UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

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| STUART T. GUTTMAN, M.D., | ) | |
| | ) | |
| Plaintiff | ) | |
| | ) | Case No. 2:03-cv-00463-MCA-KBM |
| v. | ) | |
| | ) | |
| THE STATE OF NEW MEXICO, | ) | |
| | ) | |
| Defendant | ) | |
| _____ | ) | |

**UNITED STATES' BRIEF AS INTERVENOR**

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**BACKGROUND**

1. This case involves a suit filed under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq*. Title II 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(1). A "qualified individual with a disability" is a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service. 42 U.S.C. 12131(2).[1]

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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.

A person does not meet essential eligibility requirements if he poses a "direct threat" in the form of "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services." See 28 C.F.R. Pt. 35, App. A, p. 553 (2007) (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).

The discrimination prohibited by Title II of the ADA 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 "fundamentally alter[ing] the nature of the service, program, or activity." 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 doing 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. 35.151.

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. *Id*. at 1167. 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. *Ibid*. 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 Compl. ¶¶ 43-47. This Court granted summary judgment for the defendants. *Guttman*, 320 F. Supp. 2d at 1166. Specifically, this Court 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, this Court concluded 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. *Id.* at 1170. This 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.

On appeal, the Tenth Circuit reversed and remanded in light of the Supreme Court's decisions in *Tennessee* v. *Lane* and *United States* v. *Georgia*. See *Guttman* v. *Khalsa*, 446 F.3d 1027, 1034-1036 (10th Cir. 2006).

## ARGUMENT[2]

## I

## THIS COURT SHOULD FIRST ADDRESS THE THRESHOLD ISSUE PRESENTED IN THIS CASE BEFORE CONDUCTING THE ANALYSIS SET FORTH IN *UNITED STATES* V. *GEORGIA* FOR EXAMINING THE CONSTITUTIONALITY OF TITLE II

### *A. This Court Should First Address Defendant's Collateral Estoppel Argument*

Defendant argues that plaintiff's ADA claims are barred by collateral estoppel. The United States takes no position with regard to the merits of this issue, but we assert that the issue should be resolved prior to addressing any constitutional questions.

This Court has a duty "'not to pass on questions of constitutionality' unless adjudication of the constitutional issue is necessary." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004) (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)). That

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[2] There are significant verbatim similarities between this brief and Plaintiff's Response To Defendant's Motion To Dismiss. As plaintiff notes (Pl.'s Resp. 9 n.1), this is because large portions of his argument are drawn from the appellate brief the United States filed when this case was before the Tenth Circuit. The United States' position with regard to the Eleventh Amendment issue has not changed since the time it filed its appellate brief, and we are now reiterating those same arguments before this Court. Accordingly, large portions of this brief also are drawn from the United States' prior appellate filing and for this reason may appear similar to plaintiff's response.

principle of constitutional avoidance is at its apex when courts address the constitutionality of an Act of Congress and thereby undertake "the gravest and most delicate duty" that courts are "called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation and internal quotation marks omitted). Accordingly, a "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988).

Thus, this Court should first address the question whether plaintiff's ADA claims are barred by collateral estoppel. If it determines that they are, it should not reach the constitutionality of Congress's abrogation of Eleventh Amendment immunity for claims brought pursuant to Title II of the ADA in the context of public licensing programs. This approach is consistent with the Tenth Circuit's instructions in this case. See *Guttman* v. *Khalsa*, 446 F.3d 1027, 1036 (10th Cir. 2006) ("If the district court determines that [plaintiff alleged a violation of Title II], and that the allegation is not precluded by res judicata or collateral estoppel, it should *then* determine whether, by passing Title II, Congress abrogated sovereign immunity as applied to that challenge.") (emphasis added).

*B. If This Court Proceeds Beyond The Collateral-Estoppel Issue, The Supreme Court's Decision In* United States *v.* Georgia *Provides The Relevant Inquiry*

If it determines that it must go beyond the collateral-estoppel issue, this Court must conduct the inquiry established by *United States* v. *Georgia*, 546 U.S. 151 (2006), to determine the validity of the State's claim of Eleventh Amendment immunity. The issue presented in *Georgia* was whether Title II, as applied to corrections programs, validly abrogates States'

Eleventh Amendment immunity. However, the Court ultimately declined to determine the extent to which Title II's prophylactic protection is valid because the district court and court of appeals had not yet determined whether the Title II claims in that case could independently have constituted viable constitutional claims, or whether the Title II claims relied solely on the statute's prophylactic protection. *Georgia*, 546 U.S. at 159. The Court held that, to the extent any of the plaintiff's Title II claims would independently state a constitutional violation, Title II's abrogation of immunity for those claims is valid. *Ibid.* Thus, a court need not question whether Title II is congruent and proportional under the test articulated in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), with respect to such claims. Because it was not clear whether the plaintiff in *Georgia* had stated any viable Title II claims that would not independently state constitutional violations, the Court declined to decide whether any prophylactic protection provided by Title II is within Congress's authority under Section 5 of the Fourteenth Amendment. *Ibid.*

In *Georgia*, the Court included instructions to lower courts as to how Eleventh Amendment immunity challenges in Title II cases should proceed: Lower courts must "determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Georgia*, 546 U.S. at 159. See also *Guttman*, 446 F.3d at 1035-1036.

Thus, in order to resolve the immunity question, a court first must determine which of plaintiff's allegations against the State validly state a claim under Title II. The court then must

determine which of plaintiff's valid Title II claims against the State would independently state constitutional claims. *Only* if plaintiff has alleged valid Title II claims against the State that are not also claims of constitutional violations should a court consider whether Congress validly abrogated States' sovereign immunity to claims asserted under Title II with respect to the "*class* of conduct" at issue. *Georgia*, 546 U.S. at 159 (emphasis added).

Here, the parties agree that this Court has held that plaintiff stated a claim under Title II. See Mot. to Dismiss 5; Pl.'s Response 5. Accordingly, this Court need only address the second and third steps of the *Georgia* analysis.[3]

## II

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

### *A. Congress Clearly Intended To Abrogate Sovereign Immunity With Respect To Claims Asserted Under The ADA*

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*, 541 U.S. 509, 518 (2004). Moreover, it is settled that "Congress can abrogate a State's sovereign immunity when it

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[3] If this Court concludes that the conduct at issue violates the constitution, it obviously need proceed no further. The government believes that issue is best addressed by the parties, who are closer to the facts of this case. However, if this Court proceeds to address the question of abrogation, the government offers its analysis below.

does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment." *Lane*, 541 U.S. at 518. Because Title II validly abrogates States' sovereign immunity in the context of public licensing programs, it is valid as applied to this case.

*B.* Tennessee *v.* Lane *Establishes The Analytical Framework*

In *Lane*, the Supreme Court considered the claims of two plaintiffs, George Lane and Beverly Jones, "both of whom are paraplegics who use wheelchairs for mobility" and who "claimed that they were denied access to, and the services of, the state court system by reason of their disabilities" in violation of Title II. 541 U.S. at 513. Lane was a defendant in a criminal proceeding held on the second floor of a courthouse with no elevator. *Ibid*. "Jones, a certified court reporter, alleged that she ha[d] not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process." *Id*. at 514. The State argued that Congress lacked the authority to abrogate Eleventh Amendment immunity as to these claims, but the Supreme Court disagreed. See *id.* at 533-534.

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*, 541 U.S. at 522; (2) whether there was a history of unconstitutional disability discrimination to support Congress's determination that "inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at 529; and (3) "whether Title II is an appropriate response to this history and pattern of unequal treatment," as applied to the class of cases implicating access to judicial services, *id*. at 530.

With respect to the first question, the Court found that Title II enforces rights under the Equal Protection Clause as well as an array of rights subject to heightened constitutional scrutiny under the Due Process Clause of the Fourteenth Amendment. See *Lane*, 541 U.S. at 522-523. With respect to the second question, the Court conclusively found a sufficient historical predicate of unconstitutional disability discrimination in the provision of public services to justify enactment of a prophylactic remedy pursuant to Congress's authority under Section 5 of the Fourteenth Amendment. See *id*. at 523-530. And finally, with respect to the third question, the Court found that the congruence and proportionality of the remedies in Title II should be judged on a category-by-category basis in light of the particular constitutional rights at stake in the relevant category of public services. See *id*. at 530-531. Applying the holding of *Lane*, this Court should conclude that Congress validly abrogated States' sovereign immunity to claims asserted under Title II in the context of public licensing programs.[4]

*C. The Appropriate Range Of Title II Applications This Court Should Consider In This Case Is The Class Of Cases Implicating Public Licensing*

Defendant asserts the context at issue here is that of "physician licensing." Mot. to Dismiss 1. This overly-narrow view of the appropriate context or range of Title II applications to consider in this case conflicts with the Supreme Court's decision in *Lane*.

In *Lane*, the plaintiffs filed suit to enforce the constitutional right of access to the courts.

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[4] The Court in *Lane* did not examine the congruence and proportionality of Title II as a whole because the Court found that the statute validly abrogated States' sovereign immunity to the class of cases before it. Because the same holds true with respect to 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*, 541 U.S. at 529.

541 U.S. at 513-514, 530-531. The Supreme Court accordingly addressed whether Title II is valid Section 5 legislation "as it applies to the class of cases implicating the accessibility of judicial services." *Id.* at 531. In so holding, however, the Court did not confine itself to the particular factual problem of access to the courts and judicial services presented by the individual plaintiffs, nor did it limit its analysis to the specific constitutional interests entrenched upon in the particular case. Both of the plaintiffs in *Lane* were paraplegics who use wheelchairs for mobility and who were denied physical access to and the services of the state court system because of their disabilities. Plaintiff Lane alleged that, when he was unable to appear to answer criminal charges because the courthouse was inaccessible, he was arrested and placed in jail for failing to appear. *Id.* at 513-514. Plaintiff Jones, a certified court reporter, alleged that she could not work because she could not access some county courthouses. *Ibid.* Lane's particular claims thus implicated his rights under the Due Process and Confrontation Clauses, and Jones' claims implicated only her rights under the Equal Protection Clause.

In analyzing Congress's power to enact Title II, however, the Supreme Court discussed the full range of constitutional rights implicated by the broad category of "accessibility of judicial services," *Lane*, 541 U.S. at 531:

> The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant such as respondent Lane the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." The Due Process Clause also requires the States to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings. We have held that the Sixth Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of "identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." And, finally, we have recognized that

> members of the public have a right of access to criminal proceedings secured by the First Amendment.

*Id.* at 523 (citations omitted); see also *id.* at 525 n.14 (considering cases involving the denial of interpretive services to deaf defendants and the exclusion of blind and hearing impaired persons from jury duty). Thus, a number of the constitutional rights, and a number of Title II applications, that the Supreme Court found relevant to its analysis in *Lane* were not pressed by the plaintiffs or directly implicated by the facts of their case. For instance, neither Lane nor Jones alleged that he or she was unable to participate in jury service or was subjected to a jury trial that excluded persons with disabilities from jury service. Similarly, neither Lane nor Jones was prevented by disability from participating in any civil litigation, nor did either allege a violation of First Amendment rights. The facts of their cases also did not implicate Title II's requirement that government, in the administration of justice, provide "aides to assist persons with disabilities in accessing services," *id.* at 532, such as sign language interpreters or materials in Braille, yet the Supreme Court broadly considered the full range of constitutional rights and Title II remedies potentially at issue, framing its analysis in terms of the broad "class of cases implicating the accessibility of judicial services." *Id.* at 531.

The categorical approach taken by the Supreme Court in *Lane* is a much more appropriate mode of analysis than the litigant-specific approach urged by defendant. Congress is a national legislature. In legislating generally, and pursuant to its prophylactic and remedial Section 5 power in particular, it necessarily responds not to the isolated claims of individual litigants, but to broad patterns of unconstitutional conduct by government officials in the substantive areas in which they operate. Indeed, in enacting Title II, Congress specifically found that unconstitutional

treatment of individuals with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3).

Accordingly, in evaluating whether Title II is an appropriate response to "pervasive unequal treatment in the administration of state services and programs," *Lane*, 541 U.S. at 524, the Supreme Court's decision in *Lane* indicates that courts are to consider the entire "class of cases" arising from the type of governmental operations implicated by the lawsuit, *id.* at 531. Just as the Supreme Court upheld Title II's application in *Lane* by comprehensively considering Title II's enforcement of all the constitutional rights and Title II remedies potentially at issue in the entire "class of cases implicating the accessibility of judicial services," *ibid.*, this Court should assess Title II's constitutionality as applied to the entire "class of cases," *ibid.*, implicating public licensing. As discussed more fully *infra*, those constitutional interests and the Title II remedies they trigger include not just the equal protection rights at stake in medical licensing, but also the widespread pattern of unequal treatment of persons with disabilities in the provision of public licenses in a broad range of life activities documented in the legislative history of Title II. That evidence includes discrimination in licensing in areas implicating fundamental rights as well as claims of irrational discrimination in public licensing on the basis of disability.

When viewed through the analytical framework established and applied by the Supreme Court in *Lane* and the "sheer volume of evidence" compiled by Congress, *Lane*, 541 U.S. at 528, "Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating" public licensing, *id.* at 531.

*D. There Are Substantial 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." 541 U.S. at 522-523. In deciding the case before it, the Court considered a subset of Title II applications – "the class of cases implicating the accessibility of judicial services," *id*. at 531 – 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, see *id*. at 522-523, while court reporter Beverly Jones' exclusion from the courtroom implicated only Equal Protection rights subject to rational basis review.[5]

This case presents a similar category, one that implicates a range of constitutional rights, some of which are subject to heightened scrutiny, 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, 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

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[5] The Court mentioned that, in general, "members of the public have a right of access to criminal proceedings secured by the First Amendment." *Lane*, 541 U.S. at 523. The Court did not, however, conclude that Jones' 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).

recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer* v. *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 persons with disabilities are afforded the same "meaningful opportunity to be heard" as others. See 541 U.S. at 532-533 (citation and internal quotations omitted).

License denials and revocations are also subject to limitations under the Equal Protection Clause. See *Schware* v. *Board of Bar Exam'rs*, 353 U.S. 232, 238-239 (1957); *Dent*, 129 U.S. at 121-122. Irrational discrimination against individuals with disabilities 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) (internal quotations omitted), 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 individuals with disabilities 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 individuals with disabilities 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).

### *E. There Is A Considerable 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*, 541 U.S. at 523

(quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966)). Accordingly, in *Lane*, the Court reviewed the historical experience reflected in Title II and concluded that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Id.* at 524. The Court remarked on the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," *id*. at 528, and concluded that it is "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at 529.

*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 *Lane*, 541 U.S. at 530-531. 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 525, but also violations of constitutional rights in the context of voting, jury service, the penal system, public education, and the treatment of institutionalized persons, *id.* at 524-525.[6] Importantly, the Court specifically considered the record of discrimination in public

[6] In describing the adequacy of the historical predicate, the Court also spoke in general terms, remarking, for instance, on "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of *public services*." *Lane*, 541 U.S. at 528 (emphasis added).

licensing programs, noting the history of disability discrimination in marriage licensing, *id*. at 524. That record, the Court concluded, supported prophylactic legislation to address discrimination in "public services" generally. *Id*. at 529.

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. See *Klingler* v. *Department of Revenue*, 455 F.3d 888, 896 (8th Cir. 2006) ("The court's decision in *Lane* that Title II targeted a pattern of unconstitutional conduct forecloses the need for further inquiry."); *Association for Disabled Americans, Inc.* v. *Florida Int'l Univ.*, 405 F.3d 954, 958 (11th Cir. 2005) ("Under its analysis of [the second *Boerne*] prong, the Supreme Court [in *Lane*] considered the record supporting Title II *as a whole*, and conclusively held that Congress had documented 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."). But even if it were an open question, there is an ample historical basis for extending Title II to disability discrimination in public licensing.

*2. There Is Considerable 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," 541 U.S. at 524, through criminal and licensing statutes that infringe on a person's ability to marry. See *id*. at 524 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 unless certain conditions were met).[7] 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.[8]

Further, there was specific evidence before Congress of similar discrimination in 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.*). Teachers from several states complained about licensing requirements that excluded deaf teachers from teaching deaf

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[7] 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 541 U.S. at 524-525 nn.7-14.

[8] In *Lane*, the Court relied on the handwritten letters and commentaries collected during forums held by the Task Force on the Rights of Empowerment of Americans with Disabilities. These materials, which were part of the official legislative history of the ADA, were 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*, 541 U.S. at 526. That Appendix cites to the documents by State and Bates stamp number, *Garrett*, 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.

students. See, *e.g.*, CA 261; KY 732; TX 1503; TX 1549. 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 wheelchair user 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 down 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 1766. 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, 684-687 (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 individuals with disabilities 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 individuals with disabilities 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. Significant Harm Is Caused By 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*, 541 U.S. at 523. 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

persons 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 "half of all disabled persons surveyed had incomes of $15,000 or less," while "just over a quarter" of "non-disabled Americans" "had incomes in that bracket." 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 quarter worked full-time. *Id*. at 14.

Similarly, discrimination in the administration of drivers licenses can deprive persons with disabilities of an independence that most people take for granted and can contribute to the substantial isolation of persons 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.

### *F. 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*, 541 U.S. at 530. 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 a 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 531. 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*, 541 U.S. at 531. 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 Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 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).

"The remedy Congress chose is * * * a limited one." *Lane*, 541 U.S. at 531. 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*, 541 U.S. at 532 (quoting 42 U.S.C. 12131(2)), and does not require States to "undertake measures that would impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the

service," *ibid*.

Importantly, as applied to licensing programs such as this one, Title II does not require a State to license a physician who poses a "direct threat": that is, "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services." See 28 C.F.R. Pt. 35, App. A, p. 553 (2007) (Preamble to Title II Regulations); 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).

As applied to discrimination in public licensing, Title II serves a number of important and valid prophylactic and remedial functions. First, in public licensing, Title II often applies directly to prohibit unconstitutional discrimination against individuals with disabilities, *i.e.*, discrimination which is based on irrational stereotypes about, or animosity toward, persons 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 persons 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 wheelchair user 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 persons with disabilities are afforded fair hearings. See *Lane*, 541 U.S. at 532-533.

Second, given the history of unconstitutional treatment of persons 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)(8) (congressional finding that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous"). 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 persons 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 individuals with disabilities, and proscribing governmental conduct the discriminatory effects of which cannot be or have not been adequately justified, Title II prevents covert intentional discrimination against licensing applicants with disabilities and provides strong remedies for the lingering effects of past unconstitutional treatment against individuals with disabilities in the public licensing context. See *Lane*, 541 U.S. at 520 ("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 in 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 "eugenics" movement of the early 20th century. See *Lane*, 541 U.S. at 534-535 (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 persons 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 persons 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

individuals with disabilities invisible to government officials and planners, thereby creating a self-perpetuating spiral of segregation, stigma, and neglect. See *Hibbs*, 538 U.S. at 736-737 (addressing gender stereotypes); *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).[9] 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 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 persons with disabilities was not limited to a few discrete areas (such as licensing); to the contrary, Congress found that persons 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

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[9] 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).

inequalities on a single class, *Lane*, 541 U.S. at 522-530, 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, 216 n.14 (1982). Title II's application to public licensing programs thus combats a historic and enduring problem of broad-based unconstitutional treatment of individuals with disabilities, 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, if this Court reaches the Eleventh Amendment issue, it should hold that Congress validly abrogated States' sovereign immunity to claims asserted under Title II of the ADA in the context of public licensing.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on December 4, 2009, the foregoing United States' Brief As Intervenor was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all counsel of record. A copy was also sent by mail to the following address:

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