

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BOARD OF TRUSTEES OF UNIVERSITY :

4 OF ALABAMA, ET AL., :

5 Petitioners :

6 v. : No. 99-1240

7 PATRICIA GARRETT, ET AL., :

8 - - - - - X

9 Washington, D.C.

10 Wednesday, October 11, 2000

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 10:03 a.m.

14 APPEARANCES:

15 JEFFREY S. SUTTON, ESQ., Columbus, Ohio; on behalf of

16 the Petitioners.

17 MICHAEL GOTTESMAN, ESQ., Washington, D.C.; on behalf of

18 the Respondents.

19 SETH P. WAXMAN, ESQ., Solicitor General, Department of

20 Justice, Washington, D.C.; on behalf of the United

21 States.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 99-1240, the Board of Trustees of the
5 University of Alabama v. Patricia Garrett.

6 Mr. Sutton.

7 ORAL ARGUMENT OF JEFFREY S. SUTTON

8 ON BEHALF OF THE PETITIONERS

9 MR. SUTTON: Thank you, Mr. Chief Justice, may
10 it please the Court:

11 In enacting the Americans with Disabilities Act
12 in 1990, Congress invoked its powers to regulate
13 interstate commerce and to enforce the Fourteenth
14 Amendment. We do not challenge Congress' authority to
15 pass the ADA under the Commerce Clause and, indeed, doubt
16 anyone ever would bring such an across-the-board attack on
17 the law, yet it is precisely the virtues of the ADA as a
18 matter of Commerce Clause legislation, its breadth of
19 coverage, its exacting accommodation requirements, that
20 make it unsustainable as a section 5 law.

21 Now, before this Court has authorized Congress
22 to impose extra constitutional duties on the States, it
23 has required the Congress to show that the States brought
24 this loss of authority upon themselves first by engaging
25 in a widespread pattern and practice of unconstitutional

1 conduct and, second, by showing that the remedial
2 legislation is proportionate and congruent in nature.

3 QUESTION: Let's --

4 QUESTION: Mr. Sutton, there were congressional
5 findings that there has been discrimination against the
6 disabled in voting, health services, transportation,
7 education, and so on, and there are numerous examples in
8 the legislative record, and those are areas of traditional
9 State control. Do you think that those findings are
10 somehow false, or not relevant in some way, or that the
11 discrimination is just not unconstitutional, or what?

12 MR. SUTTON: Your Honor, they're exceedingly
13 relevant, and they certainly sustain the ADA as matter of
14 Commerce Clause legislation, but just as with Kimel and
15 the age laws they refer only to discrimination in general.
16 They don't establish constitutional violations.

17 QUESTION: Well, that's what I'm trying to press
18 you on a little bit, because the findings in some
19 instances are in areas that are under traditional State
20 control.

21 MR. SUTTON: That's true, Your Honor, and
22 there's no doubt if we had a situation where Congress had
23 actually identified constitutional violations in these
24 areas of State control, Congress would have section 5
25 authority.

1 QUESTION: Did the findings distinguish at all
2 between discrimination that was the result of the State as
3 opposed to, say, the county or the city?

4 MR. SUTTON: Not at all, Your Honor. There's no
5 distinction whatsoever between State, city and county when
6 it comes to constitutional violations. It's usually just
7 local government and State government generically put
8 together, but the key point is in the ADA the age laws, in
9 the statement of purpose and findings, it was exactly the
10 same. In fact, in the age --

11 QUESTION: Why isn't it a constitutional
12 violation when one witness said, the Essex Junction School
13 System said they were not hiring me because I was using a
14 wheelchair?

15 MR. SUTTON: Well, Your Honor, it might well be
16 a constitutional violation, but the fact of the matter is
17 that particular allegation was won by just one side of the
18 dispute.

19 QUESTION: Well, I mean, I pick that out because
20 the SG's brief is filled with references, and we have all
21 these amicus briefs that are filled with references along
22 the lines I just said.

23 Now, if I -- is it that I'm supposed to count
24 all those, and they have a whole lot here in a huge stack
25 of briefs, and count them all and then say, well, they're

1 just not enough, or there are enough? Why wouldn't, say,
2 200 instances like that be enough?

3 MR. SUTTON: Well, the first problem, Your
4 Honor, is that it wouldn't be a remedial section 5 problem
5 because, if those allegations are true, if there's no
6 rational explanation for what was done they all violate
7 State law. They would -- all 50 States by 19 --

8 QUESTION: Well, they tell us, for example, that
9 a lot of States didn't have laws, to use this case,
10 involving cancer, or perceptions of handicap which really
11 weren't, and then they list all kinds of flaws in those
12 laws in these briefs, and I suppose they're probably right
13 in terms of the facts here.

14 MR. SUTTON: But Your Honor, the risk is one of
15 constitutional violation.

16 QUESTION: Well, I mean, that's what I'm asking.
17 That's what I'm trying to get to. Why isn't it a
18 constitutional violation where Congress has lots and lots
19 of instances of States that seem to discriminate against
20 handicapped people under instances where, given the
21 information in front of them, for some reason or other,
22 these handicapped people have not been able successfully
23 to avail themselves of State law.

24 MR. SUTTON: Your Honor, those would be relevant
25 if Congress had made a second finding, which is just

1 critical and is what is exactly missing here, and that
2 finding had been, despite this conduct by States in local
3 areas of local control, the States weren't enforcing the
4 very antidiscrimination laws they had on the books.

5 Let's draw an analogy to the race cases. If in
6 the early sixties every State in the country banned
7 literacy tests, all right, banned the very thing Congress
8 was trying to get at, it would not be enough for Congress
9 to say literacy tests are causing problems. They would
10 have to make a second showing which is, the States are not
11 enforcing their laws on the books.

12 QUESTION: So if, in fact, in the sixties, there
13 had been discrimination in the South, and we discovered
14 there was a State law banning racial discrimination,
15 Congress would not have been able to pass laws against
16 racial discrimination in your view without --

17 MR. SUTTON: In the early sixties they would
18 have been, because I think in the early sixties you would
19 have been able to show that the States, those were shams.
20 They were statutory Potemkin villages. They meant
21 nothing.

22 QUESTION: And today? What about today?

23 MR. SUTTON: There's no showing on that front,
24 not at all, Your Honor. There's no -- Congress did not
25 even look in the direction. It's true they looked in the

1 direction of -- excuse me.

2 QUESTION: Let me ask you, suppose we have a
3 real case or a hypothetical case along the lines described
4 by Justice Breyer, a very egregious case, a person
5 absolutely confined to a wheelchair. That person can't
6 get into the court hearing on time, or can't get into a
7 voting booth, and you have an insensitive State official.
8 In that single discrete case, could there be an action
9 brought under the Equal Protection Clause to compel the
10 access, compel access to the court, compel access to the
11 building?

12 MR. SUTTON: Well, I think you've got two
13 possible issues there, one what type of review, would that
14 be a rational basis setting, or because it's a --

15 QUESTION: That's why I'm asking.

16 MR. SUTTON: -- fundamental right, and so
17 therefore would you have heightened review.

18 I think there would be situations in which you
19 might bring a constitutional claim, but -- and I hope I'm
20 getting to your point --

21 QUESTION: Would the court be wrong to say that
22 there's a quasi -- would the court be wrong to say there's
23 a quasi-suspect class here, or suspect class?

24 MR. SUTTON: I don't think the issue would be
25 changing rational basis scrutiny. The issue would be

1 whether it's a voting rights problem which gets heightened
2 review, but Your Honor, the key point on voting, access to
3 courthouses and access to voting booths, the ADA does not
4 correct that problem.

5 To the extent you think that was the
6 constitutional problem the ADA was getting at, it exempted
7 all --

8 QUESTION: Well, what I'm trying to find out --

9 QUESTION: Mr. --

10 QUESTION: -- is if there's ever an equal
11 protection violation on a stand-alone discrete case --

12 MR. SUTTON: Mm-hmm.

13 QUESTION: -- where a State discriminates
14 against a person by reason of a severe handicap.

15 MR. SUTTON: That --

16 QUESTION: Does that state an equal protection
17 violation, and if it does, why is it that the courts can
18 do what Congress cannot? That's the line of inquiry I --

19 MR. SUTTON: Why is it that the courts have more
20 authority here to limit that type of State conduct than
21 Congress?

22 QUESTION: Yes. It would seem that that's one
23 consequence of your argument, and I want you to address
24 it.

25 MR. SUTTON: Well, Your Honor, I think if it

1 were -- if I were in the situation where I was saying the
2 courts had more remedial authority than the Congress I'd
3 have a real problem, because of course that's not what's
4 going on. The point of section 5 is to give Congress
5 remedial authority.

6 But the point I'm trying to make on the
7 courthouse access to buildings point is that that's not
8 something the ADA addresses. The Congressional Record
9 shows that by 1990 every State in the country had an
10 architectural barriers law that precluded the building of
11 new buildings that didn't have access.

12 QUESTION: But you're willing to concede,
13 apparently, that it is a constitutional violation not to
14 make special provision in public buildings for those who
15 are handicapped.

16 MR. SUTTON: Well --

17 QUESTION: That is a denial of equal protection
18 of the laws.

19 MR. SUTTON: I'm not willing to concede that,
20 Your Honor, because --

21 QUESTION: Do you know of any case that has held
22 that?

23 MR. SUTTON: I don't, Your Honor and I would, in
24 fact, point the Court to Alexander --

25 QUESTION: When Congress was speaking of

1 discrimination could it possibly have been referring to
2 the statutory definition of discrimination?

3 MR. SUTTON: Absolutely, and there's no doubt
4 that's what they were referring to.

5 QUESTION: Is there any compatibility between
6 that and the constitutional requirement of equal
7 protection?

8 MR. SUTTON: There's not. In fact, of all the
9 Federal --

10 QUESTION: I don't know why you're running away
11 from it. It seems to me that's the core issue in this
12 case.

13 QUESTION: Mr. Sutton --

14 QUESTION: Whether, in fact -- whether, in fact,
15 making special accommodation for those who are
16 handicapped, or the failure to do so, is a violation of
17 the Constitution. I think if it is your case is a hard
18 one.

19 MR. SUTTON: It's not, and there's no Federal
20 civil rights statute --

21 QUESTION: But Mr. Sutton, isn't this an
22 employment case rather than an access case?

23 MR. SUTTON: Well, Your Honor, it's a challenge
24 to the ADA across the board. There's just one
25 abrogation --

1 QUESTION: But the particular claims are
2 employment claims, and is it not at least theoretically
3 possible that refusal of employment to a person because of
4 a handicap would be an equal protection violation,
5 regardless of whether the access provision was?

6 MR. SUTTON: Well, if there were only arbitrary
7 justifications for a decision --

8 QUESTION: Should they have ruled --

9 MR. SUTTON: -- you have no problem.

10 QUESTION: -- that nobody with an artificial
11 limb can ever have a job of a certain character? You
12 could say that wouldn't pass the rational basis test,
13 couldn't you?

14 MR. SUTTON: There's no evidence, Your Honor,
15 that there are any such State laws --

16 QUESTION: No, but in that kind of a
17 hypothetical you would agree that that could be a
18 constitutional violation?

19 MR. SUTTON: If there were -- no -- if all you
20 had were arbitrary justifications for that law, of course
21 you would. That's City of Cleburne, and that's all of the
22 equal protection cases.

23 QUESTION: If there were no rational basis for
24 it, in other words.

25 MR. SUTTON: Absolutely, Your Honor.

1 QUESTION: But there might be a rational basis
2 for refusing to hire a teacher who was in a wheelchair --

3 MR. SUTTON: If this Court's --

4 QUESTION: -- if only that the school is not
5 properly equipped to accommodate such a teacher.

6 MR. SUTTON: This Court said that very thing in
7 a case involving the Federal Government, where it said
8 budgetary constraints alone can state a rational basis.

9 QUESTION: How about Justice Stevens'
10 hypothesis, a man with an artificial limb turned down for
11 a teacher, just without any real basis for it, you know,
12 we're just afraid we might not be able to handle you.

13 MR. SUTTON: Well, if there --

14 QUESTION: That would be arbitrary.

15 MR. SUTTON: I think that is arbitrary, and I
16 think that would be a problem. The question, though, is
17 whether there was evidence of that going on in the
18 eighties, number 1, and number 2, were State laws against
19 that very thing not being enforced.

20 QUESTION: Well, assuming there was evidence of
21 that kind of discrimination, I really don't understand the
22 argument that the fact that there are State remedies also
23 available makes it impermissible for there to be a Federal
24 remedy.

25 MR. SUTTON: Oh, there can be a Federal remedy,

1 and that's why the Commerce Clause legislation is fine.

2 The question is whether you can trump --

3 QUESTION: No, I --

4 MR. SUTTON: -- the Tenth or Eleventh Amendment.

5 QUESTION: Why couldn't there be a Fourteenth
6 Amendment Federal remedy, even though there also was a
7 State remedy? I don't quite understand the thrust of your
8 main argument.

9 MR. SUTTON: Because the very point of section 5
10 is to correct State conduct that violates the
11 Constitution, and if the States aren't violating the
12 Constitution, one --

13 QUESTION: Yes, but the fact that a State remedy
14 exists does not necessarily mean that discrimination is
15 not taking place.

16 MR. SUTTON: I agree entirely, and that's why
17 one has to look at whether the State laws are being
18 enforced.

19 QUESTION: So I take it if you went back to
20 Justice Breyer's example and used the hypothesis of maybe
21 200 examples -- I don't know how many we've got, but maybe
22 that many were adduced -- and in each of those instances
23 Congress had said not only, we find here is an example of
24 an instance of discrimination, but Congress had also
25 expressly said, and we find that in this example there was

1 no enforcement of State law to correct it, and it had
2 matched its 200 examples with 200 examples of State
3 failure to enforce, do I understand your position to be
4 that then there would be an adequate legislative predicate
5 under section 5?

6 MR. SUTTON: Yes, and I -- the answer is yes,
7 but I just want to --

8 QUESTION: So that if you win this case,
9 Congress could go back and dredge up from its record its
10 200 examples and, if Congress said well, we now -- you
11 know, we've checked into this, and in each of these
12 examples there was no State enforcement, Congress could
13 then pass the act again under section 5 and it would -- on
14 your view would be valid?

15 MR. SUTTON: No. Yes to the first, but no to
16 the second.

17 QUESTION: Okay.

18 MR. SUTTON: The second problem with the ADA is,
19 it's unlike any section 5 law to my knowledge ever
20 enacted, and certainly ever upheld by the Court, in the
21 sense that it truly is a constitutional amendment in
22 section 5 clothing. It applies not just to every State,
23 but every form of Government service that ever existed or
24 ever will exist.

25 That truly is evading Article 5 and the

1 requirement that two-thirds of each House approve a
2 constitutional amendment and, most importantly, the
3 States, three-fourths of them, get an opportunity to
4 change it, and that's exactly what would happen, and
5 that's what would be very risky about allowing that
6 hypothetical to justify the ADA.

7 QUESTION: Mr. Sutton, would you -- I thought we
8 were talking just about the employment section, those of
9 the ADA, but you're saying no, it's broader than that.

10 MR. SUTTON: Your Honor, we've briefed the case
11 that it is all of the ADA. There's just one abrogation
12 provision that applies to, you know, title I, title II,
13 and title IV, so I'm not sure how you could slice it that
14 we're just dealing with employment, but if, Your Honor, we
15 were dealing with employment, and you had Justice Souter's
16 hypothetical, 200 instances, just employment, States
17 refusing to enforce, sure, you would have a problem.

18 QUESTION: Well, you would want to know,
19 wouldn't you, Mr. Sutton, whether these 200 instances
20 were, quote, discrimination, close quote, in the sense
21 that Congress used it, or discrimination in the sense that
22 it's used in the City of Cleburne --

23 MR. SUTTON: Well, I --

24 QUESTION: -- as that's different.

25 MR. SUTTON: Well, I assume, Justice Souter,

1 that's what you were saying. Yes. I mean, absolutely.

2 But my -- if we're going to talk about this
3 solely as an employment case, which is fine by us, we're
4 perfectly agnostic about the issue, this case is Kimel. I
5 mean, it's exactly like Kimel. It's employment. You've
6 got, in fact, a greater gap between a statutory standard
7 and a constitutional standard, and an equally anemic
8 record when it comes to constitutional violations. I
9 mean, even --

10 QUESTION: Well, the difference that I wondered
11 about is, Kimel I thought was ambiguous as to whether or
12 not a rational basis test applies, and I'd be
13 interested -- I know you're probably aware of the
14 argument, the SG makes it, that rational basis is a test
15 that courts have created in order not to intrude upon the
16 province of the legislature.

17 But there is no reason to have the province of
18 the legislature not intruding upon the province of the
19 legislature and, therefore, you don't need to apply that
20 strict a matter and should respect the congressional
21 judgment that, in fact, there is unreasonable
22 discrimination being exhibited in these States against
23 handicapped people.

24 I would like to get your response to that kind
25 of an argument.

1 MR. SUTTON: Yes, Your Honor. It's an important
2 point. There's no doubt that when it comes to run-of-
3 the-mill legislation, City of Cleburne is right. We need
4 that authority to enact these 50 State laws and the 30
5 Federal laws that protect the rights of the disabled, so
6 there's just no doubt about that at all.

7 But in the section 5 context you've got two
8 other issues, the relationship between this Court and its
9 final Marbury power and the relationship between the
10 Congress and the States, and that's why the section 5
11 inquiries are always different. You've got a zero sum
12 game. Congress' gain is invariably the State's loss, and
13 just as Congress gets a presumption of constitutionality
14 in enacting these 30 Federal disability laws, so do the
15 States get a presumption of constitutionality that when
16 they pass these 50 State laws, 1) they're presumptively
17 good and 2) they're enforcing them.

18 Now, that can -- you know, that's not
19 dispositive, of course. Ultimately, if it turns out the
20 States aren't enforcing them, they're just shams, well
21 then they're got a problem and, you know, that's why the
22 voting rights laws are --

23 QUESTION: I don't think the issue is one that
24 is encompassed by getting into presumptions of
25 constitutionality. The issue, I think, that's getting

1 raised is one about, let's say the competence of the
2 courts to make judgments, particularly when we get into
3 the rational basis area to make sound judgments and it
4 seems that the courts are not as good second-guessers
5 there, perhaps, as legislatures may be.

6 But the fact is, Congress is a legislature, and
7 it is not laboring under the judicial disability as a
8 second-guesser, so why do we -- I mean, I go back to the
9 question raised. Why should we apply the same standard
10 that we would if we were dealing with a court's review?

11 MR. SUTTON: Well, I hope I'm answering both
12 questions. If one is concerned about the institutional
13 capacity of the courts versus Congress in this area, the
14 last thing this Court should be doing in this case is
15 making ultimately these section 5 findings itself, okay.

16 So if you're going to agree with Justice Breyer
17 and the suggestion in your question, Justice Souter, that
18 there has to be a little more deference to Congress in
19 this area, the last thing the Court should be doing is in
20 a situation where they don't ask the right questions,
21 constitutional violations as opposed to violating a
22 statutory standard, number 1, number 2, are the State
23 laws, all 50 of them on the books being enforced, the last
24 thing anyone's --

25 QUESTION: You're right, but this is just a

1 question of standard, and you're saying, look, whatever
2 standard you apply, be careful to realize that you don't
3 have, on your view, a sufficient predicate in the record
4 to pass muster on any standard. That's one argument, and
5 I think we understand that, but why should the standard be
6 the same?

7 MR. SUTTON: Because, Your Honor, it's not easy
8 being the Supreme Court and deciding what the Constitution
9 means in all these cases, but the bottom line is the
10 Marbury power rests here in this building. It doesn't
11 rest anywhere else, and clever arguments about how
12 Congress needs more deference to find out when
13 constitutional violations really exist is just a nice way,
14 a polite way of putting the fact that they across the
15 street get to decide what the Constitution means.

16 I don't know how else to divide it, but that is
17 what's going on, if they can enact a law that applies to
18 every Government services --

19 QUESTION: Can I ask you, on this very -- the SG
20 has headlined in his brief, S report number 116, at page
21 18, and in big letters, current Federal and State laws are
22 inadequate. That was right out of the Senate report, so
23 why wouldn't that be a finding that current Federal and
24 State laws are inadequate?

25 MR. SUTTON: It is a finding, it's entitled to

1 deference, and it applies to the Commerce Clause Article I
2 justification for passing this law. That does not suffice
3 to show there are constitutional violations, and
4 certainly --

5 QUESTION: The question is, I suppose,
6 inadequate to do what, inadequate to do the good things
7 that need doing?

8 MR. SUTTON: Absolutely.

9 QUESTION: Or inadequate to assure compliance
10 with the Constitution of the United States?

11 MR. SUTTON: Absolutely.

12 QUESTION: And the report doesn't say the
13 latter.

14 MR. SUTTON: No, it does not and I invite
15 everyone to read it. That's exactly what's going on.

16 QUESTION: All right. That's the other
17 question, but that's what you were answering. Why isn't
18 this a constitutional -- if Congress finds that there are
19 all these problems going on with the States, and the
20 current State laws are inadequate to help these
21 handicapped people who are discriminated against, why
22 isn't that sufficient to show the problem that permits
23 them to act under section 5?

24 MR. SUTTON: I hope -- I'm fearful that I'm
25 not -- I didn't hear the question, but let me try to

1 answer. You can cut me off as soon as it appears I didn't
2 hear what you were saying.

3 But they've got to be constitutional violations,
4 Your Honor, and if they're not constitutional violations,
5 they haven't asked the right question.

6 QUESTION: And they are not constitutional
7 violations because --

8 MR. SUTTON: That's not the question they were
9 asking. The question they were asking is precisely the
10 one Justice Scalia asked, which is, isn't -- is this
11 adequate, can we do a better job. Of course we can do a
12 better job.

13 You know, I think in 1985 the Court issued two
14 decisions which seemed to me to get right to the heart of
15 the matter. Not only was it --

16 QUESTION: Why weren't they asking about the
17 constitutionality if they explicitly abrogate the State's
18 immunity?

19 MR. SUTTON: I've no idea, Your Honor. I've
20 looked through the --

21 QUESTION: They could only do that under the
22 Fourteenth Amendment.

23 MR. SUTTON: That's exactly right.

24 QUESTION: So then they must have been talking
25 about the Fourteenth Amendment.

1 MR. SUTTON: Not necessarily, Your Honor. That
2 doesn't follow necessarily at all. I mean, one you could
3 have an abrogation provision, and States are free to waive
4 on their own.

5 QUESTION: Well, Seminole wasn't decided until
6 1997.

7 MR. SUTTON: No, until 7 years afterwards,
8 that's exactly right, but I've looked to the Congressional
9 Record trying to find instances where Congress was aware
10 of the section 5 inquiry. I found two. One of them cites
11 Fullilove, Representative Dellums saying there's a broad
12 section 5 power. Fullilove is no longer good law.

13 The second cites Morgan v. Katzenbach and just
14 has a sentence that says, embracing the broader version of
15 Morgan saying that if there's an antidiscrimination issue
16 out there, Congress can remedy under section 5, but that's
17 not the inquiry, and as early as 1970 it was clear that
18 was not the inquiry in Oregon v. Mitchell, when the Court
19 invalidated Congress' effort to lower the voting age from
20 21 to 18 in all States in the country.

21 MR. SUTTON: Mr. Sutton, you've made something
22 in your brief of the absence of a congressional provision
23 to treat the Federal Government, or Federal employment on
24 a par with private sector employment. You emphasized
25 that, but I didn't see the connection between that and the

1 section 5 inquiry that's before us.

2 MR. SUTTON: Yes, Your Honor. It goes to the
3 second question, not the record issue but the
4 proportionality issue.

5 Congress purported to be remedying, in their
6 words, a national epidemic regarding disability
7 discrimination, and they decided that in order to do that
8 you needed money damages actions, which is really all that
9 is at stake here in light of Ex parte Young. How can they
10 say that it's a proportionate and necessary tailored
11 remedy when they're not only not imposing it on private
12 business in many instances, but on themselves?

13 That just doesn't stand. It's not only the
14 failure to lead by example, just direction, but it doesn't
15 show proportionality. I mean, it proves our very point.
16 This was not needed. It's not proportionate to the very
17 problem they were trying to correct.

18 QUESTION: What is being imposed on State
19 governments that's not being imposed on private employers?

20 MR. SUTTON: Money damages actions in public
21 accommodations requirement. Title II applies to any form
22 of discrimination plus access to public services. Under
23 title III those provisions, most of those provisions are
24 extended to private businesses, and there are no money
25 damages remedies there, which really proves the difference

1 between the State's ability to lobby, and private
2 businesses.

3 QUESTION: But with respect to the kinds of
4 cases that we're dealing with, with employment, there are
5 money damages against individuals.

6 MR. SUTTON: That's true, Your Honor. I mean,
7 again -- but if this is an employment case, which is fine
8 by us, it really is controlled by Kimel, because the gap
9 between the statutory standard and the constitutional
10 standard is even broader in this case than it was in
11 Kimel, and then --

12 QUESTION: Well, your -- I'm sorry.

13 QUESTION: That's a proposition a little hard to
14 maintain, because in the age discrimination area this
15 Court has never found a violation of the rational basis
16 test, but in the handicapped area we've found a bunch of
17 violations.

18 MR. SUTTON: This Court has never found one
19 against employment, Your Honor. If we're going to stick
20 with employment, there are none with respect to
21 employment, zero.

22 QUESTION: But there are a number of other areas
23 where there have been constitutional violations, but none
24 in the age area.

25 MR. SUTTON: Well, I suspect, Your Honor, if we

1 reviewed all of the Court's constitutional findings there
2 would be cases in which an elderly person was a plaintiff
3 and won a constitutional case.

4 QUESTION: Yes, but not that it was
5 unconstitutional to place the discrimination on the basis
6 of that person's age.

7 MR. SUTTON: I think that's true, Your Honor,
8 but I mean, if you can remedy constitutional violations in
9 one area by transferring it to another area, then we
10 really should talk about the entire ADA, and talk about
11 its biggest flaw. Its biggest flaw that it is a section --
12 it is a constitutional amendment in section 5 clothing.
13 It applies to every single form of Government service, and
14 if they're allowed to do this, they'll do it in every
15 area, rational basis scrutiny of all sorts.

16 QUESTION: May I ask you if you think the
17 congressional findings might have been phrased a little
18 differently if they'd been made after the Seminole
19 decision?

20 MR. SUTTON: It's certainly possible, Your
21 Honor, and one of the best things I think that can be done
22 here is, instead of the Court having to engage in this
23 section 5 inquiry on the basis of the Government lawyers
24 after the fact, let them do it again.

25 But I will suggest this, Your Honor. It is not

1 going to be as easy as one submits to say --

2 QUESTION: It seems to me you're suggesting that
3 we treat the Congress of the United States as a trial
4 court and remand the case to them to prepare better
5 findings.

6 (Laughter.)

7 MR. SUTTON: No, Your Honor. No, Your Honor,
8 not at all. The ADA would be invalid. 12202, Section
9 12202 would be invalid, and it would be up to them to
10 decide what they wanted to do. In fact, in City of Boerne
11 this Court invalidated the RFRA. They're back at it
12 again. They're entitled to do that.

13 I will submit that there is a bright line here.
14 It's constitutional violations. U.S. Senators, U.S. House
15 of Representatives Members are not going to lightly find
16 States are violating the Constitution, but we want them to
17 ask that question. That's the very point of section 5.
18 We want them to look out, root out this type of invidious
19 discrimination, and if it's going on, have them ask the
20 right question, identify it, and end it.

21 QUESTION: May I go back to the remedy question
22 that Justice Ginsburg raised? Is it your position that
23 with respect to the damages remedy that you zeroed in on,
24 that that would fail the proportionality test unless the
25 same remedy were applied to the National Government and to

1 private employers generally? Is that the position that
2 you're taking?

3 MR. SUTTON: Your Honor, it certainly helps our
4 case and it makes it a lot easier, but to be candid with
5 you, if they imposed this same remedy on the Federal
6 Government, I think they would still have problem,
7 precisely because it applies to every Government service,
8 but it just makes it --

9 QUESTION: Well, it may not be sufficient, but
10 is it your position that it would be necessary to survive
11 the proportionality --

12 MR. SUTTON: Not in this case, Your Honor. The
13 breadth of coverage and the gap between the statutory and
14 constitutional standards are enough in this case.

15 If I could reserve the rest of my time for
16 rebuttal.

17 QUESTION: Very well, Mr. Sutton.

18 MR. SUTTON: Thank you.

19 QUESTION: Mr. Gottesman, we'll hear from you.

20 ORAL ARGUMENT OF MICHAEL GOTTESMAN

21 ON BEHALF OF THE RESPONDENTS

22 MR. GOTTESMAN: Thank you, Mr. Chief Justice,
23 and may it please the Court:

24 I want to begin by responding to what Mr. Sutton
25 said in his opening, that the ADA rests securely on the

1 Commerce Clause. No State would ever challenge that, and
2 so what's at issue here is quite narrow.

3 Indeed, States are challenging in the lower
4 courts the Commerce Clause predicate for title II of the
5 ADA, and they are arguing that in light of this Court's
6 decisions in Lopez and Morrison that so many State
7 activities and programs are not commercial in character
8 and, thus, cannot be reached by the Commerce Clause, so
9 that were this Court to hold that the ADA is not proper
10 Fourteenth Amendment legislation, there is significant
11 danger that the ADA would be without a constitutional --

12 QUESTION: But has -- Mr. Gottesman, has any
13 court bought that argument? After all, there is the
14 Garcia case to deal with, and --

15 MR. GOTTESMAN: So far there is one district
16 court that has bought the argument, Pierce v. King, 918
17 F.Supp. 932. The issue is now pending in several courts
18 of appeals on appeals by the State.

19 QUESTION: This would be an argument that could
20 be made only by the State, not by a county or a city, I
21 take it.

22 MR. GOTTESMAN: Well, no, because a county or a
23 city -- if you take the Fourteenth Amendment away, the
24 Fourteenth Amendment argument -- the Eleventh Amendment
25 argument is available, of course, only to a State, but if

1 you say that the ADA is not grounded in the Fourteenth
2 Amendment and courts later hold that it is not grounded in
3 the Commerce Clause, then it is not appropriate
4 legislation directed to either, as we understand it.

5 QUESTION: I would think that if you lose the
6 Commerce Clause challenge the least of your worries is the
7 States. You're going to have many more businesses who
8 employ people, that they're going to be exempt.

9 MR. GOTTESMAN: Well, except only -- title II
10 applies only to the States, and so it, losing title II is
11 losing -- I'm sorry. In that sense it applies to State
12 and local governments, and if it goes down under the
13 Commerce Clause then State and local governments will not
14 be governed by title II.

15 QUESTION: Mr. Gottesman, I'm not sure that the
16 record here presents much in the way of a title II claim.
17 I know the Ninth Circuit has said that all employment
18 disputes under the ADA are covered only by title I, not
19 title II, that title II addresses public services, and I
20 know the grant of certiorari covered both, ostensibly,
21 because the plaintiffs' cause of action appeared to
22 address both, and I think this Court probably hasn't
23 decided whether all employment cases fall under title I,
24 but if we thought they did, do we have to address the
25 title II issue?

1 MR. GOTTESMAN: Well, no. If you resolved in
2 this case, although the question is not presented, the
3 conflict among the circuits as to whether employment
4 discrimination also violates title II, and if you decided,
5 adversely to our position, that it does, the position we
6 advanced in the lower courts, then yes, only title I would
7 apply to employment, and only it would be at issue.

8 But we would hope that before this Court
9 resolved that important issue that has divided the courts
10 of appeals, that there would be an opportunity for
11 briefing.

12 In this case, the petitioners never raised an
13 objection to title II's application to employment, so it
14 never became an issue in this case.

15 Now, I want to turn to the merits of the
16 Fourteenth Amendment argument and we want to suggest as a
17 preliminary petitioners have never really acknowledged an
18 important body of Fourteenth Amendment decisional law,
19 which is that even when we're dealing with groups or
20 classifications that are covered by the rational basis
21 standard, it is irrational for a State to act with a
22 purpose that is irrational.

23 A number of Supreme Court decisions have held
24 that State action that rests on invidious prejudice,
25 irrational fear, false stereotypes that have evolved from

1 those prejudices and fears, desires not to be discomforted
2 by association with disfavored classes, patronization, if
3 that's what actually motivates a State decision, that
4 itself provides the irrationality which violates the
5 Fourteenth Amendment.

6 QUESTION: And how does one usually determine
7 that? I mean, I would usually consider it to be
8 irrational and motivated by prejudice when there's no
9 practical reason for it. Doesn't it boil down to the same
10 thing? You look to see whether, indeed, there's a
11 rational basis for what's been done. If there's no
12 rational basis, you say it must be motivated by, you know,
13 irrational prejudice or stereotyping, or whatever.

14 MR. GOTTESMAN: Well, surely it's the case that
15 when we see that there could be no rational basis, that
16 will fuel our conclusion.

17 QUESTION: I'm not sure it advances the ball. I
18 think the two boil down to the same.

19 MR. GOTTESMAN: But the irrational purpose prong
20 of Fourteenth Amendment jurisprudence is not limited only
21 to those cases where it is irrational, where the decision
22 itself would have to be irrational.

23 That is to say, it's a well-developed concept
24 that a State may take an action where there could be some
25 rational reason for the action, but we determined that

1 reason is a pretext --

2 QUESTION: I understand.

3 MR. GOTTESMAN: -- that what really motivated

4 them was hostility to the class.

5 QUESTION: I just don't know how you prove that,

6 except by looking at whether there is, in fact, a rational

7 basis. How do you prove that --

8 MR. GOTTESMAN: Well, that problem of proof,

9 Your Honor, is precisely why Congress found the need to

10 adopt prophylaxis here, and -- but I want to, before I get

11 to that, to lay out just what Congress --

12 QUESTION: That puts the cart before the horse.

13 They have to have shown unconstitutional State action

14 before they can use the prophylaxis.

15 MR. GOTTESMAN: Correct, so --

16 QUESTION: And you're saying the

17 unconstitutional State action is going to be based upon

18 not the realities out there, whether there was a rational

19 basis, but whether, even though there was a rational

20 basis, the States somehow were acting out of irrational

21 hatred of the disabled. How do you establish that?

22 MR. GOTTESMAN: Well --

23 QUESTION: Did Congress establish it?

24 MR. GOTTESMAN: Yes, it did.

25 QUESTION: Tell me how.

1 MR. GOTTESMAN: What it did was find that these
2 kinds of motivated actions are widespread. Let's just --

3 QUESTION: I didn't catch the last word, Mr. --
4 are what?

5 MR. GOTTESMAN: Widespread.

6 QUESTION: Widespread.

7 MR. GOTTESMAN: Pervasive was their word. What
8 they said in the findings on the face of this statute is
9 that there is pervasive prejudice, still, today, or still
10 in 1990, when they enacted this statute, there is
11 pervasive prejudice against persons with disabilities, a
12 history of purposeful unequal treatment, outright
13 intentional exclusion, stereotypical assumptions that are
14 wholly false and linked to prejudice, and they said these
15 animuses, or animi, have been aimed at a group which has
16 been historically disfavored and which constitutes a
17 discrete and insular minority.

18 There is a we they way in which people think
19 about persons --

20 QUESTION: That proves that prejudice exists.
21 Does it prove that State action has been taken on the
22 basis of that prejudice when there is rational basis for
23 the State action?

24 MR. GOTTESMAN: Yes, because Congress went
25 through enormous volumes of material that showed that

1 State action had been taken on the basis of that
2 prejudice.

3 QUESTION: Let's not talk about State action for
4 a minute, Mr. Gottesman. Let's talk about the States and
5 the Eleventh Amendment section. What findings did
6 Congress make, what examples did it use to tie in the
7 States with this sort of irrational discrimination?

8 MR. GOTTESMAN: Fair enough, Your Honor. Here,
9 I will talk only about States and only about employment,
10 because that is the narrowest focus.

11 As the Government's brief shows, there was an
12 enormous volume of State discrimination across wide
13 sectors, really everywhere, which is not surprising if you
14 accept the premise that there are pervasive, widely held
15 prevalent views that stigmatize and disadvantage persons
16 with disabilities.

17 QUESTION: Now, when you say discrimination in
18 answer to this question, you mean --

19 MR. GOTTESMAN: Fourteenth Amendment --

20 QUESTION: -- unconstitutional --

21 MR. GOTTESMAN: Correct.

22 QUESTION: Unconstitutional action.

23 MR. GOTTESMAN: Correct. Congress had two --
24 three kinds of evidence. Number 1, it had individual
25 incidents, and it had them in substantial number.

1 QUESTION: By people who were acting for the
2 State?

3 MR. GOTTESMAN: Yes. I'll give
4 you -- here's a couple of examples. A woman crippled by
5 arthritis is denied a job as a teacher in a university
6 because they don't want the students to have to look at
7 her. That is prejudice of a kind that would violate the
8 Fourteenth Amendment.

9 QUESTION: What was the basis for that finding?

10 MR. GOTTESMAN: Testimony of the teacher.

11 QUESTION: Was there -- of the teacher?

12 MR. GOTTESMAN: Yes.

13 QUESTION: Was there any testimony on the other
14 side?

15 MR. GOTTESMAN: No, because the State --

16 QUESTION: Just hear one side and make a
17 finding?

18 MR. GOTTESMAN: Well, the States were -- the
19 States spoke about this statute. They spoke in favor of
20 this statute. The States told Congress, a) we have this
21 problem, and b) State laws are inadequate to deal with it.
22 That's why we support the enactment of this statute. We
23 need the remedies.

24 QUESTION: One witness who says, the reason I
25 didn't get promoted was my arthritis, and Congress says

1 State -- unconstitutional state discrimination.

2 MR. GOTTESMAN: There are hundreds of these,
3 Your Honor, not one, hundreds. But broader than that --
4 if Your Honor wants, I'll give you some more. A
5 microfilmer at the Kansas Department of Transportation is
6 fired, and he is told, the reason you are being fired is
7 that we have now discovered that you have epilepsy. He
8 has throughout his tenure there been performing above the
9 standards required for employment there. Now, Your Honor
10 can say --

11 QUESTION: That is unconstitutional
12 discrimination?

13 MR. GOTTESMAN: Yes.

14 QUESTION: That is irrational discrimination?

15 MR. GOTTESMAN: Yes.

16 QUESTION: Whether it's good or bad --

17 MR. GOTTESMAN: Yes.

18 QUESTION: -- maybe it shouldn't exist, but you
19 think there is no rational basis.

20 MR. GOTTESMAN: That is correct, and Congress
21 thought that --

22 QUESTION: On the facts of this case, could the
23 plaintiffs have gone to a court of competent jurisdiction
24 and established an equal protection violation?

25 MR. GOTTESMAN: They could if they could prove

1 the motivation. They would have to prove the motivation.
2 They would have the burden of proving the motivation, but
3 yes, if Pat Garrett was demoted from her position as
4 director of nursing because of some antipathy on the part
5 of the person who made that decision, or some irrational,
6 erroneous stereotype, that would be a case --

7 QUESTION: Are there cases in the State courts,
8 or in the lower Federal courts which have accepted this
9 rationale?

10 MR. GOTTESMAN: Well, there are cases -- because
11 of the prior existence of section 504, we've cited in our
12 briefs some cases that were brought. Understandably
13 courts don't reach constitutional questions, so they can
14 find it violates the statute, but the findings made in
15 those cases are that employees were denied jobs out of
16 irrational antipathy.

17 QUESTION: But if this is so evidently an equal
18 protection violation, why haven't courts for the last 30,
19 40, 50 years routinely entertained these challenges and
20 given relief?

21 MR. GOTTESMAN: Because it is the burden on the
22 plaintiffs -- first of all there have not been that many
23 cases -- we -- let me back up for a minute. We would not
24 expect to see reported decisions of that. If a plaintiff
25 comes in and has the kind of evidence that would win an

1 Equal Protection Clause, the odds are that case is going
2 to get resolved before you ever see a --

3 QUESTION: You're telling me that over the last
4 30 or 40 or 50 years there have been numerous cases in the
5 courts where handicapped and disabled people have
6 routinely made equal protection claims and prevailed?

7 MR. GOTTESMAN: No, that they have made claims
8 and have prevailed under section 504, with the court not
9 reaching, as it should not reach, a constitutional
10 question if it finds that the statute was violated, but
11 I --

12 QUESTION: Mr. Gottesman, what are your other
13 two arguments? You had three, I believe.

14 MR. GOTTESMAN: Yes, the three prongs. One was
15 the individual cases. Second is the studies. Congress
16 had a number of studies of State employment. They're all
17 cited in our brief. One of those studies was performed by
18 a congressionally created committee, the Advisory
19 Committee on Intergovernmental Relations, whose very
20 function was to police whether Congress was overregulating
21 the States, unnecessarily regulating the States.

22 Its membership consisted predominantly of State
23 and local governmental officials, and it submitted a
24 report to every Member of Congress while the ADA was under
25 consideration recounting the findings of its own inquiries

1 of State officials in which it asked State officials, can
2 you explain why there is such a low percentage of persons
3 with disabilities working for you?

4 And overwhelmingly those State officials
5 responded, yes, the problem is that middle managers, the
6 people who make these kinds of decisions, the personnel
7 decisions in our State, are afflicted with negative
8 attitudes about persons with disabilities, discomfort
9 about working among them, myths and stereotypes about the
10 incapacity of people with disabilities to perform jobs,
11 things that have been -- and the report goes on to say
12 this. Empirical studies over and over and over again have
13 shown that these myths are false, that there is not a
14 higher turnover rate among persons with disabilities.

15 QUESTION: Were these findings by Congress?

16 MR. GOTTESMAN: Yes. Congress -- you say are
17 these findings by Congress. Congress made extensive
18 findings that these things are true, that all of these
19 things are animating decisions.

20 QUESTION: This report that you're now
21 describing was a report made to Congress by --

22 MR. GOTTESMAN: That's correct. This was a
23 report to Congress, and we cite six other reports by
24 various -- many of them conducted by the States
25 themselves, saying we have a terrible problem. Our

1 supervisors have qualms about hiring people with
2 disabilities. They're uncomfortable with it.

3 So that's the second body of evidence, and the
4 third body of evidence is the evidence that Congress had
5 about the reality of the psychological attitudes in our
6 society about people with disabilities. In accommodating
7 the spectrum, which was the report of the Civil Rights
8 Commission, they relied upon extensive bodies of
9 professional evidence that showed that there were four
10 crippling attitudes that many people in our society have
11 about people with disabilities.

12 They are discomfited about being around them.
13 They have stigmatic attitudes about them. They think they
14 are inferior, less than normal human beings, that they
15 hold all kinds of erroneous stereotypes about them, that
16 cancer is contagious, that epilepsy --

17 QUESTION: Do you think it is proper to leap
18 from these general psychological generalizations about the
19 society at large, and State employers in particular, to
20 the conclusion that the States have been acting
21 unconstitutionally?

22 MR. GOTTESMAN: My light is on, Your Honor.

23 QUESTION: You may answer, Mr. Gottesman,
24 briefly.

25 MR. GOTTESMAN: The point is that --

1 QUESTION: The answer is yes.

2 MR. GOTTESMAN: No, the answer is --

3 (Laughter.)

4 MR. GOTTESMAN: No, the answer is, they have all
5 three together. It's not just, should we rely on
6 psychiatrists. We have the evidence of what actually is
7 happening. We have the acknowledgements of the State in
8 these studies, and we have the understanding of why this
9 is happening from the psychological studies.

10 QUESTION: Thank you, Mr. Gottesman.

11 General Waxman, we'll hear from you.

12 ORAL ARGUMENT OF SETH P. WAXMAN

13 ON BEHALF OF THE UNITED STATES

14 GENERAL WAXMAN: Mr. Chief Justice, and may it
15 please the Court:

16 The question was -- reference was made to the
17 caption in the Senate report, and it also appears in the
18 House report, of Congress' conclusion that the State
19 remedies were inadequate, a conclusion that was also
20 supported by the 50 State Governors' committees that
21 examined this issue, and the question I think that Justice
22 Scalia asked was, inadequate to do what, because that,
23 after all, is the issue.

24 Now, this is a case where a statute was enacted
25 before Seminole Tribe and before Boerne, and therefore the

1 paradigm that this Court has created for the words, the
2 precise magic words that we would now expect Congress to
3 use didn't -- can't, I think, fairly be imposed on a
4 coordinate branch of Government.

5 But the answer, Justice Scalia, to the question,
6 I think, is determined by reference to what the
7 legislative record before Congress, not only when it
8 conducted its eighteen hearings and amassed seven separate
9 complete reports in enacting the ADA, but also when it
10 investigated the problems that led it to create the CRIPA
11 statute, the Constitutional Rights of Institutionalized
12 Persons, and IDEA, and others, but looking just --
13 looking --

14 QUESTION: But General Waxman, it's not magic
15 words. The whole point of City of Boerne is that when
16 Congress alters the Federal balance it must consider very
17 carefully the consequences of doing so, and to say that
18 it's simply magic words does not do justice or respect to
19 that very fundamental principle, and the Federal --

20 GENERAL WAXMAN: I absolutely --

21 QUESTION: And the Federal balance is altered
22 far more under the Fourteenth Amendment than it is under
23 the Commerce Clause.

24 GENERAL WAXMAN: Justice Kennedy, I agree, and I
25 would say therefore that the question fairly put is

1 whether the Disabilities Act sweeps more broadly than
2 Congress could reasonably have deemed necessary to remedy
3 and prevent the constitutional problem it found applying
4 this Court's definition of the standard, and what it found
5 were four things.

6 It found, first, that there is pervasive and
7 widespread discrimination against the disabled, which is
8 often the product of hostility, overbroad and irrational
9 stereotypes, and deliberate selective indifference, the
10 hallmarks of unconstitutional intent.

11 QUESTION: General Waxman, do you agree with Mr.
12 Gottesman that if the -- supposing there emerged a 55-
13 year retirement law, rational basis, relied on in Kimel,
14 do you agree with Mr. Gottesman's suggestion that if a
15 court could be persuaded that when the legislature acted,
16 that they really had it in for people over 55, that that
17 would be invalid?

18 GENERAL WAXMAN: No, I -- well, I don't think a
19 court would -- a court would not find that invalid,
20 applying a rational basis standard, because this Court has
21 had -- has held that under rational basis review of
22 legislation one looks at whether there is a conceivable
23 rational basis that would support a distinction, and that,
24 in fact --

25 QUESTION: Well, but now, I don't want to put

1 words in Mr. Gottesman's mouth, but I understood him to
2 say that sure, rational basis, but if you could prove that
3 although there was a rational basis for requiring people
4 to retire at 55, if the legislature that enacted that had
5 really been motivated by a dislike for people over 55,
6 then it would -- there would be a violation of equal
7 protection.

8 GENERAL WAXMAN: Well, Justice -- Mr. Chief
9 Justice, this Court has made clear that as a paradigm
10 of --

11 QUESTION: Are you in the process of answering
12 my question?

13 (Laughter.)

14 GENERAL WAXMAN: Was -- if your question was
15 whether I also understood Mr. Gottesman to say that, I --

16 (Laughter.)

17 QUESTION: No, no, no.

18 (Laughter.)

19 QUESTION: Do you agree with Mr. Gottesman?

20 GENERAL WAXMAN: I do not agree that a
21 legislature that could have had a -- a legislature that
22 could have had a rational reason for doing something
23 which, in fact, was motivated by invidious discrimination
24 would be struck down if this Court applied rational basis
25 review, but Cleburne, it seems to me, and the other cases

1 in which this Court has dealt with and remarked on
2 discrimination against the disabled points the way to the
3 correct resolution of this case, and before I -- I do want
4 to address that, but first I'll finish --

5 QUESTION: Well, do you think it provided
6 rational basis as the foundation of review in Cleburne?

7 GENERAL WAXMAN: In Cleburne --

8 QUESTION: Or something more?

9 GENERAL WAXMAN: Well, there is a great debate
10 about the answer to that question, but I will answer the
11 question on the assumption that the Court in fact applied
12 rational basis review, but what the Court explained was
13 that rational basis review is contextual, and context,
14 just like applying the proportionate and congruence test,
15 is contextual, and it requires a reference to the
16 historical context in which it arises.

17 And what this Court said in Cleburne is, we are
18 not going to look first at the facial constitutionality or
19 unconstitutionality of this statute. We're going to
20 require, in the unique context of a history of pervasive
21 invidious discrimination against the disabled, what this
22 municipality's reasons were. And having looked at that,
23 it concluded that the -- that it must have been motivated
24 by an invidious intent, because the proffered reasons were
25 not, in fact, rational.

1 Now, Cleburne, in the context of many other
2 cases in which this Court and Justices of this Court have
3 remarked on the history of pervasive invidious
4 discrimination against the disabled, provided --
5 essentially gave Congress the blueprint in which it acted
6 in this case, and here's why.

7 QUESTION: Do you think Congress can by law
8 establish that the disabled are a discrete minority
9 entitled to heightened scrutiny in reviewing legislation,
10 or action by States?

11 GENERAL WAXMAN: Our argument doesn't depend on
12 it, but I think the answer from Cleburne is yes, because
13 in Cleburne what this Court said -- and I don't have the
14 exact words in front of me -- was that because
15 discrimination against the disabled is such a complicated
16 issue, that is, because there are reasons why differential
17 treatment is sometimes permitted and, indeed, perhaps the
18 Constitution sometimes requires it, that we have to give
19 broad deference to the legislatures, and we have to let
20 legislatures deal, as they more competently can, with this
21 difficult problem, unless --

22 QUESTION: We said the same thing in Kimel. We
23 said, rational basis scrutiny, much legislative latitude.

24 GENERAL WAXMAN: Yes, Mr. Chief Justice, but
25 what this Court said in Cleburne is, because of that

1 unique history, absent congressional direction, we will
2 apply, as a paradigm of judicial restraint, rational basis
3 review.

4 QUESTION: Well, but -- I'll reread Cleburne,
5 but Cleburne said that in order to defer to the authority
6 of the legislature to pass a zoning law, that did not have
7 to do with the authority of the legislature to declare a
8 suspect class.

9 GENERAL WAXMAN: That --

10 QUESTION: That's quite different.

11 GENERAL WAXMAN: And I'm not suggesting to the
12 contrary, Justice Kennedy. I was responding to Justice
13 O'Connor's question about whether a legislature could
14 instruct a court to apply a different level of scrutiny,
15 and the language in Cleburne that says access --

16 QUESTION: And you think Congress can do that?

17 GENERAL WAXMAN: We -- I believe, as Cleburne
18 says, absent congressional direction we apply rational
19 basis for review.

20 QUESTION: But I persist in the point that that
21 did not address Congress' authority and scope and
22 prerogatives under section 5 of the Fourteenth Amendment.
23 That's quite different.

24 GENERAL WAXMAN: I agree that that's not
25 necessarily the case, but if I can simply point out,

1 Justice Kennedy -- this actually does go back to Justice
2 Scalia's original question -- that not only was -- I mean,
3 it is important, it is critical here to understand that
4 not only does the Congress find a massive record of
5 discrimination based on states of mind that are the
6 hallmarks of constitutional intent, but also that this
7 discrimination is the legacy of a not-too-distant past in
8 which Government practices deliberately isolated,
9 segregated, and withheld from the disabled fundamental
10 rights and the chance to participate in mainstream life.

11 When Justice Marshall wrote, in his separate
12 opinion in Cleburne, a statement that no Justice
13 contradicted, that a regime of State-mandated segregation
14 and degradation that in its virulence and bigotry rivaled
15 and, indeed, paralleled the worst excesses of Jim Crow --

16 QUESTION: Well now, General Waxman, are we then
17 to look through separate opinions, dissenting opinions,
18 and say if the majority didn't contradict them they must
19 have been subscribed to by the whole Court? We've never
20 done that.

21 GENERAL WAXMAN: Not at all, Justice --

22 QUESTION: I'm surprised that you would simply
23 cite an opinion like that, as if -- unless the majority
24 said, gee, we don't agree with that statement, it suggests
25 the majority did agree with it.

1 GENERAL WAXMAN: Mr. Chief Justice, the point
2 I'm making is more broadly that Congress itself had before
3 it a record not only of what was going on currently, but
4 what had produced it. The Civil Rights Commission
5 prepared a report --

6 QUESTION: What you were citing was Justice
7 Marshall's opinion, and are you saying that Congress could
8 rely on that?

9 GENERAL WAXMAN: I'm -- as an observation of
10 historical fact, Congress could certainly rely on it, and
11 he was not the only one in Cleburne to make that
12 observation. Justice Stevens, writing for himself and the
13 Chief Justice, said that through ignorance and prejudice
14 the mentally retarded have been subjected to a history of
15 unfair and often grotesque mistreatment.

16 QUESTION: Well then, one -- Congress could make
17 its record, I take it, out of statements in dissenting
18 opinions from this Court.

19 QUESTION: I have to write more dissents and
20 concurring opinions, I guess, if I want to be really
21 influential.

22 (Laughter.)

23 GENERAL WAXMAN: Mr. Chief Justice, so that I am
24 not -- I don't want to be misunderstood. This is not
25 an -- I'm using the -- Justice Marshall's categorization

1 because I think it well-reflects the evidence that
2 Congress itself heard. The Civil Rights Commission report
3 accommodating the spectrum which was submitted to Congress
4 at its request details at great length, and was decided --
5 and was issued before Cleburne, the history of State-
6 sponsored intentional, pervasive isolation and segregation
7 and --

8 QUESTION: Unconstitutional. Did they use the
9 words --

10 GENERAL WAXMAN: Yes.

11 QUESTION: -- unconstitutional?

12 GENERAL WAXMAN: Yes. Forced -- yes, it does.
13 Forced sterilization, refusal to allow --

14 QUESTION: What does? What does?

15 GENERAL WAXMAN: The --

16 QUESTION: The congressional findings here?

17 GENERAL WAXMAN: The Civil Rights Commission
18 report uses the word, unconstitutional, but whether it
19 does or not, the practices -- I don't think anybody -- I
20 don't think that Mr. Sutton would conclude that the
21 historical practices -- and I'm not suggesting they
22 persist, but we're talking here about a section 5
23 authority not only to deal with a pervasive current
24 problem, but to remedy the effects of past intentional
25 unconstitutional discrimination.

1 The remedy for past segregation and isolation is
2 integration, and that explains in part why the
3 Disabilities Act admittedly reaches some conduct that a
4 court applying rational basis review would not deem
5 unconstitutional. It's both. It's that --

6 QUESTION: Mr. Waxman, is it really rational
7 basis review? I mean, Cleburne does -- the result seems
8 at odds with the -- with just anything goes, which had
9 been what rational basis meant.

10 I thought that the Cleburne decision was very
11 much like Reed v. Reed in the gender area. That is, the
12 Court purported to apply rational basis, but came to a
13 result that didn't square with any prior rational basis
14 decision.

15 GENERAL WAXMAN: The one thing one can certainly
16 say, whatever words one uses, and Justice Stevens in his
17 concurrence in Cleburne, as I recall it, basically says, I
18 don't really know whether we have three distinct
19 typologies. I consider all of this rational basis review.
20 It just depends on how high the justification is and how
21 great the reason there is to suspect that something
22 unconstitutional may be going on.

23 But it is clear that what Cleburne did was, in
24 looking at the actual administrative bureaucratic
25 decision, as opposed to the legislative choice, require an

1 articulation of the actual reasons in the context of
2 alleged discrimination in this unique historical area.

3 And what Congress did essentially was to
4 generalize what this Court did in *Cleburne*. It took this
5 Court's specific inquiry in *Cleburne* in the light of the
6 Court, many instances in which the majority of this Court
7 has remarked about the history of discrimination in
8 *Choate, Alexander v. Choate* and other cases, and it
9 applied it to what Congress had in front of it, which was
10 on the one hand a body of half-a-dozen or a dozen
11 comprehensive studies detailing a widespread problem and
12 historic unconstitutional practices, and over 5,000
13 narrative accounts that the congressional task force
14 accumulated of individual instances of discrimination
15 against the handicapped, 600 of which addressed State or
16 local governments which for purposes of the Fourteenth
17 Amendment and State action have to be considered as one.

18 QUESTION: What about judicial findings, a
19 question posed to your colleague. One would really have
20 expected, if this was a massive constitutional problem,
21 that there would have been a large number of cases that
22 had found the States guilty of unconstitutional action.

23 GENERAL WAXMAN: May I --

24 QUESTION: Yes.

25 GENERAL WAXMAN: May I answer?

1 QUESTION: Yes.

2 GENERAL WAXMAN: At footnote 11 in our brief we
3 cite some of those decisions but, as this Court recognized
4 in Watson v. Forth Worth Bank & Trust there are many, many
5 instances in which subconscious attitudes and prejudices
6 cannot be proved to a judicial exactitude.

7 Thank you very much.

8 QUESTION: Thank you, General Waxman.

9 Mr. Sutton, you have 5 minutes remaining.

10 REBUTTAL ARGUMENT OF JEFFREY S. SUTTON

11 ON BEHALF OF THE PETITIONERS

12 MR. SUTTON: Three brief points, Your Honor. I
13 certainly hope City of Cleburne applied rational basis,
14 because if it didn't the ADA has many constitutional
15 problems.

16 If the -- if in the area of discrimination
17 against the disabled you apply heightened review, just
18 consider the very problem of defining who is disabled and
19 who is not under the law. You're going to have
20 underinclusiveness and overinclusiveness problems that
21 would never survive heightened review, so let's hope it's
22 rational basis scrutiny. That was the very point of the
23 law.

24 Second, I've not heard anything today from the
25 other side --

1 QUESTION: And how do you explain the results?
2 I mean, one could conceive of many bases that would uphold
3 that zoning provision, and yet the court not only didn't
4 attempt to justify the legislation, but held the
5 legislation to a rather stringent burden of justification.

6 MR. SUTTON: Your Honor, I would disagree
7 respectfully. When a Government lawyer comes before a
8 court, whether at the trial level or this Court, and
9 offers five explanations for a law that they all say are
10 rational, it turns out they're not, they're irrational and
11 driven by animus, they lose.

12 QUESTION: I thought under classic rational
13 basis review the court was not only to listen to the
14 Government's argument, but if there's any basis it could
15 conceive -- and surely there were bases that could be
16 conceived --

17 MR. SUTTON: I --

18 QUESTION: -- that were not driven by animus --

19 MR. SUTTON: To be honest with you, I've
20 never -- I'm not aware that that is the Court's rule, that
21 the Court's job is to conceive of rational basis. I
22 always thought that was the job of the Government lawyer
23 to come before the court -- the inquiry is not exactly
24 what the Government did. It's whether there's any
25 rational explanation after the fact.

1 And, as this Court's decisions prove, there are
2 probably a dozen to two dozen of them. There are some
3 instances where they can't come up with anything, and
4 that's exactly what happened there. Whether it was good
5 lawyering, bad lawyering, the end result, everything they
6 identified was not rational.

7 The second thing, I've not heard anything from
8 the Government or the private respondents in their briefs
9 or today about the second half of the City of Boerne
10 inquiry. There's nothing about proportionality and, as
11 the Court said in *Kimel*, *Florida Prepaid*, and *City of*
12 *Boerne* itself, the issue on proportionality is whether the
13 statutory standard covers, quote, substantially more
14 conduct than would be found unconstitutional. That itself
15 invalidates this law.

16 Now, the question of discrimination, whether it
17 exists at the society or the Government level, I think
18 this Court's decisions from 1985, one of them written, by
19 the way, by Justice Marshall in *Alexander v. Choate*,
20 Justice Marshall says in a 9-0 decision, the main problem
21 with disability discrimination is not one of intent. It's
22 one of either trying too hard, needless paternalism, or
23 not trying hard enough, unintentional neglect. That's the
24 problem.

25 That's an Article I problem, and we're happy the

1 ADA was enacted. The only challenges that have been made
2 to it to our knowledge are in the prison setting, and it's
3 about inmates and, if there's one area where maybe
4 interstate commerce doesn't go, it's to a prison, where
5 the very point of a prison is to keep people out of
6 interstate commerce, so --

7 (Laughter.)

8 MR. SUTTON: And I don't think that's a very
9 good example.

10 Unless there are any other questions --

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sutton.

12 QUESTION: Well, if you have a minute, I would
13 like to go back to equal protection of the law.

14 Equal protection of the law might be violated
15 where a State official has a bad reason for doing
16 something, though he might have a good one. As you point
17 out, a court probably wouldn't catch that violation,
18 because a court has to apply a rational basis test, but
19 that's for institutional reasons, so why should we apply
20 such a test where the institution is Congress?

21 So do you see what I'm -- I'm trying to get --

22 MR. SUTTON: I understand exactly what you're
23 saying, Your Honor.

24 QUESTION: Yes.

25 MR. SUTTON: But to apply the test you're

1 suggesting is one that requires the overruling of City of
2 Boerne. The very point of City of Boerne --

3 QUESTION: City of Boerne, if I find City of
4 Boerne ambiguous on this point, on the point of whether
5 it's going to -- whether a court would find a violation,
6 or whether there is a violation, if I find it ambiguous on
7 that point, can't I pre-crank in my institutional
8 considerations?

9 MR. SUTTON: No, Your Honor. I would suggest
10 that's just the power to use section 5 to redefine
11 section 1, and that is what City of Boerne says, and
12 that's what Kimel says, also a rational basis case. But
13 at the most, Your Honor, if you're going to talk about
14 individual decisions by Government officials, that's why
15 you need a pattern and practice. It's a very big
16 distinction between individual officials doing something
17 and State laws that discriminate invidiously. That's the
18 Voting Rights Act cases, versus City of Boerne, versus
19 Kimel.

20 Thank you, Your Honor.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sutton.
22 The case is submitted.

23 (Whereupon, at 11:03 a.m., the case in the
24 above-entitled matter was submitted.)

25