No. 03-2345

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CHARLOTTE KLINGLER, CHARLES WEHNER,
SHEILA BRASHEAR,

Plaintiffs-Appellees

v.

DIRECTOR, DEPARTMENT OF REVENUE,
STATE OF MISSOURI,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF ON REMAND FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF THE ISSUE REMAINING AFTER REMAND

Whether Missouri's practice of charging a fee for disabled parking placards violates Title II of the Americans with Disability Act, 42 U.S.C. 12101 *et seq.*, and its implementing regulations.

STATEMENT OF THE CASE

While handicap license plates are available in Missouri without a surcharge, the State charges a $2 annual fee for portable parking placards. See Mo. Rev. Stat. § 301.142.4, 301.142.5 (2004). Plaintiffs assert that this placard fee violates Title II of the ADA, as interpreted by the "surcharge regulation." 28 C.F.R. 35.130(f). That regulation provides that a "public entity may not place a surcharge on a

particular individual with a disability * * * to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part." The district court declared that the State's placard fee violated the regulation, and enjoined the director of the Department of Revenue from collecting the fee in the future. See *Klingler* v. *Director, Dep't of Revenue*, 366 F.3d 614, 615-616 (8th Cir. 2004).

A panel of this Court reversed. *Klingler*, 366 F.3d at 615. The panel declined to address whether the placard fee violated Title II and the surcharge regulation, stating that "this is one of those rare occasions where the appropriate resolution of the constitutional issue is reasonably straightforward and determinate and the resolution of the statutory issue is, by contrast, difficult and complex." *Id*. at 616. Relying on *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), the panel then held that Title II is not valid legislation to enforce the Fourteenth Amendment. *Id*. at 616-617. The panel next asked "whether the statute's application to the regulated activity in the case at hand is a valid one" under the Commerce Clause. *Id*. at 617. The relevant "regulated activity," the Court concluded, was the collection of the surcharge. *Id*. at 617. Applying *United States* v. *Lopez*, 514 U.S. 549 (1995), the Court held that Congress lacked authority under the Commerce Clause to regulate the collection of a surcharge because, among other things, it was speculative whether the imposition of a $2 fee would "deter any significant number of people, who would obtain placards if they were

free, from purchasing them and thus acquiring the enhanced ability to engage in economic transactions that the placards might afford." *Id*. at 619-620.

Judge Richard Arnold dissented, arguing that the majority took "too narrow a view of what activity is being regulated by Title II," 366 F.3d at 620, and that "Congress rationally could have found that the number of individuals deterred by the $2.00 fee from engaging in interstate commerce was substantial." *Id*. at 622.

The United States intervened and filed a petition for rehearing, arguing (1) that the panel should have resolved the statutory questions first and determined that the challenged fee does not violate Title II, (2) that the panel erred in concluding that the surcharge regulation violates the Commerce Clause as applied to the challenged fee, and (3) that this Court's earlier conclusion that Title II is not a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment should be reconsidered in light of the Supreme Court's decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004). The Court denied the United States' and plaintiffs' petitions for rehearing over the dissent of Judges Smith, Colloton, and Gruender. Plaintiffs filed a petition for certiorari, and both the United States and the state defendant filed responses agreeing that the decision of this Court should be vacated and the case remanded for further consideration in light of the Supreme Court's decision in *Tennessee* v. *Lane*. On June 13, 2005, the Supreme Court granted plaintiffs' petition for certiorari, vacated the decision of this Court and remanded the case "for further consideration in light of" *Lane* and *Gonzalez* v. *Raich*, 125 S. Ct. 2195 (2005). On July 27, 2005, this Court requested supplemental briefing

from the parties "addressing the *Lane* and *Raich* cases and their impact on this appeal."

SUMMARY OF ARGUMENT

In its supplemental brief to this Court, the state defendant has explicitly abandoned its challenge to the constitutionality of Title II of the ADA as interpreted by its implementing regulations. Because no party now challenges the constitutionality of Title II, this Court need not and should not rule on that issue. The United States intervened in this action pursuant to 28 U.S.C. 2403 for the sole purpose of defending the constitutionality of Title II and its regulations. Because the constitutionality of the statute and its regulations is no longer at issue in this case, the United States no longer has a stake in the outcome of this appeal.

ARGUMENT

THE CONSTITUTIONALITY OF TITLE II AND ITS REGULATIONS IS NO LONGER AT ISSUE IN THIS CASE

In its supplemental brief to this Court after remand from the Supreme Court, the State concedes (Def. Supp. Br. 13) that, in light of the Supreme Court's recent decision in *Gonzales* v. *Raich*, 125 S. Ct. 2195 (2005), the application of Title II of the ADA and its implementing regulation to the parking placard fee at issue in this case is "undoubtedly" a valid exercise of Congress's authority under the Commerce Clause. The State urges the Court to address the merits of plaintiffs' statutory claims and rule that the fee does not violate the statute or regulations.

The State has therefore explicitly abandoned its challenge to the constitutionality of Title II of the ADA and its implementing regulations.[1]

By abandoning its constitutional challenge to Title II and its regulations, the State has agreed to subject itself to their application should this Court determine, as the district court did, that the statute and regulations prohibit the fee at issue in this case. Thus, this Court should not consider the constitutional issue. Considering a constitutional challenge to an act of Congress is "the gravest and most delicate duty that [a] Court is called on to perform." *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable." *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944). Accordingly, a "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*,

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[1] The State also explicitly declined (Def. Br. 12 n.4) to challenge the validity of Title II as an exercise of Congress's authority under Section 5 of the Fourteenth Amendment, admitting that this Court's decision in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999), "could have only partially survived *Tennessee* v. *Lane*." Moreover, the state defendant conceded in its brief to the Supreme Court in *Lane* itself that Title II, in all of its applications, is valid Fourteenth Amendment legislation. See 2003 WL 22733906, Brief of the States of Minnesota, Connecticut, Illinois, Massachusetts, Missouri, New Mexico, New York, Vermont, Washington, and Wisconsin as Amici Curiae in Support of Respondents, *Tennessee* v. *Lane*, 541 U.S. 509 (2004) (No. 02-1667). Because the State no longer asserts that Title II is not valid Section 5 legislation, this Court need not and should not reach that question.

485 U.S. 439, 445 (1988). Moreover, the constitutionality of a statute is not jurisdictional. Where, as here, no party asserts the unconstitutionality of a statute, it is inappropriate for the Court to reach the constitutional question. Indeed, the Supreme Court has reiterated that principle in a case involving Title II of the ADA. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) (declining to rule on the constitutionality of Title II of the ADA where defendants failed to raise that issue below).

The United States intervened in this case pursuant to 28 U.S.C. 2403(a) in order to defend the constitutionality of an act of Congress. Because the constitutionality of Title II and its regulations is no longer at issue in this appeal, the United States no longer has a role in the instant case and does not plan to participate in the oral argument scheduled for September 12, 2005 unless requested to do so by the Court.

CONCLUSION

Because the constitutionality of Title II and its regulations are no longer at issue in the instant case, this Court should not reach the constitutional question.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 8th Cir. R. 28A(c), I hereby certify that the foregoing brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). This Brief was prepared using Wordperfect 9.0 and contains 1,437 words. The type face is Times New Roman, 14-point font.

I further certify that the diskettes submitted to Court and counsel and on which an electronic version of this brief is stored have been scanned and are virus free.

_____
SARAH E. HARRINGTON
Attorney

Date: August 30, 2004

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2005, two copies of the foregoing BRIEF ON REMAND FOR THE UNITED STATES AS INTERVENOR, as well as one electronic copy of the foregoing brief, were served by overnight delivery on the following parties and counsel of record:

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