No. 07-60997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN HALE,

Plaintiff-Appellant

v.

RONALD KING, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to oral argument and would like to participate if the Court concludes that argument is necessary.

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Key v. *Grayson*, 179 F.3d 996 (6th Cir. 1999),
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Koehl v. *Dalsheim*, 85 F.3d 86 (2d Cir. 1996)..... 27

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Nolley v. *County of Erie*, 776 F. Supp. 715 (W.D.N.Y. 1991). 27

Parrish v. *Johnson*, 800 F.2d 600 (6th Cir. 1986). 28

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Pennsylvania Dep't of Corr. v. *Yeskey*, 524 U.S. 206 (1998). 14, 20

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United States v. *Virginia*, 518 U.S. 515 (1996). 36

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Developmental Disabilities Assistance and Bill of Rights Act,
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Education of the Handicapped Act Amendments of 1983,
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Protection and Advocacy for Mentally Ill Individuals Act of 1986,
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Rehabilitation Amendments of 1984, Pub. L. No. 98-221,
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Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506,
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28 U.S.C. 1331 1

38 U.S.C. 1502. 19

38 U.S.C. 1524. 19

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LEGISLATIVE HISTORY: **PAGE**

AIDS and the Admin. of Justice: Hearing Before the House Comm. on the Judiciary, 100th Cong., 1st Sess. (1987). 22

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. (1977) 23-25

Civil Rights of the Institutionalized: Hearings on S. 10 Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. (1979). 24

Civil Rights of Instit. Persons: Hearings on S. 1393 Before the Senate Comm. on the Judiciary, 95th Cong., 1st Sess.(1977). 23

Corrections: Hearings Before the House Comm. on the Judiciary, 92d Cong., 2d Sess. Pt. 8 (1972). 24-25

2 *Drugs in Institutions: Hearings Before the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) 25

Juvenile Delinquency: Hearings Before the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. Pt. 20 (1969) 25

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* (Comm. Print 1990). 20, 22

H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2 (1990). 20-21

S. Rep. No. 116, 101st Cong., 1st Sess. (1989). 20-21

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136 Cong. Rec. 11,461 (1990). 21

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California Att'y Gen., *Commission on Disability: Final Report* (Dec. 1989)..... 15, 26-27

Louis Harris & Assocs., The *ICD Survey II: Employing Disabled Americans* (1987)..... 21

Louis Harris & Assos., *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (1986)..... 21

M. Santamour & B. West, Dep't of Justice, *The Mentally Retarded Offender and Corrections* (1977). 25

National Council on the Handicapped, *On the Threshold of Independence* (Jan. 1988)..... 19

National Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities* (Feb. 1986). 19

National Inst. of Corrections, U.S. Dep't of Justice, *The Handicapped Offender* (1981)..... 15, 22, 25

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* (June 2005)..... 25-26

Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988)..... 20

Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* (1990)..... 20

United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (Sept. 1983)..... *passim*

ARTICLES: **PAGE**

J. Krienert *et al.*, *Inmates with Physical Disabilities: Establishing a Knowledge Base*, 1 S.W. J. of Crim. Just. 13 (2003)..... 21

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 (June 1990)..... 22

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. 1331. It entered a final order on November 9, 2007. R.89. Appellant filed a timely notice of appeal on November 26, 2007. R.90. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

The United States will address the question posed by this Court: "Whether Title II of the ADA validly abrogates Eleventh Amendment sovereign immunity for claims that violate Title II but are not actual violations of the Fourteenth Amendment." November 23, 2009, Letter to Counsel.

STATEMENT OF THE CASE

Plaintiff is a former inmate at the South Mississippi Correctional Institution (SMCI). *Hale* v. *Mississippi*, No. 2:06cv245-MTP, 2007 WL 3357562, at *1 (S.D. Miss. Nov. 9, 2007). The complaint "asserts claims for denial of adequate medical treatment, denial of proper diet, and violation of the ADA." *Ibid.* "Specifically, plaintiff alleges that he received inadequate medical care for his chronic hepatitis C, chronic back pain, and psychiatric conditions." *Ibid.* Plaintiff seeks injunctive relief, damages, and attorney's fees and costs. *Id.* at *2. The district court dismissed plaintiff's claims with prejudice. *Id.* at *9. This appeal followed.

STATEMENT OF FACTS

Plaintiff's ADA claims are based on allegations that "he was discriminated and retaliated against." *Hale*, 2007 WL 3357562, at *5. "Specifically, he claims that he was denied access to the satellite and regional facilities, was denied the ability to work in the prison kitchen, and was denied the ability to go to school" because of his medical and psychiatric classifications. *Ibid.*

SUMMARY OF ARGUMENT

1. The procedure for analyzing Eleventh Amendment challenges to the constitutionality of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, is set forth in *United States* v. *Georgia*, 546 U.S. 151 (2006). The first step in this analysis is to determine whether a plaintiff has properly stated a claim under Title II.

Here, the district court assumed *arguendo* that plaintiff could state a claim under Title II, which enabled the court to reach the constitutional issue. This was error. Accordingly, this Court should vacate the district court's Eleventh Amendment analysis and remand this matter so the district court can determine in the first instance whether plaintiff stated a claim under Title II. If plaintiff cannot state a Title II claim, then there is no reason for the district court or this Court to reach the constitutional issue.

2. If this Court elects not to remand this matter to the district court, then it should continue following the procedure set forth by the Supreme Court in *Georgia* and hold that Title II of the ADA validly abrogates States' Eleventh Amendment immunity in the prison context. Application of Title II to the administration of prisons falls squarely within Congress's comprehensive legislative power under Section 5 of the Fourteenth Amendment to prohibit, remedy, and prevent violations of the rights secured by that Amendment.

In Title II, Congress formulated a statute that is carefully designed to root out present instances of unconstitutional discrimination, to undo the effects of past

discrimination, and to prevent future unconstitutional treatment by prohibiting discrimination and promoting integration where reasonable. At the same time, Title II preserves the latitude and flexibility that States legitimately require in the administration of their prison programs and services. The statute is carefully tailored to prohibit state conduct that presents a substantial risk of violating the Constitution or that unreasonably perpetuates the exclusionary effects of prior unconstitutional treatment and isolation in the prison context.

ARGUMENT

I

THE DISTRICT COURT ERRED IN REACHING THE QUESTION OF TITLE II'S CONSTITUTIONALITY

A. Background

In *United States* v. *Georgia*, 546 U.S. 151 (2006), the Supreme Court set forth instructions to lower courts regarding how Eleventh Amendment immunity challenges in Title II cases should be handled. Specifically, the Court explained that lower courts must "determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Id.* at 159.

B. The District Court's Decision

The district court dismissed plaintiff's ADA claims against defendants in their individual capacities. *Hale*, 2007 WL 3357562, at *6. It also denied his claims for injunctive and declaratory relief as moot because he no longer is incarcerated. *Ibid.* With regard to claims against defendants in their official capacities, the court determined that prisoners do not have constitutionally-protected interests in job assignments or training. *Id.* at *7. It also determined that they do not "enjoy a constitutional right to be incarcerated in a particular prison or facility." *Ibid.* The district court therefore concluded that plaintiff's allegations did not violate either the Fourteenth Amendment or the Equal Protection Clause and held that, "assuming *arguendo* that plaintiff would be able to establish a prima facie case under Title II of the ADA, plaintiff has failed to show that the defendants' alleged conduct *actually* violates the Fourteenth Amendment." *Ibid.*

The district court next addressed "whether Congress's purported abrogation of sovereign immunity is valid for conduct that violates Title II of the ADA, but does not violate the Fourteenth Amendment." *Hale*, 2007 WL 3357562, at *7. With regard to this issue, the district court "conclude[d] that Title II is not a 'congruent and proportional' response in the context of state prisons." *Id.* at *8. It held that "sovereign immunity is only abrogated to the extent the alleged conduct *actually* violates the Fourteenth Amendment," and dismissed plaintiff's ADA claims against defendants in their official capacities. *Ibid.*

C. The District Court Erred In Reaching The Constitutional Issue

The district court misapplied *Georgia* in that it failed to rule on the question whether plaintiff stated valid claims under Title II of the ADA. It simply assumed *arguendo* the existence of valid ADA claims so that it could reach the question whether Congress's abrogation of Eleventh Amendment immunity was a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment. See *Hale*, 2007 WL 3357562, at *7. This approach violates the procedure established in *Georgia*. See *Georgia*, 546 U.S. at 159.

The United States takes no position with regard to whether plaintiff has stated a valid claim under Title II of the ADA. However, because the district court did not definitively resolve this issue, it was error for the court to move on to the second and third steps of the *Georgia* analysis. Accordingly, this Court should not address the Eleventh Amendment issue and should vacate the district court's Eleventh Amendment analysis. See *Zibbell* v. *Michigan Dep't of Human Servs.*, 313 F. App'x 843, 847-848 (6th Cir.) (unpublished) (holding that the district court erred in proceeding to address the Eleventh Amendment issue following dismissal of plaintiffs' claims and vacating the district court's Eleventh Amendment analysis), cert. denied, 129 S. Ct. 2869 (2009).

This approach is consistent with the well-settled notion that 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). Accordingly, a "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988).

II

THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S ADA CLAIMS ON THE BASIS OF ELEVENTH AMENDMENT IMMUNITY

If this Court elects not to remand this matter to the district court to determine in the first instance whether plaintiff has stated a claim under Title II of the ADA, it must proceed with the *Georgia* analysis. If it does so, this Court should reverse the district court's holding that Title II, as applied to the administration of prisons, only abrogates sovereign immunity "to the extent the alleged conduct *actually* violates the Fourteenth Amendment." *Hale*, 2007 WL 3357562, at *8.[1]

[1] The United States takes no position with regard to the second step of the *Georgia* analysis in this case – *i.e.*, whether plaintiff's claims state actual Fourteenth Amendment violations, see *Hale*, 2007 WL 3357562, at *6-7 – other than to say that this Court must address this step before engaging in the *City of Boerne* inquiry required by the third step of the *Georgia* analysis.

A. Background

Although the Eleventh Amendment ordinarily renders States immune from suits in federal court by private citizens, Congress may abrogate States' immunity if it "unequivocally expresse[s] its intent to abrogate that immunity" and "act[s] pursuant to a valid grant of constitutional authority." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). Congress unequivocally expressed its intent to abrogate States' sovereign immunity to claims under the ADA. See 42 U.S.C. 12202; *Tennessee* v. *Lane*, 541 U.S. 509, 518 (2004). Moreover, it is settled that "Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment." *Ibid*.

Section 5 of the Fourteenth Amendment gives Congress the "authority both to remedy and to deter violation of [Fourteenth Amendment] rights * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 727 (2003) (quoting *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001)). Section 5 "is a 'broad power indeed,'" *Lane*, 541 U.S. at 518 (citation omitted), 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," *Hibbs*, 538 U.S. at 727-728. 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.

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 *Lane*, the Supreme Court considered the claims of two plaintiffs, George Lane and Beverly Jones, "both of whom are paraplegics who use wheelchairs for mobility" and who "claimed that they were denied access to, and the services of, the state court system by reason of their disabilities" in violation of Title II. 541 U.S. at 513. The state defendant in that case argued that Congress lacked the authority to abrogate the State's Eleventh Amendment immunity to these claims, and the Supreme Court in *Lane* disagreed. See *id.* at 533-534.

In evaluating whether Title II is an appropriate response to past unconstitutional treatment of individuals with disabilities, the Court upheld Title II of the ADA as "valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services." *Lane*, 541 U.S. at 531. To reach this conclusion, the Court applied the three-part analysis for Fourteenth Amendment legislation articulated in *Boerne*. The Court considered: (1) the "constitutional right or rights that Congress sought to enforce when it enacted Title II," *Lane*, 541 U.S. at 522; (2) whether there was a history of unconstitutional disability discrimination to support Congress's determination that "inadequate provision of public services and access to public facilities was an appropriate subject for

prophylactic legislation," *id*. at 529; and (3) "whether Title II is an appropriate response to this history and pattern of unequal treatment," as applied to the class of cases implicating access to judicial services, *id.* at 530.

With respect to the first question, the Court found that Title II enforces rights under the Equal Protection Clause as well as an array of rights subject to heightened constitutional scrutiny under the Due Process Clause of the Fourteenth Amendment. See *Lane*, 541 U.S. at 522-523; accord *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 486-487 (4th Cir. 2005). With respect to the second question, 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 *Constantine*, 411 F.3d at 487. And finally, with respect to the third question, the Court found that the congruence and proportionality of the remedies in Title II should be judged on a category-by-category basis in light of the particular constitutional rights at stake in the relevant category of public services. *Lane*, 541 U.S. at 530-534.[2]

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[2] 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

(continued...)

As explained below, 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.

B. Under The Boerne Framework, Title II Of The ADA 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 third stage of the *Georgia* analysis requires the Court to apply the *Boerne* congruence-and-proportionality analysis. Applying the holding of *Lane*, 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

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[2](...continued)
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.

targeted by Title II is "unequal treatment in the administration of * * * the penal system," *id.* at 525.

Moreover, 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. And the Court indicated in *Georgia* that Title II's application to the prison context implicates numerous constitutional protections, including rights stemming from both the Eighth Amendment and "other constitutional provision[s]." 546 U.S. at 159; *id.* at 162 (Stevens, J., concurring) (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 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).

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, see *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, see *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).

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. Accordingly, many of the constitutional rights retained by prisoners are protected by Title II. The rights of religious freedom and free speech, for example, would mean little to an inmate if his or her disabilities precluded participation in religious activities or other gatherings normally permitted in the context of prison life. And the right of access to the courts may be hollow if an inmate is denied access to library resources. See *Lewis* v. *Casey*, 518 U.S. 343, 351 (1996).[3]

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

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[3] As described more fully in the following sections, Title II's reasonable accommodation requirement is a valid means of targeting violations of constitutional rights and of preventing and deterring constitutional violations throughout the range of government services, many of which implicate fundamental constitutional rights. See *Lane*, 541 U.S. at 540.

with disabilities – are not deprived of their life, liberty, or property without procedures affording "fundamental fairness." *Lassiter* v. *Department of 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, see *Washington* v. *Harper*, 494 U.S. 210, 221-222 (1990), involuntary transfer to a mental hospital, see *Vitek* v. *Jones*, 445 U.S. 480, 494 (1980), and parole hearings, see *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). As with the rights discussed above, Title II acts to protect inmates with disabilities against violation of some of these rights. *See*, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 208 (1998) (disabled inmate denied admission to boot camp program "which would have led to his release on parole in just six months" rather than serving 18-36 months); *Key* v. *Grayson*, 179 F.3d 996 (6th Cir. 1999) (deaf inmate denied access to sex offender program that allegedly was required as a condition of parole), cert. denied, 528 U.S. 1120 (2000). See also *Littlefield* v. *Deland*, 641 F.2d 729, 730-732 (10th Cir. 1981) (in pre-ADA

case, 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).[4]

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 these 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, see *Hudson* v. *McMillian*, 503 U.S. 1

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[4] 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 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 National Inst. of Corrections, U.S. Dep't of Justice, *The Handicapped Offender* 4 (1981) (stereotypes about abilities of mentally ill offenders impair their access to work programs); California Att'y Gen., *Commission on Disability: Final Report* 102 (Dec. 1989) (*Calif. Report*) ("Too many criminal justice policies" remain the product of "erroneous myths and stereotypes.").

Moreover, 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 of those disabilities, *Wilkinson* v. *Austin*, 545 U.S. 209, 224 (2005).

(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," *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); see also *Helling* v. *McKinney*, 509 U.S. 25, 32 (1993).[5]

Finally, in this case, in which constitutional rights in the penal system are implicated, Title II also enforces the Equal Protection Clause's prohibition of arbitrary treatment based on irrational stereotypes or hostility, as well as the heightened constitutional protection afforded to a variety of constitutional rights arising in the prison context.

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

a. The Supreme Court's Decision In Lane

The Supreme Court in *Lane* left no doubt that there was a sufficient historical predicate of unconstitutional disability discrimination in the provision of

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[5] 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 governmental objective." *Id.* at 539.

public services to justify prophylactic legislation under Section 5 of the Fourteenth Amendment. See *Constantine*, 411 F.3d at 487. In so holding, the 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. It 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 (citation and internal quotations omitted).

Although *Lane* ultimately upheld Title II as valid Fourteenth Amendment legislation only as applied to access to courts, the Supreme Court's conclusions regarding the historical predicate for Title II are not limited to that context. See *Constantine*, 411 F.3d at 487. 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, 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. As the Fourth Circuit has held, the Supreme Court's holding as to the

adequacy of this historical record applies to Title II as a whole, rather than to Title II's application to the court access context alone:

> After *Lane*, it is settled that Title II was enacted in response to a pattern of unconstitutional disability discrimination by States and nonstate government entities with respect to the provision of public services. This conclusion is sufficient to satisfy the historical inquiry into the harms sought to be addressed by Title II.

Constantine, 411 F.3d at 487. Thus, the adequacy of the historical predicate for Title II is no longer open to dispute.

As explained below, 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.

b. Historical Evidence

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 persons with disabilities 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 40 years of experience studying the scope and nature of discrimination against persons with disabilities and testing incremental legislative steps to combat that discrimination;[6] (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;[7] (3) 13 congressional 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

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[6] 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 *et seq.*; 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. 1357; Fair Housing Amendments Act of 1988, 42 U.S.C. 3604.

[7] 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, 100 Stat. 1828-1829; see also National Council on the Handicapped, *On the Threshold of Independence* (Jan. 1988); National Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities* (Feb. 1986).

collected by a congressionally-designated Task Force that held 63 public forums across the country;[8] and (5) several reports and surveys.[9]

That evidence led Congress to find 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 U.S.C. 12101(a)(3). That targeted finding of past and enduring unconstitutional treatment

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[8] 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* 1039-1040, 1324 (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.

[9] 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 Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983) (*Spectrum*); Louis Harris & Assos., *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).

of institutionalized individuals with disabilities by States and their political subdivisions can naturally "be thought to include penal institutions." *Yeskey*, 524 U.S. at 212.

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 (Sept. 1983) (*Spectrum*).[10] Likewise, a report by the California Attorney General's Commission on Disability acknowledged problems

[10] A more 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 provided accessible cells. J. Krienert *et al.*, *Inmates with Physical Disabilities: Establishing a Knowledge Base*, 1 S.W. J. of Crim. Just. 13, 20 (2003).

with police officers removing individuals "unsafely from their wheelchairs to transport them to jail." *Calif. Report* 102; *id.* at 110.[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.[12]

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

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[11] See also DE 331 ("There exists a gross lack of psychiatric care for juveniles and adult offenders. While the system provides other medical care, those in need of psychiatric treatment are often left with little or no intervention."); *The Handicapped Offender* 4 (1981) (noting the lack of appropriate treatment facilities for mentally ill and mentally retarded offenders, inadequate training of personnel to treat the disabled offender, and inadequate diagnostic services); 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) ("[S]ince disorders such as schizophrenia, major depression, and mania require immediate attention, jails must routinely screen all incoming detainees for severe mental disorder. Interestingly, although the courts mandate that jails conduct routine mental health evaluations, many jails do not do so.") (footnotes omitted).

[12] *AIDS and the Admin. of Justice: Hearing Before the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 39 (1987); see *ibid.* (medical system in Illinois prisons had been held unconstitutional).

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.[13] 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.[14] In another facility, correctional

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[13] *Civil Rights of Instit. Persons: Hearings on S. 1393 Before the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 1066-1067 (1977) (*S. 1393 Hearings*) (Alabama Board of Corrections provides "constitutionally inadequate" care to inmates who are mentally retarded or suffer from mental illness).

[14] *S. 1393 Hearings* 232-233 (noting repeated instances of bedridden inmates suffering from "lack of medical treatment, living in filth with rats, substandard conditions, draining bedsores, inmates that are catheterized and the catheters have

(continued...)

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. Simply put, inmates with disabilities have broadly been denied "the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834.[15]

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[14](...continued)
not been changed in weeks with urinary tract infections, human suffering"); *id.* at 233 (bedridden inmates are "incarcerated 24 hours a day with bedsores, a lack of medical and nursing treatment, poor nutrition, poor food service, exposed to rats, bad ventilation, exorbitant temperatures"); *id.* at 234 (inmates with "draining bedsores that had not been treated" were "locked up in a cellblock area that was unquestionably a firetrap").

[15] See, *e.g.*, *H.R. 2439 Hearings* 293 ("The lack of adequate medical care in state and local correctional institutions is another serious condition which we have found."); *id.* at 316-317 (at Louisiana State Penitentiary, inmates with psychiatric problems "do not receive adequate medical care, exercise, and other treatment"); *S. 1393 Hearings* 121 ("Most persons charged with felonies" in the Los Angeles County Jail "are not eligible for transfer" to the state hospital for treatment of disabilities and, even when transferred, may be "returned precipitously to the jail regardless of treatment needs"); *id.* at 234 ("In one institution a mental patient (stripped of clothing) in a 7 ft. by 5 ft. cell, with a room temperature of 102 [degrees] F and no air movement, was sleeping on urine- and fecal-soaked floors"; the corrections officer advised that the "patient had been confined under these conditions * * * about 6 to 8 weeks."); *id.* at 569-570 ("[T]here are not proper facilities in the Maryland prisons * * * to treat mentally retarded, geriatrics or psychologically disturbed prisoners."); *id.* at 1107 ("Though approximately one half of the average in-patient population at the penitentiary is hospitalized for psychiatric reasons, there is no professional psychiatric staff available for treatment on a regular basis."); *Civil Rights of the Institutionalized: Hearings on S. 10 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 474 (1979) (*S. 10 Hearings*) ("The overtly psychotic were housed without treatment or supervision in dimly-lit, unventilated and filthy 5' x 8' cells for 24 hours a day."); *Corrections: Hearings Before the House Comm. on the Judiciary*, 92d Cong., 2d Sess. Pt. 8, at 92 (1972) ("Inmates with serious medical conditions do not receive necessary medical care. * * * [N]o psychological treatment is usually provided."); (continued...)

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 *S. 10 Hearings* 474 (noting repeated rape of a mentally retarded inmate: "The mentally retarded were victimized and given no care.").[16]

It also knew that consigning inmates with disabilities to maximum security, lock-down facilities, or other atypically harsh conditions of confinement because

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[15](...continued)
id. at 131 (mentally ill inmates are segregated into "areas [that] are known as mental wards, although no psychiatric treatment is given, other than the administration of tranquilizing drugs"); 2 *Drugs in Institutions: Hearings Before the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 2 (1975) (discussing the "chemical straitjacketing of thousands" – the use of psychotropic drugs to control behavior – of mentally retarded persons within the "juvenile justice system" and other institutions); *Juvenile Delinquency: Hearings Before the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. Pt. 20, at 5012 (1969) (although superintendent of state penitentiary "knew the man was psychotic and could not be locked in his cell without being let out periodically, * * * the superintendent locked this man in a cell and left him there," and "scoffed at" his pleas for help, until prisoner committed suicide).

[16] See 126 Cong. Rec. 3713 (1980) (Sen. Bayh) (noting prison conditions that permit the "gang homosexual rape of paraplegic prisoners"); *Spectrum* 168 (noting the persistent problem of "[a]buse of handicapped persons by other inmates"); *The Handicapped Offender* 4 (noting the problem of abuse and exploitation of inmates with disabilities); *H.R. 2439 Hearings* 240 ("Physical abuse at the hands of officers and other inmates is a frequent occurrence, most often inflicted upon those who are young, weak and mentally deficient."); NM 1091 (inmates with developmental disabilities are "more subject to physical and mental attacks by other inmates"); M. Santamour & B. West, Dep't of Justice, *The Mentally Retarded Offender and Corrections* 9 (1977) (discussing the widespread abuse of mentally retarded inmates as "a scapegoat or a sexual object"); 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*).

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.[17]

Finally, 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 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

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[17] See *Calif. Report* 111; NM 1091 (prisoners with developmental disabilities subjected to longer terms of imprisonment); Del. 345 (denial of equal access to prison facilities); *NY Report* 15 ("most inmates with mental illness are housed * * * in maximum security facilities"); *id.* at 23 (in some units, "over half of the inmates in solitary confinement were identified as seriously mentally ill"); *id.* at 24 (one seriously mentally ill man "had accumulated a total of 35 years in solitary confinement") (emphasis removed); IL 572 (deaf people arrested and held in jail overnight without explanation because of failure to provide interpretive services); NC 1161 (police failed to provide interpretive services to deaf person in jail); KS 673 (deaf man jailed and held without a sign language interpreter for him to "understand the charges against him and his rights").

segregation and isolation. See *S. 1393 Hearings* 639 (inmate in wheelchair "had not been out of the second floor dormitory in the Draper Prison for years").[18]

c. Case Law And Department Of Justice Enforcement Efforts

Ample evidence of discrimination also exists in case law. Indeed, 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 (citing cases[19]).[20] Numerous courts have found discrimination and the

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[18] See *S. 10 Hearings* 474 ("The mentally retarded were * * * given no care, educational or special programs."); *Spectrum* 168 (identifying widespread problem of "[i]nadequate * * * rehabilitation programs"); *Calif. Report* 102 ("jail visiting rooms and jails have architectural barriers that make them inaccessible to people who use wheelchairs"); *id.* at 102-103 (documenting the inaccessibility of "visiting, showering, and recreation areas in jails and prisons"); *id.* at 110-111; MD 787 (state prison lacks telecommunications for the deaf).

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

[20] See also, *e.g.*, *Armstrong* v. *Davis*, 275 F.3d 849 (9th Cir. 2001) (failure to conduct parole and parole revocation proceedings in a manner that disabled inmates can understand and in which they can participate), cert. denied, 537 U.S. 812 (2002); *Bradley* v. *Puckett*, 157 F.3d 1022, 1025-1026 (5th Cir. 1998) (failure for several months to provide means for inmate with leg brace to bathe led to infection); *Koehl* v. *Dalsheim*, 85 F.3d 86 (2d Cir. 1996) (Eighth Amendment potentially violated when inmate with serious vision problem denied glasses and treatment); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) ("squalor in which [prisoner] was forced to live as a result of being denied a wheelchair" violated the Eighth Amendment); *Miranda* v. *Munoz*, 770 F.2d 255, 258-259 (1st Cir. 1985) (failure to provide medications for epilepsy, which caused prisoner's death, violated Eighth Amendment); *Carty* v. *Farrelly*, 957 F. Supp. 727, 739 (D.V.I. 1997) ("The abominable treatment of the mentally ill inmates shows overwhelmingly that defendants subject inmates to dehumanizing conditions punishable under the Eighth Amendment."); *Kaufman* v. *Carter*, 952 F. Supp. 520

(continued...)

deprivation of fundamental rights on the basis of disability. In one case, a prison guard repeatedly used a knife to assault inmates with disabilities, caused 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, an inmate with a mental illness had his due process rights 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 his cell," no access to "reading or writing materials," and frequently no clothing or bedding material. *Littlefield*, 641 F.2d at 730-732.

Another case found constitutional violations where inmates with mental illness or impairments were confined to the prison's "Special Needs Unit" and subjected to unjustified uses of physical force and brutality by prison guards.

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[20](...continued)
(W.D. Mich. 1996) (amputee hospitalized after fall in inaccessible jail shower); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1466 (M.D. Ala. 1994) (paraplegic prisoner denied use of a wheelchair and forced to crawl around his cell); *Nolley* v. *County of Erie*, 776 F. Supp. 715 (W.D.N.Y. 1991) (Constitution violated where inmate with HIV was housed in part of prison reserved for inmates who are mentally disturbed, suicidal, or a danger to themselves, and was denied access to prison library and religious services); *Bonner* v. *Arizona Dep't of Corr.*, 714 F. Supp. 420 (D. Ariz. 1989) (deaf, mute, and vision-impaired inmate denied communication assistance, including in disciplinary proceedings, counseling sessions, and medical treatment). For a more extensive list of cases in which state and local prisons and jails infringed upon the constitutional rights of inmates with disabilities, please see Appendix A to the United States' Brief as Petitioner to the United States Supreme Court in *United States* v. *Georgia*, No. 04-1203.

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. See *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 patterns or practices of unconstitutional treatment of individuals with disabilities in correctional facilities in 13 States.[21] 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,"[22] (2) engaged in the improper use of chemical agents on mentally ill inmates,[23] and (3) pervasively denied even minimally adequate medical care for both juvenile and adult detainees.[24] In addition,

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

[22] Findings Letter Re: State Prison of Southern Michigan, Marquette Branch Prison, and Michigan Reformatory (1982).

[23] Findings Letter Re: Wisconsin Prison System (1982).

[24] 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 Health Centers, IL (1984); Findings Letter Re: Logansport State Hospital, IN (1984); Findings Letter Re: Napa State Hospital, CA (1986); Findings Letter Re:

(continued...)

mentally 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.[25] 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).

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.

Here, the district court concluded that because Title II "could impose potential liability for the denial of a prisoner's educational programs, recreational activities, or other programs or activities, although prisoners enjoy no constitutional right to same * * * the requirements of Title II surpass the rights

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[24](...continued)
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).

[25] Findings Letter Re: Hinds County Detention Center, MS (1986).

secured by the Constitution." *Hale*, 2007 WL 3357562, at *8. This was error. For the reasons stated below, if this Court reaches the issue it should hold that the statutory remedy is appropriately tailored to the constitutional rights at stake, and therefore is valid under Section 5.

As described above, the record of unconstitutional treatment of inmates with disabilities by state and local governments is extensive. Indeed, it arguably exceeds both the evidence of violations of the rights of access to the courts presented in *Lane*, see *id.* at 524-525 & 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 either

outlawed by the Constitution itself or 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 531-532.

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.[26] The Due Process Clause itself requires an assessment of the

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[26] Claims of violations of Eighth Amendment and Due Process Clause rights are not subject to the *Turner* "reasonably related" test. See *Hope*, 536 U.S. at 738; *Hewitt* v. *Helms*, 459 U.S. 460, 474-477 (1983), modified by *Sandin* v. *Conner*,

(continued...)

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*, 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," be operated so that, "when viewed in its entirety," it "is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a).

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[26](...continued)
515 U.S. 472 (1995).

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 ("[I]t does not matter whether the risk [of harm] comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk."); *Wilson* v. *Seiter*, 501 U.S. 294, 299 n.1 (1991) ("[I]f an individual prisoner is deprived of needed medical treatment, that is a condition of *his* confinement, whether or not the deprivation is inflicted upon everyone else."). 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 (remedy of

requiring "across-the-board" provision of family leave congruent and proportional to problem of employers relying on gender-based stereotypes); see also *Constantine*, 411 F.3d at 490 (comparing Title II favorably to Title I of the ADA, the Court noted that "it is more likely that disability discrimination in the context of a State's operation of public education programs will be unconstitutional than discrimination in the context of public employment"). 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 the effect of rendering 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 also *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 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, if this Court reaches the constitutional issue, it should hold that Congress validly abrogated Eleventh Amendment immunity to claims arising under Title II of the ADA.

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CERTIFICATE OF SERVICE

I certify that on April 9, 2010, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in this case who are registered CM/ECF users will be served electronically by the appellate CM/ECF system. Participants who are not registered CM/ECF users will be served via FedEx. Their address is below:

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CERTIFICATE REGARDING PRIVACY REDACTIONS AND VIRUS SCANNING

I certify (1) that all required privacy redactions have been made in this brief, in compliance with 5th Cir. Rule 25.2.13; (2) that the electronic submission is an exact copy of the paper document, in compliance with 5th Cir. R. 25.2.1; and (3) that the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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Dated: April 9, 2010

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I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect X4 and contains no more than 9,831 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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