No. 02-1667

In The Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES, and UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131–12165 (2002), exceeds Congress' authority under section 5 of the Fourteenth Amendment, thereby failing validly to abrogate the States' Eleventh Amendment immunity from private damages claims.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-5) is reported at 315 F.3d 680 (6th Cir. 2003). The original opinion of the court of appeals (Pet. App. 10-11) and the order of the district court denying petitioner's motion to dismiss (Pet. App. 6-7) are unreported.

JURISDICTION

The initial judgment of the court of appeals was entered on July 16, 2002. A timely petition for rehearing was filed on August 29, 2002. The petition for rehearing was granted, and the court of appeals entered an amended opinion on January 10, 2003. Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including May 12, 2003, and on that date petitioner filed its petition. On June 23, 2003, this Court granted the petition, limited to the first question presented. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> Section 1: . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

> Section 5: The congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV. The Eleventh Amendment is set out verbatim in the petition. (Pet. 2)

Title II of the Americans with Disabilities Act of 1990 ("ADA") provides in part:

> Subject to the provisions of this subchapter, 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.

The abrogation provision of the ADA provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. § 12202.

Other relevant provisions of Title II, together with relevant portions of the regulations promulgated by the Attorney General to implement Title II, *see* 42 U.S.C.

§ 12134, are reproduced in Appendices A and C of this brief.

STATEMENT OF THE CASE

1. Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12131–12165, comprehensively regulates all services, programs and activities conducted by a "public entity," defined to include the States and their departments, agencies and instrumentalities. 42 U.S.C. § 12131(1). 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. The statute defines "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). Thus, Title II does not simply prohibit the States from making distinctions based upon disabilities but affirmatively requires that public entities make reasonable modifications for disabled persons who qualify. Title II also prohibits discrimination in public transportation and affirmatively requires public entities to provide handicap access in most such facilities. 42 U.S.C. §§ 12141–12165.

Pursuant to congressional directive, *see* 42 U.S.C. § 12134, the Attorney General has promulgated regulations to implement Title II. 28 C.F.R. §§ 35.101–.190 (2002). The implementing regulations require public entities, among other things:

- to locate, design, and construct all new facilities in such a manner that they are "readily accessible to and usable by individuals with disabilities . . . ," 28 C.F.R. § 35.151(a);
- to incorporate curb ramps at all intersections of newly constructed streets, roads, and highways to accommodate disabled persons, 28 C.F.R. § 35.151(e);
- to modify existing buildings and roadways when necessary to insure that programs and services are accessible to individuals with disabilities, 28 C.F.R. § 35.150;
- to "administer services, programs, and activities in the most integrated setting appropriate to the needs of . . ." the disabled, 28 C.F.R. § 35.130(d); and,
- to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability . . . ," 28 C.F.R. § 35.130(b)(7).

The regulations forbid public entities from:

- utilizing criteria, including facility site selection criteria, in the administration of programs and services that "have the effect of subjecting qualified individuals with disabilities to discrimination" or of "impairing accomplishment of the objectives of the . . .

program with respect to individuals with disabilities . . . ," 28 C.F.R. §§ 35.130(b)(3)(i)-(ii) & 35.130(b)(4)(i);

- imposing eligibility criteria "that screen out or tend to screen out" disabled persons "from fully and equally enjoying any service, program, or activity . . . ," 28 C.F.R. § 35.130(b)(8);
- administering licensing and certification programs "in a manner that subjects . . . [disabled persons] to discrimination . . . ," 28 C.F.R. § 35.130(b)(6);
- providing the disabled with "an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others," 28 C.F.R. § 35.130(b)(1)(iii); and,
- charging disabled persons "to cover the costs of measures . . . required to provide . . . the nondiscriminatory treatment required by the . . . [ADA or implementing regulations]." 28 C.F.R. § 35.130(f).

A State may avoid its obligation to modify policies, practices and procedures having discriminatory effects only if it "can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). A State may avoid its obligation to modify existing physical facilities when the modification is necessary to eliminate discriminatory effects only if it can demonstrate that the modification would cause "a fundamental alteration in the nature of the service, program, or activity" conducted there *or* "undue financial and administrative burdens . . . after

considering all resources available for use in the funding and operation of the service, program, or activity . . . ." 28 C.F.R. § 35.150(a)(3). A State may avoid its obligation to eliminate screening criteria that have a discriminatory effect only if it can demonstrate that such criteria are "necessary for the provision of the service, program, or activity being offered." 28 C.F.R. § 35.130(b)(8).

Anyone aggrieved by discrimination in violation of Title II may bring an action against the offending public entity and is entitled to the same "remedies, procedures, and rights" as those allowed under the Rehabilitation Act of 1973, 29 U.S.C. § 794a. 42 U.S.C. § 12133. Compensatory damages and injunctive relief are available in such actions; punitive damages are not. *Barnes v. Gorman*, 536 U.S. 181 (2002). A prevailing party may be awarded attorneys' fees. 42 U.S.C. § 12205.

2. Respondents George Lane and Beverly Jones filed this suit on August 10, 1998, in the United States District Court for the Middle District of Tennessee against the State of Tennessee ("petitioner") and several Tennessee counties charging them with violations of Title II and its implementing regulations. Specifically, Lane, a paraplegic, alleged that petitioner and Polk County had "discriminated against [him on account of his disability] . . . in that they . . . excluded him from participation in, or denied him the benefits of, the services of its [sic] court systems in violation of 42 U.S.C. [§] 12132" in connection with criminal charges brought against him in 1996 and 1997. (Pet. App. 23)

According to the Complaint, at his initial appearance on those charges in the General Sessions Court, Lane "was required to crawl up two flights of stairs" to the courtroom

on the second floor of the Polk County Courthouse in Benton, Tennessee, because there was no elevator. (Pet. App. 15) The Complaint does not disclose whether Lane requested to have his hearing conducted in an accessible location. Likewise, the Complaint does not state whether he sought assistance from anyone to reach the courtroom on this occasion, nor does it allege that anyone refused him such assistance.

On the day of his next scheduled appearance, Lane sent word to the judge that he would not crawl up the stairs to the courtroom. (Pet. App. 15) When officers were dispatched to the ground floor to help him up the stairs, he refused their assistance and refused to appear in the courtroom. (Pet. App. 15) Accordingly, the court issued an attachment for his arrest. (Pet. App. 15) Upon his release from custody, Lane retained counsel and thereafter "attended court proceedings by waiting downstairs from the courtroom and having his attorney shuttle back and forth with information concerning his case." (Pet. App. 15-16) On February 24, 1997, the court conducted Lane's preliminary hearing in the courthouse library, which was fully accessible to handicapped persons, over Lane's objection that the library was "a location that was not regularly frequented by the public." (Pet. App. 16) His case was bound over to the grand jury, which indicted him on two misdemeanor charges. (Pet. App. 16)

At his arraignment on these charges on March 17, 1997, Lane's counsel appeared on his behalf and informed the court that Lane "was on the first floor of the courthouse and could not come to the courtroom because of the requirement to climb the stairs to the courtroom." (Pet. App. 16) According to the Complaint, counsel then moved to continue the arraignment until such time as the courthouse

could be made to conform to the requirements of the ADA. (Pet. App. 16) The court denied the motion and set the case for trial.[1] (Pet. App. 16) Lane unsuccessfully prosecuted an extraordinary interlocutory appeal of the trial court's order to the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court. (Pet. App. 16-17) Thereafter, Circuit Court Judge Carroll Ross entered an order staying all criminal proceedings in the Polk County Courthouse until an elevator was installed. (Pet. App. 17) Construction of the elevator was completed in June 1998. (Pet. App. 17)

The Complaint further alleged that respondent Beverly Jones, a certified court reporter, is a paraplegic confined to a wheelchair as a result of injuries received in an automobile accident in 1989. (Pet. App. 19) She has an active practice and "is called upon by attorneys and other

[1] Pursuant to Rule 32 of the Rules of the Supreme Court, petitioner has submitted to the Clerk a request to lodge certified copies of the following public documents on file in the Tennessee Supreme Court Clerk's Office: a verbatim transcript of the March 17, 1997, hearing; Lane's "Motion to Dismiss Indictment or in the Alternative to Continue Arraignment;" the trial court's order denying that motion; and the orders of the Tennessee Court of Criminal Appeals and Tennessee Supreme Court disposing of Lane's extraordinary interlocutory appeal of the trial court's order. These materials disclose that, before ruling on Lane's motion, the trial court offered (1) to send two sheriff's deputies to the ground floor to help Lane up the stairs to the courtroom and (2) to conduct all further proceedings in the case in a handicapped-accessible room on the first floor of the courthouse in Benton or in a handicapped-accessible courthouse in nearby Ducktown. The trial judge also repeatedly asked for suggestions for accommodations from Lane's counsel. Lane refused these offers of accommodation and refused to suggest any other reasonable option. These materials further disclose that the relief sought by Lane was not merely a continuance of his arraignment but an outright dismissal of the indictment on account of the architectural deficiencies in the Polk County Courthouse.

parties to work all over Middle Tennessee . . . for the purposes of recording proceedings before the state courts . . . ." (Pet. App. 19) Because the courthouses in some of the counties where she offers her services fail to comply with the accessibility requirements of the ADA, she "has lost work and an opportunity to participate in the judicial process because of her inability to gain access to . . . [those] courthouses." (Pet. App. 20) As a consequence, respondent Jones charged that petitioner and these counties have "discriminated against . . . [her] in that they have excluded her from participating in the services offered by the courthouses and access to the Court proceedings . . . by failing to eliminate physical obstacles to her participation" in violation of Title II of the ADA. (Pet. App. 23)

Respondent Lane sought money damages for humiliation and embarrassment in an amount not to exceed $100,000. (Pet. App. 27) Respondent Jones sought money damages for humiliation and embarrassment and lost income in an amount not to exceed $250,000. (Pet. App. 27) Respondents also requested that the district court order petitioner and the counties named as defendants to bring the courthouses in question into compliance with Title II. (Pet. App. 28)

3. Petitioner moved to dismiss the claims against it on the ground that the Eleventh Amendment protects it from private suits for money damages under Title II. (Pet. App. 6) By order entered November 10, 1998, the district court denied the motion without comment (Pet. App. 7), and petitioner appealed that order to the United States Court of Appeals for the Sixth Circuit. (J.A. 1 & 8) On February 10, 1999, pursuant to Rule 44(a), FED. R. APP. P., petitioner notified the clerk that the case involved a constitutional

challenge to a federal statute. (J.A. 1) The Sixth Circuit granted the United States leave to intervene to defend the constitutionality of Title II on March 31, 1999. (J.A. 2)

On January 10, 2002, the Sixth Circuit, sitting en banc, decided *Popovich v. Cuyahoga County Court of Common Pleas,* 276 F.3d 808 (6th Cir.), *cert. denied,* 537 U.S. 812 (2002), in which the sharply divided court concluded, based on *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), "that congressional authority under section 5 [of the Fourteenth Amendment] to enforce the Equal Protection Clause is limited and will not sustain the Disabilities Act as an exception to Eleventh Amendment state immunity." 276 F.3d at 812. The Sixth Circuit, however, distinguished between Title II claims sounding in equal protection principles and those sounding in due process principles and held that the latter category of claims is not barred by the Eleventh Amendment. *Id*. at 813-16.

On July 16, 2002, a panel of the court of appeals issued a per curiam order affirming the district court's denial of petitioner's motion to dismiss respondents' claims. (Pet. App. 10) Concluding, based on *Popovich,* "that the Eleventh Amendment does not bar Title II claims against state entities that are based upon Fourteenth Amendment due process principles," the panel determined that respondents' Title II claims were not barred "[b]ecause . . . [they are] based on such due process principles." (Pet. App. 11) On August 29, 2002, petitioner sought a panel rehearing, arguing that *Popovich* should not control because the Complaint, properly analyzed, did not allege due process violations. (Pet. App. 8) On January 10, 2003, the panel issued an amended opinion affirming the decision of the district court and remanding the case for

further proceedings. (Pet. App. 1) Noting that "[a]mong the rights protected by the Due Process Clause of the Fourteenth Amendment is the right of access to the courts" (Pet. App. 3), the court, without citation to authority, asserted that "[t]he evidence before Congress when it enacted Title II of the . . . [ADA] established that physical barriers in government buildings, including courthouses and in the courtrooms themselves, have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause." (Pet. App. 3-4) The panel therefore concluded that Congress enacted Title II as an appropriate means "'to guarantee meaningful enforcement' of the constitutional rights of the disabled," including "the right of access to the courts." (Pet. App. 4, quoting *Popovich*, 276 F.3d at 815-16)

Addressing respondents' particular claims, the panel decided that both sought to redress "due process-type" violations of Title II: "Jones and Lane are seeking to vindicate their right of access to the courts in Tennessee. Lane alleges that he has been denied the benefit of access to the courts. Jones similarly alleges that she has been excluded from courthouses and court proceedings by an inability to access the physical facilities." (Pet. App. 5) The panel declined to answer petitioner's contention that respondents' allegations, particularly those made by Jones, were based on equal protection principles. (Pet. App. 5)

SUMMARY OF THE ARGUMENT

In *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), this Court held that in order to achieve a valid

abrogation of the States' sovereign immunity from private suits for money damages: (1) Congress must have "unequivocally expresse[d] its intent to abrogate the immunity . . ."; and (2) Congress must have acted "pursuant to a valid exercise of power." *Id.* at 55 (internal quotations and citations omitted). After *Seminole Tribe*, section 5 of the Fourteenth Amendment is the only source of congressional power sufficient to abrogate the States' Eleventh Amendment sovereign immunity. *Id.* at 59-66. While Congress clearly stated its intent to abrogate in the text of the ADA, 42 U.S.C. § 12202, Title II of the ADA exceeds Congress' section 5 powers.

A. Title II is first and foremost equal protection legislation designed to eliminate discrimination against disabled persons in the "services, programs, or activities" of state and local governments. 42 U.S.C. § 12132. State action taken on the basis of disability is presumptively constitutional under the Equal Protection Clause and is subjected to minimum rational-basis scrutiny. *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 446 (1985). When Congress seeks to invoke its section 5 powers to enforce the Fourteenth Amendment's protections against irrational discrimination, it must base such action on evidence of a "widespread and persisting deprivation of constitutional rights" by the States. *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997). *Accord Nevada Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1982 (2003).

The legislative record developed in connection with the enactment of the ADA wholly fails to demonstrate any persisting pattern of unconstitutional discrimination against disabled persons by the States. The official congressional findings set forth in the text of the ADA make no reference to constitutional violations. Those findings do

not even refer to the States. Nor do the House and Senate Reports on the ADA contain the slightest hint that Congress was responding to evidence of widespread equal protection violations by the States against the disabled in their services and programs. Indeed, far from indicating concerns about unconstitutional behavior, the record recognizes the States' leadership in safeguarding the rights of the disabled. Likewise, the information presented to Congress by the Task Force on the Rights and Empowerment of Americans with Disabilities fails to document a pattern of irrational exclusion of the disabled from participation in state programs and services.

Nor can Title II be sustained on the theory that it was needed to enforce the due process rights of the disabled against state infringement. All citizens enjoy a panoply of fundamental constitutional rights protected by the Fourteenth Amendment's due process guarantee. But there is nothing in the legislative record to suggest that Congress was acting to protect due process rights, and no substantial evidence was presented to Congress that the States were engaged in a pattern of violations of the fundamental rights of the disabled.

B. Even if the legislative record had documented instances of unconstitutional treatment of the disabled by the States, Title II's sweeping provisions, the vast majority of which operate to prohibit entirely constitutional conduct, are "so out of proportion to a supposed remedial or preventive object that . . . [Title II] cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532. Title II shares all of the incongruent and disproportionate features of Title I of the ADA that led this Court in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356

(2001), to decide that Title I exceeded Congress' section 5 authority. While as a general rule States are not required to make special accommodations for the disabled by the Fourteenth Amendment, the entire thrust of Title II is to require them to do just that. In addition, although the Fourteenth Amendment presumes that a failure to make such accommodations is permissible, Title II presumes the contrary and casts upon the States the burden to justify any such failure to act. And Title II prohibits virtually every state action that has an unintended adverse, disparate effect on disabled persons' access to state services and programs, without regard to whether the action is rationally related to legitimate goals. All of these features demonstrate that Title II was calculated to accomplish precisely what section 5 forbids – "a substantive redefinition" of the States' obligations under the Fourteenth Amendment. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000).

Neither is Title II sustainable as prophylactic legislation, needed to deter future constitutional violations by the States. Because there was no record of a pattern of existing unconstitutional treatment by the States of persons with disabilities, Congress had no reason to believe that broad prophylactic legislation was necessary in this field. Moreover, this was not a situation where previous legislative attempts to curb unconstitutional behavior by the States had failed. Indeed, the legislative record indicates that it was the very success of the Rehabilitation Act of 1973, which addressed the needs of disabled persons in connection with programs and services of recipients of federal funds, that led Congress to expand the Rehabilitation Act's access requirements through the ADA to all state activities as well as to the private sector. Finally, the sheer

breadth of Title II, reaching as it does into every facet of the States' activities, means that Congress could not reasonably have concluded that any significant proportion of the state laws and policies affected by Title II's provisions would be unconstitutional. In sum, Title II lacks that "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" which section 5 demands. *City of Boerne*, 521 U.S. at 520.

ARGUMENT

TITLE II OF THE ADA EXCEEDS CONGRESS' POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT TO ABROGATE THE SOVEREIGN IMMUNITY OF THE STATES.

This case presents the second occasion for the Court to address the validity of Congress' attempt to abrogate the States' sovereign immunity from suits for money damages brought by private persons under the ADA. In *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356 (2001), this Court held the attempt invalid as to damages claims against the States asserted under Title I of the ADA, which forbids discrimination on the basis of disability in employment matters. The Court, however, declined to decide whether Congress had the constitutional authority to subject the States to claims for money damages under Title II of the ADA. *Id.* at 360 n.1. That question is squarely presented here and, for the reasons stated in this brief, should also be answered in the negative.

Petitioner fully shares the view that the ADA represents "a milestone on the path to a more decent, tolerant,

progressive society," *id.* at 375 (Kennedy and O'Connor, J.J., concurring), and does not question its duty to comply with the requirements of Title II in all of its services, programs, and activities.[2] Petitioner likewise recognizes that its officials may be held to account for any breach of that obligation in actions by private individuals for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908), as well as in enforcement actions by the United States. *See Garrett*, 531 U.S. at 374 n.9. What is at stake here, instead, is the preservation of "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ," *Alden v. Maine*, 527 U.S. 706, 713 (1999), namely, their immunity from suit at the hands of private parties without their consent. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). "The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002).

The validity of any attempt by Congress to abrogate state sovereign immunity turns on the answer to two

[2] More than a decade before the passage of the ADA, petitioner enacted various laws protecting the rights of the disabled. *See, e.g.,* TENN. CODE ANN. § 8-50-103 (2002 Repl.) (prohibiting discrimination against the handicapped in employment matters) (enacted 1976); TENN. CODE ANN. § 8-50-104 (2002 Repl.) (directing state and local government "to give positive emphasis to the recruitment, evaluation, and employment of handicapped persons in the public service . . . .") (enacted 1976); TENN. CODE ANN. §§ 68-120-201–205 (2001 Repl.) (requiring public building accessibility) (enacted 1970).

questions: "first, whether Congress has unequivocally expresse[d] its intent to abrogate the immunity, . . . and second, whether Congress has acted pursuant to a valid exercise of power." *Seminole Tribe,* 517 U.S. at 55 (internal quotations and citations omitted). In the text of the ADA, Congress has clearly stated its intent to subject the States to suit by private persons for violations of Title II. *See* 42 U.S.C. § 12202.

"Whether Congress had the power to compel [the] States to surrender their sovereign immunity for these purposes, however, is another matter." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 635 (1999). Congress sought to rest its adoption of the ADA on "the sweep of . . . [its] authority, including the power to enforce the fourteenth amendment and to regulate commerce . . . ." 42 U.S.C. § 12101(b)(4). The Article I commerce power is not a valid source of authority to override the States' immunity from suit. *Seminole Tribe*, 517 U.S. at 72-73; *Kimel*, 528 U.S. at 78-79. Congress' power under the Fourteenth Amendment is the only source of legislative authority sufficient to support abrogation. *Seminole Tribe*, 517 U.S. at 59-66.

Accordingly, unless Title II constitutes an appropriate exercise of Congress' power under section 5 of the Fourteenth Amendment to enforce the rights guaranteed to the disabled by that Amendment, Congress lacked the constitutional authority to abrogate the States' immunity from suits by private persons under Title II. As was the case with Title I of the ADA, Title II exceeds Congress' section 5 enforcement authority, because the sweeping prohibitions of Title II do not exhibit the constitutionally required "congruence and proportionality between the injury to be

prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

A. Title II was not enacted in response to evidence of a widespread pattern of state action violating the Fourteenth Amendment rights of the disabled.

"'The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch.'" *Nevada Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1977 (2003) (quoting *Kimel,* 528 U.S. at 81)). Thus, the power conferred on Congress by section 5 to enforce the Fourteenth Amendment "by appropriate legislation" is "corrective or preventive, not definitional." *City of Boerne,* 521 U.S. at 525. A valid exercise of that power against the States requires that Congress at a minimum "identify conduct transgressing the Fourteenth Amendment's substantive provisions" on the part of the States. *Florida Prepaid,* 527 U.S. at 639. And when, as in the case of Title II, Congress desires to adopt national enforcement legislation that indiscriminately intrudes upon the sovereignty of all fifty States, it must base its action on evidence of a "widespread and persisting deprivation of constitutional rights" by the States, *City of Boerne,* 521 U.S. at 526, documenting the existence of "a problem of national import." *Florida Prepaid*, 527 U.S. at 641. Measured against these now well-settled standards, the record on which Congress sought to justify Title II is fatally deficient.

1. The legislative record fails to document a pattern of irrational discrimination by the States against the disabled.

To ascertain whether Title II was supported by the requisite evidentiary predicate, "[t]he first step . . . is to identify with some precision the scope of the constitutional right at issue . . . ." *Garrett*, 531 U.S. at 365. Like the other titles of the ADA, Title II is first and foremost equal protection legislation. Its core purpose is "the elimination of *discrimination* against individuals with disabilities," 42 U.S.C. § 12101(b)(1) (emphasis added), in the "services, programs, or activities" of state and local governments. 42 U.S.C. § 12132. Under this Court's equal protection jurisprudence, state action that classifies on the basis of disability "incurs only the minimum 'rational-basis' review applicable to general social and economic legislation." *Garrett*, 531 U.S. at 366 (footnote omitted) (citing *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 446 (1985)). "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Moreover, such classifications are presumptively constitutional: "[T]he State need not articulate its reasoning at the moment a particular decision is made," *Garrett*, 531 U.S. at 366, but, instead, " 'the burden is on the one attacking . . . [the classification] to negative every conceivable basis which might support it.' " *Heller,* 509 U.S. at 320 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). The Equal Protection Clause of the Fourteenth Amendment thus guarantees to disabled persons the right to be free from wholly arbitrary and irrational discrimination at the hands of the States.

Congress failed to identify any "widespread and persisting" pattern of arbitrary and irrational discrimination by the States against individuals with disabilities in connection with its enactment of Title II. The official congressional findings set forth in the text of the ADA make no mention of constitutional violations. *See* 42 U.S.C. § 12101(a)(1)-(9). Although Congress' findings refer to the existence of both "discrimination against" and "purposeful unequal treatment of" the disabled in many "critical areas" of our society, including "access to public services," those findings do not identify the States as the source of the problem, nor do they even indirectly suggest that any such disparate treatment properly attributable to the States is of the irrational sort that violates the Equal Protection Clause. *Id*. That is to say, insofar as the findings can be said to refer to the States at all, they merely assert that the States are engaged in presumptively constitutional, although perhaps socially undesirable, behavior. Disability is "a characteristic that the government may legitimately take into account in a wide range of decisions." *Cleburne*, 473 U.S. at 446.

Nor do the House and Senate Reports on the ADA contain the slightest hint that Congress was responding to evidence of widespread equal protection violations by the States against persons with disabilities in their services and programs. The Senate Report's succinct statement of Title II's purposes does not express any concerns of constitutional dimension:

> Title II of the legislation has two purposes. The first purpose is to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act

> of 1973, to all programs, activities, and services provided or made available by state and local governments . . . regardless of whether or not such entities receive Federal financial assistance. Currently, section 504 prohibits discrimination only by recipients of Federal financial assistance.
>
> The second purpose is to clarify the requirements of section 504 for public transportation entities that receive Federal aid, and to extend coverage to all public entities that provide public transportation, whether or not such entities receive Federal aid.

S. REP. NO. 101-116, 101st Cong., 1st Sess. 44 (1989). Conspicuously absent from this explanation of Title II's purposes is any allegation that the States had been ignoring the requirements of the Rehabilitation Act in those programs to which that Act had applied for nearly two decades prior to the passage of Title II, or that the States were engaged in wholesale unconstitutional discrimination in those programs and services not yet covered. The House Report similarly cited the need to expand the reach of the antidiscrimination provisions of the Rehabilitation Act as a central objective of the ADA but did not allege any pattern or practice of violations of that Act by the States, let alone widespread, irrational discrimination against disabled persons. The House Report emphasized instead that additional legislation was needed because "section 504 [of the Rehabilitation Act] does not apply to *private sector entities* that do not receive Federal funds." H.R. REP. NO. 101-485(IV), 101st Cong., 2d Sess. 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 512, 513 (emphasis added).

Indeed, far from indicating concerns about state-sponsored misconduct, the legislative record reflects

congressional recognition of the States' leadership in safeguarding the rights of the disabled. As this Court observed in *Garrett*: "It is worth noting that by the time Congress enacted the ADA in 1990, every State in the Union had enacted such measures. At least one Member of Congress remarked that 'this is probably one of the few times where the States are so far out in front of the Federal Government, it's not funny.'" 531 U.S. at 368 n.5. The Senate Report candidly acknowledged that "[a]ll states currently mandate accessibility in newly constructed state-owned public buildings . . . ," S. REP. NO. 101-116 at 92, and recognized that "[v]irtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life." *Id.* at 182. Senator Hatch applauded the "growing array of programs and antidiscrimination provisions at the local, *state* and federal levels designed to enhance [the opportunities of disabled persons] to lead lives of independence . . . ," *id.* at 96 (emphasis added), while others expressed the view that existing state antidiscrimination laws provided a model for federal action. *See*, *e.g.,* 136 CONG. REC. H2614 (daily ed. May 22, 1990) (Statement of Rep. Berman) ("States like California, Pennsylvania, New York, North Carolina, Massachusetts, Connecticut, Iowa, Illinois and others have offered models on which many aspects of the ADA are based.").

Nor did the information presented to Congress by the Task Force on the Rights and Empowerment of Americans with Disabilities ("Task Force Report"), summarized in Appendix C to Justice Breyer's dissenting opinion in *Garrett*, 531 U.S. at 391-424, document a pattern of irrational exclusion of the disabled from participation in state services, programs and activities. In the first place, these "unexamined, anecdotal accounts of adverse disparate treatment"

of the disabled, *id.* at 370 (internal quotations omitted), "are so lacking in detail as to make it impossible to determine whether a constitutional violation actually occurred." *Wessel v. Glendening*, 306 F.3d 203, 213 (4th Cir. 2002). Furthermore, fewer than one-third of the examples listed in Appendix C clearly refer to any conduct by a state actor. Although by far the largest category of examples in the compilation concerns a lack of physical access to government buildings and transportation facilities due to architectural barriers and design deficiencies, as well as the failure to comply with regulations regarding handicap parking spaces, most of these examples do not specify state ownership or control of the facilities in question. And, significantly, merely reciting the failure of a state or local government agency to retrofit its facilities to accommodate the disabled, or to provide more convenient parking for the disabled, does not establish an equal protection violation.

"The failure of a State to revise policies now seen as incorrect under a new understanding of proper policy does not always constitute the purposeful and intentional action required to make out a violation of the Equal Protection Clause." *Garrett*, 531 U.S. at 375 (Kennedy and O'Connor, J.J., concurring). This Court has recognized since *Cleburne* that the "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." *Id.* at 367. While decisions by state officials to allocate limited tax dollars to priorities other than improved handicap access to public buildings and transport may justifiably be criticized as "hardheaded" and even "hardhearted," *id.,* such choices are not irrational and are therefore presumptively constitutional.

"If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." *Id.* at 368 (footnote omitted).

Finally, the legislative record contains no discussion of state or federal case law demonstrating the existence of widespread equal protection violations by the States arising from discriminatory exclusion of disabled persons from access to government programs and services. The failure of Congress to cite to any such "confirming judicial documentation" is hardly surprising, since, as Justices Kennedy and O'Connor have already noted in their concurring opinion in *Garrett*, "it does not exist." *Id.* at 376.

2. The legislative record likewise fails to document a pattern of state action violating the due process rights of the disabled.

In this case, the court below asserted that the aim of Title II was not merely to safeguard the rights of the disabled to equal protection of the laws but to enforce the Due Process Clause of the Fourteenth Amendment as well. According to the court of appeals, the specific due process right implicated by respondents' Complaint was "the right of access to the courts." (Pet. App. 3) But, in the court's view, the existence of "physical barriers in government buildings" generally has "had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause," thereby rendering Title II appropriate section 5 enforcement legislation. (Pet. App. 3-4)

The citizens of the States, including disabled citizens, enjoy a panoply of fundamental constitutional rights

protected by the Fourteenth Amendment's due process guarantee, among them, the rights enumerated in the Bill of Rights that have been incorporated through the Due Process Clause, *e.g.*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 847 (1992) ("[T]he Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States."); the right of access to the courts, *e.g.*, *Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971) (Though not guaranteed a trial on the merits, "persons forced to settle claims of right and duty through judicial process must be given meaningful opportunity to be heard."); the right to vote, *e.g., Bush v. Gore*, 531 U.S. 98, 104 (2000) ("When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental . . ."); the right to travel, *e.g.*, *Jones v. Helms*, 452 U.S. 412, 418-19 (1981) (The right to travel is a "privilege of national citizenship, and . . . an aspect of liberty that is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments."); and various parenting, procreative, and privacy rights, *e.g.*, *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) ("[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education."). State action abridging these rights is subject to strict scrutiny and may survive constitutional challenge only if necessary to achieve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

The legislative record fails to support the Sixth Circuit's claim that Title II was enacted to remedy widespread and persisting due process violations by the States. There is no reference to any of the aforementioned fundamental rights in the findings section of the ADA, save a

cursory reference to the existence of "discrimination against individuals with disabilities . . . in . . . voting." 42 U.S.C. § 12101(a)(3). But that solitary reference neither identifies state actors as the perpetrators of such discrimination nor even remotely suggests that the difficulties encountered by some disabled individuals in gaining physical access to deficiently designed polling places have resulted in widespread, unconstitutional deprivations of the right to vote. *Id.* Similarly, the findings' generic statement that the disabled have encountered discrimination in access to "public services," *id.,* simply cannot be read to allege a systematic pattern of fundamental rights violations by the States.

The Senate and House Reports are no more illuminating. Under the major heading "Nature and Extent of Discrimination on the Basis of Disability" and subheading "Public services," the Senate Report describes only one problem pertinent here – that the "Committee heard about people with disabilities who were forced to vote by absentee ballot before key debates by the candidates were held." S. REP. NO. 101-116 at 12. No unconstitutional abridgment of the right to vote is easily discerned from these incidents. The House Report contains no discussion whatsoever of any state action abridging the fundamental rights of the disabled.

In sum, there are no findings either in the ADA itself or in the reports accompanying the legislation to the floor of each house of Congress that Title II was needed to remedy rampant violations of fundamental rights by the States. And the handful of incidents described in the Task Force Report that might conceivably rise to the level of such a violation suffer from the same infirmities as those anecdotes discussed above in connection with the Equal

Protection Clause. They are simply too vague in content and too few in number to establish a pattern of state misconduct warranting invocation of Congress' section 5 powers.

B. Title II is not congruent with or proportional to an appropriate remedial objective authorized by section 5 of the Fourteenth Amendment.

Because the traditional separation of powers assigns "to this Court, not Congress, [the authority] to define the substance of constitutional guarantees," *Hibbs*, 123 S. Ct. at 1977, Congress' section 5 power to remedy and deter violations of the Fourteenth Amendment on the part of the States is "not the power to determine what constitutes a constitutional violation," *City of Boerne*, 521 U.S. at 519, or "to substantively redefine the States' legal obligations" under section 1. *Kimel*, 528 U.S. at 88. "Congress does not enforce a constitutional right by changing what the right is." *City of Boerne*, 521 U.S. at 519. A valid exercise of the section 5 enforcement power is, therefore, one "adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against." *The Civil Rights Cases*, 109 U.S. 3, 13 (1883). To insure proper respect for "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law," *City of Boerne*, 521 U.S. at 519, the Constitution demands of section 5 legislation that there "be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.

Garrett held that Title I of the ADA unconstitutionally crossed that line in at least three critical respects. First,

after examining whether Congress had identified evidence of widespread, irrational mistreatment of the disabled by the States in the employment sphere, the Court concluded that the legislative record of the ADA fell "far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based." *Garrett*, 531 U.S. at 370. The Court also determined that Title I's core "reasonable accommodation" requirement "far exceed[ed] what is constitutionally required" of the States, (1) because it imposed on state employers a duty to make the workplace accessible to disabled employees, even when it would be rational for employers to save money by hiring only workers able to use existing facilities, and (2) because it placed the burden on state employers to justify a failure to accommodate on grounds of undue hardship, "instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision." *Id.* at 372. Finally, the Court focused on provisions of Title I forbidding employment practices "that disparately impact the disabled, without regard to whether such conduct has a rational basis" and found them disproportionate to any legitimate remedial objective. *Id.* at 372-74.

Petitioner has already exposed the serious inadequacies in the legislative record on which Congress sought to ground Title II. That record provided no more justification for an exercise of Congress' section 5 enforcement power to remedy alleged discrimination against the disabled by the States in their "services, programs, or activities" than it did to support application of Title I's employment discrimination ban to the States. In addition, the rights and remedies created by Title II share all of the incongruent and disproportionate features of Title I deemed unconstitutional by this Court in *Garrett*.

1. Title II's indiscriminate scope and extra-constitutional remedial scheme are not tailored to cure violations of the Fourteenth Amendment rights of the disabled.

Title II's lack of congruence with any constitutional injury that has been inflicted by the States on disabled persons is apparent on the face of the statute. Title II reaches all "services, programs, or activities" of the States, 42 U.S.C. § 12132, a formulation that "encompasses virtually everything that a public entity does." *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998). Its provisions are not tailored to eradicate discrimination in those programs and services that might impact the exercise of fundamental constitutional rights. Instead, "Title II targets *every* state law, policy or program," *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1009 (8th Cir. 1999) (en banc), *cert. dismissed*, 529 U.S. 1001 (2000), addressing an unlimited array of subjects ranging from parking space availability at state museums[3] and concert seating priorities at state performing arts centers[4] to recreational offerings at

[3] *See, e.g.,* U.S. Dep't of Justice, The Americans with Disabilities Act: Title II Technical Assistance Manual (1993) ("TAM") § II-5.4000: "A public entity should provide an adequate number of accessible parking spaces in existing parking lots or garages over which it has jurisdiction."

[4] *See, e.g.,* TAM § II-5.2000, illus. 4 (Supp. 1994): "A municipal performing arts center provides seating at two prices – inexpensive balcony seats and more expensive orchestra seats. All of the accessible seating is located on the higher priced orchestra level. In lieu of providing accessible seating on the balcony level, the city must make a reasonable number of accessible orchestra-level seats available at the lower price of balcony seats."

state parks[5] and the configuration of bathroom stalls at highway rest areas.[6] Thus, Title II suffers from the same defect that was fatal to the Religious Freedom Restoration Act, struck down by this Court in *City of Boerne*: Title II "cannot be considered remedial, preventive legislation, if those terms are to have any meaning," because its "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." 521 U.S. at 532.

Unlike the Voting Rights Act of 1965, approved by this Court as an appropriate exercise of Congress' power to enforce the Fifteenth Amendment in *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966), Title II is the very antithesis of "a detailed but limited remedial scheme" crafted to address a clearly "targeted violation" of the constitutional rights of disabled persons. *Garrett*, 531 U.S. at 373-74; *see also Hibbs*, 123 S. Ct. at 1983 ("[T]he FMLA is narrowly targeted . . . and affects only one aspect of the employment relationship."). Instead, Title II more closely resembles the Patent Remedy Act, declared unconstitutional in *Florida Prepaid*: When fashioning Title II's

[5] *See, e.g.,* TAM § II-3.5100, illus. 1: "The director of a county recreation program prohibits persons who use wheelchairs from participating in county-sponsored scuba diving classes because he believes that persons who use wheelchairs probably cannot swim well enough to participate. An unnecessary blanket exclusion of this nature would violate the ADA."

[6] *See, e.g.,* TAM § II-5.1000, illus. 3: "A State provides ten rest areas approximately 50 miles apart along an interstate highway. Program accessibility requires that an accessible toilet room for each sex with at least one accessible stall, or a unisex bathroom, be provided at each rest area."

comprehensive antidiscrimination mandate, "Congress did nothing to limit . . . [its] coverage . . . to cases involving arguable constitutional violations" or to those "States with . . . a high incidence of" such violations. 527 U.S. at 646-47. In Title II, as in the Patent Remedy Act, "Congress made all States immediately amenable to suit in federal court" for "[a]n unlimited range of state conduct" and "for an indefinite duration." *Id.* Title II's "indiscriminate scope" alone deprives it of that congruence and proportionality essential to valid section 5 legislation. *Id.* at 647.

Moreover, in the vast majority of circumstances to which Title II applies, the rights and remedies made available to disabled persons by the statute impose requirements on the States that go well beyond anything demanded of them by the Constitution. While as a general rule the "States are not required by the Fourteenth Amendment to make special accommodations for the disabled," *Garrett*, 531 U.S. at 367, Title II commands that the States must make "reasonable modifications to rules, policies, or practices," remove "architectural, communication, or transportation barriers," and furnish "auxiliary aids and services," 42 U.S.C. § 12131(2), if necessary to allow a "qualified individual with a disability" access to state-sponsored "services, programs, or activities." 42 U.S.C. § 12132. In other words, "[i]n contrast to the Equal Protection Clause['s] prohibition on invidious discrimination against the disabled and irrational distinctions between the disabled and the nondisabled, Title II requires public entities to recognize the unique position of the disabled and to make favorable accommodations on their behalf." *Thompson v. Colorado*, 278 F.3d 1020, 1031 (10th Cir. 2001), *cert. denied,* 535 U.S. 1077 (2002). Similarly, the regulations implementing Title II make clear

that the failure of a State to make such "favorable accommodations" is presumptively illegal under Title II, unless it "can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity" involved. 28 C.F.R. § 35.130(b)(7). By contrast, the Fourteenth Amendment presumes that a decision not to undertake such affirmative efforts to assist the disabled is entirely permissible, and it casts the burden upon the party claiming otherwise to demonstrate irrational, disparate treatment on the part of the State. *Garrett*, 531 U.S. at 372.

Indeed, Title II's reach is not in the least confined to state decisions made with conscious intent to treat disabled persons differently than other citizens. "Title II focuses on disparate effects divorced from any inquiry into intent." *Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn*, 280 F.3d 98, 110 (2d Cir. 2001). *See, e.g.*, 28 C.F.R. § 35.130(b)(3)(i) (forbidding the use of criteria or methods of administration in state programs "[t]hat have the effect of subjecting [disabled persons] to discrimination"); 28 C.F.R. § 35.130(b)(4)(i) (forbidding the selection of sites for public facilities "[t]hat have the effect of . . . subjecting [the disabled] to discrimination"); 28 C.F.R. § 35.130(b)(8) (forbidding the use of program eligibility criteria that "tend to screen out an individual with a disability").[7] But

[7] There can be little doubt that these disparate impact regulations accurately interpret Title II's provisions. Congress directed in Title IV of the ADA that no provision of the statute "shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a). The Rehabilitation Act, in turn, authorizes discrimination claims against federal

(Continued on following page)

state action for which there exists some rational basis does not violate the Fourteenth Amendment simply because it may have an adverse, disparate effect on access of disabled persons to state programs and services. For purposes of establishing a constitutional violation, "evidence [of disparate impact] alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny." *Garrett*, 531 U.S. at 373.

Title II's lack of proportionality is further revealed when its remedial provisions are compared with those contained in Title III of the ADA, which imposes access and accommodation duties on the private sector comparable to those placed on public entities by Title II. Whereas Congress chose in Title II to subject the States to suits for money damages, *see generally Barnes v. Gorman*, 536 U.S. 181 (2002), disabled persons are *not* entitled to recover such relief in a suit to enforce a private sector entity's obligations under Title III[8] but are instead limited to injunctive relief and recovery of attorneys' fees. 42 U.S.C. § 12188(a)(1); 42 U.S.C. § 2000a-3(a). There is certainly nothing in the ADA's legislative history to support the proposition that individuals with disabilities had experienced less serious or pervasive discrimination in the private sector than at the hands of the States or that stronger measures were needed to insure compliance with the ADA's access and modification mandates by States

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grantees arising from policies and practices that have the effect of denying to handicapped persons "meaningful access to the benefit that the grantee offers." *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

[8] Congress limited the availability of money damages under Title III to suits brought by the U.S. Attorney General. 42 U.S.C. § 12188(b).

than by private entities. To the contrary, as previously discussed, the House Report cited the urgency of addressing discrimination *in the private sector* as the primary reason for expanding the reach of the Rehabilitation Act's access requirements beyond recipients of federal funds through the vehicle of the ADA.

All of these features of Title II's remedial scheme demonstrate that the legislation was calculated not to remedy or deter violations of the Fourteenth Amendment rights of disabled persons but rather to accomplish precisely the objective that section 5 forbids – "a substantive redefinition" of the States' obligations under section 1 of the Amendment. *Kimel,* 528 U.S. at 81. Indeed, Congress made no pretense otherwise. In the ADA's statement of findings and purpose, Congress declared that "individuals with disabilities are a discrete and insular minority . . . relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and . . . not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a)(7). These words are, of course, borrowed directly from this Court's case law defining the content of the Fourteenth Amendment's substantive guarantees. *See United States v. Carolene Prod. Co.,* 304 U.S. 144, 152-53 n.4 (1938) ("discrete and insular minorities"); *Mathews v. Lucas,* 427 U.S. 495, 505 (1976) (illegitimacy deserves quasi-suspect classification status because that characteristic has "no relation to the individual's ability to participate in and contribute to society."). And these words unmistakably reveal Congress' intent that state policies affecting the disabled should be subjected to the more exacting levels of scrutiny reserved by the Fourteenth Amendment for "suspect" or

"quasi-suspect" classifications, despite this Court's express holding to the contrary only five years earlier in *Cleburne*. 473 U.S. at 442-48.

2. Title II is not sustainable as prophylactic legislation needed to deter constitutional violations by the States.

Title II prohibits the States from enacting a wide range of entirely constitutional measures affecting the interests of disabled persons and, in addition, requires the States to undertake on their behalf countless affirmative efforts that the Constitution does not command. While Congress' section 5 enforcement power includes the authority to deter violations of the Fourteenth Amendment "by prohibiting a somewhat broader swath of conduct . . . [than is] forbidden by the Amendment's text," *Kimel*, 528 U.S. at 81, Title II does not satisfy any of the requirements of constitutionally valid prophylactic legislation.

Most significantly, the paucity of evidence before Congress indicating that the States were engaged in a pattern of unconstitutional discrimination against individuals with disabilities "confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field." *Id.* at 91. Although section 5 prophylactic legislation may be justified by "the extent and specificity of the . . . record of unconstitutional state conduct" presented to Congress, *Hibbs*, 123 S. Ct. at 1981 n.11, it bears repeating that the legislative record of the ADA reveals neither widespread irrational treatment of disabled persons nor persistent denials of their fundamental rights by the States.

Second, during its deliberations leading to the enactment of Title II, Congress did not face a situation "where

previous legislative attempts had failed" to turn the States away from unconstitutional practices with respect to the disabled, so as to "justify added prophylactic measures in response." *Id.* at 1982. *See also Kimel,* 528 U.S. at 88 ("Difficult and intractable problems often require powerful remedies . . . "). Dating back to the adoption of the Rehabilitation Act of 1973, 29 U.S.C. § 701, all state agencies receiving federal financial assistance had been required to follow most of the same access requirements imposed on the States by Title II.[9] Yet Congress made no finding of widespread state violations of the Rehabilitation Act at the time of its passage of the ADA. Indeed, the legislative record suggests that it was the very efficacy of this prior enactment that spurred Congress to expand its requirements through the ADA to all state "services, programs, or activities" as well as to the private sector.

[9] Although not at issue in this appeal, petitioner notes that the circuits are split over whether the States have immunity from private suits for money damages under the Rehabilitation Act. *Compare Reickenbacker v. Foster,* 274 F.3d 974, 983 (5th Cir. 2001) (Congress exceeded its authority in abrogating the States' immunity under the Rehabilitation Act), *and Garcia*, 280 F.3d at 114-15 (the acceptance of federal funds under the Rehabilitation Act by the State of New York did not constitute a knowing waiver of sovereign immunity), *with Shepard v. Irving,* No. 02-1712, 2003 WL 21977963 at *8 (4th Cir. Aug. 20, 2003) (a state's acceptance of federal funds under the Rehabilitation Act constitutes a voluntary waiver of sovereign immunity), *and Koslow v. Commonwealth of Pa.,* 302 F.3d 161, 169-71 (3d Cir. 2002) (same), *cert. denied,* 123 S. Ct. 1353 (2003), *and Robinson v. Kansas*, 295 F.3d 1183, 1189-90 (10th Cir. 2002) (same), *cert. denied,* 123 S. Ct. 2574 (2003), *and Nihiser v. Ohio Envtl. Prot. Agency,* 269 F.3d 626, 628 (6th Cir. 2001) (same), *cert. denied*, 536 U.S. 922 (2002), *and Douglas v. California Dep't of Youth Auth.*, 271 F.3d 812, 820-21 (9th Cir. 2001) (same), *cert. denied*, 536 U.S. 924 (2002), and *Jim C. v. United States*, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (en banc) (same), *cert. denied sub nom. Arkansas Dep't of Educ. v. Jim C.,* 533 U.S. 949 (2001).

Finally, the sheer breadth of Title II's coverage, which reaches into every facet of the States' business, compels the conclusion that there is no "reason to believe that many of the laws affected by . . . [Title II] have a significant likelihood of being unconstitutional." *City of Boerne*, 521 U.S. at 532. To the contrary, the vast majority of state action, as well as inaction, made illegal by Title II would not violate the Fourteenth Amendment rights of disabled persons. In sum, Title II "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX A

SELECTED PROVISIONS FROM THE AMERICANS WITH DISABILITIES ACT OF 1990

42 U.S.C. § 12101. Findings and purpose

(a) Findings

The Congress finds that –

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure

to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice 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, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

(Pub.L. 101-336, § 2, July 26, 1990, 104 Stat. 328)

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42 U.S.C. § 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes –

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered

materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

(Pub.L. 101-336, § 3, July 26, 1990, 104 Stat. 329.)

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42 U.S.C. § 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means –

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of Title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

(Pub.L. 101-336, Title II, § 201, July 26, 1990, 104 Stat. 337.)

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42 U.S.C. § 12132. Discrimination

Subject to the provisions of this subchapter, 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.

(Pub.L. 101-336, Title II, § 202, July 26, 1990; 104 Stat. 337.)

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42 U.S.C. § 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

(Pub.L. 101-336, Title II, § 203, July 26, 1990, 104 Stat. 337.)

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42 U.S.C. § 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of Title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

(Pub.L. 101-336, Title II, § 204, July 26, 1990, 104 Stat. 337.)

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42 U.S.C. § 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in[1] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

(Pub.L. 101-336, Title V, § 502, July 26, 1990, 104 Stat. 370.)

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[1] So in original. Probably should be "in a".

APPENDIX B

SELECTED PROVISIONS FROM THE REHABILITATION ACT OF 1973

29 U.S.C. § 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Pub.L. 93-112, Title V, § 505, as added Pub.L. 95-602, Title I, § 120(a), Nov. 6, 1978, 92 Stat. 2982.)

APPENDIX C

SELECTED REGULATIONS FROM TITLE 28 CHAPTER 1 PART 35

28 C.F.R. § 35.160 General.

(a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(2) In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.

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28 C.F.R. § 35.101 Purpose.

The purpose of this part is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12131), which prohibits discrimination on the basis of disability by public entities.

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28 C.F.R. § 35.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of 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 public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability –

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections –

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service,

program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an

individual with whom the individual or entity is known to have a relationship or association.

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28 C.F.R. § 35.149 Discrimination prohibited.

Except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, 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 public entity.

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28 C.F.R. § 35.150 Existing facilities.

(a) General. A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not –

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue

financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(b) Methods –

(1) General. A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making

alterations to existing buildings, shall meet the accessibility requirements of § 35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2) Historic preservation programs. In meeting the requirements of § 35.150(a) in historic preservation programs, a public entity shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required because of paragraph (a)(2) or (a)(3) of this section, alternative methods of achieving program accessibility include –

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) Time period for compliance. Where structural changes in facilities are undertaken to comply with the obligations established under this section, such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible.

(d) Transition plan.

(1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a

public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.

(2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

(3) The plan shall, at a minimum –

(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

(4) If a public entity has already complied with the transition plan requirement of a Federal agency regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this paragraph (d) shall apply only to those policies and practices that were not included in the previous transition plan.

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28 C.F.R. § 35.151 New construction and alterations.

(a) Design and construction. Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(b) Alteration. Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(c) Accessibility standards. Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR part 101-19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (Appendix A to 28 CFR part 36) shall be deemed to comply with the requirements of this section with respect to those facilities, except that the elevator exemption contained at section 4.1.3(5) and section

4.1.6(1)(k) of ADAAG shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(d) Alterations: Historic properties.

(1) Alterations to historic properties shall comply, to the maximum extent feasible, with section 4.1.7 of UFAS or section 4.1.7 of ADAAG.

(2) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of § 35.150.

(e) Curb ramps.

(1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

(2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.

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28 C.F.R. § 35.164 Duties.

This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the

public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.