No. 04-3263

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BILL M.,by and through is father and natural guardian, William M.; JOHN DOE, by and through his mother and natural guardian, Marcia V.; JANE S., by and through her mother and natural guardian, Patricia S.; KEVIN V., by and through his mother and legal guardian, Kathy V.; JENNIFER T., by and through her parents and legal guardians, Sharon and Greg T.; MARCUS J., by and through his parents and legal guardians, Julie and Miles J.; and on behalf of themselves and all other similarly situated,

Plaintiffs-Appellees

v.

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT; NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BRIEF FOR THE UNITED STATES AS INTERVENOR

R. ALEXANDER ACOSTA
Assistant Attorney General

JESSICA DUNSAY SILVER
KEVIN RUSSELL
Attorneys
Department of Justice
Civil Rights Division - Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 305-4584

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JURISDICTIONAL STATEMENT

Plaintiffs' 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 August 6, 2004, the district court denied defendants' motion to dismiss some of plaintiffs' claims on Eleventh

Amendment immunity grounds. Defendants filed a timely notice of appeal on September 7, 2004. 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 CASE

1. Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, 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.

In enacting the ADA, Congress instructed the Attorney General to promulgate regulations to interpret and implement Title II of the Act. See 42 U.S.C 12134. The

Title II regulations require, among other things, that a "public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d). In *Olmstead* v. *L.C.*, 527 U.S. 581 (1999), the Supreme Court interpreted Title II in light of the integration regulation and held that "[u]njustified isolation" of individuals with disabilities in institutions "is properly regarded as discrimination based on disability," in violation of the ADA. *Id.* at 597. At the same time, the plurality recognized that the State's responsibility under the Act "is not boundless." *Id.* at 603 (plurality); see also *id.* at 607 (Stevens, J., concurring) (same). States need only make "reasonable modifications" to avoid discrimination, which does not include changes that would "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7); see *Olmstead*, 527 U.S. at 603 (plurality); *id.* at 607 (Stevens, J., concurring).

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

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, imposes the same antidiscrimination requirement on recipients of federal funding. See *Olmstead*, 527 U.S. at 590-592. Congress expressly conditioned receipt of federal

funds on waiver of the States' Eleventh Amendment immunity to private suits to enforce Section 504 in federal court. See 42 U.S.C. 2000d-7.

2. Plaintiffs are a group of individuals with mental retardation and other developmental disabilities who seek medical services from the State of Nebraska (State) through programs that receive federal financial assistance under the Medicaid Act, 42 U.S.C. 1396 *et seq.* See App. 1. Among other things, plaintiffs allege that the State is violating Title II of the ADA and Section 504 of the Rehabilitation Act, by offering plaintiffs medical services in institutional settings when services could be provided in less restrictive community placements without fundamentally altering the nature of the State's medical programs or imposing an undue financial or administrative burden. App. 27-28.[1] Plaintiffs sued the state agencies responsible for administering the State's Medicaid programs as well as various state officials in their official capacities, seeking declaratory and prospective injunctive relief. See App. at 5-6, 35-39.

On October 17, 2003, the State moved to dismiss plaintiffs' Title II claims against the state agencies, arguing that Congress did not validly abrogate the State's

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[1] Plaintiffs have also brought claims under the Medicaid Act and its implementing regulations, the Fourteenth Amendment, the Nebraska Constitution, and various state laws and regulations. See App. 28-35. None of those claims is at issue in this appeal.

sovereign immunity to those claims. The State did not, however, raise an Eleventh Amendment challenge to plaintiffs' Section 504 claims and conceded that plaintiffs could pursue their Title II claims against the state officials under *Ex parte Young*, 209 U.S. 129 (1908).[2] On August 6, 2004, the district court denied the State's motion to dismiss. Having "carefully reviewed the arguments of the defendants," the district court concluded that "at this stage in the proceedings dismissal would be inappropriate." App. 46. The State then filed this interlocutory appeal.

SUMMARY OF ARGUMENT

Although the State proceeds from the assumption that the district court rejected its claim of sovereign immunity on the merits, it appears that the court simply postponed adjudication of the Eleventh Amendment issue until later in the proceedings. See App. 46. Such a course is appropriate in this case. The State has challenged the constitutionality of Title II's abrogation provision, but does not contest plaintiffs' right to pursue essentially identical claims under Section 504. Accordingly, even if the district court held the Title II abrogation provision unconstitutional in this context, the State would still be required to defend against the same legal and factual allegations under the parallel provisions of the

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[2] The State raised other non-Eleventh Amendment grounds for dismissal of these and other claims, but none of those grounds is at issue in this appeal.

Rehabilitation Act. If plaintiffs succeed in their Section 504 claims, there would be no need to decide their Title II claims or the State's Eleventh Amendment objection to those claims. Conversely, if plaintiffs cannot prove a violation of Section 504, they would not be able to prove a violation of Title II either and, again, there would be no need to address the State's Eleventh Amendment argument. Thus, deferring a ruling on the State's Eleventh Amendment challenge to Title II until after adjudication of the Section 504 claims will avoid the need to decide a hard constitutional question without imposing any additional litigation burdens on the State. Under these unique circumstances, the district court properly declined to grant the State's motion to dismiss at this time.

In any event, the State's Eleventh Amendment argument lacks merit. Congress may abrogate a State's sovereign immunity pursuant to a valid exercise of its power to enforce the Fourteenth Amendment. Viewed in light of *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), Title II of the Americans with Disabilities Act is valid Fourteenth Amendment legislation as applied to cases implicating institutionalization. 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." *Id.* at 1989. The history of unconstitutional discrimination, the Court held, authorized

Congress to enact prophylactic legislation to address "public services" generally, see *id.* at 1992, including institutional services for people with disabilities. In any case, there is ample support for Congress's decision to extend Title II to the context of institutionalization.

Title II, as it applies to institutionalization, is a congruent and proportionate response to that record. Title II is carefully tailored to respect the State's legitimate interests while protecting against the risk of unconstitutional discrimination in this area and remedying the lingering effects of discrimination against people with disabilities in the context of institutionalization. Title II only requires community placements when a State's own treating professionals recommend it, and only then if a placement can be provided without imposing an undue burden on the State or a fundamental alteration of the State's programs. Thus limited, Title II often applies in this context to prohibit discrimination based on hidden invidious animus that would be difficult to detect or prove directly. Moreover, in integrating people with disabilities into community settings, Title II acts to relieve the irrational 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 exists both in institutional settings and in other areas of government services, represent a

good faith effort to make meaningful the guarantees of the Fourteenth Amendment, not an illicit attempt to rewrite them. Accordingly, Congress validly abrogated the State's sovereign immunity to plaintiffs' Title II claims in this case.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DECLINED TO RULE ON THE STATE'S ELEVENTH AMENDMENT CHALLENGE AT THIS STAGE IN THE PROCEEDINGS

Although the district court's order is not entirely clear, it appears that the court did not reject the State's Eleventh Amendment argument, but simply declined to rule on it at this point in the case. The court stated that having "carefully reviewed the arguments of the defendants, *at this stage in the proceedings* dismissal would be *inappropriate*." App. 46 (emphasis added). Thus, the Court did not rule out acceptance of the State's argument at a later stage in the proceedings. Moreover, the court's use of the word "inappropriate" further suggests an exercise of discretion regarding the timing of its ruling, rather than a ruling on the merits of the motion itself. Understood as a decision to postpone adjudication of the State's Eleventh Amendment claims, the district court's order was entirely appropriate under the circumstances of this case.

The State's Eleventh Amendment argument challenges the constitutionality of Congress's abrogation of the State's sovereign immunity to claims under Title II. Considering a constitutional challenge to an act of Congress is "the gravest and most delicate duty that [a] Court is called on to perform." *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable." *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944). 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).

In this case, postponing adjudication of the State's Eleventh Amendment challenge will avoid the need to decide the constitutional question. Plaintiffs have brought parallel claims under Section 504 of the Rehabilitation Act, 29 U.S.C. 794, which provides the same rights and remedies as the ADA in this area. See *Olmstead* v. *L.C.*, 527 U.S. 581, 592 (1999) (Title II integration regulation same as predecessor requirement under Section 504, 28 C.F.R. 41.51(d)); 42 U.S.C. 12133 (Title II remedies same as those available under Section 504). The State has not

challenged the constitutionality of Section 504,[3] nor sought dismissal of these claims on Eleventh Amendment grounds. If plaintiffs prevail on their claims under Section 504, it will be unnecessary to adjudicate their claims against the state agencies under Title II. On the other hand, if plaintiffs cannot establish a violation of Section 504, they would not be able to prove a violation of Title II either and, again, the court can avoid the Eleventh Amendment issue by ruling in the State's favor on the merits of the Title II claim. See *Northern States Power Co.* v. *Federal Transit Admin.*, 358 F.3d 1050, 1057-1058 (8th Cir. 2004) (declining to rule on Eleventh Amendment defense when judgment properly issued in favor of defendant on the merits).

Thus, regardless of the outcome, the district court's resolution of plaintiffs' Section 504 claims will avoid the need to rule on the State's constitutional challenge to the Title II abrogation provision. In these circumstances, basic principles of judicial restraint and constitutional avoidance strongly support the district court's decision to deny the State's motion to dismiss at this point in the litigation.[4]

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[3] See *Doe* v. *Nebraska*, 345 F.3d 593 (8th Cir. 2003) (rejecting constitutional challenge to Section 504); *Jim C.* v. *Arkansas Dep't of Educ.*, 235 F.3d 1079 (8th Cir. 2000) (en banc) (same), cert. denied, 533 U.S. 949 (2001).

[4] If this Court were uncertain whether the district court intended to defer adjudication of the State's motion, the same principles of constitutional avoidance should lead this Court to remand the case to the district court with instructions to

(continued...)

The fact that the State's constitutional claim is grounded in the Eleventh Amendment does not require a different result, given the unique circumstances of this case. It is true that Eleventh Amendment claims ordinarily must be decided early in the litigation and, if rejected, permitted immediate review by interlocutory appeal. See, *e.g.*, *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993). This is because the Eleventh Amendment confers an immunity from suit, not just a defense against liability. See *ibid.* However, in this case, the State does not raise an Eleventh Amendment objection to litigation under Section 504. Nor does the State deny that the Section 504 litigation will resolve exactly the same factual and legal issues that arise under Title II. Accordingly, deciding the State's Eleventh Amendment claims at this juncture will not advance any Eleventh Amendment interest in avoiding the indignity or burdens of unauthorized litigation against the State.

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[4](...continued)
amend its order to make clear that the State's motion is denied without prejudice.

II

CONGRESS VALIDLY ABROGATED THE STATE'S ELEVENTH AMENDMENT IMMUNITY TO CLAIMS UNDER TITLE II OF THE ADA IN THE INSTITUTIONALIZATION CONTEXT

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

A. The Supreme Court's Decision In Tennessee *v.* Lane *Supercedes This Court's Prior Decision In* Alsbrook *v.* City Of Maumelle

In arguing to the contrary, the State relies on this Court's prior decision in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999) (en banc), cert. granted, 528 U.S. 1146, cert. dismissed, 529 U.S. 1001 (2000), which held that Title II was invalid Fourteenth Amendment legislation in all its applications. That holding, however, has been superceded by the Supreme Court's more recent decision in *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004).[5] Accordingly, the State's Eleventh Amendment claim must now be considered in light of *Lane*. See *Young* v. *Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (panel no longer bound by prior panel opinion when intervening Supreme Court case is inconsistent with previous opinions).

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. *Lane*, 124 S. Ct. at 1982. Lane was a defendant in a criminal proceeding held on the second

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[5] *Alsbrook* was also decided prior to the Supreme Court's decision *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721 (2003), which held that the family medical leave provision of the Family Medical Leave Act, 29 U.S.C. 2612(a)(1)(C), is valid Fourteenth Amendment legislation.

floor of a courthouse with no elevator. *Ibid.* "Jones, a certified court reporter, alleged that she had not been able to gain access to a number of county courthouses, and, as a result, has lost both work and an opportunity to participate in the judicial process." *Id.* at 1983. The State argued that Congress lacked the authority to abrogate the State's Eleventh Amendment immunity to these claims, a position accepted by this Court in *Alsbrook*. See 184 F. 3d at 1010. The Supreme Court in *Lane* disagreed. See 124 S. Ct. at 1994.

To reach this conclusion, the Court applied the three-part analysis for Fourteenth Amendment legislation created by *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). The Court considered: (1) the "constitutional right or rights that Congress sought to enforce when it enacted Title II," *Lane*, 124 S. Ct. at 1988; (2) whether there was a history of unconstitutional disability discrimination to support Congress's determination that "inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id.* at 1992; and (3) "whether Title II is an appropriate response to this history and pattern of unequal treatment," as applied to the class of cases implicating access to judicial services. *Ibid.*

With respect to the first question, the Court found that Title II enforces rights under the Equal Protection Clause as well as an array of rights subject to heightened

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

The Supreme Court's Fourteenth Amendment analysis in *Lane* differed substantially from the analysis applied by this Court in *Alsbrook*. To begin with, *Alsbrook* held that the proper "scope of our Section 5 inquiry [is] Title II of the ADA" as a whole. 184 F.3d at 1006 n.11. The Supreme Court, in contrast, declined to "examine the broad range of Title II's applications all at once, and to treat that breadth as a mark of the law's invalidity." 124 S. Ct. at 1992. Instead, the Court concluded that the only question before it was "whether Congress had the power under § 5 to enforce the constitutional right of access to the courts." *Id.* at 1993.

Even beyond the scope of review, the Supreme Court's decision in *Lane* rejected several critical aspects of the analysis in *Alsbrook*. For example, in *Alsbrook*, this Court reviewed the requirements of Title II only in relation to the Equal Protection Clause's prohibition against irrational discrimination. See 184 F.3d at 1008-1009. *Lane*, however, made clear that Title II enforces not only the Equal Protection Clause but also a variety of other constitutional rights. 124 S. Ct. at 1988. Similarly, *Alsbrook* held that Congress lacked a sufficient historical predicate for the enactment of Title II's prophylactic measures. See 184 F.3d at 1009. The Supreme Court, on the other hand, held that Congress identified a "volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," 124 S. Ct. at 1991, making it "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id.* at 1992. In reaching the contrary conclusion, *Alsbrook* considered only evidence of discrimination by State governments. See 184 F.3d at 1009 & n.17. *Lane*, however, specifically rejected that view as based on "the mistaken premise that a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves." 124 S. Ct. at 1991 n.16. This Court also declined to give deference to Congress's

finding of pervasive discrimination in public services, see 184 F.3d at 1007-1008, but *Lane* relied prominently on the very same findings, see 124 S. Ct. at 1992.

Accordingly, *Alsbrook* has been superceded and this Court is compelled to follow the precedent established by the Supreme Court in *Lane*. See *Hayes*, 218 F.3d at 853. Viewed in light of *Lane*, Title II is valid Fourteenth Amendment legislation as applied to cases relating to institutionalization.[6]

B. Constitutional Rights Implicated

Title II enforces the Equal Protection Clause's "prohibition on irrational disability discrimination," as well as "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Lane*, 124 S. Ct. at 1988. In the context of this case, Title II acts to enforce the Equal Protection Clause's prohibition against arbitrary treatment based on irrational

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[6] 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 in the institutionalization context, 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. 124 S. Ct. at 1992.

stereotypes or hostility,[7] as well as the heightened constitutional protection applied to the "treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment, *e.g.*, *Jackson* v. *Indiana*, 406 U.S. 715 (1972); [and] the abuse and neglect of persons committed to state mental health hospitals, *Youngberg* v. *Romeo*, 457 U.S. 307 (1982)." *Id.* at 1989 (parallel citations omitted). See also *O'Connor* v. *Donaldson*, 422 U.S. 563, 573-576 (1975) (unconstitutional institutionalization); *Thomas S. by Brooks* v. *Flaherty*, 902 F.2d 250 (4th Cir.) (confinement when appropriate community placement available), cert. denied, 498 U.S. 951 (1990); *Clark* v. *Cohen*, 794 F.2d 79 (3d Cir.) (same), cert. denied, 479 U.S. 962 (1986).

As was true of the right to access to courts at issue in *Lane*, "ordinary considerations of cost and convenience alone cannot justify" institutionalization decisions or the denial of institutionalized persons accommodations necessary to ensure their basic rights. *Lane*, 124 S. Ct. at 1994; see *e.g.*, *O'Connor*, 422 U.S. at

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[7] Even under rational basis scrutiny, "mere negative attitudes, or fear" alone cannot justify disparate treatment of those with disabilities. *University of Ala.* v. *Garrett*, 531 U.S. 356, 367 (2001). A purported rational basis for treatment of the disabled will also fail if the State does not accord the same treatment to other groups similarly situated, *id.* at 366 n.4; *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447-450 (1985), if it is based on "animosity" towards the disabled, *Romer* v. *Evans*, 517 U.S. 620, 634 (1996), or if it simply gives effect to private biases, *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

575-576; *Youngberg*, 457 U.S. at 324-325. Finally, as described below, the integration mandate of Title II assists in the prevention of constitutional violations throughout the range of government services, many of which implicate fundamental constitutional rights. See *Lane*, 124 S. Ct. at 1998.

C. Historical Predicate

"Whether Title II validly enforces these constitutional rights is a question that 'must be judged with reference to the historical experience which it reflects.'" *Lane*, 124 S. Ct. at 1988. Accordingly, in *Lane*, the Court reviewed the historical experience reflected in Title II and concluded that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." 124 S. Ct. at 1989. The Court remarked on the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," *id.* at 1991, and concluded that it is "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *ibid.*

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

Although *Lane* ultimately upheld Title II as valid Fourteenth Amendment legislation only as applied to access to courts, its conclusions regarding the

historical predicate for Title II are not limited to that context. The 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 124 S. Ct. at 1992-1993. 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 1990, but also violations of constitutional rights in the context of voting, jury service, the penal system, public education, law enforcement, and institutionalization, *id.* at 1989. That record, the Court concluded, supported prophylactic legislation to address discrimination in "public services" generally. *Id.* at 1992.[8]

Thus, the adequacy of Title II's historical predicate to support prophylactic legislation addressing discrimination in public services, including institutional services for people with disabilities, is no longer open to dispute. See *Miller* v.

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

King, 384 F.3d 1248, 1270-1272 (11th Cir. 2004). But even if it were, there is an ample historical basis for extending Title II to disability discrimination relating to institutionalization.

2. Historical Discrimination Against People With Disabilities Subject To Institutionalization

Of particular relevance to this case, the Supreme Court expressly acknowledged and cited the well-documented pattern of unconstitutional treatment of and discrimination against persons with disabilities in the context of institutionalization. See *Lane*, 124 S. Ct at 1989 ("The historical experience that Title II reflects is also documented in this Court's cases, which have identified unconstitutional treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment * * * [and] the abuse and neglect of persons committed to state mental health hospitals.") (citations omitted); see also *id.* at 1989 n.10 ("The undisputed findings of fact in *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1 (1981), provide another example of such mistreatment. See *id.* at 7 ('Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the 'habilitation' of the retarded').") (parallel citations omitted).

Indeed, Congress and the Supreme Court have long acknowledged the Nation's "history of unfair and often grotesque mistreatment" of persons with

disabilities. *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 454 (1985) (Stevens, J., concurring); see also *Olmstead* v. *L.C.*, 527 U.S. 581, 608 (1999) (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 (noting that "[d]oubtless, 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, 295 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. United States Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* 20 (1983) (*Spectrum*). A cornerstone of that movement was forced institutionalization directed at separating individuals with disabilities from the community at large.[9] "A regime of state-mandated segregation" emerged in which "[m]assive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the

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[9] See *Spectrum* 19-20; see also *Employees of Dep't of Pub. Health & Welfare* v. *Department of Pub. Health & Welfare*, 411 U.S. 279, 284 n.2 (1973) (noting that "the institutionalization of the insane became the standard procedure of the society" and a "cult of asylum swept the country") (quoting D. Rothman, *The Discovery of the Asylum* 130 (1971)).

retarded and 'nearly extinguish their race.'" *Cleburne*, 473 U.S. at 462 (Marshall, J., concurring in the judgment in part).[10] State statutes provided for the involuntary institutionalization of persons with mental disabilities and, frequently, epilepsy.[11] Some States also required public officials and parents, sometimes at risk of criminal prosecution, to report the "feeble-minded" for institutionalization. *Spectrum* 20, 33-34; T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 402 (1991). Additionally, almost every State accompanied institutionalization with compulsory sterilization and prohibitions of marriage. *Cleburne*, 473 U.S. at 462-463 (Marshall, J., concurring in the judgment in part); see also *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) (upholding compulsory sterilization law "in order to prevent our being swamped with incompetence."; "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from

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[10] See also 473 U.S. at 463 n.9 (noting Texas statute, enacted in 1915 (and repealed in 1955), with stated purpose of institutionalizing the mentally retarded to relieve society of "the heavy economic and moral losses arising from the existence at large of these unfortunate persons").

[11] See *Spectrum* 19; T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 400 (1991); Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979).

continuing their kind. * * * Three generations of imbeciles are enough.").[12]

In considering the ADA, Congress also heard extensive testimony regarding unconstitutional treatment and unjustified institutionalization of persons with disabilities in state facilities. See, *e.g.*, 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 1203 (Comm. Print 1990) (Leg. Hist.) (Lelia Batten) (state hospitals are "notorious for using medication for controlling the behavior of clients and not for treatment alone. Seclusion rooms and restraints are used to punish clients."); *id.* at 1262-1263 (Eleanor C. Blake) (detailing the "minimal, custodial, neglectful, abusive" care received at state mental hospital, and willful indifference resulting in rape); *Spectrum* 32-35; see also California Att'y Gen., *Commission on Disability: Final Report* 114 (Dec. 1989). In addition, Congress drew upon its prior experience investigating institutionalization in passing the Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. 1997 *et seq.*, the Developmental Disabilities Act of 1984, 42 U.S.C. 6000 *et seq.*, and the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. 10801 *et seq.*

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[12] See also 3 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 2242 (Comm. Print 1990) (James Ellis); M. Burgdorf & R. Burgdorf, *A History of Unequal Treatment*, 15 Santa Clara Lawyer 855, 887-888 (1975).

Moreover, the Department of Justice's investigations in the 1980s under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, further documented egregious and flagrant denials of constitutional rights by state-run institutions for individuals with disabilities.[13] Unconstitutional uses of physical and medical restraints were commonplace in many institutions. For example, investigations frequently found institutions strapping mentally retarded residents to their beds in five-point restraints for the convenience of staff.[14] One facility forced mentally retarded residents to inhale ammonia fumes as punishment for misbehavior.[15] Residents in other facilities lacked adequate food, clothing and

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[13] In the years immediately preceding enactment of the ADA, the Department of Justice found unconstitutional treatment of individuals with disabilities in state institutions for the mentally retarded or mentally ill in more than 25 States. The results of those investigations were recorded in findings letters required by 42 U.S.C. 1997b(a).

[14] See Notice of Findings Regarding Los Lunas Hospital and Training School 2 (1988); Notice of Findings Regarding Fairview Training Center 4-5 (1985) (residents frequently placed in physical restraints and medicated in lieu of being given training or treatment); Notice of Findings Regarding Westboro State Hospital 7 (1986) (geriatric patients in psychiatric hospital frequently given sedating drugs "as punishment for antisocial behavior, for the convenience of staff, or in lieu of treatment").

[15] See Notice of Findings Regarding Los Lunas Hospital and Training School 2 (1988).

sanitation.[16] Many state facilities failed to provide basic safety to residents, resulting in serious physical injuries, sexual assaults, and even deaths.[17] Others were denied minimally adequate medical care, leading to serious medical complications and

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[16] See, *e.g.*, Notice of Findings Regarding Hawaii State Hospital 2-3 (1990) (residents lacked adequate food, had to wrap themselves in sheets for lack of clothing, and were served food prepared in a kitchen infested with cockroaches); Notice of Findings Regarding Westboro State Hospital 3 (1986) (investigation found that the "smell and sight of urine and feces pervade not only toilet areas, but ward floors and walls as well * * *. Bathrooms and showers were filthy. Living areas are infested with vermin. There are consistent shortages of clean bed sheets, face cloths, towels, and underwear."); Notice of Findings Regarding Fairview Training Center 6, 9 (due to lack of adequate staffing, many residents suffer from "the unhealthy effects of poor oral and other bodily hygiene. We observed several residents who were laying or sitting in their own urine or soiled diapers or clothes," while 70% of residents suffered from gum disease and 35% "had pinworm infection, a parasite which is spread by fecal and oral routes in unclean environments").

[17] Notice of Findings Regarding Los Lunas Hospital and Training School 3 (1988) (facility failed to provide minimally adequate supervision and safety, and as a result "a woman was raped, developed peritonitis and died"); Notice of Findings Regarding Rosewood Center 4 (1984) (inadequate supervision of residents contributed to rapes and sexual assaults of several residents; profoundly retarded resident left unsupervised drowned in bathtub; another died of exposure after leaving the facility unnoticed); Notice of Findings Regarding Fairview Training Center 3 (1985) (Department found "numerous residents with open wounds, gashes, abrasions, contusions and fresh bite marks" due to lack of training for residents and lack of adequate supervision by staff); Notice of Findings Regarding Northville Regional Psychiatric Center 2-3 (1984) (one resident died after staff placed him in a stranglehold and left him unconscious on seclusion room floor for 15-20 minutes before making any effort to resuscitate him); *id.* at 3 (several other residents found dead with severe bruising, many other incidents of "rape, assault, threat of assault, broken bones and bruises" found).

further deaths.[18]

This record demonstrates that "Congress was justified in concluding that this 'difficult and intractable proble[m]' warranted 'added prophylactic measures in response.'" *Lane*, 124 S. Ct. at 1993 (quoting *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 737 (2003)).

D. Congruence And Proportionality

"The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment." *Lane*, 124 S. Ct. at 1992. To answer that question, this Court must decide whether Title II is congruent and proportionate legislation as applied to the class of cases implicating the constitutional rights of institutionalized persons.

As was true of access to courts, the "unequal treatment of disabled persons" in the area of institutions "has a long history, and has persisted despite several

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[18] See, *e.g.*, Notice of Findings Regarding Enid and Pauls Valley State Schools 2 (1983) (inadequate medical care and monitoring contributed to deaths of six residents); Notice of Findings Regarding Manteno Mental Health Center 4 (1984) (investigation of state mental health facility found "widespread occurrence of severe drug side-effects" that could be "debilitating or life-threatening" going "unmentioned in patient records, unrecognized by staff, untreated, or inappropriately treated"); Notice of Findings Regarding Napa State Hospital 2-3 (1986) (facility staff "violated all known standards of medical practice by prescribing psychotropic medications in excessively large daily doses" and by failing to monitor patients for serious, irreversible side effects).

legislative efforts." *Lane*, 124 S. Ct. at 1993; see *id.* at 1991; *Olmstead*, 527 U.S. at 600 (describing prior statutes). Thus, Congress faced a "difficult and intractable proble[m]," *Lane*, 124 S. Ct. at 1993, which it could conclude would "require powerful remedies." *Id.* at 1989.

Nonetheless, the remedy imposed by Title II is "a limited one." *Lane*, 124 S. Ct. at 1993. 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," *ibid.*, and does not require States to "undertake measures that would impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service," *id.* at 1994. See also *Olmstead*, 527 U.S. at 603-606 (plurality).

Title II's carefully circumscribed integration mandate is consistent with the commands of the Constitution in this area. Congress was well aware of the long history of state institutionalization decisions being driven by insufficient or illegitimate state purposes, irrational stereotypes, and even outright hostility toward people with disabilities. See Section II(C)(2), *supra*. Title II provides a proportionate response to that history, congruent with the requirements of the Due Process and Equal Protection Clauses, by requiring the State to treat people with

disabilities in accordance with their individual needs and capabilities. Compare *Olmstead*, 527 U.S. at 602, with *O'Connor*, 422 U.S. at 575-576 (requiring individualized assessment prior to involuntary commitment); *Parham* v. *J.R.*, 442 U.S. 584, 600, 606-607 (1979) (same for voluntary commitment of a child); *Youngberg*, 457 U.S. at 321-323 (requiring individualized consideration in context of conditions of confinement within institutions).

Moreover, given the history of unconstitutional compulsory institutionalization, Congress was entitled to conclude that there exists a real risk that some state officials may continue to make placement decisions based on hidden invidious class-based stereotypes or animus that would be difficult to detect or prove. See *Hibbs*, 538 U.S. at 732-733, 735-736. Title II appropriately balances the need to protect against that risk and the State's legitimate interests. *Olmstead* generally permits a State to limit services to an institutional setting when the State's treating professionals determine that a restrictive setting is necessary for an individual patient, or when providing a community placement would impose unwarranted burdens on the State's ability to "maintain a range of facilities and to administer services with an even hand." 527 U.S. at 605 (plurality). But when a State persistently refuses to follow the advice of its own professionals and is unable to demonstrate that its decision is justified by sufficient administrative or financial

considerations, the risk of unconstitutional treatment is sufficient to warrant Title II's prophylactic response. Compare *Hibbs*, 538 U.S. at 736-737 (Congress may respond to risk of "subtle discrimination that may be difficult to detect on a case-by-case basis" by "creating an across-the-board, routine employment benefit for all eligible employees").[19]

Title II also serves broader remedial and prophylactic purposes. The integration accomplished by Title II is a proper remedy for the continuing segregative effects of the historical exclusion of people with disabilities from their communities, schools, and other government services. See *Lane*, 124 S. Ct. at 1989-1990; *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) ("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.") (internal punctuation omitted). It is also a reasonable prophylaxis against the risk of future unconstitutional discrimination in government services. "[I]nstitutional

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[19] The integration mandate is also a proportionate response to the history of widespread "abuse and neglect of persons committed to state mental health hospitals." *Lane*, 124 S. Ct. at 1989. Congress could justifiably respond to this record of unconstitutional treatment within institutions by requiring reasonable steps to remove from such settings those who can be adequately treated in community settings. The reasonable modification and other Title II requirements further ensure that those who remain in State care are afforded the individualized treatment that is often necessary to ensure basic safety and humane conditions.

placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Olmstead*, 527 U.S. at 600. Much of the discrimination Congress documented occurred in the context of individual state officials making discretionary decisions driven by just such "false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies," H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 30 (1990). Congress could reasonably expect that Title II's integration mandate would reduce the risk of unconstitutional state action by ameliorating one of its root causes through "increasing social contact and interaction of nonhandicapped and handicapped people." *Spectrum* at 43.

Thus, the integration mandate plays an important role in Title II's larger goal of relieving the isolation and invisibility of people with disabilities that is both a legacy of past unconstitutional treatment and a contributor to continuing denials of basic constitutional rights. Accordingly, in the context presented by this case, Title II "cannot be said to be 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Lane*, 124 S. Ct. at 1994.

CONCLUSION

The State's challenge to the constitutionality of Title II of the Americans with Disabilities Act should be rejected.

Respectfully submitted,

R. ALEXANDER ACOSTA
Assistant Attorney General

JESSICA DUNSAY SILVER
KEVIN RUSSELL
Attorneys
Department of Justice
Civil Rights Division - Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
Voice: (202) 305-4584
Facsimile: (202) 514-8490

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Pursuant to Fed. R. App. P. 32(a)(7)(C) and 8th Cir. R. 28A(c), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

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KEVIN RUSSELL
Attorney

Date: November 26, 2004

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I certify that two copies of the above BRIEF FOR THE UNITED STATES AS INTERVENOR, along with a computer disk containing an electronic version of the brief, were served by first-class mail, postage prepaid, on November 26, 2004, on the following parties:

Bradford E. Kistler
David W. Rowe
KINSEY, RIDENOUR LAW FIRM
P.O. Box 85778
Lincoln, NE 68501-5778

Bruce G. Mason
Dianne D. DeLair
Shirley A. Mora James
NEBRASKA ADVOCACY SERVICES
134 South 13th Street
Suite 600
Lincoln, NE 68508

Douglas D. Dexter
ATTORNEY GENERAL'S OFFICE - NEBRASKA
P.O. Box 98920
Lincoln, NE 68509-8920

_____
KEVIN RUSSELL
Attorney