No. 02-1667

In the Supreme Court of the United States

STATE OF TENNESSEE, PETITIONER

v.

GEORGE LANE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, exceeds Congress's authority under Section 5 of the Fourteenth Amendment.

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OPINIONS BELOW

The court of appeals' amended opinion on rehearing (Pet. App. 1-5) is reported at 315 F.3d 680. The original opinion of the court of appeals (Pet. App. 10-11) and the order of the district court (Pet. App. 6-7) are unreported.

JURISDICTION

The court of appeals entered its original judgment on July 16, 2002, and its amended opinion on rehearing on January 10, 2003. On March 4, 2003, Justice Stevens extended the time within which to file a petition for a writ of certiorari to May 12, 2003, and the petition was filed on that date. The petition was granted, limited to Question 1, on June 23, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that "historically, society has

tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, Congress found that persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons with disabilities

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

42 U.S.C. 12101(a)(7). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" to enact the Disabilities Act. 42 U.S.C. 12101(b)(4).

The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities. This case arises under Title II of the Disabilities Act, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B). Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

Title II prohibits governments from, among other things, denying a benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii), (vii).[1] In addition, a public entity must make reasonable modifications in its policies, practices, or procedures if necessary to avoid the exclusion of individuals with disabilities, unless the accommodation would impose an undue financial or administrative burden on the

[1] Congress instructed the Attorney General to issue regulations to implement Title II, based on regulations previously promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. See 42 U.S.C. 12134.

government, or would fundamentally alter the nature of the service. See 28 C.F.R. 35.130(b)(7). The Disabilities Act does not normally require a public entity to make its existing physical facilities accessible. 28 C.F.R. 35.150(a)(1). Public entities need only ensure that "each service, program or activity, * * * when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). However, building construction or alterations undertaken after Title II's effective date must be designed to provide accessibility. 28 C.F.R. 35.151.

2. Respondents George Lane and Beverly Jones have paraplegia and use wheelchairs to ambulate. Pet. App. 13. In 1996, petitioner charged Lane with two misdemeanor offenses and summoned him to appear in the Polk County Courthouse to answer the charges. *Id.* at 15-16. All court proceedings in that courthouse take place on the second floor of a building that, at that time, had no elevator. At his first appearance, Lane crawled up two flights of stairs to get to the courtroom. On his second visit, he was arrested after he "sent word to the court that he would not crawl to the courtroom again" and further declined to be carried by officers. *Id.* at 15. The court conducted subsequent proceedings with Lane waiting on the ground floor while his attorney shuttled back and forth between Lane and the second-floor courtroom. *Id.* at 15-16. The trial court later held the criminal case in abeyance while an elevator was constructed. *Id.* at 17.

Respondent Jones is a certified court reporter who must attend court proceedings to perform her job. Because many courtrooms in Tennessee are inaccessible to people in wheelchairs, she has been unable to complete a number of assignments, has not been able "to participate in the judicial process," and has otherwise been denied "access[]" to "the services of the judiciary." Pet. App. 19-20.

Respondents filed suit against petitioner and 25 Tennessee counties alleging past and ongoing violations of Title II based on the physical inaccessibility of courthouses within the State. Pet. App. 12-28. Respondents also seek to represent a class of persons who, because of their physical disabilities, cannot climb stairs or ascend steep inclines in Tennessee courthouses. *Id.* at 26. Respondents seek injunctive relief and damages. *Id.* at 27-28. Petitioner filed a motion to dismiss on the ground of Eleventh Amendment immunity, which the district court denied. *Id.* at 11.

3. Petitioner filed an interlocutory appeal, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and the United States intervened to defend the constitutionality of Title II and Congress's abrogation of Eleventh Amendment immunity, see 28 U.S.C. 2403.

While the appeal was pending, the Sixth Circuit issued its en banc opinion in *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808, cert. denied, 537 U.S. 812 (2002), which held that the Disabilities Act's abrogation of Eleventh Amendment immunity is valid for claims based on due process principles, but not for claims based on equal protection principles. The court then affirmed the denial of petitioner's motion to dismiss on the ground that respondents' claims are based on due process principles. Pet. App. 10-11. On rehearing, the panel issued an amended opinion (*id.* at 1-5) explaining that plaintiffs' claims are based on due process principles because "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." *Id.* at 4.

SUMMARY OF ARGUMENT

Application of Title II of the Americans with Disabilities Act to States and their subdivisions falls squarely within

Congress's comprehensive legislative power under Section 5 of the Fourteenth Amendment to prohibit, remedy, and prevent violations of the rights secured by that Amendment. In enacting Title II, Congress focused its legislative attention on the specific problem of discriminatory access to state and local government services; it did not simply extend a policy focused on the private sector to the government.

After decades of study, Congress determined that persons with disabilities had suffered from a virulent history of official governmental discrimination, isolation, and segregation. Congress found, moreover, that such discrimination and segregation, like race and gender discrimination, have repercussions that have persisted over the years and that continue to be manifested in decisionmaking by state and local officials across the span of governmental operations. That official discrimination results not just in the denial of the equal protection of the laws and equal access to governmental benefits, but also in the deprivation of fundamental rights, such as the rights of access to the courts, to vote, to substantive and procedural due process, to petition government officials, and to other protections of the First, Fourth, Fifth, Sixth, and Eighth Amendments.

In Title II, Congress formulated a statute that, much like federal laws combating racial and gender discrimination, is carefully designed to root out present instances of unconstitutional discrimination, to undo the effects of past discrimination, and to prevent future unconstitutional treatment by prohibiting discrimination and promoting integration where reasonable. At the same time, the Disabilities Act preserves the latitude and flexibility that States legitimately require in the administration of their programs and services. The Disabilities Act accomplishes those objectives by requiring States to afford persons with disabilities genuinely equal access to services and programs, while at the same time confining the statute's protections to *qualified* individuals

who, by definition, meet all of the States' legitimate and essential eligibility requirements. The Act only requires reasonable modifications for individuals with disabilities that do not impose an undue burden and do not fundamentally alter the nature or character of the governmental program. The statute is thus carefully tailored to prohibit state conduct that presents a substantial risk of violating the Constitution or that unreasonably perpetuates the exclusionary effects of prior unconstitutional treatment and exclusion.

ARGUMENT

BECAUSE IT BOTH REMEDIES THE CONTINUING EFFECTS OF PAST CONSTITUTIONAL VIOLATIONS AND COMBATS AN ENDURING PROBLEM OF UNCONSTITUTIONAL MISTREATMENT OF INDIVIDUALS WITH DISABILITIES, TITLE II OF THE AMERICANS WITH DISABILITIES ACT OF 1990 IS VALID SECTION 5 LEGISLATION

Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power, see *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 80 (2000), that gives Congress the "authority both to remedy and to deter violation of [Fourteenth Amendment] rights * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," *Nevada Dep't of Human Res.* v. *Hibbs*, 123 S. Ct. 1972, 1977 (2003) (quoting *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001)). Section 5 thus "gives Congress broad power indeed," *Saenz* v. *Roe*, 526 U.S. 489, 508 (1999), including the power to remedy past violations of constitutional rights, to enact "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," and to abrogate the States' Eleventh Amendment immunity, *Hibbs*, 123 S. Ct. at 1977. Such legislation, however, must demonstrate a "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). Title II of the Disabilities Act is appropriate Section 5 legislation because it is reasonably designed to remedy a history of pervasive discrimination and deprivation of constitutional rights by States, to prevent continuing denials of constitutional rights, and to eradicate enduring false stereotypes that would otherwise freeze into place the effects of past unconstitutional treatment.

A. Title II Of The Disabilities Act Targets Distinctly Governmental Activities That Often Burden The Exercise Of Fundamental Rights

In *Garrett*, *supra*, this Court held that Title I of the Disabilities Act, 42 U.S.C. 12111 to 12117, which prohibits public and private employers from discriminating in employment, was not valid Section 5 legislation. 531 U.S. at 365-374. Title II, however, is fundamentally different from Title I in four constitutionally determinative respects.

First, in enacting Title I, Congress addressed issues that affect all employers—private or public sector—and simply included States within a general ban on employment discrimination, without considering sufficiently whether there was a distinctive problem of unconstitutional employment discrimination by the States. *Garrett*, 531 U.S. at 369-371. While Title I regulates States *qua* employers, Title II, by contrast, was enacted specifically and deliberately to regulate state and local governments *qua governments*. Congress thus legislated with both an appreciation for the unique status of state and local governments and a singular focus on the historic and enduring problem of official discrimination and unconstitutional treatment on the basis of

disability by "any State or local government," 42 U.S.C. 12131(1)(A) and (B).[2]

For that reason, as *Garrett* acknowledged, Title II is predicated on a more substantial legislative record pertaining to "discrimination by the States in the provision of public services." 531 U.S. at 371 n.7; see Section B(2), *infra*. That legislative record, in turn, led Congress to make specific findings about the historic and enduring problem of discrimination by States and their subdivisions. In particular, Congress found that "discrimination against individuals with disabilities persists in such critical areas as * * * education, transportation, * * * institutionalization, * * * voting, and access to public services." 42 U.S.C. 12101(a)(3). Those are areas for which States and their subdivisions are either exclusively or predominantly responsible. Contrast *Garrett*, 531 U.S. at 371 (no findings about state employment discrimination). In addition, the same committee reports that the Court in *Garrett* found lacking with regard to public employment, 531 U.S. at 371-372, are directly on point here, declaring that "there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the area[] of * * * public services." H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at

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[2] In a number of other cases, Congress likewise invoked its Section 5 power simply to "place States on the same footing as private parties." *Kimel*, 528 U.S. at 82; see *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 631-632 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). While congressional efforts to regulate States *qua* employers could have been understood by Members of Congress (prior to this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996)) to depend critically on Congress's ability to abrogate States' immunity under the Commerce Clause, Congress's regulation in Title II of the States' provision of public services perforce accounted for the States' governmental character and thus necessarily implicated the Section 5 power.

28 (1990); see also S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989) ("Discrimination still persists in such critical areas as * * * public services."). Congress thus specifically concluded, on the basis of a weighty legislative record, that States were contributors to the "history of purposeful unequal treatment" and participants in "the continuing existence of unfair and unnecessary discrimination and prejudice" against individuals with disabilities, 42 U.S.C. 12101(a)(7) and (9)—and those "conclusions are entitled to much deference." *Kimel*, 528 U.S. at 81.

Second, because Title I pertains to employment, decisions made by state employers concerning individuals with disabilities implicate only the Equal Protection Clause's guarantee against irrational employment decisions. *Garrett*, 531 U.S. at 366-368. Like *Kimel*, 528 U.S. at 83, Title I thus addressed state conduct in an area where the States, as sovereigns, are given an extraordinarily wide berth and constitutional violations are infrequently found. See, *e.g.*, *Hibbs*, 123 S. Ct. at 1981-1982; *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 676 (1996).

Title II, by contrast, enforces not only the Equal Protection Clause, but also a wide array of fundamental constitutional rights—the right to petition the government, the right of access to the courts, the right to vote, Fourth and Eighth Amendment protections, and procedural and substantive due process. Indeed, Title I dealt only with the States' denial of an opportunity—employment—that individuals equally could pursue in the private sector. Title II, by contrast, regulates state and local governments when they intervene in and regulate the activities of private citizens, or deprive them of their liberty, property, or parental rights, often in contexts in which there is no private-sector alternative and the citizen has no ability to opt out. Title II also regulates a State's ability to deny a class of citizens access to government services upon which all citizens must rely for basic

opportunities (and sometimes the necessities) of modern life. The private sector cannot provide for binding judicial process, or the ability to cast a ballot, serve as a juror, adopt children, secure the protection of the police, or seek the enactment of legislation. Title II thus legislates in an area where the States' conduct often "triggers a heightened level of scrutiny," *Hibbs*, 123 S. Ct. at 1982, and where its ability to infringe those rights generally, let alone to deny them disparately to one particular segment of the population, is constitutionally curtailed. For that reason, it "was easier for Congress" to identify and "to show a pattern of state constitutional violations" in enacting Title II. *Ibid.*

Third, unlike *Kimel* and *Garrett*, this case implicates concerns beyond abrogation and the ability of individuals to sue the States for money damages. Because both *Kimel* and *Garrett* targeted *employment* discrimination, those decisions only invalidated the statutes' abrogation provisions; the substantive prohibitions of those laws remain applicable to the States pursuant to Congress's undoubted power to regulate employment under its Commerce Clause authority, and they can be enforced against state officials under *Ex parte Young*, 209 U.S. 123 (1908). See *Garrett*, 531 U.S. at 374 n.9; *EEOC* v. *Wyoming*, 460 U.S. 226, 235-243 (1983). While petitioner concedes (Br. 16) that Title II's substantive provisions are valid Commerce Clause legislation, its state amici (Br. 22, 25) and a number of other States pointedly do not.[3] Accordingly, unless Title II is appropriate Commerce Clause legislation, the issue presented here draws into

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[3] See *Thompson* v. *Colorado*, 278 F.3d 1020, 1025 n.2 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002); *State Dep't of Highway Safety* v. *Rendon*, 832 So. 2d 141, 146 n.5 (Fla. Dist. Ct. App. 2002), review denied, 851 So. 2d 729 (Fla. 2003), petition for cert. pending, No. 03-559 (filed Oct. 13, 2003); *Meyers* v. *Texas*, No. 02-50452 (5th Cir. argued Mar. 12, 2003); *McCarthy* v. *Hale*, No. 03-50608 (5th Cir.) (pending); *Doe* v. *Regier*, No. 03-2794 (Fla. Dist. Ct. App.) (pending).

question the power of Congress to require both States and local governments, whether through private damages actions, private injunctive actions, or suits by the United States itself, to make their buildings, programs, and public life accessible to a historically marginalized population.

Fourth, for all of the foregoing reasons, and especially because this case may implicate the constitutional authority for enactment of Title II's substantive prohibitions as applied to *all* levels of government, this Court is not constrained, as it was in *Garrett*, to consider only the legislative evidence of unconstitutional conduct directly by the States. When Congress specifically focuses the substantive provisions of Section 5 legislation jointly on the operations of state and local governments *qua* governments, its enforcement powers under Section 5, like the substantive protections of Section 1, can charge the States with some responsibility for the unconstitutional conduct of the subdivisions of government that the States themselves create and empower to act.[4]

That is, in part, because the line between state and local government is much harder to discern in the context of public services than it is in employment. While employment decisions can be made independently, the operations of state and local governments in the provision of government services, such as voting, education, welfare benefits, zoning, licensing, and the administration of justice are often closely intertwined. Indeed, in this case, the State uses county courthouses for the conduct of its own judicial business. Pet. App. 14-15; see generally *Anderson County Quarterly Court* v. *Judges of the 28th Judicial Circuit*, 579 S.W.2d 875 (Tenn. Ct. App. 1978). Likewise, with respect to education, States play a substantial role in directing, supervising, and limiting

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[4] See *Atkin* v. *Kansas*, 191 U.S. 207, 220-221 (1903); *Lawrence County* v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 270-271 (1985) (Rehnquist, J., dissenting).

the discretion of local agencies, either by administrative supervision or by statutory direction. The complexity of the relationship between state and local governments in the administration of public services often raises difficult, state-by-state questions regarding whether a particular entity is operating as an "arm of the state." The record of historic and pervasive discrimination and unconstitutional treatment by all levels of government further blurs the line between state and local governmental action, because the conduct of local officials often may be traceable, at least in part, to the rules of state-mandated discrimination and segregation under which they operated for years.

Indeed, under similar circumstances, this Court has recognized the relevance of local governmental conduct in assessing the validity of Section 5 legislation as applied to the States. In both *Garrett* and *Hibbs*, the Court cited the substantive provisions of the Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*, which were upheld in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), as "appropriate" Section 5 legislation because that Act is predicated upon a documented "problem of racial discrimination in voting." *Garrett*, 531 U.S. at 373; see *Hibbs*, 123 S. Ct. at 1982. Much of the evidence of unconstitutional conduct described on the referenced pages of *South Carolina* (383 U.S. at 308-313), however, involved the conduct of *county* and *city* officials.[5] In fact, almost all of the evidence of specific instances of discrimination underlying the Voting Rights Act of 1965 concerned local officials rather than state officials; the rest of

[5] See *South Carolina*, 383 U.S. at 312 n.12 (discrimination by Montgomery County Registrar); *id.* at 312 n.13 (Panola County and Forrest County registrars); *id.* at 313 n.14 (Dallas County Board of Registrars); *id.* at 313 n.15 (Walker County registrar); *id.* at 314 ("certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls"); *id.* at 314-315 (Selma, Alabama, and Dallas County).

the evidence was either statistical evidence or lists of state laws.[6] See also *Flores*, 521 U.S. at 530-531 (in analyzing Section 5 as a source of power for the *substantive* provisions of a law, the Court did not distinguish between evidence of state and local governmental conduct). Thus, while Congress compiled ample evidence of unconstitutional conduct by the States themselves in enacting Title II, the constitutional question presented here, unlike *Garrett*, compels consideration of the evidence of local government discrimination as well.

B. Title II Responds To A Long History And A Continuing Problem Of Unconstitutional Treatment Of Individuals With Disabilities

1. Congress Exhaustively Investigated Disability Discrimination

In *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), this Court acknowledged the superior expertise of legislatures in addressing the "difficult" problem of discrimination against and mistreatment of individuals with disabilities. *Id.* at 443. "In identifying past evils," for which Section 5 legislation is appropriate, moreover, "Congress

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[6] See, *e.g.*, *Voting Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 5-8 (1965) (voting discrimination by local officials in Selma, Alabama, and Dallas County); *id.* at 8 (abuses by local sheriff and deputy sheriff in Mississippi); *id.* at 36 (21 of 22 voting discrimination lawsuits filed by the Department of Justice in Mississippi were against counties); *Voting Rights: Hearings Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 12 (1965) (discrimination in Clarke County, Mississippi, and Wilcox County, Alabama); H.R. Rep. No. 439, 89th Cong., 1st Sess. 16 (1965) (parish registrars); S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3, at 7-9 (1965) (discrimination and litigation in Dallas County, Alabama); *id.* at 12 (counties' discriminatory use of "good moral character" test); *id.* at 33 (county officials' discriminatory use of poll tax).

obviously may avail itself of information from any probative source," *South Carolina*, 383 U.S. at 330, including

> the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Fullilove v. *Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring).

The Congress that enacted Title II of the Disabilities Act brought to that legislative process more than forty years of experience studying the scope and nature of discrimination against persons with disabilities and testing incremental legislative steps to combat that discrimination. See *Garrett*, 531 U.S. at 390-391 (Breyer, J., dissenting) (listing prior legislation). Building on that expertise, Congress commissioned two reports from the National Council on the Handicapped to report on the adequacy of existing federal laws and programs addressing discrimination against persons with disabilities.[7] Those studies revealed that "the most pervasive and recurrent problem faced by disabled persons appeared to be unfair and unnecessary discrimination." National Council on the Handicapped, *On the Threshold of Independence* 2 (1988) (*Threshold*); see National Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities* (1986). Persons with disabilities reported "denials of educational opportunities, lack of access to public buildings and public bathrooms, [and] the absence of accessible

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[7] See Rehabilitation Amendments of 1984, Pub. L. No. 98-221, Title I, § 141(a), 98 Stat. 26; Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Title V, § 502(b), 100 Stat. 1829.

transportation." *Threshold* 20-21, 41. Congress also learned of an "alarming rate of poverty," a dramatic educational gap, and a life of social "isolat[ion]" for persons with disabilities. *Id.* at 14.[8]

Congress itself engaged in extensive study and fact-finding concerning the problem of unconstitutional treatment of individuals with disabilities, holding 13 hearings devoted specifically to consideration of the Disabilities Act. See *Garrett*, 531 U.S. at 389-390 (Breyer, J., dissenting) (listing hearings). In addition, a congressionally designated Task Force held 63 public forums across the country that were attended by more than 30,000 individuals. Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 16 (1990) (*Task Force Report*). The Task Force also presented to Congress evidence submitted by nearly 5,000 individuals documenting the problems with discrimination and invidious stereotypes that persons with disabilities faced daily—often at the hands of state and local governments. See 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with*

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[8] Twenty percent of persons with disabilities—more than twice the percentage for the general population—lived below the poverty line, and 15% of disabled persons had incomes of $15,000 or less. *Threshold* 13-14. Forty percent of persons with disabilities—triple the rate for the general population—did not finish high school. Only 29% of persons with disabilities had some college education, compared with 48% for the general population. *Id.* at 14. Two-thirds of all working-age persons with disabilities were unemployed; only one in four worked full-time. *Ibid.* Two-thirds of persons with disabilities had not attended a movie or sporting event in the past year; three-fourths had not seen live theater or music performances; persons with disabilities were three times more likely not to eat in restaurants; and 13% of persons with disabilities never went to grocery stores. *Id.* at 16-17.

Disabilities Act 1040 (Comm. Print 1990) (*Leg. Hist.*).[9] Congress also considered several reports and surveys. See S. Rep. No. 116, *supra*, at 6; H.R. Rep. No. 485, *supra*, Pt. 2, at 28; *Task Force Report* 16.[10]

2. Congress Amassed Voluminous Evidence Of Historic And Enduring Discrimination And Deprivation Of Fundamental Rights By States

a. ***Historic Discrimination***: The "propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.'" *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 640 (1999) (quoting *Flores*, 521 U.S. at 525). While petitioner and its seven amici States ignore it, Congress and this Court have long acknowledged the Nation's "history of unfair and often grotesque mistreatment" of persons with disabilities. *Cleburne*, 473 U.S. at 454 (Stevens, J., concurring); see also *Olmstead* v. *L.C.*, 527 U.S. 581, 608 (1999) (Kennedy, J., concurring) ("[O]f course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility."); *Cleburne*, 473 U.S. at 446 ("Doubtless, there have been and there will continue to be instances of dis-

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[9] See also *Task Force Report* 16. Those "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life," 2 *Leg. Hist.* 1324-1325, are part of the official legislative history of the Disabilities Act, *id.* at 1336, 1389. Those submissions were lodged with the Court in *Garrett*, see 531 U.S. at 391-424 (Breyer, J., dissenting). Those submissions are cited herein by reference to the State and Bates stamp number, which is how they were lodged in *Garrett*.

[10] Those included the United States Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* (1983); two polls conducted by Louis Harris & Associates, *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (1986), and *The ICD Survey II: Employing Disabled Americans* (1987); the *Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic* (1988); and eleven interim reports submitted by the Task Force.

crimination against the retarded that are in fact invidious."); *Alexander* v. *Choate*, 469 U.S. 287, 295 n.12 (1985) ("well-cataloged instances of invidious discrimination against the handicapped do exist").

"[T]orture, imprisonment, and execution of handicapped people throughout history are not uncommon." United States Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* 18 n.5 (1983) (*Spectrum*). More often, "societal practices of isolation and segregation have been the rule." *Ibid.* From the 1920s to the 1960s, the eugenics movement labeled persons with mental and physical disabilities as "sub-human creatures" and "waste products" responsible for poverty and crime. *Id.* at 20. *Every single State*, by law, provided for the segregation of persons with mental disabilities and, frequently, epilepsy, and excluded them from public schools and other state services and privileges of citizenship.[11] States also fueled the fear and isolation of persons with disabilities by requiring public officials and parents to report and segregate into institutions the "feebleminded."[12]

Almost every State accompanied forced segregation with compulsory sterilization and prohibitions on marriage. See *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) ("It is better for all the world, if * * * society can prevent those who are manifestly unfit from continuing their kind. * * * Three generations of imbeciles are enough."); 3 *Leg. Hist.* 2242; M. Burgdorf & R. Burgdorf, *A History of Unequal Treatment* (*Unequal Treatment*), 15 Santa Clara Lawyer 855, 887-888

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[11] See People First Amicus Br., App. A, *Alsbrook* v. *Arkansas*, cert. granted, 528 U.S. 1146 and cert. dismissed, 529 U.S. 1001 (2000) (No. 99-423) (*Compendium of State Laws*); see also Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979).

[12] *Spectrum* 20, 33-34; *Compendium of State Laws* A5, A21-A22, A25, A28-A29, A40, A44, A46-A49, A50-A51, A56, A61-A63, A65-A66, A71, A74-A75.

(1975). Children with mental disabilities "were excluded completely from any form of public education." *Board of Educ.* v. *Rowley*, 458 U.S. 176, 191 (1982). Numerous States also restricted the rights of the physically disabled to enter into contracts, *Spectrum* 40, while a number of large cities enacted "ugly laws," which prohibited the physically disabled from appearing in public. Chicago's law provided:

> No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places in this city, shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense.

Unequal Treatment 863 (quoting ordinance). Such laws were enforced as recently as 1974. *Id.* at 864.[13]

b. ***Enduring Unconstitutional Treatment*:** "Prejudice, once let loose, is not easily cabined." *Cleburne*, 473 U.S. at 464 (Marshall, J., concurring); see *Hibbs*, 123 S. Ct. at 1979 (noting the "persistence" of gender discrimination and the "firmly rooted" stereotypes that accompany it). Indeed, Congress found that "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right," and "[t]he result is massive, society-wide discrimination." S. Rep. No. 116, *supra*, at 8-9.

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

That is because a concerted process of changing discriminatory laws, policies, practices, and stereotypical conceptions and prejudices did not even *begin* until the 1970s and 1980s. Cf. *Hibbs*, 123 S. Ct. at 1978. Even then, "out-dated statutes [were] still on the books, and irrational fears or ignorance, *traceable to the prolonged social and cultural isolation*" of those with disabilities "continue to stymie recognition of the[ir] dignity and individuality." *Cleburne*, 473 U.S. at 467 (Marshall, J., concurring) (emphasis added). The involuntary sterilization of the disabled is not distant history; it continued into the 1970s, and occasionally even into the 1980s—well within the lifetime of many current governmental decisionmakers. P. Reilly, *The Surgical Solution* 2, 148 (1991); *Look Back at Oregon's History of Sterilizing Residents of State Institutions* (National Pub. Radio broadcast Dec. 2, 2002). As recently as 1983, fifteen States continued to have compulsory sterilization laws on the books. *Spectrum* 37; see *Stump* v. *Sparkman*, 435 U.S. 349, 351 (1978) (state judge ordered the sterilization of a "somewhat retarded" 15-year-old girl); Reilly, *supra*, at 148-160; contrast *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942) (strict scrutiny governs sterilization classifications). Until the late 1970s, "peonage was a common practice in [Oregon] institutions." Governor J. Kitzhaber, *Proclamation of Human Rights Day, and Apology for Oregon's Forced Sterilization of Institutionalized Persons*, Speech at Salem, Or. (Dec. 2, 2002) (available at <http://arcweb.sos.state.or.us/governors/Kitzhaber/web_pages/governor/speeches/s021202.htm>). As of 1979, "most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials." *Cleburne*, 473 U.S. at 464 (Marshall, J., concurring).

Based on the evidence it amassed, Congress found, as a matter of present reality and historical fact, that persons

with disabilities have confronted "widespread and persisting deprivation of [their] constitutional rights" with respect to a broad array of public services. *Florida Prepaid*, 527 U.S. at 645; see 42 U.S.C. 12101(a)(2) and (3).

(i) Access to the courts: "Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds." *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 628 (1991). The Fourteenth Amendment protects the rights of civil litigants, criminal defendants, and members of the public to have access to the courts. *E.g.*, *Richmond Newspapers*, *Inc.* v. *Virginia*, 448 U.S. 555 (1980). For individuals charged with crimes, like respondent Lane, the Due Process Clause and the Sixth Amendment afford the accused "a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings," *Faretta* v. *California*, 422 U.S. 806, 819 & n.15 (1975), a right that criminal proceedings generally be open to the public, *Waller* v. *Georgia*, 467 U.S. 39, 47 (1984), and a right to be tried by a jury of their peers, U.S. Const. Amend. VI. Yet Congress learned —as the present case well illustrates—that "[t]he courthouse door is still closed to Americans with disabilities"—literally. 2 *Leg. Hist.* 936 (Sen. Harkin).

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

> the courtroom, he could not look at me because of my wheelchair. * * * The employees of the courtroom came back to me and told me, "You are not the norm. You are not the normal person we see every day."

Id. at 1071 (Emeka Nwojke).

That was not an isolated incident. A report before Congress showed that 76% of state-owned buildings offering services and programs for the general public were inaccessible and unusable for persons with disabilities. *Spectrum* 39. State officials themselves "pointed to negative attitudes and misconceptions as potent impediments to [their own] barrier removal policies."[14] In addition, the Department of Justice's quarterly reports on its enforcement efforts under the Disabilities Act document numerous investigations into jurisdictions (including in Tennessee), whose courthouses and courtroom facilities are totally inaccessible to persons who use wheelchairs, have inaccessible jury boxes, witness stands, attorneys' areas, or spectator seats, do not provide sign language interpreters or other assistive listening devices to litigants, spectators, or other courtroom participants, or do

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[14] Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* 87 (Apr. 1989). See also Texas Civil Rights Project, *Courts Closed to Justice: A Survey of Courthouse Accessibility in Texas for People with Disabilities* 10 (Nov. 1996) (Texas Supreme Court, Court of Criminal Appeals, Austin Court of Appeals, Office of the Attorney General, and state law library remained inaccessible until suit filed under Title II); AL 15 ("A man, called to testify in court, had to get out of his wheelchair and physically pull himself up three flights of stairs to reach the courtroom."); WV 1745 (witness in court case had to be carried up two flights of stairs because the sheriff would not let him use the elevator); WY 1786 (individual unable to get a marriage license because the courthouse was not accessible); MA 812; CA 254; CO 273; ID 528; PA 1394; WA 1690; MS 990, 998; SD 1475; NC 1161-1164; AL 5; DE 345; GA 374; HI 455; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

not contain any accessible bathroom facilities.[15] Such findings properly inform the Court's evaluation of the propriety of Section 5 legislation. See *South Carolina*, 383 U.S. at 312. Further, that pattern of inaccessibility, marginalization, and constructive exclusion of defendants and civil litigants with disabilities denies those individuals "'the feeling of just treatment by the government'" that the Due Process Clause guarantees. *Carey* v. *Piphus*, 435 U.S. 247, 261 (1978). It is "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection * * * that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996).

(ii) Participation in the judicial process: "Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system." *J.E.B.* v. *Alabama*, 511 U.S. 127, 145 (1994). But differential treatment of individuals with disabilities affects their ability to be heard, to observe, and to participate meaningfully in judicial proceedings. See, *e.g.*, ID 506 (adult victims of abuse with developmental disabilities denied equal rights to testify in court). Furthermore, "excluding identifiable segments playing major roles in the community" from jury service "cannot be squared with the constitutional concept of jury service." *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975). Yet, to this day, petitioner continues to prohibit the "physically dis-

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[15] See, *e.g.*, *Enforcing the ADA: A Status Report from the Dep't of Justice* (*ADA Report*), Oct.-Dec. 2002, at 7 (criminal defendant with hearing disability had difficultly obtaining interpreter); *id.*, Apr.-June, 2002, at 7-8 (inaccessible jury boxes); *id.*, Apr.- June, 2001, at 7 (inaccessible hearing rooms); *id.*, Apr.-Sept., 2000, at 8; *id.*, Apr.-June, 1999, at 8 (inaccessible courtroom entrance, seating areas, witness stand, jury box, jury room, and jury rest room); *id.*, Apr.-June, 1998, at 10; *id.*, Apr.-June, 1997, at 6. Appendix B to this brief contains a Table summarizing the Justice Department's enforcement efforts in this area.

abled" from serving as jurors. Tenn. Code Ann. § 22-2-304(c) and(d)(3) (1994); see Mich. Comp. Laws Ann. § 729.204 (West 2002) (board compiling jury list "shall select only the names of persons who are * * * not infirm or decrepit"); *id.* §§ 730.254, 730.404. Arkansas similarly prohibited the physically disabled from serving as jurors at the time of Title II's enactment.[16] When States categorically exclude individuals from jury service because of their disability, without regard to their ability to perform as jurors, the Constitution's "promise of equality dims, and the integrity of our judicial system is jeopardized." *J.E.B.*, 511 U.S. at 146; see *Edmonson*, 500 U.S. at 628.

(iii) Education: "[E]ducation is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Indeed, "classifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions." *Plyler* v. *Doe*, 457 U.S. 202, 234 (1982) (Blackmun, J., concurring). Accordingly, where

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[16] See Ark. Code. Ann., title 16, ch. 31 note (Michie 1999) (until 1994, state law prohibited "any person whose sense of hearing or seeing is substantially impaired" from serving as a juror); see also La. Rev. Stat. Ann. § 13:3041 (1991) (Hist. & Stat. Notes) (1966 amendment removed provision permitting judges to "hold prospective jurors incompetent because of physical infirmities"); Appendix B; *State* v. *Spivey*, 700 S.W.2d 812, 814-815 (Mo. 1985) (upholding the exclusion of deaf persons from the jury wheel); *ADA Report*, Jan.-Mar., 1997, at 5 (two jurisdictions disqualify prospective jurors because of deafness); Fla. Stat. Ann. § 40.01 (2003), Hist. & Stat. Notes (until 1979, the "physically or mentally infirm" were ineligible for jury service); *Guthrie* v. *State*, 194 P.2d 895, 902 (Okla. Crim. App. 1948) (Oklahoma law "pertaining to the qualifications of a juror prevents a person serving on the jury who is afflicted with a bodily infirmity amounting to a disability").

the State provides a public education, that right "must be made available to all on equal terms." *Brown*, 347 U.S. at 493.

But Congress learned that irrational prejudices, fears, and animus still operate to deny persons with disabilities an equal opportunity for public education. As recently as 1975, approximately 1 million disabled students were "excluded entirely from the public school system." 42 U.S.C. 1400(c)(2)(C). A quadriplegic woman with cerebral palsy and a high intellect was branded "retarded" by educators, denied placement in a regular school setting, and placed with emotionally disturbed children, where she was told she was "not college material." VT 1635. Other school districts also simply labeled as mentally retarded a blind child and a child with cerebral palsy. NB 1031; AK 38 (child with cerebral palsy subsequently obtained a Masters Degree). "When I was 5," another witness testified, "my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard." S. Rep. No. 116, *supra*, at 7.[17]

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[17] See also Cal. Att'y Gen., *Commission on Disability: Final Report* 17, 81 (Dec. 1989) (*Cal. Report*) ("A bright child with cerebral palsy is assigned to a class with mentally retarded and other developmentally disabled children solely because of her physical disability"; in one town, all children with disabilities are grouped into a single classroom regardless of individual ability.); 136 Cong. Rec. 10,913 (1990) (Rep. McDermott) (school board excluded Ryan White, who had AIDS, not because the board "thought Ryan would infect the others" but because "some parents were afraid he would"); NY 1123 (three elementary schools locked mentally disabled children in a box for punishment); *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Pub. Welfare*, 93d Cong., 1st Sess., Pt. 2, at 793 (1973) (Christine Griffith) (first-grade student "was spanked every day" because her deafness prevented her from following instructions); *id.*, Pt. 1, at 400 (Mrs. R. Walbridge) (student with spina bifida barred from the school library "because her braces and crutches made too much

State institutions of higher education acted on the same stereotypes and prejudices. Indeed, the "higher one goes on the education scale, the lower the proportion of handicapped people one finds." *Spectrum* 28; see *Threshold* 14. A person with epilepsy was asked to leave a state college because her seizures were "disrupt[ive]" and, officials said, created a risk of liability. 2 *Leg. Hist.* 1162 (Barbara Waters). A doctor with multiple sclerosis was denied admission to a psychiatric residency program because the state admissions committee "feared the negative reactions of patients to his disability." *Id.* at 1617 (Arlene Mayerson). Another witness explained that, "when I was first injured, my college refused to readmit me" because "it would be 'disgusting' to my roommates to have to live with a woman with a disability." WA 1733. Similarly, a student was denied a teaching assignment because administrators thought the students would react badly to her appearance. OR 1384.[18]

For both good and ill, "the law can be a teacher." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). As with race discrimination, few governmental messages more profoundly

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noise"); *id.* at 384; 2 *Leg. Hist.* 989; *Spectrum* 28, 29; UT 1556; PA 1432; NM 1090; OR 1375; AL 32; SD 1481; MO 1014; NC 1144; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

[18] See also 2 *Leg. Hist.* 1224 (Denise Karuth) (state university forced blind student to drop music class because "you can't see"); *id.* at 1225 (state commission refused to sponsor legally blind student for masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors, '[s]ince,' and this is a quote: 'they could not drive to see their clients'"); J. Shapiro, *No Pity* 45 (1993) (Dean of the University of California at Berkeley told a prospective student that "[w]e've tried cripples before and it didn't work"); SD 1476; LA 999; MO 1010; WIS 1757; CO 283; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting); *Cal. Report* 138; Appendix A, *infra*.

affect individuals and their communities than segregation in education:

> Segregation in education impacts on segregation throughout the community. Generations of citizens attend school with no opportunity to be a friend with persons with disabilities, to grow together, to develop an awareness of capabilities * * * [.] Awareness deficits in our young people who become our community leaders and employers perpetuate the discrimination fostered in the segregated educational system.

MO 1007 (Pat Jones).

(iv) Voting: Because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U.S. 533, 561-562 (1964). Congress found, however, that persons with disabilities have been "relegated to a position of political powerlessness," 42 U.S.C. 12101(a)(7), and continue to be subjected to discrimination in voting, 42 U.S.C. 12101(a)(3). Congress made that finding after hearing that "people with disabilities have been turned away from the polling places after they have been registered to vote because they did not *look* competent." 2 *Leg. Hist.* 1220 (Nancy Husted-Jensen) (emphasis added). A deaf voter was told that "you still have to be able to use your voice" to vote. *Equal Access to Voting for Elderly and Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin.*, 98th Cong., 1st Sess. 94 (1984) (*Equal Voting Hearings*).[19]

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[19] One voter was "told to go home once when I came to the poll and found the voting machines down a flight of stairs with no paper ballots available"; on another occasion that voter "had to shout my choice of candidates over the noise of a crowd to a precinct judge who pushed the levers of the machine for me, feeling all the while as if I had to offer an

The legislative record also documented that many persons with disabilities "cannot exercise one of your most basic rights as an American" because polling places or voting machines are inaccessible. S. Rep. No. 116, *supra*, at 12. As a consequence, persons with disabilities "were forced to vote by absentee ballot before key debates by the candidates were held." *Ibid.*; see also *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Res. and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 76 (1989) (*May 1989 Hearings*) (Ill. Att'y Gen. Hartigan). Voting by absentee ballot also "deprives the disabled voter of an option available to other absentee voters, the right to change their vote by appearing personally at the polls on election day." 2 *Leg. Hist.* 1745 (Nanette Bowling). "How can disabled people have clout with our elected officials when they are aware that many of us are prevented from voting?" ARK 155.[20]

(v) Access to government officials and proceedings: "The very idea of a government, republican in form, implies a right on the part of its citizens to * * * petition for a redress of grievances," *United States* v. *Cruikshank*, 92 U.S. 542, 552-554 (1875), and that right cannot be denied to an entire class of citizens without compelling justification,

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explanation for my decisions." *Equal Voting Hearings* 45; AL 16; *Help America Vote Act of 2001: Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 15 (2001) ("Twice in Massachusetts and once in California, while relying on a poll worker to cast my ballot, the poll worker attempted to change my mind about whom I was voting for. * * * [T]o this day I really do not know if they cast my ballot according to my wishes."); *id.* at 13; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

[20] See *Equal Voting Hearings* 17, 461; 2 *Leg. Hist.* 1767; WS 1756; MT 1024, 1026-1027; MI 922; ND 1185; DE 307; AL 16; *Garrett*, 531 U.S. at 395-424 (Breyer, J., dissenting); FEC, *Polling Place Accessibility in the 1988 General Election* 7 (1989) (21% of polling places inaccessible; 27% were inaccessible in 1986).

NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982). State governments must "act as neutral entities, ready to take instruction and to enact laws when their citizens so demand." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). But government cannot take instruction from those whom it cannot see or hear. The Illinois Attorney General testified that he "had innumerable complaints regarding lack of access to public services—people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building." *May 1989 Hearings* 488, 491. Another individual, "who has been in a wheelchair for 12 years, tried three times last year to testify before state legislative committees. And three times, he was thwarted by a narrow set of Statehouse stairs, the only route to the small hearing room." IN 626. The Constitution prohibits laws "declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government," *Romer*, 517 U.S. at 633; governmental actions that have that same practical effect are equally pernicious.[21]

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[21] See also H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, at 40 (1990) (town hall and public schools inaccessible); *May 1989 Hearings* 663 (Dr. Mary Lynn Fletcher) (to attend town meetings, "I (or anyone with a severe mobility impairment) must crawl up three flights of circular stairs to the * * * room [where] all public business is conducted by the county government"); *id.* at 76; AK 73 (in response to complaints about lack of access to city and State buildings, City Manager responded that "[H]e runs this town * * * and no one is going to tell him what to do."); *ADA Report*, Oct.-Dec. 2001, at 9 (candidate for city council unable to access a city council platform to address constituents); *id.*, July-Sept. 1997, at 7-9 (State general assembly inaccessible); *id.*, Oct.-Dec. 1994, at 4-6 (access to town hall and polling places); Dep't of Justice, *Enforcing the ADA: Looking Back on a Decade of Progress* 4-8 (July 2000) (lack of access to public meetings, offices, and court proceedings); AL 17; IN 651; WS 1758; NY 1119; *Cal. Report* 70; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

(vi) Law Enforcement: Persons with disabilities have also been victimized in their dealings with law enforcement, in violation of their Fourteenth Amendment rights to due process and protection from unreasonable searches and seizures. When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." 2 *Leg. Hist.* 1005 (Belinda Mason). Police refused to accept a rape complaint from a blind woman because she could not make a visual identification. NM 1081. A person in a wheelchair was given a ticket and six-months' probation for obstructing traffic on the street, even though the person could not use the sidewalk because it lacked curb cuts. VA 1684. Persons with hearing impairments "have been arrested and held in jail over night without ever knowing their rights nor what they are being held for." 2 *Leg. Hist.* 1331 (Justin Dart). In addition, persons with disabilities like epilepsy are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, *supra*, Pt. 3, at 50.[22]

(vii) Child Custody: The Constitution protects and respects the sanctity of the parent-child relationship, *e.g.*,

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[22] See *Cal. Report* 103 (parole agent "sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though * * * he could not make the appointments because he was unable to get accessible transportation"); 2 *Leg. Hist.* 1115 (Paul Zapun) (sheriff threatens persons with disabilities who stop in town); *id.* at 1197 (police officer taunted witness by putting a gun to her head and pulling the trigger on an empty barrel, "because he thought it would be 'funny' since I have quadraparesis and couldn't flee or fight"); *Task Force Report* 21 (six wheelchair users *arrested* for failing to leave restaurant after manager complained that "they took up too much space"); *ADA Report*, Apr.-June 1997, at 5-7 (unreasonable treatment during traffic stop of deaf motorist); AL 6, DE 345, KS 673, WV 1746, IL 572 (all: lack of interpreter for deaf arrestee); 2 *Leg. Hist.* 1196; IL 569-570, 583; TX 1541; LA 748; *Cal. Report* 101-104; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

Troxel v. *Granville*, 530 U.S. 57 (2000); *Stanley* v. *Illinois*, 405 U.S. 645 (1972), and the Due Process Clause requires States to afford individuals with disabilities fair child custody proceedings, including the opportunity to be heard "at a meaningful time and in a meaningful manner," *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1970). But Congress heard that "clients whose children have been taken away from them a[re] told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?" 2 *Leg. Hist.* 1331 (Justin Dart). Another government agency refused to authorize a couple's adoption of a child solely because the woman had muscular dystrophy. MA 829.[23]

(viii) Institutionalization: The Constitution protects individuals with disabilities from unjustified institutionalization and from unduly severe treatment while institutionalized. *Youngberg* v. *Romeo*, 457 U.S. 307, 315, 322 (1982); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975); *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972). Yet unconstitutional denials of appropriate treatment and unreasonable institutionalization of persons in state mental hospitals were commonplace. See 2 *Leg. Hist.* 1203 (Lelia Batten) (state hospitals are "notorious for using medication for controlling the behavior of clients and not for treatment alone.

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[23] See H.R. Rep. No. 485, *supra*, Pt. 3, at 25; *id.*, Pt. 2, at 41 ("[B]eing paralyzed has meant far more than being unable to walk—it has meant being * * * deemed an 'unfit parent'" in custody proceedings.); 2 *Leg. Hist.* 1611 n.10 (Arlene Mayerson) ("Historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent."); *Spectrum* 40; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting); *No Pity*, *supra*, at 26 (woman with cerebral palsy denied custody of her two sons); *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979) (lower court "stereotype[d] William as a person deemed forever unable to be a good parent simply because he is physically handicapped"); Appendix A, *infra*.

Seclusion rooms and restraints are used to punish clients."); *id.* at 1262-1263 (Eleanor C. Blake) (detailing the "minimal, custodial, neglectful, abusive" care received at state mental hospital, and willful indifference resulting in rape); *Spectrum* 34-35.[24]

Indeed, in the years immediately preceding the enactment of Title II, the Department of Justice found unconstitutional treatment in state institutions for the mentally retarded or mentally ill in more than half of the States. One facility punished mentally retarded residents by forcing them to inhale ammonia fumes. See Department of Justice, Notice of Findings Regarding Los Lunas Hosp. & Training Sch. 2 (1988). Residents in other facilities lacked adequate food, clothing, and sanitation. Many state facilities failed to provide basic safety to individuals, resulting in serious physical injuries, sexual assaults, and deaths. See Appendix C, *infra*.

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[24] See Oregon Gov. Kitzhaber, *supra* (admitting the use of "inhumane devices to restrain and control patients" until "the mid 1980's"); *Cal. Report* 114; 132 Cong. Rec. 10,589 (1986) (Sen. Kerry) ("appalling" findings in investigation of State-run mental health facilities; "The extent of neglect and abuse uncovered in their facilities was beyond belief."); *Civil Rights of Instit. Persons: Hearings on S. 1393 Before the Subcomm. on the Const. of the Sen. Comm. on the Judiciary*, 95th Cong., 1st Sess. 127 (1977) (Michael D. McGuire, M.D.) ("the personnel regarded patients as animals, * * * [and] group kicking and beatings were part of the program"); *id.* at 191-192; *Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 239 (1977) (Stanley C. Van Ness) (describing "pattern and practice of physical assaults and mental abuse of patients, and of unhealthy, unsanitary, and anti-therapeutic living conditions" in New Jersey institutions); *Civil Rights of Instit. Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 34 (1979) (Paul Friedman) ("[A] number of the residents were literally kept in cages"; patients "had regressed because of these shockingly inhumane conditions of confinement"); *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

(ix) Zoning: Congress knew that *Cleburne*, where this Court found unconstitutional disability discrimination in a zoning decision, was not an isolated incident. In Wyoming, a zoning board refused to authorize a group home because of "local residents' unfounded fears that the residents would be a danger to the children in a nearby school." WY 1781. In New Jersey, a group home for those who had suffered head injuries was barred because the public perceived such persons as "totally incompetent, sexual deviants, and that they needed 'room to roam.' * * * Officially, the application was turned down due to lack of parking spaces, even though it was early established that the residents would not have automobiles." NJ 1068.[25]

(x) Licensing: Licensing decisions by state and local officials evidenced yet another form of discriminatory treatment. The House Report discussed a woman who was denied a teaching credential, not because of her substantive teaching skills, but because of her paralysis. H.R. Rep. No. 485, *supra*, Pt. 2, at 29; see 2 *Leg Hist.* 1611 n.9 (Arlene Mayerson) (teaching license denied "on the grounds that being confined to a wheelchair as a result of polio, she was physically and medically unsuited for teaching").[26]

(xi) Public Transportation: Individuals reported discriminatory treatment on public transportation that lacked any rational basis and that "made no sense in light of how the [government] treated other groups similarly situated in relevant respects." *Garrett*, 531 U.S. at 366 n.4. One student testified:

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[25] See also 2 *Leg. Hist.* 1230 (Larry Urban); People First Amicus Br. 20 n.94; AL 2, 31; CO 283; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting); Appendix A, *infra*.

[26] See TX 1549 (state licensing requirements for teaching deaf students require the ability to hear); CA 261; HI 479; TX 1528, 1542-1543; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

> Some of the drivers are very rude and get mad if I want to take the bus. Can you believe that? I work and part of my taxes pay for public buses and then they get mad just because I am using a wheelchair. * * * It is hard for people to feel good about themselves if they have to crawl up the stairs of a bus, or if the driver passes by without stopping.

2 *Leg. Hist.* 993 (Jade Calegory); MA 831 ("Blacks wanted to ride in the front of the bus. Disabled people just want[] on."). A high-level Connecticut transportation official responded to requests for accessibility by asking "Why can't all the handicapped people live in one place and work in one place? It would make it easier for us." 2 *Leg. Hist.* 1085; see also *id.* at 1097, 1190; WA 1716; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

(xii) Prison conditions: The Eighth Amendment protects inmates with disabilities against treatment that is deliberately indifferent to their serious medical needs and safety or imposes wanton suffering. *Farmer* v. *Brennan*, 511 U.S. 825 (1994); *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981). But Congress heard that "jailers rational[ize] taking away their wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs." 2 *Leg. Hist.* 1190 (Cindy Miller). Another prison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead." *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986).[27]

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[27] See *Spectrum* 168; NM 1091 (prisoners with developmental disabilities subjected to longer prison terms); *ADA Report*, Apr.-June 1998, at 8-10 (longer pre-trial detention for detainees with disabilities; medical treatment and communications with family denied); Appendices A & C, *infra*. Individuals awaiting placement in State mental institutions in Mississippi were held in a county jail and routinely left for days shackled in a "drunk

(xiii) Other Public Services: The scope of the testimony offered to Congress regarding unconstitutional treatment touched virtually every aspect of individuals' encounters with their government, sweeping so broadly as to defy isolation into select categories of state action. Services and programs as varied as the operation of public libraries, public swimming pools and park programs, homeless shelters, and benefit programs exposed the discriminatory attitudes of officials.[28]

3. Other Evidence Confirms the Problem

In *Garrett*, Justice Kennedy suggested that, if a widespread problem of disability discrimination existed, "one would have expected to find * * * extensive litigation and discussion of the constitutional violations." 531 U.S. at 968. Appendix A to this brief provides a non-exhaustive list of cases in which courts have found discrimination and the

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tank" without any mental health treatment or supervision. Dep't of Justice, Notice of Findings Regarding Hinds County Detention Ctr. 3 (1986).

[28] A paraplegic Vietnam veteran was forbidden to use a public pool; the park commissioner explained that "[i]t's not my fault you went to Vietnam and got crippled." 3 *Leg. Hist.* 1872 (Peter Addesso); see also *id.* at 1995 (Rev. Scott Allen) (woman with AIDS and her children denied entry to a public swimming pool); 2 *Leg. Hist.* 1100, 1078, 1116; WS 1752 (deaf child denied swimming lessons); NC 1156 (mentally retarded child not allowed in pool); CA 166; MS 855; *May 1989 Hearings* 76 (Ill. Att'y Gen. Hartigan) (visually impaired children with guide dogs "cannot participate in park district programs when the park has a 'no dogs' rule"); NC 1155; PA 1391 (limiting library cards for "those having physical as well as mental disabilities"); CA 216 (wheelchair users not allowed in homeless shelter); CA 223 (same); DE 322 (same for mentally ill); KS 713 (discrimination in state job training program); IL 533 (female disability workshop participants advised to get sterilized); IA 664; AK 72, 145; OH 1218; AZ 116; AZ 127; HI 456; ID 541; see generally *Spectrum* App. A (identifying 20 broad categories of state-provided or supported services and programs in which discrimination against persons with disabilities arises).

deprivation of fundamental rights on the basis of disability. Many of the cases specifically found constitutional violations. In others, the facts support that conclusion, but the existence of statutory relief allowed the court to avoid the constitutional question. Federal efforts to enforce the rights of individuals with disabilities offer still more evidence. See Appendix B. The Department of Justice has found unconstitutional treatment of individuals with disabilities in institutions or prisons in more than 30 States. See Appendix C.

4. The Constitutional Significance of Unfair Treatment in Government Services

The foregoing record of extensive state and local discrimination in the provision of government services provides the necessary predicate for exercise of Congress's Section 5 enforcement power, for three reasons.

First, much of the identified state conduct interferes with or threatens the fundamental rights of individuals with disabilities, or occurs where the right to equal protection intersects with other constitutional rights, see *Employment Div.* v. *Smith*, 494 U.S. 872, 881 (1990). A particular class of individuals cannot be excluded from voting, participating in court proceedings, accessing public meetings and services, or raising their children based on nothing more than administrative convenience. Such infringements are unconstitutional "unless shown to be necessary to promote a compelling governmental interest." *Saenz*, 526 U.S. at 499; see *Troxel*, 530 U.S. at 65. State laws, like petitioner's, that exclude individuals with disabilities from jury service, see pages 23-24, *supra*, plainly fail such scrutiny and evidence the kind of lingering unconstitutional state action and "state-sanctioned stereotype[s]" that provide a valid predicate for Section 5 legislation. *Hibbs*, 123 S. Ct. at 1983.

Second, much of the identified conduct fails even rational basis scrutiny. Even that low constitutional threshold can-

not justify beating a deaf student for failure to follow spoken instructions, refusing to let the disabled on buses, excluding a paralyzed veteran from a public swimming pool, or denying a disabled student a college education either because "it would be 'disgusting' to [her] roommates to have to live with a woman with a disability," or because of groundless stereotypes that individuals with disabilities cannot teach, provide competent rehabilitation counseling, or succeed in a music course. See pages 25-26, 34-35 & nn.17-18, 26, 28, *supra*. "[M]ere negative attitudes, or fear" alone cannot justify disparate treatment of those with disabilities, *Garrett*, 531 U.S. at 367.

Moreover, a purported rational basis for treatment of the disabled will fail if the State does not accord the same treatment to other groups similarly situated, *Garrett*, 531 U.S. at 366 n.4; *Cleburne*, 473 U.S. at 447-450, if it is based on "animosity" towards the disabled, *Romer*, 517 U.S. at 634, or if it simply gives effect to private biases, *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984). It accordingly is not enough that the State can offer a rational basis—such as finances—for failing to offer benefit information or services in handicap-accessible formats if the State is already accommodating the special communication needs of other (*e.g.*, non-English speaking) constituents. Police may not refuse to take complaints from blind individuals (see page 30, *supra*), while taking them from victims who were blindfolded or unconscious. Moreover, many of the instances of discriminatory treatment reported to Congress arose in contexts, like education, institutionalization, and zoning, where state actors already make accommodations for other groups, but are selectively resistant to doing so for those with disabilities.

Third, and most importantly, the aggregate effect of consistently excluding individuals with disabilities from a broad range of important government services causes a constitutional problem that is greater than the sum of its parts. The

persistent "imposition of inequalities," on a single class, *Romer*, 517 U.S. at 633, and the chronic distribution of benefits and services, whether through legislation or executive action, in a way that "impos[es] special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish," *Plyler*, 457 U.S. at 217 n.14; see also *Lawrence* v. *Texas*, 123 S. Ct 2472, 2487 (2003) (O'Connor, J., concurring). Indeed, the combined effect of such governmental decisionmaking has denied individuals with disabilities the Constitution's most basic guarantees. An individual denied the ability to file a criminal complaint with the police, to participate at trial as a witness or juror, to petition the legislature or agencies to lift or modify exclusions, and to vote into office more responsive governmental officials, see pages 21-24, 27-30, *supra*, is denied those core rights that form the essence of democratic government, rights that others often take for granted. Thus Congress, in Title II, targeted not isolated and unrelated instances of unfair treatment, but an "across the board" pattern of governmental decisionmaking that time and again has left individuals with disabilities "exclu[ded] from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer*, 517 U.S. at 631, 633; see *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374 (1886).

5. Title II Is Constitutional In Its Entirety

Petitioner's State amici argue (Br. 7-11) that this Court should focus not on Title II's overall propriety as Section 5 legislation, but instead should independently analyze whether Congress's regulation of access to public buildings in Title II was appropriate. The legislative record provides an ample predicate for Congress's inclusion of public-access requirements in Title II. See Sections B(2)(b)(i), (iv), (v),

and (xiii); Appendix B. Beyond that, amici's piecemeal mode of analyzing Congress's exercise of its Section 5 power is fundamentally flawed.

First, amici's context-specific approach is not the model this Court has applied. In the past, this Court has analyzed whether Congress has the authority to apply to the States a statute as a whole, *Flores*, *supra*, a specific Title of a statute, *Garrett*, *supra*, or a specific Section of a statute, *South Carolina*, *supra*. But in no case has this Court required Congress to justify the application of an intentionally comprehensive statutory provision to every potential factual setting. In fact, the Court took a different tack in *City of Rome* v. *United States*, 446 U.S. 156 (1980), in upholding the application of voting preclearance requirements to cities where no discriminatory purpose underlay their adoption of an electoral system. *Id.* at 172; see also *Gaston County* v. *United States*, 395 U.S. 285 (1969). Likewise, this Court rejected in *Hibbs* the dissent's emphasis on Nevada's specific leave policies. Instead, the Court focused on the broader "backdrop of limited state leave policies," and found that "Congress was justified in enacting the [Family and Medical Leave Act] as remedial legislation," "no matter how generous" Nevada's own policies might have been. 123 S. Ct. at 1981.

Second, amici's approach is at odds with this Court's congruence and proportionality test for evaluating Section 5 legislation. Congruence and proportionality analysis necessarily entails looking at a statutory provision's overall operation and coverage, and measuring it against the predicate for congressional action as a whole. Where the necessary predicate for Section 5 legislation lies, Congress "must have wide latitude in determining" the proper means of enforcing the right. *Flores*, 521 U.S. at 519- 520; see generally *Hibbs*, *supra*; *South Carolina*, *supra*. Congress thus may legislate based on commonsense conclusions about the scope of a

problem and may enact prophylactic legislation designed to remedy the continuing effects of past discrimination, to root out difficult-to-detect discrimination and stereotyping, and to prevent the expansion of unconstitutional treatment into new areas.[29]

Thus, contrary to amici's argument, the congruence and proportionality test is not a license for judicial micro-management of every potential application of a law. Title VII, 42 U.S.C. 2000e *et seq.*, for example, prohibits sex and race discrimination in the administration of any and all employment terms, conditions, and benefits; yet, this Court has never insisted that Congress justify its prohibitions application-by-application with a lengthy, documented record of particularized state discrimination. That is for the commonsense reason that discrimination, by its nature, does not operate in isolated compartments. The same mindset that has presumed that persons with disabilities cannot be educated, should not be parents, need not vote, and are too much trouble to transport, has also traditionally excluded individuals with disabilities from its conception of the community served by public programs and benefits. See *Hibbs*, 123 S. Ct. at 1980 n.5.[30]

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[29] See *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.) (Congress's Section 5 power "include[s] the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations"); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding a nationwide ban on literacy tests and residency requirements despite the geographically limited evidence of abuse).

[30] Prior to the Court's adoption of the congruence and proportionality test in *Flores*, *supra*, the Court did rely upon an as-applied analysis to *sustain* the constitutionality of legislation enacted under Section 2 of the Fifteenth Amendment. See *United States* v. *Raines*, 362 U.S. 17, 21-26 (1960); cf. *Griffin* v. *Breckenridge*, 403 U.S. 88, 104-106 (1971) (sustaining the constitutionality of a law enacted under Section 2 of the Thirteenth Amendment both facially and as applied).

In that regard, amici's balkanized approach to Title II fundamentally misapprehends the nature and scope of the constitutional problem addressed by Congress. The legislative record before Congress revealed an interconnected pattern in the distribution of government services through which State actors continue to exclude and isolate individuals with disabilities, perpetuate false stereotypes, and persistently deny the disabled the same types of reasonable accommodations and adjustments that are routinely afforded other members of the public. Congress enacted a comprehensive and unitary remedy because it confronted a comprehensive and unitary problem. See *Hibbs*, 123 S. Ct. at 1981 ("Congress did not create a particular leave policy for its own sake," but rather addressed leave policy as part of a broader effort to "dismantle persisting gender-based barriers to the hiring, retention, and promotion of women in the workplace").

6. State Laws Provide Insufficient Protection

Petitioner and its amici argue (Pet. Br. 21-22; Ala. Br. 22-25) that the existence of state laws prohibiting some forms of disability discrimination made congressional action unnecessary. But, as the facts of this case well illustrate, that argument confuses the existence of laws with their effectiveness, and *Hibbs* made clear that effectiveness is what matters. 123 S. Ct. at 1980-1981 (addressing "important shortcomings" of laws cited by the dissenters). Congress specifically found that state laws were "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." S. Rep. No. 116, *supra*, at 18; see also *ibid.* (section of report entitled "CURRENT FEDERAL AND STATE LAWS ARE INADEQUATE"); H.R. Rep. No. 485,

supra, Pt. 2, at 47 (same).[31] State officials themselves broadly agreed with that assessment. The 50 State Governors' Committees "report[ed] that existing State laws do not adequately counter * * * discrimination." S. Rep. No. 116, *supra*, at 18; H.R. Rep. No. 485, *supra*, Pt. 2, at 47; *Cal. Report* 22-23 (noting "contradictions" and "gaps" in state law). The Illinois Attorney General testified that "[p]eople with disabilities should not have to win these rights on a State-by-State basis," and that "[i]t is long past time * * * [for] a national policy that puts persons with disabilities on equal footing with other Americans." *May 1989 Hearings* 77.[32]

In addition, petitioner exaggerates the coverage of state laws. See generally J. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 Ark. L. Rev. 261 (1986) (detailing gaps in coverage of state laws). Prior to 1990, nearly half of the States did not protect persons with mental illness and/or mental disabilities. See *id.* at 278-280. New Hampshire excluded disabilities caused by illness, N.H. Rev. Stat. Ann. § 354-A:3(XIII) (1984), while Arizona excluded disabilities which were first manifested after the age of 18, Ariz. Rev. Stat. § 36-551(11)(b) (1986). Flaccus, *supra*, at 285. Few States protected against discrimination based on either a perceived disability or a his-

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[31] See 136 Cong. Rec. 11,455 (1990) (Rep. Wolpe), *id.* at 11,461 (Rep. Levine); 134 Cong. Rec. 9384-9385 (1988) (Sen. Simon); 2 *Leg. Hist.* 963, 967, 1642-1643; 3 *Leg. Hist.* 2245; AL 24; AK 52.

[32] See Dep't of Health & Human Servs., *Visions of: Independence, Productivity, Integration for People with Developmental Disabilities* 29 (1990) (19 States strongly recommended passage of the Disabilities Act); 2 *Leg. Hist.* 1050 (Mass. Rehab. Comm'n); *id.* at 1455-1456 (Treas., Harris Co., Tex.); *id.* at 1473-1474 (Chair, Metro. Transit Auth. of Harris Co., Tex.); *id.* at 1506 (Texas State Sen. Brooks); *id.* at 1508; *May 1989 Hearings* 778 (Ohio Governor).

tory of illness such as cancer. See B. Hoffman, *Employment Discrimination Based on Cancer History*, 1986 Temple L. Q. 1 (1986). Many States failed to provide for private rights of action and compensatory damages, effectively leaving vicims of discrimination without enforceable remedies. *Id.* at App. B; Flaccus, *supra*, at 300-310, 317-321.[33] Even today, less than half of the States provide statutory protection comparable to Title II. See R. Colker & A. Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075, 1076, 1083 (Summer 2002). In fact, petitioner's and amicus Wyoming's public accommodation laws do not cover discrimination in the provision of governmental services based on disability at all, and the laws of petitioner and four of its amici lack any enforcement mechanism against the State. *Id.* at 1093, 1102. Thus, just as state laws against gender discrimination have neither eradicated the problem nor undermined the basis for subjecting States to federal prohibitions, see *Hibbs*, 123 S. Ct. at 1978-1982, Congress was equally justified in concluding that state laws against disability discrimination had generally been ineffective in combating the lingering effects of prior official discrimination and exclusionary laws and policies and, more importantly, in changing the behavior of individual state actors.

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[33] See *May 1989 Hearings* 386-394; 3 *Leg. Hist.* 2245; *Employment Discrim. Against Cancer Victims and the Handicapped: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. & Labor*, 99th Cong., 1st Sess. 62 (1985) (Rep. Moakley) ("[O]ne-fourth of the states have no protection for the handicapped. Additionally, even those states with laws differ greatly in their regulations.") (ten-state survey showing gaps in coverage of laws).

C. The Americans With Disabilities Act Of 1990 Is Reasonably Tailored To Remedying And Preventing Constitutional Violations

While Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified, *Florida Prepaid*, 527 U.S. at 639, "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies," *Flores*, 521 U.S. at 519-520. Thus, the relevant inquiry is not whether Title II "prohibit[s] a somewhat broader swath of conduct," *Garrett*, 531 U.S. at 365, than would the courts. "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Ibid.* The question is whether, in light of the scope of the problem identified by Congress, the enactment "is so out of proportion to the supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Kimel*, 528 U.S. at 86. Title II is not.

1. Title II's Terms are Tailored To The Constitutional Problems It Remedies

Title II targets exclusively governmental action that is itself directly limited by the Constitution, rather than regulating public and private employment policies as a single, undifferentiated whole. Title II also focuses on discrimination that threatens fundamental rights or that is unreasonable. For those reasons, much of Title II's operation targets conduct outlawed by the Constitution itself. As applied to discrimination in voting, child custody proceedings, criminal cases, institutionalization, conditions of confinement, interactions with law enforcement, judicial proceedings, access to public officials and offices, and other areas implicating fundamental rights, Title II tracks the Fourteenth Amendment

when it prevents the disparate deprivation of those rights for invidious or insubstantial reasons. Furthermore, Title II targets discrimination that is unreasonable and, in so doing, ensures (as this Court did in *Cleburne*, 473 U.S. at 447-450), that the government's articulated rationale for differential treatment does not mask impermissible animus and does not result in the differential treatment of similarly situated groups. The States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all. The Disabilities Act does not require preferences and permits the denial of benefits or services if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service. 42 U.S.C. 12131(2). But once an individual proves that he can meet all the essential eligibility requirements of a program or service, especially those programs and services that implicate fundamental rights, the government's interest in excluding that *qualified* individual solely "by reason of such disability," 42 U.S.C. 12132, is both minimal and, in light of history, constitutionally circumscribed. At the same time, permitting the States to retain and enforce their essential eligibility requirements protects their legitimate interests in structuring governmental activities. The Disabilities Act thus balances a State's legitimate operational interests against the right of a person with a disability to be judged "by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 528 U.S. 495, 496 (2000).

As petitioner notes (Br. 31), the Disabilities Act requires "reasonable modifications" in public services. 42 U.S.C. 12131(2). But, as *Hibbs* makes clear, once Congress identifies a predicate of unconstitutional conduct that it seeks to remedy, Congress has flexibility in fashioning the remedy. See *Hibbs*, 123 S. Ct. at 1981 n.10, 1982-1984. The requirement of reasonable modifications, moreover, is precisely

tailored to the unique features of disability discrimination in two ways.

First, given the history of segregation and isolation and the entrenched stereotypes, fear, prejudices, and ignorance about persons with disabilities that it spawned, Congress reasonably determined that a simple ban on overt discrimination would be insufficient. It would do little to combat the "stereotypes [that have] created a self-fulfilling cycle of discrimination" against individuals with disabilities, and which, in turn, lead "to subtle discrimination that may be difficult to detect on a case-by-case basis." *Hibbs*, 123 S. Ct. at 1982. Given the record of discrimination against and unconstitutional treatment of the disabled, government's failure to make reasonable accommodations to the rigid enforcement of seemingly neutral criteria can often mask just such invidious, but difficult to prove, discrimination. Congress's Section 5 power includes the ability to ensure that constitutional violations are not left unremedied because of difficulties of proof. See, *e.g.*, *Hibbs*, 123 S. Ct. at 1982; *South Carolina*, 383 U.S. at 314-315.

In addition, a simple ban on discrimination would freeze in place the effects of States' prior official exclusion and isolation of individuals with disabilities, which had the effect of rendering the disabled invisible to government planners, thereby creating a self-perpetuating spiral of segregation, stigma, and neglect. See *Gaston County*, *supra* (constitutionally administered literacy test banned because it perpetuates the effects of past discrimination). By reducing stereotypes and misconceptions, integration reduces the likelihood that constitutional violations will recur. Cf. *Olmstead*, 527 U.S. at 600 (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life").

Second, the Constitution itself already requires individualized consideration and modification of practices or pro-

grams, when necessary to avoid infringing on fundamental rights.[34] Beyond that, States may not justify infringement on fundamental rights by pointing to the administrative convenience or cost savings achieved by maintaining barriers to the enjoyment of those rights.[35] Title II, moreover, requires modifications only where "reasonable." 42 U.S.C. 12131(2). Governments need not make modifications that "impose an undue hardship" or require "fundamental alterations in the nature of a service, program, or activity," in light of their nature or cost, agency resources, and the operational practices and structure of the program. 42 U.S.C. 12111(10), 12112(b)(5)(A); 28 C.F.R. 35.130(b)(7), 35.150(a)(3), 35.164; *Olmstead*, 527 U.S. at 606 n.16 (plurality opinion). Furthermore, based on the consistent testimony of witnesses and expert studies, Congress determined that the vast majority of modifications entail little or no cost. One local government official stressed that "[t]his bill will not impose great hardships on our county governments" because "the majority of accommodations for employees with disabilities are less than $50" and "[t]he cost of making new or renovated structures accessible is less than 1 percent of the total cost of construction." 2 *Leg. Hist.* 1443 (Treasurer, Harris Co., Tex.).[36]

Title II thus goes further than the Constitution itself only to the extent that some disability discrimination in the realm

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[34] See, *e.g.*, *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 121-122 (1996); *Stanley*, 405 U.S. at 651-658.

[35] See, *e.g.*, *Little* v. *Streater*, 452 U.S. 1, 13-17 (1981); *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250, 263 (1974); *Carrington* v. *Rash*, 380 U.S. 89, 95 (1965).

[36] See also S. Rep. No. 116, *supra*, at 10-12, 89, 92; H.R. Rep. No. 485, *supra*, Pt. 2, at 34; 2 *Leg. Hist.* 1552, 1077, 1388-1389, 1456-1457, 1560; 3 *Leg. Hist.* 2190-2191; *Task Force Report* 27; *Spectrum* 2, 30, 70; GAO, *Briefing Report on Costs of Accommodations, Americans with Disabilities Act: Hearing Before the House Comm. on Small Business*, 101st Cong., 2d Sess. 190 (1990).

of public services may have no impact on fundamental rights and may be rational for constitutional purposes, but still be unreasonable under the standards of the Disabilities Act. But that margin of statutory protection does not exceed Congress's authority. Like Title VII on which it was modeled, that level of statutory protection is necessary both to reach unconstitutional conduct that would otherwise escape detection in court and to deter future constitutional violations.

Furthermore, "[a] proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996). Section 5 thus empowers Congress to do more than simply prohibit the creation of new barriers to equality; it can require States to tear down the walls they erected during decades of discrimination and exclusion. See *id.* at 550 n.19 (Equal Protection Clause itself can require modification of facilities and programs to ensure equal access); see also *Hibbs*, 123 S. Ct. at 1981 n.10. Title II's accommodation requirements eliminate the effects of past discrimination by ensuring that persons previously invisible to program and building designers are now considered part of the government's service constituency. "Just as it is unthinkable to design a building with a bathroom only for use by men, it ought to be just as unacceptable to design a building that can only be used by able-bodied persons." 3 *Leg. Hist.* 1987 n.4 (Laura Cooper). That is because "[i]t is exclusive *designs*, and not any inevitable consequence of a disability that results in the isolation and segregation of persons with disabilities in our society." *Ibid.* In short, Title II is appropri-

ate legislation because the remedy for segregation is integration, not inertia.[37]

2. Title II Is As Broad As Necessary

Lastly, petitioner objects (Br. 29-31) to the scope of Title II's coverage. But the operative question is not whether Title II is broad, but whether it is broader than necessary. It is not. Congress found that the history of unconstitutional treatment and the risk of future discrimination found by Congress pertain to all aspects of governmental operations. It determined that only a comprehensive effort to integrate persons with disabilities would end the cycle of isolation, segregation, and second-class citizenship, and deter further discrimination. Integration in education alone, for example, would not suffice if there were not going to be jobs and professional licenses for those who received the education. Integration in employment and licensing would not suffice if persons with disabilities lacked transportation. Integration in transportation is insufficient unless persons with disabilities can get into the facilities to which they are traveling. Ending unnecessary institutionalization is of little gain if neither government services nor the social activities of public life (libraries, museums, parks, and recreational services) are accessible to bring persons with disabilities into the life of the community. And none of those efforts would suffice if persons with disabilities continued to lack equivalent access to government officials, courthouses, and polling places.

In short, Congress chose a comprehensive remedy because it confronted an all-encompassing, inter-connected

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[37] Likewise, child-size and adult-size water fountains routinely appear in buildings; requiring accessible fountains just expands that routine design process. 2 *Leg. Hist.* 993-994 (Jade Calegory) ("Black people had to use separate drinking fountains and those of us using wheelchairs cannot even reach some drinking fountains. We get thirsty, too.").

problem. To do less would be as ineffectual as "throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway," S. Rep. No. 116, *supra*, at 13.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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