No. 99-423

In the Supreme Court of the United States

CHRISTOPHER ALSBROOK, PETITIONER

v.

CITY OF MAUMELLE, 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 II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165 (1994 & Supp. III 1997), 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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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-42a) is reported at 184 F.3d 999. The panel opinion of the court of appeals (Pet. App. 1b-18b) is reported at 156 F.3d 825. The opinion of the district court (Pet. App. 1c-12c) is not yet reported.

JURISDICTION

The court of appeals entered its judgment on July 23, 1999. The petition for a writ of certiorari was filed on September 8, 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 factfinding by Congress,[1] and Congress's lengthy experience with the analogous nondiscrimination requirement in Section 504 of the Rehabilitation Act of 1973 (Rehabilitation Act), 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, institu-

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[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 Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983); National Council on Disability, *Toward Independence* (1986); and National Council on Disability, *On the Threshold of Independence* (1988)); H.R. Rep. No. 485, *supra*, Pt. 2, at 28 (same).

tionalization, 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 affecting interstate commerce; Title II, 42 U.S.C. 12131-12165 (1994 & Supp. III 1997), 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 II of the Disabilities Act, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is expressly defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and (B).[2] The prohibition on discrimination may be enforced through private suits against public entities. See 42 U.S.C. 12133; see also *Olmstead* v. *L.C.*, 119 S. Ct. 2176, 2182 (1999). In the Disabilities Act, Congress expressly abrogated the

[2] While the Disabilities Act does not apply to the federal government, substantially similar protections are provided by Section 504(a) of the Rehabilitation Act, 29 U.S.C. 794(a), which has governed "any program or activity conducted by any Executive agency" since 1978. In addition, Congress has extended the requirements of the Disabilities Act to itself. See 2 U.S.C. 1331(b)(1) (Supp. IV 1998).

States' Eleventh Amendment immunity to 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. Respondent Arkansas, through respondents Arkansas Commission on Law Enforcement Standards and Training and its chairman and commissioners, requires all law enforcement officers in the State to possess visual acuity that can be corrected to 20/20 in each eye. Pet. App. 4a. Although petitioner has 20/20 corrected vision using both eyes, and 20/20 corrected vision in his left eye, his right eye alone has 20/30 vision due to a condition called amblyopia (commonly referred to as "lazy eye"). The right eye's vision cannot be corrected to 20/20. *Id.* at 2c, 8c.

Petitioner enrolled in the Arkansas Law Enforcement Training Academy. He successfully completed the officer training course and was hired by the City of Maumelle as a law enforcement officer. Pet. App. 5a, 2c. While working for the City, he performed all the essential functions of a police officer and, when he was tested for his ability to use a weapon, qualified as an "expert" capable of shooting with either hand at targets on both his right and left sides. *Id.* at 2c. Two years later, petitioner sought to join the Little Rock Police Department. *Id.* at 5a. He was denied employment because he did not meet the State's vision requirement, and respondents denied petitioner's request for a waiver. *Id.* at 5a-6a.[3] The State then notified the City

[3] After studying the visual acuity requirement in light of petitioner's application, the State reaffirmed its commitment to the vision standard. Pet. App. 6a. During deposition testimony in

of Maumelle that Alsbrook was not certified for law enforcement duties within the State. The City accordingly barred petitioner from responding to any police calls or working on any police-related paperwork or duties. *Id.* at 6a.

Petitioner filed suit in federal district court against respondents and certain state officials who were sued in their individual capacities. Petitioner alleged that respondents' decision not to waive the eyesight requirement violated Title II of the Disabilities Act and sought monetary and injunctive relief. Respondents moved to dismiss on the ground of Eleventh Amendment immunity. The district court denied the motion. The court held that the Disabilities Act contained a valid abrogation of Eleventh Amendment immunity because the Act was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. Pet. App. 3c.[4]

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district court, however, a member of the Arkansas Commission on Law Enforcement Standards and Training acknowledged that he did not know

> at what measurement his eyesight begins to impair his ability to be a police officer, I don't know what those numbers would be, I mean, what the parameters should be. I know that our policy is too vague and does not really deal with such matters. * * * [W]e recognize our shortcomings in terms of the certain standard that we have.

Id. at 9c. Other Commission members echoed that perspective. *Id.* at 9c-10c.

[4] The district court also denied respondents' motion for summary judgment on the ground that petitioner was not an "individual with a disability," holding that petitioner's exclusion from all law enforcement jobs within the State because of his impairment substantially limited his major life activity of working. Pet. App. 4c-7c.

3. Respondents took an interlocutory appeal of the denial of Eleventh Amendment immunity. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the abrogation. A panel of the court of appeals affirmed in relevant part. Pet. App. 1b-18b.[5]

The court agreed with respondents that "Congress unequivocally expressed within the [Disabilities Act] its intent to abrogate the states' Eleventh Amendment immunity." Pet. App. 8b (citing 42 U.S.C. 12202). Reviewing the "detailed and specific [congressional] findings regarding the nature and extent of persistent discrimination suffered by individuals with disabilities," *id.* at 9b, the court also concluded that the Disabilities Act is "an exercise of Congress's power under section 5 of the Fourteenth Amendment * * * to enact legislation designed to enforce and bolster the substantive provisions of the amendment, in this case the equal protection clause." *Id.* at 11b (quoting *Crawford* v. *Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997)). Judge Beam dissented solely on the ground that the panel should await the en banc court's issuance of its opinion in another case involving the same issue.[6]

4. On rehearing en banc, a divided court of appeals held that Congress did not have the power under

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[5] The court of appeals also held that petitioner could not sue the state officials in their individual capacities under 42 U.S.C. 1983 for violations of the Disabilities Act. Pet. App. 12b-17b. The United States' intervention was limited to defending the constitutionality of the Disabilities Act's abrogation provision and thus took no position on that aspect of the appeal.

[6] In that case, the en banc court was equally divided and thus issued no opinion. See *Autio* v. *AFSCME, Local 3139*, 157 F.3d 1141 (8th Cir. 1998).

Section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity for suits under the Disabilities Act. Pet. App. 1a-42a.[7] The en banc majority found it "obvious" that Congress intended to abrogate the States' Eleventh Amendment immunity to Disabilities Act suits. *Id.* at 13a. It also agreed that Congress expressly invoked its power to enforce the Fourteenth Amendment, *id.* at 14a, and that Congress's power to enforce the Equal Protection Clause extended to prohibiting discrimination on the basis of disability, *id.* at 20a-21a.

The majority held, however, that the Disabilities Act was not valid Section 5 legislation because it "does far more than enforce the rational relationship standard recognized by the Supreme Court in [*City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)]." Pet. App. 21a. While agreeing that Congress made "extensive findings" regarding discrimination against persons with disabilities, the court did not think the legislative record sufficiently documented instances of unconstitutional discrimination by States against persons with disabilities. *Id.* at 18a-19a, 23a-24a. The court concluded that Congress's power under Section 5 was limited to "rectify[ing] an existing constitutional violation," *id.* at 23a, and rejected the notion that Congress also could act to prevent and deter future violations. See also *id.* at 20a ("Congress, under Section

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[7] At oral argument before the en banc court, it was learned that petitioner had recently received a waiver of the State's visual acuity requirement and is now employed by the City of Little Rock Police Department. That waiver mooted petitioner's claim for injunctive relief, leaving only a monetary damages claim in the case. Pet. App. 7a n.5.

5, only has the power to prohibit that which the Fourteenth Amendment prohibits.").[8]

Judge McMillian, writing for four judges, dissented. The dissent concluded that the Disabilities Act was a valid exercise of Congress's power to prohibit invidious and irrational discrimination against persons with disabilities. The dissent also disagreed with the majority's conclusion that the Section 5 power extended only to remedying existing discrimination, and not also to addressing the effects of past discrimination and deterring constitutional violations. In light of Congress's finding of extensive governmental discrimination against persons with disabilities, the dissent would have held that the Disabilities Act was an appropriate means of redressing constitutionally cognizable injuries. Pet. App. 29a-42a.

DISCUSSION

The holding of the en banc Eighth Circuit has significantly eroded the scope and operation of important civil rights legislation. The decision misreads this Court's precedents and 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).

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[8] With respect to the claims against state officials in their individual capacities, the court of appeals unanimously held that they were not proper defendants in a Title II action, Pet. App. 11a-12a n.8, and that Title II's remedial scheme precluded enforcement of the Disabilities Act against persons in their individual capacities through an action under 42 U.S.C. 1983, Pet. App. 25a-29a. The court did not decide whether state officials could be sued in their official capacities for injunctive relief, as petitioner had received the waiver he requested subsequent to filing suit. *Id.* at 7a-8a n.5, 25a n.19.

The decision, moreover, is in direct conflict with the rulings of six other circuits, including three decisions that were rendered subsequent to the Eighth Circuit's ruling 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, and *Kimel* v. *Florida Bd. of Regents*, No. 98-791 (both scheduled for oral argument 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 *Clark* v. *California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998); *Coolbaugh* v. *Louisiana*, 136 F.3d 430 (5th Cir.), cert. denied, 119 S. Ct. 58 (1998); *Kimel* v. *Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998), petition for cert. pending *sub nom. Florida Dep't of Corrections* v. *Dickson*, No. 98-829;[9] *Seaborn* v. *Florida*, 143 F.3d 1405 (11th Cir. 1998), cert. denied, 119 S. Ct. 1038 (1999); *Amos* v. *Maryland*

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[9] At the time we responded to the petition in *Dickson*, there was no circuit conflict, and we opposed certiorari predominantly on that ground. See Brief for the United States in Opposition at 5, 13-14, *Florida Dep't of Corrections* v. *Dickson*, *supra*. Now that a circuit conflict has been created, it would be appropriate to hold *Dickson*, as well as this case, as explained below.

Dep't of Pub. Safety & Correctional Servs., 178 F.3d 212 (4th Cir. 1999); see also *Torres* v. *Puerto Rico Tourism Co.*, 175 F.3d 1, 6 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").[10] The Eighth Circuit's decision is in direct conflict with the rulings of those courts. See also Pet. App. 17a n.13 ("[W]e part company with some circuits that have decided this issue.").[11]

The three courts of appeals that have considered or reconsidered the validity of the Disabilities Act's abro-

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[10] The Seventh Circuit also 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 (1997). The question of the continuing validity of *Crawford* is currently pending in *Erickson* v. *Board of Governors of State Colleges and Universities*, No. 95 C 2541, 1998 WL 748277 (N.D. Ill. Oct. 1, 1998), appeal pending, No. 98-3614 (7th Cir.) (oral argument heard April 27, 1999). The constitutionality of the Disabilities Act's abrogation is also pending in a number of cases before the Sixth Circuit, for which a consolidated oral argument is currently scheduled on October 26, 1999. See, *e.g.*, *Nihiser* v. *Ohio EPA*, 979 F. Supp. 1168 (S.D. Ohio 1997), appeal pending, No. 97-3933.

[11] The court found support for its decision (Pet. App. 18a 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 Disabilities Act's abrogation was unconstitutional as applied to a specific *regulation* that prohibited imposing surcharges for services required to be provided by the Disabilities Act. The court expressly disclaimed the intent to address Congress's power to enact provisions of the Disabilities Act. *Id.* at 704-705, 708 n.*. The Fourth Circuit has 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.

gation 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 *Dare* v. *California*, No. 97-56065, 1999 WL 717724 (9th Cir. Sept. 16, 1999); *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).

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 against invidious and irrational stereotypes that limit 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,[12] 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 required "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. 12101(b)(1), Congress acted consistently with this Court's decision in *City of Cleburne* v. *Cleburne Living Center, Inc.*, *supra*. 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 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.

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[12] See Brief for the United States in Opposition at 5-14, *Florida Dep't of Corrections* v. *Dickson*, *supra* (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.*, *supra* (No. 98-536).

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 the disabled. This Court reasoned that "[h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals." 473 U.S. at 442-443. 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. See 473 U.S. at 443; see also *Olmstead*, 119 S. Ct. at 2181 n.1.

Second, an extensive legislative record of studies and findings, moreover, 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).[13]

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[13] *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).

Third, the Disabilities Act's nondiscrimination provision and reasonable-accommodation requirements are reasonably tailored to combating invidious discrimination against persons with disabilities. Title II of the Disabilities Act does not require governmental entities to articulate a "compelling interest," but only requires "reasonable modifications" that do not "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7).

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 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 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*; see also Pet. App. 16a-17a, 20a (relying for Disabilities Act holding on *Humenansky* v. *Regents of the Univ. of Minn.*, 152 F.3d 822 (8th Cir. 1998), petition for cert. pending, No. 98-1235, in which the court found the ADEA to be in excess of Congress's Section 5 authority).

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.[14]

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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[14] Because the United States intervened in this litigation solely to defend the constitutionality of the Disabilities Act's abrogation provision, 28 U.S.C. 2403(a), we take no position on the appropriate disposition of the second question presented by the petition.