No. 03-50608

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHRISTY McCARTHY, by and through her next friend
JAMIE TRAVIS*, et al.*,

Plaintiffs-Appellees

v.

KAREN F. HALE, in her official capacity as Commissioner of the Texas Department of Mental Health & Retardation, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS INTERVENOR

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50452

CHRISTY McCARTHY, by and through her next friend
JAMIE TRAVIS, *et al.*,

Plaintiffs-Appellees

v.

KAREN F. HALE, in her official capacity as Commissioner of the Texas Department of Mental Health & Retardation, *et al.*,

Defendants-Appellants

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS INTERVENOR

Pursuant to this Court's order of May 18, 2004, the United States submits this supplemental brief on the effect of *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), on the issues raised in this appeal.

ARGUMENT

1. As the United States argued in its prior brief, the constitutionality of the substantive requirements of Title II of the Americans with Disabilities Act, 42 U.S.C. 12131-12165, is not properly before this Court in this interlocutory appeal. See U.S. Br. 16-21.

2. In its prior brief, the State argued that the substantive requirements of Title II were beyond Congress's Fourteenth Amendment authority. The Supreme

Court addressed that contention in *Lane*, holding that "Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." 124 S. Ct. at 1994. Accordingly, the Court's decision in *Lane* requires a lower court to examine whether Title II is valid Fourteenth Amendment legislation as applied to the relevant category of cases.

3. Viewed in light of the teachings and example of *Lane*, Title II is valid Fourteenth Amendment legislation as applied to cases implicating the constitutional rights of institutionalized persons.

Lane applied the three-part analysis for Fourteenth Amendment legislation created by *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), asking (1) what "constitutional right or rights that Congress sought to enforce when it enacted Title II," *Lane*, 124 S. Ct. at 1988; (2) whether there was a history of unconstitutional disability discrimination to support Congress's determination that "inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at 1992; and (3) "whether Title II is an appropriate response to this history and pattern of unequal treatment," *ibid*. The Court conclusively resolved the first two questions and indicated that the third should be addressed on a category-by-category basis.

a. Title II enforces the Equal Protection Clause's "prohibition on irrational disability discrimination," as well as "a variety of other basic constitutional guarantees, infringements of which are subject to more searching

judicial review." *Lane*, 124 S. Ct. at 1988. In the context of this case, Title II acts to enforce the Equal Protection Clause's prohibition against arbitrary treatment based on irrational stereotypes or hostility,[1] as well as to enforce the heightened constitutional protection applied to the "treatment of disabled persons by state agencies in a variety of settings, including unjustified commitment, *e.g.*, *Jackson* v. *Indiana*, 406 U.S. 715 (1972); [and] the abuse and neglect of persons committed to state mental health hospitals, *Youngberg* v. *Romeo*, 457 U.S. 307 (1982)." *Id*. at 1989 (parallel citations omitted).[2] As was true of the right to access to courts at issue in *Lane*, "ordinary considerations of cost and convenience alone cannot justify" institutionalization decisions or the denial of institutionalized persons accommodations necessary to ensure their basic rights. *Id*. at 1994; see, *e.g.*, *O'Connor* v. *Donaldson*, 422 U.S. 563, 575-576 (1975); *Youngberg* v. *Romeo*, 457

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

[2] See also *O'Connor* v. *Donaldson*, 422 U.S. 563, 573-576 (1975) (unconstitutional institutionalization); *Thomas S. by Brooks* v. *Flaherty*, 902 F.2d 250 (4th Cir.) (confinement when appropriate community placement available), cert. denied, 498 U.S. 951 (1990); *Clark* v. *Cohen*, 794 F.2d 79 (3d Cir.) (same), cert. denied, 479 U.S. 962 (1986).

U.S. 307, 324-325 (1982). Finally, as described below, the integration mandate of Title II assists in the prevention of constitutional violations throughout the range of government services, many of which implicate fundamental constitutional rights. See *Lane*, 124 S. Ct. at 1989.

b. In *Reickenbacker* v. *Foster*, the panel concluded that Title II failed the second step of the *Boerne* analysis because the "requisite pattern of unconstitutional discrimination by the States against the disabled" was absent. 274 F.3d 974, 983 (5th Cir. 2001). The Supreme Court reached the opposite conclusion in *Lane*, finding that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Lane*, 124 S. Ct. at 1989. The Court held that Congress's legislative finding of persistent "discrimination against individuals with disabilities * * * [in] access to public services," 42 U.S.C. 12101(a)(3), taken "together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." 124 S. Ct. at 1992.

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 found that the record included not only "a pattern of unconstitutional treatment in the administration of justice," *Lane*, 124 S. Ct. at 1989, but also violations of

constitutional rights in the context of voting, marriage, jury service, zoning, the penal system, public education, law enforcement, and treatment of institutionalized persons. *Ibid*. This history, the Court held, warranted prophylactic legislation addressing "public services" generally. *Id*. at 1992.

Thus, the adequacy of the historical predicate for Title II is no longer open to dispute. Even if it were, the United States' original brief in this case provides ample additional support for the Supreme Court's conclusion in the context of institutionalization. See U.S. Br. 25-33.[3]

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

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[3] As in *Lane*, "the record of constitutional violations in this case * * * far exceeds the record in [*Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003)]." *Lane*, 124 S. Ct. at 1992. See also *id*. at 1991-1992 (noting *Hibbs* record contained "little" evidence of "unconstitutional state conduct"); *id* at 1992 n.17. And the record in the context of institutionalization far exceeds the record of unconstitutional treatment in judicial services. Compare *Lane*, 124 S. Ct. at 1990 nn. 9 & 14, 1991 with U.S. Br. 25-33 & App. A. In its prior brief, the State challenged the quality and sources of this evidence, but the Supreme Court relied on precisely the same sources and types of information in reaching its conclusions in *Lane*. See, *e.g.*, 124 S. Ct. at 1990 nn. 7-14 (relying on statutes and cases post-dating enactment of ADA); *id*. at 1991 (Task Force testimony and Breyer appendix in *Garrett*); *id*. at 1991 n. 16 (conduct of local governments); *id*. at 1992 n. 17 (noting *Hibbs* relied on legislative history to predecessor statute); *id*. at 1992 (congressional finding of persisting "discrimination" in public services).

As was true of access to courts, the "unequal treatment of disabled persons" in the area of institutions "has a long history, and has persisted despite several legislative efforts." *Lane*, 124 S. Ct. at 1993; see *id*. at 1991; *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 599 (1999); U.S. Br. 26-32. Thus, Congress faced a "difficult and intractable proble[m]," *Lane*, 124 S. Ct. at 1993, which it could conclude would "require powerful remedies." *Id*. at 1989.

Nonetheless, the remedy imposed by Title II is "a limited one." *Lane*, 124 S. Ct. at 1993. Even though it requires States to take some affirmative steps to avoid discrimination, it "does not require States to compromise their essential eligibility criteria," requires only "'reasonable modifications' that would not fundamentally alter the nature of the service provided," *id*. at 1993, and does not require States to "undertake measures that would impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service," *id*. at 1994. See also *Olmstead*, 527 U.S. at 603-606 (plurality).

Title II's carefully circumscribed integration mandate is consistent with the commands of the Constitution in this area. Congress was well aware of the long history of state institutionalization decisions being driven by insufficient or illegitimate state purposes, irrational stereotypes and even outright hostility toward people with disabilities. See U.S. Br. 26-32. Title II provides a proportionate response to that history, congruent with the requirements of the Due Process and Equal Protection Clauses, by requiring the State to treat people with disabilities in accordance with their individual needs and capabilities. Compare *Olmstead*, 527

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

Moreover, given the history of unconstitutional compulsory institutionalization, Congress was entitled to conclude that there exists a real risk that some state officials may continue to make placement decisions based on hidden invidious class-based stereotypes or animus that would be difficult to detect or prove. See *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 732-733, 735-736 (2003). Title II appropriately balances the need to protect against that risk and the State's legitimate interests. *Olmstead* generally permits a State to limit services to an institutional setting when the State's treating professionals determine that a restrictive setting is necessary for an individual patient, or when providing a community placement would impose unwarranted burdens on the State's ability to "maintain a range of facilities and to administer services with an even hand." 527 U.S. at 605 (plurality). But when a State persistently refuses to follow the advice of its own professionals and is unable to demonstrate that its decision is justified by sufficient administrative or financial considerations, the risk of unconstitutional treatment is sufficient to warrant Title II's prophylactic response. Compare *Hibbs*, 538 U.S. at 736-737 (Congress may respond to risk of "subtle discrimination that

may be difficult to detect on a case-by-case basis" by "creating an across-the-board, routine employment benefit for all eligible employees").[4]

Title II also serves broader remedial and prophylactic purposes. The integration accomplished by Title II is a proper remedy for continuing segregative effects of the historical exclusion of people with disabilities from their communities, schools, and other government services. See *Lane*, 124 S. Ct. at 1989-1990; *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) ("A proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future.") (internal punctuation omitted). It is also a reasonable prophylaxis against the risk of future unconstitutional discrimination in government services. "[I]nstitutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Olmstead*, 527 U.S. at 600-601. Much of the discrimination Congress documented occurred in the context of individual state officials making discretionary decisions driven by just such "false

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

presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies," H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 30 (1990). Congress could reasonably expect that Title II's integration mandate would reduce the risk of unconstitutional state action by ameliorating one of its root causes through "increasing social contact and interaction of nonhandicapped and handicapped people." Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* 43 (1983).

Thus, the integration mandate plays an important role in Title II's larger goal of relieving the isolation and invisibility of people with disabilities that is both a legacy of past unconstitutional treatment and a contributor to continuing denials of basic constitutional rights. Accordingly, in the context presented by this case, Title II "cannot be said to be 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Lane*, 124 S. Ct. at 1994.[5]

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[5] If this Court holds that Congress validly abrogated the State's Eleventh Amendment immunity to claims under Title II, the same conclusion would follow with respect to Section 504 of the Rehabilitation Act, 29 U.S.C. 794, thereby avoiding the need to determine whether the State validly waived its immunity to plaintiffs' Section 504 claims. See *Reickenbacker*, 274 F.3d at 977 n. 17; cf. *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875 n. 15 (5th Cir. 2000).

CONCLUSION

For the foregoing reasons, and those stated in the United States' prior brief, the district court's denial of the State's motion to dismiss plaintiffs' Title II and Section 504 claims on sovereign immunity grounds should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that two copies of the above SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS INTERVENOR, along with a computer disk containing an electronic version of the brief, were served by overnight mail, postage prepaid, on June 15, 2004, on the following parties:

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