No. 06-1466

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DANIEL BUCHANAN, as Personal Representative of the Estate of Michael Buchanan; ESTATE OF MICHAEL BUCHANAN,

Plaintiffs-Appellants

v.

STATE OF MAINE; LYNN DUBY, individually and in her official capacity as former Commissioner of the Maine Department of Behavioral and Developmental Services; JULIANNE EDMONSON; JOEL GILBERT; LINCOLN COUNTY; ROBERT EMERSON; KENNETH HATCH; JOHN NICHOLAS, Commissioner, Maine Department of Health and Human Services; WILLIAM CARTER; TODD BRACKETT, Sheriff, Lincoln County,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

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 (ADA), 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 the provision of mental health services, including institution- and community-based care.

INTRODUCTION

1. 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 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.[1]

In enacting the ADA, Congress instructed the Attorney General to promulgate regulations to interpret and implement Title II of the Act. See 42 U.S.C. 12134. The Title II regulations require, among other things, that a "public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d). In *Olmstead* v. *L.C.*, 527 U.S. 581 (1999), the Supreme Court interpreted Title II in light of the integration regulation and held that "[u]njustified isolation" of individuals with disabilities in institutions "is properly regarded as discrimination based on disability," in violation of the ADA. *Id.* at 597. At the same time, the plurality recognized that the State's responsibility under the Act "is not boundless." *Id.* at 603 (plurality); see also *id.* at 607 (Stevens, J., concurring) (same). States need only make "reasonable modifications" to avoid discrimination, which does not include changes that would "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7); see *Olmstead*, 527 U.S. at 603 (plurality); *id.* at 607 (Stevens, J., concurring).

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[1] 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.

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.

2. Plaintiff Daniel Buchanan is the personal representative of the estate of Michael Buchanan, who died on February 25, 2002, when he was shot in his home by sheriff's deputies in Lincoln County, Maine. *Buchanan* v. *Maine*, 417 F. Supp. 2d 24, 26 (D. Me. 2006). Michael Buchanan began exhibiting signs of mental illness in the early 1970s and was ultimately diagnosed with schizoaffective and bipolar disorder. *Id.* at 27. As an adult, Buchanan was twice involuntarily committed to the Augusta Mental Health Institute (AMHI) in Augusta, Maine. *Ibid.* Under a consent decree entered in a class action filed in state court, Buchanan was entitled to receive comprehensive community-based mental health services upon his discharge from AMHI in October 1999. *Id.* at 27-29.

Prior to his release from AMHI in the fall of 1999, the State of Maine assigned Joel Gilbert to be Buchanan's "intensive case manager." 417 F. Supp. 2d at 30. When Gilbert visited Buchanan at his home, he found Buchanan's living conditions to be horrible, found Buchanan to be delusional, and realized that Buchanan was not taking his medication properly. *Id.* at 30-33. On February 25, 2002, Buchanan's neighbor called Gilbert to report that Buchanan had "growled and glared" at her that morning and that her husband had seen someone who looked like Buchanan lighting a fire in their woodpile. *Id.* at 36. The neighbor then called the Sheriff's Office, which dispatched two deputies to Buchanan's

home without Gilbert. *Ibid.* During a confrontation on a stairwell inside Buchanan's home, Buchanan produced a knife and stabbed a deputy, at which point the other deputy shot and killed Buchanan. *Ibid.*

Buchanan's brother and personal representative filed this suit against the State of Maine, Lincoln County, and various state and local officials in their official and personal capacities. The complaint alleges claims under Title II of the ADA for inadequate care, as well as 42 U.S.C. 1983 and state law provisions, and seeks monetary damages. *Buchanan* v. *Maine*, 366 F. Supp. 2d 169, 174 (D. Me. 2005). The state defendant asserted Eleventh Amendment immunity to the plaintiff's Title II claim. The district court held that Title II does not validly abrogate States' immunity in the context of access to public mental health services, and granted summary judgment to the defendants on the Title II claim, as well as on the plaintiffs' other claims. *Buchanan*, 417 F. Supp. 2d at 38-41; see also generally *Buchanan* v. *Maine*, 417 F. Supp. 2d 45 (D. Me. 2006). Plaintiff appealed.

In the court of appeals, Maine continues to assert Eleventh Amendment immunity to Buchanan's Title II claims. On August 1, 2006, in response to notification from plaintiff that the State is challenging the constitutionality of Title II's abrogation of States' immunity, this Court certified the constitutional question to the Attorney General pursuant to Federal Rule of Appellate Procedure 44(a). The United States subsequently intervened in this appeal pursuant to 28 U.S.C.

2403(a)[2] in order to defend the constitutionality of the statutory provisions that subject States to private suits under Title II of the ADA.

SUMMARY OF ARGUMENT

Congress validly abrogated the state defendant'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 the provision of mental health services, including institutionalization and community-based care. 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 the provision of mental health services for people with disabilities. In any case, there is ample support for Congress's decision to extend Title II to the provision of mental health services, including institutionalization and community-based care.

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[2] 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).

Title II, as it applies to this context, is a congruent and proportionate response to that record. Title II is carefully tailored to respect the State's legitimate interests while protecting against the risk of unconstitutional discrimination in this area and remedying the lingering effects of discrimination against people with disabilities in the provision of mental health services, including institutionalization and community-based care. Title II only requires community placements when a State's own treating professionals recommend it, and only then if a placement can be provided without imposing an undue burden on the State or a fundamental alteration of the State's programs. Thus limited, Title II often applies in this context to prohibit discrimination based on hidden invidious animus that would be difficult to detect or prove directly. Moreover, in integrating people with disabilities into community settings, Title II acts to relieve the irrational stereotypes Congress found at the base of much unconstitutional disability discrimination.

These limited prophylactic and remedial measures, judged against the backdrop of pervasive unconstitutional discrimination that Congress found exists both in institutional settings and in other areas of government services, represent a good faith effort to make meaningful the guarantees of the Fourteenth Amendment, not an illicit attempt to rewrite them. Accordingly, Congress validly abrogated the State's sovereign immunity to plaintiffs' Title II claims in this case.

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); *City of Mobile* v. *Bolden*, 446 U.S. 55, 60 (1980). In the instant case, this Court should therefore decide whether plaintiff states a viable claim against the state defendant under Title II before the Court may consider the State's contention that Title II is an unconstitutional exercise of Congress's

authority under Section 5. See *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).

II

TITLE II IS VALID FOURTEENTH AMENDMENT LEGISLATION AS APPLIED IN THE CONTEXT OF THE PROVISION OF MENTAL HEALTH SERVICES

This Court should hold that Congress validly abrogated the State's sovereign immunity to private claims under Title II of the ADA as applied to the provision of mental health services, including institutionalization and community-based care. 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 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." *Ibid*.

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 the provision of mental health services, including institution- and

community-based care, because it is reasonably designed to remedy past and prevent future unconstitutional treatment of disabled individuals and deprivation of their constitutional rights in the provision of institution-based and community-based mental health services.

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 *City of 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." 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).[3]

[3] Because of the limited nature of our role as intervenor, we do not take a position on whether the plaintiff has stated valid Title II claims or on whether any of those claims would independently state a constitutional violation.

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*, 541 U.S. 509 (2004).

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 *Boerne*. 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 "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.[4] *Id.* at 530-534. Applying the holdings of the Supreme Court's decision in *Lane*,

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[4] 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 the provision of mental health services, 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 to the provision of mental health services.

1. This Court Must Consider Title II's Application To The Full Range Of The State's Provision Of Mental Health Services

In accordance with the teachings of *Lane*, this Court must consider the validity of Title II and its abrogation provision as applied to the provision of the entire range of mental health services, including institution-based and community-based care. Michael Buchanan was the recipient of mental health services within a state-run institution. After his release from the institution, he was entitled to receive community-based mental health services pursuant to a consent decree entered in a class action lawsuit against the State of Maine. And, as discussed *supra*, Title II requires that public entities provide mental health care in the most integrative setting appropriate, thereby avoiding unnecessary institutionalization. Thus, the facts of this case implicate the provision of both institution-based and community-based mental health services. But even if the facts of this particular case did not directly implicate the full range of the State's provision of mental health services, the teachings of *Lane* and of this Court's decision in *Toledo* v. *Sanchez*, 454 F.3d 24 (1st Cir. 2006), dictate that this Court must consider the validity of Title II's application to the State's provision of mental services generally rather than some subsection of those services.

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.

But, as this Court noted in *Toledo*, see 454 F.3d at 36, in analyzing Congress's power to enact Title II, 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, witnesses, and members of the press. *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. See *Toledo*, 454 F.3d at 36 (noting that "a number of" the statutory applications considered in *Lane* "and the corresponding constitutional rights that they implicated were neither presented by the plaintiffs * * * nor directly related to the facts of the case"). 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. Thus, this Court should consider Title II's application to the full range of the State's provision of mental health services.

2. Constitutional Rights At Stake

Title II enforces the Equal Protection Clause's "prohibition on irrational disability discrimination," as well as "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Lane*, 541 U.S. at 522-523. In the context of this case, Title II acts to enforce the

Equal Protection Clause's prohibition against arbitrary treatment based on irrational stereotypes or hostility. Even under rational basis scrutiny, "mere negative attitudes, or fear" alone cannot justify disparate treatment of those with disabilities. *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 367 (2001). A purported rational basis for treatment of the disabled will also fail if the State does not accord the same treatment to other groups similarly situated, *id*. at 366 n.4; *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447-450 (1985), if it is based on "animosity" towards the disabled, *Romer* v. *Evans*, 517 U.S. 620, 634 (1996), or if it simply gives effect to private biases, *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

In addition, the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment impose affirmative obligations on States in the context of the involuntary commitment of mentally impaired individuals. See, *e.g.*, *Jackson* v. *Indiana*, 406 U.S. 715, 723-739 (1972). For instance, the Supreme Court has made clear that a State must proffer more than just any conceivable rational and benign reason for involuntarily committing a nondangerous mentally ill person in order not to run afoul of that person's liberty interest under the Due Process Clause. *O'Connor* v. *Donaldson*, 422 U.S. 563, 573-576 (1975) (rejecting various justifications for commitment); see also *Clark* v. *Cohen*, 794 F.2d 79 (3d Cir.) (confinement when appropriate community placement available), cert. denied, 479 U.S. 962 (1986). And the Supreme Court has held that persons committed to state mental health hospitals are guaranteed certain substantive rights under the

Fourteenth Amendment. *Youngberg* v. *Romeo*, 457 U.S. 307 (1982); see also *Thomas S. by Brooks* v. *Flaherty*, 902 F.2d 250 (4th Cir.), cert. denied, 498 U.S. 951 (1990). Thus, where a State houses civilly committed individuals, the Due Process Clause requires the State to ensure that such individuals enjoy safe living conditions, *id.* at 315-316, freedom from excessive bodily restraint, *id.* at 316, and such training as is necessary to ensure safety and freedom from restraint, *id.* at 318-319.

As was true of the right of access to courts at issue in *Lane*, "ordinary considerations of cost and convenience alone cannot justify" institutionalization decisions or the denial of institutionalized persons accommodations necessary to ensure their basic rights. *Lane*, 541 U.S. at 512; see, *e.g.*, *O'Connor*, 422 U.S. at 575-576; *Youngberg*, 457 U.S. at 324-325. Finally, as described below, the integration mandate of Title II assists in the prevention of constitutional violations throughout the range of government services, many of which implicate fundamental constitutional rights. See *Lane*, 541 U.S. at 539.

Maine argues (Br. 49-52) that Title II is valid Section 5 legislation only as applied to the enforcement of "fundamental" rights. That argument finds no support in the decisions of the Supreme Court, this Court, or the other courts of appeals. The same Section 5 analysis applies regardless of what type of constitutional right Congress seeks to protect or enforce through legislation. Indeed, in *Lane*, 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.

Indeed, this Court recently applied the *Boerne* framework, as elucidated in *Lane*, to uphold Title II as applied to the context of public education. See *Toledo* v. *Sanchez*, 454 F.3d 24 (1st Cir. 2006). The two other courts of appeals to consider the validity of Title II's abrogation in the education context similarly upheld it although the context of public education does not implicate any fundamental right. See *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005); *Association of Disabled Ams.* v. *Florida Int'l Univ.*, 405 F.3d 954 (11th Cir. 2005). This Court should similarly uphold Title II's abrogation as applied to the provision of mental health services.

3. 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 523 (quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966)). Accordingly, in *Lane*, the Court reviewed the historical experience reflected in Title II 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." 541 U.S. at

524. 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," *ibid*.

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.[5] Moreover, the

[5] 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*." *Lane*, 541 U.S. at 528 (emphasis added). In concluding that the "the record of constitutional

(continued...)

Court specifically noted that its prior opinions had documented a history of "unconstitutional treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment [and] the abuse and neglect of persons committed to state mental health hospitals." *Ibid.* (internal citations omitted). That record, the Court concluded, supported prophylactic legislation to address discrimination in "public services," *id.* at 529, including discrimination in "institutionalization," and "health services," *ibid.* Thus, the adequacy of Title II's historical predicate to support prophylactic legislation is no longer open to dispute.

As a panel of this Court recently recognized, in considering the congruence and proportionality of Title II's prophylactic protection in a particular context, this Court must evaluate the protections of Title II in light of the history of unconstitutional discrimination in that area. See *Toledo*, 454 F.3d at 34-35, 37-40. There is ample evidence of a history of unconstitutional discrimination against individual with disabilities relating to the provision of mental health services.

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[5](...continued)
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).

b. History Of Disability Discrimination In The Provision of Mental Health Services

Of particular relevance to this case, the Supreme Court expressly acknowledged and cited the well-documented pattern of unconstitutional treatment of and discrimination against persons with disabilities in the provision of public mental health services. See *Lane*, 541 U.S. at 524-525 ("The historical experience that Title II reflects is also documented in this Court's cases, which have identified unconstitutional treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment * * * [and] the abuse and neglect of persons committed to state mental health hospitals.") (citations omitted); see also *id*. at 510 n.10 ("The undisputed findings of fact in *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1 (1981), provide another example of such mistreatment. See *id*. at 7 ('Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the 'habilitation' of the retarded').") (parallel citations omitted).

Indeed, Congress and the Supreme Court have long acknowledged the Nation's "history of unfair and often grotesque mistreatment" of persons with disabilities. *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 454 (1985) (Stevens, J., concurring); see also *Olmstead* v. *L.C.*, 527 U.S. 581, 608 (1999) (Kennedy, J., concurring) ("[O]f course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility."); *Cleburne*, 473 U.S. at 446 (noting that "[d]oubtless, 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, 295 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. United States Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* 20 (1983) (*Spectrum*). A cornerstone of that movement was forced institutionalization directed at separating individuals with disabilities from the community at large.[6] "A regime of state-mandated segregation" emerged in which "[m]assive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and 'nearly extinguish their race.'" *Cleburne*, 473 U.S. at 462 (Marshall, J., concurring in the judgment in part).[7] State statutes provided for the involuntary institutionalization of persons with mental disabilities and, frequently, epilepsy.[8]

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[6] See *Spectrum* 19-20; see also *Employees of Dep't of Pub. Health & Welfare* v. *Department of Pub. Health & Welfare*, 411 U.S. 279, 284 n.2 (1973) (noting that "the institutionalization of the insane became the standard procedure of the society" and a "cult of asylum swept the country") (quoting D. Rothman, *The Discovery of the Asylum* 130 (1971)).

[7] See also 473 U.S. at 463 n.9 (noting Texas statute, enacted in 1915 (and repealed in 1955), with stated purpose of institutionalizing the mentally retarded to relieve society of "the heavy economic and moral losses arising from the existence at large of these unfortunate persons").

[8] See *Spectrum* 19; T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 400 (1991); Note, *Mental Disability*

(continued...)

Some States also required public officials and parents, sometimes at risk of criminal prosecution, to report the "feeble-minded" for institutionalization. *Spectrum* 20, 33-34; T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 402 (1991). Additionally, almost every State accompanied institutionalization with compulsory sterilization and prohibitions of marriage. *Cleburne*, 473 U.S. at 462-463 (Marshall, J., concurring in the judgment in part); see also *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) (upholding compulsory sterilization law "in order to prevent our being swamped with incompetence"; "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. * * * Three generations of imbeciles are enough.").[9]

In considering the ADA, Congress also heard extensive testimony regarding unconstitutional treatment and unjustified institutionalization of persons with disabilities in state facilities. See, *e.g.*, 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 1203 (Comm. Print 1990) (Leg. Hist.) (Lelia

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[8](...continued)
and the Right to Vote, 88 Yale L.J. 1644 (1979).

[9] See also 3 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 2242 (Comm. Print 1990) (James Ellis); M. Burgdorf & R. Burgdorf, *A History of Unequal Treatment*, 15 Santa Clara Lawyer 855, 887-888 (1975).

Batten) (state hospitals are "notorious for using medication for controlling the behavior of clients and not for treatment alone. Seclusion rooms and restraints are used to punish clients."); *id*. at 1262-1263 (Eleanor C. Blake) (detailing the "minimal, custodial, neglectful, abusive" care received at state mental hospital, and willful indifference resulting in rape); *Spectrum* 32-35; see also California Att'y Gen., *Commission on Disability: Final Report* 114 (Dec. 1989). In addition, Congress drew upon its prior experience investigating institutionalization in passing the Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. 1997 *et seq.*, the Developmental Disabilities Act of 1984, 42 U.S.C. 6000 *et seq.*, and the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. 10801 *et seq*.

Moreover, the Department of Justice's investigations in the 1980s under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, further documented egregious and flagrant denials of constitutional rights by state-run institutions for individuals with disabilities.[10] Unconstitutional uses of physical and medical restraints were commonplace in many institutions. For example, investigations frequently found institutions strapping mentally retarded residents

[10] In the years immediately preceding enactment of the ADA, the Department of Justice found unconstitutional treatment of individuals with disabilities in state institutions for the mentally retarded or mentally ill in more than 25 States. The results of those investigations were recorded in findings letters required by 42 U.S.C. 1997b(a).

to their beds in five-point restraints for the convenience of staff.[11] One facility forced mentally retarded residents to inhale ammonia fumes as punishment for misbehavior.[12] Residents in other facilities lacked adequate food, clothing and sanitation.[13] Many state facilities failed to provide basic safety to residents, resulting in serious physical injuries, sexual assaults, and even deaths.[14] Others

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[11] See Notice of Findings Regarding Los Lunas Hospital and Training School 2 (1988); Notice of Findings Regarding Fairview Training Center 4-5 (1985) (residents frequently placed in physical restraints and medicated in lieu of being given training or treatment); Notice of Findings Regarding Westboro State Hospital 7 (1986) (geriatric patients in psychiatric hospital frequently given sedating drugs "as punishment for antisocial behavior, for the convenience of staff, or in lieu of treatment").

[12] See Notice of Findings Regarding Los Lunas Hospital and Training School 2 (1988).

[13] See, *e.g.*, Notice of Findings Regarding Hawaii State Hospital 2-3 (1990) (residents lacked adequate food, had to wrap themselves in sheets for lack of clothing, and were served food prepared in a kitchen infested with cockroaches); Notice of Findings Regarding Westboro State Hospital 3 (1986) (Investigation found that the "smell and sight of urine and feces pervade not only toilet areas, but ward floors and walls as well * * *. Bathrooms and showers were filthy. Living areas are infested with vermin. There are consistent shortages of clean bed sheets, face cloths, towels, and underwear."); Notice of Findings Regarding Fairview Training Center 6, 9 (Due to lack of adequate staffing, many residents suffer from "the unhealthy effects of poor oral and other bodily hygiene. We observed several residents who were laying or sitting in their own urine or soiled diapers or clothes," while 70% of residents suffered from gum disease and 35% "had pinworm infection, a parasite which is spread by fecal and oral routes in unclean environments.").

[14] Notice of Findings Regarding Los Lunas Hospital and Training School 3 (1988) (facility failed to provide minimally adequate supervision and safety, and as a result, "a woman was raped, developed peritonitis and died"); Notice of Findings Regarding Rosewood Center 4 (1984) (inadequate supervision of residents contributed to rapes and sexual assaults of several residents; profoundly

(continued...)

were denied minimally adequate medical care, leading to serious medical complications and further deaths.[15]

This record demonstrates that "Congress was justified in concluding that this 'difficult and intractable proble[m]' warranted 'added prophylactic measures in response.'" *Lane*, 541 U.S. at 531 (quoting *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 737 (2003)).[16]

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[14](...continued)
retarded resident left unsupervised drowned in bathtub; another died of exposure after leaving the facility unnoticed); Notice of Findings Regarding Fairview Training Center 3 (1985) (Department found "numerous residents with open wounds, gashes, abrasions, contusions and fresh bite marks" due to lack of training for residents and lack of adequate supervision by staff); Notice of Findings Regarding Northville Regional Psychiatric Center 2-3 (1984) (one resident died after staff placed him in a stranglehold and left him unconscious on seclusion room floor for 15-20 minutes before making any effort to resuscitate him); *id*. at 3 (several other residents found dead with severe bruising, many other incidents of "rape, assault, threat of assault, broken bones and bruises" found).

[15] See, *e.g.*, Notice of Findings Regarding Enid and Pauls Valley State Schools 2 (1983) (inadequate medical care and monitoring contributed to deaths of six residents); Notice of Findings Regarding Manteno Mental Health Center 4 (1984) (investigation of state mental health facility found "widespread occurrence of severe drug side-effects" that could be "debilitating or life-threatening" going "unmentioned in patient records, unrecognized by staff, untreated, or inappropriately treated"); Notice of Findings Regarding Napa State Hospital 2-3 (1986) (facility staff "violated all known standards of medical practice by prescribing psychotropic medications in excessively large daily doses" and by failing to monitor patients for serious, irreversible side effects).

[16] 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 528 n.17. And the record in the context of mental health services exceeds the record of unconstitutional treatment in judicial services. See *Id.* at 524-525 nn.10 & 14, 527. The Supreme Court relied on precisely the same sources and types of (continued...)

4. As Applied To The Provision Of Mental Health Services, 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. To answer that question, this Court must decide whether Title II is congruent and proportionate legislation as applied to the class of cases implicating the constitutional rights of persons entitled to receive public mental health services, including institution- and community-based care.

As was true of access to courts, the "unequal treatment of disabled persons" in the area of mental health care, including institutionalization and community-based care, "has a long history, and has persisted despite several legislative efforts." *Lane*, 541 U.S. at 531; see *id.* at 526; *Olmstead*, 527 U.S. at 600 (describing prior statutes). Thus, Congress faced a "difficult and intractable proble[m]," *Lane*, 541 U.S. at 531, which it could conclude would "require powerful remedies." *Id.* at 524.

Nonetheless, the remedy imposed by Title II is "a limited one." *Lane*, 541 U.S. at 531. Even though it requires States to take some affirmative steps to avoid

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[16](...continued)
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).

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," *ibid.*, 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," *id.* at 532. See also *Olmstead*, 527 U.S. at 603-606 (plurality).

Title II's carefully circumscribed integration mandate is consistent with the commands of the Constitution in this area. Congress was well aware of the long history of state institutionalization decisions being driven by insufficient or illegitimate state purposes, irrational stereotypes, and even outright hostility toward people with disabilities. See Section II(B)(3)(b), *supra*. Title II provides a proportionate response to that history, congruent with the requirements of the Due Process and Equal Protection Clauses, by requiring the State to treat people with disabilities in accordance with their individual needs and capabilities. Compare *Olmstead*, 527 U.S. at 602, with *O'Connor*, 422 U.S. at 575-576 (requiring individualized assessment prior to involuntary commitment); *Parham* v. *J.R.*, 442 U.S. 584, 600, 606-607 (1979) (same for voluntary commitment of a child); *Youngberg*, 457 U.S. at 321-323 (requiring individualized consideration in context of conditions of confinement within institutions).

Moreover, given the history of unconstitutional compulsory institutionalization, Congress was entitled to conclude that there exists a real risk that some state officials may continue to make placement decisions based on

hidden invidious class-based stereotypes or animus that would be difficult to detect or prove. See *Hibbs*, 538 U.S. at 732-733, 735-736. Title II appropriately balances the need to protect against that risk and the State's legitimate interests. *Olmstead* generally permits a State to limit an individual's services to an institutional setting when the State's treating professionals determine that a restrictive setting is necessary for an individual patient, or when providing a community placement would impose unwarranted burdens on the State's ability to "maintain a range of facilities and to administer services with an even hand." 527 U.S. at 605 (plurality). But when a State persistently refuses to follow the advice of its own professionals and is unable to demonstrate that its decision is justified by sufficient administrative or financial considerations, the risk of unconstitutional treatment (*e.g.*, a State's basing its treatment decisions on irrational stereotypes or fears) is sufficient to warrant Title II's prophylactic response. Compare *Hibbs*, 538 U.S. at 736-737 (Congress may respond to risk of "subtle discrimination that may be difficult to detect on a case-by-case basis" by "creating an across-the-board, routine employment benefit for all eligible employees").

The integration mandate is also a proportionate response to the history of widespread "abuse and neglect of persons committed to state mental health hospitals." *Lane*, 541 U.S. at 525. Congress could justifiably respond to this record of unconstitutional treatment within institutions by requiring reasonable steps to remove from such settings those who can be adequately treated in community settings. The reasonable modification and other Title II requirements

further ensure that those who remain in State care are afforded the individualized treatment that is often necessary to ensure basic safety and humane conditions.

Title II also serves broader remedial and prophylactic purposes. The integration accomplished by Title II is a proper remedy for the continuing segregative effects of the historical exclusion of people with disabilities from their communities, schools, and other government services. See *Lane*, 541 U.S. at 524-526; *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) ("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.") (internal punctuation omitted). It is also a reasonable prophylaxis against the risk of future unconstitutional discrimination in government services. "[I]nstitutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Olmstead*, 527 U.S. at 600. Much of the discrimination Congress documented occurred in the context of individual state officials making discretionary decisions driven by just such "false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies," H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 30 (1990). Congress could reasonably expect that Title II's integration mandate would reduce the risk of unconstitutional state action by ameliorating one of its root causes through "increasing social contact and interaction of nonhandicapped and handicapped people." *Spectrum* 43.

Thus, the integration mandate plays an important role in Title II's larger goal of relieving the isolation and invisibility of people with disabilities that is both a legacy of past unconstitutional treatment and a contributor to continuing denials of basic constitutional rights. Accordingly, in the context presented by this case, Title II "cannot be said to be 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Lane*, 541 U.S. at 533 (quoting *Boerne*, 521 U.S. at 532).

CONCLUSION

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

Respectfully submitted,

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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 8,257 words.

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CERTIFICATE OF SERVICE

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