IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Intervenor-Appellant

MICHEAL LEE SPENCER, SR.,

Plaintiff-Appellant

v.

MARK L. EARLEY; COMMONWEALTH OF VIRGINIA, DEPARTMENT OF CORRECTIONS; BRUNSWICK CORRECTIONAL CENTER; OFFICE OF HEALTH SERVICES; ERIC M. MADSEN; RONALD J. ANGELONE; GENE M. JOHNSON,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CONSTITUTION AND STATUTES:

IN THE UNITED STATES COURT OF APPEALS
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Nos. 07-6248, 07-6418, 07-6460

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ARGUMENT

I. THIS COURT SHOULD AVOID DECIDING A NEW CONSTITUTIONAL QUESTION

A. This Court Has A Duty To Avoid Deciding A Constitutional Question Unnecessarily

This Court may avoid ruling on the constitutionality of Title II of the ADA, as applied in the prison context, by ordering the district court to reinstate the plaintiff's claims under Section 504 of the Rehabilitation Act. (See U.S. Br. 11-

15). Those claims should not have been dismissed in light of the liberal pleading standards applied to pro se complaints.[1] See U.S. Br. 11-13; *Erickson* v. *Pardus*, 127 S. Ct. 2197, 2200 (2007). As this Court has held, Title II and Section 504 "generally are construed to impose the same requirements due to the similarity of the language of the two acts." *Baird* v. *Rose*, 192 F.3d 462, 468 (4th Cir. 1999). Thus, Spencer is entitled to the same relief under Section 504 as he is under Title II.

Moreover, as discussed *infra*, notwithstanding Virginia's lengthy assertions to the contrary, this Court has already held that state agencies that accept federal financial assistance validly waive their Eleventh Amendment immunity to claims under Section 504. *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 496 (4th Cir. 2005) (holding that the Virginia defendant "waived whatever Eleventh Amendment immunity it had when it accepted federal funds under [Section 504, which] clearly and unambiguously conditioned the receipt of

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[1] Virginia cites (VA Br. 37) this Court's decision in *National Home Equity Mortgage Ass'n* v. *Face*, 322 F.3d 802 (4th Cir.), cert. denied, 540 U.S. 823 (2003), in support of its claim that the Supreme Court's order granting Spencer's petition for certiorari, vacating this Court's earlier decision, and remanding this case for further proceedings extinguished Spencer's Section 504 claims because they were not the subject of his petition for certiorari. But that decision makes no such holding. This Court held in *National Home Equity Mortgage Ass'n* that the Supreme Court's grant-vacate-remand order in that case did not rehabilitate claims that defendant Virginia had previously waived by failing to appeal them from the district court to this Court. *Id.* at 804. That is not the situation in the instant case, in which Spencer appealed the district court's dismissal of his entire case to this Court in 2004. The Supreme Court's order vacating this Court's order affirming the district court in no way extinguished any of the issues that were before this Court on appeal.

such funds on a waiver of immunity"). No decision of this Court or the Supreme Court has limited or overruled that holding in any way.

Because Spencer can secure any relief to which he is entitled under Section 504, there is no reason for this Court to pass on the constitutionality of Title II as applied in the prison context. It is, therefore, incumbent upon this Court not to decide that question. *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) (noting that the "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them"); see also *Pace* v. *Bogalusa City Sch. Bd.*, 403 F.3d 272, 287-289 (5th Cir.) (en banc) ("As we hold that Louisiana waived its Eleventh Amendment immunity with respect to the Rehabilitation Act * * *, it is not necessary for us to address * * * whether Title II of the ADA abrogates Eleventh Amendment immunity in this case."), cert. denied, 546 U.S. 933 (2005).

B. Virginia Cannot Avoid This Court's Holding In Constantine That It Does Not Have Eleventh Amendment Immunity To Claims Under Section 504

In spite of this Court's unambiguous holding in *Constantine* v. *Rectors & Visitors of George Mason University*, 411 F.3d 474, 496 (4th Cir. 2005), that a state agency that accepts federal funds waives its Eleventh Amendment immunity to claims under Section 504 of the Rehabilitation Act, Virginia goes to great lengths to circumvent that binding decision. Its efforts, ultimately, are unavailing

as they are based on misinterpretations of the decisions of this Court and the Supreme Court.

1. Virginia's primary argument is that Congress may not use its authority under the Spending Clause to induce a state agency to waive its sovereign immunity in an area where Congress could not unilaterally abrogate States' immunity. That argument has been rejected by the Supreme Court and by this Court. In support of its claim, the State relies primarily on the Supreme Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). But Virginia misconstrues the Court's holding in that case by selectively quoting from passages of the decision that have nothing to do with Congress's authority under the Spending Clause and ignoring the passages that do discuss that authority.

The State relies heavily on the following statement:

> Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe* [v. *Florida*, 517 U.S. 44 (1996)]. Forced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin.

527 U.S. at 683-684 (VA Br. 4-5). From this statement, Virginia argues, it follows that, "because the power to abrogate is constitutionally indistinguishable from the power to exact a waiver, any limitation on the power to abrogate applies to the power to exact a waiver" (VA Br. 5). In so arguing, Virginia would have this Court believe that the type of waiver exacted through a Spending Clause statute

such as Section 504 is the type of "constructive" waiver that the Supreme Court equated with abrogation in *College Savings Bank*. But Virginia is overreaching.

The alleged "waiver" at issue in *College Savings Bank* involved a provision in the Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567, which amended the Lanham Act by subjecting States to private suits for false and misleading advertising. 527 U.S. at 668. The plaintiff and the United States in that case first argued that the statute validly abrogated States' Eleventh Amendment immunity to Lanham Act suits, and the Court rejected that argument. *Id.* at 672-675. The parties then argued that the State of Florida had "'impliedly' or 'constructively' waived its immunity from Lanham Act suit," *id.* at 676, by advertising an investment program "after being put on notice by the clear language of the [Act] that it would be subject to Lanham Act liability for doing so," *id.* at 680. The Court rejected that argument as well, reasoning that the State's "mere presence in a field subject to congressional regulation" was insufficient to qualify as express consent by the State to waive its sovereign immunity. *Ibid.*

Far from equating the alleged "constructive waiver" at issue in that case with the type of waiver effected through use of the Spending Clause, however, the Court *explicitly held* that Spending Clause waivers are "fundamentally different" from the constructive waivers invalidated in that case. 527 U.S. at 686. The parties in *College Savings Bank* did not even attempt to argue that the constructive waiver at issue there amounted to the State's "express[] consent[] to being sued in federal court." *Id.* at 676. The Court contrasted that situation with Spending Clause

waivers, reaffirming that, when States accept federal funds that are clearly conditioned "upon their taking certain actions that Congress could not require them to take" – such as waiving Eleventh Amendment immunity – "acceptance of the funds entails an agreement to the actions." *Id.* at 686. Thus, Virginia's claim (VA Br. 48) that "*College Sav. Bank* implicitly holds that, when the Eleventh Amendment limits the power to abrogate, the Eleventh Amendment also limits the Spending Clause power to exact a waiver," is exactly contrary to the plain language of the decision itself. Rather, the Court's decision in *College Savings Bank* unambiguously supports Congress's authority to grant federal funds to state agencies in exchange for their waiver of sovereign immunity to certain types of suit, regardless of whether Congress could simultaneously abrogate States' immunity. Cf. *Constantine*, 411 F.3d at 491 (relying on *College Savings Bank* for proposition that "[a] State may waive its Eleventh Amendment immunity and consent to suit in federal court"); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 555 (4th Cir. 1999) ("[W]hen a condition under the Spending Clause includes an unambiguous waiver of Eleventh Amendment immunity, the condition is constitutionally permissible as long as it rests on the state's voluntary and knowing acceptance of it."), cert. denied, 528 U.S. 1181 (2000).

2. Virginia similarly attempts to limit the reach of this Court's decision in *Constantine* by claiming (VA Br. 20) that it held *only* that, "when Congress may abrogate sovereign immunity, it also may exact a waiver of sovereign immunity." The State is simply incorrect. This Court in *Constantine* held that a state agency

that accepts federal financial assistance voluntarily waives its Eleventh Amendment immunity to claims under Section 504. 411 F.3d at 491-496.[2] The State cannot point to anything in that decision that limits its holding to instances in which Congress could have abrogated States' immunity. Rather, this Court's holding that States knowingly and voluntarily consent to waive their immunity when they accept federal funds means that a waiver under Section 504 is *not* the type of "constructive" waiver that the Supreme Court condemned in *College Savings Bank*. The validity of the waiver does not, therefore, depend on whether Congress could have abrogated States' immunity to Section 504 claims.

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[2] Although Virginia attempts (VA Br. 4 n.9) to portray the validity of the waiver under Section 504 as "an issue of first impression nationally," that is not the case. Indeed, every court of appeals in the nation has 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.) (en banc), cert. denied, 546 U.S. 933 (2005); *Nieves-Marquez* v. *Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 537 U.S. 1232 (2003); *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 (9th Cir.), amended by 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 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 (2d Cir. 2001).

Just last year, moreover, in *Madison* v. *Virginia*, 474 F.3d 118, 127 (4th Cir. 2006), this Court explicitly rejected Virginia's argument that Congress may not attach conditions to federal funds that it could not impose on States unilaterally. The Court in *Madison* upheld the Religious Land Use and Institutionalized Persons Act (RLUIPA) as valid Spending Clause legislation while acknowledging the Supreme Court's holding in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), that Congress could not enact substantively identical statutory requirements pursuant to its authority under Section 5 of the Fourteenth Amendment. *Madison*, 474 F.3d at 123-124. In so doing, this Court reaffirmed that Congress's authority under the Spending Clause is "'arguably greater' than Congress's power to achieve its goals directly." *Id.* at 127. Virginia attempts to distinguish *Madison* by pointing out (VA Br. 56-58) that the decision also held that, while States consented to private suit in federal court under RLUIPA by accepting federal funds, they did not consent to private damages claims. But this Court in *Madison* did not hold that Congress lacked the authority to condition the receipt of funds on a State's consent to private damages claims. Rather, the Court held that, as a statutory matter, RLUIPA did not condition a State's acceptance of federal funds on its consent to suit for money damages. *Id.* at 130-133. The same cannot be said of Section 504. See *Barnes* v. *Gorman*, 536 U.S. 181, 185-187 (2002).

3. Also unavailing is Virginia's claim that the holding in *Constantine* is limited to "§ 504 claims in the higher education context" (VA Br. 20). Although the holding in *Constantine* that Congress validly abrogated States' immunity to

claims under Title II of the ADA was limited to the context of public higher education, that limitation does not extend to its holding with respect to Section 504. The question whether Congress may condition the receipt of federal funds upon a State's waiver of immunity to statutory claims is entirely distinct from the question whether Congress may abrogate States' immunity to such claims. In each situation, Congress relies upon a different enumerated power, and the validity of the exercise of each power is judged by a different constitutional standard. As discussed *infra*, when Congress *abrogates* States' immunity, it does so pursuant to its authority under Section 5 of the Fourteenth Amendment. However, when Congress conditions the receipt of federal funds on a State's *waiver* of its immunity, Congress relies on its authority under the Spending Clause. Any limitations that may exist on Congress's Section 5 authority to enact Title II have no bearing on Congress's Spending Clause authority to enact Section 504.

Congress's authority to enact legislation under Section 5 is limited to enacting legislation that "enforce[s]" the protections provided in Section 1 of the Fourteenth Amendment. U.S. Const. amend. XIV, § 5. In establishing the *Boerne* test and refining that test in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), and *United States* v. *Georgia*, 546 U.S. 151 (2006), the Supreme Court has attempted to ensure that Congress does not exceed this grant of authority by providing statutory protections that are not congruent and proportional to the object of enforcing the constitutional protections provided in Section 1 of the Fourteenth Amendment. See *Boerne*, 521 U.S. at 516-520; *Lane*, 541 U.S. at 520-522; *Georgia*, 546 U.S. at

157-159. Indeed, it was the concept of congruence and proportionality that motivated the *Georgia* Court to bifurcate the plaintiff's statutory claims sounding in constitutional violations from the plaintiff's nonconstitutional statutory claims: the Court held that statutory enforcement of the former claims is by definition congruent and proportional to enforcement of constitutional protections, and declined to decide whether statutory enforcement of the latter claims is. Concerns about congruence and proportionality are unique to the Section 5 context and have no place in the consideration of whether Section 504 is a valid exercise of Congress's Spending Clause authority.

In assessing whether Section 5 legislation is congruent and proportional, courts examine the constitutional rights at stake in a particular context, as well as the history of deprivations of those rights. See *infra*, pp. 12-15. When a court inquires whether conditions imposed on a grant of federal funds are valid under the Spending Clause, it focuses on the text of the statute itself rather than the historical and social context in which it was enacted. See *Constantine*, 411 F.3d at 492-496. The text of the statute does not vary from context to context. Therefore, this Court's conclusion in *Constantine* that the State's waiver of immunity was valid applies with equal force to the instant case.

4. Finally, Virginia seeks to circumvent this Court's holding in *Constantine* by arguing (VA Br. 43-51) that conditioning the receipt of federal funds on a State's waiver of immunity runs afoul of the Supreme Court's admonition that Congress's authority under the Spending Clause is limited by any "independent

constitutional bar" that might apply. See *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987). On close inspection, this is merely a new gloss on the State's argument that Congress may not use its authority under the Spending Clause to extract a waiver of immunity where it cannot abrogate immunity. See, *e.g.*, VA Br. 46 ("In other words, when an independent constitutional bar is present, the validity of a Spending Clause statute turns on whether Congress could impose the funding condition directly."). For the reasons already discussed herein – as well as by the Supreme Court in *College Savings Bank* and by this Court in *Constantine* and *Madison* – that argument is unavailing.

An additional flaw in this argument, however, stems from Virginia's misunderstanding of the term "independent constitutional bar." In *South Dakota* v. *Dole*, the Supreme Court made clear that this rule prevents Congress from using the fisc "to induce the States to engage in activities that would themselves be unconstitutional." 483 U.S. 203, 210 (1987).[3] But a State's voluntary waiver of its own immunity is not an unconstitutional activity. Regardless of whether Congress may abrogate States' immunity in a particular area, a State clearly is free to waive its own immunity whenever and wherever it chooses without running afoul of the Constitution.

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[3] Virginia attempts to rely on the Supreme Court's recent decision in *Rumsfeld* v. *FAIR*, 547 U.S. 47 (2006), in support of its position. But *Rumsfeld* stands for the unremarkable proposition that Congress may not use its authority under the Spending Clause to place unconstitutional restrictions on the speech and association rights guaranteed to citizens in the First Amendment. See *id.* at 58-70. The instant case does not involve any First Amendment rights.

II. SHOULD THIS COURT REACH THE QUESTION, IT SHOULD HOLD THAT CONGRESS VALIDLY ABROGATED STATES' ELEVENTH AMENDMENT IMMUNITY TO CLAIMS UNDER TITLE II OF THE ADA, AS APPLIED IN THE PRISON CONTEXT

In arguing that Congress did not validly exercise its authority under Section 5 of the Fourteenth Amendment when it enacted Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.*, Virginia misconstrues and misapplies the proper constitutional test, articulated by the Supreme Court in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). As applied by the Supreme Court to Title II in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), the three-part *Boerne* analysis requires a court to determine: (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 "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. Under the proper test, correctly applied, Title II is a valid exercise of Congress's authority under Section 5. Consequently, Title II validly abrogates States' Eleventh Amendment immunity.

A. Title II Implicates An Array Of Constitutional Rights In The Prison Context

In the first step of the *Boerne* analysis, the State erroneously asserts (at 23-24) – as did the district court in this case – that the only constitutional right Title II

enforces in the prison context is the equal protection right "not to be subject to arbitrary or irrational exclusion from the services, programs, or benefits provided by the state" (quoting *Wessel* v. *Glendening*, 306 F.3d 203, 210 (4th Cir. 2002), superceded by *Lane*, as recognized in *Constantine*, 411 F.3d at 486 n.8). This assertion is contrary to the Supreme Court's decisions in both *Lane* and *United States* v. *Georgia*, 546 U.S. 151 (2006). In *Georgia*, the Court made clear that a court must consider the full array of constitutional rights implicated by disability discrimination in a particular context. Indeed, the Court specifically noted that Title II's application to the prison context implicates *numerous* constitutional protections in addition to rights under the Equal Protection Clause, including rights stemming from both the Eighth Amendment and "other constitutional provision[s]." *Georgia*, 546 U.S. at 159; *id.* at 162 (Stevens, J., concurring) (finding that there is a "constellation of rights applicable in the prison context").

As discussed in the United States' opening brief (at 24-28), Title II enforces not only the Equal Protection Clause's prohibition of arbitrary treatment based on irrational stereotypes or hostility in the prison context, but the heightened constitutional protection afforded to a variety of constitutional rights arising in that context as well. The nature and extent of those rights is laid out in some detail in the United States' opening brief.

B. The State Is Incorrect In Asserting That Congress Must Identify Constitutional Wrongdoing By Every State In The Union Before Exercising Its Section 5 Authority

In the opening briefs in this case, both the United States and the plaintiff devoted numerous pages to documenting the ample evidence before Congress of this country's history of unconstitutional discrimination against inmates with disabilities (see U.S. Br. 30-43; Pl. Br. 37-46). Rather than refute – or even discuss – any of the evidence presented therein, Virginia expends less than two pages dismissing the widespread pattern of unconstitutional treatment by asserting that the only evidence of discrimination that could be relevant in this case is evidence of unconstitutional treatment of disabled inmates *by Virginia* itself (VA Br. 33-35). Not only does this argument find no support in any decision from this Court or the Supreme Court, it is in direct conflict with the controlling cases in this area.

A brief examination of the Supreme Court's decisions in *Lane* and *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003), should suffice to dispose of this argument. In *Lane*, in which the State of Tennessee was the defendant, the Court upheld Title II as valid Section 5 legislation, as applied to the class of cases implicating access to courts and judicial services, without identifying a pattern of unconstitutional discrimination by the State of Tennessee in that area. See 541 U.S. at 524-527. In *Hibbs*, in which the State of Nevada was the defendant, the Court upheld the family leave provisions of the Family and Medical Leave Act (FMLA) as valid Section 5 legislation without identifying any discriminatory action whatsoever by the State of Nevada. 538 U.S. at 729-735.

Indeed, as Justice Kennedy pointed out in his dissenting opinion, Nevada offered extensive family leave to its employees on a gender-neutral basis well before Congress enacted the FMLA. See *id.* at 755 (Kennedy, J., dissenting); *id.* at 732 (majority opinion acknowledging Justice Kennedy's point). Virginia's cramped view that the only evidence that is relevant in determining whether Congress abrogated States' immunity is evidence of wrongdoing by a particular state defendant in a particular case simply cannot be reconciled with the Supreme Court's holdings in *Lane* and *Hibbs*.

C. Title II Is A Congruent And Proportional Means Of Enforcing The Constitutional Rights Of Disabled Inmates

1. This Court And The Supreme Court Have Already Held That Title II Validly Abrogates States' Eleventh Amendment Immunity To At Least Some Claims That Do Not State Constitutional Violations

Virginia asserts (VA Br. 29) both that the Supreme Court's Eleventh Amendment decisions "implicitly suggest that Congress may not abrogate sovereign immunity for disability discrimination claims that do not involve a constitutional violation" and that, "[w]hen confronted with a statutory claim that does not involve a constitutional violation, the Supreme Court consistently has rejected abrogation." These assertions amount to a claim that Congress may not enact prophylactic legislation – *i.e.*, legislation that prohibits conduct not prohibited by the Constitution – and are manifestly incorrect. Indeed, as the Court in *Lane* explicitly held, "[w]hen Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation

proscribing practices that are discriminatory in effect, if not in intent." 541 U.S. at 520; see also *City of Rome* v. *United States*, 446 U.S. 156, 175 (1980). This holding precludes Virginia's argument that Congress's authority under Section 5 – and, therefore, its authority to abrogate States' sovereign immunity – is limited to prohibiting conduct already prohibited by the Constitution.

The decision in *Lane* confirms that Virginia's view of the state of the law is mistaken. In *Lane*, the Court held that, because Title II is valid Section 5 legislation, as applied to cases implicating access to courts and judicial services, it effectively abrogates States' Eleventh Amendment immunity. 541 U.S. at 533. In so holding, the Court did not determine whether the statutory claims before it stated constitutional violations, and in no way limited its holding to claims that state constitutional violations. In fact, it is likely that the statutory claim of at least one of the plaintiffs in *Lane* – Beverly Jones – did not state a constitutional violation. Plaintiff Jones alleged statutory 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. *Lane*, 541 U.S. at 513-514. Such an allegation likely falls short of alleging conduct that violates the Constitution. The Supreme Court itself noted in *Georgia*, that the plaintiff before it "differ[ed] from the claimants" in *Lane* because he alleged "conduct that independently violated the provisions of § 1 of the Fourteenth Amendment." 546 U.S. at 157-158.

The Supreme Court's decision in *Hibbs* also confirms that Congress has the authority, pursuant to Section 5, to enact prophylactic legislation where appropriate. The family leave provisions of the FMLA upheld in *Hibbs* were intended to "protect the right to be free from gender-based discrimination in the workplace." 538 U.S. at 728. The Court later noted, however, that there was "no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose that would render it unconstitutional" in that case. *Lane*, 541 U.S. at 519. Moreover, the FMLA does not actually prohibit gender-based discrimination – or any discrimination – at all, but requires employers to provide employees with up to 12 weeks of unpaid leave annually in certain family leave situations. Nevertheless, the Court confirmed that Congress is not confined to merely prohibiting conduct that is unconstitutional and held that this remedy – a remedy that makes no reference either to gender or to discrimination – was an appropriate means of enforcing the Equal Protection Clause's prohibition on gender-based discrimination. *Hibbs*, 538 U.S. at 740.

Virginia also erroneously suggests (VA Br. 27-28) that this Court's holding in *Constantine* that Title II is valid Section 5 legislation in the context of public higher education is limited to statutory claims that state constitutional violations. The plaintiff in *Constantine* alleged that a state law school discriminated against her in violation of Title II by not allowing her to retake a final exam in the manner she requested. 411 F.3d at 499. Such a claim is extremely unlikely to state a constitutional violation, and this Court gave no indication that its holding as to the

validity of Title II in the education context was limited to cases in which a plaintiff's statutory claims would state independent constitutional violations. On the contrary, this Court forthrightly acknowledged that, "[u]ndoubtedly, Title II imposes a greater burden on the States than does the Fourteenth Amendment" in the education context. *Id.* at 489. This acknowledgment precludes Virginia's argument that the holding of *Constantine* applies only to claims that allege constitutional violations.

Nor does the Supreme Court's decision in *United States* v. *Georgia* dictate a different result, as Virginia urges (VA Br. 32). It is true that the Court in *Georgia* declined to decide whether Title II's prophylactic protection was a valid exercise of Congress's Section 5 authority, as applied in the prison context. 546 U.S. at 159. But, as noted *supra*, the Court openly acknowledged that it had already held in *Lane* that Title II's prophylactic protection was valid in the court access context even though the plaintiffs' claims did not allege constitutional violations. *Id.* at 157-158. This Court in *Constantine* followed the reasoning in *Lane* to reach the same conclusion with respect to Title II's application in the context of higher education. Far from undermining the holding of *Constantine*, the decision in *Georgia*, including its reaffirmation of *Lane*, reinforces the validity of this Court's conclusion.

2. In Assessing The Congruence And Proportionality Of Title II, This Court Should Focus On The Substantive Statutory Remedy

Virginia argues (VA Br. 26) that, in assessing the congruence and proportionality of Title II, this Court may not examine the actual statutory remedy in question and the limitations Congress included therein, but may only consider the statute's abrogation of States' immunity. This assertion, too, is in direct conflict with the decisions of the Supreme Court. It is now well-settled that Congress may abrogate States' Eleventh Amendment immunity pursuant to its authority under Section 5 of the Fourteenth Amendment where it makes its intent to do so unmistakably clear. *E.g.*, *Lane*, 541 U.S. at 517; *Hibbs*, 538 U.S. at 726. Thus, in determining whether a statute validly abrogates States' immunity, the Supreme Court asks only whether Congress intended to do so and whether the statute at issue is a valid exercise of Congress's Section 5 authority. *Lane*, 541 U.S. at 517-533; *Hibbs*, 538 U.S. at 726-740. If a statute is valid Section 5 legislation, any intended and clearly expressed abrogation is, by definition, valid. *Georgia*, 546 U.S. at 158-159 (Congress's Section 5 "enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States.").

In applying the *Boerne* analysis to determine whether a statute is valid Section 5 legislation, the Supreme Court has consistently considered the contours of the statutory remedy in question in assessing its congruence and proportionality. Thus, in *Boerne*, the Court examined the "reach and scope" of the Religious

Freedom Restoration Act, including available affirmative defenses. 521 U.S. at 532-534. In *Kimel* v. *Florida Board of Regents*, 528 U.S. 62, 82-83 (2000), the Court considered the "substantive requirements" of the Age Discrimination in Employment Act. The same was true when the Court considered the validity of Title I of the ADA in *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356, 372-373 (2001), and of the FMLA in *Hibbs*, 538 U.S. at 737-740. And in *Lane*, of course, the Court discussed extensively the "limited" nature of the statutory remedy Congress created in Title II. 541 U.S. at 531.

Although Virginia acknowledges (VA Br. 26 & n.32) that these decisions considered "the substantive right created by the statute" in question, it suggests that the analysis employed in those decisions was somehow invalidated by the Court's prior decision in *Florida Prepaid Postsecondary Education Expense Board* v. *College Savings Bank*, 527 U.S. 627 (1999), and its subsequent decision in *Georgia*. Virginia is incorrect. Contrary to the State's assertion, the Court in *Florida Prepaid* did consider the substantive remedy of the statute in question, the Patent Remedy Act. The Court cited the statute's lack of an intent requirement and its creation of "expansive liability" for States in the form of "direct, induced, or contributory patent infringement" as aspects of the statute's lack of congruence and proportionality. 527 U.S. at 645-647. With respect to the Court's decision in *Georgia*, there is no import in Virginia's pointing out that the Court did not consider the contours of Title II in reaching its decision. The *Georgia* Court explicitly declined to consider the congruence and proportionality of Title II in the

prison context; the Court, therefore, had no reason to explore the content of the statutory remedy. 546 U.S. at 159.

As explained in the United States' opening brief (at 22-51), Title II is a congruent and proportional means of enforcing the constitutional rights of disabled inmates. Title II's abrogation of States' Eleventh Amendment immunity is, therefore, valid.

CONCLUSION

This Court should reverse the district court's dismissal of plaintiff's claims under Title II of the ADA and Section 504 of the Rehabilitation Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains 5,423 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

Date: December 14, 2007

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing REPLY BRIEF FOR THE UNITED STATES AS APPELLANT were served by Federal Express, postage prepaid, on December 14, 2007, on the following counsel of record:

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