No. 03-2244

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STUART T. GUTTMAN, M.D.,

Plaintiff-Appellant

v.

G.T.S. KHALSA, LIVINGSTON PARSONS and
THE STATE OF NEW MEXICO,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
THE HONORABLE LESLIE C. SMITH

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF RELATED CASES

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STATEMENT OF JURISDICTION

The district court had jurisdiction over plaintiff's suit pursuant to 28 U.S.C. 1331, and this Court has jurisdiction under 28 U.S.C. 1291 to hear plaintiff's appeal from the district court's final order granting summary judgment to defendants. In the district court, and on appeal, the State has argued that the lower federal courts lack jurisdiction to adjudicate plaintiff's claims in this case under the "*Rooker-Feldman*" doctrine and 28 U.S.C. 1257. That contention is discussed *infra*.

STATEMENT OF THE CASE

1. This case involves a suit filed 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) & (B). The term "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. 12102(2). A "qualified individual with a disability" is a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service. 42 U.S.C. 12131(2); 28 C.F.R. 35.140.[1]

A person does not meet essential eligibility requirements if he poses a direct threat to the health or safety of others that cannot be eliminated or reduced to an acceptable level by the public entity's modification of its policies, practices, or procedures, or by the provision of auxiliary aids or services. See 28 C.F.R. Pt. 25 App. A, pp. 536-537 (2003) (Preamble to Title II Regulations); Department of Justice, The Americans With Disabilities Act: Title II Technical Assistance Manual 7-8 (available at *http://www.usdoj.gov/crt/ada/taman2.html*); cf. 42 U.S.C. 12111 (Title I); 42 U.S.C. 12182(b)(3) (Title III); *School Board of Nassau County* v.

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

Arline, 480 U.S. 273, 287-289 (1987) (Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794).

The discrimination prohibited by Title II of the Disabilities Act includes, among other things, denying a government benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii), (vii). In addition, a public entity must make reasonable modifications in policies, practices, or procedures if the accommodation is necessary to avoid the exclusion of individuals with disabilities and can be accomplished without imposing an undue financial or administrative burden on the government, or fundamentally altering the nature of the service. See 28 C.F.R. 35.130(b)(7). The Act does not normally require a public entity to make its existing physical facilities accessible. Public entities need only ensure that each "service, program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities," unless to do so would fundamentally alter the program or impose an undue financial or administrative burden. 28 C.F.R. 35.150(a). However, facilities altered or constructed after the effective date of the Act must be made accessible. 28 C.F.R. 35.150(a)(1), 35.151.

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

2. According to his complaint, plaintiff is a physician with a history of depression and post traumatic stress disorder. See *Guttman* v. *Khalsa*, 320 F. Supp. 2d 1164, 1166 (D.N.M. 2003). After various administrative proceedings, the New Mexico Board of Medical Examiners (Board) revoked plaintiff's license to practice medicine on February 28, 2001. *Ibid*. Plaintiff challenged the revocation decision in state court arguing, among other things, that the revocation violated Title II of the ADA, 42 U.S.C. 12131-12165. *Ibid*. The state court upheld the revocation, concluding that the Board's action was based on substantial evidence, in accordance with law, and not arbitrary, capricious or fraudulent. *Id*. at 1167. The state court declined, however, to determine whether the revocation violated the ADA because plaintiff failed to raise his ADA claims before the Board. *Ibid*.

Plaintiff then brought this suit in federal court against certain Board officials and the State of New Mexico, asserting that the revocation of his license violated the ADA, and requesting compensatory and punitive damages, civil penalties and such other relief as the court deemed appropriate. See App. 1, Complaint ¶¶ 43-47. The district court granted summary judgment for the defendants. 320 F. Supp. 2d at 1166. The court first held that it lacked subject matter jurisdiction to hear plaintiff's claims under the "*Rooker-Feldman*" doctrine. See *id*. at 1168-1169 (relying on *Rooker* v. *Fidelity Trust*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983)). In the alternative, the court held that defendants Khalsa and Parsons were entitled to absolute immunity in their personal capacity for their participation in the Board's decision to revoke plaintiff's

medical license. 320 F. Supp. 2d at 1170. The court further held that plaintiff's Title II claims against the State itself were barred by the Eleventh Amendment, relying on *Thompson* v. *Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001), which held unconstitutional Congress's attempt to abrogate the State's sovereign immunity to private claims under Title II. This appeal followed.

SUMMARY OF ARGUMENT

Before reaching the Board's Eleventh Amendment challenge, this Court must decide whether the *Rooker-Feldman* doctrine deprived the district court of subject matter jurisdiction over this case. That doctrine prevents the lower federal courts from engaging in what amounts, in substance, to appellate review of a state court judgment. Although the doctrine ordinarily does not apply to federal suits challenging the decisions of a state agency like the Medical Board, it may apply when that agency decision has previously been reviewed by a state court. Where, as here, the state court did not actually decide the plaintiff's ADA claim, the question is whether the federal suit raises a challenge that is inextricably intertwined with the state court judgment. To decide that question, this Court should consider the relief plaintiff seeks and whether the injury he alleges was caused by the state court judgment itself.

If necessary, this Court should hold that plaintiff's claims are not barred by the Eleventh Amendment. Viewed in light of *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), Title II of the Americans with Disabilities Act is valid Fourteenth Amendment legislation as applied to cases challenging public licensing decisions. In *Lane*, the Court considered Title II's application to access to judicial services, an area of

government services that sometimes implicates fundamental rights (such as George Lane's rights in his criminal proceedings) and sometimes implicates rights subject only to rational basis scrutiny (as was true in the case of Lane's co-plaintiff, Beverly Jones, who was prevented from acting as a court reporter because of physical barriers to courtroom access). Public licensing programs similarly implicate a range of constitutional rights, some of which are subject to heightened, and others rational basis, scrutiny. In *Lane*, the Court held that Congress acted appropriately in prohibiting disability discrimination impairing access to judicial services generally. The same is true of public licensing.

In *Lane*, the Court found that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Lane*, 124 S. Ct. at 1989. That history of unconstitutional discrimination, the Court held, authorized Congress to enact prophylactic legislation to address "public services" generally, see *id*. at 1992, a conclusion that necessarily applies to public licensing programs. In any case, there is ample support for Congress's decision to extend Title II to the licensing context.

Title II, as it applies to licensing, is a congruent and proportionate response to that record. Title II is carefully tailored to respect the State's legitimate interests while protecting against the risk of unconstitutional discrimination in licensing and remedying the lingering legacy of discrimination against people with disabilities both in the licensing context and in the provision of public services generally. Thus, Title II often applies in licensing to prohibit discrimination based on hidden invidious

animus that would be difficult to detect or prove directly. The statute also establishes reasonable uniform standards for treating requests for accommodations in licensing programs where unfettered discretionary decision-making has, in the past, led to irrational and invidious decisions. Moreover, in integrating people with disabilities in professions, Title II acts to relieve the ignorance and stereotypes Congress found at the base of much unconstitutional disability discrimination.

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

ARGUMENT

I

THE *ROOKER-FELDMAN* DOCTRINE

The district court held that the *Rooker-Feldman* doctrine deprived it of jurisdiction over plaintiff's claims under the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq*., because those claims effectively sought review of a prior state court judgement. See *Guttman* v. *Khalsa*, 320 F. Supp. 2d 1164, 1168-1169 (D.N.M. 2003). While the United States takes no position on whether the *Rooker-Feldman* doctrines bars the plaintiff's suit under the facts of this particular case, we wish to emphasize several important considerations that apply to suits under the ADA that

challenge either a court's failure to provide accommodations during judicial proceedings, or the actions of an administrative agency that are subject to judicial review in state court.

The *Rooker-Feldman* doctrine enforces the jurisdictional limitation imposed on lower federal courts by 28 U.S.C. 1257. That statute provides that "[f]inal judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari." Under this provision, "a party losing in state court is barred from seeking what in substance would be appellate review of the state judgement in a United States district court," since such review is reserved by Section 1257 to the United States Supreme Court. *Johnson* v. *De Grandy*, 512 U.S. 997, 1005-1006 (1994). In other words, the *Rooker-Feldman* doctrine "prevent[s] a federal district court from entertaining a challenge to a state court's judgment, see *Rooker*, 263 U.S. at 415- 416, or a challenge that is 'inextricably intertwined' with such a judgment. See *Feldman*, 460 U.S. at 486-487." *Johnson* v. *Rodrigues*, 226 F.3d 1103, 1108 (10th Cir. 2000) (parallel citations omitted).

Because *Rooker-Feldman* acts to prevent appellate review of state court judgments, it is inapplicable to suits challenging the decisions of state administrative agencies, even when those agencies resolve complaints in a quasi-judicial capacity. See *Verizon Md., Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 644 n.3 (2002) (holding that federal court has jurisdiction to hear a challenge to a state utility commission's resolution of a rate dispute between two carriers because *Rooker-Feldman* "has no

application to judicial review of executive action, including determinations made by a state administrative agency").[2] Thus, when a plaintiff sues in federal court alleging that a state agency has violated a statute like the ADA, *Rooker-Feldman* ordinarily has no application. The question becomes more complicated in cases such as this one, when the federal plaintiff previously sought review of the state agency's action in a state court proceeding. Although *Rooker-Feldman* does not bar review of the agency's decision, it would bar any attempt to seek appellate review of the state court decision affirming the agency decision. See, *e.g.*, *Pittsburg County Rural Water District No. 7* v. *City of McAlester*, 358 F.3d 694, 706 (10th Cir. 2004).[3]

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[2] *Rooker-Feldman* also does not apply to decisions made by courts in a "legislative, ministerial, or administrative" capacity. *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 479 (1983). Thus, when a court decides whether or not to grant accommodations to witnesses, lawyers, or litigants with disabilities, those administrative decisions are not necessarily shielded from review in federal court by *Rooker-Feldman*. Cf. *Lane*, 124 S.Ct. at 1982-1983 (ADA suit challenging access to courthouses); *Forrester* v. *White*, 484 U.S. 219, 229 (1988) (judge not entitled to judicial immunity when acting in administrative capacity, *e.g.*, "supervising court employees and overseeing the efficient operation of a court"); *id*. at 228 (noting that judicial immunity is less appropriate when the same tasks are performed by other branches of government).

[3] As the district court acknowledged, 320 F. Supp. 2d at 1168, *Rooker-Feldman* would not prevent a plaintiff from bringing a general challenge to a medical board's policy or practices, similar to the claim permitted in *Feldman* itself. See 460 U.S. at 486-487 (permitting a general challenge to validity of bar rules, but not a challenge to a state court's denial of a petition to waive those rules in a particular case).

In deciding whether plaintiff's federal challenge "is 'inextricably intertwined' with such a judgment," *Johnson*, 226 F.3d at 1108,[4] this Court's precedents look primarily to the relief sought and the source of the plaintiff's alleged injury. See *Kenmen Eng'g* v. *City of Union*, 314 F.3d 468, 476 (10th Cir. 2002). *Rooker-Feldman* clearly precludes a federal lawsuit seeking to overturn or enjoin a state court judgment, for example. See *Rooker*, 263 U.S. at 415-416. When a lawsuit does not seek such relief, this Court "must ask 'whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment.'" *Kenmen*, 314 F.3d at 476 (quoting *Garry* v. *Geils*, 82 F.3d 1362, 1365 (7th Cir. 1996)). "In other words, we approach the question by asking whether the state-court judgment *caused*, actually and proximately, the *injury* for which the federal-court plaintiff seeks *redress*. If it did, *Rooker-Feldman* deprives the federal court of jurisdiction." *Ibid*. (emphasis in original) (footnote omitted); see also *Kenmen*, 413 F.3d at 476; *Pittsburg County*, 358 F.3d at 707-708 (*Rooker-Feldman* no bar to federal challenge to county board's action, even though action was previously

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[4] In this case, the state courts did not "actually decide" plaintiff's ADA claims. See *Guttman*, 320 F. Supp. 2d at 1167; see also *Merrill Lynch Bus. Fin. Svcs., Inc.* v. *Nudell*, 363 F.3d 1072, 1075 (10th Cir. 2004) ("When a state court does not pass on the merits of the claim the 'actually decided' test is not satisfied."); *Pittsburg County*, 358 F.3d at 707 (same where "the merits of [plaintiff's] claims for relief * * * were not actually decided by the Oklahoma district court, which performed no merits analysis and dismissed [plaintiff's] appeal due to defective service of process."). The same would obviously be true if a state agency lacked authority to consider claims based on the ADA or other federal law.

upheld by a state court, because plaintiff's injury was caused by board's action, not by the state court judgment which simply failed to provide a remedy).

Thus, *Rooker-Feldman* does not necessarily bar a suit challenging a state agency's decision simply because a state court has previously found the agency decision lawful, when the state court did not consider the plaintiff's federal claims. In *Sheehan* v. *Marr*, 207 F.3d 35 (2000), the First Circuit held that a police lieutenant's Disabilities Act challenge to involuntary retirement was not barred by *Rooker-Feldman*. The court reasoned that the claim "cannot be regarded as inextricably intertwined with the state court's involuntary retirement determination" because, despite the common issues in the federal and state cases, "[o]ther disputed issues that require consideration under the ADA * * * were not before the state court: notably, whether [the lieutenant] could perform essential job duties with reasonable accommodation * * * and whether any adverse employment action against [him] was due to discrimination on the basis of his disability." Id. at 40. The plaintiff's failure to raise or preserve the federal claim in state court may invoke the preclusion doctrine of res judicata, but it does not necessarily give rise to a jurisdictional bar under *Rooker-Feldman*. See *Kenmen*, 314 F.3d at 479-480 ("The *Rooker-Feldman* doctrine asks: is the federal plaintiff seeking to set aside a state judgment, or does he present some independent claim, albeit it one that denies a legal conclusion that a state court has reached in a case to which he was a party? If the former, then the district court lacks jurisdiction; if the latter, then there is jurisdiction and state law

determines whether the defendant prevails under principles of preclusion.") (citation omitted).

Because *Rooker-Feldman* imposes a limitation on the subject matter jurisdiction of the lower federal courts, this Court must apply these principles and determine whether plaintiff's suit effectively seeks appellate review of the state court judgment under the facts of this particular case. See, *e.g.*, *Kenmen*, 314 F.3d at 479 (*Rooker-Feldman* bar is jurisdictional). If this Court holds that the claim is barred by *Rooker-Feldman*, there is no need to consider the State's additional Eleventh Amendment challenge.

II

UNDER THE ANALYSIS OF *TENNESSEE* V. *LANE*, TITLE II IS VALID FOURTEENTH AMENDMENT LEGISLATION AS APPLIED IN THE CONTEXT OF PUBLIC LICENSING PROGRAMS

Although the Eleventh Amendment ordinarily renders a State immune from suits in federal court by private citizens, Congress may abrogate the State's immunity if it "unequivocally expressed its intent to abrogate that immunity" and "acted pursuant to a valid grant of constitutional authority." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). There is no question that Congress unequivocally expressed its intent to abrogate the State's sovereign immunity to claims under the ADA. See 42 U.S.C. 12202; *Tennessee* v. *Lane*, 124 S. Ct. 1978, 1985 (2004). Moreover, it is settled that "Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment." *Ibid*. Because Title II is valid legislation to enforce the Fourteenth Amendment in the context of public licensing programs, the ADA abrogation provision is valid as applied to this case.

A. The Supreme Court's Decision In Tennessee *v.* Lane *Supercedes This Circuit's Prior Decision in* Thompson *v.* Colorado

In concluding that plaintiff's ADA claim was barred by the Eleventh Amendment, the district court followed this Court's prior decision in *Thompson* v. *Colorado*, 278 F.3d 1020 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002), which held that Title II was invalid Fourteenth Amendment legislation in all its

applications. While this case was pending on appeal, however, the Supreme Court decided *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), upholding the Title II abrogation as applied to cases implicating access to judicial services. As discussed next, *Lane* superceded *Thompson* and the State's Eleventh Amendment claim must now be considered in light of the Supreme Court's more recent decision. See *Thompson*, 278 F.3d at 1027-1028 (stating that a panel is not bound by a prior circuit opinion "when there is a superceding Supreme Court decision").

In *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), 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. *Id*. at 1982. 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 1983. The State argued that Congress lacked the authority to abrogate the State's Eleventh Amendment immunity to these claims, a position accepted by this Court in *Thompson*. See 278 F.3d at 1034. The Supreme Court in Lane disagreed. See 124 S. Ct. at 1994.

To reach this conclusion, the Court applied the three-part analysis for Fourteenth Amendment legislation created 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*, 124 S. Ct. at 1988; (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 1992; 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. *Ibid*.

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*, 124 S. Ct. at 1988. 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 1988-1992. 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 1992-1993.

The Supreme Court's Fourteenth Amendment analysis in *Lane* differed substantially from the analysis applied by the this Court in *Thompson*. To begin with, *Thompson* specifically declined to conduct its analysis with respect to any subset of

Title II's applications, deciding instead to "conduct the abrogation analysis by considering Title II in its entirety." 278 F.3d at 1028 n.4. The Supreme Court, in contrast, declined to "examine the broad range of Title II's applications all at once, and to treat that breadth as the mark of the law's invalidity." 124 S. Ct. at 1992. 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 1993.

In *Thompson*, this Court held that a similar difference in the scope of analysis undertaken by the Supreme Court and that performed by a prior panel deprived the panel decision of any continuing binding effect. *Thompson* observed that the prior circuit decision in *Martin* v. *Kansas*, 190 F.3d 1120 (10th Cir. 1999), appeared to hold that the ADA's abrogation provision was invalid as applied to the entire statute. However, *Thompson* read the Supreme Court's subsequent decision in *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), to "clarif[y] that when evaluating a claim under the ADA the abrogation analysis should be conducted on each specific Title, not on the statute as a whole." 278 F.3d at 1027. "Thus, even if *Martin* was a holding as to the entire ADA, *Garrett* demonstrates that it was error to conduct the abrogation analysis at that level of generality." *Ibid*. "Therefore, this court now writes on a clean slate in addressing whether Title II of the ADA is a valid abrogation of the states' Eleventh Amendment immunity." *Id*. at 1028. The same reasoning applies in this case, because the Supreme Court's decision in *Lane* made clear that it was error for *Thompson* to hold the ADA abrogation invalid as applied to Title II as a whole. Thus,

as in *Thompson*, in addressing the validity of the Title II abrogation as applied to the context of this case, "this court now writes on a clean slate." *Ibid*.

Even beyond the scope of review, the Supreme Court's decision in *Lane* rejected several critical aspects of this Court's analysis in *Thompson*. For example, in *Thompson* this Court held that Congress lacked a sufficient historical predicate for the enactment of Title II's prophylactic measures. See 278 F.3d at 1034. The Supreme Court, on the other hand, held that Congress identified a "volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," 124 S. Ct. at 1991, making it "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at 1992. In reaching the contrary conclusion, *Thompson* declined to consider evidence of discrimination by local governments. See 278 F.3d at 1032 (noting that record contained examples of unconstitutional conduct, but that "most of these occurrences involve local officials, and not the states"). *Lane*, however, specifically rejected that view as based on "the mistaken premise that a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves." 124 S. Ct. at 1991 n.16. This Court also declined to give deference to Congress's finding of pervasive discrimination in public services, see 278 F.3d at 1033, but *Lane* relied prominently on the very same findings, see 124 S. Ct. at 1992. Furthermore, the panel in *Thompson* was "unable to identify a history and pattern of unconstitutional state conduct in The Report of the Task Force

on the Rights and Empowerment of Americans with Disabilities," 278 F.3d at 1034 n.10, as summarized in Justice Breyer's Appendix in *Garrett*. Looking at the same evidence, however, the Supreme Court concluded that it supported Title II by providing "hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions." See 124 S. Ct. at 1990-1991.

Accordingly, *Thompson* has been superceded and this Court is compelled to follow the precedent established by the Supreme Court in *Lane*. See *Thompson*, 278 F.3d at 1027-1028. Applying the holding of *Lane*, this Court should conclude that Title II is valid Fourteenth Amendment Legislation as it applies in the context of public licensing programs.[5]

B. Constitutional Rights At Stake

In *Lane*, the Court explained that Title II "seeks to enforce [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." 124 S. Ct. at 1988. In deciding the case before it, the

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[5] The Court in *Lane* did not examine the congruence and proportionality of Title II as a whole because the Court found that the statute was valid Section 5 legislation as applied to the class of cases before it. Because Title II is valid Section 5 legislation as applied to discrimination in public licensing programs, this Court need not consider the validity of Title II as a whole. The United States continues to maintain, however, that Title II as a whole is valid Section 5 legislation because it is congruent and proportional to Congress's goal of eliminating discrimination on the basis of disability in the provision of public services – an area that the Supreme Court in *Lane* determined is an "appropriate subject for prophylactic legislation" under Section 5. *Lane*, 124 S. Ct. at 1992.

Court considered a subset of Title II applications – "the class of cases implicating the accessibility of judicial services," *id*. at 1993 – that sometimes invoke rights subject to heightened scrutiny, but other times invoke only rational basis scrutiny under the Equal Protection Clause. For example, George Lane's exclusion from his criminal proceedings implicated Due Process and Sixth Amendment rights subject to heightened constitutional scrutiny, while court reporter Beverly Jones's exclusion from the court room implicated only Equal Protection rights subject to rational basis review.[6] See *id*. at 1988.

This case presents a similar category, one that implicates a range of constitutional rights, some of which are subject to heightened, and others rational basis, scrutiny. The liberty guaranteed by the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer* v.

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[6] The Court mentioned that, in general, "members of the public have a right of access to criminal proceedings secured by the First Amendment." *Lane*, 124 S. Ct. at 1988. The Court did not, however, conclude that Jones's claim implicated that First Amendment right. While the Court has held that complete closure of a criminal trial to the public is subject to strict scrutiny, see *Press-Enterprise Co.* v. *Superior Court of Calif.*, 478 U.S. 1, 8-9 (1986), it has not held that strict scrutiny applies to a court's denial of a request for an accommodation that would permit attendance by a particular member of the public (*i.e.*, a person with a disability such as Jones).

Nebraska, 262 U.S. 390, 399 (1923). Licensing programs that regulate these and other constitutionally-protected activities are often subject to heightened constitutional scrutiny. See, *e.g.*, *Watchtower Bible & Tract Soc.* v. *Village of Stratton*, 536 U.S. 150, 160-169 (2002) (applying heightened First Amendment scrutiny to licensing requirement for door-to-door advocacy); *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 130-137 (1992) (same for parade permits); *Riley* v. *National Fed. of the Blind*, 487 U.S. 781, 801-802 (1988) (same for licensing requirement for professional fundraisers); *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (restriction on marriage licenses for those behind in child support payments subject to strict scrutiny under Equal Protection Clause); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (prohibition against marriage licenses for inter-racial couples subject to strict scrutiny under Equal Protection and Due Process Clauses); *Thomas* v. *Collins*, 323 U.S. 516 (1945) (applying heightened First Amendment scrutiny to licensing requirement for union organizers); see also *Supreme Ct. of New Hampshire* v. *Piper*, 470 U.S. 274, 284 (1985) (applying heightened scrutiny under Privileges and Immunities Clause to certain bar licensing requirements).

In other cases, licensing requirements implicate rights that, while not fundamental, are still subject to the basic protections of the Due Process and Equal Protection Clauses. The courts have long recognized "the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose" and that limitations on that right are subject to constitutional limitations. *Dent* v. *West Virginia*, 129 U.S. 114, 121 (1889). For example, the denial or revocation of a license

can trigger the procedural requirements of the Due Process clause. See, *e.g.*, *Bell* v. *Burson*, 402 U.S. 535, 539 (1971). As made clear in *Lane*, public entities may be required to take steps to ensure that people with disabilities are afforded the same meaningful opportunity to be heard as others. See 124 S. Ct. at 1994.

License denials and revocations are also subject to limitations under the Equal Protection clause. See *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957); *Dent*, 129 U.S. at 121-122. Discrimination against the disabled in licensing programs is unconstitutional if based on "[m]ere negative attitudes, or fear" alone, *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 367 (2001), for even rational basis scrutiny is not satisfied by irrational fears or stereotypes, see *ibid*., *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 450 (1985), and simple "animosity" towards the disabled is not a legitimate state purpose, see *Romer* v. *Evans*, 517 U.S. 620, 634 (1996). And while it is generally true that States are not required by the Equal Protection Clause "to make special accommodations for the disabled" when fundamental rights are not at stake, this is true only "so long as their actions toward such individuals are rational." *Garrett*, 531 U.S. at 367. Moreover, a purported rational basis for treatment of the disabled will fail if the State does not accord the same treatment to other groups similarly situated, see *id*. at 366 n.4, or if the State treats individuals with disabilities in a way that simply gives effect to private invidious discrimination. See *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

C. Historical Predicate Of Unconstitutional Disability Discrimination In Public Services And Public Licensing Programs

"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*, 124 S. Ct. at 1988. 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." 124 S. Ct. at 1989. 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 1992, and concluded that it is "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *ibid*.

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

Although *Lane* ultimately upheld Title II as valid Fourteenth Amendment legislation only as applied to access to courts, its conclusions regarding the historical predicate for Title II are not limited to that context. The 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 124 S. Ct. at 1992-1993. At the second step, the Court considered the record supporting Title II in all its applications and found not only "a pattern of unconstitutional treatment in the administration of justice," *id*. at 1990, but also violations of constitutional rights in the context of voting, jury service, the penal system, public education, law enforcement, and the treatment of

institutionalized persons, *id.* at 1989.[7] Importantly, the Court specifically considered the record of discrimination in public licensing programs, noting the history of disability discrimination in marriage licensing, *id*. at 1989. That record, the Court concluded, supported prophylactic legislation to address discrimination in "public services" generally. *Id*. at 1992. Thus, the adequacy of Title II's historical predicate to support prophylactic legislation addressing discrimination in public services, including public licensing programs, is no longer open to dispute. But even if it were, there is an ample historical basis for extending Title II to disability discrimination in public licensing.

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[7] 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*." *Id*. at 1991 (emphasis added). In concluding that the "the record of constitutional violations in this case * * * far exceeds the record in *Hibbs*," *id*. at 1992, 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).

2. Historical Predicate For Title II's Application To Discrimination In Licensing Programs

In *Lane,* the Court recognized that "a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying," 124 S. Ct. at 1989, through criminal and licensing statutes that infringe on a person's ability to marry. See *id*. at 1989 n.8 (providing sample of statutes). And even after the enactment of the ADA, a State passed legislation prohibiting and voiding all marriages of persons with AIDS. See *T.E.P.* v. *Leavitt*, 840 F. Supp. 110 (D. Utah 1993); see also *Doe* v. *County of Centre*, 242 F.3d 437, 441 (3d Cir. 2001) (county refused to license family with HIV positive child as foster parents for children without HIV).[8] Congress also heard complaints of discrimination in the administration of marriage licenses. For example, Congress was told of a person in a wheelchair who was denied a marriage license because the local courthouse was inaccessible. WY 1786.[9] Further, there was specific evidence before Congress of similar discrimination in

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[8] In *Lane*, the Supreme Court relied extensively on cases post-dating enactment of the ADA to demonstrate that Congress had a sufficient basis for enacting Title II. See 124 S. Ct. at 1990 nn. 7-14.

[9] In *Lane*, the Court relied on the handwritten letters and commentaries collected during the Task Force's forums, which were part of the official legislative history of the ADA, lodged with the Court in *Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), and catalogued in Appendix C to Justice Breyer's dissent in that case. See *Lane*, 124 S. Ct. at 1990. That Appendix cites to the documents by State and Bates stamp number, 531 U.S. at 389-424, a practice we follow in this brief. The United States can provide this Court copies of the documents cited in this brief, or the entire four-volume set, upon request.

professional licensing programs. The House Report, for example, recounts that a woman was denied a teaching license on the grounds that she was paralyzed. H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 29 (1990). Congress heard similar testimony regarding another teacher denied a license "on the grounds that being confined to a wheelchair as a result of polio, she was physically and medically unsuited for teaching." 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 1040, 1611 n.9 (Comm. Print 1990) (*Leg. Hist.*) (Arlene Mayerson). Teachers from several states complained about licensing requirements that excluded deaf teachers from teaching deaf students. See, *e.g.*, CA 261; KY 732; TX 1503; TX 1549. A Massachusetts man described being discriminated against in his quest for a license as a daycare worker because he was blind. MA 808. In another case, a court found that in administering licenses for security guards, a State had imposed a "blanket exclusion of all one-handed license applicants because of an unfounded fear that they are dangerous and more likely to use deadly force," in violation of the ADA and the Fourteenth Amendment. *Stillwell* v. *Kansas City Bd. of Police Comm'rs*, 872 F.Supp. 682, 687-688 (W.D. Mo. 1995).

Congress also heard numerous complaints of discrimination in the administration of driver licenses. For example, one witness described that a person in a wheelchair was denied a drivers license, not because of any inability to pass the drivers test, but because the test was held in an inaccessible room up a flight of stairs. ND 1170. In another case, a Department of Motor Vehicle official investigating a car

accident assumed that a person's disability prevented him from driving safely when the real cause of the accident was a brake failure. WI 35. See also AZ 124 (discrimination in drivers licensing); CA 262 (same); CO 283 (same); HI 458 (same); OH 1231 (same); MI 950 (same); TX 1514 (same); TX 1529 (same); WI 1760 (same); WY 1777 (same). See also *Tolbert* v. *McGriff*, 434 F. Supp. 682, 685-687 (M.D. Ala. 1976) (State violated the Due Process clause by summarily revoking a truck driver's license upon learning that he took medications to prevent seizures, even though the medication had successfully prevented the driver from having any seizures for more than 15 years).

Congress also knew that discrimination had occurred in the public licensing of group homes. In *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985), the Supreme Court found that a city discriminated against the disabled by imposing special licensing requirements on a group home for the mentally retarded when it failed to impose the same requirement on similarly situated facilities, thereby giving rise to the inference that the licensing requirement "rest[ed] on an irrational prejudice against the mentally retarded." *Id*. at 450. Congress knew that *Cleburne* was not an isolated incident of discrimination against the disabled in the licensing of group homes as it heard similar complaints from others. See 2 *Leg. Hist.* 1230 (Larry Urban); NJ 1068 (group home for those with head injuries barred because such persons perceived as "totally incompetent, sexual deviants, and that they needed 'room to roam'"; "Officially, the application was turned down due to lack of parking spaces, even though it was early established that the residents would

not have automobiles").

3. Gravity Of Harm Of Disability Discrimination In Licensing

The appropriateness of Section 5 legislation, moreover, is not purely a product of the history of discrimination. It is also a function of the "gravity of the harm [the law] seeks to prevent." *Lane*, 124 S. Ct. at 1988. Even when discrimination in licensing does not implicate a fundamental right, the gravity of the harm is substantial.

Unlike many government programs that simply provide benefits to constituents, licensing programs involve a positive limitation on individuals' abilities to engage in a broad range of basic freedoms, including the right to participate in a chosen profession, to own and dispose of property, to travel, and to choose where to live. Discriminatory limitations on those freedoms can have enormous consequences for the lives of individuals with disabilities. Cf. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he very idea that one man may be compelled to hold his * * * means of living * * * at the mere will of another, seems to be intolerable in any country where freedom prevails").

Discrimination in licensing, like the construction barriers that impaired Beverly Jones' ability to engage in her profession in *Lane*, can severely restrict employment opportunities for people with disabilities. Due in part to such barriers, Congress found that "people with disabilities, as a group * * * [are] severely disadvantaged * * * economically." 42 U.S.C. 12101(a)(6). Congress was told, for instance, that 20% of persons with disabilities – more than twice the percentage for the general population –

live below the poverty line, and 15% of disabled persons had incomes of $15,000 or less. See National Council on the Handicapped, *On the Threshold of Independence* 13-14 (1988) (*Threshold*). Additionally, two-thirds of all working-age persons with disabilities were unemployed, and only one in four worked full-time. *Id*. at 14.

Similarly, discrimination in the administration of drivers licenses can deprive people with disabilities of an independence that most people take for granted and can contribute to the substantial isolation of people with disabilities. According to extensive surveys, for example, Congress was told that two-thirds of persons with disabilities had not attended a movie or sporting event in the past year; three-fourths had not seen live theater or music performances; persons with disabilities were three times more likely not to eat in restaurants; and 13% of persons with disabilities never went to grocery stores. *Threshold* 16-17.

Accordingly, the evidence set forth above regarding disability discrimination in public licensing was more than adequate to support comprehensive prophylactic and remedial legislation.

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

"The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment." *Lane*, 124 S. Ct. at 1992. In deciding that question, the Court in *Lane* declined to "examine the broad range of Title II's applications all at once, and to treat that breadth as the mark of the law's invalidity."

Ibid. Instead, the Court concluded that the only question before it was "whether Congress had the power under § 5 to enforce the constitutional right of access to the courts." *Id*. at 1993. The question before this Court, then, is whether Title II is congruent and proportionate legislation as applied to public licensing. See *ibid*.

A statutory remedy is valid under Section 5 where it is "congruent and proportional to its object of enforcing the right[s]" protected by the statute in the relevant context. *Lane*, 124 S. Ct. at 1993. As applied to public licensing, Title II is a congruent and proportional means of preventing and remedying the unconstitutional discrimination that Congress found exists both in public licensing and in other areas of governmental services, many of which implicate fundamental rights. See *Nevada* v. *Hibbs*, 538 U.S. 721, 722-723, 735-737 (2003) (remedy of requiring "across-the-board" provision of family leave congruent and proportional to problem of employers relying on gender-based stereotypes).

As was true in *Lane* with respect to cases implicating access to courts and judicial services, "Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility is congruent and proportional to its object of enforcing" the rights of disabled persons subject to public licensing requirements. 124 S. Ct. at 1993.

"The remedy Congress chose is * * * a limited one." *Lane*, 124 S. Ct. at 1993. The Title prohibits only discrimination "by reason of * * * disability," 42 U.S.C. 12132, so that the States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability or for no

reason at all. Even though it requires States to take some affirmative steps to avoid discrimination, it "does not require States to compromise their essential eligibility criteria," requires only "'reasonable modifications' that would not fundamentally alter the nature of the service provided," *Lane*, 124 S. Ct. at 1993, and does not require States to "undertake measures that would impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service," *id*. at 1994.

Importantly, as applied to licensing programs such as this one, Title II does not require a State to a license a physician who poses a direct threat to the health or safety of others if that threat cannot be eliminated or reduced to an acceptable level by a reasonable modification or the provision of auxiliary aids or services. See 28 C.F.R. Pt. 25 App. A, pp. 536-537 (2003) (Preamble to Title II Regulations) ("direct threat" analysis under Title III applies to Title II cases as well); cf. 42 U.S.C. 12182(b)(3) (Title III "direct threat" standard); *Bragdon* v. *Abbott*, 524 U.S. 624 (1998) (applying "direct threat" standard in medical care setting).

With respect to physical access to facilities, Congress required only "reasonable measures to remove architectural and other barriers to accessibility." *Lane*, 124 S. Ct. at 1993. Having found that facilities may be made accessible at little additional cost at the time of construction, Congress imposed reasonable architectural standards for new construction and alterations. See 28 C.F.R. 35.151; See GAO, Briefing Reports on Costs of Accommodations, *Americans with Disabilities Act: Hearing Before the House Comm. on Small Business*, 101st Cong., 2d Sess. 190 (1990); see also, *e.g.*, S.

Rep. No. 116, 101st Cong., 1st Sess. 10-12, 89, 92 (1989); H.R. Rep. No. 485, Pt. 2, at 34. At the same time,

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

Lane, 124 S. Ct. at 1993-1994.

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

First, in public licensing, Title II often applies directly to prohibit unconstitutional discrimination against the disabled, *i.e.*, discrimination which is based on irrational stereotypes about, or animosity toward, people with disabilities. For example, Title II directly enforces the requirements of the Fourteenth Amendment when it prohibits a State from refusing to provide marriage licenses to people with AIDS. See *T.E.P.* v. *Leavitt*, 840 F. Supp. 110 (D. Utah 1993). Title II enforces the Equal Protection Clause's rationality requirement when it acts to prohibit denial of a teacher's license based on the irrational belief that a person in a wheelchair cannot be a good educator. See H. R. Rep. No. 485, Pt. 2, at 29; 2 *Leg. Hist.* 1611 n.9 (Arlene Mayerson). The Act further enforces the requirements of procedural due process when it requires a State to make accommodations necessary to ensure that

people with disabilities are afforded fair hearings on license revocations and denials. See *Lane*, 124 S. Ct. at 1994.

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

Title II's prophylactic remedy thus acts to detect and prevent difficult-to-uncover discrimination in public licensing against people with disabilities that could otherwise evade judicial remedy. Congress understood that discretionary decisionmaking by individual public officials, as often occurs in licensing, creates a risk that decisions will be made based on unspoken (and, therefore, difficult to prove) irrational assumptions or invidious stereotypes, leading to "subtle discrimination that

may be difficult to detect on a case-by-case basis." *Hibbs*, 538 U.S. at 736. By prohibiting insubstantial reasons for denying accommodations to the disabled, and proscribing governmental conduct the discriminatory effects of which cannot be or have not been adequately justified, Title II prevents covert intentional discrimination against disabled licensing applicants and provides strong remedies for the lingering effects of past unconstitutional treatment against the disabled in the public licensing context. See *Lane*, 124 S. Ct. at 1986 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not intent, to carry out the basic objectives of the Equal Protection Clause.").

Prohibiting disability discrimination in public licensing programs is also an appropriate means of preventing and remedying discrimination in public services generally, and is responsive to the enduring effects of the pervasive discrimination against individuals with disabilities that ran throughout the Nation's history, peaking with the Social Darwinism movement of the mid-20th century. See *Lane*, 124 S. Ct. at 1995 (Souter, J., concurring)

"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 punctuation omitted). Discrimination in licensing has a direct and profound impact on the ability of people with disabilities to integrate into the community, literally excluding them from being able to drive themselves to community businesses and

events or from working in certain professions with their non-disabled peers. This segregative effect, in turn, feeds the irrational stereotypes that lead to further discrimination in public services (many implicating fundamental rights), as the absence of people with disabilities from professions is taken as evidence of their incapacity to serve as teachers, doctors, or lawyers. Cf. *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999) (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life").

Title II's application to public licensing is thus congruent and proportional because a simple ban on discrimination would have frozen in place the effects of States' prior official exclusion and isolation of individuals with disabilities, which had the effect of rendering the disabled invisible to government officials and planners, thereby creating a self-perpetuating spiral of segregation, stigma, and neglect. See *Hibbs*, 538 U.S. at 736; *Gaston County* v. *United States*, 395 U.S. 285, 289-290 (1969) (constitutionally administered literacy test banned because it perpetuates the effects of past discrimination).[10] In his testimony before Congress, Attorney General Thornburg explained that a key to ending this spiral "is to increase contact between and among people with disabilities and their more able-bodied peers. And an essential component of that effort is the enactment of a comprehensive law that promotes the integration of people with disabilities into our communities, schools and

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[10] See also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

work places." 3 *Leg. Hist.* at 2020. Removing barriers to integration created by discrimination in licensing is an important part of this effort to reduce stereotypes and misconceptions that risk constitutional violations throughout government services, including areas implicating fundamental rights.

Finally, Title II's application to public licensing must be viewed in light of the broader purpose and application of the statute. Congress found that the discrimination faced by people with disabilities was not limited to a few discrete areas (such as licensing); to the contrary, Congress found that people with disabilities have been subjected to systematic discrimination in a broad range of public services. See 42 U.S.C. 12101(a)(3). Title II's application to public licensing, thus, is part of a broader remedy to a constitutional problem that is greater than the sum of its parts. That is, comprehensively protecting the rights of individuals with disabilities in the licensing context directly remedies and prospectively prevents the persistent imposition of inequalities on a single class, *Lane*, 124 S. Ct. at 1988-1992, and the chronic distribution of benefits and services, whether through legislation or executive action, in a way that "impos[es] special disabilities upon groups disfavored by virtue of circumstances beyond their control." *Plyler* v. *Doe*, 457 U.S. 202, 217 n.14 (1982). Title II's application to public licensing programs thus combats a historic and enduring problem of broad-based unconstitutional treatment of the disabled, including programmatic exclusions from public life that sought to accomplish the very "kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish," *ibid.*

CONCLUSION

For the foregoing reasons, the district court's dismissal of plaintiff's Title II claims on sovereign immunity grounds should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

As required by Federal Rule of Appellate Procedure 32(a)(7)(B), I, Kevin Russell, counsel for Intervenor United States, certify that this brief is proportionally spaced Times New Roman, 14 point font, and contains 9,261 words. I relied on my word processor to count the words and it is WordPerfect 9 software.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF SERVICE

I certify that two copies of the above BRIEF FOR THE UNITED STATES AS INTERVENOR were served by overnight mail, postage prepaid, on September 10, 2004, on the following parties:

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