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United States Supreme Court Amicus Brief.

PENNSYLVANIA DEPARTMENT OF CORRECTIONS, et al., Petitioners,
v.
Ronald YESKEY, Respondent.

No. 97-634.
October Term, 1997.
March 22, 1998.

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

BRIEF OF NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, AND NEW YORK LAWYERS FOR THE PUBLIC INTEREST, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

STEVEN J. SCHWARTZ
Counsel of Record
JAMES R. PINGEON
CENTER FOR PUBLIC
REPRESENTATION
246 Walnut Street
Newton, Massachusetts 02160
(617) 965-0776
STEPHEN F. HANLON
LESLIE S. SPITALNEY
LEO C. RYDZEWSKI

HOLLAND AND KNIGHT LLP
2100 Pennsylvania Avenue
Suite 400
Washington, D.C. 20037
(202) 955-3000

Attorneys for Amici Curiae

***i** TABLE OF CONTENTS

***ii** TABLE OF AUTHORITIES

Federal Cases:

*1 INTEREST OF *AMICI CURIAE*

Amici curiae the National Association of Protection and Advocacy Systems (NAPAS), the Judge David L. Bazelon Center for Mental Health Law (Bazelon Center), and the New York Lawyers for the Public Interest (NYLPI) are organizations which advocate for the rights and interests of persons with disabilities, including their rights under various disability statutes such as the ADA.[1] Specifically, ***2** NAPAS is a membership organization for the nationwide system of protection and advocacy (P & A) agencies. P & As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings, including prisons and other correctional facilities. The Bazelon Center is a national legal advocacy organization which seeks full integration into the community of people with mental disabilities by protecting their rights to choice and dignity and expanding their access to housing, employment, and other services under the ADA and other statutes. NYLPI represents numerous individuals in various institutional settings, including prisons, and files amicus briefs on its own behalf and on behalf of disability and civil rights groups on cases addressing the application of the ADA.

Amici curiae are deeply familiar with our Nation's history of invidious discrimination against individuals with disabilities and with the various legislative efforts to redress this discrimination, particularly the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (ADA). These organizations and the individuals whom they represent have direct experience with the state sponsored discriminatory activities and attitudes which informed Congress in its drafting of the ADA. They have a direct stake in the interpretation of the Act, including both its scope and its constitutionality.

Amici curiae recognize that the petitioners generally do not challenge the constitutionality of Title II of the ADA. However, several of their *amici* do, asking the Court to declare Title II unconstitutional with respect to all state entities, or at least with regard to its application to prisons and presumably other correctional activities. This brief is submitted in response to the broad and unfounded constitutional ***3** arguments of petitioners' *amici* with respect to Congress' authority under Section 5 of the Fourteenth Amendment.

SUMMARY OF THE ARGUMENT

Since the petitioners did not raise the constitutionality of Title II of the ADA in the court below and since this issue is not properly included in the Question Presented, the Court should not reach out to decide whether Title II is a proper exercise of Congress' authority.

If the Court does deem it appropriate to address the constitutional issue, it should conclude that Title II is a reasonable and congruent response to the pervasive pattern of discrimination, fear, and inaccurate stereotypes which characterizes our Nation's treatment of individuals with disabilities. Title II is proportionate to the evil of state sponsored, invidious discrimination against persons with disabilities that this Court has recognized and Congress has found. The statute, both in general and as applied to correctional settings and other institutions, is an appropriate expression of Congress' power under Section 5 of the Fourteenth Amendment to remediate and prevent such discrimination in state activities.

Deference to prison administrators does not require the abdication of judicial decisionmaking concerning the application of federal law. The ADA can be implemented in prisons in a manner which respects the States' valid penological interests. Just as other nondiscrimination statutes, designed to prevent unequal treatment on the basis of race or gender and to remedy the exclusion of students from public education, have been applied and adjusted to prison conditions, so too can the ADA.

*4 ARGUMENT

I. THE COURT SHOULD NOT REACH THE QUESTION OF WHETHER TITLE II OF THE ADA, EITHER IN GENERAL OR AS APPLIED TO PRISONS, IS CONSTITUTIONAL.

The lower court did not consider or decide the issue of whether the ADA may constitutionally be applied to prisons. Petitioners made no argument and the court of appeals made no ruling on the constitutionality of the ADA. *Yeskey v. Pennsylvania Dep't of Corrections,* 118 F.3d 168 (3d Cir.1997). Before this Court petitioners concede the ADA legitimately applies to portions of the prison environment and to persons who visit, work in, or are otherwise present in prison, other than prisoners themselves. Pet. for Cert at 11. Petitioners also recognize that Title II of the ADA is generally a legitimate exercise of Congress' authority to redress discrimination under Section 5 of the Fourteenth Amendment, see Pet. Br. at 13, 26, although not with respect to state prisoners. *Id.* at 31.

The constitutionality of the ADA is not fairly within the question presented.[2] Given petitioners' concessions about the constitutionality of Title II where Congress has made specific findings, the question is one which requires scrutinizing the factual record before Congress as to the nature, scope, and persistence of discrimination against persons with disabilities in a wide range of activities, including correctional settings. Further, a constitutional ***5** analysis of the ADA would not definitively resolve the practical questions faced by prison administrators regarding their obligations to disabled prisoners because lower courts have also prohibited discrimination against prisoners under the Rehabilitation Act, 29 U.S.C. § 794. See *Duffy v. Riveland,* 98 F.3d 447, 453 (9th Cir.1996).[3]

In light of the well-established rule that the Court should not consider constitutional issues which are not decided below, the Court need not and should not accept petitioners' or its *amici's* invitation to determine whether the application of the ADA to state prisons is a proper exercise of Congress' authority. *Taylor v. Freeland & Kronz,* 503 U.S. 638, 646 (1992). Just as the Court declined to address the constitutionality of extending Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, to states because it was not raised below, *Dothard v. Rawlinson,* 433 U.S. 321, 323 n. 1 (1977), so here it should reject the invitation to decide the constitutionality of the ADA when the petitioners did not argue this issue in the lower courts.

II. THE ADA IS AN APPROPRIATE EXERCISE OF CONGRESS' AUTHORITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT.[4]

A. The Court Has Already Concluded That Invidious Discrimination Against Persons With Disabilities, Based Upon Stereotypes and Archaic Laws, Violates the Equal Protection Clause.

The issue of invidious discrimination against persons with disabilities is not new to this Court. *City of Cleburne* ***6** *v. Cleburne Living Center,* 473 U.S. 432 (1985); *School Board of Nassau County, Florida v. Arline,* 480 U.S. 273 (1987). In *Cleburne* the Court recognized that: "Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms." 473 U.S. at 446. It concluded that the discriminatory application of a uniquely local function-land use-could not withstand scrutiny, despite a number of proffered justifications which otherwise would satisfy a rational basis standard.[5] 473 U.S. at 448-50. The *Cleburne* majority emphasized, as this Court has in cases before and since, that decisions based upon "mere negative attitudes, or fear" cannot meet the constitutional requirement that governmentally imposed distinctions must be relevant to a legitimate state interest. *Id.* at 448. See ***7** *Romer v. Evans,* 116 S.Ct. 1620 (1996); *Department of Agriculture v. Moreno,* 413 U.S. 528, 534 (1973). Justice White's opinion makes a special point of acknowledging the many ways Congress has acted to protect persons with disabilities from segregation, discrimination, and denial of equal access, including passage of § 504 of the Rehabilitation Act, 29 U.S.C. § 794, which is the predecessor to the ADA. *Cleburne,* 473 U.S. at 443. The opinion points to the superiority of the legislative forum for determining the most appropriate methods for addressing these issues. *Id.* In fact, the Court's equal protection standard is justified in significant part as a method for encouraging and accommodating legislative judgments by not subjecting them to invalidation under a more rigorous standard of review. *Id.* at 442-43.

In a separate concurring opinion, Justice Stevens stated the relevant equal protection standard somewhat differently: whether a rational member of the disadvantaged class could ever approve of the discriminatory application of the rule in question. 473 U.S. at 455 (Stevens, J., joined by the Chief Justice, concurring). Three members of the Court, while joining in the judgment that the city's zoning ordinance cannot withstand constitutional scrutiny, catalogued a litany of state enforced segregation,[6] state enacted discrimination,[7] and other invidious forms of unequal ***8** treatment.[8] *Id.* at 461-66 (Marshall, J., joined by Brennan, J., and Blackmun, J.) Justice Marshall's opinion argues for a flexible equal protection standard that varies with the

importance of the interest affected and the invidiousness of the basis for the classification. *Id.* at 460, citing *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 99 (Marshall, J., dissenting). Most importantly for purposes here, it recognizes the proper role of the Court in affording respect to legislative judgments that reflect "evolving standards of equality," as it did with respect to gender. *Id.* at 466, citing *Frontiero v. Richardson,* 411 U.S. 677 (1973).

Despite the somewhat different language used in all three opinions to strike down the City of Cleburne's unequal treatment of persons with disabilities, the full Court affirmed that persons with retardation have been routinely subjected to a regime of invidious discrimination which violates the Equal Protection Clause of the Fourteenth Amendment. In so doing, the Court confirmed what Congress was to find five years later: that persons with disabilities have long been subjected to a widespread and persistent pattern of unconstitutional discriminatory treatment that is incorporated into archaic laws, that is reflected in public policies, practices and activities, and that is grounded in prejudice and inaccurate stereotypes about persons with disabilities.

Not surprising, when the Court was asked to review two different nondiscrimination statutes adopted by Congress in response to this pattern of unequal treatment of persons with disabilities, the Court gave each an expansive application. In interpreting the definition of handicapped ***9** person in § 504, the Court concluded that Congress was legitimately concerned with "protecting the handicapped against discrimination stemming not only from simple prejudice, but also from "archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps'." *Arline,* 480 U.S. at 279. It found that the basic purpose of the statute "is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." *Id.* at 284.[9] In *Dellmuth v. Muth,* 491 U.S. 223 (1989), the Court accepted the state's concession[10] that Congress could abrogate the state's Eleventh Amendment immunity through its remedial authority under Section 5 of the Fourteenth Amendment, provided it had a proper record of discrimination before it and provided that it did so clearly. Indeed, the Court acknowledged that Congress had done precisely this in its 1986 amendments to the Rehabilitation Act. 491 U.S. at 228-29. While the Education of the Handicapped Act (EHA), 20 U.S.C. § 1400 *et seq.,* did not contain such a clear statement of abrogation, the Court left no doubt that Congress could legitimately accomplish this result in light of the history of exclusion, segregation, and discriminatory treatment of persons with disabilities which informed its adoption of the EHA.[11]

***10** Congress was well aware of this Court's conclusions that persons with various disabilities have been subjected to a regime of invidious discrimination and a denial of due process in a broad range of public services and activities. That regime includes purposeful segregation, persistent patterns of hostility, prejudice and negative stereotypes, and archaic laws which, taken together, confirm Congress' subsequent findings of unconstitutional discrimination against persons with disabilities by the States. This regime, as documented and elaborated before numerous Congressional committees, provides the constitutional predicate for Title II of the ADA.

B. Congress Has Broad Authority Under Section 5 of the Fourteenth Amendment to Intrude on State Functions When Necessary to Address Invidious Discrimination and to Adopt a Comprehensive Approach to Prevent, As Well As to Remediate, Discrimination.

Section 5 of the Fourteenth Amendment enlarged Congress' power as against the States and provided it with the constitutional authority to adopt any rational means to combat discrimination. *South Carolina v. Katzenbach,* 383 U.S. 301, 326 (1966), citing *Ex Parte Virginia,* 100 U.S. 339 (1879). In interpreting Congress' power under the Civil War Amendments, the Court has proclaimed:

> Whatever 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 enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex Parte Virginia, 100 U.S. at 345-46, quoted approvingly in ***11** *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 2163 (1997). The *Boerne* Court noted that this rule has been applied to uphold Congress' authority to enforce the Fourteenth Amendment, *Katzenbach v. Morgan,* 384 U.S. 641 (1966), the Fifteenth Amendment, *South Carolina v. Katzenbach,* 383

U.S. at 326 (collecting cases), and the Eighteenth Amendment, *James Everard Breweries v. Day,* 265 U.S. 545 (1924). *City of Boerne,* 117 S.Ct. at 2163. The rule is not limited to state policies and practices which themselves have been determined to violate the Fourteenth Amendment.

> A construction of § 5 which would require a judicial determination that the enforcement of the state law precluded by Congress violated the [Fourteenth] Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment. See *Fay v. New York,* 332 U.S. 261, 283-84 (1947).

Katzenbach v. Morgan, 384 U.S. at 648-49.[12] ***12** This Court only recently reviewed and affirmed the long line of cases upholding Congress' authority to redress and prevent discrimination pursuant to Section 5 of the Fourteenth Amendment. *City of Boerne,* 117 S.Ct. at 2163, 2167. Acting pursuant to its broad remedial powers under Section 5, Congress can enjoin unintentional discrimination, even though only intentional discrimination is prohibited by Section 1. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976); *City of Rome v. United States,* 446 U.S. 156, 173 (1980). As this Court has recognized: "When a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work." *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 274 (1979). As long as the federal enactment is reasonably related to the goal of enforcing the Equal Protection Clause, Congress may outlaw practices not themselves violative of that Clause. *City of Rome,* 446 U.S. at 175-77 (reviewing cases under the Fourteenth and Fifteenth Amendments); *City of Boerne,* 117 S.Ct. at 2167.

Not only does Congress' remedial authority extend beyond intentional violations of the Fourteenth Amendment, Congress may act in one arena to prevent discrimination against a disfavored group in another. Thus, a state requirement that voters read and write English, while not unconstitutional on its face, was still subject to Congressional prohibition under Section 5 of the Fourteenth Amendment as a way of "gaining nondiscriminatory treatment in public services for the entire Puerto Rican community." ***13** [13] *Morgan,* 384 U.S. at 652. See also *Oregon v. Mitchell,* 400 U.S. at 133 (opinion of Black, J.) (educational segregation and inequality justifies voting remedies). The *Morgan* Court observed:

> It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations-the risk of pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of state interests....

384 U.S. at 653. Congress made just such a judgment in enacting Title II of the ADA and in applying it to all state entities and activities, without exception or enumeration.[14]

Nor is it essential that Congress restrict its remedy solely to instances, areas, or locations where it has specific evidence of unconstitutional discrimination. *City of Boerne,* 117 S.Ct. at 2163. Rather, based upon its experience with the ineffectiveness of more limited approaches, it can adopt a comprehensive scheme designed to prevent as well as remediate discrimination in places where it does not yet exist. The full Court, in five separate opinions, unanimously confirmed that Congress has ***14** power to ban the use of literacy tests nationwide, after more focused prohibitions had proven too cumbersome and inefficient. *Oregon v. Mitchell,* 400 U.S. 112 (1970) (separate opinions of Black, J., 400 U.S. at 127-28; Douglas, J., 400 U.S. at 145; Harlan, J., 400 U.S. at 216; Brennan, White, and Marshall, JJ., 400 U.S. at 232-33: and Stewart, the Chief Justice, and Blackmun, JJ., 400 U.S. at 283-85). As Justice Black wrote, after noting the extensive evidence of discrimination considered by Congress: "In imposing a nationwide ban on literacy tests, Congress has recognized a national problem for what it is-a serious *national* dilemma that touches every corner of our land." *Id.* at 133. And as Justice Brennan recognized, Congress could fairly conclude that state sponsored discrimination in one area (education) might require remedial action in another (voting), or that more narrow remedies which prove to be unsuccessful on burdensome subsequently might justify more comprehensive ones. *Id.* at 235-36.

Finally, in enacting remedial and prophylactic legislation under Section 5, Congress may adopt criteria that do not precisely mirror judicially-formulated equal protection standards and which take into account the need to prevent invidious

discrimination which is not easily susceptible to proof. Compare *Dothard,* 433 U.S. at 331, n. 14 (recognizing business necessity and *bona fide* occupational qualification tests in Title VII) with *Washington v. Davis.* 426 U.S. 229 (1976); compare *City of Rome,* 446 U.S. at 163-64 (approving preclearance standards and procedures in the Voting Rights Act) with *City of Mobile v. Bolden,* 446 U.S. 55 (1980). Were it otherwise, Congress would be unable to exercise the full reach of its Section 5 authority to address arbitrary and irrational discrimination against a non-suspect class, to prevent as well as remedy discrimination, to redress discrimination that has a disparate impact on the disfavored group, and to correct the underlying causes of the invidious discrimination that are ***15** evidenced in other areas of society. In effect, Congress would be restricted to drafting statutes which do no more than prevent what the Constitution already proscribes.[15] It would be unable to develop appropriately tailored compliance standards and flexible implementation criteria. While Congress clearly cannot "alter the meaning" of the clause it is seeking to enforce, *City of Boerne,* 117 S.Ct. at 2164, it may do more than incorporate a judicial standard of review as the only means of enforcing its remedial enactments.

Neither the prohibitions of the Equal Protection Clause nor the reach of Congress' Section 5 powers is limited to suspect classifications. See *Cleburne,* 473 U.S. at 450. Where a legislative classification is irrational or arbitrarily targets a specific group based upon historic and inaccurate stereotypes, prejudice, or animus, it violates the Equal Protection Clause regardless of the level of scrutiny employed. *Romer v. Evans,* 116 S.Ct. at 1627. "Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status ... are a denial of equal protection of the laws in the most literal sense." *Id.* at 1628. Moreover, such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.,* citing *Department of Agriculture v. Moreno,* 413 U.S. at 534. Where legislative classifications "exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, ***16** the objective itself is illegitimate." *Mississippi University for Women v. Hogan,* 458 U.S. 718, 725 (1980).[16] These principles are equally true regardless of the level of suspectness of the classification.[17]

Since the Fourteenth Amendment was enacted after the Tenth, the Court has repeatedly noted that the enlargement of Congress' powers to remedy discrimination supersedes the reserved powers of the States. There are no core State functions which are immune from Congress' remedial authority or beyond the reach of its Section 5 powers.[18] The Court has recognized that even intrusions upon the most fundamental of state functions-the electonal process and the selection of its representatives-are subservient to the equal protection mandate of the Fourteenth ***17** Amendment and that Congress has ample authority to remedy demonstrated violations of that Clause. *Chandler v. Miller,* 117 S.Ct. 1295, 1302 (1997) ("We are aware of no precedent suggesting that a State's power to establish qualifications for state offices-any more than its sovereign power to prosecute crime-diminishes the constraints on state action imposed by the Fourteenth Amendment"); *Oregon v. Mitchell,* 400 U.S. at 249-50. As the Chief Justice eloquently declared, in approving the application of a damage remedy under Title VII against the States:

When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for the private suits against States or state officials which are constitutionally impermissible in other contexts.

Fitzpatrick, 427 U.S. at 456 (footnote omitted).

Petitioners and its amici read *City of Boerne* as a retreat from the long line of voting rights and other civil rights decisions upholding Congress' expansive authority under Section 5 of the Fourteenth Amendment. Pet. Br. at 25-26. To the contrary, the Court repeatedly reaffirmed the holdings of those cases in *City of Boerne,* 117 S.Ct. at 2163, and restated its endorsement of Congress' broad prerogatives that concomitantly limit the States' otherwise reserved powers: "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States'." *Id.,* quoting from *Fitzpatrick v.* ***18** *Bitzer,* 427 U.S. at 455. More properly construed, *Boerne* simply reaffirms what Justice Black noted more than twenty-five years earlier: Congress' Section 5 authority is not wholly unlimited. *Oregon v. Mitchell,* 400 U.S. at 128. Properly exercised, that authority must be rooted in a factual foundation of unconstitutional discrimination and must adopt approaches that are congruent and proportional to Congress' findings. *Id.* at 2169. It is this expansive, albeit not unlimited, power which Congress exercised when it conducted extensive factual inquiries and passed a proportionate remedial statute prohibiting all forms of discrimination by any public entity when it enacted Title

II of the ADA.

C. The ADA Was Enacted Pursuant to Section 5 of the Fourteenth Amendment to Remedy the Pattern of Unconstitutional Discrimination Imposed Upon Persons With Disabilities.

Title II of the ADA, like the Voting Rights Acts of 1965 and 1970, and Titles VI and VII of the Civil Rights Act of 1964, is grounded in an extensive Congressional factual record and findings of invidious discrimination against persons with disabilities which required a comprehensive national solution. It is, of course, entitled to the usual presumption of constitutionality. In addition, as a legislative judgment that is based upon careful consideration of empirical data concerning the *present* impact of discrimination against persons with disabilities in a multitude of areas, as well a thorough assessment of the Nation's treatment of persons with disabilities both historically and to date, it should be afforded particular deference. *City of Rome,* 446 U.S. at 181-82; *Turner Broad. Sys., Inc. v. FCC (Turner II),* 117 S.Ct. 1174, 1189 (1997). Congress conducted an extensive review of a lengthy record, and had over three decades of experience with more tailored approaches in redressing discrimination in education, housing, employment, architectural barriers, and health care services. Congress knew what was ***19** needed to remedy this tradition of invidious discrimination and knew that a comprehensive, national scheme was essential to alter the attitudes of hostility and fear which characterized our Nation's treatment of persons with disabilities.

In contrast to the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.,* struck down in *City of Boerne,* Congress had before it a record of *current* discriminatory patterns and animus by public entities which demonstrated that bigotry and discriminatory treatment was widespread, longstanding, and deeply rooted. *Id.* 117 S.Ct. at 2167. This persistent pattern of exclusion was incorporated in both intentional, state sponsored disparate treatment as well as state actions that have a grossly disproportionate burden on citizens with disabilities. The latter as well as the former is a legitimate basis for inferring bigotry and hostility sufficient to support Congress' broad remedial and prophylactic authority in enacting Title II of the ADA. *City of Boerne,* 117 S.Ct. at 2163. Moreover, unlike RFRA-where no actual discrimination need be proven to state a violation of the Act-the ADA requires claimants to demonstrate both that they are within the specific group protected (a "qualified person with a disability", see 42 U.S.C. § 12131) and that the defendant state entity has discriminated against them. Such discrimination may include situations where a public entity refuses to make a reasonable accommodation that would not place an undue burden on the entity and would not require a fundamental alteration of its program. This standard is not only far more flexible and deferential to legitimate state interests, including resource constraints, than is RFRA's compelling state interest and least restrictive alternative criteria, but, as a practical matter, it requires a respectful balancing of the State's interests and the individual's claim to be afforded equal treatment. *Alexander v. Choate,* 469 U.S. at 308-09. Simply put, the standards for assessing and the burden for proving an ADA violation affords each State "discretion ***20** to achieve its goals *in the way it thinks best* " and, rather than entirely overriding that discretion, only subjects it to a "reasonable federal standard." *EEOC v. Wyoming,* 460 U.S. 226, 240 (1983).

The ADA, and specifically Title II, does not decree the substance of the Fourteenth Amendment, *City of Boerne,* 117 S.Ct. at 2164. Instead, it is a legitimate effort to prevent and remediate discrimination by establishing criteria designed to allow persons with disabilities to compete equally with other members of society. *Morgan,* 384 U.S. at 652. See *Jenness v. Fortson,* 403 U.S. 431, 442 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."). Requiring reasonable accommodation as a method to redress a persistent pattern of invidious discrimination is not a special privilege, but instead a necessary and reasonable element of the remedy for the "evil presented. *City of Boerne,* 117 S.Ct. at 2169. It is preventive precisely because it demands that state agencies demonstrate that their different treatment of persons with disabilities is not the product of inaccurate stereotypes or irrational fears. It is remedial by ensuring that the fundamental interest of individuals with disabilities to participate in various governmental services and activities, rather than being excluded or segregated, is respected. This is particularly important given the "irrational fears or ignorance, traceable to the prolonged social and cultural isolation" of persons with disabilities. *Cleburne,* 473 U.S. at 467 (Marshall, J.).

The ADA was not enacted to reverse a prior Supreme Court decision,[19] to modify an interpretative principle, or to establish a different standard for assessing constitutional conduct. Rather, it was a further legislative response to a ***21** pervasive problem Congress had long recognized, and previously responded to, albeit in a piecemeal fashion. In fact, the ADA is precisely the type of flexible legislative judgment which the *Cleburne* court sought to preserve in adopting its invigorated

rational basis review.[20] *Cleburne,* 473 U.S. at 442-43. The ADA neither "changes" nor defines the underlying constitutional rights set forth in Section 1, but instead establishes a moderate, flexible, and narrowly tailored scheme to redress the patterns of discrimination suffered by persons with disabilities at the hands of public entities. As such, it is properly preventive and remedial, not a substantive modification of the actual meaning of Section 1 of the Fourteenth Amendment.

As required by *City of Boerne,* Title II reflects a congruence between the nature and scope of the discrimination which Congress considered and sought to remedy and the means Congress chose to accomplish its constitutional responsibility. It was enacted in response to nine comprehensive Congressional Findings in order to combat the persistent pattern of state sponsored discrimination which has long characterized our Nation's shameful history of disenfranchising, segregating, and excluding persons with disabilities from public activities. That record was generated by numerous hearings before multiple committees of the Congress, all of which documented a persistent pattern of national scope that covered virtually every form of public agency and activity, including law enforcement, corrections, and prisons. That Congress adopted an unconditional term-"all public entities"-is reasonable in light of the record of state codified and sponsored discrimination which infected so many state practices for so ***22** long.[21] Moreover, Congress could reasonably conclude that its prior piecemeal approach to legislating with reference to subject matter or source of funding was no longer appropriate, efficient, or likely to produce the equal opportunity to which persons with disabilities still were being denied. *City of Boerne,* 117 S.Ct. at 2167, citing *South Carolina v. Katzenbach,* 383 U.S. at 308, 313-15, 333-34. That Congress continued to proscribe unintentional discrimination as well as purposeful disparate treatment, as it had in prior legislation, see 29 U.S.C. § 794, is entirely consistent with the Court's holdings in *Fitzpatrick, EEOC, and Choate.* The ADA's basic purpose of equal access, and its reach to all state entities, reflects an appropriate exercise of Congressional authority directed to enhancing the political power of persons with disabilities directly relevant to gaining non-discriminatory treatment in public services. *Morgan,* 384 U.S. at 652. Although comprehensive in scope and prophylactic in approach, it goes no farther than necessary to address a national problem of longstanding and current impact.

Consistent with the command of *City of Boerne,* Title II is proportionate to the persistent patterns of discrimination against persons with disabilities which Congress found. Although proportionality does not "require [ ] termination dates, geographic restrictions, and egregious predicates," *City of Boerne,* 117 S.Ct. at 2170, the Congressional findings of the ADA certainly reflect such predi ***23** cates.[22] Significantly, the ADA only applies to a "qualified person with a disability."[23] 42 U.S.C. §§ 12102(2) and 12131(2). Congress purposely chose to narrow its scope to persons with impairments who were able to meet the eligibility standards for the relevant activity. Most importantly, the responsibility of state entities is not unlimited. States and their agencies are not required to eliminate every vestige of discriminatory treatment nor forebear from ever treating persons with disabilities unequally. Thus, Title II and its implementing regulations properly reflect this Court's recognition that there are some undeniable differences between persons with disabilities and those without impairments, as well as between persons with different disabilities. *Cleburne,* 473 U.S. at 444. See 28 C.F.R. 35.130(b)(7), 35.150(a)(3) and 36.164. Only when such inequality can be remedied by an accommodation which does not impose an undue burden on the state entity or require a fundamental alteration of the state's program or service does Title II comman non-discriminatory treatment. 42 U.S.C. §§ 12101(10) and 12302(b)(2)(A)(ii).[24] Finally, Title II is proportionate precisely because it is "responsive to, or designed to prevent, unconstitutional behavior," given the indisputable reality that many of the invidiously discriminatory state ***24** laws, policies, and practices that it was designed to correct "have a significant likelihood of being unconstitutional." *City of Boerne,* 117 S.Ct. at 2170. See *Cleburne,* 473 U.S. at 446.

The three courts of appeals which have directly addressed the constitutionality of Title II of the ADA have concluded that the application of this non-discrimination statute to the States is a valid exercise of Congress' Section 5 powers. *Crawford v. Indiana Dep't of Corrections,* 115 F.3d 481, 487 (7th Cir.1997) (prisons); *Clark v. California,* 123 F.3d 1267, 1269 (9th Cir.1997) (prisons); and *Coolbaugh v. State of Louisiana,* --- F.3d nnnn, 1998 WL 84123 (5th Cir. Feb. 27, 1998) (motor vehicles).[25] As the Fifth Circuit explained:

In sum, the ADA represents Congress' considered efforts to remedy and prevent what is perceived as serious, widespread discrimination against the disabled. We recognize that in some instances, the provisions of the ADA will "prohibit [ ] conduct which is not itself unconstitutional and intrude[ ] into 'legislative spheres of autonomy previously reserved for the States.' " *Flores,* 521 U.S. 507, 117 S.Ct. at 2163 (quoting Fitzpatrick, 427 U.S. at 455). We cannot say, however, in light of the extensive findings of unconstitutional discrimination made by Congress, that these remedies are too sweeping to survive the *Flores* proportionality test for legislation that provides a remedy for unconstitutional discrimination or prevents threatened unconstitutional actions.

Id. at *7.

Title II of the ADA, like the Voting Rights Act of 1965 and 1970 and Titles VI, VII, and IX of the Civil Rights Act of 1964, does not threaten the independent existence ***25** of the States, with respect to any state entity or activity, including prisons.[26] Prisons are no more a critical aspect of state sovereignty than public education, juries, or state employment, and arguably less than voting, all of which are explicitly mentioned in the ADA, 42 U.S.C. § 12101(a)(3) and cited approvingly by the petitioners as a proper exercise of Congress' Section 5 power. Pet. Br. 13-14. Nor is it less central than land use regulation, which Congress restricted in the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and which the Court recently endorsed as applied to persons with disabilities. *City of Edmonds v. Oxford House,* 514 U.S. 725 (1995). The limitations on the State's traditional regulatory power that are imposed by Title II in the 'operation of government and the provision of public services, including prisons, were clearly envisioned by Congress and are entirely appropriate to redress, as well as to prevent, the persistent pattern of invidious discrimination that both the Congress and this Court found with respect to persons with disabilities. 42 U.S.C. § 12101(a); *Cleburne,* 473 U.S. at 446 and at 461-64.

III. LIKE OTHER NONDISCRIMINATION STATUTES WHICH HAVE BEEN APPLIED TO PRISONS, TITLE II CAN BE IMPLEMENTED IN A MANNER THAT AFFORDS DUE RESPECT TO VALID PENOLOGICAL INTERESTS.

The application of civil rights and equal protection remedial statutes such as the ADA to state prisons is neither novel nor unprecedented. While the Court has repeatedly ***26** acknowledged the need to defer to prison administrators with respect to the balancing of valid penological interests with the exercise of inmates' federally-protected rights, it has never deferred to such administrators in determining whether the Constitution or a federal statute applies in the first instance.

The Court's deference to prison administration is a policy of restraint, not abdication, and it does not impact an inmate's right to seek redress for violations of constitutional and statutory law:

> a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state prison. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.

Procunier v. Martinez, 416 U.S. 396, 405-06 (1974). See also *Turner v. Safley,* 482 U.S. 78, 84 (1987). Thus, while the contours of individual rights are altered in prison, it cannot be disputed that "constitutional and statutory requirements" apply in this setting. *Bell v. Wolfish,* 441 U.S. 520, 562 (1979); *Turner,* 482 U.S. at 84.

It is significant that many forms of nondiscriminatory treatment and related accommodations required by the ADA are otherwise constitutionally mandated, either by the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment. For instance, in an opinion authored by retired Supreme Court Justice Powell, the Fourth Circuit Court of Appeals held that the failure to provide a paraplegic inmate with a handicap accessible toilet constituted cruel and unusual punishment. *LaFaut v. Smith,* 839 F.2d 387 (4th Cir.1987). The court also declared unconstitutional the failure to modify the toilet facilities in the inmate's work area, rejecting the claim that this would cause the "toilets to be temporarily inoperative, and this 'would be highly inconvenient for all staff ***27** and inmates who work in the area.' " *Id.* at 393. Similarly, the Due Process Clause mandates that inmates with disabilities receive accommodations at prison administrative hearings, which can include not only interpreters for deaf inmates but also legal assistance for inmates with mental disabilities. See *Ruiz v. Estelle,* 503 F.Supp. 1265, 1346 (S.D.Tex.1980), *aff'd in part and rev'd in part,* 679 F.2d 1115 (5th Cir.1982) (mentally retarded prisoners facing disciplinary charges must be provided "the assistance of counsel substitute, a right clearly contemplated by the due process clause. *Wolff v. McDonnell,* 418 U.S. 539, 570 (1974)").[27]

Just as the principle of deference shown by courts to prison administrators has never prevented the application of § 1983,[28] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d,[29] Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681(a),[30] and the Individuals ***28** with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 141 1-20,[31] to state correctional

facilities, it should not prevent the application of the ADA to such facilities here. As Judge Posner stated:

Rights against discrimination are among the few rights that prisoners do not park at the prison gates. Although the special conditions of the prison setting license a degree of discrimination that would not be tolerated in a free environment, there is no general right of prison officials to discriminate against prisoners on grounds of race, sex, religion, and so forth. If a prison may not exclude blacks from the prison dining hall and force them to eat in their cells, and if Congress thinks that discriminating against a blind person is like discriminating against a black person, it is not obvious that the prison may exclude the blind from the dining hall, unless allowing him to use the dining hall would place an undue burden on prison management.

Crawford, 115 F.3d at 486.

***29 CONCLUSION**

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

Footnotes

1 Counsel for the amici curiae authored this brief in its entirety. No person or entity other than the amici curiae, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented in writing to the filing of this brief and letters of consent have been filed with the Clerk of the Court.

2 That question is "Does the Americans with Disabilities Act apply to inmates in state prisons." Pet. for Cert. i. The question is framed as, and should be decided as, one of statutory construction. The analysis of the statute's scope is not so inextricably intertwined with the question of Congress' authority as to require a constitutional decision. The decision of the court of appeals can be reviewed solely as a matter of statutory interpretation. Nor should the Court reach out to decide the constitutional question, since that issue can be addressed, if and when it is appropriately presented.

3 The constitutionality of the Rehabilitation Act is not subject to question, since it was promulgated pursuant to Congress' spending authority and since most states receive federal funding for the operation of their prisons. See *Lane v. Pena,* 116 S. Ct. 2092, 2100 (1996).

4 *Amici* do not address a second important source of Congress' authority to enact Title II of the ADA pursuant to the Commerce Clause. This authority has been relied upon to sustain other antidiscrimination statutes. *EEOC v. Wyoming,* 460 U.S. 226 (1983). Congress clearly enacted the ADA pursuant to this Clause. 42 U.S.C. § 12101(b). Activities covered by the ADA, including equal access to transportation, communications, public accommodations, employment, and many governmental services are properly within the reach of its Commerce Clause powers, even after *Printz v. United States,* 117 S. Ct. 2365 (1997). Since many applications of Title II do not involve damages or retrospective relief, in those situations there would be no Eleventh Amendment constraint on Congress' Commerce Clause powers. See *Seminole Tribe v. Florida,* 517 U.S. 44 (1996). Moreover, this Clause unquestionably provides a proper foundation for Title II of the Act with respect to county and municipal government entities, such as local jails, as well as with respect to private prisons operating under contract with the states.

5 It is significant that many of the factors relied upon by the City of Cleburne and rejected by the Court have been found in other cases to be rational reasons for sustaining government decisions. *Id.* at 458-59 (Marshall, J., concurring in the judgment and dissenting in part). The Court's conclusion-that the city's zoning ordinance was unconstitutionally applied to the Cleburne Living Center-strongly suggests the adoption of a more invigorated standard of review than deferential rationality. It is this more invigorated rational basis standard which really is applied by Justice White and which is necessary to secure a majority of the Court.

6 The indefinite, involuntary confinement of persons with mental disabilities in large, segregated institutions became the accepted method for rendering retardation, as well as people with retardation, invisible to society. 473 U.S. at 462-63. This form of state enacted segregation, as well as others, are explicitly noted in Congress' Findings in the ADA. See 42 U.S.C. § 12101(a)(2).

7 State statutes which required the compulsory sterilization of persons with retardation, prevented them from marrying, deprived them of custody of their offspring, and prohibited them from exercising the usual vestiges of citizenship remain among the most pernicious form of state sponsored discrimination. 473 U.S. at 461-64. These statutes informed Congress' Findings on the scope of

discrimination encountered by individuals with disabilities. 42 U.S.C. § 12101(a)(3).

8 Persons with mental and physical disabilities traditionally were totally excluded from public schools and other public activities and programs. 473 U.S. at 464, nn. 13, 17. It is this history of state sponsored discrimination which guided Congress' judgment in enacting Title II of the ADA and other remedial statutes and which is specifically cited in its Findings. 42 U.S.C. § 12101(a)(5).

9 During the same Term as *Cleburne,* the Court reviewed the legislative history of § 504 of the Rehabilitation Act and determined that the Act properly reached all forms of discrimination. *Alexander v. Choate,* 469 U.S. 287, 297-98 (1985).

10 It was an agency of the Commonwealth of Pennsylvania, a petitioner here, which made that concession.

11 In fact, even before the Court's decision in *Dellmuth,* Congress did just that: it explicitly abrogated the State's Eleventh Amendment immunity for suits brought under the EHA. 42 U.S.C. § 2000d-7.

12 Morgan involved the question of whether an English literacy test, as applied to Spanish speaking members of New York's Puerto Rican community, could be prohibited by Congress under its Section 5 powers, even if such a test did not itself violate the Equal Protection Clause and was otherwise constitutional. The Court had little difficulty in upholding Congress' broad remedial authority to enjoin otherwise constitutional conduct. In doing so it reaffirmed its early rulings that " § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Morgan,* 384 U.S. at 651. While this authority is not without limits, the proper boundaries are determined in the first instance by Congress, based upon its assessment of the record of discrimination, and only then by the Court, with substantial deference to Congress' superior fact-findings function. "It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Id.* at 653. See *City of Boerne,* 117 S.Ct. at 2170; *Oregon v. Mitchell,* 400 U.S. 112, 207 (Opinion of Harlan, J.) and at 247-49 (opinion of Brennan, White and Marshall, JJ.)

13 This dual rationale for the Court's opinion in *Morgan* was explicitly endorsed in *City of Boerne,* 117 S.Ct. at 2168, thereby confirming that Congress may act to ensure that a previously excluded group has full access to all relevant public services and activities.

14 Congress' remedial powers are also reflected in its enactment of the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997 *et seq.,* which authorizes the Department of Justice to protect the constitutional rights of persons involuntarily confined in state facilities, including psychiatric hospitals, prisons, and jails. CRIPA was explicitly adopted pursuant to Section 5 of the Fourteenth Amendment. S. Rep. No. 416, 96th Congress, 1st Sess. 42 (1980), *reprinted in* 1980 USCCAN 783823.

15 In fact, Congress would be effectively precluded from legislating at all with respect to classifications other than those based upon race, alienage, or national origin, thereby undermining its critical fact-finding function and the very scope of Section 1 of the Fourteenth Amendment. Its constitutional authority would also vary with the evolving application of judicially developed standards of equal protection scrutiny. Compare *Frontiero v. Richardson,* 411 U.S. at 688 (strict scrutiny of gender classification) with *Wengler v. Druggists Mutual Ins. Co.,* 446 U.S. 142, 150 (1980) (intermediate scrutiny).

16 This history of discrimination, devaluation grounded in pejorative stereotypes, exclusion, and irrational protectionism is an equally accurate description of the State's treatment of persons with disabilites. See *Cleburne,* 473 U.S. at 446, 461-64, *Arline,* 480 U.S. at 279.

17 For instance, in *Maker v. Gagne,* 448 U.S. 112 (1980) the Court upheld the Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988 as a valid exercise of Congress' Section 5 powers, although it covers any person who prevails on civil rights claim, regardless of the level of scrutiny employed under the Fourteenth Amendment.

18 Chief Justice Rehnquist quoted at length from *Ex Parte Virginia* in describing the scope of Congress' authority with respect to the State's power over traditional functions and discretionary activities:
The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty.... Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.
Fitzpatrick, 427 U.S. at 454-55, quoting from *Ex Parte Virginia,* 100 U.S. at 346-48.

19 A careful search of the legislative history reveals no mention of dissatisfaction with the Court's disability cases, including its leading equal protection decision in *City of Cleburne v. Cleburne Living Center, supra.*

20 It would be ironic indeed if, as some of petitioners' amici suggest, Congress could not act to prevent discrimination against persons

with disabilities solely because this Court had adopted a level of equal protection scrutiny that was designed to encourage just those legislative enactments such as Title II. *Cleburne,* 473 U.S. at 444.

[21] The States enacted this disparate treatment through a tapestry of law and policies affecting multiple aspects of the lives of persons with disabilities, including the wholesale denial of the franchise and the freedom to participate in the operations of government, exclusion from public education and other public services, compulsory sterilization and prohibitions on marriage, child-rearing, and intimate relations, involuntary segregation in massive institutions, and unconditional restrictions on the exercise of fundamental civil rights.

[22] Of particular significance is the second finding:
(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination continue to be a serious and pervasive social problem.
42 U.S.C. § 12101(a).

[23] Thus, unlike RFRA which is unlimited in its scope and applicable to everyone, the ADA is a carefully tailored response to the problem Congress sought to address.

[24] This is obviously a far more flexible and deferential standard than the compelling state interest and less restrictive alternative criteria that contributed to the Court's disapproval of RFRA. *City of Boerne,* 117 S.Ct. at 2171.

[25] The latter two decisions post-dated *City of Boene* and thus reached their conclusions based upon a careful analysis of the congruence and proportionality test established by this Court for evaluating exercises of Congressional authority under Section 5.

[26] While, as Chief Judge Posner noted in concluding that the ADA did apply to state prisons, there may be some "inner core of sovereign functions" which go to the very balance of power between the separate branches of state government, prisons, education, and other public services are not amongst them. *Crawford,* 115 F.3d at 483. This case does not present the question of the applicability of the ADA to functions which define the very existence of the States.

[27] The Court held in *Wolff* that ordinarily inmates have no right to assistance at such hearings.

[28] Although 42 U.S.C. § 1983 does not explicitly mention prisons, the Court frequently has allowed state prisoners to seek redress under this statute for violations of federally-protected rights. *Cooper v. Pate,* 378 U.S. 546 (1964); *Houghton v. Shafer,* 392 U.S. 639 (1968).

[29] See *Franklin v. District of Columbia,* 960 F. Supp. 394, 432 (D.D.C.1997) (Title VI would be violated where "prison programs [were] offered based upon an inmate's race of ethnic origin").

[30] See *Klinger v. Department of Corrections,* 107 F.3d 609, 615 (8th Cir.1997) (Title IX applies to Nebraska state prison system); *Jeldness v. Pearce,* 30 F.3d 1220, 1224-26 (9th Cir.1994) (Title IX applies to prison education programs). See also *O'Connor v. Davis,* 126 F.3d 112, 118 (2d Cir.1997). The Ninth Circuit, in discussing Title IX's application to state prisons, properly interpreted the separation of powers principles that should guide a court in considering this issue:
[a court] cannot judicially impose a special exception to these statutes for correctional institutions.... If there is a pelling need to exempt corrections from these requirements regarding education and employment programs, that argument should be addressed to the legislative branch.
Jeldness, 30 F.3d at 1225.

[31] See *Doe v. Arizona Dep't of Educ.,* 111 F.3d 678 (9th Cir.1997); *Paul Y. v. Singletary,* 979 F. Supp. 1422 (S.D.Fla.1997); *Alexander S. By and Through Bowers v. Boyd,* 876 F. Supp. 773 (D.S.C.1995); *Donnell C. v. Illinois State Bd. of Educ.,* 829 F. Supp. 1016 (N.D.Ill.1993).

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