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Good afternoon everybody. I want to thank the JOURNAL for inviting me. It is an honor to be here in such distinguished company.

I knew that the *Tennessee v. Lane*[2] decision was a tremendously important case to the millions of Americans with disabilities, and I knew it was very interesting to lawyers because of the complexity of the legal issues involved. However, I did not realize how well-known the case was in Tennessee until this morning when I was in a taxicab on the way to the symposium from the airport. My taxi driver asked why I was going to the law school. I said I am going to speak in a symposium on the Supreme Court decision in *Tennessee v. Lane.* He said, "I know that case, that is the case where the guy was in a wheelchair and had to crawl up the stairs to get to the courthouse . . .." I thought, wow, even the taxi driver knows about it. He said "I have a view on the case." Being used to D.C. cab drivers I was not sure I wanted to ask what his view was, but I took my life in my hands and asked. He said, "I think it is very simple. We can make Burger Kings accessible, why can't we make courthouses accessible?" I was strongly reminded of that comment when Mr. Lane told us about his K.I.S.S. motto earlier today.

I have to start with a caveat here. I am an antitrust lawyer, not a civil rights lawyer. I became involved in this case when my firm was lucky enough to be asked to participate in writing an amicus brief in the first of the sovereign immunity ADA cases in the Supreme Court, the

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[2] 541 U.S. 509 (2004).

Garrett case.[3] I was pulled in on that brief, and then we wrote another *amicus* brief in the *Hason*,[4] the California case that was dismissed. Then we wrote another *amicus* brief in *Lane*, and in that case the plaintiffs finally got their win.

The *amicus* briefs we drafted in *Garrett*, *Hason*, and *Lane* focused on the history of state-sponsored discrimination against people with disabilities. Our goal was to focus on the portion of the *City of Boerne* case that says Congress can abrogate sovereign immunity under the Fourteenth Amendment as a response to a pervasive history of state-sponsored discrimination or unconstitutional behavior in the area.[5] We tried to focus our *Lane* brief in response to some of the points the Court made in *Garrett* about the kind of evidence that Congress could look at and should consider when it is deciding whether to abrogate sovereign immunity. We tried to focus on cases of discrimination with the state as actor. We tried to focus on instances that rose to the level of constitutional violations. We tried to focus on not just some of the horrible things that happened in the early years of the century, but also things that happened close to the time when the ADA was enacted.

In our *Lane* brief, we described a whole spectrum of that kind of discrimination against people with disabilities. Of course, we focused on discrimination in the provision of judicial services and access to the courts, telling stories similar to the stories that Ms. Jones and Mr. Lane told about individuals being denied access to our judicial system and buildings. We provided evidence of both individual cases of discrimination against individuals in the judicial system and also systemic, structural barriers that prevented

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[3] Bd. of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356 (2001).
[4] Med. Bd. of Cal. v. Hason, 538 U.S. 958 (2003).
[5] City of Boerne v. Flores, 521 U.S. 507 (1997).

access to courthouses. We also focused more broadly on a number of other instances of state-sponsored discrimination outside the specific context of judicial access. That included discrimination in access to polling places and in the ability to vote. It included discrimination in jury service. It included some of the shameful history Ms. Millett referred to of state sterilization of people with disabilities. We described statutes, some still on the books, that prevent people from disabilities from obtaining marriage licenses and marrying freely. And, of course, there are some heart wrenching instances that we described of awful treatment of people with disabilities in institutions, both people who are institutionalized unnecessarily and people with disabilities who suffer horribly from inappropriate and cruel treatment while they are institutionalized and in prisons.

We were tremendously gratified and happy when some of the instances of the history of state sponsored discrimination that we talked about in our brief were some of the same instances that Justice Stevens mentioned in his majority opinion in *Lane*.[6] I certainly do not mean to suggest our brief was the only one that described these kinds of instances. We were writing an *amicus* brief, so our role was to amplify one important issue of the case while the parties and the attorney general focused on the broader implications. There were a number of briefs that contained these kinds of descriptions, including the fabulous brief that the Department of Justice prepared.

Here is one thing that was tremendously interesting to me, and brings me to my substantive point about the policy implications of *Lane*. As I told you, we worked on the same brief recounting the history of state-sponsored discrimination in the *Garrett* case and in the *Hason* case as we did in the *Lane* case. It seems to me that the record in *Garrett* presented a very similar set of historical facts about

[6] 541 U.S. at 524-27.

the history of state-sponsored employment discrimination against people with disabilities as the record in *Lane* presented with respect to discrimination against people with disabilities in the court system. There was the same rich and substantive record before Congress when it enacted Title I of the ADA that states had discriminated against people with disabilities in employment as there was when it enacted Title II that states had discriminated against people with disabilities in the provision of public facilities. But *Garrett* came out one way; *Lane* came out the other way. Why the difference? I think that the specific legislative findings that Congress issued in support of Title II were helpful, as was the fact that the issue involved in *Lane* was a deprivation of a fundamental right, access to the courthouse. I also think that the two opinions, *Lane* and *Garrett*, evidence in some aspects a fundamentally different approach to analysis of the legislative record. These different approaches may create some uncertainty for litigants and lower courts.

What is certain after *Lane*? Plaintiffs now can sue states for damages under the ADA for issues related to access to the courts and the judicial system. That is certain, and that is a tremendously important and a very significant victory for people with disabilities. Also after *Lane* there is far more scope for litigants to argue for an expansive reading of the history of discrimination in the legislative and public record. But the differences in the *Lane* and *Garrett* approach to the analysis may continue to create uncertainty about what courts can look at to determine if a particular claim passes muster and what that evidence means.

What are some of these differences? First, the *Garrett* majority opinion, in a manner similar to Judge Rehnquist's dissent in *Lane*, seemed to assume that the historical record that Congress is required to consider when it abrogates sovereign immunity is similar to the judicial record a court would need to make a decision in a specific

case. *Lane*, in contrast, took a more expansive view of the kind of evidence in the legislative record and the historical record that will suffice for the requisite pattern and practice of discrimination. It is more a difference of tone than of anything actually articulated in the opinion, but the *Lane* opinion was considerably more accepting of the concept that Congress acts like a Congress. Congress is a legislative body; it is supposed to consider all sorts of evidence from the social and historical record; and it does not have to develop a quasi-judicial record when enacting legislation.

Second, I think the *Garrett* opinion seemed to suggest that only evidence related to the statute at issue counted, *i.e.*, evidence in *Garrett* of state-sponsored discrimination in employment. The *Lane* Court, although it limited its holding to upholding Title II "as applied" to access to the courts, also looked at evidence of past discrimination from a whole variety of other areas and concluded that that evidence showed that Title II as a whole was enacted in the face of that extensive evidence.[7]

Third, the *Garrett* opinion seemed to indicate that any evidence of discrimination needed to be by the state acting as a state. In contrast, the *Lane* Court, in a footnote, recognized that local municipality activity, when the

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[7] "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," citing discrimination in the areas of voting rights, institutionalization, marriage, education, jury service, and others, *id.* at 524-25; "Given the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services, the dissent's contention that the record is insufficient to justify Congress' exercise of its prophylactic power is puzzling, to say the least," *id.* at 528; legislative finding, "together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id.* at 529.

locality is acting as an arm of a state "counts" for purposes of the sovereign immunity analysis.[8]

Where are litigants and courts after *Lane* with respect to the necessity of a historical record of discrimination before Congress? It is like the proverbial man feeling the elephant, everybody touches a different place and comes to a different conclusion. After *Lane* and *Garrett*, each side is going to argue its own particular view of how you look at the historical record. In the end, the *Lane* view is the correct one—Congress should not be required to act like a court when it is enacting legislation.

In conclusion, *Lane* was a historic decision, one that represented a significant victory for the plaintiffs and for all people with disabilities. Thanks so much for the opportunity to share my thoughts about this case with you today.

[8] *Id.* at 527 n.16.