No. 01-31026

In the
United States Court of Appeals
for the Fifth Circuit

TRAVIS PACE,

PLAINTIFF-APPELLANT

V.

THE BOGALUSA CITY SCHOOL BOARD; THE LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION; THE LOUISIANA DEPARTMENT OF EDUCATION; AND THE STATE OF LOUISIANA,

DEFENDANTS-APPELLEES.

On Appeal from the United States District Court
Eastern District of Louisiana, New Orleans Division

BRIEF AMICUS CURIAE OF THE ADVOCACY CENTER, *ET AL.* IN SUPPORT OF APPELLANT TRAVIS PACE REGARDING APPLICABILITY OF *TENNESSEE V. LANE* (U.S. 2004)

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Pursuant to Fed. R. App. P. 26.1 and 29, incorporated *amici curiae* state that they have no parent corporations, nor is there any publicly held corporation owning 10% or more of their stock.

INTRODUCTION

Travis Pace, a severely disabled young adult, seeks to challenge the actions of the Bogalusa City School Board and the other defendants in relegating him to an unequal, ineffective education delivered in an inaccessible and dangerous setting. More than five years after filing his complaint in federal court, Travis has yet to secure a trial on the merits of his claim. The delay is occasioned in part by the state defendants' intractable position that they are immune from the requirements of federal disability discrimination laws even in the context of public education, a core governmental function of grave constitutional significance. In light of the Supreme Court's decision in *Tennessee v. Lane*, 124 S. Ct. 1978 (2004), this narrow and ill-considered stance must be finally and totally rejected.

As longtime advocates for disability civil rights, the undersigned *amici* know too well the harsh, costly, and painful history of disability discrimination in public education and other basic state programs. *Amici* include organizations that assisted lawmakers in compiling and reviewing this regrettable past during the hearings that preceded the enactment of the ADA in 1990. As detailed below, and in the other briefs submitted on behalf of Pace, Congress relied upon a substantial record of unconstitutional discrimination, and acted well within its constitutional authority in adopting the balanced provisions of Title II at issue here.

The case must be remanded for a trial on the merits, long overdue.

ARGUMENT

Congress may abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under section 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment. *Tennessee v. Lane*, 124 S. Ct. 1978, 1985 (2004). This power includes "the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Id.* (citation omitted). Congress's section 5 power is not, however, unlimited. While Congress has a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, section 5 enactments must exhibit "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 1986 (citation omitted). Here, the state defendants argue, Pace may not sue Louisiana and its agencies under the ADA to remedy the dangerous and inaccessible conditions of his public education because Congress did not validly abrogate the state's sovereign immunity in passing Title II.

To determine whether a statutory enactment is a lawful exercise of Congressional power, courts must engage in a two-step inquiry. First, upon identifying the constitutional rights that Congress sought to protect, the court must ascertain whether there is a sufficient record of interference such that prophylactic

action was appropriate. Here, like the courthouses considered in *Lane*, public school buildings are the site of constitutionally protected activities fundamental to our civil society. Primary among these is, of course, the free and public education of all school age children, including children with disabilities. Additional constitutionally protected activities, including voting and petitioning one's government, also take place within public school buildings. *See* Part III, *infra* (noting that 24% of American polling places are in schools). As detailed below, Congress responded to widespread constitutional violations, including violations infringing the very activities at issue here. *See Lane*, 124 S. Ct. at 1989-92 (reviewing discrimination in public education, voting, and additional areas of civic importance).[1]

Second, the court must determine whether the legislative remedy devised by Congress is congruent and proportionate to its object of protecting the identified rights. In this case, Pace invokes the same provisions of Title II already approved by *Lane*. 124 S. Ct. at 1992-94.

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[1] The *Lane* Court recognized that Title II was enacted "against a backdrop of pervasive unequal treatment in the administration of state services and programs" for persons with disabilities. 124 S. Ct. at 1989. As such, *Lane* supercedes this Court's opinion in *Reickenbacker v. Foster*, which characterized the Congressional record supporting Title II's enactment as consisting of many "facially neutral state policies that are unlikely to represent unconstitutional discrimination." 274 F.3d 974 (5th Cir. 2001).

I. THE PROVISION OF PUBLIC EDUCATION TO CHILDREN WITH DISABILITIES IS A MATTER OF GREAT CONSTITUTIONAL CONSEQUENCE.

Today, as in 1954, "education is perhaps the most important function of state and local governments." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). All states fund and administer a system of public education, and all require their children to attend school. *See, e.g.,* La. Const. art. VIII ("The goal of the public educational system is to provide learning environments and experiences, at all stages of human development, that are humane, just, and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential."), § 1 ("The legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system."); La. Rev. Stat. 17:221 (requiring children to attend school).

Our nation's laws and policies recognize "the importance of education to our democratic society." *Brown*, 347 U.S. at 493; *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29-30 (1973) (noting the "abiding respect for the vital role of education in a free society" found in Supreme Court decisions, and acknowledging the "grave significance of education both to the individual and to our society"); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (recognizing public education as "a most vital civic institution for the preservation of a democratic system of government," one that plays "a fundamental role in maintaining the

fabric of our society") (citation omitted); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961) ("It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society."). Indeed, public education "is the very foundation of good citizenship." *Brown*, 347 U.S. at 493.

As a practical matter, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.*; *see also Plyler*, 457 U.S. at 221-22 (education provides "basic tools" for self-reliance and self-sufficiency); *Dixon*, 294 F.2d at 157 ("Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.").

Citing such considerations, the Supreme Court has ruled that excluding children from public education, or relegating them to segregated schools, violates the equal protection clause. *Brown*, 347 U.S. at 493 ("Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."); *Plyler*, 457 U.S. at 230. This is so even under a "rational basis" analysis:

> By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the state law challenged], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light

> of these countervailing costs, the discrimination . . . can hardly be considered rational unless it furthers some substantial goal of the state. . . . No such showing was made here.

Plyler, 457 U.S. at 223-24, 230 (striking down state law excluding undocumented resident children from public education).

Consistent with these standards, federal courts have ruled that the unnecessary exclusion or segregation of children with disabilities in public education violates the constitutional guarantee of equal protection. *New York State Ass'n for Retarded Children, Inc. v. Carey*, 466 F. Supp. 487, 505 (E.D. N.Y. 1979) (school board's plan to segregate developmentally disabled children with hepatitis B lacked rational basis and violated equal protection under any level of review); *Pennsylvania Ass'n of Retarded Children (PARC) v. Commonwealth*, 343 F. Supp. 279, 296-97 (1972) (plaintiffs established colorable claim that exclusion of developmentally disabled children had no rational basis and violated equal protection).

Excluding children from public education, or relegating them to segregated schools or classrooms, also raises serious concerns under the due process clause. Such deprivations conflict with the clause's liberty interest, as well as its procedural requirements. In *Bolling v. Sharpe,* the companion case to *Brown*, the Supreme Court ruled that the segregated education of African-American children in the District of Columbia constituted an arbitrary deprivation of liberty in

violation of due process. 347 U.S. 497, 500 (1954). Similarly, in *Goss v. Lopez*, 419 U.S. 565 (1975), the Court ruled that public school children have a liberty interest in their "good name, reputation, honor, or integrity," and that their suspension unilaterally and without process "immediately collides with the requirements of the Constitution." 419 U.S. 565, 574-75. Further, states may not withdraw from children the right to public education absent "fundamentally fair procedures." *Id.* at 574.

Excluding children from school raises due process claims because it "could serious damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." *Id.* at 575. As the Court poignantly reviewed in *Brown,* the stigma imposed by segregated education "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494. Accordingly, federal courts have held that excluding disabled children imposes stigma and thereby violate liberty interests protected substantively by the due process clause. *Mills v. Board of Educ.*, 348 F. Supp. 866, 874-75 (D.D.C. 1972); *PARC*, 343 F. Supp. at 293-95.

Due process concerns also arise when children with disabilities are improperly institutionalized rather than educated in the community alongside their non-disabled peers. The Supreme Court has held that substantive liberty interests

may be infringed by the terms and conditions of institutionalization. *See Youngberg v. Romeo*, 457 U.S. 307, 319-24 (1982); *Vitek v. Jones*, 445 U.S. 480, 492 (1980). Further, the state must provide the individual with a disability a certain level of training to ensure these interests. *Youngberg*, 457 U.S. at 324. If the state institutionalizes a disabled individual without an adequate basis in professional opinion, or denies appropriate placement and education, it violates her liberty right. *See, e.g., Clark v. Cohen*, 794 F.2d 79, 87 (3d Cir. 1986); *Thomas S. v. Childress*, 781 F.2d 367, 374 (4th Cir. 1986); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd*, 503 F.2d 1305 (5th Cir. 1974).

Although in 1973 the Supreme Court declined to find that unequal funding of public education violates a fundamental right, *Rodriguez*, 411 U.S. at 37-39, it was plain at the time of the enactment of the ADA that the total exclusion of children from public education is a matter of grave constitutional import. As the Supreme Court noted in 1975, "the total exclusion from the educational process for more than a trivial period . . . is a serious event in the life of the suspended child." *Goss,* 419 U.S. at 576; *cf. Rodriguez*, 411 U.S. at 24, 25 n.60 (a system that "absolutely precluded" certain children from receiving an education "would present a far more compelling set of circumstances for judicial assistance"). Accordingly, federal courts have ruled that disabled children must be given access

to an adequate, publicly supported education. *See Board of Educ. v. Rowley*, 458 U.S. 176, 180 (1982) (citing *Mills* and *PARC*).

Despite these constitutional principles, millions of children with disabilities continued to be totally excluded from our nation's schools until Congress took repeated steps to address the crisis. Even after Congress took action, millions of disabled children continued to be educated in segregated, dangerous, and second-class classrooms and schools. Indeed, as the facts of this case demonstrate, such violations continue to this day. These injuries provided an ample basis for Title II.

II. TITLE II'S APPLICATION TO PUBLIC SCHOOLS IS SUPPORTED BY A HISTORY OF UNCONSTITUTIONAL DISCRIMINATION AGAINST DISABLED CHILDREN IN PUBLIC EDUCATION.

In enacting Title II, federal lawmakers considered statistical data, judicial rulings and findings of fact, testimony, studies, reports, and anecdotal evidence, collectively detailing widespread exclusion, segregation, and inequality in public education. Consistent with section 5 of the Fourteenth Amendment, Congress acted to remedy and prevent unconstitutional disability discrimination.

A. Congress Began Consideration of Title II of the ADA Having Already Compiled a Substantial Record of Unconstitutional Disability Discrimination in Public Education.

When Congress began debate on Title II, it had already compiled a substantial body of evidence detailing the unconstitutional deprivations experienced by children with disabilities in public education. In enacting the

Education of All Handicapped Children Act (EAHCA) in 1975, later renamed the Individuals with Disabilities Education Act (IDEA), Congress expressly found that "one million of the handicapped children in the United States are excluded entirely from the public school system." 20 U.S.C. fmr. § 1400(b)(4); see also S. Rep. No. 94-168, at 8 (1975) (noting Department of Education statistics that estimating that more than 1.75 million disabled children were receiving no educational services at all, while 2.5 million were receiving inadequate services). Similar statistics were presented to Congress when it considered and passed the Rehabilitation Act of 1973. 118 Cong. Rec. 4341 (1972) (statement of Representative Charles Vanik, noting that as many as 4.25 million children with disabilities were being excluded from public schools); 118 Cong. Rec. 525 (1972) (statement of Senator Hubert Humphrey).

In passing the EAHCA, Congress reviewed federal court decisions finding constitutional violations where children with disabilities experienced systemic unequal treatment in public education. S. Rep. No. 94-168, at 6-7 (1975) (citing *PARC* and *Mills*, and noting similar decisions in 27 other states); *cf. Lane*, 124 S. Ct. at 1989 n.12 (citing *Mills* as exemplar of systemic unequal treatment of disabled students in public education). Echoing the Department of Education statistics, the district court litigation revealed stark levels of exclusion. *PARC*, 343 F. Supp. at 296 (in 1965 between 70,000 and 80,000 Pennsylvania students with

developmental disabilities were denied any education); *Mills*, 348 F. Supp. at 868-69 (approximately 12,340 children with disabilities in the District of Columbia were provided with no educational services in 1971-72). Following *Mills* and *PARC*, more than fifty cases were initiated in other jurisdictions alleging similar exclusions on behalf of students with disabilities.[2]

As the *Mills* and *PARC* cases make plain, children with disabilities faced state laws that explicitly codified their state's discriminatory practices. *See, e.g., PARC*, 343 F. Supp. at 282 & nn. 3-6 (reviewing text of statutes excluding children who are "uneducable and untrainable").[3] Further, state courts historically upheld the exclusion of students with mental or physical disabilities from integrated public

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[2] Richard F. Daugherty, Special Education: A Summary of Legal Requirements, Terms, and Trends 5 (2001). *See, e.g., Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983); *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980); *Darlene L. v. Illinois State Bd. of Educ.*, 568 F. Supp. 1340 (N.D. Ill. 1983); *David H. v. Spring Branch Ind. Sch. Dist.*, 569 F. Supp. 1324 (E.D. Tex. 1983); *Panitch v. Wisconsin*, 444 F. Supp. 320 (E.D. Wis. 1977); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D.W. Va. 1976); *Harrison v. Michigan*, 350 F. Supp. 846 (E.D. Mich. 1972); *In the Interest of G.H.*, 218 N.W.2d 441 (N.D. 1974).

[3] *See also, e.g.,* Neb. Rev. Stat. §§ 79-201, 79-202 (1971) (excusing from compulsory education children who were "physically or mentally incapacitated for the work done in the school"); Nev. Rev. Stat. § 392.050 (1967) (excusing from compulsory education children whose "physical or mental condition or attitude is such as to prevent or render inadvisable his attendance at school"); N.C. Gen. Stat. § 115-165 (1966) ("A child so severely afflicted by mental, emotional, or physical incapacity as to make it impossible for such child to profit by instruction given in the public schools shall not be permitted to attend the public schools of the State.").

education settings.[4] *Cf. Brown*, 347 U.S. at 494 (detrimental impact of segregation "is greater when it has the sanction of the law," as it is usually interpreted as denoting the inferiority of the segregated group). This well-known legal history was the vestige of an earlier, far crueler era in the states' treatment of children with disabilities.[5]

B. Congress Identified Major Shortcomings in Existing State and Federal Laws, and Enacted Title II to Remedy Ongoing Problems.

Prior to enacting Title II, Congress identified important shortcomings in existing state and federal laws that rendered them "'inadequate to address the

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[4] *See, e.g., Department of Pub. Welfare v. Haas*, 154 N.E.2d 265, 270 (Ill. 1958) (compulsory education law did not require that education be provided to "mentally deficient or feeble-minded" child); *State ex rel. Beattie v. Board of Educ.*, 172 N.W. 153 (Wis. 1919) (excluding child with "peculiarly high, rasping, and disturbing tone of voice, accompanied with uncontrollable facial contortions" and "an uncontrollable flow of saliva, which drools from his mouth onto his clothing and books, causing him to present an unclean appearance"); *Watson v. City of Cambridge*, 32 N.E. 864, 864 (Mass. 1893) (excluding student who "was too weak-minded"). *Cf.* 117 Cong. Rec. 45974-75 (1972) ("In one case a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance 'produced a nauseating effect' on his classmates.") (statement of Representative Vanik in support of Rehabilitation Act).

[5] J.E. Wallace Wallin, The Education of Handicapped Children 92 (1924) (at turn of the century, states regularly refused to educate children with disabilities, following the popular view that "the feeble-minded and subnormal represent, as it were, an unassimilable accumulation of human clinkers, ballast, driftwood, or derelicts which seriously retards the rate of progress of the entire class and which often constitutes a positive irritant to the teacher and the other pupils."); *cf. City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 463 (1985) (Marshall, J., concurring in the judgment in part) (noting that children with developmental disabilities had been labeled "ineducable" and excluded from public schools to "protect nonretarded children from them").

pervasive problems of discrimination that people with disabilities are facing,'" *Lane*, 124 S. Ct. at 1290 (quoting S. Rep. No. 101-116, at 18), including failings limiting access to education. One witness testified that many schools remained inaccessible 13 years after enactment of Rehabilitation Act. Americans with Disabilities Act of 1988: Joint Hearing Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Human Resources and the Subcomm. on Select Educ. of the House Comm. on Educ. & Labor, 100th Cong. 966 (Sept. 27, 1988) (testimony of Sandra Parrino, chairperson of National Council on Disability). Another witness testified that, even after passage of the EAHCA and its state equivalent in Massachusetts, she was only "tutored less than 2 hours per week . . . . because the public high school that I [was] assigned to attend [was] architecturally inaccessible to people with mobility disabilities." Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing before the Subcomm. on Select Educ. of the Comm. on Educ. & Labor, 100th Cong. 73 (1988) (testimony of Melissa Marshall).

"[Congress] also uncovered further evidence of those shortcomings, in the form of hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions." *Lane*, 124 S. Ct. at 1990. For example, Judith Heuman, of the World Institute on Disability, recounted:

> When I was 5 my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the

> principal ruled that I was "a fire hazard." I was forced to go into home instruction, receiving one hour of education twice a week for 3 1/2 years. . . . As a teenager, I could not travel with my friends on the bus because it was not accessible. At my graduation from high school, the principal attempted to prevent me from accepting an award in a ceremony on stage simply because I was in a wheelchair.

Americans with Disabilities Act of 1988: Joint Hearing Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Human Resources and the Subcomm. on Select Educ. of the House Comm. on Educ. & Labor, 100th Cong. 74 (1988). A Senator testified that his deaf brother was told that he would be limited to schooling for one of only three occupations – cobbler, printer, or baker – and that this educational limitation led to "a life of frustration and missed opportunities." Americans with Disabilities Act of 1989: Hearings Before the Senate Comm. on Labor & Human Resources and the Subcomm. on the Handicapped, 101st Cong. 16 (May 9, 1989) (statement of Sen. Harkin).[6]

The Task Force on the Rights and Empowerment of Americans with Disabilities collected statements from nearly 5,000 disabled persons through 63 public forums, including numerous stories detailing discrimination in public

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[6] *See also* Hearing on H.R. 2273, Americans with Disabilities Act of 1989: Hearing Before the Subcomm. On Select Educ. of the House Comm. on Educ. & Labor (1989) (testimony of Ric Edwards) (noting that he was told that he would have to be bused to "special" school 20 miles away because hometown school contained no elevator); Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before Subcomm. on Select Educ. of House Comm. on Educ. & Labor, 100th Cong. 1261-62 (Oct. 24, 1988) (testimony of Eleanor Blake) (recounting how she was forced to leave her college because her department had a policy of excluding persons who were not "psychologically fit," even though she had straight As).

education.[7] The Task Force's chairperson described its materials as evidence of "massive, society-wide discrimination." Joint Hearing on H.R. 2273, The Americans with Disabilities Act of 1989: Joint Hearing Before the Subcomms. on Select Educ. & Employment Opportunities of the House Comm. on Educ. & Labor, 101st Cong. 62 (1989) (statement of Justin Dart). Whether these violations are assigned to "state" or "local" officials, under *Lane* they must be weighed in the constitutional analysis. 124 S. Ct. at 1991 n.16.[8]

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[7] These included, among many others: an Alabama child with cerebral palsy who was denied admission to school; a developmentally disabled student in North Carolina who was excluded from an after-school program because "their policy was not to keep handicapped" children; a disabled student from Oregon who was given cleaning jobs while non-disabled student played sports; a disabled Utah student refused admission to first grade because the teacher refused to teach him; and three New York elementary schools where mentally disabled children were locked in 3-by-3-by-7' boxes as punishment. Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 18 (1990); 2 Staff of the House Comm. on Educ. & Labor, 101st Cong., Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act 1040 (Comm. Print 1990) (collecting legislative history).

[8] As the Court reasoned, it is a "mistaken premise that a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves." *Id.* Here, as with the provision of judicial services, *see id.*, "local" school districts have been treated as "arms of the state" for sovereign immunity purposes. *See, e.g., Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 251 (9th Cir. 1992) (California); *De Levay v. Richmond County Sch. Bd.*, 284 F.2d 340, 340 (4th Cir. 1960) (Virginia). And, like the judicial system considered in *Lane*, Title II's application to public education does not seek to place the States on equal footing with private actors; rather, it is an attempt to gain meaningful access to purely governmental services and facilities. *See Lane*, 124 S. Ct. at 1991 n.16.

Congress was also informed by contemporaneous judicial decisions in enacting Title II. *See Lane*, 124 S. Ct. at 1989, 1992. The Senate took explicit note of a disability discrimination case in which "a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance 'produced a nauseating effect' on his classmates." S. Rep. No. 101-116, at 7 (1989). Numerous additional rulings – all following the enactment of the EAHCA – illustrated the need for further Congressional action. *See Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1987) (unnecessary exclusion of students with HIV from integrated classrooms); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 466 F. Supp. 487 (E.D.N.Y. 1979) (unnecessary segregation of developmentally disabled students with hepatitis B); *cf. Lane*, 124 S. Ct. at 1989 n.12 (citing *Thomas and Carey* as examples of judicial decisions creating record of unequal treatment of disabled children).[9]

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[9] *See also Martinez v. School Bd.*, 861 F.2d 1502, 1504 (11th Cir. 1988) (school improperly segregated developmentally disabled student with HIV by building glass wall between her and the classroom); *Robertson v. Granite City Comm. Unified Sch. Dist. No. 9*, 684 F. Supp. 1002, 1007 (S.D. Ill. 1988) (granting preliminary injunction against school district that isolated first-grader with HIV); *Doe v. Belleville Pub. Sch. Dist. No. 118*, 672 F. Supp. 342, 346 (S.D. Ill. 1987) (exclusion of first grader because of his HIV); *Ray v. School Dist.*, 666 F. Supp. 1524, 1536 (M.D. Fla. 1987) (ordering school district to integrate siblings with HIV); *cf.* 136 Cong. Rec. 10913 (1990) (statement of Rep. McDermott) (describing how school district excluded Ryan White).

Congress also considered statistical data confirming the continuing segregation of children with disabilities in American public education. During the 1986-1987 school year, more than one million students, or 30 percent of all children with disabilities, were being served in segregated facilities or in segregated classrooms in general education buildings. U.S. Dep't of Education, *Eleventh Annual Report to Congress* 24 & Fig. 6 (1989).[10] Indeed, the states' overall rate of placement of students with disabilities in segregated schools had hardly changed since the passage of the EAHCA in 1975. *Id.* at 21. In some states, the segregation of students with disabilities had actually *increased* since the law's enactment.[11] In California alone, more than 21,000 students with disabilities were still attending segregated programs as of 1987. F. Farron Davis & A. Halvorsen, Survey of California's Special Centers for Severely Disabled Students, cited in Cook, *supra*, at 414.

Perhaps unsurprisingly, the National Council on Disability, an independent federal agency, reported the result of a 1986 Harris Poll that 40 percent of students

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[10] Similarly, a 1988 study estimated that states prevented up to 55 percent of students with severe disabilities from attending their neighborhood public schools. Luanna H. Meyer & JoAnne Putnam, *Social Integration*, in Handbook of Developmental and Physical Disabilities 107, 114 (Vincent B. Van Hasselt, *et al.*, eds., 1988).

[11] A 1987 Massachusetts survey reported that from 1974 to 1985, the number of disabled students educated with their peers decreased by 61 percent. J. Landau, Out of the Mainstream: Education of Disabled Youth in Massachusetts (1987), cited in Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temple L. Rev. 393, 414 (1991).

with disabilities did not graduate from high school, a proportion nearly three times higher than that of the non-disabled population. National Council on Disability, *On the Threshold of Independence* 14 (1988). Only 29 percent attended college. *Id.* Similarly, as late as 1986, sixty-seven percent of persons with disabilities seeking employment were unable to find work, with many attributing the failure to a lack of appropriate education or training. *Id.* at 14-15.

In its findings preceding the ADA, Congress concluded that "discrimination against individuals with disabilities persists in such critical areas as . . . education . . . and access to public services." 42 U.S.C. § 12101(a)(3). Certainly, the "sheer volume" of evidence demonstrating the nature and extent of unconstitutional discrimination against students and others with disabilities in the provision of public education services "makes it clear beyond peradventure" that Title II is appropriate prophylactic legislation. *See Lane*, 124 S. Ct. at 1991, 1992.[12]

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[12] As the United States notes, the record of unconstitutional conduct in public education far exceeds the record in *Lane* of unconstitutional conduct in the provision of judicial services. *See* Second Supplemental En Banc Brief for the United States as Intervenor at 28 & n.13. Further, the *Lane* Court contrasted that record with other decisions upholding legislation under section 5 that "contained little specific evidence of a pattern of unconstitutional discrimination on the part of the States." 124 S. Ct. at 1991 n.16 (citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) and *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003)).

C. Title II is Slowly Beginning to Undo a History of Discrimination; However, Many Barriers to Full Inclusion Remain.

In the years since its passage, Title II has begun to achieve some of its objectives with regard to public education. For example, whereas 80 percent of students with disabilities in 1977 were placed in institutions or inferior separate facilities, by 1998 more than 95 percent of such students were served in regular public schools. National Council on Disability, *Improving Educational Outcomes for Students with Disabilities* 17 (2004). Today approximately 20 percent of students with disabilities nationwide fail to graduate from high school – still twice as many as those students without disabilities, but down from nearly 40 percent in 1986. *See* National Organization on Disability, Landmark Disability Survey Finds Pervasive Disadvantages (June 24, 2004), *at* http://www.nod.org/content.cfm?id=1537.

Still, graduation rates remain dismally low in some states. In Louisiana, the state in which Travis Pace attempted to attend school, witnesses at a 1998 hearing testified that that "the vast majority of youth with disabilities in the state drop out of school before earning a diploma or certificate," and only 15 percent receive high school diplomas. National Council on Disability, *Grassroots Experiences with Government Programs and Disability Policy* 3-4 (1998), *at* http://www.ncd.gov/newsroom/publications/1998/louisiana.htm; *see also* U.S. Dep't of Education, Office of Special Educ. and Rehabilitative Servs., *Louisiana*

Monitoring Report 44 (Jul. 20, 2001) (reporting that only 13.8% of Louisiana's disabled students receive high school diplomas). Further, the Department of Education found that, between 1994 and 1998, 36 states failed to ensure that students with disabilities were educated in the most integrated setting appropriate. National Council on Disability, *Back to School on Civil Rights* 97-98 (2000).

Courts continue to grapple with the claims of students, and their families, who are excluded from school because of stereotypes and fears about particular disabilities, or because of physical barriers preventing the student from accessing programs within the school facility. *See, e.g., Thomas ex rel. Thomas v. Davidson Academy*, 846 F. Supp. 611 (M.D. Tenn. 1994) (granting injunction to bar school from expelling student based on her autoimmune disease); Order Granting Pls. Mot. for Partial Summ. J., *Lopez v. San Francisco Unified Sch. Dist.*, No. C 99-3260 SI (N.D. Cal. Apr. 20, 2004) (holding that new schools were constructed in violation of ADA accessibility standards); *Putnam v. Oakland Unified Sch. Dist.*, No. C-93-3772CW, 1995 WL 873734 (N.D. Cal. Jun. 9, 1995) (finding that school district violated Section 504 by failing to remove architectural barriers). At the same time, defendant school districts and other state entities continue to argue that

they are immune from federal disability laws, and that Congress lacked power under the Constitution to enact these provisions.[13]

Travis Pace's story illustrates the ongoing segregation and exclusion of too many disabled children, who by decades-old law should be provided an equal educational opportunity. Pace attended a high school with no accessible entrance, elevator, or restroom. R. Vol. 1 at 79-80, 204. The school refused to relocate

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[13] State defendants have asserted that Congress lacked power under the Fourteenth Amendment to enact Title II against them. *See, e.g.*, Brief of Amici Curiae Alabama, et al., in Support of Petitioner in Tennessee v. Lane, 2003 WL 22176110 (Sept. 8, 2003). Since *Lane*, states have continued to assert that Title II is unconstitutional in particular contexts. *See, e.g.*, Supplemental Letter Brief to Charles R. Fulbridge III, Clerk, from Amy Warr, Assistant Solicitor General (Texas) in *McCarthy v. Hale*, Case No. 03-50608 (5th Cir.) (arguing that Lane does not apply to cases implicating constitutional rights of institutionalized persons). More drastically, states have asserted that Congress lacked power under the Commerce Clause to enact Title II against them – this analysis, where accepted, eliminates any *Ex Parte Young* action for injunctive remedies. *See, e.g., Klingler v. Department of Revenue*, 366 F.3d 614, 620 (8th Cir. 2004) (finding that Congress lacked power under Commerce Clause to apply Title II against state placard program); Defendant's Motion to Dismiss in *McCarthy v. Gilbert*, Civil Action No. 02-CV-600 (E.D. Tex.) (arguing that *Ex Parte Young* cannot be used to enforce Title II of the ADA or its regulations because Title II exceeds the scope of Congress's power under Section 5 and the Commerce Clause); Brief of Appellees in *Meyers v. Texas*, Case No. 02-50452 (5th Cir.) ("it offends fundamental notions of federalism to permit *Young* suits based on statutes Congress lacked authority to enact under Section 5"); *see also Henrietta D. v. Bloomberg*, 331 F.3d 261, 287-89 (2d Cir. 2003) (rejecting state defendant's assertion of immunity against *Ex Parte Young* action); *Thompson v. Colorado*, 278 F.3d 1020, 1025 n.2 (10th Cir. 2001) (noting state's challenge to constitutionality of Title II under Commerce Clause after plaintiffs proposed *Ex Parte Young* claim for injunctive relief). Further, states continue to argue that Congress lacked authority under the Spending Clause to enact the Rehabilitation Act. *See, e.g.*, State's Response on Rehearing En Banc to Brief of Pace on Eleventh Amendment Issue and to Supplemental Brief of the United States, at 11-51.

Pace's general education classes to a ground floor classroom. *Cf. Lane*, 124 S. Ct. at 1993 (acknowledging that "failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion"). Assigned to a second-story room, Travis was forced to use a *dumbwaiter*, a feature designed for transporting heavy equipment and completely unsafe for human transport. R. Vol. I at 79, 204. No evacuation plan was developed to safely transport Travis in the event of an emergency. During fire drills Travis was either taken down in the dumbwaiter, asked to crawl down the stairs, or was carried down the stairs by untrained staff or fellow students without equipment such as an evacuation chair. *Id.*

III. TITLE II'S APPLICATION TO PUBLIC SCHOOL BUILDINGS AND OTHER PUBLIC FACILITIES USED FOR CORE CIVIC ACTIVITIES IS FURTHER SUPPORTED BY UNCONSTITUTIONAL DISCRIMINATION AGAINST PERSONS WITH DISABILITIES IN VOTING AND GOVERNMENT MEETINGS.

In addition to the public education of children, numerous civic activities take place in public school buildings. Virtually all jurisdictions utilize these buildings as polling sites and as places for public meetings such as school board meetings. In Louisiana, for example, recent government meetings held at school sites have

included town hall meetings,[14] public hearings regarding matters of importance to the community,[15] and numerous school board meetings.[16] Voting in public school buildings is also common.[17] In fact, a 2001 GAO report estimated that *24 percent of polling places are in schools*. U.S. General Accounting Office, *Voters with Disabilities: Access to Polling Places and Alternative Voting Methods* 8 (Oct. 2001). Of these, *nearly 80 percent* have a potential barrier to access. *Id.* School officials in New Orleans, Louisiana, have reported that most of their school facilities are inaccessible. U.S. General Accounting Office, *School Facilities:*

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[14] *See, e.g.,* http://www.st-charles.la.us/council/5-5-03%20supplemental.html (St. Charles Parish, La., town hall meeting held in middle school cafeteria) (May 2003).

[15] *See, e.g.,* http://www.dnr.state.la.us/CONS/gwater/cgwa_app/02-0001/05initialhearing.pdf (public hearing of the Louisiana Ground Water Management Commission held in high school auditorium) (Oct. 2002); http://www.deq.state.la.us/news/pdf/CombustionIncNewsRelease.pdf (public meeting of Louisiana Department of Environmental Quality on superfund cleanup held at Walker High School Cafeteria) (May 2003); http://www.lacoast.gov/news/press/2000-12-06a.htm (public meeting of Louisiana Department of Natural Resources held at Garyville/Mt. Airy Magnet School) (Dec. 2000).

[16] *See, e.g.,* http://www.monroe.k12.la.us/mcs/district/minutes/02-03/ja7.html (Monroe City, La., school board meeting held in Carroll High School Auditorium, board voted to meet next time at Clark Magnet School) (Jan. 2003); http://www.vrml.k12.la.us/board/minutes/082103.pdf (Vermilion Parish, La., school board met at North Vermilion High School) (Aug. 2003).

[17] *See, e.g.,* http://www.ci.shreveport.la.us/ccmin/2001/3052cc2001.htm (listing polling places for special election for Shreveport, La., including polling in 43 elementary, middle, and high schools) (May 2001); The Advocate (Baton Rouge, Louisiana), Registrar Uses Wheelchair to Check Polling Places, July 22, 2002, at 3-B (detailing efforts of temporarily disabled registrar of Caddo Parish to access polling place at Huntington High School).

Accessibility for the Disabled Still an Issue 5 (Dec. 1995); *see also id.* at 9 (most school districts surveyed reported that they needed to spend more money to improve accessibility in their facilities).

These activities – voting and interacting with one's government – are constitutionally protected. *See Bush v. Gore*, 531 U.S. 98, 104-105 (2000) (right to vote as granted and prescribed by state legislature is fundamental, and is protected by principles of equal protection); *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."). Like the right to access the judiciary considered in *Lane*, the right to vote and to access one's government are "basic rights . . . that call for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications." 124 S. Ct. at 1992.

While the history of discrimination in public education is more than adequate to demonstrate that Title II's application here does not offend the principles of sovereign immunity, the record of interference with these core activities of civic life provides additional bases for congressional action. As the Supreme Court reviewed, the history before Congress documented "a pattern of unequal treatment in the administration of a wide range of public services,

programs, and activities," and included the "systematic deprivations of fundamental rights," including deprivations of the right to vote. *Lane*, 124 S. Ct. at 1989. Further, as the Court noted, "[a] report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities." *Id.* at 1990-91 (citing U.S. Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* 39 (1983)). As the 2001 GAO report makes clear, these barriers continue to exclude persons with disabilities and to impede their ability to participate in civic life.

IV. TITLE II'S REMEDIAL SCHEME IS CONGRUENT AND PROPORTIONAL TO THE HISTORY OF UNCONSTITUTIONAL DISCRIMINATION AGAINST DISABLED PERSONS IN PUBLIC EDUCATION AND OTHER CIVIC ACTIVITIES.

Under the test applied by the Supreme Court in *Lane*, this Court must decide whether Title II is "congruent and proportional" to Congress's goal of ensuring access to public education facilities and the many state and local government programs, services, and activities that take place within them. 124 S. Ct. at 1993. Here, the exclusion of children with disabilities from public education has a long history, and has persisted despite several legislative efforts to impose a remedy. *See id.* As such, "Congress was justified in concluding that this difficult and intractable problem warranted added prophylactic measures in response." *Id.* (citation omitted).

As the Court in *Lane* detailed, Congress chose a balanced and limited approach to ensuring access to public facilities and programs. "Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to take *reasonable* measures to remove architectural and other barriers to accessibility." *Lane*, 124 S. Ct. at 1993 (citing 42 U.S.C. § 12131(2)) (emphasis added). Title II "requires only 'reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service." *Id.* The Department of Justice's regulations at 28 C.F.R. §§ 35.150 and 35.151 implement this flexible remedy. *Id.* at 1993-94 (detailing non-structural remedies permitted for older facilities, and statutory defenses including undue burden and fundamental alteration).

In this case, Travis Pace seeks to apply Title II's flexible approach to public education services and facilities – "perhaps the most important function of state and local governments," *Brown*, 347 U.S. at 493. Accordingly, he may invoke this "reasonable prophylactic measure, reasonably targeted to a legitimate end." *Lane*, 124 S. Ct. at 1994.

CONCLUSION

Although the Supreme Court ruled in *Lane* only that Title II is constitutional as applied to state judicial systems, in drafting its opinion it also gave specific and intentional guidance with respect to other applications of the Act. Relevant here, our highest court expressly acknowledged that Congress had before it a record of unconstitutional disability discrimination in public education. *See* 124 S. Ct. at 1989-92 & n.12. The briefs submitted on behalf of Travis Pace have elaborated on the Supreme Court's reference, and have provided to this Court an ample basis upon which to follow the *Lane* Court's guidance without hesitation. The application of Title II to this case is fully authorized by section 5 of the Fourteenth Amendment.

Respectfully submitted,

THE LEGAL AID SOCIETY –
EMPLOYMENT LAW CENTER

Date: 7/7/04

By: _____
Claudia Center

By: _____
Lewis Bossing
Counsel for *Amici* in Support of Appellant

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Counsel for *Amici Curiae*

Dated: 7/7/04

APPENDIX OF AMICI CURIAE IN SUPPORT OF TRAVIS PACE

The **Advocacy Center** is the agency designated by the Governor of Louisiana to protect and advocate for the rights of individuals with disabilities in the State of Louisiana, pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 USC §15041 *et seq.*, the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 USC § 10801 *et seq.*, and the Protection and Advocacy of Individual Rights program, 29 U.S.C. §794e. As the P&A agency for Louisiana, the Advocacy Center is interested in the enforcement of civil rights laws that protect the rights of individuals with disabilities to access services in the most integrated setting appropriate to their needs. This includes the right to access the programs of state and local government, in accordance with the Americans with Disabilities Act and § 504 of the Rehabilitation Act of 1973, and the right to a free appropriate public education, pursuant to the Individuals with Disabilities Education Act.

The **American Association of People with Disabilities** ("AAPD") is a national non-profit non-partisan membership organization advocating for political and economic empowerment for the more than 56 million children and adults with disabilities in the U.S. AAPD has a strong interest in full enforcement and implementation of the Americans with Disabilities Act (ADA).

The **Bazelon Center for Mental Health Law** is a national public interest organization founded in 1972 to advocate for the rights of individuals with mental disabilities. The Center has engaged in litigation, administrative advocacy, and public education to promote equal opportunities for individuals with mental disabilities. Much of the Center's work involves efforts to remedy disability-based discrimination through enforcement of the ADA and Section 504.

The **Disability Rights Education and Defense Fund, Inc.** ("DREDF"), based in Berkeley, California, is the nation's premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

The **Legal Aid Society – Employment Law Center** ("The LAS-ELC") is a public interest law firm that advocates on behalf of the workplace rights of individuals with disabilities and other under-represented communities. Since 1970, the Center has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy and national origin. The LAS-ELC's interest in the legal rights of those with disabilities is longstanding. The Center has represented and continues to represent clients, including students, faced with discrimination on the basis on their

disabilities, including those with claims brought under the Americans with Disabilities Act. The Center has also filed *amicus* briefs in cases of importance to persons with disabilities.

The **National Association of Protection and Advocacy Systems** ("NAPAS") is the membership organization for the nationwide system of protection and advocacy ("P&A") agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. NAPAS facilitates coordination of P&A activities and provides training and technical assistance to the P&A network. This case is of particular interest to NAPAS because protection and advocacy systems frequently represent students and their parents, and many others with disabilities who seek access to public schools and other public facilities.

The **Southern Disability Law Center** ("SDLC") is a nonprofit legal services organization, with offices in Mississippi and Texas, founded to protect and advance the legal rights of people with disabilities throughout the United States. The SDLC conducts systemic litigation focusing on major program and policy restrictions in special education, Medicaid, and other entitlement programs. The

SDLC is interested in the enforcement of Title II's accessibility mandates against state and local government entities, including public school districts.

The **Western Law Center for Disability Rights** ("WLCDR") is a non-profit organization that protects and enforces the civil rights of people with mental and physical disabilities. Since 1975, the WLCDR has handled disability rights cases under California and federal civil rights laws. The WLCDR's Learning Rights Project advocates for special education services for children with learning disabilities who are from low-income and minority communities. The WLCDR provides much needed assistance to children and adults with disabilities through litigation, administrative representation, mediation, education, and referrals to other agencies.

PROOF OF SERVICE

I, Pamela Mitchell, declare:

I am a citizen of the United States, over 18 years of age, employed in the County of San Francisco, and not a party to or interested in the within entitled action. I am an employee of THE LEGAL AID SOCIETY - EMPLOYMENT LAW CENTER, and my business address is 600 Harrison St., Suite 120, San Francisco, California 94107.

I am familiar with this company's practices for mail, whereby the mail, after being placed in a designated area, is given the appropriate postage and labeling and is deposited in a U.S. mailbox in the City of San Francisco, California, and, during the normal course of business on the same day is placed in its designated area for delivery.

On July 7, 2004, I served the within:

BRIEF AMICUS CURIAE OF THE ADVOCACY CENTER, *ET AL.* REGARDING APPLICABILITY OF *TENNESSEE V. LANE* (U.S. 2004)

on parties in said action, by causing to be delivered two true and correct copies thereof, along with a computer disk copy, to the person(s) and at the addresses set forth below by U.S. Mail:

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I declare under penalty of perjury under the laws of the State of California and of the United States of America that the foregoing is true and correct. Executed on July 7, 2004, in San Francisco, California.

Pamela Mitchell