No. 99-940

In the Supreme Court of the United States

DENISE DEBOSE AND JAMES MCCULLOUGH,
PETITIONERS

AND

UNITED STATES OF AMERICA

v.

STATE OF NEBRASKA, ET AL.

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12111-12117, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 186 F.3d 1087.

JURISDICTION

The court of appeals entered its judgment on August 9, 1999, and amended its opinion on September 14, 1999. A petition for rehearing was denied on September 14, 1999. Pet. App. 1b. The petition for a writ of certiorari was filed on December 1, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, is a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Based on extensive study and fact-finding by Congress,[1] and Congress's lengthy experience with the analogous nondiscrimination requirement in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, Congress found in the Disabilities Act that:

> (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, institution-

[1] Fourteen congressional hearings and 63 field hearings by a special congressional task force were held in the three years prior to passage of the Disabilities Act. 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); *id.* Pt. 3, at 24-25; *id.* Pt. 4, at 28-29; see also Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 393 & nn.1-3 (1991) (listing the individual hearings). Congress also drew upon reports submitted to Congress by the Executive Branch. See S. Rep. No. 116, *supra*, at 6 (citing United States Civil Rights Commission, *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).

> alization, 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; [and]
>
> (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). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment

and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189 (1994 & Supp. III 1997), addresses discrimination in public accommodations operated by private entities.

This case involves a suit under Title I of the Disabilities Act, which provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). A "covered entity" is defined to include any "person engaged in an industry affecting commerce who has 15 or more employees," 42 U.S.C. 12111(2) and (5)(A), and the term "person" incorporates the definition from Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which includes States. 42 U.S.C. 12111(7); cf. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 449 & n.2 (1976).[2]

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[2] While the Disabilities Act does not apply to the federal government, substantially similar protections are provided by Section 501(b) of the Rehabilitation Act of 1973, 29 U.S.C. 791(b), which prohibits discrimination against persons with disabilities in employment by all executive branch agencies and requires them to engage in "affirmative action" with regard to the "hiring, placement, and advancement of individuals with disabilities." See also 29 U.S.C. 791(g) ("standards used to determine whether this section has been violated in a complaint alleging nonaffirmative

The prohibition on discrimination may be enforced through private suits against public entities. See 42 U.S.C. 12117(a) (incorporating the enforcement provisions of Title VII); cf. *Fitzpatrick*, 427 U.S. at 452. In the Disabilities Act, Congress expressly abrogated the States' Eleventh Amendment immunity from private suits in federal court. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter").

2. Petitioners were employed by respondent as investigators for the Nebraska Equal Employment Opportunity Commission. Both petitioners were experiencing clinical depression that limited their major life activities. They both asked for accommodations, which were refused, and they were fired. They filed suit under Title I of the Disabilities Act. The jury entered verdicts in favor of petitioners and awarded them both back pay and compensatory damages, and awarded front pay to petitioner McCullough. The court ordered petitioner DeBose reinstated to her position. Pet. App. 3a; Pet. 15-16.

3. On appeal, respondent pressed for the first time the argument that the Eleventh Amendment barred these actions. The United States intervened, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the abrogation. The court of appeals reversed. Pet. App. 1a-4a. The court noted that, in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (1999) (en banc), petition for

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action employment discrimination * * * shall be the standards applied under title I of" the Disabilities Act). In addition, Congress has extended the obligations of the Disabilities Act to itself. See 2 U.S.C. 1302(a)(3), 1311(b)(3) (Supp. IV 1998).

cert. pending, No. 99-423, the Eighth Circuit held that Congress had exceeded its power under Section 5 of the Fourteenth Amendment in attempting to abrogate Eleventh Amendment immunity for suits under Title II of the Disabilities Act. Although *Alsbrook* had expressly declined to address the validity of Title I, see 184 F.3d at 1006 n.11, the panel held that "the principles established in that case apply with equal vigor to Title I of that act." Pet. App. 4a. It thus reversed the judgment and remanded with instructions to enter judgment for respondent.

DISCUSSION

The holding in this case, following and extending the Eighth Circuit's holding in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (1999) (en banc), petition for cert. pending, No. 99-423, has significantly eroded the operation of important civil rights legislation. Contrary to this Court's precedents, the decision places unwarranted limits on Congress's authority to provide "strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(2). The decision, moreover, is in direct conflict with the rulings of six other circuits, including four decisions that were rendered subsequent to the Eighth Circuit's ruling in this case and that have expressly rejected that court's holding. Petitioner is thus correct that this case ultimately may warrant an exercise of this Court's certiorari jurisdiction. In our opinion, however, a grant of certiorari at this time would be premature, in light of litigation presenting an analogous question currently pending before the Court. See *United States* v. *Florida Bd. of Regents*, No. 98-796; *Kimel* v. *Florida Bd. of Regents*, No. 98-791 (oral argument in both heard on October 13, 1999).

1. Following this Court's decisions in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), four courts of appeals held that the abrogation of Eleventh Amendment immunity contained in the Disabilities Act is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to "enforce" the Equal Protection Clause. See *Amos* v. *Maryland Dep't of Pub. Safety & Correctional Servs.*, 178 F.3d 212 (4th Cir. 1999) (Title II); *Kimel* v. *Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998) (Title I), petition for cert. pending *sub nom. Florida Dep't of Corrections* v. *Dickson*, No. 98-829; *Coolbaugh* v. *Louisiana*, 136 F.3d 430 (5th Cir.) (Title II), cert. denied, 119 S. Ct. 58 (1998); *Clark* v. *California*, 123 F.3d 1267 (9th Cir. 1997) (Title II), cert. denied, 118 S. Ct. 2340 (1998); see also *Torres* v. *Puerto Rico Tourism Co.*, 175 F.3d 1, 6 n.7 (1st Cir. 1999) (in Title I case, court states that "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] The Eighth Circuit's

[3] The Seventh Circuit upheld the Disabilities Act's abrogation prior to this Court's decision in *Flores*, *supra*. See *Crawford* v. *Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997) (Title II). The question of the continuing validity of *Crawford* is currently pending in a case arising under Title I, *Erickson* v. *Board of Governors of State Colleges & Universities*, No. 95 C 2541, 1998 WL 748277 (N.D. Ill. Sept. 30, 1998), appeal pending, No. 98-3614 (7th Cir.) (oral argument heard Apr. 27, 1999). The constitutionality of the Disabilities Act's abrogation for both Titles I and II is also pending in a number of cases before the Sixth Circuit, for which a consolidated oral argument was heard on October 26, 1999. See, *e.g.*, *Nihiser* v. *Ohio EPA*, 979 F. Supp. 1168 (S.D. Ohio 1997), appeal pending, No. 97-3933.

decision is in direct conflict with the rulings of those courts.[4]

Furthermore, the four courts of appeals that have considered or reconsidered the validity of the Disabilities Act's abrogation after the Eighth Circuit's decision in this case and after this Court's decision last Term in *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 119 S. Ct. 2199 (1999), have all rejected the Eighth Circuit's holding and have upheld the Disabilities Act's abrogation as valid Section 5 legislation. See *Garrett* v. *University of Ala.*, 193 F.3d 1214 (11th Cir. 1999) (Title I); *Dare* v. *California*, 191 F.3d 1167 (9th Cir. 1999) (Title II); *Martin* v. *Kansas*, 190 F.3d 1120 (10th Cir. 1999) (Title I); *Muller* v. *Costello*, 187 F.3d 298 (2d Cir. 1999) (Title I).

The question of Congress's authority to abrogate the States' Eleventh Amendment immunity in the Disabilities Act has thus been extensively evaluated and considered by the courts of appeals. The conflict is firmly entrenched and incapable of resolution absent intervening action by this Court.

2. The question presented is one of broad and enduring importance. The Disabilities Act is vital civil rights legislation needed to protect millions of Americans

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[4] The court in *Alsbrook* found support for its decision (184 F.3d at 1007 n.13) in *Brown* v. *North Carolina Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), petition for cert. pending, No. 99-424. In *Brown*, however, a divided panel held only that the abrogation for suits under Title II of the Disabilities Act was unconstitutional as applied to a specific Department of Justice *regulation*. The court expressly disclaimed any intent to address Congress's power to enact other provisions of the Disabilities Act. *Id.* at 704-705, 708 n.*. The Fourth Circuit subsequently upheld the Disabilities Act's abrogation of immunity in another Title II case and limited *Brown* to its facts. See *Amos*, 178 F.3d at 221 n.8.

against invidious and irrational stereotypes and limitations on their ability to function in society and to enjoy "perfect equality of civil rights and the equal protection of the laws against State denial or invasion." *Ex parte Virginia*, 100 U.S. 339, 346 (1880). As a consequence of the Eighth Circuit's decision here, the operation of this important civil rights legislation has been significantly impaired in seven States. Unlike litigants in the six circuits where the Disabilities Act's abrogation of Eleventh Amendment immunity has been sustained, persons with disabilities in the Eighth Circuit cannot fully enforce their federal rights under the Disabilities Act in federal court.

3. For the reasons stated in numerous filings we have previously made with the Court,[5] the court of appeals' determination that the Disabilities Act does not fall within Congress's broad power under Section 5 of the Fourteenth Amendment is erroneous. First, in determining that the treatment of persons with disabilities in this country requires "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*, 473 U.S. 432, 450 (1985). In *Cleburne*, this Court unanimously declared unconstitutional as invidious discrimination the city's denial of a special use permit that would allow the operation of a group home

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[5] See, *e.g.*, Brief for the United States in Opposition at 5-14, *Florida Dep't of Corrections* v. *Dickson*, No. 98-829; Brief for the United States as Amicus Curiae at 21-28, *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206 (1998) (No. 97-634); Brief for the United States as Amicus Curiae at 29-30, *Olmstead* v. *L.C.*, 119 S. Ct. 2176 (1999) (No. 98-536).

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.

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 persons 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." See 473 U.S. at 442-443. In that regard, the Court specifically discussed a number of federal statutes and rules that protect individuals with disabilities, including Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. 473 U.S. at 443; see also *Olmstead* v. *L.C.*, 119 S. Ct. 2176, 2181 n.1 (1999).

Second, an extensive legislative record of studies and findings provides a comprehensive factual predicate for congressional action. In particular, Congress 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 Disabilities Act, Congress sought to remedy the effects of such 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).[6]

Third, the Disabilities Act's nondiscrimination provision and reasonable-accommodation requirements are reasonably tailored to combating invidious discrimination against persons with disabilities. Title I of the Disabilities Act does not require governmental entities to articulate a "compelling interest" or to advance their interests by the least restrictive means. It only requires "reasonable accommodations" that do not impose an "undue hardship" on the State. 42 U.S.C. 12112(b)(5)(A); see also 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).

4. The Eighth Circuit's decision thus bears all the hallmarks of a case meriting an exercise of this Court's certiorari jurisdiction, and granting this petition may ultimately be appropriate. We do not, however, consider a grant of the petition at the present time to be warranted. That is because, on October 13, 1999, this Court heard oral argument in *United States* v. *Florida*

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[6] *Alexander* involved Section 504 of the Rehabilitation Act, but Congress intended that the Disabilities Act be read as imposing substantive requirements at least as stringent as those in Section 504. See *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632 (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).

Board of Regents, cert. granted, 119 S. Ct. 902 (1999) (No. 98-796), and *Kimel* v. *Florida Board of Regents*, cert. granted, 119 S. Ct. 901 (1999) (No. 98-791). Those cases present the questions of whether the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, contains a clear expression of Congress's intent to abrogate Eleventh Amendment immunity, and whether the ADEA reflects a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment. As we have noted in our petition for a writ of certiorari in No. 98-796, while the provisions, scope, and legislative record of the ADEA differ in some respects from those of the Disabilities Act, the resolution of the abrogation issue under the ADEA may shed light on the resolution of the parallel issue under the Disabilities Act. See Petition at 12-13, *United States* v. *Florida Bd. of Regents*, *supra* (No. 98-796). That is especially so because both statutes concern the scope of Congress's power to enforce the Equal Protection Clause for classifications (age and disability) that are not normally subject to heightened judicial scrutiny. See *Cleburne*, *supra*.

On the other hand, because the ADEA and Disabilities Act differ in some ways in terms of their structure and legislative record, it may be that the Court's decision in the *Florida Board of Regents* cases will not negate the need for plenary review of the validity of the Disabilities Act's abrogation. Furthermore, the *Florida Board of Regents* cases present the separate question—which is not at issue here—of whether Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity in the ADEA. Were this Court's resolution of the *Florida Board of Regents* cases to turn upon that question, rather than upon the scope of Congress's power under Section 5, it

is quite unlikely that the disposition would offer relevant guidance to the court of appeals in reviewing the constitutionality of the Disabilities Act's abrogation.

In short, this Court's decision this Term in the *Florida Board of Regents* cases may cast significant light on the question presented by the petition. Not until a decision issues in those cases will counsel and the Court be able to undertake a fully informed and considered analysis of whether granting this petition (or another petition presenting the same issue) is appropriate, or whether, instead, an order granting, vacating, and remanding to the court of appeals for reconsideration in light of the decision in Nos. 98-796 and 98-791 is the preferable course of action. We therefore suggest that the petition be held pending this Court's decision in *United States* v. *Florida Board of Regents*, No. 98-796, and *Kimel* v. *Florida Board of Regents*, No. 98-791.[7] Within fourteen days of the decision in those cases, the United States will submit a supplemental filing containing its views, in light of that ruling, as to the appropriate disposition of this petition.

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[7] We have made the same suggestion in response to the petition in *Alsbrook* and in a supplemental brief in *Dickson*.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Florida Board of Regents*, No. 98-796, and *Kimel* v. *Florida Board of Regents*, No. 98-791.

Respectfully submitted.

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DECEMBER 1999