No. 01-2640

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RAMON BADILLO-SANTIAGO,

Plaintiff-Appellee

v.

HON. MIRIAM NAVEIRA-MERLY, in her official capacity as Administrator of the Judiciary System; HON. LIRIO BERNAL SANCHEZ, in her official capacity as Director of the Office of Courts Administration; WILFREDO GIRAU-TOLEDO, in his official capacity as Director of the Public Buildings Authority; JOSE A. FUENTES-AGOSTINI, in his official capacity as Secretary of Justice of Puerto Rico; THE COMMONWEALTH OF PUERTO RICO; ADMINISTRACION DE TRIBUNALES; Adm. de Tribunales de P.R., AUTORIDAD DE EDIFICIOS PUBLICOS,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS INTERVENOR

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES:

REGULATIONS:

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Pursuant to this Court's order of March 9, 2004, the United States submits this supplemental brief addressing the effects of *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), on the proper disposition of this case.

This case arises from a civil suit brought against Badillo-Santiago in the courts of the Commonwealth of Puerto Rico.[1] In his federal complaint, Badillo-Santiago alleges that he has a hearing disability that was not adequately accommodated during the Commonwealth trial, resulting in his inability to follow the proceedings and assist his counsel in his defense. App. 22-24. In particular, the only accommodation offered to assist Badillo-Santiago in following the proceedings was the Court's instruction that Badillo-Santiago should "use a wheel-secretary chair * * * to move around to hear the proceedings." App. 23. Badillo-Santiago explained that he initially attempted to comply with this suggestion, but later stopped because he "consider[ed] it a humiliating and ineffective aid." *Ibid*. The Puerto Rico court subsequently entered a judgment against him.

While an appeal from that judgment was pending, Badillo-Santiago filed this action in the district court against the Commonwealth and various officials responsible for the administration of the Puerto Rico courts, alleging violations of Title II of the Americans with Disabilities Act, 42 U.S.C. 12131-12134. See App. 21-25. The district court dismissed Badillo-Santiago's Title II claims against the Commonwealth and its officials in their official capacities, concluding that

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[1] Because this case was decided on a motion to dismiss, we describe the facts as alleged in Badillo-Santiago's complaint.

Congress did not validly abrogate the Commonwealth's sovereign immunity. See *Badillo-Santiago* v. *Andreu-Garcia*, 167 F. Supp. 2d. 194, 198 (D.P.R. 2001). On appeal, this Court held the case in abeyance pending the Puerto Rico Supreme Court's decision in Badillo-Santiago's appeal from the original suit,[2] and the Supreme Court's decision in *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004).

ARGUMENT

The Supreme Court's decision in *Lane* resolves the Eleventh Amendment issue in this appeal. The Court held that Congress validly abrogated the State's sovereign immunity to the plaintiffs' Title II claims in *Lane* because "Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." 124 S. Ct. at 1994.

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[2] The Puerto Rico Supreme Court eventually affirmed the judgment, rejecting Badillo-Santiago's claim that the alleged ADA violations warranted a new trial. See *Gonzales* v. *Badillo*, No. CC-2000-939 (P.R. Sept. 30, 2003). The parties have already filed supplemental briefs on whether the Commonwealth Supreme Court decision precludes Badillo-Santiago's Title II claims in federal court. The United States has taken no position on that question, but we do observe that if *Gonzales* entirely precludes the Title II claims, this Court need not decide the Commonwealth's Eleventh Amendment challenge. See, *e.g.*, *Parella* v. *Retirement Bd.*, 173 F.3d 46, 53-57 (1st Cir. 1999) ("Under this circuit's practice, we have considered it permissible to defer an Eleventh Amendment question until after the merits were addressed, thus avoiding the Eleventh Amendment question entirely if plaintiffs lost on the merits.").

Lane arose from a lawsuit by two individuals who use wheelchairs and were unable to access certain judicial proceedings because of physical barriers at various courthouses in Tennessee. *Id*. at 1982. In particular, George Lane was unable to access a courtroom in which he was being tried on criminal charges. *Id*. at 1982-1983. Plaintiff Beverly Jones, "a certified court reporter, alleged that she has not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process." *Id*. at 1983. The State argued that these plaintiffs' claims were barred by the Eleventh Amendment because the abrogation of the State's Eleventh Amendment immunity to claims under Title II exceeded Congress's authority under Section 5 of the Fourteenth Amendment.

To resolve this claim, *Lane* applied the three-part analysis of 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," *ibid*. The Court conclusively resolved the first two questions, and indicated that the third should be addressed on a context-by-context basis.

1. 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," including "the right of access to the courts at issue in this case." *Lane*, 124 S. Ct. at 1988. The Court explained that a number of constitutional provisions are implicated by barriers to access to courts, including the Due Process Clause, which "requires the States to afford certain civil litigants a meaningful opportunity to be heard by removing obstacles to their full participation in judicial proceedings." *Ibid*. (citations and internal quotation marks omitted).

2. The Court next considered the historical predicate for Title II and 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 1992.

Thus, the adequacy of the historical predicate for Title II in its application to "public services" in general, and "the administration of justice" in particular, is no

longer open to dispute. It is noteworthy, however, that the record described by the Court includes examples not only of a lack of physical accessibility to courthouses of the sort faced by Lane and Jones, but also failures to provide adequate accommodations to participants with hearing impairments, as alleged in this case.[3] The Court further observed that Congress's appointed task force heard "numerous examples of the exclusion of persons with disabilities from state judicial services and programs," including "failure of state and local governments to provide interpretive services for the hearing impaired." *Id*. at 1991.[4]

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[3] The Court's opinion includes the following citations and descriptions of cases documenting the "pattern of unconstitutional treatment in the administration of justice," *Lane*, 124 S. Ct. at 1990:

> *E.g., Ferrell* v. *Estelle*, 568 F.2d 1128, 1132-1133 (C.A.5) (deaf criminal defendant denied interpretive services), opinion withdrawn as moot, 573 F.2d 867 (C.A.5 1978); *State* v. *Schaim*, 65 Ohio St.3d 51, 64, 600 N.E.2d 661, 672 (1992) (same); *People* v. *Rivera*, 125 Misc.2d 516, 528, 480 N.Y.S.2d 426, 434 (Sup.Ct.1984) (same). See also, *e.g.*, * * * *DeLong* v. *Brumbaugh*, 703 F.Supp. 399, 405 (W.D. Pa.1989) (deaf individual excluded from jury service); *People* v. *Green*, 148 Misc.2d 666, 561 N.Y.S.2d 130, 133 (Cty.Ct.1990) (prosecutor exercised peremptory strike against prospective juror solely because she was hearing impaired).

Id. at 1990 n.14.

[4] In its prior brief, the Commonwealth challenged the quality and sources of some of this evidence, but the Supreme Court relied on precisely the same sources and types of information in reaching its conclusions in *Lane*. See, *e.g.*, *id*. at 1990

(continued...)

3. "The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment." *Id*. 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 Court concluded that "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 right of access to the courts." *Id*. at 1993. That remedy, the Court explained, is "a limited one." *Ibid*. 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," and does not require States to "undertake

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[4](...continued)
nn.7-14 (relying on statutes and cases post-dating enactment of ADA); *id*. at 1991 (Task Force testimony and Breyer appendix in *University of Ala.* v. *Garrett*, 531 U.S. 356 (2001)); *id*. at 1991 n.16 (conduct of local governments); *id*. at 1992 n.17 (noting *Nevada* v. *Hibbs*, 538 U.S. 721 (2003), relied on legislative history to predecessor statute); *id*. at 1992 (congressional finding of persisting "discrimination" in public services).

measures that would impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service." *Id*. at 1993-1994 (citations omitted).

Thus limited, the requirements of Title II are "perfectly consistent with the well-established due process principle that, within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard in its courts." *Id*. at 1994 (citation and internal quotation marks omitted). "For these reasons, we conclude that Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." *Ibid*.

Because this case also "implicat[es] the accessibility of judicial services," *id*. at 1993, it falls squarely within the holding of *Lane.* Although Badillo-Santiago challenges communication, rather than physical, barriers, the holding of *Lane* extends to both types of cases. By its terms, the Court's holding applies to cases "implicating the accessibility of judicial services," *id*. at 1993, and is not limited to cases involving the right of *physical* access to courts. Moreover, the opinion made clear that the "right of access to the courts,"[5] includes not only the right to be

[5] See also, *e.g.*, 124 S. Ct. at 1993 ("Congress' chosen remedy * * *, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of *access to the courts*.") (emphasis added); *id*. at 1994 n.20

(continued...)

present in the courthouse, but also the broader right to a "meaningful opportunity to be heard." *Id*. at 1988. In describing the history of violations of this right, the Court gave examples both of physical exclusion from courthouses, and also of failure to provide sign language interpreters to deaf litigants and discriminatory rules that excluded people with hearing and vision impairments from courtroom participation. See *supra* at 6 & n.3; 124 S. Ct. at 1990-1991 & n.14. The Court concluded that this history provided a predicate for enacting prophylactic legislation to address not only "access to public *facilities,*" but also legislation to address "inadequate provision of public services" more generally. *Id*. at 1992 (emphasis added).

Title II addresses both physical and communication barriers to access to courts through parallel regulations imposing the same limited duty. See 28 C.F.R. 35.150 (facility accessibility); 28 C.F.R. 35.160-35.164 (communications). The communications regulations, like the physical accessibility requirements, require accommodations only where necessary to ensure access for individuals who are otherwise qualified for the government service, and when the accommodation can

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[5](...continued)
("[T]his case implicates the right of *access to the courts* * * *") (emphasis added); *id*. at 1994 ("Title II, as it applies to the class of *cases implicating the fundamental right of access to courts*, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment.") (emphasis added).

be reasonably provided without fundamentally altering the government program or imposing an undue financial or administrative burden. See *Lane*, 124 S. Ct. at 1993-1994; 28 C.F.R. 35.164. In *Lane*, the Court held that such obligations are "perfectly consistent" with the congressional objective of enforcing constitutional rights. 124 S. Ct. at 1994. There is no basis for a different conclusion here.

CONCLUSION

The district court erred in holding that Congress failed to validly abrogate the Commonwealth's sovereign immunity to Badillo-Santiago's claim under Title II of the ADA.

Respectfully submitted,

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