UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOETTE PAULONE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:09-cv-2007 (ELH)
	)	
CITY OF FREDERICK, *et al.*,	)	
	)	
Defendants.	)	
	)	

INTERVENOR UNITED STATES' MEMORANDUM REGARDING ELEVENTH AMENDMENT IMMUNITY

At the invitation of this Court, see Docket No. 111, the United States intervenes in this case pursuant to 28 U.S.C. 2403(a) for the limited purpose of defending the constitutionality of the abrogation of the States' sovereign immunity effected by Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131-12134. This brief is filed in response to the State of Maryland's memorandum of law in support of Eleventh Amendment immunity, Docket No. 101 (State Br.), and its reply brief, Docket No. 117.

STATEMENT AND SUMMARY OF ARGUMENT

1. This case arises under Title II of the ADA, which established a "comprehensive 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). Accordingly, it "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).

Title II of the ADA bars disability discrimination by public entities, which include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B). It 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. Such discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." *Seremeth* v. *Board of Cnty. Comm'rs of Frederick Cnty.*, 673 F.3d 333, 336 (4th Cir. 2012) (quoting 42 U.S.C. 12112(b)(5)(A)). It is now settled in the Fourth Circuit that Title II's requirements apply to policing. *Id.* at 338-339. Title II may be enforced through private suits against public entities, see 42 U.S.C. 12133, and Congress expressly abrogated the States' Eleventh Amendment immunity to such suits in federal court, 42 U.S.C. 12202.

2. Plaintiff Joette Paulone is deaf. She was arrested at night by City of Frederick police on charges of driving while intoxicated (DWI).[1] After administering a field sobriety test, an officer took her to police headquarters. She later was transferred to a detention center, where she remained until the next morning. Plaintiff contends that, during her time in detention, she was not provided an interpreter and was able to communicate only through written notes. Detention center personnel provided her with a teletypewriter (TTY), but plaintiff contends that it did not work.

[1] This statement of facts is derived from this Court's previous opinions, which looked at the evidence in the light most favorable to the plaintiff for purposes of summary judgment. The United States expresses no view as to what facts the plaintiff may be able to prove at trial.

Plaintiff was released in the morning after a brief hearing. She later pleaded guilty to DWI and received probation. Her sentence required her to attend "victim impact panel meetings" and to submit to alcohol and drug evaluation, testing, and treatment as directed by the State's Division of Parole and Probation (the Parole Division). Plaintiff requested that the State provide an American Sign Language interpreter at her evaluation and the victim impact panels. Her request was rejected, and she attended a victim impact panel without an interpreter. The Parole Division then directed plaintiff to enroll in a state-sponsored alcohol education class but declined to provide an interpreter. Plaintiff tried unsuccessfully to locate a class with an interpreter, and the Parole Division filed a violation of probation charge against her for failing to enroll. The charge was dropped before a hearing was held when plaintiff found a course taught in sign language that she could attend via videophone.

Plaintiff sued the State of Maryland (and others not relevant to this motion), alleging violations of Title II, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and state law. This Court dismissed her Section 504 claims for failure to allege that any program or activity implicated by her complaint receives federal funds. See *Paulone* v. *City of Frederick,* 718 F. Supp. 2d 626, 634 (D. Md. 2010). It later dismissed plaintiff's claims stemming from her treatment at her initial hearing, see *Paulone* v. *City of Frederick*, 787 F. Supp. 2d 360, 399 (D. Md. 2011), granted plaintiff summary judgment with respect to the State's failure to accommodate her regarding the victim impact panel, *id.* at 405, and set for trial the remaining factual disputes over whether the detention center had a working TTY machine and otherwise properly assisted plaintiff in communicating, *id.* at 387-388, 392, and whether plaintiff's rights were violated with respect to the alcohol treatment class, *id.* at 407. The

parties settled the latter claim, leaving for trial only factual disputes regarding plaintiff's treatment at the detention center.

In pretrial motion practice, the State for the first time asserted that Title II did not validly abrogate its sovereign immunity. This Court certified the constitutional question to the United States. Meanwhile, in light of the State's assertion of sovereign immunity, the plaintiff has asked this Court for leave to replead a Section 504 claim and obtain limited discovery as to federal funding.

3. This Court should grant plaintiff leave to amend her complaint and obtain discovery for the limited purpose of ascertaining whether the State has waived its sovereign immunity from suit under Section 504. Because Section 504 imposes the same substantive requirements as Title II, a finding that the State is subject to suit under that statute will make it unnecessary for this Court to reach the question of Title II's constitutionality as a proper exercise of Congress's authority under Section Five of the Fourteenth Amendment legislation.

Should it nonetheless reach the question, this Court should find that Title II of the Americans with Disabilities Act is a proper exercise of Congress's Fourteenth Amendment power, and thus validly abrogates the States' sovereign immunity, where (as in this case) it protects the rights of individuals with disabilities in the context of criminal law enforcement. In this context, Title II's remedy is a congruent and proportional response to a long history of official discrimination against individuals with disabilities that often has resulted in the deprivation of constitutional rights. It is well-tailored to respect the States' legitimate law enforcement needs, even as it ensures that individuals with disabilities receive even-handed treatment. There is no basis for the State's core argument, which is that Title II cannot abrogate sovereign immunity unless the plaintiff can show that it remedies a constitutional violation in this

particular case. The State does not appear to contend that Title II is not proportional and congruent legislation with respect to the broad class of cases to which this case belongs, and any such effort in any event would be unavailing.

ARGUMENT

I.

THIS COURT SHOULD NOT DECIDE WHETHER TITLE II VALIDLY ABROGATES SOVEREIGN IMMUNITY UNTIL IT DETERMINES WHETHER THE STATE HAS WAIVED ITS IMMUNITY TO SUIT UNDER THE REHABILITATION ACT

In response to the State's belated motion to dismiss on Eleventh Amendment immunity grounds, plaintiff has moved to amend her complaint to add a claim under Section 504 of the Rehabilitation Act, as well as to obtain discovery regarding whether the State receives federal funding for law enforcement such that it is subject to Section 504's requirements. This Court should grant such relief, which is likely to result in a determination that the State – like many law enforcement entities – accepts federal funds such that it is subject to suit under Section 504 for disability discrimination in law enforcement.

In the context of this case, Section 504 imposes the same substantive requirements as Title II. See *Constantine* v. *Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005) (observing that the elements of a claim under either statute are identical).[2] Moreover, it is now settled that the acceptance of federal funds waives a State's sovereign immunity to claims under Section 504.

[2] The Fourth Circuit has held that, where a plaintiff alleges intentional discrimination on the basis of disability, causation can be somewhat easier to establish under Title II, in that a Title II plaintiff must only prove that disability was "a motivating cause" of the defendant's behavior, whereas under Section 504, the plaintiff must prove that disability was the sole reason. See *Halpern* v. *Wake Forest Univ. Health Scis.*, 669 F.3d 454, 461-462 (4th Cir. 2012). In a case such as this one, where plaintiff does not contend that any factor other than her disability motivated the defendants' actions, this difference is irrelevant.

See *id.* at 496. Accordingly, a determination that the State is subject to suit under Section 504 would make it unnecessary for this Court to determine whether Title II abrogates sovereign immunity. See *Bennett-Nelson* v. *Louisiana Bd. of Regents*, 431 F.3d 448, 455 (5th Cir. 2005) (declining to reach Title II abrogation question after finding that defendants had waived immunity for substantively identical Section 504 claim), cert. denied, 547 U.S. 1098 (2006); cf. *Halpern* v. *Wake Forest Univ. Health Scis.*, 669 F.3d 454, 460 n.2 (4th Cir. 2012) (declining to decide whether defendant's conduct was regulated by Title III of the ADA, because such a claim would be governed by same standards as plaintiff's Section 504 claim).

It would be particularly appropriate for this Court to avoid unnecessary adjudication of the constitutionality of a federal statute. It is a "fundamental and longstanding principle of judicial restraint" 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 principle holds even truer where, as here, the constitutionality of an act of Congress is at issue. See, *e.g.*, *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 129 S. Ct. 2504, 2513 (2009). Accordingly, this Court should not adjudicate the validity of Title II's abrogation of sovereign immunity until it has ascertained that something tangible in this case turns on the question. Cf. *United States* v. *Georgia*, 546 U.S. 151, 159 (2006) (instructing lower courts not to reach this question unless and until they determined that the plaintiff had pleaded a valid Title II claim that did not also state a constitutional violation).

II.

TITLE II VALIDLY ABROGATES THE STATES' SOVEREIGN IMMUNITY IN THE CONTEXT OF CRIMINAL LAW ENFORCEMENT

If this Court nonetheless reaches the question, it should find that Title II of the Americans with Disabilities Act is a proper exercise of Congress's Fourteenth Amendment power, and thus validly abrogates the States' sovereign immunity, where (as in this case) it protects the rights of individuals with disabilities in the context of criminal law enforcement.

1. As a preliminary matter, and as the State does not appear to dispute, all other requirements for abrogation are satisfied. Although the Eleventh Amendment ordinarily renders a State immune from suits in federal court by private citizens, Congress may abrogate that immunity so long as 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). There is no question that Congress unequivocally expressed its intent to abrogate the States' sovereign immunity with respect to claims under the ADA. See 42 U.S.C. 12202; *Tennessee* v. *Lane*, 541 U.S. 509, 518 (2004). Similarly, it is settled that "Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment." *Lane*, 541 U.S. at 518.

Section Five legislation "must be targeted at conduct transgressing the Fourteenth Amendment's substantive provisions." *Coleman* v. *Court of Appeals of Md.*, 132 S. Ct. 1327, 1333 (2012) (internal quotation marks and citation omitted). As the Supreme Court held in *Lane*, and the Fourth Circuit confirmed in *Constantine* v. *Rectors and Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005), Title II as a whole satisfies this requirement. Title II was enacted "against a backdrop of pervasive

unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Lane*, 541 U.S. at 524. Accordingly, Congress possessed authority under Section Five to pass prophylactic legislation to protect the right of people with disabilities to receive all public services on an equal footing. *Id.* at 528-529; accord *Constantine*, 411 F.3d at 487 (finding that "[a]fter *Lane*, it is settled that Title II was enacted in response to a pattern of unconstitutional disability discrimination" that "satisf[ies] the historical inquiry into the harms sought to be addressed by Title II").

2. The only remaining question here, therefore, is whether Title II is a proportional and congruent response to the constitutional violations that it remedies and prevents in the broad class of cases involving criminal law enforcement. The State errs in framing the question more narrowly, as whether Title II represents a proportional and congruent response to the constitutional violations at issue "in each particular case." State Br. 8; see *id.* at 10 (acknowledging variety of constitutional rights that Title II can protect in this context, but arguing that "none of these constitutional rights is at all implicated in the present case"). This assertion misreads the Supreme Court's holdings in *Lane* and *United States* v. *Georgia*, 546 U.S. 151 (2006), and cannot be reconciled with the Fourth Circuit's holding in *Constantine*.

After determining that Congress had compiled a sufficient record of official disability discrimination to trigger its Section Five authority with respect to all public services, *Lane* determined that Title II was a proportional and congruent response to such discrimination with respect to "the class of cases implicating the accessibility of judicial services." *Lane*, 541 U.S. at 530-531. In doing so, it neither engaged in nor endorsed a narrow, as-applied congruence-and-proportionality analysis, as

though every application of Title II were a wholly separate statute. Rather, it held that some classes of cases are so different from others, in the rights implicated and "the manner in which the legislation operates to enforce that particular guarantee," as to make those applications of Title II fully severable. See *id.* at 530-531 & n.18. For example, Title II's protections for "the accessibility of judicial services" could readily be severed from those involving voting rights or access to hockey rinks, because it was "unclear what, if anything, examining Title II's application to hockey rinks or voting booths can tell us about whether Title II substantively redefines the right of access to the courts." *Id.* at 531 & n.18.

At the same time, *Lane* made clear that a court must consider a broader context than the facts of the particular case before it. The plaintiffs in *Lane* both were paraplegics who contended that courthouses were inaccessible to individuals who relied upon wheelchairs. See *Lane*, 541 U.S. at 513. As a result, one plaintiff alleged that he was unable to appear to answer charges against him, while the other alleged that she could not perform her work as a court reporter. *Id.* at 513-514. The Supreme Court did not limit the abrogation question before it to either the specific judicial services (such as criminal adjudication) alleged to be inaccessible or the particular sort of access sought (wheelchair access to a courtroom). Rather, it framed the question broadly, with respect "to the class of cases implicating the accessibility of judicial services." *Id.* at 531.

Accordingly, the Court found relevant to its analysis a number of constitutional rights and fact patterns not implicated by the plaintiffs' claims. Neither of the *Lane* plaintiffs alleged that he or she was excluded from jury service or subjected to a jury trial that excluded persons with disabilities. Neither was prevented from participating in civil litigation, nor did either allege a violation of First Amendment rights. The nature of plaintiffs' disabilities did not implicate Title II's requirement that government, in

the administration of justice, make available measures such as sign-language interpreters or materials in Braille. Yet the Supreme Court broadly considered the full range of constitutional rights and Title II remedies potentially at issue in the broad "class of cases implicating the accessibility of judicial services." *Lane*, 541 U.S. at 531. Similarly, in *Constantine*, the Fourth Circuit considered Title II's application in "the context of public higher education," see 411 F.3d at 488, not with respect to the narrow facts of the plaintiff's case. To the extent that *Brown* v. *North Carolina Division of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999), can be read to support the State's as-applied analysis, it has been superseded by *Lane* and *Constantine*. Cf. *Klingler* v. *Department of Revenue*, 455 F.3d 888, 896 (8th Cir. 2006) (declining to follow *Brown* because "the more recent decisions in *Garrett* and *Lane* lead us to believe that the Supreme Court is painting with a broader brush").

Georgia did not alter the "class of cases" mode of analysis set forth by *Lane* with respect to the congruence and proportionality inquiry. Rather, *Georgia* held that, where a particular plaintiff's Title II claim also constitutes a constitutional violation, Title II abrogates sovereign immunity for that claim alone, regardless of whether it does so for the larger class of cases of which that claim is a part. See 546 U.S. at 159. Where, as here, the plaintiff does not contend that her remaining Title II claim rises to the level of a constitutional violation, a court is to consider the congruence and proportionality of Title II's remedy with respect to the "class of conduct" alleged, *ibid.*, not the plaintiff's particular allegations.

Controlling precedent thus rejects the State's approach to this question, and for good reason. Having documented a long history of disability discrimination that infringed upon constitutional rights, Congress was entitled to pass legislation remedying such discrimination "even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne* v. *Flores*, 521 U.S. 507, 518

(1997). Accordingly, it is expected and permissible for Section Five legislation to apply in situations where the constitutional rights it protects are not violated. As *Constantine* explained, "the question is not *whether* Title II exceeds the boundaries of the Fourteenth Amendment, but *by how much*." See 411 F.3d at 490.

Following *Lane* and *Constantine*, this Court should determine the congruence and proportionality of Title II within the entire "class of cases" involving criminal law enforcement. See *Lane*, 541 U.S. at 531. Individuals with disabilities face similar discrimination in this class of cases, implicating similar due process and equal protection concerns, while "the manner in which the legislation operates" to remedy such discrimination is comparable in such cases. See *Lane*, 541 U.S. at 531 n.18. Moreover, individuals with disabilities often suffer multiple related discriminatory actions arising out of the same enforcement of the criminal law – just as plaintiff alleges happens here. Accordingly, this class of cases meaningfully can be severed from other Title II applications and considered together for purposes of the congruence and proportionality analysis.

3. The long history of discrimination in the criminal law enforcement context suggests that Title II is congruent and proportional to the discrimination it remedies and prevents in this class of cases. Adjudicating the validity of Title II as Section Five legislation in any context requires consideration of: (1) the constitutional rights Title II protects in that context, see *Lane*, 541 U.S. at 522; (2) the history of those rights being violated, see *id.* at 529; and (3) whether Title II is "an appropriate response to this history and pattern of unequal treatment," see *id.* at 530. Put differently, whether Title II validly enforces constitutional rights in a particular context "is a question that 'must be judged with reference to

the historical experience which it reflects.'" *Id.* at 523 (quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966)).

As one lawmaker stated on the House floor during deliberations on the ADA: "Regrettably, it is not rare for persons with disabilities to be mistreated by the police." 136 Cong. Rec. 11,461 (1990) (statement of Rep. Levine). For example, he continued, officers often wrongfully arrest people with cerebral palsy, "who might walk in a staggering manner," or persons "with epilepsy who are having seizures." *Ibid.* Meanwhile, "deaf persons who are arrested are put in handcuffs" and left "completely unable to communicate." *Ibid.* The House Judiciary Committee report added that those wrongly arrested because of seizures then "are deprived of medications while in jail, resulting in further seizures." H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 50 (1990).

These issues had been well documented long before the passage of the ADA, and continue to be a problem today. Indeed, while individuals with a variety of disabilities have suffered discrimination in this context, discrimination against deaf individuals is particularly well chronicled. For example, because police officers had not been trained to deal with deaf individuals, for whom their standard procedures were ineffective, officers subjected deaf individuals to unnecessary arrests and harsh treatment. See, *e.g.*, Bonnie P. Tucker, *Deaf Prison Inmates: Time to Be Heard*, 22 Loy. L.A. L. Rev. 1, 3 (1988) (*Deaf Prison Inmates*) (describing encounter in which police officer dislocated driver's shoulder, arrested him, and reported that he refused to take a breathalyzer test – leading to a six-month revocation of a driver's license – because driver did not understand the officer's instructions); *id.* at 3-4 (police officer, able to understand only the hearing individual involved in a fight, arrested the deaf individual, who spent the night locked up). Police officers have mistaken deaf individuals' attempts to

communicate for aggressive behavior, gang signs, or an attempt to grab a weapon, leading to unnecessary violence and/or arrests. See Kelly McAnnany & Aditi K. Shah, *With Their Own Hands: A Community Lawyering Approach to Improving Law Enforcement Practices in the Deaf Community*, 45 Val. U. L. Rev. 875, 878-879 (2011) (*With Their Own Hands*). And the experience of deaf individuals has been shared by those with other disabilities who are misunderstood by police officers, often with serious – sometimes fatal – consequences. See, *e.g.*, Elizabeth Hervey Olson, Comment, *What Happened to "Paul's Law"?: Insights On Advocating for Better Training and Better Outcomes in Encounters Between Law Enforcement and Persons with Autism Spectrum Disorders*, 79 U. Colo. L. Rev. 333, 335-337, 357-364 (2008) (describing several such encounters).[3]

States also denied arrested deaf individuals any means to communicate, leading to the denial of many pre-trial rights, including those guaranteed by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and its progeny. See, *e.g.*, *Kiddy* v. *City of Okla. City*, 576 P.2d 298, 301 (Okla. 1978) ("Because of the City's failure to provide interpreters, deaf-mutes, because of their inability to appreciate all their rights, and communicate with those able to help them, may be required to remain incarcerated for a longer period than other individuals not so impaired."); *State* v. *Mason*, 633 P.2d 820, 826 (Or. Ct. App. 1981) (police failed to convey *Miranda* warnings in manner that deaf suspect could understand); see Jeffrey B. Wood, *Protecting Deaf Suspects' Right to Understand Criminal Proceedings*, 75 J. Crim. L. & Criminology 166, 166 (1984) ("Although American criminal suspects who are deaf possess the same constitutional

[3] In particular, officers continue to subject individuals suffering from epileptic seizures to the deprivations of liberty observed by Congress. See, *e.g.*, Jim Avila & Lara Setrakian, *Arrested For Epilepsy*, ABC News, Nov. 23, 2006, available at http://abcnews.go.com/Health/story?id=2675812&page=1#.T4xrEHYbSbs (last visited Apr. 20, 2012).

rights as hearing suspects, they are often denied full protection of those rights."). Unsurprisingly, such concerns were among those voiced to the Task Force on the Rights and Empowerment of Americans with Disabilities, a body appointed by Congress that took written and oral testimony from numerous individuals with disabilities from every part of the country as to the obstacles they faced.[4] The Task Force was told that deaf individuals were "arrested and held in jail overnight without ever knowing their rights nor what they being held for." IL 572; accord KS 673 (deaf man "held for several hours without having been charged or without knowing what the problem was" when Topeka police failed to provide sign language interpreter).

Those detained pending trial also have suffered violations akin to those experienced more generally by prisoners with disabilities. One deaf prisoner was not told in a manner intelligible to him that he was eligible for parole but was required to request a hearing; as a result, he remained in jail an additional four months. See *Deaf Prison Inmates* 2-3. And deaf prisoners often have been denied interpreters at disciplinary hearings, a practice that, the State concedes, violates their due process rights, see State Br. 12-13. See, *e.g.*, *Deaf Prison Inmates* 9-10; *Clarkson* v. *Coughlin*, 898 F. Supp. 1019, 1049-1050 (S.D.N.Y. 1995); *Bonner* v. *Arizona*, 714 F. Supp. 420, 425 (D. Ariz. 1989). Meanwhile, even those prisons that have working TTY devices place restrictions on their use that effectively limit

[4] In *Lane*, the Court relied on the Task Force's "numerous examples of the exclusion of persons with disabilities from state judicial services and programs." See 541 U.S. at 527. The materials collected by the Task Force were lodged with the Court in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), and catalogued in Appendix C to Justice Breyer's dissent in that case. See *Lane*, 541 U.S. at 526-527. The *Garrett* appendix cites to the documents by State and Bates stamp number, *Garrett*, 531 U.S. at 389-424, a practice we follow in this brief. In addition, an addendum to this brief provides for the convenience of this Court and the parties a copy of all the documents cited herein.

deaf prisoners' phone use to much less than is enjoyed by other prisoners. *Deaf Prison Inmates* 11. Thus, plaintiff's allegations regarding her experience while detained not only are typical but are part of a wider problem of discrimination in prison administration that leads to the violation of constitutional rights. This case, however, does not require this Court to consider the Section Five validity of Title II as applied to the somewhat related but distinct context of general prison administration, and so *Chase* v. *Baskerville*, 508 F. Supp. 2d 492 (E.D. Va. 2007), aff'd as to different question, 305 F. App'x 135 (4th Cir. 2008), and other cases cited by the State regarding that context are inapposite. See State Br. 13-16.[5] Whether or not unequal access to a telephone or lack of interpreter for a convicted prisoner is discrimination that Section Five permits Congress to remedy across the spectrum of prison administration, it is a far different matter to withhold any ability to communicate from those in an overnight holding cell, who have an urgent need to understand the charges against them and to contact family, friends, and lawyers.

Individuals with disabilities have suffered discrimination not only as suspects, but also when they try to avail themselves of one of the most vital of public services. As one lawmaker pointed out during debate on the ADA, many deaf individuals had no means of calling for police help in an emergency. See 136 Cong. Rec. 4484 (1990) (remarks of Rep. Gunderson). One deaf person told the Task Force that a police department's TTY device "was broken for over two weeks with no backup

[5] Accordingly, while the United States disagrees with the district court's decision in *Chase*, there is no need to argue that question in full here other than to observe that prisoners with disabilities have suffered deprivations of numerous rights, as *Lane* acknowledged. See *Lane*, 541 U.S. at 525 & n.11 (including "the penal system" among the contexts in which widespread "unequal treatment" has been documented, and citing cases). For a lengthier exposition of the history of discrimination in the prison context, see Br. for the United States as Petitioner at 21-32, *United States* v. *Georgia*, No. 04-1203 (S. Ct. July 29, 2005), available at http://www.justice.gov/osg/briefs/2005/3mer/2mer/2004-1203.mer.aa.pdf.

available," and so she "had no idea how I was to reach them if necessary." KY 729. And a study conducted in Chicago found that one in three TTY calls placed to 911 resulted in a lost connection, and responses took more than a minute on average – far more than the ten-second response the city generally required for 911 calls. IL 583. Meanwhile, deaf victims of crime have faced "great obstacles in filing police reports," including "being mocked by police officers." See *With Their Own Hands* 884-886 (collecting stories).

Not only has the history of discrimination against individuals with disabilities in this context been well documented, but the consequences of that discrimination are grave. The appropriateness of Section Five legislation turns not only on the pervasiveness of discrimination, but also on the "gravity of the harm [the law] seeks to prevent." See *Lane*, 541 U.S. at 523. Disability discrimination in the criminal law enforcement context is particularly likely to result in the deprivation of liberty, due process, and vital pre-trial procedural rights. And even those who escape the gravest of constitutional violations can be severely traumatized by discriminatory encounters with law enforcement. See, *e.g.*, *Seremeth* v. *Board of Cnty. Comm'rs of Frederick Cnty.*, 673 F.3d 333, 336 (4th Cir. 2012) (plaintiff was receiving counseling to address emotional issues stemming from discriminatory interrogation).

4. Against that background of discrimination, Title II of the ADA is well tailored in this context – as in others – to protect against and remedy such discrimination, and the accompanying violations of constitutional rights, without infringing on public entities' legitimate prerogatives. See *Coleman*, 132 S. Ct. at 1333 ("Congress must tailor legislation enacted under §5 to remedy or prevent conduct transgressing the Fourteenth Amendment's substantive provisions.") (internal quotation marks and citations omitted). Title II is a "limited" remedy that is "reasonably targeted to a legitimate end" here,

just as *Lane* found it to be in the context of judicial services. *Lane*, 541 U.S. at 531-533. Accordingly, it is an "appropriate response to this history and pattern of unequal treatment." *Id.* at 530.

a. In remedying the extensive history of public disability discrimination, Congress was not limited to barring actual constitutional violations. It was entitled to "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 727-728 (2003). In particular, Congress permissibly banned "practices that are discriminatory in effect, if not in intent," notwithstanding that the Equal Protection Clause bans only intentional discrimination. *Lane*, 541 U.S. at 520. Moreover, Title II enforces not only the Equal Protection Clause, but also "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review" than rational basis. *Lane*, 541 U.S. at 522-523.

What Congress may not do is pass legislation "which alters the meaning of" the constitutional rights purportedly enforced. *City of Boerne*, 521 U.S. at 519. "[T]he line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies." *Id.* at 519-520. The ultimate question is whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.

That Title II requires States to take certain actions that the Constitution itself might not compel does not make it a disproportionate response. Having identified a constitutional problem, Congress was entitled to pass prophylactic legislation that requires state agencies to reasonably accommodate individuals with disabilities in general, not simply in those encounters in which a court would find a due

process or equal protection violation. For example, the Supreme Court upheld the family leave provisions of the Family and Medical Leave Act as a valid exercise of Section Five authority, notwithstanding that the FMLA – meant to remedy the long history of employment discrimination against women – requires the "across-the-board" provision of family leave to men and women alike. See *Hibbs*, 538 U.S. at 737.

The State errs in relying on *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), for the proposition that Congress may not impose requirements on States beyond that which courts would impose under the rational-basis review that governs equal protection claims of disability discrimination. See State Br. 16-18. In *Garrett*, with respect to the public employment covered by Title I, the Supreme Court found no record of "the pattern of unconstitutional discrimination on which [Fourteenth Amendment] legislation must be based," and so Congress's remedial authority was relatively limited. 531 U.S. at 370. By contrast, with respect to the public services covered by Title II, Congress compiled an extensive record of past state discrimination – sometimes involving constitutional rights that receive heightened scrutiny – and so it had authority to pass prophylactic legislation that goes beyond barring irrational conduct or remedying actual constitutional violations. See *Lane*, 541 U.S. at 523-526.

b. In the context of criminal law enforcement, Title II's requirements serve a number of important and valid prophylactic and remedial functions. For example, Title II requires in this context that public entities provide interpreters for the hearing impaired, ensuring that they are aware of their rights and are afforded a "meaningful opportunity to be heard," *Lane*, 541 U.S. at 532 (citation omitted). It requires that pretrial detention facilities (like prison facilities in general) are safe and afford the same

opportunities to individuals with disabilities as are afforded to others, see 28 C.F.R. 35.152. And it requires emergency responders, like other public entities, to communicate with deaf individuals through TTY "or equally effective telecommunications systems." 28 C.F.R. 35.161(a). Each of these requirements directly remedies the pattern of discrimination described above. This case is, therefore, entirely unlike *Coleman*, in which the Supreme Court found little reason to believe that the statutory provision at issue (the self-care provision of the Family and Medical Leave Act) actually remedied the gender discrimination that was claimed to justify it. See *Coleman*, 132 S. Ct. at 1335 ("Without widespread evidence of sex discrimination or sex stereotyping in the administration of sick leave, it is apparent that the congressional purpose in enacting the self-care provision is unrelated to these supposed wrongs.").

Title II also prevents violations of equal protection in this context. Not only does it directly bar overt discrimination, but its requirements serve to detect and prevent difficult-to-uncover discrimination that could otherwise evade judicial review. See 42 U.S.C. 12101(a)(5) (describing "various forms of discrimination," including but not limited to "outright intentional exclusion," to which individuals with disabilities are subject). When public officials make discretionary decisions, as they often must do in this context, there is a real risk that those decisions will be based on unspoken, irrational assumptions, leading to "subtle discrimination that may be difficult to detect on a case-by-case basis." *Hibbs*, 538 U.S. at 736. By prohibiting insubstantial reasons for, *e.g.*, arresting persons with disabilities, Title II prevents covert discrimination.

Furthermore, a "proper remedy for an unconstitutional exclusion" does not simply "bar like discrimination in the future," but also "aims to eliminate so far as possible the discriminatory effects of

the past." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) (citation and alterations omitted). A simple ban on overt discrimination would have frozen in place the effects of States' prior official exclusion and isolation of individuals with disabilities, under which persons with disabilities were invisible to government officials and planners, resulting in inaccessible buildings and impassable procedures. Removing barriers to integration caused by past discrimination is an important part of accomplishing Title II's goal of reducing stereotypes and misconceptions that risk constitutional violations throughout government services.

c. Title II accomplishes these critical objectives while minimizing the burden of compliance on States. Title II prohibits only discrimination "by reason of * * * disability," 42 U.S.C. 12132, and so States retain the discretion to make decisions for any lawful reason unrelated to disability. Moreover, Title II "does not require States to employ any and all means" to make public services accessible and non-discriminatory for people with disabilities, but rather requires only certain "'reasonable modifications' that would not fundamentally alter the nature of the service provided." *Lane*, 541 U.S. at 531-532 (quoting 42 U.S.C. 12132(2)). Public entities need not "compromise their essential eligibility criteria for public programs." *Lane*, 541 U.S. at 532; see 28 C.F.R. 35.104 (defining "[q]ualified individual with a disability" as individual with a disability "who, with or without reasonable modifications to rules, policies, or practices, * * * meets the essential eligibility requirements"). Rather, they retain the power to set core standards, and an individual with a disability must meet such standards "before he or she can even invoke the nondiscrimination provisions of the statute." *Constantine*, 411 F.3d at 488.

In particular, a public entity need not modify its program in such a way that someone with a disability would "pose[] a direct threat to the health or safety of others," 28 C.F.R. 35.139(a). Title II simply requires that law enforcement entities make the "direct threat" inquiry even-handedly, without reliance on stereotypes about, or ignorance of, individuals with disabilities. See, *e.g.*, *Doe* v. *County of Centre*, 242 F.3d 437, 449 (3d Cir. 2001) (finding that "analysis of the ADA's direct threat exception should involve an individualized inquiry into the significance of the threat posed"). To assist law enforcement entities in doing so, the Justice Department issues common-sense guidance as to how to handle common problems that arise. See Civil Rights Division, *Commonly Asked Questions About The Americans With Disabilities Act And Law Enforcement*, available at http://www.ada.gov/q%26a_law.pdf (last visited Apr. 20, 2012).

Nor does Title II require States to "undertake measures that would impose an undue financial or administrative burden." *Lane*, 541 U.S. at 532; see *Olmstead* v. *L.C.*, 527 U.S. 581, 603-605 (1999) (describing limitations on a State's responsibility); accord *Constantine*, 411 F.3d at 488-489. For example, Title II requires adherence to certain architectural standards only for new construction and alterations, when facilities can be made accessible at little additional cost. 28 C.F.R. 35.151. By contrast, a public entity need not engage in costly structural modification for older facilities if it can make services accessible in other ways, such as by "relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services." *Lane*, 541 U.S. at 532. These important limitations on the scope of Title II "tend to ensure Congress' means are proportionate to ends legitimate under § 5." *Constantine*, 411 F.3d at 489 (quoting *City of Boerne*, 521 U.S. at 533).

5. Finally, the validity of Title II's application to the context of criminal law enforcement must be viewed in light of the broader purpose and application of the statute. Congress found that the discrimination faced by persons with disabilities was not limited to a few discrete areas. To the contrary, Congress found that persons with disabilities have been subjected to systematic discrimination in a broad range of public services. See 42 U.S.C. 12101(a)(3). As harmful as discrimination is when felt in just one place, it is that much worse when it manifests in every part of society. Individuals with disabilities, Congress found, suffered from the "kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." *Plyler* v. *Doe*, 457 U.S. 202, 216 n.14 (1982).

Title II's application to criminal law enforcement, thus, is part of a broader remedy to a constitutional problem that is greater than the sum of its parts. It operates not in isolation, but in conjunction with Title II's application to courthouses, education, and all other public services and programs. Before enacting Title II, Congress compiled a voluminous record of official discrimination against individuals with disabilities in virtually every public service or program imaginable. See *Lane*, 541 U.S. at 528 (noting "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services"). In response to that record, Congress required public entities to take reasonable measures in every context to ensure that individuals with disabilities can be full participants and are freed from unnecessary public discrimination.

Ending discrimination in one context is part of ending it in others, both by putting a stop to irrational stereotypes and by laying the foundation for greater participation by individuals with disabilities in other areas. See *Association for Disabled Ams., Inc.* v. *Florida Int'l Univ.*, 405 F.3d 954,

959 (11th Cir. 2005) ("Discrimination against disabled students in education affects disabled persons' future ability to exercise and participate in the most basic rights and responsibilities of citizenship, such as voting and participation in public programs and services."). Discrimination in this context can lead to unnecessary arrests and other trauma and hampers the ability of individuals with disabilities to live more independently, join the workforce, and otherwise integrate into the larger community. Cf. *Olmstead*, 527 U.S. at 600 (unnecessary segregation of individuals with disability is discrimination, in part because it "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life"). Title II's application to criminal law enforcement is just one part of a much larger project, which itself is a proportional and congruent response to the myriad of constitutional violations that it remedies.[6]

[6] The Court in *Lane* did not examine the congruence and proportionality of Title II as a whole because it found that the statute was valid Section Five legislation as applied to the class of cases before it. Similarly, because Title II is valid Section Five legislation as applied to discrimination in criminal law enforcement, this Court need not consider the validity of Title II as a whole. It remains the position of the United States, however, that Title II as a whole is valid Section Five legislation because it is congruent and proportional to Congress's goal of eliminating discrimination on the basis of disability in the provision of public services – an area that *Lane* determined is an "appropriate subject for prophylactic legislation." *Lane*, 541 U.S. at 529.

CONCLUSION

This Court should first ascertain whether defendants have waived their sovereign immunity to suit under Section 504 of the Rehabilitation Act, in which case it is unnecessary to decide whether Title II of the ADA is valid legislation under Section Five of the Fourteenth Amendment. Should it reach the question, this Court should find that Title II of the ADA is valid Section Five legislation and thus abrogates the States' sovereign immunity in cases involving criminal law enforcement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 23, 2012, the foregoing "Intervenor United States' Memorandum Regarding Eleventh Amendment Immunity" was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all counsel of record.

/s/ Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney

ADDENDUM

(1)

00572 Christi Lyle

2742 N

Chicago, IL

July 22, 19c

Representative Dan Rostenkowski
2111 Rayburn HOB
Washington DC, 20515

Dear Rep. Rostenkowski,

I strongly urge you to support the Americans with Disabilities Act of 1988. It is unfortunate that we as a society require a law as this, but require it we do. As Director of Social Services and Advocacy at the Chicago Hearing Society, I and my staff are involved on a daily basis with severely hearing impaired persons who do not have access to public services. We have clients who are admitted into hospitals, undergo surgery and released without the benefit of a sign language interpreter to receive information critical for their health. We have clients who have been arrested and held in jail overnight without ever knowing their rights nor what they are being held for. We have clients whose children have been taken away from them & told to get parent education but have no place to go because the services are not accessible. What chance do they have to ever get their children back? These are just 3 examples of the many we have where hearing impaired persons have had their basic human rights violated.

The Rehab. Act of 1973 has been in effect for 15 years and these violations occurred in 1988! We obviously need more: a stronger law, funding for compliance, & funding for prosecuting the violators, for enforcement. I believe The Americans with Disabilities Act is the best thing we have right now to provide more. Please support this Act.

Christi M Boyce

TO GIVE YOU AN EXAMPLE, ON ANY GIVEN DAY IN ILLINOIS, A DEAF PERSON MORE LIKELY WILL NOT BE ABLE TO CALL FOR EMERGENCY MEDICAL, POLICE AND FIRE SERVICES. IT IS EITHER BECAUSE THERE IS NO TELECOMMUNICATIONS DEVICE FOR THE DEAF AT THE EMERGENCY SERVICE CENTER TO CALL OR IF THERE ARE TDDS AT THE EMERGENCY SERVICE CENTER, THE CALLS ARE MORE LIKELY HUNG UP, RATHER THAN ANSWERED. THIS IS DUE TO INSUFFICIENT TRAINING AND SENSIVITY OR AWARNESS OF TDD CALLS.

I CONDUCTED A TELECOMMUNICATIONS EMERGENCY ACCESSIBILITY SERVICE STUDY LAST DECEMBER. OF 59 CHICAGO METROPOLITAN AREA POLICE AND FIRE ERMERGENCY SERVICES THAT HAD TDDS, ONE OF THREE CALLS HUNG UP. IF A TDD CALL WAS ANSWERED BY THE SERVICE, ON AVERAGE IT TOOK MORE THAN A MINUTE BEFORE IT WAS ANSWERED. ONE CALL WAS ON HOLD FOR 12 MINUTES AND THEN HUNG UP WITHOUT EVER TYPING ANY MESSAGE. ACCORDING TO THE CITY OF CHICAGO, ITS 9-1-1 SERVICE REQUIRES EVERY CALL BE ANSWERED AND EVERY CALL BE RESPONDED IN TEN SECONDS. WE DO NOT HAVE SUCH SERVICE ANYWHERE IN THE STATE, LET ALONE 9-1-1 SERVICE. WE EVEN INTRODUCED A STATE OF ILLINOIS LEGISLATIVE BILL TO ENFORCE THE TELECOMMUNICATIONS EMERGENCY ACCESSIBILITY FOR TDD USERS TWICE DURING SPRING SESSIONS OF 1987 AND 1988, THE BILLS WERE DEFEATED, DENYING US THESE CRITICAL AND NECCESSARY EMERGENCY SERVICES. WE DO NOT GIVE UP, HOWEVER, AND WE ARE INVESTIGATING OTHER MEANS TO MAKE THESE EMERGENCY SERVICES ACCESSIBLE.

swimming unsupervised in swimming pools anyway. The couple still does not have a swimming pool in their back yard. They contacted several other companies, but their estimates for the work were all several hundred dollars higher. The couple was therefore barred from dealing with the company prepared to give the best price, because that company did not wish to deal with blind people.

A deaf man with whom I work was arrested for driving while intoxicated. He alleges to this day that he was not in fact intoxicated. A klood test was given because it was clear to the police that the man did not understand the charges which were being leveled against him. Nonetheless, the city police in Topeka made absolutely no effort to provide the gentleman with a qualified sign language interpreter in order that he might understand the charges against him and his rights. As it turned out, the gentleman was never actually charged with a crime. He was, however, held for several hours in jail without having been charged or without knowing what the problem was. The police had in their possession a list of qualified sign language interpreters so they could have made one available to the gentleman. They did not simply because they chose not to bother to do s.. Upon finally being released from jail, the gentleman did file a 504 complaint against the Topeka Police Department. The finding in this complaint was that the Topeka Police were not, at that time, receiving federal funds for any program. Therefore, even though this took place prior to Grove City, the 504 complaint was ruled without jurisdiction by the Office for Civil Rights and the police went unpunished for their discrimination.

A lady who is in a wheelchair chose to live in an apartment which had several steps leading up to it. She asked the landlord for no modifications because she was capable of getting out of the chair, crawling up the steps, and dragging the chair behind her. She liked everything else about the apartment and chose to live there. While her method of life was thus a bit unorthodox, she certainly was not endangering herself or anyone else by her actions. She paid her rent on time and was appropriate in her maintenance of the property. Nonetheless, she was evicted because the landlord, who was not willing to make any adaptations to the property even

Often, people will just hang up without attempting to use it, even when the number I called was stated to be the telephone telecommunications number. The public library of Lexington, the police dept. of Lexingtong, the University of Kentucky library all displayed inadequate training. At one point the police dept.s device was broken for over two weeks with no backup available. I had no idea how I was to reach them if necessary. I have to admit that my preoccupation was heightened by the attack on my person the previous year while I was alone and sleeping in my apt. Then, I had no device. If I had, would they have staff who were adequately trained? I asked my neighborhood police officer if he was familiar with the device, and was told that each officer was shown how to use it one time. This is not enough.

While I was discovering how inadequate training was, more and more questions kept coming up. I feel that better training and orientation for the new private user is as necessary as the orientation of the public services staff who use them. One must keep the message short and concise for each reply and request. One must know how to communicate, type, write. I was so frustrated with the problem I discussed it with my counselor. The solution was for me to self-advocate by making people use it on a regular basis. It takes much longer to use this device than it does to make a direct call. Being in my first year of graduate school with new and many responsibilities and problems, it angered me that I should also have the added responsibility of training these people by constantly phoning them. Some administrative remediation is needed.

When I need to contact a business associate, public services, shop the yellow pages, or call the doctor, I am dependent on our volunteer relay systems. While Red Cross of Lexington was very good, I did not and do not find the volunteer relay services in Northern Kentucky to be adequate in either services or accessibility even though I have two facilities I can call during the hours of 9a.m. to 9p.m., provided the volunteer has shown up. These numbers are constantly busy and it is difficult for me or my business associates to get through.

I am struggling to make contact of a professional nature through the