UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

AMY SHEPARD, Plaintiff, v. THE RECTOR AND VISITORS OF GEORGE MASON UNIVERSITY, ALAN MERTEN, in his official capacity, as President of George Mason University, GIRARD MULHERIN, in his official capacity as Dean of Students, Defendants.	)	Civil Action No. 01-1093-A

BRIEF OF THE UNITED STATES AS INTERVENOR REGARDING CONSTITUTIONALITY OF 42 U.S.C. 12202

Pursuant to this Court's order dated June 17, 2004, the United States submits this brief addressing the constitutionality of 42 U.S.C. 12202, the provision of the Americans with Disability Act, 42 U.S.C. 12101 *et seq.*, that abrogates States' Eleventh Amendment immunity to retaliation claims under Section 12203 of the Act.

STATEMENT

1. As relevant to the University's pending motion to dismiss, plaintiff Amy Shepard alleges that during the summer of 2000 she was a student with a disability attending George Mason University (GMU). See *Shepard* v. *Irving*, 77 Fed. Appx. 615, 616-617 (4th Cir. 2003). Shepard alleges that she requested, and was denied, an accommodation for her disability from her English teacher, defendant Irving. *Id.* at 617. Shepard complained of the denial to the GMU Disability Resource Center. As a result, she alleges, Irving retaliated against her by accusing her

of plagarism and giving her a failing grade in the class. *Ibid.* Shepard subsequently brought this lawsuit, alleging violations of Titles II and V of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq*.

2. The ADA is composed of five titles, the first three of which target 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 governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities. In addition, Title IV of the Act addresses the accessibility of telecommunications, see 47 U.S.C. 225, while Title V includes a number of miscellaneous provisions, including a prohibition against retaliation, 42 U.S.C. 12203.

The University's motion to dismiss concerns Titles II and V. Title II 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 modifications * * * meets the

essential eligibility requirements" for the governmental program or service. 42 U.S.C. 12131(2); 28 C.F.R. 35.140.[1]

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 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).

Title V of the ADA contains a retaliation provision which states that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. 12203(a).

Title II and the retaliation provision may be enforced through private suits against public entities. See 42 U.S.C. 12133, 12203(c). Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. See 42 U.S.C. 12202.

---

[1] 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.

3. In a prior appeal in this case, the University argued that Shepard's claims under Title II and Title V are barred by the Eleventh Amendment. Relying on its prior decision in *Wessel* v. *Glendening*, 306 F.3d 203 (4th Cir. 2002), the Fourth Circuit held that Congress failed to validly abrogate the State's immunity to claims under Title II of the ADA. See *Shepard*, 77 Fed. Appx. at 618. The court declined, however, to consider whether that holding should be extended to retaliation claims under Title V, since this Court had not ruled on that question. See *id*. at 622. Accordingly, the court remanded the case for further proceedings. *Ibid*. On remand, the University renewed its motion to dismiss Shepard's ADA retaliation claim on Eleventh Amendment grounds.[2]

ARGUMENT

Although the Eleventh Amendment ordinarily renders the States 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*.

---

[2] The court of appeals noted that Shepard also "contends that she adequately states a claim for retaliation under * * * the Rehabilitation Act." 77 Fed. Appx. at 622. The University apparently believes that she has not. The United States takes no position on that question.

Congress had the Fourteenth Amendment power to prohibit discrimination against the disabled in education under Title II. As a result, Congress also had the power to make that prohibition meaningful by prohibiting retaliation that interferes with the enforcement of that right. In addition, the retaliation provision regarding discrimination against the disabled in education enforces the First Amendment right to free speech and to petition the government, rights that are incorporated by the Due Process Clause of the Fourteenth Amendment.

I

THE SUPREME COURT'S DECISION IN *TENNESSEE* V. *LANE* SUPERCEDES THE FOURTH CIRCUIT'S PRIOR DECISION IN *WESSEL* V. *GLENDENING*

Contrary to the State's assertion in its motion, in deciding whether Title II is valid Fourteenth Amendment legislation, this Court must follow the recent precedent of *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), rather than the Fourth Circuit's superceded decision in *Wessel* v. *Glendening*, 306 F.3d 203 (4th Cir. 2002). See *Chisolm* v. *Transouth Fin. Corp.*, 95 F.3d 331, 337 n.7 (4th Cir. 1996) (Circuit precedent binding only until superceded by Supreme Court authority).

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. 124 S. Ct. 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, a position accepted by the Fourth Circuit in *Wessel*. See 306 F.3d at 215. The Supreme Court in *Lane* disagreed. See 124 S. Ct. 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. With respect to the second question, the Court conclusively found a sufficient historical predicate of unconstitutional disability discrimination in the provision of public services to justify enactment of a prophylactic remedy pursuant to Congress's authority under Section 5 of the Fourteenth Amendment. And finally, with respect to the third question, the Court found that the congruence and proportionality of the remedies in Title II should be judged on a category-by-category basis in light of the particular constitutional rights at stake in the relevant category of public services.[3]

---

[3] 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

At each step in this analysis, the Supreme Court departed substantially from the analysis applied by the Fourth Circuit in *Wessel*. At the first step, *Wessel* considered only Title II's enforcement of rights under the Equal Protection Clause, while *Lane* made clear that Title II also enforces a range of constitutional rights, including rights invoking heightened judicial scrutiny. Compare *Wessel*, 306 F.3d at 210 with *Lane*, 124 S. Ct. at 1991-1992.

At the second step, the Fourth Circuit concluded that "Congress did not have an adequate record of unconstitutional discrimination by states against the disabled to support abrogation." 306 F.3d at 213. However, in *Lane*, the Court held that it was "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." *Lane*, 124 S. Ct. at 1992. In reaching the contrary conclusion, the Fourth Circuit declined to consider evidence of discrimination by local governments. See *Wessel*, 306 F.3d at 210. *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." 124 S. Ct. at 1991 n.16. The Fourth Circuit also declined to give deference to Congress's finding of pervasive discrimination in public services, see 306 F.3d at 211, but *Lane* relied prominently on the very same findings, see 124 S. Ct. at 1992. Furthermore, *Wessel* discounted the evidence gathered by the Task Force on the Rights and Empowerment of Americans with Disabilities and summarized in Justice

---

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

Breyer's Appendix in *University of Ala.* v. *Garrett*, 531 U.S. 356 (2001), calling the testimony "so lacking in detail as to make it impossible to determine whether a constitutional violation actually occurred." 306 F.3d at 213. Looking at the same evidence, however, the Supreme Court concluded that it demonstrated "hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions." See 124 S. Ct. at 1990-1991.

These very different approaches led to diametrically opposed conclusions. *Wessel* specifically found that there was insufficient evidence to demonstrate a pattern of constitutional violations in general, or with respect to access to courts in particular. See 306 F.3d at 212. 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," 124 S. Ct. at 1991, including a "pattern of unconstitutional treatment in the administration of justice," *id*. at 1990.

At the third stage, the Fourth Circuit "concluded that we must conduct the abrogation analysis as to the whole of Part A of Title II," 306 F.3d at 208, rather than limiting its review to Title II's application to prisons. 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 the mark of the law's invalidity." 124 S. Ct. at 1992. 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.

Accordingly, *Wessel* has been superceded and this Court is compelled to follow the precedent established by the Supreme Court in *Lane*. See *Chisolm*, 95 F.3d at 337 n.7.

II

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

Applying the holding of *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), this Court should conclude that Title II is valid Fourteenth Amendment Legislation as it applies in the context of public education.

A. Constitutional Rights At Stake

The Supreme Court held in *Tennessee* v. *Lane* that Title II enforces the Equal Protection Clause's "prohibition on irrational disability discrimination," as well as "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." 124 S. Ct. 1978, 1988 (2004).

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

Although classifications relating to education only involve rational basis review under the Equal Protection Clause, public education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982). "Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction." *Ibid.* Indeed, the Court has long recognized that "education is perhaps the most important function of state and

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

In the modern age, the importance of access to education extends to the university as well. In considering access to a college education, the Court recently reaffirmed "the overriding importance of preparing students for work and citizenship" and described "education as pivotal to sustaining our political and cultural heritage with a fundamental role in maintaining the fabric of society." *Grutter* v. *Bollinger*, 539 U.S. 306, 331 (2003) (internal quotation marks omitted). "This Court has long recognized that education is the very foundation of good citizenship." *Ibid.* (quoting *Brown*, 347 U.S. at 493) (internal punctuation omitted). For this reason, the Court explained, "[e]nsuring that public [educational] institutions are open and available to all segments of American society * * * represents a paramount government objective." *Id.* at 331-332.

Of course a State "may legitimately attempt to limit its expenditures" for public education. *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969). "But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Ibid.* Such invidious distinctions include discrimination against the disabled based on "[m]ere negative attitudes, or fear" alone, *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 367 (2001), for even rational basis scrutiny is not satisfied by irrational fears or stereotypes, see *ibid.*, and simple "animosity"

towards the disabled is not a legitimate state purpose, see *Romer* v. *Evans*, 517 U.S. 620, 634 (1996). By the same token, a State may not treat individuals with disabilities in a way that simply gives effect to private invidious discrimination. See *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

And while it is generally true that States are not required by the Equal Protection Clause "to make special accommodations for the disabled," this is true only "so long as their actions toward such individuals are rational." *Garrett*, 531 U.S. at 367. Moreover, a purported rational basis for treatment of the disabled will fail if the State does not accord the same treatment to other groups similarly situated. See *id*. at 366 n.4; *City of Cleburne* v. *Cleburne Living Ctr*., 473 U.S. 432, 447-450 (1985).[4]

B. Historical Predicate Of Unconstitutional Disability Discrimination In Public Services

In *Lane*, the Court reviewed the evidence and concluded that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." 124 S. Ct. at 1989. The Court remarked on the "sheer volume of evidence demonstrating the nature and extent of

---

[4] Discrimination in education can also implicate the Due Process Clause. "[T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause." *Goss* v. *Lopez*, 419 U.S. 565, 574 (1975). Accordingly, suspension and expulsion decisions must be made in accordance with the basic due process requirement of notice and an opportunity to be heard. *Id*. at 579. As made clear in *Lane*, public entities may be required to take steps to ensure that people with disabilities are afforded the same meaningful opportunity to be heard as others. See 124 S. Ct. at 1994. In addition, students have a substantive right under the Due Process Clause to be free from government conduct that is "arbitrary in the constitutional sense." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998). See, *e.g.*, *Jefferson* v. *Ysleta Indep. Sch. Dist.*, 817 F.2d 303 (5th Cir. 1987) (due process violated when student tied to a chair and not allowed to use the bathroom for most of school day).

unconstitutional discrimination against persons with disabilities in the provision of public services," *id*. at 1992, and concluded that it is "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *ibid*.

Although *Lane* ultimately upheld Title II as valid Fourteenth Amendment legislation only as applied to access to courts, its conclusions regarding the historical predicate for Title II are not limited to that context. The Court did not begin its "as-applied" analysis until it reached the third step of the *Boerne* analysis addressing the Act's congruence and proportionality. See 124 S. Ct. at 1992-1993. At the second step, the Court considered the record supporting Title II in all its applications and found not only "a pattern of unconstitutional treatment in the administration of justice," *id*. at 1990, but also violations of constitutional rights in the context of voting, marriage, jury service, zoning, the penal system, public education, law enforcement, and the treatment of institutionalized persons, *id.* at 1989.[5] That record, the Court concluded, supported prophylactic legislation to address discrimination in "public services," *id*. at 1992, including discrimination in "education," *ibid*. See also *id*. at 1989 (finding a "pattern of unequal treatment in the administration of a wide range of public services * * * including * * * public education"). Thus,

---

[5] 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*." *Id*. at 1991 (emphasis added). In concluding that the "the record of constitutional violations in this case * * * far exceeds the record in *Hibbs*," *id*. at 1992, the Court specifically referred to the record of "exclusion of persons with disabilities from the enjoyment of *public services*," *ibid*. (emphasis added), rather than to the record of exclusion from judicial services in particular. See also *ibid.* (relying on congressional finding in 42 U.S.C. 12101(a)(3) and italicizing phrase "access to public services" rather than specific examples of public services listed in the finding).

the adequacy of Title II's historical predicate to support prophylactic legislation is no longer open to dispute. But even if it were, there is ample evidence of a history of unconstitutional discrimination against individual with disabilities in public education.

1. History Of Disability Discrimination In Public Education

Children with mental disabilities were labeled "ineducable" and categorically excluded from public schools to "protect nonretarded children from them." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 463 (1985) (Marshall, J., concurring in the judgment in part); see also *Board of Educ.* v. *Rowley*, 458 U.S. 176, 191 (1982) ("many of these children were excluded completely from any form of public education"). Even in the relatively recent past, many States permitted school administrators to exclude from school children who, in their opinion, "would not benefit" from education.[6] In 1965, North Carolina criminalized any subsequent attempt by parents to send their excluded child to school. See Act of May 18, 1965, ch. 584, 1965 N.C. Sess. Law. 643. Some States also required school officials and parents to report disabled children for institutionalization[7] or enrollment in special segregated schools.[8]

---

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

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

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

When Congress studied disability discrimination in education in the mid-1970s, it found continuing wholesale exclusion of disabled students from the public schools. Congress's findings, which led to passage of the Education of the Handicapped Act of 1975 (EHA), 84 Stat. 175, were later described by the Supreme Court:

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

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

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

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

a. Record Of Exclusion From Education

Congress was presented with substantial evidence that even years after the passage of the EHA, tens of thousands of disabled children were still being excluded from the public schools. See U.S. Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* 28 n.77 (1983) (*Spectrum*). Extensive surveys further revealed a dramatic educational gap between individuals with disabilities and the community at large. Forty percent of persons with disabilities did not finish high school (triple the rate for the general population), and only 29% had any college education (compared with 48% for the population at large). National Council on the Handicapped, *On the Threshold of Independence* 14 (1988) (*Threshold*).[9] This lack of educational attainment contributed to an "alarming rate of poverty"[10] and a "Great Divide" in employment[11] for persons with disabilities. *Ibid*. Congress was also given first-hand accounts illustrating these statistics, through testimony that often made clear the invidious basis of the exclusionary practices. For example, one witness testified that "[w]hen I was 5, my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard." S. Rep. No. 116, 101st Cong., 1st

---

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

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

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

Sess. 7 (1989). Another person recounted that a state university declined to admit him to a graduate program, explaining that "we have had disabled persons in this department before; it never worked out well." WI 1757.[12]

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

---

[12] 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.

Hearings) (Peter Hickey) (student in Vermont was forced to attend classes with students two years behind him because he could not climb staircase to attend classes with his peers).[13]

This pattern of exclusion is also documented in numerous state and federal cases. For example, in *Lane*, the Supreme Court specifically noted two cases in which students with AIDS were excluded from the public schools. See 124 S. Ct. at 1989 n.12. In one, a seven-year old student with AIDS was confined to a modular classroom where he was the only student. See *Robertson* v. *Granite City Cmty. Unit Sch. Dist. No. 9*, 684 F. Supp. 1002 (S.D. Ill. 1988). In another, a kindergarten student with AIDS was excluded from class and forced to take home tutoring. See *Thomas* v. *Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1986). Congress was specifically aware of cases like these. See, *e.g.*, 136 Cong. Rec. 2471, 2480 (May 17, 1990) (Rep. Barnett) (discussing case of Ryan White, who had AIDS and was excluded from school not because the school board "thought Ryan would infect the others" but because "some parents were afraid he would"). There are many other similar cases as well. See *Martinez* v. *School Bd.*, 861 F.2d 1502 (11th Cir. 1988) (child with HIV excluded from school); *Chalk* v. *United States Dist. Ct. Cent. Dist.*, 840 F.2d 701 (9th Cir. 1988) (certified teacher barred from teaching after diagnosis of AIDS); *Doe* v. *Dolton Elem. Sch. Dist. No. 148*, 694 F. Supp. 440 (N.D. Ill. 1988) (elementary student with AIDS excluded from attending regular classes or extracurricular activities); *District 27 Cmty. Sch. Bd.* v. *Board of Educ.*, 502 N.Y.S.2d 325 (N.Y.

---

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

Sup. Ct. 1986) (two school boards sought to prevent attendance of any student with AIDS in any school in the city, unless all of the students at that school had AIDS); *Board of Educ.* v. *Cooperman*, 507 A.2d 253, 217 (N.J. Super. Ct. App. Div. 1986) (children with AIDS were excluded from regular classroom attendance), aff'd as modified by 523 A.2d 655 (N.J. 1987); *Ray* v. *School Dist.*, 666 F. Supp. 1524, 1528 (M.D. Fla. 1987) (children with HIV excluded from school, despite health officials' certification that children could safely attend school); *Doe* v. *Belleville Pub. Sch. Dist. No. 118*, 672 F. Supp. 342 (S.D. Ill. 1987) (child with HIV excluded from school).

The examples in the case law of discriminatory exclusion are not limited to cases involving children with HIV or AIDS. See, *e.g.*, *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, 466 F. Supp. 487 (E.D.N.Y. 1979) (mentally retarded students excluded from public school system); *Hairston* v. *Drosick*, 423 F. Supp. 180 (S.D. W. Va. 1976) (school refused to admit child with spina bifida without the daily presence of her mother, even though student was of normal mental competence and capable of performing easily in a classroom situation); *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (mentally retarded students excluded from public school system); *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) (mentally retarded students excluded from public school system); *Harrison* v. *Michigan*, 350 F. Supp. 846, 847 (E.D. Mich. 1972) ("Until very recently the State of Michigan was making little effort to educate children who are suffering from a variety of mental, behavioral, physical and emotional handicaps. Many children were denied education."); see also Frederick J. Weintraub & Alan R. Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 Syracuse L. Rev. 1037, 1042 (1972) (autistic child excluded from

public schools); *ibid*. (disabled student with low IQ but able to read and do basic math excluded from school as "unable to profit from school attendance"); *id*. at 1043 (child with petit mal epilepsy, controlled through medication, refused admission to public school).

b. Record Of Discriminatory Treatment Within Schools

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

the witness recalled, "they would demonstrate – putting a cap on their head. I was never allowed to put on a thinking-cap because I was the handicap kid." *Ibid.*

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

Similar incidents illustrating irrational stereotypes and intolerance occurred at the university level. One witness recalled that, "when I was first injured, my college refused to readmit me" because "it would be 'disgusting' to my roommates to have to live with a woman with a disability." WA 1733.[14] A student with epilepsy was asked to leave a state college because her seizures were "disrupt[ive]" and, officials said, created a risk of liability. 2 *Leg.*

---

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

Hist. 1162 (Barbara Waters). A doctor with multiple sclerosis was denied admission to a psychiatric residency program because the state admissions committee "feared the negative reactions of patients to his disability." *Id*. at 1617 (Arlene Mayerson). Similarly, a student with facial paralysis was denied a teaching assignment based solely on her appearance. OR 1384. A state university forced a blind student to drop music class because "you can't see." 2 *Leg. Hist.* 1224 (Denise Karuth). Conversely, in another case, a blind student was discouraged from pursuing a degree in her chosen field of personnel management and urged to pursue a degree in music instead. See MO 1010. Congress also heard that a state commission refused to sponsor a blind student for a masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors, '[s]ince,' and this is a quote: 'they could not drive to see their clients.'" 2 *Leg. Hist.* 1225. A different state university denied a blind student a chance to student teach, as required to obtain a teaching certificate, because the dean of the school was "convinced that blind people could not teach in public schools." SD 1476. See also J. Shapiro, No Pity 45 (1993) (Dean of the University of California at Berkeley told a prospective student that "[w]e've tried cripples before and it didn't work"); MO 1010 (college instructor told blind student she did not think she could teach the student).

c. Record Of Educational Segregation

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

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

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

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

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

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

d. Record Of Physical Mistreatment

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

2. Gravity Of Harm Of Disability Discrimination In Public Education

The appropriateness of Section 5 legislation, however, is not purely a product of the history of discrimination. It is also a function of the "gravity of the harm [the law] seeks to prevent." *Lane*, 124 S. Ct. at 1988. Even when discrimination in education does not abridge a fundamental right, the gravity of the harm is enormous. See, *e.g.*, *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954).

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

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

> Segregation in education impacts on segregation throughout the community. Generations of citizens attend school with no opportunity to be a friend with persons with disabilities, to grow together, to develop an awareness of capabilities * * *[.] Awareness deficits in our young people who become our community leaders and employers perpetuate the discrimination fostered in the segregated educational system.

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

* * *

Accordingly, the evidence set forth above was more than adequate to support comprehensive prophylactic and remedial legislation, particularly compared to the record found sufficient in *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003) and *Lane*.[15]

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

"The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment." *Tennessee* v. *Lane*, 124 S. Ct. 1978, 1992 (2004). In deciding that question, the Court in *Lane* declined to "examine the broad range of Title II's applications all at once, and to treat that breadth as the mark of the law's invalidity." *Ibid.* Instead, the Court concluded that the only question before it was "whether Congress had the power under § 5 to enforce the constitutional right of access to the courts." *Id.* at 1993. The question before this Court, then, is whether Title II is congruent and proportionate legislation as applied to the class of cases implicating access to education. See *ibid.*

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 education, Title II is a congruent and proportional means of preventing

---

[15] As in *Lane*, "the record of constitutional violations in this case * * * far exceeds the record in *Hibbs*." *Lane*, 124 S. Ct. at 1992. See also *id.* at 1991 (noting *Hibbs* record contained "little" evidence of "unconstitutional state conduct"); *id.* at 1992 n.17. And the record in the context of education far exceeds the record of unconstitutional treatment in judicial services. See *Lane*, 124 S. Ct. at 1990 nn. 9 & 14, 1991. In its prior brief, the State challenged the quality and sources of this evidence, but the Supreme Court relied on precisely the same sources and types of information in reaching its conclusions in *Lane*. See, *e.g.*, *id.* at 1990 nn.7-14 (relying on statutes and cases post-dating enactment of ADA); *id.* at 1991 (Task Force testimony and Breyer appendix in *Garrett*); *id.* at 1991 n.16 (conduct of local governments); *id.* at 1992 n.17 (noting *Hibbs* relied on legislative history to predecessor statute); *id.* at 1992 (congressional finding of persisting "discrimination" in public services).

and remedying the unconstitutional discrimination that Congress found exists both in education and in other areas of governmental services, many of which implicate fundamental rights.

As was true in *Lane* with respect to cases implicating access to courts and judicial services, "Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility is congruent and proportional to its object of enforcing" the rights of disabled persons seeking access to public schools. 124 S. Ct. at 1993. Further, like *Lane*, the "unequal treatment of disabled persons in the administration of" education has a "long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination." *Ibid.*[16] "Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in concluding that this 'difficult and intractable proble[m]' warranted 'added prophylactic measures in response.'" *Ibid.*

"The remedy Congress chose is * * * a limited one." *Lane*, 124 S. Ct. at 1993. The Title prohibits only discrimination "by reason of * * * disability," 42 U.S.C. 12132, so that the States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all. Even though it requires States to take some affirmative steps to avoid discrimination, it "does not require States to compromise

---

[16] See Elementary and Secondary Education Amendments Act of 1965, Pub. L. 89-313 No. 89-10; Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750; Vocational Rehabilitation Act of 1973, Pub. L. No. 93-112; Education Amendments of 1974, Pub. L. No. 93-380; Education for All Handicapped Children Act of 1975 (EHA), Pub. L. No. 94-142; Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199; Carl D. Perkins Vocational Education Act of 1984, Pub. L. No. 98-524; Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372; Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457; Individuals with Disabilities Education Act of 1990 (IDEA), Pub. L. 101-476No. 91-230, 20 U.S.C. 1400 *et seq.* See also *Honig* v. *Doe*, 484 U.S. 305, 310 n.1 (1988) ("Congress'' earlier efforts to ensure that disabled students received adequate public education had failed in part because the measures it adopted were largely hortatory.").

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.

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,[17] Congress imposed reasonable architectural standards for new construction and alterations. See 28 C.F.R. 35.151. At the same time,

> in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services. § 35.150(b)(1). Only if these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes. Ibid. And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service. §§ 35.150(a)(2), (a)(3).

Lane, 124 S. Ct. at 1993-1994.

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

---

[17] See GAO, Briefing Reports on Costs of Accommodations, *Americans with Disabilities Act: Hearing Before the House Comm. on Small Business*, 101st Cong., 2d Sess. 190 (1990); see also, *e.g.*, S. Rep. No. 116, 101st Cong., 1st Sess. 10-12, 89, 92 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 34 (1990).

In public education, Title II often applies directly to prohibit unconstitutional discrimination against the disabled, *i.e.*, discrimination which is based on irrational stereotypes about, or animosity toward, people with disabilities. Indeed, education is an area where discrimination against the disabled will not infrequently fail rational basis review. For example, Title II enforces the Equal Protection requirement of rationality when it applies to prohibit inflicting corporal punishment against a deaf student for failure to follow spoken instructions,[18] or denying a disabled student admission to a public college because "it would be 'disgusting' to [her] roommates to have to live with a woman with a disability."[19] Title II further enforces the constitutional protection against state action based on irrational stereotypes, such as denying admission to state universities or training programs based on the assumption that blind people cannot teach in public schools,[20] be competent rehabilitation counselors,[21] or succeed in a music course.[22]

Moreover, given the history of unconstitutional treatment of students with disabilities, Congress was entitled to conclude that there exists a real risk that some state officials may continue to make decisions about how students with disabilities should be treated based on

---

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

[19] WA 1733.

[20] SD 1476.

[21] 2 *Leg. Hist.* 1225.

[22] *Id.* at 1224.

invidious class-based stereotypes or animus that would be difficult to detect or prove. See 42 U.S.C. 12101(a)(7) (congressional finding that individuals with disabilities "have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.") In such a situation, the risk of unconstitutional treatment is sufficient to warrant Title II's prophylactic response. See *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 722-723, 735-737 (2003) (remedy of requiring "across-the-board" provision of family leave congruent and proportional to problem of employers relying on gender-based stereotypes).

Title II's prophylactic remedy acts to detect and prevent difficult-to-uncover discrimination against disabled students that could otherwise evade judicial remedy. By proscribing governmental conduct the discriminatory effects of which cannot be or have not been adequately justified, Title II prevents covert intentional discrimination against disabled students and provides strong remedies for the lingering effects of past unconstitutional treatment against the disabled in the education context. See *Lane*, 124 S. Ct. at 1986 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not intent, to carry out the basic objectives of the Equal Protection Clause."). Further, by prohibiting insubstantial reasons for denying accommodations to the disabled, Title II prevents invidious discrimination and unconstitutional treatment in the day-to-day actions of state officials exercising discretionary powers over disabled students. See *Hibbs*, 538 U.S. at 736 (Congress justified in concluding that

perceptions based on stereotypes "lead to subtle discrimination that may be difficult to detect on a case-by-case basis."). Moreover, in requiring reasonable steps to permit physical access to existing school buildings and to design new school buildings with the needs of individuals with disabilities in mind, Title II responds to the lingering effects of a long history of exclusion of people with disabilities from schools.

As has long been recognized in the areas of race and gender discrimination,[23] eliminating discrimination and segregation in education is critical to remedy and prevent discrimination in access to public services and public life generally. "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). As the Supreme Court's cases upholding congressional bans on literacy tests as proper remedial and prophylactic legislation recognize, discrimination and segregation in education have enduring effects that reach beyond the educational context and affect individuals' ability to exercise and enjoy the most basic rights and responsibilities of citizenship, including voting, access to public officials, and equal opportunities to participate in public programs and services. Title II's application to education 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,

---

[23] See, *e.g.*, *Brown* v. *Board of Ed. of Topeka*, 347 U.S. 483, 493 (1954); *Mississippi University for Women* v. *Hogan,* 458 U.S. 718, 729-730 (1982).

stigma, and neglect. See *Gaston County,* 395 U.S. 285, 289-290 (1969) (constitutionally administered literacy test banned because it perpetuates the effects of past discrimination).[24]

By reducing stereotypes and misconceptions, integration in education also reduces the likelihood that constitutional violations in other areas implicating fundamental rights will recur. Cf. *Olmstead*, 527 U.S. at 600 (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life"). For instance, requiring physical accessibility of schools serves the broader purpose of protecting access to other government services that are often conducted in schools. Congress could reasonably determine that making school buildings reasonably accessible would have the prophylactic effect of avoiding unconstitutional denials of the right to vote, to participate in government board meetings, or gain access to other government services implicating fundamental rights, when these activities take place in local schools.

Further, the exclusion of individuals with disabilities from public education was a critical component of the historic eugenics movement, that sought to eliminate and completely exclude individuals with disabilities from public life through systematic, government-endorsed programs of forced institutionalization and sterilization.

Title II's application to education thus targets a constitutional problem that is greater than the sum of its parts. Comprehensively protecting the rights of individuals with disabilities in the educational 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

---

[24] 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).

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*, 457 U.S. at 217 n.14. Title II's application to education thus combats and overcomes a historic and enduring problem of broad-based unconstitutional treatment of the disabled, including programmatic exclusions from public life and education that sought to accomplish the very "kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish," *ibid.*

III

THE ADA RETALIATION PROVISION EFFECTUATES THE PRIMARY REQUIREMENTS OF TITLE II AS APPLIED IN THE CONTEXT OF PUBLIC EDUCATION WHICH IS VALID FOURTEENTH AMENDMENT LEGISLATION

Section 12303 is a valid means of effectuating the primary substantive requirements of Title II as applied in the context of public education, which as discussed above, is valid legislation to enforce the requirements of the Fourteenth Amendment.

The Fourth Circuit recently explained that prohibitions against retaliation for the exercise of rights are a traditional and essential means of ensuring that the rights promised by legislation are, in fact, realized in practice. See *Peters* v. *Jenney*, 327 F.3d 307, 318 (4th Cir. 2003) (Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, reasonably interpreted to prohibit retaliation as well as intentional racial discrimination because "retaliation serves as a means of implementing or actually engaging in intentional discrimination by encouraging such discrimination and removing or punishing those who oppose it or refuse to engage in it."). See also *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997) (noting that a "primary purpose of

antiretaliation provisions" is "[m]aintaining unfettered access to statutory remedial mechanisms"). For the same reasons, in the context of the ADA, Congress reasonably determined that, in order to ensure the effectiveness of its prohibitions against disability discrimination in the context of education under Title II, it must also prohibit retaliation that interferes with the enforcement of those rights.

Since Congress had the Fourteenth Amendment power to prohibit discrimination against the disabled in education under Title II, Congress also had the power to make that prohibition meaningful by prohibiting retaliation that interferes with those rights.

IV

THE ADA'S RETALIATION PROVISION REGARDING DISCRIMINATION AGAINST THE DISABLED IN EDUCATION IS VALID LEGISLATION TO ENFORCE THE FIRST AMENDMENT RIGHT TO FREE SPEECH AND TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES

In prohibiting government retaliation against those who complain about or oppose violations of Title II in the education context, Section 12203 prohibits conduct that independently violates the First Amendment and, therefore, is necessarily "appropriate legislation" to enforce the Fourteenth Amendment. See *Roberts* v. *Pennsylvania Dep't of Pub. Welfare*, 199 F. Supp. 2d. 249 (E.D. Pa. 2002).[25]

---

[25] In *Demshki* v. *Monteith*, 255 F.3d 986, 988-989 (9th Cir. 2001), the Ninth Circuit held that Congress did not validly abrogate a State's sovereign immunity to an ADA retaliation claim "at least where, as here, the claims are predicated on alleged violations of Title I," which prohibits disability discrimination in employment. Cf. *University of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001) (Title I not valid Fourteenth Amendment legislation). This case, of course, involves claims predicated on alleged violations of Title II, a question the *Demshki* court did not address.

A. The ADA Retaliation Provision Regarding Discrimination Against the Disabled In Education Mirrors The Requirements Of The First Amendment

Speech objecting to unlawful government discrimination is protected by the First Amendment. See, *e.g.*, *Seemuller* v. *Fairfax Co. Sch. Bd.*, 878 F.2d 1578 (4th Cir. 1989); *Echtenkamp* v. *Loudon Co. Pub. Schs.*, 263 F. Supp. 2d. 1043, 1058 (E.D. Va. 2003). When complaints are made to public officials, the speech also implicates the "right of the people * * * to petition the Government for a redress of grievances." U.S. Const. Am. I. "The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression." *McDonald* v. *Smith*, 472 U.S. 479, 482 (1985). Indeed, the Court has described the right to petition as "one of 'the most precious liberties safeguarded by the Bill of Rights," a right "implied by '[t]he very idea of government, republican in form.'" *BE & K Construction Co.* v. *NLBR*, 536 U.S. 516, 524-525 (2002).

"The First Amendment right to free speech includes not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right." *Suarez Corp.* v. *McGraw*, 202 F.3d 676, 685 (4th Cir. 2000). In the recent appeal in this case, the Fourth Circuit set forth the First Amendment standard for retaliation claims:

> A plaintiff seeking to recover under § 1983 for retaliation must establish three elements: (1) the plaintiff's right to speak was protected; (2) the plaintiff suffered some adverse action in response to her exercise of a protected right; and (3) a causal relationship between the plaintiff's speech and the defendant's retaliatory action.

77 Fed. Appx. 615, 621 (2003) (citations omitted).

The elements of an ADA retaliation claim regarding discrimination against the disabled in education are essentially identical. The statute provides that "[n]o person shall discriminate

against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. 12203(a). Thus, in the education context, the plaintiff must show that (1) she "opposed" an unlawful act or otherwise participated in enforcement proceedings regarding discrimination against the disabled in education, activities that are undoubtedly protected by the First Amendment;[26] (2) that she suffered the adverse action of being "discriminated against"; and (3) that she suffered the discrimination "because" she opposed the practice or participated in the proceedings (*i.e.*, that there is a causal relationship between the plaintiff's opposition and the retaliatory discrimination). See generally *Rhoads* v. *FDIC*, 257 F.3d 373, 391-392 (4th Cir. 2001).

Thus, the ADA retaliation provision regarding discrimination against the disabled in education does little more than provide a statutory remedy for violations of the First Amendment in the context of disability discrimination in education.

B. Congress Need Not Identify A Record Of Prior Unconstitutional Retaliation Regarding Discrimination Against The Disabled In Education By The States Prior To Forbidding What The First Amendment Itself Already Makes Illegal

Fourteenth Amendment "legislation *reaching beyond the scope of § 1's actual guarantees* must exhibit 'congruence and proportionality,'" *University of Ala.* v. *Garrett*, 531 U.S. 356, 365

---

[26] See *Shepard*, 77 Fed. Appx. at 621 (noting that defendants do not contest that "plaintiff's complaint to the Resource Center constitute[s] protected speech"). See also *BE & K Constr. Co.* v. *NLBR*, 536 U.S. 516, 525 (2002) (First Amendment right to petition "extends to all departments of the Government," including the courts and administrative agencies); *Gagliardi* v. *Village of Pawling*, 18 F.3d 188, 194-195 (2d Cir. 1994) ("The right to complain to public officials and to seek administrative and judicial relief are protected by the First Amendment."); *Echtenkamp*, 263 F. Supp. 2d. at 1058 (same with respect to complaints regarding violations of the ADA).

(2001), under the test of *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (emphasis added). Legislation that does *not* reach beyond the scope of the Fourteenth Amendment's "actual guarantees" – that is, legislation simply enforcing the courts' interpretation of the requirements of the Constitution – necessarily meets the constitutional test for "appropriate legislation" to enforce the Fourteenth Amendment. See *Lesage* v. *Texas*, 158 F.3d 213, 217 (5th Cir. 1998), rev'd in part on other grounds, 528 U.S. 18 (1999); *Franks* v. *Kentucky Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998); *Roberts*, 199 F. Supp. at 253-254; cf. *Kovacevich* v. *Kent State Univ.*, 224 F.3d 806, 821 n.6 (6th Cir. 2000).

When a statute prohibits otherwise constitutional conduct, the Court has looked to the legislative record to determine whether the terms of the statute are "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." *Boerne*, 521 U.S. at 532.[27] Such an examination is necessary in such cases because a statute that "prohibits very little conduct likely to be held unconstitutional" could either represent a legitimate attempt to address "[d]ifficult and intractable problems [that] often require powerful remedies," or "merely an attempt to substantively redefine" the State's constitutional obligations. *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 88 (2000). Comparing the scope of the statute to the history of unconstitutional state conduct assists the Court in distinguishing legitimate attempts to make meaningful the requirements of the

---

[27] See, *e.g.*, *University of Ala.* v. *Garrett*, 531 U.S. 356, 372 (2001) (statutory duty "far exceeds what is constitutionally required"); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 88 (2000) (noting that the statute "prohibits very little conduct likely to be held unconstitutional"); *Florida Prepaid Postsec. Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 642-643 (1999) (describing substantial differences between constitutional and statutory standards); *Boerne*, 521 U.S. at 532 (noting statute's "sweeping coverage" prohibiting far more than the Constitution).

Fourteenth Amendment from illicit congressional attempts to rewrite the actual requirements of the Constitution.

On the other hand, when a statute simply prohibits what the Constitution itself already makes illegal, there is no risk that Congress is attempting to usurp the judicial role and, consequently, the Court has not required a historical predicate of unconstitutional State conduct. See *Roberts*, 199 F. Supp. 2d at 253-254. Thus, for example, the Supreme Court has twice upheld, as a proper exercise of Congress's Section 5 authority, 18 U.S.C. 242, a criminal statute that prohibits persons acting under color of law from depriving individuals of constitutional rights, without inquiring into the extent to which such criminal acts occurred or the availability of state remedies. See *Williams* v. *United States*, 341 U.S. 97 (1951); *Screws* v. *United States*, 325 U.S. 91 (1945).

Similarly, the Supreme Court has noted that 42 U.S.C. 1983, "was enacted for the purpose of enforcing the provisions of the Fourteenth Amendment," *Ngiraingas* v. *Sanchez*, 495 U.S. 182, 187 (1990), and has repeatedly upheld the use of Section 1983 to enforce rights under the Fourteenth Amendment, without requiring an inquiry whether there was a record of such violations before Congress when it enacted the provision. Indeed, the Court has permitted the use of Section 1983 to enforce constitutional rights that had not been recognized at the time Section 1983 was enacted, even though Congress could not have established a record of States violating those rights before creating the cause of action in Section 1983. See, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964) (recognizing right to "one person, one vote"); *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954) (recognizing right to desegregated public education).

CONCLUSION

For the above reasons, this Court should deny the University's motion to dismiss plaintiff's retaliation claims under 42 U.S.C. 12203 as barred by the Eleventh Amendment.

Respectfully submitted,

PAUL J. McNULTY
United States Attorney

R. ALEXANDER ACOSTA
Assistant Attorney General

Of Counsel:

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

_____

LESLIE B. McCLENDON
Virginia State Bar No. 43709
Assistant United States Attorney
Eastern District of Virginia
2100 Jamieson Avenue
Alexandria, Virginia 22314
(703) 299-3831

CERTIFICATE OF SERVICE

I certify that on July 14, 2004, copies of the foregoing BRIEF OF THE UNITED STATES AS INTERVENOR REGARDING CONSTITUTIONALITY OF 42 U.S.C. 12202 were served by first class mail, postage prepaid, to the following counsel of record:

Michael Jackson Beattie
MICHAEL J. BEATTIE & ASSOCIATES
9502-B Lee Highway
Fairfax, VA 22031

William Eugene Thro
OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA
900 East Main Street
Richmond, VA 23219

Brian Walther
Associate University Counsel
Office of University Counsel, MS 2A3
George Mason University
4400 University Drive
Fairfax, Virginia 22030-4444

_____
Leslie B. McClendon
Assistant United States Attorney

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (CONTINUED)

PAGE