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Tennessee's Legal Strategy

Honorable Michael Moore

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The Honorable Michael Moore[1]

The State of Tennessee did not anticipate that *Lane*[2] would be the first case through which the Court would address the Title II sovereign immunity issue. We fully recognized that its unattractive facts made the case a particularly unfavorable vehicle for that purpose. By the time the Sixth Circuit finally disposed of the State's petition for panel rehearing in January 2003, the Supreme Court had already granted review in *Medical Board of California v. Hason*,[3] a case from the Ninth Circuit that presented the sovereign immunity issue in a far more favorable light from the perspective of the States.

We thus had every reason to believe that, when the time arrived to file our petition for certiorari in *Lane* in the Spring of 2003, *Hason* would already have been argued and submitted, and that the Court would simply hold our petition pending its decision in *Hason*. Then, most likely, the Court would remand our case to the court of appeals for reconsideration in light of *Hason*. But, in an extraordinary turn of events, just a few weeks before *Hason* was to be argued and after the case had been fully briefed on the merits, California abruptly asked that its certiorari petition in that case be dismissed, a request that the Court obliged. Thus, *Lane* came front and center as the next available case that might be used to address the issue. Within a matter of weeks after *Hason* had been dismissed, Tennessee filed its petition for certiorari in *Lane*; respondents Lane and Jones, as well as the United States, promptly filed responses that essentially acquiesced in a grant; and the Court granted the petition at the end of the Term in late June 2003.

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[1] Michael Moore is the Tennessee Solicitor General.

[2] Tennessee v. Lane, 541 U.S. 509 (2004).

[3] 279 F.3d 1167 (9th Cir. 2002), *cert. granted*, 537 U.S. 1028 (2002).

Our petition for certiorari framed two questions for the Court's consideration. The first presented the generic sovereign immunity issue: whether Title II of the ADA[4] exceeded Congress's authority under Section 5 of the Fourteenth Amendment and, thus, failed validly to abrogate the States' Eleventh Amendment immunity from private damages actions. The second question asked the Court specifically to address the Sixth Circuit's assertion that the outcome of the sovereign immunity analysis should vary depending upon the nature of the constitutional right implicated by the particular allegations of the Title II claim in each case, a "context-specific" approach that in our view was wholly inconsistent with the Court's prior abrogation jurisprudence. The Court limited its grant of certiorari to the first question, an action suggesting to us that our opening brief should concentrate on demonstrating why Title II, viewed in its entirety, failed the "congruence and proportionality" test for valid abrogations of Eleventh Amendment immunity.

It is often said that the skill that is most essential to conducting a successful Supreme Court practice is the ability to count to five. Since all nine of the current Justices had written extensively on the subject of sovereign immunity during the previous decade, we were able to predict with a high degree of confidence that, no matter how the parties briefed the case, the States could *not* win the votes of Justices Stevens, Souter, Breyer, or Ginsburg and that, just as surely, we should be able to count on the vote of the Chief Justice as well as those of Justices Kennedy, Scalia, and Thomas. Accordingly, our goal as we approached briefing the case was to construct an argument that maximized our opportunity to attract (or, more precisely, to hold) the critical fifth vote needed to win the case—the vote of Justice O'Connor.

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[4] 42 U.S.C. §§ 12131-12300 (2005).

In our quest for that fifth vote, we were presented with a tactical dilemma of sorts. On the one hand, the strongest argument in favor of immunity and against abrogation derives from the sheer breadth of Title II. By covering all "services, programs, and activities," the legislation purports to regulate virtually everything a state undertakes to do; Congress made no effort whatsoever to tailor the law's provisions to those state activities that might implicate the exercise of fundamental constitutional rights.

Moreover, the case law under Title II demonstrates that it is most often applied in contexts that have nothing to do with the exercise of constitutional rights (state parks, highway rest areas, parking, performing arts centers, museums, access to public gardens, etc.). The "overbreadth" argument thus dictated that we emphasize the operation of Title II as a whole and assert that the Congressional abrogation of sovereign immunity should be invalidated in its entirety because Title II was not a proportionate response to any demonstrated contemporary pattern of constitutional violations of the rights of disabled persons by the states. Indeed, for the most part, the statute is unconcerned with protecting constitutional rights.

The "overbreadth" argument had the additional virtue of allowing us to dwell at length upon Title II's quite remarkable and unprecedented intrusion upon state sovereignty while avoiding very much discussion of the unattractive facts of our case.

But many Court-watchers more savvy than we cautioned us that Justice O'Connor, even while sympathizing with our view that Title II represented a particularly egregious example of federal overreaching, would be hesitant to strike down Title II in its entirety and would perhaps find a narrower argument more palatable. One that, for example, sought to sustain sovereign immunity in public building access cases, but would leave unresolved the validity of the Congressional abrogation in

other contexts (*e.g.*, in voting cases, education cases, or cases involving the rights of institutionalized persons).

The problem with this approach, of course, was that it would tend to blunt the impact of our strongest argument (the statute's overbreadth) and would require us to confront head on the application of Title II to courts and courthouses (and, even more distastefully from our point of view, to address Mr. Lane's and Ms. Jones' unfortunate experiences at Tennessee's courthouses). The fear was that, if we were forced to argue this case on the basis of its facts (rather than on the basis of overarching principles of state sovereignty and federalism), our prospects of attracting Justice O'Connor's vote would be greatly diminished, and that we might even run the risk of putting another friendly vote (Justice Kennedy) in play. In the final analysis, the divergent approaches taken by respondents Lane and Jones, on the one hand, and by the United States, on the other, forced us to embrace both tactics. The lawyers for Lane and Jones did not even attempt to defend the breadth of Title II; they argued instead that the validity of Title II's abrogation of sovereign immunity should be considered on a case-by-case basis and should be sustained in the courthouse access context as a valid exercise of the federal power to enforce the fundamental constitutional right of access to the courts. The United States, by contrast, urged the Court to reject the respondents' context-specific approach and went for broke, attempting to defend Title II in its entirety.

The State was required to analyze the case under both approaches. Our opening brief and half of our reply emphasized the statute's indefensible overbreadth; the other half of our reply argued that, even as applied in the narrow courthouse access context, Title II exceeded Congress's authority to enforce the Fourteenth Amendment because there was insufficient evidence presented to Congress that the States were violating the constitutional rights of disabled persons at courthouses.

The decision of the five-member majority in *Lane* turned out to be a relatively narrow one, the price (we suspect) of persuading Justice O'Connor to join it. Damages claims under Title II may proceed against the States in cases involving the right of access to the courts and (perhaps) in cases involving the exercise of other fundamental constitutional rights. But the Court's opinion expressly disavows any implication that it is intended to authorize Title II damages claims in other contexts.[5] The lower federal courts appear to agree with our view of *Lane*'s narrow scope and have for the most part declined to extend it beyond cases involving the exercise of fundamental constitutional rights. Thus, the viability of Title II's attempted abrogation of state sovereign immunity remains largely unsettled after *Lane*. As one participant observed at a seminar I recently attended concerning *Lane*'s impact, the future of damages claims against the states under Title II may well depend upon how many of the Justices are big hockey fans.

[5] "Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts." *Tennessee v. Lane*, 124 S. Ct. 1978, 1992-93 (2004).