Nos. 05-2426, 05-2269

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

KATHLEEN BOWERS,

Plaintiff-Appellee

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, TEMPLE UNIVERSITY,

Defendants-Appellees

UNIVERSITY OF IOWA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether the statutory provision abrogating Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq*., is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, as it applies in the context of public education.

INTRODUCTION

1. The United States intervened in three previous consolidated appeals in this case in March and June, 2002. *Bowers* v. *NCAA*, Nos. 01-4226, 01-4492, 02-1789. The United States intervened pursuant to 28 U.S.C. 2403(a)[1] in order to defend the constitutionality of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, and its provision abrogating States' Eleventh Amendment immunity, as well as Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794, and the statutory provision that conditions the receipt of federal funds on a state agency's waiver of its Eleventh Amendment immunity to claims under Section 504. In resolving those appeals, this Court did not reach the immunity issues addressed by the United States, instead remanding the case on different grounds. The case is now back in this Court, and one of the state defendants – the University of Iowa – has reasserted its Eleventh Amendment immunity to plaintiff's claims under Title II and Section 504.

A panel of this Court has already held that a state entity – such as the University of Iowa – that accepts federal financial assistance waives its Eleventh Amendment immunity to claims under Section 504. *Koslow* v. *Pennsylvania*, 302 F.3d 161, 167-176 (3d Cir. 2002), cert. denied, 537 U.S. 1232 (2003); see also

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[1] Section 2403(a) of Title 28 provides that "[i]n any action, suit or proceeding in a court of the United States to which the United States * * * is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court * * * *shall permit the United States to intervene * * * for argument on the question of constitutionality*" (emphasis added).

A.W. v. *Jersey City Pub. Schs.*, 341 F.3d 234, 238-244 (3d Cir. 2003). Although the University of Iowa does not acknowledge this precedent in its briefs, this Court is bound by that decision.

On August 2, 2006, this Court ordered the plaintiff and the University of Iowa to file the following:

> a supplemental letter brief adequately addressing, in the wake of the Supreme Court's decision in *United States* v. *Georgia*, 126 S. Ct. 877 (2006), the following issues: (1) which aspects of the University of Iowa's conduct allegedly violated Title II; (2) whether the University of Iowa's conduct also violated the Fourteenth Amendment; and (3) if the University of Iowa's conduct violated Title II but did not violate the Fourteenth Amendment, whether Congress exceeded its grant of Constitutional authority when it abrogated the States' Eleventh Amendment immunity under Title II of the ADA.

Because the United States intervened in this case to defend the constitutionality of Title II's abrogation, we are submitting this brief addressing the third issue identified by the Court – namely, whether Congress validly abrogated States' Eleventh Amendment immunity to claims under Title II as applied in the context of public education.[2]

2. In 1990, Congress enacted the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, to supplement the requirements of Section 504 and to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Title I of the ADA, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting

[2] Because the United States intervened for a limited purpose, we do not address the first or second issue identified by this Court.

interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This appeal concerns Title II, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) & (B). The term "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; * * * a record of such an impairment; or * * * being regarded as having such an impairment." 42 U.S.C. 12102(2). A "qualified individual with a disability" is a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service. 42 U.S.C. 12131(2); 28 C.F.R. 35.140.[3]

The discrimination prohibited by Title II of the Disabilities Act includes, among other things, denying a government benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is

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

given to others, or limiting his enjoyment of the rights and benefits provided to others. See 28 C.F.R. 35.130(b)(1)(i), (iii), (vii). In addition, a public entity must make reasonable modifications in policies, practices, or procedures if the accommodation is necessary to avoid the exclusion of individuals with disabilities and can be accomplished without imposing an undue financial or administrative burden on the government, or fundamentally altering the nature of the service. See 28 C.F.R. 35.130(b)(7).

Title II may be enforced through private suits against public entities. See 42 U.S.C. 12133, 12203(c). Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. See 42 U.S.C. 12202.

SUMMARY OF ARGUMENT

Congress validly abrogated the University's Eleventh Amendment immunity to plaintiff's claims under Title II of the ADA. Viewed in light of *Tennessee* v. *Lane*, 541 U.S. 509 (2004), Title II is valid Fourteenth Amendment legislation as applied to disability discrimination in public education. In *Lane*, the Court found that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Id.* at 524. That history of unconstitutional discrimination, the Court held, authorized Congress to enact prophylactic legislation to address "public services" generally, see *id*. at 529, including public educational services. In any case, there is ample support for Congress's decision to extend Title II to public schools.

Title II, as it applies to public education, is a congruent and proportionate response to that record. Title II is carefully tailored to respect States' legitimate interests while protecting against the risk of unconstitutional discrimination in education and remedying the lingering legacy of discrimination against people with disabilities in education. Thus, Title II applies in public education to prohibit discrimination based on hidden invidious animus that would be difficult to detect or prove directly. The statute also establishes reasonable uniform standards for treating requests for accommodations in public schools where unfettered discretionary decision-making has, in the past, led to irrational and invidious decisions. Moreover, in integrating students with disabilities among their peers, Title II acts to relieve the ignorance and stereotypes Congress found at the base of much discrimination in education. These limited prophylactic and remedial measures, judged against the backdrop of pervasive unconstitutional discrimination that Congress found both in public education and in other areas of governmental services, represent a good faith effort to make meaningful the guarantees of the Fourteenth Amendment, not an illicit attempt to rewrite them.

ARGUMENT

I

THIS COURT SHOULD NOT REACH THE CONSTITUTIONALITY OF TITLE II UNLESS NECESSARY

This Court should not assess the constitutionality of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, unless it is

necessary to do so. Considering a constitutional challenge to an act of Congress is "the gravest and most delicate duty that [a] Court is called on to perform." *Blodgett* v. *Holden*, 275 U.S. 142, 147-148 (1927) (opinion of Holmes, J.). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable." *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944). Accordingly, a "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988).

Thus, "[p]rior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89, 99 (1981); *Mobile* v. *Bolden*, 446 U.S. 55, 60 (1980). In the instant case, this Court should therefore decide whether the district court properly dismissed the plaintiff's case and whether the district court correctly held that the defendants did not violate Title II before the Court may consider the University of Iowa's contention that Title II is an unconstitutional exercise of Congress's authority under Section 5. The constitutionality of Title II is properly before the court *only* if the challenged conduct in fact violates Title II. Cf. *United States* v. *Georgia*, 126 S. Ct. 877, 882 (2006) (instructing lower courts to "determine in the first instance, on a claim-by-claim basis, * * * which aspects of the State's alleged

conduct violated Title II" before inquiring whether Congress had the authority to enact the implicated statutory prohibition).

In this case, there is no reason for this Court to reach the validity of Title II because plaintiff asserts identical claims under Section 504, which provides the same protection as that provided under Title II, as applied to public entities – such as the University of Iowa – that receive federal financial assistance. This Court has already held that such entities do not enjoy Eleventh Amendment immunity to claims under Section 504 because they waive any such immunity when they accept clearly conditioned federal financial assistance. See *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 537 U.S. 1232 (2003). That holding is binding and is in accord with every other court of appeals, all of which have held that state entities that accept federal funds waive their immunity to private suits under Section 504.[4] Because the state defendant in this case is undeniably subject

[4] The courts of appeals have uniformly held that Section 504, along with 42 U.S.C. 2000d-7, unambiguously conditions receipt of federal funds on a waiver of Eleventh Amendment immunity. See *Barbour* v. *WMATA*, 374 F.3d 1161 (D.C. Cir. 2004), cert. denied, 544 U.S. 904 (2005); *Pace* v. *Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir.), cert. denied, 126 S. Ct. 416 (2005); *Nieves-Marquez* v. *Commonwealth of Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Koslow*, 302 F.3d at 172; *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 536 U.S. 924 (2002); *Nihiser* v. *Ohio EPA*, 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *Jim C.* v. *United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000). Even the Second

(continued...)

to suit under Section 504, and because Section 504 provides plaintiff with identical protection to that afforded under Title II, there is no reason for this Court to consider the University of Iowa's complex constitutional challenge to the validity of Title II's abrogation.

II

TITLE II IS VALID FOURTEENTH AMENDMENT LEGISLATION AS APPLIED IN THE CONTEXT OF PUBLIC EDUCATION

This Court should hold that Congress validly abrogated the University's sovereign immunity to private claims under Title II of the ADA in the education context, as have all three courts of appeals to consider this question to date. See *Toledo* v. *Sanchez*, No. 05-1376, 2006 WL 1846326 (1st Cir. July 6, 2006); *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005); *Association of Disabled Americans* v. *Florida Int'l Univ.*, 405 F.3d 954 (11th Cir. 2005). Although the Eleventh Amendment ordinarily renders States immune from suits in federal court by private citizens, Congress may abrogate States' immunity if it "unequivocally expressed its intent to abrogate that immunity" and "acted pursuant to a valid grant of constitutional authority." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). There is no question that

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[4](...continued)
Circuit, which has concluded that the application of Section 504 to the States was for a time foreclosed because of concerns about notice to the States of their obligations, has not disputed that Section 504 may generally be applied to the States now and in the future, as those concerns have dissipated. See *Garcia* v. *S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98, 113-115 (2001).

Congress unequivocally expressed its intent to abrogate States' sovereign immunity to claims under the Americans with Disabilities Act. See 42 U.S.C. 12202; *Tennessee* v. *Lane*, 541 U.S. 509, 518 (2004). Moreover, it is settled that "Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment." *Lane*, 541 U.S. at 518.

Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power, see *Kimel*, 528 U.S. at 80, that gives Congress the "authority both to remedy and to deter violation of [Fourteenth Amendment] rights * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 727 (2003) (quoting *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001)). Section 5 "is a 'broad power indeed,'" *Lane*, 541 U.S. at 518, empowering Congress not only to remedy past violations of constitutional rights, but also to enact "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," *Hibbs*, 538 U.S. at 727-728. Congress also may prohibit "practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Lane*, 541 U.S. at 520.

Section 5 legislation must, however, demonstrate a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). In

evaluating whether Title II is an appropriate response to past unconstitutional treatment of individuals with disabilities, the Supreme Court in *Lane* declined to address Title II as a whole, upholding it instead as "valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services," 541 U.S. at 531. Title II of the ADA likewise is appropriate Section 5 legislation as applied to public education because it is reasonably designed to remedy past and prevent future unconstitutional treatment of disabled individuals and deprivation of their constitutional rights in the operation of public education systems.

A. In United States v. Georgia, The Supreme Court Instructed That Courts Should Not Judge The Validity Of Title II's Prophylactic Protection In Cases Where That Protection Is Not Implicated

United States v. *Georgia*, 126 S. Ct. 877 (2006), presented the Supreme Court with the question whether Congress validly abrogated States' Eleventh Amendment immunity to claims under Title II of the ADA, as applied in the prison context. However, the Court declined to determine the extent to which Title II's prophylactic protection is valid in that context because the lower courts in *Georgia* had not determined whether the Title II claims in that case could have independently constituted viable constitutional claims or whether the Title II claims relied solely on the statute's prophylactic protection. To the extent any of the plaintiff's Title II claims would independently state a constitutional violation, the Court held, Title II's abrogation of immunity for those claims is valid, and a court need not question whether Title II is congruent and proportional under the test first articulated in *Boerne*. *Georgia*, 126 S. Ct. at 881-882. Because it was

not clear whether the plaintiff in *Georgia* had stated any viable Title II claims that would not independently state constitutional violations, the Court declined to decide whether any prophylactic protection provided by Title II is within Congress's authority under Section 5 of the Fourteenth Amendment. *Ibid.*

In *Georgia*, the Supreme Court included instructions to lower courts for handling Eleventh Amendment immunity challenges in Title II cases, admonishing that lower courts must "determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Georgia*, 126 S. Ct. at 882. Thus, in order to resolve the immunity question in the instant case, this Court must first determine which of plaintiff's allegations state a claim under Title II. This Court must then determine which of plaintiff's valid Title II claims would independently state constitutional claims. And finally, only if plaintiff has alleged valid Title II claims that are not also claims of constitutional violations, this Court should consider whether the prophylactic protection afforded by Title II is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment as applied to "the *class* of conduct" at issue. *Ibid*. (emphasis added).[5]

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[5] Because of the limited nature of our role as intervenor, we do not take a

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B. Under The Boerne Framework, Properly Applied, Title II's Prophylactic Protection Is A Valid Exercise Of Congress's Authority Under Section 5 Of The Fourteenth Amendment

If this Court finds it necessary to decide whether Title II's prophylactic protection is a valid exercise of Congress's Section 5 authority, the third stage of the *Georgia* analysis requires the Court to apply the *Boerne* congruence and proportionality analysis, as that analysis was applied to Title II in *Tennessee* v. *Lane*.

In *Lane*, the Supreme Court considered the claims of two plaintiffs, George Lane and Beverly Jones, "both of whom are paraplegics who use wheelchairs for mobility" and who "claimed that they were denied access to, and the services of, the state court system by reason of their disabilities" in violation of Title II. 541 U.S. at 513. The state defendant in that case argued that Congress lacked the authority to abrogate the State's Eleventh Amendment immunity to these claims, and the Supreme Court in *Lane* disagreed. See *id.* at 533-534.

To reach this conclusion, the Court applied the three-part analysis for Fourteenth Amendment legislation created by *City of Boerne* v. *Flores*. The Court considered: (1) the "constitutional right or rights that Congress sought to enforce when it enacted Title II," *Lane*, 541 U.S. at 522; (2) whether there was a history of unconstitutional disability discrimination to support Congress's determination that

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[5](...continued)
position on whether the plaintiff has stated valid Title II claims or on whether any of those claims would independently state a constitutional violation.

"inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at 529; and (3) "whether Title II is an appropriate response to this history and pattern of unequal treatment," as applied to the class of cases implicating access to judicial services, *id.* at 530.

With respect to the first question, the Court found that Title II enforces rights under the Equal Protection Clause as well as an array of rights subject to heightened constitutional scrutiny under the Due Process Clause of the Fourteenth Amendment. *Lane*, 541 U.S. at 522-523. With respect to the second question, the Court conclusively found a sufficient historical predicate of unconstitutional disability discrimination in the provision of public services to justify enactment of a prophylactic remedy pursuant to Congress's authority under Section 5 of the Fourteenth Amendment. *Id.* at 523-528. And finally, with respect to the third question, the Court found that the congruence and proportionality of the remedies in Title II should be judged on a category-by-category basis in light of the particular constitutional rights at stake in the relevant category of public services.[6] *Id.* at 530-534. Applying the holdings of the Supreme Court's decision in *Lane*,

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[6] The Court in *Lane* did not examine the congruence and proportionality of Title II as a whole because the Court found that the statute was valid Section 5 legislation as applied to the class of cases before it. Because Title II is valid Section 5 legislation as applied to the class of cases implicating public education, this Court need not consider the validity of Title II as a whole. The United States continues to maintain, however, that Title II as a whole is valid Section 5 legislation because it is congruent and proportional to Congress's goal of eliminating discrimination on the basis of disability in the provision of public services – an area that the Supreme Court in *Lane* determined is an "appropriate subject for prophylactic legislation" under Section 5. 541 U.S. at 529.

this Court should conclude that Title II is valid Fourteenth Amendment Legislation as it applies in the context of public education.

In accordance with the teachings of *Lane*, this Court must consider the validity of Title II and its abrogation provision as applied to the entire category of public education rather than merely as applied to the facts of the instant case. Both of the plaintiffs in *Lane* were paraplegics who use wheelchairs for mobility and who were denied physical access to and the services of the state court system because of their disabilities. Plaintiff Lane alleged violations that implicated his rights under the Due Process Clause and the Confrontation Clause – namely, that when he was physically unable to appear to answer criminal charges because the courthouse was inaccessible, he was arrested and jailed for failure to appear. Plaintiff Jones alleged violations that implicated her equal protection rights – namely, that she could not work as a certified court reporter because she could not gain access to a number of county courthouses. 541 U.S. at 513-514.

In analyzing Congress's power to enact Title II, however, the Supreme Court discussed the full range of applications Title II could have in cases implicating the "accessibility of judicial services," *Lane*, 514 U.S. at 531, including applications to criminal defendants, civil litigants, jurors, public spectators and press, and witnesses. *Id*. at 522-523 (discussing constitutional rights at stake in courthouse context); *id.* at 527 (discussing evidence presented to Congress of disability discrimination in the provision of judicial services); see also *id*. at 525 n.14 (considering cases involving the denial of interpretive services to

deaf defendants and the exclusion of blind and hearing impaired persons from jury duty).

Thus, a number of the statutory applications and implicated constitutional rights that the Court found relevant to its analysis in *Lane* were not pressed by the plaintiffs or directly implicated by the facts of their case. For instance, neither Lane nor Jones alleged that he or she was unable to participate in jury service or was subjected to a jury trial that excluded persons with disabilities from jury service. Similarly, neither Lane nor Jones was prevented by disability from participating in any civil litigation, nor did either allege a violation of First Amendment rights.

The facts of their cases also did not implicate Title II's requirement that government, in the administration of justice, provide "aides to assist persons with disabilities in accessing services," such as sign language interpreters or materials in Braille, 541 U.S. at 532, yet the Supreme Court considered the full range of constitutional rights and Title II remedies potentially at issue, framing its analysis in terms of the "*class of cases* implicating the accessibility of judicial services." *Id*. at 531 (emphasis added).

That categorical approach makes sense. In legislating generally, Congress necessarily responds not to the isolated claims of individual litigants, but to broad patterns of unconstitutional conduct by government officials in the substantive areas in which they operate. Indeed, in enacting Title II, Congress specifically found that unconstitutional treatment of individuals with disabilities "persists in

such critical *areas* as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3) (emphasis added).[7]

1. Constitutional Rights At Stake

As discussed in Part 2, *infra*, when Congress enacted the ADA, it had before it evidence of a widespread pattern of exclusion of children with disabilities from public schools and discrimination within schools, much of which reflected irrational stereotypes and hostility toward people with disabilities. Such treatment is subject to rational basis review under the Equal Protection Clause, which prohibits arbitrary treatment based on irrational stereotypes or hostility.

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[7] Nor is it appropriate to limit this Court's consideration of Title II's application to the class of cases involving "higher education" rather than "public education." As the First Circuit recently recognized in *Toledo* v. *Sanchez*, No. 05-1376, 2006 WL 1846326, at *7 (1st Cir. July 6, 2006), the Supreme Court did not define the appropriate category in *Lane* in such a limited way. In choosing to consider the validity of Title II's application to the class of cases implicating access to courts and judicial services, the Court grouped together a range of public services that involve similar types of interests that must be weighed on the sides of both the government and the private individual. For the same reasons, this Court should consider the validity of Title II's applications to the class of cases implicating public education in general. Just as the Supreme Court did not separate civil litigants from criminal defendants, or litigants from jurors and witnesses, this Court should not separate higher education from primary and secondary education. Indeed, in describing various categories of public services to which Title II applies, the Supreme Court itself identified "public education" as one such category, on a par with "the administration of justice" at issue in that case. 541 U.S. at 525. Congress, too, identified education as a whole as an area in which it had identified a problem of disability discrimination. 42 U.S.C. 12101(a)(3). Thus, this Court should follow the Supreme Court and the ADA's statutory findings in considering Title II as it applies to the entire context of public education.

Although classifications relating to education only involve rational basis review under the Equal Protection Clause, public education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982). "Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction." *Ibid*. Indeed, the Court has long recognized that "education is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Beyond the importance of education to the individual, the Court recognized "early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Wisconsin* v. *Yoder*, 406 U.S. 205, 221 (1972).

In the modern age, the importance of access to education extends to the university as well. In considering access to a college education, the Court recently reaffirmed "the overriding importance of preparing students for work and citizenship" and described "education as pivotal to sustaining our political and cultural heritage with a fundamental role in maintaining the fabric of society." *Grutter* v. *Bollinger*, 539 U.S. 306, 331 (2003) (internal quotation marks omitted). "This Court has long recognized that education is the very foundation of good citizenship." *Ibid*. (quoting *Brown*, 347 U.S. at 493) (internal punctuation

omitted). For this reason, the Court explained, "[e]nsuring that public [educational] institutions are open and available to all segments of American society * * * represents a paramount government objective." *Id*. at 331-332.

Of course, a State "may legitimately attempt to limit its expenditures" for public education. *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969). "But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Ibid*. Such invidious distinctions include discrimination against the disabled based on "[m]ere negative attitudes, or fear" alone, *Garrett*, 531 U.S. at 367, for even rational basis scrutiny is not satisfied by irrational fears or stereotypes, see *ibid*., and simple "animosity" towards the disabled is not a legitimate state purpose, see *Romer* v. *Evans*, 517 U.S. 620, 634 (1996). By the same token, a State may not treat individuals with disabilities in a way that simply gives effect to private invidious discrimination. See *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

And while it is generally true that States are not required by the Equal Protection Clause "to make special accommodations for the disabled," this is true only "so long as their actions toward such individuals are rational." *Garrett*, 531 U.S. at 367. Moreover, a purported rational basis for treatment of the disabled will fail if the State does not accord the same treatment to other groups similarly

situated. See *id*. at 366 n.4; *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 447-450 (1985).[8]

The fact that the public education context does not directly implicate a fundamental right does not mean that Title II's prophylactic protection in this context is invalid. The same Section 5 analysis applies regardless of what type of constitutional right Congress seeks to protect or enforce through legislation. Indeed, the Supreme Court did not draw a distinction between the claims of George Lane, which implicated the Sixth Amendment and the Due Process Clause, and the claims of Beverly Jones, which implicated the Equal Protection Clause. Rather, the Court considered all claims potentially implicated by the context before it and applied the long-established *Boerne* analysis in upholding Title II as applied to that context. This Court should also apply the *Boerne* framework, as elucidated in *Lane*, to uphold Title II as applied to the context of public education.

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[8] Discrimination in education can also implicate the Due Process Clause. "[T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause." *Goss* v. *Lopez*, 419 U.S. 565, 574 (1975). Accordingly, suspension and expulsion decisions must be made in accordance with the basic due process requirement of notice and an opportunity to be heard. *Id*. at 579. As made clear in *Lane*, public entities may be required to take steps to ensure that people with disabilities are afforded the same meaningful opportunity to be heard as others. See 541 U.S. at 532-533. In addition, students have a substantive right under the Due Process Clause to be free from government conduct that is "arbitrary in the constitutional sense." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998) (quoting *Collins* v. *Harker Heights*, 503 U.S. 115, 129 (1992)). See, *e.g.*, *Jefferson* v. *Ysleta Indep. Sch. Dist.*, 817 F.2d 303 (5th Cir. 1987) (due process violated when student tied to a chair and not allowed to use the bathroom for most of school day).

2. Historical Predicate Of Unconstitutional Disability Discrimination In Public Services

"Whether Title II validly enforces these constitutional rights is a question that 'must be judged with reference to the historical experience which it reflects.'" *Lane*, 541 U.S. at 524. Accordingly, in *Lane*, the Court reviewed the evidence and concluded that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Ibid.* The Court remarked on the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," *id*. at 528, and concluded that it is "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at 529.

a. Lane Conclusively Established The Adequacy Of The Predicate For Title II's Application To Discrimination In All Public Services

Although *Lane* ultimately upheld Title II as valid Fourteenth Amendment legislation only as applied to access to courts, its conclusions regarding the historical predicate for Title II are not limited to that context. The Supreme Court did not begin its "as-applied" analysis until it reached the third step of the *Boerne* analysis addressing the Act's congruence and proportionality. See 541 U.S. at 530-531. At the second step, the Court considered the record supporting Title II in all its applications and found the record included not only "a pattern of

unconstitutional treatment in the administration of justice," *id*. at 525, but also violations of constitutional rights in the context of voting, jury service, the penal system, public education, and law enforcement, *id.* at 524-525.[9] That record, the Court concluded, supported prophylactic legislation to address discrimination in "public services," *id*. at 529, including discrimination in "education," *ibid*. See also *id*. at 525 (finding a "pattern of unequal treatment in the administration of a wide range of public services * * * including * * * public education"). Thus, the adequacy of Title II's historical predicate to support prophylactic legislation is no longer open to dispute. See *Constantine*, 411 F.3d at 478 ("After *Lane*, it is settled that Title II was enacted in response to a pattern of unconstitutional disability discrimination by States and nonstate government entities with respect to the provision of public services. This conclusion is sufficient to satisfy the historical inquiry into the harms sought to be addressed by Title II."); *Association for Disabled Americans*, 405 F.3d at 958 ("Under its analysis of [the second *Boerne*] prong, the Supreme Court [in *Lane*] considered the record supporting Title II *as a*

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[9] In describing the adequacy of the historical predicate, the Court also spoke in general terms, remarking, for instance, on "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of *public services*." 541 U.S. at 528 (emphasis added). In concluding that the "the record of constitutional violations in this case * * * far exceeds the record in *Hibbs*," *id*. at 529, the Court specifically referred to the record of "exclusion of persons with disabilities from the enjoyment of *public services*," *ibid*. (emphasis added), rather than to the record of exclusion from judicial services in particular. See also *ibid.* (relying on congressional finding in 42 U.S.C. 12101(a)(3) and italicizing phrase "access to public services" rather than specific examples of public services listed in the finding).

whole, and conclusively held that Congress had documented a sufficient historical predicate of unconstitutional disability discrimination in the provision of public services to justify enactment of a prophylactic remedy pursuant to Congress's authority under Section 5 of the Fourteenth Amendment."). But even if it were, there is ample evidence of a history of unconstitutional discrimination against individuals with disabilities in the context of public education.

b. History Of Disability Discrimination In Public Education

Children with mental disabilities were labeled "ineducable" and categorically excluded from public schools to "protect nonretarded children from them." *City of Cleburne*, 473 U.S. at 463 (Marshall, J., concurring in the judgment in part); see also *Board of Educ.* v. *Rowley*, 458 U.S. 176, 191 (1982) ("many of these children were excluded completely from any form of public education"). Even in the relatively recent past, many States permitted school administrators to exclude from school children who, in their opinion, "would not benefit" from education.[10] In 1965, North Carolina criminalized any subsequent attempt by parents to send their excluded child to school. See Act of May 18, 1965, ch. 584, 1965 N.C. Sess. Laws. 643. Some States also required school officials and parents

[10] See Philip T.K. Daniel, *Educating Students with Disabilities in the Least Restrictive Environment: A Slippery Slope for Educators*, 35 J. of Educ. and Admin. 397, 398 (1997).

to report disabled children for institutionalization[11] or enrollment in special segregated schools.[12]

When Congress studied disability discrimination in education in the mid-1970s, it found continuing wholesale exclusion of disabled students from the public schools. Congress's findings, which led to passage of the Education of the Handicapped Act of 1975 (EHA), 20 U.S.C. 1400 *et seq.*, were later described by the Supreme Court:

> When the [EHA] was passed in 1975, Congress had before it ample evidence that such legislative assurances were sorely needed: 21 years after this Court declared education to be "perhaps the most important function of state and local governments," congressional studies revealed that better than half of the Nation's 8 million disabled children were not receiving appropriate educational services. Indeed, one out of every eight of these children was excluded from the public school altogether; many others were simply "warehoused" in special classes or were neglectfully shepherded through the system until they were old enough to drop out.

Honig v. *Doe*, 484 U.S. 305, 309 (1988) (citations omitted). Thus, the legislative findings of the EHA described that as late as 1975, and despite prior federal

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[11] See *e.g.*, Act of Mar. 3, 1921, ch. 235, 1921 S.D. Sess. Laws 344; Act of Feb. 21, 1917, ch. 354, §5, 1917 Or. Laws 740; Act of June 21, 1906, ch. 508, §12, 1906 Mass. Acts & Resolves 707.

[12] See, *e.g.*, Ala. Code § 21-1-10 (1975); Iowa Code Ann. § 299.18 (1983); Ohio Rev. Code Ann. § 3325.02 (2002); Okla. Stat. Ann. tit. 70, § 1744 (West 1990); see also Tex. Code Ann. § 3260 (West 1990) (establishing "State Hospital for Crippled and Deformed Children"); Mont. Code Ann. §§ 38-801, 38-802 (1961) (establishing a school "for the education, training and detention of subnormal minors and adults and epileptics" who "from social standards, are a menace to society").

efforts, "millions of children with disabilities" in the United States "were excluded entirely from the public school system." 20 U.S.C. 1400(c)(2)(C).

A decade later, during investigations which led to the passage of the ADA, Congress found that "discrimination against individuals with disabilities persists in such critical areas as * * * education," 42 U.S.C. 12101(a)(3), and that, as a result, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally," 42 U.S.C. 12101(a)(6).

Those statutory findings were amply supported by evidence not only of widespread exclusion of disabled students from education altogether, but also repeated examples of irrational and invidious discrimination against those students allowed to attend school.

i. Record Of Exclusion From Education

Congress was presented with substantial evidence that even years after the passage of the EHA, tens of thousands of disabled children were still being excluded from the public schools. See U.S. Civil Rights Comm'n, *Accomodating the Spectrum of Individual Abilities* 28 n.77 (1983) (*Spectrum*). Extensive surveys further revealed a dramatic educational gap between individuals with disabilities and the community at large. Forty percent of persons with disabilities did not finish high school (triple the rate for the general population), and only 29% had any college education (compared with 48% for the population at large). National Council on the Handicapped, *On the Threshold of Independence* 14 (1988)

(*Threshold*).[13] This lack of educational attainment contributed to an "alarming rate of poverty"[14] and a "Great Divide" in employment[15] for persons with disabilities. *Ibid*. Congress was also given first-hand accounts illustrating these statistics, through testimony that often made clear the invidious basis of the exclusionary practices. For example, one witness testified that "[w]hen I was 5, my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard." S. Rep. No. 116, 101st Cong., 1st Sess. 7 (1989). Another person recounted that a state university declined to admit him to a graduate program, explaining that "we have had disabled persons in this department before; it never worked out well." WI 1757.[16] Indeed, the record is replete with examples of discriminatory

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[13] See also *Hearing on the Commission on Education of the Deaf and Special Education Programs: Hearing Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 3 (1988) (statement of Rep. Bartlett) ("Seventy percent of hearing impaired high school graduates cannot attend a post-secondary educational institution because their reading levels are still at a second or third grade level.").

[14] Twenty percent of persons with disabilities had family incomes below the poverty line (more than twice the percentage of the general population), and 15% of disabled persons had incomes of $15,000 or less. *Threshold* 13-14.

[15] Two-thirds of all working-age persons with disabilities were unemployed; only one in four worked full-time. *Threshold* 14.

[16] In *Lane*, the Court relied on the handwritten letters and commentaries collected during the Task Force's forums, which were part of the official legislative history of the ADA, lodged with the Court in *Garrett*, 531 U.S. 356, and catalogued in Appendix C to Justice Breyer's dissent in that case. See *Lane*, 541 U.S. at 526. That Appendix cites to the documents by State and Bates stamp

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exclusion of disabled students from schools under circumstances that Congress could reasonably conclude often demonstrate invidious animus.[17]

This pattern of exclusion is also documented in numerous state and federal cases. For example, in *Lane*, the Supreme Court specifically noted two cases in which students with AIDS were excluded from the public schools. See 541 U.S. at 525 n.12. In one, a seven-year-old student with AIDS was confined to a modular classroom where he was the only student. See *Robertson* v. *Granite City Cmty.*

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[16](...continued)
number, 531 U.S. at 389-424, a practice we follow in this brief.

[17] See UT 1556 (child denied admission to public school because first grade teacher refused to teach him); AL 08 (child with cerebral palsy denied admission to school); UT 1587 (third grade teacher refused to give student with disability any grades, writing on the report card, "[t]his child does not belong in public schools, he is a waste of tax payers[']money"); MS 999 (state university instructor refused to teach blind person); MI 920 (student denied admission to medical school because of speech impediment); NC 1144 (mentally handicapped student with no behavior problems denied admission to after-school program because "their policy was not to keep handicapped" kids); see also PA 1432 (a child who uses wheelchair, unable to enroll in first grade because the class was held in inaccessible classroom; school system proposed, instead, to enroll him in self-contained special education classes held in accessible room, even though the child had no mental impairment); *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 384 (1973) (EHA Senate Hearings) (Statement of Peter Hickey) (student in Vermont was forced to attend classes with students two years behind him because he could not climb staircase to attend classes with his peers); *Commission on the Education of the Deaf's Report to Congress: Hearing Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 100th Cong., 2d Sess. 15 (1988) (testimony of Gertrude S. Galloway, Chairperson, Precollege Programs Committee) ("[W]e found that many deaf children are receiving inappropriate education or no education at all, that very same problem that promoted passage of the EHA in the first place.").

Unit Sch. Dist. No. 9, 684 F. Supp. 1002 (S.D. Ill. 1988). In another, a kindergarten student with AIDS was excluded from class and forced to take home tutoring. See *Thomas* v. *Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1986). Congress was specifically aware of cases like these. See, *e.g.*, 136 Cong. Rec. 2480 (May 17, 1990) (Statement of Rep. McDermott) (discussing case of Ryan White, who had AIDS and was excluded from school not because the school board "thought Ryan would infect the others" but because "some parents were afraid he would"). There are many other similar cases as well.[18] Moreover, the examples in the case law of discriminatory exclusion are not limited to cases involving children with HIV or AIDS.[19]

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[18] See *Martinez* v. *School Bd.*, 861 F.2d 1502 (11th Cir. 1988) (child with HIV excluded from school); *Chalk* v. *United States Dist. Ct. Cent. Dist.*, 840 F.2d 701 (9th Cir. 1988) (certified teacher barred from teaching after diagnosis of AIDS); *Doe* v. *Dolton Elem. Sch. Dist. No. 148*, 694 F. Supp. 440 (N.D. Ill. 1988) (elementary student with AIDS excluded from attending regular classes or extracurricular activities); *District 27 Cmty. Sch. Bd.* v. *Board of Educ.*, 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986) (two school boards sought to prevent attendance of any student with AIDS in any school in the city, unless all of the students at that school had AIDS); *Board of Educ.* v. *Cooperman*, 507 A.2d 253, 277 (N.J. Super. Ct. App. Div. 1986) (children with AIDS were excluded from regular classroom attendance), aff'd as modified, 523 A.2d 655 (N.J. Super. Ct. 1987); *Ray* v. *School Dist.*, 666 F. Supp. 1524, 1528 (M.D. Fla. 1987) (children with HIV excluded from school, despite health officials' certification that children could safely attend school); *Doe* v. *Belleville Pub. Sch. Dist. No. 118*, 672 F. Supp. 342 (S.D. Ill. 1987) (child with HIV excluded from school).

[19] See, *e.g.*, *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, 466 F. Supp. 487 (E.D.N.Y. 1979) (mentally retarded students excluded from public school system); *Hairston* v. *Drosick*, 423 F. Supp. 180 (S.D. W. Va. 1976) (school refused to admit child with spina bifida without the daily presence of her mother, even though student was of normal mental competence and capable of performing

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ii. Record Of Discriminatory Treatment Within Schools

Even when students with disabilities were permitted to attend school, students faced treatment that Congress could reasonably conclude represented discrimination based on invidious stereotypes or hostility toward people with disabilities. For example, Congress heard of a student with spina bifida who was barred from the school library for two years "because her braces and crutches made too much noise." *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 400 (1973) (EHA Senate Hearings) (Statement of Mrs. Richard Walbridge). Another student testified that at her "graduation from high school, the principal attempted to prevent me from accepting an award in a ceremony on stage simply because I was in a wheelchair." S. Rep. No. 116, *supra*, at 7. Many other examples show actions based on the

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[19](...continued)
easily in a classroom situation); *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (mentally retarded students excluded from public school system); *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) (mentally retarded students excluded from public school system); *Harrison* v. *Michigan*, 350 F. Supp. 846, 847 (E.D. Mich. 1972) ("Until very recently the State of Michigan was making little effort to educate children who are suffering from a variety of mental, behavioral, physical and emotional handicaps. Many children were denied education."); see also Frederick J. Weintraub & Alan R. Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 Syracuse L. Rev. 1037, 1042 (1972) (autistic child excluded from public schools); *ibid*. (disabled student with low IQ but able to read and do basic math excluded from school as "unable to profit from school attendance"); *id*. at 1043 (child with petit mal epilepsy, controlled through medication, refused admission to public school).

continued assumption that children with disabilities were unworthy of, or unable to benefit from, an education. Thus, one witness told Congress that "I was considered too crippled to compete by both the school and my parents. In fact, the [segregated] school never even took the time to teach me to write! * * * The effects of the school's failure to teach me are still evident today." 2 *Staff of the House Comm. on Education and Labor*, 101st Cong., 2d Sess., *Legislative History of Public Law 101-336: The Americans with Disabilities Act* 989 (Comm. Print 1990) (*Leg. Hist*.) (Mary Ella Linden). In another case, a witness with a hearing impairment described how her teacher had pointed her out in class as example of the difference between children with disabilities and others. NM 1090. When other children were told to put on their "thinking-caps," the witness recalled, "they would demonstrate – putting a cap on their head. I was never allowed to put on a thinking-cap because I was the handicap kid." *Ibid*. The record also contains numerous examples of children with physical impairments being placed in special education classes with mentally-impaired students for no apparent reason other than the assumption that any disability precludes receiving an education in a normal environment.[20]

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[20] See, *e.g.*, Office of the Att'y Gen., Cal. Dep't of Justice, *Attorney General's Commission on Disability: Final Report* 17, 81 (1989) ("A bright child with cerebral palsy is assigned to a class with mentally retarded and other developmentally disabled children solely because of her physical disability"; in one town, all children with disabilities are grouped into a single classroom regardless of individual ability); VT 1635-1636 (quadriplegic woman with cerebral palsy and a high intellect, who scored well in school, was branded "retarded" by educators, denied placement in a regular school setting, and placed with emotionally disturbed children, where she was told she was "not college material"); NE 1031 (school

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Similar incidents illustrating irrational stereotypes and intolerance occurred at the university level. One witness recalled that, "when I was first injured, my college refused to readmit me" because "it would be 'disgusting' to my roommates to have to live with a woman with a disability." WA 1733.[21] A student with epilepsy was asked to leave a state college because her seizures were "disrupt[ive]" and, officials said, created a risk of liability. 2 *Leg. Hist.* 1162 (Statement of Barbara Waters). A doctor with multiple sclerosis was denied admission to a psychiatric residency program because the state admissions committee "feared the negative reactions of patients to his disability." *Id*. at 1617 (Statement of Arlene Mayerson). Similarly, a student with facial paralysis was denied a teaching assignment based solely on her appearance. OR 1384. A state university forced a blind student to drop music class because "you can't see." 2 *Leg. Hist.* 1224 (Statement of Denise Karuth). Conversely, in another case, a blind student was discouraged from pursuing a degree in her chosen field of personnel management and urged to pursue a degree in music instead. See MO 1010. Congress also heard that a state commission refused to sponsor a blind

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[20](...continued)
districts labeled as mentally retarded a blind child); AK 38 (school district labeled child with cerebral palsy, who subsequently obtained a Masters Degree, as mentally retarded).

[21] Compare *State* v. *Board of Educ.*, 172 N.W. 153, 153 (Wis. 1919) (excluding a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children").

student for a masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors, '[s]ince,' and this is a quote: 'they could not drive to see their clients.'" 2 *Leg. Hist*. 1225. A different state university denied a blind student a chance to student teach, as required to obtain a teaching certificate, because the dean of the school was "convinced that blind people could not teach in public schools." SD 1476. See also J. Shapiro, *No Pity* 45 (1993) (Dean of the University of California at Berkeley told a prospective student that "[w]e've tried cripples before and it didn't work"); MO 1010 (college instructor told blind student she did not think she could teach the student).

iii. Record Of Educational Segregation

Congress was told that "some school systems have unnecessarily isolated and segregated handicapped children, often in separate schools and facilities." *Spectrum* 29. While it is possible that some such instances of segregation were entirely rational, Congress was justified in concluding that segregation of disabled students often arises from invidious animus. In a recent report to Congress, the National Council on Disability explained that it has found that

> [t]he asserted reasons for segregating children with disabilities in educational settings – that a wheelchair is a fire hazard, that a child's IQ renders her uneducable, and the like – do not reveal the true basis for excluding them. The true basis is the expectation that the children will become dependent adults, unable to contribute to society. This view makes their childhood education seem futile – they will be dependent no matter how good their education. Compounded by widespread discrimination, inaccessible buildings, inaccessible transportation, and lack of adequate support services, these stereotypes were the reason for severely restricted options available to

> children and adults with disabilities and promoted segregated and inferior education.

National Council on Disability, *Back to School on Civil Rights: Advancing the Federal Commitment to Leave No Child Behind* 27 (2000).

These observations were borne out in cases documenting segregation of disabled children from their classmates for no apparent rational reason.[22] Congress was also told that "a great many handicapped children" are denied "recreational, athletic, and extracurricular activities provided for non-handicapped students." *Spectrum* 29.[23]

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[22] See, *e.g.*, *Hairston*, 423 F. Supp. at 182 (child with spina bifida, who was "of normal mental competence" and "clearly physically able to attend school in a regular public classroom" excluded from local public school because she "was not wanted in the regular classroom"); *Roncker* v. *Walter*, 700 F.2d 1058 (6th Cir.) (mentally retarded children excluded from all contact with nondisabled children), cert. denied, 464 U.S. 864 (1983); *Daniel R.R.* v. *State Bd. of Educ.*, 874 F.2d 1036, 1050 (5th Cir. 1989) (same); *Greer* v. *Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991) (same); *Wilson* v. *Marana Unified Sch. Dist. No. 6*, 735 F.2d 1178 (9th Cir. 1984) (student with cerebral palsy sent to segregated school); *Johnston* v. *Ann Arbor Pub. Sch.*, 569 F. Supp. 1502, 1505-1506 (E.D. Mich. 1983) (student with cerebral palsy sent to segregated school).

[23] See also TX 1480-1481 (student in wheelchair excluded from all activities in physical education class, even activities she could easily perform, like throwing a frisbee); MO 1014 (high school students with mental disabilities not allowed to attend gym class with other students); OR 1375 (child with cerebral palsy was "given cleaning jobs while other[] [non-disabled students] played sports"); VA 1642 (high school student with learning disability labeled "retarded" and forbidden from attending regular community school or taking a drama class, although student already performed in community youth theater); *Baird* v. *Rose*, 192 F.3d 462 (4th Cir. 1999) (seventh-grader suffering from clinical depression prohibited from singing in school choir).

iv. Record Of Physical Mistreatment

The record further documents instances of physical mistreatment of students with disabilities. For example, Congress heard the story of a first grade student who "was spanked every day" because her deafness prevented her from following spoken instructions. EHA Senate Hearings 793 (Statement of Christine Griffith). The Task Force was given a newspaper article describing how three elementary schools locked mentally disabled children in a box for punishment. See NY 1123.

c. Gravity Of Harm Of Disability Discrimination In Public Education

The appropriateness of Section 5 legislation, however, is not purely a product of the history of discrimination. It is also a function of the "gravity of the harm [the law] seeks to prevent." *Lane*, 541 U.S. at 523. Even when discrimination in education does not abridge a fundamental right, the gravity of the harm is enormous. See, *e.g.*, *Brown*, 347 U.S. at 493.

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

For both good and ill, "the law can be a teacher." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). As with race discrimination, few governmental messages more profoundly affect individuals and their communities than segregation in education:

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

MO 1007 (Pat Jones). Indeed, discrimination in *public* schools is particularly harmful because "[p]ublic education must prepare pupils for citizenship in the Republic" and must teach "the shared values of a civilized social order." *Bethel Sch. Dist.* v. *Fraser*, 478 U.S. 675, 681, 683 (1986). Combating discrimination in education thus prevents the grave harm to constitutional interests that arises from governmental action that creates a substantial risk of relegating a class of individuals to society's sidelines – unable to participate meaningfully in public or civic life.

Accordingly, the evidence set forth above was more than adequate to support comprehensive prophylactic and remedial legislation, particularly compared to the record found sufficient in *Hibbs* and *Lane*.[24]

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[24] As in *Lane*, "the record of constitutional violations in this case * * * far exceeds the record in *Hibbs*." *Lane*, 541 U.S. at 529. See also *id*. at 528 (noting *Hibbs* record contained "little" evidence of "unconstitutional state conduct"); *id*. at

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3. As Applied To Discrimination In Education, Title II Is Congruent And Proportional To The Constitutional Rights At Issue And The History Of Discrimination

"The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment." *Lane*, 541 U.S. at 530. In deciding that question, the Supreme Court in *Lane* declined to "examine the broad range of Title II's applications all at once, and to treat that breadth as a mark of the law's invalidity." *Ibid*. Instead, the Court concluded that the only question before it was "whether Congress had the power under § 5 to enforce the constitutional right of access to the courts." *Id*. at 531. The question before this Court, then, is whether Title II is congruent and proportionate legislation as applied to the class of cases implicating access to education. See *ibid*. All three courts of appeals to have considered this question to date have answered that question in the affirmative.

A statutory remedy is valid under Section 5 where it is "congruent and proportional to its object of enforcing the right[s]" protected by the statute in the relevant context. *Lane*, 541 U.S. at 531. As applied to education, Title II is a

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[24](...continued)
528 n.17. And the record in the context of education far exceeds the record of unconstitutional treatment in judicial services. See *Id.* at 525 nn. 9 & 14, 527. The Supreme Court relied on precisely the same sources and types of information in reaching its conclusions in *Lane*. See, *e.g.*, *id*. at 524 nn.7-14 (relying on statutes and cases post-dating enactment of ADA); *id*. at 527 (Task Force testimony and Breyer appendix in *Garrett*); *id*. at 527 n.16 (conduct of local governments); *id*. at 528 n.17 (noting *Hibbs* relied on legislative history to predecessor statute); *id*. at 529 (congressional finding of persisting "discrimination" in public services).

congruent and proportional means of preventing and remedying the unconstitutional discrimination that Congress found exists both in education and in other areas of governmental services, many of which implicate fundamental rights.

As was true in *Lane* with respect to cases implicating access to courts and judicial services, "Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility is congruent and proportional to its object of enforcing" the rights of disabled persons seeking access to public schools. 541 U.S. at 531. Further, like *Lane*, the "unequal treatment of disabled persons in the administration of" education has a "long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination." *Ibid*.[25] "Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in

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[25] See, *e.g.*, Elementary and Secondary Education Amendments Act of 1965, Pub. L. No. 89-10, 79 Stat. 27; Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191; Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355; Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484; Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773; Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199, 97 Stat. 1357; Carl D. Perkins Vocational Education Act of 1984, Pub. L. No. 98-524, 98 Stat. 2435; Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796; Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, 100 Stat. 1145; Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* See also *Honig* v. *Doe*, 484 U.S. 305, 310 n.1 (1988) ("Congress' earlier efforts to ensure that disabled students received adequate public education had failed in part because the measures it adopted were largely hortatory.").

concluding that this 'difficult and intractable proble[m]' warranted 'added prophylactic measures in response.'" *Ibid* (quoting *Hibbs*, 538 U.S. at 737).

"The remedy Congress chose is * * * a limited one." *Lane*, 541 U.S. at 531. The Title prohibits only discrimination "by reason of * * * disability," 42 U.S.C. 12132, so that the States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all. Even though it requires States to take some affirmative steps to avoid discrimination, it "does not require States to compromise their essential eligibility criteria," requires only "'reasonable modifications' that would not fundamentally alter the nature of the service provided," and does not require States to "undertake measures that would impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service." *Lane*, 541 U.S. at 532.

With respect to physical access to facilities, Congress required only "reasonable measures to remove architectural and other barriers to accessibility." *Lane*, 541 U.S. at 531. Having found that facilities may be made accessible at little additional cost at the time of construction,[26] Congress imposed reasonable architectural standards for new construction and alterations. See 28 C.F.R. 35.151. At the same time,

[26] See GAO, Briefing Reports on Costs of Accommodations, *Americans with Disabilities Act: Hearing Before the House Comm. on Small Business*, 101st Cong., 2d Sess. 190 (1990); see also, *e.g.*, S. Rep. No. 116, *supra*, at 10-12, 89, 92; H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 34 (1990).

> in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services. § 35.150(b)(1). Only if these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes. *Ibid*. And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service. §§ 35.150(a)(2), (a)(3).

Lane, 541 U.S. 532.

As applied to discrimination in education, these requirements serve a number of important and valid prophylactic and remedial functions.

In public education, Title II often applies directly to prohibit unconstitutional discrimination against the disabled, *i.e.*, discrimination which is based on irrational stereotypes about, or animosity toward, people with disabilities. Indeed, education is an area where discrimination against the disabled will not infrequently fail rational basis review. For example, Title II enforces the Equal Protection requirement of rationality when it applies to prohibit inflicting corporal punishment against a deaf student for failure to follow spoken instructions,[27] or denying a disabled student admission to a public college because "it would be 'disgusting' to [her] roommates to have to live with a woman with a

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[27] See *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Public Welfare*, 93d Cong., 1st Sess. 384, 793 (1973) (Statement of Christine Griffith) (first-grade student "was spanked every day" because her deafness prevented her from following instructions).

disability." WA 1733. Title II further enforces the constitutional protection against state action based on irrational stereotypes, such as denying admission to state universities or training programs based on the assumption that blind people cannot teach in public schools, SD 1476, be competent rehabilitation counselors, 2 *Leg. Hist.* 1225, or succeed in a music course, *id*. at 1224.

Moreover, given the history of unconstitutional treatment of students with disabilities, Congress was entitled to conclude that there exists a real risk that some state officials may continue to make decisions about how students with disabilities should be treated based on invidious class-based stereotypes or animus that would be difficult to detect or prove. See 42 U.S.C. 12101(a)(7) (congressional finding that individuals with disabilities "have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society"). In such a situation, the risk of unconstitutional treatment is sufficient to warrant Title II's prophylactic response. See *Hibbs*, 538 U.S. at 722-723, 735-737 (remedy of requiring "across-the-board" provision of family leave congruent and proportional to problem of employers relying on gender-based stereotypes).

Title II's prophylactic remedy acts to detect and prevent difficult-to-uncover discrimination against disabled students that could otherwise evade judicial

remedy. By proscribing governmental conduct the discriminatory effects of which cannot be or have not been adequately justified, Title II prevents covert intentional discrimination against disabled students and provides strong remedies for the lingering effects of past unconstitutional treatment against the disabled in the education context. See *Lane*, 541 U.S. at 520 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not intent, to carry out the basic objectives of the Equal Protection Clause."). Further, by prohibiting insubstantial reasons for denying accommodations to the disabled, Title II prevents invidious discrimination and unconstitutional treatment in the day-to-day actions of state officials exercising discretionary powers over disabled students. See *Hibbs*, 538 U.S. at 736 (Congress justified in concluding that perceptions based on stereotypes "lead to subtle discrimination that may be difficult to detect on a case-by-case basis"). Moreover, in requiring reasonable steps to permit physical access to existing school buildings and to design new school buildings with the needs of individuals with disabilities in mind, Title II responds to the lingering effects of a long history of exclusion of people with disabilities from schools.

As has long been recognized in the areas of race and gender discrimination,[28] eliminating discrimination and segregation in education is critical

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[28] See, *e.g.*, *Brown*, 347 U.S. at 493, *Mississippi Univ. For Women* v.

(continued...)

to remedy and prevent discrimination in access to public services and public life generally. "A proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) (punctuation omitted). As the Supreme Court's cases upholding congressional bans on literacy tests as proper remedial and prophylactic legislation recognize, discrimination and segregation in education have enduring effects that reach beyond the educational context and affect individuals' ability to exercise and enjoy the most basic rights and responsibilities of citizenship, including voting, access to public officials, and equal opportunities to participate in public programs and services. Title II's application to education is thus congruent and proportional because a simple ban on discrimination would have frozen in place the effects of States' prior official exclusion and isolation of individuals with disabilities, which had the effect of rendering the disabled invisible to government officials and planners, thereby creating a self-perpetuating spiral of segregation, stigma, and neglect. See *Gaston County* v. *United States*, 395 U.S. 285, 289-290 (1969) (constitutionally administered literacy test banned because it perpetuates the effects of past discrimination).[29]

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[28](...continued)
Hogan, 458 U.S. 718, 729-730 (1982).

[29] See also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112

(continued...)

By reducing stereotypes and misconceptions, integration in education also reduces the likelihood that constitutional violations in other areas implicating fundamental rights will recur. Cf. *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999) (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life"). For instance, requiring physical accessibility of schools serves the broader purpose of protecting access to other government services that are often conducted in schools. Congress could reasonably determine that making school buildings reasonably accessible would have the prophylactic effect of avoiding unconstitutional denials of the right to vote, participate in government board meetings, or gain access to other government services implicating fundamental rights, when these activities take place in local schools.

Further, the exclusion of individuals with disabilities from public education was a critical component of the historic eugenics movement, which sought to eliminate and completely exclude individuals with disabilities from public life through systematic, government-endorsed programs of forced institutionalization and sterilization. Indeed, Congress and the Supreme Court have long acknowledged the Nation's "history of unfair and often grotesque mistreatment" of persons with disabilities. *Cleburne*, 473 U.S. at 454 (Stevens, J., concurring); see also *Olmstead*, 527 U.S. at 608 (Kennedy, J., concurring) ("[O]f course,

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[29](...continued)
(1970).

persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility."); *Cleburne*, 473 U.S. at 446 ("Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious."); *Alexander* v. *Choate*, 469 U.S. 287, 296 n.12 (1985) ("well-cataloged instances of invidious discrimination against the handicapped do exist"). From the 1920s to the 1960s, the eugenics movement labeled persons with mental and physical disabilities as "sub-human creatures" and "waste products" responsible for poverty and crime. *Spectrum* 20. Every single State, by law, provided for the segregation of persons with mental disabilities and, frequently, epilepsy. A critical component of that program of official segregation and isolation was the exclusion of the disabled from public schools, as well as from other state services and privileges of citizenship. Children with mental disabilities "were excluded completely from any form of public education." *Rowley*, 458 U.S. at 191; see also *State* v. *Board of Educ. of Antigo*, 172 N.W. 153, 153 (Wis. 1919) (approving exclusion of a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children") (noted at 2 *Leg. Hist.* 2243); see generally T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temple L. Rev. 393, 399-407 (1991).

Title II's application to education thus targets a constitutional problem that is greater than the sum of its parts. Comprehensively protecting the rights of individuals with disabilities in the educational context directly remedies and

prospectively prevents the persistent imposition of inequalities on a single class, *Lane*, 541 U.S. at 522-529, and the chronic distribution of benefits and services, whether through legislation or executive action, in a way that "impos[es] special disabilities upon groups disfavored by virtue of circumstances beyond their control." *Plyler*, 457 U.S. at 216 n.14. Title II's application to education thus combats and overcomes a historic and enduring problem of broad-based unconstitutional treatment of the disabled, including programmatic exclusions from public life and education that sought to accomplish the very "kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish," *ibid.*

CONCLUSION

The Eleventh Amendment is no bar to plaintiff's claims under Title II of the Americans with Disabilities Act.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the brief complies with the type-volume limitations set out in Fed. R. App. P. 32(a)(7)(B). The brief is proportionately spaced, has a typeface of 14 points, was prepared using WordPerfect 9.0, and contains 12,220 words.

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