No. 98-3308

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOHN WALKER

Plaintiff-Appellant

v.

ODIE WASHINGTON, et al.

Defendants-Appellees

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF SUBJECT MATTER JURISDICTION

Plaintiff filed a complaint in the United States District Court for the Northern District of Illinois, alleging that various state officials violated, inter alia, Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 et seq. For the reasons discussed in this brief, the district court had jurisdiction over this action pursuant to 28 U.S.C. 1331.

STATEMENT OF APPELLATE JURISDICTION

This appeal is from a final judgment entered June 11, 1998. The defendant filed a notice of appeal on July 13, 1998. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether the statutory abrogation of Eleventh Amendment immunity for suits under the Americans with Disabilities Act is a valid exercise of Congress' authority under Section 5 of the Fourteenth Amendment.

STATEMENT OF THE CASE

This suit is a private action filed by an inmate with a disability against various state officials for injunctive and monetary relief under Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 et seq., and 42 U.S.C. 1983. The district court found that defendants were entitled to qualified immunity for the damage claims and that the injunctive claims were moot. After the court dismissed plaintiff's amended complaint for failure to state a claim, plaintiff appealed.

SUMMARY OF ARGUMENT

There is no Eleventh Amendment bar to suits against state officials in their individual capacities or against state officials in their official capacities for injunctive relief.

The Eleventh Amendment also does not bar plaintiff's claims against state officials in their official capacities for monetary relief under the ADA. This Court correctly held in Crawford v. Indiana Department of Corrections, 115 F.3d 481 (1997), that the ADA's abrogation of Eleventh Amendment immunity is a valid exercise of Congress' power under Section 5 of the Fourteenth Amendment, which authorizes Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. In

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

Nor is Congress' remedial authority limited to prohibiting present intentional discrimination against persons with disabilities. Congress found that due to the pervasiveness of discriminatory exclusion, irrational fears, and inaccurate stereotypes, the interests of people with disabilities were not considered when purportedly "neutral" rules and practices were established. The continuing effects of this past exclusion, combined with present discrimination, have resulted in persons with disabilities being excluded from full participation in all aspects of society. In light of these findings, Congress required public entities to take reasonable steps to modify their practices and physical facilities so that persons with disabilities would have meaningful access to all the services, programs, or activities of those entities. This finely-tuned mandate is plainly adapted to the underlying purpose of the Equal Protection Clause: "the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." Plyler v. Doe, 457 U.S. 202, 222 (1982).

ARGUMENT

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

The state officials have argued (Br. 12-15), as an alternative grounds for affirming the district court's dismissal of the action, that the Eleventh Amendment bars the plaintiff's claims under Title II of the Americans with Disabilities Act of 1990 (ADA). Before addressing this argument, it is important to understand the Eleventh Amendment's limited role in this case.

Plaintiff's complaint did not indicate whether the defendants were being sued in their individual or official capacities. In such circumstances, there is a presumption that the suit is only brought against defendants in their official capacities. See Stevens v. Umsted, 131 F.3d 697, 706 (7th Cir. 1997). That presumption is not conclusive, however, and can be overcome by "the manner in which the parties have treated the suit." Id. at 707 (quoting Conner v. Reinhard, 847 F.2d 384, 394 n.8 (7th Cir.), cert. denied, 488 U.S. 856 (1988)).

Here, the defendants have treated the suit as being brought against them in both capacities. Consistent with the presumption that defendants are sued in their official capacities, defendants have asked on appeal (Br. 4 n.1) that named defendant Odie Washington be substituted by his successor under Fed. R. App. P. 43(c), a procedure available only for a party acting in his official capacity. See Karcher v. May, 484 U.S. 72, 77-78 (1987). In addition, defendants have raised an Eleventh

Amendment defense, which again is only available in official capacity suits. See Stevens, 131 F.3d at 706-707.

The parties' course of conduct indicates that they also viewed this case as being brought against the defendants in their individual capacities. As in Stevens, the defendants in the district court and on appeal raised "the defense of qualified immunity, which is applicable only in individual capacity suits." 131 F.3d at 707. As the district court dismissed the damage claims on qualified immunity grounds, this Court should "honor the obvious intentions of the parties," ibid., and conclude that the suit was brought against defendants in both their individual and official capacities.[1/]

The Eleventh Amendment does not bar suits against state officials in their individual capacities. See Alden v. Maine, 119 S. Ct. 2240, 2267 (1999). Nor, under the doctrine of Ex parte Young, 209 U.S. 123 (1908), does the Eleventh Amendment bar suits against officials in their official capacities for injunctive relief. See Marie O. v. Edgar, 131 F.3d 610, 615-616 (7th Cir. 1997). For cases applying Ex parte Young to claims for injunctive relief brought under Title II of the ADA, see J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1287 (10th Cir. 1999); Nelson v. Miller, 170 F.3d 641, 646-647 (6th Cir. 1999); Armstrong v.

[1/] The United States takes no position on whether officials can be sued in their individual capacities under Title II of the ADA or whether "qualified immunity" is an available defense to such claims. See generally Gary S. Gildin, Dis-Qualified Immunity for Discrimination Against the Disabled, 3 U. Ill. L. Rev. 897 (1999).

Wilson, 124 F.3d 1019, 1025-1026 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998).

Thus, the defendants' Eleventh Amendment defense is only relevant to damage claims brought against them in their official capacities. But for the reasons discussed below, Congress validly abrogated States' immunity to ADA suits; and therefore, defendants are not entitled to such immunity in their official capacities. See DeVito v. Chicago Park Dist., 83 F.3d 878, 881 (7th Cir. 1996) ("[t]he only immunities available in an official capacity suit are those that may be asserted by the governmental entity itself"); Duffy v. Riveland, 98 F.3d 447, 452 n.4 (9th Cir. 1996) ("Congress's abrogation of the states' Eleventh Amendment immunity from suit under the ADA * * * similarly precludes assertion of immunity by state officials sued in their official capacity").

In Crawford v. Indiana Department of Corrections, 115 F.3d 481, 487 (1997), this Court held that Congress had the power under Section 5 of the Fourteenth Amendment to abrogate States' Eleventh Amendment immunity for suits under Title II of the ADA. The defendants contend (Br. 14) that the Supreme Court's subsequent decisions in City of Boerne v. Flores, 521 U.S. 507 (1997), and Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 119 S. Ct. 2199 (1999), have undermined that holding, and point to the opinion in Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999), petition for cert. pending, 68 U.S.L.W. 3164 (U.S. Sept. 8, 1999) (No. 99-423), in

which a deeply divided en banc court held that Title II of the ADA was not a valid exercise of Congress' power to enforce the Fourteenth Amendment. As defendants concede (Br. 13-14), this is a minority view. Since City of Boerne, however, four courts of appeals have followed this Court's opinion in Crawford and upheld the abrogation in the ADA as valid Section 5 legislation.[2/] Since Florida Prepaid, four other courts have reached the same conclusion or reaffirmed their previous holdings.[3/] We agree with these courts and urge this Court to adhere to Crawford.[4/]

In Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), the Supreme Court articulated a two-part test to determine

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[2/] See Clark v. California, 123 F.3d 1267, 1270-1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); Coolbaugh v. Louisiana, 136 F.3d 430, 432-433 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998); Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998), petition for cert. pending sub nom. Florida Dep't of Corrections v. Dickson, 67 U.S.L.W. 3364 (U.S. Nov. 16, 1998) (No. 98-829); Seaborn v. Florida, 143 F.3d 1405, 1407 (11th Cir. 1998), cert. denied, 119 S. Ct. 1038 (1999); Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 178 F.3d 212, 216-222 (4th Cir. 1999); see also Torres v. Puerto Rico Tourism Co., 175 F.3d 1, 5 n.7 (1st Cir. 1999) ("we have considered the issue of Congress's authority sufficiently to conclude that, were we to confront the question head-on, we almost certainly would join the majority of courts upholding the provision").

[3/] See Muller v. Costello, 187 F.3d 298, 302 (2d Cir. 1999); Martin v. Kansas, 190 F.3d 1120, 1125-1128 (10th Cir. 1999); Dare v. California, 191 F.3d 1167, 1173-1176 (9th Cir. 1999); Garrett v. University of Ala. at Birmingham, 193 F.3d 1214, 1216-1218 (11th Cir. 1999).

[4/] Challenges to the holding of Crawford are also pending in Erickson v. Board of Governors of State Colleges and Universities, No. 98-3614 (oral argument heard April 27, 1999), and Zihala v. Illinois Department of Public Health, No. 99-1669.

whether Congress has properly abrogated States' Eleventh Amendment immunity:

> first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power.

Id. at 55 (citations and brackets omitted).

Section 12202 of Title 42 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 this chapter." This language exceeds what is necessary to constitute an abrogation. See Seminole Tribe, 517 U.S. at 56-57; Pennsylvania v. Union Gas Co., 491 U.S. 1, 13-14 (1989); id. at 29-30 (Scalia, J., concurring in part and dissenting in part). Indeed, defendants concede (Br. 13) that Section 12202 satisfies the first requirement.

The second inquiry under Seminole Tribe is whether "Congress has the power to abrogate unilaterally the States' immunity from suit." 517 U.S. at 59. Here, the Fourteenth Amendment provides that authority. Section 5 of the Fourteenth Amendment empowers Congress to enact "appropriate legislation" to "enforce" the Equal Protection Clause. As the Supreme Court explained over a hundred years ago:

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

> prohibited, is brought within the domain of congressional power.

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

In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court upheld the abrogation of States' Eleventh Amendment immunity in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., as "appropriate" legislation under Section 5. It explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." 427 U.S. at 456. In Seminole Tribe, the Court reaffirmed the holding of Fitzpatrick. See 517 U.S. at 59, 65, 71 n.15. Thus, "[e]ven after Seminole Tribe, 'the Eleventh Amendment does not insulate the states from suits in federal courts to enforce federal statutes enacted under the authority of the Fourteenth Amendment.'" Varner v. Illinois State Univ., 150 F.3d 706, 709 (7th Cir. 1998), petition for cert. pending, 67 U.S.L.W. 3469 (U.S. Jan. 11, 1999) (No. 98-1117).

A. The ADA Is An Enactment To Enforce The Equal Protection Clause

Although Congress need not announce that it is legislating pursuant to its Section 5 authority, see Varner, 150 F.3d at 712, Congress declared that its intent in enacting the ADA 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). Although such a declaration is not dispositive, neither should it be ignored. "Given the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government,'" a court should "not lightly second-guess such legislative judgments." Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226, 251 (1990).

In Crawford, this Court held that "[i]nvidious discrimination by governmental agencies * * * violates the equal protection clause even if the discrimination is not racial, though racial discrimination was the original focus of the clause." 115 F.3d at 487; accord Goshtasby v. Board of Trustees of Univ. of Ill., 141 F.3d 761, 771 (7th Cir. 1998). That holding was clearly correct and was not altered by the Court's decisions in City of Boerne or Florida Prepaid. Neither the prohibitions of the Equal Protection Clause nor Congress' Section 5 authority is limited to suspect classifications. "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and

arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352 (1918). Thus "arbitrary and irrational discrimination violates the Equal Protection Clause under even [the] most deferential standard of review." Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988); see, e.g., Romer v. Evans, 517 U.S. 620, 631-634 (1996); Mills v. Maine, 118 F.3d 37, 46 (1st Cir. 1997) (collecting cases).

While the Court in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), held that persons with disabilities were not subject to heightened scrutiny, it held that government discrimination on the basis of disability is prohibited by the Equal Protection Clause when it is arbitrary. Although a majority declined to deem classifications on the basis of mental retardation as "quasi-suspect," it held that this did not leave persons with such disabilities "unprotected from invidious discrimination." Id. at 446.

Thus, the ADA can be regarded as legislation to enforce the Equal Protection Clause. As Representative Dellums explained during the enactment of the ADA, "we are empowered with a special responsibility by the 14th amendment to the Constitution to ensure that every citizen, not just those of particular ethnic groups, not just those who arguably are 'able-bodied,' not just those who own property -- but every citizen shall enjoy the equal

protection of the laws." 136 Cong. Rec. 11,467 (1990); see also id. at 11,468 (remarks of Rep. Hoyer).

B. The ADA Is Plainly Adapted To Enforcing The Equal Protection Clause

The defendants argue (Br. 14-15) that the ADA is not "plainly adapted" to enforcing the Equal Protection Clause, because it prohibits more than what a court might declare unconstitutional in any individual case. The Supreme Court's decision in City of Boerne v. Flores, 521 U.S. 507 (1997), addressed the question of what constitutes "plainly adapted" enforcement. It concluded that even statutes that prohibit more than the Equal Protection Clause does on its own can be "appropriate remedial measures" when there is "a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented." Id. at 530.

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

Congress made express findings about the status of people with disabilities in our society and determined that they were subject to continuing "serious and pervasive" discrimination that "tended to isolate and segregate individuals with disabilities." 42 U.S.C. 12101(a)(2). We need not repeat these findings here in toto. (They are attached in an addendum to this brief.) Nor can we provide a complete summary of the 14 hearings held by Congress at the Capitol, the 63 field hearings, the lengthy floor debates,

and the myriad of reports submitted to Congress by the Executive Branch in the three years prior to the enactment of the ADA, see Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 393-394 nn.1-4, 412 n.133 (1991) (collecting citations), as well as Congress' 30 years of experience with other statutes aimed at preventing discrimination against persons with disabilities, see Lowell P. Weicker, Jr., Historical Background of the Americans with Disabilities Act, 64 Temp. L. Rev. 387, 387-389 (1991) (discussing other laws enacted to redress discrimination against persons with disabilities). However, in the next few pages we will briefly sketch some of the major areas of discrimination that Congress discovered and attempted to redress.

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

that prejudice against persons with disabilities manifested itself in a variety of ways, including "reaction[s] of aversion," reliance on "false" stereotypes, and stigma associated with disabilities that lead to people with disabilities being "thought of as not quite human." U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 23-26 (1983); see also Senate Report, supra, at 21. The negative attitudes, in turn, produced fear and reluctance on the part of people with disabilities to participate in society. See Senate Report, supra, at 16; House Report, supra, at 35, 41-43; Cook, supra, at 411. Congress thus concluded that persons with disabilities were "faced with restrictions and limitations * * * resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. 12101(a)(7).

These decades of ignorance, fear, and misunderstanding created a tangled web of discrimination, resulting in and being reinforced by isolation and segregation. The evidence before Congress demonstrated that these attitudes were linked more generally to the segregation of people with disabilities. See Senate Report, supra, at 11; U.S. Commission on Civil Rights, supra, at 43-45. This segregation was in part the result of government policies in "critical areas [such] as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3).

For example, in enacting the IDEA, Congress had determined that millions of children with disabilities were receiving no education whatsoever, were receiving an inadequate education, or were receiving their education in an unnecessarily segregated environment. See 20 U.S.C. 1400(c)(2)-(c)(4) (as amended, 1997); see also Board of Educ. v. Rowley, 458 U.S. 176, 191-203 (1982) (surveying legislative findings); Cook, supra, at 413-414.

Similarly, there was evidence before Congress that, like most public accommodations, government buildings were not accessible to people with disabilities. For example, a study conducted in 1980 of state-owned buildings available to the general public found 76 percent of them to be physically inaccessible to and unusable by people with disabilities. See 135 Cong. Rec. 8,712 (1989) (remarks of Rep. Coelho); U.S. Commission on Civil Rights, supra, at 38-39. In another survey, 40 percent of persons with disabilities reported that an important reason for their segregation was the inaccessibility of buildings and restrooms. See Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 334 (1989) (House Judiciary Hearings).

Of course, even when the buildings were accessible, persons with disabilities were often excluded because they could not reach the buildings. The evidence before Congress showed that, in fact, public streets and sidewalks were not accessible. See House Report, supra, at 84; House Judiciary Hearings, supra, at

248, 271. And even when they could navigate the streets, people with disabilities were shut out of most public transportation. See H.R. Rep. No. 485, Pt. 1, 101st Cong., 2d Sess. 24 (1990); National Council on the Handicapped, Toward Independence 32-33 (1986); U.S. Commission on Civil Rights, supra, at 39. Some transit systems offered paratransit services (special demand-responsive systems for people with disabilities) to compensate for the absence of other means of transportation, but those services were often too limited and further contributed to the segregation of people with disabilities from the general public. See Senate Report, supra, at 13, 45; House Report, supra, at 38, 86; Toward Independence, supra, at 33; U.S. Commission on Civil Rights, supra, at 39. As Congress reasoned, "[t]ransportation plays a central role in the lives of all Americans. It is a veritable lifeline to the economic and social benefits that our Nation offers its citizens. The absence of effective access to the transportation network can mean, in turn, the inability to obtain satisfactory employment. It can also mean the inability to take full advantage of the services and other opportunities provided by both the public and private sectors." H.R. Rep. No. 485, Pt. 4, 101st Cong., 2d Sess. 25 (1990); see House Report, supra, at 37, 87-88; Senate Report, supra, at 13.

Finally, even when people with disabilities had access to generally available goods and services, often they could not afford them due to poverty. Over 20 percent of people with disabilities of working age live in poverty, more than twice the

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

People with disabilities who were able to overcome these barriers proved to be excellent workers. "[T]here is consistent * * * empirical evidence to back up the claims * * * that handicapped persons are more stable workers, with lower turnover, less absenteeism, lower risks of accident, and more loyalty to and satisfaction with their jobs and employers than other workers of similar characteristics in similar jobs." Frederick C. Collignon, The Role of Reasonable Accommodation in Employing Disabled Persons in Private Industry, in Disability and the Labor Market 196, 208 (Monroe Berkowitz & M. Anne Hill eds., 1986); see also Senate Report, supra, at 28-29 (discussing studies that show

job performance of employees with disabilities was as good as others); House Report, supra, at 58-59 (same).

Given these facts, it is not surprising that surveys of both people with disabilities and employers revealed that discrimination was one of the primary reasons many people with disabilities did not have jobs. See Senate Report, supra, at 9; House Report, supra, at 33, 37; On the Threshold of Independence, supra, at 15. "[R]ecent studies suggest that prejudice against impaired persons is more intense than against other minorities. [One study] concludes that employer attitudes toward impaired workers are 'less favorable than those . . . toward elderly individuals, minority group members, ex-convicts, and student radicals,' and [another study] finds that handicapped persons are victims of 'greater animosity and rejections than many other groups in society.'" William G. Johnson, The Rehabilitation Act and Discrimination Against Handicapped Workers, in Disability and the Labor Market 242, 245 (Monroe Berkowitz & M. Anne Hill eds., 1986); accord Americans with Disabilities Act: Hearing Before the House Comm. on Small Business, 101st Cong., 2d Sess. 128-134 (1990) (testimony of Arlene Mayerson) (collecting additional studies). Congress thus had a basis in fact for concluding that "[f]requently, employer prejudices exclude[d] handicapped persons from jobs." U.S. Commission on Civil Rights, supra, at 29. And even when employed, people with disabilities received lower wages that could not be explained by any factor other than discrimination. See id. at 31-32; Equal Employment Opportunities

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

There is no doubt that similar discrimination existed in government programs and services. A survey of state officials by the Advisory Commission on Intergovernmental Relations (ACIR) prior to the enactment of the ADA reported that 35 percent identified "negative attitudes about person[s] with disabilities" as a "serious impediment" to employing persons with disabilities in state government. ACIR, Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal 73 (Apr. 1989). The report concluded that even when States had good policies on paper, "implementation has sometimes been impeded by negative attitudes and misconceptions about persons with disabilities and their performance capabilities" by "those who actually make hiring and promotion decisions." Id. at 75; see also Stephen L. Mikochik, The Constitution and the Americans with Disabilities Act: Some First Impressions, 64 Temp. L. Rev. 619, 624 n.33 (1991) (collecting testimony before Congress on state employment practices). Similarly, state officials "pointed to negative attitudes and misconceptions as potent impediments to [their own] barrier removal policies." ACIR, supra, 87. But as the Court explained in Cleburne, 473 U.S. at 448, "mere negative attitudes

* * * are not permissible bases" for making legitimate government decisions.[5/]

These government policies and practices, in tandem with similar private discrimination, produced a situation in which people with disabilities were largely poor, isolated, and segregated. As Justice Marshall explained, "lengthy and continuing isolation of [persons with disabilities] perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them." Cleburne, 473 U.S. at 464; see also U.S. Commission on Civil Rights, supra, at 43-45. Congress could reasonably have found government discrimination to be a root

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[5/] In our view, Congress' conclusions regarding the need for deterrence and remedies of discrimination against disabled persons generally is sufficient to bring prisons within the legitimate scope of the ADA; but the legislative record demonstrates that Congress identified a problem of irrational discrimination against disabled persons specifically in the law enforcement system, such that deterrence and remedies in that context were thought necessary. See H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 50 (1990) (noting that persons with disabilities, including those with epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail," and stating that "[s]uch discriminatory treatment based on disability can be avoided by proper training"); see also U.S. Commission on Civil Rights, supra, at 168 (describing "major types of areas of discrimination" against disabled in criminal justice system, including "inadequate ability to deal with physically handicapped accused persons and convicts (e.g. accessible jail cells and toilet facilities)"); 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 Resources & the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor, 100th Cong., 2d Sess. 77 (1988) (testimony of Belinda Mason, describing incident in which arrestee with HIV was locked inside his car overnight); The Americans with Disabilities Act of 1989: Joint Hearing on H.R. 2273 Before the Subcomm. on Select Educ. and Employment Opportunities of the House Comm. on Educ. and Labor, 101st Cong., 1st Sess. 63 (1989) (testimony of Justin Dart, describing experience of disabled persons arrested and held in jail).

cause of "people with disabilities, as a group, occupy[ing] an inferior status in our society, and [being] severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6). Cf. Fullilove v. Klutznick, 448 U.S. 448, 478 (1980) (opinion of Burger, C.J.) (finding statute governing state procurement a valid exercise of Section 5 authority although "much" of the history of discrimination presented to Congress concerned discrimination in federal procurement).[6/]

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

Section 5 of the Fourteenth Amendment vests in Congress broad power to address the "continuing existence of unfair and unnecessary discrimination and prejudice [that] denies people with disabilities the opportunity * * * to pursue those

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[6/] Since the enactment of the ADA, people with disabilities "have experienced increased access to many environments and services" and "[e]mployment opportunities have increased." National Council on Disability, Achieving Independence: The Challenge for the 21st Century 34 (1996). (The Council is an independent federal agency charged with gathering information about the effectiveness and impact of the ADA, see 29 U.S.C. 780a, 781(a)(7)). However, discrimination continues to be a significant force in the lives of people with disabilities. See id. at 14-16, 35-36; National Council on Disability, ADA Watch -- Year One: A Report to the President and the Congress on Progress in Implementing the Americans with Disabilities Act 36 (1993) ("Reports of discrimination abound in formal actions through the courts and federal agencies, in statistical survey data, and in anecdotal evidence."); National Organization on Disability, Closing the Gap: The N.O.D./Harris Survey of Americans with Disabilities -- A Summary 13, 15 (1994) (30 percent of people with disabilities said they encountered discrimination in their job search, and 40 percent said that employers would not recognize that they could do a good job).

opportunities for which our free society is justifiably famous." 42 U.S.C. 12101(a)(9). "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) (opinion of Burger, C.J.).

"Prejudice, once let loose, is not easily cabined." Cleburne, 473 U.S. at 464 (Marshall, J.). After extensive investigation (and long experience with the analogous nondiscrimination requirement contained in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794), Congress found that the exclusion of persons with disabilities from government facilities, programs, and benefits was a result of past and on-going discrimination. In 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).[7/] Thus, Title II of the ADA requires that programs not unnecessarily exclude persons with disabilities, either intentionally or unintentionally, and that government entities make "reasonable modifications to rules, policies, or

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[7/] Alexander was discussing Section 504 of the Rehabilitation Act. This Court, however, has held that the ADA imposes substantive requirements similar to Section 504. See, e.g., Rothman v. Emory Univ., 123 F.3d 446, 451 (1997).

practices" for a "qualified individual with a disability," 42 U.S.C. 12131(2), when the modifications are "necessary to avoid discrimination on the basis of disability," 28 C.F.R. 35.130(b)(7) (emphasis added). While this requirement imposes some burden on the States, the statutory scheme created by Congress acknowledges the importance of other interests as well. The ADA does not require governmental entities to articulate a "compelling interest," but only requires "reasonable modifications" that do not entail a "fundamental[] alter[ation] in the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7). In general, governmental entities need not provide accommodations if they can show "undue financial and administrative burdens." 28 C.F.R. 35.150(a)(3), 35.164 (emphasis added).

3. In Enacting The ADA, Congress Was Redressing Constitutionally Cognizable Injuries

In enacting the ADA, Congress was acting within the constitutional framework that has been laid out by the Supreme Court. As discussed above, the Equal Protection Clause prohibits invidious discrimination, that is "a classification whose relationship to [a legitimate] goal is so attenuated as to render the distinction arbitrary or irrational." Cleburne, 473 U.S. at 446. In Cleburne, the Supreme Court unanimously declared unconstitutional as invidious discrimination a decision by a city to deny a special use permit for the operation of a group home for people with mental retardation. A majority of the Court

recognized that "through ignorance and prejudice [persons with disabilities] 'have been subjected to a history of unfair and often grotesque mistreatment.'" Id. at 454 (Stevens, J., concurring); see id. at 461 (Marshall, J., concurring in the judgment in part). The Court acknowledged that "irrational prejudice," id. at 450, "irrational fears," id. at 455 (Stevens, J.), and "impermissible assumptions or outmoded and perhaps invidious stereotypes," id. at 465 (Marshall, J.), existed against people with disabilities in society at large and sometimes inappropriately infected government decision making.

While a majority of the Court declined to deem classifications based on disability as suspect or "quasi-suspect," it elected not to do so, in part, because it would unduly limit legislative solutions to problems faced by the disabled. The Court reasoned that "[h]ow this large and diversified group is to be treated under the law is a difficult and often technical matter, very much a task for legislators guided by qualified professionals." 473 U.S. at 442-443. It specifically noted with approval legislation such as Section 504, which aimed at protecting persons with disabilities, and openly worried that requiring governmental entities to justify their efforts under heightened scrutiny might "lead [governmental entities] to refrain from acting at all." Id. at 444.

Nevertheless, it did affirm that "there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly

subject to judicial correction under constitutional norms," 473 U.S. at 446, and found the actions at issue in that case unconstitutional. In doing so, it articulated several criteria for making such determinations in cases involving disabilities. First, the Court held that the fact that persons with mental retardation were "indeed different from others" did not preclude a claim that they were denied equal protection; instead, it had to be shown that the difference was relevant to the "legitimate interests" furthered by the rules. Id. at 448. Second, in measuring the government's interest, the Court did not examine all conceivable rationales for the differential treatment of the mentally retarded; instead, it looked to the record and found that "the record [did] not reveal any rational basis" for the decision to deny a special use permit. Ibid.; see also id. at 450 (stating that "this record does not clarify how * * * the characteristics of [people with mental retardation] rationally justify denying" to them what would be permitted to others). Third, the Court found that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable * * * are not permissible bases" for imposing special restrictions on persons with disabilities. Id. at 448. Thus, the Equal Protection Clause of its own force already proscribes treating persons with disabilities differently when the government has not put forward evidence justifying the difference or where the justification is based on mere negative attitudes.

The Supreme Court has also recognized that the principle of equality is not an empty formalism divorced from the realities of day-to-day life, and thus, the Equal Protection Clause is not limited to prohibiting unequal treatment of similarly situated persons. The Equal Protection Clause also guarantees "that people of different circumstances will not be treated as if they were the same." United States v. Horton, 601 F.2d 319, 324 (7th Cir.), cert. denied, 444 U.S. 937 (1979) (quoting Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law 520 (1978)). By definition, persons with disabilities have "a physical or mental impairment that substantially limits one or more * * * major life activities." 42 U.S.C. 12102(2)(A). Thus, as to that life activity, "the handicapped typically are not similarly situated to the nonhandicapped." Alexander, 469 U.S. at 298. The Constitution is not blind to this reality and instead, in certain circumstances, requires equal access rather than simply identical treatment. While it is true that the "Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same," Plyler v. Doe, 457 U.S. 202, 216 (1982), it is also true that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." Jenness v. Fortson, 403 U.S. 431, 442 (1971).[8/]

[8/] In a series of Supreme Court cases beginning with Griffin v. Illinois, 351 U.S. 12 (1956), and culminating in M.L.B. v. S.L.J., 117 S. Ct. 555 (1996), the Court has held that principles of equality are sometimes violated by treating unlike persons

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Thus, there is a basis in constitutional law for recognition that discrimination exists not only by treating people with disabilities differently for no legitimate reason, but also by treating them identically when they have recognizable differences. As the Sixth Circuit has explained in a case involving gender classifications, "in order to measure equal opportunity, present relevant differences cannot be ignored. When males and females are not in fact similarly situated and when the law is blind to those differences, there may be as much a denial of equality as when a difference is created which does not exist." Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 657 (1981); see also Lau v. Nichols, 483 F.2d 791, 806 (9th Cir. 1973) (Hufstedler, J., dissenting from the denial of reh'g en banc), rev'd, 414 U.S. 563 (1974). Similarly, it is also a denial of

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alike. In these cases, the Supreme Court has held that a State violates the Equal Protection Clause when it treats indigent parties appealing from certain court proceedings as if they were not indigent. Central to these holdings is the acknowledgment that "a law nondiscriminatory on its face may be grossly discriminatory in its operation." Id. at 569 (quoting Griffin, 351 U.S. at 17 n.11). The Court held in these cases that even though States are applying a facially neutral policy by charging all litigants equal fees for an appeal, the Equal Protection Clause requires States to waive such fees in order to ensure equal "access" to appeal. 117 S. Ct. at 560. Nor is it sufficient if a State permits an indigent person to appeal without charge but does not provide free trial transcripts. The Court has declared that the State cannot "extend to such indigent defendants merely a 'meaningless ritual' while others in better economic circumstances have a 'meaningful appeal.'" Id. at 569 n.16 (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)); see also Lewis v. Casey, 518 U.S. 343, 356-357 (1996) (holding that State has not met its obligation to provide illiterate prisoners access to courts simply by providing a law library).

equality when access to facilities, benefits, and services are denied, because the State refuses to acknowledge the "real and undeniable differences between [persons with disabilities] and others." Cleburne, 473 U.S. at 444.

4. Unlike The Statutes Found Unconstitutional In City Of Boerne and Florida Prepaid, The ADA Is A Remedial And Preventive Scheme Proportional To The Injury

Of course, there is no need for this Court to decide whether every requirement of the ADA could be ordered by a court under the authority of the Equal Protection Clause. It is sufficient that Congress found the ADA was appropriate legislation to redress the rampant discrimination it discovered in its decades-long examination of the question. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." Florida Prepaid, 119 S. Ct. at 2206.

Congress' decision to follow the teachings of Cleburne in enacting the ADA distinguishes this case from City of Boerne. The Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb et seq. (the statute at issue in City of Boerne) was enacted by Congress in response to the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990). Smith held that the Free Exercise Clause did not require States to provide exceptions to neutral and generally applicable laws even when those laws significantly burdened religious practices. See id. at 887. In RFRA, Congress attempted to overcome the effects of

Smith by imposing through legislation a requirement that laws substantially burdening a person's exercise of religion be justified as in furtherance of a compelling state interest and as the least restrictive means of furthering that interest. See 42 U.S.C. 2000bb-1. The Court found that in enacting this standard, Congress was not acting in response to a history of unconstitutional activity. Indeed, "RFRA's legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry." City of Boerne, 521 U.S. at 530. The Court found that Congress was "attempt[ing] a substantive change in constitutional protections," id. at 532, rather than attempting to "enforce" a recognized Fourteenth Amendment right.

As such, the Court found RFRA to be an unconstitutional exercise of Section 5. It explained that the authority to enforce the Fourteenth Amendment is a broad power to remedy past and present discrimination and to prevent future discrimination. 521 U.S. at 517-519, 536. The Court also reaffirmed Congress' power to prohibit activities that themselves were not unconstitutional in furtherance of its remedial scheme. Id. at 518, 525-526, 530. The Court stressed, however, that Congress' power had to be linked to constitutional injuries and that there must be a "congruence and proportionality" between the identified harms and the statutory remedy. Id. at 519-520. There is no "bright line" test. The Court acknowledged that "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, and Congress must have wide latitude in determining where it lies." Ibid.

In City of Boerne the Court found that RFRA was "out of proportion" to the problems identified so that it could not be viewed as preventive or remedial. 521 U.S. at 532. First, it found that there was no "pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith." Id. at 534; see also id. at 530 (surveying legislative record). It also found that RFRA's requirement that the State prove a compelling state interest and narrow tailoring imposed "the most demanding test known to constitutional law" and thus possessed a high "likelihood of invalidat[ing]" many state laws. Id. at 534. While stressing that Congress was entitled to "much deference" in determining the need for and scope of laws to enforce Fourteenth Amendment rights, id. at 536, the Court found that Congress had simply gone so far in attempting to regulate local behavior that, in light of the lack of evidence of a risk of unconstitutional conduct, it could no longer be viewed as remedial or preventive. Id. at 531-532.

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

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

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from RFRA in a more fundamental way. RFRA was attempting to expand the substantive meaning of the Fourteenth Amendment by imposing a strict scrutiny standard on the States in the absence of evidence of widespread use of constitutionally improper criteria. The ADA, on the other hand, is simply seeking to make effective the right to be free from invidious discrimination by establishing a remedial scheme tailored to detecting and preventing those activities most likely to be the result of past or present discrimination. Moreover, unlike the background to RFRA -- which demonstrated that Congress acted out of displeasure with the Court's decision in Smith -- there is no evidence that Congress enacted the ADA because of its disagreement with any decision of the Court. "In the ADA, Congress included no language attempting to upset the balance of powers and usurp the Court's function of establishing a standard of review by establishing a standard different from the one previously established by the Supreme Court." Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998).

The defendants suggest that Florida Prepaid is helpful in examining the validity of the ADA. But defendants, like the Eighth Circuit in Alsbrook, ignore the fundamental differences in

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of persons with disabilities and public entities plainly manifests a "congruence" between the "means used" and the "ends to be achieved." See City of Boerne, 521 U.S. at 530. Moreover, there is no problem regarding judicially manageable standards, as the courts have regularly applied the "reasonable accommodation" test under Section 504 to recipients of federal funds for the past 20 years.

the nature of the constitutional violation at issue in Florida Prepaid compared with this case. The legal theory of Florida Prepaid was that Congress was attempting to prevent and redress violations of procedural due process. This required the Court to focus on availability of state remedies, because a procedural due process violation requires not only a deprivation of property but also a lack of post-deprivation remedies. 119 S. Ct. at 2208-2209. Here, by contrast, when the constitutional right is based on the Equal Protection Clause, the violation is complete when the action is taken. "It is, however, established as a fundamental proposition that every state official, high and low, is bound by the Fourteenth and Fifteenth Amendments. We think this Court has already made it clear that it follows from this that Congress has the power to provide for the correction of the constitutional violations of every such official without regard to the presence of other authority in the State that might possibly revise their actions." United States v. Raines, 362 U.S. 17, 25 (1960) (citation omitted).

The Eighth Circuit thus erred in Alsbrook, relying on Florida Prepaid, in suggesting that the fact that some States have laws prohibiting discrimination against persons with disabilities was relevant to whether the ADA was "appropriate" legislation to "enforce" the Fourteenth Amendment. No one would suggest, for example, that the validity of Title VII of the Civil Rights Act of 1964 as Section 5 legislation is premised on whether States prohibited race and sex discrimination. Indeed,

when Congress extended Title VII to the States in 1972, 37 States already prohibited race discrimination in employment; see S. Rep. No. 415, 92d Cong., 1st Sess. 19 (1971), yet the Supreme Court had no compunction about upholding Title VII's abrogation in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).[10/]

Because Florida Prepaid involved procedural due process, and thus a constitutional violation did not exist unless a State failed to provide post-deprivation remedies, the Court found that Congress' failure to consider the existence of state remedies undermined its determination that constitutional violations existed. 119 S. Ct. at 2209. Here, by contrast, Congress made express findings that people with disabilities "continually encounter various forms of discrimination, including outright intentional exclusion * * * and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities," as well as having been subject to "a history of purposeful unequal treatment," and "unfair and unnecessary discrimination and prejudice" that continues to exist. 42 U.S.C. 12101(a)(5), (7),

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[10/] Moreover, the Eighth Circuit's decision ignored express congressional findings. Congress found that nationwide "individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." 42 U.S.C. 12101(a)(4). The fact that some States have provided remedies in some instances does not negate Congress' power to enact Section 5 legislation that governs all States. For example, in Oregon v. Mitchell, 400 U.S. 112 (1970), while the Court agreed that there was little evidence that literacy tests were unconstitutional in every State, it concluded that Congress had the authority to enact a nationwide ban to address what it perceived to be a more than sporadic problem. See especially id. at 283-284 (opinion of Stewart, J.); see also Fullilove v. Klutznick, 448 U.S. 448, 483 (1980) (plurality); id. at 501 n.3 (Powell, J., concurring).

and (9). These are the very types of actions prohibited by the Equal Protection Clause as interpreted by the Supreme Court in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

Whether the ADA is valid Section 5 legislation ultimately depends on how pervasively States were unconstitutionally discriminating against persons with disabilities. For the greater the constitutional evil, the broader Congress' remedial power. See City of Boerne, 521 U.S. at 530. "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." Radice v. New York, 264 U.S. 292, 294 (1924). This great deference is due not only because Congress is specifically charged by Section 5 with the power to enforce the Fourteenth Amendment, but also because Congress has a unique institutional capacity to gather information on a comprehensive basis, unconstrained by the limitations of particular litigation, and a distinct capacity to draw relevant information from the people and communities represented by its Members. Congress can study a problem for decades (as it did here), hold fact-finding hearings, and receive reports from the executive branch on the state of a problem across the nation.

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

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

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

Policies and criteria restricting access to government programs and services are just as much a barrier to some as physical barriers are to others. As Congress and the Supreme Court recognized, many of the problems faced today by persons with disabilities are a result of "thoughtlessness or indifference -- of benign neglect" to the interaction between those purportedly "neutral" rules and persons with disabilities.[11/] In addressing that pervasive, nationwide problem, Congress was entitled to conclude that a simple ban on discrimination would not be sufficient to purge the process of the effects of past discrimination and to prevent discrimination in the future. Congress could conclude that it would be difficult, on a case-by-case basis, to prove that prejudicial attitudes or misinformation about disabilities affected any particular decision. In many instances, individual decision-makers may not be aware of their own stereotypical thinking. Moreover, rules that exclude those with disabilities may have originated at a time when segregation and isolation of those with disabilities was the norm. At best, those rules were devised without any consideration of how a disabled person could

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

participate in the program. At worst, the prejudices and misconceptions of the time are reflected in the rule. Even the neutral application of those rules would carry forward the effects of past discrimination. Congress required government entities to make reasonable accommodations for qualified individuals with disabilities for two reasons: that absent discriminatory attitudes, governments would have made those accommodations on their own and that public entities needed to take affirmative steps to overcome the effects of past discrimination, segregation, and isolation. Cf. Fullilove, 448 U.S. at 477-478.

The ADA thus falls neatly in line with other statutes that have been upheld as valid Section 5 legislation. For when there is evidence of a history of extensive discrimination, as here, Congress may prohibit or require modifications of rules, policies, and practices that tend to have a discriminatory effect on a class or individual, regardless of the intent behind those actions. In South Carolina v. Katzenbach, 383 U.S. 301, 325-337 (1966), and again in City of Rome v. United States, 446 U.S. 156, 177 (1980), both cited with approval in City of Boerne, the Supreme Court upheld the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect. Similarly, this Court in United States v. City of Chicago, 573 F.2d 416, 423-424 (1978), and Liberles v. County of Cook, 709 F.2d 1122, 1135 (1983), upheld the

application of Title VII's disparate impact standard to States as a valid exercise of Congress' Section 5 authority. See also Varner, 150 F.3d at 717 n.14; City of Boerne, 521 U.S. at 529 (agreeing that "Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause").

There can be no dispute that "well-cataloged instances of invidious discrimination against the handicapped do exist." Alexander v. Choate, 469 U.S. 287, 295 n.12 (1985). In exercising its broad power under Section 5 to remedy the on-going effects of past discrimination and prevent present and future discrimination, Congress is afforded "wide latitude." Florida Prepaid, 119 S. Ct. at 2206 (quoting City of Boerne, 521 U.S. at 518). As the Supreme Court reaffirmed in City of Boerne, "[i]t is for Congress in the first instance to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." Id. at 519-520 (quoting Katzenbach, 384 U.S. at 651).

Following this tradition, the Fifth Circuit held that "the ADA represents Congress' considered efforts to remedy and prevent what it perceived as serious, widespread discrimination against the disabled. * * * We cannot say * * *, in light of the extensive findings of unconstitutional discrimination made by Congress, that these remedies are too sweeping to survive the Flores proportionality test for legislation that provides a

remedy for unconstitutional discrimination or prevents threatened unconstitutional actions." Coolbaugh v. Louisiana, 136 F.3d 430, 438, cert. denied, 119 S. Ct. 58 (1998). This holding is consistent with five other courts of appeals that have considered the issue since City of Boerne. See Clark v. California, 123 F.3d 1267, 1270-1271 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); Kimel v. Board of Regents, 139 F.3d 1426, 1433, 1442-1443 (11th Cir.), petition for cert. pending sub nom. Florida Dep't of Corrections v. Dickson, 67 U.S.L.W. 3364 (U.S. Nov. 16, 1998) (No. 98-829); Seaborn v. Florida, 143 F.3d 1405, 1407 (11th Cir. 1998), cert. denied, 119 S. Ct. 1038 (1999); Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 178 F.3d 212, 216-217 (4th Cir. 1999); Muller v. Costello, 187 F.3d 298, 308-310 (2d Cir. 1999); Martin v. Kansas, 190 F.3d 1120, 1125-1128 (10th Cir. 1999); Dare v. California, 191 F.3d 1167, 1174-1175 (9th Cir. 1999); Garrett v. University of Ala. at Birmingham, 193 F.3d 1214, 1218 (11th Cir. 1999). This Court should thus adhere to its holding in Crawford v. Indiana Department of Corrections, 115 F.3d 481 (1997), and uphold the ADA as valid Section 5 legislation.

CONCLUSION

The district court had jurisdiction over the plaintiff's ADA claim against the state officials in their official capacities.

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CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 37(a)(7)(C) and Circuit Rule 32. This brief was prepared using WordPerfect 7 and contains 9,821 words and 1,086 lines of monospace type.

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 1999, one copy of the Motion of the United States to File the Attached Brief out-of-time as Intervenor was served by first-class mail, postage prepaid, on the following counsel:

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