerne* v. *Flores*, 521 U.S. 507, 531 (1997) ("Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.'").

It is true that the Supreme Court in *Garrett* looked to the underlying legislative record in an effort to determine whether there was a basis for upholding the legislation as an appropriate prophylactic remedy. But in that case the Court found (contrary to the situation here) that Congress had made *no* relevant findings regarding States and further determined (again, contrary to the situation here) that the only relevant evidence in the legislative record, involving six examples of unconstitutional conduct, was equivalent to no record at all.

But here, as the panel acknowledged (slip op. 26), there are findings reflecting Congress's determination that States engaged in forms of discrimination that the panel determined (slip op. 25, 27) can rise to the level of unconstitutional conduct: "outright intentional exclusion, * * * failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services." 42 U.S.C. 12101(a)(5). Given the deference to Congress's preeminent fact-finding role, the evidence in the record (briefly summarized in the panel opinion and recounted at length in our supplemental brief) mandated a judicial holding that Congress could have reasonably reached the conclusion (expressed in statutory findings) that States were unconstitutionally discriminating against persons with disabilities. While the record may not have been as extensive as the panel would have liked, it was constitutionally sufficient.

3. Congress's finding, in turn, is sufficient to support the statute as valid Fourteenth Amendment legislation. Once Congress's determination regarding the existence of constitutional violations has been confirmed, the scope of the remedy is purely a matter of legislative choice. Cf. *M'Culloch* v. *Maryland*, 17 U.S. 316, 423 (1819) ("But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."). There is no requirement that the solution Congress adopts be the least-restrictive legislation to remedy and prevent the unconstitutional state conduct it has identified. Instead, as the Supreme Court explained in *City of Boerne* v. *Flores*, 521 U.S. at 536, and reiterated in *Kimel*, 528

U.S. at 80-81: "It 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."

Congress determined that only a comprehensive effort to integrate persons with disabilities would end the cycle of isolation, segregation, and second-class citizenship, and deter further state 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, 101st Cong., 1st Sess. 13 (1989). "Difficult and intractable problems often require powerful remedies * * * ." *Kimel*, 528 U.S. at 88. 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. The panel's failure to provide proper deference to the judgment of a coordinate branch of government warrants en banc review.

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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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2001, two copies of the foregoing Petition for Rehearing or Rehearing En Banc 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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