No. 17-11231-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DORIS FREYRE,

Plaintiff-Appellee

v.

DAVID GEE, AS SHERIFF OF THE HILLSBOROUGH COUNTY SHERIFF'S OFFICE,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS INTERVENOR

JOHN M. GORE
Acting Assistant Attorney General

THOMAS E. CHANDLER
DAYNA J. ZOLLE
Attorneys
Department of Justice
Civil Rights Division
Appellate Section – RFK 3718
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-8194

Doris Freyre v. *David Gee*, No. 17-11231-JJ

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the United States as Intervenor certifies that, in addition to those listed in the certificate filed by defendant-appellant in his opening brief on May 1, 2017, the following persons may have an interest in the outcome of this case:

1. Chandler, Thomas E., U.S. Department of Justice, Civil Rights Division, counsel for the United States;

2. Gore, John M., U.S. Department of Justice, Civil Rights Division, counsel for the United States;

3. Zolle, Dayna J., U.S. Department of Justice, Civil Rights Division, counsel for the United States.

s/ Dayna J. Zolle
DAYNA J. ZOLLE
Attorney

Date: October 13, 2017

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS INTERVENOR

JURISDICTIONAL STATEMENT

Plaintiff-appellee Doris Freyre alleged, among other things, that the defendant-appellant Sheriff[1] violated her rights under Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.* Doc. 71, at 2.[2] The

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[1] Freyre sued then-Sheriff David Gee in his official capacity as Hillsborough County Sheriff; Chad Chronister became Sheriff during this appeal and moved to be substituted for Gee.

[2] "Doc. __, at __" refers to documents and pages in the district court record. "Br. __" refers to pages in the Sheriff's opening brief.

district court had jurisdiction under 28 U.S.C. 1331. On March 15, 2017, the district court granted in part and denied in part the Sheriff's motion for summary judgment. Doc. 249, at 1-2. The Sheriff filed a timely notice of interlocutory appeal on March 17, 2017, challenging the district court's rejection of his Eleventh Amendment immunity defense. Doc. 256; Br. 1. This Court has jurisdiction under 28 U.S.C. 1291. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993); *Black* v. *Wigington*, 811 F.3d 1259, 1270 (11th Cir. 2016). The United States intervened in this case to defend the constitutionality of the ADA's abrogation of Eleventh Amendment immunity, which the Sheriff disputes in his opening brief.[3] See Br. 3, 27, 49.

STATEMENT OF THE ISSUE

The United States addresses the following issue:

Whether the statutory provision abrogating Eleventh Amendment immunity for suits under the ADA, 42 U.S.C. 12202, as applied to Title II claims involving public child-protective services, is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

[3] Freyre has also cross-appealed to challenge some of the district court's decisions on the merits. See Doc. 261, at 1. We take no position on this cross-appeal, including any underlying jurisdictional issues.

STATEMENT OF THE CASE

Doris Freyre is a woman with physical disabilities whose 14-year-old daughter had cerebral palsy and other disabilities. Doc. 71, at 7. Based on allegations of abuse and neglect, child-protective investigators for the Hillsborough County Sheriff's Office in Florida removed Freyre's daughter from her mother's custody and transferred her to a skilled nursing facility, where she died. Doc. 71, at 8-9, 23.

1. Freyre's Claims And Their Legal Bases

In response to her daughter's death, Freyre sued two child-protective investigators, Iris Valdez-Corey and Jessica Pietrzak; the Hillsborough County Sheriff in his official capacity; and others in federal court. Doc. 71, at 1-3. As relevant here, Freyre alleged that the investigators and the Sheriff unjustifiably removed and institutionalized her daughter in violation of her individual and associational rights under Title II of the ADA; her individual and associational rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794; and her right to due process under the Fourteenth Amendment and 42 U.S.C. 1983. Doc. 71, at 2, 31, 38. Freyre sought compensatory damages, fees, and costs. Doc. 71, at 33, 39, 58.

Title II of the ADA 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. Similarly, Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794. Finally, the Due Process Clause of the Fourteenth Amendment forbids a State from depriving any person of life, liberty, or property without due process of law. U.S. Const. Amend. XIV, § 1.

2. The Proceedings Below

The individual investigators and the Sheriff moved for summary judgment. Doc. 189; Doc. 190; Doc. 191. The district court granted the investigators' motions (Doc. 247), and it granted in part and denied in part the Sheriff's motion (Doc. 249, at 1-2).

In considering the Sheriff's motion, the district court first determined that Freyre had standing to bring both her individual and associational Title II claims. Doc. 249, at 4-5. The district court then granted summary judgment for the Sheriff on the merits of Freyre's individual claim, but it denied summary judgment on Freyre's associational Title II claim. Doc. 249, at 14. The district court concluded that Freyre had "proffered evidence to raise a question of material fact on her

associational claim that [her daughter] was unjustifiably institutionalized." Doc. 249, at 14. The district court also determined that the Sheriff was not entitled to Eleventh Amendment immunity, which generally precludes private citizens from suing States for damages in federal court, because it found that the Sheriff, in his official capacity, is not an "arm of the [S]tate." Doc. 249, at 22.

As for Freyre's other claims, the district court granted summary judgment for the Sheriff on Freyre's Section 504 claims because it determined that the Sheriff did not receive federal funds and is therefore not subject to Section 504 liability. Doc. 249, at 17-18. The district court also granted summary judgment for the Sheriff on Freyre's Section 1983 claim, concluding that Freyre had not demonstrated that the Sheriff had a policy or custom of disability discrimination sufficient to establish municipal liability. Doc. 249, at 18-19.

3. The Present Appeal

The Sheriff appealed. Doc. 256. In his opening brief, the Sheriff argues, among other things, that he is entitled to Eleventh Amendment immunity. Br. 27. He cites *United States* v. *Georgia*, 546 U.S. 151, 159 (2006), for the proposition that Title II "*only* abrogates state sovereign immunity when the alleged conduct *actually* violated the Fourteenth Amendment." Br. 3, 49. The Sheriff suggests that, because Freyre failed to establish a Fourteenth Amendment violation in this case, the ADA did not validly abrogate Eleventh Amendment immunity for her

Title II claims, and the State is immune from suit. Br. 27. He also argues that he is entitled to such immunity because he is an arm of the State. Br. 50-58.

SUMMARY OF ARGUMENT

1. The Court should not consider the constitutionality of the ADA's abrogation of Eleventh Amendment immunity unless it is necessary to do so. It may avoid this constitutional question under three circumstances. First, the Court should avoid the constitutional question if it concludes that the Sheriff is not an arm of the State and is therefore not entitled to state sovereign immunity, regardless of any abrogation. Second, the Court should not examine the validity of the ADA's abrogation of immunity if it determines that the Sheriff received federal financial assistance and is therefore subject to Section 504 liability, for which the State waived its immunity. Finally, the Court should not reach the constitutional question if Freyre has not alleged conduct that violates Title II.

2. If the Court must reach the constitutional question, it should hold that the ADA's abrogating provision, as applied to Title II claims involving public child-protective services, is valid legislation under Section 5 of the Fourteenth Amendment. To make this determination, the Court should apply the legal framework set forth in *United States* v. *Georgia*, 546 U.S. 151 (2006). Under *Georgia*, if Freyre alleged misconduct that violated Title II, the Court must consider whether that misconduct also violated the Fourteenth Amendment. If the

alleged misconduct actually violated the Fourteenth Amendment, then the Court should hold that the ADA validly abrogated the State's immunity as to Freyre's Title II claims.

But the inquiry does not necessarily end there. As this Court and others have consistently recognized, the ADA may validly abrogate Eleventh Amendment immunity for Title II claims despite the absence of an alleged Fourteenth Amendment violation in a particular case. Accordingly, if the Court concludes that Freyre has not alleged an actual Fourteenth Amendment violation, then the Court must examine whether the ADA's abrogation of immunity for Title II claims is nevertheless valid under *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).

Application of the three-step *Boerne* analysis demonstrates that the ADA, as applied to Title II claims involving public child-protective services, validly abrogated Eleventh Amendment immunity. First, Congress sought to enforce several constitutional rights under Title II, including the fundamental right of parents to make decisions concerning the custody, care, and control of their children. Second, Congress identified ample evidence of a history and pattern of constitutional violations by the States to justify enacting Section 5 legislation. Third, Title II, as applied to public child-protective services, is a congruent and proportional response to this history of unconstitutional disability discrimination,

even if, *in this case*, the alleged misconduct did not violate the Fourteenth Amendment.

For these reasons, if the Court finds it necessary to address the issue, it should hold that Congress acted within its constitutional authority in abrogating Eleventh Amendment immunity for Title II claims involving public child-protective services. Accordingly, Eleventh Amendment immunity does not bar this suit.

ARGUMENT

I

THIS COURT SHOULD NOT CONSIDER THE CONSTITUTIONALITY OF THE ADA'S ABROGATION OF ELEVENTH AMENDMENT IMMUNITY UNLESS NECESSARY

This Court should not assess the constitutionality of Congress's abrogation of States' Eleventh Amendment immunity for claims under Title II of the ADA unless it is necessary to do so. It is well established that "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). This is because "[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). If any of the following three circumstances applies, this Court need not—

and therefore should not—reach the question of whether the ADA constitutionally abrogated Eleventh Amendment immunity in this case.

A. The Court Should Not Reach The Constitutional Question If The Sheriff Is Not An Arm Of The State And Is Therefore Not Entitled To State Sovereign Immunity

First, the Court should not reach the constitutional question regarding Eleventh Amendment immunity if it agrees with the district court (Doc. 249, at 22) that the Hillsborough County Sheriff is not an arm of the State of Florida. The Eleventh Amendment generally bars suits in federal court against a State itself or an "arm of the State," including state agents and instrumentalities. *Manders* v. *Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003) (citation omitted), cert. denied, 540 U.S. 1107 (2004); accord *Black* v. *Wigington*, 811 F.3d 1259, 1269 (11th Cir. 2016). Eleventh Amendment immunity does not extend, however, to municipal corporations or political subdivisions, such as cities and counties. *Mount Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977). Accordingly, this Court should avoid the constitutional question if it concludes that the Sheriff is not an arm of the State and is therefore not entitled to state sovereign immunity, regardless of any abrogation. Cf. *Abusaid* v. *Hillsborough Cty. Bd. of Cty. Comm'rs*, 405 F.3d 1298, 1305 (11th Cir. 2005) (holding that a Florida county sheriff is not an arm of the State when acting to enforce a county ordinance and is therefore not entitled to Eleventh Amendment immunity). Because the United

States intervened in this case for the limited purpose of defending the constitutionality of the ADA's abrogation of state sovereign immunity, we do not take a position on whether the Sheriff is an arm of the State.

B. The Court Should Not Reach The Constitutional Question If The Sheriff Received Federal Assistance And Is Therefore Subject To Section 504 Liability, For Which The State Waived Its Immunity

The Court should also not consider the constitutional question if it concludes that the Sheriff received federal financial assistance and is therefore subject to liability under Section 504 of the Rehabilitation Act. In *Garrett* v. *University of Alabama at Birmingham Board of Trustees*, 344 F.3d 1288 (11th Cir. 2003) (*UAB*), this Court held that a public entity that receives federal financial assistance waives its immunity to private suits under Section 504. *Id.* at 1293; accord *Williams* v. *Fulton Cty. Sch. Dist.*, 181 F. Supp. 3d 1089, 1139 (N.D. Ga. 2016). This is because Section 504 unambiguously conditions the receipt of such assistance on a State's waiver of immunity. *UAB*, 344 F.3d at 1293; see 42 U.S.C. 2000d-7. Accordingly, if the Sheriff accepted federal financial assistance, this Court could resolve this case on Section 504 grounds and avoid the constitutional question associated with Title II. We take no position on whether the Sheriff received such assistance.

C. The Court Should Not Reach The Constitutional Question If Freyre Has Not Alleged Misconduct That Violated Title II

Finally, the Court must consider whether the Sheriff's alleged misconduct violated Title II before addressing the constitutional question. In *United States* v. *Georgia*, 546 U.S. 151 (2006), the Supreme Court instructed that a court should "determine in the first instance, on a claim-by-claim basis * * * which aspects of the State's alleged conduct violated Title II" before examining whether Congress had the authority to abrogate sovereign immunity for claims under that statute. *Id.* at 159. Thus, as a threshold matter, the Court should consider whether Freyre failed to allege misconduct that violated Title II. If Freyre has not alleged a Title II violation, this Court must not reach the abrogation question and should resolve the case on these statutory grounds.[4] We do not take a position on this issue.

If this Court concludes, however, that the Sheriff is an arm of the State, that he did not receive federal financial assistance, and that his alleged misconduct violated Title II, then the Court must address the constitutionality of the ADA's abrogation of state sovereign immunity.

[4] The Sheriff has also challenged Freyre's standing to raise her associational Title II claim. Br. 28. If this Court concludes that Freyre lacked standing, it also would not need to reach the abrogation issue.

II

THE ADA'S ABROGATING PROVISION, AS APPLIED TO TITLE II CLAIMS INVOLVING PUBLIC CHILD-PROTECTIVE SERVICES, IS VALID SECTION 5 LEGISLATION

If the Court finds it necessary to reach the issue, it should hold that the ADA's abrogating provision, as applied to Title II claims involving public child-protective services, is valid Section 5 legislation. Although the Eleventh Amendment generally insulates States from suits by private citizens for damages in federal court, Congress may remove state sovereign immunity if it "unequivocally expresse[s] its intent to abrogate that immunity" and "act[s] pursuant to a valid grant of constitutional authority." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 73 (2000); see also *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976). As for the first requirement, the Supreme Court has recognized that Congress unequivocally expressed its intent to abrogate States' immunity under the ADA. *United States* v. *Georgia*, 546 U.S. 151, 154 (2006); see also 42 U.S.C. 12202 ("A State shall not be immune under the eleventh amendment * * * in [a] Federal or State court of competent jurisdiction for a violation of [the ADA]."). The relevant inquiry, therefore, is whether Congress had the constitutional authority to effect this abrogation.

In enacting the ADA, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment." 42 U.S.C.

12101(b)(4). That power stems from Section 5 of the Fourteenth Amendment, which authorizes Congress to enforce the Amendment's substantive guarantees through "appropriate legislation." See *City of Boerne* v. *Flores*, 521 U.S. 507, 517 (1997). Although Congress may not effect a "substantive change in constitutional protections," *id.* at 509, Section 5 allows Congress to do more than proscribe unconstitutional conduct. Indeed, Section 5 authorizes Congress "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.* v. *Garrett*, 531 U.S. 356, 365 (2001) (*Garrett*)). In other words, Section 5 enables Congress to pass "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Id.* at 727-728; accord *Tennessee* v. *Lane*, 541 U.S. 509, 518 (2004).

A. The Court Should Apply The Legal Framework Set Forth In United States *v.* Georgia *To Determine Whether The ADA Validly Abrogated States' Eleventh Amendment Immunity*

A court must follow three steps to determine whether Congress acted within its Section 5 authority in abrogating States' Eleventh Amendment immunity for Title II claims. As the Supreme Court explained in *Georgia*, a court must determine 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." 546 U.S. at 159. Thus, as explained above, a court must first determine whether the State's alleged conduct violated Title II. If a plaintiff has not alleged a Title II violation, the court should resolve the case on that statutory basis.

1. If The Court Concludes That The Alleged Misconduct Violated Title II, It Should Consider Whether That Misconduct Also Violated The Fourteenth Amendment And, If So, Hold That The ADA Validly Abrogated Eleventh Amendment Immunity

Where the alleged misconduct violated Title II, the court must consider, at step two of *Georgia*, whether that misconduct also violated the Fourteenth Amendment. At a minimum, Section 5 grants Congress the authority to enforce the Fourteenth Amendment's substantive provisions—that is, to proscribe actual constitutional violations. See *Georgia*, 546 U.S. at 158; *Fitzpatrick*, 427 U.S. at 456. Congress therefore acts within its authority when it subjects States to private suits for conduct that "*actually* violates the Fourteenth Amendment." *Georgia*, 546 U.S. at 159; see also *Black* v. *Wigington*, 811 F.3d 1259, 1269 (11th Cir. 2016) ("This abrogation is a valid exercise of Congress's authority under section 5 of the Fourteenth Amendment when a plaintiff complains about conduct that violates both Title II and the Fourteenth Amendment.").

A plaintiff who has alleged an actual violation of the Fourteenth Amendment need not establish that she is entitled to summary judgment on that claim to defeat Eleventh Amendment immunity, which "is a question of jurisdiction." See *Black*, 811 F.3d at 1269-1270. In other words, the inquiry at this stage is whether a plaintiff has plausibly alleged misconduct that, if it occurred, would violate both Title II and the Fourteenth Amendment; it is not whether the Sheriff *actually* violated Title II and the Fourteenth Amendment. *Id.* at 1270; see also *id.* at 1269-1270 (recognizing that the Eleventh Amendment is no bar to suit unless the allegations of Title II and Fourteenth Amendment violations are "wholly insubstantial and frivolous" (quoting *Blue Cross & Blue Shield of Ala.* v. *Sanders*, 138 F.3d 1347, 1352 (11th Cir. 1998))). Accordingly, if this Court determines that Freyre plausibly alleged misconduct that would violate both Title II and the Fourteenth Amendment, it must reject the Sheriff's immunity defense.

2. If The Court Concludes That The Alleged Misconduct Did Not Violate The Fourteenth Amendment, It Must Consider Whether The ADA's Abrogation Of Eleventh Amendment Immunity Is Nevertheless Valid Under City Of Boerne *v.* Flores

If the Court concludes that the alleged misconduct violated Title II but *not* the Fourteenth Amendment, the inquiry does not end there. Instead, at step three of *Georgia*, the Court must determine whether "Congress's purported abrogation of sovereign immunity as to that class of conduct is *nevertheless valid.*" 546 U.S. at 159 (emphasis added). This is because, as explained above, Section 5 allows

Congress to prohibit not only constitutional violations, but also "facially constitutional conduct, in order to prevent and deter unconstitutional conduct." See *Hibbs*, 538 U.S. at 727-728. To determine whether Congress acted within its constitutional authority in proscribing conduct that does not actually violate the Fourteenth Amendment, the Court must apply the three-part test established in *Boerne*. See, *e.g.*, *Association for Disabled Ams., Inc.* v. *Florida Int'l Univ.*, 405 F.3d 954, 957-959 (11th Cir. 2005) (applying the *Boerne* analysis).

The Sheriff, therefore, is incorrect in asserting that, under *Georgia*, "the ADA *only* abrogates state sovereign immunity when the alleged conduct *actually* violated the Fourteenth Amendment." See Br. 3, 49. Further, the Sheriff has no basis for suggesting that he is automatically entitled to Eleventh Amendment immunity if Freyre's due process claim fails. See Br. 27; see also *R.W.* v. *Board of Regents*, 114 F. Supp. 3d 1260, 1280-1281 (N.D. Ga. 2015) (rejecting a defendant's contention that "for sovereign immunity to be abrogated for Title II of the ADA, there must also be a constitutional violation committed in the case"). Instead, if the Court reaches the constitutional question and concludes that the alleged misconduct did not violate the Fourteenth Amendment, it must conduct the *Boerne* analysis to determine whether the abrogation is nevertheless valid.

a. This Court Has Recognized That The ADA May Validly Abrogate Eleventh Amendment Immunity Despite The Absence Of An Alleged Fourteenth Amendment Violation In A Particular Case

In *Association for Disabled Americans*, this Court held that the ADA, as applied to a Title II claim involving public education, validly abrogated Florida's sovereign immunity, even though the plaintiffs did not purport to raise a constitutional claim. See 405 F.3d at 957-958; see also Br. for Appellants, *Association for Disabled Ams.*, 2002 WL 32901434, at *1-2 (June 11, 2002) (No. 02-10360) (mentioning only a Title II claim). Because the case lacked an alleged Fourteenth Amendment violation, the Court performed the *Boerne* analysis and concluded that Title II is an appropriate response to a history of unconstitutional discrimination against students with disabilities. See *Association for Disabled Ams.*, 405 F.3d at 959.

The Supreme Court's decision in *Georgia* the following year reaffirmed this Court's reasoning. See *McBay* v. *City of Decatur*, No. CV-11-S-3273-NE, 2014 WL 1513344, at *10 (N.D. Ala. Apr. 11, 2014) ("The Eleventh Circuit's decision in [*Association for Disabled Americans*] is consistent with the Supreme Court's holding in *United States v. Georgia*."). To be sure, *Georgia* recognized that a court can take a shortcut when a plaintiff alleges misconduct that actually violates the Fourteenth Amendment: in such a case, the court can circumvent the *Boerne* analysis and hold that the ADA's abrogation is valid as applied because Title II is

squarely enforcing the Fourteenth Amendment. See *Georgia*, 546 U.S. at 159. But *Georgia* also reaffirmed that when a plaintiff has *not* alleged an actual Fourteenth Amendment violation, a court must still assess the validity of the ADA's abrogation, as applied to a particular class of conduct. See *ibid.*

b. Other Courts Have Reached The Same Conclusion

Other courts have also held that the ADA validly abrogated Eleventh Amendment immunity for Title II claims when plaintiffs have not alleged actual Fourteenth Amendment violations. In *Toledo* v. *Sánchez*, 454 F.3d 24 (2006), cert. denied, 549 U.S. 1301 (2007), for instance, the First Circuit applied the three-step *Georgia* framework and correctly explained that "[b]ecause [the plaintiff] has stated a claim that the University violated Title II but not the Fourteenth Amendment, we must address whether Congress's abrogation of sovereign immunity as to that class of conduct is valid as a prophylactic measure within Congress's § 5 power." *Id.* at 34. Accordingly, the court applied *Boerne* and concluded that "Title II, as it applies to the class of cases implicating the right of access to public education, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." *Id.* at 40.

Similarly, in *Bowers* v. *NCAA*, 475 F.3d 524 (2007), the Third Circuit appropriately performed the *Boerne* analysis after determining that the plaintiff had stated a claim for a violation of Title II but not the Fourteenth Amendment. *Id.* at

554-555. The court concluded that, as applied to public education, Title II is a justifiable prophylactic remedy, and it "join[ed] several sister circuits in holding that Congress acted within its Constitutional authority in abrogating sovereign immunity under Title II of the ADA." *Id.* at 556.

In sum, the ADA may validly abrogate a State's Eleventh Amendment immunity even when a plaintiff has not alleged a constitutional violation. See, *e.g.*, *Guttman* v. *Khalsa*, 669 F.3d 1101, 1116 (10th Cir. 2012) ("Under the Fourteenth Amendment, a state may be subject to a statutory suit under Title II of the ADA, even if there is no allegation of an actual Fourteenth Amendment violation."). The Sheriff has not cited—nor is the United States aware of—any cases holding otherwise. Accordingly, if this Court concludes that Freyre has not alleged a Fourteenth Amendment violation, it must perform the three-step *Boerne* analysis to determine whether Congress's abrogation of immunity is nevertheless valid. See *Georgia*, 546 U.S. at 159.

B. Application Of The Boerne *Analysis Demonstrates That The ADA, As Applied To Title II Claims Involving Public Child-Protective Services, Validly Abrogated Eleventh Amendment Immunity*

Under *Boerne*, a court must (1) "identify the constitutional right or rights that Congress sought to enforce when it enacted Title II," *Lane*, 541 U.S. at 522; (2) "examine whether Congress identified a history and pattern of unconstitutional * * * discrimination by the States against the disabled," *Garrett*,

531 U.S. at 368; and (3) determine "whether Title II is an appropriate response to this history and pattern of unequal treatment," *Lane*, 541 U.S. at 530. See, *e.g.*, *Association for Disabled Ams.*, 405 F.3d at 957. Ultimately, Title II is valid Section 5 legislation, as applied to a particular class of cases, if it exhibits "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520. This Court should hold that the ADA's provision abrogating Eleventh Amendment immunity is valid prophylactic legislation, as applied to Title II claims involving public child-protective services.

1. Congress Sought To Enforce Several Constitutional Rights Under Title II, Including The Fundamental Right Of Parents To Make Decisions Concerning The Custody, Care, And Control Of Their Children

Under the first step of *Boerne*, a court must "identify the constitutional right or rights that Congress sought to enforce when it enacted Title II." *Lane*, 541 U.S. at 522. In applying this step in *Lane*, the Supreme Court explained that Congress enacted Title II to enforce not only the Equal Protection Clause and its proscription of irrational disability discrimination, but also "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Id.* at 522-523. The Court recognized that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of

state services and programs, including systematic deprivations of fundamental rights." *Id.* at 524.

As discussed below, one of the due process rights that Congress sought to enforce under Title II is "the fundamental right of parents to make decisions concerning the care, custody, and control of their children," *Troxel* v. *Granville*, 530 U.S. 57, 66 (2000) (plurality opinion). See *Frazier* v. *Winn*, 535 F.3d 1279, 1284 (11th Cir. 2008) (discussing the fundamental right of parents to control their children's upbringing), cert. denied, 558 U.S. 818 (2009). The Supreme Court has long held that the Due Process Clause protects this "fundamental liberty interest." *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982); see, *e.g.*, *Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) (acknowledging that the Due Process Clause protects the right of parents to "establish a home and bring up children"). The Supreme Court has also recognized that the "rights to conceive and to raise one's children have been deemed 'essential,'" *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972) (quoting *Meyer*, 262 U.S. at 399), and that these rights are "far more precious * * * than property rights," *May* v. *Anderson*, 345 U.S. 528, 533 (1953).

Moreover, the Due Process Clause requires States to provide parents with "a hearing on their fitness before their children are removed from their custody." *Stanley*, 405 U.S. at 657-658. This procedural due process right ensures that States afford parents with fair child-custody hearings, including the opportunity to be heard "at a meaningful time and in a meaningful manner." See *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1970) (citation omitted). The Supreme Court has also recognized that parents "retain a substantial, if not the dominant role" in deciding whether to institutionalize their children, absent a finding of abuse or neglect. *Parham* v. *J.R.*, 442 U.S. 584, 604 (1979). Thus, by prohibiting public entities from engaging in disability discrimination, including prohibiting them from depriving parents of custody of their children and a fair custody hearing based on disability, Congress sought to enforce several constitutional rights under Title II.

2. Congress Identified Ample Evidence Of A History And Pattern Of Unconstitutional Disability Discrimination By The States To Justify Enacting Section 5 Legislation

The next question, at step two of *Boerne*, is whether Congress identified a history and pattern of unconstitutional disability discrimination by the States to warrant a prophylactic response. See *Garrett*, 531 U.S. at 368. The Supreme Court in *Lane* conclusively answered this question in the affirmative. 541 U.S. at 528-529. The Court explained that Congress considered extensive evidence of States' discrimination against individuals with disabilities before passing the ADA.

See *id.* at 526; see also *Garrett*, 531 U.S. at 389-390 (Breyer, J., dissenting) (listing hearings). The Court emphasized "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services." *Lane*, 541 U.S. at 528. It also observed that Congress had expressly recognized in the ADA that "[d]iscrimination against individuals with disabilities persists in such critical areas as * * * *access to public services*." *Id.* at 529 (quoting 42 U.S.C. 12101(a)(3)). Accordingly, the Court concluded that it is "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." *Ibid.*

Although the Supreme Court narrowed its ultimate holding in *Lane* to the class of cases implicating the accessibility of judicial services, 541 U.S. at 531, this Court has held that *Lane*'s conclusion at step two of *Boerne* recognized a sufficient historical predicate for Section 5 legislation as applied to all public services. In *Association for Disabled Americans*, this Court explained that the Supreme Court in *Lane* "considered the record supporting Title II *as a whole*[] and conclusively held that Congress had documented a sufficient historical predicate of unconstitutional disability discrimination in the provision of public services to justify enactment of a prophylactic remedy." *Association for Disabled Ams.*, 405 F.3d at 958. Thus, even though *Association for Disabled Americans* did not

concern access to judicial services, this Court relied on *Lane*'s analysis in determining that "the second *Boerne* inquiry was satisfied." *Ibid.* In doing so, the Court demonstrated that public services are an appropriate subject for Section 5 legislation and that this issue is no longer open for dispute in this Circuit.[5] See *ibid.*

3. Title II, As Applied To Public Child-Protective Services, Is An Appropriate Response To This History And Pattern Of Unconstitutional Discrimination

The question remaining, at step three of *Boerne*, is whether Title II, as applied to a particular class of cases, is an appropriate response to this history of unconstitutional discrimination and is therefore valid Section 5 legislation. See *Lane*, 541 U.S. at 530. To answer this question, the Court must determine whether Title II, as applied, exhibits "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." See *Boerne*, 521 U.S. at 520. The Supreme Court has taken a context-specific approach at this step, and it has instructed lower courts to do the same. See, *e.g.*, *Georgia*, 546 U.S. at

[5] In applying the first two steps of *Boerne* in *Association for Disabled Americans*, this Court appropriately considered (1) what constitutional rights Congress intended to enforce under Title II and (2) whether Congress identified a history of unconstitutional discrimination to warrant a prophylactic response. See *Association for Disabled Ams.*, 405 F.3d at 957-958. As explained above, however, the Court did not require the plaintiffs to have alleged a present-day constitutional violation to establish that the ADA validly abrogated immunity for Title II claims. See *ibid.*

159 (directing courts to determine "whether Congress's purported abrogation of sovereign immunity as to [a] class of conduct is nevertheless valid," despite the absence of a constitutional violation); *Lane*, 541 U.S. at 531 ("Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further.").

Freyre's claims arose in the context of public child-protective services (see Doc. 71, at 2), and Congress identified ample evidence of unconstitutional disability discrimination by the States in this context to warrant prophylactic legislation. For instance, Congress heard testimony that "[h]istorically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent." 2 Staff of the House Comm. on Educ. & Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 1611 n.10 (Comm. Print 1990) (Arlene Mayerson) (*Leg. Hist.*); see also H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 25 (1990) ("These discriminatory policies and practices affect people with disabilities in every aspect of their lives * * * [including] securing custody of their children."); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 41 (1990) ("[B]eing paralyzed has meant far more than being unable to walk—it has meant * * * being deemed an 'unfit parent.'"); Joseph P. Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* 26 (1st ed. 1993) (woman with cerebral palsy denied custody of her two

sons); *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979) (lower court "stereotype[d] William as a person deemed forever unable to be a good parent simply because he is physically handicapped"). Further, Congress considered evidence of States' failure to provide parents with disabilities a meaningful opportunity to prevent or remedy the removal of their children. See, *e.g.*, *Leg. Hist.* 1331 (Justin Dart) ("[C]lients whose children have been taken away from them a[re] told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?").

In considering this record of disability discrimination in public child-protective services, Congress identified a history and pattern of Fourteenth Amendment violations. The record showed persistent misconduct by the States that implicated fundamental rights, including the rights of parents to maintain custody of their children and to receive a fair and meaningful hearing before losing custody. Infringement on these fundamental rights is subject to heightened scrutiny. See *Reno* v. *Flores*, 507 U.S. 292, 301-302 (1993). Accordingly, "it was easier for Congress to show a pattern of state constitutional violations" in this class of cases than it otherwise might have been. *Lane*, 541 U.S. at 529 (quoting *Hibbs*, 538 U.S. at 735-737). Thus, Congress identified a history of constitutional violations that warranted a prophylactic response.

Indeed, the record of unconstitutional discrimination before Congress warranted a robust response. The Supreme Court has emphasized that "the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent." *Lane*, 541 U.S. at 523. For instance, "[d]ifficult and intractable problems often require powerful remedies." *Id.* at 524 (quoting *Kimel*, 528 U.S. at 88). The constitutional violations that Congress observed in the context of public child-protective services were particularly harmful: the Supreme Court has emphasized that "[f]ew consequences of judicial action are so grave as the severance of natural family ties." *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 119 (1996) (citation omitted; brackets in original). Congress also recognized the difficulty of preventing these constitutional violations, as it heard testimony that previous legislation had proven "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." *Lane*, 541 U.S. at 526 (quoting S. Rep. No. 116, 101st Cong., 1st Sess. 18 (1989)). As a result, Congress had the authority under Section 5 to craft a remedy to prevent and deter violations of these "essential" liberties. See *Meyer*, 262 U.S. at 399.

Congress appropriately exercised this authority in abrogating States' Eleventh Amendment immunity for Title II claims involving public child-protective services. Title II, as applied, prevents state entities from denying parents with disabilities an equal opportunity to participate in and benefit from

child-protective-services investigations and proceedings. See 42 U.S.C. 12132; 28 C.F.R. 35.160(b)(1). As the Court explained in *Lane*, Title II "does not require States to employ any and all means" to ensure that States afford equal treatment to individuals with disabilities, 541 U.S. at 531-532, and it "does not require States to compromise their essential eligibility criteria for public programs," *id.* at 532. Instead, it requires that States make "only 'reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual seeking the modification is otherwise eligible for the service." *Ibid.* Finally, Title II does not compel States "to undertake measures that would impose an undue financial or administrative burden." *Ibid.* (citing 28 C.F.R. 35.150(a)(3)). Title II is therefore a "limited" remedy. *Id.* at 531.

Given these internal constraints, Title II is a congruent and proportional response to the history of unconstitutional disability discrimination that Congress observed in the context of public child-protective services. Thus, to the extent that Title II reaches conduct in this case that does not violate the Fourteenth Amendment, the statute is nevertheless "a reasonable prophylactic measure, reasonably targeted to a legitimate end," *Lane*, 541 U.S. at 533. Cf. *Association for Disabled Ams.*, 405 F.3d at 957-959 (applying the *Boerne* analysis and holding that Title II, as applied to public education, is a valid exercise of Congress's Section 5 power).

For these reasons, the ADA, as applied to Title II claims involving public child-protective services, validly abrogated Eleventh Amendment immunity. Thus, if the Court finds it necessary to decide this question, it should conclude that the Sheriff is not immune from this suit.

CONCLUSION

This Court should apply the standards set forth in this brief in evaluating the Sheriff's claim of sovereign immunity.

Respectfully submitted,

JOHN M. GORE
Acting Assistant Attorney General

s/ Dayna J. Zolle
THOMAS E. CHANDLER
DAYNA J. ZOLLE
Attorneys
Department of Justice
Civil Rights Division
Appellate Section – RFK 3718
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-8194

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached BRIEF FOR THE UNITED STATES AS INTERVENOR:

(1) complies with the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6154 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

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s/ Dayna J. Zolle
DAYNA J. ZOLLE
Attorney

Date: October 13, 2017

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I further certify that seven paper copies will be mailed to the Clerk of the Court by certified First-Class mail.

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DAYNA J. ZOLLE
Attorney