No. 01-31026

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TRAVIS PACE,

Plaintiff-Appellant

v.

BOGALUSA CITY SCHOOL BOARD*, et al.*,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

SECOND SUPPLEMENTAL EN BANC BRIEF FOR THE UNITED STATES AS INTERVENOR

R. ALEXANDER ACOSTA
Assistant Attorney General

JESSICA DUNSAY SILVER
KEVIN RUSSELL
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - PHB 5010
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
(202) 305-4584

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CONSTITUTION & STATUTES: **PAGE**

STATUTES (continued): **PAGE**

REGULATION:

LEGISLATIVE HISTORY: **PAGE**

MISCELLANEOUS:

MISCELLANEOUS (continued): **PAGE**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-31026

TRAVIS PACE,

Plaintiff-Appellant

v.

BOGALUSA CITY SCHOOL BOARD, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

SECOND SUPPLEMENTAL EN BANC BRIEF FOR THE UNITED STATES AS INTERVENOR

Pursuant to this Court's order of May 25, 2004, the United States files this supplemental brief on the effect of *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), on the issues raised in this appeal.

STATEMENT OF THE CASE

Plaintiff, a student with a disability, sued state and local educational agencies, alleging that he was denied access to various educational services in violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C.

12131 *et seq.* Plaintiff also brought claims under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq*., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. The district court dismissed plaintiff's claims against the state defendants, holding that plaintiff failed to prove a violation of the ADA, the IDEA, or Section 504. See *Pace* v. *Bogalusa City Sch. Bd.*, No. 99-806, 2001 WL 969103 (E.D. La. Aug. 23, 2001). On appeal, the panel held, among other things, that Congress did not have the power under Section 5 of the Fourteenth Amendment to unilaterally abrogate a State's Eleventh Amendment immunity to suits under Title II of the ADA or Section 504, relying on *Reickenbacker* v. *Foster*, 274 F.3d 974 (5th Cir. 2001). See *Pace* v. *Bogalusa Sch. Bd*., 325 F.3d 609, 613 (5th Cir. 2003).

SUMMARY OF ARGUMENT

As argued in our prior briefs, the State validly waived its Eleventh Amendment immunity to plaintiff's claims under Section 504 and the IDEA. This Court need not, therefore, consider whether Congress also validly abrogated the State's immunity to claims under those statutes. However, Title II of the ADA is not tied to federal spending; instead, its provisions subjecting States to suit are an exercise of Congress's authority under the Fourteenth Amendment to unilaterally abrogate the State's Eleventh Amendment immunity. In *Reickenbacker* v. *Foster*,

274 F.3d 974 (5th Cir. 2001), this Court held that Congress lacked the authority to enact this abrogation. That conclusion, however, must be re-examined in light of the Supreme Court's decision in *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004). Viewed in light of the teachings and example of *Lane*, Title II is valid Fourteenth Amendment legislation as applied to cases implicating access to educational services. 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." *Id.* at 1989. That history of unconstitutional discrimination, the Court held, authorized Congress to enact prophylactic legislation to address "public services," generally, including educational services. See *id*. at 1992. Indeed, the evidence of unconstitutional discrimination in education was overwhelming, including outright exclusion of disabled children from schools (over 1 million in 1975) and a broad range of discriminatory treatment within schools, evincing reliance on irrational stereotypes and even outright hostility toward people with disabilities.

Title II, as it applies to education, 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 education and remedying the lingering legacy of discrimination against people with

disabilities in education. Thus, Title II often applies in public education to prohibit directly 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 public schools where unfettered discretionary decision-making has, in the past, led to irrational and invidious decisions. In requiring reasonable steps toward making school facilities physically accessible, Title II responds to the lingering effects of a long history of exclusion of people with disabilities from schools. Moreover, in integrating students with disabilities among their peers, Title II acts to relieve the ignorance and stereotypes it found at the base of discrimination in education.

These limited prophylactic and remedial measures, judged against the backdrop of pervasive unconstitutional discrimination in public education, 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 access to public education in this case.

ARGUMENT

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 has 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. Although the State argued that Congress lacked the authority to abrogate the State's Eleventh Amendment immunity to these claims, the Supreme Court disagreed.

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. 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. 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.[1]

---

[1] 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 the class of cases implicating students' rights, 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

(continued...)

I

THE CONSTITUTIONAL RIGHTS AT STAKE

The Supreme Court held in *Tennessee* v. *Lane* that Title II enforces 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. 1978, 1988 (2004).

As discussed in Part II, when Congress enacted the ADA, it had before it evidence of a widespread pattern of exclusion of children with disabilities from public schools and discrimination within schools, much of which reflected irrational stereotypes and hostility toward people with disabilities. Such treatment is subject to rational basis review under the Equal Protection Clause, which prohibits arbitrary treatment based on irrational stereotypes or hostility.

Although classifications relating to education only involve rational basis review under the Equal Protection Clause, public education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982). "Both the importance of education in maintaining our basic institutions, and the lasting impact of its

---

[1](...continued)
Supreme Court in *Lane* determined is an "appropriate subject for prophylactic legislation" under Section 5. *Lane*, 124 S. Ct. at 1992.

deprivation on the life of the child, mark the distinction." *Ibid*. Indeed, the Court has long recognized that "education is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Beyond the importance of education to the individual, the Court recognized "early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Wisconsin* v. *Yoder*, 406 U.S. 205, 221 (1972).

In the modern age, the importance of access to education extends to the university as well. In considering access to a college education, the Court recently reaffirmed "the overriding importance of preparing students for work and citizenship" and described "education as pivotal to sustaining our political and cultural heritage with a fundamental role in maintaining the fabric of society." *Grutter* v. *Bollinger*, 539 U.S. 306, 331 (2003) (internal quotation marks omitted). "This Court has long recognized that education is the very foundation of good citizenship." *Ibid*. (quoting *Brown*, 347 U.S. at 493) (internal punctuation omitted). For this reason, the Court explained, "[e]nsuring that public

[educational] institutions are open and available to all segments of American society * * * represents a paramount government objective." *Id*. at 331-332.

Of course a State "may legitimately attempt to limit its expenditures" for public education. *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969). "But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Ibid*. Such invidious distinctions include discrimination against the disabled 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*., and simple "animosity" towards the disabled is not a legitimate state purpose, see *Romer* v. *Evans*, 517 U.S. 620, 634 (1996). By the same token, a State may not treat individuals with disabilities in a way that simply gives effect to private invidious discrimination. See *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

And while it is generally true that States are not required by the Equal Protection Clause "to make special accommodations for the disabled," 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; *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 447-450 (1985).[2]

II

HISTORICAL PREDICATE OF UNCONSTITUTIONAL DISABILITY DISCRIMINATION IN THE PROVISION OF PUBLIC SERVICES

In *Reickenbacker* v. *Foster*, the panel held that Congress lacked the authority to enact Title II because the "requisite pattern of unconstitutional discrimination by the States against the disabled" was absent. 274 F.3d 974, 983 (5th Cir. 2001). The Supreme Court reached the precise opposite conclusion in *Lane*. The Court reviewed the evidence 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

---

[2] Discrimination in education can also implicate the Due Process Clause. "[T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause." *Goss* v. *Lopez*, 419 U.S. 565, 574 (1975). Accordingly, suspension and expulsion decisions must be made in accordance with the basic due process requirement of notice and an opportunity to be heard. *Id*. at 579. 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. In addition, students have a substantive right under the Due Process Clause to be free from government conduct that is "arbitrary in the constitutional sense." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998). See, *e.g.*, *Jefferson* v. *Ysleta Indep. Sch. Dist.*, 817 F.2d 303 (5th Cir. 1987) (due process violated when student tied to a chair and not allowed to use the bathroom for most of school day).

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*.

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, marriage, jury service, zoning, the penal system, public education, law enforcement, and the treatment of institutionalized persons, *id.* at 1989.[3] That record, the Court concluded, supported prophylactic legislation to

---

[3] In describing the adequacy of the historical predicate, the Court also spoke in general terms, remarking, for instance, on "the sheer volume of evidence

(continued...)

address discrimination in "public services," *id*. at 1992, including discrimination in "education," *ibid*. See also *id*. at 1989 (finding a "pattern of unequal treatment in the administration of a wide range of public services * * * including * * * public education"). Thus, the adequacy of Title II's historical predicate to support prophylactic legislation is no longer open to dispute. But even if it were, there is ample evidence of a history of unconstitutional discrimination against individual with disabilities in public education.

A. History Of Disability Discrimination In Public Education

Children with mental disabilities were labeled "ineducable" and categorically excluded from public schools to "protect nonretarded children from them." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 463 (1985) (Marshall, J., concurring in the judgment in part); see also *Board of Educ.* v. *Rowley*, 458 U.S. 176, 191 (1982) ("many of these children were excluded

---

[3](...continued)
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).

completely from any form of public education"). Even in the relatively recent past, many States permitted school administrators to exclude from school children who, in their opinion, "would not benefit" from education.[4] In 1965, North Carolina criminalized any subsequent attempt by parents to send their excluded child to school. See Act of May 18, 1965, ch. 584, 1965 N.C. Sess. Law. 643. Some States also required school officials and parents to report disabled children for institutionalization[5] or enrollment in special segregated schools.[6]

When Congress studied disability discrimination in education in the mid-1970s, it found continuing wholesale exclusion of disabled students from the public schools. Congress's findings, which led to passage of the Education of the

---

[4] See Philip T.K. Daniel, *Educating Students with Disabilities in the Least Restrictive Environment: A Slippery Slope for Educators*, 35 J. of Educ. and Admin. 397, 398 (1997).

[5] See *e.g.*, Act of Mar. 3, 1921, ch. 235, 1921 S.D. Sess. Laws 344; Act of Feb. 21, 1917, ch. 354, §5, 1917 Or. Laws 740; Act of June 21, 1906, ch. 508, §12, 1906 Mass. Acts & Resolves 707.

[6] See, *e.g.*, Ala. Code §21-1-10 (1975); Iowa Code Ann. § 299.18 (1983); Ohio Rev. Code Ann. §3325.02 (2002); Okla. Stat. Ann. tit. 70, § 1744 (West 1990); see also Tex. Code Ann. § 3260 (West 1990) (establishing "State Hospital for Crippled and Deformed Children"); Mont. Code Ann. §§38-801, 38-802 (1961) (establishing a school "for the education, training and detention of subnormal minors and adults and epileptics" who "from social standards, are a menace to society").

Handicapped Act of 1975 (EHA), 84 Stat. 175, were later described by the Supreme Court:

> When the [EHA] was passed in 1975, Congress had before it ample evidence that such legislative assurances were sorely needed: 21 years after this Court declared education to be "perhaps the most important function of state and local governments," congressional studies revealed that better than half of the Nation's 8 million disabled children was not receiving appropriate educational services. Indeed, one out of every eight of these children were excluded from the public school altogether; many others were simply "warehoused" in special classes or were neglectfully shepherded through the system until they were old enough to drop out.

Honig v. *Doe*, 484 U.S. 305, 309 (1988) (citations omitted). Thus, the legislative findings of the EHA described that as late as 1975, and despite prior federal efforts, "1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system." 20 U.S.C. 1400(c)(2)(C).

A decade later, during investigations which led to the passage of the ADA, Congress found that "discrimination against individuals with disabilities persists in such critical areas as * * * education," 42 U.S.C. 12101(a)(3), and that, as a result, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally," 42 U.S.C. 12101(a)(6).

Those statutory findings were amply supported by evidence not only of widespread exclusion of disabled students from education altogether, but also repeated examples of irrational and invidious discrimination against those students allowed to attend school.

1. Record Of Exclusion From Education

Congress was presented with substantial evidence that even years after the passage of the EHA, tens of thousands of disabled children were still being excluded from the public schools. See U.S. Civil Rights Comm'n, *Accomodating the Spectrum of Individual Abilities* 28 n.77 (1983) (*Spectrum*). Extensive surveys further revealed a dramatic educational gap between individuals with disabilities and the community at large. Forty percent of persons with disabilities did not finish high school (triple the rate for the general population), and only 29% had any college education (compared with 48% for the population at large). National Council on the Handicapped, *On the Threshold of Independence* 14 (1988) (*Threshold*).[7] This lack of educational attainment contributed to an "alarming rate

---

[7] See also *Hearing on the Commission on Education of the Deaf and Special Education Programs: Hearing Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. 3 (1988) (statement of Rep. Bartlett) ("Seventy percent of hearing impaired high school graduates cannot attend a post-secondary educational institution because their reading levels are still at a second or third grade level.").

of poverty"[8] and a "Great Divide" in employment[9] for persons with disabilities. *Ibid*. Congress was also given first-hand accounts illustrating these statistics, through testimony that often made clear the invidious basis of the exclusionary practices. For example, one witness testified that "[w]hen I was 5, my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard." S. Rep. No. 116, 101st Cong., 1st Sess. 7 (1989). Another person recounted that a state university declined to admit him to a graduate program, explaining that "we have had disabled persons in this department before; it never worked out well." WI 1757.[10]

---

[8] Twenty percent of persons with disabilities had family incomes below the poverty line (more than twice the percentage of the general population), and 15% of disabled persons had incomes of $15,000 or less. *Threshold* 13-14.

[9] Two-thirds of all working-age persons with disabilities were unemployed; only one in four worked full-time. *Threshold* 14.

[10] 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.

Indeed, the record is replete with examples of discriminatory exclusion of disabled students from schools under circumstances that Congress could reasonably conclude often demonstrate invidious animus. See UT 1556 (child denied admission to public school because first grade treacher refused to teach him); AL 08 (child with cerebral palsy denied admission to school); UT 1587 (third grade teacher refused to give student with disability any grades, writing on the report card "[t]his child does not belong in public schools, he is a waste of tax payers money"); MS 999 (state university instructor refused to teach blind person); MI 920 (student denied admission to medical school because of speech impediment); NC 1144 (mentally handicapped student with no behavior problems denied admission to after-school program because "their policy was not to keep handicapped" kids); see also PA 1432 (a child who uses wheelchair, unable to enroll in first grade because the class was held in inaccessible classroom; school system proposed, instead, to enroll him in self-contained special education classes held in accessible room, even though the child had no mental impairment); *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 384 (1973) (EHA Senate Hearings) (Peter Hickey) (student in

Vermont was forced to attend classes with students two years behind him because he could not climb staircase to attend classes with his peers).[11]

This pattern of exclusion is also documented in numerous state and federal cases. For example, in *Lane*, the Supreme Court specifically noted two cases in which students with AIDS were excluded from the public schools. See 124 S. Ct. at 1989 n.12. In one, a seven-year old student with AIDS was confined to a modular classroom where he was the only student. See *Robertson* v. *Granite City Cmty. Unit Sch. Dist. No. 9*, 684 F. Supp. 1002 (S.D. Ill. 1988). In another, a kindergarten student with AIDS was excluded from class and forced to take home tutoring. See *Thomas* v. *Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1986). Congress was specifically aware of cases like these. See, *e.g.*, 136 Cong. Rec. 2471, 2480 (May 17, 1990) (Rep. Barnett) (discussing case of Ryan White, who had AIDS and was excluded from school not because the school board "thought Ryan would infect the others" but because "some parents were afraid he would"). There are many other similar cases as well. See *Martinez* v. *School Bd.*,

---

[11] See also *Commission on the Education of the Deaf's Report to Congress: Hearing Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 100th Cong., 2d Sess. 15 (1988) (testimony of Gertrude S. Galloway, Chairperson, Precollege Programs Committee) ("[W]e found that many deaf children are receiving inappropriate education or no education at all, that very same problem that promoted passage of the EHA in the first place.")

861 F.2d 1502 (11th Cir. 1988) (child with HIV excluded from school); *Chalk* v. *United States Dist. Ct. Cent. Dist.*, 840 F.2d 701 (9th Cir. 1988) (certified teacher barred from teaching after diagnosis of AIDS); *Doe* v. *Dolton Elem. Sch. Dist. No. 148*, 694 F. Supp. 440 (N.D. Ill. 1988) (elementary student with AIDS excluded from attending regular classes or extracurricular activities); *District 27 Cmty. Sch. Bd.* v. *Board of Educ.*, 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986) (two school boards sought to prevent attendance of any student with AIDS in any school in the city, unless all of the students at that school had AIDS); *Board of Educ.* v. *Cooperman*, 507 A.2d 253, 217 (N.J. Super. Ct. App. Div. 1986) (children with AIDS were excluded from regular classroom attendance), aff'd as modified by 523 A.2d 655 (N.J. 1987); *Ray* v. *School Dist.*, 666 F. Supp. 1524, 1528 (M.D. Fla. 1987) (children with HIV excluded from school, despite health officials' certification that children could safely attend school); *Doe* v. *Belleville Pub. Sch. Dist. No. 118*, 672 F. Supp. 342 (S.D. Ill. 1987) (child with HIV excluded from school).

The examples in the case law of discriminatory exclusion are not limited to cases involving children with HIV or AIDS. See, *e.g.*, *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, 466 F. Supp. 487 (E.D.N.Y. 1979) (mentally retarded students excluded from public school system); *Hairston* v. *Drosick*, 423 F. Supp. 180 (S.D. W. Va. 1976) (school refused to admit child with spina bifida

without the daily presence of her mother, even though student was of normal mental competence and capable of performing easily in a classroom situation); *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (mentally retarded students excluded from public school system); *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) (mentally retarded students excluded from public school system); *Harrison* v. *Michigan*, 350 F. Supp. 846, 847 (E.D. Mich. 1972) ("Until very recently the State of Michigan was making little effort to educate children who are suffering from a variety of mental, behavioral, physical and emotional handicaps. Many children were denied education."); see also Frederick J. Weintraub & Alan R. Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 Syracuse L. Rev. 1037, 1042 (1972) (autistic child excluded from public schools); *ibid*. (disabled student with low IQ but able to read and do basic math excluded from school as "unable to profit from school attendance"); *id*. at 1043 (child with petit mal epilepsy, controlled through medication, refused admission to public school).

2. Record Of Discriminatory Treatment Within Schools

Even when students with disabilities were permitted to attend school, students faced treatment that Congress could reasonably conclude represented discrimination based on invidious stereotypes or hostility toward people with

disabilities. For example, Congress heard of a student with spina bifida who was barred from the school library for two years "because her braces and crutches made too much noise." EHA Senate Hearings at 400 (Mrs. Richard Walbridge). Another student testified that at her "graduation from high school, the principal attempted to prevent me from accepting an award in a ceremony on stage simply because I was in a wheelchair." S. Rep. No. 116, *supra*, at 7. Many other examples show actions based on the continued assumption that children with disabilities were unworthy of, or unable to benefit from, an education. Thus, one witness told Congress that "I was considered too crippled to compete by both the school and my parents. In fact, the [segregated] school never even took the time to teach me to write! * * * The effects of the school's failure to teach me are still evident today." 2 *Staff of the House Comm. on Education and Labor*, 101st Cong., 2d Sess., *Legislative History of Public Law 101-336: The Americans with Disabilities Act* 989 (Comm. Print 1990) (*Leg. Hist*.) (Mary Ella Linden). In another case, a witness with a hearing impairment described how her teacher had pointed her out in class as example of the difference between children with disabilities and others. NM 1090. When other children were told to put on their "thinking-caps," the witness recalled, "they would demonstrate – putting a cap on

their head. I was never allowed to put on a thinking-cap because I was the handicap kid." *Ibid*.

The record also contains numerous examples of children with physical impairments being placed in special education classes with mentally-impaired students for no apparent reason other than the assumption that any disability precludes receiving an education in a normal environment. See, *e.g.*, Office of the Att'y Gen., Cal. Dep't of Justice, *Attorney General's Commission on Disability: Final Report* 17, 81 (1989) ("A bright child with cerebral palsy is assigned to a class with mentally retarded and other developmentally disabled children solely because of her physical disability"; in one town, all children with disabilities are grouped into a single classroom regardless of individual ability); VT 1635-1636 (quadriplegic woman with cerebral palsy and a high intellect, who scored well in school, was branded "retarded" by educators, denied placement in a regular school setting, and placed with emotionally disturbed children, where she was told she was "not college material"); NE 1031 (school districts labeled as mentally retarded a blind child); AK 38 (school district labeled child with cerebral palsy, who subsequently obtained a Masters Degree, as mentally retarded).

Similar incidents illustrating irrational stereotypes and intolerance occurred at the university level. One witness recalled that, "when I was first injured, my

college refused to readmit me" because "it would be 'disgusting' to my roommates to have to live with a woman with a disability." WA 1733.[12] A student with epilepsy was asked to leave a state college because her seizures were "disrupt[ive]" and, officials said, created a risk of liability. 2 *Leg. Hist*. 1162 (Barbara Waters). A doctor with multiple sclerosis was denied admission to a psychiatric residency program because the state admissions committee "feared the negative reactions of patients to his disability." *Id*. at 1617 (Arlene Mayerson). Similarly, a student with facial paralysis was denied a teaching assignment based solely on her appearance. OR 1384. A state university forced a blind student to drop music class because "you can't see." 2 *Leg. Hist*. 1224 (Denise Karuth). Conversely, in another case, a blind student was discouraged from pursuing a degree in her chosen field of personnel management and urged to pursue a degree in music instead. See MO 1010. Congress also heard that a state commission refused to sponsor a blind student for a masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors, '[s]ince,' and this is a quote: 'they could not drive to see their clients.'" 2 *Leg. Hist*. 1225. A different state university denied a blind student a chance to student teach, as required to obtain a teaching

---

[12] Compare *State* v. *Board of Educ.*, 172 N.W. 153, 153 (Wis. 1919) (excluding a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children").

certificate, because the dean of the school was "convinced that blind people could not teach in public schools." SD 1476. See also J. Shapiro, No Pity 45 (1993) (Dean of the University of California at Berkeley told a prospective student that "[w]e've tried cripples before and it didn't work"); MO 1010 (college instructor told blind student she did not think she could teach the student).

3. Record Of Educational Segregation

Congress was told that "some school systems have unnecessarily isolated and segregated handicapped children, often in separate schools and facilities." *Spectrum* at 29. While it is possible that some such instances of segregation were entirely rational, Congress was justified in concluding that segregation of disabled students often arises from invidious animus. In a recent report to Congress, the National Council on Disability explained that it has found that

> [t]he asserted reasons for segregating children with disabilities in educational settings – that a wheelchair is a fire hazard, that a child's IQ renders her uneducable, and the like – do not reveal the true basis for excluding them. The true basis is the expectation that the children will become dependent adults, unable to contribute to society. This view makes their childhood education seem futile – they will be dependent no matter how good their education. Compounded by widespread discrimination, inaccessible buildings, inaccessible transportation, and lack of adequate support services, these stereotypes were the reason for severely restricted options available to children and adults with disabilities and promoted segregated and inferior education.

National Council on Disability, *Back to School on Civil Rights: Advancing the Federal Commitment to Leave No Child Behind* 27 (2000).

These observations were borne out in cases documenting segregation of disabled children from their classmates for no apparent rational reason. See, *e.g.*, *Hairston*, 423 F. Supp. at 182 (child with spinobifida, who was "of normal mental competence" and "clearly physically able to attend school in a regular public classroom" excluded from local public school because she "was not wanted in the regular classroom"); *Roncker* v. *Walter*, 700 F.2d 1058 (6th Cir.) (mentally retarded children excluded from all contact with nondisabled children), cert. denied, 464 U.S. 864 (1983); *Daniel R.R.* v. *State Bd. of Educ.*, 874 F.2d 1036, 1050 (5th Cir. 1989) (same); *Greer* v. *Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991) (same); *Wilson* v. *Marana Unified Sch. Dist. No. 6*, 735 F.2d 1178 (9th Cir. 1984) (student with cerebral palsy sent to segregated school); *Johnston* v. *Ann Arbor Pub. Schs.*, 569 F. Supp. 1502, 1505-1506 (E.D. Mich. 1983) (student with cerebral palsy sent to segregated school).

Congress was also told that "a great many handicapped children" are denied "recreational, athletic, and extracurricular activities provided for non-handicapped students." *Spectrum* 29. See also TX 1480-1481 (student in wheelchair excluded from all activities in physical education class, even activities, like throwing a

frisbee, she could easily perform); MO 1014 (high school students with mental disabilities not allowed to attend gym class with other students); OR 1375 (child with cerebral palsy was "given cleaning jobs while other[] [non-disabled students] played sports"); VA 1642 (high school student with learning disability labeled "retarded" and forbidden from attending regular community school or taking a drama class, although student already performed in community youth theater); *Baird ex rel. Baird* v. *Rose*, 192 F.3d 462 (4th Cir. 1999) (seventh-grader suffering from clinical depression prohibited from singing in school choir).

4. Record Of Physical Mistreatment

The record further documents instances of physical mistreatment of students with disabilities. For example, Congress heard the story of a first grade student who "was spanked every day" because her deafness prevented her from following spoken instructions. EHA Senate Hearings 793 (Christine Griffith). The Task Force was given a newspaper article describing how three elementary schools locked mentally disabled children in a box for punishment. See NY 1123.

B. Gravity Of Harm Of Disability Discrimination In Public Education

The appropriateness of Section 5 legislation, however, 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 education does not abridge a fundamental right, the gravity of the harm is enormous. See, *e.g.*, *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954).

"[E]ducation is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown*, 347 U.S. at 493. Indeed, "classifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions." *Plyler* v. *Doe,* 457 U.S. 202, 234 (1982) (Blackmun, J., concurring).

For both good and ill, "the law can be a teacher." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). As with race discrimination, few governmental messages more profoundly affect individuals and their communities than segregation in education:

> Segregation in education impacts on segregation throughout the community. Generations of citizens attend school with no opportunity to be a friend with persons with disabilities, to grow together, to

> develop an awareness of capabilities * * *[.] Awareness deficits in our young people who become our community leaders and employers perpetuate the discrimination fostered in the segregated educational system.

MO 1007 (Pat Jones). Indeed, discrimination in *public* schools is particularly harmful because "[p]ublic education must prepare pupils for citizenship in the Republic" and must teach "the shared values of a civilized social order." *Bethel Sch. Dist.* v. *Fraser*, 478 U.S. 675, 681, 683 (1986). Combating discrimination in education thus prevents the grave harm to constitutional interests that arises from governmental action that creates a substantial risk of relegating a class of individuals to society's sidelines – unable to participate meaningfully in public or civic life.

* * *

Accordingly, the evidence set forth above was more than adequate to support comprehensive prophylactic and remedial legislation, particularly compared to the record found sufficient in *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003) and *Lane*.[13]

---

[13] As in *Lane*, "the record of constitutional violations in this case * * * far exceeds the record in *Hibbs*." *Lane*, 124 S. Ct. at 1992. See also *id*. at 1991 (noting *Hibbs* record contained "little" evidence of "unconstitutional state conduct"); *id.* at 1992 n.17. And the record in the context of education far exceeds the record of unconstitutional treatment in judicial services. See *Lane*, 124 S. Ct. at 1990 nn. 9

(continued...)

III

AS APPLIED TO DISCRIMINATION IN EDUCATION, 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." *Tennessee* v. *Lane*, 124 S. Ct. 1978, 1992 (2004). 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 the class of cases implicating access to education. See *ibid*.

---

[13](...continued)
& 14, 1991. In its prior brief, the State challenged the quality and sources of this evidence, but the Supreme Court relied on precisely the same sources and types of information in reaching its conclusions in *Lane*. See, *e.g.*, *id*. at 1990 nn.7-14 (relying on statutes and cases post-dating enactment of ADA); *id*. at 1991 (Task Force testimony and Breyer appendix in *Garrett*); *id*. at 1991 n.16 (conduct of local governments); *id*. at 1992 n.17 (noting *Hibbs* relied on legislative history to predecessor statute); *id*. at 1992 (congressional finding of persisting "discrimination" in public services).

A statutory remedy is valid under Section 5 where it is "congruent and proportional to its object of enforcing the right[s]" at issue in the particular situation. *Lane*, 124 S. Ct. at 1993. Thus, in the context of access to public education, this Court should judge the appropriateness of Title II's remedies against the background of the rights implicated in the educational context and in light of the history of unequal treatment of students with disabilities. Where, as here, a statutory remedy is appropriately tailored to the constitutional rights at stake, it is valid under Section 5.

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 seeking access to public schools. 124 S. Ct. at 1993. Further, like *Lane*, the "unequal treatment of disabled persons in the administration of" education has a "long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination." *Ibid*.[14] "Faced with considerable evidence

---

[14] See Elementary and Secondary Education Amendments Act of 1965, Pub. L. 89-313 No. 89-10; Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750; Vocational Rehabilitation Act of 1973, Pub. L. No. 93-112; Education Amendments of 1974, Pub. L. No. 93-380; Education for All

(continued...)

of the shortcomings of previous legislative responses, Congress was justified in concluding that this 'difficult and intractable proble[m]' warranted 'added prophylactic measures in response.'" *Ibid*.

"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

---

[14](...continued)
Handicapped Children Act of 1975, Pub. L. No. 94-142; Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199; Carl D. Perkins Vocational Education Act of 1984, Pub. L. No. 98-524; Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372; Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457; Individuals with Disabilities Education Act of 1990 (IDEA), Pub. L. 101-476No. 91-230, 20 U.S.C. 1400 *et seq*. See also *Honig* v. *Doe*, 484 U.S. 305, 310 n.1 (1988) ("Congress'' earlier efforts to ensure that disabled students received adequate public education had failed in part because the measures it adopted were largely hortatory.").

undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service," *id*. at 1994.

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,[15] Congress imposed reasonable architectural standards for new construction and alterations. See 28 C.F.R. 35.151. 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.

---

[15] 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, 101st Cong., 2d Sess. 34 (1990).

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

In public education, 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. Indeed, education is an area where discrimination against the disabled will not infrequently fail rational basis review. For example, Title II enforces the qual rotection requirement of rationality when it applies to prohibit inflicting corporal punishment against a deaf student for failure to follow spoken instructions,[16] or denying a disabled student admission to a public college because "it would be 'disgusting' to [her] roommates to have to live with a woman with a disability."[17] Title II further enforces the constitutional protection against state action based on irrational stereotypes, such as denying admission to state universities or training

---

[16] See *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Public Welfare*, 93d Cong., 1st Sess. 384, 793 (1973) (Christine Griffith) (first-grade student "was spanked every day" because her deafness prevented her from following instructions).

[17] WA 1733.

programs based on the assumption that blind people cannot teach in public schools,[18] be competent rehabilitation counselors,[19] or succeed in a music course.[20]

Moreover, given the history of unconstitutional treatment of students with disabilities, Congress was entitled to conclude that there exists a real risk that some state officials may continue to make decisions about how students with disabilities should be treated 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 *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 722-723, 735-737 (2003) (remedy of

---

[18] SD 1476.

[19] 2 *Leg. Hist*. 1225.

[20] *Id*. at 1224.

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 acts to detect and prevent difficult-to-uncover discrimination against disabled students that could otherwise evade judicial remedy. By proscribing governmental conduct the discriminatory effects of which cannot be or have not been adequately justified, Title II prevents covert intentional discrimination against disabled students and provides strong remedies for the lingering effects of past unconstitutional treatment against the disabled in the education 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."). Further, by prohibiting insubstantial reasons for denying accommodations to the disabled, Title II prevents invidious discrimination and unconstitutional treatment in the day-to-day actions of state officials exercising discretionary powers over disabled students. See *Hibbs*, 538 U.S. at 736 (Congress justified in concluding that perceptions based on stereotypes "lead to subtle discrimination that may be difficult to detect on a case-by-case basis."). Moreover, in requiring reasonable steps to permit physical access to existing school buildings and to design new

school buildings with the needs of individuals with disabilities in mind, Title II responds to the lingering effects of a long history of exclusion of people with disabilities from schools.

In addition, a simple ban on discrimination would freeze 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 state officials, thereby creating a self-perpetuating spiral of segregation, stigma, and neglect. See *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). By reducing stereotypes and misconceptions, integration reduces the likelihood that constitutional violations will recur. 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").

Moreover, opening education to people with disabilities is also essential to the exercise and enjoyment of the most basic and fundamental civil rights, like voting and the exercise of first amendment freedoms. In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the Court explained that a congressional ban on English literacy tests as a prerequisite to voting "could be justified as a remedial measure to

deal with 'discrimination in governmental services'" because it gave "Puerto Ricans 'enhanced political power' that would be 'helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community." 521 U.S. at 528 (quoting *Katzenbach* v. *Morgan*, 384 U.S. 641, 652 (1966)). The same is true of Title II, especially as it applies to education. Providing access to basic education is a means of ensuring that students with disabilities will have the basic skills and resources they need to effectively confront and overcome discrimination in voting, judicial services, and other areas implicating fundamental rights. Indeed, unconstitutional discrimination in voting, access to public officials, full participation in governmental processes (courts, legislatures, administrative proceedings), etc. cannot be fully halted, prevented, or remedied without also eliminating discrimination in education.

In the context presented by this case, Title II "cannot be said to be so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Lane*, 124 S. Ct. at 1994 (citation and quotation marks omitted). Accordingly, Congress validly abrogated the State's sovereign immunity to plaintiff's claims regarding access to public education in this case.

CONCLUSION

For the foregoing reasons, and those stated in the United States' prior brief, the district court's denial of the State's motion to dismiss plaintiffs' Title II and Section 504 claims on sovereign immunity grounds should be affirmed.

Respectfully submitted,

R. ALEXANDER ACOSTA
Assistant Attorney General

_____
JESSICA DUNSAY SILVER
KEVIN RUSSELL
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - PHB 5010
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 305-4584

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing SECOND SUPPLEMENTAL EN BANC BRIEF FOR THE UNITED STATES AS INTERVENOR, along with a computer disk containing an electronic version of the brief, were served by first class mail, postage prepaid, on July 1, 2004, to the following counsel of record:

Anne Arata Spell, Esq.
Spell & Spell
943 Ellis Street
Franklinton, LA 70438

Thomas C. Goldstein
Goldstein & Howe, P.C.
4607 Asbury Place, N.W.
Washington, DC 20016

Ernest L. O'Bannon, Esq.
Christopher M. G'sell, Esq.
John W. Waters, Jr., Esq.
Bienvenu, Foster, Ryan & O'Bannon
1010 Common Street, Suite 2200
New Orleans, LA 70130

Charles K. Reasonover, Esq.
Lamothe & Hamilton
601 Poydras Street, Suite 2750
New Orleans, LA 70130

_____
KEVIN RUSSELL
Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and 32.3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2, the Brief contains 8,374 words.
2. The Brief has been prepared in proportionally spaced typeface using WordPerfect 9.0 in Times New Roman 14 point font.
3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the Court's striking the Brief and imposing sanctions against the person signing the Brief.

_____
KEVIN RUSSELL
Attorney

Date: July 1, 2004