No. 04-5360

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JANE ROE,

Plaintiff-Appellant

v.

PETER J. JOHNSON, individually and in his capacity as chair of the Supreme Court Appellate Division Committee on Character and Fitness First Department; JOHN DOES, inclusive of Members of Committee on Character and Fitness in their individual and Official capacities; JANE DOE, in her individual and official capacity; SARAH J. HAMILTON, in her individual and in her official capacity; MAURO DIGIROLAMO, individual and official capacity; KAY C. MURRAY, individual and official capacity; SUPREME COURT OF THE STATE OF NEW YORK; APPELLATE DIVISION, FIRST DEPARTMENT, its Capacity as a rule-making body for the Admission of Attorney and Counselors at Law for the State of New York,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF JURISDICTION

The district court had jurisdiction over the plaintiff's suit pursuant to 28 U.S.C. 1331.[1] This Court has jurisdiction pursuant to 28 U.S.C. 1291. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993).

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[1] The district court found that Roe lacked standing to assert one of her claims. The United States takes no position on the merits of that determination.

ISSUE PRESENTED

The United States will address the following issue:

Whether the statutory provision abrogating Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, as applied to the context of government licensing.[2]

STATEMENT OF THE CASE

1. This case involves a suit filed under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq*. That Title provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) & (B). The term "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual * * *; a record of such an impairment * * *; or being regarded as having such an impairment." 42 U.S.C. 12102(2). A "qualified individual with a disability" is a person "who, with or without reasonable

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[2] The United States intervenes pursuant to 28 U.S.C. 2403 for the limited purpose of defending the constitutionality of the provision of Title II of the ADA that abrogates States' Eleventh Amendment immunity. The United States does not take a position on the merits of the plaintiff's claims or on any other issue raised in this appeal.

modifications * * * meets the essential eligibility requirements" for the governmental program or service. 42 U.S.C. 12131(2); 28 C.F.R. 35.140.[3]

A person does not meet essential eligibility requirements if he poses a direct threat to the health or safety of others that cannot be eliminated or reduced to an acceptable level by the public entity's modification of its policies, practices, or procedures, or by the provision of auxiliary aids or services. See 28 C.F.R. Pt. 25 App. A, pp. 536-537 (2003) (Preamble to Title II Regulations); Department of Justice, *The Americans With Disabilities Act: Title II Technical Assistance Manual*, 7-8, available at http://www.usdoj.gov/crt/ada/taman2.html; cf. 42 U.S.C. 12111 (Title I); 42 U.S.C. 12182(b)(3) (Title III); *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 287-289 (1987) (Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794).

The discrimination prohibited by Title II of the Disabilities Act includes, among other things, denying a government benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii), (vii). In addition, a public entity must make reasonable modifications in policies, practices, or procedures if the accommodation is necessary to avoid the exclusion of individuals with disabilities

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[3] Congress instructed the Attorney General to issue regulations to implement Title II based on prior regulations promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. See 42 U.S.C. 12134.

and can be accomplished without imposing an undue financial or administrative burden on the government, or fundamentally altering the nature of the service. See 28 C.F.R. 35.130(b)(7). The Act does not normally require a public entity to make its existing physical facilities accessible. Public entities need only ensure that each "service, program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities," unless doing so would fundamentally alter the program or impose an undue financial or administrative burden. 28 C.F.R. 35.150(a). However, facilities altered or constructed after the effective date of the Act must be made accessible. 28 C.F.R. 35.150(a)(1), 35.151.

Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

2. According to the district court opinion in this case, plaintiff Jane Roe "filed an application with the Committee for admission to the Bar of the State of New York" in 2002. *Roe* v. *Johnson*, 334 F. Supp.2d 415, 417 (S.D.N.Y. 2004). One of the questions on the application "asked whether the applicant had any mental or emotional condition that would adversely affect his or her ability to practice law." *Ibid.* Although Roe suffers from depression, she answered that question in the negative because her depression does not substantially impair her ability to function or to practice law. *Ibid.* At the request of the Committee, Roe met with Committee members in January 2003 to answer questions relating to a bankruptcy she had filed as well as lawsuits she had filed on her own behalf. *Ibid.* Roe contends that "the

meeting was adversarial and confrontational." *Ibid.* In response to a question regarding one of her lawsuits, Roe stated that "she was seeking damages for emotional anguish and distress." *Ibid.* The Committee Chair then asked Roe whether she was seeing a psychiatrist and if so, for how long. *Ibid.* After the meeting, Roe received a letter from the Committee asking that she provide a letter from her "treating psychiatrist or psychologist describing her condition, prognosis, and diagnosis." *Ibid.* In March 2003, Roe contacted the Committee and inquired whether it had conducted a self-evaluation as required under regulations implementing the ADA. As of the date of her complaint, she had not received a response to her inquiry. *Id.* at 418.

Prior to this lawsuit, Roe made several attempts to obtain relief, first from the state agency responsible for bar admissions, and then from the district court. First, she filed a motion with the Appellate Division, First Department of the Supreme Court of New York, seeking an order approving her application for admission to the bar. *Roe*, 334 F. Supp.2d at 418. In support of her motion, Roe claimed that the Committee's questioning of her regarding her mental health violated the ADA. *Ibid.* That motion was denied in an unpublished order based on the fact that the admissions Committee had not yet ruled on her application. *Ibid.* Roe did not appeal that decision. *Ibid.* Roe filed a second motion with the Appellate Division, First Department, seeking an order recusing several members of the Committee and excluding certain materials before the Committee relating to her application for admission. *Ibid.* In that motion, Roe claimed that the Committee had delayed her

admission in retaliation for her claim that the Committee had violated the ADA. *Ibid.* This motion was also denied in an unpublished order and Roe did not appeal that ruling. *Ibid.*

Roe next turned to federal district court, filing two consecutive actions. *Roe*, 334 F. Supp.2d at 418. In her first action, Roe sought damages as well as an injunction preventing the defendants from requiring or further requesting or conditioning her bar admission on information from her psychiatrist. *Ibid.* She alleged violations of the ADA as well as state and federal constitutional provisions. *Ibid.* The district court dismissed the action sua sponte on the ground that Roe's request for a review of an ongoing state judicial proceeding was barred by the *Younger* abstention doctrine, and that her challenge to a state court order requiring production of additional medical records violated the *Rooker-Feldman* doctrine. *Id.* at 418-419 (relying on *Younger* v. *Harris*, 401 U.S. 37 (1971); *Rooker* v. *Fidelity Trust*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983)). In her second action in federal court, Roe sought money damages and an injunction preventing the defendants from denying her admission to the New York State bar, from proceeding with a scheduled hearing, and from harassing her and retaliating against her. *Roe*, 334 F. Supp.2d at 419. The district court also dismissed this action sua sponte, on the grounds that interference with state court proceedings would violate the *Younger* doctrine, and that her allegations of conspiracy, retaliation, and racial discrimination were vague and conclusory. *Ibid.*

Roe filed a complaint in the instant case in federal district court on April 4, 2004, alleging that the application question regarding mental health violates the ADA. *Roe*, 334 F. Supp.2d at 418. She also seeks compensatory damages against the defendants for the Committee's violation of the ADA in questioning her at the January 2003 meeting.[4] *Ibid.* The State moved to dismiss Roe's complaint on various grounds, including that Roe's claims are barred by *Rooker-Feldman*, that the *Younger* abstention doctrine prevents the district court from reviewing Roe's claims, on standing, and on Eleventh Amendment immunity grounds.

The district court granted the State's motion to dismiss. See *Roe*, 334 F. Supp.2d at 419-424. With respect to Roe's allegation that the mental health question on the bar application violates the ADA, the court found that she lacked standing because she failed to allege that the inclusion of the question harmed her. *Id.* at 420. The court based this conclusion on the fact that Roe answered the question about past mental health treatment in the negative. *Ibid.* With respect to her claims against the state entities and state officials in their official capacity regarding her questioning at the Committee interview, the court found that the defendants were protected by Eleventh Amendment immunity from her ADA claims. *Id.* at 420-423. The court based this conclusion on the fact that "[t]he legislative record for the ADA does not include any findings documenting a pattern of state discrimination in the

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[4] Roe also seeks damages from individual defendants under Section 1983.

admission of attorneys to the bar, or more generally in the granting of licenses to professionals." *Id.* at 422. This appeal followed.

SUMMARY OF ARGUMENT

Before reaching the State's Eleventh Amendment challenge, this Court must decide whether the plaintiff has standing to pursue her claims, whether the *Rooker-Feldman* doctrine deprived the district court of subject matter jurisdiction over any of the plaintiff's claims, and whether the district court should have abstained from hearing any of the plaintiff's claims under the *Younger* abstention doctrine. Both principles of standing and the *Rooker-Feldman* doctrine impose limitations on the subject matter jurisdiction of federal courts. Although the *Younger* abstention doctrine is grounded in principles of federalism and comity rather than subject matter jurisdiction, this Court has held that a federal court must abstain from hearing a claim where the requirements of the *Younger* doctrine are satisfied. Although the United States takes no position on whether any of the plaintiff's claims are barred because of lack of standing, *Rooker-Feldman*, or *Younger*, we urge this Court to address those issues before reaching, if necessary, the validity of Title II of the ADA and its abrogation provision, as applied in the context of public licensing. Striking down a federal statute is one of the gravest duties a court is called upon to do and should not be undertaken unless necessary.

If necessary, this Court should hold that the plaintiff's claims are not barred by the Eleventh Amendment. Viewed in light of *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), Title II of the Americans with Disabilities Act is valid Fourteenth

Amendment legislation as applied to cases challenging public licensing decisions. In *Lane*, the Court considered Title II's application to access to judicial services, an area of government services that sometimes implicates fundamental rights (such as George Lane's rights in his criminal proceedings) and sometimes implicates rights subject only to rational basis scrutiny (as was true in the case of Lane's co-plaintiff, Beverly Jones, who was prevented from acting as a court reporter because of physical barriers to courtroom access). Public licensing programs similarly implicate a range of constitutional rights, some of which are subject to heightened, and others rational basis, scrutiny. In *Lane*, the Court held that Congress acted appropriately in prohibiting disability discrimination impairing access to judicial services generally. The same is true of public licensing.

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." *Lane*, 124 S. Ct. at 1989. That history of unconstitutional discrimination, the Court held, authorized Congress to enact prophylactic legislation to address "public services" generally, see *id*. at 1992, a conclusion that necessarily applies to public licensing programs. In any case, there is ample support for Congress's decision to extend Title II to the licensing context.

Title II, as it applies to licensing, 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 licensing and

remedying the lingering legacy of discrimination against people with disabilities both in the licensing context and in the provision of public services generally. Thus, Title II often applies in licensing to prohibit 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 licensing programs where unfettered discretionary decision-making has, in the past, led to irrational and invidious decisions. Moreover, in integrating people with disabilities in professions, Title II acts to relieve the ignorance and stereotypes Congress found at the base of much unconstitutional disability discrimination.

These limited prophylactic and remedial measures, judged against the backdrop of pervasive unconstitutional discrimination that Congress found both in public licensing and in other areas of governmental services, 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 the plaintiff's claims regarding public licensing in this case.

ARGUMENT

I

THIS COURT SHOULD NOT RULE ON THE CONSTITUTIONALITY OF TITLE II WITHOUT FIRST CONSIDERING ALTERNATIVE GROUNDS FOR AFFIRMING OR REVERSING

Before ruling on the constitutionality of Title II of the ADA, as applied to state defendants in the context of public licensing, this Court should first determine whether it has subject matter jurisdiction over the plaintiff's claims and whether the

Younger abstention doctrine counsels against allowing the plaintiff to proceed with her claims in federal court at this time. In its motion to dismiss in the district court, the state defendants urged dismissal on Eleventh Amendment grounds as well as the following alternative grounds: (1) Roe lacks standing to challenge the use of question 18(c) on the bar application, (2) Roe's claims are barred by the *Rooker-Feldman* doctrine, and (3) the district court should refrain from considering Roe's claims at this time pursuant to the abstention doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971). Assuming that the state defendant reasserts these claims on appeal, this court should rule on those grounds before reaching the question whether Title II of the ADA, as applied to the class of cases implicating public licensing, is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

It is axiomatic that a federal court may not proceed with a claim over which it lacks subject matter jurisdiction. Where a plaintiff lacks standing to pursue a particular claim – either because she has not suffered an injury in fact, has not demonstrated that the injury has a causal connection to the actions complained of, or has not demonstrated that a favorable outcome will redress her injury – a federal court lacks Article III jurisdiction to hear the case. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Thus, this Court must first determine whether the plaintiff has standing to pursue her claims. See *Great S. Fire Proof Hotel Co.* v. *Jones*, 177 U.S. 449, 453 (1900) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and

answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.").

Moreover, the *Rooker-Feldman* doctrine imposes an additional limitation on the subject matter jurisdiction of federal courts because lower federal courts "do not have jurisdiction over claims that have already been decided, or that are 'inextricably intertwined' with issues that have already been decided, by a state court." *Bridgewater Operating Corp.* v. *Feldstein*, 346 F.3d 27, 29 (2d Cir. 2003), cert. denied, 125 S. Ct. 49 (2004); see also *Moccio* v. *New York State Office of Court Admin.*, 95 F.3d 195, 198 (2d Cir. 1996) ("A challenge under the *Rooker-Feldman* doctrine is for lack of subject matter jurisdiction[.]"). Because *Rooker-Feldman* imposes a limitation on the subject matter jurisdiction of the lower federal courts, this Court must determine whether the plaintiff's suit effectively seeks appellate review of a state court judgment under the facts of this particular case. If this Court holds that the claim is barred by *Rooker-Feldman*, there is no need to consider the State's additional Eleventh Amendment challenge.

Finally, under the abstention doctrine articulated in *Younger* v. *Harris*, "interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Hawaii Hous. Auth.* v. *Midkiff*, 467 U.S. 229, 237-238 (1984). *Younger* abstention is required "when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place in the federal court.'" *Id.* at 238 (quoting *Hicks* v.

Miranda, 422 U.S. 332, 349 (1975)). Although the *Younger* abstention doctrine is not a limit on federal courts' Article III jurisdiction, this Court has held that "dismissal or a stay of claims is mandatory when the requirements for *Younger* abstention are satisfied." *Spargo* v. *New York State Comm'n on Judicial Conduct*, 351 F.3d 65, 74 (2d Cir. 2003) (citing *Diamond "D" Constr. Corp.* v. *McGowan,* 282 F.3d 191, 197 (2d Cir. 2002)), cert. denied, 124 S. Ct. 2812 (2004).

II

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

Although the Eleventh Amendment ordinarily renders a State immune from suits in federal court by private citizens, Congress may abrogate the State's immunity if it "unequivocally expressed its intent to abrogate that immunity" and "acted pursuant to a valid grant of constitutional authority." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). There is no question that Congress unequivocally expressed its intent to abrogate the State's sovereign immunity to claims under the ADA. See 42 U.S.C. 12202; *Tennessee* v. *Lane*, 124 S. Ct. 1978, 1985 (2004). Moreover, it is settled that "Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment." *Ibid*. Because Title II is valid legislation to enforce the Fourteenth Amendment in the context of public licensing programs, the ADA abrogation provision is valid as applied to this case.

A. Analytical Framework Established In Tennessee *v.* Lane

In 2002, this Court held that Title II was invalid Fourteenth Amendment legislation in all contexts, except where a plaintiff could "establish that the Title II violation was motivated by discriminatory animus or ill will based on the plaintiff's disability." *Garcia* v. *SUNY Health Scis. Ctr.*, 280 F.3d 98, 111 (2d Cir. 2001). That decision was overruled last year by the Supreme Court's decision in *Tennessee* v. *Lane*, which upheld Title II's abrogation as applied to cases implicating access to judicial services, regardless of whether a particular case demonstrated or even alleged discriminatory animus or ill will based on disability.

In *Tennessee* v. *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. *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 had 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. The State argued that Congress lacked the authority to abrogate the State's Eleventh Amendment immunity to these claims, and the Supreme Court disagreed. See *id.* at 1994.

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. See *Lane*, 124 S. Ct. at 1988. With respect to the second question, the Court conclusively found a sufficient historical predicate of unconstitutional disability discrimination in the provision of public services to justify enactment of a prophylactic remedy pursuant to Congress's authority under Section 5 of the Fourteenth Amendment. See *id*. at 1988-1992. And finally, with respect to the third question, the Court found that the congruence and proportionality of the remedies in Title II should be judged on a category-by-category basis in light of the particular constitutional rights at stake in the relevant category of public services. See *id*. at 1992-1993. Applying the holding of *Lane*, this Court should conclude that Title

II is valid Fourteenth Amendment Legislation as it applies in the context of public licensing programs.[5]

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

The district court in the instant case erred in adopting an overly narrow view of the appropriate context or range of Title II applications to consider in this case. In holding that Title II is not congruent and proportional Section 5 legislation, the district court considered Title II's application to claims of "discrimination against persons with disabilities seeking admission to a state bar" only. *Roe* v. *Johnson*, 334 F. Supp.2d 415, 422 (S.D.N.Y. 2004). In adopting such a narrow view of the range of applications at stake in this case, the district court's approach directly conflicts with the Supreme Court's decision in *Lane*.

In *Lane*, the plaintiffs filed suit to enforce the constitutional right of access to the courts. 124 S. Ct. at 1982-1983, 1993. The Supreme Court accordingly addressed whether Title II is valid Section 5 legislation "as it applies to the class of cases implicating the accessibility of judicial services." *Id.* at 1993. In so holding,

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[5] 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 discrimination in public licensing programs, this Court need not consider the validity of Title II as a whole. The United States continues to maintain, however, that Title II as a whole is valid Section 5 legislation because it is congruent and proportional to Congress's goal of eliminating discrimination on the basis of disability in the provision of public services – an area that the Supreme Court in *Lane* determined is an "appropriate subject for prophylactic legislation" under Section 5. *Lane*, 124 S. Ct. at 1992.

however, the Court did not confine itself to the particular factual problem of access to the courts and judicial services presented by the individual plaintiffs, nor did it limit its analysis to the specific constitutional interests entrenched upon in the particular case. Both of the plaintiffs in *Lane* were paraplegics who use wheelchairs for mobility and who were denied physical access to and the services of the state court system because of their disabilities. Plaintiff Lane alleged that, when he was physically unable to appear to answer criminal charges because the courthouse was inaccessible, he was arrested and jailed for failure to appear. Plaintiff Jones, a certified court reporter, alleged that she could not work because she could not gain access to a number of county courthouses. *Id.* at 1982-1983. Lane's particular claims thus implicated his rights under the Due Process and Confrontation Clauses, and Jones's claims implicated only her rights under the Equal Protection Clause.

In analyzing Congress's power to enact Title II, however, the Supreme Court discussed the full range of constitutional rights implicated by the broad category of "accessibility of judicial services," *Lane*, 124 S. Ct. at 1993:

> The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant such as respondent Lane the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." The Due Process Clause also requires the States to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings. We have held that the Sixth Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of "identifiable segments playing major roles in the

> community cannot be squared with the constitutional concept of jury trial." And, finally, we have recognized that members of the public have a right of access to criminal proceedings secured by the First Amendment.

Id. at 1988 (citations omitted); see also *id.* at 1990 n.14 (considering cases involving the denial of interpretive services to deaf defendants and the exclusion of blind and hearing impaired persons from jury duty). Thus, a number of the constitutional rights, and a number of Title II applications, that the Supreme Court found relevant to its analysis in *Lane* were not pressed by the plaintiffs or directly implicated by the facts of their case. For instance, neither Lane nor Jones alleged that he or she was unable to participate in jury service or was subjected to a jury trial that excluded persons with disabilities from jury service. Similarly, neither Lane nor Jones was prevented by disability from participating in any civil litigation, nor did either allege a violation of First Amendment rights. The facts of their cases also did not implicate Title II's requirement that government, in the administration of justice, provide "aides to assist persons with disabilities in accessing services," such as sign language interpreters or materials in Braille, yet the Supreme Court broadly considered the full range of constitutional rights and Title II remedies potentially at issue, framing its analysis in terms of the broad "class of cases implicating the accessibility of judicial services." *Id.* at 1993.

The categorical approach taken by the Supreme Court in *Lane* is a much more appropriate mode of analysis than the district court's litigant-specific approach of considering only the specific factual claim of the plaintiff before it.

Congress is a national legislature and in legislating generally, and pursuant to its prophylactic and remedial Section 5 power in particular, necessarily responds not to the isolated claims of individual litigants, but to broad patterns of unconstitutional conduct by government officials in the substantive areas in which they operate. Indeed, in enacting Title II, Congress specifically found that unconstitutional treatment of individuals with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3).

Accordingly, in evaluating whether Title II is an appropriate response to "pervasive unequal treatment in the administration of state services and programs," Lane, 124 S. Ct. at 1989, the Supreme Court's decision in *Lane* directs courts to consider the entire "class of cases" arising from the type of governmental operations implicated by the lawsuit, *id.* at 1993. Just as the Supreme Court upheld Title II's application in *Lane* by comprehensively considering Title II's enforcement of all the constitutional rights and Title II remedies potentially at issue in the entire "class of cases implicating the accessibility of judicial services," the district court should have assessed Title II's constitutionality as applied to the entire "class of cases," *ibid.*, implicating public licensing. As discussed more fully *infra*, those constitutional interests and the Title II remedies they trigger include not just the equal protection rights at stake in attorney licensing, but also the widespread pattern of unequal treatment of persons with disabilities in the provision of government licenses

in a broad range of life activities documented in the legislative history of Title II. That evidence includes discrimination in licensing in areas implicating fundamental rights as well as claims of irrational discrimination in public licensing on the basis of disability.

When viewed through the analytical framework established and applied by the Supreme Court in Lane and the "sheer volume of evidence" compiled by Congress, *Lane*, 124 S. Ct. at 1991, "Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating" public licensing. *Id.* at 1989, 1993.

C. Constitutional Rights At Stake

In *Lane*, the Court explained that Title II "seeks to enforce [the Equal Protection Clause's] prohibition on irrational disability discrimination" as well as "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." 124 S. Ct. at 1988. In deciding the case before it, the Court considered a subset of Title II applications – "the class of cases implicating the accessibility of judicial services," *id*. at 1993 – that sometimes invoke rights subject to heightened scrutiny, but other times invoke only rational basis scrutiny under the Equal Protection Clause. For example, George Lane's exclusion from his criminal proceedings implicated Due Process and Sixth Amendment rights subject to heightened constitutional scrutiny, while court reporter Beverly Jones's exclusion

from the court room implicated only Equal Protection rights subject to rational basis review.[6] See *id*. at 1988.

This case presents a similar category, one that implicates a range of constitutional rights, some of which are subject to heightened, and others rational basis, scrutiny. The liberty guaranteed by the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). Licensing programs that regulate these and other constitutionally-protected activities are often subject to heightened constitutional scrutiny. See, *e.g.*, *Watchtower Bible & Tract Soc.* v. *Village of Stratton*, 536 U.S. 150, 160-169 (2002) (applying heightened First Amendment scrutiny to licensing requirement for door-to-door advocacy); *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 130-137 (1992) (same for parade

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[6] The Court mentioned that, in general, "members of the public have a right of access to criminal proceedings secured by the First Amendment." *Lane*, 124 S. Ct. at 1988. The Court did not, however, conclude that Jones's claim implicated that First Amendment right. While the Court has held that complete closure of a criminal trial to the public is subject to strict scrutiny, see *Press-Enterprise Co.* v. *Superior Court of Calif.*, 478 U.S. 1, 8-9 (1986), it has not held that strict scrutiny applies to a court's denial of a request for an accommodation that would permit attendance by a particular member of the public (*i.e.*, a person with a disability such as Jones).

permits); *Riley* v. *National Fed. of the Blind*, 487 U.S. 781, 801-802 (1988) (same for licensing requirement for professional fundraisers); *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (restriction on marriage licenses for those behind in child support payments subject to strict scrutiny under Equal Protection Clause); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (prohibition against marriage licenses for inter-racial couples subject to strict scrutiny under Equal Protection and Due Process Clauses); *Thomas* v. *Collins*, 323 U.S. 516 (1945) (applying heightened First Amendment scrutiny to licensing requirement for union organizers); see also *Supreme Ct. of New Hampshire* v. *Piper*, 470 U.S. 274, 284 (1985) (applying heightened scrutiny under Privileges and Immunities Clause to certain bar licensing requirements).

In other cases, licensing requirements implicate rights that, while not fundamental, are still subject to the basic protections of the Due Process and Equal Protection Clauses. The courts have long recognized "the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose" and that limitations on that right are subject to constitutional limitations. *Dent* v. *West Virginia*, 129 U.S. 114, 121 (1889). For example, the denial or revocation of a license can trigger the procedural requirements of the Due Process clause. See, *e.g.*, *Bell* v. *Burson*, 402 U.S. 535, 539 (1971). As made clear in *Lane*, public entities may be required to take steps to ensure that people with disabilities are afforded the same meaningful opportunity to be heard as others. See 124 S. Ct. at 1994.

License denials and revocations are also subject to limitations under the Equal Protection clause. See *Schware* v. *Board of Bar Exam'rs*, 353 U.S. 232, 238-239

(1957); *Dent*, 129 U.S. at 121-122. Discrimination against the disabled in licensing programs is unconstitutional if based on "[m]ere negative attitudes, or fear" alone, *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 367 (2001), for even rational basis scrutiny is not satisfied by irrational fears or stereotypes, see *ibid*., *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 450 (1985), and simple "animosity" towards the disabled is not a legitimate state purpose, see *Romer* v. *Evans*, 517 U.S. 620, 634 (1996). And while it is generally true that States are not required by the Equal Protection Clause "to make special accommodations for the disabled" when fundamental rights are not at stake, this is true only "so long as their actions toward such individuals are rational." *Garrett*, 531 U.S. at 367. Moreover, a purported rational basis for treatment of the disabled will fail if the State does not accord the same treatment to other groups similarly situated, see *id*. at 366 n.4, or if the State treats individuals with disabilities in a way that simply gives effect to private invidious discrimination. See *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

D. Historical Predicate Of Unconstitutional Disability Discrimination In Public Services And Public Licensing Programs

"Whether Title II validly enforces these constitutional rights is a question that 'must be judged with reference to the historical experience which it reflects.'" *Lane*, 124 S. Ct. at 1988. Accordingly, in *Lane*, the Court reviewed the historical experience reflected in Title II and concluded that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." 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*.

1. Lane *Conclusively Established The Adequacy Of The Predicate For Title II's Application To Discrimination In All Public Services*

Although *Lane* ultimately upheld Title II as valid Fourteenth Amendment legislation only as applied to access to courts, its conclusions regarding the historical predicate for Title II are not limited to that context. The Court did not begin its "as-applied" analysis until it reached the third step of the *Boerne* analysis addressing the Act's congruence and proportionality. See 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, jury service, the penal system, public education, law enforcement, and the treatment of institutionalized persons, *id.* at 1989.[7]

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[7] In describing the adequacy of the historical predicate, the Court also spoke in general terms, remarking, for instance, on "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of *public services*." *Lane*, 124 S. Ct. 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

(continued...)

Importantly, the Court specifically considered the record of discrimination in public licensing programs, noting the history of disability discrimination in marriage licensing, *id*. at 1989. That record, the Court concluded, supported prophylactic legislation to address discrimination in "public services" generally. *Id*. at 1992. Thus, the adequacy of Title II's historical predicate to support prophylactic legislation addressing discrimination in public services, including public licensing programs, is no longer open to dispute. But even if it were, there is an ample historical basis for extending Title II to disability discrimination in public licensing.

2. Historical Predicate For Title II's Application To Discrimination In Licensing Programs

In *Lane*, the Court recognized that "a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying," 124 S. Ct. at 1989, through criminal and licensing statutes that infringe on a person's ability to marry. See *id*. at 1989 n.8 (providing sample of statutes). And even after the enactment of the ADA, a State passed legislation prohibiting and voiding all marriages of persons with AIDS. See *T.E.P.* v. *Leavitt*, 840 F. Supp. 110 (D. Utah 1993); see also *Doe* v. *County of Centre*, 242 F.3d 437, 441 (3d Cir. 2001) (county refused to license family with HIV positive child as foster parents for

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[7](...continued)
public services" rather than specific examples of public services listed in the finding).

children without HIV).[8] Congress also heard complaints of discrimination in the administration of marriage licenses. For example, Congress was told of a person in a wheelchair who was denied a marriage license because the local courthouse was inaccessible. WY 1786.[9]

Further, there was specific evidence before Congress of similar discrimination in professional licensing programs. The House Report, for example, recounts that a woman was denied a teaching license on the grounds that she was paralyzed. H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 29 (1990). Congress heard similar testimony regarding another teacher denied a license "on the grounds that being confined to a wheelchair as a result of polio, she was physically and medically unsuited for teaching." 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 1040, 1611 n.9 (Comm. Print 1990) (*Leg. Hist.*) (Arlene Mayerson). Teachers from several states complained about licensing requirements that excluded deaf teachers from teaching deaf students. See, *e.g.*, CA 261; KY 732;

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[8] In *Lane*, the Supreme Court relied extensively on cases post-dating enactment of the ADA to demonstrate that Congress had a sufficient basis for enacting Title II. See 124 S. Ct. at 1990 nn. 7-14.

[9] 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.

TX 1503; TX 1549. A Massachusetts man described being discriminated against in his quest for a license as a daycare worker because he was blind. MA 808. In another case, a court found that in administering licenses for security guards, a State had imposed a "blanket exclusion of all one-handed license applicants because of an unfounded fear that they are dangerous and more likely to use deadly force," in violation of the ADA and the Fourteenth Amendment. *Stillwell* v. *Kansas City Bd. of Police Comm'rs*, 872 F.Supp. 682, 687-688 (W.D. Mo. 1995).

Congress also heard numerous complaints of discrimination in the administration of driver licenses. For example, one witness described that a person in a wheelchair was denied a drivers license, not because of any inability to pass the drivers test, but because the test was held in an inaccessible room up a flight of stairs. ND 1170. In another case, a Department of Motor Vehicle official investigating a car accident assumed that a person's disability prevented him from driving safely when the real cause of the accident was a brake failure. WI 35. See also AZ 124 (discrimination in drivers licensing); CA 262 (same); CO 283 (same); HI 458 (same); OH 1231 (same); MI 950 (same); TX 1514 (same); TX 1529 (same); WI 1760 (same); WY 1777 (same). See also *Tolbert* v. *McGriff*, 434 F. Supp. 682, 685-687 (M.D. Ala. 1976) (State violated the Due Process clause by summarily revoking a truck driver's license upon learning that he took medications to prevent seizures, even though the medication had successfully prevented the driver from having any seizures for more than 15 years).

Congress also knew that discrimination had occurred in the public licensing of group homes. In *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985), the Supreme Court found that a city discriminated against the disabled by imposing special licensing requirements on a group home for the mentally retarded when it failed to impose the same requirement on similarly situated facilities, thereby giving rise to the inference that the licensing requirement "rest[ed] on an irrational prejudice against the mentally retarded." *Id*. at 450. Congress knew that *Cleburne* was not an isolated incident of discrimination against the disabled in the licensing of group homes as it heard similar complaints from others. See 2 *Leg. Hist.* 1230 (Larry Urban); NJ 1068 (group home for those with head injuries barred because such persons perceived as "totally incompetent, sexual deviants, and that they needed 'room to roam'"; "Officially, the application was turned down due to lack of parking spaces, even though it was early established that the residents would not have automobiles").

3. Gravity Of Harm Of Disability Discrimination In Licensing

The appropriateness of Section 5 legislation, moreover, is not purely a product of the history of discrimination. It is also a function of the "gravity of the harm [the law] seeks to prevent." *Lane*, 124 S. Ct. at 1988. Even when discrimination in licensing does not implicate a fundamental right, the gravity of the harm is substantial.

Unlike many government programs that simply provide benefits to constituents, licensing programs involve a positive limitation on individuals' abilities to engage in a broad range of basic freedoms, including the right to participate in a chosen

profession, to own and dispose of property, to travel, and to choose where to live. Discriminatory limitations on those freedoms can have enormous consequences for the lives of individuals with disabilities. Cf. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he very idea that one man may be compelled to hold his * * * means of living * * * at the mere will of another, seems to be intolerable in any country where freedom prevails").

Discrimination in licensing, like the construction barriers that impaired Beverly Jones' ability to engage in her profession in *Lane*, can severely restrict employment opportunities for people with disabilities. Due in part to such barriers, Congress found that "people with disabilities, as a group * * * [are] severely disadvantaged * * * economically." 42 U.S.C. 12101(a)(6). Congress was told, for instance, that 20% of persons with disabilities – more than twice the percentage for the general population – live below the poverty line, and 15% of disabled persons had incomes of $15,000 or less. See National Council on the Handicapped, *On the Threshold of Independence* 13-14 (1988) (*Threshold*). Additionally, two-thirds of all working-age persons with disabilities were unemployed, and only one in four worked full-time. *Id*. at 14.

Similarly, discrimination in the administration of drivers licenses can deprive people with disabilities of an independence that most people take for granted and can contribute to the substantial isolation of people with disabilities. According to extensive surveys, for example, Congress was told that two-thirds of persons with disabilities had not attended a movie or sporting event in the past year; three-fourths had not seen live theater or music performances; persons with disabilities were three

times more likely not to eat in restaurants; and 13% of persons with disabilities never went to grocery stores. *Threshold* 16-17.

Accordingly, the evidence set forth above regarding disability discrimination in public licensing was more than adequate to support comprehensive prophylactic and remedial legislation.

E. As Applied To Discrimination In Public Licensing, Title II Is Congruent And Proportional To The Constitutional Rights At Issue And The History Of Discrimination

"The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment." *Lane*, 124 S. Ct. at 1992. 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 public licensing. See *ibid*.

A statutory remedy is valid under Section 5 where it is "congruent and proportional to its object of enforcing the right[s]" protected by the statute in the relevant context. *Lane*, 124 S. Ct. at 1993. As applied to public licensing, Title II is a congruent and proportional means of preventing and remedying the unconstitutional discrimination that Congress found exists both in public licensing and in other areas of governmental services, many of which implicate fundamental rights. See *Nevada* v. *Hibbs*, 538 U.S. 721, 722-723, 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).

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 subject to public licensing requirements. 124 S. Ct. at 1993.

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

Importantly, as applied to licensing programs such as this one, Title II does not require a State to license a physician who poses a direct threat to the health or safety of others if that threat cannot be eliminated or reduced to an acceptable level by a reasonable modification or the provision of auxiliary aids or services. See 28 C.F.R.

Pt. 25 App. A, pp. 536-537 (2003) (Preamble to Title II Regulations) ("direct threat" analysis under Title III applies to Title II cases as well); cf. 42 U.S.C. 12182(b)(3) (Title III "direct threat" standard); *Bragdon* v. *Abbott*, 524 U.S. 624 (1998) (applying "direct threat" standard in medical care setting).

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, Congress imposed reasonable architectural standards for new construction and alterations. See 28 C.F.R. 35.151; 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, at 34. 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.

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

First, in public licensing, 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. For example, Title II directly enforces the requirements of the Fourteenth Amendment when it prohibits a State from refusing to provide marriage licenses to people with AIDS. See *T.E.P.* v. *Leavitt*, 840 F. Supp. 110 (D. Utah 1993). Title II enforces the Equal Protection Clause's rationality requirement when it acts to prohibit denial of a teacher's license based on the irrational belief that a person in a wheelchair cannot be a good educator. See H. R. Rep. No. 485, Pt. 2, at 29; 2 *Leg. Hist.* 1611 n.9 (Arlene Mayerson). The Act further enforces the requirements of procedural due process when it requires a State to make accommodations necessary to ensure that people with disabilities are afforded fair hearings on license revocations and denials. See *Lane*, 124 S. Ct. at 1994.

Second, given the history of unconstitutional treatment of people with disabilities in public licensing, Congress was entitled to conclude that there exists a real risk that some state officials may continue to make licensing decisions based on invidious class-based stereotypes or animus that would be difficult to detect or prove. See 42 U.S.C. 12101(a)(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 *Hibbs*, 538 U.S. at 722-723, 735-737 (remedy of requiring "across-the-board" provision of family leave congruent and proportional to problem of employers relying on gender-based stereotypes).

Title II's prophylactic remedy thus acts to detect and prevent difficult-to-uncover discrimination in public licensing against people with disabilities that could otherwise evade judicial remedy. Congress understood that discretionary decisionmaking by individual public officials, as often occurs in licensing, creates a risk that decisions will be made based on unspoken (and, therefore, difficult to prove) irrational assumptions or invidious stereotypes, leading to "subtle discrimination that may be difficult to detect on a case-by-case basis." *Hibbs*, 538 U.S. at 736. By prohibiting insubstantial reasons for denying accommodations to the disabled, and proscribing governmental conduct the discriminatory effects of which cannot be or have not been adequately justified, Title II prevents covert intentional discrimination against disabled licensing applicants and provides strong remedies for the lingering effects of past unconstitutional treatment against the disabled in the public licensing 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.").

Prohibiting disability discrimination in public licensing programs is also an appropriate means of preventing and remedying discrimination in public services generally, and is responsive to the enduring effects of the pervasive discrimination against individuals with disabilities that ran throughout the Nation's history, peaking with the Social Darwinism movement of the mid-20th century. See *Lane*, 124 S. Ct. at 1995 (Souter, J., concurring)

"A proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) (internal punctuation omitted). Discrimination in licensing has a direct and profound impact on the ability of people with disabilities to integrate into the community, literally excluding them from being able to drive themselves to community businesses and events or from working in certain professions with their non-disabled peers. This segregative effect, in turn, feeds the irrational stereotypes that lead to further discrimination in public services (many implicating fundamental rights), as the absence of people with disabilities from professions is taken as evidence of their incapacity to serve as teachers, doctors, or lawyers. Cf. *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999) (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life").

Title II's application to public licensing is thus congruent and proportional because a simple ban on discrimination would have frozen in place the effects of

States' prior official exclusion and isolation of individuals with disabilities, which had the effect of rendering the disabled invisible to government officials and planners, thereby creating a self-perpetuating spiral of segregation, stigma, and neglect. See *Hibbs*, 538 U.S. at 736; *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).[10] In his testimony before Congress, Attorney General Thornburg explained that a key to ending this spiral "is to increase contact between and among people with disabilities and their more able-bodied peers. And an essential component of that effort is the enactment of a comprehensive law that promotes the integration of people with disabilities into our communities, schools and work places." 3 *Leg. Hist.* at 2020. Removing barriers to integration created by discrimination in licensing is an important part of this effort to reduce stereotypes and misconceptions that risk constitutional violations throughout government services, including areas implicating fundamental rights.

Finally, Title II's application to public licensing must be viewed in light of the broader purpose and application of the statute. Congress found that the discrimination faced by people with disabilities was not limited to a few discrete areas (such as licensing); to the contrary, Congress found that people with disabilities have been subjected to systematic discrimination in a broad range of public services. See 42 U.S.C. 12101(a)(3). Title II's application to public licensing, thus, is part of a

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[10] See also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

broader remedy to a constitutional problem that is greater than the sum of its parts. That is, comprehensively protecting the rights of individuals with disabilities in the licensing context directly remedies and prospectively prevents the persistent imposition of inequalities on a single class, *Lane*, 124 S. Ct. at 1988-1992, and the chronic distribution of benefits and services, whether through legislation or executive action, in a way that "impos[es] special disabilities upon groups disfavored by virtue of circumstances beyond their control." *Plyler* v. *Doe*, 457 U.S. 202, 217 n.14 (1982). Title II's application to public licensing programs thus combats a historic and enduring problem of broad-based unconstitutional treatment of the disabled, including programmatic exclusions from public life that sought to accomplish the very "kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish," *ibid.*

CONCLUSION

For the foregoing reasons, the district court's dismissal of the plaintiff's Title II claims on sovereign immunity grounds should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached answering brief is proportionately spaced, has a typeface of 14 points and contains 9,749 words.

_____
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Date: March 14, 2005

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2005, two copies of the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR were served by first-class mail, postage prepaid, on the following counsel of record:

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