UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISABILITY RIGHTS COUNCIL OF GREATER WASHINGTON, et al.,	)	
Plaintiffs	)	
v.	)	Case No. 1:04-cv-00498-HHK-JMF
WMATA, et al.,	)	
Defendants	)	

UNITED STATES' RESPONSE TO WMATA'S MOTION TO DISMISS ON ELEVENTH AMENDMENT GROUNDS

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

TABLE OF AUTHORITIES (continued): **PAGE**

TABLE OF AUTHORITIES (continued): **PAGE**

TABLE OF AUTHORITIES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

REGULATIONS:

REGULATIONS (continued): **PAGE**

LEGISLATIVE HISTORY:

LEGISLATIVE HISTORY (continued): **PAGE**

MISCELLANEOUS:

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Intervenor United States of America respectfully submits this Memorandum in Opposition to the Washington Metropolitan Area Transportation Authority's (WMATA) Motion to Dismiss Second Amended Complaint filed on March 30, 2006. In its motion, WMATA asserts that it is immune under the Eleventh Amendment from private suits under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq*. After this Court certified the constitutional question to the Attorney General, the United States intervened in this case pursuant to 28 U.S.C. 2403(a) in order to defend the constitutionality of the abrogation of Eleventh Amendment immunity for claims under Title II.

STATEMENT OF THE ISSUE

Whether the statutory provision abrogating Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.*, is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, as applied to the class of cases implicating access to public transportation.

INTRODUCTION

1. The ADA established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons 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). In addition, Congress found that persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons 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.

42 U.S.C. 12101(a)(7). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment," to enact the ADA. 42 U.S.C. 12101(b)(4).

The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by state and local governmental entities in the operation of public services, programs, and activities; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This case arises under Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components, 42 U.S.C. 12131(1)(A) and (B). Title II may be enforced through private suits against public entities, 42 U.S.C. 12133, and Congress expressly abrogated the States' Eleventh Amendment immunity to such suits in federal court, 42 U.S.C. 12202. Title II prohibits governments from, among other things, denying a benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii), and (vii).[1] In addition, while there is no absolute duty to accommodate individuals with a disability, a public entity must make reasonable modifications to its policies, practices, or procedures if necessary to avoid the exclusion of

[1] Congress instructed the Attorney General to issue regulations to implement Title II, based on regulations previously promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. I 2001). See 42 U.S.C. 12134.

individuals with disabilities, unless the accommodation would impose an undue financial or administrative burden on the government, or would fundamentally alter the nature of the service. See 28 C.F.R. 35.130(b)(7), 35.150(a)(2) and (3). The ADA does not normally require a public entity to make its existing physical facilities accessible. 28 C.F.R. 35.150(a)(1). Public entities need only ensure that "each service, program, or activity * * * when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). However, buildings constructed or altered after Title II's effective date must be designed to provide accessibility. 28 C.F.R. 35.151.

2. Plaintiffs also claim violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504). That provision states that "[n]o otherwise qualified individual with a disability in the United States * * * 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(a). The provision applies to a "program or activity," a term defined to include "all of the operations" of a state agency, State, or public system of higher education "any part of which is extended Federal financial assistance." 29 U.S.C. 794(b). Section 504 may be enforced through private suits against States or state agencies providing programs or activities receiving federal funds. See *Barnes* v. *Gorman*, 536 U.S. 181, 185 (2002).

The D.C. Circuit held in *Barbour* v. *WMATA*, 374 F.3d 1161 (D.C. Cir. 2004), cert. denied, 544 U.S. 904 (2005) that, by applying for and accepting federal financial assistance, WMATA waived its Eleventh Amendment immunity to suits under Section 504. Thus, WMATA is not immune to plaintiffs' Section 504 claims.

3. According to their complaint, plaintiffs are a non-profit group that advocates for the rights of persons with disabilities, several individuals with disabilities, and a putative class of individuals with disabilities. Plaintiffs brought this suit against WMATA and the director of WMATA in his official capacity, alleging that the paratransit services provided by WMATA are not comparable to the public transportation services provided to persons who do not have disabilities, and, therefore, violate Title II of the ADA and Section 504 of the Rehabilitation Act. Specifically, plaintiffs allege that WMATA has, *inter alia*, engaged in a pattern or practice of significantly untimely pickups due to driver negligence, no-shows by drivers, unreasonably lengthy and circuitous trips, inadequate telephone services, provision of inaccurate information, lack of accommodation by drivers of riders with visual impairments, and inadequately-equipped vehicles. Plaintiffs seek declaratory and injunctive relief as well as compensatory damages.

ARGUMENT

I

THIS COURT SHOULD NOT REACH THIS ISSUE

This Court should not assess the constitutionality of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, unless it is necessary to do so. 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, 147-148 (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, there is no reason for this Court to reach the validity of Title II because plaintiffs assert identical claims under Section 504, which provides the same protection as that provided under Title II, as applied to public entities – such as WMATA – that receive federal financial assistance. The D.C. Circuit has already held that WMATA does not enjoy Eleventh Amendment immunity to claims under Section 504 because it waived any such immunity when it accepted clearly conditioned federal financial assistance. See *Barbour* v. *WMATA*, 374 F.3d 1161 (D.C. Cir. 2004), cert. denied, 544 U.S. 904 (2005). That holding is binding on this Court, and is in accord with every other court of appeals, all of which have held that state entities that accept federal funds waive their immunity to private suits under Section 504.[2] Because WMATA is undeniably subject to suit under Section 504, and because Section 504 provides to

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[2] The courts of appeals have uniformly held that Section 504, along with 42 U.S.C. 2000d-7, unambiguously conditions receipt of federal funds on a waiver of Eleventh Amendment immunity. See *Barbour* v. *WMATA*, 374 F.3d 1161 (D.C. Cir. 2004); *Pace* v. *Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir.), cert. denied, 126 S. Ct. 416 (2005); *Nieves-Marquez* v. *Commonwealth of 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, opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied, 536 U.S. 924 (2002); *Nihiser* v. *Ohio EPA*, 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 536 U.S. 922 (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. 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 (2001).

plaintiffs identical protection to that afforded under Title II, there is no reason for this Court to consider WMATA's complex constitutional challenge to the validity of Title II's abrogation.

Moreover, in its motion to dismiss, WMATA offers various alternative grounds for dismissing plaintiffs' claims. "Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89, 99 (1981); see also *Mobile* v. *Bolden*, 446 U.S. 55, 60 (1980). Thus, at the very least, this Court should first consider any nonconstitutional grounds of dismissal before considering WMATA's constitutional challenge.

Finally, it is not clear whether WMATA is entitled to assert Eleventh Amendment immunity at all. Although the D.C. Circuit held in *Morris* v. *WMATA*, 781 F.2d 218 (D.C. Cir. 1986), that WMATA is cloaked with Eleventh Amendment immunity, and has adhered to that decision, the soundness of that conclusion has been called into question by the Supreme Court's holding in *Port Authority Trans-Hudson* v. *Feeney*, 495 U.S. 299, 306-308 (1990). In that case, the Supreme Court considered the bi-state compact creating the Port Authority of New York and New Jersey. The Court held that the compact – which had been approved by Congress and contained a provision consenting to suit, along with a venue provision referring cases against the entity to federal courts – was sufficient to establish that the entity waived any Eleventh Amendment immunity it might have otherwise enjoyed. Section 81 of the Compact that formed WMATA provides that "[t]he United States District Courts shall have original jurisdiction, concurrent with the Courts of Maryland and Virginia, of all actions brought by or against the Authority." Washington Metropolitan Area Transit Authority Compact, Pub. L. No. 89-774, 80 Stat. 1324, 1350 (1966). *Feeney* suggests that this provision should be understood as

manifesting Congress's intention that WMATA not retain any Eleventh Amendment immunity it might otherwise have had.

At the same time, Section 80 of the Compact provides that WMATA "shall be liable for its contracts and for its torts * * * committed in the conduct of any proprietary function, * * * but shall not be liable for any torts occurring in the performance of a governmental function." *Ibid.* This provision could be viewed as a statutory grant of federal immunity to WMATA. *Feeney*, 495 U.S. at 318-319 (Brennan, J., concurring); *Souders* v. *WMATA*, 48 F.3d 546, 548 n.3 (D.C. Cir. 1995). However, Congress may have rescinded this statutory grant of immunity through its subsequent authorization of suits against "instrumentalities" of States in Title II.[3]

As discussed *supra* pp. 5-7, this Court may and should avoid these difficult issues by permitting the suit to go forward as a challenge under Section 504, which provides equivalent relief to any relief available to plaintiffs under Title II.[4]

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[3] The Compact that created WMATA defines WMATA as an instrumentality of Maryland, Virginia, and the District of Columbia. See 80 Stat. 1324.

[4] With respect to plaintiffs' Title II claims for injunctive relief against the director of WMATA in his official capacity, the Eleventh Amendment is not implicated. The Supreme Court has long held that private parties may enforce valid federal statutes through suits for prospective injunctive relief against state officials in their official capacities under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). In addition to being a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, Title II is also a valid exercise of Congress's authority under the Commerce Clause. Because WMATA does not contend that Title II is not valid Commerce Clause legislation, this Court need not reach the question whether Title II is also valid Section 5 legislation, at least with respect to plaintiffs' claims for prospective injunctive relief against the director of WMATA in his official capacity.

II

TITLE II IS VALID FOURTEENTH AMENDMENT LEGISLATION AS APPLIED TO THE CONTEXT OF PUBLIC TRANSPORTATION

Although the Eleventh Amendment ordinarily renders States immune from suits in federal court by private citizens, Congress may abrogate States' 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 States' sovereign immunity to claims under the Americans with Disabilities Act. 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." *Ibid*.

Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power, see *Kimel*, 528 U.S. at 80, that gives Congress the "authority both to remedy and to deter violation of [Fourteenth Amendment] rights * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 727 (2003) (quoting *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001)). Section 5 "is a 'broad power indeed,'" *Lane*, 541 U.S. at 518, empowering Congress not only to remedy past violations of constitutional rights, but also to enact "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," *Hibbs*, 538 U.S. at 727-728. Congress also may prohibit

"practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Lane*, 541 U.S. at 520.

Section 5 legislation must, however, demonstrate a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). In evaluating whether Title II is an appropriate response to past unconstitutional treatment of individuals with disabilities, the Supreme Court in *Lane* declined to address Title II as a whole, upholding it instead as "valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services," 541 U.S. at 531. Title II of the ADA likewise is appropriate Section 5 legislation as applied to public transportation because it is reasonably designed to remedy past and prevent future unconstitutional treatment of disabled individuals and deprivation of their constitutional rights in the operation of public transportation systems.

A. In United States v. Georgia, The Supreme Court Instructed That Courts Should Not Judge The Validity Of Title II's Prophylactic Protection In Cases Where That Protection Is Not Implicated

United States v. *Georgia*, 126 S. Ct. 877 (2006), presented the Supreme Court with the question whether Congress validly abrogated States' Eleventh Amendment immunity to claims under Title II of the ADA, as applied in the prison context. However, the Court declined to determine the extent to which Title II's prophylactic protection is valid in that context because the lower courts in *Georgia* had not determined whether the Title II claims in that case could have independently constituted viable constitutional claims or whether the Title II claims relied solely on the statute's prophylactic protection. To the extent any of the plaintiff's Title II claims would independently state a constitutional violation, the Court held, 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 first articulated in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). *Georgia*, 126 S. Ct. at 881-882. 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.*

In *Georgia*, the Supreme Court included instructions to lower courts for handling Eleventh Amendment immunity challenges in Title II cases, admonishing that 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*, 126 S. Ct. at 882. Thus, in order to resolve the immunity question in the instant case, this Court must first determine which of plaintiffs' allegations state a claim under Title II. This Court must then determine which of plaintiffs' valid Title II claims would independently state constitutional claims. And finally, only if plaintiffs have alleged valid Title II claims that are not also claims of constitutional violations, this Court should 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. *Ibid*. (emphasis added).[5]

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[5] Because of the limited nature of our role as intervenor, we do not take a position on whether the

(continued...)

B. Under The Boerne Framework, Properly Applied, 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 apply the *Boerne* congruence and proportionality analysis, as that analysis was applied to Title II in *Tennessee* v. *Lane*, 541 U.S. 509 (2004).

In *Lane*, the Supreme Court considered the claims of two plaintiffs, George Lane and Beverly Jones, "both of whom are paraplegics who use wheelchairs for mobility" and who "claimed that they were denied access to, and the services of, the state court system by reason of their disabilities" in violation of Title II. 541 U.S. at 513. The state defendant in that case argued that Congress lacked the authority to abrogate the State's Eleventh Amendment immunity to these claims, and the Supreme Court in *Lane* disagreed. See *id.* at 533-534.

To reach this conclusion, the Court applied the three-part analysis for Fourteenth Amendment legislation created by *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). The Court considered: (1) the "constitutional right or rights that Congress sought to enforce when it enacted Title II," *Lane*, 541 U.S. at 522; (2) whether there was a history of unconstitutional disability discrimination to support Congress's determination that "inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at 529; and (3) "whether Title II is an appropriate response to this history and

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[5](...continued)
plaintiffs have stated valid Title II claims or on whether any of those claims would independently state a constitutional violation.

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. *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. *Lane*, 541 U.S. at 523-528. 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.[6] *Lane,* 541 U.S. at 530-534. Applying the holdings of the Supreme Court's decision in *Lane*, this Court should conclude that Title II is valid Fourteenth Amendment Legislation as it applies in the context of public transportation.

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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 as applied to the class of cases implicating public transportation, 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.

1. Constitutional Rights At Stake

In deciding the case before it, the Supreme Court in *Lane* considered a subset of Title II applications – "the class of cases implicating the accessibility of judicial services," *id*. at 531 – that sometimes invoke rights subject to heightened scrutiny, but other times invoke only rational basis scrutiny under the Equal Protection Clause. For example, George Lane's exclusion from his criminal proceedings implicated Due Process and Sixth Amendment rights subject to heightened constitutional scrutiny, while court reporter Beverly Jones's exclusion from the court room implicated only Equal Protection rights subject to rational basis review.[7] See *id*. at 522-523. The Court first examined the range of constitutional rights protected by Title II as a whole, concluding that Title II enforces the Equal Protection Clause's "prohibition on irrational disability discrimination," as well as "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Lane*, 541 U.S. at 522-523. Similarly, the instant case, in which the right to access public transportation is implicated, Title II enforces the Equal Protection Clause's prohibition of arbitrary treatment based on irrational stereotypes or hostility, as well as the heightened constitutional protection afforded to a variety of constitutional rights implicated by restrictions on a person's ability to travel.

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[7] The Court mentioned that, in general, "members of the public have a right of access to criminal proceedings secured by the First Amendment." *Id*. at 523. The Court did not, however, conclude that Jones's claim implicated that First Amendment right. While the Court has held that complete closure of a criminal trial to the public is subject to strict scrutiny, see *Press-Enterprise Co.* v. *Superior Ct. of Cal.*, 478 U.S. 1, 8-9 (1986), it has not held that strict scrutiny applies to a court's denial of a request for an accommodation that would permit attendance by a particular member of the public (*i.e.*, a person with a disability such as Jones).

The Supreme Court has long recognized that the Constitution guarantees a fundamental personal right "to travel throughout the United States." *United States* v. *Guest*, 383 U.S. 745, 758 (1966) (upholding validity of statute criminalizing conspiracy to injure or intimidate citizen in exercise of right to travel because of that citizen's race). Where such fundamental rights are involved, strict scrutiny is normally appropriate. See, *e.g.*, *Shapiro* v. *Thompson*, 394 U.S. 618, 670 (1969) (durational residency requirements for receipt of welfare benefits); *Dunn* v. *Blumstein*, 405 U.S. 330, 340 (1972) (durational residency requirements for voting); *United States* v. *Klinzing*, 315 F.3d 803, 808 (7th Cir. 2003) (challenging "Deadbeat Parents Punishment Act").

To date, the Supreme Court has considered the right to travel only in the context of interstate and international travel. See *Shapiro*, 394 U.S. 618 (interstate travel); *Kent* v. *Dulles*, 357 U.S. 116, 125 (1958) (international travel). Although the Court has expressly reserved the question whether there is a concomitant right to intrastate travel, *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250, 256 n.9 (1974), the Court has spoken of the right to travel in expansive terms that suggest the possibility that such a right exists.[8] See, *e.g.*, *Shapiro*, 394 U.S. at 629-630 ("This Court long ago recognized that the nature of our Federal Union and our constitutional

[8] To date, three courts of appeals have recognized a constitutional right to intrastate travel. See *Johnson* v. *City of Cincinnati*, 310 F.3d 484, 497-498 (6th Cir. 2002), cert. denied, 539 U.S. 915 (2003); *Lutz* v. *City of York*, 899 F.2d 255, 268 (3d Cir. 1990) ("We conclude that the right to move freely about one's neighborhood or town, even by automobile, is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.'"); *King* v. *New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648-649 (2d Cir.) ("It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."), cert. denied, 404 U.S. 863 (1971).

concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.").[9]

Of course, the constitutional right to travel does not grant to citizens an affirmative right to have means of transportation provided to them by the government, and plaintiffs here make no such claim. But by recognizing that the Constitution treats the right to travel as a fundamental right, courts have indicated the importance our society places on the ability to travel.

Moreover, the cases cited above recognize that protecting citizens' right to travel is important as a means of protecting their right to exercise other basic privileges and attributes of citizenship, such as voting and participation in legal proceedings. See *Kent*, 357 U.S. at 126 ("Freedom of movement is basic in our scheme of values."); see also *Aptheker* v. *Secretary of State*, 378 U.S. 500, 517 (1964) ("[F]reedom of travel is a constitutional liberty closely related to rights of free speech and association."). Congress's legitimate attempt to protect and vindicate those rights through Title II, pursuant to its powers under Section 5 of the Fourteenth Amendment, would be significantly diminished if persons with disabilities were discriminatorily denied the opportunity to get to the voting booth or the courthouse. By guaranteeing a right of

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[9] *United States* v. *Wheeler*, 254 U.S. 281, 293 (1920) ("In all the states, from the beginning down to the adoption of the Articles of Confederation, the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the states to forbid and punish violations of this fundamental right."); *Williams* v. *Fears*, 179 U.S. 270, 274 (1900) ("Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by the 14th Amendment and by other provisions of the Constitution.").

nondiscriminatory access to public transportation, Title II thus protects these and other rights that are subject to heightened constitutional review.

Title II also directly enforces the guarantees of the Equal Protection Clause. Of course, a State "may legitimately attempt to limit its expenditures" for public transportation. *Shapiro*, 394 U.S. at 633. "But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Ibid*. Such invidious distinctions include discrimination against the disabled based on "[m]ere negative attitudes, or fear" alone, *Garrett*, 531 U.S. at 367, for even rational basis scrutiny is not satisfied by irrational fears or stereotypes, see *ibid*.; *City of Cleburne* v. *Cleburne Living Ctr*., 473 U.S. 432, 447-450 (1985), and simple "animosity" towards the disabled 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," this is true only "so long as their actions toward such individuals are rational." *Garrett*, 531 U.S. at 367. Moreover, a purported rational basis for treatment of the disabled will fail if the State does not accord the same treatment to other groups similarly situated, see *id*. at 366 n.4, 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).

WMATA argues (Mot. to Dismiss at 11-12) that Title II is valid Section 5 legislation only as applied to the enforcement of "fundamental" rights, and that this Court need not determine whether Title II's prophylactic protection is valid where no such fundamental right is implicated. Even if it applied in this context, that argument finds no support in the decisions of

the Supreme Court or the courts of appeals. The same Section 5 analysis applies regardless of what type of constitutional right Congress seeks to protect or enforce through legislation. Indeed, in *Lane*, the Supreme Court did not draw a distinction between the claims of George Lane, which implicated the Sixth Amendment and the Due Process Clause, and the claims of Beverly Jones, which implicated the Equal Protection Clause. Rather, the Court considered all claims potentially implicated by the context before it and applied the long-established *Boerne* analysis in upholding Title II as applied to that context. This Court should also apply the *Boerne* framework, as elucidated in *Lane*, to uphold Title II as applied to the context of public transportation.

To date, three courts of appeals have upheld Title II as valid Section 5 legislation in the context of public education, which does not implicate any fundamental right. See *Toledo* v. *Sanchez*, No. 05-1376, 2006 WL 1846326 (1st Cir. July 6, 2006); *Constantine* v. *Rectors and Visitors of George Mason University*, 411 F.3d 474 (4th Cir. 2005); *Association of Disabled Ams.* v. *Florida Int'l Univ.*, 405 F.3d 954 (11th Cir. 2005). Moreover, both of the courts of appeals that struck down Title II in the prison context subsequently vacated their opinions. See *Cochran* v. *Pinchak*, 401 F.3d 184 (3d Cir. 2005) vacated, 412 F.3d 500 (3d Cir. 2005); *Miller* v. *King*, 384 F.3d 1248 (11th Cir. 2004), vacated, 449 F.3d 1149 (11th Cir. 2006).[10] Thus, of courts of appeals cases WMATA cites that were decided after *Lane* and address the validity of Title II, the only two that remain good law – *Constantine* and *Association of Disabled Americans*, *supra*

[10] In addition, the Eighth Circuit's decision in *Bill M.* v. *Nebraska Dep't Health & Human Servs. Fin. & Support*, 408 F.3d 1096 (8th Cir. 2005), was recently vacated by the Supreme Court, 126 S. Ct. 1826 (2006).

– actually upheld the statute as valid Section 5 legislation in a context that does not implicate any fundamental rights.

2. Historical Predicate Of Unconstitutional Disability Discrimination In Public Services

"Whether Title II validly enforces these constitutional rights is a question that 'must be judged with reference to the historical experience which it reflects.'" *Lane*, 541 U.S. at 523 (quoting *South Carolina* 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." 541 U.S. at 524. The Court remarked on the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," *id*. at 528, and concluded that it is "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at 529.

Although *Lane* ultimately upheld Title II as valid Fourteenth Amendment legislation only as applied to access to courts, its conclusions regarding the historical predicate for Title II are not limited to that context. The Court did not begin its "as-applied" analysis until it reached the third step of the *Boerne* analysis addressing the Act's congruence and proportionality. See 541 U.S. at 530-534. 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, zoning, the penal system, public education, law enforcement, and the treatment of institutionalized persons, *id.* at 524-525.[11] That record, the Court concluded, supported prophylactic legislation to address discrimination in "public services" writ large, *id*. at 528-529, including discrimination in "transportation," *id.* at 529; see also *id*. at 522-523 (identifying some of the rights enforced by Title II that are subject to "searching judicial review" by citation to *Shapiro* v. *Thompson*, 394 U.S. 618 (1969)). Thus, the adequacy of Title II's historical predicate to support prophylactic legislation addressing discrimination in public services, including public transportation, is no longer open to dispute. But even if it were, there is an ample historical basis for extending Title II to disability discrimination in public transportation.

3. Historical Predicate Of Unconstitutional Disability Discrimination In Public Transportation

One of Congress's primary purposes in enacting Title II was to address the problem of disability discrimination in the provision of public transportation. Consequently, the legislative history of the ADA includes voluminous testimony and other evidence documenting the problem of disability discrimination in transportation and the devastating and far-reaching effects of that discrimination.

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[11] In describing the adequacy of the historical predicate, the Court also spoke in general terms, remarking, for instance, on "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of *public services*." *Id*. at 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).

In the years leading up to the passage of the ADA, Congress conducted extensive investigations into the extent to which Americans with disabilities experienced discrimination and exclusion in various aspects of their lives. The information amassed during those years led Congress to make statutory findings that "discrimination against individuals with disabilities persists in such critical areas as * * * transportation," 42 U.S.C. 12101(a)(3), that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion [and] the discriminatory effects of * * * transportation * * * barriers," 42 U.S.C. 12101(a)(5), and that, as a result, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally," 42 U.S.C. 12101(a)(6).

The legislative record of the ADA includes first-hand reports of the inability of persons with disabilities to utilize public transportation and the devastating ripple effects of that lack of access on many aspects of their lives. A congressionally designated Task Force held 63 public forums across the country that were attended by more than 7,000 individuals. Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 18 (1990). The Task Force collected evidence from nearly 5,000 individuals documenting the problems with discrimination and invidious stereotypes that persons with disabilities faced daily and presented that evidence to Congress. See 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* 1039-1040 (Comm. Print 1990) (*Leg. Hist.*) (Justin Dart).[12] In examining this

[12] See also Task Force on the Rights and Empowerment of Americans with Disabilities, *From* (continued...)

evidence, the Supreme Court in *Lane* concluded that it demonstrated "hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions." See 541 U.S. at 526-527. Among those examples are at least 140 accounts of persons with disabilities who were denied the opportunity to use public transportation.[13] Congressional committees also heard testimony from persons with disabilities who were unable to use public transportation due to intentional discrimination.[14] For example, Congress learned that

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[12](...continued)
ADA to Empowerment 16 (1990). Those "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life," 2 *Leg. Hist.* 1324-1325 (Justin Dart), are part of the official legislative history of the Disabilities Act, *id.* at 1336, 1389 (Chairman Owens). Those submissions were lodged with the Supreme 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, 531 U.S. at 391-424, 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.

[13] See AL 07; AL 09; AL 10; AL 11; AL 13; AL 21; AL 23; AL 26; AL 27; AK 44; AK 57; AK 61; AK 69; AK 70; AZ 110; AZ 121; AR 141; AR 144; AR 150; CA 180; CA 181; CA 211; CA 212; CA 214; CA 215; CA 221; CA 222; CA 223; CA 226; CA 240; CA 241; CA 244; CA 247; CA 248; CA 250; CA 252; CA 253; CO 266; CO 267; CO 268; CO 269; CO 271; CO 274; CO 275; CO 276; DE 301; DE 302; DE 310; DE 323; DE 325; DE 337; DE 343; GA 365; GA 372; HI 444; HI 446; HI 452; HI 462; HI 463; HI 467; HI 468; HI 469; HI 475; HI 476; HI 488; HI 490; HI 491; HI 494; HI 495; ID 502; ID 505; ID 508; ID 510; ID 516; ID 522; ID 523; ID 524; IL 554; IL 575; IL 576; IL 586; IL 589; IL 590; IL 596; IL 597; IL 600; IL 603; IL 605; IN 613; IN 616; IN 619; IN 621; KS 685; KY 706; KY 709; KY 717; KY 720; KY 733; KY 736; LA 745; LA 751; LA 753; LA 773; MD 785; MD 797; MI 923; MI 926; MI 933; MI 968; MS 853; MS 994; MS 997; MS 1000; MO 1009; MO 1013; NV 1044; NV 1051; NM 1092; OH 1218; OH 1230; OH 1234; OH 1235; OH 1242; OK 1266; PA 1399; PA 1408; PA 1413; PA 1423; PA 1425; PA 1434; SD 1470; TX 1483; TX 1527; TX 1540; UT 1576; UT 1584; VA 1664; VA 1668; VA 1677; WV 1742; WI 1761 (catalogued in *Garrett*, 531 U.S. at 391-423 (Breyer, J., dissenting)). See also WA 1716.

[14] See 2 *Leg. Hist.* 1077 (John Nelson) ("In the areas of transportation, I, personally, face discrimination in getting on trains, getting on planes. In fact, I was not allowed to get on some
(continued...)

transportation providers "refus[ed] to transport people with certain handicaps, requir[ed] personal attendants to accompany disabled people even if they are fully able to travel alone, and den[ied] passage to guide dogs." United States Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* 39 (1983) (*Spectrum*).

4. Gravity Of Harm Of Disability Discrimination In Public Transportation

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 transportation does not implicate a fundamental right, the gravity of the harm is substantial.

Congressional committees heard voluminous testimony that the lack of accessible transportation contributes to the ongoing segregation and isolation of individuals with disabilities that is the result of historical discriminatory practices,[15] and that "[t]ransportation is the linchpin

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[14](...continued)
planes because I did not have an able bodied person traveling with me, even though I had attendants on either end of the flight."); *id.* at 1079 (Ellen Telker) ("Lack of transportation is the other problem faced by visually impaired persons"); *id.* at 1081 (Eugenia Evans) ("I would like to bring to the attention of the committee that we feel one of the most corrigious [*sic*] forms of discrimination that occurs daily when a disabled person tries to use a public bus."); see also 135 Cong. Rec. H1690, E1575-E1576 (daily ed. May 9, 1989) (statement of Rep. Coelho) ("Another problem area for the disabled is transportation. This most common service in our very mobile society is frequently denied to disabled people. The Congressional Budget Office described the extent of the problem this way: 'More than 1 million physically disabled, blind, or deaf persons who live within a short walk of transit service cannot physically use it.'"); United States Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* 39 (1983) (*Spectrum*) ("Our otherwise mobile society frequently denies handicapped people access to the various means of transportation.").

[15] See 2 *Leg. Hist.* 943 (Rep. Coelho) ("When regular transportation is inaccessible, and transit services for the disabled are segregated, you won't see them on your bus or commuter train."); (continued...)

which enables people with disabilities to be integrated and mainstreamed into society." H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, 37 (1990).[16] Congress knew that decades of isolation of persons with disabilities led to widespread myths and stereotypes that continue to foster discrimination, often under the guise of "benign neglect" and "thoughtlessness or indifference."[17]

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[15](...continued)
136 Cong. Rec. H2447 (daily ed. May 17, 1990) (statement of Rep. Miller) ("Society has made them invisible by shutting them away in segregated facilities, by erecting structural barriers that literally keep them out of buildings and off of public transportation[.]"); see also Timothy M. Cook, *The Americans With Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 419-420 (1991) ("Congress particularly focused on the segregation issue in the context of public transportation, both because of the importance of transportation in accessing all other public services and because of the mounting number of conflicting court decisions regarding public transportation.").

[16] See also H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, 88 (1990) ("Accessible transportation also allows individuals with disabilities to enjoy cultural, recreational, commercial and other benefits that society has to offer. Transportation affects virtually every aspect of American life"); H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 4, 25 (1990) ("The absence of adequate and accessible transportation can present a serious barrier to disabled individuals seeking integration into the community, impeding their efforts to lead spontaneous, independent lives."); 2 *Leg. Hist.* 1104 (Julie Reisken) ("The Americans With Disabilities Act will create more accessible transportation which will enable more people to leave their homes and be participating citizens."); *id.* at 1712 (Greg Fehribach) ("Transportation is essential for disabled persons to maintain self-sufficiency. There is not one of us in this room today who does not need some form of transportation in order to pursue employment, to recreate, or to contribute effectively to society as a whole."); *id.* at 1775 (Marchell Hunt) ("the lack of transportation is the primary barrier to community participation, education, employment, recreation, adequate medical care, and independent living for people with disabilities"); 3 *Leg. Hist.* 2560 (Rep. Mineta) ("Many disabled individuals have cited a lack of transportation as the chief barrier to full participation in their communities."); *id.* at 2561 (Rep. Hammerschmidt) ("No where are these goals more important than in transportation, for it is often the key which enables the disabled to become part of the mainstream[.]"); *id.* at 2647 (David Capozzi) ("Accessible transportation also allows individuals with disabilities to enjoy cultural, recreational, commercial and other benefits that society has to offer.").

[17] 1 *Leg. Hist.* 302 (House Report) ("Discrimination also includes harms resulting from the construction of transportation, architectural, and communication barriers or the adoption or
(continued...)

Indeed, one high-level Connecticut transportation official responded to requests for accessibility by asking, "Why can't all the handicapped people live in one place and work in one place? It would make it easier for us." 2 *Leg. Hist.* 1085 (Edith Harris); see also 2 *Leg. Hist.* 1097 (Bill Dorfer) (discussing serious inadequacies of existing public transportation). In enacting the ADA, Congress recognized that integrating persons with disabilities into mainstream society would help break down harmful stereotypes and eradicate discrimination.[18]

Further, congressional committees heard volumes of testimony about how the lack of accessible transportation for persons with disabilities prevents them from fully participating in

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[17](...continued)
application of standards, criteria, practices or procedures that are based on thoughtlessness or indifference – that discrimination resulting from benign neglect."); H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, 38 (1990) ("reasons commonly provided as to why mainline accessibility cannot be accomplished reflect myths"); 2 *Leg. Hist.* 943 (Rep. Coelho) ("Society has neglected to challenge itself and its misconceptions about people with disabilities. When people don't see the disabled among our co-workers, or on the bus, or at the sports field, or in a movie theater, most Americans think it's because they can't. It's time to break this myth. The real reason people don't see the disabled among their co-workers, or on the bus, or at the sports field, or in a movie theater is because of barriers and discrimination. Nothing more. It is barriers and discrimination that have caused an 'out of sight, out of mind' situation with disabled people."); 136 Cong. Rec. H2435 (daily ed. May 17, 1990) (statement of Rep. Anderson) ("Far too often, it is society, and not the individual's impairment, which handicaps our disabled citizens. This legislation will help cure what ails this society, and in so doing; by allowing our disabled to live up to their full potential, it will make this Nation better and stronger for each of us.").

[18] See 2 *Leg. Hist.* 1775-1776 (Marchell Hunt) ("In short, accessible mainline public transportation can help change attitudes through interaction. For attitudinal barriers can be just as difficult to overcome as those which are physical. Because segregated isolation promotes misconceptions."); H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 4, 25 (1990) ("The ADA renews the commitment made by Congress in enacting section 504 to promote the mainstreaming of individuals with disabilities by providing clear, consistent, and enforceable standards addressing discrimination on the basis of disabilities and by ensuring that the Federal government plays a central role in enforcing those standards."); *Spectrum* at 43 ("Because discriminatory practices and prejudices are closely intertwined, an effective remedy of the former must incorporate a remedy for the latter.").

civic life because "[t]ransportation is basic to [the exercise of] other rights." 2 *Leg. Hist.* 1322 (Joseph Rauh, Jr.).[19] For example, numerous witnesses testified that widespread surveys of persons with disabilities revealed that "inaccessible transportation services has been identified as a major barrier [to equal employment opportunities], second only to discriminatory attitudes." 2 *Leg. Hist.* 1571 (Jay Rochlin, Executive Director of President's Comm. on Employment of People with Disabilities).[20] Congress also learned that the lack of accessible public transportation

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[19] See also H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 4, 25 (1990) ("Transportation plays a central role in the lives of all Americans."); *Americans With Disabilities Act of 1989: Hearings Before the Senate Comm. on Labor & Human Res. & the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 78 (May 10, 1989) (Neil F. Hartigan, Attorney General of the State of Illinois) ("The bill before you must also be commended for recognizing that transportation is perhaps the most important factor in accessibility. Of what use is an accessible building if [a] person with disabilities cannot get to that building?"); *Spectrum* at 42 ("[L]ack of access to transportation systems restricts employment, education, housing, and recreational opportunities.").

[20] See also H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, 37 (1990) ("It makes little sense to protect an individual from discrimination in employment if, for example, they have less than adequate accessible public transportation services. We have conducted surveys in 45 communities over the last seven years, and, consistently, inaccessible transportation has been identified [as] the major barrier, second only to discriminatory attitudes."); *id.* at 87-88 ("Inaccessible vehicles affect more than just individuals with disabilities' ability to travel independently. It affects their ability to gain employment. When such individuals are able to depend on an accessible transportation system, one major barrier is removed which could prevent them from joining the work force."); H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 4, 25 (1990) ("The absence of effective access to the transportation network can mean, in turn, the inability to obtain satisfactory employment."); 2 *Leg. Hist.* 1086 (Statement of Edith Harris); *id.* at 1098 (William Dorfer, Jr.); *id.* at 1163 (Joseph Mallen); *id.* at 1252 (Speed Davis); 3 *Leg. Hist.* 1865 (James S. Brady); *id.* at 2560 (Rep. Mineta); *id.* at 2636 (Ellen Daly); *id.* at 2647 (David Capozzi); *id.* at 2707 (Kathleen Wingen); 135 Cong. Rec. S19899 (daily ed. Sept. 7, 1989) (statement of Sen. Simon); *Spectrum* at 80 ("One commentator has estimated that 13 percent of unemployment among handicapped people is due to travel barriers and that 200,000 handicapped people would enter the work force if the barriers were eliminated, adding as much as $1 billion in annual earnings to our economy.").

prevented persons with disabilities from exercising their right to vote[21] and impaired their ability to attend public governmental hearings.[22] Congress also heard of one example in which a person in a wheelchair was penalized by having his parole revoked because a lack of accessible transportation prevented him from making appointments with his parole officer.[23] Many witnesses testified that the advances this country has seen in the past several decades in education of children with disabilities was partially wasted because the lack of accessible transportation prevented those children from using their education to participate in society and the workforce as adults.[24] Congressional committees also heard testimony that persons with

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[21] See H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, 37 (1990) ("People who cannot get to * * * the voting place cannot exercise their rights and obligations as citizens."); 2 *Leg. Hist.* 1190 (Cindy Miller) ("The transportation authorities in America do not provide accessible transit because it does not value people with disabilities or the contributions that are gained by Americans with disabilities being able to get to work, vote, medical appointments, or cultural events.").

[22] See 135 Cong. Rec. S4984, S4994 (daily ed. May 9, 1989) (statement of Sen. Durenberger) ("The Minnesota Governor's Council on Disabilities recently held hearings on the problems persons with disabilities face in the area of transportation. However, four of the people were unable to attend because their accessible transportation did not arrive. Several other persons had to leave early because their only transportation home came before they could testify."); 2 *Leg. Hist.* 1104 (Julie Reisken).

[23] See Cal. Att'y Gen., *Commission on Disability: Final Report* 103 (Dec. 1989) (parole agent "sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though * * * he could not make the appointments because he was unable to get accessible transportation").

[24] See 2 *Leg. Hist.* 990-991 (Mary Linden); 3 *Leg. Hist.* 2480 (Tim Cook); *id.* at 2743 (James Weisman); see also 117 Cong. Rec. 42293 (1971) (Statement of Sen Cook) ("Many of the physically handicapped children do have the mental ability to attend public school but are denied that right due to architectural barriers and-or transportation problems."); see also Americans with Disabilities Act of 1990: Statement by President George Bush Upon Signing S. 933, 26 Weekly Comp. Pres. Doc. 1165 (July 26, 1990) ("Many of our young people, who have benefited from the equal educational opportunity guaranteed under the Rehabilitation Act and the Education of

(continued...)

disabilities were unable to access public services in general due to the lack of accessible transportation.[25]

As the numerous cases regarding discrimination in transportation demonstrate, discriminatory provision of public transportation perpetuates isolation and prevents persons with disabilities from joining the mainstream of American life. Accordingly, in enacting Title II, Congress was confronting a substantial problem with grave consequences, one that "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity" and threatened the ability of people with disabilities "to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. 12101(a)(9).

Accordingly, the evidence set forth above regarding disability discrimination in public transportation was more than adequate to support comprehensive prophylactic and remedial legislation.

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[24](...continued)
the Handicapped Act, have found themselves on graduation day still shut out of the mainstream of American life. They have faced persistent discrimination in the workplace and barriers posed by inaccessible public transportation, public accommodations, and telecommunications.").

[25] See also H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 4, 25 (1990) (transportation "is a veritable lifeline to the economic and social benefits our Nation offers its citizens"); *ibid.* (lack of transportation leads to "inability to take full advantage of the services and other opportunities provided by both the public and private sectors").

5. As Applied To Discrimination In Public Transportation, 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 [the] mark of the law's invalidity." *Ibid*. Instead, the Court concluded that the only question before it was "whether Congress had the power under § 5 to enforce the constitutional right of access to the courts." *Id*. at 531. The question before this Court, then, is whether Title II is congruent and proportional legislation as applied to the class of cases implicating access to public transportation.

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 public transportation, Title II is a congruent and proportional means of preventing and remedying the unconstitutional discrimination that Congress found exists both in transportation and in other areas of governmental services, many of which implicate fundamental rights.

As was true in *Lane* with respect to cases implicating access to courts and judicial services, "Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing" the rights of disabled persons seeking accessible transportation. *Ibid.* Further, like *Lane*, the "unequal treatment of disabled persons in the administration of" transportation has a "long history, and has persisted despite several legislative efforts to remedy the problem of

disability discrimination." *Ibid.* "Faced with considerable evidence of the shortcomings of previous legislative responses,[26] Congress was justified in concluding that this 'difficult and intractable proble[m]' warranted 'added prophylactic measures in response.'" *Ibid.* (quoting *Hibbs*, 538 U.S. at 737).

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[26] Congress learned that previous legislative attempts to cure the problem of disability discrimination in public services had not been successful. In particular, Congress repeatedly heard testimony that Section 504 of the Rehabilitation Act had failed to adequately address the problem of disability discrimination in the provision of public transportation. See H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, 47-48 (1990) ("With respect to the provisions of accessible transportation services, there have been misinterpretations by executive agencies and some courts regarding the prohibition against discrimination by public entities under the Rehabilitation Act and there has been no protection from discrimination by private transportation companies not otherwise covered under federal laws."); H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 4, 25 (1990) ("17 years of experience with the Rehabilitation Act has enabled the Congress in this legislation to address several important issues related to the accessibility of passenger rail transportation that have arisen in the administration of section 504."); 3 *Leg. Hist.* 2018 (Attorney General Dick Thornburgh) ("The provision of accessible transportation for persons with disabilities has been one of the most complex issues faced by Congress and the executive branch. Four statutes and a series of current Department of Transportation regulations present an interrelated, complicated set of obligations. Several Federal circuit courts have interpreted these statutes and rules. The President agrees that additional legislation is needed to bring certainty to this area and believes that the Americans with Disabilities Act appropriately clarifies transit requirements. Our goal, and yours, is to ensure that persons with disabilities have access to adequate transportation in this country. The Americans with Disabilities Act would, for the first time, guarantee that public bus systems in this country are accessible to persons with mobility impairments by requiring that all new public buses be accessible to persons with disabilities with the Department of Transportation empowered to grant waivers in the narrow circumstances where such buses are unavailable."); 135 Cong. Rec. S4986 (daily ed. May 9, 1989) (Statement of Sen. Harkin) ("Thus, there is a need to clarify section 504 in the public transportation context to ensure once and for all that no Federal agency or judge will ever again misconstrue the congressional mandate to integrate people with disabilities into the mainstream."); *Spectrum* at 136-138; *Americans with Disabilities Act of 1989: Hearings before the Senate Comm. on Labor & Human Res. & the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 195 (June 22, 1989) (Attorney General Dick Thornburgh) ("Fifteen years have gone by since the Rehabilitation Act took effect. Nevertheless, persons with disabilities are still too often shut out of the economic and social mainstream of American life."). See also Colker & Milani, *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination*, 53 Ala. L. Rev. 1075 (2002).

Nevertheless, "[t]he remedy Congress chose is * * * a limited one." *Ibid.* 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 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," *Lane*, 541 U.S. at 531-532, 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 532.

With respect to the provision of transportation in particular, Title II did not impose its vehicle accessibility requirements retroactively, instead requiring that transportation providers purchase accessible vehicles when they opt to purchase new vehicles, 42 U.S.C. 12142(a), 42 U.S.C. 12144, 42 U.S.C. 12162(a)(1), and that they make "good faith efforts" to purchase or lease accessible used vehicles when they opt to purchase or lease used vehicles, 42 U.S.C. 12142(b), 42 U.S.C. 12162(d)(2). Title II requires operators of paratransit systems to provide a level of service that is "comparable" to the services provided to persons without disabilities and to do so with a response time that is "comparable, to the extent practicable" to that provided to persons without disabilities. 42 U.S.C. 12143(a). In the event that providing the required paratransit services imposes an "undue financial burden on the public entity" providing the service, Title II provides that such entity "shall only be required to provide such services to the extent that providing such services would not impose such a burden." 42 U.S.C. 12143(c)(4). In the case of rail transportation, Title II does not require that every rail car be made accessible,

instead imposing a "one car per train rule." 42 U.S.C. 12148(b), 42 U.S.C. 12162.

With respect to physical access to existing 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,[27] Congress imposed reasonable architectural standards for new construction and alterations. See 28 C.F.R. 35.151. At the same time,

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

Lane, 541 U.S. at 532; see also 42 U.S.C. 12148(a)(1). With respect to "[p]ublic transportation programs and activities in existing facilities," Title II requires that the programs and activities "when viewed in the entirety" be readily accessible and useable by individuals with disabilities, 42 U.S.C. 12148, as long as "key stations" within rail systems are made accessible, 42 U.S.C. 12147(b).

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

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

In the public transportation context, Title II applies directly to prohibit unconstitutional discrimination against the disabled, *i.e.*, discrimination that is based on irrational stereotypes about, or animosity toward, people with disabilities. Given the history of unconstitutional treatment of persons with disabilities in the provision of transportation, see *supra* part I.B.2, Congress was entitled to conclude that there exists a real risk that some state officials may continue to make decisions about whether and how persons with disabilities should have access to public transportation 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 722-723, 735-737 (remedy of requiring "across-the-board" provision of family leave congruent and proportional to problem of employers relying on gender-based stereotypes).

Title II's prophylactic remedy thus acts to prevent difficult-to-uncover discrimination against persons with disabilities that could otherwise evade judicial remedy. By proscribing governmental conduct the discriminatory effects of which cannot be or have not been adequately justified, Title II prevents covert intentional discrimination against persons with disabilities. See *Lane*, 541 U.S. at 520 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are

discriminatory in effect, if not intent, to carry out the basic objectives of the Equal Protection Clause."). Further, by prohibiting insubstantial reasons for denying accommodations to persons with disabilities, Title II prevents invidious discrimination and unconstitutional treatment in the day-to-day actions of state officials exercising discretionary powers over citizens. See *Hibbs*, 538 U.S. at 736 (Congress justified in concluding that perceptions based on stereotypes "lead to subtle discrimination that may be difficult to detect on a case-by-case basis."). Moreover, by requiring reasonable steps to permit physical access to existing transportation facilities and to acquire new vehicles with the needs of individuals with disabilities in mind, Title II responds to the lingering effects of a long history of exclusion of people with disabilities from systems of public transportation.

Prohibiting disability discrimination in public transportation 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 Social Darwinism movement of the mid-20th century. See *Lane*, 541 U.S. Ct. at 535 (Souter, J., concurring). 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.*, 473 U.S. 432, 454 (1985) (Stevens, J., concurring); see also *Olmstead* v. *L.C. ex rel. Zimring*, 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 ("Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious."); *Alexander* v. *Choate*, 469 U.S. 287, 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. *Spectrum*, at 18 n.5; *id.* at 20.

Those decades of officially compelled isolation, segregation, and discrimination rendered persons with disabilities invisible to government officials generally and to those who designed and provided public transportation services to the community at large. They also gave rise to and continue to fuel discrimination borne of stereotypes, fear, and negative attitudes towards those with disabilities. Title II's requirements, as applied to transportation, eliminate the effects of that past discrimination by ensuring that persons previously invisible to program designers are now considered part of the government's service constituency. See 2 *Leg. Hist.* 993 (Jade Calegory) ("Some of the drivers are very rude and get mad if I want to take the bus. Can you believe that? I work and part of my taxes pay for public buses and then they get mad just because I am using a wheelchair. * * * It is hard for people to feel good about themselves if they have to crawl up the stairs of a bus, or if the driver passes by without stopping."); MA 831 ("Blacks wanted to ride in the front of the bus. Disabled people just want[] on."). That is because "[i]t is exclusive designs, and not any inevitable consequence of a disability that results in the isolation and segregation of persons with disabilities in our society." *Ibid.*

"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). Discrimination in public transportation has a direct and profound impact on the ability of people with disabilities to integrate into the

community, literally excluding them at times from being able to attend community events, from voting or from working. This segregative effect, in turn, feeds the irrational stereotypes that lead to further discrimination in public services (many implicating fundamental rights). Cf. *Olmstead*, 527 U.S. at 600 (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life").

Title II's application to public transportation is thus congruent and proportional because a simple ban on discrimination would have frozen in place the effects of States' prior official exclusion and isolation of individuals with disabilities, which had the effect of rendering the disabled invisible to government officials and planners, thereby creating a self-perpetuating spiral of segregation, stigma, and neglect. See *Hibbs*, 538 U.S. at 736; *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).[28] 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." 3 *Leg. Hist.* 2020. Removing barriers to integration created by discrimination in public transportation 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 public transportation must be viewed in light of the

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[28] 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).

broader purpose and application of the statute. Congress found that the discrimination faced by people with disabilities was not limited to a few discrete areas (such as public transportation); to the contrary, Congress found that people 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 public transportation, 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 transportation 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, 217 n.14 (1982). Title II's application to public transportation thus combats a 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.*

CONCLUSION

For the foregoing reasons, this Court should deny WMATA's motion to dismiss on grounds of Eleventh Amendment immunity.

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CERTIFICATE OF SERVICE

I certify that on the 17th day of July, 2006, I electronically filed the foregoing **UNITED STATES' RESPONSE TO WMATA'S MOTION TO DISMISS ON ELEVENTH AMENDMENT GROUNDS** with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following, or, if notification was not so sent, that the document filed was mailed by United States Mail, postage prepaid:

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