ORAL ARGUMENT REQUESTED

Nos. 10-2167 & 10-2172

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STUART T. GUTTMAN, M.D.,

Plaintiff-Appellant

v.

STATE OF NEW MEXICO, *et al*.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
THE HONORABLE M. CHRISTINA ARMIJO

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLANT

THOMAS E. PEREZ
Assistant Attorney General

DIANA K. FLYNN
DIRK C. PHILLIPS
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 305-4876

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

STATEMENT OF RELATED CASES

Guttman v. *Khalsa*, *et al.*, No. 03-2244, 401 F.3d 1170 (10th Cir. 2005) (vacated); 446 F.3d 1027 (10th Cir. 2006)

Guttman v. *Khalsa*, *et al.*, No. 07-2147, 325 F. App'x 687 (10th Cir. 2009)

Guttman v. *Khalsa*, *et al.*, No. 07-2169

Guttman v. *Khalsa*, *et al.*, No. 10-2167

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

REGULATIONS:

LEGISLATIVE HISTORY:

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 10-2167 & 10-2172

STUART T. GUTTMAN, M.D.,

Plaintiff-Appellant

v.

STATE OF NEW MEXICO, *et al*.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
THE HONORABLE M. CHRISTINA ARMIJO

BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLANT

STATEMENT OF JURISDICTION

The district court had jurisdiction over the plaintiff's suit pursuant to 28 U.S.C. 1331. This Court has jurisdiction over the district court's final order pursuant to 28 U.S.C. 1291.

ISSUE PRESENTED

The United States will address the following issue: Whether the statutory provision abrogating Eleventh Amendment immunity for suits under Title II of the

Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, as applied to the context of public licensing.[1]

STATEMENT OF THE CASE

Plaintiff is a physician with a history of depression and post-traumatic stress disorder. See *Guttman* v. *Khalsa*, 320 F. Supp. 2d 1164, 1166 (D.N.M. 2003). After various administrative proceedings, the New Mexico Board of Medical Examiners (Board) revoked plaintiff's license to practice medicine on February 28, 2001. *Ibid.* Plaintiff challenged the revocation decision in state court, arguing, among other things, that the revocation violated Title II of the ADA. *Id.* at 1167. The state court upheld the revocation, concluding that the Board's action was based on substantial evidence, in accordance with law, and "not arbitrary, capricious or fraudulent." *Ibid.* The state court declined, however, to determine whether the revocation violated the ADA because plaintiff failed to raise his ADA claims before the Board. *Ibid.*

Plaintiff then brought this suit in federal court against certain Board officials and the State of New Mexico, asserting that the revocation of his license violated the ADA, and requesting damages. The district court granted summary judgment

[1] The United States does not take a position on the merits of plaintiff's claims or on any other issue raised in this appeal.

for the defendants. *Guttman*, 320 F. Supp. 2d at 1166. Specifically, it held that it lacked subject matter jurisdiction to hear plaintiff's claims under the "*Rooker-Feldman*" doctrine. See *id*. at 1168-1169 (relying on *Rooker* v. *Fidelity Trust*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983)). In the alternative, the district court concluded that defendants Khalsa and Parsons were entitled to absolute immunity in their personal capacity for their participation in the Board's decision to revoke plaintiff's medical license. *Id.* at 1170. It further held that plaintiff's Title II claims against the State itself were barred by the Eleventh Amendment, relying on *Thompson* v. *Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001), which held unconstitutional Congress's attempt to abrogate the State's sovereign immunity to private claims under Title II. *Guttman*, 320 F. Supp. 2d at 1170.

In the initial appeal, this Court affirmed. See *Guttman* v. *Khalsa*, 401 F.3d 1170 (10th Cir. 2005). However, the Supreme Court vacated that ruling. See *Guttman* v. *Khalsa*, 546 U.S. 801 (2005). On remand, this Court reversed, holding that the *Rooker-Feldman* doctrine was not a bar to this suit. See *Guttman* v. *Khalsa*, 446 F.3d 1027, 1032 (10th Cir. 2006). On the Eleventh Amendment issue, this Court held that *Thompson* is no longer good law, and remanded the matter in light of the Supreme Court's decisions in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), and *United States* v. *Georgia*, 546 U.S. 151 (2006). See *Guttman*, 446 F.3d at

1034-1036. On remand, the district court at first declined to complete the Eleventh Amendment analysis. A subsequent appeal was filed, and this Court remanded for a full decision on the Eleventh Amendment issue. See *Guttman* v. *New Mexico*, 325 F. App'x 687, 690-692 (10th Cir. 2009) (unpublished).

On remand, the district court held, *inter alia*, that the ADA did not validly abrogate defendant's Eleventh Amendment immunity in the context of this case. See Stipulated Joint Appendix (SJA) 363-369. This appeal followed.

SUMMARY OF ARGUMENT

If this Court reaches the Eleventh Amendment issue, it should hold that Congress validly abrogated states' sovereign immunity to claims asserted under Title II of the ADA in the context of public licensing.

The Supreme Court's decision in *United States* v. *Georgia*, 546 U.S. 151 (2006), establishes the proper analysis for determining the validity of a state's claim of Eleventh Amendment immunity. Under *Georgia*, courts must "determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." 546 U.S. at 159.

If this Court reaches the third step of *Georgia*, it must apply the congruence-and-proportionality analysis from *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), as the Supreme Court did in analyzing the abrogation of Eleventh Amendment immunity for Title II claims addressing access to judicial services in *Tennessee* v. *Lane*, 541 U.S. 509, 518 (2004). Under *Lane*, this Court must determine "whether Congress unequivocally expressed its intent to abrogate that immunity," and, "if it did, whether Congress acted pursuant to a valid grant of constitutional authority." *Id.* at 517 (quoting *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 73 (2000)). The first question is straightforward, as Congress clearly expressed its intent to abrogate. See 42 U.S.C. 12202; *Lane*, 541 U.S. at 518.

With regard to the validity of the abrogation, this Court must consider: (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.

The district court concluded that the third aspect of this analysis was not satisfied, and that the abrogation of Eleventh Amendment immunity therefore was

not valid in this case. This decision was based in large part on the district court's belief that it should apply the congruence-and-proportionality analysis to the subset of professional licensing, as opposed to the more general category of public licensing urged by the United States. The United States respectfully submits that this was error. It also contends that the congruence-and-proportionality standard is satisfied with respect to both the general category of public licensing and the subset of professional licensing.

ARGUMENT

I

THIS COURT SHOULD FIRST ADDRESS THE THRESHOLD ISSUES PRESENTED IN THIS CASE BEFORE CONDUCTING THE ANALYSIS SET FORTH IN *UNITED STATES* V. *GEORGIA* FOR EXAMINING THE CONSTITUTIONALITY OF TITLE II

A. This Court Should First Address Any Threshold Issues

Defendant argued below that plaintiff's ADA claims are barred by collateral estoppel. See SJA 369-370. As stated in footnote 1, *supra*, the United States takes no position with regard to any issue other than the validity of the abrogation of Eleventh Amendment immunity. We assert, however, that, to the extent the existence of a collateral estoppel or other threshold issue may obviate the need to address the constitutional issue, those threshold issues should be addressed first.

This Court has a duty "'not to pass on questions of constitutionality' unless adjudication of the constitutional issue is necessary." *Elk Grove Unified Sch. Dist.*

v. *Newdow*, 542 U.S. 1, 11 (2004) (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)). That principle of constitutional avoidance is at its apex when courts address the constitutionality of an Act of Congress and thereby undertake "the gravest and most delicate duty" that courts are "called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation and internal quotation marks omitted). Accordingly, a "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988).

Thus, this Court should first address any threshold issues, such as whether plaintiff's ADA claims are barred by collateral estoppel, and, if possible, resolve this appeal on those grounds prior to reaching the constitutionality of Congress's abrogation of Eleventh Amendment immunity for claims brought pursuant to Title II of the ADA in the context of public licensing programs. Such an approach is consistent with this Court's instructions to the district court in the prior appeal. See *Guttman* v. *Khalsa*, 446 F.3d 1027, 1036 (10th Cir. 2006) ("If the district court determines that [plaintiff alleged a violation of Title II], and that the allegation is not precluded by res judicata or collateral estoppel, it should *then* determine whether, by passing Title II, Congress abrogated sovereign immunity as applied to that challenge.") (emphasis added). If this Court determines that it was not

necessary for the district court to reach the Eleventh Amendment issue, then it should vacate the district court's Eleventh Amendment analysis.

B. If This Court Proceeds Beyond The Threshold Issues, The Supreme Court's Decision In United States *v.* Georgia *Provides The Relevant Framework*

If it determines that it must go beyond the threshold issues, this Court must conduct the inquiry established by *United States* v. *Georgia*, 546 U.S. 151 (2006), to determine the validity of the State's claim of Eleventh Amendment immunity. In *Georgia*, the Court included instructions to lower courts as to how Eleventh Amendment immunity challenges in Title II cases should proceed: Lower courts must "determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Georgia*, 546 U.S. at 159. See also *Guttman*, 446 F.3d at 1035-1036.

Thus, in order to resolve the immunity question, a court first must determine which of plaintiff's allegations against the State validly state a claim under Title II. The court then must determine which of plaintiff's valid Title II claims against the State would independently state constitutional claims. *Only* if plaintiff has alleged valid Title II claims against the State that are not also claims of constitutional

violations should a court consider whether Congress validly abrogated States' sovereign immunity to claims asserted under Title II – and that determination is to be made with respect to the "*class* of conduct" at issue. *Georgia*, 546 U.S. at 159 (emphasis added).

Here, the parties agree that this Court has held that plaintiff stated a claim under Title II. See SJA 350. Accordingly, this Court need only address the second and third steps of the *Georgia* analysis.[2]

II

UNDER THE ANALYSIS OF *TENNESSEE* V. *LANE*, CONGRESS VALIDLY ABROGATED STATE SOVEREIGN IMMUNITY IN THE CONTEXT OF PUBLIC OR PROFESSIONAL LICENSING PROGRAMS

A. Standard Of Review

This Court exercises de novo review over questions of Eleventh Amendment immunity. See *Steadfast Ins. Co.* v. *Agricultural Ins. Co.*, 507 F.3d 1250, 1253 (10th Cir. 2007).

[2] If this Court concludes at the second step of the *Georgia* inquiry that the conduct at issue violates the constitution, it obviously should not proceed further. The United States takes no position with respect to this issue. However, if this Court proceeds to address the question of abrogation (*i.e.*, the third step of the *Georgia* inquiry), the United States offers its analysis below.

B. Congress Clearly Intended To Abrogate Sovereign Immunity With Respect To Claims Asserted Under The ADA

Although the Eleventh Amendment ordinarily renders a state immune from suits in federal court by private citizens, Congress's abrogation of a state's immunity is valid if it "unequivocally expressed its intent to abrogate that immunity" and "acted 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 states' sovereign immunity to claims under the ADA. See 42 U.S.C. 12202; *Tennessee* v. *Lane*, 541 U.S. 509, 518 (2004). Moreover, 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. Because Title II validly abrogates states' sovereign immunity in the context of public licensing programs, it is valid as applied to this case.

C. Tennessee *v.* Lane *Establishes The Analytical Framework*

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. Lane was a defendant in a criminal proceeding held on the second

floor of a courthouse with no elevator. *Ibid*. "Jones, a certified court reporter, alleged that she ha[d] not been able to gain access to a number of county courthouses, and, as a result, ha[d] lost both work and an opportunity to participate in the judicial process." *Id*. at 514. The state argued that Congress lacked the authority to abrogate Eleventh Amendment immunity as to these claims, but the Supreme Court disagreed. See *id.* at 533-534.

To reach this conclusion, the Court applied the three-part analysis for 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. See *Lane*, 541 U.S. at 522-523. With respect to the second question,

the Court 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. See *id*. at 523-530. 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. See *id*. at 530-531.

Subsections D through F below apply the three-step *City of Boerne* analysis used in *Lane*. The district court held that the first two elements of this test (discussed in Subsections D and E below) were satisfied. See SJA 363-364. The United States agrees with these conclusions. However, the district court concluded that the third element was lacking. See SJA 364-369. As explained in Subsection F, that was error. Thus, applying the holding of *Lane*, this Court should conclude that Congress validly abrogated states' sovereign immunity to claims asserted under Title II in the context of public licensing programs.[3]

---

[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 validly abrogated States' sovereign immunity to the class of cases before it. Because the same holds true with respect to public licensing programs, this Court need not consider the validity of Title II as a whole. The United States continues to maintain, however, that Title II as a whole is valid Section 5 legislation because it is congruent and

(continued…)

D. There Are Substantial Constitutional Rights At Stake

The district court seemed to conclude that the first step in the congruence and proportionality analysis was satisfied by the Supreme Court's identification of the rights at issue in *Lane*. See SJA 363. For the reasons stated below, the United States agrees.

In *Lane*, the Court explained that Title II "seeks to enforce [the Equal Protection Clause's] prohibition on irrational disability discrimination" as well as "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." 541 U.S. at 522-523. In deciding the case before it, the Court considered a subset of Title II applications – "the class of cases implicating the accessibility of judicial services," *id*. at 531 – that sometimes invoke rights subject to heightened scrutiny, but other times invoke only rational basis scrutiny under the Equal Protection Clause. For example, George Lane's exclusion from his criminal proceedings implicated Due Process and Sixth Amendment rights subject to heightened constitutional scrutiny, see *id*. at 522-523,

---

(continued…)
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. *Lane*, 541 U.S. at 529.

while court reporter Beverly Jones' exclusion from the courtroom implicated only Equal Protection rights subject to rational basis review.[4]

This case presents a similar category, one that implicates a range of constitutional rights, some of which are subject to heightened scrutiny, others rational-basis scrutiny. The liberty guaranteed by the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). Licensing programs that regulate these and other constitutionally-protected activities are often subject to heightened constitutional scrutiny. See, *e.g.*, *Watchtower Bible & Tract Soc. of New York, Inc.* v. *Village of Stratton*, 536 U.S. 150, 160-169 (2002) (applying heightened First Amendment scrutiny to licensing

[4] The Court mentioned that, in general, "members of the public have a right of access to criminal proceedings secured by the First Amendment." *Lane*, 541 U.S. at 523. The Court did not, however, conclude that Jones' claim implicated that First Amendment right. While the Court has held that complete closure of a criminal trial to the public is subject to strict scrutiny, see *Press-Enterprise Co.* v. *Superior Court of Cal.*, 478 U.S. 1, 8-9 (1986), it has not held that strict scrutiny applies to a court's denial of a request for an accommodation that would permit attendance by a particular member of the public (*i.e.*, a person with a disability such as Jones).

requirement for door-to-door advocacy); *Forsyth Cnty.* v. *Nationalist Movement*, 505 U.S. 123, 130-137 (1992) (same for parade permits); *Riley* v. *National Fed. of the Blind of North Carolina, Inc.*, 487 U.S. 781, 801-802 (1988) (same for licensing requirement for professional fundraisers); *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (restriction on marriage licenses for those behind in child support payments subject to strict scrutiny under Equal Protection Clause); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (prohibition against marriage licenses for inter-racial couples subject to strict scrutiny under Equal Protection and Due Process Clauses); see also *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 284-288 (1985) (applying heightened scrutiny under Privileges and Immunities Clause to certain bar licensing requirements).

In other cases, licensing requirements implicate rights that, while not fundamental, are still subject to the basic protections of the Due Process and Equal Protection Clauses. The courts have long recognized "the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose," and that limitations on that right are subject to constitutional limitations. *Dent* v. *West Virginia*, 129 U.S. 114, 121 (1889). For example, the denial or revocation of a license can trigger the procedural requirements of the Due Process clause. See, *e.g.*, *Bell* v. *Burson*, 402 U.S. 535, 539 (1971). As made clear in *Lane*, public entities may be required to take steps to ensure that persons with

disabilities are afforded the same "meaningful opportunity to be heard" as others. See 541 U.S. at 532-533 (citation and internal quotation marks omitted).

License denials and revocations are also subject to limitations under the Equal Protection Clause. See *Schware* v. *Board of Bar Exam'rs*, 353 U.S. 232, 238-239 (1957); *Dent*, 129 U.S. at 121-122. And while it is generally true that States are not required by the Equal Protection Clause "to make special accommodations for the disabled" when fundamental rights are not at stake, this is true only "so long as their actions toward such individuals are rational." *Board of Tr. of Univ. of Alabama* v. *Garrett*, 531 U.S. 356, 367 (2001). Moreover, a purported rational basis for treatment of individuals with disabilities will fail if the State does not accord the same treatment to other groups similarly situated, see *id.* at 366 n.4, or if the State treats individuals with disabilities in a way that simply gives effect to private invidious discrimination. See *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

E. There Is A Considerable Historical Predicate Of Unconstitutional Disability Discrimination In Public Services And Public Licensing Programs

The district court concluded that this second step in the analysis was satisfied as well. See SJA 363-364. For the reasons stated below, the United States agrees.

"Whether Title II validly enforces these constitutional rights is a question that 'must be judged with reference to the historical experience which it reflects.'"

Lane, 541 U.S. at 523 (quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966)). Accordingly, in *Lane*, the Court reviewed the historical experience reflected in Title II and concluded that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Id.* at 524. The Court remarked on the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," *id*. at 528, and concluded that it is "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at 529.

1. Lane *Established The Adequacy Of The Predicate For Title II's Application To Discrimination In All Public Services*

Although *Lane* ultimately upheld Title II as valid Fourteenth Amendment legislation only as applied to access to courts, its conclusions regarding the historical predicate for Title II are not limited to that context. The Court did not begin its "as-applied" analysis until it reached the third step of the *Boerne* analysis addressing the Act's congruence and proportionality. See *Lane*, 541 U.S. at 530-531. At the second step, the Court considered the record supporting Title II in all its applications and found not only "a pattern of unconstitutional treatment in the administration of justice," *id*. at 525, but also violations of constitutional rights in the context of voting, jury service, the penal system, public education, and the

treatment of institutionalized persons, *id.* at 524-525.[5] Importantly, the Court specifically considered the record of discrimination in public licensing programs, noting the history of disability discrimination in marriage licensing, *id*. at 524 & n.8. That overall record, the Court concluded, supported prophylactic legislation to address discrimination in "public services" generally. *Id*. at 529.

Thus, the adequacy of Title II's historical predicate to support prophylactic legislation addressing discrimination in public services, including public licensing programs, is largely settled. See *Klingler* v. *Department of Revenue*, 455 F.3d 888, 896 (8th Cir. 2006) ("The court's decision in *Lane* that Title II targeted a pattern of unconstitutional conduct forecloses the need for further inquiry."); *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 487 (4th Cir. 2005) ("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.") (footnote omitted); *Association for Disabled Americans, Inc.* v. *Florida Int'l Univ.*, 405 F.3d 954, 958 (11th Cir. 2005) ("Under its analysis of [the second

[5] In describing the adequacy of the historical predicate, the Court also spoke in general terms, remarking, for instance, on "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of *public services*." *Lane*, 541 U.S. at 528 (emphasis added).

Boerne] prong, the Supreme Court [in *Lane*] considered the record supporting Title II *as a whole*, and conclusively held that Congress had documented 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.").[6] But even if it were not, there is an ample historical basis for extending Title II to disability discrimination in public licensing.

2. There Is Considerable Historical Predicate For Title II's Application To Discrimination In Licensing Programs

In *Lane*, the Court recognized that "a number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying," 541 U.S. at 524, through criminal and licensing statutes that infringe on a person's ability to marry. See *id*. at 524 n.8 (providing sample of statutes). And even after the enactment of the ADA, a court struck down legislation prohibiting and voiding all marriages of persons with AIDS. See *T.E.P.* v. *Leavitt*, 840 F. Supp. 110 (D. Utah 1993).[7] Congress also heard complaints of discrimination in

---

[6] But see *Toledo* v. *Sanchez*, 454 F.3d 24, 35 (1st Cir. 2006) (concluding that "the sounder approach is to focus the entire *City of Boerne* test on the particular category of state conduct at issue"), cert. denied, 549 U.S. 1301 (2007).

[7] In *Lane*, the Supreme Court relied extensively on cases post-dating enactment of the ADA to demonstrate that Congress had a sufficient basis for enacting Title II. See 541 U.S. at 524-525 nn.7-14.

the administration of marriage licenses. For example, Congress was told of a person in a wheelchair who was denied a marriage license because the local courthouse was inaccessible. WY 1786.[8]

Further, there was specific evidence before Congress of similar discrimination in professional licensing programs. The House Report, for example, recounts that a woman was denied a teaching license on the grounds that she was paralyzed. H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 29 (1990). Congress also knew of another teacher denied a license "on the grounds that being confined to a wheelchair as a result of polio, she was physically and medically unsuited for teaching." 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 1040, 1611 n.9 (Comm. Print 1990) (*Leg. Hist.*). Teachers from several states complained about requirements that excluded deaf teachers from teaching deaf students. See, *e.g.*, CA 261; KY 732; TX 1503; TX 1549. In another case, a court found that in administering licenses for security guards, a

[8] In *Lane*, the Court relied on the handwritten letters and commentaries collected during forums held by the Task Force on the Rights of Empowerment of Americans with Disabilities. These materials were lodged with the Court in *Board of Trustees of 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. That 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. The United States can provide this Court copies of the documents cited in this brief, or the entire four-volume set, upon request.

State had imposed a "blanket exclusion of all one-handed license applicants because of an unfounded fear that they are dangerous and more likely to use deadly force," in violation of the ADA and the Fourteenth Amendment. *Stillwell* v. *Kansas City Bd. of Police Comm'rs*, 872 F. Supp. 682, 687-688 (W.D. Mo. 1995).

Congress also heard numerous complaints of discrimination in the administration of driver licenses. For example, one witness described a person who could not obtain a driver's license because the exam was held in an inaccessible room down a flight of stairs. ND 1170. In another case, a Department of Motor Vehicle official investigating a car accident assumed that a person's disability prevented him from driving safely, when the real cause of the accident was a brake failure. WI 1766. See also AZ 124 (discrimination in drivers licensing); CA 262 (same); CO 283 (same); HI 458 (same); OH 1231 (same); MI 950 (same); TX 1514 (same); TX 1529 (same); WI 1760 (same); WY 1777 (same). See also *Tolbert* v. *McGriff*, 434 F. Supp. 682, 684-687 (M.D. Ala. 1976) (state violated the Due Process clause by summarily revoking a truck driver's license upon learning that he took medications to prevent seizures).

3. Significant Harm Is Caused By Disability Discrimination In Licensing

The appropriateness of Section 5 legislation, moreover, is not purely a product of the history of discrimination. It is also a function of the "gravity of the harm [the law] seeks to prevent." *Lane*, 541 U.S. at 523. Even when

discrimination in licensing does not implicate a fundamental right, the gravity of the harm is substantial.

Unlike many government programs that simply provide benefits to constituents, licensing programs involve a positive limitation on individuals' abilities to engage in a broad range of basic freedoms, including the right to participate in a chosen profession and to travel. Discriminatory limitations on those freedoms can have enormous consequences for the lives of individuals with disabilities. Cf. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he very idea that one man may be compelled to hold his * * * means of living * * * at the mere will of another, seems to be intolerable in any country where freedom prevails.").

Discrimination in licensing, like the construction barriers that impaired Beverly Jones' ability to engage in her profession in *Lane*, can severely restrict employment opportunities for persons with disabilities. Due in part to such barriers, Congress found that "people with disabilities, as a group * * * are severely disadvantaged * * * economically." 42 U.S.C. 12101(a)(6). Congress was told, for instance, that "half of all disabled persons surveyed had incomes of $15,000 or less," while "just over a quarter" of "non-disabled Americans" "had incomes in that bracket." National Council on the Handicapped, *On the Threshold of Independence* 13-14 (1988) (*Threshold*). Additionally, two-thirds of all

working-age persons with disabilities were unemployed, and only one quarter worked full-time. *Id.* at 14.

Similarly, discrimination in the administration of drivers licenses can deprive persons with disabilities of an independence that most people take for granted and can contribute to the substantial isolation of persons with disabilities. According to surveys, for example, Congress was told that two-thirds of persons with disabilities had not attended a movie or sporting event in the past year; three-fourths had not seen live theater or music performances; persons with disabilities were three times more likely not to eat in restaurants than persons without disabilities; and 13% of persons with disabilities never went to grocery stores. *Threshold* 16-17.

Accordingly, the evidence set forth above regarding disability discrimination in public licensing was more than adequate to support comprehensive prophylactic and remedial legislation.

F. As Applied To Discrimination In Public Licensing, Title II Is Congruent And Proportional To The Constitutional Rights At Issue And The History Of Discrimination

In reaching the third step of the *City of Boerne* analysis, the district court limited its focus to the subset of professional licensing – rather than the broader category of public licensing in general – and subsequently concluded that the congruence-and-proportionality standard was not satisfied as to this narrow subset

of state licensing decisions. See SJA 364-369. For the reasons stated below, this was error. Moreover, even if the district court was correct, the abrogation of Eleventh Amendment immunity is valid with respect to the subset of professional licensing.

1. The Appropriate Range Of Title II Applications This Court Should Consider In This Case Is The Class Of Cases Implicating Public Licensing

As a preliminary step to applying *Lane*, a court must determine the category at issue. In this case, the district court cast the focus too narrowly by examining the subset of professional licensing, rather than public licensing in general. See SJA 364-366.

a. The District Court's Approach Is Inconsistent With Lane

In *Lane*, the plaintiffs filed suit to enforce the constitutional right of access to the courts. 541 U.S. at 513-514. The Supreme Court accordingly addressed whether Title II is valid Section 5 legislation "as it applies to the class of cases implicating the accessibility of judicial services." *Id.* at 531. In so holding, however, the Court did not confine itself to the particular factual problem of access to the courts and judicial services presented by the individual plaintiffs, nor did it limit its analysis to the specific constitutional interests entrenched upon in that particular case. Both of the plaintiffs in *Lane* were paraplegics who used wheelchairs for mobility and were denied physical access to and the services of the

state court system because of their disabilities. Plaintiff Lane alleged that, when he was unable to appear to answer criminal charges because the courthouse was inaccessible, he was arrested and placed in jail for failing to appear. *Id.* at 513-514. Plaintiff Jones, a certified court reporter, alleged that she could not work because she could not access some county courthouses. *Id.* at 514. Lane's particular claims thus implicated his rights under the Due Process and Confrontation Clauses, and Jones' claims implicated only her rights under the Equal Protection Clause.

In analyzing Congress's power to enact Title II, however, the Supreme Court discussed the full range of constitutional rights implicated by the broad category of "accessibility of judicial services," *Lane*, 541 U.S. at 531:

> The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant such as respondent Lane the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." The Due Process Clause also requires the States to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings. We have held that the Sixth Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of "identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." And, finally, we have recognized that members of the public have a right of access to criminal proceedings secured by the First Amendment.

Id. at 523 (citations omitted); see also *id.* at 525 n.14 (considering cases involving the denial of interpretive services to deaf defendants and the exclusion of blind and hearing-impaired persons from jury duty). Thus, a number of the constitutional rights, and a number of Title II applications, that the Supreme Court found relevant to its analysis in *Lane* were not pressed by the plaintiffs or directly implicated by the facts of their case. Yet the Supreme Court broadly considered the full range of constitutional rights and Title II remedies potentially at issue, framing its analysis in terms of the broad "class of cases implicating the accessibility of judicial services." *Id.* at 531.

In view of the foregoing, the First Circuit, in *Toledo* v. *Sanchez*, 454 F.3d 24 (1st Cir. 2006), rejected a narrowing argument similar to the one advanced by defendants and adopted by the district court in this case. *Toledo* addressed the validity of the abrogation of Eleventh Amendment immunity under Title II of the ADA in the education context. The defendant university in *Toledo* – like defendants in this case – urged a narrow construction of the relevant category limited to the situation before the court; specifically, it urged the court to limit its "decision to the validity of Title II as it applies to the conduct of public universities." *Id.* at 36. As in this case, the United States urged the court of appeals to consider the full category at issue, rather than a narrow subset; in

Toledo, this meant considering "government conduct at all levels of public education." *Ibid.* The First Circuit agreed with the United States:

> In *Lane*, the [Supreme] Court decided the validity of Title II as it applied to the class of cases implicating the "accessibility of judicial services," including applications to criminal defendants, civil litigants, juror, public spectators, the press, and witnesses. A number of these statutory applications and the corresponding constitutional rights that they implicated were neither presented by the plaintiffs in *Lane* nor directly related to the facts of the case. The Supreme Court's broad treatment of judicial services suggests that we should consider Title II as it applies to public education in general. The *Lane* opinion covered an even more varied range of government conduct than the United States urges in this case, so we conclude that our analysis should be applied to public education generally.

Id. at 36 (citation omitted). See also *Association For Disabled Americans*, 405 F.3d at 958 (framing the question as "whether Title II of the ADA, as applied to access to public education, constitutes a valid exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment" in a suit against a public university).[9] As was the case in *Toledo*, the range of government conduct urged by the United States in this case – *i.e.*, public licensing decisions – is considerably less varied than the range considered by the Supreme Court in *Lane*. Accordingly, the

[9] But see *Constantine*, 411 F.3d at 488 (analyzing the class of cases involving public higher education).

district court's decision to focus only on the narrow subset of professional licensing is inconsistent with both *Lane* and *Toledo*.

b. The Approach Taken In Lane *Is The Appropriate Analysis*

The broader approach taken by the Supreme Court in *Lane* and the First Circuit in *Toledo* is a more sensible mode of analysis than the litigant-specific approach adopted by the district court. Congress is a national legislature. In legislating generally, and pursuant to its prophylactic and remedial Section 5 power in particular, it necessarily responds not to the isolated claims of individual litigants, but to broad patterns of unconstitutional conduct by government officials in the substantive areas in which they operate. Indeed, in enacting Title II, Congress specifically found that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3).

More to the point, distinguishing among different types of licensing decisions makes little sense when it comes to preventing discrimination. At the most basic level, all licensing is similar – it is a decision by a state to grant or deny permission to engage in a desired activity. Stated alternatively, it is a discretionary, state-imposed limitation on individual action. Thus, all licensing

decisions are potentially subject to discrimination, and, in the context of prohibiting disability discrimination under the ADA, there is no logical reason to differentiate among types of licenses.

Simply put, in evaluating whether Title II is an appropriate response to "pervasive unequal treatment in the administration of state services and programs," *Lane*, 541 U.S. at 524, the Supreme Court's decision in *Lane* indicates that courts are to consider the entire "class of cases" arising from the type of governmental operations implicated by the lawsuit, *id.* at 531. Just as the Supreme Court upheld Title II's application in *Lane* by comprehensively considering Title II's enforcement of all the constitutional rights and Title II remedies potentially at issue in the entire "class of cases implicating the accessibility of judicial services," *ibid.*, this Court should assess Title II's constitutionality as applied to the entire "class of cases," *ibid.*, implicating public licensing. As discussed more fully *infra*, those constitutional interests and the Title II remedies they trigger include not just the equal protection rights at stake in medical licensing, but also the widespread pattern of unequal treatment of persons with disabilities in the provision of public licenses in a range of life activities documented in the legislative history of Title II. That evidence includes discrimination in licensing in areas implicating fundamental rights as well as claims of irrational discrimination in public licensing on the basis of disability.

c. The Primary Basis For The District Court's Approach Does Not Withstand Scrutiny

The district court's limitation of the scope of its inquiry to professional licensing decisions is based primarily on its interpretation of *Lane*. See SJA 365-366. Specifically, the court noted that the decision in *Lane* "considered the range of physical accessibility issues related to access to the judicial system – it did not evaluate the range of accessibility issues with regard to all government buildings." SJA 365. The district court concluded that the United States' proposed approach "eliminates the case-specific balancing that is necessary to resolve the question before" it. SJA 365-366.

This analysis is flawed for two reasons. First, the district court's reliance on *Lane* is misplaced. The district court focused on the Supreme Court's statement that the question presented in *Lane* was "not whether Congress can validly subject States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths." SJA 365 (quoting *Lane*, 541 U.S. at 530). But this statement was not made in order to explain why the Supreme Court delineated the category before it as access to judicial services, as opposed to some other similar context. See *Lane*, 541 U.S. at 530-531. Rather, the Supreme Court made this statement to explain why it was examining "the class of cases implicating the accessibility of judicial services," *id.* at 531, and not Title II "as an undifferentiated whole," *id.* at 530 (footnote omitted). Put another way, that

portion of *Lane* explains why the Supreme Court took a category-by-category approach rather than upholding or striking down Title II in its entirety. Thus, read in context, the language upon which the district court relied says nothing about how broadly a category should be drawn in a particular case.

Second, the district court's belief that it must engage in "case-specific balancing * * * to resolve the question before [it]," SJA 365-366, is flatly inconsistent with *Lane*. As explained above, the Supreme Court in *Lane* did not limit its analysis to the case-specific facts before it. Rather, *Lane* establishes a category-specific – not case-specific – approach. And, as both *Lane* and *Toledo* demonstrate, the relevant category is not limited to the facts of a particular case.

2. The Abrogation Of Eleventh Amendment Immunity Is Congruent And Proportional As Applied Either To The Category of Public Licensing Or The Subset Of Professional Licensing

The district court's error in defining the category at issue too narrowly obviously affected its congruence-and-proportionality analysis as well. Accordingly, if this Court concludes that the proper subject of analysis is the category of public licensing – as opposed to the subset of professional licensing – it should reverse and remand this matter without proceeding further so the district court may determine in the first instance whether the category of public licensing satisfies the congruence-and-proportionality test. See *Guttman* v. *New Mexico*, 325 F. App'x 687, 692 (10th Cir. 2009) (unpublished) (returning the Eleventh

Amendment issue to the district court rather than deciding it on appeal "because the district court is 'best situated' in the first instance to determine whether Title II abrogated sovereign immunity with respect to Guttman's claims") (unpublished) (citing *Georgia*, 546 U.S. at 159).

If this Court agrees that the district court erred in defining the category too narrowly, but nevertheless determines that remand is not appropriate, it should hold that the category of public licensing is congruent and proportional for the reasons stated below in Subsection II.F.2.a. If, on the other hand, this Court determines that professional licensing is the proper category for analysis, it nevertheless should reverse the district court's determination that professional licensing fails to satisfy the congruence-and-proportionality standard for the reasons stated in Subsection II.F.2.b.

a. Title II Of The ADA Is A Congruent And Proportional Response To The Harms Sought To Be Remedied In The Context Of Public Licensing Decisions

As applied to discrimination in public licensing, Title II serves a number of important and valid prophylactic and remedial functions. First, in public licensing, Title II often applies directly to prohibit unconstitutional discrimination against individuals with disabilities, *i.e.*, discrimination which is based on irrational stereotypes about, or animosity toward, persons with disabilities. For example, Title II enforces the requirements of the Fourteenth Amendment when it prohibits

a State from refusing to provide marriage licenses to persons with AIDS. See *T.E.P.* v. *Leavitt*, 840 F. Supp. 110 (D. Utah 1993). Title II enforces the Equal Protection Clause's rationality requirement when it acts to prohibit denial of a teacher's license based on the irrational belief that a wheelchair user cannot be a good educator. See H. R. Rep. No. 485, Pt. 2, at 29; 2 *Leg. Hist.* 1611 n.9 (Arlene Mayerson). The Act further enforces the requirements of procedural due process when it requires a State to make accommodations necessary to ensure that persons with disabilities are afforded fair hearings. See *Lane*, 541 U.S. at 532-533.

Second, given the history of unconstitutional treatment of persons with disabilities in public licensing, Congress was entitled to conclude that there exists a real risk that some state officials may continue to make licensing decisions based on invidious class-based stereotypes or animus that would be difficult to detect or prove. See 42 U.S.C. 12101(a)(8) (congressional finding that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous"). In such a situation, the risk of unconstitutional treatment is sufficient to warrant Title II's prophylactic response. See *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 735-737 (2003) (remedy of requiring "across-the-board" provision of family leave

congruent and proportional to problem of employers relying on gender-based stereotypes).

Title II's prophylactic remedy thus acts to detect and prevent difficult-to-uncover discrimination in public licensing against persons with disabilities that could otherwise evade judicial remedy. Indeed, discretionary decisionmaking by individual public officials, as often occurs in licensing, creates a risk that decisions will be made based on unspoken (and, therefore, difficult to prove) irrational assumptions or invidious stereotypes, 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 denying accommodations to individuals with disabilities, and proscribing governmental conduct the discriminatory effects of which cannot be or have not been adequately justified, Title II prevents covert intentional discrimination against licensing applicants with disabilities and provides strong remedies for the lingering effects of past unconstitutional treatment against individuals with disabilities in the public licensing context. See *Lane*, 541 U.S. at 520 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause.").

Prohibiting disability discrimination in public licensing programs is also an appropriate means of preventing and remedying discrimination in public services generally, and is responsive to the enduring effects of the pervasive discrimination against individuals with disabilities that ran throughout the Nation's history, peaking with the "eugenics" movement of the early 20th century. See *Lane*, 541 U.S. at 534-535 (Souter, J., concurring).

Discrimination in licensing has a direct and profound impact on the ability of persons with disabilities to integrate into the community, literally excluding them from being able to drive themselves to community businesses and events or from working in certain professions with their non-disabled peers. This segregative effect, in turn, feeds the irrational stereotypes that lead to further discrimination in public services (many implicating fundamental rights), as the absence of persons with disabilities from professions is taken as evidence of their incapacity to serve as teachers, doctors, or lawyers. Cf. *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999) (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life").

Title II's application to public licensing is thus congruent and proportional because a simple ban on discrimination would have frozen in place the effects of States' prior official exclusion and isolation of individuals with disabilities, which

had the effect of rendering individuals with disabilities invisible to government officials and planners, thereby creating a self-perpetuating spiral of segregation, stigma, and neglect. See *Hibbs*, 538 U.S. at 736-737 (addressing gender stereotypes); *Gaston County* v. *United States*, 395 U.S. 285, 289-290, 293-296 (1969) (literacy test banned because it perpetuates the effects of past discrimination). In his testimony before Congress, Attorney General Thornburg explained that a key to ending such problems "is to increase contact between and among people with disabilities and their more able-bodied peers. And an essential component of that effort is the enactment of a comprehensive law that promotes the integration of people with disabilities into our communities, schools and work places." 3 *Leg. Hist.* at 2020. Removing barriers to integration created by discrimination in licensing is an important part of this effort to reduce stereotypes and misconceptions that risk constitutional violations throughout government services, including areas implicating fundamental rights.

Finally, Title II's application to public licensing 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 discrimination in a broad range of public services. See 42 U.S.C. 12101(a)(3). Title II's application to public licensing, thus, is part of a broader

remedy to a constitutional problem that is greater than the sum of its parts. That is, comprehensively protecting the rights of individuals with disabilities in the licensing context directly remedies and prospectively prevents the persistent imposition of inequalities on a single class, see *Lane*, 541 U.S. at 522-529, and the chronic distribution of benefits and services, whether through legislation or executive action, in a way that "impos[es] special disabilities upon groups disfavored by virtue of circumstances beyond their control." *Plyler* v. *Doe*, 457 U.S. 202, 216 n.14 (1982). Title II's application to public licensing programs thus combats a historic and enduring problem of broad-based unconstitutional treatment of individuals with disabilities, including programmatic exclusions from public life that sought to accomplish the very "kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." *Ibid.*

b. Title II Of The ADA Is A Congruent And Proportional Response To The Harms Sought To Be Remedied In The Context Of Professional Licensing Decisions

(i) The District Court's Reliance On Garrett *Is Misplaced*

In holding that the narrowed subset of professional licensing did not satisfy the congruence-and-proportionality requirement, the district court relied largely on the Supreme Court's rulings in *Garrett* and *Lane*. See SJA 366-369. Specifically, the court noted (1) the general differences between the two holdings, see SJA 366-367; and (2) the fact that the right at issue in *Garrett* "was subject to less searching

scrutiny," while the right at issue in *Lane* "was fundamental," see SJA 367. It then concluded that this case "more closely resembles *Garrett* than *Lane* because Title II's remedy in the context of professional licensing far exceeds what is constitutionally required." SJA 368. This was error.

First, the difference in outcomes between *Garrett* and *Lane* is largely explained not by the factual differences between the cases, but by the differences between Title I (the provision at issue in *Garrett*) and Title II (the provision at issue both in *Lane* and in this case). As the Fourth Circuit has noted, "Title II presents fewer congruence-and-proportionality concerns than does Title I." *Constantine*, 411 F.3d at 489. This is so because "the remedial measures described in Title I are aimed at discrimination by public entities acting as employers, not as sovereigns," *ibid.*, and because "the remedial measures employed in Title II are likely less burdensome to the States than those employed in Title I," *id.* at 490.

Second, the fact that the right at issue in this case is subject to less scrutiny than that associated with fundamental rights is far from determinant. Indeed, other circuits have upheld the abrogation of Eleventh Amendment immunity with respect to Title II claims asserted in the education context, despite the fact that education is not a fundamental right and is subject only to rational-basis review. See

Constantine, 411 F.3d at 486-487 & 490; *Association For Disabled Americans* v. *Florida Int'l Univ.*, 405 F.3d 954, 957-959 (11th Cir. 2005).[10]

Moreover, there is another reason that this case does not resemble *Garrett*: *Garrett* involved plaintiffs who were transferred to a lower-paying position or were refused an accommodation at their existing job. See 531 U.S. at 362. That is significantly distinguishable from a plaintiff whose professional license is restricted or revoked by a state. It is one thing to refuse to accommodate a plaintiff within his or her current job; it is quite another to restrict or revoke a license – likely acquired after many years of study or training – and thereby foreclose all future jobs in a plaintiff's chosen field or profession.

(ii) The District Court's Ultimate Conclusion With Regard To Congruence And Proportionality Is Incorrect

The district court determined that the remedy at issue "far exceeds what is constitutionally required" in the context of professional licensing. SJA 368 (citing *Garrett*, 531 U.S. at 372). This holding is based largely on the court's conclusion that Title II and its accompanying regulations (1) "require states to justify licensing decisions that would be otherwise constitutional," and (2) require licensing entities

[10] But see *Association For Disabled Americans*, 405 F.3d at 957 (noting that "'the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child,' distinguishes public education from other rights subject to rational basis review") (quoting *Plyler*, 457 U.S. at 221).

to "demonstrate that modifications would 'fundamentally alter the nature' of the service that those entities provide," thereby imposing "significant burden on such entities – a burden that is not constitutionally required because the consideration of a physician's mental health is rationally related to a legitimate governmental purpose." SJA 369. From this, the district court concluded that "Title II's remedy is thus not proportional in that it 'prohibits substantially more' licensing decisions 'than would likely be held unconstitutional under the applicable equal protection, rational basis, standard.'" SJA 369 (quoting *Kimel*, 528 U.S. at 86).

None of these concerns provide a sufficient foundation for the district court's ruling. First, the fact that states may be required to justify decisions that are constitutional is not unique to this case. Indeed, the Supreme Court "has made it clear that prophylactic legislation such as Title II 'can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional.'" *Constantine*, 411 F.3d at 490 (quoting *City of Boerne*, 521 U.S. at 518). "Thus, the question is not *whether* Title II exceeds the boundaries of the Fourteenth Amendment, but *by how much*." *Constantine*, 411 F.3d at 490.

Second, the fact that licensing entities may be required to justify their decisions is not a significant burden. The Title prohibits only discrimination "by reason of * * * disability," 42 U.S.C. 12132, so states retain their discretion to

exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all. And the individual at issue must, "with or without reasonable modifications to rules, policies, or practices * * * or the provision of auxiliary aids and services," be able to "meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. 12131(2).

Importantly, as applied to licensing programs such as this one, Title II does not require a State to license a physician who poses a "direct threat"; that is, "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services." See 28 C.F.R. Pt. 35, App. A, p. 553 (2007) (Preamble to Title II Regulations);[11] cf. 42 U.S.C. 12182(b)(3) (Title III "direct threat" standard); *Bragdon* v. *Abbott*, 524 U.S. 624 (1998) (applying "direct threat" standard in medical care setting).

In view of the foregoing, the district court's conclusion that Title II fails the congruence-and-proportionality requirement fails even as to the narrow subset of professional licensing.

---

[11] The definition of "direct threat" is currently found in the Preamble to the Title II regulations. Effective March 15, 2011, it may be found at 28 C.F.R. 35.104, and the direct-threat provision may be found at 28 C.F.R. 35.139. See 75 F.R. 56,177 and 75 F.R. 56,180.

CONCLUSION

If this Court reaches the Eleventh Amendment issue, it should hold that Congress validly abrogated states' sovereign immunity to claims asserted under Title II of the ADA in the context of public licensing.

STATEMENT REGARDING ORAL ARGUMENT

This case presents an important and complex issue of constitutional law, as the district court held that a portion of an act of Congress is invalid. The United States respectfully submits that oral argument is warranted, at least with respect to the Eleventh Amendment issue.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/ Dirk C. Phillips
DIANA K. FLYNN
DIRK C. PHILLIPS
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 305-4876

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 9,699 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, prepared for submission via ECF, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/ Dirk C. Phillips
DIRK C. PHILLIPS
Attorney

Date: October 22, 2010

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2010, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR-APPELLANT with the Clerk of the Court using the CM/ECF system.

s/ Dirk C. Phillips
DIRK C. PHILLIPS
Attorney

ATTACHMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STUART T. GUTTMAN, M.D.,
Plaintiff,

v. No. CIV-03-463 MCA/KBM

G.T.S. KHALSA, LIVINGSTON PARSONS, AND THE STATE OF NEW MEXICO,
Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the following motions by the parties: Plaintiff's *Motion For Leave To File Second Amended Civil Complaint* [Doc 108]; Plaintiff's *Motion To Lift Stay Of Discovery* [Doc 107];Defendant's *Motion To Dismiss* [Doc 116]; *Plaintiff's Motion To Strike Defenses And Statements From Defendant's Fourth Motion To Dismiss* [Doc 117]; Plaintiff's *Motion To Compel Discovery Responses* [Doc 126]. Having considered the parties' submissions, the relevant law, and otherwise being fully advised in the premises, the Court grants Doc 108, denies Doc 107, grants in part and denies in part Doc 116, denies Doc 117, and denies Doc 126.

I. BACKGROUND

In 1993, Plaintiff obtained a license to practice medicine in the state of New Mexico. The license was subject to stipulations that resulted from Plaintiff's mental illness, which included depression and post traumatic stress disorder. In 1995, the stipulations were lifted by the New Mexico Board of Medical Examiners (Board). In 1999, based on a number of

complaints that had been received about Plaintiff, the Board instructed Plaintiff to appear before a statutorily assembled Impaired Physician Examining Committee (IPC).

Plaintiff met with the IPC in January 2000, and in March 2000, Plaintiff received a Notice of Contemplated Action and an Order of Summary Suspension from the Board. This action was based on Plaintiff's mental disability, allegations of false statements to the Board, and allegations of inappropriate behavior with patients and staff. A hearing before the Board was convened in October 2000, at which Plaintiff appeared with counsel. Plaintiff's license was revoked in February 2001. The Board found the following: (1) Plaintiff made dishonest statements to the Board; (2) Plaintiff had behaved in an abusive and disruptive manner towards colleagues, staff, and patients; (3) Plaintiff had a history of major depression, post traumatic stress disorder, and an underlying mixed personality disorder; (4) prior attempts at therapeutic treatment and intervention by Plaintiff's employers had been ineffective; and (5) Plaintiff could not be effectively monitored.

Plaintiff appealed the revocation of his license to the Seventh Judicial District Court of New Mexico, which affirmed the Board's order. Plaintiff filed a motion for reconsideration to the New Mexico Court of Appeals, followed by a petition for certiorari to the New Mexico Supreme Court. Both courts denied Plaintiff's appeals. Plaintiff next filed suit in this Court, alleging violations of Title II of the Americans with Disabilities Act (ADA) and various constitutional deprivations. Over the next seven years, this federal cause

of action has resulted in numerous opinions from this Court[1], three opinions from the Tenth Circuit Court of Appeals[2], and one intervention from the Supreme Court of the United States.[3] At the current time, the Tenth Circuit Court of Appeals has issued a mandate requiring this Court to address certain specific issues, all of them related to whether Defendant[4] is entitled to Eleventh Amendment immunity from suit.[5]

II. ANALYSIS

A. The Terms of the Mandate

In this most recent remand, our Tenth Circuit Court of Appeals directed this Court to determine the following:

> (1) which aspects of [New Mexico's] alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

---

[1] Most notably the following opinions were issued by the Honorable Judge Leslie C. Smith: Guttman v. Khalsa, 320 F.Supp.2d 164 (D.N.M. Sept. 15, 2003) (Guttman I); Guttman v. Khalsa, No. Civ 03-0463, Doc 39 (D.N.M. Oct. 17, 2006) (Guttman IV); and Guttman v. Khalsa, No. Civ 03-0463, Doc 43 (D.N.M. Nov. 17, 2006) (Guttman V). The Honorable M. Christina Armijo was assigned to the case on October 1, 2008. [Doc 105]

[2] Guttman v. Khalsa, 401 F.3d 1170 (10th Cir. 2005) (Guttman II); Guttman v. Khalsa, 446 F.3d 1027 (10th Cir. 2006) (Guttman III); and Guttman v. Khalsa, 325 Fed.Appx. 687 (10th Cir. 2009) (Guttman VI).

[3] Guttman v. Khalsa, 126 S.Ct. 321 (2005) (vacating Guttman II).

[4] Through the disposition of various motions, the only remaining Defendant in this case is the State of New Mexico.

[5] With regard to the Eleventh Amendment immunity question, the United States of America has filed briefs in this case as an Intervenor.

Guttman VI, 325 Fed.Appx. at 692 (alteration in original). Guttman VI emphasizes that this Court is "best situated" to determine the question of sovereign immunity because the Tenth Circuit Court of Appeals was "unclear about the precise nature of the conduct [Plaintiff] alleges in support of his Title II claim—at the October 2000 Board hearing or otherwise." Id. Nevertheless, this remand, does not, as Plaintiff argues, indicate an immediate need for further discovery for two reasons. [See *Plaintiff's Motion To Lift Stay Of Discovery* [Doc 107] and Plaintiff's *Motion To Compel Discovery* [Doc 126]]

First, our Circuit explained that the sovereign immunity question must be decided now, rather than later. This is because immunity is an attribute of state sovereignty that should be addressed promptly, because the Eleventh Amendment provides immunity from suit and the burdens associated with it, because the question of immunity challenges a court's subject matter jurisdiction, and because the current immunity question potentially resolves the entire case. Guttman VI, 325 Fed.Appx. at 691-92. To permit further discovery at this stage would deprive New Mexico of one of the benefits of sovereignty—the benefit to be free from the burden of suit.[6]

[6] Plaintiff also argues that the stay of discovery that was imposed by this Court in 2007 is no longer in effect because the stay expired automatically if any of his claims survived Defendant's motion to dismiss. [Doc 107 at 2] This Court's order granting Defendant's motion for a stay states that if any of Plaintiff's claims "survive the Motion to Dismiss," Defendant is to respond to the outstanding discovery requests within ten days of receiving the Court's opinion. [Doc 62] The Tenth Circuit Court of Appeals has purposefully yet to address or resolve the absolute and qualified immunity issues that were the subject of that motion to dismiss and the basis for the stay. Therefore, by its terms, the stay has not yet expired and discovery is not yet due because it is as yet impossible to determine whether any of Plaintiff's claims have survived the motion to dismiss.

Second, in remanding the matter to this Court, the Guttman VI Court cited Justice Stevens's concurring opinion in United States v. Georgia, 546 U.S. 151, 160 (2006). Justice Stevens observed that the majority opinion "wisely permits the parties, guided by Tennessee v. Lane, 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004), to create a factual record that will inform [the] outer limits of Title II's valid abrogation of state sovereign immunity." Justice Stevens then continued, in a footnote, to observe that a factual record was necessary because "Title II prohibits a somewhat broader swath of conduct than the Constitution itself forbids," and "[w]hile a factual record may not be absolutely necessary to . . . resolution of the question, it will surely aid . . . understanding of the issues. . . ." United States v.Georgia, 541 U.S. at 160, n.2. This language, together with the Guttman VI direction to clarify "the nature of the conduct [Plaintiff] alleges in support of his Title II claim," Guttman VI, 325 Fed.Appx. at 692, indicates that this Court's role is to clarify Plaintiff's allegations—and not to require the parties to develop evidence to support their respective positions.

This conclusion is further supported by the majority opinion in United States v. Georgia. In that case, the matter was remanded to the district court because it was "not precisely clear what conduct [the plaintiff] intended to allege in support of his Title II claims." 546 U.S. at 159. In order to clarify, "the Eleventh Circuit ordered that the suit be remanded to the District Court to permit [the plaintiff] to amend his complaint. . . ." Id. The Supreme Court of the United States observed that the district court would be "best situated" to determine the ultimate issues after the complaint was amended—and not after additional discovery. Id. Thus, this Court will look to the allegations in Plaintiff's complaint in order

to determine the scope of his statutory and constitutional claims—as well as any additional filings that further clarify those allegations.

In that vein, Plaintiff has filed a motion for leave to amend his complaint a second time. [Doc 108] Plaintiff asserts that the proposed Second Amended Complaint alleges the facts necessary to support his claim against the state for violations of procedural due process. [Id. at 3] Defendant opposes Plaintiff's motion. [Doc 109] Defendant argues that permitting Plaintiff to amend his complaint is contrary to the mandate in Guttman VI, that Plaintiff's motion is untimely, and that amendment is futile. [Doc 109 at 1-2] The Tenth Circuit's mandate required this Court to permit the parties to develop a "factual record" that would facilitate review of Plaintiff's Title II claims. While this Court is not convinced that further discovery is required or even desirable, it is apparent that the Eleventh Amendment immunity question requires the sharpest possible picture of Plaintiff's allegations. Thus, Plaintiff's request to amend his complaint is not contrary to the Tenth Circuit's mandate. In addition, Rule 15(a)(2) of the Federal Rules of Civil Procedure permits this Court to "freely give leave [to amend] when justice so requires." Defendant's concerns about timeliness and futility do not supercede "justice" under these circumstances, when Plaintiff cannot be granted leave to conduct discovery and when Plaintiff's entire case rests on the clarity of his allegations. Accordingly, this Court considers the Plaintiff's *Second Amended Civil Complaint* [Doc 108-2] to be the basis for his remaining allegations.

The Court therefore denies *Plaintiff's Motion To Lift Stay Of Discovery* [Doc 107] and Plaintiff's *Motion To Compel Discovery Responses* [Doc 126]. In order to facilitate

expeditious review of the issues before the Court, Plaintiff's *Motion For Leave To File Second Amended Civil Complaint* [Doc 108] is granted and the proposed *Second Amended Civil Complaint* is deemed to be before the Court for consideration.

B. Eleventh Amendment Immunity

Pursuant to the Eleventh Amendment to the United States Constitution, the states are immune from "any suit in law or equity, commenced or prosecuted . . . by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court of the United States has made clear that "[e]ven though the Amendment by its terms . . . applies only to suits against a State by citizens of another State, our cases have repeatedly held that this immunity also applies to unconsented suits brought by a State's own citizens." Tennessee v. Lane, 541 U.S. at 517 (second alteration in original) (internal quotation marks and citation omitted) (Lane). Despite this historical constitutional protection from suit, it is well established that Congress may abrogate the states' Eleventh Amendment sovereign immunity. See Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001) (Garrett).

To determine whether Congress has abrogated Eleventh Amendment immunity, "two predicate questions" must be resolved: "first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority." Lane, 541 U.S. at 517 (internal quotation marks and citation omitted). There is no question that in the ADA, Congress "unequivocally expressed its intent to abrogate [sovereign] immunity." Id. at 518. Title II sets forth that a

"State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." 42 U.S.C. §12202. Thus, the pertinent inquiry regarding Title II is whether "Congress had the power to give effect to its intent." Lane, 541 U.S. at 518.

Congress's authority to abrogate a state's sovereign immunity stems from Section 5 of the Fourteenth Amendment, which empowers Congress to "enforce the substantive guarantees of that Amendment." Lane, 541 U.S. at 518. Congress's power under Section 5

> is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment [but rather,] Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.

Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000). In other words, Congress may "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." Lane, 541 U.S. at 518 (internal quotation marks and citation omitted). Congressional Section 5 power is not, however, unlimited—it is by nature "remedial and preventive." City of Boerne v. Flores, 521 U.S. 507, 524 (1997). The authority to determine the substantive parameters of the Fourteenth Amendment remains with the judiciary—only the courts have the power to "determine *what constitutes* a constitutional violation." Kimel, 528 at 81.

The courts therefore evaluate congressional action in order to determine whether

legislation that abrogates Eleventh Amendment immunity is a valid use of Section 5 power—whether the legislation is "remedial and preventive." City of Boerne, 521 at 524. Legislation is sufficiently "remedial" to be a valid Congressional use of Section 5 power when there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Id. at 520. The Supreme Court of the United States has cautioned that "[l]acking such a connection, legislation may become substantive in operation and effect," and under those circumstances, Congress exceeds its constitutional authority. Id. at 519-20.

Further, while the scope of Congress's "prophylactic enforcement powers under § 5 of the Fourteenth Amendment" is a source of judicial disagreement, "no one doubts that § 5 grants Congress the power to enforce the provisions of the Amendment by creating private remedies against the States for *actual* violations of those provisions." United States v. Georgia, 546 U.S. at 158 (internal quotation marks and citation omitted). Thus, "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." Id. at 159. In sum, according to both the mandate of our Tenth Circuit Court of Appeals and the United States Supreme Court in United States v. Georgia, this Court must determine the following:

> (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity

as to that class of conduct is nevertheless valid.

United States v. Georgia, 546 U.S. at 159; see also Guttman VI, 325 Fed.Appx. at 692. The parties agree that this Court has already determined that Plaintiff's complaint adequately states a claim for violations of Title II. [See Doc 116 at 5; Doc 118 at 5; Doc 39 at 4] Accordingly, the questions remaining are whether the alleged misconduct "also violated the Fourteenth Amendment" and whether Congress validly abrogated sovereign immunity as to the class of conduct that Plaintiff contends violated only Title II.

1. Independent Constitutional Violations

Plaintiff's *Second Amended Complaint* alleges independent constitutional violations pursuant to the Equal Protection Clause and the Due Process Clause.[7] [Doc 108-2 at 10-16] These constitutional arguments are addressed—apart from Title II and on their own merits—in turn.

a. Equal Protection

[7] Plaintiff has also alleged violations of the First Amendment, based on a retaliatory discharge theory. Neither Plaintiff nor Defendant reference the First Amendment claim in their recent briefing. This claim is not new, it was first set out in Plaintiff's *First Amended Civil Complaint*. [Doc 28 at 12-13] Defendant argued that this claim should be dismissed on the merits in its second motion to dismiss. [Doc 30 at 14] This Court ruled that the claim could proceed against the State only for prospective injunctive relief. [Doc 43 at 1-2] This issue, relating to the First Amendment claim, has not been raised again, but the claim reappears in Plaintiff's second amended complaint. Plaintiff has discussed the conduct that he alleges constitutes "independent violations of the Fourteenth Amendment" at length, and he has not included a violation of Section 1 of the Fourteenth Amendment, which applies the First Amendment's protections against the states. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996) (noting that the First Amendment is "made applicable to the States by the Due Process Clause of the Fourteenth Amendment"). Accordingly, the Court presumes that while the First Amendment retaliation claim remains in limited fashion, Plaintiff did not intend for it to be asserted as an independent constitutional violation under Title II.

The Equal Protection Clause of the Fourteenth Amendment assures that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This protection boils down to "a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Section 5 of the Fourteenth Amendment, as discussed above authorizes Congress to enforce the Equal Protection Clause, but "the courts themselves have devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection." Id. at 440.

Generally, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related a legitimate state interest." Id. When the statute or official action classifies by race, alienage, national origin, gender, or illegitimacy, it is well established that the "general rule gives way . . . and these laws are subjected to strict scrutiny." Id. The Supreme Court of the United States, however, has determined that disability does not fall under the strict scrutiny umbrella, and instead, "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." Garrett, 531 U.S. at 367. As a result, the Court examines the alleged unequal treatment in order to determine if that treatment is rationally related to a legitimate state interest.

Turning to the *Second Amended Complaint*, Plaintiff has alleged the following:

> 65. In dealing with other licensed physicians in New Mexico who have come before the Board for disciplinary matters, the Board and these Defendants provide greater accommodation, and administer lesser penalties on

those physicians who do not have a known disability, than they did in dealing with Plaintiff.

66. Other licensed physicians in New Mexico who did not have a known disability have come before the Board for disciplinary matters that dealt with direct violations of patient trust or patient care, or on matters that raised concerns about those physicians' abilities to safely practice medicine were given lesser penalties than the Board and these Defendants assessed against Plaintiff.

67. Other licensed physicians who did not have a known disability but whose alleged disciplinary violations were far more egregious than those alleged against Plaintiff were allowed to continue to practice medicine, while Plaintiff's license was revoked.

68. Plaintiff was treated differently from those other physicians who were similarly situated before the New Mexico Medical Review Board and Defendants.

69. Plaintiff was not treated as these other physicians because of Defendants' animosity and discrimination against Plaintiff because of his known disabilities.

70. There was no legitimate state purpose for this animosity and discrimination against Plaintiff based upon his disabilities, which was a violation of clearly established law.

[Doc 108-2 at 10-11] Plaintiff contends that based on his disability, he was impermissibly treated differently than other similarly situated physicians who came before the Board for disciplinary purposes. This contention inevitably leads to a conclusion that medical licensing boards may not rationally consider a licensee's mental health disability as a part of the disciplinary review process—that there can be no legitimate purpose for evaluating mental health factors in the licensing context. To the contrary, a legitimate public safety concern—the protection of patients from a mentally unstable physician—is an abundantly

rational basis for treating Plaintiff differently than other similarly situated physicians—other physicians who are facing disciplinary action from a licensing board. See Kimel, 528 U.S. at 84 (explaining that "when conducting rational basis review [courts] will not overturn such [governmental action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational" (some alterations in original) (internal quotation marks and citation omitted));See Williamson v. Lee Optical of Okla., 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

Plaintiff cites City of Cleburne, Garrett and Romer v. Evans, 517 U.S. 620 (1996), for the proposition that "even rational basis scrutiny is not satisfied by irrational fears or stereotypes . . . and simple 'animosity' towards the disabled is not a legitimate state purpose." [Doc 118 at 16] The context of those cases, however, belies their application in the present case. In City of Cleburne, the Supreme Court of the United States could discern no legitimate purpose for requiring a special use permit in order to run a facility for the mentally retarded. 473 U.S. at 477-48. Such a permit was not required for apartments, boarding and lodging houses, fraternities or sororities, hospitals, sanitariums, or nursing homes. Id. Specifically, the record revealed no "rational basis for believing that the [home for the mentally retarded] would pose any special threat to the city's legitimate interests." Id. at 448. As a result, the Court affirmed the judgment that the ordinance was constitutionally invalid as applied in that case. In the present case, however, Defendant has

a legitimate interest in handling the licensing of physicians with mental health disabilities differently than other physicians. See Amanatullah v. Colo. Bd. of Med. Exam'rs, 187 F.3d 1160, 1164-65 (10th Cir. 1999) (stating, in the context of Younger v. Harris, 401 U.S. 37 (1971), that "it is difficult to imagine a state interest more important than the protection of its citizens against the harms of unauthorized, unqualified, and improper practice of medicine"). Put another way, there is a rational basis for believing that a licensed mentally disabled physician could pose a special threat to Defendant's legitimate interests. See City of Cleburne, 473 U.S. at 448.

Turning next to Garrett, Plaintiff's citation to that case is incomplete. Plaintiff attributes the following proposition to Garrett: "Discrimination against the disabled in licensing programs is unconstitutional if based on '[m]ere negative attitudes, or fear' alone. . . ." [Id.] The language in Garrett, however, quoted City of Cleburne, and the entire quote reads as follows: "[M]ere negative attitudes, or fear, *unsubstantiated by factors which are properly cognizable* in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently. . . ." Garrett, 531 U.S. at 367, quoting City of Cleburne, 473 U.S. at 448 (alteration in original) (emphasis in original). In the present case, the mental health of the physician is a "properly cognizable" factor in a licensing proceeding and therefore, is a constitutionally permissible basis for the different treatment of a physician. City of Cleburne, 473 U.S. at 448. Garrett thus does not aid Plaintiff's cause.

Romer also does not further Plaintiff's argument. In Romer, the Supreme Court of the United States evaluated a state constitutional amendment that prohibited the passage of

laws or ordinances designed to protected homosexual persons. 517 U.S. at 623-24. The Romer Court determined that the amendment violated the Equal Protection Clause, in part because it "rais[ed] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." Id. at 631-34. The amendment denied homosexual persons "any particular protections from the law" and thereby inflicted on them "immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." Id. at 635. Such is not the case under the present circumstances—the use of Plaintiff's history of mental disability for the purpose of a medical licensing disciplinary proceeding does not raise an inference of animosity toward "the class of persons affected." Id. at 634. Instead, the Board included Plaintiff's history of mental disability as a part of a "broad and ambitious purpose" that "can be explained by reference to legitimate public policies," which justify "the incidental disadvantages that they impose on certain persons." Id. at 635.

Factually, this case most closely resembles Kimel. The plaintiffs in Kimel filed suit under the Age Discrimination in Employment Act (ADEA) in order to recover money damages for their state employer's alleged discrimination based on the plaintiffs' age. Kimel, 528 U.S. at 66. The state defendants argued that the ADEA did not validly abrogate Eleventh Amendment immunity. Id. In considering this question, the Supreme Court of the United States evaluated whether age classifications violate the Equal Protection Clause. Id., at 83. The Court observed that "[a]ge classifications, unlike governmental conduct based on race or gender, cannot be characterized as so seldom relevant to the achievement of any

legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." Id. (internal quotation marks and citation omitted). Because age is not considered to be a suspect classification, the Kimel Court concluded that "[u]nder the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests." Id. at 84. Similarly, as has already been explained, disability is not a suspect classification, and thus, it is a reasonable "proxy for other qualities." Id.

Plaintiff does not deny that he has a mental health disability. Instead, he contends that his mental health disability was an impermissible basis for the license revocation. Based on well-established authority, the Court concludes that Plaintiff has failed to sufficiently allege a claim for violations of the Equal Protection clause of the Fourteenth Amendment because the Board could rationally consider Plaintiff's mental health disability in order to further a legitimate state purpose when evaluating whether to revoke Plaintiff's license to practice medicine.

b. Due Process

Plaintiff also alleges that Defendant's conduct violated his right to procedural due process under the Fourteenth Amendment. [Doc 108-2 at 11] In resolving procedural due process questions, the Tenth Circuit Court of Appeals engages a two-part inquiry: "(1) Did the individual possess a protected interest to which due process protection was applicable? [and] (2) Was the individual afforded an appropriate level of process?" Ward v. Anderson, 494 F.3d 929, 934 (10th Cir. 2007) (internal quotation marks and citation omitted). Plaintiff

correctly posits that the denial or revocation of a license can trigger the procedural protections of the Due Process Clause. See Stidham v. Peace Officer Standards & Training, 265 F.3d 1144, 1150 (10th Cir. 2007) ("[T]he revocation or removal of a license or certificate that is essential in the pursuit of a livelihood requires procedural due process under the Fourteenth Amendment." (internal quotation marks and citation omitted)). Plaintiff must have a license in order for him to work as a physician. Accordingly, Plaintiff "retains a protected property right" in his medical license, id., and the analysis turns to whether Plaintiff received the appropriate level of process before that license was revoked.

Due process is a "flexible concept that varies with the particular situation." Zinermon v. Burch, 494 U.S. 113, 127 (1990). In order to determine whether the procedure employed in a particular situation was constitutionally sufficient, this Court considers the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 127 (quoting Matthews v. Eldridge, 424 U.S. 319, 395 (1976)). The right implicated in the present case is the right to maintain a professional license and to work as a physician—an undoubtedly significant interest. In order to consider the second factor, the risk of erroneous deprivation, it is first necessary to lay out the procedures that were employed during the revocation proceedings.

Pursuant to NMSA 1978, § 61-7-4 (A) (1995), the Board convened an IPC. See also NMSA 1978, § 61-7-2 (2001) (defining the "board"). Plaintiff appeared before the IPC and answered its questions. Plaintiff alleges that the IPC was not properly convened according to Section 61-7-4(B), because one of the three physicians who sat on the IPC was not currently licensed. [Doc 108-2 at 4] Plaintiff further alleges that the Board provided the IPC with selected and incomplete materials, which cast Plaintiff in a bad light and which improperly raised issues that had been resolved by other proceedings in years past. [Id. at 4, 15] According to Plaintiff, the IPC contacted and questioned the Board, contrary to IPC guidelines. [Id. at 4] The IPC met a second time, which is not contemplated by the IPC guidelines, and Plaintiff did not receive notice of the second meeting, nor was he invited to appear. [Id.] Plaintiff contends that he was given insufficient notice of the subject of inquiry and that the IPC refused to clarify the cause for the inquiry. [Id. at 14] Under threat of license revocation, Plaintiff was required, on 24 hours notice, to explain 27 alleged complaints and all of his alleged misstatements. [Id. at 16] After receiving a Notice of Contemplated Action, Plaintiff appeared before a hearing officer, Dr. Parsons. [Id. at 7] Plaintiff states that Dr. Parsons was biased against him based on personal knowledge and conflict of interest. [Id. at 13] After proceedings conducted by Dr. Parsons, Plaintiff's license was revoked.

After the revocation, Plaintiff appealed to the state district court, pursuant to NMSA 1978, § 61-7-10 (1995); NMSA 1978, § 61-1-7 (1999); and NMSA 1978, § 39-3-1.1(c). [See Doc 5-2 at 20] In extensive and detailed pleadings, Plaintiff raised the issue of bias before

the state district court, [id. at 36] and that court concluded, with no explanation, that the decision of the Board was not "fraudulent, arbitrary, or capricious." [Id. at 41] Plaintiff pursued the matter to the New Mexico Court of Appeals, which affirmed the district court. Plaintiff filed a petition for certiorari with the New Mexico Supreme Court, which was denied. [Id. at 43]

Plaintiff contends, in great detail that various violations of New Mexico law demonstrate a lack of due process. He points to potential bias, to an unlicensed board member, to an alleged conflict of interest, and to deficiencies in the statutory procedure for disciplinary hearings. The Supreme Court of the United States has made clear, however, that although the contours of a constitutional right can be defined by state law, the question of whether a state has afforded sufficient process to protect that right is not a question of state law. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538, 540-41 (1985) (stating that protected interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law" but that "once it is determined that the Due Process Clause applies, the question remains what process is due [and] the answer to that question is not to be found in the [state] statute" (internal quotation marks and citations omitted)). In the present case, the protected interest—Plaintiff's medical license—is created by New Mexico law. The Court turns to constitutional principles, however, to determine whether the State afforded constitutionally adequate process in the deprivation of that interest. Id. In that regard, the essential principle of the due process guarantee is that the State provide "notice and opportunity for hearing appropriate to the

nature of the case." Id. at 542.

In general, the Supreme Court of the United states has described this "root requirement of the Due Process Clause as being that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." Id. (emphasis in original) (internal quotation marks and citation omitted). Nevertheless, "an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available." Hudson v. Palmer, 468 U.S. 517, 533 (1984). Plaintiff does not argue that he was deprived of his medical license as the result of an established Board *policy* of acting pursuant to bias and without regard for the established IPC procedures. It would seem that Plaintiff's procedural due process arguments stem from the alleged random and unauthorized acts of the Board and the IPC. Considering the remedy available to Plaintiff after the allegedly random and unauthorized deprivation of his license, Defendant provided ample opportunity for redress. Plaintiff had an automatic statutory right to appeal to the district court and a further discretionary opportunity to appeal to the New Mexico Court of Appeals and to the New Mexico Supreme Court. That the state appellate courts did not accept Plaintiff's invitation for further review does not lessen the practical effect of its availability—Plaintiff had three chances to challenge the Board and IPC proceedings.

These opportunities for review of the Board's decision focus the procedural due process question: what more could the State—Defendant—have done? Plaintiff was entitled

to three levels of appeal, three examinations of the merits of his claims and the proceedings below. The New Mexico Legislature foresaw the need for appellate review of Board decisions and provided ample process for Plaintiff to pursue his claims. It is difficult to imagine what more process could be provided to Plaintiff in order to address and remedy an unauthorized deprivation.

Plaintiff argues that the standard of review for the proceedings before the state district court, the Court of Appeals, and the New Mexico Supreme Court, prevented him from asserting his due process claims—prevented him from receiving adequate process from Defendant to correct the allegedly inadequate process that he received from the Board. Section 39-3-1.1(D) outlines the standard for review for agency appeals:

> In a proceeding for judicial review of a final decision by an agency, the district court may set aside, reverse or remand the final decision if it determines that:
>
> (1) the agency acted fraudulently, arbitrarily or capriciously;
>
> (2) the final decision was not supported by substantial evidence; or
>
> (3) the agency did not act in accordance with law.

This standard has been succinctly characterized by the New Mexico Court of Appeals in the following manner:

> The party challenging an agency decision bears the burden on appeal of showing that agency action falls within one of the oft-mentioned grounds for reversal including whether the decision is arbitrary and capricious; whether it is supported by substantial evidence; and whether it represents an abuse of the agency's discretion by being outside the scope of the agency's authority, clear error, or violative of due process.

Miss. Potash, Inc. v. Lemon, 2002-NMCA-014, ¶ 8, 133 N.M. 128, 61 P.3d 837 (internal quotation marks and citation omitted). Indeed, the New Mexico Supreme Court has explained that "even when we review for an abuse of discretion, our review of the application of the law to the facts is conducted de novo." N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶ 7, 127 N.M. 854, 886 P.2d 450 (internal quotation marks and citation omitted). This is because an "abuse of discretion" is a "discretionary decision that [is] premised on a misapprehension of the law." Id. (alteration in original) (internal quotation marks and citation omitted). Thus, the doors of the New Mexico appellate courts were open to Plaintiff with regard to his contentions that the revocation proceedings were constitutionally flawed.[8] See Lopez v. N.M. Bd. of Med. Exam'rs, 107 N.M. 145, 145, 147, 754 P.2d 522, 522, 524 (1988) (evaluating a due process claim brought by a physician appealing the revocation of his license).

Based on these considerations, it is difficult to contemplate what "additional or substitute procedural safeguards" could be employed by Defendant to cure the allegedly random and unauthorized deprivation of Plaintiff's medical license. See Zinermon, 494 U.S. at 127. Defendant currently authorizes one appeal by right to the district court, followed by two opportunities for discretionary appeal. Plaintiff has not suggested an alternate procedure. Accordingly, balancing the three factors and viewing the entire state procedure, the Court

[8] These observations do not constitute a ruling on Defendant's argument that collateral estoppel prevents this Court from considering Plaintiff's factual assertion that the Board failed to provide reasonable accommodations. [See Doc 116] The current analysis focuses on the process that Defendant afforded to Plaintiff to correct any errors in the proceedings before the Board.

finds that although he was ultimately unsuccessful, Plaintiff received sufficient process in order to protect his significant interest in his medical license.

c. Summary

Thus, Plaintiff has failed to allege independent constitutional violations that would, pursuant to United States v. Georgia, end the Title II analysis. This Court is therefore required to continue to consider whether "Congress's purported abrogation as to [the] class of conduct is nevertheless valid." United States v. Georgia, 546 U.S. at 159.

2. Valid Abrogation

As stated earlier, in order for Congress to validly abrogate the states' Eleventh Amendment immunity, the legislation must exhibit "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Lane, 541 U.S. at 520 (internal quotation marks and citation omitted). The "congruence and proportionality" test is a three-part inquiry: "(1) identifying the constitutional right or rights that Congress sought to enforce when it enacted Title II; (2) determining whether Congress identified a history and pattern of unconstitutional conduct by the states; and, if so, (3) whether the abrogation constitutes a proportionate response to the constitutional violation." Guttman VI, 325 Fed.Appx. at 692 (internal quotation marks and citations omitted). With regard to the first step of this analysis, the Supreme Court of the United States, in Lane, explained that the constitutional purpose of Title II, like Title I, is for the "enforcement of the Fourteenth Amendment's command that all persons similarly situated should be treated alike." Lane, 541 U.S. at 522. The second factor is likewise settled. The Lane Court

considered the history of Title II and concluded that there was sufficient evidence in the legislative record to support Congress's passage of the "prophylactic legislation" in response to a documented history of inadequate provision of public services and access to public facilities. Id. at 529; see also Klingler v. Director, Dep't of Rev., 455 F.3d 888, 896 (8th Cir. 2006) ("The court's decision in Lane that Title II targeted a pattern of unconstitutional conduct forecloses the need for further inquiry."); Day v. State, Civ. No. 05-2675, *22, 2007 WL 4321999 (D.Minn. Dec. 6, 2007).

The next step of the inquiry focuses on whether "Title II is an appropriate response to this history and pattern of unequal treatment." Id. at 530. For this phase, Lane directs courts to narrow the scope of the analysis. Accordingly, the Court will not evaluate Title II's "wide variety of applications, as an undifferentiated whole." Id. Instead, the Court will consider whether Title II is valid Section 5 legislation "as it applies" to the class of cases implicated in the present controversy. Id. at 531. The parties, however, do not agree on the scope of the "class of cases" that are implicated. Plaintiff and the United States as Intervenor (the Government) argue that this case implicates "public licensing," and thus offers comparisons to a state's ability to restrict marriage licenses, teacher's licenses, driver's licenses, and licenses for group homes. [Doc 118 at 9-12] Defendant contends that the abrogation of sovereign immunity should be considered in relation only to the state's ability to limit "professional licenses." [Doc 128 at 11]

Plaintiff and the Government assert that this Court should consider "the full range of constitutional rights and Title II remedies potentially at issue," and thus evaluate the "type

of governmental operations implicated by the lawsuit." [Doc 125 at 11] Plaintiff and the Government use Lane as the example. In that case, the plaintiffs were a physically disabled criminal defendant and a physically disabled court reporter, who were unable to access the court house because the state had made no physical accommodations. Id. at 513-514. Plaintiff points out that the Lane Court did not confine itself to the Sixth Amendment right to confrontation or the Fourteenth Amendment right to Equal Protection. Instead, the Court considered not just the individual plaintiffs' accessibility difficulties, but the entire range of accessibility issues that are related to accessing the judicial system. Id. at 531-32.

Lane, however, limited its scope. The Court considered the range of physical accessibility issues related to access to the judicial system—it did not evaluate the range of accessibility issues with regard to all government buildings. Lane specifically did not address physical accessibility to all state-owned buildings—"the question presented in this case is not whether Congress can validly subject States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths. . . ." Id. at 530. In the present case, the categories of licensing and the cases cited by Plaintiff and the Government are widely varying and implicate different state interests. For example, the Government cites statutes which deny marriage licenses to persons with HIV or to persons with mental disabilities. The question in the current case, whether Defendant violated Title II when it revoked Plaintiff's medical license based in part on his mental disability, does not "implicate" the same governmental response as discrimination in marriage licensing. Lumping these licensing categories together eliminates the case-specific balancing that is necessary to resolve

the question before the Court. Surely the states have widely different interests in regulating marriage than in regulating the practice of medicine—surely the courts *should* consider the different state responsibilities and objectives that are inherent with different restrictions on different types of licenses. This is why the Lane Court did not consider access to hockey rinks when the question before it was access to courts.

The analyses in Garrett and Lane support narrowing the scope of the current dispute because the specific rights at stake necessarily implicate a specific, corresponding governmental interest. In Garrett, the Supreme Court of the United States considered whether Congress validly abrogated sovereign immunity with respect to Title I of the ADA. 531 U.S. at 360. The Court determined that the abrogation of sovereign immunity was out of proportion to the remedial objective because "it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities," but "the ADA requires employers to mak[e] existing facilities used by employees readily accessible to and usable by individuals with disabilities." Id. at 372 (internal quotation marks and citation omitted). The Court continued to determine that "the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternative responses that would be reasonable but would fall short of imposing an 'undue burden' on the employer." Id.

In Lane, the Court was concerned with the right of access to the courts as it is intertwined with the rights to equal protection and due process. 541 U.S. at 522-23, 531 ("[T]he question presented in this case is . . . whether Congress had the power under § 5 to

enforce the constitutional right of access to the courts."). The Title II remedy, the Court noted, was justified by a long and documented history of the exclusion of persons with disabilities from the justice system, "which persisted despite several legislative efforts to remedy the problem." Id. at 531. The abrogation of sovereign immunity was further justified because the remedy was limited: the states need only provide "reasonable modifications." Id. at 532-33. Ultimately, the Court concluded that "ordinary considerations of costs and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts." Id. at 533. In both cases, the Court considered a specific right and balanced against that right the corresponding governmental interest, which in part, accounts for the difference in outcome between the cases.

An additional distinction between Lane and Garrett is the constitutional importance of the right at stake. In Garrett, the constitutional right at issue was subject to less searching scrutiny; the states are permitted greater latitude in employment discrimination based on disability. Meanwhile, in Lane, the right at stake was fundamental, and the state was required to provide significant justification before denying disabled citizens access to the judicial system. In the present case, the right implicated is not fundamental: a professional license may be denied if the state's decision is rationally related to a legitimate state purpose. Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 238-39 (1957) (explaining that a state may not exclude a person from the practice of any profession unless there is a rational connection between the requisite qualifications and the applicants fitness or capacity to practice); See Simmang v. Texas Bd. of Law Exam'rs, 346 F.Supp.2d 874 (W.D. Tex. 2004) (explaining

that the Lane holding "is founded squarely on the *source* of the plaintiff's encroached rights"). For Title II of the ADA to increase the level of scrutiny for disabled persons in the current context of professional licensing would be to exceed the legislative power "to enforce" Section 5's guarantees. See Kimel, 528 U.S. at 81 ("Congress cannot decree the *substance* of the Fourteenth Amendment's restrictions on the States." (internal quotation marks and citation omitted)). It is clear that "[t]he ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch." Id. The Court in Lane was satisfied that Title II's abrogation of sovereign immunity in the context of access to the judicial system did not alter the constitutional equal protection framework: there could be *no rational reason* to prevent disabled persons from accessing the judicial system. At the same time, the Court in Garrett was concerned that the ADA imposed significant burdens on the state that well exceeded what was required by the constitution.

The present case more closely resembles Garrett than Lane because Title II's remedy in the context of professional licensing far exceeds what is constitutionally required. See Garrett, 531 at 372. The statute states 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 (1990). The regulations that accompany Title II further mandate that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would

fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). The language of Title II, together with its enforcing regulations, require states to justify licensing decisions that would be otherwise constitutional. Licensing entities, under Title II's scheme, are required to demonstrate that modifications would "fundamentally alter the nature" of the service that those entities provide. This is a significant burden on such entities—a burden that is not constitutionally required because the consideration of a physician's mental health is rationally related to a legitimate governmental purpose.

Title II's remedy is thus not proportional in that it "prohibits substantially more" licensing decisions "than would likely be held unconstitutional under the applicable equal protection, rational basis, standard." Kimel, 528 U.S. at 86 (concluding that the abrogation of sovereign immunity under the ADEA was not proportional because the statue, "through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard"). Under these circumstances, the abrogation of sovereign immunity is not valid. See Garrett, 531 U.S. at 374 (concluding that for abrogation of immunity to be valid, "the remedy imposed by Congress must be congruent and proportional to the targeted violation"). The Court therefore concludes that Defendant's Eleventh Amendment immunity remains intact and it is not subject to suit under Title II.

C. Collateral Estoppel

Defendant, as a part of its *Motion To Dismiss*, [Doc 116] urges this Court to also determine whether the continued litigation of certain factual issues is barred by collateral

estoppel. [Id. at 10] Specifically, Defendant argues that the question of accommodation and the question of Plaintiff's honesty have already been determined through the course of the state-court litigation. [Id. at 10, 13] Plaintiff argues that Defendant waived the collateral estoppel defense and that in any event, it does not apply.

Defendant's collateral estoppel argument is not easily disposed due to the procedural tangle of this case. Defendant has filed four motions to dismiss. The first motion to dismiss was in response to Plaintiff's initial complaint. [Doc 4] In that motion, Defendant raised the collateral estoppel argument, [Doc 5 at 9-10] but this Court did not issue a ruling on that issue. [See Doc 18] On appeal, our Tenth Circuit Court of Appeals directed this Court to consider the collateral estoppel issue. See Guttman III, 446 F.3d at 1036 (observing that on remand, the district court "will be able to determine whether [Plaintiff's] claims are otherwise barred because they are precluded by res judicata or collateral estoppel"). After that appeal, Plaintiff filed an amended complaint, [Doc 28] to which Defendant responded with its second motion to dismiss. [Doc 29] In that motion to dismiss, Defendant again argued that certain factual issues were barred from relitigation by collateral estoppel. [Id. at 7-11] Again, this Court did not address the issue. [See Doc 39; Doc 43] Thereafter, Defendant filed a third motion to dismiss, which did not raise the collateral estoppel issue. [See Doc 59] The subsequent order from this Court, and the resulting remand from the Tenth Circuit, also did not further address the collateral estoppel issue. [See Doc 77; Doc 106]

Plaintiff, in response to Defendant's collateral estoppel argument, filed *Plaintiff's Motion To Strike Defenses And Statements From Defendant's Fourth Motion To Dismiss* [Doc

117]. In that Motion, Plaintiff insists that the defense of collateral estoppel has already been rejected by this Court, that Defendant waived the defense by failing to raise the issue in the third motion to dismiss, that consideration of the issue is contrary to the Tenth Circuit's most recent remand, and that Defendant's arguments impermissibly reference evidence outside of the pleadings. [See id.] With regard to the first argument, Plaintiff cites this Court's Memorandum Opinion and Order, filed October 17, 2006 (Guttman IV) and the Memorandum Opinion and Order, filed November 17, 2006 (Guttman V). In Guttman IV, this Court acknowledged in a footnote that the Tenth Circuit, in Guttman III, had directed the Court to address in part, "whether Plaintiff's claims are otherwise barred because they are precluded by res judicata or collateral estoppel." [Doc 39 at 4, n.1] The remainder of the opinion is silent on the issue of collateral estoppel because this Court was of the opinion that "[t]he issues the Tenth Circuit raised . . .are more appropriate for decision at a later stage. . . . " [Id. at 4] In Guttman V, contrary to Plaintiff's assertion, this Court did not refuse to "dismiss Plaintiff's claims," thereby rejecting Defendant's collateral estoppel argument. [Doc 117 at 2] Instead, the Court simply resolved additional outstanding issues and permitted the parties to begin discovery, as the Court clearly thought was necessary in order to determine the issues that the Tenth Circuit raised. [See Doc 39 at 4 (noting that to handle the Tenth Circuit's "specific instructions," would require "some development of the facts")] Plaintiff has not pointed to another place in the record that would indicate a ruling on the collateral estoppel question.

Additionally, close examination of the pleadings demonstrates that the course of this

litigation has been very difficult to follow. Multiple filings by the parties, together with multiple orders by various courts have left the issues somewhat in disarray. The purpose behind requiring parties to raise the issue of collateral estoppel is that of notice. See Sierra Club v. El Paso Gold Mines, Inc., No. 01-cv-002163, * 3, 2006WL2331082 (10th Cir. Aug. 10, 2006). There is certainly no question that Plaintiff has had notice and there does not appear to be any prejudice in permitting Defendant to proceed on this theory. This is particularly so in light of the Court's next conclusion, which is that the question of collateral estoppel is not currently ripe for decision. In Guttman IV, this Court indicated that further discovery was needed before certain issues could be decided. While some of those issues—Eleventh Amendment immunity—could be resolved without discovery, the collateral estoppel question "require[s] a determination of the precise nature of plaintiffs' claims and would necessarily rest on materials outside the complaint (in particular the record of the state court proceedings)." Garcia v. Int'l Elevator Co., 358 F.3d 777, 782 (10th Cir. 2004). Thus, "[w]hether res judicata or collateral estoppel bars this action in whole or part is more appropriately decided in the context of a motion for summary judgment than it is in the context of a defendant's motion to dismiss." Id. Thus, to the extent that Defendant's *Motion To Dismiss* relates to collateral estoppel, it is denied. Further, *Plaintiff's Motion To Strike Defenses And Statements From Defendant's Fourth Motion To Dismiss* is granted to the extent that the Court will not consider the collateral estoppel argument in the context of a motion to dismiss, but Defendant is permitted raise the issue again should discovery be conducted in this matter.

III. CONCLUSION

This Court has not yet determined whether any of Plaintiff's claims or factual assertions are precluded by collateral estoppel. Nor has this Court taken up the recently filed *Plaintiff's Motion For Partial Summary Judgment* [Doc 136], which has not yet completed briefing.[9] Finally, because Plaintiff's First Amendment retaliation claim against Defendant was not addressed by the parties after Guttman VI, it remains pending, subject to the limitations already imposed by this Court and subject to any appellate ruling on the absolute quasi-judicial immunity issue. [See Doc 43 at 1-2]

IT IS THEREFORE ORDERED THAT Plaintiff's *Motion For Leave To File Second Amended Civil Complaint* [Doc 108] is granted; Plaintiff's *Motion To Lift Stay Of Discovery* [Doc 107] is denied; Defendant's *Motion To Dismiss* [Doc 116] is granted in part and denied in part; *Plaintiff's Motion To Strike Defenses And Statements From Defendant's Fourth Motion To Dismiss* [Doc 117] is granted; and Plaintiff's *Motion To Compel Discovery Responses* [Doc 126] is denied.

---

[9] In addition, Plaintiff contends that *Plaintiff's Motion For Reconsideration*, [Doc 83] remains before this Court. Specifically, Plaintiff requests this Court to reopen Judge Smith's order, which granted the three individual defendants qualified immunity on Plaintiff's stigma plus claim. [See Doc 77] Judge Smith denied *Plaintiff's Motion For Reconsideration* based on his conclusion that the Court lacked subject matter jurisdiction—Defendant filed a Notice of Appeal on June 7, 2007, three days after the Court's order was entered, and Plaintiff did not file the motion for reconsideration until June 12, 2007. [See Doc 95] Plaintiff cites no authority for his position that because the Motion was denied for lack of subject matter jurisdiction, the Motion somehow remains pending before the Court at this time. Because the order acting on the Motion was entered, the Motion has been disposed. Whether the Motion was properly denied for lack of jurisdiction is a question for our Circuit. See Fed. R. App. P. 4(a).

SO ORDERED this 31st day of March, 2010, in Albuquerque, New Mexico.

M. CHRISTINA ARMIJO
United States District Judge