No. 98-829

In the Supreme Court of the United States

OCTOBER TERM, 1998

FLORIDA DEPARTMENT OF CORRECTIONS, PETITIONER

v.

WELLINGTON N. DICKSON, A/K/A/ DUKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
BILL LANN LEE
Acting Assistant Attorney General
JESSICA DUNSAY SILVER
SETH M. GALANTER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether 42 U.S.C. 12202, which provides that a State shall not be immune under the Eleventh Amendment from suits for violations of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, including suits (like this one) predicated on an alleged violation of the ADA's express prohibition against discrimination on the basis of disability in employment, 42 U.S.C. 12112, is a constitutional exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Alexander v. *Choate*, 469 U.S. 287 (1985)	11
Alsbrook v. *City of Maumelle*, 156 F.2d 825 (8th Cir. 1998)	13
Autio v. *AFSCME, Local 3139*, 140 F.3d 802, aff'd, 157 F.3d 1141 (8th Cir. 1998)	13
Bragdon v. *Abbott*, 118 S. Ct. 2196 (1998)	11
City of Boerne v. *Flores*, 117 S. Ct. 2157 (1997)	4, 6, 8, 9, 13
City of Cleburne v. *Cleburne Living Ctr.*, 473 U.S. 432 (1985)	7, 8
Clark v. *California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998)	13
Contractors Ass'n of E. Pa., Inc. v. *City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993)	11
Coolbaugh v. *Louisiana*, 136 F.3d 430 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998)	4, 13
Counsel v. *Dow*, 849 F.2d 731 (2d Cir.), cert. denied, 488 U.S. 955 (1988)	13
Crawford v. *Indiana Dep't of Corrections*, 115 F.3d 481 (7th Cir. 1997)	13
EEOC v. *Wyoming*, 460 U.S. 226 (1983)	6
Employment Division v. *Smith*, 494 U.S. 872 (1990)	8
Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976)	6, 12

Cases—Continued: Page

Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 13
Lake v. *Arnold*, 112 F.3d 682 (3d Cir. 1997) 11
More v. *Farrier*, 984 F.2d 269 (8th Cir. 1993), cert. denied, 510 U.S. 819 (1993) 11
Olmstead v. *L.C.*, cert. granted, No. 98-536 (Dec. 17, 1998) 5
Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 2
School Board of Nassau County v. *Arline*, 480 U.S. 273 (1987) 13
Seaborn v. *Florida*, 143 F.3d 1405 (11th Cir. 1998) 3
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 5, 6
Wilson v. *Armstrong*, cert. denied, 118 S. Ct. 2340 (1998) 5

Constitution and statutes:

U.S. Const.:
Amend. I (Free Exercise Clause) 8
Amend. XI 2, 3, 4, 5, 6, 13
Amend. XIV 3, 4, 5, 6, 9
§ 1 (Equal Protection Clause) 4, 6, 12
§ 5 (Enforcement Clause) 2, 6, 9, 12, 13, 14
Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 2
Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* .....
42 U.S.C. 12101(a) 11
42 U.S.C. 12101(a)(5) 11
42 U.S.C. 12101(a)(7) 3, 11
42 U.S.C. 12101(b) 3
42 U.S.C. 12101(b)(1) 7
42 U.S.C. 12101(b)(4) 6
Tit. I, 42 U.S.C. 12111 *et seq.* 2, 12
42 U.S.C. 12111(10) 12

Statutes—Continued: Page

42 U.S.C. 12112(b)(5)(A) 12
Tit. II, 42 U.S.C. 12131 *et seq.* 5
Tit. IV, 42 U.S.C. 12201 *et seq.*:
42 U.S.C. 12201(a) 11
42 U.S.C. 12202 ..... 2, 3, 5
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 12
Education of the Handicapped Act, 20 U.S.C. 1400 *et seq.* 13
Rehabilitation Act of 1973, § 504, 29 U.S.C. 794 ..... 7, 9, 11
Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* 8
42 U.S.C. 2000bb-1 8
28 U.S.C. 2403(a) 2
29 U.S.C. 630(b) 2
42 U.S.C. 1985(3) 11

Miscellaneous:

T. Cook, *The Americans With Disabillities Act: The Move to Integraton*, 64 Temp. L. Rev. 393 (1991) 9
H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990) 9, 11
National Council on Disability, *On the Threshold of Independence* (1988) 9
National Concil on the Hadicapped, *Toward Independence* (1996) 9
S. Rep. No. 116, 101st Cong., 1st Sess. (1989) 9, 11
U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983) 9

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-829

FLORIDA DEPARTMENT OF CORRECTIONS, PETITIONER

v.

WELLINGTON N. DICKSON, A/K/A/ DUKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-50) is reported at 139 F.3d 1426. The opinion of the district court (Pet. App. 51-54) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1998. A petition for rehearing was denied on August 17, 1998 (98-796 Pet. App. 77a-79a, 81a-83a). The petition for a writ of certiorari was filed on November 16, 1998 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Wellington N. Dickson is a correctional officer employed by petitioner Florida Department of Corrections. He filed suit in district court alleging that petitioner had failed to promote him and had taken other adverse employment action against him in violation of the prohibition against discrimination in employment on the basis of disability in Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111 *et seq.*, and the Age Discrimination in Employment Act of 1967 (Age Act), 29 U.S.C. 621 *et seq.* Petitioner moved to dismiss on the ground that the suit was barred by the Eleventh Amendment. The district court denied that motion to dismiss. It held that, in 42 U.S.C. 12202 and in 29 U.S.C. 630(b), Congress had validly exercised its powers under Section 5 of the Fourteenth Amendment to abrogate petitioner's Eleventh Amendment immunity to suits under the ADA and the Age Act, respectively. Pet. App. 51-54.

2. Petitioner took an interlocutory appeal of right from the denial of Eleventh Amendment immunity, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and the United States intervened in the appeal to defend the constitutionality of the abrogations, see 28 U.S.C. 2403(a). The court of appeals consolidated the case for argument with two other appeals involving the abrogation in the Age Act. The majority concluded that the ADA is a valid exercise of the Enforcement Clause of the Fourteenth Amendment, and that the ADA's clear abrogation of Eleventh Amendment immunity validly authorized States to be sued by individuals in federal court. See

also *Seaborn* v. *Florida*, 143 F.3d 1405, 1407 (11th Cir. 1998). Pet. App. 1-50.[1]

Judge Edmondson observed that the ADA contained "a clear statement of intent to abrogate Eleventh Amendment immunity," Pet. App. 12 (citing 42 U.S.C. 12202), and so the only question for the court was whether that abrogation was constitutional under the Fourteenth Amendment, *id.* at 13. Noting that Congress had expressly invoked its power to enforce the Fourteenth Amendment, *ibid.* (citing 42 U.S.C. 12101(b)), and accepting Congress's finding that individuals with disabilities have been "subjected to a history of purposeful unequal treatment," *ibid.* (quoting 42 U.S.C. 12101(a)(7)), Judge Edmondson agreed with other courts that had addressed the issue that "the ADA was properly enacted under Congress's Fourteenth Amendment enforcement powers." *Ibid.*

Chief Judge Hatchett, concurring in part of the court's judgment and dissenting in part, wrote separately to express his agreement with Judge Edmondson that Congress's express abrogation of the States' Eleventh Amendment immunity to employment discrimination suits under the ADA is valid. Pet. App. 15 n.2. Chief Judge Hatchett explained that "Congress did not exceed its authority in enacting [the ADA] simply

---

[1] With regard to the claim involving the Age Act, Judge Edmondson and Judge Cox concluded, albeit for different reasons, that the Age Act did not validly abrogate the States' Eleventh Amendment immunity. Pet. App. 5-12, 43-47. Chief Judge Hatchett concurred in part and dissented in part. *Id.* at 16-19, 21-30. The United States and respondent Dickson have filed petitions for a writ of certiorari seeking review of that adverse judgment. See *United States* v. *Florida Board of Regents*, petition for cert. pending, No. 98-796; *Kimel* v. *Florida Board of Regents*, petition for cert. pending, No. 98-791.

because the ADA may impose liability in situations that the courts would not find to violate judicial standards under the Equal Protection Clause." *Id.* at 32. He stressed that "Congress considered an abundance of evidence and made extensive findings in the ADA concerning the extent of the discrimination against, and resulting harm to, the disabled." *Id.* at 33. He also concluded that the ADA did not pose any threat to the separation of powers because Congress was not attempting to "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." *Id.* at 36 (quoting *Coolbaugh* v. *Louisiana*, 136 F.3d 430, 438 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998)). And he noted that the ADA is not "out of proportion" to its asserted remedial objective, such that it could not be understood as "responsive to, or designed to prevent, unconstitutional behavior." *Ibid.* (quoting *City of Boerne* v. *Flores*, 117 S. Ct. 2157, 2170 (1997)).

Judge Cox, dissenting from the majority's disposition of the ADA claim, did not disagree with the majority's conclusion that the ADA clearly abrogates the States' Eleventh Amendment immunity. See Pet. App. 39. He concluded, however, that this abrogation is invalid. *Id.* at 47-50. He stressed that the ADA provides greater protection for persons with disabilities than does the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 48-49. He reasoned that, because classifications based on disability are not subject to heightened judicial scrutiny in constitutional cases, and because the Act was "unaccompanied by any finding that widespread violation of the disabled's constitutional rights required the creation of prophylactic

remedies," the ADA was not appropriate legislation to enforce the Fourteenth Amendment. *Id.* at 49.

ARGUMENT

The court of appeals correctly held that the abrogation of Eleventh Amendment immunity contained in the ADA is a valid exercise of Congress's power to enforce the Fourteenth Amendment. That ruling does not conflict with any decision of this Court or of any other court of appeals. In addition, this Court recently denied a petition for a writ of certiorari in *Wilson* v. *Armstrong*, 118 S. Ct. 2340 (1998), which also presented the question of the validity of Congress's abrogation of the States' Eleventh Amendment immunity to suits under the ADA. The court also denied review of the question of the constitutionality of the application of Title II of the ADA to state agencies in *Olmstead* v. *L.C.*, No. 98-536 (Dec. 17, 1998) (order limiting grant of certiorari to statutory question presented by the petition). Further review by this Court is therefore not warranted.

Petitioner argues (Pet. 3-13) that the Eleventh Amendment bars federal courts from adjudicating claims against state agencies under the ADA. The ADA provides that a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of" the ADA. 42 U.S.C. 12202. Petitioner does not dispute that the ADA contains an unequivocal expression of Congress's intent to abrogate Eleventh Amendment immunity. It contends, however, the abrogation is invalid. That contention is without merit.

In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court reaffirmed that Congress may remove States'

Eleventh Amendment immunity pursuant to its authority under Section 5 of the Fourteenth Amendment. *Id.* at 59, 65, 71-72 n.15; see *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). And although Congress need not announce that it is legislating pursuant to its Section 5 authority for legislation to be upheld on that basis, see *EEOC* v. *Wyoming*, 460 U.S. 226, 243-244 n.18 (1983), it did make clear in the ADA that its intent was "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment[,] * * * in order to address the major areas of discrimination faced day-to-day by people with disabilities," 42 U.S.C. 12101(b)(4).

Petitioner argues (Pet. 6-12) that the abrogation contained in the ADA is not a valid exercise of Congress's Section 5 authority. Section 5 of the Fourteenth Amendment empowers Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. U.S. Const. Amend. XIV, § 5. In *City of Boerne* v. *Flores*, 117 S. Ct. 2157 (1997), this Court explained that the authority to enforce the Fourteenth Amendment is a broad power to remedy past and present discrimination and to prevent future discrimination. *Id.* at 2163, 2172. It reaffirmed that Congress may prohibit activities that are not themselves necessarily unconstitutional, in furtherance of a remedial scheme. *Id.* at 2163, 2167, 2169. The Court stressed, however, that Congress's power must 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. "The appropriateness of remedial measures must be considered in light of the evil presented." *Id.* at 2169.

The abrogation of Eleventh Amendment immunity in the ADA satisfies the standard for Section 5 enforce-

ment legislation set forth in *Flores*. First, in determining that the treatment of persons with disabilities in this country required "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. 12101(b)(1), Congress acted consistently with this Court's decision in *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985). In *Cleburne*, this 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 461-464 (Marshall, J., concurring in the judgment in part and dissenting 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.

A majority of the Court in *Cleburne* declined to deem classifications based on disability as suspect or "quasi-suspect," in part because such heightened scrutiny would unduly limit legislative solutions to problems faced by those with disabilities. This Court reasoned that "[h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals." 473 U.S. at 442-443. It pointed to legislation such as Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, intended to protect persons

with disabilities, and expressed concern that requiring governmental entities to justify their efforts under heightened scrutiny might "lead [governmental entities] to refrain from acting at all." 473 U.S. at 443-444. Nevertheless, the Court left no doubt 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 indeed it held the actions at issue in *Cleburne* to have been unconstitutional.

The extensive factual basis for congressional findings about the extent of discrimination against persons with disabilities distinguishes this case from *Flores*. The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* (the statute at issue in *Flores*), was enacted by Congress in response to this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). *Smith* held that the Free Exercise Clause does not require States to provide exceptions to neutral and generally applicable laws for religiously motivated behavior, even when those laws significantly burden religious practices. See *id.* at 888-890. In RFRA, Congress attempted to overcome the effect 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.

This Court held that application of RFRA to the States was "out of proportion" to the problems identified, so that it could not be viewed as preventive or remedial. *Flores*, 117 S. Ct. at 2170. First, the Court 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). The Court also noted that RFRA's requirements of 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 "wide latitude" in determining the need for the scope of laws to enforce Fourteenth Amendment rights, *id.* at 2164, the Court concluded that Congress had gone too far in attempting to regulate local behavior because, in light of the lack of evidence of a risk of unconstitutional conduct, application of RFRA to the States could not properly be viewed as remedial or preventive. *Id.* at 2169-2170. Hence, that application was not a constitutional exercise of Congress's Section 5 authority.

By contrast, based on extensive fact-finding undertaken by Congress and the Executive Branch[2] (and long experience with the analogous nondiscrimination requirement contained in Section 504), Congress made express findings in the ADA as follows:

---

[2] That fact-finding included 14 hearings at the Capitol and 63 field hearings held in the three years prior to the enactment of the ADA. See S. Rep. No. 116, 101st Cong., 1st Sess. 4-5, 8 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 24-28, 31 (1990); H.R. Rep. No. 485, *supra*, Pt. 3, at 24-25; H.R. Rep. No. 485, *supra*, Pt. 4, at 28-29; see also T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 393 & nn.1-3 (1991) (listing all the hearings). It also drew on reports submitted to Congress by the Executive Branch. See S. Rep. No. 116, *supra*, at 6 (citing U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983); National Council on Disability, *Toward Independence* (1986); and National Council on Disability, *On the Threshold of Independence* (1988)); H.R. Rep. No. 485, *supra*, Pt. 2, at 28 (same).

(2) historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

* * * * *

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

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a

> position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society[.]

42 U.S.C. 12101(a).[3]

Congress thus found that the exclusion of persons with disabilities from government facilities, programs, and benefits was in part a result of past and ongoing "outright intentional exclusion" and "purposeful unequal treatment." 42 U.S.C. 12101(a)(5) and (7). In the ADA, 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).[4]

---

[3] Although some of the language used by Congress in 42 U.S.C. 12101(a)(7) is drawn from decisions of this Court discussing the qualities of a constitutionally suspect class for purposes of the Equal Protection Clause, we do not suggest that Congress has declared persons with disabilities to be a suspect classification for constitutional equal protection purposes. See *Contractors Ass'n of E. Pa, Inc.* v. *City of Philadelphia*, 6 F.3d 990, 1001 (3d Cir. 1993), *More* v. *Farrier*, 984 F.2d 269, 271 n.4 (8th Cir.), cert. denied, 510 U.S. 819 (1993); but cf. *Lake* v. *Arnold*, 112 F.3d 682, 688 n.10 (3d Cir. 1997) (relying on findings in determining that mentally retarded persons may state claim under civil rights conspiracy statute, 42 U.S.C. 1985(3)). Instead, we rely on these findings as a factual basis for the remedial scheme that Congress enacted.

[4] *Alexander* involved Section 504, but Congress intended that the ADA be read as imposing substantive requirements similar to those in Section 504. See *Bragdon* v. *Abbott*, 118 S. Ct. 2196, 2202 (1998); S. Rep. No. 116, *supra*, at 44; H.R. Rep. No. 485, *supra*, Pt. 2, at 84; see also 42 U.S.C. 12201(a).

Hence, Title I of the ADA requires that employers, including government employers, not unnecessarily exclude persons with disabilities, either intentionally or unintentionally, and that they make "*reasonable* accommodations to the known physical or mental limitations of an otherwise *qualified* individual with a disability." 42 U.S.C. 12112(b)(5)(A) (emphases added).[5]

While the ADA's nondiscrimination provision and reasonable-accommodation requirement do impose some burdens on the States, the statutory scheme created by Congress acknowledges the importance of countervailing interests as well. The ADA does not require governmental entities to articulate a "compelling interest," but only requires "reasonable accommodations" that do not entail an "undue hardship" on the State. 42 U.S.C. 12112(b)(5)(A); see 42 U.S.C. 12111(10) (defining "undue hardship" to mean "an action requiring significant difficulty or expense" in light of "the overall financial resources" and "type of operation" of the covered entity). Thus, the court of appeals correctly held that the Act does not provide a remedial scheme so sweeping that it exceeds the harms that it is designed to redress.[6]

---

[5] Petitioner contends (Pet. 6) that, because Congress simply applied the anti-discrimination mandate of Title I of the ADA to both state and private employers, Congress could not have been acting to redress constitutional violations by state actors. Discrimination by state actors in employment does, however, raise constitutional concerns under the Equal Protection Clause. Thus, this Court has upheld the application to state employers of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, as a valid exercise of Congress's Section 5 power. See *Fitzpatrick* v. *Bitzer*, *supra*.

[6] Petitioner suggests (Pet. 10-11) that the inclusion of those who are "regarded as" disabled within the scope of the statute's

This Court reaffirmed in *Flores* that "[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." 117 S. Ct. at 2172 (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)). Following that deferential approach, every other court of appeals that has addressed the Eleventh Amendment issue has also upheld the ADA as valid Section 5 legislation. See *Coolbaugh* v. *Louisiana*, 136 F.3d 430, 438 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998); *Clark* v. *California*, 123 F.3d 1267, 1270-1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); *Crawford* v. *Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997); cf. *Counsel* v. *Dow*, 849 F.2d 731, 737 (2d Cir.) (collecting cases upholding the Education of the Handicapped Act, 20 U.S.C. 1400 *et seq.*, as a valid exercise of Section 5 power), cert. denied, 488 U.S. 955 (1988).[7] Accordingly, in the absence of any conflict in

---

protection evidences overbreadth. But as this Court explained in *School Board of Nassau County* v. *Arline*, 480 U.S. 273, 284 (1987), the breadth of the definition is based on the acknowledgment "that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."

[7] Although two panels of the Eighth Circuit have also upheld the constitutionality of the ADA's abrogation, there is currently no binding law in that circuit on the issue. In *Autio* v. *AFSCME, Local 3139*, 140 F.3d 802, 804-806 (1998), a panel unanimously affirmed the district court's judgment that the ADA's abrogation was valid. The panel opinion was vacated when the court granted rehearing en banc, see *id.* at 806, and an equally divided court subsequently affirmed the judgment of the district court without opinion, see 157 F.3d 1141 (1998). More recently, the Eighth Circuit has granted rehearing en banc in *Alsbrook* v. *City of Maumelle*, 156 F.3d 825, 829-831 (1998), another panel opinion

the circuits on the issue, this Court should deny review of petitioners' challenge to the abrogation of Eleventh Amendment immunity from ADA suits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
BILL LANN LEE
Acting Assistant Attorney General
JESSICA DUNSAY SILVER
SETH M. GALANTER
Attorneys

DECEMBER 1998

---

upholding the validity of the ADA's abrogation as valid Section 5 legislation. Oral argument before the en banc court is scheduled for January 11, 1999.