UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ELIZABETH WELCH,	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 7:06-cv-00137-gec**
	)	
VIRGINIA POLYTECHNIC INSTITUTE	)	
AND STATE UNIVERSITY,	)	
and	)	
DR. GRANT TURNWALD,	)	
Defendants.	)	
_____	)	

BRIEF OF THE UNITED STATES AS INTERVENOR IN SUPPORT OF CONSTITUTIONALITY OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT

The United States, intervenor in this case, submits this brief in support of (1) the constitutionality of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, including the provision that abrogates States' Eleventh Amendment immunity, as applied in the context of access to public education, and (2) the constitutionality of Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794(a), and 42 U.S.C. 2000d-7, which conditions the receipt of federal financial assistance on a state agency's waiver of its Eleventh Amendment immunity from suit by private individuals under Section 504.

STATEMENT

1. This case arises under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131-12165, 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's coverage of "services, programs, or activities," 42 U.S.C. 12132, includes the administration of state-run universities. Title II may be enforced through private suits against public entities, 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.

Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability or from excluding persons from participation in or denying persons the benefits of such program or activity on the basis of disability. 29 U.S.C. 794(a). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. See 29 U.S.C. 794(a); *Barnes* v. *Gorman*, 536 U.S. 181 (2002); *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999).

In 1986, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1845. Section 2000d-7 provides, in relevant part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], * * *.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. 2000d-7(a).

2. In her complaint, plaintiff Elizabeth Welch alleges that she "has attention deficit hyperactivity disorder, major depression, and a generalized anxiety disorder." Plaintiff contends

that, individually or in combination, these conditions substantially limit one or more major life activities, thereby qualifying her as an individual with a disability entitled to protection under the ADA and Section 504. Plaintiff enrolled in the graduate program in veterinary medicine at Virginia Polytechnic Institute & State University (Virginia Tech) in 2001. While enrolled, plaintiff alleges that she suffered harassment and discriminatory treatment by the university because of her disability and because of her attempts to obtain accommodations for her disability. Plaintiff alleges that, in the fall of 2002, the university's office for students with disabilities informed her that the veterinary program refused to accommodate any student in his or her final year of the program. She further alleges that she was routinely threatened with dismissal, was graded more harshly than other students, and was ultimately discharged from the program because of her disability and because she filed a discrimination complaint with the Department of Education Office of Civil Rights.

Plaintiff filed suit against Virginia Tech and the Associate Dean of the College of Veterinary Medicine, alleging violations of, *inter alia*, Title II of the ADA and Section 504. Defendants filed a motion to dismiss, arguing that Congress did not validly abrogate States' immunity to claims under Title II, as applied in the public education context, or to claims under Section 504. This Court certified the constitutional questions to the United States on October 23, 2006. On December 20, 2006, the United States intervened in this case pursuant to 28 U.S.C. 2403[1] in order to defend the constitutionality of Title II of the ADA, as applied in the context of public education, of Section 504, and of the statutory provisions removing States' Eleventh Amendment immunity to suits under Title II and Section 504.

[1] 28 U.S.C. 2403 provides: "In any action, suit or proceeding in a court of the United States to which the United States * * * is not a party, wherein the constitutionality of an Act of Congress affecting the public interest is drawn in question, the court shall * * * permit the United States to intervene for * * * argument on the question of constitutionality."

ARGUMENT

I

THE FOURTH CIRCUIT HAS ALREADY HELD THAT TITLE II VALIDLY ABROGATES STATES' IMMUNITY TO CLAIMS UNDER TITLE II OF THE ADA IN THE CONTEXT OF PUBLIC HIGHER EDUCATION

The Fourth Circuit held in *Constantine* v. *Rectors and Visitors of George Mason University*, 411 F.3d 474 (4th Cir. 2005), that Congress validly abrogated States' sovereign immunity to private damages claims under Title II in the context of public higher education. Defendant makes no effort to distinguish the immunity question presented in the instant case from that presented in *Constantine*.[2] Indeed, defendant barely acknowledges this controlling circuit precedent. In a footnote (Defendants' Responsive Pleading at 12 n.3), defendant notes that "the Fourth Circuit held that sovereign immunity did not bar an ADA claim in the context of higher education," but claims that this holding "is not controlling in this case" because the Supreme Court in *United States* v. *Georgia*, 126 S. Ct. 877 (2006), "adopted a new framework for resolving whether sovereign immunity bars an ADA claim." Defendant is incorrect. *Constantine* controls this case.

1. In *Tennessee* v. *Lane*, 541 U.S. 509, 518 (2004), the Supreme Court considered for the first time whether Congress properly abrogated States' Eleventh Amendment immunity to claims under Title II of the ADA. 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. 541 U.S. at 513. The state

[2] Virginia was also the defendant in *Constantine*, but did not petition for rehearing in that case and did not file a petition for certiorari.

defendant in *Lane* argued that Congress lacked the authority to abrogate the State's Eleventh Amendment immunity to these claims, and the Supreme Court disagreed. See *id.* at 533-534.

To reach this conclusion, the Court applied the three-part analysis for determining the validity of Fourteenth Amendment legislation created by *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). 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. *Lane*, 541 U.S. at 522-523. With respect to the second question, the Court conclusively found 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. *Id.* at 523-528. 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 on a category-by-category basis in light of the particular constitutional rights at stake in the relevant category of public services.[3] *Id.* at 530-534.

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[3] The Court in *Lane* did not examine the congruence and proportionality of Title II as a whole because the Court found that the statute was valid Section 5 legislation as applied to the class of cases before it. Because Title II is valid Section 5 legislation as applied to the class of cases implicating public education, this Court need not consider the validity of Title II as a whole. The

2. A year later, the Fourth Circuit in *Constantine* applied the Supreme Court's decision in *Lane* in considering whether Title II is valid Section 5 legislation as applied to the context of public higher education. Applying the 3-part *Boerne* test, as articulated in *Lane*, the Fourth Circuit first concluded that, as applied to public education, Title II enforces the Fourteenth Amendment's prohibition on irrational discrimination. 411 F.3d at 486-487. Turning to the question whether Title II was "responsive to, or designed to prevent unconstitutional behavior," the court held that:

> After *Lane*, it is settled that Title II was enacted in response to a pattern of unconstitutional disability discrimination by States and nonstate government entities with respect to the provision of public services. This conclusion is sufficient to satisfy the historical inquiry into the harms sought to be addressed by Title II.

Id. at 487. Finally, the court held that, because Title II is a "congruent and proportional response to this demonstrated history and pattern of unconstitutional disability discrimination" in this context, "Title II of the ADA is valid § 5 legislation, at least as it applies to public higher education." *Id.* at 487-490.

3. Contrary to defendant's assertions, the Supreme Court's decision in *United States* v. *Georgia* did not alter the analysis courts must use to determine whether Congress properly abrogated States' Eleventh Amendment immunity to Title II claims. Rather, what defendant calls the "new framework" adopted in *Georgia* merely instructs lower courts *not* to reach the question whether Title II is valid prophylactic Section 5 legislation *unless* that prophylactic protection is implicated in a specific case.

United States continues to maintain, however, that Title II as a whole is valid Section 5 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 the Supreme Court in *Lane* determined is an "appropriate subject for prophylactic legislation" under Section 5. 541 U.S. at 529.

Georgia presented the Supreme Court with the question whether Congress validly abrogated States' Eleventh Amendment immunity to claims under Title II of the ADA, as applied in the prison context. However, the Court declined to reach that issue. Instead, the Court instructed that lower courts presented with such claims should answer two preliminary questions before they consider evaluating the legitimacy of the statute's prophylactic protection. The Court admonished lower courts to "determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II,[4] and (2) to what extent such misconduct also violated the Fourteenth Amendment. Insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment," courts should then determine (3) "whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Georgia*, 126 S. Ct. at 882.

The purpose of this inquiry is to determine whether the Title II claims in a particular case could have independently constituted viable constitutional claims or whether those Title II claims rely solely on the statute's prophylactic protection. To the extent any of a plaintiff's Title II claims would independently state a constitutional violation, the *Georgia* Court held, Title II's abrogation of immunity for those claims is, by definition, valid, and a court need not question whether Title II is congruent and proportional under the test first articulated in *Boerne* and further elucidated in *Lane*. *Georgia*, 126 S. Ct. at 881-882. A court may thereby avoid deciding a constitutional issue – the validity of the prophylactic protection of Title II – that is not necessary to resolution of the plaintiff's claims. Because it was not clear whether the plaintiff in

[4] *Georgia* did have a limited impact on *Constantine*. Although the Fourth Circuit in *Constantine* found that it was required to consider the state defendant's Eleventh Amendment arguments before considering the merits of the plaintiff's claim, that holding was overruled by *Georgia* at least insofar as *Georgia* requires courts to first determine whether a plaintiff even states any valid statutory claims before determining whether a state defendant is immune from such claims.

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.*

4. The first and second *Georgia* inquiries are unnecessary in this case because the Fourth Circuit in *Constantine* already answered the third inquiry, holding that any prophylactic protection afforded by Title II is valid in the context of public higher education. Thus, nothing in *Georgia* calls into question the precedential value of *Constantine*.[5] *Constantine* is therefore binding on this Court.

II

THE FOURTH CIRCUIT HAS ALSO HELD THAT A STATE AGENCY VALIDLY WAIVES ITS ELEVENTH AMENDMENT IMMUNITY TO CLAIMS UNDER SECTION 504 WHEN IT ACCEPTS FEDERAL FINANCIAL ASSISTANCE

The Fourth Circuit also unequivocally held in *Constantine* that a state agency that accepts federal financial assistance waives its Eleventh Amendment immunity to claims under Section 504 of the Rehabilitation Act. 411 F.3d at 490-496. Defendant does not even acknowledge this holding, let alone make any attempt to distinguish it. The decision in *Constantine* is binding upon this Court.

Defendant asserts its immunity to plaintiff's Section 504 claim merely by adopting its argument with respect to plaintiff's Title II claim. Although Section 504 and Title II impose the same substantive requirements on defendant, Section 504 was enacted pursuant to Congress's

[5] Ordinarily, this Court would first determine which of Welch's allegations state a claim under Title II, and then determine which of Welch's valid Title II claims would independently state constitutional claims. Then, only if the Court found that Welch has alleged valid Title II claims that are not also claims of constitutional violations would this Court 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).

authority under the Spending Clause, while the ADA was not. The Fourth Circuit held in *Constantine* that Congress appropriately exercised its spending power in enacting Section 504 and in conditioning the receipt of federal funds on a state agency's waiver of its Eleventh Amendment immunity. 411 F.3d at 490-496. That is sufficient to defeat defendants' claim of immunity in this case.[6]

CONCLUSION

For the above reasons, this Court should deny the defendants' motion to dismiss plaintiff's ADA and Section 504 claims as barred by the Eleventh Amendment.

Respectfully submitted,

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[6] Morever, if Congress has the power under the Fourteenth Amendment to abrogate a State's Eleventh Amendment immunity to claims under Title II of the ADA, it has the same power with respect to claims under Section 504. See, *e.g.*, *Reickenbacker* v. *Foster*, 274 F.3d 974, 977 n.17 (5th Cir. 2001); *Garcia* v. *SUNY Health Sciences Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001).

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of January, 2007, electronically filed the foregoing **Brief of the United States as Intervenor in Support of Constitutionality of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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