No. 04-3263

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BILL M., by and through his father and natural guardian, William M.; JOHN DOE, by and through his mother and natural guardian, Marcia V.; JANE S., by and through her mother and natural guardian, Patricia S.; KEVIN V., by and through his mother and legal guardian, Kathy V.; JENNIFER T., by and through her parents and legal guardians, Sharon and Greg T.; MARCUS J., by and through his parents and legal guardians, Julie and Miles J.; and on behalf of themselves and all other similarly situated,

Plaintiffs-Appellees

v.

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT; NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PETITION FOR REHEARING EN BANC FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF THE ISSUES

1. Whether this Court's holding in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), that Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq*., is unconstitutional in its entirety, survives the Supreme Court's recent holding in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), that the statute is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment in at least some applications.

2. Whether the statutory provision abrogating Eleventh Amendment immunity for suits under Title II is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment as applied to the context of institutionalization.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

1. This case involves a suit filed under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq*. Title II 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, and requires public entities to ensure that each "service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities," unless doing so would fundamentally alter the program or impose an undue financial or administrative burden. 28 C.F.R. 35.150(a).

2. Plaintiffs are a group of individuals with mental retardation and other

developmental disabilities who seek medical services from the State of Nebraska (State) through programs that receive federal financial assistance under the Medicaid Act, 42 U.S.C. 1396 *et seq.* See App. 1. Among other things, plaintiffs allege that the State is violating Title II of the ADA, as interpreted by the Supreme Court in *Olmstead* v. *L.C.*, 527 U.S. 581 (1999), and Section 504 of the Rehabilitation Act, by offering plaintiffs medical services in institutional settings when services could be provided in less restrictive community placements without fundamentally altering the nature of the State's medical programs or imposing an undue financial or administrative burden. App. 27-28. Plaintiffs sued the state agencies responsible for administering the State's Medicaid programs as well as various state officials in their official capacities, seeking declaratory and prospective injunctive relief. See App. at 5-6, 35-39.

The State moved to dismiss plaintiffs' Title II claims against the state agencies, arguing that Congress did not validly abrogate the State's sovereign immunity to those claims. The district court denied the motion, and the State filed this interlocutory appeal. The United States intervened on appeal pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of Title II and its abrogation provision, as applied in the context of institutionalization. The United States argued to the panel that the Supreme Court's recent decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), has superceded this Court's en banc decision in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999), which held that Title II in its entirety is not a valid exercise of Congress's

authority under Section 5 of the Fourteenth Amendment. Although the Supreme Court in *Lane* declined to rule on the validity of Title II as a whole, it upheld Title II "as it applies to the class of cases implicating the accessibility of judicial services." 541 U.S. at 531. The United States also argued that Title II is a valid exercise of Congress's Section 5 authority as applied in the context of institutionalization.

On May 27, 2005, a panel of this Court issued its opinion in this case reversing the district court. The panel declined to consider whether Title II is valid Section 5 legislation as applied to the context of *Olmstead*-type claims, holding instead that it was bound by this Court's pre-*Lane* decision in *Alsbrook* that Title II is invalid under Section 5 in all of its applications. The panel noted that "*Lane* may well presage the eventual rejection of *Alsbrook*'s rationale," but concluded that "*Alsbrook* has been modified by *Lane* to the extent that a discrete application of Title II abrogation – related to claims of denial of access to the courts – has been deemed by the [Supreme] Court to constitute a proper exercise of Congress' power." Slip op. 6 & n.3. The panel concluded that "[o]ther applications of Title II abrogation, like the one at issue here, continue to be governed by *Alsbrook*." Slip op. 6. For the reasons stated in this petition, that conclusion was in error.

REASONS FOR EN BANC REHEARING

1. The panel's decision in the instant case conflicts with the Supreme Court's decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), and consideration by the full

Court is therefore necessary to secure and maintain uniformity of this Court's decisions.

2. This case involves a question of exceptional importance. Until this Court rules that *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), is no longer good law, this Court will be prevented from considering whether Title II of the Americans with Disabilities Act effectively abrogates States' immunity in any context other than the court access context. If left undisturbed, the panel's decision will have the effect of rejecting all future non-court-access Title II suits against state entities without providing any legal basis for that rejection. Moreover, the panel decision conflicts with the Fourth Circuit's decision in *Constantine* v. *Rectors and Visitors of George Mason University*, No. 04-1410, 2005 WL 1384373 (4th Cir. June 13, 2005).

ARGUMENT

THE PANEL INCORRECTLY CONCLUDED THAT THIS COURT'S 1999 HOLDING IN *ALSBROOK* V. *CITY OF MAUMELLE* CONTROLS THE OUTCOME OF THIS CASE

This Court should grant rehearing en banc to hold that its en banc decision in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999), has been superceded by the Supreme Court's decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004).

1. In *Lane*, the Supreme Court considered the claims of two plaintiffs, George Lane and Beverly Jones, "both of whom are paraplegics who use wheelchairs for mobility" and who "claimed that they were denied access to, and the services of, the

state court system by reason of their disabilities" in violation of Title II of the ADA. *Lane*, 541 U.S. at 513. The State argued that Congress lacked the authority to abrogate the State's Eleventh Amendment immunity to claims under Title II, a position accepted by this Court in *Alsbrook*. See 184 F. 3d at 1010. The Supreme Court in *Lane* disagreed. See 541 U.S. at 533-534.

To reach this conclusion, the Supreme Court applied the three-part analysis for Fourteenth Amendment legislation created by *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and its progeny. The Court considered: (1) the "constitutional right or rights that Congress sought to enforce when it enacted Title II," *Lane*, 541 U.S. at 522; (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 529; and (3) "whether Title II is an appropriate response to this history and pattern of unequal treatment," as applied to the class of cases implicating access to judicial services. *Id*. at 530.

With respect to the first question, the Court found that Title II enforces rights under the Equal Protection Clause as well as an array of rights subject to heightened constitutional scrutiny under the Due Process Clause of the Fourteenth Amendment. See *Lane*, 541 U.S. at 522-523. With respect to the second question, the Court concluded that there was a sufficient historical predicate of unconstitutional disability

discrimination in the provision of public services to justify enactment of a prophylactic remedy pursuant to Congress's authority under Section 5 of the Fourteenth Amendment. See *id*. at 522-529. And finally, with respect to the third question, the Court found that the congruence and proportionality of the remedies in Title II should be judged not for public services as a whole, but on a category-by-category basis in light of the particular constitutional rights at stake in the relevant category of public services. See *id*. at 530-531.

Although this Court, in *Alsbrook*, applied the three-step analysis of *Boerne*, *Lane* made clear that this Court's application of that test was faulty in several critical aspects. To begin with, *Alsbrook* held that the proper "scope of our Section 5 inquiry [is] Title II of the ADA" as a whole. 184 F.3d at 1006 n.11. The Supreme Court, in contrast, declined to "examine the broad range of Title II's applications all at once, and to treat that breadth as a mark of the law's invalidity." 541 U.S. at 530. Instead, the Court concluded that the only question before it was "whether Congress had the power under § 5 to enforce the constitutional right of access to the courts," *id*. at 531, and answered that question in the affirmative. The panel in the instant case made no attempt to reconcile the holding in *Lane* that Title II is valid Section 5 legislation in at least one category of applications with this Court's holding in *Alsbrook* that Title II is *not* valid Section 5 legislation in *all* of its applications. Rather, the panel merely carved out the court access context from *Alsbrook*'s holding, and concluded that Title

II remains invalid Section 5 legislation in all other applications. But, as explained below, the two holdings are inconsistent at every step of the *Boerne* analysis and cannot be reconciled in this way.

The Fourth Circuit recently held that *Lane* supercedes its pre-*Lane* circuit precedent holding that Title II is not valid Section 5 legislation in all of its applications. In *Constantine* v. *Rectors and Visitors of George Mason University*, No. 04-1410, 2005 WL 1384373, at *8 n.8 (4th Circuit June 17, 2005), that court stated:

> While *Lane* specifically overrules *Wessel* [v. *Glendening*, 306 F.3d 203 (4th Cir. 2002),] only with respect to the application of Title II to cases involving the right of access to courts, the reasoning of *Lane* renders *Wessel* obsolete. Contrary to our conclusion in *Wessel* that 'Congress did not have an adequate record of unconstitutional discrimination by states against the disabled to support abrogation,' 306 F.3d at 213, the Court in *Lane* found that Congress enacted Title II of the ADA – considered as a whole – in response to a pattern of unconstitutional conduct by States and nonstate government entities, 124 S. Ct. at 1989-92. Moreover, *Lane* specifically rejects the proposition – crucial to our analysis in *Wessel* – that Congress may enact § 5 legislation only in response to unconstitutional conduct by States themselves. *Id.* at 1991 n.16. For these reasons, *Wessel* does not control our analysis in this case.

For the same reasons, this Court's decision in *Alsbrook* is no longer good law, and this Court must consider anew whether Title II is valid Section 5 legislation as applied in the institutionalization context.

Moreover, in *Klingler* v. *Director, Department of Revenue*, a post-*Lane* case involving the validity of Title II in a different context in which this Court adhered to *Alsbrook*, see 366 F.3d 614, 616-617 (8th Cir. 2004), the Supreme Court recently

granted a petition for certiorari, vacated this Court's decision, and remanded the case "for further consideration in light of *Tennessee* v. *Lane*, 541 U.S. 509 (2004), and *Gonzales* v. *Raich*, 545 U.S. ____ (2005)." 2005 WL 1383725 (June 13, 2005) (parallel citations omitted). That action by the Supreme Court indicates that it does not consider the rote application of *Alsbrook* to be consistent with *Lane*.

In the first step of the *Boerne* analysis, this Court in *Alsbrook* reviewed the requirements of Title II only in relation to the Equal Protection Clause's prohibition against irrational discrimination. See 184 F.3d at 1008-1009. *Lane*, however, made clear that Title II enforces not only the Equal Protection Clause but also a variety of other constitutional rights. 541 U.S. at 522-523.

In the second step of the *Boerne* analysis, this Court held in *Alsbrook* that Congress lacked a sufficient historical predicate for the enactment of Title II's prophylactic measures. See 184 F.3d at 1009. The Supreme Court, on the other hand, held that Congress identified a "volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," 541 U.S. at 528, making it "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at 529. In reaching the contrary conclusion, *Alsbrook* considered only evidence of discrimination by State governments. See 184 F.3d at 1009 & n.17. *Lane*, however, specifically rejected that

view as based on "the mistaken premise that a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves." 541 U.S. at 527 n.16. This Court also declined to give deference to Congress's finding of pervasive discrimination in public services, see 184 F.3d at 1007-1008, but *Lane* relied prominently on the very same findings, see 541 U.S. at 528-529.

Finally, as noted above, in the third step of the *Boerne* analysis, this Court in *Alsbrook* found that Title II in its entirety is not a valid exercise of Congress's authority under Section 5. 184 F.3d at 1006 n.11. The Supreme Court, in contrast, concluded that the only question before it was "whether Congress had the power under § 5 to enforce the constitutional right of access to the courts." 541 U.S. at 531. This Court, too, should limit the scope of its review to the question whether Title II is an appropriate means of enforcing the constitutional rights at stake in the institutionalization context.

2. Following the teachings of *Lane*, it is clear that Title II is a valid exercise of Congress's Section 5 authority in the context of institutionalization. In this context, Title II acts to enforce the Equal Protection Clause's prohibition against arbitrary treatment based on irrational stereotypes or hostility,[1] as well as the heightened

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[1] Even under rational basis scrutiny, "mere negative attitudes, or fear" alone cannot justify disparate treatment of those with disabilities. *University of Ala.* v. *Garrett*, 531 U.S. 356, 367 (2001). A purported rational basis for treatment of the disabled will also fail if

(continued...)

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)." *Lane*, 541 U.S. at 524-525 (parallel citations omitted). 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).

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. *Lane*, 541 U.S. at 533; see, *e.g.*, *O'Connor*, 422 U.S. at 575-576; *Youngberg*, 457 U.S. at 324-325. 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*, 541 U.S. at 523.

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[1](...continued)
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).

As discussed above, although *Lane* ultimately upheld Title II as valid Fourteenth Amendment legislation only as applied to access to courts, its conclusion that the historical predicate for Title II is sufficient to justify prophylactic legislation in the area of public services is not limited to the court access context. The Supreme Court did not begin its "as-applied" analysis until it reached the third step of the *Boerne* analysis addressing the Act's congruence and proportionality. See 541 U.S. at 530-531. At the second step, the Court considered the record supporting Title II in all its applications and found the record included not only "a pattern of unconstitutional treatment in the administration of justice," *id.* at 525, but also violations of constitutional rights in the context of voting, jury service, the penal system, public education, law enforcement, and institutionalization, *id.* at 524-525 That record, the Court concluded, supported prophylactic legislation to address discrimination in "public services" generally. *Id.* at 529.

Thus, the adequacy of Title II's historical predicate to support prophylactic legislation addressing discrimination in public services, including institutional services for people with disabilities, is no longer open to dispute. See *Miller* v. *King*, 384 F.3d 1248, 1270-1272 (11th Cir. 2004); *Constantine*, 2005 WL 1384373, at *9 (4th Cir. 2005). But even if it were, the United States set forth in its brief to the panel an account of the long and well-documented historical basis for extending Title II to disability discrimination relating to institutionalization. See U.S. Br. at 20-27.

Finally, as discussed more fully in our brief to the panel, Title II is a congruent and proportional means of enforcing those rights, particularly in light of the Supreme Court's finding that access to public services is an appropriate area for prophylactic Section 5 legislation banning disability discrimination. 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*, 541 U.S. at 531; see *id*. at 527; *Olmstead*, 527 U.S. at 600 (describing prior statutes). Thus, Congress faced a "difficult and intractable proble[m]," *Lane*, 541 U.S. at 531, which it could conclude would "require powerful remedies." *Id*. at 524. Nonetheless, the remedy imposed by Title II is "a limited one." *Lane*, 124 S. Ct. at 531. 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 532, 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," *ibid*. 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. 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. Title II also serves broader remedial and prophylactic purposes. The integration accomplished by Title II is a proper remedy for the continuing segregative effects of the historical exclusion of people with disabilities from their communities, schools, and other government services. See *Lane*, 541 U.S. at 524-525. 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. 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.

Viewed in light of *Lane*, Title II is valid Fourteenth Amendment legislation as applied to cases relating to institutionalization.

Because the panel in the instant case felt bound by the decision in *Alsbrook*, it did not consider whether Title II is a congruent and proportional means of enforcing the protections of the Fourteenth Amendment in this context. If this Court grants rehearing en banc to hold that *Alsbrook* is no longer good law in the wake of *Lane*, it may wish to remand the case for the panel to apply the teachings of *Lane* to the context of institutionalization in the first instance. If the en banc Court wishes to address the latter issue, we urge it to uphold Title II as applied to the context of institutionalization. Further, we note that the Supreme Court has granted two petitions for certiorari in a case presenting the question whether Title II is valid Section 5 legislation in the prison context. *United States* v. *Georgia*, No. 04-1203, and *Goodman* v. *Georgia*, No. 04-1236 (collectively "*Goodman*"). If this Court chooses to consider the validity of Title II in the institutionalization context, we recommend that the Court delay resolution of that issue until the Supreme Court issues a decision in *Goodman*.

CONCLUSION

Wherefore, this Court should grant rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). This Petition was prepared using Wordperfect 9.0 and contains 3,683 words. The type face is Times New Roman, 14-point font.

I further certify that the diskettes submitted to Court and counsel and on which an electronic version of this brief is stored have been scanned and are virus-free.

_____
SARAH E. HARRINGTON
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DATE: July 8, 2005

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2005, two copies of the foregoing PETITION FOR REHEARING EN BANC FOR THE UNITED STATES AS INTERVENOR were served by overnight delivery on the following parties and counsel of record:

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