No. 99-1240

IN THE
Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,
Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,
Respondents.

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

BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
COUNTER STATEMENT OF FACTS	1
1. Patricia Garrett	1
2. Milton Ash	3
3. The Provisions of the ADA Relevant to this Case	5
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. CONGRESS PROPERLY FOUND A SERIOUS AND PERVASIVE PROBLEM OF UNCONSTITUTIONAL EMPLOYMENT DISCRIMINATION	15
A. What Conduct Offends the Equal Protection Clause?	15
B. Congress Found Pervasive Discrimination Against Persons with Disabilities in a Wide Variety of Contexts, Including State Employment	17
1. Evidence of Unconstitutional Employment Discrimination	20
2. Evidence of the Causes of Prejudice Against Persons with Disabilities	26
(a) Discomfort and Aversion	27
(b) Stigmatization	28

TABLE OF CONTENTS—Continued

Page

(c) Stereotyping 28

(d) Patronization 31

3. Evidence of Prejudice in State Actions Apart from Employment 31

C. Congress Correctly Found that State Disability Laws Did Not Solve the Problem 35

II. THE ADA IS CONGRUENT AND PROPORTIONAL TO THE PROBLEM..... 38

A. Each of the Employment Provisions of the ADA Serves an Important Prophylactic Purpose 39

1. The General Rule 39

2. Stereotypes 40

3. Non-Job-Related Qualification Standards 41

4. Reasonable Accommodation..... 44

B. The Nationwide Scope of the ADA is Congruent and Proportional 49

C. The Absence of a Sunset Provision is not Fatal to Congruence or Proportionality..... 49

CONCLUSION 50

TABLE OF AUTHORITIES

CASES Page

Bankers Life & Casualty Co. v. Crenshaw, 486 US 71 (1988) 15
Baxter v. City of Belleville, 720 F. Supp. 720 (S.D. Ill. 1989) 34
Bledsoe v. Palm Beach County Soil & Water Conservation District, 133 F.3d 816 (11th Cir. 1998) 6
Burstyn v. City of Miami Beach, 663 F. Supp. 528 (S.D. Fla. 1987) 34
Chalk v. United States District Ct. Central District of Cal., 840 F.2d 701 (9th Cir. 1988) ... 25
City of Boerne v. Flores, 521 US 507 (1997) .....*passim*
City of Rome v. United States, 446 US 156 (1980) 42, 43
Cleburne v. Cleburne Living Ctr., 473 US 432 (1985) 15, 16, 28, 29, 38, 45-46
Doe v. Dolton Elementary Sch. District No. 148, 694 F. Supp. 440 (N.D. Ill. 1988) 34
Ex Parte Virginia, 100 US 339 (1879) 13
FCC v. Beach Communications, 508 US 307 (1993) 16
Frontiero v. Richardson, 411 US 677 (1973) 31
Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977) 25
Halderman v. Pennhurst State Sch. & Hospital, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part*, 612 F.2d 84 (3d Cir. 1979), (en banc) *rev'd on other grounds*, 451 U.S. 1 (1981) 35
Heller v. Doe, 509 US 312 (1993) 16
Hendrick Hudson District Bd. of Ed. v. Rowley, 458 US 176 (1982) 17
Irving Independent School Dist. v Tatro, 468 U. S. 883 (1984) 17

TABLE OF AUTHORITIES—Continued

Page

J.W. v. City of Tacoma, 720 F.2d 1126 (9th Cir. 1983) 34
Katzenbach v. Morgan, 384 US 641 (1966) 14, 43
Kimel v. Florida Bd. of Regents, ___ US ___, 120 S.Ct. 631 (2000) ..... *passim*
Leach v. Shelby County, 891 F.2d 1241 (6th Cir. 1989), *reh'g den, en banc*, 1990 U.S. App. Lexis (6th Cir.), *cert. denied*, 495 U.S. 932 (1990) 35
Lindsey v. Normet, 405 US 56 (1972) 15
Lopez v. Monterey County, 525 US 266 (1999) 44
M.L.B. v. S.L.J., 519 US 102 (1996) 17
Manhattan State Citizens Group, Inc. v. Bass, 524 F. Supp. 1270 (S.D.N.Y. 1981) 35
Massachusetts Board of Retirement v. Murgia, 427 US 307 (1976) 30
Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972) 34
Mt. Healthy City School District v. Doyle, 429 US 274 (1977) 15
Nash v. Florida Industrial Commission, 389 US 235 (1967) 47
New York Association for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) 34-35
New York City Transit Authority v. Beazer, 440 US 568 (1979) 28
New York State Association for Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979) 33
O'Connor v. Donaldson, 422 US 563 (1975) 28
Olmstead v. L.C., 527 US 581 (1999) 6, 16, 18, 30, 41
Oregon v. Mitchell, 400 US 112 (1970) 43, 49

TABLE OF AUTHORITIES—Continued

Page

Panitch v. Wisconsin, 444 F. Supp. 320 (E.D. Wis. 1977) 34
Parrish v. Johnson, 800 F.2d 600 (6th Cir. 1986) 35
Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) 34
Pennsylvania Dept. of Corrections v. Yeskey, 524 US 206 (1998) 6, 18
Pennsylvania v. Union Gas Co., 491 US 1 (1989) 12
Personnel Adm'r of Massachusetts v. Feeney, 442 US 256 (1979) 17
Pushkin v. Regents of the University of Colo., 658 F.2d 1372 (10th Cir. 1981) 25
Ray v. School District of Desoto County, 666 F. Supp. 1524 (M.D. Fla. 1987) 34
Recanzone v. Washoe County Sch. District, 696 F. Supp. 1372 (D. Nev. 1988) 25
Reno v. Bossier Parish Sch. Board, 520 US 471 (1997) 42
Robertson v. Granite City Community Unit Sch. District No. 9, 684 F. Supp. 1002 (S.D. Ill. 1988) 34
Romer v. Evans, 517 US 620 (1996) 15, 16
School Bd. of Nassau Cy. v. Arline, 480 US 273 (1987) 22, 29, 41, 48
Schweiker v. Wilson, 450 US 221 (1981) 16
Seminole Tribe v. Florida, 517 US 44 (1996) 12
South Carolina v. Katzenbach, 383 US 301 (1966) 13, 14, 43
Thomas S. v. Flaherty, 699 F. Supp. 1178 (W.D.N.C. 1988), *aff'd*, 902 F.2d 250 (4th Cir. 1990) 35

TABLE OF AUTHORITIES—Continued

Page

Thomas v. Atascadero Unified Sch. District, 662 F. Supp. 376 (C.D. Cal. 1986) 34
Turner Broadcasting System, Inc. v. FCC, 520 US 180 (1997)..... 19
United States v. Gainey, 380 US 63 (1965)..... 19
United States v. Virginia, 518 US 515 (1996)..... 31
Vance v. Bradley, 440 U.S. 93 (1979) 30
Village of Willowbrook v. Olech, ___ US ___, 120 S.Ct. 1073 (2000)..... 15
Washington v. Davis, 426 US 229 (1976)..... 17, 41
Watson v. Fort Worth Bank & Trust, 487 US 977 (1988) 37, 42, 46
Watson v. Memphis, 373 US 526 (1963) 28
Will v. Michigan Department of State Police, 491 US 58 (1989)..... 40
Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1305 (5th Cir. 1974) 35
Zimmerman v. Oregon Department of Justice, 170 F.3d 1169 (9th Cir. 1999), *cert petition pending* (No.99-243)..... 6

STATE CASES

Boyd v. Board of Registrars of Voters of Belchertown, 334 N.E.2d 629 (Mass. 1975) 35
Carroll v. Cobb, 354 A.2d 355 (N.J. Super. Ct. App. Div. 1976) 34
In re Marriage of Carney, 598 P.2d 36 (Cal. 1979) 35
In re Marriage of R.R., 575 S.W.2d 766 (Mo. Ct. App. 1978) 35
Richardson v. Los Angeles County Bureau of Adoptions, 59 Cal. Rptr. 323 (Cal. Ct. App. 1967) 35

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend XI 7
U.S. Const. Amend. XIV ..... *passim*

FEDERAL RULES AND STATUTES

28 C.F.R. § 35.140..... 6
29 C.F.R. §§ 1613.701-709 5
§ 1630.2(j)(3) 5
20 U.S.C. § 1400..... 33
29 U.S.C. § 791..... 5
42 U.S.C. § 1983..... 39
§ 12101.....17, 18, 31
§ 12102..... 6
§ 12111..... 6, 44
§ 12112.....7, 38-43, 46
§ 12113..... 7, 40-42
§ 12117..... 6, 7
§ 12133..... 6, 7
§ 12134..... 6
§ 12202..... 7
§ 12203..... 46
§ 12213..... 7

Pub. L. No. 86-380, 73 Stat. 703 (1959)..... 19

LEGISLATIVE MATERIALS

Americans With Disabilities Act: Hearing on S. 933 Before the Senate Comm. on Labor and Hum. Resources, 101st Cong., 1st Sess. (1989)..... 23
House Comm. on Education and Labor, H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. (1990)..... *passim*

TABLE OF AUTHORITIES—Continued

Page

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136 Cong. Rec. H2603..... 48

MISCELLANEOUS

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TABLE OF AUTHORITIES—Continued

Page

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BRIEF FOR RESPONDENTS PATRICIA GARRETT AND MILTON ASH

COUNTER STATEMENT OF FACTS

The Complaints in these consolidated cases, alleging violations of the employment provisions of the Americans with Disabilities Act (ADA), were dismissed by the District Court on Eleventh Amendment grounds, thus pretermitting adjudication of the merits. We therefore outline the facts as stated in the Complaints and in affidavit and deposition testimony submitted by the plaintiffs (respondents here) prior to the dismissal.

1. **Patricia Garrett.** Respondent Patricia Garrett was hired by Petitioner University of Alabama-Birmingham ("UAB") as a registered nurse in the University Hospital, in 1977 (GC3, GA2, GD15).[1] While employed, she attained a Masters degree in Nursing, and then received several promotions, culminating in her appointment, in 1992, as Director of Nursing, Women's Services/Neonatology (GC3, GA 2-3)

In late August 1994, Garrett was diagnosed with breast cancer, and had a lumpectomy, node removal and biopsy (GD48). Her treatment plan, established at that time, was radiation treatments commencing in October 1994, and chemotherapy starting in January 1995. (GA5, GD49-50). During these treatments, Garrett's supervisor, Sabrina Shannon, Associate Executive Director of the Hospital, initially encouraged, and then pressured, Garrett to take leave or to transfer to a lesser job. (Garrett GC4-5; 10, 14-15;

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[1] As used herein, "GC_" means p._ of Garrett's amended complaint (Garrett R1-20); "GA_" means ¶ _ of Garrett's affidavit (Garrett R1-47), and AD" means p. _of Garrett's deposition testimony (Garrett R1-48)..

GD154-55, 159-60, 199-201, 205). A fellow employee told Garrett that Shannon didn't like "sick people" and had a history of getting rid of them. (GA11).

Garrett made clear to her supervisor that she wished to continue to carry the full duties of her job. Garrett, in fact, satisfactorily performed those duties. She did so during the period of her preventative treatments, when on some occasions fatigue necessitated that she complete her duties by working at home in the evenings**.** (GA 9, 14-15, GD 70). Nevertheless, Garrett's supervisor made continuing threats to transfer Garrett to a lesser job (GD 199-204, 210) In addition, Garrett's supervisor listed Garrett's job as "being recruited" (when Garrett protested, the supervisor told her the listing was a "typographical error"); at another time, Garrett found herself locked out of the Hospital's computer system; and, finally, Garrett's supervisor solicited one of Garrett's subordinates to assume Garrett's duties while Garrett would be transferred to a temporary position to a satellite hospital. (GA13-15, GD 275-279).

In March 1995, Garrett described the foregoing events to her physician, who advised that the addition of the workplace harassment to her chemotherapy treatment was inimical to her health. Upon his recommendation, Garrett took leave for the duration of her chemotherapy—leave to which she was entitled under the Hospital's employee handbook. (GA15-16; GD204-205, 249).

When Garrett was ready to return to work in July 1995, Shannon announced that UAB did not want Garrett back. However, at the urging of the Hospital's Personnel Department, Garrett was allowed to return to the job, and fully and satisfactorily performed her duties. (GD 266-270, 290, 371). Nonetheless, just two weeks after Garrett's return, Shannon declared that there was no way Garrett could be successful in her job, and that Garrett's options were to quit, to accept a demotion to the nursing pool, or to be discharged.

(GC5, GA17, GD 354, 358). Garrett's request that at the least she be retained in her position until October 1995, for insurance purposes, was refused. (GD 356-57). In these circumstances**,** Garrett fortunately found a position as a Nurse Manager at a convalescence home, albeit at a $13,000 decrease in salary (GA19).

Garrett then filed her lawsuit against UAB, alleging *inter alia* that UAB's actions violated her rights under the ADA in the following respects: (1) defendant, by forcing her from the Director of Nursing position, "intentionally [and] maliciously . . . discriminated against [her] . . . because of her disability," (2) defendant failed to accommodate her, by not proffering another position of comparable salary and status; and (3) defendant retaliated against her for requesting such accommodation. (GC6-7).

2. **Milton Ash.** Respondent Milton Ash began working as a Security Officer for Petitioner Alabama Department of Youth Services [ADYS] in September 1993 (AC3).[2] Ash performed his job well, and, in 1996, was promoted to the classification of Youth Services Security Officer. (AA 10, 26). Throughout his tenure with ADYS, Ash has suffered from severe chronic asthma and other respiratory disabilities; he is vulnerable to asthma attacks so severe that they require hospitalization (AC2, AA2-5).

Between 1993 and 1996, Ash repeatedly made requests for two accommodations, to eliminate conditions that were exacerbating his respiratory condition. The first was that Respondent ADYS enforce its promulgated "no-smoking" rule in the Gatehouse, where he was confined in a small workspace with fellow employees who smoked in violation of the rule. (AA14-15). The second was for the repair of ADYS vehicles Ash was required to drive, so that they did not emit

[2] As used herein, "AC_" means p._ of Ash's complaint (Ash R1-1) and AA_5" means ¶– of Ash's affidavit (Ash R1-14, Exh. 1).

carbon monoxide fumes into the passenger compartment. (AC3; AA11-12).

ADYS took no steps to accommodate either of these requests, despite Ash's presentation of notes from his doctor explaining that both conditions were having an adverse effect on his health. (AA 11-17, 21, 30-31, 33-34). Instead, the Superintendent of Youth Services suggested to Ash that he "just go ahead and quit, . . . just go home and draw disability." (AA20).

In July 1996, Ash was diagnosed with yet another respiratory disease, sleep apnea. His doctor urged that ADYS accommodate Ash, who was then assigned to rotating shifts, by transferring him to the daylight shift so that he could sleep normal hours. (AA24). ADYS agreed that it would do so when a vacancy occurred on the daylight shift.

Thereafter, Ash filed an EEOC charge alleging that ADYS had violated the ADA by, *inter alia*, failing to enforce its no-smoking rule and failing to fix the carbon monoxide leaks in its vehicles. (AC4, AA23) After this charge was filed, two openings occurred on the daylight shift. Instead of transferring Ash to that shift, as had been promised, ADYS transferred two security officers junior to Ash, who had not claimed a medical need to transfer. (AC4, AA25). In September 1996, Ash received his periodic performance evaluation, which was "meets standards" rather than, as in his previous evaluation, "exceeds standards." (AC4, AA26).[3]

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[3] As Ash's evaluations reflect, and as his complaint alleged (AC5), at all times he was able to perform his job satisfactorily. Petitioners intimate that Ash acknowledged otherwise, citing the allegation in his complaint that working was one of the major life activities in which he was "substantially impaired" by reason of his disabilities. Pet. 29. This misunderstands Ash's complaint, as Petitioners misunderstand a similar allegation in Garrett's complaint. In order to qualify as a person with disabilities under the ADA, one must be suffering a substantial impairment of a major life activity by reason of the disability. The purpose of this requirement is to limit ADA coverage only to persons with serious disabilities. To

Ash then filed his lawsuit, alleging, *inter alia*, that ADYS had violated the ADA by denying him the reasonable accommodations of enforcing its no-smoking rule, repairing the carbon monoxide leaks in the vehicles, and transferring him to the first shift; and that ADYS further violated the ADA by retaliating against him (by refusing the transfer and lowering his evaluation) for asserting his ADA rights via his initial EEOC charge. (AC18-22). The Complaint alleged that ADYS' actions were done "intentionally, and with malice" (AC5).

3. **The Provisions of the ADA Relevant to this Case.** The Complaints in these consolidated cases allege that the complained-of actions violated both Title I and Title II of the ADA. Title I deals exclusively with employment, and covers private, state, and local governmental employers with 15 or more employees. § 12111(5).[4] Title II forbids discrimination by public entitities with respect to any of their programs, services or activities, and thus applies to many

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be substantially impaired in the major life activity of working, one's disability must preclude performing a range of jobs. 29 C.F.R. 1630.2 (j)(3). The ability or inability to do one particular job is irrelevant to this qualification standard [*id*]. The allegations in Ash's and Garrett's Complaints meant that there was a range of jobs they could not do (thus showing that their disabilities were serious), not that they could not do the particular job on which they were employed.

[4] The federal government and bona fide membership clubs are excluded from the definition of "employer." *Id.* At the time the ADA was enacted, the federal government was already governed by more sweeping provisions. Section 501(b) of the Rehabilitation Act of 1973, 29 USC '791(b), and implementing regulations, 29 CFR § 1613.701-709, imposed on the federal government an affirmative action obligation, as well the substantive non-discrimination obligations imposed by Section 504 on state and local governmental employers who took federal funds. In 1992, shortly after the ADA was enacted, Congress amended Section 501 of the Rehabilitation Act to declare expressly that the non-discrimination obligations of the federal government included compliance with all the employment provisions of the ADA, in addition to the affirmative action obligation already stated in Section 501(b). *See*, 29 USC § 791(g).

diverse areas in addition to employment. *See, e.g.*, *Olmstead v L.C.*, 527 US 581 (1999) (institutionalization); *Pennsylvania Dep't of Corrections v Yeskey*, 524 US 206 (1998) (prison programs). In the case of employment, the Attorney General—who is charged in § 12134 with responsibility for promulgating regulations to implement Title II—has issued a regulation declaring that, insofar as the titles overlap (i.e, in their coverage of employment discrimination by public employers of 15 or more employees), Title II's substantive provisions are to be interpreted *in haec verba* with Title I's substantive provisions. 28 CFR 35.140.[5] See also, Section-by-Section Analysis, 28 CFR Part 35, App. A, 35.140.[6]

The Title I substantive scheme, in a nutshell, is this: Protection is accorded only to "qualified individual[s] with a disability." 42 USC § 12112. In this regard, "disability" is defined in the ADA as "a physical or mental impairment that substantially limits one or more of the major life activities of the individual," § 12102(2), and a "qualified individual with a disability" is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." §12111(7).

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[5] This regulation rests on the Attorney General's understanding that Title II applies to the employment practices of public employers. That is, as well, the understanding of the Eleventh Circuit, which decided this case. *Bledsoe v Palm Beach County Soil & Water Conservation District*, 133 F3d 816, 820-25 (11th Cir. 1998). *But see, contra*, *Zimmerman v Oregon Department of Justice*, 170 F3d 1169 (9th Cir. 1999), *cert petition pending (*No.99-243*)*.

[6] While the States' substantive obligations respecting employment are the same under Title II as under Title I, the availability of both titles is relevant to remedies and procedures, for Title I is enforced pursuant to the remedial scheme of Title VII of the Civil Rights Act of 1964, *see* 42 USC 12117(a), while Title II is enforced pursuant to the remedial scheme of Title VI of the Civil Rights Act of 1964. *See*, 42 USC 12133; *Olmstead*, 527 US at 590, n.4.

Title I states a "general rule" banning employment discrimination against a qualified individual "because of the disability of such individual." § 12112(a). The statute then defines certain specific actions as constituting "discrimination." These provisions are described infra at 38-46.

Both titles authorize an aggrieved individual to sue his or her employer (§ 12117, 12133). The Act expressly declares Congress' intention to lift the States' Eleventh Amendment immunity. § 12202. The Act also contains a typical severability clause, 42 USC § 12213, declaring that the unconstitutionality of one provision "shall not affect the enforceability of the remaining provisions of the Act."

SUMMARY OF ARGUMENT

The question, properly stated, is whether Congress had power under § 5 to enact the ADA employment provisions. We focus only on the ADA's employment provisions, because it is only those that are invoked by the plaintiffs in these cases, and, given the ADA's severability clause as well as traditional "case and controversy" considerations, it is only those whose constitutionality is properly at issue.

This Court's decisions defining Congress' § 5 power establish that, at the least, Congress has § 5 power to address identified conduct transgressing the Fourteenth Amendment's substantive provisions through a legislative scheme tailored to remedying or preventing such conduct, in the sense that the scheme is congruent and proportional to the constitutional injury to be prevented or remedied. *City of Boerne v Flores*, 521 US 507 (1997); *Kimel v Florida Bd. of Regents*, 120 S.Ct. 631 (2000).

In Part I, we address the "identified conduct" prong of the *Boerne/Kimel* two-part test. We show that Congress *found* that employment disability discrimination by State and other public employers was, at the time of passage of the ADA, a serious and pervasive problem, rooted in deeply and widely-held prejudices regarding persons with disabilities. And we

describe the comprehensive record amassed over years of diligent congressional inquiry that supports that finding. For the sake of exposition, our presentation divides the evidence upon which Congress relied into three categories.

(a) First is the direct evidence of unconsitutional employment discrimination by State and local governmental employers. Congress received voluminous evidence—including governmentally-authorized studies, reports of individual acts, and the assessment of State officials themselves—that public employer workplace discrimination against persons with disabilities motivated by prejudice continued to be a pervasive reality. We detail this evidence at pp. 20-25, *infra*.

(b) Second is the evidence that located the roots of that disability prejudice in feelings of discomfort and aversion, stigmatization, false stereotyping, and paternalism. As we show, decisionmaking in the public workplace respecting persons with disabilities that is animated by these sorts of feelings violates the Equal Protection Clause. *See,* 26-31, *infra.*

(c) Third is the voluminous evidence gathered by Congress of invidious disability discrimination by State and local government in areas apart from employment. Given the nature of the factors that cause disability discrimination, Congress reasonably drew the logical conclusion that state actors who make employment decisions are not different in kind from those governmental actors whose prejudices are so widely manifested in institutions, education, voting, and public services, and thus that the pervasive prejudice could not be expected to stop just short of the door to the work-place. *See,* pp. 31-35, *infra.*

We then show that, as Congress expressly found, existing State law was inadequate to solve the disability dis-crimination problem. The evidence before Congress of pervasive continuing discrimination made this clear, and it

was confirmed by reports from State officials. *See,* pp. 35-38, *infra.*

In Part II, we demonstrate that the ADA's employment provisions are a congruent and proportional response to the pervasive problem Congress found. Congress' § 5 power includes the enactment of "prophylactic legislation" to meet "a difficult and intractable problem" of a "pattern" of discrimination by the States "at the level of constitutional violation." *Kimel*, 120 S. Ct. at 648-49. The Senate and House Committee Reports on the ADA explain, as to each of the ADA substantive employment provisions, why Congress deemed the provision a necessary prophylactic against workplace disability discrimination based on "pervasive bias." These well-considered judgments—targeted at practices that experience indicated were likely to manifest disability prejudice and to serve as a means to effectuate disability discrimination—were well within Congress' broad § 5 legislative power. And Congress acted with due proportion by crafting each provision to leave untouched employment practices likely to be legitimately motivated. We conclude by showing why it was proper for Congress to apply the ADA nationwide, and not to include an automatic "sunset" provision. *See*, pp. 38-50, *infra.*

ARGUMENT

There are occasions in the public life of the Nation when the evidence of pervasive public and private oppression of a group of citizens is so plain and so compelling that a consensus emerges for a national response in the form of a comprehensive federal legislative remedy—a consensus that knows no partisan political conflict, no ideological disagreement, and no Federal/State divide. The enactment of the Americans with Disabilities Act in 1990 was such an occasion.

The ADA grew out of more than 20 years of hearings and investigations into the deplorable public- and private-sector treatment of persons with disabilities, and their consequent deplorable situation.[7] Those hearings and investigations led to the introduction of a broadly-sponsored legislative response; to two years of fine-tuning in committee and floor deliberations leading to a final bill that was the product of "compromise, carefully crafted and painstakingly wrought;"[8] and to passage of the final bill by 91-6 in the Senate and 377-28 in the House.[9]

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[7] With respect to the ADA alone, Congress held 18 hearings, 63 field hearings, considered innumerable studies and reports evaluating the discriminatory treatment of persons with disabilities and the reasons therefor, issued five committee reports, and engaged in prolonged floor debate. See, Timothy Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temple L. Rev. 393, 393, 414 (1991). The ADA deliberations, moreover, rested on the institutional knowledge and expertise Congress had gained in considering and enacting prior statutes addressing discrimination on the basis of disability. Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 Temple L.Rev. 387, 387-89 (1991). A fuller description of this deliberative process appears in Brief Amicus Curiae of the National Council on Disability in Support of Respondents.

[8] 135 Cong. Rec. S10710 (daily ed. Sept. 7, 1989) (Sen. Harkin), hereinafter "___ C.R. ___." See also, to the same effect, *id at* S10714 (Sen. Hatch).

[9] 135 C.R. S9695; *id.* at H4629.

As the legislation moved forward, it was championed by Federal and State authorities alike. Attorney General Thornburgh for the Bush Administration supported its passage,[10] as did the leaders of both parties in Congress,[11] the National Association of Attorneys General, the National Association of Counties, and the National Association of State Mental Retardation Program Directors.[12] The ADA marshalled this unity of action for the most compelling of reasons; as President Bush stated in signing the ADA into law:

> [T]ragically, for too many Americans, the blessings of liberty have been limited or even denied.
>
> The Civil Rights Act of '64 took a bold step towards righting that wrong. But the stark fact remained that people with disabilities were still victims of segregation and discrimination, and this was intolerable. Today's legislation brings us closer to that day when no Americans will ever again be deprived of their basic guarantee of life, liberty, and the pursuit of happiness.[13]

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[10] 3 LH 2014-15. Throughout this brief, "LH" refers to the three-volume Legislative History of Public Law 101-336 (the ADA) published by the Committee on Education and Labor, U.S. House of Representatives, 101st Cong. 2d Sess. (1990), Serial Nos. 102-A, B and C.

[11] 135 C.R. S10714 (Sen. Hatch); 134 C.R. S5106 (Sen. Weicker); 135 C.R. S10789 (Sen. Kennedy); 135 C.R. S10790-91 (Sen. Dole); 135 C.R. S10711-12 (Sen. Harkin).

[12] 135 C.R. S10710. In addition, the fifty Governors' Committees advised Congress that State laws were inadequate. See p. 35, infra. There was no opposition to the bill from the States.

[13] The White House, Office of the Press Secretary, *Remarks by the President during Ceremony for the Signing of the Americans with Disabilities Act of 1990*, published in National Foundation for the Study of Employment Policy, *Legislative History of the Americans with Disabilities Act* at 844, 845 (1990).

In its essence, what Congress found regarding employment in its lengthy investigation was a pattern and practice of invidious discrimination against people with disabilities, in both the public and private sector—discrimination that resulted from deep-rooted and widely-held feelings of irrational prejudice against, fear of, and ignorance about persons with disabilities. And, in its essence, what Congress did was to enact both a general prohibition on employment discrimination based on disability and an interlocking set of discrete anti-discrimination norms addressed to employment practices that experience had shown are particularly likely to manifest disability prejudice and to serve as a means of effectuating disability discrimination. In so doing, Congress covered State employers as well as local governmental and private employers, and provided aggrieved employees a cause of action to vindicate their rights.

At the time the ADA was enacted, the governing law—stated in *Pennsylvania v Union Gas Co.*, 491 US 1 (1989)—was that Congress, when exercising its Article I legislative powers, may authorize private party suits against States to enforce the federal law. But this Court has since overruled *Union Gas*, holding, in *Seminole Tribe v Florida*, 517 US 44 (1996), that Congress is precluded by the Eleventh Amendment from authorizing private party suits against States, except when exercising its power, conferred in § 5 of the Fourteenth Amendment, to "enforce by appropriate legislation" that Amendment's substantive provisions.[14] The question whether Congress had § 5 power to enact the ADA thus obtains.

The § 5 question here is focused—and made salient—by the set of recent decisions of this Court from *City of Boerne* to *Kimel*. Those decisions establish that, at the least,

[14] Four members of this Court have stated that they do not accept the holding in *Seminole Tribe*. *See, e.g., Kimel*, 120 S.Ct. at 650-54 (Stevens, J., dissenting).

Congress has § 5 power to meet identified conduct transgressing the Fourteenth Amendment's substantive provisions through a legislative scheme tailored to remedying or preventing such conduct, in the sense that the scheme is congruent and proportional to the constitutional injury to be prevented or remedied. *Kimel*, 120 S. Ct. at 644-49.

The "identified conduct" prong of this two-part test is, we believe, straightforward in concept. The "congruent/proportional" prong is more complex, and we would note two points of elaboration. First, congruence and proportion are relational terms—the nature and dimension of the wrong determine the nature and dimension of a congruent and proportional legislative response. "Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Kimel*, 120 S.Ct. at 648 (*quoting City of Boerne v. Flores*, 521 US at 530-31.

Second, subject to the limit, recognized in *City of Boerne*, 521 US at 519, that § 5 grants "the power 'to enforce' not the power to determine *what constitutes* a constitutional violation," § 5 is a "broad" grant of legislative power. *Kimel*, 120 S.Ct. at 644. "[T]he Framers indicated that Congress was to be chiefly responsible for implementing the rights created in [the Civil War Amendments.]" *South Carolina v Katzenbach*, 383 US 301, 325-26 (1966) (*quoting Ex parte Virginia*, 100 US 339, 345 (1879)). And, precisely because § 5 is a grant of the most protean of constitutional powers, it "[brings] within the domain of congressional power," the enactment of "[w]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the . . . equal protection of the laws against State denial or invasion, if not prohibited. . . ." *City of Boerne*, 521 US at 517-18 (*quoting Ex parte Virginia*, 100 US at 345-46).

Given the nature of that grant, "[i]t is for Congress in the first instance to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' " *City of Boerne*, 521 US at 536 (*quoting Katzenbach v Morgan*, 384 US 641, 651 (1966)). As the Court explained in *Katzenbach*, 384 US at 653:

> It [is] for Congress, as the branch that [makes] this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction . . . as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the [state action] . . .

The sum of the matter is that "[a]s against the reserved powers of the States, Congress may use any rational means" to effectuate the constitutional prohibitions. *South Carolina v Katzenbach*, 383 US at 324. It follows, we submit, that the ultimate *Boerne/Kimel* question in this case is whether the ADA employment provisions are a rational legislative means of remedying and preventing the constitutional problem Congress found. Our single focus is on the employment provisions of the ADA because the ADA's severability provision and the wise constraints of the Article III "case and controversy" requirement make it plain that it is only those provisions' constitutionality that is at issue here.[15]

In Part I of this brief we show that Congress found, and rightly so, that employment discrimination by State and other

[15] So that we are not misunderstood, we wish to note that we have no doubt that the ADA in its entirety is a proper exercise of Congress' § 5 powers. But given the nature of the *Boerne/Kimel* inquiry and the size of the evidentiary record of public disability discrimination assembled by the ADA Congress, it would take far more than the fifty pages this Court's rules allot to make a full, and fully reasoned, showing that addresses each of the areas covered by Title II of the ADA. .

public employers against persons with disabilities, of the kind that violates the Equal Protection Clause, was, at the time of passage of the ADA, a serious and pervasive problem.[16] In Part II we show that the ADA's substantive commands respecting employment are a congruent and proportional response to that problem.

I. CONGRESS PROPERLY FOUND A SERIOUS AND PERVASIVE PROBLEM OF UNCONSTITUTIONAL EMPLOYMENT DISCRIMINATION

A. What Conduct Offends the Equal Protection Clause?

In asking whether Congress had reason to believe that there was widespread unconstitutional discrimination against persons with disabilities in public employment, it is necessary to begin by defining what public conduct violates the Equal Protection Clause. The exact perimeters of that Clause's application to disability discrimination are not altogether clear from the decisional law. But this Court's decisions do most assuredly establish that *at a minimum* the Equal Protection Clause forbids three categories of public conduct: (1) conduct that disfavors persons with disabilities that is motivated by "mere negative attitudes" against such persons, or by "vague, undifferentiated fears," *Cleburne v. Cleburne Living Ctr.*, 473 US 432, 448-49 (1985); *see also, Romer v Evans*, 517 US 620, 635 (1996); (2) conduct that disfavors

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[16] We use the term "State and other public employers" rather than just State employers, because while local governments do not enjoy Eleventh Amendment immunity, *Mt. Healthy City School District v Doyle*, 429 US 274, 280 (1977), their discrimination is "state action" violative of the Fourteenth Amendment and thus a proper occasion for Congress' exercise of its Section 5 power. As will be apparent from the text, much of the evidence relates to employment discrimination by the States themselves.

such persons that is irrational and/or arbitrary;[17] and (3) conduct that treats such persons and similarly situated groups unequally, *Cleburne*, 473 US at 439-40; *Olmstead v. L.C.*, 527 US 581, 613 (1999) (Kennedy, J., concurring).[18]

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[17] *Bankers Life & Cas. Co. v Crenshaw*, 486 US 71, 83 (1988) ("arbitrary and irrational discrimination violates the Equal Protection Clause even under our most deferential standard of review"); *Lindsey v Normet*, 405 US 56, 79 (1972) (same); *Romer v Evans*, 517 US 620, 630 (1996) (constitutionality hinged on whether classification was arbitrary). Even conduct that disqualifies but a single individual is unconstitutional if arbitrary. *Village of Willowbrook v Olech*,120 S.Ct. 1073 (2000).

[18] It may well be that the Equal Protection Clause affords more constitutional protection to persons with disabilities than we hazard in text. We note here some of the unsettled questions. (1) It is not altogether clear whether the particulars in this Court's opinions defining the application of the "rational basis" test are matters of constitutional command, or simply of judicial restraint. *See e.g., FCC v Beach Communications*, 508 US 307, 313 (1993) (rational basis standard is "a paradigm of *judicial* restraint" (emphasis added); *Cleburne*, 473 US at 439-40 (*absent congressional action*, court will apply rational basis standard) . And see, for a full exposition of this issue, Robert C. Post & Reva B. Siegel, *The Uncertain Future of Federal Antidiscrimination Law: Morrison, Kimel, and the Dismantling of Congressional Section 5 Powers*, at 19-23, 110 Yale L.J. (forthcoming Dec. 2000) (draft lodged with Clerk). (2) It is unsettled whether claims of disability discrimination are governed by rational basis scrutiny or by heightened scrutiny. *See*, *Schweiker v. Wilson*, 450 US 221, 231 n. 13 (1981) (declining to decide re mental illness); *Heller v Doe*, 509 US 312 (1993) (declining to decide whether *Cleburne* remains the standard for mental retardation, perhaps because of Congress' intervening factual findings in the ADA, see *id.* at 335&n1, 336-37 (Souter, J., dissenting)). (3) Even if rational basis scrutiny applies, it is unsettled whether, in the case of disability, the rationality of the state action turns on a balancing test, weighing the justification for the classification against the degree of injury it would inflict, as the controlling votes in *Cleburne* declared, 473 US at 452 and n.4 (Stevens, J., concurring); *cf. Romer v Evans*, 517 US at 635 ("Amendment 2. . . inflicts on [gays and lesbians] immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it"). (4) It is unsettled whether action that

B. Congress Found Pervasive Discrimination Against Persons with Disabilities in A Wide Variety of Contexts, Including State Employment.

Congress in its extensive "findings" in § 12101 of the ADA, found, *inter alia*, that isolation and segregation of persons with disabilities "continue to be a serious and pervasive problem" (§ 12101(2)), and that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis..." (§ 12101(9)). *See also*, S. Rep. 8, (noting "the severity and pervasiveness of discrimination"); *id.* at 8-9 (quoting approvingly a witness' testimony that "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less

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disadvantages only members of a historically discriminated-against group, and no-one else, is shielded by the holdings in *Washington v Davis* 426 US 229 (1976) and *Massachussetts v Feeney*, 442 US 256 (1979) (where the Court relied upon the fact that others were also impacted adversely by the action), or whether such action is governed by the standard announced in *M.L.B. v. S.L.J.*, 519 US 102, 126-27 (1996). (5) It is unsettled whether the Equal Protection Clause requires States to provide persons with disabilities "equal access" to State services via, e.g., a ramp to a schoolhouse door. See, *Hendrick Hudson Dist. Bd. of Ed. v Rowley*, 458 US 176, 200 (1982); *Irving Independent School Dist. v. Tatro*, 468 U.S. 883, 891 (1984).

We do not brief these issues further, as we believe the ADA is a proper exercise of Congress § 5 power even on the assumption that the scope of the Equal Protection Clause is as described in text. Assuming, *arguendo*, that the propriety of exercising the § 5 power turned on the answers to these questions, it has been suggested that the Court should uphold congressional action as a proper exercise of § 5 power when it is grounded in plausible interpretations of the Fourteenth Amendment that do not conflict with holdings of this Court. Post & Siegel, supra, at 28-33.

than fully human"); *id* at 11 (citing the degrading experiences encountered by persons with disabilities).[19]

The findings recite that such disability discrimination persists in a number of "critical areas," the first listed of which is "employment" (§ 12101(3)).[20] This finding makes no distinction between public sector employment and private sector employment. Congress had before it voluminous evidence of employment discrimination against persons with disabilities in both sectors, and it is clear in context that Congress meant the finding to cover both. Others of the "critical areas" listed in that same sentence ("education, ... institutionalization, . . . voting, and access to public services") are largely public sectors, leaving no doubt that § 12101(3) refers to the public sector, as this Court found in *Yeskey*, 524 US at 211-12, and *Olmstead*, 527 US at 581.

"In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress. . . . We owe Congress' findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broadcasting Sys., Inc. v FCC*, 520 US 180, 195 (1997) (citations omitted). *See also*, *City of Boerne*, 521 US at 536. And, as we now show, Congress' finding that there was a pervasive problem of disability discrimination in public sector employment was a proper exercise of its unique institutional capacity "to amass

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[19] Throughout this brief, "S. Rep." Refers to Senate Comm. On Labor and Human Resources, S. Rep. 101-116, 101st Cong., 1st Sess. (1989). See also, to same effect, House Comm. on Education and Labor, HR Rep. No. 485 (II), 101st Cong., 2d Sess. at 28-32 (1990), reprinted in 1990 U.S.C.C.A.N. 303 (hereinafter "H.Rep. (pt. 2)"); House Comm. on the Judiciary, HR Rep. No. 485 (III), 101st Cong. 2d Sess, at 25 (1990) (hereinafter "H.Rep. (pt. 3)").

[20] The Committee Reports also reflect Congress' finding that employment discrimination based on fear, ignorance and prejudice is pervasive. See infra, 26.

the stuff of actual experience and cull conclusions from it." *United States v Gainey*, 380 US 63, 66-67 (1965). *See also, Turner Broadcasting*, 520 US at 200, 208-09.

For the sake of clarity of exposition, we divide the evidence on which Congress' finding rests into three categories. In Section (1), we describe the evidence before Congress of unconstitutional employment discrimination by States and by local governments. In Section (2), we discuss the evidence, credited by Congress, of the pathology of prejudice against persons with disabilities that explains the discrimination and shows why it is so prevalent and persistent. In Section (3), we provide a brief overview of the evidence before Congress of State discrimination against persons with disabilities in areas other than employment—evidence which supports Congress' recognition that disability prejudice is so deeply ingrained that, unless checked, it would continue to manifest itself in public sector employment as elsewhere.

As this showing will demonstrate, the status of the ADA on the "identified conduct" prong of the *Boerne/Kimel* inquiry is at the polar opposite to the status of the Age Discrimination in Employment Act addressed in *Kimel*. In the ADA, Congress made express findings that there was a pervasive problem of unconstitutional State and local government conduct, whereas Congress made no such finding in the ADEA. See *Kimel*, 120 S.Ct. at 649. And, the ADA Congress made those findings on a record that fully supports it, whereas the ADEA Congress proceeded on an empty record. *Id.*

1. Evidence of Unconstitutional Employment Discrimination

A congressionally-created agency, the Advisory Commission on Intergovernmental Relations [ACIR][21]—a majority of whose members were State and local governmental officials[22]—published, and distributed to each member of the ADA Congress,[23] a report addressing, *inter alia*, why so few persons with disabilities were employed by the States. ACIR, *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal (A-111, April 1989)* (hereinafter, "ACIR Rep.").

The report described the results of a survey the Commission conducted of "officials in state agencies." 82.7% of the State officials polled declared that "negative attitudes" or "misconceptions by employers about the work capabilities of persons with disabilities" had either a "strong" or "moderate" impact on State employment of persons with disabilities, *id* at 72-73, 120.[24] In addition, ACIR invited state officials to provide narratives stating what they thought

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[21] ACIR was established by the 86th Congress (Public Law 86-380; 73 Stat. 703) as a "permanent, bipartisan body," "to give continuing study to the relationship among local, state, and national levels of government." Among its statutory functions was to "[m]ake available technical assistance to the executive and legislative branches of the Federal Government in the review of proposed legislation to determine its overall effect on the Federal system."

[22] The Commission had twenty members at the time this report was published: two Governors, three members of State legislatures, three mayors, three county officials, six members of Congress (three from each house), the US Attorney General, and two private citizens. ACIR Rep., at i.

[23] See Appendix to this brief (original lodged with Clerk). Even before the report was published, the draft of the ACIR Report was described in testimony to Congress, 2 LH 1614.

[24] 34.7% of state officials polled said 'strong,' 48.0% said 'moderate,' 10.7% said 'weak,' and 2.0% said 'none.' (*Id.* 72).

was impeding the States' employment of more persons with disabilities:

> State . . . public officials . . . reiterated the significant and often negative impact of public and employer attitudes toward persons with disabilities. Such attitudes have multiple dimensions, including feelings of discomfort in associating with disabled individuals, [and] inaccurate assessments of their productivity . . . [State officials] expressed strong distress at the prominence of these attitudes and the difficulty in changing them. [*Id.* at 73].

Other studies before Congress reached similar conclusions. A study commissioned by the U.S. Department of Labor had reported, in 1969:

> In general, observations made during the field research suggested that job opportunities for the handicapped were even more circumscribed in the public than in the private sector, except for such model programs as the Federal government program for hiring the mentally retarded. While state and local governments are becoming increasingly important as employers, their policies on hiring the handicapped are not improving accordingly. . . . [M]any have rigid physical examination requirements which may be quite irrelevant to the demands of the jobs in question. . . . These requirements appear to be based on outmoded assumptions about the capacities of the handicapped and also on the belief that there are widespread aversions to visible handicaps which would lower public confidence in the employee.[25]

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[25] Greenleigh Associates, Inc, *A Study to Develop a Model for Employment Services for the Handicapped* (1969), at 121-22, cited in testimony to Congress at 2 LH 1621-22. A 1972 study by the Texas Rehabilitation Committee made similar findings with respect to state employment in Texas. Texas Rehabilitation Commission, *Excerpts & Recommendations from the Workplace for Placement of the Handicapped in State Government Service* 1-5 (1972). The report found, *inter alia*, that "front-line surpervisors" had "qualms" about working with persons with

Congress was advised of a study of 23 public jurisdictions showing, *inter alia*, that none was willing to hire blind applicants; that many excluded applicants with a history of cancer; and that one even had a written standard prohibiting the hiring of an amputee for any job unless he or she made use of a prosthesis, even though it might not be required for success on the job. *Hearing on S. 557 Before the Senate Comm. On Labor and Human Resources* 80 (March 19, 1987). Still another study, conducted by the American Cancer Society, found that most government agencies in California discriminated in hiring of applicants for an average of five years after treatment for cancer. 2 LH 1619. On the basis of these and other sources, Congress found that "there still exists widespread irrational prejudice against persons with cancer." S.Rep. 39-40.[26] *See also*, this Court's observation in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), a public employment disability discrimination case, that "[e]ven those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced

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disabilities, and that there was a "social stigma" that deterred hiring of such persons. And an in-depth study of state employment in New York after enactment of the ADA showed that these problems have persisted even after the ADA's enactment. Sharon L. Harlan and Pamela M. Robert, *Disability in Work Organizations: Barrier to Employment Opportunity, Final Report*, at xiii, University at Albany, State University of New York (November 1995) (finding that persons with disabilities seeking employment with the State "confront stereotypes, ignorance, misinformation, fear and pity that impede progress toward equal opportunity").

[26] Respondent Patricia Garrett alleges that she has been the victim of just such irrational prejudice. See also, B. Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 Temple L.Q. 1, 2-9 (1986) (describing reasons for employment discrimination against persons with cancer histories, and finding that such discrimination exists in both public and private employment).

discrimination based on the irrational fear that they may be contagious." 480 US at 284 (footnote omitted).

Congress also took note of the report of President Bush's Commission on the HIV Epidemic on the need for legal constraints to prevent discrimination against persons with HIV. S. Rep.19. *See also*, 3 L. H. 1995.

Witnesses recounted specific instances of exclusion of persons with disabilities from public employment based on aversion and irrational fear. The Committee Reports note "a case in which a woman 'crippled by arthritis' was denied a job, not because she could not do the work but because 'college trustees [thought] normal students shouldn't see her'." S.Rep. 7; H.Rep. (pt.2) 30); and another in which a person was denied a public school teacher job because she was in a wheelchair, *id*. Congress heard testimony that a professor of veterinary medicine at a state university was fired when it was discovered that he had AIDS.[27] Senator Durenberger told of a highly qualified applicant who was turned down for a job at a public hospital because "her fellow employees would not be comfortable working with a person as disabled as you are." 136 C.R. S9688. Additional instances were cited in a report of the US Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* at 21 (1983) (Alabama National Guard officer terminated with no benefits when it was learned that he had been diagnosed with depression and anxiety some 25 years earlier); *id.* (laborer employed by State Conservation Corps subjected to workplace harassment and public ridicule by superior because of his mental retardation); *id*. at 22 (city bus driver subjected to supervisory harassment, ridicule, and pressure to resign because of mental illness).

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[27] *Americans with Disabilities Act: Hearing on S. 933 Before the Senate Comm. on Labor and Hum. Resources*, 101st Cong. 404 (May 9, 1989) (testimony of National Organizations Responding to AIDS).

Congressman Major Owens, who chaired an ADA subcommittee, appointed a Task Force, which conducted 63 public forums and compiled and submitted to Congress a documentary record of personal accounts of disability discrimination. 2 LH 1324-25, 1336, 1389.[28] A number of the accounts describe instances of discriminatory conduct in State and local government employment. We recite a few in the margin.[29]

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[28] The record presented to Congress is now in the possession of the President's Committee on Employment of People with Disabilities. See, Jonathan M. Young, *National Council on Disability, Equality of Opportunity: The Making of the Americans with Disabilities Act*, at App. E (1997). We have lodged with the Clerk copies of those cited in n.29, *infra*. They are cited by State, and the number of the cited document within that State's folder.

[29] A health administrator walked into a job interview with a department head at the University of North Carolina, who immediately said, "Ah----- if I knew you were blind I wouldn't have bothered bringing you in for an interview." N.C. 173. A student at a state university was denied the ability to practice teach and thus earn his teaching certificate because "[t]he Dean of the School of Education at that time and his successor were convinced that blind people could not teach in public schools." SD 57. A microfilmer at the Kansas Department of Transportation was fired "for the stated reason that I have epilepsy" despite exceeding the department's daily output requirement. KS 3. "Deaf workers at the University of Oklahoma are being paid a lower salary than their Hearing workers and are required to perform the same work. . ." OK 26. The State of Indiana's personnel office informed a woman with a hidden disability that she should not disclose her disability if she wanted to obtain employment. IN 7. A blind state college administrator prevailed on a disability discrimination claim when he was not rehired despite positive evaluations. MA 9. Despite having a higher score for training and experience than the sighted person who was hired, a blind applicant was denied the position of Director of State Services for the Blind. MN 13. A teacher was denied a permanent position because she wears braces and walks with canes. MS 33. A lifeguard who worked for three summers at a city pool was denied a permanent job because he had epilepsy; he had not had a seizure since childhood. GA 4. A job seeker looking for a position with a public library was told, "they had already hired someone with a disability and they had

Numerous additional instances of invidious discrimination in public employment were described in published lower court decisions predating the ADA. We describe some of these in the margin.[30]

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met their quota." WI 55. A municipality initially told a summer job applicant that he would not be interviewed because he was in a wheelchair and then gave him a different interview than other applicants. AK 30. A blind teacher repeatedly has been told that she is not qualified for a position because the school needs a football coach; "In each case, a sighted person, who does not coach football, has been hired." UT 75. A teacher's aide with a visual impairment was told "point blank that the reason I wasn't hired to work with children was because of the way my eyes were, that the children would, 'try to imitate me.' " IL 151. One writer summed up his experience, "rather than relate one specific example, as a state employee I daily see covert discrimination in hiring or not hiring people with disabilities with no reason given specifically." SD 46.

[30] *Chalk v. United States Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701, 711 (9th Cir. 1988) (reversing denial of injunction sought by teacher with AIDS who was excluded from classroom teaching, and noting that "to allow the court to base its decision on the fear and apprehension of others would frustrate the goals of section 504."); *Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372, 1387 (10th Cir. 1981) (upholding injunction granting doctor with multiple sclerosis admission to psychiatry residency program, and noting that the Chairman of the Department stated that Dr. Pushkin "is teachable, but to face the devastation, guilt, pity and rage that can be stirred up in his patients by his physical condition appears to be too much to ask of his patients or of him."); *Recanzone v. Washoe County Sch. Dist.*, 696 F. Supp. 1372 (D. Nev. 1988) (highly praised substitute teacher with no right hand, a left hand with three digits, and a speech impediment prevailed on a discrimination claim that she was denied a permanent contract while less qualified, non-disabled candidates were granted such contracts); *Gurmankin v. Costanzo*, 411 F. Supp. 982, 987 (E.D. Pa. 1976) (holding unconstitutional school district's initial policy of totally excluding blind persons as teachers. Court also found that teacher's evaluation was based "on misconceptions and stereotypes about the blind and on assumptions that the blind simply cannot perform . . ."), *aff'd*, 556 F.2d 184 (3d Cir. 1977).

2. Evidence of the Causes of Prejudice Against Persons with Disabilities

In determining the pervasiveness of disability discrimination in public employment, Congress was entitled to—and did—draw the appropriate inference that the incidents brought to public notice were but the tip of an iceberg. The "record" could include only the situations of those who (a) knew what motivated their adverse employment incidents, and (b) chose either to sue or to publicly testify about the embarrassing details. Congress, as we describe, had abundant evidence that these were not isolated incidents, but rather manifestations of the deeply-rooted prejudices against persons with disabilities that are endemic in our society and "carry over into the conduct of public agencies." ACIR Rep. at 56.[31]

Congress identified the root causes of disability discrimination. It is "based on false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies." S.Rep. 7. "Every government and private study on the issue has shown that employers disfavor hiring persons with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears about increased cost and decreased productivity," and "pervasive bias." *Id* at 37. *Accord:* H.Rep. (pt.2) 40 ("stereotypical assumptions, fears and myths"); *id* at 71 ("pervasive bias"); *id* at 75 ("widespread, irrational prejudice"); H.Rep. (pt. 3) 31 ("stereotypes, discomfort, misconceptions"). These findings paralleled this Court's observation in *Arline,* cited in the Committee reports, that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." 480 US at 284, *cited in*

[31] The quote referred to both Federal and State employment. *See also, id* at 69, 75.

H.Rep. (pt2) 53; S.Rep. 24.[32] These large engines of prejudice, Congress recognized, had generated an immense and intractable disability discrimination problem.

Congress' findings as to the root causes of disability discrimination rested on a firm evidentiary base.[33] Congress relied heavily on a report prepared by the U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983) (hereinafter "*Spectrum*").[34] That report, drawing on extensive professional literature, detailed four "major types" of "prejudice" that persons with disabilities encounter. *Id* at 22-27. Governmental action disadvantaging persons with disabilities that is animated by any of these four violates the Equal Protection Clause, as we next show.

(a) ***Discomfort/Aversion:*** "Psychological studies indicate that interaction with handicapped people, particularly those with visible handicaps, commonly produces feelings of discomfort and embarrassment in nonhandicapped people . . .

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[32] See also, ACIR Report, at 20, described in congressional testimony at 2 LH 1614:

> Probably the most significant barriers faced by persons with disabilities relate to the attitudes, predispositions, and behaviors of nondisabled persons. Such attitudes range from negative views of disability to discomfort in associating with people who experience some form of disability. The nature and extent of attitudes about disability have been documented through an extensive set of research studies conducted in many settings. One common finding is that nonhandicapped people tend to be preoccupied with disabling conditions and often are incapable of seeing beyond these conditions to the whole person. . . . Such predispositions lead nondisabled persons to overlook and ignore the full range of abilities of persons with disabilities.

[33] A more comprehensive recitation of the evidence supporting Congress' findings on the causes of prejudice against persons with disabilities appears in the Brief Amicus Curiae of Paralyzed Veterans of America, et al, in Support of Respondents.

[34] S.Rep. 6; H.Rep. (pt.2) 28.

[H]andicapped people encounter the reaction of aversion every day." *Id* at 23.

Adverse governmental actions against persons with disabilities motivated by these feelings violates the Equal Protection Clause, as *Cleburne* holds. 473 US at 448-49. *See also, O'Connor v Donaldson,* 422 US 563, 575 (1975) (noting that state may not "fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different"); *Watson v Memphis,* 373 US 526 (1963) (holding public discomfort with a minority's perceived differences an unconstitutional ground for state action).

(b) ***Stigmatization:*** "A handicapping condition is frequently, albeit illogically, viewed as a blameworthy characteristic or a badge of disgrace," and one who possesses that condition "as not quite human." *Spectrum*, at 26. "The professional literature is full of discussions about the stigma associated with handicaps," *id*; *see also,* ACIR Rep. at 20. As Congress noted, "our society is *still* infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human." S.Rep. 8-9 (quoting Justin Dart).[35]

Governmental action motivated by these negative, stigmatizing attitudes is at the very core of what the Fourteenth Amendment forbids. *New York City Transit Authority v Beazer,* 440 US 568, 593 n.40 (1979) (citing cases).

(c) ***Stereotyping:*** Congress found that it was "strikingly clear" from the evidence it received at the ADA hearings that "stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still pervasive today." S. Rep. 37. Many of the widely-held stereotypes about persons with disabilities are simply myths,

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[35] Just how much "less than human," *see* S.Rep. 7 (zookeeper barred children with Downs Syndrome, because he feared they would frighten the chimpanzees).

such as the ones that epilepsy and cancer are contagious, cited in *Arline*, and the one that the HIV virus is transmittable by casual contact.

Other common disability stereotypes consist of false generalizations attributing negative characteristics to persons with disabilities as a class, when, in fact, those characteristics are no more prevalent among that class than among the population at large. The Senate Report, at 28-29, addressed the false "group based fears" phenomenon by describing a 1973 study that had "examined the job performance, safety record and attendance of 1,452 physically impaired employees of E.I. duPont de Nemours and Company" in order to "determine the validity of several concerns express by employers with regard to hiring veterans with disabilities," *id.* at 28. The duPont study found that: as to each of these concerns "the disabled workers performed as well as or better than their non-disabled co-workers." [*Id* at 28-29].[36]

Nonetheless, as the ACIR found 16 years later, employment discrimination against persons with disabilities based on "false stereotypes" persisted in the public sector. ACIR Report, at 72-73. That Report explained:

> The reluctance of employers to hire persons with disabilities is rooted in common myths and misunderstandings, including the notions that the employment of disabled workers will increase insurance

[36]Some specific findings of the study were as follows:

> Ninety-one percent of Du Pont's disabled workers rated average or better in performance.
>
> Only four percent of the workers with disabilities were below average in safety records; more than half were above average.
>
> Ninety-three percent of the workers with disabilities rated average or better with regard to job stability (turnover rate).
>
> Seventy-nine percent of the workers with disabilities rated average or better in attendance. [S.Rep. 29]

> and worker compensation costs, lead to higher absenteeism, harm efficiency and productivity, and require expensive accommodations.
>
> . . . . These attitudes, common to many employers in the United States, have persisted despite empirical evidence from several quarters that disabled workers perform at levels equal to or superior to other employees. [ACIR Report, at 21].

Denying persons with disabilities equal access to the workplace on the basis of myths or false generalizations plainly violates the Equal Protection Clause. *Cleburne*, 473 US at 449 (finding zoning ordinance excluding group homes for persons with mental retardation violative of Equal Protection Clause when predicated on city's belief that persons with mental retardation create a "special hazard," disturb the "serenity of the neighborhood," and pose "danger to others," yet fraternity houses and college dormitories that pose similar dangers are allowed; "[i]t is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard."). *See also, Olmstead,*527 US at 612 (Kennedy, J., concurring) (indicating that treating persons with disabilities differently from the public generally "without adequate justification" is discrimination).

Nothing said by this Court in *Kimel* is to the contrary. The Court there addressed a conceptually different kind of generalization—one that, while not true of every individual in the class or group, is recognized as being true on average, *viz*, that older workers on average would be less productive than younger workers on average. 120 S.Ct. at 646 (quoting *Vance v. Bradley*, 440 U.S. 93, 108 (1979)). And, the Court dealt there with a class (older persons) which had not been subject to a history of invidious discrimination. *Id* at 645 (*quoting Massachusetts Bd. Of Retirement v Murgia*, 427 US 307, 313 (1976)). In that context, the Court held that action in reliance

on such a generalization has a rational basis. 120 S.Ct. at 646-47. *Kimel* does not remotely suggest that action taken in reliance on a myth, or on a stereotype that wrongly attributes to a historically disfavored class a characteristic no truer of that class than of the public at large, has a rational basis. And, of course, *Cleburne* belies just that proposition, as does *United States v Virginia*, 518 US 515, 541 (1996).

(d) ***Patronization.*** Often, persons with disabilities suffer from actions that "spare" them the "rigors" of ordinary life that, in fact, they earnestly desire to confront and that they are fully capable of handling. *Spectrum*, at 24. And Congress concluded from its ADA hearings that "[i]t is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant [for employment.]" S.Rep. 38.

However "well-intentioned," such paternalism is another form of unconstitutional discrimination. "Traditionally, [gender] discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Frontiero v Richardson*, 411 US 677, 684 (1973) (plurality opinion). *See,United States v Virginia,* 518 US at 538, 549-50 & n.20.

3. Evidence of Prejudice in State Actions Apart from Employment

The evidence before Congress showed widespread governmental discrimination against persons with disabilities in areas other than employment. Congress found that there continued to be pervasive public disability discrimination in the "critical areas" of institutionalization, education, voting, and access to public services generally. § 12101(a)(3).[37]

[37] Congress was not alone in making these findings. A report of the [California] Attorney General's Commission on Disability, California Dept. of Justice, *Final Report* (1989), issued while Congress was considering the ADA, found that agencies of the California government "continue to use unfair social policies premised on paternalism and

Those findings were solidly based. The fact that disability prejudice was operative across this wide range of State services informed Congress' judgment of the dimensions of disability discrimination in public sector employment. For the logic is compelling that state actors with employment responsibilities are not distinct in this regard from state actors with institutionalization, education, electoral and public service responsibilities.

Our description of the evidence in other areas is truncated, given that this is an employment case. A fuller account appears in the Brief of Morton Horwitz [and] Other Historians and Scholars as Amici Curiae in Support of Respondents.

In *Spectrum,* the Civil Rights Commission provided Congress an extensive, carefully documented account of the history of public mistreatment of persons with disabilities, and its current consequences. The Commission demonstrated, with supporting chapter and verse, that "[i]nstances of ridicule, torture, imprisonment, and execution of handicapped people throughout history are not uncommon, while societal practices of isolation and segregation have been the rule." *Spectrum,* at 18.

In the late 1800s and early 1900s, States erected institutions to house great numbers of people with disabilities "to protect society from disabled people." *Id.* at 19. By the 20th century, State institutionalization had become society's systemized response to its unwillingness to integrate persons with disabilities, often coupled with forced sterilization programs, initiatives that are "still pursued today" in some States. *Id* at 34-37.

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discriminatory attitudes which effectively exclude people with disabilities from full participation in community life," *id* at 57. The Commission reported many "disturbing accounts of discrimination in community and State Colleges and Universities," *id* at 138.

The Commission's report documents extensive discriminatory conduct in the form of continued exclusion and segregation in education. Even in present times, "[t]he ways in which handicapped children have been denied equal educational opportunity are legion." *Id*. at 28.[38]

Similarly, architectural barriers have taken a variety of forms and continue to present a serious problem to people with mobility impairments. Despite laws establishing access guidelines, there is much resistance, in part because "designers, by and large, have responded to them with hostility." *Id.* at 38. The failure of States to comply with laws requiring accessibility for persons with disabilities was documented in ACIR Rep., at 79-88. State officials surveyed by ACIR attributed the delinquency in part to negative attitudes toward persons with disabilities, *id* at 87.

The Civil Rights Commission reported that States are also still notorious for denying other basic rights to persons with disabilities that most people take for granted.

> These include the right to vote, to hold public office, and to obtain a driver's or hunting or fishing license. Many States restrict the rights of physically and mentally handicapped people to marry and to enter into contracts. . . . Based on the fact that they are handicapped, parents have had custody of their children challenged in proceedings to terminate parental rights and in proceedings growing out of divorce. [*Spectrum* at 40.]

Judicial decisions provide myriad additional examples of State and local discrimination against persons with disabilities of a kind that violates the Fourteenth Amendment (given the existence of statutory bans, many of these decisions do

[38] In 1975, Congress found that one million children with disabilities were excluded from the public school system. 20 USC § 1400(b) (Supp IV 1980). *Id*. at 27.

not address the constitutional issue in terms). We cite some in the margin.[39]

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[39] **Housing and Zoning.** *J.W. v. City of Tacoma*, 720 F.2d 1126, 1129 (9th Cir. 1983) (finding it highly likely that Tacoma ordinance was based on prejudices against persons who have been institutionalized for mental health treatment, and noting the prevalence of social stigma and irrational fear); *Baxter v. City of Belleville*, 720 F. Supp. 720, 732 (S.D. Ill. 1989) (finding that "irrational fear of AIDS" was a motivating factor of the city's refusal to grant a special use permit); *Burstyn v. City of Miami Beach*, 663 F. Supp. 528, 536-37 (S.D. Fla. 1987) (finding that "fear and prejudice" motivated passage of ordinance restricting housing for people with physical or mental impairments).

Education. *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644, 651 (2d Cir. 1979) (concluding that segregated facilities for mentally disabled children infected with the hepatitis virus "will reinforce the stigma to which these children have already been subjected."); *Panitch v. Wisconsin*, 444 F. Supp. 320, 322 (E.D. Wis. 1977) (finding that state and local school district officials intentionally discriminated against students with disabilities by delaying implementation of statutes which would have otherwise provided the students with an education); *Mills v. Board of Educ. of the Dist. of Columbia*, 348 F. Supp. 866, 870 (D.D.C. 1972) (finding that D.C. Board of Education "entirely excluded from all publicly supported education" children with mental disabilities and other behavioral problems); *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 294-95 (E.D. Pa. 1972) (challenging statutory exclusion of about 50,000 children with mental retardation from any education in Pennsylvania; court recounted history of Eugenics movement and lingering stigmatization of children with mental retardation, which some parents likened to a "sentence of death"). Numerous decisions detail the prejudice and fear motivating exclusion of children with AIDS from the classroom. *See*, e.g., *Doe v. Dolton Elementary Sch. Dist. No. 148*, 694 F. Supp. 440, 444, 448-49 (N.D. Ill. 1988); *Robertson v. Granite City Community Unit Sch. Dist. No. 9*, 684 F. Supp. 1002, 1006-07 (S.D. Ill. 1988); *Ray v. School Dist. of Desoto County*, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 382 (C.D. Cal. 1986).

Voting. *Carroll v. Cobb*, 354 A.2d 355, 357 (N.J. Super. Ct. App. Div. 1976) (noting trial court's determination that residents of state facility for the mentally retarded were denied the right to register to vote due to "the hostility that the Municipal Fathers and even the County Board of

C. Congress Correctly Found that State Disability Laws Did Not Solve the Problem

Petitioners (Br. 32, 33, 37) place great weight on the argument that State laws forbidding disability discrimination at the time the ADA was enacted demonstrate that state action

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Election had against people who were confined to such a school."). *See also*, *Manhattan State Citizens Group, Inc. v. Bass*, 524 F. Supp. 1270, 1275 (S.D.N.Y. 1981); *Boyd v. Board of Registrars of Voters of Belchertown*, 334 N.E.2d 629, 632 (Mass. 1975).

Opportunity to Adopt and Raise Children. *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979) (court condemned trial court's preconception that father with quadriplegia was "deemed forever unable to be a good parent simply because he is physically handicapped," and stated that "[l]ike most stereotypes, this is both false and demeaning."); *Richardson v. Los Angeles County Bureau of Adoptions*, 59 Cal. Rptr. 323, 327-29 (Cal. Ct. App. 1967) (holding that trial judge violated the constitution by acting on the basis of "bias" and "prejudice" when he summarily denied adoption because petitioners were deaf); *In re Marriage of R.R.*, 575 S.W.2d 766, 768 (Mo. Ct. App. 1978) (reversing trial judge's order, which awarded custody of children to mother, despite finding her "immoral" and "dishonest," because of unsubstantiated fear that the children would be "emotionally damaged because of [their father's] handicap," multiple sclerosis, which required the use of a wheelchair).

Mistreatment in State Institutions. Courts have documented terrible abuses of persons with disabilities in institutions. In Petitioners' State, *see Wyatt v. Stickney*, 344 F. Supp. 387, 391, 391 n.7 (M.D. Ala. 1972) (finding conditions at institution for people with mental retardation "grossly substandard." Testimony indicated that the administration and programs "hark back to decades ago when the retarded were misperceived as being sick, as being threats to society, or as being subhuman organisms."), *aff'd in relevant part*, 503 F.2d 1305 (5th Cir. 1974). *See also*, *Thomas S. v. Flaherty*, 699 F. Supp. 1178, 1185-99 (W.D.N.C. 1988), *aff'd*, 902 F.2d 250 (4th Cir. 1990); *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1306B09 (E.D. Pa. 1977), *aff'd in relevant part*, 612 F.2d 84 (3d Cir. 1979), *rev'd on other grounds*, 451 U.S. 1 (1981); *New York Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 756 (E.D.N.Y. 1973); *Leach v. Shelby County*, 891 F.2d 1241, 1247 (6th Cir. 1989); *Parrish v. Johnson*, 800 F.2d 600, 603 (6th Cir. 1986).

toward persons with disabilities based on prejudice was a thing of the past and thus pretermitted the need for an ADA. This flawed argument cannot possibly bear that weight.

First, the description of State laws in Petitioners' Appendix A and of their efficacy is grossly inaccurate.[40] Congress had before it the far different and far more accurate assessment of the "50 State Governors' committees. . . who report that existing state laws do not adequately counter such acts of discrimination," S.Rep 18. The evidence before Congress of pervasive contemporary governmental disability discrimination was dramatic confirmation of that assessment, and Congress concluded that "[s]tate laws are inadequate." *Id*.

A 1986 study of state laws found that only eight states had substantive provisions as protective as the federal Rehabilitation Act, Janet A. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be Any Help?* 40 Arkansas L.Rev. 261, 322 (1986),[41] and Congress also concluded, from the massive evidence of continuing disability discrimination, that the Rehabilitation Act "is also inadequate." S.Rep. 18.

As a White House Conference on Handicapped Individuals had concluded, "[t]he entire . . . record overwhelmingly reflects that formal articulation of a right is one matter; the general enjoyment of that right is quite another." [42] In that

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[40] A state-by-state account of those inaccuracies appears in Brief for the National Association of Protection & Advocacy Systems, *et al*, as Amici Curiae in Support of Respondents, at Appendix A.

[41] Congress was informed of this study at the hearings (2 LH 1641). Because the Rehabilitation Act covered only employers who receive federal funds, most state laws covered a larger number of employers, albeit with weaker protections.

[42] White House Conference on Handicapped Individuals, Volume Three: Implementation Plan, 61 (1978).

regard, it was Congress' legislative conclusion that prophylactics against pretextual decisionmaking are required if discrimination that is invidiously motivated is to be rooted out (S.Rep. 37; H.Rep. (pt.2) 71), and such prophylactics are provided in the employment provisions of the ADA. (We discuss these infra, at 39-47.) But many state laws did not contain any such prophylactic, and virtually none contained the range provided in the ADA.[43]

Second, and related, the adoption of State laws banning disability discrimination does not wash away all the state actor hostility toward persons with disabilities. These laws, whatever their insufficiencies, do, of course, suggest that state *legislators* are not hostile to persons with disabilities. But most disability discrimination comes, as in the two cases here, from *ad hoc* decisions made by individual personnel officers and supervisors. As the ACIR learned *from State officials*, the "negative attitudes" and "stereotypes and misconceptions" that are the stuff of State employment discrimination against persons with disabilities come from "the middle management level where most employment decisions are made." ACIR Rep. 73. *See also*, *id* at 75; Texas Report, *supra* n.25; *Watson v. Fort Worth Bank & Trust*, 487 US 977, 990 (1988) (noting that while top executives may be well intentioned, "[i]t does not follow . . . that the particular supervisors to whom . . . discretion is delegated always act without discriminatory intent.")

Congress had every reason to believe, as the evidence before it showed, that such State actors, who are not in the public spotlight, and do not document their decisional rationales, had not been deterred by (and would not in the future be deterred by) the limited legislation then on the

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[43] For example, nearly half the states at the time the ADA was enacted had no reasonable accommodation requirement. Flaccus, 40 Ark. L. Rev. at 309, and many others had very weak accommodation provisions, *id* at 306-09.

books. And, as this Court's decisions make clear, "the adequacy of . . . alternative remedies" is a judgment that Congress is best situated to make, and one to which the courts owe substantial deference. See p. 14, supra. This is especially so with respect to disability law, where, as this Court has recognized, the legislature's superior institutional capacity is at its zenith. *Cleburne*, 473 US at 443:

> How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps uninformed opinions of the judiciary.

II. THE ADA IS CONGRUENT AND PROPORTIONAL TO THE PROBLEM

Congress' broad Fourteenth Amendment §5 power "to enforce" the Equal Protection Clause, as we have noted, is not so broad as to be "the power to determine *what constitutes* a constitutional violation," *Kimel*, 120 S.Ct. at 644 (emphasis in original). But it is not so narrow and insignificant as to be a power, scarcely warranting the term "legislative," to "merely parrot [ ] the precise wording of the Fourteenth Amendment." *Id.* To the contrary, Congress most assuredly has the § 5 power to enact "prophylactic legislation" that is an "appropriate remedy to a difficult and intractable problem" including, most particularly, the problem of a "pattern" of discrimination by the states "at the level of constitutional violation." *Id* at 648-49. And, under the *Boerne/Kimel* test, §5 prophylactic legislation is an "appropriate" remedy to the problem when there is "congruence and proportionality between the injury to be prevented and the means adopted to that end." *Id* at 644.

Our showing in Part I has been that on the basis of the comprehensive record before it Congress had every reason to believe, and so found, that there was a pattern of

unconstitutional State and local government discrimination against persons with disabilities rooted in the most deep-seated prejudice. Given its nature and dimension this discrimination is precisely the kind of difficult and intractable problem that does not bow to a simple general anti-discrimination command and that the Legislative Branch is empowered to determine requires "strong measures" constituting a "powerful" remedial response. *Kimel*, 120 S. Ct. at 648. The ADA's substantive provisions, as Congress crafted them, are such a response—carefully tuned to the problem and carefully measured so as not to intrude unnecessarily on the States' legitimate interests as employers.

The ADA's employment provisions take the form of a general ban on discrimination based on disability elaborated by a set of discrete requirements aimed at practices that experience indicated were likely to manifest disability prejudice and to serve as a means to effectuate disability discrimination. We show now that each of these, and all together, are a congruent and proportional response to the problem Congress found.

A. Each of the Employment Provisions of the ADA Serves an Important Prophylactic Function

1. The General Rule § 12112(a) contains a "general rule" that employers are not to engage in employment discrimination against a qualified individual with a disability "because of the disability of such individual." This general rule, in its terms, is addressed to State employment actions that are unconstitutional under such Equal Protection Clause decisions as *Cleburne*, and, in its most literal and limited sense, is a rule that "enforces" the guarantees of the Fourteenth Amendment. The Fourteenth Amendment does not, standing alone, confer a cause of action upon individuals who suffer constitutional violations, and States are not "persons " suable under 42 USC §1983, *Will v. Michigan*

Dept. of State Police, 491 US 58 (1989). As Congress had strong evidence of such State employment discrimination, the provision creating that cause of action is the clearest example of proper §5 legislation.

2. Stereotypes. §12112(b)(1) declares that "discrimination" within the meaning of the statute includes:

> [L]imiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.

The Senate and House reports make clear that this provision is aimed at the practice of making employment decisions based on disability-based stereotypes. The provision targets both the refusal to consider persons with disabilities for employment based on stereotypes and adverse treatment based on such stereotypes (such as separate lines of progression, pay scales, or work places for persons with disabilities). S.Rep. 28-29; H.Rep. (pt.2) 58; H.Rep. (pt. 3) 31, 36.

As we have shown, State action based on stereotypes that are totally false, or that attribute to a disfavored class characteristics that do not distinguish them from the rest of the public, are unconstitutional. But § 12112(b)(1), in addition to reaching such State action, goes a step further by banning State employment action based on all disability stereotypes, including the kinds of stereotypes that this Court declared in *Kimel* are not unconstitutional (i.e., stereotypes that are truer of persons with disabilities as a class than of others, although not applicable to each individual in the disfavored class). In the case of ADA, the provision and its consequent requirement of individual inquiry is an appropriate prophylactic.

Congress knew that that there was widespread invidious prejudice against persons with disabilities, and that

stereotypes used by State and local employers often were reflections of (or "covers" for) employment decisions based on disability prejudice or fear. See *supra* n. 25 [Greenleigh Study]. *See also*, *Arline*, 480 U.S. at 284-85; *Olmstead*, 527 U.S. at 611 (Kennedy, J. concurring) ("the line between animus and stereotype is often indistinct. . ."). Against this background, it was Congress' judgment that "individualized inquiry" is "essential" if the statute "is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear," *Arline*, 480 US at 287. This distinguishes the ADA in a crucial way from the ADEA, given this Court's conclusion in *Kimel* that older persons are not subjected to invidious discrimination.

3. Non-Job-Related Qualification Standards. Although not invoked by either of the plaintiffs in these two cases, there are three provisions of the ADA that ban rules and practices that screen out persons with disabilities and that are not job related and consistent with business necessity. § 12112(b)(3)(A) defines "discrimination" to include the use of "standards, criteria, or methods of administration ... that have the effect of discrimination on the basis of disability." §12112(b)(6) and (7) particularize this requirement as to "qualification standards, employment tests, or other selection criteria." These definitions are qualified by §§12113(a) and 12112(b)(6), which afford the employer a defense if it can show the use of the criteria to be "job-related and consistent with business necessity," and by §12113(b), which permits the use of qualification standards that disqualify individuals who would "pose a direct threat to the health or safety of other individuals in the workplace."

It is, to be sure, a staple of this Court's jurisprudence that the Fourteenth Amendment does not ban State action merely because of its disparate impact. *Washington v. Davis*, 426 U.S. 229. But this Court has also recognized that disparate impact can be an indicator that an improper discriminatory

purpose motivated selection of a facially neutral rule. *Reno v Bossier Parish Sch. Bd.*, 520 US 471, 489 (1997). In consequence, this Court has repeatedly recognized that, when confronting a problem of public discrimination fueled by prejudice against an unpopular group, "Congress can prohibit laws with discriminatory effects in order to prevent .... discrimination in violation of the Equal Protection Clause." *City of Boerne*, 521 US at 529, citing *City of Rome v United States*, 446 US 156 (1980). It follows, that in the same circumstance Congress can for the same preventive purpose prohibit state *practices* with discriminatory effects.

And that is precisely what the ADA Congress did. The Senate Report (at 37) explained that the purpose of the disparate impact provisions in the ADA is precisely to assure that facial neutrality does not shield invidious discrimination:

> The requirement that job criteria actually measure ability required by the job is a critical protection against discrimination based on disability. As was made strikingly clear at the hearings on the ADA, stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still pervasive today. Every government study on the issue has shown that employers disfavor hiring persons with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears ....

Against that background, both the House and Senate Reports declare the prohibition aimed at practices with disparate effects to be one of three "pivotal" commands that "work together to provide a high degree of protection to eliminate the current pervasive bias against employing persons with disabilities in the selection process." S. Rep. 37; H.Rep (pt.2) 71. Congress' explanation parallels this Court's explanation of the similar provision in Title VII of the Civil Rights Act of 1964. *Watson*, 487 US at 990 (disparate impact analysis safeguards against decisions motivated by

discriminatory intent; and "*even if* one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain") (emphasis added).

Of course, not every practice with disparate impact on persons with disabilities will be the product of conscious or subconscious prejudice. Congress so recognized, and through §§12112(b)(6) and 12113(a) and (b), exempted from the ADA's ban those rules and practices with disparate impact that are least likely to rest on disability prejudice: those where the employer has strong justification for using the criterion—business necessity or concern for safety.[44]

To be sure, even with these limits, the possibility exists that these disparate effects provisions will ban some facially neutral practices that in fact were not motivated by prejudice. But Congress, faced with sufficient evidence of a serious risk of unconstitutional behavior, and to assure against the underprotection of constitutional rights, may, as a prophylactic, ban facially neutral State practices that would not violate the Constitution unless badly motivated, and do so outright. Indeed, this Court on several occasions has upheld federal statutes that do so.[45] *A fortiori*, the ADA Congress

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[44] Moreover, only those claimants who can prove they are "qualified" for the job they are seeking are eligible to assert a claim under the ADA, so that decisions based correctly on lack of credentials (another common ground for rejection that is unlikely to be unconstitutional) are insulated from liability. *See* p. 6, *supra*.

[45] *South Carolina v Katzenbach*, 383 US 301 (upholding congressional ban on literacy tests for voting, although such tests violate Fifteenth Amendment only if badly motivated); *Katzenbach v Morgan*, 384 US 641 (upholding congressional ban on English-language eligibility requirement for voting, irrespective of whether the requirement was adopted with bad motive); *Oregon v Mitchell*, 400 US 112 (1970) (upholding nationwide ban on literacy tests for voting regardless of motive); *City of Rome v United States*, 446 US 156 (1980) (upholding ban on changes in electoral schemes with discriminatory effects, regardless whether State badly

was entitled to enact such a prophylactic ban tempered by a limited defense that saves some State practices, crafted so that it does not allow discriminatory conduct to be smuggled under its cover.

To say this is most emphatically not to say that Congress has the power to enact such a provision without a proper § 5 predicate. As *Kimel* shows, prophylactic § 5 legislation cannot stand where the evidence before Congress does not show a pattern of unconstitutional discrimination, or the likelihood of such discrimination. But in the ADA, Congress concluded, on the basis of a powerful record, that the danger of continuing unconstitutional discrimination was very great, and that a strong remedial response was needed. In that crucial respect, the ADA is different from the statutes that were held in *City of Boerne* and *Kimel* not to be proper exercises of the § 5 power.

4. Reasonable Accommodation. §12112(b)(5)(A) defines "discrimination" to include:

> [N]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity...

Reasonable accommodation is available only to applicants or employees who are otherwise qualified for the job. Even as to qualified applicants or employees, it is not an ADA violation to refuse an accommodation that would cause an "undue hardship" to the employer, defined as "requiring

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motivated in adopting the changes); *Lopez v Monterey County*, 525 US 266 (1999) (upholding prohibition on implementation of electoral changes without approval of U.S. Attorney General, regardless of whether changes are unconstitutional.)

significant difficulty or expense, when considered in light of" the "nature and cost of the accommodation," the financial impact on the employer, and the nature of the employer's operation. §12111(10).

Some persons with disabilities who are fully competent to perform a job need some adjustment of the work environment because of their disability. And it is an easy matter for a State actor who in fact is animated by disability prejudice, and not by concern about the often minor cost of providing the accommodation,[46] to conceal his or her true motivation by invoking the cost of accommodation as a "neutral" justification for denying employment opportunities to persons with disabilities. As EEOC Commissioner Evan Kemp testified, if employers "want[ ] disabled people, the accommodations really don't become a burden. If they don't, they always do." 2 LH 1552, quoted in H.Rep. (pt.2) 34 The ACIR reported to Congress that: "Sometimes the only real impediment [to accommodation] is the perception of the supervisor.... [A]rguments about accommodation costs are used as a smokescreen to mask the real reasons for not hiring a person with a mental or physical disability." ACIR Rep. at 75.

For these reasons, Congress concluded that the reasonable accommodation provision of the ADA is, along with the disparate impact provision, one of the "pivotal provisions" necessary "to provide a high degree of protection to eliminate the current pervasive bias against employing persons with disabilities..." S.Rep. 37. Congress had ample justification for this conclusion. This Court, in *Cleburne*, observed that "a

[46] Congress found that "many typical accommodations" can be provided for under $50," although, of course, some required accommodations would be more expensive. S. Rep. 10. See also, ACIR Rept. at 73 ("studies show[ ] that most workplace accommodations involve little cost.") The accommodations sought by Respondent Ash reflect this.

civilized and decent society *expects*" its government to make some accommodation for the differences of persons with disabilities. 473 US at 444 (emphasis added). Given the pervasiveness of prejudice against persons with disabilities, when a state actor fails to do what a civilized and decent society expects, and cites costs that are not an undue hardship as the ground for rejecting the applicant who would otherwise be most qualified,[47] there is every reason to conclude that prejudice and not cost underlies the refusal.

Congress was also persuaded that the reasonable accommodation provision was necessary to assure that false stereotypes about disability not result in false assumptions of what it would cost to accommodate a person with disability and thus in resultant unwillingness to hire. "Stereotypes about disability can result in stereotypes about the need for accommodations, which may exceed what is actually required." H.Rep. (pt. 3) 39.

Here, then, as with disparate impact, Congress was warranted in concluding that discriminatory intent cannot be "adequately policed through disparate treatment analysis," and even if it could, "the problem of subconscious stereotypes and prejudices would remain." *Watson*, 487 US at 990. And, in acting on that understanding, Congress proceeded in a proportionate manner, limiting the scope of the reasonable accommodation provision so that it did not invalidate State action in those contexts where it was likely to be motivated by legitimate interests. Thus, an employer (1) need not even consider a candidate who is not qualified, (2) need not select a qualified candidate with a disability if even with reasonable

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[47] The reasonable accommodation provision does not oblige the employer to select a candidate with a disability, but only to evaluate his or her candidacy without taking into account the need to provide the reasonable accommodation. The candidate will be entitled to hire only if, with the need for accommodation removed from the calculus, he or she emerges as the best candidate.

accommodation he or she would not be the best candidate, (3) need not incur undue hardship, and (4) need not act in any way that would pose a direct threat to the health or safety of others.[48]

Congress expected that the constraints on discrimination imposed by the prophylactics described above would, in the long run, deter future discrimination in yet another way: as

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[48] There are four other substantive employment provisions in the ADA, whose role in preventing discrimination we discuss in this footnote. The Act bans preemployment inquiries of job applicants as to whether they have disabilities, and medical examinations prior to an offer of employment (which may be conditioned on satisfying a medical examination.) § 12112(d). Congress explained that these practices were "often used to exclude applicants with disabilities -- particularly those with so-called hidden disabilities such as epilepsy, diabetes, emotional illness, heart disease, and cancer -- before their ability to perform the job was even evaluated." S.Rep. 39. Banning them, until the employer is otherwise prepared to offer a job, "is critical to assure that bias does not enter the selection process." S.Rep. 39.

§12112(b)(2) forbids an employer's participating in a contractual or other arrangement with referral agencies, labor unions, and others, when such arrangements result in discriminatory selection or treatment of the employer's workforce. §12112(b)(4) forbids an employer's discriminating against an individual "because of the known disability" of another with whom the individual "is known to have a relationship or association." These provisions are aimed at deterring unconstitutional conduct in the same manner as those discussed in text.

Finally, §12203 forbids discrimination against an individual for opposing a practice made unlawful by the ADA, or for seeking legal remedy for such violations. The provision is obviously appropriate to assure that the central goals of the ADA are not eroded by employer coercion. Indeed, it may well be that a state's retaliating against an employee who seeks legal remedy from the federal government (as ADYS is alleged to have done to Respondent Ash) is a violation of the constitutional right to petition the federal government and/or of the individual's privileges and immunities of federal citizenship. See, *Nash v Florida Industrial Commission*, 389 US 235 (1967) (noting but not deciding the issue.)

employers became exposed to persons with disabilities through compliance with the ADA, they would be educated out of the stereotypes, prejudices, and discomfort that had become entrenched due to the absence of such persons in the workplace. Over time, with exposure, employers would hire persons with disabilities because they recognized their capacities and were not discomfited, and not simply to avoid violating the ADA.

As this Court noted in *Arline*, 480 US at 279, past discrimination against persons with disabilities had led to "erroneous but prevalent perceptions about the handicapped." Attorney General Thornburgh, testifying in support of the ADA, declared: "Attitudes can only be reshaped gradually. One of the keys to this reshaping is to increase contact between and among people with disabilities and their non-disabled peers." [49] The US Commission on Civil Rights told Congress that "[s]tudies suggest that increased positive interaction with handicapped people reduces fears and discomfort and leads to better acceptance of handicapped people." *Spectrum*, at 43. Representative Collins made the same point, noting that "only by breaking down barriers between people can we dispel the negative attitudes and myths," and predicting that employers would not apply false stereotypes if they *saw* the capabilities of persons with disabilities. 136 C.R. H2603. Senator Durenberger stated that the ADA will "remove the shades many of us wear, focusing on people's abilities rather than their disabilities." 135 C.R. S9688. And, Congress had clear evidence that employers who hired persons with disabilities quickly discovered that many of their stereotypical assumptions were entirely wrong. S.Rep. 28-29 (describing duPont's experience.)

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[49] ADA of 1988, Hearings Before the Senate Comm. on Labor and Human Resources, Subcomm. on the Handicapped, 101st Cong. 2d Sess. 202 (1989).

B. The Nationwide Scope of the ADA is Congruent and Proportional

In *Oregon v Mitchell*, eight Justices concluded that it is within Congress' Section 5 power to enact nationwide prophylactic provisions when the evidence before Congress suggests that a problem is widespread, even though Congress lacks specific evidence that every State has or is likely to engage in unconstitutional behavior.[50] The prevalence of disability prejudice that Congress found knows no geographic bounds, and Congress had evidence of discriminatory actions animated by that prejudice throughout the nation. See pp. 20-25 supra. Congress concluded from that evidence that there is a nationwide virus of prejudice: "our society is still infected by the .... assumption that people with disabilities are less than fully human," S. Rep. 8-9. It was more than reasonable for Congress to conclude that the prophylactics in the ADA should have nationwide application.

Petitioners fail to deal with *Mitchell*, or with the nature of the problem Congress was addressing in the ADA. Instead, they invoke passages in *City of Boerne* and *Kimel*, that disapproved the nationwide scope of the statutes in those cases. In each of those cases, however, the Court found that there was little if any evidence that *any* State had or was likely to violate the Constitution. In that setting, it is understandable that the Court found a nationwide ban incongruent. That is not the setting of the ADA.

C. The Absence of a Sunset Provision Is Not Fatal to Congruence or Proportionality

Petitioners argue that the ADA fails the congruence and proportionality test because it does not contain an automatic sunset provision. While that is a relevant factor to consider in evaluating congruence and proportionality, it is not a *sine qua*

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[50] 400 U.S. at 147 (Douglas, J., concurring); 216 (Harlan, J., concurring); 236 (Brennan, J., concurring); 283-84 (Stewart J., concurring).

non. City of Boerne, 521 U.S. at 533. In the case of the ADA, the persistence and prevalence of governmental discrimination against persons with disabilities, coupled with Congress' recognition that it would take a long time for greater interaction with persons with disability to rid the populace of the prejudice that fueled that discrimination, made selection of an automatic cut-off not sensible. The States have permanent institutions in Washington to represent their interests in Congress, and assuredly have no difficulty getting Congress' attention. If the day comes that the States think the ADA's ban on employment discrimination is no longer needed, they can be expected to invite consideration of its repeal. But that day has not yet arrived, as is evidenced by the decision of 42 States not to support Petitioner Alabama's quest in this Court.[51]

CONCLUSION

For the reasons set forth above, the decision below should be affirmed.

[51] Although no State opposed enactment of the ADA, seven states, unhappy having to defend claims that they have violated the Act, have expressed "buyer's remorse" in an amicus brief supporting the Alabama agencies.

Respectfully submitted,

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APPENDIX

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August 3, 2000

Prof. Michael Gottesman
Georgetown University Law Center, Room 452
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Dear Professor Gottesman:

This letter is to inform you that I was the Executive Director of the U.S. Advisory Commission on Intergovernmental Relations in Washington, D.C., from mid-1988 to mid-1994 and, therefore, the Executive Director at the time, April 1989, when the Commission issued its policy report A-111 entitled *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal*. The Commission sent this report (A-111) to all the elected members of the United States Congress in May 1989.

Sincerely yours,

/s/ John Kincaid
JOHN KINCAID
Professor & Director

[Original Lodged with Clerk]