UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
Statesboro Division

TONY GOODMAN,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	CV699-012-JEG
	)	
JAMES E. DONALD, *et al.*	)	
	)	
Defendants.	)	
	)	

INTERVENOR UNITED STATES' RESPONSE TO DEFENDANTS' SUPPLEMENTAL BRIEF ON ABROGATION OF SOVEREIGN IMMUNITY

The relevant factual and procedural history in this case is laid out in the plaintiff's and defendants' summary judgment papers. The United States intervened in this case pursuant to 28 U.S.C. 2403(a) while it was on appeal to the Eleventh Circuit in order to defend the constitutionality of the federal statutory provisions that abrogate States' Eleventh Amendment immunity to claims pursuant to Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.* The United States subsequently filed a petition for certiorari from the court of appeals' decision. The Supreme Court granted the petition, reversed the court of appeals' decision, and remanded the case. *United States* v. *Georgia*, 546 U.S. 151 (2006). The court of appeals then remanded the case to this Court. *Goodman* v. *Ray*, 449 F.3d 1152 (11th Cir. 2006). The United States respectfully submits this response to the defendants' assertion of Eleventh Amendment immunity.

ARGUMENT

I. THIS COURT SHOULD AVOID DECIDING THE CONSTITUTIONALITY OF TITLE II OF THE ADA

This Court should decline to consider the constitutionality of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, and the statutory provision abrogating States'

Eleventh Amendment immunity to Title II claims, because it is not necessary to do so. Plaintiff Goodman asserts substantively identical claims against the state defendants under both Title II and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794. As the Eleventh Circuit has held, Title II and Section 504 impose identical antidiscrimination and accommodation requirements on entities such as the state defendants. See, *Cash* v. *Smith*, 231 F.3d 1301, 1305 & n.2 (11th Cir. 2000); see also *Bircoll* v. *Miami-Dade County*, 480 F.3d 1072, 1988 n.21 (11th Cir. 2007); *Badillo* v. *Thorpe*, 158 F. App'x 208, 214 (11th Cir. 2005). Indeed, in the text of the ADA itself, Congress directed courts to construe the statute not to apply a lesser standard than the standard applied under Section 504. 42 U.S.C. 12201(a); *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632 (1998); 28 C.F.R. 35.103(a). Congress further instructed that the "remedies, procedures, and rights set forth in [the Rehabilitation Act] shall be the remedies, procedures, and rights" of Title II. *Barnes* v. *Gorman*, 536 U.S. 181, 185 (2002); 42 U.S.C. 12133. Thus, any allegation that states a Title II claim against a state agency that receives federal funds necessarily states a Section 504 claim as well.

The Eleventh Circuit has already held that a state agency such as defendant that receives federal financial assistance does not enjoy Eleventh Amendment immunity to claims under Section 504 because it waives any such immunity when it accepts clearly conditioned federal financial assistance. See *Garrett* v. *University of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1290-1293 (11th Cir. 2003). That holding is in accord with every other court of appeals, all of which have held that state entities that accept federal funds waive their immunity to private suits under Section 504. Because the state defendants are subject to suit under Section 504, and because Section 504 provides Goodman with identical protection to that afforded under Title II, this Court should not consider the State's challenge to the constitutionality of Title II and the provision abrogating States' Eleventh Amendment immunity.

Considering a constitutional challenge to an act of Congress is "the gravest and most delicate duty that [a] Court is called on to perform." *Blodgett* v. *Holden*, 275 U.S. 142, 147-148 (1927) (opinion of Holmes, J.). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable." *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944). The principle of constitutional avoidance is at its apex when courts address the constitutionality of an Act of Congress. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). Thus, this Court should avoid passing on the constitutionality of Title II because Goodman can get all the relief to which he is entitled under Section 504.

II. CONGRESS VALIDLY ABROGATED STATES' ELEVENTH AMENDMENT IMMUNITY TO CLAIMS UNDER TITLE II OF THE ADA

Congress unequivocally expressed its intent to abrogate States' sovereign immunity to claims under the Americans with Disabilities Act. 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. Section 5 "is a 'broad power indeed,'" *Lane*, 541 U.S. at 518, empowering Congress not only to remedy past violations of constitutional rights, but also to enact "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 727-728 (2003). Congress also may prohibit "practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Lane*, 541 U.S. at 520. State prison operations are no exception to this power. See *Hutto* v. *Finney*, 437 U.S. 678, 693-699 (1978).

Section 5 legislation, however, must demonstrate a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). In evaluating whether Title II is an appropriate response to past unconstitutional treatment of individuals with disabilities, the Supreme Court in *Lane* upheld Title II of the ADA as "valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services," 541 U.S. at 531. Title II likewise is appropriate Section 5 legislation as applied to prison administration because it is reasonably designed to remedy past and prevent future unconstitutional treatment of disabled inmates and deprivation of their constitutional rights in the operation of state penal systems.

When the instant case was before the Supreme Court as *United States* v. *Georgia*, 546 U.S. 151 (2006), the question potentially presented was whether Congress validly abrogated States' Eleventh Amendment immunity to claims under Title II of the ADA, as applied in the prison context. However, the Court declined to determine the extent to which Title II's prophylactic protection is valid in this context because this Court and the Eleventh Circuit had not determined whether Goodman's Title II claims could have independently constituted viable constitutional claims or whether the Title II claims relied solely on the statute's prophylactic protection. To the extent any of his Title II claims would independently state a constitutional violation, the Court held, Title II's abrogation of immunity for those claims is valid, and a court need not question whether Title II is congruent and proportional under the test first articulated in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). *Georgia*, 546 U.S. at 157-159. This Court has instructed the parties to address the issue of whether Title II validly abrogates States' immunity to private Title II claims alleging conduct that would not independently violate the Constitution.

A. Under The Boerne Framework, Properly Applied, Title II Of The Americans With Disabilities Act Is Valid Section 5 Legislation As Applied To Prison Administration

If this Court finds it necessary to decide whether Title II's prophylactic protection is a valid exercise of Congress's Section 5 authority, the Court must apply the *Boerne* congruence and proportionality analysis, as that analysis was applied to Title II in *Tennessee* v. *Lane*. In 2005, the Eleventh Circuit applied the *Lane* analysis in *Association of Disabled Americans, Inc.* v. *Florida International University (FIU)*, 405 F.3d 954 (11th Cir. 2005), and held that Title II is valid Section 5 legislation, as applied to the context of public education. Although the instant case involves the application of Title II in a different context, this Court is bound to follow the analysis employed in *FIU*.

In *Lane*, the Supreme Court applied the three-part analysis for assessing Fourteenth Amendment legislation articulated in *Boerne* and held that the state defendant was not immune under the Eleventh Amendment immunity to the plaintiffs' claims. See *Lane*, 541 U.S. at 533-534. The Court considered: (1) the "constitutional right or rights that Congress sought to enforce when it enacted Title II," *id.* 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.

First, 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. *Lane*, 541 U.S. at 522-523; accord *FIU*, 405 F.3d at 957-958. Second, the Court conclusively 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. *Lane*, 541 U.S. at 523-528; accord *FIU*, 405 F.3d at 958. And third, 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.[1] *Lane*, 541 U.S. at 530-534; accord *FIU*, 405 F.3d at 958-959. Applying the holdings of the Supreme Court's decision in *Lane* and the Eleventh Circuit's decision in *FIU*, this Court should conclude that Title II is valid Fourteenth Amendment legislation as it applies in the context of prison administration.

1. Title II Implicates An Array Of Constitutional Rights In The Prison Context

The Supreme Court held in *Lane* that Title II enforces 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. The *Lane* Court specifically noted that Title II seeks to enforce rights "protected by the Due Process Clause of the Fourteenth Amendment," *id.* at 523, and noted that one area targeted by Title II is "unequal treatment in the administration of * * * the penal system," *id.* at 525. In this case, in which constitutional rights in the penal system are implicated, Title II enforces the Equal Protection

[1] The Court in *Lane* did not examine the congruence and proportionality of Title II as a whole because the Court found that the statute was valid Section 5 legislation as applied to the class of cases before it. Because Title II is valid Section 5 legislation as applied to the class of cases implicating prisoners' rights, 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 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.

Clause's prohibition of arbitrary treatment based on irrational stereotypes or hostility,[2] as well as the heightened constitutional protection afforded to a variety of constitutional rights arising in the prison context.

The Supreme Court made clear in *Lane* and in *Georgia* that a court must consider the full array of constitutional rights implicated by disability discrimination in a particular context, regardless of whether every one of those rights is implicated by the facts of the case at bar. And the Supreme Court made clear in *Georgia* that Title II's application to the prison context implicates *numerous* constitutional protections in addition to rights under the Equal Protection Clause, including rights stemming from both the Eighth Amendment and "other constitutional provision[s]." *Georgia*, 546 U.S. at 159; *id.* at 162 (Stevens, J., concurring) (finding that there is a "constellation of rights applicable in the prison context").

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

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[2] Even under rational basis scrutiny, "mere negative attitudes, or fear" alone cannot justify disparate treatment of those with disabilities. *University of Ala.* v. *Garrett*, 531 U.S. 356, 367 (2001). A purported rational basis for treatment of the disabled will also fail if the State does not accord the same treatment to other groups similarly situated, *id*. at 366 n.4; *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447-450 (1985), if it is based on "animosity" towards the disabled, *Romer* v. *Evans*, 517 U.S. 620, 634 (1996), or if it simply gives effect to private biases, *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

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); *Ex parte Hull*, 312 U.S. 546 (1941), the right to "enjoy substantial religious freedom under the First and Fourteenth Amendments," *Wolff* v. *McDonnell*, 418 U.S. 539, 556 (1974) (citing *Cruz* v. *Beto*, 405 U.S. 319 (1972)); *Cooper* v. *Pate*, 378 U.S. 546 (1964), 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 Social Serv.*, 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*, 418 U.S. at 557 (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*, 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); see also *Helling* v. *McKinney*, 509 U.S. 25, 32 (1993).

In addition, although the Eighth Amendment does not apply to persons who have not been convicted of a crime, pretrial detainees held in jails do enjoy protections under the Due Process Clause. *Bell* v. *Wolfish*, 441 U.S. 520, 535-536 (1979). Under that clause, restrictions on or conditions of pretrial detainees may not amount to punishment and must be "reasonably related to a legitimate government objective." *Id.* at 539.

As described below, Title II's reasonable accommodation requirement is a valid means of targeting violations of these constitutional rights and of preventing and deterring constitutional violations throughout the range of government services, many of which implicate fundamental constitutional rights. *Lane*, 541 U.S. at 540.

2. The Historical Predicate Of Unconstitutional Disability Discrimination In The Provision Of Public Services Is Sufficient To Justify Prophylactic Legislation

As the Eleventh Circuit held in *FIU*, 405 F.3d at 958, the Supreme Court in *Lane* left no doubt that there was a sufficient historical predicate of unconstitutional disability discrimination in the provision of public services to justify prophylactic legislation under Section 5 of the Fourteenth Amendment. In so holding, the Supreme Court found 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," *Lane*, 541 U.S. at 524. The Court held that Congress's legislative finding of persistent "discrimination against individuals with disabilities * * * [in] access to public services," taken "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.

Although *Lane* ultimately upheld Title II as valid Fourteenth Amendment legislation only as applied to access to courts, the Eleventh Circuit in *FIU* held that the Supreme Court's conclusions regarding the historical predicate for Title II are not limited to that context. See 405 F.3d at 958. The *Lane* Court found that the record included not only "a pattern of unconstitutional treatment in the administration of justice," 541 U.S. at 525, but also violations of constitutional rights in the context of voting, marriage, jury service, zoning, the penal system, public education, law enforcement, and the treatment of institutionalized persons. *Id.* at 524-525. This history, the Court held, warranted prophylactic legislation addressing "public services" generally. *Id.* at 529; accord, *FIU*, 405 F.3d at 958.

But even if this Court were free to examine Title II's historical predicate anew, there is ample

evidence of a history of unconstitutional discrimination against inmates with disabilities. The record before Congress included substantial evidence of both historic and enduring unconstitutional treatment of individuals with disabilities by States and their subdivisions in the administration of their penal systems. Moreover, in studying the problem of unconstitutional treatment of the disabled in prisons, Congress confronted an area of state activity in which constitutional concerns and limitations pervade virtually every aspect of governmental operations, and where unconstitutional treatment, biases, fears, and stereotypes can have much more severe and far-reaching repercussions than in society at large, because of the inmates' reduced capacity for self-help or to seek the assistance of others.

Congress enacted Title II based on (1) more than forty years of experience studying the scope and nature of discrimination against persons with disabilities and testing incremental legislative steps to combat that discrimination;[3] (2) two reports from the National Council on the Handicapped, an independent federal agency that was commissioned to report on the adequacy of existing federal laws and programs addressing discrimination against persons with disabilities;[4] (3) thirteen congressional

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[3] See, *e.g.*, Act of June 10, 1948, ch. 434, 62 Stat. 351; Architectural Barriers Act of 1968, 42 U.S.C. 4151 *et seq.*; Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*; Education of the Handicapped Act, Pub. L. No. 91-230, Title VI, 84 Stat. 175 (reenacted in 1990 as the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*); Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq.*; Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. 1973ee *et seq.*; Air Carrier Access Act of 1986, 49 U.S.C. 41705; Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. 10801; 42 U.S.C. 1437f; 38 U.S.C. 1502, 1524; Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199, § 10, 97 Stat. 1367; Fair Housing Amendments Act of 1988, 42 U.S.C. 3604.

[4] See Rehabilitation Amendments of 1984, Pub. L. No. 98-221, Title I, § 141(a), 98 Stat. 26; Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Title V, § 502(b), 100 Stat. 1829; see also National Council on the Handicapped, *On the Threshold of Independence* (1988); National Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws*

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hearings devoted specifically to consideration of the ADA, see *Garrett*, 531 U.S. at 389-390 (Breyer, J., dissenting) (listing hearings); (4) evidence presented to Congress by nearly 5000 individuals documenting the problems with discrimination persons with disabilities face daily, which was collected by a congressionally designated Task Force that held 63 public forums across the country;[5] and (5) several reports and surveys.[6]

That evidence led Congress to find that individuals with disabilities have been "subjected to a history of purposeful unequal treatment," 42 U.S.C. 12101(a)(7), and that "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination." S. Rep. No. 116, 101st Cong., 1st Sess. 8-9 (1989). And Congress specifically identified "institutionalization" as one "critical area[]" in which "discrimination * * * persists." 42

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and Programs Affecting Persons with Disabilities (1986).

[5] See Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 18 (1990) (*Task Force Report*); 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 (Comm. Print 1990) (*Leg. Hist.*). The Task Force submitted those "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" to Congress, 2 *Leg. Hist.* 1324-1325, as part of the official legislative history of the ADA. See *id.* at 1336, 1389; *Lane*, 541 U.S. at 516. In *Garrett*, the United States lodged with the Clerk a complete set of those submissions. See 531 U.S. at 391-424 (Breyer, J., dissenting). As in *Garrett*, those submissions are cited herein by reference to the State and Bates stamp number.

[6] See S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 28 (1990); *Task Force Report* 16; United States Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* (1983); Louis Harris & Assoc., *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (1986); Louis Harris & Assocs., *The ICD Survey II: Employing Disabled Americans* (1987); *Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic* (1988).

U.S.C. 12101(a)(3). That targeted finding of past and enduring unconstitutional treatment of institutionalized individuals with disabilities by States and their political subdivisions can naturally "be thought to include penal institutions." *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998).

In fact, the Court in *Lane* specifically took notice of the historical record of disability discrimination in the penal system, as documented in the decisions of various courts. 541 U.S. at 525 & n.11.[7] Numerous courts have found discrimination and the deprivation of fundamental rights on the basis of disability. In one case, a prison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead." *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986). In another, a mentally ill inmate's due process rights were violated when he was confined without notice or an opportunity to be heard for 56 days in solitary confinement in a "strip cell" with no windows, no interior lights, no bunk, no floor covering, no toilet beyond a hole in the floor, no articles of personal hygiene, no opportunity for recreation outside the cell, no access to reading materials, and frequently no clothing or bedding material. *Littlefield* v. *Deland*, 641 F.2d 729, 730-732 (10th Cir. 1981). Another case found constitutional violations where mentally ill and impaired inmates were confined

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[7] Citing *LaFaut* v. *Smith*, 834 F.2d 389, 394 (4th Cir. 1987); *Schmidt* v. *Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999); *Key* v. *Grayson*, 179 F.3d 996 (6th Cir. 1999). See also, *e.g.*, *Kiman* v. *New Hampshire Dep't of Corr.*, 301 F.3d 13, 15-16 (1st Cir. 2002); *Armstrong* v. *Davis*, 275 F.3d 849 (9th Cir. 2001); *Bradley* v. *Puckett*, 157 F.3d 1022, 1025-1026 (5th Cir. 1998); *Koehl* v. *Dalsheim*, 85 F.3d 86 (2d Cir. 1996); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993); *Miranda* v. *Munoz*, 770 F.2d 255, 259 (1st Cir. 1985); *Carty* v. *Farrelly*, 957 F. Supp. 727, 739 (D.V.I. 1997); *Kaufman* v. *Carter*, 952 F. Supp. 520 (W.D. Mich. 1996); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1466 (M.D. Ala. 1994); *Nolley* v. *County of Erie*, 776 F. Supp. 715 (W.D.N.Y. 1991); *Bonner* v. *Arizona Dep't of Corr.*, 714 F. Supp. 420 (D. Ariz. 1989); see also Appendix A to the United States' Brief as Petitioner to the United States Supreme Court in *United States* v. *Georgia*, No. 04-1203.

to the prison's "special needs unit" and subjected to unjustified uses of physical force and brutality by prison guards. *Kendrick* v. *Bland*, 541 F. Supp. 21, 26 (W.D. Ky. 1981). Scores of other cases echoed the problem, while more recent cases document its enduring and intractable nature. "[I]t is not only appropriate but also realistic to presume that," in enacting Title II, "Congress was thoroughly familiar with th[o]se unusually important precedents" that predated the enactment of Title II and that addressed in constitutional terms the very problem under study by Congress. *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979); see also *Lane*, 541 U.S. at 524 n.7, 525 & nn.11-14.

Federal efforts to enforce the rights of individuals with disabilities offer still more evidence. Between 1980 and the enactment of Title II in 1990, Department of Justice investigations found unconstitutional treatment of individuals with disabilities in correctional facilities in 13 States.[8] Those findings include institutions that (1) had the practice of "stripping naked psychotic inmates and inmates attempting suicide, shackling them, and placing them in a glazed cell without ventilation," see Findings Letter Re: State Prison of Southern Michigan, Marquette Branch Prison, and Michigan Reformatory (1982); (2) engaged in the improper use of chemical agents on mentally ill inmates, see Findings Letter Re: Wisconsin Prison System (1982); and (3) pervasively denied even minimally adequate medical care for both juvenile and adult detainees.[9] In addition, mentally

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[8] For a detailed accounting of the findings of those investigations, please see Appendix B to the United States' Brief as Petitioner to the United States Supreme Court in *United States* v. *Georgia*, No. 04-1203.

[9] See Findings Letter Re: Western State Correctional Institution, MA (1981); East Louisiana State Hospital (1982); Findings Letter Re: State Prison of Southern Michigan, Marquette Branch Prison, and Michigan Reformatory (1982); Findings Letter Re: Wisconsin Prison System (1982); Findings Letter Re: Oahu Community Correctional Center and High Security Facility, HI (1984); Findings Letter Re: Ada County Jail, ID (1984); Findings Letter Re: Elgin Mental

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disabled detainees in a county jail in Mississippi were routinely left for days shackled in a "drunk tank" without any mental health treatment or supervision, see Findings Letter Re: Hinds County Detention Center, MS (1986). Such findings properly inform the Court's evaluation of the propriety of Section 5 legislation. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 312-313 (1966).

Information before Congress documented a widespread and deeply rooted pattern of correctional officials' deliberate indifference to the health, safety, suffering, and medical needs of prisoners with disabilities. In fact, the House Report concluded that persons with disabilities, such as epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 3, at 50 (1990); see also 136 Cong. Rec. 11,461 (1990) (Rep. Levine). The report of the United States Civil Rights Commission that was before Congress, see S. Rep. No. 116 at 6; H.R. Rep. No. 485, Pt. 2, at 28, also identified as problems the "[i]nadequate treatment * * * in penal and juvenile facilities," and "[i]nadequate ability to deal with physically handicapped accused persons and convicts (*e.g.*, accessible jail cells and toilet facilities)." United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 168 (1983) (*Spectrum*).[10] Likewise, a report by the California Attorney General's

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[9](...continued)
Health Centers, IL (1984); Findings Letter Re: Logansport State Hospital, IN (1984); Findings Letter Re: Napa State Hospital, CA (1986); Findings Letter Re: Kalamazoo Regional Psychiatric Center, MI (1986); Findings Letter Re: Hinds County Detention Center, MS (1986); Findings Letter Re: Sing Sing Correctional Facility, NY (1986); Findings Letter Re: Crittendon County Jail, AK (1987); Findings Letter Re: California Medical Facility (1987); Findings Letter Re: Los Angeles County Juvenile Halls, CA (1987); Findings Letter Re: Santa Rita Jail, CA (1987); Findings Letter Re: Kansas State Penitentiary (1987).

[10] A recent survey of state prisons revealed that only one out of 38 responding States had grab bars or chairs in the prison shower to accommodate inmates with physical disabilities. Only ten provide accessible cells. J. Krienert *et al.*, *Inmates with Physical Disabilities: Establishing a Knowledge Base*, 1 S.W. J. of Crim. Just. 13, 20 (2003).

Commission on Disability acknowledged problems with police officers removing individuals "unsafely from their wheelchairs to transport them to jail." California Att'y Gen., *Commission on Disability: Final Report* 102 (Dec. 1989) (Calif. Report); *id.* at 110; see also *Barnes* v. *Gorman*, 536 U.S. 181, 183-184 (2002).[11]

In addition, persons with hearing impairments "have been arrested and held in jail over night without ever knowing their rights nor what they are being held for." 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* 1331 (Comm. Print 1990) (*Leg. Hist.*). That occurs even when interpreters are readily available. KS 673. Congress also was aware that "[m]edical care at best in most State systems barely scratches the surface of constitutional minima," leaving prisoners with disabilities without adequate treatment for their needs. *AIDS and the Admin. of Justice: Hearing Before the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 39 (1987).

Congress was aware that "the confinement of inmates who are in need of psychiatric care and treatment * * * in the so called psychiatric unit of the Louisiana State Penitentiary constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution." *Civil Rights for Instit. Persons: Hearings on H.R. 2439 and H.R. 5791 Before the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 320- 321 (1977) (*H.R. 2439 Hearings*). The lack of treatment of mentally ill patients in other jurisdictions was found to be equally constitutionally deficient. *Civil Rights of Instit. Persons: Hearings on S. 1393 Before the Senate Comm. on the Judiciary*, 95th

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[11] See also Kentucky Legis. Research Comm'n, *Research Report No.125*, Mentally Retarded Offenders in Adult and Juvenile Correctional Institutions, at A-3 (1975); *id*. at A-29 to A-34; AK 55; DE 331; National Inst. of Corrections, U.S. Dep't of Justice, *The Handicapped Offender* 4 (1981); L. Teplin, *The Prevalence of Severe Mental Disorder Among Male Urban Jail Detainees: Comparison with the Epidemiologic Catchment Area Program*, 80 *Am. J. Pub. Health* 663, 666 (June 1990).

Cong., 1st Sess. 1066-1067 (1977) (*S. 1393 Hearings*). One inmate "who had suffered a stroke and was partially incontinent" was made

> to sit day after day on a wooden bench beside his bed so that the bed would be kept clean. He frequently fell from the bench, and his legs became blue and swollen. One leg was later amputated, and he died the following day.

S. 1393 Hearings 1067. As a result of the denial of the most basic medical care, "[a] quadriplegic [inmate] * * * suffered from bedsores which had developed into open wounds because of lack of care and which eventually became infested with maggots." *Ibid.* "Days would pass without his bandages being changed, until the stench pervaded the entire ward. The records show that in the month before his death, he was bathed and [h]is dressings were changed only once." *Ibid.* That, unfortunately, was not an isolated incident. See *id.* at 232-234. In another facility, correctional officers served "mental patients" a "'stew' (containing no meats or vegetables) that was lacking in nutritional quality" because corrections officials reasoned that "mental cases don't know what they eat anyway." *Id.* at 234. Indeed, inmates with disabilities have broadly been denied "the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834.[12]

Congress also learned that inmates with disabilities are uniquely susceptible to being raped, assaulted, and preyed upon by other inmates, and that prison officials have repeatedly failed to provide adequate protection. See *Civil Rights of the Institutionalized: Hearings on S. 10 Before the*

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[12] See, *e.g.*, *H.R. 2439 Hearings* 293, 316-317; *S. 1393 Hearings* 121, 234 , 569-570, 1107; *Civil Rights of the Institutionalized: Hearings on S. 10 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 474 (1979); *Corrections: Hearings Before the House Comm. on the Judiciary*, 92d Cong., 2d Sess. Pt. 8, at 92 (1972); *Drugs in Institutions: Hearings Before the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 2 (1975); *Juvenile Delinquency: Hearings Before the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. Pt. 20, at 5012 (1969).

Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 474 (1979) (*S. 10 Hearings*).[13] "[H]aving stripped [inmates with disabilities] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Farmer*, 511 U.S. at 833.

The Fourteenth Amendment's Due Process and Equal Protection Clauses also prohibit the imposition of significantly harsher conditions of confinement based on disability, rather than the inmate's conduct. Just as a State cannot make it a "criminal offense for a person to be mentally ill," *Robinson* v. *California*, 370 U.S. 660, 666 (1962), States may not subject individuals with physical or mental disabilities to "atypical and significant hardship within the correctional context" just because they are disabled, *Wilkinson* v. *Austin*, 545 U.S. 209, 224 (2005). Yet consigning inmates with disabilities to maximum security, lock-down facilities, or other atypically harsh conditions of confinement because of their disability is not uncommon. When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." *2 Leg. Hist.* 1005. In California, inmates with disabilities often are unnecessarily "confined to medical units where access to work, job training, recreation and rehabilitation programs is limited." *Calif. Report* 103; see also *id.* at 111; NM 1091; DE 345; *NY Report* 15, 23-24; IL 572; KS 673.

Congress also was aware that many States structure prison programs and operations in a manner that has the effect of denying persons with disabilities the equal opportunity to obtain vital

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[13] See 126 Cong. Rec. 3713 (1980) (Sen. Bayh); *Spectrum* 168; National Institute of Corr., U.S. Dep't of Justice, *The Handicapped Offender* 4 (1981); *H.R. 2439 Hearings* 240; NM 1091; M. Santamour & B. West, *The Mentally Retarded Offender and Corrections* 9 (Dep't of Justice 1977); Prison Visiting Comm., Corr. Ass'n of N.Y., *State of the Prisons 2002-2003: Conditions of Confinement in 14 New York State Corr. Facilities* 15, 19 (June 2005) (*NY Report*).

services and to exercise fundamental rights, such as attending religious services, accessing the law library, or maintaining contact with spouses and children who visit. Indeed, for inmates with disabilities, the failure to provide accessible programs and facilities has the same real-world effect as incarcerating them under the most severe terms of segregation and isolation. See *S. 1393 Hearings* 639; *S. 10 Hearings* 474; *Spectrum* 168; *Calif. Report* 102-103, 110-111; MD 787. Where programs required for parole or good time credits are inaccessible, disabled inmates directly suffer longer prison sentences solely because of their disability. See *Yeskey*, 524 U.S. at 208; *Key* v. *Grayson*, 179 F.3d 996 (6th Cir. 1999).

Beyond that, because "most offenders will eventually return to society, [a] paramount objective of the corrections system is the rehabilitation of those committed to its custody." *McKune* v. *Lile*, 536 U.S. 24, 36 (2002) (plurality) (quoting *Pell* v. *Procunier*, 417 U.S. 817, 823 (1974)). Inmates with disabilities have the same interest in access to the programs, services, and activities provided to the other inmates as individuals with disabilities outside of prison have to the counterpart programs, services, and activities. At a minimum, they have a due process right not to be treated worse than other inmates solely because of their disability. Negative stereotypes about the abilities and needs of inmates with disabilities often underlie that selective denial of services that other inmates routinely receive. See *Handicapped Offender* 4; *Calif. Report* 102.

3. Title II Is A Congruent And Proportional Means Of Protecting The Constitutional Rights Of Inmates With Disabilities

"The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment." *Lane*, 541 U.S. at 530. The Court in *Lane* limited its consideration of this question to the class of cases implicating the right of "access to the courts" and "the accessibility of judicial services," finding that the remedy of Title II "is congruent and

proportional to its object of enforcing the right of access to the courts." *Id.* at 530-534. In *FIU*, the Eleventh Circuit limited its consideration of this question "to public education." 405 F.3d at 958. In the instant case, this Court must decide whether Title II is congruent and proportional legislation as applied to the class of cases implicating prisoners' rights. Because this statutory remedy is appropriately tailored to the constitutional rights at stake, it is valid under Section 5.

The record of extensive unconstitutional treatment of inmates with disabilities by state and local governments reaffirms the Supreme Court's holding in *Lane* that "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities," 541 U.S. at 528 – evidence that the Supreme Court (and the Eleventh Circuit in *FIU*) agreed "document[ed] a pattern of unequal treatment in the administration of * * * the penal system," *id.* at 525 – "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, especially in the prison context. Indeed, the evidence of unconstitutional treatment exceeds both the evidence of violations of the rights of access to the courts presented in *Lane*, see *id.* at 524 & n.14, 527, and the evidence of unconstitutional leave policies in *Hibbs*, 538 U.S. at 730-732. Given that solid evidentiary predicate for congressional action, application of the congruence and proportionality analysis must afford Congress the same "wide berth in devising appropriate remedial and preventative measures," *Lane*, 541 U.S. at 520, that Congress was afforded in *Hibbs* and *Lane*.

As was true in *Lane* with respect to cases implicating access to courts and judicial services, "Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing" the rights of persons who are incarcerated in state prisons. 541 U.S. at 531. In the prison context, Title II targets exclusively governmental action that is itself directly and comprehensively regulated by

the Constitution. Title II in the prison context also focuses on government action that threatens fundamental rights or that is unreasonable. For those reasons, much of Title II's operation in prisons targets conduct that is outlawed by the Constitution itself or that creates a substantial risk that constitutional rights are imperilled, see *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980).

But Title II "does not require States to employ any and all means to make [prison] services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for [prison] programs." *Lane*, 541 U.S. at 531-532. Title II 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." *Id.* at 531-533.

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[14] 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).

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[14] The appropriate deference afforded to prison officials in the *Turner* "reasonably related" test does not apply to Eighth Amendment claims, race-based equal protection claims, and other claims that are not inconsistent with proper incarceration. See *Johnson* v. *California*, 543 U.S. 499, 510 (2005); *Hope*, 536 U.S. at 738; *Hewitt* v. *Helms*, 459 U.S. 460, 474-477 (1983).

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*, 541 U.S. at 532. 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 and usable by individuals with disabilities." 28 C.F.R. 35.150(a).

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*, 418 U.S. 539. 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.

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 addition, the perpetual intrusion of the state into every aspect of day-to-day life inherent in prison life makes the prison context an area of great constitutional concern, implicating a broad array of constitutional rights and interests on the part of inmates with disabilities. In such a situation, the risk of unconstitutional treatment is sufficient to warrant Title II's prophylactic response. See *Hibbs*, 538 U.S. at 732-733, 735-737 (2003). By proscribing governmental conduct, the discriminatory effects of which cannot be or have not been adequately justified, Title II's prophylactic remedy 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.

Given (1) the history of segregation, isolation, and abusive detention; (2) the resulting entrenched stereotypes, fear, prejudices, and ignorance about inmates with disabilities; (3) the endurance of unconstitutional treatment; and (4) the inability of prior legislative responses to resolve the problem, Congress reasonably determined that a simple ban on overt discrimination would be insufficient. Such a ban would do little to combat the "stereotypes [that have] created a self-fulfilling cycle of discrimination" against inmates with disabilities, and which, in turn, lead "to subtle discrimination that may be difficult to detect on a case-by-case basis." *Hibbs*, 538 U.S. at 736. Prison officials' failure to make reasonable accommodations to the rigid enforcement of seemingly neutral criteria – especially the types of accommodations and adjustments that are made for non-

disabled inmates – can often mask just such invidious, but difficult to prove, discrimination. At the same time, given the history and persistence of unconstitutional treatment in the administration of public services, the statute appropriately casts a skeptical eye over decisions made "because of" or "on the basis of disability."

In addition, a simple ban on discrimination would freeze in place the effects of States' prior official mistreatment of inmates with disabilities, which had rendered the disabled invisible to the designers of prison facilities and programs. See *Gaston County* v. *United States*, 395 U.S. 285 (1969) (constitutionally administered literacy test banned because it perpetuates the effects of past discrimination). "A proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) (internal quotation marks and brackets omitted). Section 5 thus empowers Congress to do more than simply prohibit the creation of new barriers to equality; it can require States to remedy enduring manifestations of past discrimination and exclusion. See *id.* at 550 n.19 (Equal Protection Clause itself can require modification of facilities and programs to ensure equal access); see *Hibbs*, 538 U.S. at 734 n.10. Accordingly, as applied to prisons, Title II is "a reasonable prophylactic measure, reasonably targeted to a legitimate end." *Lane*, 541 U.S. at 533.

In *FIU*, the Eleventh Circuit held that, although Title II imposes greater obligations on the States than the Constitution does, it is congruent and proportional means of protecting the constitutional rights of citizens with disabilities. 405 F.3d at 959. That holding, which applies to Title II in the context of education, is even more true in the prison context. Whereas the only constitutional right at stake in the education context is the Equal Protection right to be free of irrational discrimination, a wide range of constitutional rights – many of which are subject to

heightened scrutiny – are at stake in the prison context. Thus, the gap between Title II's statutory protections and the relevant constitutional protections is considerably narrower in the instant case than it was in *FIU*. Because the Eleventh Circuit found that Title II's prophylactic protection passes muster in the educational context, that protection must be valid in the prison context as well. Accordingly, in the context presented by this case, Title II "cannot be said to be so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Lane*, 541 U.S. at 533 (citation and quotation marks omitted).

CONCLUSION

For the above reasons, this Court should deny the state defendants' motion to dismiss plaintiff's claims under Title II of the ADA on the basis of Eleventh Amendment immunity.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Intervenor United States' Response to Defendant's Supplemental Brief on Abrogation of Sovereign Immunity" were served upon all known counsel of record by placing such copies in post paid envelopes addressed to:

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