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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

	HON. ANNE E. THOMPSON
DISABILITY RIGHTS NEW JERSEY, INC.	Civil Action No. 05-4723 Document Electronically Filed
Plaintiff,	
v.	
JENNIFER VELEZ, in her official capacity as Commissioner of the New Jersey Department of Human Services, and the STATE OF NEW JERSEY	
Defendants.	

BRIEF OF THE UNITED STATES AS INTERVENOR IN SUPPORT OF THE CONSTITUTIONALITY OF SECTION 504 OF THE REHABILITATION ACT AND TITLE II OF THE AMERICANS WITH DISABILITIES ACT

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On April 5, 2010, the Court issued an order certifying that this case involves constitutional challenges to federal statutes. Specifically, defendants assert that they are immune under the Eleventh Amendment from private suits under Title II of the ADA and Section 504 of the Rehabilitation Act. As a result, the United States intervened in this matter pursuant to 28 U.S.C. 2403(a) in order to defend the constitutionality of (1) conditioning the receipt of federal financial assistance on a state's waiver of its sovereign immunity to claims under Section 504 of the Rehabilitation Act; and (2) the abrogation of Eleventh Amendment immunity for claims under Title II of the ADA. The United States now respectfully submits this brief in opposition to the Eleventh Amendment arguments asserted in defendants' motion for summary judgment.

STATEMENT OF THE ISSUES

1. Whether plaintiff's claims against a state official arising under Title II of the ADA and Section 504 of the Rehabilitation Act fall within the exception to Eleventh Amendment immunity established in *Ex parte Young*.

2. Whether plaintiff's Rehabilitation Act claim against the State may proceed because (a) the State waived Eleventh Amendment immunity by accepting federal funds, and (b) the statutory provision waiving Eleventh Amendment immunity for suits under Section 504 is valid Spending Clause legislation.

3. Whether plaintiff has stated a valid ADA claim against the State, and, if so, whether the statutory provision abrogating Eleventh Amendment immunity for suits under Title II of the ADA is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, as applied in the context of integration claims.

INTRODUCTION

1. This suit was brought under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq*. That Title 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) and (B). The term "disability" is defined as "a physical or mental impairment that substantially limits one or more 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(1). 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).[1]

The discrimination prohibited by Title II includes, among other things, denying a government benefit to "a qualified individual with a disability" because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to others. See, *e.g.*, 28 C.F.R. 35.130(b)(1)(i), (iii), and (vii). In addition, a public entity must "make reasonable modifications in policies, practices, or procedures" if necessary to avoid the exclusion of individuals with disabilities if such modifications can be accomplished without "fundamentally alter[ing] the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7).

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

2. Plaintiff also alleges a violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. That provision states that "[n]o otherwise qualified

[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.

individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). The provision applies to a "program or activity," a term defined to include "all of the operations" of, *inter alia*, "a department, agency * * * or other instrumentality of a State or of a local government" "any part of which is extended Federal financial assistance." 29 U.S.C. 794(b). Section 504 may be enforced through private suits against states or state agencies providing programs or activities receiving federal funds. See *Barnes* v. *Gorman*, 536 U.S. 181, 185 (2002).

3. This case involves the institutionalization of persons with developmental disabilities. According to the amended complaint, plaintiff seeks relief "on behalf of individuals who are unnecessarily institutionalized in the State's seven large, congregate facilities (known as developmental centers) and who wish to reside in more integrated settings in the community." Am. Compl. ¶ 8. Plaintiff seeks prospective relief, together with attorney's fees and costs. Am. Compl. 23-25.

ARGUMENT

I

PLAINTIFF'S CLAIMS AGAINST A STATE OFFICIAL FALL WITHIN THE EXCEPTION TO ELEVENTH AMENDMENT IMMUNITY ESTABLISHED IN *EX PARTE YOUNG*

Under the doctrine of *Ex parte Young*, "individual state officers can be sued in their individual capacities for prospective injunctive and declaratory relief to end continuing or ongoing violations of federal law." *MCI Telecomm. Corp.* v. *Bell Atlantic-Pa.*, 271 F.3d 491, 506 (3d Cir. 2001). Here, the amended complaint seeks prospective relief against both the state and a state official (Velez) for alleged ongoing violations of federal law. See Am. Compl. 23-25. The claims against Velez fall squarely within the *Ex parte Young* exception to the Eleventh Amendment.[3]

"In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc.* v. *Public Serv.*

[3] Plaintiff also seeks attorney's fees and costs, but this does not alter the *Ex parte Young* analysis. See *Missouri* v. *Jenkins*, 491 U.S. 274, 279 (1989) ("[A]n award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment."); *Hutto* v. *Finney*, 437 U.S. 678, 695-698 (1978).

Comm'n of Md., 535 U.S. 635, 645 (2002) (internal quotation marks and citation omitted). See also *Pennsylvania Fed'n of Sportsmen's Clubs, Inc.* v. *Hess*, 297 F.3d 310, 324 (3d Cir. 2002) ("In determining whether the *Ex parte Young* doctrine avoids an Eleventh Amendment bar, the Supreme Court has made it quite clear that 'a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'") (internal quotation marks and citation omitted).[4] In particular, "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon*, 535 U.S. at 646. See also *McCarthy* v. *Hawkins*, 381 F.3d 407, 415-416 (5th Cir. 2004).[5]

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[4] See also *South Carolina Wildlife Fed'n* v. *Limehouse*, 549 F.3d 324, 332 (4th Cir. 2008) ("For purposes of Eleventh Amendment analysis, it is sufficient to determine that [plaintiff] alleges facts that, if proven, would violate federal law and that the requested relief is prospective."); *League of Women Voters of Ohio* v. *Brunner*, 548 F.3d 463, 474 (6th Cir. 2008) ("The focus of the inquiry remains on the allegations only; it does not include an analysis of the merits of the claim.") (internal quotation marks and citation omitted); *In re Deposit Ins. Agency*, 482 F.3d 612, 623 (2d Cir. 2007) ("When a court reviews the legal merits of a claim for purposes of *Ex parte Young*, it reviews only whether a violation of federal law is *alleged*."); *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 496 (4th Cir. 2005) ("We do not consider the merits of the plaintiff's claims; it is enough that the complaint *alleges* an ongoing violation of federal law.").

[5] The Supreme Court's decision in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), is not to the contrary. As the Third Circuit has noted, "Justice Kennedy's opinion in *Coeur d'Alene* cannot be read to establish the controlling

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Plaintiff's claims against Velez fall squarely within the *Ex parte Young* exception. Accordingly, this Court should reach the same conclusion it did in *New Jersey Protection & Advocacy, Inc.* v. *Velez*, No. 3:08-cv-01858-AET-LHG (*NJP&A*), and reject Eleventh Amendment arguments as to the claims asserted against Velez on the basis of *Ex parte Young*. See *NJP&A* July 23 Order 5-7. With regard to the claims asserted against the State, this Court should follow the steps set forth in Sections II and III below.[6]

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standard for *Young*. Seven Justices rejected such a balancing and agreed that *Young* generally should apply when an action against a state officer alleges an ongoing violation of federal law and seeks prospective relief." *MCI Telecomm. Corp.*, 271 F.3d at 507. This view subsequently was reinforced by the Supreme Court's decision in *Verizon*. See 535 U.S. at 645 (citing concurring and dissenting opinions from *Coeur d'Alene*). Accordingly, *Verizon* – not Justice Kennedy's opinion for two justices in *Coeur d'Alene* – provides the relevant standard for addressing the *Ex parte Young* issue presented in this case.

[6] If this Court concludes that the claims against Velez fall outside the scope of *Ex parte Young*, the analysis below would apply to those claims as well.

II

THE STATE WAIVED ELEVENTH AMENDMENT IMMUNITY TO CLAIMS ARISING UNDER SECTION 504 OF THE REHABILITATION ACT

A. The State's Waiver

The Third Circuit already has considered a number of challenges to Section 504 of the Rehabilitation Act, including the following: (1) whether the state's acceptance of federal funds "means it waived its Eleventh Amendment immunity for Rehabilitation Act suits against a department receiving those funds," (2) "whether the Rehabilitation Act, especially 42 U.S.C. § 2000d-7, imposes an 'unconstitutional condition' on the [State's] receipt of federal funds," and (3) "whether the Rehabilitation Act is valid legislation under the Spending Clause." *Koslow* v. *Commonwealth of Pa.*, 302 F.3d 161, 167 (3d Cir. 2002), cert. denied, 537 U.S. 1232 (2003).

The panel in *Koslow* concluded that (1) "if a state accepts federal funds for a specific department or agency, it voluntarily waives sovereign immunity for Rehabilitation Act claims against the department or agency – but only against that department or agency," 302 F.3d at 171; (2) the Rehabilitation Act's conditioning of receipt of federal funds upon waiver of Eleventh Amendment immunity is not

an unconstitutional condition, *id.* at 174; and (3) the Rehabilitation Act is valid Spending Clause legislation, *id.* at 175-176. The ruling in *Koslow* is controlling.

Defendants argue that the State did not knowingly waive its Eleventh Amendment immunity to suit under the Rehabilitation Act because it could not foresee how the law would later be interpreted. See Br. in Supp. of Defs.' Mot. for S.J. 85-87. This argument fails.

The relevant statute provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." 42 U.S.C. 2000d-7. That provision clearly put the state on notice that, by accepting federal funds, it was subjecting itself to suit in federal court for violations of Section 504. That is all the notice that is required for a valid waiver of immunity. The state need not know how the law would later be interpreted, nor have knowledge of every conceivable interpretation of the statute in order for its waiver to be knowing, as defendants' argument implies. Rather, the state need only be on notice that its acceptance of federal funds generally subjects it to suit in federal court for violation of the statute at issue. See *A.W.* v. *Jersey City Pub. Sch.*, 341 F.3d 234, 240 (3d Cir. 2003) ("The state's 'acceptance of the funds entails an agreement' to the condition of consenting to suit in federal court.") (quoting

College Sav. Bank v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999)); *id.* at 241 ("In the context of the gift of federal funds, the clear congressional statement that entitlement to federal funds is conditioned on the waiver of immunity, taken together with the state's receipt of these funds, constitute a declaration of the state's submission to federal-court jurisdiction."); see also *Pace* v. *Bogalusa City Sch. Bd.*, 403 F.3d 272, 279 (5th Cir. 2005) ("In our reading of [*Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1 (1981)], the only 'knowledge' that the Court is concerned about is a state's knowledge that a Spending Clause condition requires waiver of immunity, *not* a state's knowledge that it has immunity that it could assert.").[7] Defendants' argument therefore fails.[8]

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[7] Even if knowledge of potential interpretations of the statute were required, that standard is satisfied in this case. The relevant regulations provide notice. See 28 C.F.R. 35.130(d) ("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(b)(7) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."). In addition, the primary point of *Olmstead* is the importance of integration, and the language of the opinion is broad enough to have put the state on notice that qualified individuals should not be institutionalized unnecessarily. *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 601 (1999). And, even before *Olmstead*, the Third Circuit addressed the integration mandate in *Helen L.* v. *DiDario*, 46 F.3d 325 (3d Cir. 1995), holding that "the ADA and its attendant regulations clearly define

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B. If This Court Concludes That The State Waived Eleventh Amendment Immunity With Respect To Section 504 Claims, It Should Permit Plaintiff To Proceed Only On That Ground

Since it is clear under Third Circuit precedent that Section 504 of the Rehabilitation Act is valid and that the State waived immunity by accepting federal funds, this Court may proceed to determine the substantive claims under Section 504 and need not address the validity of the abrogation of immunity under Title II of the ADA. That approach flows from the general principle that courts should not reach questions in advance of the necessity of deciding them.

The substantive provisions of Section 504 and Title II are the same for purposes of establishing liability in this case. See *Bowers* v. *National Collegiate Athletic Ass'n*, 475 F.3d 524, 535 n.12 (3d Cir. 2007) ("Although the language of the ADA and Rehabilitation Act differs, the standards for determining liability

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unnecessary segregation as a form of illegal discrimination against the disabled." *Id.* at 333.

[8] If Congress has the power under the Fourteenth Amendment to abrogate a state's Eleventh Amendment immunity to claims under Title II of the ADA, it has the same power with respect to claims under Section 504. See *Pace*, 403 F.3d at 301 n.5 (5th Cir. 2005) (Jones, J., concurring in part and dissenting in part) (citing cases). Accordingly, even if not waived, the state's sovereign immunity to Section 504 claims was properly abrogated for the reasons stated in Section III.B. below with regard to the ADA. However, the United States does not believe the Court needs to reach this issue.

under the two statutes are identical.") (citing *McDonald* v. *Commonwealth of Pa., Dep't of Pub. Welfare*, 62 F.3d 92, 94 (3d Cir. 1995)). This holds true with regard to the integration mandate. See *Frederick L.* v. *Department of Pub. Welfare of the Commonwealth of Pa.*, 364 F.3d 487, 491-492 (3d Cir. 2004) ("[W]here appropriate for the patient, both the ADA and RA favor integrated, community-based treatment over institutionalization."); see also *Pennsylvania Protection & Advocacy, Inc.* v. *Pennsylvania Dep't of Pub. Welfare*, 402 F.3d 374, 379 & n.3 (3d Cir. 2005). It also holds true with regard to remedies. See 42 U.S.C. 12133; *Bowers* v. *National Collegiate Athletic Ass'n*, 346 F.3d 402, 419 (3d Cir. 2003) (noting that Title II "provides that the remedies, procedures and rights applicable to section 504 of the Rehabilitation Act also are applicable under Title II") (citing 42 U.S.C. 12133).

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).

Because plaintiff can secure any and all relief to which it is entitled under Section 504, there is no reason for this Court to pass on the constitutionality of Title II's abrogation of immunity. See *Pace*, 403 F.3d at 287-289; *Bennett-Nelson* v. *Louisiana Bd. of Regents*, 431 F.3d 448, 455 (5th Cir. 2005).

III

CONGRESS PROPERLY ABROGATED ELEVENTH AMENDMENT IMMUNITY WITH REGARD TO CLAIMS ARISING UNDER TITLE II OF THE ADA

A. Before Reaching The Abrogation Issue, This Court Must Follow The Steps Established In United States *v.* Georgia

If this Court determines that it must reach the ADA claim, the procedure for doing so is set forth in *United States* v. *Georgia*, 546 U.S. 151 (2006). Under *Georgia*, 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." 546 U.S. at 159.

Thus, in order to resolve the immunity question in the present case, this Court first must determine whether plaintiff states a claim under Title II. The Court must then determine if any valid Title II claim would independently state a constitutional claim. And finally, if plaintiff has alleged a valid Title II claim that is not also a constitutional violation, only then should this Court 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" – here, institutionalization – at issue. *Georgia*, 546 U.S. at 159.

B. Congress Properly Abrogated Eleventh Amendment Immunity For Title II Claims

If this Court determines that it is necessary to address defendants' Eleventh Amendment arguments regarding the ADA claim, it should hold that the abrogation of immunity under Title II is a valid exercise of Congress's powers under the Fourteenth Amendment.

1. Tennessee *v.* Lane

Although the Eleventh Amendment ordinarily renders a state immune from suits in federal court by private citizens, Congress may abrogate states' immunity

if it "unequivocally expresse[s] its intent to abrogate that immunity" and "act[s] 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 ADA. See 42 U.S.C. 12202; *Tennessee* v. *Lane*, 541 U.S. 509, 517-518 (2004). Moreover, it is settled that "Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment." *Lane*, 541 U.S. at 518. Because Title II is valid legislation to enforce the Fourteenth Amendment in the context of institutionalization, the ADA abrogation provision is valid as applied to this case.

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. Lane was a defendant in a criminal proceeding held on the second floor of a courthouse with no elevator. *Ibid.* "Jones, a certified court reporter, alleged that she had not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in

the judicial process." *Id*. at 514. The state argued that Congress lacked the authority to abrogate the state's Eleventh Amendment immunity to these claims. The Supreme Court in *Lane* disagreed. See 541 U.S. at 533-534.

To reach this conclusion, the Court applied the three-part analysis for Fourteenth Amendment legislation established by *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). 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. See *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. See *id*. at 523-529. 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. See *id*. at 530-531.

The Supreme Court declined to "examine the broad range of Title II's applications all at once, and to treat that breadth as a mark of the law's invalidity." *Lane*, 541 U.S. at 530. Instead, the Court concluded that the only question before it was "whether Congress had the power under § 5 to enforce the constitutional right of access to the courts." *Id*. at 531.

Viewed in light of *Lane*, Title II is valid Fourteenth Amendment legislation as applied to cases relating to institutionalization.[11]

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[11] 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 in the institutionalization context, 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

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2. Constitutional Rights Implicated

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,[12] as well as the heightened constitutional protection applied to the "treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment, *e.g.*, *Jackson* v. *Indiana*, 406 U.S. 715 (1972); [and] the abuse and neglect of persons committed to state mental health hospitals, *Youngberg* v. *Romeo*, 457 U.S. 307 (1982)." *Lane*, 541 U.S. at

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(…continued)
Court in *Lane* determined is an "appropriate subject for prophylactic legislation" under Section 5. 541 U.S. at 529.

[12] Even under rational basis scrutiny, "[m]ere negative attitudes, or fear" alone cannot justify disparate treatment of those with disabilities. *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 367 (2001) (quoting *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985)). 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, see *id*. at 366 n.4; *City of Cleburne*, 473 U.S. at 447-450, if it is based on "animosity," see *Romer* v. *Evans*, 517 U.S. 620, 634 (1996), or if it simply gives effect to "private biases," see *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

524-525. See also *O'Connor* v. *Donaldson*, 422 U.S. 563, 573-576 (1975) (unconstitutional institutionalization); *Thomas S. by Brooks* v. *Flaherty*, 902 F.2d 250 (4th Cir. 1990) (confinement when appropriate community placement available).

In *Clark* v. *Cohen*, 794 F.2d 79 (3d Cir. 1986), the Third Circuit addressed a situation involving a patient "who was committed without notice or a hearing as a result of a petition containing an incorrect diagnosis, and who was retained against her will without a hearing for over twenty-eight years." *Id.* at 86. This despite the fact that she "repeatedly requested that the persons in charge of her detention arrange for such a hearing," and those requests "were endorsed by the professional staff of the institution." *Ibid.* The Third Circuit concluded that this violated both her procedural and substantive due process rights. *Id.* at 86-87.

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 533; 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 540 (Rehnquist, C.J., dissenting).

3. Historical Predicate

a. Lane *Conclusively Established The Adequacy Of The Predicate For Title II's Application To Discrimination In All 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," *id.* at 529.

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 *Lane*, 541 U.S. at 530-532. 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 institutionalization, *id.* at 524-525. That record, the Court concluded, supported prophylactic legislation to address discrimination in "public services" generally. *Id*. at 529.[13]

[13] 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 record of constitutional violations in this case * * * far exceeds the record in *Hibbs*," *id*. at 529, the Court specifically referred to the record of "exclusion of persons with disabilities from the enjoyment of *public services*," *ibid*. (emphasis added), rather than to the record of exclusion from judicial services in particular. See also *ibid.* (relying on congressional finding in 42 U.S.C. 12101(a)(3) and italicizing phrase "access to public services" rather than specific examples of public services listed in the finding).

Thus, the adequacy of Title II's historical predicate to support prophylactic legislation addressing discrimination in public services is clear. Likewise, there is an ample historical basis for applying Title II to disability discrimination relating to institutionalization.

b. Historical Discrimination Against People With Disabilities Subject To Institutionalization

Of particular relevance to this case, the Supreme Court in *Lane* expressly acknowledged and cited the well-documented pattern of unconstitutional treatment of and discrimination against persons with disabilities in the context of institutionalization. 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 525 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, the Supreme Court has 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) (citation omitted); see also *Olmstead* v. *L.C. ex rel. Zimring*, 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.").

During the early twentieth century, the eugenics movement labeled persons with mental and physical disabilities as "sub-human creatures" and "waste products" responsible for poverty and crime. United States Commission On Civil Rights, *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.[14] "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

[14] 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") (citation and internal quotations omitted).

reproduction of the retarded and 'nearly extinguish their race.'" *Cleburne*, 473 U.S. at 462 (Marshall, J., concurring in part and dissenting in part) (citation omitted).[15] State statutes provided for the involuntary institutionalization of persons with disabilities.[16] Additionally, many states accompanied institutionalization with compulsory sterilization and prohibitions of marriage. *Cleburne*, 473 U.S. at 462-463 (Marshall, J., concurring in part and dissenting 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.").[17]

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[15] See also *Cleburne*, 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").

[16] See *Spectrum* 19; Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 400 (1991); see also Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979).

[17] See also 3 Staff of H. 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); M. Burgdorf & R. Burgdorf, *A History of Unequal*

(continued…)

In considering the ADA, Congress also heard testimony regarding unconstitutional treatment and unjustified institutionalization of persons with disabilities in state facilities. See, *e.g.*, 2 Staff of H. 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) (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 (detailing the "minimal, custodial, neglectful, abusive" care received at state mental hospital, and willful indifference resulting in rape); see also *Spectrum* 32-35. 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

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Treatment: The Qualifications of Handicapped Persons As A "Suspect Class" Under The Equal Protection Clause, 15 Santa Clara Lawyer 855, 887-888 (1975).

documented egregious and flagrant denials of constitutional rights by state-run institutions for individuals with disabilities.[18] Unconstitutional uses of physical and medical restraints were commonplace in many institutions. For example, investigations found institutions strapping mentally retarded residents to their beds in restraints for the convenience of staff.[19] One facility forced residents with mental disabilities to inhale ammonia fumes as punishment for misbehavior.[20] Residents in other facilities lacked adequate food, clothing and sanitation.[21] Many

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[18] 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).

[19] 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) ("Our consultant found numerous incidents where bodily restraint was inappropriately used as punishment for antisocial behavior, for the convenience of staff, or in lieu of treatment, in violation of the residents' constitutional rights.").

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

[21] 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

(continued…)

state facilities failed to provide basic safety to residents, resulting in serious physical injuries, sexual assaults, and even deaths.[22] Others were denied minimally dequate medical care, leading to serious medical complications and further

(…continued)
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 (1985) (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 35% "had pinworm infection, a parasite which is spread by fecal and oral routes in unclean environments").

[22] 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 (1982) (inadequate supervision of residents contributed to rapes and sexual assaults of several residents; profoundly 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); 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 and threat of assault, broken bones and bruises" found).

deaths.[23]

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)).

4. Congruence And Proportionality

"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 institutionalized persons.

As was true of access to courts, the "unequal treatment of disabled persons" in the area of institutions "has a long history, and has persisted despite several

[23] 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, potentially irreversible side effects).

legislative efforts." *Lane*, 541 U.S. at 531; see *id*. at 527-528; *Olmstead*, 527 U.S. at 599-600 (describing prior statutes). Thus, Congress faced a "difficult and intractable proble[m]," *Lane*, 541 U.S. at 531 (citation omitted), which it could conclude would "require powerful remedies." *Id*. at 524 (citation omitted).

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 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," *id*. at 532, 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," *ibid*. 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. As noted, 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 III.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 (addressing gender discrimination). Title II appropriately balances the need to protect against that risk and the state's legitimate interests. *Olmstead* generally permits a state to limit services to an institutional setting when 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 declines to follow the advice of professionals, or when it is unable to demonstrate that its decision is justified by

sufficient administrative or financial considerations, the risk of unconstitutional treatment 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.").[24]

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 524-525; *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.") (citation and internal punctuation omitted). It is also a reasonable prophylaxis against the risk of future unconstitutional discrimination in government services.

[24] The integration mandate is also a proportionate response to the history of "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.

"[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 (citation and internal quotation marks omitted).

In arguing that Title II is not congruent and proportionate legislation as applied to the class of cases implicating the constitutional rights of institutionalized persons, defendants contend, *inter alia*, that the integration requirement at issue "far surpasses any constitutional protection," and that the remedy at issue likewise is beyond Congress's authority to enact. See Br. in Supp. of Defs.' Mot. for S.J. 78-81. Both arguments fail.

Section 5 of the Fourteenth Amendment 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," *Hibbs*, 538 U.S. at 727 (quoting *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001)). Section 5 "is a 'broad power indeed,'" *Lane*, 541 U.S. at 518 (citation omitted), 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. Accordingly, Congress did not exceed its authority in enacting Title II of the ADA, as applied in the context of institutionalization.

CONCLUSION

This Court should hold that the Eleventh Amendment does not bar plaintiff's claims arising under Title II of the ADA and Section 504 of the Rehabilitation Act.

Respectfully submitted,

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