ORAL ARGUMENT REQUESTED
Nos. 10-2167 & 10-2172

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STUART T. GUTTMAN, M.D.,

Plaintiff-Appellant

v.

STATE OF NEW MEXICO, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
THE HONORABLE M. CHRISTINA ARMIJO

REPLY BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLANT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES:

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INTRODUCTION

The district court held that the abrogation of Eleventh Amendment immunity for claims arising under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, is not valid in the context of professional licensing. This was error.

As a preliminary matter, the district court misconstrued the class of cases before it. As explained in the United States' opening brief (U.S. Br. 24-31), the

district court's decision to limit its analysis to professional licensing – as opposed to all public licensing – is inconsistent with the Supreme Court's approach in *Tennessee* v. *Lane*, 541 U.S. 509 (2004). Nothing in defendants' brief undermines this conclusion.

Moreover, the district court's error with regard to this issue infected its determination that the statute was not a congruent and proportional response to the problem Congress sought to address in passing Title II. For that reason, this Court should reverse and remand this matter to the district court so that it may apply the congruence-and-proportionality test in the first instance to the proper class of cases (*i.e.*, all public licensing). In the alternative, this Court should hold that Title II passes the congruence-and-proportionality test, and thus is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, either as to the full class of cases involving public licensing or the subset of cases involving professional licensing.

ARGUMENT

I

THE DISTRICT COURT ERRED IN LIMITING ITS FOCUS TO THE SUBSET OF CASES INVOLVING PROFESSIONAL LICENSING

The first step in this Court's analysis is to determine the scope of the "class of cases, " *Tennessee* v. *Lane*, 541 U.S. 509, 531 (2004), at issue. See U.S. Br. 24-31. The United States contends that the appropriate class includes all public-

licensing cases, while defendants assert that the relevant category is limited to the subset of professional licensing. Aside from *Lane* itself, the most relevant appellate precedent on this issue is the First Circuit's decision in *Toledo* v. *Sanchez*, 454 F.3d 24, 36 (1st Cir. 2006), cert. denied, 549 U.S. 1301 (2007). In *Toledo*, the court of appeals – relying on the Supreme Court's decision in *Lane* – sided with the United States and rejected a narrowing argument similar to the one advanced by defendants in this case. See U.S. Br. 26-27 (discussing *Toledo*, 454 F.3d at 36). Tellingly, defendants' Answer Brief in this case does not discuss, let alone distinguish, the First Circuit's ruling in *Toledo*.

Instead, defendants assert that the focus should be narrowed to the subset of cases involving professional licensing for three reasons: (1) the Supreme Court's decision in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), requires courts to "identify with some precision the scope of the constitutional right at issue," *id.* at 365; (2) what defendants refer to as "the most relevant precedents," Defs.' Br. 42, require more precision than that urged by the United States; and (3) examining all public licensing requires examination of more than one constitutional right. See Defs.' Br. 41-43. None of these assertions support the weight of defendants' argument.

First, the Supreme Court's statement in *Garrett* that courts must "identify with some precision the scope of the constitutional right at issue," 531 U.S. at 365,

has little to do with the question before this Court – *i.e.*, the scope of the class of cases at issue in a challenge to the abrogation of Eleventh Amendment immunity for claims arising under Title II of the ADA. *Garrett* addressed a challenge to the abrogation of Eleventh Amendment immunity as to *all* of Title I, and it pre-dates the Court's consideration of Title II in *Lane*. Thus, the quoted phrase from *Garrett* cannot speak to the issue of how broadly or narrowly to draw the class of cases at issue in a post-*Lane* Eleventh Amendment challenge involving Title II.

Even if it were relevant, the quoted phrase from *Garrett* would not carry the meaning ascribed to it by defendants. Indeed, immediately after stating that the scope of the right at issue must be identified "with some precision," the Court noted that, "[h]ere, that inquiry requires us to examine the limitations § 1 of the Fourteenth Amendment places upon States' treatment of the disabled," and determined that it must look to its "prior decisions under the Equal Protection Clause dealing with this issue." 531 U.S. at 365. Thus, the "precision" referred to in the quoted passage from *Garrett* was far less precise than the public licensing class of cases at issue here. Accordingly, it has no relevance to a determination by this Court regarding whether to examine all public licensing decisions, or only those involving professional licensing.

Ironically, to the extent precision is required, it is defendants' proposed class of cases – not that advanced by the United States – that is imprecise. The class of

cases proposed by the United States – *i.e.*, all public licensing – is comprehensive, and thus easily defined and applied. By contrast, the professional licensing construct put forward by defendants is both arbitrary and ambiguous. Does it include the licensing of teachers and barbers, or only those who attend "professional" schools, such as doctors and lawyers? If a commercial truck driver needs a special driver's license in order to engage in his chosen profession, is that included, such that commercial driver's licenses are covered, but ordinary driver's licenses are not? And what about hunting and fishing licenses, when those activities relate to a person's chosen profession? In short, defendants' proposed class of cases is artificial and unworkable.

Second, defendants' assertion that "the most relevant precedents," Defs.' Br. 42, require more precision than that urged by the United States also misses the mark. None of the Supreme Court cases cited in support of this proposition addresses the constitutionality of the abrogation of Eleventh Amendment immunity as it relates to Title II of the ADA, and all predate the Court's consideration of Title II in *Lane*. It therefore is difficult to see how these cases inform this Court's analysis as to how broadly to construe the class of cases at issue here.

Indeed, as noted above, the most relevant appellate decisions on this point include *Lane* itself, as well as the First Circuit's decision in *Toledo*. See U.S. Br. 24-28. Both decisions support the United States' position that the relevant class of

cases should not be limited to the facts of any given case. See *Toledo*, 454 F.3d at 36 (noting that "[a] number of the[] statutory applications and the corresponding constitutional rights" implicated in *Lane* "were neither presented by the plaintiffs in *Lane nor directly related to the facts of the case*") (emphasis added).

Third, the fact that the examination of all public licensing requires analysis of more than one constitutional right, see Defs.' Br. 42-43, undercuts – rather than supports – defendants' argument. The rights at issue in the public-licensing context are no more diverse than those considered by the Supreme Court in *Lane*. See *Lane*, 541 U.S. at 522-523; see also *Toledo*, 454 F.3d at 36. Thus, defendants' desire to "control[] the constitutional variables," Defs.' Br. 43, is misplaced; the goal of the inquiry is not to control variables, but rather to address the complete class of cases at issue. And, as previously stated, there is no commonsense basis for differentiating among different types of licenses when it comes to preventing discrimination by state officials, see U.S. Br. 28-29, and no clear method of determining what constitutes a "professional" license, see pp. 4-5, *supra*. Simply put, defendants' assertion that this Court must conduct a narrow, fact-specific analysis is both unworkable and inconsistent with the relevant appellate decisions. See *Lane*, 541 U.S. at 522-523; *Toledo*, 454 F.3d at 36.

Moreover, defendants' position also is unrealistic in light of Congress's role as a national legislature, which requires it to respond not to the isolated claims of

individual litigants, but rather to broad patterns of unconstitutional conduct by government officials in the substantive areas in which they operate. Thus, in exercising its broad prophylactic powers under Section 5 of the Fourteenth Amendment, Congress cannot – and need not – anticipate every conceivable factual scenario that might arise under Title II.

For example, the Supreme Court in *Lane* did not require Beverly Jones – a court reporter and one of two plaintiffs in that case – to come forward with evidence indicating that Congress specifically considered or documented a history of discrimination against court reporters, or even court employees in general. Rather, the majority in *Lane* focused its analysis on the class of cases – not the specific fact pattern – before it. That class of cases dealt with access to the courts in general, just as the class at issue here involves state licensing decisions in general, not simply those licensing decisions relating to medical or other professionals.

In view of the foregoing, this Court should follow the approach of the First Circuit in *Toledo* and reject defendants' attempt to narrow the class of cases at issue. Here, such an approach is best implemented by reversing the district court's ruling and remanding this matter so the district court may determine in the first instance whether the abrogation of Eleventh Amendment immunity was a congruent and proportional response with regard to the class of cases involving all

public licensing, rather than the subset of professional licensing. See *Guttman* v. *New Mexico*, 325 F. App'x 687, 692 (10th Cir. 2009) (unpublished) (returning the Eleventh Amendment issue to the district court rather than deciding it on appeal "because the district court is 'best situated' in the first instance to determine whether Title II abrogated sovereign immunity with respect to Guttman's claims") (citing *United States* v. *Georgia*, 546 U.S. 151, 159 (2006)).

II

IF THIS COURT ELECTS NOT TO REMAND THIS MATTER TO THE DISTRICT COURT, IT SHOULD HOLD THAT CONGRESS'S ABROGATION OF ELEVENTH AMENDMENT IMMUNITY IS VALID LEGISLATION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT, AS APPLIED TO THE CLASS OF CASES IMPLICATING PUBLIC OR PROFESSIONAL LICENSING

In defending the district court's ruling, defendants make two primary arguments: (1) Congress's express abrogation of Eleventh Amendment immunity is invalid as to the claim at issue because it does not involve a fundamental right; and (2) the historical record of violations is insufficient to justify abrogation. See Defs.' Br. 30. Neither provides a sufficient basis for the court's decision.

First, as noted in the government's opening brief, the question whether a right is fundamental is not determinative with regard to the validity of Congress's abrogation of Eleventh Amendment immunity. See U.S. Br. 38-39 (noting that courts have upheld the abrogation of Eleventh Amendment immunity as to Title II claims brought in the education context despite the fact that education is not a

fundamental right). Rather, it is simply one factor that must be weighed as part of the congruence-and-proportionality analysis.

If, as some circuits have held, the abrogation of Eleventh Amendment immunity is valid in the public-education context, see U.S. Br. 38-39, there is no logical reason why it would not also be valid in the public-licensing context. Indeed, it would be passing strange to conclude that Congress validly abrogated Eleventh Amendment immunity for claims arising in the context of a public medical or law school, but not as to claims arising from the public licensure process that invariably follows therefrom. Thus, adoption of defendants' suggested approach would result in a nonsensical, patchwork approach to determining ADA coverage.

Moreover, it is important to separate the broader Eleventh Amendment issue from the specific allegations at issue in a given case. Whatever this Court may think of the merits of Dr. Guttman's Title II claim, the facts of his case are irrelevant to the Eleventh Amendment determination, except to the extent that they identify the relevant class of cases at issue. The question, for purposes of Eleventh Amendment analysis, is not whether a licensing-based claim should be permitted to proceed in any given case; rather, it is whether states should be immune from *all* claims in the licensing context.

Under defendants' theory of the case, a state that adopted a policy prohibiting all persons with disabilities from obtaining a medical license – or prohibiting all persons with a history of mental illness, however minor, from obtaining a law license – would retain its Eleventh Amendment immunity from suit under the ADA despite Congress's clearly-expressed intent to the contrary. Simply put, that is a staggering result, and one that should not be countenanced by this Court.

Moreover, if the majority in *Lane* believed that the abrogation of Eleventh Amendment immunity could never be valid with respect to non-fundamental rights, it presumably would have said as much. It did not. Beverly Jones, one of the two plaintiffs in *Lane*, presented a claim implicating Equal Protection rights subject only to rational-basis review, see U.S. Br. 14;[1] a claim not unlike the one at issue in this case. Yet the Supreme Court did not analyze her claim in isolation, as defendants seek to have this Court do with respect to Dr. Guttman's claim. Instead, the majority in *Lane* construed Jones' claim together with all others that may arise in the class of cases implicating access to judicial services – some of which were subject to more searching review – and concluded that Congress's

[1] As noted in the opening brief, see U.S. Br. 14 n.4, we are not aware of a Supreme Court decision extending strict scrutiny to a request for accommodation brought by a specific member of the public, such as a person with a disability like Jones. The Supreme Court's decision *Presley* v. *Georgia*, 130 S. Ct. 721 (2010), is not to the contrary, as it dealt with a claim arising under the Sixth Amendment. See *id.* at 723.

abrogation of Eleventh Amendment immunity was valid as to the entire class of cases that fall within that context.

Thus, the ruling in *Lane* provides authority for the proposition that, notwithstanding the Supreme Court's ruling in *Garrett*, state action that has the effect of preventing persons with disabilities from engaging in their chosen profession may appropriately be the subject of Fourteenth Amendment legislation – at least where, as here, the context at issue (licensing) overlaps with other fundamental rights (such as marriage and travel).[2]

Moreover, defendants' argument fails for an additional reason: it focuses on the right at issue, neglecting any substantive discussion of the remedy. As the Fourth Circuit has noted, however, "Title II presents fewer congruence-and-proportionality concerns than does Title I" because "the remedial measures

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[2] Defendants attempt to explain away the non-fundamental nature of Jones' claim in *Lane*. See Defs.' Br. 35-36. The United States respectfully disagrees with defendants' reading of that case. When the majority in *Lane* stated that the case before it "implicate[d] the right of access to the courts," and that it therefore "need not consider whether Title II's duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only *Cleburne's* prohibition on irrational discrimination," *Lane*, 541 U.S. at 532 n.20, it could not have meant – as defendants assert – that all claims before it were based solely on fundamental rights, as Jones' claim was subject only to rational-basis review. Rather, a better reading of the opinion is that the *Lane* Court did not need to determine whether abrogation would be valid as to a class of cases involving *purely* non-fundamental rights. Similarly, this Court also need not reach that question, as the class of cases involving public licensing – like the class of cases at issue in *Lane* – implicates a range of rights, some of which are subject to heightened scrutiny, others rational-basis scrutiny.

described in Title I are aimed at discrimination by public entities acting as employers, not as sovereigns," and because "the remedial measures employed in Title II are likely less burdensome to the States than those employed in Title I." *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 489-490 (4th Cir. 2005).

Second, the historical record of violations also is not determinative. As noted in the United States' opening brief, the appropriateness of Section 5 legislation is not purely a product of the history of discrimination; it also is a function of the "gravity of the harm [the law] seeks to prevent." *Lane*, 541 U.S. at 523. Here, that harm is substantial. See U.S. Br. 21-23.

CONCLUSION

This Court should reverse the district court's ruling and remand this matter with instructions that the district court conduct the congruence-and-proportionality analysis as to the full class of cases implicating public licensing. In the alternative, 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 either the context of public or professional licensing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 2,777 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, prepared for submission via ECF, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/ Dirk C. Phillips
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Date: January 10, 2011

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLANT was furnished through (ECF) electronic service to the following on this the 10th day of January, 2011:

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