



U.S. Department of Justice

Civil Rights Division

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*Department of Justice  
Civil Rights Division - Appellate Section  
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April 18, 2007

Leonard Green, Clerk  
United States Court of Appeals for the Sixth Circuit  
540 Potter Stewart U.S. Courthouse  
100 E. Fifth Street  
Cincinnati, Ohio 45202-3988

Re: *Haas v. Quest Recovery Servs., Inc., et al.*, No. 05-3147

Dear Mr. Green,

The United States intervened in this case in the Supreme Court pursuant to 28 U.S.C. 2403(a) in order to defend the constitutionality of Title II of the ADA, 42 U.S.C. 12131, *et seq.*, and its provision abrogating States' Eleventh Amendment immunity. The Supreme Court granted plaintiffs' petition for certiorari, vacated this Court's decision, and remanded this case for further consideration in light of the views of the United States. On April 9, 2007, this Court ordered plaintiffs and defendant State of Ohio to submit letter briefs addressing, *inter alia*, the "views of the United States, particularly the impact of *United States v. Georgia*, 546 U.S. 151 (2006)." The United States, as intervenor, hereby submits a letter brief setting forth our views regarding application of the Supreme Court's decision in *United States v. Georgia* to this case.

1. The issue presented in *United States v. Georgia*, 126 S. Ct. 877 (2006), was whether Title II, as applied to corrections programs, validly abrogates States'

Eleventh Amendment immunity. However, the Supreme Court in *Georgia* ultimately declined to determine the extent to which Title II's prophylactic protection is valid because the district court and court of appeals had not yet determined whether the Title II claims in that case could independently have constituted viable constitutional claims or whether the Title II claims relied solely on the statute's prophylactic protection. To the extent any of the plaintiff's Title II claims would independently state a constitutional violation, the Court held, Title II's abrogation of immunity for those claims is valid, and a court need not question whether Title II is congruent and proportional under the test articulated in *City of Boerne v. Flores*, 521 U.S. 507 (1997). *Georgia*, 126 S. Ct. at 881-882. Because it was not clear whether the plaintiff in *Georgia* had stated any viable Title II claims that would not independently state constitutional violations, the Court declined to decide whether any prophylactic protection provided by Title II is within Congress's authority under Section 5 of the Fourteenth Amendment. *Ibid.*

In *Georgia*, the Supreme Court included instructions to lower courts as to how Eleventh Amendment immunity challenges in Title II cases should be handled, admonishing that lower courts must "determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Georgia*,

126 S. Ct. at 882. Thus, in order to resolve the immunity question in the instant case, this Court must first determine which of plaintiffs' allegations against the State validly state a claim under Title II. This Court must then determine which of plaintiffs' valid Title II claims against the State would independently state constitutional claims. And finally, only if plaintiffs have alleged valid Title II claims against the State that are not also claims of constitutional violations, this Court should consider whether the prophylactic protection afforded by Title II is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment as applied to "the *class* of conduct" at issue. *Ibid.* (emphasis added).

2. In its decision of March 27, 2006, this Court first held that plaintiffs had not stated a valid Title II claim against the State of Ohio. *Haas v. Quest Recovery Servs.*, 174 F.App'x 265, 269-270 (6th Cir. 2006). Under the framework set out by the Supreme Court in *Georgia*, this Court's inquiry should have ended there. If plaintiffs failed to state a claim against Ohio under Title II, there is no need to determine whether Congress abrogated States' immunity to Title II claims brought by private parties. Indeed, this Court had a duty not to reach that constitutional question after disposing of plaintiffs' Title II claims on statutory grounds in light of the "'deeply rooted' commitment" and obligation of federal courts "'not to pass on questions of constitutionality' unless adjudication of the constitutional issue is necessary." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)). That principle of constitutional avoidance is at its apex when courts address the

constitutionality of an Act of Congress and thereby undertake “the gravest and most delicate duty” that courts are “called upon to perform.” *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (internal quotation marks omitted). Accordingly, a “fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.” *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988).

This Court went on, however, to conclude that Congress did not validly abrogate States’ Eleventh Amendment immunity in enacting Title II. *Haas*, 174 F.App’x at 270-271. In light of this Court’s holding that plaintiffs have not stated valid Title II claims against the State, this Court’s subsequent conclusion that the State is immune to plaintiffs’ Title II claims is in contravention of the Supreme Court’s instructions in *Georgia* and should not be reinstated.

3. If, in considering the arguments set forth in letter briefs by plaintiffs and defendant, this Court determines that plaintiffs have not stated valid Title II claims against Ohio, then this Court should not reach the question whether Ohio retains Eleventh Amendment immunity to claims under Title II. If, however, this Court concludes that plaintiffs do state valid Title II claims against Ohio, this Court should follow the Supreme Court’s instructions in *Georgia* and determine whether any of plaintiffs’ valid Title II claims would independently state constitutional violations. As the Supreme Court held in *Georgia*, Congress validly abrogated Ohio’s Eleventh Amendment immunity to any of plaintiffs’ valid Title II claims

that also state constitutional violations. *Georgia*, 126 S. Ct. at 881.

If this Court determines that plaintiffs have stated valid Title II claims that do not independently state constitutional violations, then this Court must determine whether Congress acted pursuant to its authority under Section 5 of the Fourteenth Amendment in enacting the prophylactic protection in Title II. In that case, the United States respectfully requests that this Court order a regular briefing schedule to allow the parties, including intervenor United States, to fully brief the complex constitutional issues involved in resolution of the immunity question. If it is necessary to determine whether Title II's prophylactic protection, as applied to the correctional system, is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, the decision in *Georgia* makes clear that courts must apply the *Boerne* congruence and proportionality analysis, as that analysis was applied to Title II in *Tennessee v. Lane*, 541 U.S. 509 (2004). See *Georgia*, 126 S. Ct. at 882 (holding that courts must determine, "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." (emphasis added)); see also *id.* at 883-884 (Stevens, J., concurring).

Resolution of that question will require this Court to consider the array of constitutional rights at stake in the context of the correctional system, *Lane*, 541 U.S. at 522, the history of violations of the constitutional rights of individuals with disabilities, *id.* at 529, as well as the appropriateness of the statutory remedies

provided in Title II, *id.* at 530. It would be difficult indeed for the parties, including the United States, to adequately address such complex constitutional questions in a letter brief.

Furthermore, in holding that Ohio had immunity to plaintiffs' Title II claims in the instant action, this Court relied on *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002). That case was decided prior to the Supreme Court's decision in *Lane*, and held that Congress abrogated States' immunity to private Title II claims based on due process rights, but not to private Title II claims based on equal protection rights. In the wake of the Supreme Court's decision in *Lane*, *Popovich* is no longer good law. Indeed, in *Lane* itself, the Court reversed this Court's application of *Popovich*, declining to adopt this Court's categorical distinction between Title II claims rooted in due process principles and those enforcing equal protection. The Court in *Lane* eschewed the *Popovich* model notwithstanding the fact that one of the plaintiffs before the Court – Beverly Jones – raised claims that implicated only the Equal Protection Clause. *Lane*, 541 U.S at 514.

This Court's decision in *Popovich* is, moreover, inconsistent with *Lane* in several respects. For instance, the Court in *Lane* held that it was "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 light of the "extensive record of disability discrimination", *ibid.*, and "of pervasive unequal treatment [of individuals with disabilities] in the administration

of state services and programs, including systematic deprivation of fundamental rights,” *id.* at 524. In addition, the Supreme Court made clear in *Lane* that the appropriate focus for examining the constitutionality of the prophylactic reach of Title II’s abrogation is not the particular type of claim raised by an individual plaintiff, but rather the substantive category of governmental activities and the cluster of constitutional rights they may implicate. *Id.* at 531. Thus, the operative question is not, as this Court held, whether plaintiffs’ claims sound in due process rather than equal protection, but whether Title II is proper Section 5 legislation as applied to the entire “class of cases implicating the accessibility” of correctional programs. *Ibid.* The Supreme Court’s decision in *Georgia* underscores that the lens through which courts should analyze the constitutionality of Title II’s abrogation is the “class of [governmental] conduct” at issue. *Georgia*, 126 S. Ct. at 882.

Thus, in the event this Court concludes that plaintiffs do indeed state valid Title II claims against Ohio that would not constitute constitutional violations, the United States respectfully requests that this Court order full briefing on the validity of Title II and its abrogation in the corrections context so that the United States may set forth a full defense of the statute, consistent with 28 U.S.C. 2403(a) and the Supreme Court’s instructions to this Court on remand.

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

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