No. 98-829

In the Supreme Court of the United States

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

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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Pursuant to this Court's Rule 15.8, the Solicitor General respectfully files this supplemental brief to advise the Court of an alteration in the United States' position regarding the appropriate disposition of the petition for a writ of certiorari, in light of a court of appeals decision that issued after the brief in opposition was filed in this case.

1. This case presents the question whether Title I of the Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12111 to 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. In a brief in opposition filed in December 1998, the United States opposed the petition for a writ of certiorari

predominantly on the ground that no circuit conflict existed. See Br. in Opp. 5, 13-14.

Since that time, three more courts of appeals have, like the Eleventh Circuit here, upheld the Disabilities Act's abrogation of Eleventh Amendment immunity. See *Martin* v. *Kansas*, No. 98-3102, 1999 WL 635916 (10th Cir. Aug. 19, 1999); *Muller* v. *Costello*, No. 98-7491, 1999 WL 599285 (2d Cir. Aug. 11, 1999); *Amos* v. *Maryland Dep't of Pub. Safety & Correctional Servs.*, 178 F.3d 212 (4th Cir. 1999). On July 23, 1999, however, the en banc Eighth Circuit became the first and only court of appeals to invalidate the Disabilities Act's abrogation of Eleventh Amendment immunity, in a case arising under Title II of that Act. See *Alsbrook* v. *City of Maumelle*, 184 F.3d 999, petition for cert. pending, No. 99-423. The Eighth Circuit subsequently extended its holding to Title I of the Disabilities Act, which is the Title at issue in the present case. See *DeBose* v. *Nebraska*, No. 97-3541, 1999 WL 595048 (8th Cir. Aug. 9, 1999).

2. As a result of the en banc Eighth Circuit's decisions in *DeBose* and *Alsbrook*, there is now a square conflict in the circuits regarding the constitutionality of the Disabilities Act's abrogation provision. As the number of court of appeals' decisions indicates, moreover, the question of Congress's authority to abrogate Eleventh Amendment immunity in the Disabilities Act has been extensively evaluated and considered by the courts. The conflict is firmly entrenched and incapable of resolution absent intervening action by this Court.

Furthermore, the Disabilities Act is vital civil rights legislation needed to protect millions of Americans 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 decisions, the operation of this important civil rights legislation has been significantly impaired in seven States. Unlike litigants within the Eleventh Circuit and the five other 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. In light of these developments, the United States no longer adheres to the view expressed in its brief in opposition that the petition does not merit an exercise of this Court's certiorari jurisdiction. However, we also believe that a grant of the petition at the present time is not warranted. That is because, on October 13, 1999, this Court will hear oral argument in *United States* v. *Florida 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, and whether the ADEA reflects a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment. As we 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*. 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.

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. 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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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.

SETH P. WAXMAN
Solicitor General

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