No. 06-779

In the Supreme Court of the United States

UNIVERSITY OF PUERTO RICO, PETITIONER

v.

IVÁN TOLEDO

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied to the Commonwealth of Puerto Rico in the context of public education.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 454 F.3d 24. The opinion of the district court (Pet. App. 26-34) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 6, 2006. On September 27, 2006, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including December 3, 2006 (a Sunday), and the petition was filed on December 4, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, established a "compre-

hensive 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 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 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, 42 U.S.C. 12133, and Congress expressly abrogated the States' Eleventh Amendment immunity to suit in federal court, 42 U.S.C. 12202. Congress further defined the "State" governments subject to the ADA to include the Commonwealth of Puerto Rico and other federal territories. 42 U.S.C. 12102(3).

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, a public entity must make reasonable modifications in its policies, practices, or procedures if necessary to avoid the exclusion of 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). 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, building construction or alterations undertaken after Title II's effective date must be designed to provide accessibility. 28 C.F.R. 35.151.

2. Iván Toledo suffers from schizoaffective disorder, a mental disability. Toledo alleges that, while he was enrolled at the University of Puerto Rico School of Architecture, various University employees discriminated against him on the basis of his disability and refused to provide reasonable accommodations for his disability. Pet. App. 2-4. Toledo subsequently filed suit in federal court against the University and various University officials, alleging violations of, *inter alia*, Title II of the ADA and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. III 2003). Pet. App. 4. Petitioner and the other state defendants moved to dismiss the Title II claims as barred by Eleventh Amendment

[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. III 2003). See 42 U.S.C. 12134.

immunity. *Ibid.* Although the district court initially granted the motion to dismiss, the court reinstated those claims following this Court's decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004). Pet. App. 26-33; see also *id.* at 4-5.

Petitioner and the other state defendants filed an interlocutory appeal on the immunity question, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), and the United States intervened on appeal, pursuant to 28 U.S.C. 2403, to defend the constitutionality of Congress's abrogation of immunity in Title II in the context of public education.

3. The court of appeals unanimously affirmed. Pet. App. 1-25. The court first held, based on circuit precedent, that Puerto Rico enjoys the same Eleventh Amendment immunity as States, and that petitioner, the University of Puerto Rico, is an arm of the state for purposes of the Eleventh Amendment. *Id.* at 5 n.1. The court further held that Toledo's complaint stated only statutory, rather than constitutional, challenges to petitioner's actions. As a result, under this Court's decision in *United States* v. *Georgia*, 126 S. Ct. 877 (2006), the court of appeals concluded that the question before it was whether Title II of the ADA was proper legislation to enforce the rights guaranteed by the Fourteenth Amendment. Pet. App. 6-12.

The court held that, as applied to education, Title II is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment to enforce constitutional rights and to prevent their violation. In so holding, the court of appeals followed this Court's lead in *Lane*, in which the Court addressed Title II as applied to access to the courts in a broad variety of forms and at all levels of government, 541 U.S. at 522-523, 532. Here,

the court of appeals likewise considered whether Title II was proper legislation as "applied to public education generally," rather than only as applied to public universities. Pet. App. 15. The court then concluded that Title II is reasonably tailored to protect the States' important governmental interests while preventing and remedying a "persistent pattern of exclusion and irrational treatment of disabled students in public education," and "the gravity of the harm worked by such discrimination." *Id.* at 24.

ARGUMENT

Petitioner seeks (Pet. 8-26) this Court's review of Congress's authority to abrogate the States' Eleventh Amendment immunity to claims under Title II of the ADA as applied to public education. Further review is not warranted for four reasons.

1. Petitioner seeks this Court's review of Congress's power to authorize suits under Title II "against a State." Pet. i; see Pet. 8-12, 15, 22-25. But petitioner is not a State. Petitioner is a federal territory, subject to Congress's plenary legislative authority over federally controlled land. See U.S. Const. Art. IV, § 3 (Congress is empowered to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States").

More to the point, as a territory, petitioner does not enjoy the Eleventh Amendment immunity that the petition seeks to vindicate (see Pet. 1, 14-16, 24). While the First Circuit has held that petitioner enjoys Eleventh Amendment immunity, see Pet. App. 5 n.1, that decision finds no home in the text of that Amendment, its historical genesis, or purpose. Federal territories, unlike States, do not enter the Union "with their sovereignty

intact." *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 779 (1991). Their relation with the federal government and the level of control that Congress exercises over them are in substantial tension with the federalism considerations that underlie Eleventh Amendment jurisprudence.

> The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. * * * Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments.

National Bank v. *County of Yankton*, 101 U.S. 129, 133 (1879).

Furthermore, even if petitioner retained some form of sovereign immunity, there is substantial doubt that the Constitution would constrain Congress's authority to abrogate that immunity in the same manner and to the same extent that the Eleventh Amendment cabins congressional power. See, *e.g.*, *Palmore* v. *United States*, 411 U.S. 389, 398 (1973) (Congress may "legislate for the [territories] in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. I, § 8.").

At a minimum, those constitutional questions concerning (i) what, if any, form of sovereign immunity petitioner enjoys, and (ii) what power Congress has to abrogate any immunity enjoyed by federal territories pose significant, and perhaps insurmountable, threshold barriers to resolution of the question for which petitioner seeks this Court's review. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 n.1 (1993) (reserving the question of whether Puerto Rico enjoys Eleventh Amendment immunity). Notably, petitioner does *not* contend that the question of Congress's power to abrogate any territorial immunity warrants this Court's review, and it does not. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995) (when confronted with two constitutional questions, Court must resolve the question with narrower constitutional reach first).

2. There is no conflict in the circuits that warrants this Court's review. Indeed, to the government's knowledge, no other court of appeals has addressed the question of Congress's authority to subject territories (or United States' possessions) to suit for damages under Title II of the ADA.

Nor is there any conflict in the courts of appeals on the general question of whether Title II is appropriate Section 5 legislation as applied to public education. To the contrary, every court of appeals to address that question has, like the court of appeals here, upheld the constitutionality of Congress's abrogation in the educational context. See *Bowers* v. *NCAA*, No. 05-2262, 2007 WL 270098 (3d Cir. Feb. 1, 2007); *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005); *Association for Disabled Americans, Inc.* v. *Florida Int'l Univ.*, 405 F.3d 954 (11th Cir. 2005);

see also *Phiffer* v. *Columbia River Corr. Inst.*, 384 F.3d 791 (9th Cir. 2004) (upholding Title II's abrogation in all applications), cert. denied, 126 S. Ct. 1140 (2006).

Petitioner contends (Pet. 10-15) that the courts of appeals are divided over Congress's authority to abrogate the States' Eleventh Amendment immunity for constitutional rights that are not subject to heightened scrutiny and that are not independently violated by the governmental action in question. This Court's decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), however, made clear that the question of congressional power should not be resolved at that level of generality. See *id.* at 515, 530-531. None of the court of appeals cases upon which petitioner relies (Pet. 6-15)—at least none that remains good law, see Pet. 13 (relying on vacated decisions)—adopts or endorses the sweeping bright-line distinction between rights subject to heightened scrutiny and those subject to rational-basis review that petitioner advocates. Indeed, given that the Fourteenth Amendment, including its provision for congressional enforcement, was adopted nearly a century before this Court began to identify and apply varying tiers of constitutional scrutiny, petitioner's proposed limitation on constitutional text is particularly suspect.

Furthermore, there could be no genuine conflict along the lines petitioner posits because not only history, but also this Court's precedent would preclude it. Rights subject to rational basis review are not immune from constitutional infringement, see *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), and that is particularly well established in the context of education, see *Plyler* v. *Doe*, 457 U.S. 202 (1982); cf. *Honig* v. *Doe*, 484 U.S. 305, 309-310 (1988). This Court unanimously underscored last Term that "no one doubts

that § 5 grants Congress the power to 'enforce . . . the provisions' of the [Fourteenth] Amendment by creating private remedies against the States for *actual* violations of those provisions." *United States* v. *Georgia*, 126 S. Ct. 877 (2006) (quoting *Lane*, 541 U.S. at 559). Furthermore, this Court has already upheld Section 5 legislation enforcing rights subject to rational basis review.[2]

Petitioner's reliance (Pet. 11) on the Eighth Circuit's decision in *Klingler* v. *Director, Department of Revenue*, 455 F.3d 888 (2006), is misplaced. That case held only that Title II's abrogation of Eleventh Amendment immunity in the narrow context of proscribing nominal surcharges for handicap parking placards is not appropriate Section 5 legislation. *Id*. at 896-897. Nothing in the court's opinion mentions, let alone disapproves, Title II's application to the educational context.

In any event, even if (contrary to precedent) the distinct constitutional status of the *States* warranted the differential treatment of constitutional rights that petitioner advocates, that question would be better addressed in a case where a *State* asserts Eleventh Amend-

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[2] See *Lane*, 541 U.S. at 513-514 (sustaining Title II as applied to a court reporter who had been denied employment opportunities); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) (sustaining under Section 5 the extension of Title VII's ban on gender discrimination to the States at a time when no majority of the Court had yet held that gender discrimination warrants heightened scrutiny); compare *Oregon* v. *Mitchell*, 400 U.S. 112, 285-287 (1970) (Stewart, J., joined by Burger, C.J., & Blackmun, J.) (upholding Congress's ban on durational residency requirements for voting, 42 U.S.C. 1973aa-1(a)(5)); *id.* at 236-239 (opinion of Brennan, White, Marshall, JJ.) (same); *id.* at 147-150 (opinion of Douglas, J.) (same), with *Carrington* v. *Rash*, 380 U.S. 89, 91 (1965) (subjecting residency requirement to rational-basis review); but see *Evans* v. *Cornman*, 398 U.S. 419, 422 (1970) (suggesting a need for "close constitutional scrutiny").

ment immunity, since the question with respect to a federal territory like petitioner would require different constitutional analysis.[3]

3. An exercise of this Court's certiorari jurisdiction is particularly unwarranted here because Toledo's complaint pled a parallel claim for relief under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. III 2003), which prohibits the same conduct and provides the same remedies as Title II of the ADA. See note 1, *supra*; 42 U.S.C. 12133 (providing that the remedies under Section 504 "shall be the remedies * * * this subchapter provides to any person alleging discrimination on the basis of disability in violation of" Title II of the ADA). The First Circuit—like every other court of appeals to consider the question—has held that the acceptance of federal financial assistance under Section 504 waives any claim to Eleventh Amendment immunity that a State or a federal territory might assert. See, *e.g.*, *Nieves-Márquez* v. *Puerto Rico*, 353 F.3d 108 (1st Cir. 2003). A holding that petitioner is constitutionally immune to suit under Title II thus would have no effect on petitioner's substantive liability or the scope of remedies available against it in this litigation. This Court

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[3] For that same reason, petitioner's concern about other aspects of how the congruence-and-proportionality analysis is applied (Pet. 16-19) begs the constitutional question of whether or to what extent that same congruence-and-proportionality analysis might limit federal legislation with respect to federal territories. In any event, petitioner documents no conflict in the courts of appeals on those questions. Indeed, the main conflict that petitioner asserts in the resolution of those questions is between the court of appeals' answers and the position advocated by petitioner itself. See, *e.g.*, Pet. 18 ("[T]he Court of Appeals concluded that the appropriate class [of cases under consideration] included all levels of education, whereas the University argues that the appropriate class should be limited to higher education.").

should not exercise its certiorari jurisdiction for the purpose of granting ineffectual relief and, in particular, should avoid granting certiorari to decide important questions of constitutional law that are not "absolutely necessary to a decision of the case," see *United States* v. *Resendiz-Ponce*, 127 S. Ct. 782, 785 (2007).

4. For the reasons explained by the United States in its briefs on the merits in *Lane*, *supra*, and *Georgia*, *supra*, the decision of the court of appeals is correct. Indeed, this Court in *Lane* held that it is "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." 541 U.S. at 529. In so holding, the Court specifically noted the "pattern of unequal treatment" of the disabled in, *inter alia*, "public education." *Id.* at 525 & n.12. Petitioner, in fact, concedes the "shameful" and "extensive record of discrimination" in public education against disabled children. Pet. 20. Petitioner simply insists (*ibid.*) that unconstitutional discrimination by governments against students for the first thirteen years of their education has no logical relationship to unconstitutional treatment in the fourteenth year. Congress could reasonably conclude otherwise. Cf. *Gaston County* v. *United States*, 395 U.S. 285 (1969) (upholding federal ban on literacy tests because it combats the enduring effects of past discrimination). And, given the "gravity of the harm" that unconstitutional treatment and discrimination in education can inflict, *Lane*, 541 U.S. at 523, Title II's calibrated measures are reasonably tailored to preventing and remedying violations of the Fourteenth Amendment's substantive protections in the context of education.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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