No. 08-1553

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEFFREY ZIBBELL and CHERYL ZIBBELL,

Plaintiffs-Appellants

v.

JENNIFER GRANHOLM, *et al.*,

Defendants,

and MICHIGAN DEPARTMENT OF HUMAN SERVICES, MICHIGAN DEPARTMENT OF COMMUNITY HEALTH, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS INTERVENOR

GRACE CHUNG BECKER
Acting Assistant Attorney General

GREGORY B. FRIEL
DIRK C. PHILLIPS
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-4876

STATEMENT REGARDING ORAL ARGUMENT

If the Court grants appellees' request for oral argument, the United States would like to participate to address the Eleventh Amendment issues.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331. This Court has jurisdiction under 28 U.S.C. 1291.

ISSUES PRESENTED

The United States will address the following questions:

1. Whether the statutory provision abrogating Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, as applied to the context of social services.[1]

2. Whether conditioning the receipt of federal financial assistance on a waiver of states' Eleventh Amendment immunity for suits under Section 504 of the Rehabilitation Act, 29 U.S.C. 794, is a valid exercise of Congress's authority under the Spending Clause.[2]

STATEMENT OF THE CASE

Plaintiffs Jeffrey and Cheryl Zibbell filed this pro se action against various state and private agencies alleging, *inter alia*, violations of Title II of the ADA. *Zibbell* v. *Granholm*, No. 2:07-cv-96, 2008 WL 1766588, at *1 (W.D. Mich. April 14, 2008). In support of their Title II claims, plaintiffs allege they (1) are persons with disabilities, and (2) have improperly been denied financial assistance

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[1] As used in this brief, the term "social services" is intended to cover need-based programs that provide benefits or other services to persons who are economically disadvantaged or have other special needs. Examples include welfare benefits and other forms of need-based public financial assistance, as well as various forms of training and other assistance for persons with disabilities.

[2] Aside from these two questions, the United States does not take a position on the merits of plaintiffs' claims or on any other issue raised in this appeal.

allegedly owed to them as a result of their disabilities. *Id.* at *2-4. Their complaint refers to various forms of assistance, including assistance for the homeless and low-income energy assistance. See R.1 (Complaint) at 3, 5-8.

The state defendants (the Michigan Department of Human Services (DHS) and the Michigan Department of Community Mental Health (DCMH)) moved to dismiss plaintiffs' ADA claims. The district court assumed, for purposes of defendants' motion, "that plaintiffs are disabled as defined under the ADA." *Zibbell*, 2008 WL 1766588, at *5. The court went on to note that "[i]t is not clear exactly what defendant DHS denied the plaintiffs." *Ibid.* The court "assume[d] that plaintiffs sought some type of disability benefits from the DHS, but the benefits were denied." *Ibid.*

Noting that plaintiffs' complaint "simply allege[s] that they were denied services after defendants informed them that plaintiffs were too 'rich' to receive benefits," the court held that "[a] denial of benefits because the plaintiffs' [*sic*] are considered 'rich' is not a basis to support an ADA claim." *Zibbell*, 2008 WL 1766588, at *5. The court further noted that "it seems unlikely that a person could state an ADA claim by asserting that they were denied disability benefits because they were disabled," as "[b]eing disabled certainly is a precondition to receiving disability benefits." *Ibid.*

In addressing the Eleventh Amendment issue, the district court ruled that DHS and DCMH are immune from suit. In so doing, the court did not undertake its own analysis. Instead, it relied on this Court's ruling in *Popovich* v. *Cuyahoga Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (en banc), cert. denied, 537 U.S. 812 (2002), holding that "the Eleventh Amendment bars a civil rights action to the extent that it relie[s] on congressional enforcement of equal protection in non-employment ADA cases." *Zibbell*, 2008 WL 1766588, at *5.

Although plaintiffs argue on appeal that they have viable claims against the state defendants under Section 504 of the Rehabilitation Act, the district court did not address that issue.

SUMMARY OF ARGUMENT

1. Before reaching the state defendants' Eleventh Amendment challenge with regard to plaintiffs' ADA claims, this Court must first decide whether plaintiffs stated valid claims under Title II of the Act. If, as the district court held, plaintiffs failed to state a claim under the ADA, it was error for the court to reach the Eleventh Amendment issue. Both traditional principles of constitutional avoidance and the Supreme Court's ruling in *United States* v. *Georgia*, 546 U.S. 151 (2006), counsel against such action. Indeed, because striking down a federal statute is one of the gravest duties a court is called upon to undertake, it should not

be done unless necessary. Accordingly, if this Court concludes that plaintiffs failed to state valid ADA claims against the state defendants, it should vacate the district court's Eleventh Amendment ruling.

2. If this Court determines that the district court erred in rejecting the substance of plaintiffs' ADA claims, then it must address the state's Eleventh Amendment argument. If this Court reaches the issue, it should hold that plaintiffs' claims are not barred by the Eleventh Amendment.

In analyzing the Eleventh Amendment issue, this Court must decide at the outset whether any of plaintiffs' valid Title II claims could have independently constituted viable constitutional claims or whether, instead, the Title II claims relied solely on the statute's prophylactic protection. See *Georgia*, 546 U.S. at 159. To the extent any of plaintiffs' valid Title II claims would independently state a constitutional violation, Title II's abrogation of immunity for those claims is valid, and this Court need not question whether Title II is congruent and proportional under the test first articulated in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).

If this Court finds it necessary to decide whether Title II's prophylactic protection is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, the Court must perform the *Boerne* congruence-and-

proportionality analysis, as that analysis was applied to Title II in *Tennessee* v. *Lane*, 541 U.S. 509 (2004).

Viewed in light of *Lane*, Title II of the ADA is valid Fourteenth Amendment legislation as applied to disability discrimination in the provision of social services. 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 528-529, a conclusion that necessarily applies to social services programs. In any case, there is ample support for Congress's decision to extend Title II to the social services context.

Title II, as it applies to social services, is a congruent and proportionate response to that record of discrimination. Title II is carefully tailored to respect the state's legitimate interests while protecting against the risk of unconstitutional discrimination in the provision of social services and remedying the lingering legacy of discrimination against persons with disabilities both in the social services context and in the provision of public services generally. For example, some of the accommodations that Title II requires for persons with disabilities

may be necessary to ensure their constitutional rights to procedural due process in the context of social services. In addition, Title II applies in the provision of social services 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 social services programs where unfettered discretionary decision-making has, in the past, led to irrational and invidious decisions. Moreover, by prohibiting disability discrimination in the provision of social services, Title II often helps integrate persons with disabilities into our society, including the workplace. By facilitating such integration, Title II acts to relieve the ignorance and stereotypes Congress found at the base of much unconstitutional disability discrimination.

These limited prophylactic and remedial measures, judged against the backdrop of pervasive unconstitutional discrimination that Congress found both in the provision of social services and in other areas of governmental services, represent a good faith effort to make meaningful the guarantees of the Fourteenth Amendment, not an illicit attempt to rewrite them. Accordingly, Congress validly abrogated the state defendants' sovereign immunity to the plaintiffs' claims regarding the provision of social services in this case.

3. On appeal, plaintiffs assert that they have viable claims against the state defendants under Section 504 of the Rehabilitation Act. The state defendants contend that plaintiffs failed to raise those claims below and cannot assert them on appeal. In the alternative, the state defendants contend that the Section 504 claims are foreclosed by Eleventh Amendment immunity. If this Court reaches the issue, it should reject the state defendants' claim of Eleventh Amendment immunity, as it is foreclosed by Circuit precedent. See *Nihiser* v. *Ohio Environmental Protection Agency*, 269 F.3d 626, 628-629 (6th Cir. 2001).

ARGUMENT

I

THE DISTRICT COURT ERRED IN HOLDING THAT THE STATE DEFENDANTS ARE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY WITH RESPECT TO PLAINTIFFS' CLAIMS UNDER TITLE II OF THE ADA

As explained more fully below, if this Court determines that the district court correctly held that plaintiffs have not stated valid claims against the state defendants under Title II of the ADA, then the Court should (1) affirm the dismissal of plaintiffs' ADA claims on that basis alone, and (2) vacate the district court's ruling on the Eleventh Amendment issue, as it was error for the court to address the Eleventh Amendment arguments under such circumstances. If,

however, this Court determines that plaintiffs presented valid ADA claims against the state defendants, the Court should address and reverse the district court's holding that the state defendants are entitled to Eleventh Amendment immunity in this case.

A. This Court Should Vacate The District Court's Ruling On The Eleventh Amendment Issue If This Court Determines That Plaintiffs Failed To State Valid Claims Under Title II Of The ADA

1. General Principles Of Constitutional Avoidance Caution Against Addressing The Eleventh Amendment Issue

When possible, this Court has a duty not to reach constitutional questions in light of the "'deeply rooted' commitment" and obligation of federal courts "'not to pass on questions of constitutionality' unless adjudication of the constitutional issue is necessary." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004) (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)). That principle of constitutional avoidance is at its apex when courts address the constitutionality of an Act of Congress and thereby undertake "the gravest and most delicate duty" that courts are "called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (internal quotation marks omitted). Accordingly, a "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the

necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988).

2. The Supreme Court's Decision In United States *v.* Georgia *Provides The Relevant Inquiry For Cases Involving Title II Of The ADA*

Consistent with the principle of constitutional avoidance, the Supreme Court in *United States* v. *Georgia*, 546 U.S. 151 (2006), mandated a procedure for lower courts to follow when confronted with a state's claim of Eleventh Amendment immunity in a case involving Title II of the ADA. This Court must follow the *Georgia* procedure in analyzing the Eleventh Amendment question in this appeal.

The issue presented in *Georgia* was whether Title II, as applied to corrections programs, validly abrogates states' Eleventh Amendment immunity. However, the Court ultimately declined to determine the extent to which Title II's prophylactic protection is valid because the district court and court of appeals had not yet determined whether the Title II claims in that case could independently have constituted viable constitutional claims, or, instead, whether the Title II claims relied solely on the statute's prophylactic protection. *Georgia*, 546 U.S. at 159.

The Court held that, to the extent any of the plaintiff's Title II claims would independently state a constitutional violation, Title II's abrogation of immunity for those claims is valid, and a court need not question whether Title II is congruent and proportional under the test articulated in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). *Georgia*, 546 U.S. at 159. Because it was not clear whether the plaintiff in *Georgia* had stated any viable Title II claims that would not independently state constitutional violations, the Court declined to decide whether any prophylactic protection provided by Title II is within Congress's authority under Section 5 of the Fourteenth Amendment. *Ibid.*

The ruling in *Georgia* includes instructions to lower courts as to how Eleventh Amendment immunity challenges in Title II cases should proceed: Lower courts must "determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Georgia*, 546 U.S. at 159. This Court followed the approach outlined in *Georgia* in its decision in *Haas* v. *Quest Recovery Services,*

Inc., 247 Fed. Appx. 670, 672-673 (6th Cir. Aug. 21, 2007) (unpublished), petition for cert. pending, No. 07-1259 (filed Feb. 19, 2008).

Thus, in order to resolve the immunity question in the present case, this Court first must determine which of plaintiffs' allegations against the state defendants validly state a claim under Title II. The Court then must determine which of those valid Title II claims would independently state constitutional claims. And finally, if plaintiffs have alleged valid Title II claims against the state defendants that are not also claims of constitutional violations, only then should this Court consider whether the prophylactic protection afforded by Title II is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment as applied to the *"class* of conduct" at issue. *Georgia*, 546 U.S. at 159 (emphasis added).[3]

3. The District Court Erred In Reaching The Eleventh Amendment Issue

Here, the district court noted that plaintiffs' complaint "simply allege[s] that they were denied services after defendants informed them that plaintiffs were too 'rich' to receive benefits." *Zibbell* v. *Granholm*, No. 2:07-cv-96, 2008 WL 1766588, at *5 (W.D. Mich. April 14, 2008). The court held that "[a] denial of

[3] Because of the limited nature of our role as intervenor, we do not take a position on whether plaintiffs have stated valid Title II claims or whether any of those claims would independently state a constitutional violation.

benefits because the plaintiffs' [*sic*] are considered 'rich' is not a basis to support an ADA claim." *Ibid.* The district court further noted that "it seems unlikely that a person could state an ADA claim by asserting that they were denied disability benefits because they were disabled," as "[b]eing disabled certainly is a precondition to receiving disability benefits." *Ibid.*

Having concluded that plaintiffs failed to state valid Title II claims against the state defendants, the district court was required by *Georgia* to avoid addressing the constitutionality of Congress's abrogation of Eleventh Amendment immunity. Accordingly, if this Court affirms the district court's holding that plaintiffs failed to state valid ADA claims against the state defendants, the Court should vacate the district court's ruling on the Eleventh Amendment issue.

B. Congress Validly Abrogated The State's Eleventh Amendment Immunity To Private Claims Under Title II Of The ADA As Applied In The Context Of Social Services

1. Congress Clearly Intended To Abrogate Sovereign Immunity With Respect To Claims Asserted Under The ADA

Although the Eleventh Amendment ordinarily renders a state immune from suits in federal court by private citizens, Congress may abrogate the state's immunity if it "unequivocally expressed its intent to abrogate that immunity" and "acted pursuant to a valid grant of constitutional authority." *Kimel* v. *Florida Bd.*

of Regents, 528 U.S. 62, 73 (2000). There is no question that Congress unequivocally expressed its intent to abrogate the state's sovereign immunity to claims under the ADA. See 42 U.S.C. 12202; *Tennessee* v. *Lane*, 541 U.S. 509, 518 (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." *Lane*, 541 U.S. at 518. Because Title II is valid legislation to enforce the Fourteenth Amendment in the context of social services programs, the ADA abrogation provision is valid as applied to this case.

2. If The Conduct Alleged In Plaintiffs' ADA Claims Violates The Fourteenth Amendment, This Court Should Avoid Deciding The Validity Of Title II's Prophylactic Protection

The Supreme Court held in *Georgia* that, "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." 546 U.S. at 159. Thus, if this Court determines that plaintiffs have alleged valid Title II claims, it must proceed to the second step of the *Georgia* analysis and determine "to what extent [the misconduct underlying plaintiffs' Title

II claims] also violate[s] the Fourteenth Amendment." *Ibid.*[4] If this Court determines that the actions underlying plaintiffs' Title II claims violate the Fourteenth Amendment, then it should reverse the district court's ruling on the Eleventh Amendment issue. If this Court reaches a contrary conclusion, it should proceed to the third step of the *Georgia* analysis, which is discussed immediately below in Subsection I.B.3.

3. Under the Analysis Of Lane *And* Boerne*, Title II's Prophylactic Protection Is A Valid Exercise Of Congress's Authority Under Section 5 Of The Fourteenth Amendment*

If this Court finds it necessary to decide whether Title II's prophylactic protection is a valid exercise of Congress's Section 5 authority, the third stage of the *Georgia* analysis requires the Court to undertake the *Boerne* congruence-and-proportionality analysis, as it was applied to Title II in *Tennessee* v. *Lane*, 541 U.S. 509 (2004).

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

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,

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[4] The United States takes no position as to whether the actions alleged in plaintiffs' complaint violate the Fourteenth Amendment.

the state court system by reason of their disabilities" in violation of Title II. 541 U.S. at 513. The state defendants in that case argued that Congress lacked the authority to abrogate the state's Eleventh Amendment immunity to these claims, but the Supreme Court disagreed. See *id.* at 533-534.

To reach this conclusion, the Court applied the three-part analysis for Fourteenth Amendment legislation created by *Boerne*. The Court considered: (1) the "constitutional right or rights that Congress sought to enforce when it enacted Title II," *Lane*, 541 U.S. at 522; (2) whether there was a history of unconstitutional disability discrimination to support Congress's determination that "inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at 529; and (3) "whether Title II is an appropriate response to this history and pattern of unequal treatment," as applied to the class of cases implicating access to judicial services. *Id*. at 530.

With respect to the first question, the Court found that Title II enforces rights under the Equal Protection Clause as well as an array of rights subject to heightened constitutional scrutiny under the Due Process Clause of the Fourteenth Amendment. See *Lane*, 541 U.S. at 522-523. With respect to the second question, the Court conclusively found a sufficient historical predicate of unconstitutional disability discrimination in the provision of public services to justify enactment of

a prophylactic remedy pursuant to Congress's authority under Section 5 of the Fourteenth Amendment. See *id*. at 523-529. And finally, with respect to the third question, the Court found that the congruence and proportionality of the remedies in Title II should be judged on a category-by-category basis in light of the particular constitutional rights at stake in the relevant category of public services. See *id*. at 530-531. Applying the holding of *Lane*, this Court should conclude that Title II is valid Fourteenth Amendment legislation as it applies to social services programs.[5]

b. This Court's Decision In Popovich *Is No Longer Good Law*

In addressing the Eleventh Amendment issue, the district court did not undertake the above-described analysis from *Lane*. See *Zibbell*, 2008 WL 1766588, at *5. Instead, it relied on this Court's decision in *Popovich* v. *Cuyahoga Court of Common Pleas*, 276 F.3d 808 (6th Cir.) (en banc), cert.

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[5] The Court in *Lane* did not examine the congruence and proportionality of Title II as a whole because the Court found that the statute was valid Section 5 legislation as applied to the class of cases before it. Because Title II is valid Section 5 legislation as applied to discrimination in social services programs, this Court need not consider the validity of Title II as a whole. The United States continues to maintain, however, that Title II as a whole is valid Section 5 legislation because it is congruent and proportional to Congress's goal of eliminating discrimination on the basis of disability in the provision of public services – an area that the Supreme Court in *Lane* determined is an "appropriate subject for prophylactic legislation" under Section 5. *Lane*, 541 U.S. at 529.

denied, 537 U.S. 812 (2002), which holds that the abrogation of Eleventh Amendment immunity for claims brought pursuant to Title II of the ADA is valid only insofar as it applies to claims sounding in due process, not for claims based on equal protection. *Id.* at 812. That ruling predates – and is irreconcilable with – the Supreme Court's decision in *Lane*.

First, *Lane* itself arose out of this Court's application of *Popovich*, and the Supreme Court pointedly did not adopt that decision's categorical distinction between Title II claims rooted in due process principles and those enforcing equal protection. 541 U.S. at 515, 522-534. Moreover, the Supreme Court in *Lane* eschewed the *Popovich* model notwithstanding that one of the plaintiffs before the Court, Beverly Jones, raised claims that implicated only the Equal Protection Clause. *Id.* at 514 ("Jones, a certified court reporter, alleged that she has not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process.").

Second, *Popovich* failed to consider whether there was a history of unconstitutional discrimination in the provision of governmental services that warranted an exercise of Congress's prophylactic powers under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. The Supreme Court held in *Lane*, however, that Congress passed Title II in response to an

"extensive record of disability discrimination," 541 U.S. at 529, and "of pervasive unequal treatment [of individuals with disabilities] in the administration of state services and programs, including systematic deprivations of fundamental rights," *id.* at 524. See also *id.* at 528 (noting the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services"). The Court accordingly held in *Lane* that it was "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id.* at 529.

Finally, as explained more fully below (see pp. 20-24, *infra*), the Supreme Court clarified in *Lane* that the relevant focus for examining the constitutionality of the prophylactic reach of Title II's abrogation is not the particular type of claim raised by an individual plaintiff, but rather the substantive category of governmental activities and the cluster of constitutional rights they may implicate. See *Lane*, 541 U.S. at 522-527, 531 (discussing the full range of constitutional rights involved in the administration and accessibility of judicial services, not just the particular claims raised by the two plaintiffs); see also *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 729-730 (2003).

The operative question thus is not – as this Court held in *Popovich* – whether the case involves claims based on equal protection as opposed to due process. Rather, the issue is whether Title II is proper Section 5 legislation as applied to the entire "class of cases implicating the accessibility of" social services. *Lane*, 541 U.S. at 531. Accordingly, this Court's ruling in *Popovich* no longer is good law.

c. The Appropriate Range Of Title II Applications The Court Should Consider In This Case Is The Entire Class Of Cases Implicating Social Services

Because the district court relied only on *Popovich*, it failed to examine the "class of [governmental] conduct" at issue, as required after *Lane*. *Georgia*, 546 U.S. at 159. In *Lane*, the plaintiffs filed suit to enforce the constitutional right of access to the courts. 541 U.S. at 513-514, 530-531. The Supreme Court accordingly addressed whether Title II is valid Section 5 legislation "as it applies to the class of cases implicating the accessibility of judicial services." *Id.* at 531. In so holding, however, the Court did not confine itself to the particular factual problem of access to the courts and judicial services presented by the individual plaintiffs, nor did it limit its analysis to the specific constitutional interests entrenched upon in the particular case. Both of the plaintiffs in *Lane* were paraplegics who used wheelchairs for mobility and who were denied physical

access to and the services of the state court system because of their disabilities. Plaintiff Lane alleged that, when he was physically unable to appear to answer criminal charges because the courthouse was inaccessible, he was arrested and placed in jail for failing to appear. *Id.* at 513-514. Plaintiff Jones, a certified court reporter, alleged that she could not work because she could not access some county courthouses. *Ibid.* Lane's particular claims thus implicated his rights under the Due Process and Confrontation Clauses, and Jones's claims implicated only her rights under the Equal Protection Clause.

In analyzing Congress's power to enact Title II, however, the Supreme Court discussed the full range of constitutional rights implicated by the broad category of "accessibility of judicial services," *Lane*, 541 U.S. at 531:

> The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant such as respondent Lane the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." The Due Process Clause also requires the States to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings. We have held that the Sixth Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of "identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." And, finally, we have recognized that members of the public have a right of access to criminal proceedings secured by the First Amendment.

Id. at 523 (citations omitted); 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 constitutional rights, and a number of Title II applications, that the Supreme Court found relevant to its analysis in *Lane* were not pressed by the plaintiffs or directly implicated by the facts of their case. For instance, neither Lane nor Jones alleged that he or she was unable to participate in jury service or was subjected to a jury trial that excluded persons with disabilities from jury service. Similarly, neither Lane nor Jones was prevented by disability from participating in any civil litigation, nor did either allege a violation of First Amendment rights. The facts of their cases also did not implicate Title II's requirement that government, in the administration of justice, provide "aides to assist persons with disabilities in accessing services," *Lane*, 541 U.S. at 532, such as sign language interpreters or materials in Braille, yet the Supreme Court broadly considered the full range of constitutional rights and Title II remedies potentially at issue, framing its analysis in terms of the broad "class of cases implicating the accessibility of judicial services." *Id.* at 531.

The categorical approach taken by the Supreme Court in *Lane* is the appropriate mode of analysis. Congress is a national legislature. In legislating

generally, and pursuant to its prophylactic and remedial Section 5 power in particular, 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).

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. Just as the Supreme Court upheld Title II's application in *Lane* by comprehensively considering Title II's enforcement of all the constitutional rights and Title II remedies potentially at issue in the entire "class of cases implicating the accessibility of judicial services," the district court in the present case should have assessed Title II's

constitutionality as applied to the entire "class of cases," *ibid.*, implicating social services.

When viewed through the analytical framework established and applied by the Supreme Court in *Lane* and the "sheer volume of evidence" compiled by Congress, *Lane*, 541 U.S. at 528, "Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating" social services. *Id.* at 531.

d. Constitutional Rights At Stake

In *Lane*, the Court explained that Title II "seeks to enforce [the Equal Protection Clause's] prohibition on irrational disability discrimination" as well as "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." 541 U.S. at 522-523. In the context of social services, Title II acts to enforce not only the Equal Protection Clause, but also the rights guaranteed by the Due Process Clause of the Fourteenth Amendment.

In the context of social services, some forms of disability discrimination prohibited by Title II can violate the Fourteenth Amendment right to procedural due process. For example, courts have long recognized a procedural due process right covering those entitled to receive welfare benefits. See *Goldberg* v. *Kelly*,

397 U.S. 254, 261-262 (1970).[6] Indeed, "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Id.* at 267 (quoting *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914)). Although "due process does not require a particular order of proof or mode of offering evidence," *id.* at 269, "[t]he opportunity to be heard *must be tailored to the capacities and circumstances of those who are to be heard*." *Id.* at 268-269 (emphasis added).

Other courts, including this Circuit, have applied this due process principle to cases involving the failure of government agencies to make accommodations for persons with disabilities in the context of social services programs. For example, this Court has held that where a social security disability claimant "present[ed] a colorable argument that she failed to understand and act upon the notice she received because of her mental condition," "a denial of benefits based upon this failure [wa]s a denial of due process." *Parker* v. *Califano*, 644 F.2d 1199, 1203 (6th Cir. 1981). See also *Young* v. *Bowen*, 858 F.2d 951, 955 (4th Cir. 1988) ("It offends fundamental fairness * * * to bind a claimant to an adverse ruling who lacks both the mental competency and the legal assistance necessary to contest the

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[6] Some courts have recognized that this due process right covers applicants as well as those already receiving social services. See *Holbrook* v. *Pitt*, 643 F.2d 1261, 1278 n.35 (7th Cir. 1981) ("Applicants who have met the objective eligibility criteria of a wide variety of governmental programs have been held to be entitled to protection under the due process clause.") (citing cases).

initial determination."); *Shrader* v. *Harris*, 631 F.2d 297, 301-302 (4th Cir. 1980) (claimant seeking social security disability was denied due process when his claim was dismissed despite the fact that he was "so mentally ill that he [could not] understand the administrative procedure").

This due process principle is reflected in some of the obligations Title II imposes on governmental entities. Under certain circumstances, Title II and its implementing regulations may require public entities to take steps to ensure that persons with disabilities are afforded the same "meaningful opportunity to be heard," *Lane*, 541 U.S. at 532 (internal quotations omitted), as others. In the context of providing social services, doing so may require, *inter alia*, providing (1) interpreters for the hearing impaired, (2) assistance for those unable to complete applications for social services because of various disabilities, and (3) physical access to government buildings that provide social services and are otherwise inaccessible to persons with disabilities.[7] See, *e.g.*, 42 U.S.C. 12131(2) & 12132; 28 C.F.R. 35.130, 35.150, 35.160, 35.161; 28 C.F.R. 35.104 (defining "auxiliary aids and services" for purposes of Section 35.160); 28 C.F.R. Pt. 35 App. A, p. 568 (2007) (Preamble to Title II Regulations); see also *Lane*, 541 U.S.

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[7] The historical need for such assistance is discussed more fully at pp. 30-35, *infra*.

at 532; *Ability Ctr. of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 909-913 (6th Cir. 2004).

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

e. Historical Predicate Of Unconstitutional Disability Discrimination In Public Services, Including Social Services Programs

"Whether Title II validly enforces these constitutional rights is a question that 'must be judged with reference to the historical experience which it reflects.'" *Lane*, 541 U.S. at 523 (quoting *South Carlina* v. *Katzenbach*, 383 U.S. 301, 308 (1966)). Accordingly, in *Lane*, the Court reviewed the historical experience reflected in Title II and concluded that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Id.* 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.

i. 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 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 the treatment of institutionalized persons, *id*. at 524-525.[8]

Thus, the adequacy of Title II's historical predicate to support prophylactic legislation addressing discrimination in public services, including social services programs, is no longer open to dispute. See *Klingler* v. *Department of Revenue*, 455 F.3d 888, 896 (8th Cir. 2006) ("The court's decision in *Lane* that Title II targeted a pattern of unconstitutional conduct forecloses the need for further

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[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*." *Lane*, 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 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).

inquiry" into this issue); *Association for Disabled Americans, Inc.* v. *Florida Int'l Univ.*, 405 F.3d 954, 958 (11th Cir. 2005) ("[U]nder 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."); *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 478 (4th Cir. 2005) ("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."). But even if it were an open question, there is an ample historical basis for extending Title II to disability discrimination in the provision of social services.

ii. Historical Predicate For Title II's Application To Discrimination In Social Services Programs

When Congress enacted the ADA, it had before it abundant evidence from across the country that public agencies had discriminated on the basis of disability

in the provision of a wide variety of social services. For example, Congress heard testimony about "a homeless person with AIDS who was being denied public housing due to people's primitive values towards people with AIDS." *Oversight Hearings on H.R. 4498, Americans With Disabilities Act of 1988: Hearing Before the House Comm. on Educ. & Labor* 229 (1988) (statement of James Brooks of the Disability Law Center) (*Oversight Hearings*). In a similar vein, the legislative record includes several reports that persons with disabilities had been discriminatorily excluded from homeless shelters. *Oversight Hearings*, *supra*, at 50 ("our homeless people are kicked out of the homeless shelters if they can even get in") (statement of Ilona Durkin); DE 322 (exclusion of persons with mental illness); CA 216 (exclusion of wheelchair user); CA 223 (same).[9] Congress also heard testimony that state social service agencies "discriminate[d] against people with traumatic brain injury because of their disability." *Oversight Hearings*,

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[9] In *Lane*, the Court relied on the handwritten letters and commentaries collected during forums held by the Task Force on the Rights of Empowerment of Americans with Disabilities. These materials, which were part of the official legislative history of the ADA, were 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*, 541 U.S. at 526. That Appendix cites to the documents by state and Bates stamp number, *Garrett*, 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.

supra, at 50 (statement of Ilona Durkin). Another witness reported that individuals with disabilities who participated in a disability workshop had been told to get sterilized. IL 553.

The legislative record is also replete with examples of disability-based discrimination in vocational rehabilitation and job training programs, including outright denial of services to persons because of their disabilities. Several of these reports of discrimination are summarized in Appendix C to Justice Breyer's dissent in *Garrett*. See, *e.g.*, *Garrett*, 531 U.S. at 392 ("man denied vocational rehabilitation services based on his cerebral palsy") (citing AL 27); *id.* at 395 ("rehabilitation services failed to assist people with all kinds of disabilities") (citing AR 156); *id.* at 409 ("vocational rehabilitation counselors failed to help deaf people find jobs") (citing MD 789).[10] Witnesses at congressional hearings provided similar testimony about discrimination by vocational rehabilitation agencies. See, *e.g.*, *Oversight Hearings*, *supra*, at 39 (statement of Linda Pelletier); *id.* at 50-51 (statement of Ilona Durkin); *id.* at 119, 122 (statement of Cathie Marshall); *id.* at 173, 176 (statement of Lelia Batten, Portland (Maine)

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[10] For other examples of such discrimination, see KY 713; *Garrett*, 531 U.S. at 392, 399, 406-408, 411, 414, 416, 420 (citing AL 31; CO 283; IN 608-609, 655; KS 695; KY 723; LA 752; MI 964; NH 1061; OH 1221, 1224, 1229, 1236; TX 1521).

Coalition for the Psychiatrically Labeled); accord *Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Res. and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2nd Sess. 1080, 1081, 1149, 1203, 1206 (1988) (*Joint Hearing*).

In addition, the legislative record contains voluminous evidence from across the country that persons with disabilities were being denied equal access to social services because of communication barriers. For example, Congress was provided numerous examples in which persons who were deaf or otherwise hard of hearing were denied services because of the lack of interpreters or telecommunication devices necessary for those individuals to communicate with social services agencies. See, *e.g.*, *Garrett*, 531 U.S. at 396 ("state mental health services failed to provide access for deaf people") (citing CA 219); MD 787 (many social service agencies, including "places where people must go for food stamps, welfare, or other needs" were not accessible to deaf persons); HI 456 (state employment services office denied an interpreter to a deaf person who tried to access the agency's services); see also *Garrett*, 531 U.S. at 403, 404 (citing HI 487 and ID 518); AK 71-72; HI 473; ID 541; IN 622; VA 1656. Blind people also confronted barriers when seeking social services. Congress heard testimony that

"applications for various types of public assistance are almost never available in media which a nonprint reader can use." *Oversight Hearings*, *supra*, at 49 (statement of Ellen M. Telker). Consequently, Congress was told, "a blind person may sign releases, consent forms or applications for assistance without understanding or adequately considering the ramifications of the act, possibly waiving important legal rights." *Ibid.*; accord *Joint Hearing*, *supra*, at 1079.

Persons with disabilities also encountered architectural barriers when seeking social services from public agencies. The legislative record contains voluminous evidence that wheelchair users and other persons with mobility impairments were denied social services because public entities were physically inaccessible to applicants. See, *e.g.*, NE 1034 (mental-health boarding houses and shelters for the abused and homeless not accessible to persons with physical disabilities); see also AR 143; UT 1586; *Garrett*, 531 U.S. at 394-395, 413, 416 (citing AZ 131; AR 145, 161; NE 1034; OH 1218).[11]

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[11] In addition, Congress received evidence of several miscellaneous types of disability discrimination in social services. Those examples included reports that "state social service employees placed limits on opportunities for persons with disabilities based on stereotypical assumptions," *Garrett*, 531 U.S. at 402 (citing HI 473), that a state social service agency had failed "to assist persons with head injuries" despite the availability of funding, *id.* at 413 (citing NH 1057), and that a person using a respirator was "denied access to [the] Alaska State Division of Medical Assistance." *Id.* at 393 (citing AK 63).

Congress was well-aware of the importance of social services in helping persons with disabilities achieve independence and become fully integrated into society. As one report to Congress emphasized, "[i]n order to live independently," and to "participat[e] in the day-to-day life of the community," persons with disabilities "require a wide range of support services according to their disability type." *A Report To The President And To The Congress Of The United States: Toward Independence: An Assessment Of Federal Laws And Programs Affecting Persons With Disabilities – With Legislative Recommendations* 43 (National Council On The Handicapped, Feb. 1986).

iii. Gravity Of Harm Of Disability Discrimination In The Provision Of Social Services

The appropriateness of Section 5 legislation, moreover, is not purely a product of the history of discrimination. It is also a function of the "gravity of the harm [the law] seeks to prevent." *Lane*, 541 U.S. at 523. Even when discrimination in the provision of social services does not abridge a fundamental right, the gravity of the harm is substantial.

Discriminatory limitations on access to social services can have enormous consequences for the lives of individuals with disabilities. That is particularly true for those social services that are designed to meet individuals' most basic needs,

such as food and shelter. See, *e.g.*, CA 216 (wheelchair users not allowed in homeless shelter); *Oversight Hearings*, *supra*, at 50 ("our homeless people are kicked out of the homeless shelters if they can even get in"); NE 1034 (mental-health boarding houses and shelters for the abused and homeless not accessible to wheelchair users).

Discrimination in the provision of social services, like the construction barriers that impaired Beverly Jones' ability to engage in her profession in *Lane*, can severely restrict economic opportunities for persons with disabilities. Due in part to such barriers, Congress found that "people with disabilities, as a group * * * [are] severely disadvantaged * * * economically." 42 U.S.C. 12101(a)(6). Congress was told, for instance, that "half of all disabled persons surveyed had incomes of $15,000 or less," while "just over a quarter" of "non-disabled Americans" "had incomes in that bracket." National Council on the Handicapped, *On the Threshold of Independence* 13-14 (1988) (*Threshold*).[12] Additionally, two-thirds of all working-age persons with disabilities were unemployed, and only one quarter worked full-time. *Id*. at 14.

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[12] This report was one of two that Congress commissioned from the National Council on the Handicapped, an independent federal agency, as part of the process leading to the enactment of the ADA. See Rehabilitation Amendments of 1984, Pub. L. No. 98-221, Title I, § 141(a), 98 Stat. 17, 26; Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Title V, § 502(b), 100 Stat. 1807, 1829.

Similarly, discrimination in the provision of social services can deprive persons with disabilities of an independence that most people take for granted and can contribute to the substantial isolation of such individuals. Cf. *Goldberg*, 397 U.S. at 265 (noting that public assistance can be crucial in giving some individuals "the same opportunities that are available to others to participate meaningfully in the life of the community"). Congress was well aware of the social isolation that persons with disabilities often faced. Based on the results of extensive surveys, for example, Congress was told that two-thirds of persons with disabilities had not attended a movie or sporting event in the past year; three-fourths had not seen live theater or music performances; persons with disabilities were three times more likely not to eat in restaurants; and 13% of persons with disabilities never went to grocery stores. *Threshold* 16-17. One of Congress's primary goals in enacting the ADA was to combat this historical isolation of persons with disabilities from the rest of society. See 42 U.S.C. 12101(a)(2).

Accordingly, the evidence set forth above regarding disability discrimination in the provision of social services was more than adequate to support comprehensive prophylactic and remedial legislation.

f. As Applied To Discrimination In The Provision Of Social Services, 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 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 in the social services context. 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*, 541 U.S. at 531. As applied to the social-services context, Title II is a congruent and proportional means of preventing and remedying the unconstitutional discrimination that Congress found exists both in the provision of social services and in other areas of governmental services, many of which implicate fundamental rights. 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).

"The remedy Congress chose is * * * a limited one." *Lane*, 541 U.S. at 531. Title II 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 obligates states to take some affirmative steps to avoid discrimination, Title II "does not require States to compromise their essential eligibility criteria," requires only "'reasonable modifications' that would not fundamentally alter the nature of the service provided," *Lane*, 541 U.S. at 532 (quoting 42 U.S.C. 12132(2)), 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," *ibid*.

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

35.151; 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. 34-36 (1990). 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. at 532.

As applied to discrimination in the social services context, these requirements serve a number of important and valid prophylactic and remedial functions. First, in the context of social services, Title II applies directly to prohibit unconstitutional discrimination against persons with disabilities. For example, the Act enforces the requirements of procedural due process when it requires a state, under certain circumstances, to make accommodations necessary to ensure that persons with disabilities are afforded a "meaningful opportunity to

be heard," *Lane*, 541 U.S. at 532 (internal quotations omitted), before being denied social services. See pp. 25-26, *supra*. In addition, Title II combats discrimination that is based on irrational stereotypes about, or animosity toward, people with disabilities.

Second, given the history of unconstitutional treatment of persons with disabilities in the provision of social services, Congress was entitled to conclude that there exists a real risk that some state officials may continue to make decisions regarding social services based on invidious class-based stereotypes or animus that would be difficult to detect or prove. See 42 U.S.C. 12101(a)(7) (congressional finding that individuals with disabilities "have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society"). In such a situation, the risk of unconstitutional treatment is sufficient to warrant Title II's prophylactic response. See *Hibbs*, 538 U.S. at 735-737 (remedy of requiring "across-the-board" provision of family leave congruent and proportional to problem of employers relying on gender-based stereotypes).

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

Prohibiting disability discrimination in social services programs is also an appropriate means of preventing and remedying discrimination in public services

generally, and is responsive to the enduring effects of the pervasive discrimination against individuals with disabilities that ran throughout the Nation's history, peaking with the "eugenics" movement of the early 20th century. See *Lane*, 541 U.S. at 534-535 (Souter, J., concurring)

"A proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) (internal punctuation omitted). Discrimination in the provision of social services has a direct and profound impact on the ability of persons with disabilities to integrate into the community. For example, when individuals are wrongfully excluded from a vocational rehabilitation program because of their disabilities, see pp. 32-33, *supra*, such discrimination may well interfere with their ability to join the workforce.

Excluding persons with disabilities from participating in such aspects of daily life prevents them from interacting with their non-disabled peers. This segregative effect, in turn, feeds the irrational stereotypes that lead to further discrimination in public services (many implicating fundamental rights), as the absence of persons with disabilities from professions is taken as evidence of their incapacity to serve as teachers, doctors, or lawyers. Cf. *Olmstead* v. *L.C. ex rel.*

Zimring, 527 U.S. 581, 600 (1999) (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life").

Title II's application to the provision of social services 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 persons with disabilities invisible to government officials and planners, thereby creating a self-perpetuating spiral of segregation, stigma, and neglect. See *Hibbs*, 538 U.S. at 736-737 (addressing gender stereotypes); *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).[13] In his testimony before Congress, Attorney General Thornburg explained that a key to ending this spiral "is to increase contact between and among people with disabilities and their more able-bodied peers. And an essential component of that effort is the enactment of a comprehensive law that promotes the integration of people with disabilities into our communities, schools and work places." *Legislative History of Pub. L. No. 101-336: The*

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[13] 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).

Americans with Disabilities Act, Vol. 3, p. 2020 (Comm. Print. 1990). Removing barriers to integration created by discrimination in the provision of social services is an important part of this effort to reduce stereotypes and misconceptions that risk constitutional violations throughout government services, including areas implicating fundamental rights.

Finally, Title II's application to the social services context must be viewed in light of the broader purpose and application of the statute. Congress found that the discrimination faced by persons with disabilities was not limited to a few discrete areas (such as the provision of social services); to the contrary, Congress found that persons with disabilities have been subjected to systematic discrimination in a broad range of public services. See 42 U.S.C. 12101(a)(3). Title II's application to the provision of social services, thus, is part of a broader remedy to a constitutional problem that is greater than the sum of its parts. That is, comprehensively protecting the rights of individuals with disabilities in the social services 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* v. *Doe*, 457

U.S. 202, 216 n.14 (1982). Title II's application to social services programs thus combats an historic and enduring problem of broad-based unconstitutional treatment of the disabled, including programmatic exclusions from public life that sought to accomplish the very "kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish," *ibid.*

II

SECTION 504 IS VALID SPENDING CLAUSE LEGISLATION

On appeal, plaintiffs assert that they have viable claims against the state defendants under Section 504 of the Rehabilitation Act. The state defendants contend that plaintiffs failed to raise those claims below and cannot pursue them on appeal. In the alternative, the state defendants assert that the Rehabilitation Act claims are foreclosed by Eleventh Amendment immunity. The district court's opinion did not address the Rehabilitation Act.

Section 504 provides that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794. Congress has provided that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for

a violation of section 504 of the Rehabilitation Act of 1973 * * * or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. 2000d-7(a)(1).

If this Court reaches the Eleventh Amendment issue with regard to Section 504, the Court should reject the state defendants' argument because it conflicts with Sixth Circuit precedent. This Court already has addressed the issue and concluded that the Eleventh Amendment presents no bar to state liability under Section 504 of the Rehabilitation Act. See *Nihiser* v. *Ohio Environmental Protection Agency*, 269 F.3d 626, 628 (6th Cir. 2001) ("[W]e hold that a plaintiff may sue a State under Section 504 of the Rehabilitation Act."), cert. denied, 536 U.S. 922 (2002). Indeed, every court of appeals in the nation has reached the same conclusion.[14]

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[14] See *Barbour* v. *WMATA*, 374 F.3d 1161 (D.C. Cir. 2004), cert. denied, 544 U.S. 904 (2005); *Pace* v. *Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir.) (en banc), cert. denied, 546 U.S. 933 (2005); *Nieves-Marquez* v. *Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), cert. denied, 537 U.S. 1232 (2003); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820 (9th Cir.), amended by 271 F.3d 910 (9th Cir. 2001), cert. denied, 536 U.S. 924 (2002); *Jim C.* v. *United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert.

(continued...)

Accordingly, the state defendants' argument with respect to this issue is meritless and should be rejected.

CONCLUSION

For the foregoing reasons, the district court's dismissal of the plaintiffs' Title II claims on sovereign immunity grounds should be vacated or, in the alternative, reversed. If this Court addresses plaintiffs' purported claims under Section 504 of the Rehabilitation Act, it should hold that the state defendants do not have Eleventh Amendment immunity as to those claims.

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[14](...continued)
denied, 528 U.S. 1181 (2000). Even the Second Circuit, which has concluded that the application of Section 504 to the states was for a time foreclosed because of concerns about notice to the states of their obligations, has not disputed that Section 504 may generally be applied to the states now and in the future, as those concerns have dissipated. See *Garcia* v. *S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98, 113-115 (2d Cir. 2001).

Respectfully submitted,

GRACE CHUNG BECKER
Acting Assistant Attorney General

GREGORY B. FRIEL
DIRK C. PHILLIPS
Attorneys
U.S. Department of Justice
Civil Rights Divisions
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-4876

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Per WordPerfect 12 software, the brief contains 10,603 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

DIRK C. PHILLIPS
Attorney

DATED: September 3, 2008

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2008, a copy of the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR was served by first class mail, postage prepaid, on counsel of record at the following addresses:

Jeffrey Zibbell
Cheryl Zibbell
306 E. New York Street
Ishpeming, MI 49849

Karen K. Kuchek, Assistant Attorney General
Michigan Department of Attorney General
Public Employment & Elections Division
5th Floor
P.O. Box 30736
Lansing, MI 48909

Jason R. Evans
Office of the Attorney General
Tort Defense Division
P.O. Box 30736
Lansing, MI 48909-8236

Cheryl L. Hill
Marquette County Prosecutor's Office
234 W. Baraga Avenue
Suite 254
Marquette, MI 49855

Thomas L. Auth, Jr.
Ronald Scott Lederman
Sullivan, Ward, Asher & Patton
25800 Northwestern Highway
Suite 1000 Maccabees Center
Southfield, MI 48075

Caryn A. Gordon, Esq.
Garan Lucow Miller
1000 Woodbridge Street
Detroit, MI 48207

John E. Heikkila
Garan Lucow Miller
1440 W. Ridge Street
Marquette, MI 49855

DIRK C. PHILLIPS
Attorney