IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD K. LOVELL,

Plaintiff-Appellee

v.

SUSAN CHANDLER, in her official capacity as the Director of the Department of Humans Services of the State of Hawaii; STATE OF HAWAII,

Defendants-Appellants

DOUGLAS D. DELMENDO,

Plaintiff-Appellee

v.

SUSAN CHANDLER, in her official capacity as the Director of the Department of Humans Services of the State of Hawaii; STATE OF HAWAII,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIEF FOR THE UNITED STATES AS INTERVENOR

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 98-16545, 98-16548

RICHARD K. LOVELL,

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STATEMENT OF THE ISSUES

The United States will address the following questions:

1. Whether the statutory provision removing Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq*., is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

2. Whether the statutory provision removing Eleventh Amendment immunity for suits under Section 504 of the Rehabilitation Act, 29 U.S.C. 794, is a valid exercise of Congress's authority under the Spending Clause or Section 5 of the Fourteenth Amendment.

STATEMENT OF THE CASE

1. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, contains an "antidiscrimination mandate" that was enacted to "enlist[] all programs receiving federal funds" in Congress's attempt to eliminate discrimination against individuals with disabilities. *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15, 277 (1987). Congress found that "individuals with disabilities constitute one of the most disadvantaged groups in society," and that they "continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services." 29 U.S.C. 701(a)(2) & (a)(5).

2. Finding that Section 504 was not sufficient to bar discrimination against individuals with disabilities, Congress enacted the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, to establish a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, persons 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.

42 U.S.C. 12101(a)(5).

Furthermore, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6). "[T]he continuing existence of unfair and unnecessary discrimination and prejudice," Congress concluded, "denies people with disabilities the opportunity to compete on an equal

basis and to pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. 12101(a)(9). In short, Congress found that persons with disabilities

> 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)(7).

Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" as authority for its passage of the ADA. 42 U.S.C. 12101(b)(4). The ADA 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, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

3. This case involves a suit filed under Title II and Section 504. Title II 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 defined

to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B). A "[q]ualified individual with a disability" is a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service. 42 U.S.C. 12131(2). Title II does not normally require a public entity to make its existing physical facilities accessible, although alterations of those facilities and any new facilities must be made accessible. 28 C.F.R. 35.150(a)(1), 35.151. Department of Justice regulations provide that, except for new construction and alterations, public entities need not take any steps that would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. 35.150(a)(3); see also 28 C.F.R. 35.130(b)(7), 35.164; *Olmstead* v. *L.C.*, 527 U.S. 581, 606 n.16 (1999). Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). A "program or activity" is defined to include "all of the operations" of a state agency, university, or public system of higher education "any part of which is extended Federal

financial assistance." 29 U.S.C. 794(b). As with Title II, protections under Section 504 are limited to "otherwise qualified" individuals, that is those persons who can meet the "essential" eligibility requirements of the relevant program or activity with or without "reasonable accommodation[s]." *Arline*, 480 U.S. at 287 n.17. An accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on the grantee or requires "a fundamental alteration in the nature of [the] program." *Ibid.* Section 504 may be enforced through private suits against programs or activities receiving federal funds. See *Kling* v. *County of Los Angeles*, 633 F.2d 876, 878 (9th Cir. 1980). Congress expressly removed the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 2000d-7.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to this action brought by a private plaintiff under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act to remedy discrimination against persons with disabilities.

1. The Supreme Court in *University of Alabama* v. *Garrett*, 121 S. Ct. 955 (2001), reaffirmed that Congress had the power to abrogate States' Eleventh Amendment immunity to private damage actions under Section 5 of the Fourteenth Amendment, which authorizes Congress to enact "appropriate legislation" to "enforce" the rights protected by Section 1 of the Fourteenth Amendment. *Garrett* held that Congress's abrogation for Title I of the ADA was not "appropriate" because Congress had only identified six examples of potentially

unconstitutional discrimination by States against people with disabilities in employment and there was no evidence that Congress had made a legislative judgment that such discrimination by States was pervasive. The record before Congress of constitutional violations in employment did not provide a sufficient basis for Congress to abrogate immunity for a statutory scheme that was designed to remedy and deter constitutional violations.

In contrast, the record before Congress supported Congress's decision to abrogate Eleventh Amendment immunity for Title II. Congress assembled a record of constitutional violations by States – violations not only of the Equal Protection Clause but also of the full spectrum of constitutional rights the Fourteenth Amendment incorporates – which Congress in its findings determined "persist[ed]" in areas controlled exclusively or predominantly by States, such as education, voting, institutionalization, and public services. These well-supported findings justify the tailored remedial scheme embodied in Title II. Congress formulated a statute that is carefully designed to root out present instances of unconstitutional discrimination, to undo the effects of past discrimination, and to prevent future unconstitutional treatment by prohibiting discrimination and promoting integration where reasonable. At the same time, Title II preserves the latitude and flexibility States legitimately require in the administration of their programs and services. Title II accomplishes those objectives by requiring States to afford persons with disabilities genuinely equal access to services and programs, while at the same time confining the statute's protections to "qualified

individual[s]," who by definition meet all of the States' legitimate and essential eligibility requirements. Title II simply requires "reasonable" modifications that do not impose an undue burden and do not fundamentally alter the nature or character of the governmental program. The statute is thus carefully tailored to prohibit only state conduct that presents a substantial risk of violating the Constitution or that unreasonably perpetuates the exclusionary effects of the prior irrational governmental segregation of persons with disabilities.

2. In addition, Congress validly removed States' immunity to private suits brought to enforce Section 504 of the Rehabilitation Act. Section 2000d-7 of Title 42 contains an express statutory provision removing Eleventh Amendment immunity for Section 504 suits. If this Court upholds the constitutionality of Title II's abrogation, then the validity of Section 2000d-7 follows as a matter of course. In any event, this provision is a valid exercise of Congress's power under the Spending Clause to impose unambiguous conditions on States receiving federal funds. By enacting Section 2000d-7, Congress put state agencies on notice that accepting federal funds waived their Eleventh Amendment immunity to discrimination suits under Section 504.

ARGUMENT

I

CONGRESS VALIDLY REMOVED STATES' ELEVENTH AMENDMENT IMMUNITY TO PRIVATE SUITS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT

In *University of Alabama* v. *Garrett*, 121 S. Ct. 955, 962 (2001), the Supreme Court reaffirmed that Section 5 of the Fourteenth Amendment grants Congress the power to abrogate the State's Eleventh Amendment immunity to private damage suits. In assessing the validity of "§ 5 legislation reaching beyond the scope of § 1's actual guarantees," the legislation "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 121 S. Ct. at 963 (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)). This requires a three-step analysis: first, a court must "identify with some precision the scope of the constitutional right at issue," *id*. at 963; second, the court must "examine whether Congress identified a history and pattern of unconstitutional * * * discrimination by the States against the disabled," *id*. at 964; finally, the Court must assess whether the "rights and remedies created" by the statute were "designed to guarantee meaningful enforcement" of the constitutional rights that Congress determined the States were violating, *id*. at 966, 967.

Applying these "now familiar principles," *id*. at 963, the Court in *Garrett* held that Congress did not validly abrogate States' Eleventh Amendment immunity to suits by private individuals for money damages under Title I of the

ADA. The Court concluded that Congress had identified only "half a dozen" incidents of relevant conduct (*i.e.*, potentially unconstitutional discrimination by States as *employers* against people with disabilities), *id*. at 965, and had not made a specific finding that discrimination in public sector employment was pervasive, *id*. at 966. Thus, the Court held, Congress did not assemble a sufficient basis to justify Title I's abrogation of Eleventh Amendment immunity for its prophylactic statutory remedies. *Id*. at 967.

The Supreme Court specifically reserved the question about which this Court requested supplemental briefing, whether Title II's abrogation can be upheld as valid Section 5 legislation.[1] The Supreme Court noted that Title II "has

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[1] Although defendants argued in the related *Burns-Vidlak* litigation that the Eleventh Amendment barred plaintiffs' claims for *punitive* damages, they did not invoke immunity to plaintiffs' Title II and Section 504 claims for restitution and compensatory damages; instead, they conceded that the Eleventh Amendment was no bar to such claims. See *Burns-Vidlak* v. *Chandler*, 165 F.3d 1257, 1260 (9th Cir. 1999) ("the state concedes that it is subject to suit, and answerable in money damages, in federal court on the appellees' Title II and Section 504 claims"); Defendants-Appellants' Petition for Reh'g & Suggestion for Reh'g En Banc, *Burns-Vidlak* v. *Chandler*, No. 97-16329, at 5 (Feb. 2, 1999) ("Hawaii is *not* asserting a right [under the Eleventh Amendment] to avoid trial and discovery burdens on *all issues* in the case, and instead concedes that Hawaii may have to bear the burdens of trial and discovery on non-punitive damage issues"); *id*. at 5 n.2 ("Defendants understand the panel's statement * * * to mean only that the state concedes that it may have no *Eleventh Amendment immunity* from suit on *non-punitive* money damages."); *id*. at 6 ("That Hawaii would still have to stand trial on the other remedies (e.g. compensatory damages) does *not* negate Hawaii's strong Eleventh Amendment interest in not incurring the *additional* burden and indignity of discovery and trial on punitive damages."). Nor is there any

(continued...)

somewhat different remedial provisions from Title I," *id*. at 960 n.1, and that the legislative record for those activities governed by Title II was more extensive, see *id*. at 966 n.7. Less than a week after deciding *Garrett*, the Supreme Court denied a petition for certiorari filed by California and let stand this Court's holding that Title II's abrogation was valid Section 5 legislation. See *Dare* v. *California*, 191 F.3d 1167 (9th Cir. 1999), cert. denied, 121 S. Ct. 1187 (2001).

As the Court's disposition of *Dare* indicates, *Garrett* does not imply that Title II's abrogation exceeds Congress's power under Section 5. For Title II differs from Title I in four significant respects. First, Congress made express findings of persistent discrimination in "public services" generally, including services provided by States, as well as specific areas of traditional state concern, such as voting, education, and institutionalization. Second, Congress's findings were based on an extensive record of unconstitutional state conduct regarding people with disabilities in the areas covered by Title II, a record more extensive

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[1](...continued)
indication in their appellate brief that defendants raised the Eleventh Amendment in the district court in either of these individual actions. A state defendant can be barred from raising an Eleventh Amendment argument on appeal when it litigates the case in the district court on the merits instead of raising its immunity claim in a timely manner. See *Hill* v. *Blind Indus. & Servs.*, 179 F.3d 754, 758-759 (9th Cir. 1999), amended, 201 F.3d 1186 (2000). Because of our status as intervenor, and because this Court agreed to supplemental briefing on the constitutional questions, we have elected to address the constitutionality of the provisions removing Eleventh Amendment immunity for these statutes without addressing the antecedent question whether the issue is properly presented in these appeals.

than existed for employment alone. Third, unlike Title I, which was intended simply to redress violations of the Equal Protection Clause as applied to a non-suspect class in an area (employment) not otherwise subject to heightened scrutiny, the range of constitutional violations implicated by Title II extends to areas where heightened judicial scrutiny is appropriate and where even policies subject to rational-basis review cannot always be justified by cost or administrative efficiency alone. Finally, the remedy enacted by Congress is more proportional and congruent to this record of violations than the record discussed in *Garrett*. We address each point in turn.

A. *Congress Identified Ample Evidence Of A Long History And A Continuing Problem Of Unconstitutional Treatment Of Persons With Disabilities By States And Made Express Findings On The Subject*

Congress engaged in extensive study and fact-finding concerning the problem of discrimination against persons with disabilities, holding 13 hearings devoted specifically to the consideration of the ADA.[2] In addition, a

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[2] See *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary and the Subcomm. on Civil and Const. Rights*, 101st Cong., 1st Sess. (1989); *Americans with Disabilities Act: Hearing on H.R. 2273 and S. 933 Before the Subcomm. on Transp. and Haz. Materials of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities Act: Hearings on H.R. 2273 Before the Subcomm. on Surface Transp. of the House Comm. on Pub. Works and Transp.*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities: Telecomm. Relay Servs., Hearing on Title V of H.R. 2273 Before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1990); *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomm. on Select Educ. of the House*

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congressionally designated Task Force held 63 public forums across the country, which were attended by more than 7,000 individuals. Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 18 (1990) (Task Force Report). The Task Force also presented to Congress evidence submitted by nearly 5,000 individuals documenting the problems with discrimination faced daily by persons with disabilities – often at the hands of state governments. See 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act*, 100th Cong., 2d Sess. 1040 (Comm. Print 1990) (*Leg. Hist.*); Task Force Report 16. Congress also considered several reports and surveys. See S. Rep.No. 116, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28

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[2](...continued)
Comm. on Educ. and Labor, 101st Cong., 1st Sess. (1989); *Field Hearing on Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (1989); *Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: Joint Hearing Before the Subcomm. on Employment Opps. and Select Educ. of the House Comm. on Educ. and Labor*, 101st Cong., 1st Sess. (July 18 & Sept. 13, 1989); *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2d Sess. (1989); *Americans with Disabilities Act: Hearing Before the House Comm. on Small Bus.*, 101st Cong., 2d Sess. (1990); *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Res. and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. (1989) (*May 1989 Hearings*); *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 Res. and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2nd Sess. (1989).

(1990); Task Force Report 16.[3]

1. *Congressional Findings*: As the Supreme Court in *Garrett* acknowledged, 121 S. Ct. at 966 n.7, the record of adverse conduct by States toward people with disabilities was both broader and deeper than the six incidents Congress identified with regard to state employment. Equally important, after amassing the record we discuss below, Congress brought its legislative judgment to bear on the issue and expressly found that discrimination was pervasive in these areas. Unlike state employment, where Congress made a finding about private employment, but no analogous finding for public employment, *id*. at 966, in the text of statute itself Congress made express findings of persisting discrimination in "education, * * * institutionalization, * * * voting, and access to public services." 42 U.S.C. 12101(a)(3). The first three areas are fields predominated by States and the last is, under the terms of the statute, the exclusive domain of state and local governments. See 104 Stat. 337 (title of Title II is "Public Services"); 42 U.S.C. 12131(1) (limiting term "public entity" to state and local governments and Amtrak). Similarly, the same Committee Reports that the Court in *Garrett* found lacking with regard to public employment are directly on point with regard to

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[3] These included the two reports of the National Council on the Handicapped; the Civil Rights Commission's *Accommodating the Spectrum of Individual Abilities* (1983) (*Spectrum*); two polls conducted by Louis Harris & Assoc., *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (1986), and *The ICD Survey II: Employing Disabled Americans* (1987); a report by the Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988); and eleven interim reports submitted by the Task Force.

public services, declaring that "there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of employment in the private sector, public accommodations, *public services*, transportation, and telecommunications." H.R. Rep. No. 485, *supra*, Pt. 2, at 28 (emphasis added); see also S. Rep. No. 116, *supra*, at 6 ("Discrimination still persists in such critical areas as employment in the private sector, public accommodations, *public services*, transportation, and telecommunications." (emphasis added)). The judgment of a co-equal branch of government – embodied in the text of the statute and its committee reports – that a pattern of State discrimination persists and requires a federal remedy is entitled to "a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985); see also *Board of Educ.* v. *Mergens*, 496 U.S. 226, 251 (1990). This judgment was supported by ample evidence.

2. *Historic Discrimination*: The "propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.'" *Florida Prepaid Postsec. Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 640 (1999). Congress and the Supreme Court have long acknowledged the Nation's "history of unfair and often grotesque mistreatment" of persons with disabilities. *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 454 (1985) (Stevens, J., concurring); see *id*. at 461 (Marshall, J., concurring in the judgment in part); see

also *Olmstead* v. *L.C.*, 527 U.S. 581, 608 (Kennedy, J., concurring) ("[O]f course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility."); *Alexander* v. *Choate*, 469 U.S. 287, 295 n.12 (1985) ("well-cataloged instances of invidious discrimination against the handicapped do exist").

That "lengthy and tragic history," *Cleburne*, 473 U.S. at 461 (Marshall, J.), of discrimination, segregation, and denial of basic civil and constitutional rights for persons with disabilities assumed an especially pernicious form in the early 1900s, when the eugenics movement and Social Darwinism labeled persons with mental and physical disabilities "a menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems." *Id*. at 462 (Marshall, J.); see also Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* 19 (1983) (*Spectrum*). Persons with disabilities were portrayed as "sub-human creatures" and "waste products" responsible for poverty and crime. *Spectrum* 20. "A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Cleburne*, 473 U.S. at 462 (Marshall, J.). Every single State, by law, provided for the segregation of persons with mental disabilities and, frequently, epilepsy, and excluded them from public schools and other state services and privileges of citizenship.[4] States also fueled

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[4] See also *Cleburne*, 473 U.S. at 463 (Marshall, J.) (state laws deemed persons

(continued...)

the fear and isolation of persons with disabilities by requiring public officials and parents, sometimes at risk of criminal prosecution, to report and segregate into institutions the "feeble-minded." *Spectrum* 20, 33-34. With the aim of halting reproduction and "nearly extinguish[ing] their race," *Cleburne*, 473 U.S. at 462 (Marshall, J.), almost every State accompanied forced segregation with compulsory sterilization and prohibitions of marriage, see *id*. at 463; see also *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) (upholding state compulsory sterilization law "in order to prevent our being swamped with incompetence"); 3 *Leg. Hist.* 2242 (James Ellis).

Children with mental disabilities were labeled "ineducable" and categorically excluded from public schools to "protect nonretarded children from them." *Cleburne*, 473 U.S. at 463 (Marshall, J.); see also *Board of Educ.* v. *Rowley*, 458 U.S. 176, 191 (1982) ("many of these children were excluded completely from any form of public education").[5] Numerous States also restricted the rights of physically disabled people to enter into contracts. See *Spectrum* 40.

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[4](...continued)
with mental disorders "unfit for citizenship"); Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979).

[5] See also *State ex rel. Beattie* v. *Board of Educ.*, 172 N.W. 153, 153 (Wis. 1919) (approving exclusion of a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children") (noted at 2 *Leg. Hist.* 2243); see generally T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 399-407 (1991) .

3. *The Enduring Legacy of Governmental Discrimination*: "Prejudice, once let loose, is not easily cabined." *Cleburne*, 473 U.S. at 464 (Marshall, J.). "[O]ut-dated statutes are still on the books, and irrational fears or ignorance, *traceable to the prolonged social and cultural isolation*" of those with disabilities "continue to stymie recognition of the[ir] dignity and individuality." *Id*. at 467 (emphasis added).[6] Consequently, "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination." S. Rep. No. 116, *supra*, at 8-9.[7]

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[6] For example, as recently as 1983, 15 States continued to have compulsory sterilization laws on the books, four of which included persons with epilepsy. *Spectrum* 37; see also *Stump* v. *Sparkman*, 435 U.S. 349, 351 (1978) (Indiana judge ordered the sterilization of a "somewhat retarded" 15-year-old girl). As of 1979, "most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials." *Cleburne*, 473 U.S. at 464 (Marshall, J.).

[7] See also 3 *Leg. Hist.* 2020 (Att'y Gen. Thornburgh) ("But persons with disabilities are all too often not allowed to participate because of stereotypical notions held by others in society – notions that have, in large measure, been created by ignorance and maintained by fear."); 2 *Leg. Hist.* 1606 (Arlene Mayerson) ("Most people assume that disabled children are excluded from school or segregated from their non-disabled peers because they cannot learn or because they need special protection. Likewise, the absence of disabled co-workers is simply considered confirmation of the obvious fact that disabled people can't work. These assumptions are deeply rooted in history."); 134 Cong. Rec. E1311 (daily ed. 1988) (Rep. Owens) ("The invisibility of disabled Americans was

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Moreover, as we detail below based on the testimony of hundreds of witnesses before Congress and at the Task Force's forums,[8] Congress found, as a matter of present reality and historical fact, that discrimination pervaded state governmental operations and that persons with disabilities have been and are subjected to "widespread and persisting deprivation of [their] constitutional rights." *Florida Prepaid*, 527 U.S. at 645; see 42 U.S.C. 12101(a)(2) and (a)(3).

In particular, Congress reasonably discerned a substantial risk that persons with disabilities will be subjected to unconstitutional discrimination by state governments in the form of "arbitrary or irrational" distinctions and exclusions, *Cleburne*, 473 U.S. at 446. In addition, the evidence before Congress established that States structure governmental programs and operations in a manner that has the effect of denying persons with disabilities the equal opportunity to obtain vital services and to exercise fundamental rights (such as the rights to vote, to petition government officials, to contract, to adequate custodial treatment, and to equal

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[7](...continued)
simply taken for granted. Disabled people were out of sight and out of mind.").

[8] The Task Force submitted to Congress "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" and "the most extreme isolation, unemployment, poverty, psychological abuse and physical deprivation experienced by any segment of our society." 2 *Leg. Hist.* 1324-1325. Those documents – mostly handwritten letters and commentaries collected during the Task Force's forums – were part of the official legislative history of the ADA. See *id*. at 1336, 1389. Both the majority and dissent in *Garrett* relied on these documents, see 121 S. Ct. at 965, with the dissent citing to them by State and Bates stamp number, *id*. at 976-993 (Breyer, J., dissenting), a practice we follow.

access to the courts and public education) in violation of the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments. The scope of the testimony offered to Congress regarding unconstitutional treatment swept so broadly, touching virtually every aspect of individuals' encounters with their government, as to defy isolating the problem into select categories of state action. Nonetheless, by necessity, we have divided the evidence into sections touching on various areas of constitutional import.

(a) *Voting, Petitioning and Access to Courts*: Voting is the right that is "preservative of all rights," *Katzenbach* v. *Morgan*, 384 U.S. 641, 652 (1966), and the Equal Protection Clause subjects voting classifications to strict scrutiny to guarantee "the opportunity for equal participation by all voters" in elections, *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966).

Congress heard that "in the past years people with disabilities have been turned away from the polling places after they have been registered to vote because they did not look competent." 2 *Leg. Hist.* 1220 (Nancy Husted-Jensen). When one witness turned in the registration card of a voter who has cerebral palsy and is blind, the "clerk of the board of canvassers looked aghast * * * and said to me, 'Is that person competent? Look at that signature." The clerk then arbitrarily invented a reason to reject the registration. *Id*. at 1219. Congress was also aware that a deaf voter was told that "you have to be able to use your voice" to vote. *Equal Access to Voting for Elderly and Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin.*, 98th Cong., 1st

Sess. 94 (1984) (*Equal Access to Voting Hearings*). "How can disabled people have clout with our elected officials when they are aware that many of us are prevented from voting?" Ark. 155.[9]

The denial of access to political officials and vital governmental services also featured prominently in the testimony. For example, "[t]he courthouse door is still closed to Americans with disabilities" – literally. 2 *Leg. Hist.* 936 (Sen. Harkin).

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[9] "A blind woman, a new resident of Alabama, went to vote and was refused instructions on the operation of the voting machine." Ala. 16. Another voter with a disability was "told to go home once when I came to the poll and found the voting machines down a flight of stairs with no paper ballots available"; on another occasion that voter "had to shout my choice of candidates over the noise of a crowd to a precinct judge who pushed the levers of the machine for me, feeling all the while as if I had to offer an explanation for my decisions." *Equal Access to Voting Hearings* 45. The legislative record also documented that many persons with disabilities "cannot exercise one of your most basic rights as an American" because polling places were frequently inaccessible. S. Rep. No. 116, *supra*, at 12. As a consequence, persons with disabilities "were forced to vote by absentee ballot before key debates by the candidates were held." *Ibid.*; see also *May 1989 Hearings* 76 (Ill. Att'y Gen. Hartigan) (similar). And even when persons with disabilities have voted absentee, they have been treated differently from other absentee voters. See 2 *Leg. Hist.* 1745 (Nanette Bowling) ("[S]ome jurisdictions merely encouraged persons with disabilities to vote by absentee ballot * * * [which] deprives the disabled voter of an option available to other absentee voters, the right to change their vote by appearing personally at the polls on election day."); *Equal Access to Voting Hearings* 17, 461 (criticizing States' imposition of special certification requirements on persons with disabilities for absentee voting); see generally FEC, *Polling Place Accessibility in the 1988 General Election* 7 (1989) (21% of polling places inaccessible; 27% were inaccessible in 1986 elections).

> I went to the courtroom one day and * * * I could not get into the building because there were about 500 steps to get in there. Then I called for the security guard to help me, who * * * told me there was an entrance at the back door for the handicapped people. * * * I went to the back door and there were three more stairs for me to get over to be able to ring a bell to announce my arrival so that somebody would come and open the door and maybe let me in. I was not able to do that. * * * This is the court system that is supposed to give me a fair hearing. It took me 2 hours to get in. * * * And when [the judge] finally saw me in the courtroom, he could not look at me because of my wheelchair. * * * The employees of the courtroom came back to me and told me, "You are not the norm. You are not the normal person we see every day."

Id. at 1071 (Emeka Nwojke).

Numerous other witnesses explained that access to the courts[10] and other important government buildings and officials[11] depended upon their willingness to

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[10] See, *e.g.*, Ala. 15 ("A man, called to testify in court, had to get out of his wheelchair and physically pull himself up three flights of stairs to reach the courtroom."); W. Va. 1745 (witness in court case had to be carried up two flights of stairs because the sheriff would not let him use the elevator).

[11] See, *e.g.*, H.R. Rep. No. 485, *supra*, Pt. 2, at 40 (town hall and public schools inaccessible); 2 *Leg. Hist.* 1331 (Justin Dart) ("We have clients whose children have been taken away from them and told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?"); *Spectrum* 39 (76% of State-owned buildings offering services and programs for the general public are inaccessible and unusable for persons with disabilities); *May 1989 Hearings* 488, 491 (Ill. Att'y Gen. Hartigan) ("I have had innumerable complaints regarding lack of access to public services – people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building"; "individuals who are deaf or hearing impaired call[] our office for assistance because the arm of government they need to reach is not accessible to them"); *id*. at 76 ("[Y]ou cannot attend town council meetings on the second story of a building that does not have

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crawl or be carried. And Congress was told that state officials *themselves* had "pointed to negative attitudes and misconceptions as potent impediments to [their own] barrier removal policies." Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* 87 (Apr. 1989).

The physical exclusion of people with disabilities from public buildings has special constitutional import when court proceedings are taking place inside. For criminal defendants, the Due Process Clause has been interpreted to provide that

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[11](...continued)
an elevator."); *id*. at 663 (Dr. Mary Lynn Fletcher) (to attend town meetings, "I (or anyone with a severe mobility impairment) must crawl up three flights of circular stairs to the 'Court Room.' In this room all public business is conducted by the county government whether on taxes, zoning, schools or any type of public business."); Ala. 17 (every day at her job, the Director of Alabama's Disabled Persons Protection Commission "ha[d] to drive home to use the bathroom or call my husband to drive in and help me because the newly renovated State House" lacked accessible bathrooms); Alaska 73 ("We have major problems in Seward, regarding accessibility to City and State buildings for the handicapped." City Manager responded that "[H]e runs this town * * * and no one is going to tell him what to do."); Ind. 626 ("Raney, who has been in a wheelchair for 12 years, tried three times last year to testify before state legislative committees. And three times, he was thwarted by a narrow set of Statehouse stairs, the only route to the small hearing room."); Ind. 651 (person with disabilities could not attend government meetings or court proceedings because entrances and locations were inaccessible); Wis. 1758 (lack of access to City Hall); Wyo. 1786 (individual unable to get a marriage license because the county courthouse was not wheelchair accessible); Calif. Att'y Gen., *Commission on Disability: Final Report* 70 (Dec. 1989) ("People with disabilities are often unable to gain access to public meetings of governmental and quasi-governmental agencies to exercise their legal right to comment on issues that impact their lives.").

"an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975). The Sixth Amendment "grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'" *Id*. at 819. Parties in civil litigation have an analogous Due Process right to be present in the courtroom unless their exclusion furthers important government interests. See, *e.g.*, *Helminski* v. *Ayerst Labs.*, 766 F.2d 208, 213 (6th Cir.), cert. denied, 474 U.S. 981 (1985).

(b) *Education:* "[E]ducation is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Accordingly, where the State undertakes to provide a public education, that right "must be made available to all on equal terms." *Ibid*. But Congress learned that irrational prejudices, fears, ignorance, and animus still operate to deny persons with disabilities an equal opportunity for public education. For example, California reported that in its school districts (which are covered by the Eleventh Amendment, see n.30, *infra)*, "[a] bright child with cerebral palsy is assigned to a class with mentally retarded and other developmentally disabled children solely because of her physical disability" and that in one California town, all disabled children are grouped into a

single classroom regardless of individual ability. Calif. Att'y Gen., *Commission on Disability: Final Report* 17, 81 (Dec. 1989) (*Calif. Report*). "When I was 5," a witness testified to Congress, "my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard." S. Rep. No. 116, *supra*, at 7.[12]

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[12] See also 136 Cong. Rec. H2480 (daily ed. May 17, 1990) (Rep. McDermott) (school board excluded Ryan White, who had AIDS, not because the board "thought Ryan would infect others" but because "some parents were afraid he would"); 2 *Leg. Hist.* 989 (Mary Ella Linden) ("I was considered too crippled to compete by both the school and my parents. In fact, the [segregated] school never even took the time to teach me to write! * * * The effects of the school's failure to teach me are still evident today."); Alaska 38 (school district labeled child with cerebral palsy who subsequently obtained a Masters Degree as mentally retarded); Neb. 1031 (school district labeled as mentally retarded a blind child); Or. 1375 (child with cerebral palsy was "given cleaning jobs while other[] [non-disabled students] played sports"); Vt. 1635 (quadriplegic woman with cerebral palsy and a high intellect, who scored well in school, was branded "retarded" by educators, denied placement in a regular school setting, and placed with emotionally disturbed children, where she was told she was "not college material"); *Spectrum* 28, 29 ("a great many handicapped children" are "excluded from the public schools" or denied "recreational, athletic, and extracurricular activities provided for non-handicapped students"); see also *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Pub. Welfare*, 93d Cong., 1st Sess. 384 (1973) (Peter Hickey) (student in Vermont was forced to attend classes with students two years behind him because he could not climb staircase to attend classes with his peers); *id*. at 793 (Christine Griffith) (first-grade student "was spanked every day" because her deafness prevented her from following instructions); *id*. at 400 (Mrs. Richard Walbridge) (student with spina bifida barred from the school library for two years "because her braces and crutches made too much noise").

State institutions of higher education also demonstrated prejudices and stereotypical thinking. A person with epilepsy was asked to leave a state college because her seizures were "disrupt[ive]" and, officials said, created a risk of liability. 2 *Leg. Hist.* 1162 (Barbara Waters). A doctor with multiple sclerosis was denied admission to a psychiatric residency program because the state admissions committee "feared the negative reactions of patients to his disability." *Id*. at 1617 (Arlene Mayerson). Another witness explained that, "when I was first injured, my college refused to readmit me" because "it would be 'disgusting' to my roommates to have to live with a woman with a disability." Wash. 1733.[13] This evidence is consistent with the finding of the Commission on Civil Rights, also before Congress, that the "higher one goes on the education scale, the lower the proportion of handicapped people one finds." *Spectrum* 28; see also National Council on the Handicapped, *On the Threshold of Independence* 14 (1988) (29% of disabled persons had attended college, compared to 48% of the non-disabled

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[13] See also 2 *Leg. Hist.* 1224 (Denise Karuth) (state university professor asked a blind student enrolled in his music class "What are you doing in this program if you can't see"; student was forced to drop class); *id*. at 1225 (state commission refuses to sponsor legally blind student for masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors, '[s]ince,' and this is a quote: 'they could not drive to see their clients'"); Wis. 1757 (a doctoral program would not accept a person with a disability because "it never worked out well"); S.D. 1476 (University of South Dakota dean and his successor were convinced that blind people could not teach in the public schools); *Calif. Report* 138; J. Shapiro, *No Pity* 45 (1994) (Dean of the University of California at Berkeley told a prospective student that "[w]e've tried cripples before and it didn't work").

population). Although such a finding does not indicate what percentage of the population have conditions such as mental retardation that might affect skills required for higher education, "they nonetheless are evidence of a substantial disparity." *Spectrum* 28. Such gross statistical disparities can be sufficient to show unconstitutional conduct. See *Garrett*, 121 S. Ct. at 967 (discussing with approval reliance on "50-percentage point gap" between white and black registration rates in finding discrimination by States in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966)).

(c) *Law Enforcement*: Persons with disabilities have also been victimized in their dealings with law enforcement. When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." 2 *Leg. Hist.* 1005 (Belinda Mason). Police refused to accept a rape complaint from a blind woman because she could not make a visual identification, ignoring the possibility of alternative means of identifying the perpetrator. N.M. 1081. A person in a wheelchair was given a ticket and six-months probation for obstructing traffic on the street, even though the person could not use the sidewalk because it lacked curb cuts. Va. 1684. Task Force Chairman Justin Dart testified, moreover, that persons with hearing impairments "have been arrested and held in jail over night without ever knowing their rights nor what they are being held for." 2 *Leg. Hist.* 1331.[14] The

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[14] See also 2 *Leg. Hist.* 1115 (Paul Zapun) (sheriff threatens persons with

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discrimination continues in correctional institutions. "I have witnessed their jailers rational[ize] taking away their wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs." 2 *Leg. Hist.* 1190 (Cindy Miller).[15] These problems implicate the entire array of constitutional protections for those in state custody for alleged or proven criminal behavior (including the Fourth Amendment right to be free from unreasonable seizures, the substantive due process rights of pre-trial detainees, the procedural due process

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[14](...continued)
disabilities who stop in town due to car trouble); *id*. at 1196 (Cindy Miller) (police "do not provide crime prevention, apprehension or prosecution because they see it as fate that Americans with disabilities will be victims"); *id*. at 1197 (police officer taunted witness by putting a gun to her head and pulling the trigger on an empty barrel, "because he thought it would be 'funny' since I have quadraparesis and couldn't flee or fight"); Tex. 1541 (police refused to take an assault complaint from a person with a disability); *Calif. Report* 101-104 (additional examples). In addition, persons with disabilities, such as epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, *supra*, Pt. 3, at 50; see also 136 Cong. Rec. H2633 (daily ed. May 22, 1990) (Rep. Levine); Wyo. 1777; Idaho 517.

[15] See also *Spectrum* 168 (noting discrimination in treatment and rehabilitation programs available to inmates with disabilities and inaccessible jail cells and toilet facilities); *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986) (prison guard repeatedly assaulted paraplegic inmates with knife, forced them to sit in own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead"); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1466 (M.D. Ala. 1994) (paraplegic prisoner denied use of a wheelchair and forced to crawl around his cell); *Calif. Report* 103 ("[A] parole agent sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though he explained that he could not make the appointments because he was unable to get accessible transportation.").

and Sixth Amendment rights to fair and open criminal proceedings, and the Eighth Amendment right to be free from cruel and unusual punishment upon conviction).

(d) *Institutionalization*: Unconstitutional denials of appropriate treatment and unreasonable institutionalization of persons in state mental hospitals were also catalogued. See 2 *Leg. Hist.* 1203 (Lelia Batten) (state law ineffective; state hospitals are "notorious for using medication for controlling the behavior of clients and not for treatment alone. Seclusion rooms and restraints are used to punish clients."); *id*. at 1262-1263 (Eleanor C. Blake) (detailing the "minimal, custodial, neglectful, abusive" care received at state mental hospital, and willful indifference resulting in rape); *Spectrum* 34-35.[16] Unnecessary institutionalization

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[16] See also *Calif. Report* 114. Congress also brought to bear the knowledge it had acquired of this problem in enacting the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349, codified at 42 U.S.C. 1997 *et seq.*, and the Developmental Disabilities Act of 1984, 42 U.S.C. 6000 *et seq*. See, *e.g.*, 132 Cong. Rec. S5914-01 (daily ed. May 14, 1986) (Sen. Kerry) (findings of investigation of State-run mental health facilities "were appalling. The extent of neglect and abuse uncovered in their facilities was beyond belief."); *Civil Rights of Instit. Persons: Hearings on S. 1393 Before the Subcomm. on the Const. of the Sen. Comm. on the Judiciary*, 95th Cong., 1st Sess. 127 (1977) (Michael D. McGuire, M.D.) ("it became quite clear * * * that the personnel regarded patients as animals, * * * and that group kicking and beatings were part of the program"); *id.* at 191-192 (Dr. Philip Roos) (characterizing institutions for persons with mental retardation throughout the nation as "dehumanizing," "unsanitary and hazardous conditions," "replete with conditions which foster regression and deterioration," "characterized by self-containment and isolation, confinement, separation from the mainstream of society"); *Civil Rights for Instit. Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, of the House Comm. on the Judiciary*, 95th

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and mistreatment within state-run facilities may violate substantive due process. See *Youngberg* v. *Romeo*, 457 U.S. 307 (1982) (unconstitutional conditions of confinement); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) (impermissible confinement); *Thomas S. by Brooks* v. *Flaherty*, 902 F.2d 250 (4th Cir.) (confinement when appropriate community placement available), cert. denied, 498 U.S. 951 (1990); *Clark* v. *Cohen*, 794 F.2d 79 (3d Cir.) (same), cert. denied, 479 U.S. 962 (1986) .

(e) *Other Public Services*: Congress heard evidence that irrational discrimination permeated the entire range of services offered by governments. Programs as varied as zoning[17]; the operation of zoos,[18] public libraries,[19] public

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[16](...continued)
Cong., 1st Sess. 239 (1977) (Stanley C. Van Ness) (describing "pattern and practice of physical assaults and mental abuse of patients, and of unhealthy, unsanitary, and anti-therapeutic living conditions" in New Jersey state institutions); *Civil Rights of Instit. Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 34 (1979) (Paul Friedman) ("[A] number of the residents were literally kept in cages. A number of those residents who had been able to walk and who were continent when they were committed had lost the ability to walk, had become incontinent, and had regressed because of these shockingly inhumane conditions of confinement.").

[17] Congress knew that *Cleburne* was not an isolated incident. See 2 *Leg. Hist.* 1230 (Larry Urban); Wyo. 1781 (zoning board declined to authorize group home because of "local residents' unfounded fears that the residents would be a danger to the children in a nearby school"); Nev. 1050 (Las Vegas has passed an ordinance that disallows the mentally ill from living in residential areas); N.J. 1068 (group home for those with head injuries barred because public perceived

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swimming pools and park programs[20]; and child custody proceedings[21] exposed

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[17](...continued)
such persons as "totally incompetent, sexual deviants, and that they needed 'room to roam'"; "Officially, the application was turned down due to lack of parking spaces, even though it was early established that the residents would not have automobiles.").

[18] A zoo keeper refused to admit children with Down Syndrome "because he feared they would upset the chimpanzees." S. Rep. No. 116, *supra*, at 7; H.R. Rep. No. 485, *supra*, Pt. 2, at 30.

[19] See 2 *Leg. Hist.* 1100 (Shelley Teed-Wargo) (town library refused to let person with mental retardation check out a video "because he lives in a group home," unless he was accompanied by a staff person or had a written permission slip); Pa. 1391 (public library will not issue library cards to residents of group homes without the countersignature of a staff member – this rule applies to "those having physical as well as mental disabilities").

[20] A paraplegic Vietnam veteran was forbidden to use a public pool in New York; the park commissioner explained that "[i]t's not my fault you went to Vietnam and got crippled." 3 *Leg. Hist.* 1872 (Peter Addesso); see also *id*. at 1995 (Rev. Scott Allen) (woman with AIDS and her children denied entry to a public swimming pool); *May 1989 Hearings* 76 (Ill. Att'y Gen. Hartigan) (visually impaired children with guide dogs "cannot participate in park district programs when the park has a 'no dogs' rule").

[21] See H.R. Rep. No. 485, *supra*, Pt. 3, at 25 ("These discriminatory policies and practices affect people with disabilities in every aspect of their lives * * * [including] securing custody of their children."); *id*., Pt. 2, at 41 ("[B]eing paralyzed has meant far more than being unable to walk – it has meant being excluded from public schools * * * and being deemed an 'unfit parent'" in custody proceedings.); 2 *Leg. Hist.* 1611 n.10 (Arlene Mayerson) ("Historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent."); Mass. 829 (government refuses to authorize couple's adoption solely because woman had muscular dystrophy); *Spectrum* 40; *No Pity*, *supra*, at 26 (woman with cerebral palsy denied custody of her two sons; children placed in

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the discriminatory actions and attitudes of officials.[22]

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[21](...continued)
foster care instead); *Carney* v. *Carney*, 598 P.2d 36, 42 (Cal. 1979) (lower court "stereotype[d] William as a person deemed forever unable to be a good parent simply because he is physically handicapped").

[22] See also H.R. Rep. No. 485, *supra*, Pt. 2, at 46 ("How many well educated and highly capable people with disabilities must sit down at home every day, not because of their lack of ability, but because of the attitudes of employers, service providers, and government officials?"); 2 *Leg. Hist.* 1061 (Eric Griffin) ("I come to you as one of those * * * who was denied a public education until age 18, one who has been put through the back door, and kept out of the front door and segregated even if you could get in."); *id*. at 1078 (Ellen Telker) ("State and local municipalities do not make many materials available to a person who is unable to read print."); *id*. at 1116 (Virginia Domini) (persons with disabilities "must fight to function in a society where busdrivers start moving before I have my balance or State human resources [sic] yell 'I can't understand you,' to justify leaving a man without food or access to food over the weekend."); *id*. at 1017 (Judith Heumann) ("Some of these people are in very high places. In fact, one of our categories of great opposition is local administrators, local elected officials."); 3 *Leg. Hist.* 2241 (James Ellis) ("Because of their disability, people with mental retardation have been denied the right to marry, the right to have children, the right to vote, the right to attend public school, and the right to live in their own community, with their own families and friends."); 2 *Leg. Hist.* 1768 (Rick Edwards) ("Why are the new drinking fountains in our State House erected out of reach of persons in wheelchairs? And why were curb cuts at the Indianapolis Airport filled in with concrete?"); Task Force Report 21 (six wheelchair users *arrested* for failing to leave restaurant after manager complained that "they took up too much space"); see generally *Spectrum* App. A (identifying 20 broad categories of state-provided or supported services and programs in which discrimination against persons with disabilities arises).

B. *The Actions Covered By Title II Implicate Both Equal Protection And Other Substantive Constitutional Rights*

Garrett instructs that in assessing the validity of Congress's Section 5 legislation, it is important to identify the constitutional rights at stake. See 121 S. Ct. at 963. Since there is no constitutional right to state employment, the Court looked to the Equal Protection Clause as the sole constitutional provision that Congress sought to enforce. *Ibid*. And because classifications based on disability are not subject to heightened scrutiny, the Court faulted Congress for failing to identify incidents when state action did not satisfy the "minimum 'rational-basis' review applicable to general social and economic legislation." *Ibid*.

By contrast, Title II governs all the operations of a State, which plainly encompasses state conduct subject to a number of other constitutional limitations embodied in the First, Fourth, Fifth, Sixth, Seventh, and Eighth Amendments and incorporated and applied to the States through the Fourteenth Amendment. To the extent that Title II enforces the Fourteenth Amendment by remedying and preventing government conduct that burdens these constitutional provisions and discriminates against persons with disabilities in their exercise of these rights, Congress did not need to identify *irrational* government action in order to identify and address *unconstitutional* government action. As mentioned earlier, those rights include the right to vote, to access the courts, to petition officials for redress of grievances, to due process by law enforcement officials, and to humane conditions of confinement.

Moreover, in evaluating generally-available public services that do not implicate fundamental rights, the same justifications that would be sufficient in an employment setting often will not suffice when the classification involves the exclusion from generally available government services. This is because when a government interacts with its citizens as employer, rather than sovereign, the core purpose of the Constitution in protecting its citizens *qua* citizens is not directly implicated. Thus, as the Supreme Court has explained in the First Amendment context, "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 676 (1996); cf. *O'Connor* v. *Ortega*, 480 U.S. 709, 724 (1987) (holding that Fourth Amendment protects government employees, but declining to impose "probable cause" requirement on searches because of special needs of government as employer). Conversely, then, interests that are sufficient to justify government employment policies may not be sufficient when the government is acting in its sovereign capacity.

Therefore, the Court's statement in *Garrett* that the Equal Protection Clause does not require States to accommodate people with disabilities if it involves additional expenditures of funds, see 121 S. Ct. at 966, is best understood as limited to government actions in its capacity as an employer. That statement certainly would not permit States to deny persons with disabilities their right to vote on the ground that providing access to the polling place is costly. Even

outside the arena of fundamental rights, the Supreme Court has made clear that a "State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446. Under this standard, reducing costs or increasing administrative efficiency will not always suffice as justification outside the employment context. See, *e.g.*, *Plyler* v. *Doe*, 457 U.S. 202, 229 (1982); *Jimenez* v. *Weinberger*, 417 U.S. 628, 636-637 (1974). Indeed, the Supreme Court has held that in order to comply with the Equal Protection Clause a State may be required to provide costly services free of charge where necessary to provide a class of persons meaningful access to important services offered to the public at-large. See *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 110, 127 n.16 (1996).

In addition, courts have found unconstitutional treatment of persons with disabilities in a wide variety of public services, including violations of the Equal Protection Clause, the Due Process Clause, and the Eighth Amendment, as incorporated into Section 1 of the Fourteenth Amendment.[23] These cases provide

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[23] See, *e.g.*, *Youngberg* v. *Romeo*, 457 U.S. 307 (1982) (unconstitutional conditions of confinement); *O'Connor* v. *Donaldson*, 422 U.S. 563, 567-575 (1975) (impermissible confinement); *LaFaut* v. *Smith*, 834 F.2d 389 (4th Cir. 1987) (Powell, J.) (failure to provide paraplegic inmate with an accessible toilet is cruel and unusual punishment); *Garrity* v. *Gallen*, 522 F. Supp. 171, 214 (D.N.H. 1981) ("blanket discrimination against the handicapped * * * is unfortunately firmly rooted in the history of our country"); *Flakes* v. *Percy*, 511 F. Supp. 1325 (W.D. Wis. 1981); *New York State Ass'n for Retarded Children* v. *Carey*, 466 F. Supp. 487 (E.D.N.Y. 1979); *Lora* v. *Board of Educ.*, 456 F. Supp. 1211, 1275

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the "confirming judicial documentation," *Garrett*, 121 S. Ct. at 968 (Kennedy, J., concurring), of unconstitutional disability discrimination by States that the Court found lacking in the employment context.

C. Title II Is Reasonably Tailored To Remedying And Preventing Unconstitutional Discrimination Against Persons With Disabilities

When enacting Section 5 legislation, Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified. *Florida Prepaid*, 527 U.S. at 639. Congress, however, may "paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." *Fullilove* v. *Klutznick*, 448 U.S. 448, 501-502 n.3 (1980) (Powell, J., concurring). Accordingly, in exercising its power, "Congress is not limited to mere legislative repetition of [the] Court's constitutional jurisprudence." *Garrett*, 121 S. Ct. at

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[23](...continued)
(E.D.N.Y. 1978); *Hairston* v. *Drosick*, 423 F. Supp. 180 (S.D. W. Va. 1976); *Frederick L.* v. *Thomas*, 408 F. Supp. 832, 836 (E.D. Pa. 1976); *Panitch* v. *Wisconsin*, 444 F. Supp. 320 (E.D. Wis. 1977); *Aden* v. *Younger*, 129 Cal. Rptr. 535 (Ct. App. 1976); *In re Downey*, 340 N.Y.S. 2d 687 (Fam. Ct. 1973); *Fialkowski* v. *Shapp*, 405 F. Supp. 946, 958-959 (E.D. Pa. 1975); *In re G.H.*, 218 N.W. 2d 441, 447 (N.D. 1974); *Stoner* v. *Miller*, 377 F. Supp. 177, 180 (E.D.N.Y. 1974); *Vecchione* v. *Wohlgemuth*, 377 F. Supp. 1361, 1368 (E.D. Pa. 1974), aff'd, 558 F.2d 150 (3rd Cir.), cert. denied, 434 U.S. 943 (1977); *Welsch* v. *Likins*, 373 F. Supp. 487 (D. Minn. 1974), aff'd in part, 550 F.2d 1122 (8th Cir. 1977); *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971); *Wyatt* v. *Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), aff'd in part, 503 F.2d 1305 (5th Cir. 1974).

963. Rather, "[l]egislation 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." *Lopez* v. *Monterey County*, 525 U.S. 266, 282-283 (1999). The operative question thus is not whether Title II "prohibit[s] a somewhat broader swath of conduct," *Garrett*, 121 S. Ct. at 963, than would the courts, but whether in response to the historic and enduring legacy of discrimination, segregation, and isolation faced by persons with disabilities at the hands of States, Title II was "designed to guarantee meaningful enforcement" of their constitutional rights, *id*. at 967.

Title II fits this description. Title II targets discrimination that is unreasonable. The States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all.[24] Title II also permits exclusion if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service. 42 U.S.C. 12131(2). But once an individual proves that she can meet all but the non-essential eligibility requirements of a program or service, the government's interest in excluding that individual "by reason of such disability," 42 U.S.C. 12132, is both minimal and, in light of history, constitutionally problematic. At

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[24] The types of disabilities covered by the Act, moreover, are generally confined to those substantially limiting conditions that have given rise to discriminatory treatment in the past. See *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy* v. *United Parcel Serv.*, 527 U.S. 516 (1999); *Albertsons, Inc.* v. *Kirkingburg*, 527 U.S. 555 (1999).

the same time, permitting the States to retain and enforce their essential eligibility requirements protects their legitimate interests in selecting and structuring governmental activities. Title II thus carefully balances a State's legitimate operational interests against the right of a person with a disability to be judged "by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 120 S. Ct. 1044, 1057 (2000).

Title II thus requires more than the Constitution only to the extent that some disability discrimination may be rational for constitutional purposes, but unreasonable under the statute. That margin of statutory protection does not redefine the constitutional right at issue. Instead, the statutory protection is necessary to enforce the courts' constitutional standard by reaching unconstitutional conduct that would otherwise escape detection in court, remedying the continuing effects of prior unconstitutional discrimination, and deterring future constitutional violations. "While 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," *Flores*, 521 U.S. at 519, Title II is on the remedial and prophylactic side of that line.

Title II requires "reasonable modifications" in public services. 42 U.S.C. 12131(2). That requirement, however is carefully tailored to the unique features of disability discrimination that Congress found persisted in public services in two ways. First, given the history of segregation and isolation and the resulting entrenched stereotypes, fear, prejudices, and ignorance about persons with

disabilities, Congress reasonably determined that a simple ban on discrimination would be insufficient to erase the stain of discrimination. Cf. *Green* v. *County Sch. Bd.*, 391 U.S. 430, 437-438 (1968) (after unconstitutional segregation, government is "charged with the affirmative duty to take whatever steps might be necessary" to eliminate discrimination "root and branch"). Therefore, Title II affirmatively promotes the integration of individuals with disabilities – both in order to remedy past unconstitutional conduct and to prevent future discrimination. Congress could reasonably conclude that the demonstrated failure of state governments to undertake reasonable efforts to accommodate and integrate persons with disabilities within their programs, services, and operations, would freeze in place the effects of their prior exclusion and isolation of individuals with disabilities, creating a self-perpetuating spiral of segregation, stigma, ill treatment, neglect, and degradation. Congress also correctly concluded that, by reducing stereotypes and misconceptions, integration reduces the likelihood that constitutional violations will recur. Cf. *Olmstead*, 527 U.S. at 600 (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life").

Second, to the extent that the accommodation requirement necessitates alterations in some governmental policies and practices, it is an appropriate enforcement mechanism for many of the same reasons that a prohibition on

disparate impact is.[25] Like practices with a disparate impact and literacy tests for voting,[26] governmental refusals to make even reasonable accommodations for persons with disabilities often perpetuate the consequences of prior unconstitutional discrimination, and thus fall within Congress's Section 5 power.[27]

Moreover, failure to accommodate the needs of qualified persons with disabilities may often result directly from hidden unconstitutional animus and false

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[25] Legislation prohibiting or requiring modifications of rules, policies, and practices that have a discriminatory impact is a traditional and appropriate exercise of the Section 5 power to combat a history of invidious discrimination. See *Fullilove*, 448 U.S. at 477 (opinion of Burger, C.J.) ("[C]ongressional authority [under Section 5] extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination."); *id.* at 502 (Powell, J., concurring) ("It is beyond question * * * that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects."); *City of Rome* v. *United States*, 446 U.S. 156, 176-177 (1980) (under its Civil War Amendment powers, Congress may prohibit conduct that is constitutional if it perpetuates the effects of past discrimination); *South Carolina* v. *Katzenbach*, 383 U.S. at 325-333; see also *Washington* v. *Davis*, 426 U.S. 229, 242 (1976) ("an invidious discriminatory purpose may often be inferred from * * * the fact, if it is true, that the law bears more heavily on one race than another").

[26] See *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding nationwide ban on literacy tests even though they are not unconstitutional per se); *Gaston County* v. *United States*, 395 U.S. 285, 293, 296-297 (1969) (Congress can proscribe constitutional action, such as literacy test, to combat ripple effects of earlier discrimination in other governmental activities); *South Carolina* v. *Katzenbach*, 383 U.S. at 333-334.

[27] Of course, the obligation to accommodate is less intrusive than the traditional disparate impact remedy because the government is not required to abandon the practice *in toto*, but may simply modify it to accommodate those otherwise qualified individuals with disabilities who are excluded by the practice's effect.

stereotypes. Title II simply makes certain that the refusal to accommodate an individual with a disability is genuinely based on unreasonable cost or actual inability to accommodate, rather than on nothing but the discomfort with the disability or unfounded concern about the costs of accommodation. Such a prophylactic response is commensurate with the problem of irrational state discrimination that denies access to benefits and services for which the State has otherwise determined individuals with disabilities to be qualified or which the State provides to all its citizens (such as education, police protection, and civil courts). It makes particular sense in the context of public services, where a *post hoc* judicial remedy may be of limited utility to an individual given the difficulty in remedying unconstitutional denials of intangible but important rights, such as the right to vote, to a fair trial, or to educational opportunity. By establishing prophylactic requirements, Congress provided additional mechanisms for individuals to avoid irreparable injuries and to ensure that constitutional rights were fully vindicated.

Further, Congress tailored the modification requirement to the unconstitutional governmental conduct it seeks to repair and prevent. The statute requires modifications only where "reasonable." 42 U.S.C. 12131(2). Governments need not make modifications that require "fundamental alterations in the nature of a service, program, or activity," in light of their nature or cost, agency resources, and the operational practices and structure of the position. 28 C.F.R. 35.130(b)(7), 35.150(a)(3), 35.164; *Olmstead*, 527 U.S. at 606 n.16. And

Congress determined, based on the consistent testimony of witnesses and expert studies, that contrary to the misconceptions of many, the vast majority of accommodations entail little or no cost.[28] And any costs are further diminished when measured against the financial and human costs of denying persons with disabilities an education or excluding them from needed government services or the equal exercise of fundamental rights, thereby rendering them a permanent underclass. See *Plyler*, 457 U.S. at 223-224, 227.

In short, "[a] proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996). Section 5 thus empowers Congress to do more than simply prohibit the creation of new barriers to equality; it can require States to tear down the walls they erected during decades of discrimination and exclusion. See *id*. at 550 n.19 (Equal Protection Clause itself can require modification of facilities and programs to ensure equal access). The remedy for segregation is integration, not inertia.

Defendants contend (Def. Supp. Br. 4-5) that, as in *Garrett*, Title II imposes on States a burden of justifying disability discrimination under the statute that is

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[28] See S. Rep. No. 116, *supra*, at 10-12, 89, 92; H.R. Rep. No. 485, *supra*, Pt. 2, at 34; 2 *Leg. Hist.* 1552 (EEOC Comm'r Evan Kemp); *id*. at 1077 (John Nelson); *id*. at 1388-1389 (Justin Dart); *id*. at 1456-1457; *id*. at 1560 (Jay Rochlin); 3 *Leg. Hist.* 2190-2191 (Robert Burgdorf); Task Force Report 27; *Spectrum* 2, 30, 70. The federal government, moreover, provides substantial funding to cover many of those costs.

greater than what a court would require under Section 1 of the Fourteenth Amendment. But an elevated burden of justification is not necessarily an impermissible effort to redefine constitutional rights; it can be, as it is here and under Title VII, an appropriate means of rooting out hidden animus and remedying and preventing pervasive discrimination that is unconstitutional under judicially defined standards.

D. *In Light Of The Legislative Record And Findings And The Tailored Statutory Scheme, Title II And Its Abrogation Are Appropriate Section 5 Legislation*

The record Congress compiled and the findings it made suffice to support Title II's substantive standard as appropriate Fourteenth Amendment legislation applicable to States and localities.[29] As such, it is one in a line of civil rights statutes, authorized by Civil War Amendments, that apply to States *and* local governments. See, *e.g.*, Titles III, IV, VI and VII of the Civil Rights Act of 1964, 42 U.S.C. 2000b-2000e *et seq.*; Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*; Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*; Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq*

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[29] The Interstate Commerce Clause is also the basis for these substantive obligations. See *Walker* v. *Snyder*, 213 F.3d 344, 346 (7th Cir. 2000), cert. denied *sub nom. United States* v. *Snyder*, 121 S. Ct. 1188 (2001). Under either basis, suits against state officials for prospective relief (relief no longer at issue in these appeals) can proceed regardless of the validity of the abrogation. See *Garrett*, 121 S. Ct. at 968 n.9; *Armstrong* v. *Wilson*, 124 F.3d 1019, 1025-1026 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998).

Aside from the substantive provisions of Title II, *Garrett* held that to sustain an *abrogation* of Eleventh Amendment immunity as appropriate Section 5 legislation, only constitutional misconduct committed by those who are "beneficiaries" of the Eleventh Amendment can be relied upon. 121 S. Ct. at 965. The line between those government entities entitled to Eleventh Amendment immunity and those which are not is not always easy to identify. For example, while school districts are generally found not to be "arms of the state" protected by the Eleventh Amendment, see *Mt. Healthy City Sch. Dist. Bd.* v. *Doyle*, 429 U.S. 274, 280–281 (1977), there are some significant exceptions to this rule.[30] Similar state-by-state inquiries are required in the law enforcement arena. See *McMillian* v. *Monroe County*, 520 U.S. 781, 795 (1997) (holding that county sheriff in Alabama is state official and noting "there is no inconsistency created by court decisions that declare sheriffs to be county officers in one State, and not in another"). In other situations, such as voting, local officials are simply administering state policies and programs. While nominally the action of a local

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[30] See *Belanger* v. *Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992), cert. denied, 507 U.S. 919 (1993) (California school districts protected by Eleventh Amendment); *Rosenfeld* v. *Montgomery County Pub. Schs.*, 41 F. Supp. 2d 581 (D. Md. 1999) (Maryland school districts protected by Eleventh Amendment). The law in other States remains in flux. Cf. *Martinez* v. *Board of Educ. of Taos Mun. Sch. Dist.*, 748 F.2d 1393 (10th Cir. 1984) (New Mexico school districts protected by Eleventh Amendment), overruled, *Duke* v. *Grady Mun. Schs.*, 127 F.3d 972 (10th Cir. 1997); *Harris* v. *Tooele County Sch. Dist.*, 471 F.2d 218 (10th Cir. 1973) (Utah school districts protected by Eleventh Amendment), overruled, *Ambus* v. *Granite Bd. of Educ.*, 995 F.3d 992 (10th Cir. 1992) (en banc).

government, the discrimination individuals with disabilities endure is directly attributable to the State. Cf. *Railroad Co.* v. *County of Otoe*, 83 U.S. 667, 676 (1872) ("Counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will. When they are authorized or directed to levy a tax, or to appropriate its proceeds, the State through them is doing indirectly what it might do directly."). Thus, as *Garrett* makes clear, actions of such local officials can be attributed to the States for purposes of the "congruence and proportionality" inquiry. See 121 S. Ct. at 967 (attributing to "States" and "State officials" conduct regarding voting that was done by county "registrar[s]" and "voting officials" in *South Carolina* v. *Katzenbach*, 383 U.S. at 312).

Given the fact that some school districts and law enforcement officials are "beneficiaries of the Eleventh Amendment," *Garrett*, 121 S. Ct. at 965, and that some local practices are done at the States' behest, the evidence before Congress regarding the treatment of people with disabilities by education, law enforcement, voting and other officials is relevant in assessing Congress's legislative record about State violations. Because the demarcation is unclear at the margins, we have in this brief provided the evidence before Congress concerning both state and local governments. But even limited to the evidence concerning States acting through their own agencies, there was a sufficient basis to sustain Congress's determination that States engaged in a pattern of unconstitutional conduct.

It is true that Title II's broad coverage contrasts with that of Section 5 of the Voting Rights Act of 1965, which the Court noted approvingly in *Garrett*, 121 S. Ct. at 967. The operative question, however, is not whether Title II is broad, but whether it is broader than necessary. It is not. The history of unconstitutional treatment and the risk of future discrimination found by Congress pertained to all aspects of governmental operations. Only a comprehensive effort to integrate persons with disabilities would end the cycle of isolation, segregation, and second-class citizenship, and deter further discrimination. Integration in education alone, for example, would not suffice if persons with disabilities were relegated to institutions or trapped in their homes by lack of transportation or inaccessible sidewalks. Ending unnecessary institutionalization is of little gain if neither government services nor the social activities of public life (libraries, museums, parks, and recreation services) are accessible to bring persons with disabilities into the life of the community. And none of those efforts would suffice if persons with disabilities continued to lack equivalent access to government officials, courthouses, and polling places. In short, Congress chose a comprehensive remedy because it confronted an all-encompassing, inter-connected problem; to do less would be as ineffectual as "throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway," S. Rep. No. 116, *supra*, at 13. "Difficult and intractable problems often require powerful remedies * * * ." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 88 (2000). It is in such cases that Congress is empowered by Section 5 to enact "reasonably

prophylactic legislation." *Ibid*. Title II is just such a powerful remedy for a problem which Congress found to be intractable.

II

42 U.S.C. 2000d-7 VALIDLY REMOVES ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), prohibits discrimination against persons with disabilities under "any program or activity receiving Federal financial assistance." Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 * * * [and] title VI of the Civil Rights Act of 1964."

As defendants concede (Def. Supp. Br. 6-7), because of the close identity between the substantive obligations of Title II and Section 504, whether Section 2000d-7 is valid Section 5 legislation for Section 504 claims is governed by this Court's determination regarding Title II's abrogation. See *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998). But even if this Court holds that Section 2000d-7 is not valid Section 5 legislation, Section 2000d-7 may be upheld as a valid exercise of Congress's power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for state agencies that voluntarily accept federal financial assistance. For States are free to waive their Eleventh Amendment immunity. See *College Sav. Bank* v. *Florida Prepaid*

Postsec. Educ. Expense Bd., 527 U.S. 666, 674 (1999). And "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and * * * acceptance of the funds entails an agreement to the actions." *Id.* at 686. Thus, Congress may, and has, conditioned the receipt of federal funds on defendants' waiver of Eleventh Amendment immunity to Section 504 claims.

A. *Section 2000d-7 Is A Clear Statement That Accepting Federal Financial Assistance Would Constitute A Waiver To Private Suits Brought Under Section 504*

Section 2000d-7 was enacted in response to the Supreme Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985). In *Atascadero*, the Court held that Congress had not provided sufficiently clear statutory language to remove States' Eleventh Amendment immunity for Section 504 claims and reaffirmed that "mere receipt of federal funds" was insufficient to constitute a waiver. 473 U.S. at 246. But the Court stated that if a statute "manifest[ed] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the federal courts would have jurisdiction over States that accepted federal funds. *Id.* at 247.

Section 2000d-7 makes unambiguously clear that Congress intended state agencies to be amenable to suit in federal court under Section 504 (and the other federal non-discrimination statutes tied to federal financial assistance) if they

accepted federal funds.[31] Any state agency reading the U.S. Code would have known that after the effective date of Section 2000d-7 it could be sued in federal court for violations of Section 504 if it accepted federal funds.[32] Section 2000d-7 thus embodies exactly the type of unambiguous condition discussed by the Court in *Atascadero*, putting States on express notice that part of the "contract" for receiving federal funds was the requirement that they consent to suit in federal court for alleged violations of Section 504 for those agencies that received any

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[31] Congress recognized that the holding of *Atascadero* had implications for not only Section 504, but also Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, which prohibit race and sex discrimination in "program[s] or activit[ies] receiving Federal financial assistance." See S. Rep. No. 388, 99th Cong., 2d Sess. 28 (1986); 131 Cong. Rec. 22,346 (1985) (Sen. Cranston); see also *United States Dep't of Transp.* v. *Paralyzed Veterans of Am.*, 477 U.S. 597, 605 (1986) ("Under * * * Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision.").

[32] Defendants appear to suggest (Def. Supp. Br. 9-10) that Section 2000d-7 is not sufficiently clear because they were not put on notice that the abrogation extended to private *damage* actions. Of course, this Court held that compensatory damages were available in Section 504 actions almost fifteen years ago. See *Greater Los Angeles Council on Deafness, Inc.* v. *Zolin*, 812 F.2d 1103, 1107 (9th Cir. 1987). Indeed, the entire impetus for the enactment of Section 2000d-7 was the Supreme Court's decision in *Atascadero*, which involved a private claim for "compensatory" relief. 473 U.S. at 236. Thus, as Justice Scalia explained in his concurrence in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 78 (1992), Section 2000d-7 "must be read * * * as an implicit acknowledgment that damages are available."

financial assistance.[33]

Thus, the Supreme Court, in *Lane* v. *Peña*, 518 U.S. 187, 200 (1996), acknowledged "the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7. This Court reached the same result in *Clark*, 123 F.3d at 1271, holding that Section 2000d-7 "manifests a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity. * * * Because California accepts federal funds under the Rehabilitation Act, California has waived any immunity under the Eleventh Amendment." Every other court of appeals to address the issue has reached the same conclusion. See *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) (Section 504), cert. denied, 2001 WL 314683 (June 29, 2001); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) (Section 504); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000) (Title IX); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999) (Title VI), rev'd on other grounds, 121 S.

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[33] The Department of Justice explained to Congress while the legislation was under consideration, "[t]o the extent that the proposed amendment is grounded on congressional spending powers, [it] makes it clear to [S]tates that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). On signing the bill into law, President Reagan similarly explained that the Act "subjects States, as a condition of their receipt of Federal financial assistance, to suits for violation of Federal laws prohibiting discrimination on the basis of handicap, race, age, or sex to the same extent as any other public or private entities." 22 Weekly Comp. Pres. Doc. 1421 (Oct. 27, 1986), reprinted in 1986 U.S.C.C.A.N. 3554.

Ct. 1511 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 554 (1999), cert. denied, 528 U.S. 1181 (2000); see also *Board of Educ.* v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.) (addressing same language in 20 U.S.C. 1403), cert. denied, 121 S. Ct. 70 (2000); *Little Rock Sch. Dist.* v. *Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (same).

B. *Congress Has Authority To Condition The Receipt Of Federal Financial Assistance On The State Waiving Its Eleventh Amendment Immunity*

Congress may condition its spending on a waiver of Eleventh Amendment immunity. Indeed, in *Alden* v. *Maine*, 527 U.S. 706, 755 (1999), the Court cited *South Dakota* v. *Dole*, 483 U.S. 203 (1987), a case involving Congress's Spending Clause authority, when it noted that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits." Similarly, in *College Savings Bank*, the Court reaffirmed the holding of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), where the Court held that Congress could condition the exercise of one of its Article I powers (there, the approval of interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. 527 U.S. at 686. At the same time, the Court suggested that Congress had the authority under the Spending Clause to condition the receipt of federal funds on the waiver of immunity. *Ibid.*; see also *id.* at 678-679 n.2. The Court explained that unlike Congress's power under the Commerce Clause to regulate "otherwise lawful activity," Congress's power to authorize interstate compacts and spend money was the grant of a "gift" on which Congress could place conditions that a State was free to accept or reject. *Id.* at

687; cf. *Premo* v. *Martin*, 119 F.3d 764, 770-771 (9th Cir. 1997) (State participation in Randolph-Sheppard Vending Stand Act constitutes a waiver of Eleventh Amendment immunity), cert. denied, 522 U.S. 1147 (1998).

C. *Section 504 Is A Valid Exercise Of The Spending Power*

The Supreme Court in *Dole* identified four limitations on Congress's Spending Power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." 483 U.S. at 207. Second, if Congress conditions the States' receipt of federal funds, it "must do so unambiguously * * *, enabling the States to exercise their choice knowingly, cognizant of the consequence of their participation." *Ibid*. (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, the Supreme Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Ibid*. And fourth, the obligations imposed by Congress may not violate any independent constitutional provisions. *Id*. at 208.

Section 504 meets all four of the *Dole* criteria. See *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079, 1080 (8th Cir. 2000) (en banc), cert. denied, 2001 WL 314683 (June 29, 2001). Defendants do not contest that Section 504 is in the general welfare, see *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 443-444 (1985) (discussing Section 504 with approval); that it is a clear condition on the receipt of federal financial assistance, see *School Bd. of Nassau County* v.

Arline, 480 U.S. 273, 286 n.15 (1987) (describing Section 504 as an "antidiscrimination mandate");[34] and that it does not induce defendants to engage in unconstitutional conduct.

1. Relying on Supreme Court *dissents*, defendants contend (Def. Supp. Br. 11-13) that that the condition embodied in Section 504 – that if an agency accepts

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[34] While defendants claim (Def. Supp. Br. 13-14) that they are challenging the clarity of Section 504's non-discrimination requirement under the Spending Clause, a fair reading of their brief indicates that they are simply repeating merits arguments regarding the proper application of Section 504 to these cases, arguments about which the United States takes no position in these appeals. Nonetheless, to the extent that defendants' brief can be understood to argue that Congress may condition the receipt of federal funds only on a State complying with existing constitutional requirements, they are simply wrong. *Dole* establishes that Congress may impose conditions of federal funding on States (such as a certain drinking age) even if Congress could not unilaterally impose such a requirement.

To the extent defendants are suggesting that the Spending Clause requires courts to employ a special method of statutory construction, they are also mistaken. State agencies that receive federal funds are entitled to notice that Congress has attached legal obligations as substantive conditions to the acceptance of federal money. See *Pennhurst*, 451 U.S. at 17. But once that threshold of notice about the recipient's obligations has been crossed, the exact scope of those obligations is simply a matter of statutory interpretation. See *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999) (citing *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 665-666 (1985)). Ambiguities as to the scope of a recipient's obligations are resolved through normal rules of statutory construction, including reliance on agency regulations and legislative history, see *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 457 (1998); *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 414-420 (1993); *Rust* v. *Sullivan*, 500 U.S. 173, 184-190 (1991), even when the recipient is a government agency, see *Davis,* 526 U.S. at 643; *Arline*, 480 U.S. at 286 n.15, including a state agency, see *Honig* v. *Doe*, 484 U.S. 305, 325 n.8 (1988); *Bennett*, 470 U.S. at 665-666.

federal financial assistance, it must not discriminate on the basis of disability – does meet the third *Dole* requirement because it is not sufficiently "related" to the federal financial assistance.

Section 504 furthers the federal interest in assuring that no federal funds are used to support, directly or indirectly, programs that discriminate or otherwise deny benefits and services on the basis of disability to qualified persons. Section 504's nondiscrimination requirement is patterned on Title VI and Title IX, which prohibit race and sex discrimination by "programs" that receive federal funds. See *NCAA* v. *Smith*, 525 U.S. 459, 466 n.3 (1999); *Arline*, 480 U.S. at 278 n.2. Both Title VI and Title IX have been upheld as valid Spending Clause legislation. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Court held that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, was a valid exercise of the Spending Power. "The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here." 414 U.S. at 569 (citations omitted).[35] The Court reached a similar conclusion in *Grove City College* v. *Bell*, 465 U.S. 555 (1984). In *Grove City*, the Court addressed whether Title IX, which prohibits education programs or activities receiving federal financial assistance from

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[35] In *Alexander* v. *Sandoval*, 121 S. Ct. 1511, 1519 (2001), the Court noted that it has "rejected *Lau*'s interpretation of § 601 [of the Civil Rights Act of 1964, 42 U.S.C. 2000d] as reaching beyond intentional discrimination." The Court did not cast doubt on the Spending Clause holding in *Lau*.

discriminating on the basis of sex, infringed on the college's First Amendment rights. The Court rejected that claim, holding that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." *Id*. at 575.

Defendants suggest (Def. Supp. Br. 12-13) that the condition embodied in Section 504's non-discrimination requirement is not "related" because Section 504 applies to funds that are not intended to assist or prevent discrimination against persons with disabilities. But the Constitution does not require that Congress provide funds to combat discrimination or help minorities if it wishes to attach a nondiscrimination requirement to its funds. In neither *Lau* nor *Grove City* was there any suggestion that the federal funds received were targeted towards alleviating discrimination. In fact, it is clear that the financial assistance at issue in *Grove City* was simply general financial aid that had no relationship to programs to combat sex discrimination. 465 U.S. at 559, 565 n.13.

Instead, these cases stand for the proposition that Congress has a legitimate interest in preventing the use of any of its funds to "encourage[], entrench[], subsidize[], or result[] in," *Lau*, 414 U.S. at 569 (internal quotation marks omitted), discrimination against persons otherwise qualified on the basis of criteria Congress has determined are irrelevant to the receipt of public services, such as race, gender, and disability. See *United States* v. *Louisiana*, 692 F. Supp. 642, 652 (E.D. La. 1988) (three-judge court) ("[T]he condition imposed by Congress on defendants [in Title VI], that they may not discriminate on the basis of race in any

part of the State's system of public higher education, is directly related to one of the main purposes for which public education funds are expended: equal education opportunities to all citizens." (footnote omitted)). Thus, Congress can require state agencies that accept Medicaid funds not to discriminate in the use of those funds.

Because this interest extends to all federal funds, Congress drafted Title VI, Title IX, and Section 504 to apply across-the-board to all federal financial assistance. The purposes articulated by Congress in enacting Title VI, purposes equally attributable to Title IX and Section 504, were to avoid the need to attach nondiscrimination provisions each time a federal assistance program was before Congress, and to avoid "piecemeal" application of the nondiscrimination requirement if Congress failed to place the provision in each grant statute. See 110 Cong. Rec. 6544 (1964) (Sen. Humphrey); *id*. at 7061-7062 (Sen. Pastore); *id*. at 2468 (Rep. Celler); *id*. at 2465 (Rep. Powell). Certainly, there is no distinction of constitutional magnitude between a nondiscrimination provision attached to each appropriation and a single provision applying to all federal spending.[36]

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[36] For other Supreme Court cases upholding as valid exercises of the Spending Clause conditions not tied to particular spending program, see *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) (upholding an across-the-board requirement in the Hatch Act that no state employee whose principal employment was in connection with any activity that was financed in whole or in part by the United States could take "any active part in political management"); *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997) (upholding federal bribery statute covering entities receiving more than $10,000 in federal funds).

2. Defendants also contend (Def. Supp. Br. 14-15) that Section 504 is invalid, at least in this case, because it is "coercive." The Supreme Court pointed out in *Dole*, that its "decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). But the only case the Court cited was *Steward Machine*, a decision that expressed doubt about the viability of such a theory. 301 U.S. at 590 (finding no undue influence even "assum[ing] that such a concept can ever be applied with fitness to the relations between state and nation"). For every congressional spending statute "is in some measure a temptation." *Dole*, 483 U.S. at 211. As the Court recognized, however, "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid*. The Court in *Dole* thus reaffirmed the assumption, founded on "a robust common sense," that the States are voluntarily exercising their power of choice in accepting the conditions attached to the receipt of federal funds. *Ibid*. (quoting *Steward Mach.*, 301 U.S. at 590).

This Court recently questioned whether there is "any viability left in the coercion theory." *California* v. *United States*, 104 F.3d 1086, 1091-1092 (9th Cir.), cert. denied, 522 U.S. 806 (1997). In rejecting a state agency's argument that conditions on Medicaid funding were unconstitutionally coercive because it had "no choice but to remain in the program in order to prevent a collapse of its medical system," this Court explained that "no party challenging the conditioning

of federal funds has ever succeeded under the coercion theory" and that "[t]he difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments." *Id*. at 1092 (quoting *Nevada* v. *Skinner*, 884 F.2d 445, 448 (9th Cir. 1989), cert. denied, 493 U.S. 1070 (1990)).[37] Even accepting that "coercion" is an independent and justiciable concept, any argument that Section 504 is coercive would be inconsistent with Supreme Court decisions that demonstrate that States may be put to "difficult" or even "unrealistic" choices about whether to take federal benefits without the conditions becoming unconstitutionally "coercive."

In *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), aff'd mem., 435 U.S. 962 (1978), a State challenged a federal law that conditioned the right to participate in "some forty-odd federal financial assistance health programs" on the creation of a "State Health Planning and Development Agency" that would regulate health services within the State. *Id*. at 533. The State argued that the Act was a coercive exercise of the Spending Clause because it conditioned money for multiple pre-existing programs on

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[37] Other courts have recognized the inherent difficulties in determining whether a State has been "coerced" into accepting a funding condition. *Kansas* v. *United States*, 214 F.3d 1196, 1202 (10th Cir.) ("the coercion theory is unclear, suspect, and has little precedent to support its application"), cert. denied, 121 S. Ct. 623 (2000); *Oklahoma* v. *Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981) ("The courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely a hard choice.").

compliance with a new condition. The three-judge court rejected that claim, holding that the condition "does not impose a mandatory requirement * * * on the State; it gives to the states an *option* to enact such legislation and, in order to induce that enactment, offers financial assistance. Such legislation conforms to the pattern generally of federal grants to the states and is not 'coercive' in the constitutional sense." *Id*. at 535-536 (footnote omitted). The Supreme Court summarily affirmed, thus making the holding binding on this Court.[38]

Similarly, in *FERC* v. *Mississippi*, 456 U.S. 742 (1982), the Court upheld a statute that required States to choose between regulating in light of federal standards or having the field preempted so that they could not regulate at all. The Court acknowledged that "the choice put to the States–that of either abandoning regulation of the field altogether or considering the federal standards–*may be a difficult one*." *Id*. at 766 (emphasis added). The Court agreed that "it may be

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[38] The State's appeal to the Supreme Court presented the questions: "Whether an Act of Congress requiring a state to enact legislation * * * under penalty of forfeiture of all benefits under approximately fifty long-standing health care programs essential to the welfare of the state's citizens, violates the Tenth Amendment and fundamental principles of federalism;" and "Whether use of the Congressional spending power to coerce states into enacting legislation and surrendering control over their public health agencies is inconsistent with the guarantee to every state of a republican form of government set forth in Article IV, § 4 of the Constitution and with fundamental principles of federalism." 77-971 Jurisdictional Statement at 2-3. Because the "correctness of that holding was placed squarely before [the Court] by the Jurisdictional Statement that the appellants filed * * * [the Supreme] Court's affirmance of the District Court's judgment is therefore a controlling precedent, unless and until re-examined by [the Supreme] Court." *Tully* v. *Griffin, Inc*., 429 U.S. 68, 74 (1976).

unlikely that the States will or easily can abandon regulation of public utilities to avoid [the statute's] requirements. But this does not change the constitutional analysis." *Id*. at 767.

Finally, in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990), the Court interpreted the scope of the Equal Access Act, 20 U.S.C. 4071 *et seq*., which prohibits any public secondary schools that receive federal financial assistance and maintain a "limited open forum" from denying "equal access" to students based on the content of their speech. In rejecting the school's argument that the Act as interpreted unduly hindered local control, the Court noted that "because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this *may be an unrealistic option*, [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups." 496 U.S. at 241 (emphasis added, citation omitted).[39]

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[39] The Supreme Court has also upheld the denial of all welfare benefits to individuals who refused to permit in-home inspections. See *Wyman* v. *James*, 400 U.S. 309, 317-318 (1971) ("We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be."). Similarly, in cases involving challenges by private groups claiming that federal funding conditions limited their First Amendment rights, the Court has held that where Congress did not preclude the recipient from restructuring its operations to separate its federally-supported

(continued...)

These cases demonstrate that the federal government can demand that States comply with federal conditions or make the "difficult" choice of losing federal funds from many different longstanding programs (*North Carolina*), losing all federal funds (*Mergens*), or even losing the ability to regulate certain areas (*FERC*), without crossing the line to coercion. Thus, the choice imposed by Section 504 is not "coercive" in the constitutional sense.

Defendants also claim (Def. Supp. Br. 15 n.10) that the amount of money involved makes the statutory scheme unduly coercive. We accept defendants' assertion, unsupported by anything in the record, that, like most government entities, it receives grants from a vast array of federal programs established by Congress. Given the amount it claims to receive from the federal government, defendants have apparently been successful in obtaining these grants, presumably in varying amounts. It does not follow, however, that because defendants have elected to apply for and accept a number of grants that the federal government's authority to impose conditions on each grant it offers is somehow diminished. If the federal government is justified in imposing conditions on modest expenditures of federal resources, it should not be less justified in imposing those conditions

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[39](...continued)

activities from other activities, Congress may constitutionally require that the entity that receives federal funds to provide services on behalf of the government not engage in conduct Congress does not wish to subsidize. See *Rust* v. *Sullivan*, 500 U.S. 173, 197-199 (1991); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 544-545 (1983).

when the amount of federal money increases. As the First Circuit has explained, "[w]e do not agree that the carrot has become a club because rewards for conforming have increased. It is not the size of the stakes that controls, but the rules of the game." *New Hampshire Dep't of Employment Sec.* v. *Marshall*, 616 F.2d 240, 246 (1st Cir.), appeal dismissed and cert. denied, 449 U.S. 806 (1980).

State officials are constantly forced to make difficult decisions regarding competing needs for limited funds. While it may not always be easy to decline federal funds, each department or agency of the State, under the control of state officials, is free to decide whether they will accept the federal funds with the Section 504 and waiver "string" attached, or simply decline the funds. See *Grove City Coll.*, 465 U.S. at 575; *Kansas* v. *United States*, 214 F.3d 1196, 1202 (10th Cir.) ("In this context, a difficult choice remains a choice, and a tempting offer is still but an offer. If Kansas finds the * * * requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be." (citation omitted)), cert. denied, 121 S. Ct. 623 (2000).[40]

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[40] Although it is not clear how far the analogy between Spending Clause legislation and contracts extends, see *United States* v. *Hatcher*, 922 F.2d 1402, 1406-1407 (9th Cir. 1991), we note that when a plaintiff is seeking to void a contract on the grounds "economic duress," it must show "acts on the part of the defendant which produced" the financial circumstances that made it impossible to decline the offer, not simply that that plaintiff wants, or even needs, the money being offered. *Undersea Engineering & Constr. Co.* v. *International Tel. & Tel. Corp.*, 429 F.2d 543, 550 (9th Cir. 1970); accord *United States* v. *Vanhorn*, 20 F.3d 104, 113 n.19 (4th Cir. 1994).

Because one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," *Alden*, 527 U.S. at 750, it is perfectly appropriate to permit each State to make its own cost-benefit analysis and determine whether it will, for any given state agency, accept the federal money with the condition that that agency can be sued in federal court for damages, or forgo the federal funds available to that agency. See *New York* v. *United States*, 505 U.S. 144, 168 (1992). But once defendants have accepted federal financial assistance, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983).

For all these reasons, compliance with Section 504 is a valid condition on the receipt of all federal financial assistance and thus Section 2000d-7 can be upheld under the Spending Clause.

CONCLUSION

The Eleventh Amendment was no bar to the district court's jurisdiction over this action.

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STATEMENT OF RELATED CASES

The constitutionality of these provisions is also being challenged by Hawaii in *Vinson* v. *Thomas*, No. 00-15534 (9th Cir.) (supplemental briefing completed June 2001), *Patrick and Kathy W.* v. *Lemahieu*, No. 01-15944 (9th Cir.) (briefing scheduled to be completed in October 2001), and *Patricia and Guy N.* v. *Lemahieu*, No. 01-16240 (9th Cir.) (briefing scheduled to be completed in November 2001).

CERTIFICATE OF COMPLIANCE

I hereby certify that the brief does *not* comply with the type-volume limitations set out in Fed. R. App. P. 32(a)(7)(B). The brief is proportionately spaced, has a typeface of 14 points, was prepared using WordPerfect 9.0, and contains 18,089 words. Concurrent with the brief's submission, the United States has filed a motion to accept the brief for filing that notes (in paragraphs 7-8) that the brief does not comply with Rule 32(a)(7)(B) and provides reasons why the brief should nevertheless be accepted.

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2001, two copies of the foregoing Brief for the United States as Intervenor were served by first-class on the following counsel of record:

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