No. 02-1047

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OLIVER COCHRAN,

Plaintiff-Appellant

v.

NEW JERSEY DEPARTMENT OF CORRECTIONS, STEVEN PINCHAK, Administrator of East Jersey State Prison, PATRICK ARVONIO, Administrator of East Jersey State Prison, ALFIERO ORTIZ, Assistant Administrator of East Jersey State Prison, TERRANCE MOORE, Assistant Administrator of East Jersey State Prison, DR. FREDERICK BAUER, LT. "JOHN" MILLER, SGT. "JOHN" TARZA, MICHAEL POWERS, THOMAS FARRELL, Supervisor of Health Services Unit of the New Jersey Department of Corrections, SCOTT A. FAUNCE, Administrator of Bayside State Prison, CHARLES LEONE, Assistant Administrator of Bayside State Prison, "JANE" MERITT, Classification Supervisor at Bayside State Prison, Corrections Officers "JOHN" BLOUNT, "JOHN" ALENDE, "JOHN" DAVENPORT, "JOHN" SNELL, SGT. "JOHN" PERGANSKI, SGT. "JOHN" DAVIS, CORRECTIONAL MEDICAL SERVICES, DR. HERTZEL ZACKAI, DR. "JOHN" CARLINO, LISA LITTLE, Hospital Administrator for Bayside State Prison, MARGE AMODEL, Director of Nursing at Bayside State Prison, individually and in their official capacities,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PETITION FOR REHEARING EN BANC FOR UNITED STATES AS INTERVENOR

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REGULATION:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the Supreme Court of the United States: *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

> Whether the statutory provision abrogating Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act, 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 class of cases implicating prisoners' rights.

SARAH E. HARRINGTON
Attorney of Record for United States

STATEMENT OF THE ISSUE

Whether the statutory provision abrogating Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act, 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 class of cases implicating prisoners' rights.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

1. This case involves a suit filed under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq*. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity," 42 U.S.C. 12132, and requires public entities to ensure that each "service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities," unless doing so would fundamentally alter the program or impose an undue financial or administrative burden. 28 C.F.R. 35.150(a).

2. Plaintiff, an inmate in a New Jersey state prison who has a disability, filed a pro se action against, *inter alia*, the New Jersey Department of Corrections and various state officials, alleging that they violated Title II. The district court entered summary judgment against plaintiff on his Title II claims, holding that Congress did not constitutionally abrogate the State's Eleventh Amendment immunity to private suits under Title II, and plaintiff appealed.

The United States intervened on appeal to defend the constitutionality of Title II's abrogation provision pursuant to 28 U.S.C. 2403(a), which permits the United

States to intervene as of right in any case in which the constitutionality of a federal statute is challenged for the purpose of presenting "argument on the question of constitutionality."

On March 25, 2005, the Court issued its opinion in this case affirming the district court's dismissal of Cochran's claims for money damages against the state entity on the basis that the State is immune under the Eleventh Amendment from suits under Title II because Title II is not valid Section 5 legislation in the prison context. For the reasons stated in this petition, that conclusion was in error.

ARGUMENT

THE PANEL'S REFUSAL TO CONSIDER THE PANOPLY OF CONSTITUTIONAL RIGHTS AT STAKE IN THE PRISON CONTEXT CONFLICTS WITH THE SUPREME COURT'S DECISION IN *TENNESSEE* V. *LANE*

This Court should grant panel rehearing or rehearing en banc because the panel erred in concluding that Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq*., is not valid legislation under Section 5 of the Fourteenth Amendment in the prison context. The panel or full Court should then hold this case pending the Supreme Court's decision in the consolidated cases of *United States* v. *Georgia*, No. 04-1203, and *Goodman* v. *Georgia*, No. 04-1236, which pose the identical legal question presented in the instant case.

Contrary to instructions from the Supreme Court in *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), the panel refused to consider the panoply of constitutional rights implicated in the class of cases implicating prisoners' rights. In doing so, the panel struck down the statute without even considering arguments put forth by intervenor

United States in defense of the statute. Moreover, because the panel fundamentally erred in its statement of the controlling law, rather than merely incorrectly applying a correct statement of the law to the facts of this case, this case merits en banc review by this Court. See 3d Cir. I.O.P. 9.3.2 ("This court does not ordinarily grant rehearing en banc when the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.").

1. In considering the constitutionality of Title II's abrogation of States' Eleventh Amendment immunity, the panel engaged in the three-part analysis set out in the line of Supreme Court cases stretching from *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), to *Lane*. In the first step of the *Boerne* analysis, a court must "identify the constitutional right or rights that Congress sought to enforce when it enacted Title II." *Lane*, 124 S. Ct. at 1988. The Court in *Lane* determined that Title II "seeks to enforce [the Equal Protection Clause's] prohibition on irrational disability discrimination," and "seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Ibid.* The Court then identified the range of constitutional rights at issue in that case, which concerned the ability of persons with disabilities to access courts and judicial services.

In applying this and the other steps of the *Boerne* analysis in the instant case, the panel relied heavily on the Eleventh Circuit's erroneous view of how to apply that analysis in challenges to Title II in the prison context, as expressed in *Miller* v.

King, 384 F.3d 1248 (11th Cir. 2004), petition for rehearing pending, No. 02-13348. In *Miller*, the Eleventh Circuit recognized – as did the panel here – both that the Supreme Court in *Lane* adopted an "as-applied approach in which the constitutionality of Title II is considered context by context," *Miller*, 384 F.3d at 1276 n.34, and that the context before the court was the prison context, see *id.* at 1268, 1270, 1273-1275. But both the *Miller* court and the panel in the instant case then refused to consider the full range of constitutional rights implicated by the prison context, finding in *Miller* that the Eighth Amendment right to be free of cruel and unusual punishment was the only right implicated in the prison context because that was the only right plaintiff Miller sought to vindicate through his Title II claims, and in the instant case that the only right at stake is "the right to be free from invidious discrimination protected by the Equal Protection Clause of the Fourteenth Amendment" because that is the only right Mr. Cochran seeks to vindicate. *Cochran* v. *Pinchak*, 401 F.3d 184, 190 (3d Cir. 2005) (attached).

Although both the plaintiff and the defendant in the instant case argued that the Court should view equal protection as the only constitutional right at stake here, that position is flatly incorrect. As the United States argued in our brief as intervenor in this case and in *Miller*, there is a wide array of constitutional rights at stake in the class of Title II cases implicating prisoners' rights, and many of those rights are subject to heightened constitutional review. See pp. 7-10, *infra*.

The panel's conclusion here that non-Equal Protection rights are not implicated in this case is clearly contrary to the Supreme Court's decision in *Lane*,

which considered the range of constitutional rights implicated in the court-access context even though some of those rights were not implicated by the claims of the particular plaintiffs in that case. In *Lane*, the Court considered the panoply of rights implicated by plaintiffs George Lane and Beverly Jones's claims that they were denied access to state courthouses and judicial services in violation of Title II. The Court did not limit its view of the rights at stake either to the plaintiffs and defendant's view of what those rights were or to the rights actually implicated by the plaintiffs' claims. Both of the plaintiffs in *Lane* are paraplegics who use wheelchairs for mobility, and claimed that they were denied access to, and the services of, the state court system because of their disabilities. Plaintiff Lane alleged that he was unable to appear to answer a set of criminal charges because the courthouse was inaccessible and was arrested and jailed for failure to appear. Plaintiff Jones, a certified court reporter, alleged that she could not work because she could not gain access to a number of county courthouses. See *Lane*, 124 S. Ct. at 1982-1983. Although Lane's particular claims implicated his rights under the Due Process and Confrontation Clauses, and Jones's particular claims implicated only her rights under the Equal Protection Clause, the Court described the range of rights implicated by plaintiffs' claims more broadly to include all constitutional rights implicated by the court-access context:

> 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 1988 (internal citations omitted). Thus, a number of the rights that the Court found to be at stake in *Lane* were not implicated by the claims of the particular plaintiffs in the case. For instance, neither plaintiff alleged that he or she was unable to participate in jury service or was subjected to a jury trial that excluded persons with disabilities from jury service. Similarly, neither plaintiff was prevented by his or her disability from participating in any civil litigation, nor did either allege a violation of First Amendment rights. Nor did the facts of their cases implicate Title II's requirement that government, in the administration of justice, provide "aides to assist persons with disabilities in accessing services," such a sign language interpreters or material in Braille, yet the 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 1993 (emphasis added).

That categorical approach – rather than the panel's litigant-specific mode of analysis – make sense. Congress is a national legislature and in legislating generally, and pursuant to its prophylactic and remedial Section 5 power in particular, Congress 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 unconstitutional treatment of 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) (emphasis added).

Accordingly, in evaluating whether Title II is an appropriate response to "pervasive unequal treatment in the administration of state services and programs," *Lane*, 124 S. Ct. at 1989, the Supreme Court's decision in *Lane* directs courts to consider the entire "class of cases" arising from the type of governmental operations implicated by the lawsuit, *id.* at 1993. 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.*, the panel in the instant case should have assessed Title II's constitutionality as applied to the entire "class of cases," *ibid.*, implicating, in the Supreme Court's words, "the administration of * * * the penal system," *id.* at 1989.

Although incarceration in a state prison necessarily entails the curtailment of many of an individual's constitutional rights, the Supreme Court has repeatedly held that prisoners must "be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson* v.

Palmer, 468 U.S. 517, 523 (1984). In addition, the very nature of prison life – the constant and pervasive governmental regulation of and imposition on the exercise of every constitutional right retained by incarcerated individuals, and the perpetual intrusion of the state into every aspect of day-to-day life – makes the penal context an area of acute constitutional concern, implicating a broad array of constitutional rights and interests on the part of inmates with disabilities. Thus, the Court has found that a variety of constitutional rights subject to heightened constitutional scrutiny are retained by prisoners, including the right of access to the courts, *Younger* v. *Gilmore*, 404 U.S. 15 (1971), aff'g *Gilmore* v. *Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970); *Johnson* v. *Avery*, 393 U.S. 483 (1969), the right to "enjoy substantial religious freedom under the First and Fourteenth Amendments," *Wolff* v. *McDonnell*, 418 U.S. 539, 556 (1974), the right to marry, *Turner* v. *Safley*, 482 U.S. 78, 95 (1987), and certain First Amendment rights of speech "not inconsistent with [an individual's] status as * * * prisoner or with the legitimate penological objectives of the corrections system," *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974).

Prisoners also retain rights under the Due Process Clause. *Wolff*, 418 U.S. at 556. The Due Process Clause imposes an affirmative obligation upon States to take such measures as are necessary to ensure that individuals, including those with disabilities, are not deprived of their life, liberty, or property without procedures affording "fundamental fairness." *Lassiter* v. *Department of Soc. Servs.*, 452 U.S. 18, 24 (1981). The Due Process Clause requires States to afford inmates, including individuals with disabilities, fair proceedings in a range of circumstances that arise

in the prison setting, including administration of antipsychotic drugs, *Washington* v. *Harper*, 494 U.S. 210, 221-222 (1990), involuntary transfer to a mental hospital, *Vitek* v. *Jones*, 445 U.S. 480, 494 (1980), and parole hearings, *Young* v. *Harper*, 520 U.S. 143, 152-153 (1997). The Due Process Clause also requires fair proceedings when a prisoner is denied access to benefits or programs created by state regulations and policies even where the liberty interest at stake does not arise from the Due Process Clause itself. See, *e.g.*, *Greenholtz* v. *Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) (parole); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) (good time credits); *id.* at 571-572 & n.19 (solitary confinement); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (probation).

Moreover, all persons incarcerated in state prisons, including persons with disabilities, have a constitutional right under the Eighth Amendment to be free from "cruel and unusual punishments." The Supreme Court has held that the Eighth Amendment both "places restraints on prison officials," and "imposes duties on those officials." *Farmer* v. *Brennan*, 511 U.S. 825, 832-833 (1994). Among the restraints imposed under the Amendment are prohibitions on the use of excessive physical force against prisoners, *Hudson* v. *McMillian*, 503 U.S. 1 (1992), and the "unnecessary and wanton infliction of pain," *Hope* v. *Pelzer*, 536 U.S. 730, 737 (2002). Among the affirmative obligations imposed are the duty to "ensure that inmates receive adequate food, clothing, shelter, and medical care," *Farmer*, 511 U.S. at 832-833, and the duty to "take reasonable measures to guarantee the safety of the inmates," *Hudson* v. *Palmer*, 468 U.S. at 526-527. Prison officials also may not

display "deliberate indifference to serious medical needs of prisoners." *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976).

By limiting its consideration of the rights at stake to plaintiff Cochran's particular claim rather than considering the range of rights implicated in the prison context, the panel's decision conflicts with the Supreme Court's decision in *Lane*.

2. In evaluating the congruence and proportionality of Title II in the third step of the *Boerne* analysis, the panel also erred in concluding that, because "[t]he ADA affects far more state prison conduct and prison services, programs, and activities than the Equal Protection Clause protects," *Cochran*, 401 F.3d at 192-193, it is not a congruent and proportional means of enforcing the constitutional rights of inmates with disabilities. But in light of the range of constitutional rights at stake in prisons, the remedy of Title II is a valid exercise of Congress's authority under Section 5. Although Title II requires States to take some affirmative steps to avoid discrimination, it "does not require States to compromise their essential eligibility criteria," requires only "'reasonable modifications' that would not fundamentally alter the nature of the service provided," and does not require States to "undertake measures that would impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service." *Lane*, 124 S. Ct. at 1993-1994.

Title II's carefully circumscribed accommodation mandate is consistent with the commands of the Constitution in the area of prisoners' rights. Claims by inmates of violations of certain constitutional rights are generally subject to analysis under

the standard set forth by the Supreme Court in *Turner* v. *Safley*, 482 U.S. 78 (1987), which takes into consideration the State's penological justification for a challenged practice, the availability of alternative means of serving the State's interests, as well as the potential impact a requested accommodation to such a practice will have on guards, other inmates, and allocation of prison resources. The Due Process Clause itself requires an assessment of the importance of the right at stake in a particular case as well as the circumstances of the individual to whom process is due. See *Goldberg* v. *Kelly*, 397 U.S. 254, 267-269 (1970).

Just as the *Turner* test and the Due Process Clause require a court to weigh the interests of an individual against the interests of the State, Title II also requires a court to balance the interests of an inmate with a disability against those of state prison administrators. While *Turner* requires a court to consider what impact protecting a particular constitutional right will have on a prison's resources and personnel, so Title II requires a court to consider whether providing an accommodation would "impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service." *Lane*, 124 S. Ct. at 1994. Furthermore, just as the *Turner* test requires a court to consider whether "there are alternative means of exercising the [constitutional] right [at stake] that remain open to prison inmates," 482 U.S. at 90, Title II does not require that a qualifying inmate necessarily be granted every requested accommodation with respect to every aspect of prison services, programs, or activities. Rather, Title II requires that a "service, program, or activity, when viewed in its entirety, is readily

accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). A determination of whether a particular program, service, or activity satisfies the requirements of Title II involves an evaluation of both the burden a requested accommodation will have on a state prison and the availability of accommodations that differ from a plaintiff's requested accommodation but nonetheless address the plaintiff's needs.

In addition, although the Due Process Clause itself does not require States to create prison programs such as the provision of "good time credits," once a State opts to create such a program, the Due Process Clause requires the State to provide procedural protections to inmates who are denied the opportunity to participate. See *Wolff* v. *McDonnell*, *supra*. Similarly, although Title II does not mandate what programs or activities a State must offer within its prisons, it does require that such programs and activities be made available to persons with disabilities consistent with the ability of such individuals to participate in such programs and activities.

Such individualized consideration has also been required in order to avoid a violation of the Eighth Amendment or Due Process Clause. See *Farmer*, 511 U.S. at 843; *Wilson* v. *Seiter*, 501 U.S. 294, 300 n.1 (1991). Thus, the Constitution itself will require state prisons to accommodate the individual needs of prisoners with disabilities in some circumstances. See, *e.g.*, *Bradley* v. *Puckett*, 157 F.3d 1022, 1025-1026 (5th Cir. 1998); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993).

Moreover, given the history of unconstitutional treatment of inmates with disabilities, Congress was entitled to conclude that there exists a real risk that some

state officials may continue to make decisions about how prisoners with disabilities should be treated based on invidious class-based stereotypes or animus that would be difficult to detect or prove. 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, 732-733, 735-737 (2003).

Title II's prophylactic remedy acts to detect and prevent difficult-to-uncover discrimination against inmates with disabilities that could otherwise evade judicial remedy. By proscribing governmental conduct, the discriminatory effects of which cannot be or have not been adequately justified, Title II prevents covert intentional discrimination against prisoners with disabilities and provides strong remedies for the lingering effects of past unconstitutional treatment against persons with disabilities in the prison context. See *Lane*, 124 S. Ct. at 1986 ("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."). Further, by prohibiting insubstantial reasons for denying accommodations to persons with disabilities, Title II prevents invidious discrimination and unconstitutional treatment in the day-to-day actions of state officials exercising discretionary powers over inmates with disabilities. See *Hibbs*, 538 U.S. at 736.

3. Finally, the panel erred in failing to address arguments advanced by the United States as intervenor in support of the constitutionality of Title II and its abrogation of States' Eleventh Amendment immunity. As noted on page 4, *supra*,

the United States argued to the panel that the *Boerne* analysis requires courts to consider the full range of constitutional rights at stake in the relevant context. Rather than considering whether and to what extent the range of rights identified by the United States is implicated in the prison context, the panel simply ignored the United States' argument that such rights are at stake. Declaring a federal statute to be unconstitutional is an extraordinary measure and should not be undertaken by a court when that court fails to address some arguments that have been presented in defense of the statute's constitutionality.

4. On May 16, 2005, the Supreme Court granted certiorari in *United States* v. *Georgia*, No. 04-1203, and *Goodman* v. *Georgia*, No. 04-1236 (collectively "*Goodman*"), two petitions arising out of an Eleventh Circuit decision that followed that court's decision in *Miller*. Because the question presented in the *Goodman* case is identical to that presented in the instant case – namely, whether Title II of the ADA is a valid exercise of Congress' Section 5 authority as applied to the class of cases implicating prisoners' rights – this Court should hold the instant case after granting rehearing or rehearing en banc pending the outcome of *Goodman*.

CONCLUSION

Wherefore, this Court should grant rehearing or rehearing en banc and hold this case pending the Supreme Court's decision in *Goodman*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2005, two copies of the foregoing PETITION FOR REHEARING EN BANC FOR THE UNITED STATES AS INTERVENOR were served by overnight delivery on the following parties and counsel of record:

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