No. 05-1376

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IVAN TOLEDO,

Plaintiff-Appellee

v.

JORGE SANCHEZ-RIVERA, Deputy President; GEORGE V. HILLYER, Chancellor; JOHN HERTZ, Dean; PEDRO PARILLA, Counselor; SONIA BAZAN, Design Professor; NATHANIEL FUSTER, Design Professor/Design Committee Director; UNIVERSITY OF PUERTO RICO,

Defendants-Appellants

UNIVERSITY OF PUERTO RICO, Rio Piedras Campus; UNIVERSITY OF PUERTO RICO, Rio Piedras Campus - Resource Office for the Disabled; LUDIM DIAZ; UNIVERSITY OF PUERTO RICO, Rio Piedras Campus, Legal Advisor's Office; LUIS M. VAZQUEZ, Director; MARIA LUGO, Legal Advisor; UNIVERSITY OF PUERTO RICO, Rio Piedras Campus - School of Architecture; MANUEL GARCIA; LIZETTE COLON, Student Affairs Administrator;

Defendants

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

BRIEF FOR THE UNITED STATES AS INTERVENOR

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Because this appeal will require this Court to adjudicate the constitutional validity of an Act of Congress, the United States believes oral argument would be appropriate and helpful.

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STATEMENT OF JURISDICTION

Plaintiff's complaint alleges, among other things, violations of Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.* The district court had jurisdiction pursuant to 28 U.S.C. 1331. On January 14, 2005, the district court denied defendants' motion to dismiss the plaintiff's Title II claims on Eleventh

Amendment immunity grounds, and subsequently denied defendants' motion to reconsider on February 2, 2005. Defendants filed a timely notice of appeal on February 11, 2005. 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).

STATEMENT OF THE ISSUE

Whether the statutory provision abrogating Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq*., is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, as it applies in the context of public education.

STATEMENT OF THE CASE

1. Plaintiff, an individual with a disability, alleges that, while he was enrolled at the University of Puerto Rico School of Architecture, various university employees discriminated against him on the basis of his disability and refused to provide reasonable accommodations to him. J.A. 1-48 (Complaint). In particular, plaintiff suffers from Schizoaffective Disorder, a mental disability that caused him to miss some classes during his first year of enrollment. J.A. 5-6. Plaintiff alleges that, when he returned to class, one of his professors refused to provide reasonable accommodations to him, causing him to turn in an incomplete assignment. J.A. 6. Plaintiff alleges that the professor then ridiculed plaintiff's work in front of the class. J.A. 6. Repeated meetings with the professor and with school administrators did not result in the University providing reasonable accommodations to plaintiff,

and plaintiff received a grade of D for the class in question. J.A. 6-8. During subsequent academic terms, plaintiff continued to suffer from his disability, requiring several hospital stays that resulted in more missed classes. J.A. 10-19. When he returned to school after his absences, he alleges, the school continued to refuse to provide reasonable accommodations to him and otherwise discriminated against him. J.A. 10-27.

Plaintiff filed suit in federal court against the University and various University officials, alleging violations of, inter alia, Title II of the ADA and Section 504 of the Rehabilitation Act. J.A. 30. The state defendants and the individual defendants sued in their official capacities moved to dismiss the Title II claims on Eleventh Amendment immunity grounds. J.A. 59-66. The district court initially granted defendants' motion to dismiss the Title II claims on immunity grounds. J.A. 126-127. Plaintiff filed a motion for reconsideration after the Supreme Court's decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004). J.A. 157-158. The district court granted the motion, holding that defendants do not enjoy Eleventh Amendment immunity to plaintiff's Title II claims and reinstating those claims. J.A. 165-167. Defendants filed an interlocutory appeal to this Court.

2. In 1990, Congress enacted the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.,* to supplement the requirements of Section 504 and to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Title I of the ADA, 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.

This appeal concerns Title II, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) & (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

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[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.

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 others. 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 II 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.

SUMMARY OF ARGUMENT

Congress validly abrogated the University's Eleventh Amendment immunity to plaintiff's claims under Title II of the ADA. Viewed in light of *Tennessee* v. *Lane*, 541 U.S. 509 (2004), Title II is valid Fourteenth Amendment legislation as applied to disability discrimination in public education. 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*, 541 U.S. at 524. That history of unconstitutional discrimination, the Court held, authorized Congress to enact prophylactic legislation to address "public services" generally, see *id*. at 529,

including public educational services. In any case, there is ample support for Congress's decision to extend Title II to public schools.

Title II, as it applies to public education, is a congruent and proportionate response to that record. Title II is carefully tailored to respect Puerto Rico's legitimate interests while protecting against the risk of unconstitutional discrimination in education and remedying the lingering legacy of discrimination against people with disabilities in education. Thus, Title II applies in public education 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 public schools where unfettered discretionary decision-making has, in the past, led to irrational and invidious decisions. Moreover, in integrating students with disabilities among their peers, Title II acts to relieve the ignorance and stereotypes Congress found at the base of much discrimination in education. These limited prophylactic and remedial measures, judged against the backdrop of pervasive unconstitutional discrimination that Congress found both in public education 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.

ARGUMENT

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

This Court should hold that Congress validly abrogated the University's sovereign immunity to private claims under Title II of the ADA in the education context, as have both courts of appeals to consider this question to date.[2] See *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005); *Association of Disabled Americans* v. *Florida Int'l Univ.*, 405 F.3d 954 (11th Cir. 2005). Congress may abrogate the States' immunity if it "unequivocally expressed its intent to abrogate that immunity," *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 73 (2000), and acts "pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment," *Tennessee* v. *Lane*, 541 U.S. 509, 518 (2004). Congress clearly expressed its intent to abrogate sovereign immunity to Title II claims. See *id*. at 517-518. The University argues, however, that Title II exceeds Congress's Fourteenth Amendment powers in the context of this case.[3]

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[2] We note that the Supreme Court has granted two petitions for certiorari in a case presenting the question whether Title II is valid Section 5 legislation in the prison context. *United States* v. *Georgia*, No. 04-1203, and *Goodman* v. *Georgia*, No. 04-1236 (collectively "*Goodman*"). We recommend that the Court delay resolution of this appeal until the Supreme Court issues a decision in *Goodman*.

[3] Regardless of the validity of Title II's abrogation provision as legislation to enforce the Fourteenth Amendment in the context of education, Congress could abrogate Puerto Rico's sovereign immunity pursuant to its Article IV authority to

(continued...)

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. 541 U.S. at 513. The state defendant in that case argued that Congress lacked the authority to abrogate the State's Eleventh Amendment immunity to these claims, and the Supreme Court in *Lane* disagreed. See *id.* at 533-534.

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*, 541 U.S. at 522; (2) whether there was a history of unconstitutional disability discrimination to support Congress's determination that "inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at

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[3](...continued)
"make all needful rules and regulations respecting the territory or other property belonging to the United States." U.S. Const. Art. IV, § 3; see *First Nat'l Bank* v. *County of Yankton*, 101 U.S. 129, 133 (1879) (Congress "has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments."). We recognize, however, that this Court has adopted a presumption that Congress would not have intended to abrogate Puerto Rico's immunity to suit if Congress did not have the power to abrogate States' Eleventh Amendment immunity, at least so long as a statute (like the ADA, see 42 U.S.C. 12102(3)) defines Puerto Rico as a State. See *Jusino Mercado* v. *Puerto Rico*, 214 F.3d 34, 40-44 (1st Cir. 2000); see also *Acevedo Lopez* v. *Police Dep't of Puerto Rico*, 247 F.3d 26 (1st Cir. 2001). While we disagree with that presumption, we acknowledge that this panel is bound to apply it in this case.

529; and (3) "whether Title II is an appropriate response to this history and pattern of unequal treatment," as applied to the class of cases implicating access to judicial services. *Id.* at 530.

With respect to the first question, the Court found that Title II enforces rights under the Equal Protection Clause as well as an array of rights subject to heightened constitutional scrutiny under the Due Process Clause of the Fourteenth Amendment. 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.[4] 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 education.

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[4] The Court in *Lane* did not examine the congruence and proportionality of Title II as a whole because the Court found that the statute was valid Section 5 legislation as applied to the class of cases before it. Because Title II is valid Section 5 legislation as applied to the class of cases implicating 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*, 541 U.S. at 529.

A. Lane *Dictates A Category-By-Category Analysis, Not A Case-By-Case Analysis*

In their brief (Def. Br. 10-14, 22-25), defendants suggest that this Court should consider whether Title II is valid Section 5 legislation, not as applied to the context of public education, but as applied to the facts of this case, and should uphold the statute only if the Court finds that plaintiff alleges a constitutional violation. In support of this suggestion, Puerto Rico relies on the reasoning of the vacated panel decision of this Court in *Kiman* v. *New Hampshire Department of Corrections*, 301 F.3d 13 (1st Cir. 2002), which analyzed an Eleventh Amendment challenge to Title II by considering Title II as applied to the allegations in the case before it, rather than by considering Title II in all of its applications.[5] Because the panel in *Kiman* found that the plaintiff had alleged constitutional violations, the Court limited its holding to a finding that "Congress acted within its powers in subjecting the states to private suit under Title II of the ADA, at least as that Title is applied to cases in which a court identifies a constitutional violation by the state." *Id.* at 24. The panel acknowledged that:

> It may be that the legislative record taken as a whole supports Congress's conclusion that the enactment of Title II taken as a whole,

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[5] That opinion is no longer precedential, however, because the full Court granted rehearing en banc, vacating the panel opinion, and subsequently split evenly, thereby affirming the judgment of the district court. 332 F.3d 29 (1st Cir. 2003). The Supreme Court then granted the plaintiff's petition for certiorari, vacated the judgment of the en banc court, and remanded the case for further consideration in light of *Lane*. 541 U.S. 1059 (2004). This Court remanded it to the district court, which held for the defendants on the merits and did not reach the Eleventh Amendment issue. It is now on appeal from that decision. See No. 05-1998.

> including the abrogation of sovereign immunity, is within the section five power. * * * It might also be that the legislative record taken as a whole supports some of Congress's decisions to render states liable for some acts not in violation of the Constitution, but not others.

Id. at 23. However, the panel declined to reach those broader questions because it could uphold Title II as applied to the case before it.

But in the wake of *Lane*, this Court must consider the validity of Title II and its abrogation provision as applied to the entire category of public education rather than merely as applied to the facts of the instant case.[6] 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 violations that implicated his rights under the Due Process Clause and the Confrontation Clause – namely, 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 alleged violations that implicated her equal protection rights – namely, that she could not work as a certified court reporter because she could not gain access to a number of county courthouses. 541 U.S. at 513-514.

In analyzing Congress's power to enact Title II, however, the Supreme Court discussed the full range of applications Title II could have in cases implicating the "accessibility of judicial services," *Lane*, 514 U.S. at 531, including applications to

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[6] Indeed, Puerto Rico acknowledges in its brief (Def. Br. 14-15) that the Supreme Court's approach in *Lane* differs from the panel's approach in *Kiman*.

criminal defendants, civil litigants, jurors, public spectators and press, and witnesses. *Id*. at 522-523 (discussing constitutional rights at stake in courthouse context); *id.* at 527 (discussing evidence presented to Congress of disability discrimination in the provision of judicial services); see also *id*. at 525 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 statutory applications and implicated constitutional rights that the 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, 541 U.S. at 532, yet the Supreme Court considered the full range of constitutional rights and Title II remedies potentially at issue, framing its analysis in terms of the "*class of cases* implicating the accessibility of judicial services." *Id*. at 531 (emphasis added).

That categorical approach – rather than the litigant-specific mode of analysis advocated by defendants in the instant case – makes sense. In legislating generally, Congress 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) (emphasis added).

Moreover, an approach that upholds Title II only as applied to cases in which a constitutional violation has been alleged would utterly ignore the Supreme Court's holding that Congress was justified in enacting prophylactic Section 5 legislation in the area of public services. As the *Kiman* panel acknowledged, 301 F.3d at 19-20, the Supreme Court has repeatedly stated in general terms that Congress may use its Section 5 powers to prohibit conduct that is not itself unconstitutional. See, *e.g.*, *Lane*, 541 U.S. at 518; *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 727-728 (2003); *Kimel*, 528 U.S. at 81; *City of Boerne*, 521 U.S. at 518. More significantly for this case, the Court in *Lane* specifically held that the legislative and historical record of disability discrimination in the provision of public services was sufficient to justify prophylactic legislation to prohibit such discrimination. *Lane*, 541 U.S. at 529.

Accordingly, in evaluating whether Title II is an appropriate response to "pervasive unequal treatment in the administration of state services and programs," *Lane*, 541 U.S. at 524, 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 531, rather than the specific claims of the case before it.

B. Constitutional Rights At Stake

As discussed in Part C, 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, *University of Alabama* 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).[7]

The defendant argues (Def. Br. 16) that a necessary conclusion stemming from *Lane* is that, "[i]f the right involved is fundamental, meaning it emanates

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[7] 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 541 U.S. at 532-533. 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) (quoting *Collins* v. *Harker Heights*, 503 U.S. 115, 129 (1992)). 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).

from the constitution, then the states are not immune from being sued in federal court." As an initial matter, the defendant is simply mistaken in implying that so-called non-fundamental rights do not "emanate[] from the constitution." Rights under the Equal Protection Clause emanate from the Constitution to the same degree as rights under the Sixth Amendment, First Amendment, and Due Process Clause. And the same Section 5 analysis applies regardless of what type of constitutional right Congress seeks to protect or enforce through legislation. Indeed, the Supreme Court did not draw a distinction between the claims of George Lane, which implicated the Sixth Amendment and the Due Process Clause, and the claims of Beverly Jones, which implicated the Equal Protection Clause. Rather, the Court considered all claims potentially implicated by the context before it and applied the long-established *City of Boerne* analysis in upholding Title II as applied to that context. This Court should also apply the *City of Boerne* framework, as elucidated in *Lane*, to uphold Title II as applied to the context of public education.

C. Historical Predicate Of Unconstitutional Disability Discrimination In Public Services

"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*, 541 U.S. at 524. Accordingly, 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." 541 U.S. at 524. 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 528, 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," *id*. at 529.

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 Supreme 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 541 U.S. at 530-531. At the second step, the Court considered the record supporting Title II in all its applications and found the record included not only "a pattern of unconstitutional treatment in the administration of justice," *id*. at 525, but also violations of constitutional rights in the context of voting, jury service, the penal system, public education, and law enforcement, *id.* at 524-525.[8] That record, the

[8] 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*." 541 U.S. at 528 (emphasis added). In concluding that the "the record of constitutional violations in this case * * * far exceeds the record in *Hibbs*," *id*. at 529, the Court specifically

(continued...)

Court concluded, supported prophylactic legislation to address discrimination in "public services," *id*. at 529, including discrimination in "education," *ibid*. See also *id*. at 525 (finding a "pattern of unequal treatment in the administration of a wide range of public services * * * including * * * public education"). Thus, the adequacy of Title II's historical predicate to support prophylactic legislation is no longer open to dispute. See *Constantine*, 441 F.3d at 478 ("After *Lane*, it is settled that Title II was enacted in response to a pattern of unconstitutional disability discrimination by States and nonstate government entities with respect to the provision of public services. This conclusion is sufficient to satisfy the historical inquiry into the harms sought to be addressed by Title II."); *Association for Disabled Americans*, 405 F.3d at 958 ("Under its analysis of [the second *Boerne*] prong, the Supreme Court [in *Lane*] considered the record supporting Title II *as a whole*, and conclusively held that Congress had documented 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."). But even if it were, there is ample evidence of a history of unconstitutional discrimination against individual with disabilities in the context of public education.

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[8](...continued)
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).

2. 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*, 473 U.S. at 463 (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.[9] 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. Laws. 643. Some States also required school officials and parents to report disabled children for institutionalization[10] or enrollment in special segregated schools.[11]

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[9] 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).

[10] 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.

[11] 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), Pub. L. No. 91-230, 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 were not receiving appropriate educational services. Indeed, one out of every eight of these children was 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, "millions of 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, *Accomodating the Spectrum of Individual Abilities* 28 n.77 (1983) (*Spectrum*). Extensive surveys further revealed a dramatic educational gap between individuals with disabilities and the community at large. Forty percent of persons with disabilities did not finish high school (triple the rate for the general population), and only 29% had any college education (compared with 48% for the population at large). National Council on the Handicapped, *On the Threshold of Independence* 14 (1988) (*Threshold*).[12] This lack of educational attainment contributed to an "alarming rate of poverty"[13] and a "Great Divide" in employment[14] for persons with

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[12] 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.").

[13] Twenty percent of persons with disabilities had family incomes below the poverty line (more than twice the percentage of the general population), and 15%

(continued...)

disabilities. *Ibid*. Congress was also given first-hand accounts illustrating these statistics, through testimony that often made clear the invidious basis of the exclusionary practices. For example, one witness testified that "[w]hen I was 5, my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard." S. Rep. No. 116, 101st Cong., 1st Sess. 7 (1989). Another person recounted that a state university declined to admit him to a graduate program, explaining that "we have had disabled persons in this department before; it never worked out well." WI 1757.[15] 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.[16]

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[13](...continued)
of disabled persons had incomes of $15,000 or less. *Threshold* 13-14.

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

[15] 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 *Garrett*, 531 U.S. 356, and catalogued in Appendix C to Justice Breyer's dissent in that case. See *Lane*, 541 U.S. at 526. That Appendix cites to the documents by State and Bates stamp number, 531 U.S. at 389-424, a practice we follow in this brief.

[16] 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

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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 541 U.S. at 525 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. 2480 (May 17, 1990) (Rep. McDermott) (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

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[16](...continued)
of speech impediment); NC 1144 (mentally handicapped student with no behavior problems denied admission to after-school program because "their policy was not to keep handicapped" kids); see also PA 1432 (a child who uses wheelchair, unable to enroll in first grade because the class was held in inaccessible classroom; school system proposed, instead, to enroll him in self-contained special education classes held in accessible room, even though the child had no mental impairment); *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 384 (1973) (EHA Senate Hearings) (Peter Hickey) (student in Vermont was forced to attend classes with students two years behind him because he could not climb staircase to attend classes with his peers); *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.")

would"). There are many other similar cases as well.[17] Moreover, the examples in the case law of discriminatory exclusion are not limited to cases involving children with HIV or AIDS.[18]

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[17] 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. 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, 277 (N.J. Super. Ct. App. Div. 1986) (children with AIDS were excluded from regular classroom attendance), aff'd as modified, 523 A.2d 655 (N.J. Sup. Ct. 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).

[18] 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.[19]

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.[20] A student with epilepsy was asked to leave a state college because her seizures were "disrupt[ive]" and, officials said, created a risk of liability. 2 *Leg. Hist*. 1162 (Barbara Waters). A doctor with multiple sclerosis was denied admission to a psychiatric residency program because the state admissions committee "feared the negative reactions of

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[19] 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).

[20] 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").

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.[21] Congress was also told that "a great many handicapped children" are denied "recreational,

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[21] See, *e.g.*, *Hairston*, 423 F. Supp. at 182 (child with spina bifida, 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. Sch.*, 569 F. Supp. 1502, 1505-1506 (E.D. Mich. 1983) (student with cerebral palsy sent to segregated school).

athletic, and extracurricular activities provided for non-handicapped students." *Spectrum* 29.[22]

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.

3. 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*, 541 U.S. at 523. Even when discrimination in education does not abridge a fundamental right, the gravity of the harm is enormous. See, *e.g.*, *Brown*, 347 U.S. at 493.

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[22] 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* v. *Rose*, 192 F.3d 462 (4th Cir. 1999) (seventh-grader suffering from clinical depression prohibited from singing in school choir).

"[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,* 457 U.S. at 234 (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 *Hibbs* and *Lane*.[23]

4. This Court Should Consider The Context Of Public Education Rather Than The More Limited Context of Higher Education

Puerto Rico argues (Br. 19-20) that this Court should consider the validity of Title II's application to the class of cases involving "higher education" rather than "public education." But the Supreme Court did not define the appropriate category in *Lane* in such a limited way. In choosing to consider the validity of Title II's application to the class of cases implicating access to courts and judicial services, the Court grouped together a range of public services that involve similar types of interests that must be weighed on the sides of both the government and the private individual. For the same reasons, this Court should consider the validity of Title

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[23] As in *Lane*, "the record of constitutional violations in this case * * * far exceeds the record in *Hibbs*." *Lane*, 541 U.S. at 529. See also *id*. at 528 (noting *Hibbs* record contained "little" evidence of "unconstitutional state conduct"); *id.* at 528 n.17. And the record in the context of education far exceeds the record of unconstitutional treatment in judicial services. See *Lane*, 541 U.S. at 525 nn. 9 & 14, 527. Puerto Rico challenges 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 524 nn.7-14 (relying on statutes and cases post-dating enactment of ADA); *id*. at 527 (Task Force testimony and Breyer appendix in *Garrett*); *id*. at 527 n.16 (conduct of local governments); *id*. at 528 n.17 (noting *Hibbs* relied on legislative history to predecessor statute); *id*. at 529 (congressional finding of persisting "discrimination" in public services).

II's applications to the class of cases implicating public education in general. Just as the Supreme Court did not separate civil litigants from criminal defendants, or litigants from jurors and witnesses, this Court should not separate higher education from primary and secondary education.

Indeed, in describing various categories of public services to which Title II applies, the Supreme Court itself identified "public education" as one such category, on a par with "the administration of justice" at issue in that case. 541 U.S. at 525. Congress, too, identified education as a whole as an area in which it had identified a problem of disability discrimination. 42 U.S.C. 12101(a)(3). Thus, this Court should follow the Supreme Court and the ADA's statutory findings in considering Title II as it applies to the entire context of public education.

D. 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." *Lane*, 541 U.S. at 530. In deciding that question, the Supreme Court in *Lane* declined to "examine the broad range of Title II's applications all at once, and to treat that breadth as a mark of the law's invalidity." *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 531. 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*. As Puerto Rico acknowledges in its brief (Def. Br. 16-19), both courts of appeals to have considered this question to date have answered that question in the affirmative.

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*, 541 U.S. at 531. As applied to education, Title II is a congruent and proportional means of preventing 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. 541 U.S. at 531. 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*.[24] "Faced with considerable evidence of the

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[24] See, *e.g.*, Elementary and Secondary Education Amendments Act of 1965, Pub. L. No. 89-10, 79 Stat. 27; Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, 80 Stat. 1191; Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355; Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484; Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773; Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199, 97 Stat. 1357; Carl D. Perkins Vocational Education Act of 1984, Pub. L.

(continued...)

shortcomings of previous legislative responses, Congress was justified in concluding that this 'difficult and intractable proble[m]' warranted 'added prophylactic measures in response.'" *Ibid* (quoting *Hibbs*, 538 U.S. at 737).[25]

"The remedy Congress chose is * * * a limited one." *Lane*, 541 U.S. at 531. 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," and does not require States

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[24](...continued)
No. 98-524, 98 Stat. 2435; Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796; Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, 100 Stat. 1145; Individuals with Disabilities Education Act, 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.").

[25] Defendants claim (Def. Br. 20-21) that, unlike elementary education, it is impossible to discern a pattern of unconstitutional treatment of students with disabilities in higher education because state institutions of higher education have been subject to the requirements of Section 504 of the Rehabilitation Act, 29 U.S.C. 794, which prohibits disability discrimination by agencies receiving federal financial assistance. But all state education agencies accept some form of federal financial assistance, thereby subjecting their public schools – including elementary and secondary schools – to the requirements of Section 504. Even in the face of this statutory remedy, Congress found that disability discrimination persisted, thereby necessitating the enactment of Title II.

to "undertake measures that would impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service." *Lane*, 541 U.S. at 532.

With respect to physical access to facilities, Congress required only "reasonable measures to remove architectural and other barriers to accessibility." *Lane*, 541 U.S. at 531. Having found that facilities may be made accessible at little additional cost at the time of construction,[26] 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, 541 U.S. 532.

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

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[26] 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, *supra*, at 10-12, 89, 92; 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,[27] 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." WA 1733. 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, SD 1476, be competent rehabilitation counselors, 2 *Leg. Hist*. 1225, or succeed in a music course, *id*. at 1224.

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

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[27] 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).

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 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*, 541 U.S. at 520 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not intent, to carry out the basic objectives of the Equal Protection Clause."). Further, by prohibiting insubstantial reasons for denying accommodations to 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,[28] 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) (punctuation omitted). 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

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[28] See, *e.g.*, *Brown*, 347 U.S. at 493; *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 729-730 (1982).

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, stigma, and neglect. See *Gaston County* v. *United States*, 395 U.S. 285, 289-290 (1969) (constitutionally administered literacy test banned because it perpetuates the effects of past discrimination).[29]

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* 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"). 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

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[29] 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).

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, which sought to eliminate and completely exclude individuals with disabilities from public life through systematic, government-endorsed programs of forced institutionalization and sterilization. Indeed, Congress and the Supreme Court have long acknowledged the nation's "history of unfair and often grotesque mistreatment'" of persons with disabilities. *Cleburne*, 473 U.S. at 454 (Stevens, J., concurring); see also *Olmstead*, 527 U.S. at 608 (Kennedy, J., concurring) ("[O]f course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility."); *Cleburne*, 473 U.S. at 446 ("Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious."); *Alexander* v. *Choate*, 469 U.S. 287, 296 n.12 (1985) ("well-cataloged instances of invidious discrimination against the handicapped do exist"). From the 1920s to the 1960s, the eugenics movement labeled persons with mental and physical disabilities as "sub-human creatures" and "waste products" responsible for poverty and crime. *Spectrum* at 20. Every single State, by law, provided for the segregation of persons with mental disabilities and, frequently, epilepsy. A critical component of that program of official segregation and isolation was the exclusion of the disabled from public schools, as well as from other state services and privileges of citizenship. Children with mental disabilities "were excluded

completely from any form of public education." *Rowley*, 458 U.S. at 191; see also *State* v. *Board of Educ.*, 172 N.W. 153, 153 (Wis. 1919) (approving exclusion of a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children") (noted at 2 *Leg. Hist.* 2243); see generally T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temple L. Rev. 393, 399-407 (1991).

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*, 541 U.S. at 522-529, 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*, 457 U.S. at 216 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.*

CONCLUSION

The Eleventh Amendment is no bar to plaintiffs' claims under Title II of the Americans with Disabilities Act.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I hereby certify that the brief complies with the type-volume limitations set out in Fed. R. App. P. 32(a)(7)(B). The brief is proportionately spaced, has a typeface of 14 points, was prepared using WordPerfect 9.0, and contains 11,561 words.

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