UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

WAYNE GILMORE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:12-cv-183-HSO
	)	
MISSISSIPPI COAST COLISEUM COMMISSION,	)	
	)	
	)	
Defendant.	)	

UNITED STATES' MEMORANDUM OF LAW AS INTERVENOR IN OPPOSITION TO MOTION TO DISMISS

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MISCELLANEOUS:

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UNITED STATES' MEMORANDUM OF LAW AS INTERVENOR IN OPPOSITION TO MOTION TO DISMISS

The United States of America, by and through its undersigned counsel, respectfully submits the following memorandum of law as intervenor pursuant to 28 U.S.C. § 2403(a). It submits this memorandum in opposition to the defendant's motion to dismiss based upon sovereign immunity (Doc. 10) (Def.'s Mot.) and the defendant's reply in support of motion to dismiss (Doc. 24) (Def.'s Reply).

QUESTIONS PRESENTED

The United States will address only the following questions:

1. Whether this Court should determine if plaintiff has pleaded a claim under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act before ruling on defendant's sovereign immunity defenses.

2. Whether plaintiff has adequately pleaded that defendant has received federal funding that requires it to comply with Section 504 of the Rehabilitation Act of 1973.

3. Whether Title II is a valid exercise of Congress's authority under Section Five of the Fourteenth Amendment, and so validly abrogates sovereign immunity, to the extent that it ensures physical access to government facilities such as the Mississippi Coast Coliseum and Convention Center at issue here.

STATEMENT OF INTEREST

The United States submits this memorandum of law as an intervenor pursuant to 28 U.S.C. § 2403(a), which permits the United States to intervene to defend any federal law.

This motion concerns the constitutional validity and enforceability of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.* (ADA), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The Department of Justice has authority to enforce and construe those two statutes, including the power to issue regulations implementing them. 42 U.S.C. §§ 12133-12134, 12204; *see*, *e.g.*, 28 C.F.R. § 41. Accordingly, the United States has a strong interest in the resolution of defendant's argument that the requirements of Title II and Section 504 are unenforceable in this private action.

SUMMARY OF ARGUMENT

1. Before reaching defendant's sovereign immunity defenses, this Court should determine whether plaintiff has stated a claim under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, as required by *United States* v. *Georgia*, 546 U.S. 151, 159 (2006).

2. If the plaintiff has stated a claim, this Court should find that plaintiff has adequately pleaded that defendant received federal funding that waives its sovereign immunity to private claims brought under Section 504. Contrary to the defendant's assumption, a plaintiff is not required to plead any specific federal funding; rather, plaintiff is entitled to learn those specifics in discovery.

3. This Court need not decide on this motion whether Title II is proper Section Five legislation that validly abrogates the States' sovereign immunity. The plaintiff adequately pleaded a violation of Section 504, which requires States receiving federal financial assistance to

meet obligations identical to those of Title II. Receipt of such funding also constitutes a waiver of sovereign immunity. Accordingly, it is unnecessary for this Court to determine whether Title II provides the same relief.

Should this Court nonetheless reach the question, it should find that Title II, where it requires that public facilities such as the coliseum at issue here be made accessible to individuals with disabilities, is a valid exercise of Congress's authority pursuant to Section Five of the Fourteenth Amendment. Title II is well tailored to remedy past discrimination against individuals with disabilities and prevent such discrimination in the future, while not imposing excessive compliance costs on public entities. It is a congruent and proportional response to a documented pattern of official discrimination in this context, just as in the contexts of courthouse access and public education. *See Tennessee* v. *Lane*, 541 U.S. 509 (2004); *Association for Disabled Ams., Inc.* v. *Florida Int'l Univ.*, 405 F.3d 954 (11th Cir. 2005).

ARGUMENT

I. THIS COURT SHOULD DETERMINE WHETHER PLAINTIFF STATES A CLAIM BEFORE REACHING THE DEFENDANT'S SOVEREIGN IMMUNITY DEFENSES

This Court should not rule on the defendant's sovereign immunity defenses unless and until it determines that plaintiff has stated a claim under Title II and Section 504. *See United States* v. *Georgia*, 546 U.S. 151, 159 (2006); *Hale* v. *King*, 642 F.3d 492, 498 (5th Cir. 2011). In *Georgia*, the Supreme Court set forth a three-step process for handling sovereign immunity defenses to Title II claims. Courts first must determine "which aspects of the [defendant]'s alleged conduct violated Title II." *Georgia*, 546 U.S. at 159. If Title II was violated, a court next should determine "to what extent such misconduct also violated the Fourteenth Amendment." *Ibid.* Finally, and only if a court finds that the alleged "misconduct violated Title

II but did not violate the Fourteenth Amendment," it should reach the question whether Congress's exercise of its Section Five authority "as to that class of conduct is nevertheless valid." *Ibid.*

Georgia thus bars this Court from adjudicating the validity of Title II's abrogation of sovereign immunity until it rules on (1) defendant's argument that plaintiff has failed to state a claim and (2) plaintiff's argument that defendant's conduct also is unconstitutional. And the principles upon which *Georgia* rests make clear that this Court additionally should delay determining whether defendant's receipt of federal funding has validly waived its sovereign immunity to claims under Section 504. Adjudicating the issues presented on this motion in that order is in keeping with the "fundamental and longstanding principle of judicial restraint" 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). This constitutional avoidance principle is at its apex when courts address the constitutionality of an act of Congress, "the gravest and most delicate duty" that courts are "called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted); *accord Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 204 (2009). Accordingly, the Fifth Circuit vacated a district court order that adjudicated the validity of Title II's abrogation of sovereign immunity without first ascertaining whether the plaintiff had stated a Title II claim. *See Hale*, 642 F.3d at 503.

Resolving the statutory issue first is particularly appropriate here, because resolution of the immunity questions would determine only whether plaintiff can obtain damages. Regardless of the answer to that question, plaintiff has live claims for injunctive and declaratory relief

pursuant to the *Ex Parte Young* doctrine.[1] *See McCarthy ex rel. Travis* v. *Hawkins*, 381 F.3d 407, 414 (5th Cir. 2004). Accordingly, ruling on the sovereign immunity questions first could not resolve this suit.

Moreover, both constitutional questions are difficult to answer without definitive resolution of which, if any, of plaintiff's allegations state claims under Title II and Section 504. By definition, it is impossible to determine whether Title II's requirements are congruent and proportional to the constitutional harms they remedy in this context without first ascertaining what, if anything, Title II actually requires here. And it is difficult to determine the relationship between the federal funds received by the defendant and the defendant's violations of Section 504 without determining what those violations are.

The United States takes no position as to whether plaintiff has stated a claim in his amended complaint. The United States does observe that the defendant is correct in pointing out that its obligation to make the facilities at issue accessible differs considerably depending on what parts of the coliseum have been newly built or altered since 1992, a point on which the amended complaint is silent. *See* Def.'s Reply 4-5. A public entity must make "readily accessible" any facility newly constructed or altered after 1992. 28 C.F.R. § 35.151(a). In the absence of new construction or alteration, on the other hand, the defendant's obligation is only to ensure that each service, program, or activity, "when viewed in its entirety, is readily accessible

[1] To be sure, in order to seek relief under *Ex Parte Young*, plaintiff would need to add a claim against an individual state official in his or her official capacity. Courts routinely permit such repleading in order to avoid constitutional difficulties. *See*, *e.g.*, *Mary Jo C.* v. *New York State and Local Ret. Sys.*, No. 11-2215, ___ F.3d ___, 2013 WL 322879, at *17 (2d Cir. Jan. 29, 2013).

to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a).[2] To comply with this mandate, a public entity need not necessarily make an existing facility fully compliant with the regulations applicable to new construction, 28 C.F.R. § 35.150(a)(1), nor must it take any action that it can demonstrate would result in "undue financial and administrative burdens." 28 C.F.R. § 35.150(a)(3).

II. PLAINTIFF ADEQUATELY PLEADED DEFENDANT'S RECEIPT OF FEDERAL FUNDING SUFFICIENT TO REQUIRE COMPLIANCE WITH THE REHABILITATION ACT

Should this Court determine that plaintiff pleaded violations of Title II and Section 504 that are not also constitutional violations, it next should consider whether plaintiff adequately pleaded that defendant received federal funding that subjects it to suit under the Rehabilitation Act. The defendant's obligations are the same pursuant to Section 504 and Title II, and so as long as the plaintiff maintains a live Section 504 claim, the constitutionality of Title II's abrogation of sovereign immunity is a purely academic question that should not be decided. *See*, *e.g.*, *Bennett-Nelson* v. *Louisiana Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005) (finding it unnecessary to decide whether Title II is valid Fourteenth Amendment legislation where plaintiff had identical Section 504 claim).

Plaintiff adequately pleaded that defendant receives federal funding sufficient to require compliance with the Rehabilitation Act. Defendant errs in two ways in arguing that, at the pleading stage, plaintiff is required to demonstrate that defendant received federal funding that "was related to the specific claims of violations, *i.e.* architectural barriers." Def.'s Mot. 7. First, plaintiff is not required to plead any specifics regarding federal funding. Second, while this

[2] A new version of Title II's implementing regulations went into effect on March 15, 2011. The changes have no substantive impact here, and so this Court need not consider under which version the plaintiff's claims should be adjudicated. We cite the new version in this brief.

Court need not determine at this time the precise showing that plaintiff must make following discovery, such showing does not include the tight nexus that defendant suggests between the funding and the specific violation alleged in this case.

1. It is unrealistic to expect specificity regarding federal funding from a plaintiff at the pleading stage, as these are matters regarding the defendant's internal organization and funding that are peculiarly within the defendant's knowledge. *See Rodriguez* v. *Plymouth Ambulance Serv.*, 577 F.3d 816, 830 (7th Cir. 2009) (plaintiff entitled to discovery as to whether the defendant was a state actor, as plaintiff could not be "charged fairly with knowing" defendant's contractual relationship with public entity). The defendant knows far better than does the plaintiff which programs are responsible for the activities at issue here and whether those programs receive federal funding. *See Gaylor* v. *Georgia Dep't of Natural Res.*, No. 2:11-cv-288, 2012 WL 3516489, at *7 (N.D. Ga. Aug. 15, 2012) ("what funds the Defendants have received are facts within Defendants' control"); *Cohn* v. *KeySpan Corp.*, 713 F. Supp. 2d 143, 159 (E.D.N.Y. 2010) ("Whether or not any of the Utility defendants receives federal funding is a fact peculiarly within the possession and control of those defendants, which plaintiff is entitled to discern during discovery.").

The plaintiff ultimately must establish that the programs alleged to violate Section 504 receive federal funds, because Section 504, as Spending Clause legislation, applies only to programs or activities that receive federal financial assistance. *See*, *e.g.*, *Koslow* v. *Pennsylvania*, 302 F.3d 161, 176 (3d Cir. 2002). But there is no basis for defendant's contention, offered without citation or argument, that plaintiff is required to demonstrate that defendant received federal funding that "was related to the specific claims of violations, *i.e.* architectural barriers." Def.'s Mot. 7. To the contrary, statutory language makes clear that "all

of the operations of" a state or local department or agency are subject to Section 504's requirements if "any part" of that department or agency receives federal financial assistance. *See* 29 U.S.C. § 794(b).[3] Indeed, as defendant concedes in its reply, Fifth Circuit precedent makes clear that the federal funds received need not have been "earmarked for programs that further the anti-discrimination and rehabilitation goals of § 504." *See* Def.'s Reply 15-16 (quoting *Miller* v. *Texas Tech Univ. Health Scis. Ctr.*, 421 F.3d 342, 349 (5th Cir. 2005)).

2. The Fifth Circuit has upheld Section 504's broad waiver of sovereign immunity as a valid exercise of the Spending Clause. In so doing, it specifically rejected the defendant's argument that it is unconstitutionally coercive to require a state agency to waive sovereign immunity to suits under Section 504 as a condition of receiving federal funding. *See Miller*, 421 F.3d at 349; *Pace* v. *Bogalusa City Sch. Bd.*, 403 F.3d 272, 287 (5th Cir. 2005) (en banc).

This Court need not consider now defendant's novel argument that conditioning the receipt of disaster relief funds (as opposed to any other funds) on the waiver of sovereign immunity is unconstitutionally coercive, *see* Def.'s Reply 16, because it is still to be determined

[3] One district court recently determined that a plaintiff in a similar case failed to plead a Section 504 claim. *See Mason* v. *City of Huntsville*, No. 10-cv-2794, 2012 WL 4815518, at *11-12 (N.D. Ala. Oct. 10, 2012). That decision appears to be based on the incorrect premise that precedent from 1981 and 1982 requiring plaintiffs to show that the very facilities alleged to be inaccessible receive federal funding remains good law. *See id.* at *5, *12 (citing *Brown* v. *Sibley*, 650 F.2d 760 (5th Cir. 1981) and *Doyle* v. *University of Ala. in Birmingham*, 680 F.2d 1323 (11th Cir. 1982)). As *Mason* acknowledged, Congress amended the Rehabilitation Act in 1987 to clarify that "all of the operations of" a state or local department or agency are subject to Section 504's requirements if "any part" of that department or agency receives federal financial assistance. *See* 29 U.S.C. § 794(b). Accordingly, *Brown* and *Doyle* no longer can be followed on this point. *See*, *e.g.*, *Locascio* v. *St. Petersburg*, 731 F. Supp. 1522, 1532 (M.D. Fla. 1990); *see also Corrales* v. *Moreno Valley Unified Sch. Dist.*, No. 08-cv-040, 2010 WL 2384599, at *9 (C.D. Cal. June 10, 2010); *Innovative Health Sys., Inc.* v. *City of White Plains*, 931 F. Supp. 222, 234 (S.D.N.Y. 1996).

in discovery whether such funds are the only federal money the defendant has received.[4] This Court should wait until the full extent of the federal funds received by defendant is clear to determine whether such funds suffice for waiver of sovereign immunity to plaintiff's claim under Section 504. But in any event, defendant does not explain what makes this limited funding stream more coercive than the many more generous offers of federal funds that, courts have consistently held, may permissibly be conditioned upon the waiver of immunity or other federal requirements. *See*, *e.g.*, *Jim C.* v. *United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (upholding waiver as condition of receipt of $250 million in federal education assistance); *Kansas* v. *United States*, 214 F.3d 1196, 1198, 1201-1202 (10th Cir. 2000) (enforcing condition in federal welfare program that provided $130 million, constituting 66% of state funds for child support enforcement program).[5]

III. TITLE II PROPERLY ABROGATES STATE SOVEREIGN IMMUNITY WHERE IT ENSURES ACCESSIBLE PUBLIC FACILITIES

There is no reason for this Court to reach, on this motion to dismiss, the question of whether Title II validly abrogates sovereign immunity. As argued above, the plaintiff adequately pleaded violations of Section 504 of the Rehabilitation Act. Accordingly, assuming that this

[4] Indeed, a quick Internet search suggests that the coliseum received continuing disaster relief funding beyond the initial $2 million identified by plaintiff. *See* Mississippi Coast Coliseum Commission: Memorandum Dated Aug. 13, 2010, available at http://www.oig.dhs.gov/assets/GrantReports/OIG_DA-10-16_Aug10.pdf (describing total of more than $9 million in disaster relief grants that had been awarded to the commission by that date).

[5] The defendant does not contend that the federal funding here is coercive in the way identified by the Supreme Court in *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012), and such an argument would be unsuccessful. In *Sebelius*, the Court concluded that Congress could not condition a State's existing Medicaid funding on the State's participation in what the Court regarded as an entirely new health care program. *See id.* at 2606. No condition of that sort is at issue here.

Court has found that plaintiff states claims under Title II and the Rehabilitation Act, it should wait until after discovery to determine whether plaintiff can produce evidence of the necessary federal funding. Only if plaintiff cannot show such funding after discovery should this Court determine the constitutionality of Title II's abrogation of sovereign immunity.

Should this Court nonetheless reach the question on this motion, it should determine that, to the extent that Title II requires public entities to make accessible their public facilities, such as the coliseum at issue here, it validly abrogates the States' sovereign immunity. In such cases, Title II is a congruent and proportional response to the extensive history of public discrimination against individuals with disabilities, including in this very context, and so it is a proper exercise of Congress's legislative authority pursuant to Section Five of the Fourteenth Amendment.

The only question is whether Title II is proper Section Five legislation in this context. All other requirements for abrogation are satisfied. There is no question that Congress unequivocally expressed its intent to abrogate the States' sovereign immunity with respect to claims under the ADA. *See* 42 U.S.C. § 12202; *Tennessee* v. *Lane*, 541 U.S. 509, 518 (2004). Similarly, 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.

As the Supreme Court held in *Lane*, Congress compiled an extensive record of discrimination against individuals with disabilities that was more than sufficient to trigger its broad authority to legislate pursuant to Section Five. Title II was enacted "against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Lane*, 541 U.S. 509 at 524. This long and broad history of official discrimination suffered by individuals with disabilities authorized Congress,

pursuant to Section Five of the Fourteenth Amendment, not only to bar actual constitutional violations, but also to pass prophylactic legislation that remedies past harm and protects the right of people with disabilities to receive all public services on an equal footing going forward. *Ibid.*; *accord Association for Disabled Ams., Inc.* v. *Florida Int'l Univ.*, 405 F.3d 954, 958 (11th Cir. 2005); *Bowers* v. *NCAA*, 475 F.3d 524, 554 & n.35 (3d Cir. 2007).

Congress was not required to make a record of official discrimination for every context in which Title II may validly apply. Title II applies to all public services, programs, and activities. Congress cannot anticipate, let alone justify with evidence, every context in which such a law may apply. What it can do is make a voluminous record demonstrating that individuals with disabilities have faced public discrimination across the board, thus justifying legislation that covers all public services, programs, and activities. And *Lane* held that Congress did just that.

Lane noted the wide variety of contexts in which individuals with disabilities faced public discrimination, including not only access to judicial services, but also voting, marrying, zoning, education, and other contexts. *See* 541 U.S. at 524-525. It held that Congress's finding of widespread discrimination in public services, "together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that *inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation*." *Id.* at 529 (emphasis added). *Lane* thus clearly held that "provision of public services and access to public facilities" as a whole – not merely the judicial services at issue in that case – is "an appropriate subject for prophylactic legislation." Accordingly, *Lane* concluded, "[t]he only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment." 541 U.S. at 530. In addressing this question – and only this question – *Lane* engaged in context-specific analysis, because Title II's remedy

operates differently in different contexts. *Id.* at 530-531. But *Lane* did not leave open, in any context, whether Congress compiled a sufficient history of disability discrimination to trigger its authority to legislate.

The circuits to consider the question overwhelmingly have concluded, correctly, that following *Lane* there is no need to show a history of discrimination in a specific context covered by Title II. *See Association for Disabled Ams.*, 405 F.3d at 958; *Bowers*, 475 F.3d at 554 & n.35; *Klingler* v. *Director, Dep't of Revenue*, 455 F.3d 888, 896 (8th Cir. 2006); *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 487-488 (4th Cir. 2005); see also *McCarthy ex rel. Travis* v. *Hawkins*, 381 F.3d 407, 423 (5th Cir. 2004) (en banc) (Garza, J., concurring in part and dissenting in part). To the extent that the Tenth Circuit held otherwise in *Guttman* v. *Khalsa*, 669 F.3d 1101, 1119 (10th Cir. 2012), it did so erroneously and should not be followed.

Nor is there any basis for defendant's argument that *Lane*'s mention of eight particular contexts in which disability discrimination has been documented, see 541 U.S. at 524-525, somehow precludes a showing that Title II is valid Fourteenth Amendment legislation in other contexts. *See* Def.'s Reply 14-15. Rather, *Lane* supports the opposite proposition – that Congress so overwhelmingly detailed a history of disability discrimination in every conceivable context that there is no need, and indeed it would not be possible, to itemize each one.

Accordingly, the only question that remains undecided following *Lane* is whether Title II's remedy is congruent and proportional to the constitutional violations it ameliorates and prevents in this context.

A. The Relevant Context Is The Provision Of Public Facilities

The congruence and proportionality of Title II's requirements can be adjudicated "in light of the particular constitutional rights at stake in the relevant category of public services."[6] *Association for Disabled Ams.*, 405 F.3d at 958. In this case, the "relevant category" of services is the provision of public facilities. At the very least, this Court should consider Title II as applied to all public recreational venues. The defendant does not explain, nor is there a reasonable basis for, confining the analysis to the narrow context of "access to a public recreational program at a public facility." *See* Def.'s Reply 11.

After determining that Congress had compiled a sufficient record of official disability discrimination to trigger its Section Five authority with respect to all public services, *Lane* determined that Title II was a proportional and congruent response to such discrimination with respect to "the class of cases implicating the accessibility of judicial services." 541 U.S. at 530-531. In doing so, it neither engaged in nor endorsed a narrow, as-applied analysis, as though every application of Title II were a wholly separate statute. Rather, it held that some broad classes of cases are so different from others, in the rights implicated and "the manner in which the legislation operates to enforce that particular guarantee," as to make those applications of Title II fully severable. *See id.* at 530-531 & n.18. For example, Title II's protections for "the accessibility of judicial services" could readily be severed from those involving voting rights or access to hockey rinks, because it was "unclear what, if anything, examining Title II's application to hockey rinks or voting booths can tell us about whether Title II substantively redefines the right of access to the courts." *Id.* at 531 & n.18.

[6] The United States maintains that Title II is constitutional in all of its applications. This case does not require this Court to consider that argument.

At the same time, *Lane* made clear that a court must consider a broader context than the facts of the particular case before it. The plaintiffs in *Lane* both were paraplegics who contended that courthouses were inaccessible to individuals who relied upon wheelchairs. *See Lane*, 541 U.S. at 513. As a result, one plaintiff was unable to appear to answer charges against him, while the other could not perform her work as a court reporter. *Id.* at 513-514. The Supreme Court did not limit the abrogation question before it to either the specific judicial services (such as criminal adjudication) alleged to be inaccessible or the particular sort of access sought (wheelchair access to a courtroom). Rather, it framed the question broadly, with respect "to the class of cases implicating the accessibility of judicial services." *Id.* at 531. Accordingly, the Court found relevant to its analysis a number of constitutional rights and fact patterns that were not implicated by the plaintiffs' claims – including exclusion from jury service, violation of First Amendment rights, and failure to make available measures such as sign-language interpreters or materials in Braille.

Similarly, in *Association for Disabled Americans*, the Eleventh Circuit properly looked at Title II's application "in the context of a public education institution," *see* 405 F.3d at 957. It did not limit its focus to the particular defendant (a university) or the disabilities of particular plaintiffs. Other courts likewise have correctly declined to focus their inquiries on the narrow sub-category of public education, such as community colleges, at issue in the particular cases before them. *See Toledo* v. *Sanchez*, 454 F.3d 24, 36 (1st Cir. 2006) (rejecting argument that Congress was required to show history of discrimination in higher education in particular); *accord Bowers*, 475 F.3d at 555.

There is good reason for these courts' determination that the validity of Title II as Fourteenth Amendment legislation must be adjudicated as applied to broad categories of services

provided by public entities. Title II is sweeping legislation that remedies a long history of discrimination across a variety of activities undertaken by public entities. Congress was entitled to pass legislation broadly remedying such discrimination "even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne* v. *Flores*, 521 U.S. 507, 518 (1997). Accordingly, it is expected and permissible for Section Five legislation to apply in situations where the constitutional rights it protects are not violated.

Following *Lane*, this Court should determine the congruence and proportionality of Title II within the entire "class of cases" involving the provision of public facilities. *See Lane*, 541 U.S. at 531. Individuals with disabilities face similar discrimination in this class of cases, while "the manner in which the legislation operates" to remedy such discrimination is comparable in such cases. *See id.* at 531 n.18. Moreover, individuals with disabilities often suffer multiple related discriminatory actions arising out of a public entity's failure to make accessible a public facility, which often can house multiple services and programs. For example, while the allegations in this case arise out of the coliseum's use for recreational purposes, it also could be used for other purposes. Accordingly, this class of cases meaningfully can be severed from other Title II applications and considered together for purposes of the congruence and proportionality analysis.

In the alternative, this Court should determine the congruence and proportionality of Title II within the class of cases involving access to public entertainment and recreation venues – with the awareness that such venues can serve a variety of purposes. *See Mason* v. *City of Huntsville*, No. 10-cv-2794, 2012 WL 4815518, at *12 (N.D. Ala. Oct. 10, 2012).

B. The Rights At Stake In This Context Are Important Ones That Have Long Been Denied To Individuals With Disabilities

In addition to enforcing the constitutional guarantee against irrational disability discrimination, Title II "seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Lane*, 541 U.S. at 522-523. For example, the accessibility of courthouses at issue in *Lane* implicated the exercise of the Due Process Clause, the Confrontation Clause, the Sixth Amendment right to a representative jury, and the First Amendment right of the public to access trial proceedings. *Id.* at 523.

Similarly important constitutional rights are implicated where a government fails to make its public facilities accessible. "The appropriateness of remedial measures must be considered in light of the evil presented." *City of Boerne*, 521 U.S. at 530. Although Congress was not required to make a record of discrimination in this particular context, evidence before it in fact demonstrated systematic failure by States and municipalities to provide accessible public facilities. It also demonstrated that, as a result, individuals with disabilities regularly were burdened in their exercise of fundamental rights as well as basic civil participation.

1. As a result of the isolation and invisibility of individuals with disabilities – isolation and invisibility that have been perpetuated by government policies and practices – public facilities in this country historically have been constructed without the needs of disabled individuals in mind. One study commissioned by Congress found in 1967 that "virtually all of the buildings and facilities most commonly used by the public have features that bar the handicapped." *See* National Commission on Architectural Barriers to Rehabilitation of the Handicapped, *Design For All Americans* 3 (1967).[7] And despite the passage of state and federal

[7] This report is available at http://www.eric.ed.gov/PDFS/ED026786.pdf.

legislation aimed at this problem, progress has been slow. As *Lane* observed, one report before Congress noted that, as of 1980, a full seventy-six percent of "public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities." 541 U.S. at 527 (citing United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 39 (1983) (*Spectrum*)).[8] Often, the result was the denial of, or serious burden on, the exercise of fundamental rights. Testimony before Congress, as well as by individual stories submitted to the Task Force on the Rights and Empowerment of Americans with Disabilities – a body appointed by Congress that took written and oral testimony from numerous individuals with disabilities as to the obstacles they faced – illustrated these burdens. *See Lane*, 541 U.S. at 527 (relying on Task Force's "numerous examples of the exclusion of persons with disabilities from state judicial services and programs").[9]

For example, inaccessible public buildings prevented individuals with disabilities from participating in public meetings, accessing government officials and proceedings, and otherwise fully exercising the right to petition for redress of grievances. *See*, *e.g.*, *Americans with Disabilities Act of 1989: Hearings Before the Senate Comm. on Labor and Human Res. and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 488 (1989) (*May 1989 Hearings*). As

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[8] This report is available at http://www.law.umaryland.edu/marshall/usccr/documents/cr11081.pdf.

[9] This brief cites certain submissions compiled by the Task Force and submitted to Congress. These submissions (along with many others) were lodged with the Supreme Court in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), and many of them were catalogued in Appendix C to Justice Breyer's dissent in that case. Justice Breyer's dissent cites to the documents by State and Bates stamp number, *see id.* at 389-424, a practice we follow in this brief. The documents cited herein also are attached for this Court's convenience in an addendum to this brief.

Lane documented, individuals with disabilities long have been shut out of inaccessible courthouses, depriving them of a number of fundamental rights attendant to judicial proceedings as well as access to other important public services housed in courthouses. *See*, *e.g.*, WY 1786 (wheelchair user unable to obtain marriage license because courthouse was inaccessible). Inaccessible public education facilities regularly denied individuals with disabilities educational opportunities. *See*, *e.g.*, S. Rep. No. 116, 101st Cong., 1st Sess. 7 (1989) (*Senate Report*). Many individuals with disabilities could not access their local libraries, *see* ND 1192, social service agencies, *see* AZ 131; AR 145, or homeless shelters, *see* CA 216.

Of particular relevance to this case, and contrary to defendant's assertion, *see* Def.'s Reply 12, the inaccessibility of public facilities denied individuals with disabilities access to a variety of public activities such as parks, museums, and sporting events. As one Task Force submission observed, individuals with disabilities often face particular difficulties accessing recreation facilities precisely because such facilities are "assumed to be not as important as many other areas in our work-oriented society." NC 1155.

For example, one Utah couple could not access a football field to watch their grandson play, an auditorium to watch their daughter perform, or the senior citizens' meals and functions held at a local school. UT 1613. A six-year-old girl with a hearing impairment was denied placement in a public swim class. WI 1751-1752. Lack of accessible facilities routinely shut individuals with disabilities out of public swimming pools. *See*, *e.g.*, CT 294-295; OK 1298; TX 1521. Public parks enforced "no dog" rules against children with visual impairments who needed guide dogs, *see May 1989 Hearings* 488, and parks had inaccessible bathrooms and other features. *See*, *e.g.*, AZ 111-112; HI 480; OH 1218; OK 1271. And individuals with disabilities regularly were excluded from watching sporting events that were central to their local

communities. *See*, *e.g.*, MI 874 (Michigan State University was "neglectful of continuing requests received from handicappers for access, reasonable seating, both in number and quality, and accommodations" at football stadium); OH 1240 (wheelchair user unable to attend sporting events at state university with his wife and children even though he was a student there).

Instead, governments often shunted individuals with disabilities into separate, more limited recreation programs. *See*, *e.g.*, NC 1155 (person with visual impairment denied access to public parks and recreation program; "he was told that there were 'blind programs' and that he should go there"); KS 704-705 (wheelchair user unable to sit with his family, relegated to "handicapped accessible" suite at city-owned sports facility); *Americans with Disabilities Act of 1989: Hearing Before the House Subcomm. on Select Educ.*, 101st Cong., 1st Sess. 70 (1989) (*Oct. 1989 Hearing*) (wheelchair user could not sit next to his family at sporting event). One paraplegic Vietnam veteran, told by his doctor that swimming would be his "best therapy," was relegated to a "kiddie pool" not deep enough for him to swim by a park commissioner who told him: "It's not my fault you went to Vietnam and got crippled." *See Americans with Disabilities Act of 1989: Hearings Before the Comm. on the Judiciary and the Subcomm. on Civil & Constitutional Rights*, 101st Cong., 1st Sess. 51 (1989) (*House Judiciary Hearing*).

The systematic and unnecessary denial of access to public recreational opportunities both results from and perpetuates the state-sponsored isolation and segregation of individuals with disabilities that has plagued our country for so long. It makes it difficult to ensure "that families function as cohesive units," "that social relationships are initiated and cemented," and that individuals with disabilities otherwise are integrated fully into society. NC 1155. Being systematically shut out of facilities otherwise open to the public rendered individuals with disabilities second-class citizens in their own communities. *See Olmstead* v. *L.C. ex rel.*

Zimring, 527 U.S. 581, 600 (1999) (unnecessary exclusion of individuals with disabilities from community "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life"). The isolation and stigma thereby officially created was a harm of constitutional magnitude that Congress was entitled to remedy and prevent. *See Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 737 (2003) (in enacting the Family Medical Leave Act, Congress properly "sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men"; the statute "attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes").

2. This pervasive inaccessibility of public facilities frequently was due to irrational discrimination, such that it would fail even rational basis scrutiny. Although cost is the reason most often given for not constructing facilities in an accessible manner, evidence before Congress demonstrated that, in truth, it is not significantly more expensive to construct accessible facilities.

One report before Congress concluded that "the cost of barrier-free construction is negligible, accounting for only an estimated one-tenth to one-half of 1 percent of construction costs." *Spectrum* 81. Indeed, as the General Accounting Office found, incorporating accessibility features in new construction "may even result in cost savings" compared with inaccessible design. Comptroller General of the United States, *Further Action Needed to Make All Public Buildings Accessible to the Physically Handicapped* 87 (1975) (*GAO Report*); *see id.*

at 87-91 (giving specific examples of cheap or even cost-saving accessible design).[10] Modifying existing buildings is more expensive, costing an estimated "3 percent of a building's value" for "full accessibility," but still is a relative bargain in light of the economic value generated by providing independence to individuals with disabilities, who then require substantially less government assistance. *Spectrum* 81. The bottom line, Congress was told, was that "the cost of discrimination far exceeds the cost of eliminating it." *Joint Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: Before the House Subcomms. on Select Educ. & Emp't Opportunities*, 101st Cong., 1st Sess. 57 (1989) (*Sept. 1989 Hearing*).[11]

Accordingly, the impediment to accessibility was "not so much real costs, but perceptions about costs." *See* Advisory Commission on Intergovernmental Relations, *Disability Rights Mandates: Federal & State Compliance with Employment Protections & Architectural Barrier Removal* 87 (1989);[12] *see id.* at 88 (citing "fear of high costs"). Public officials failed to make buildings accessible after decision-making plagued by "ignorance about the lives and needs of persons with disabilities and the negative impact that barriers have on them." *Id.* at 87; *accord*

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[10] This report is available at http://archive.gao.gov/f0402/096968.pdf.

[11] Moreover, making facilities accessible often increases their usefulness for all individuals, not just those with disabilities. *See*, *e.g.*, *Sept. 1989 Hearing* 111 (widened doorways and enlarged elevators not only permitted wheelchair access, but also allowed easier moving of heavy equipment); *Americans with Disabilities Act of 1988: Joint Hearing Before the Senate Handicapped Subcomm. and House Select Educ. Subcomm.*, 100th Cong., 2d Sess. 65-66 (1988) (lowered drinking fountains can be used by children as well as wheelchair users); *Field Hearing on Americans with Disabilities Act: Before the House Subcomm. on Select Educ.*, 101st Cong., 1st Sess. 25 (1989) (making high school accessible to wheelchairs also would permit attendance by able-bodied students who sprained ankles or suffered other temporary injuries); *Sept. 1989 Hearing* 11 (elevators permit greater access not only to wheelchair users, but also to pregnant women and children).

[12] This report is available at http://www.library.unt.edu/gpo/acir/Reports/policy/a-111.pdf.

GAO Report 92 ("Since the cost of eliminating barriers is not significant, limited progress in eliminating barriers may be due in part to a lack of commitment by Government officials.").

With respect to existing facilities, projected costs of making public services accessible often were "overestimated and contrary to common sense and practicality." *Spectrum* 70. For example, building managers complained that they would be required to "tear out their plumbing and install a new drinking fountain" to accommodate individuals with disabilities, when they could "install a five-dollar cup dispenser instead." *See* National Council on Disability, *The Americans with Disabilities Act: Ensuring Equal Access to the American Dream* 13 (1995).[13] As one witness observed, those who make a good-faith effort to accommodate generally find that their costs are minimal, but "[i]f they don't want them, the accommodations go right through the ceiling." *Sept. 1989 Hearing* 23.

Irrationality and blatant discrimination also were responsible for much of the pervasive inaccessibility of public facilities and other public services. In response to complaints that one city hall was inaccessible, a city manager said that he "runs this town" and "no one is going to tell him what to do." AK 73. One state transportation agency, in response to complaints about inaccessible bus service, said: "Why can't all the handicapped people live in one place and work in one place? It would make it easier for us." *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Before the House Subcomm. on Select Educ.*, 100th Cong., 2d Sess. 57 (1988) (*Oct. 1988 Hearing*). Town officials claimed to a newspaper that it would cost $500 more to build a curb with a ramp, prompting a rebuttal letter from a cement contractor. TX 1483. And the director of an architectural firm testified that most architects and builders would

[13] This report is available at http://www.ncd.gov/publications/1995/01262005. For another telling of this anecdote, *see Oct. 1989 Hearing* 145.

rather invest time and money seeking a variance from accessibility requirements than find out how to comply. *Oct. 1988 Hearing* 99.

3. Given this well-documented history of discrimination against individuals with disabilities in the construction of public facilities, including those devoted to recreation, it is irrelevant that claims that such discrimination is unconstitutional are subject to rational basis review. See Def.'s Reply 13. To be sure, it is easier to show that Congress confronted a history of discrimination of constitutional dimension in those contexts in which the rights that have been denied are "fundamental" and so receive heightened scrutiny. *Lane* itself, however, points to instances in which individuals with disabilities have suffered discrimination that receives rational basis scrutiny, such as in zoning decisions and public education. *See Lane*, 541 U.S. at 525. And the Eleventh Circuit, in subsequently holding that Title II is valid Section Five legislation in the context of public education, reaffirmed that Congress's authority to pass prophylactic legislation is based on the history of discrimination and the importance of the right at issue, not whether alleged deprivation of that right receives heightened scrutiny. *See Association for Disabled Ams.*, 405 F.3d at 957-958.

Defendant errs in relying heavily on the Tenth Circuit's decision in *Guttman*. That panel was simply mistaken when it detected "a trend of courts holding that, absent the need to vindicate a fundamental right or protect a suspect class, Congress may not abrogate state sovereign immunity." See *Guttman*, 669 F.3d at 1122. Remarkably, as evidence of this "trend," *Guttman* cited no circuit court majority opinions and no decisions of any sort dated after 2005.

C. Title II Is A Congruent And Proportional Response To The Pattern Of Discrimination It Remedies

Title II's measured requirements are a congruent and proportional response to the pattern of irrational discrimination that Congress documented in this context. Title II is carefully

tailored to (1) require that public entities make such physical modifications as are necessary for their public services to be accessible to individuals with disabilities, preventing the denial of many fundamental rights and facilitating the integration of individuals with disabilities into society; and (2) require that new facilities or alterations be made accessible to individuals with disabilities, a step that adds little to costs. It does not require public entities to fundamentally alter the programs and services they offer or incur undue costs. In short, in this context as in others, Title II is "a reasonable prophylactic measure, reasonably targeted to a legitimate end." *Lane*, 541 U.S. at 533.

Congress is not limited to barring actual constitutional violations pursuant to its Section Five power. Rather, Congress "may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Hibbs*, 538 U.S. at 727-728; *accord National Ass'n of Bds. of Pharmacy* v. *Board of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1316 (11th Cir. 2011). In particular, Congress may ban "practices that are discriminatory in effect, if not in intent," notwithstanding that the Equal Protection Clause bans only intentional discrimination. *Lane*, 541 U.S. at 520.

What Congress may not do is pass legislation "which alters the meaning of" the constitutional rights purportedly enforced. *City of Boerne*, 521 U.S. at 519. "[T]he line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies." *Id.* at 519-520. The ultimate question is whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. Put another way, "the question is not *whether* Title II exceeds the boundaries of the Fourteenth Amendment, but *by how much*." *Constantine*, 411 F.3d at 490.

As *Lane* concluded with respect to access to courts and judicial services, the "unequal treatment of disabled persons" with respect to physical access to public facilities has a "long history, and has persisted despite several legislative efforts to remedy the problem." *Lane*, 541 U.S. at 531. "Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this 'difficult and intractable proble[m]' warranted 'added prophylactic measures in response.'" *Ibid.* (quoting *Hibbs*, 538 U.S. at 737). Animating Title II's accessibility requirements is the view that "[j]ust as it is unthinkable to design a building with a bathroom only for use by men, it ought to be just as unacceptable to design a building that can only be used by able-bodied persons." *House Judiciary Hearing* 163 n.4. That is, "[i]t is exclusive *designs*, and not any inevitable consequence of a disability that results in the isolation and segregation of persons with disabilities in our society." *Ibid.* Congress had extensive evidence demonstrating that complying with accessible architectural standards adds only minor costs to new construction and that existing facilities often require only minor renovations to make public services accessible. It also had an enormous record of public officials nonetheless refusing to take such steps, resulting in the denial of important rights and services to individuals with disabilities.

Nevertheless, "[t]he remedy Congress chose is * * * a limited one." *Lane*, 541 U.S. at 531. Title II requires public entities to make only "'reasonable modifications' that would not fundamentally alter the nature of the service provided." *Id.* at 532 (citation omitted). It does not require them "to compromise their essential eligibility criteria." *Ibid.* Nor does it require them to "undertake measures that would impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service." *Ibid.*

In particular, as *Lane* specifically noted, Title II and its implementing regulations require compliance with specific architectural standards only for public facilities built or altered after 1992. *See* 28 C.F.R. § 35.151; *Lane*, 541 U.S. at 532. By contrast, for "older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services." *Lane*, 541 U.S. at 532 (citing 28 C.F.R. § 35.150(b)(1)). "Only if these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes." *Ibid.* The bottom line is that public entities are not "unduly burdened by the statute's remedial requirements." *Mason*, 2012 WL 4815518, at *12.

Against the background of past discrimination, Congress was entitled to ensure that public officials make rational and fair decisions about public facility construction and modification. The risk of unconstitutional treatment was sufficient to warrant Title II's prophylactic response. *See Hibbs*, 538 U.S. at 722-723, 735-737 (in light of many employers' reliance on gender-based stereotypes, Congress's requirement that all employers provide family leave was congruent and proportional response). And Congress was entitled to "enact prophylactic legislation proscribing 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.

Moreover, Congress's response was well targeted to the problem it faced. Title II requires that public officials provide *real* justifications for failing to make newly constructed or altered facilities accessible – that is, justifications based on actual, not imagined, cost or administrative difficulties. It thus takes direct aim at the invidious, class-based stereotypes that otherwise are difficult to detect or prove. And by requiring that existing facilities be made

accessible to the extent necessary to ensure access to public services, Congress directly protected a number of fundamental rights, including those at issue in *Lane*.

It was appropriate for Congress to do more than simply ban overt discrimination on the basis of disability. Not only can such "subtle discrimination" be difficult to prove, *see Hibbs*, 538 U.S. at 736, but such a limited remedy would have frozen in place the effects of public officials' prior official exclusion and isolation of individuals with disabilities. "A proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) (internal quotation marks and brackets omitted); *see Hibbs*, 538 U.S. at 736. The remedy for segregation is integration, not inertia.

Providing individuals with disabilities with long-denied access to public facilities not only is a legitimate aim of Fourteenth Amendment legislation on its own, it also is an essential piece of the ADA's larger purpose: ameliorating the enduring effects of this Nation's long and pervasive discrimination against individuals with disabilities. Such discrimination was not limited to a few discrete areas (such as access to public facilities), but rather constituted the very "kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." *Plyler* v. *Doe*, 457 U.S. 202, 216 n.14 (1982).[14] Those decades of officially compelled isolation, segregation, and discrimination rendered persons with disabilities invisible to government officials generally as well as to those who designed and built facilities for public and private

[14] For example, from the 1920s to the 1960s, the eugenics movement labeled persons with mental and physical disabilities as "sub-human creatures" and "waste products" responsible for poverty and crime. *Spectrum* 18 n.5, 20; *accord Lane*, 541 U.S. at 535 (Souter, J., concurring); *see also Olmstead*, 527 U.S. at 608 (Kennedy, J., concurring) (observing that individuals with mental disabilities "have been subject to historic mistreatment, indifference, and hostility").

entities alike. They also gave rise to, and continue to fuel, discrimination borne of stereotypes, fear, and negative attitudes towards those with disabilities.

Title II's requirements with respect to public facilities are part of a broader remedy to a constitutional problem that is greater than the sum of its parts. The inaccessibility of public facilities has a direct and profound impact on the ability of people with disabilities to integrate into the community, literally excluding them from attending community events, voting, working, and many other activities. This exclusion, in turn, feeds the irrational stereotypes that lead to further discrimination by public and private entities alike. *Cf. Olmstead*, 527 U.S. at 600 (segregation of individuals with disabilities "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life").

Title II's requirements, as applied to public facilities, are a vital part of that comprehensive law. In particular, it would undercut the effectiveness of Title III, which requires private owners of public accommodations to provide access for individuals with disabilities, not to impose the same requirements on public entities. *See Mason*, 2012 WL 4815518, at *12. Collectively, Title II and Title III directly ameliorate past and present discrimination by ensuring that the needs of persons previously invisible to architects, contractors, and others responsible for such facilities are now considered. And the access to facilities provided by both Title II and Title III helps individuals with disabilities obtain sufficient integration into society to take advantage of the other rights ensured by the ADA.

The bottom line is that Title II's remedial scheme, in this context as in others, is not "out of proportion to a supposed remedial or preventive object." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 86 (2000) (citation omitted). Rather, it is "responsive to, or designed to prevent,

unconstitutional behavior." *Ibid.* Accordingly, it is valid Section Five legislation that properly abrogates States' sovereign immunity.

CONCLUSION

The defendant's motion to dismiss on the basis of sovereign immunity should be denied.

Respectfully submitted this the 1st day of February 2013,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 1, 2013, I electronically filed the foregoing UNITED STATES MEMORANDUM OF LAW AS INTERVENOR IN OPPOSITION TO MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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