No. 04-585

In the Supreme Court of the United States

CHARLOTTE KLINGLER, CHARLES WEHNER, AND SHEILA BRASHEAR, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

DIRECTOR, DEPARTMENT OF REVENUE, STATE OF MISSOURI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a Justice Department regulation that prohibits charging individuals with disabilities for the cost of program-accessibility measures that are "required to provide that individual or group with the nondiscriminatory treatment required by" the Americans with Disabilities Act, 28 C.F.R. 35.130(f), applies to Missouri's fee for obtaining portable handicap parking placards.

2. Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied to cases implicating the right to travel and equal access to governmental services and programs.

3. Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*, is a proper exercise of Congress's Commerce Clause power, as applied to regulating the imposition of surcharges for accessible motor vehicle parking.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 366 F.3d 614. The judgment of the district court (Pet. App. 17-19) is unreported.

JURISDICTION

The court of appeals entered its judgment on May 3, 2004. A petition for rehearing was denied on August 2, 2004. Pet. App. 27. The petition for a writ of certiorari was filed on October 28, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, 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 Disabilities Act. 42 U.S.C. 12101(b)(4).

The Disabilities Act 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 governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities. This case arises under Title II of the Disabilities Act, 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(A) and (B). 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.

b. Congress charged the Attorney General with issuing regulations to implement the provisions of Title II. See 42 U.S.C. 12134(a); see generally 28 C.F.R.

Pt. 35. Those regulations, Congress further directed, "shall include standards applicable to facilities and vehicles covered by this part" that are "consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board." 42 U.S.C. 12134(c). To ensure that newly constructed facilities are accessible to people with disabilities, the regulations require that, "[i]f parking spaces are provided for self-parking by employees or visitors, or both, then accessible spaces * * * shall be provided in each such parking area" in a number proportional to the number of total parking spaces. 28 C.F.R. Pt. 36, App. A, § 4.1.2(5)(a); see 28 C.F.R. 35.151(c) (incorporating standards). Each space must be "designated as reserved by a sign showing the symbol of accessibility." 28 C.F.R. Pt. 36, App. A, § 4.6.4. Accessible parking must also be provided in existing facilities when necessary to ensure that programs, services, and activities of an entity are accessible to people with disabilities. See 28 C.F.R. 35.150.

At issue in this case is a general regulatory prohibition that forbids public entities from "plac[ing] a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part." 28 C.F.R. 35.130(f).

2. Missouri provides qualifying persons handicap license plates at the same price that is charged for all other license plates issued by the State. To obtain a portable handicap parking placard, an individual with a disability must pay an annual fee of $2. Pet. App. 3; Mo.

Ann. Stat. §§ 301.142.4, 301.142.5 (West Supp. 2004). Fees assessed on parking placards generate approximately $400,000 in annual income for the State. Pet. App. 11.

Petitioners filed a class action lawsuit against the Director of the Missouri Department of Revenue challenging the surcharge as violating Title II of the Disabilities Act and its implementing regulations and seeking injunctive and monetary relief. Pet. App. 2. The district court dismissed the case based on controlling Eighth Circuit precedent holding that Title II of the Disabilities Act, in its entirety, exceeded Congress's legislative power under Section 5 of the Fourteenth Amendment. Pet. App. 2 (citing *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), cert. granted, 528 U.S. 1146, cert. dismissed, 529 U.S. 1001 (2000)); Pet. 2-3. The court of appeals affirmed dismissal of the claim for monetary relief, but remanded for consideration of declaratory and injunctive relief pursuant to *Ex parte Young*, 209 U.S. 123 (1908). See Pet. App. 2. On remand, the district court held that the fee imposed for portable placards violates Title II's surcharge regulation and enjoined collection of the fee. *Id.* at 17-19.

3. The court of appeals reversed. Pet. App. 1-16. The court declined to address whether, as a matter of statutory and regulatory construction, the placard fee violated Title II and the surcharge regulation, holding instead that "this is one of those rare occasions where the appropriate resolution of the constitutional issue is reasonably straightforward and determinate and the resolution of the statutory issue is, by contrast, difficult and complex." *Id.* at 4.

The court then ruled that Congress lacked the legislative authority to enact Title II. The court first reaffirmed its view that Title II as a whole is not a proper exercise of Congress's power to enforce the Fourteenth Amendment. Pet. App. 4. The court next held that Congress lacked authority under the Commerce Clause to regulate the collection of Missouri's surcharge. *Id.* at 5-12. The court reasoned that Missouri's collection of hundreds of thousands of dollars annually in regulating the use of motor vehicles was not sufficiently "commercial" to fall within the reach of the Commerce Clause. *Id.* at 6. The court also found significant Congress's failure to make "express findings" in the Disabilities Act about the particularized impact of parking placard fees on interstate commerce. *Id.* at 7-8. Finally, the court reasoned that the placard fee did not implicate interstate commerce because most persons would be willing to pay the fee and thus the fee would not "reduce the number of placard-possessing disabled people to such an extent that interstate commerce would be substantially affected." *Id.* at 11.

Judge Richard Arnold dissented. Pet. App. 12-16. He would have held that Title II's application to parking placard fees reflects a proper exercise of Congress's Commerce Clause power. He noted that, under Missouri's fee provision, persons with disabilities "are being required to pay for their access to interstate commerce while non-disabled individuals are not." *Id.* at 13. He further reasoned that cases from this Court upholding statutory prohibitions on racial discrimination as valid Commerce Clause legislation would equally sustain Title II's application here because "the state has made it more difficult for [persons with disabilities] to enter the store" and "more costly for certain disabled individuals

to gain convenient access to places of business where commercial activity affecting interstate commerce is taking place." *Id.* at 16.

4. Following the panel's decision, the United States intervened to defend the constitutionality of Title II and filed a petition for rehearing and rehearing en banc.[1] That petition argued, *inter alia*, that rehearing was warranted based on this Court's intervening decision in *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), which upheld Title II as valid Section 5 legislation in the context of access to the courts claims, and thereby abrogated *Alsbrook*'s holding that Title II as a whole is unconstitutional. The court of appeals denied rehearing and rehearing en banc without opinion. Pet. App. 27. Judges Smith, Colloton, and Gruender would have granted the petition for rehearing en banc. *Ibid.*

ARGUMENT

1. The United States agrees with petitioners (Pet. 5-7) and with respondent, the Director of the Missouri Department of Revenue (Missouri) (Missouri Cert. Br. 5-10), that the petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for further consideration in light of this Court's decision in *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), and in light of respondent Missouri's change of position on the legal question of Congress's authority to

[1] The United States had intervened in the earlier appeal, pursuant to 28 U.S.C. 2403, to defend against the State's challenge to the constitutionality of Title II's abrogation of Eleventh Amendment immunity. After the court of appeals resolved that question pursuant to *Alsbrook*, the United States discontinued its participation in the case. The United States was not notified that a new constitutional challenge concerning whether Title II is valid Commerce Clause legislation had been raised in the litigation.

enact Title II of the Disabilities Act pursuant to Section 5 of the Fourteenth Amendment.

The court of appeals held, in a per curiam opinion, that Title II is not proper Section 5 legislation based entirely on prior precedent that had invalidated Title II across the board. *Klingler* v. *Director, Mo. Dep't of Revenue*, 281 F.3d 776 (8th Cir. 2002); see Pet. App. 2; see also *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), cert. granted, 528 U.S. 1146, cert. dismissed, 529 U.S. 1001 (2000). That holding is irreconcilable with this Court's decision last Term in *Tennessee* v. *Lane*, *supra*, which ruled that Title II responded to an established record of "pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights," 124 S. Ct. at 1989, rendering the unconstitutional treatment of individuals with disabilities in the "provision of public services and access to public facilities * * * an appropriate subject for prophylactic legislation," *id.* at 1992. Contrast *Alsbrook*, 184 F.3d at 1008-1010 (legislative record does not support prophylactic legislation).

In addition, the court of appeals' sweeping invalidation of Title II in all of its applications in *Alsbrook*, is evidenced both by its opinion in that case, which presented a claim of discrimination in the licensing of law enforcement officers, and its per curiam extension of that holding to the very different factual and legal context presented by this case. That aspect of its decision cannot survive this Court's holding in *Lane* that courts must analyze whether Title II is appropriate Section 5 legislation as applied to the particular legal context in which each case arises. 124 S. Ct. at 1992-1993.

Although the United States' petition for rehearing and for rehearing en banc requested that the court of appeals' reconsider its decision in light of *Lane*, the court of appeals declined that request, allowing its now abrogated rulings of law to stand. Adjudicating the constitutionality of an Act of Congress is "the gravest and most delicate duty" that courts are "called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). Fundamental and constitutionally rooted principles of judicial restraint, combined with respect for the coordinate Branches of Government that made Title II law, require more than unreasoned silence before major civil rights legislation is held unconstitutional.[2] Accordingly, vacatur of the court of appeals' decision, with instructions to reconsider the decision in light of *Tennessee* v. *Lane*, *supra*, is warranted. See *Lawrence* v. *Chater*, 516 U.S. 163, 170 (1996) (this Court has "never held lower court briefing to bar [its] review and vacatur where the lower court's order shows no sign of having applied the precedents that were briefed"); *Robinson* v. *Story*, 469 U.S. 1081 (1984) (vacating and remanding a case for reconsideration in light of decision by this Court that was handed down three months before the court of appeals' decision).

Vacatur of the judgment below and remand is also warranted in light of Missouri's critical change in its position on the constitutionality of Title II. While

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[2] That is particularly true when, as here, the United States was unable to obtain this Court's review of the underlying *Alsbrook* decision due to the parties' settlement of that case. See 529 U.S. 1001 (2000) (order dismissing the previously granted petition for a writ of certiorari).

Missouri had previously argued to the court of appeals that Title II is not valid Section 5 legislation, Missouri changed its legal position in an *amicus curiae* brief filed with this Court in *Lane*, where it joined a number of other States in arguing that Title II is valid Section 5 legislation in all of its applications. See Amicus Br. of the State of Minnesota, *et al.*, *Tennessee* v. *Lane*, *supra* (No. 02-1667) see also Missouri Cert. Br. 8-9 (confirming the change in position). As a result of that significant development, Missouri has itself recommended that this Court grant the petition, vacate the judgment below, and remand for further proceedings, Missouri Cert. Br. 8-9, explaining that Missouri is no longer "in a position to defend the position taken by the Eighth Circuit here," *id.* at 8. Importantly, that concession that Title II is valid Section 5 legislation rendered entirely unnecessary the court of appeals' ruling addressing whether Title II falls within Congress's Commerce Clause power. See *Lawrence*, 516 U.S. at 167 (vacatur and remand may be appropriate in light of "confessions of error or other positions newly taken by the Solicitor General and state attorneys general") (citations omitted).

2. In the alternative, the petition for a writ of certiorari should be denied. First, with respect to the court's holding that Title II is not valid Section 5 legislation, this is the first court of appeals' decision since *Lane* arising in the context of parking placards and their impact on access to public services and the right to travel. Not only is there no considered opinion of the Eighth Circuit applying *Lane* for this Court to review, there also is no decision of any other court of appeals or district court analyzing the question.

Second, with respect to the court of appeals' ruling that Title II is not valid Commerce Clause legislation, that decision was issued without notice to or the participation of the United States in defense of the constitutionality of the law, as required by 28 U.S.C. 2403(a), and Federal Rule of Appellate Procedure 44(a). The issue also received extremely limited briefing by the parties,[3] and the United States raised additional and substantial arguments in favor of the statute's constitutionality in its petition for rehearing. See U.S. Pet. for Reh'g and Reh'g En Banc 6-14.

Nor is there a conflict in court rulings on the Commerce Clause question that merits this Court's plenary review at this juncture. In *State* v. *Rendon*, 832 So. 2d 141 (Fla. Dist. Ct. App. 2002), review denied, 851 So. 2d 729 (Fla. 2003), an intermediate state court ruled that the Department of Justice exceeded its rulemaking authority in extending the surcharge regulation to cover modest fees for parking placards. In so holding, the court reasoned that construing Title II to preclude such charges would raise a serious constitutional question under the Commerce Clause. *Id.* at 145-146 & n.5. However, this Court subsequently vacated that judgment and remanded for reconsideration in light of *Lane*. See 124 S. Ct. 2387 (2004). That same course of action, rather than plenary review, is appropriate here.

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[3] In its opening brief, Missouri did not even mention the Commerce Clause, let alone raise it as a question presented. In its reply brief, Missouri discussed the issue in response to petitioners' presentation of the Commerce Clause as an alternative grounds for affirmance, but in so doing never cited *United States* v. *Lopez*, 514 U.S. 549 (1995), or *United States* v. *Morrison*, 529 U.S. 598 (2000), which establish the proper constitutional framework for considering the Commerce Clause challenge.

Third, the court of appeals' consideration of the constitutionality of Title II was premature. Both parties had fully briefed and argued to the court the antecedent question of whether, as a matter of statutory and regulatory construction, Title II proscribes Missouri's surcharge for portable parking placards. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [courts] ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable." *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944); see also *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) (a "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them").

That oversight is particularly perplexing in light of the fact that this Court itself applied that important principle of judicial restraint and constitutional avoidance in declining to address essentially the same question presented here in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001). See *id.* at 360 n.1 (declining to address Congress's power to enact Title II because of the unresolved statutory question of whether Title II applies to employment). The preliminary statutory question of whether Title II and its surcharge regulation prohibits Missouri's parking placard fee thus stands as a significant obstacle to this Court's consideration of the questions presented by petitioners in this case.

In fact, as the United States previously indicated in its brief in opposition to certiorari in *Thompson* v. *Colorado*, No. 01-1024—another case seeking review of Congress's power to enact Title II of the Disabilities Act

that arose in the context of parking placard fees and in which this Court denied further review, see 535 U.S. 1077 (2002)—the Justice Department interprets its regulation as *not* proscribing the fee charged by Missouri here. That is because such placards generally are not "required," 28 C.F.R. 35.130(f), to provide non-discriminatory access to buildings or facilities. Missouri already provides such access for drivers with disabilities by offering special license plates at no additional charge, which allow drivers with disabilities, their family members, and non-profit groups that transport individuals with disabilities to utilize the parking spots reserved for persons with disabilities. See Mo. Ann. Stat. § 301.142(5) (West Supp. 2004). The placard fee here thus can be understood as a fee for an alternative means of providing access, but not as a surcharge for the program accessibility that is "required" by the Disabilities Act. 28 C.F.R. 35.130(f). The Justice Department's interpretation of its own regulation merits substantial deference. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for reconsideration in light of *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), and respondent Missouri's change of position on the legal question of Congress's authority to enact Title II of the Disabili-

ties Act pursuant to its power under Section 5 of the Fourteenth Amendment. In the alternative, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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