UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
Central Division

STEVEN M. PRYE, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	Case No. 2:04-cv-4248-ODS
	)	
MATT BLUNT, et al.,	)	
	)	
Defendants	)	
	)	

BRIEF OF THE UNITED STATES AS INTERVENOR IN SUPPORT OF THE CONSTITUTIONALITY OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT

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BRIEF OF THE UNITED STATES AS INTERVENOR IN SUPPORT OF THE CONSTITUTIONALITY OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT

The United States submits this brief in support of the constitutionality of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, as applied in the context of voting.

STATEMENT

1. The ADA established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons 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). In addition, Congress found that persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons 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.

42 U.S.C. 12101(a)(7). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment," to enact the ADA. 42 U.S.C. 12101(b)(4).

The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by state and local governmental entities in the operation of public services, programs, and activities; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This case arises under Title II of the ADA, which 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) and (B). Title II's coverage of "services, programs, or activities," 42 U.S.C. 12132, includes the administration of voting. Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Title II prohibits governments from, among other things, denying a 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), and (vii).[1] In addition, while there is no absolute duty to accommodate individuals with a disability, a public entity must make reasonable modifications to its policies, practices, or procedures if necessary to avoid the exclusion of individuals with disabilities, unless the accommodation would impose an undue financial or administrative burden on the government, or would fundamentally alter the nature of the service. See 28 C.F.R. 35.130(b)(7), 35.150(a)(2) and (3). The ADA does not normally require a public entity to make its existing physical facilities accessible. 28 C.F.R. 35.150(a)(1). 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." 28 C.F.R. 35.150(a). However, buildings constructed or altered after Title II's effective date must be designed to provide accessibility. 28 C.F.R. 35.151.

2. Plaintiffs are an individual with a mental disability who has been adjudged incapacitated and had a guardian appointed for him, and an organization designated by the governor of Missouri as the statewide protection and advocacy agency for citizens of Missouri

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[1] Congress instructed the Attorney General to issue regulations to implement Title II, based on regulations previously promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. I 2001). See 42 U.S.C. 12134.

who have mental disabilities. Plaintiffs filed this *Ex parte Young* suit against various state officials, various local election commissioners, and two local boards of election commissioners challenging Missouri constitutional and statutory provisions that prohibit all persons "adjudged incapacitated" from registering to vote and from voting.

Plaintiffs seek a judgment declaring that this prohibition on voting violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as Title II of the ADA and Section 504 of the Rehabilitation Act. Plaintiffs argue that the Missouri Constitution and statutes disenfranchise individuals with disabilities without determining whether they in fact lack the capacity to vote. The fact that individuals with disabilities may require guardians to assist them with certain aspects of their lives, the plaintiffs argue, does not necessarily mean that such individuals are incapable of exercising their right to vote. Thus, the plaintiffs assert that disenfranchising such persons without a specific determination that they lack the capacity to vote violates Title II, Section 504, and the Constitution. In their complaint, plaintiffs ask for a preliminary and permanent injunction enjoining defendants from disenfranchising individuals who have been appointed a guardian but are competent to vote nonetheless.

The state defendants filed a motion for summary judgment arguing, *inter alia*, that, if Title II of the ADA and Section 504 are construed to prohibit the State's practice, those statutes would exceed Congress's authority under Section 5 of the Fourteenth Amendment.

The United States intervened in this case pursuant to 28 U.S.C. 2403[2] in order to defend the constitutionality of Title II of the ADA as applied in the voting context.

ARGUMENT

I

THIS COURT SHOULD NOT REACH THE CONSTITUTIONALITY OF TITLE II UNLESS NECESSARY

This Court should not assess the constitutionality of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, unless it is necessary to do so. 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, 147-148 (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*, 485 U.S. 439, 445 (1988).

Thus, "[p]rior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89, 99 (1981); *Mobile* v. *Bolden*, 446 U.S. 55, 60 (1980). In the instant case, this Court must therefore decide

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[2] 28 U.S.C. 2403 provides: "In any action, suit or proceeding in a court of the United States to which the United States * * * is not a party, wherein the constitutionality of an Act of Congress affecting the public interest is drawn in question, the court shall * * * permit the United States to intervene for * * * argument on the question of constitutionality." The United States does not take a position on the merits of the plaintiffs' claims.

whether enforcement of the challenged state constitutional and statutory provisions violates Title II before the Court may consider the defendants' contention that Title II is an unconstitutional exercise of Congress's authority under Section 5. The constitutionality of Title II is properly before the court *only* if the challenged provisions in fact violate Title II. Cf. *United States* v. *Georgia*, 126 S. Ct. 877, 882 (2006) (instructing lower courts to "determine in the first instance, on a claim-by-claim basis, * * * which aspects of the State's alleged conduct violated Title II" before inquiring whether Congress had the authority to enact the implicated statutory prohibition).

Furthermore, the plaintiffs in the instant case also filed suit under Section 504 of the Rehabilitation Act, 29 U.S.C. 794, which provides identical protection to that provided under Title II, as applied to public entities that receive federal funds. Although the State asserts that Congress exceeded its authority under Section 5 of the Fourteenth Amendment in enacting Section 504 as well, the Eighth Circuit has held that Section 504 is a valid exercise of Congress's Spending Clause power. See *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001), and *Doe* v. *Nebraska*, 345 F.3d 593 (8th Cir. 2003). Because the State does not challenge that holding, this Court need not reach the question whether Section 504 is valid Section 5 legislation. And because any violation of Title II will also be a violation of Section 504, this Court need not reach the validity of Title II even if it does find a violation of the statute as the plaintiffs are entitled to identical relief under either cause of action.

Finally, as the Eighth Circuit noted in *Randolph* v. *Rodgers*, 253 F.3d 342, 348 n.12 (8th Cir. 2001), "Congress enacted the ADA invoking its powers under both Section 5 of the Fourteenth Amendment and the Commerce Clause." Although the defendants argue that Title II

is not a valid exercise of Congress's Section 5 authority, they do *not* allege that Title II is not a valid exercise of Congress's Commerce Clause authority. Because no party argues that the Commerce Clause is not a valid and independent basis for Title II in its entirety, this Court need not reach the question whether Title II is valid Section 5 legislation as applied in the voting context. Moreover, this is particularly true here where the plaintiffs request only prospective, injunctive relief from state officials in their official capacities. As a result, the Eleventh Amendment is not implicated. See *Ex parte Young*, 209 U.S. 123 (1908). The Eighth Circuit previously has held that private plaintiffs may enforce Title II of the ADA through *Ex parte Young* suits. *Randolph* v. *Rodgers*, 253 F.3d 342, 346-348 (8th Cir. 2001).

Nevertheless, because this Court certified to the United States Attorney General the question of the constitutionality of Title II, we hereinafter respond to the defendants' contention that Title II is not valid Section 5 legislation.

II

TITLE II OF THE AMERICANS WITH DISABILITIES ACT IS VALID SECTION 5 LEGISLATION AS APPLIED TO VOTING

Congress enacted Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.*, pursuant to its authority under Section 5 of the Fourteenth Amendment. Section 5 is an affirmative grant of legislative power, see *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 80 (2000), that gives Congress the "authority both to remedy and to deter violation of [Fourteenth Amendment] rights * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 727 (2003) (quoting *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001)). Section 5 "is a 'broad power indeed,'" *Tennessee* v. *Lane*, 541 U.S. 509, 518

(2004), empowering Congress not only to remedy past violations of constitutional rights, but also to enact "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," *Hibbs*, 538 U.S. at 727-728. Congress also may prohibit "practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Lane*, 541 U.S. at 520.

Section 5 legislation must, however, demonstrate a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). In evaluating whether Title II is an appropriate response to past unconstitutional treatment of individuals with disabilities, the Supreme Court in *Lane* declined to address Title II as a whole, upholding it instead as "valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services," 541 U.S. at 531. Title II of the ADA likewise is appropriate Section 5 legislation as applied to voting because it is reasonably designed to remedy past and prevent future unconstitutional treatment of disabled individuals and deprivation of their constitutional rights in the operation of state voting systems.

A. *The Eighth Circuit's Decision In Alsbrook v. City Of Maumelle Is No Longer Good Law*

The Eighth Circuit held in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), that Title II of the ADA is not valid Section 5 legislation in its entirety. This Court is not bound by that holding, however, because *Alsbrook* has been superceded by the Supreme Court's decisions in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), and *Georgia*.

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 of the ADA. 541 U.S. at 513. The state defendant in that case argued that Congress lacked the authority under Section 5 to enact Title II, a position accepted by the Eighth Circuit in *Alsbrook*. See 184 F.3d at 1010. The Supreme Court in *Lane* disagreed. See 541 U.S. at 533-534.

To reach this conclusion, the Supreme Court applied the three-part analysis for Fourteenth Amendment legislation created by *Boerne* and its progeny. 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 concluded that there was 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 522-529. 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 not for public services as a whole, but 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.

Although the Eighth Circuit, in *Alsbrook*, applied the three-step analysis of *Boerne*, *Lane* made clear that the court's application of that test was faulty in several critical aspects. To begin with, *Alsbrook* held that the proper "scope of our Section 5 inquiry [is] Title II of the ADA" as a whole. 184 F.3d at 1006 n.11. The Supreme Court, in contrast, declined to "examine the broad range of Title II's applications all at once, and to treat that breadth as a mark of the law's invalidity." 541 U.S. at 530. 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, and answered that question in the affirmative.

Last year, the Fourth Circuit held that *Lane* supercedes its pre-*Lane* circuit precedent finding that Title II is not valid Section 5 legislation in all of its applications. In *Constantine* v. *Rectors and Visitors of George Mason University*, 411 F.3d 474, 486 n.8 (4th Cir. 2005), that court stated:

> While *Lane* specifically overrules *Wessel* [v. *Glendening*, 306 F.3d 203 (4th Cir. 2002),] only with respect to the application of Title II to cases involving the right of access to courts, the reasoning of *Lane* renders *Wessel* obsolete. Contrary to our conclusion in *Wessel* that 'Congress did not have an adequate record of unconstitutional discrimination by states against the disabled to support abrogation,' 306 F.3d at 213, the Court in *Lane* found that Congress enacted Title II of the ADA – considered as a whole – in response to a pattern of unconstitutional conduct by States and nonstate government entities, 124 S. Ct. at 1989-92. Moreover, *Lane* specifically rejects the proposition – crucial to our analysis in *Wessel* – that Congress may enact § 5 legislation only in response to unconstitutional conduct by States themselves. *Id.* at 1991 n.16. For these reasons, *Wessel* does not control our analysis in this case.

For the same reasons, the Eighth Circuit's decision in *Alsbrook* is no longer good law. In the two years since the Supreme Court's decision in *Lane*, the Eighth Circuit has been confronted with the validity of Title II as applied in a non-court-access context in two cases. See *Klingler* v.

Director, Dep't of Revenue, 366 F.3d 614 (8th Cir. 2004); *Bill M.* v. *Nebraska Dep't Health & Human Servs. Fin. & Support*, 408 F.3d 1096 (8th Cir. 2005). In both of those cases, the Eighth Circuit opted to adhere to the Court's decision in *Alsbrook* without considering whether or how *Lane* altered the legal landscape. But the Supreme Court vacated both of those decisions, remanding *Klingler* "for further consideration in light of *Tennessee* v. *Lane*, 541 U.S. 509 (2004), and *Gonzales* v. *Raich*, 545 U.S. ____ (2005)," see 125 S. Ct. 2899 (2005), and remanding *Bill M.* "for further consideration in light of *United States* v. *Georgia*," see 126 S. Ct. 1826 (2006). Those actions by the Supreme Court indicate that the Court does not consider the rote application of *Alsbrook* to be consistent with *Lane* and *Georgia*.

In the first step of the *Boerne* analysis, the Eighth Circuit in *Alsbrook* reviewed the requirements of Title II only in relation to the Equal Protection Clause's prohibition against irrational discrimination. See 184 F.3d at 1008-1009. *Lane*, however, made clear that Title II enforces not only the Equal Protection Clause but also a variety of other constitutional rights. 541 U.S. at 522-523; see also *Georgia*, 126 S. Ct. at 882.

In the second step of the *Boerne* analysis, the Eighth Circuit held in *Alsbrook* that Congress lacked a sufficient historical predicate for the enactment of Title II's prophylactic measures. See 184 F.3d at 1009. The Supreme Court, on the other hand, held that Congress identified a "volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," 541 U.S. at 528, making it "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at 529. In reaching the contrary conclusion, *Alsbrook* considered only evidence of discrimination by State

governments. See 184 F.3d at 1009 & n.17. *Lane*, however, specifically rejected that view as based on "the mistaken premise that a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves." 541 U.S. at 527 n.16. The Eighth Circuit also declined to give deference to Congress's finding of pervasive discrimination in public services, see 184 F.3d at 1007-1008, but *Lane* relied prominently on the very same findings, see 541 U.S. at 528-529.

Finally, as noted above, in the third step of the *Boerne* analysis, the *Alsbrook* court found that Title II in its entirety is not a valid exercise of Congress's authority under Section 5. 184 F.3d at 1006 n.11. The Supreme Court, in contrast, 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." 541 U.S. at 531; see also *Georgia*, 126 S. Ct. at 882. This Court, too, should limit the scope of its review to the question whether Title II is an appropriate means of enforcing the constitutional rights at stake in the context at issue in this case.

B. In United States v. Georgia, The Supreme Court Held That Title II Is Valid Section 5 Legislation To The Extent That It Prohibits Conduct That Would Otherwise Violate The Constitution

United States v. *Georgia*, 126 S. Ct. 877 (2006), presented the Supreme Court with the question whether Congress validly exercised its Section 5 authority[3] in acting Title II of the ADA, as applied in the prison context. However, the Court declined to determine the extent to which Title II's prophylactic protection is valid in that context because the lower courts in

[3] The question arose in *Georgia* in the context of the state defendant's assertion of its Eleventh Amendment immunity. Because the Court had previously held that Congress intended to abrogate States' Eleventh Amendment immunity when it enacted the ADA, the only question before the Court was whether Congress acted pursuant to its Section 5 authority in so doing.

Georgia had not determined whether the Title II claims in that case could have independently constituted viable constitutional claims or whether the Title II claims relied solely on the statute's prophylactic protection. To the extent any of the plaintiff's Title II claims would independently state a constitutional violation, the Court held, Title II is a valid exercise of Congress's Section 5 authority for those claims, and a court need not question whether Title II is congruent and proportional under the test first articulated in *Boerne*. *Georgia*, 126 S. Ct. at 881-882. 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.*

Thus, if this Court finds that Missouri's enforcement of the challenged provisions violates Title II *and* the federal constitution, it need inquire no further into the validity of Title II. To the extent that Title II prohibits constitutional violations in the voting context, or in any other context, the statute is by definition a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

If, however, this Court determines that the challenged state laws do violate Title II but do not violate the federal constitution, then the Court must determine whether the statutory protection in Title II, as applied in the voting context, is congruent and proportional to the protections of the Fourteenth Amendment.

C. Under The Boerne Framework, Properly Applied, Title II's Prophylactic Protection Is A Valid Exercise Of Congress's Authority Under Section 5 Of The Fourteenth Amendment

If this Court finds it necessary to decide whether Title II's prophylactic protection is a valid exercise of Congress's Section 5 authority, the third stage of the *Georgia* analysis requires

the Court to apply the *Boerne* congruence and proportionality analysis, as that analysis was applied to Title II in *Lane*. As noted above, the Court in *Lane* held that (1) 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, *Lane*, 541 U.S. at 522-523; (2) Title II was enacted against 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, *id.* 523-528; and (3) 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,[4] *id.* at 530-534. Applying the holdings of the Supreme Court's decision in *Lane*, this Court should conclude that Title II is valid Fourteenth Amendment Legislation as it applies in the context of voting.

1. Constitutional Rights At Stake

The Supreme Court held in *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." 541 U.S. at 522-523. The *Lane* Court specifically noted that Title II seeks to enforce some

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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 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 voting 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 Supreme Court in *Lane* determined is an "appropriate subject for prophylactic legislation" under Section 5. *Lane*, 541 U.S. at 529.

"basic constitutional guarantees, infringements of which are subject to more searching judicial review," citing to *Dunn* v. *Blumstein*, 405 U.S. 330, 336-337 (1972), a case dealing with restrictions on voter qualifications. 541 U.S. at 522-523. The Court also noted that one area targeted by Title II is "unequal treatment in the administration of * * * voting." *Id.* at 524.

In this case, Title II enforces the Equal Protection Clause's general prohibition of arbitrary treatment based on irrational stereotypes or hostility. Even under rational basis scrutiny, "mere negative attitudes, or fear" alone cannot justify disparate treatment of those with disabilities. *University of Ala.* v. *Garrett*, 531 U.S. 356, 367 (2001). A purported rational basis for treatment of the disabled will also fail if the State does not accord the same treatment to other groups similarly situated, *id*. at 366 n.4; *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447-450 (1985), if it is based on "animosity" towards the disabled, *Romer* v. *Evans*, 517 U.S. 620, 634 (1996), or if it simply gives effect to private biases, *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

This case also implicates the fundamental right to vote. As the Supreme Court has stated, voting is the right that is "preservative of all rights." *Katzenbach* v. *Morgan*, 384 U.S. 641, 652 (1966); see also *Evans* v. *Cornman*, 398 U.S. 419, 422 (1970) ("[T]he right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges." (internal citations omitted)). Moreover, it is well established that "once a [s]tate grant[s] the franchise, [it] must not do so in a discriminatory manner." *McDonald* v. *Bd. of Election Comm's*, 394 U.S. 802, 807 (1969). See *Bush* v. *Gore*, 531 U.S. 98, 104-105 (2000); *Dunn*, 405 U.S. at 336. The Supreme Court has made clear that a State may not impose voter qualification criteria – with a very few notable exceptions (*e.g.*, age, citizenship, residency, felon status) – that

completely exclude a class of people from the activity of voting unless such criteria survive strict scrutiny review. See, *e.g.*, *Dunn*, 405 U.S. at 337.

To be sure, the Supreme Court has repeatedly recognized that not "every voting regulation" that "impos[es] a burden upon individual voters[,]" requires "strict scrutiny." *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992). See also *Clements* v. *Fashing*, 457 U.S. 957, 965-966 (1982) ("[n]ot all ballot access restrictions require 'heightened' equal protection scrutiny"); *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972) ("not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review"); cf. *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966) ("the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate"). As the Court has explained, "a more flexible standard[] applies to a challenge to a state election law" that places only "'reasonable nondiscriminatory restrictions' upon the * * * Fourteenth Amendment rights of voters." *Burdick*, 504 U.S. at 433, 434 (quoting *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 (1983)).

To determine whether a voting statute offends the Equal Protection Clause, a court must first decide the appropriate level of review by assessing the severity of the burden on rights protected by the Fourteenth Amendment. See, *e.g.*, *Clements*, 457 U.S. at 963 (recognizing that to assess whether limitations placed on a public official's ability to become a candidate are constitutional, Court "must first determine" whether the challenged provisions deserve "vigorous" scrutiny); *Dunn*, 405 U.S. at 335 (in considering whether law establishing durational residency requirement violates the Equal Protection Clause, Court "[f]irst * * * must determine what standard of review is appropriate"). To do so, a court considers "the character of the

classification in question; the individual interests affected by the classification; and the government interests asserted in support of the classification." *Dunn*, 405 U.S. at 335. See *Kramer* v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968)) (explaining that a court considers "'the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification'"). As a result, a court must balance "the character and magnitude of the asserted injury to the rights protected by the * * * Fourteenth Amendment[]" against "the precise interests put forward by the State as justifications for the burden" taking into consideration "the extent to which those interests make it necessary to burden the * * * rights." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

As described below, Title II's reasonable accommodation requirement is a valid means of targeting violations of the right to vote and of preventing and deterring constitutional violations throughout the range of government services, many of which implicate fundamental constitutional rights. *Lane*, 541 U.S. at 540.

2. Historical Predicate Of Unconstitutional Disability Discrimination In The Provision Of Public Services

The Supreme Court in *Lane* left no doubt that there was a sufficient historical predicate of unconstitutional disability discrimination in the provision of public services to justify prophylactic legislation under Section 5 of the Fourteenth Amendment. In so holding, the Supreme Court found that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights," *Lane*, 541 U.S. at 524. The Court held that Congress's legislative finding of persistent "discrimination against individuals with disabilities * * * [in] access to

public services," taken "together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." *Id.* at 529.

Although *Lane* ultimately upheld Title II as valid Fourteenth Amendment legislation only as applied to access to courts, the Court's conclusions regarding the historical predicate for Title II are not limited to that context. The *Lane* Court found that the record included not only "a pattern of unconstitutional treatment in the administration of justice," 541 U.S. at 525, 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 524-525. This history, the Court held, warranted prophylactic legislation addressing "public services" generally. *Id.* at 529. To date, the Third, Fourth, and Eleventh Circuits have all held that the Supreme Court's holding as to the adequacy of this historical record applies to Title II as a whole, rather than to Title II's application to the court access context alone. See *Cochran* v. *Pinchak*, 401 F.3d 184, 191, vacated on other grounds, 412 F.3d 500 (3d Cir. 2005); *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 487 (4th Cir. 2005); *Miller* v. *King*, 384 F.3d 1248, 1272 (11th Cir. 2004), vacated on other grounds, __ F.3d __, 2006 WL 1330874 (11th Cir. May 17, 2006); *Association of Disabled Ams.* v. *Florida Int'l Univ.*, 405 F.3d 954, 958 (11th Cir. 2005). Thus, the adequacy of the historical predicate for Title II is no longer open to dispute.

But even if this Court were free to examine Title II's historical predicate anew, there is ample evidence of a history of unconstitutional discrimination against persons with disabilities in the context of voting. In the years leading up to the passage of the ADA, Congress conducted

extensive investigations into the extent to which Americans with disabilities experienced discrimination and exclusion in various aspects of their lives. With respect to voting in particular, Congress learned that individuals with disabilities were prohibited from voting because of their disabilities, were subjected to the discriminatory whims of registration officials, and were frequently unable to cast their votes due to the inaccessibility of polling places. The information amassed during those years led Congress to make statutory findings that "discrimination against individuals with disabilities persists in such critical areas as * * * voting," 42 U.S.C. 12101(a)(3), that "individuals with disabilities * * * have been 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," 42 U.S.C. 12101(a)(7), 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).

The legislative record of the ADA includes first-hand reports of the inability of persons with disabilities to exercise their right to vote. A congressionally designated Task Force held 63 public forums across the country that were attended by more than 30,000 individuals. The Task Force collected evidence from nearly 5,000 individuals documenting the problems with discrimination and invidious stereotypes that persons with disabilities faced daily and presented that evidence to Congress. See 2 *Staff of the House Comm. on Educ. & Labor*, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 1040

(Comm. Print 1990) (*Leg. Hist.*) (statement of Justin Dart).[5] In examining this evidence, the Supreme Court in *Lane* concluded that it demonstrated "hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions." See 541 U.S. at 526-527. Among those examples are numerous accounts of persons with disabilities who were denied the right to vote because of their disabilities.[6] Congressional committees also heard testimony of examples of disability discrimination in the provision of a vast array of governmental services, including voting.

Congress made its statutory findings after hearing that citizens with disabilities were prevented from voting because of baseless stereotypes and prejudices. Congress learned that "people with disabilities have been turned away from the polling places after they have been registered to vote because they did not *look* competent." *Oversight Hearing on H.R. 4498, Americans With Disabilities Act of 1988: Hearing Before the House Comm. on Educ. & Labor* 190 (1988) (statement of Nancy Husted-Jensen, Chairman, Governor's Comm'n on the

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[5] See also Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 16 (1990). Those "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life," 2 *Leg. Hist.* 1324-1325 (Justin Dart), are part of the official legislative history of the Disabilities Act, *id.* at 1336, 1389 (Chairman Owens). Those submissions were lodged with the Supreme 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, 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.

[6] See AL 17; AR 155; DE 303; DE 308; DE 319; IL 546; IL 573; IL 587; IL 588; IL 592; IL 594; IL 605; IN 653; LA 758; MI 922; MS 988; MS 1001; MO 1009; MT 1024; MT 1026; MT 1027; NY 1129; ND 1172; ND 1175; ND 1183; ND 1185; ND 1186; OK 1280; PA 1407; PA 1409; PA 1410; PA 1436; SD 1469; WI 1756; WI 1767 (catalogued in *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting)).

Handicapped, Providence, RI) (*Oversight Hearing*) (emphasis added). A deaf voter was told that "you still have to be able to use your voice" to vote. *Equal Access to Voting for Elderly & Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin.*, 98th Cong., 1st Sess. 94 (1984) (*Equal Voting Hearings*).[7]

The legislative record also documented that many persons with disabilities could not exercise their "most basic rights as an American" because polling places or voting machines are inaccessible. S. Rep. No. 116, 101st Cong., 1st Sess. 12 (1989).[8] As a consequence, persons

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[7] One voter was "told to go home once when I came to the poll and found the voting machines down a flight of stairs with no paper ballots available"; on another occasion, that voter "had to shout my choice of candidates over the noise of a crowd to a precinct judge who pushed the levers of the machine for me, feeling all the while as if I had to offer an explanation for my decisions." *Equal Voting Hearings* 45; *Oversight Hearing* 189 ("I spoke to one of the social workers who came to me and explained to me that in the group homes, the people who were running the group homes, the social workers and the supervisors, were deciding who they deemed competent to vote and who they deemed not competent.") (statement of Nancy Husted-Jensen); AL 16; *Help America Vote Act of 2001: Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 15 (2001) ("Twice in Massachusetts and once in California, while relying on a poll worker to cast my ballot, the poll worker attempted to change my mind about whom I was voting for. * * * [T]o this day I really do not know if they cast my ballot according to my wishes."); *id.* at 13; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

[8] See also *Americans with Disabilities Act: Hearings Before the Senate Comm. on Labor & Human Res.*, 101st Cong., 1st Sess. 663 (1989) ("The new laws on voting, not withstanding, fully 1/3 of our polling places are totally inaccessible. The election commissions are trying but if one arrives at a polling place and that individual is unable to get inside they cannot vote on election day. To vote by absentee ballot is a long, extensive draconian process which is expensive (it requires going to a physician for a doctor's permit.) One has to want to vote more than anything to subject oneself to this humiliating process.") (statement of Dr. Mary Lynn Fletcher, Director of Disability Services, Lenoir City, Tennessee); *Oversight Hearing* 49 ("When I go into a voting booth, I have to rely on someone else to tell me which lever to pull.") (statement of Ellen Telker); *id.* at 116 ("Most of our public buildings in New Hampshire are older and do not provide access. I know a man who went to city hall to vote in one of our major cities and could not get in the building. He was forced to vote outside in his wheelchair in the middle of the winter.") (Statement of Rima Sutton, Service Coordinator, National Multiple Sclerosis Society, Manchester, NH). See also 135 Cong. Rec. S4994 (1989) (noting former

(continued...)

with disabilities "were forced to vote by absentee ballot before key debates by the candidates were held." *Ibid.*; see also *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor & Human Res. & the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 76 (1989) (May 1989 Hearings) (statement of Ill. Att'y Gen. Hartigan). Voting by absentee ballot also "deprives the disabled voter of an option available to other absentee voters, the right to change their vote by appearing personally at the polls on election day." 2 *Leg. Hist.* 1745 (statement of Nanette Bowling). "How can disabled people have clout with our elected officials when they are aware that many of us are prevented from voting?" ARK 155.[9]

Since the enactment of the Voting Accessibility for the Elderly and Handicapped Act of 1984, 42 U.S.C. 1973ee *et seq.*, the Federal Election Commission (FEC) has issued regular reports on the accessibility of polling places in presidential elections. The FEC reported in 1986 that, of the 82% of precincts reporting, 27% were not accessible to individuals with physical disabilities in spite of the statutory requirement that all polling places be accessible. Federal Election Commission, *Polling Place Accessibility in the 1986 General Election* 6 (1986).

This history of disability-based discrimination in voting has played out in the courts as well. In fact, the Supreme Court in *Lane* specifically took notice of the historical record of

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[8](...continued)
campaign volunteer who could not vote because "she was unable to get up the stairs to get into the building to vote") (statement of Sen. Durenberger). Accord, Thomas H. Earle & Kristi M. Bushner, *Effective Participation or Exclusion: the Voting Rights of People with Disabilities*, 11 Temp. Pol. & Civ. Rts. L. Rev. 327, 329 (Spring 2002) (noting that, in 2000, only 46 out of 1,681 polling places in Philadelphia were accessible to wheelchair users).

[9] See *Equal Voting Hearings* 17, 461; 2 *Leg. Hist.* 1767; WS 1756; MT 1024, 1026-1027; MI 922; ND 1185; DE 307; AL 16; *Garrett*, 531 U.S. at 395-424 (Breyer, J., dissenting); FEC, *Polling Place Accessibility in the 1988 General Election* 7 (1989) (21% of polling places inaccessible; 27% were inaccessible in 1986).

disability discrimination in voting, as documented in the decisions of various courts. 541 U.S. at 525 & n.13 (citing *Doe* v. *Rowe*, 156 F. Supp. 2d 35 (Me. 2001) (disenfranchisement of persons under guardianship by reason of mental illness); *New York ex rel. Spitzer* v. *County of Delaware*, 82 F. Supp. 2d 12 (N.D.N.Y. 2000) (mobility impaired voters unable to access county polling places)).

Furthermore, as the Court stated in *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721, 735-737 (2003), and reiterated in *Lane*, 541 U.S. at 529, it is "easier for Congress to show a pattern of state constitutional violations" where, as here, Congress is targeting conduct subject to heightened constitutional review. Accordingly, the evidence set forth above regarding disability discrimination in voting was more than adequate to support comprehensive prophylactic and remedial legislation.

3. Title II Is A Congruent And Proportional Means Of Enforcing The Voting Rights Of Individuals With Disabilities

"The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment." 541 U.S. at 530. The Court in *Lane* limited its consideration of this question to the class of cases implicating the right of "access to the courts" and "the accessibility of judicial services," finding that the remedy of Title II "is congruent and proportional to its object of enforcing the right of access to the courts." *Id.* at 530-534. In the instant case, this Court must decide whether Title II is congruent and proportional legislation as applied to the class of cases implicating voting rights.

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*, 541 U.S. at 531. Thus, in the context of voting rights, this Court should judge the appropriateness of Title II's

requirement of program accessibility against the background of the panoply of rights implicated by voting and in light of the history of unequal or otherwise unconstitutional treatment of people with disabilities in that context. 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 citizens in the context of voting. 541 U.S. at 531. The Court in *Lane* found that the "unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts." *Ibid.* The same is true with respect to the treatment of persons with disabilities in the voting context. See *id.* at 525 (noting the "pattern of unequal treatment" of persons with disabilities in the administration of voting systems). In particular, Congress was aware that such problems existed despite several legislative efforts that apply directly to the voting context such as the Voting Accessibility for the Elderly and Handicapped Act and Section 504 of the Rehabilitation Act.[1] Thus, Congress faced a "difficult and intractable proble[m]," *id.* at 531, which it could conclude would "require powerful remedies," *id.* at 524.

Nevertheless, the remedy imposed by Title II "is a limited one." *Lane*, 541 U.S. at 531. Although Title II 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," and does not require States to "undertake measures that would impose an undue financial or

administrative burden * * * or effect a fundamental alteration in the nature of the service." *Id.* at 531-532.

Title II's carefully circumscribed accommodation mandate is consistent with the commands of the Constitution in the area of voting. Title II prohibits a public entity's use of criteria that "have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability." 28 C.F.R. 35.130(b)(3)(i). Nor may a public entity "impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered." 28 C.F.R. 35.130(b)(8). These prohibitions essentially mirror the commands of the Equal Protection Clause in the area of voting. The Supreme Court has made clear that a State may not impose voter qualification criteria – with a very few notable exceptions (*e.g.*, age, citizenship, residency, felon status) – that completely exclude a class of people from the activity of voting unless such criteria survive strict scrutiny review. See, *e.g.*, *Dunn*, 405 U.S. at 337.

Title II and its implementing regulations require that government services be available to and accessible by qualified individuals with disabilities on a nondiscriminatory basis. See, *e.g.*, 28 C.F.R. 35.130. Title II requires that a government program, including the administration of elections, "*when viewed in its entirety*, is readily accessible to and useable by individuals with disabilities." See 28 C.F.R. 35.150. This rule encompasses requirements that, *inter alia*, a public entity not apply eligibility criteria that screens out individuals with disabilities, 28 C.F.R. 35.130(b)(8), and that such an entity must furnish appropriate auxiliary communication aids

where necessary and appropriate, 28 C.F.R. 35.160, 35.163. Thus, Title II emphasizes that qualified individuals with disabilities must be able to participate in public services in some meaningful way. This mandate is consistent with the requirements of the Constitution in the area of voting rights.

Moreover, Title II's prohibition on discriminatory denials of access to the polls is also fully consistent with the Constitution. As the Supreme Court has made clear, "once the States grant the franchise, they must not do so in a discriminatory manner." *McDonald* v. *Board of Election Comm'rs*, 394 U.S. 802, 807 (1969). Given the history of unconstitutional treatment of individuals with disabilities in the area of voting, Congress was entitled to conclude that there exists a real risk that some state officials may continue to make decisions about how and whether individuals with disabilities may vote based on invidious class-based stereotypes or animus that would be difficult to detect or prove. In such a situation, the risk of unconstitutional treatment is sufficient to warrant Title II's prophylactic response. See *Hibbs*, 538 U.S. at 732-733, 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).

Title II's prophylactic remedy acts to detect and prevent difficult-to-uncover discrimination against individuals with disabilities in the area of voting 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 voters with disabilities and provides strong remedies for the lingering effects of past unconstitutional treatment against persons with disabilities in the voting 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 intent, to carry out the basic objectives of the Equal Protection Clause."). Further, by prohibiting insubstantial reasons for denying accommodations to persons with disabilities, Title II prevents invidious discrimination and unconstitutional treatment in the day-to-day actions of state officials exercising discretionary powers over voters with disabilities. See *Hibbs*, 538 U.S. at 736 (Congress justified in concluding that perceptions based on stereotype "lead to subtle discrimination that may be difficult to detect on a case-by-case basis"). Such a prohibition is fully consistent with the requirements of the Equal Protection Clause in the area of voter qualification laws. The rooting-out of such subtle discrimination is especially important in the area of voting as it is "beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick*, 504 U.S. at 433 (quoting *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979)).

Accordingly, 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*, 541 U.S. at 533 (citation and quotation marks omitted).[10]

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[10] The United States also believes that Section 504 of the Rehabilitation Act is a valid exercise of Congress's Section 5 authority. If this Court upholds Title II as valid legislation under Section 5, it should apply that holding to Section 504 as well because the substantive requirements of Section 504 and Title II of the ADA are identical.

CONCLUSION

For the above reasons, this Court should find that Title II of the ADA, as applied to the context of voting, is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 15th day of June, 2006, I electronically filed the foregoing BRIEF OF THE UNITED STATES AS INTERVENOR IN SUPPORT OF THE CONSTITUTIONALITY OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following, or, if notification was not so sent, that the document filed was mailed by United States Mail, postage prepaid:

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