UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

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|---|---|---|
| JOHN ASHLEY HALE, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Civil Action No. 2:06-cv-245-MTP |
| | ) | |
| RON KING, *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

**INTERVENOR UNITED STATES' MEMORANDUM OF LAW**


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**MISCELLANEOUS:**

The United States files this memorandum as intervenor, pursuant to 28 U.S.C. 2403(a), in defense of the constitutionality of 42 U.S.C. 12202, which abrogates States' Eleventh Amendment immunity for private claims under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Circuit vacated this Court's "unnecessary" finding that Title II does not validly abrogate sovereign immunity and instructed this Court instead to determine whether the plaintiff states a Title II claim before making any further constitutional ruling. See *Hale* v. *King*, 642 F.3d 492, 503-504 (5th Cir. 2011) (per curiam). Accordingly, the State primarily asks this Court to find that plaintiff's allegations do not make out a Title II claim, see Mem. in Supp. of Mot. to Dismiss 8-12 (State Br.), a question on which the United States takes no position.

The State, however, also asks this Court in the alternative to once again rule on the validity of Title II's abrogation of sovereign immunity. See State Br. 12-16. In accordance with the Fifth Circuit's ruling, as well as *United States* v. *Georgia*, 546 U.S. 151 (2006), this Court should not reach that question unless and until it determines that plaintiff has stated a Title II claim. Should it need to reach the question, this Court should find that Title II validly abrogates sovereign immunity in the prison context.

## STATEMENT OF THE CASE

1. After numerous hearings and other fact-finding, Congress concluded in 1990 that, "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Based on these findings, Congress enacted the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327, to establish a "comprehensive national

mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1).

Part of that national mandate is Title II of the ADA, which addresses discrimination by state and local governmental entities in the operation of public services, programs, and activities. See 42 U.S.C. 12131-12165. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. The public entity must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability," unless such modifications would "fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7).

A public entity must ensure that each service, program, or activity, "when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). To comply with this mandate, a public entity need not necessarily make accessible each facility that existed prior to 1992, 28 C.F.R. 35.150(a)(1), nor must it take any action that it can demonstrate would result in "undue financial and administrative burdens." 28 C.F.R. 35.150(a)(3). It must, however, make "readily accessible" any facility that is newly constructed or altered after 1992. 28 C.F.R. 35.151(a).

Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment," to enact the ADA. 42 U.S.C. 12101(b)(4). It intended to abrogate the States' sovereign immunity with respect to all private claims under the ADA. See 42 U.S.C. 12202. The Supreme Court has held that this attempted abrogation is invalid with respect to claims under Title I, which covers employment, because Congress made no record of "a pattern of

irrational state discrimination in employment against the disabled." See *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368 (2001). On the other hand, it held this abrogation valid with respect to Title II claims that enforce the right of access to courts, see *Tennessee* v. *Lane*, 541 U.S. 509, 533-534 (2004), and Title II claims that also constitute constitutional violations, see *United States* v. *Georgia*, 546 U.S. 151, 159 (2006).

2. Plaintiff John Ashley Hale, acting *pro se*, sued the State of Mississippi and a number of individuals who work for the South Mississippi Correctional Institute, where he formerly was an inmate, and the State's Department of Corrections. Among other things, Hale alleges that he was designated a "medical class III" prisoner because of certain physical infirmities. As a result, Hale alleges, he was not permitted to engage in various activities, such as work programs, although he was physically capable of carrying them out. Hale contends that the defendants thereby violated Title II of the ADA and seeks monetary damages. This Court, without first determining whether Hale's allegations stated a Title II claim, dismissed his Title II claim on sovereign immunity grounds, finding that Title II does not validly abrogate state sovereign immunity in the prison context.

3. The Fifth Circuit affirmed the dismissal of Hale's complaint on different grounds and remanded for further proceedings. *Hale* v. *King*, 642 F.3d 492 (5th Cir. 2011) (per curiam). It held that Hale failed to plead that his various "ailments substantially limited him in the performance of a major life activity." *Id.* at 501. Accordingly, Hale had not shown that he was an "individual with a disability," and so he was not entitled to any accommodation under Title II. See *id.* at 500 & n.18. Additionally, the Fifth Circuit found, Hale had not pleaded facts that plausibly suggested that the defendants regarded him as having a disability. *Id.* at 502-503.

Having found that Hale failed to plead a Title II claim, the Fifth Circuit remanded for this Court to permit Hale to amend his complaint. *Hale*, 642 F.3d at 503. Finding it "unnecessary" to adjudicate the validity of Title II's abrogation of sovereign immunity until such a time as Hale is found to have pleaded a valid Title II claim, the Fifth Circuit vacated this Court's abrogation ruling. *Ibid.*

4. This Court held a hearing to give Hale an opportunity to further articulate his Title II allegations. The State then moved to dismiss, arguing that (1) Hale failed to make new allegations that constituted a Title II claim; and (2) Title II does not validly abrogate the States' sovereign immunity. The United States intervened to defend the constitutionality of Title II's abrogation of sovereign immunity.

## ARGUMENT

### I. This Court Should Determine First Whether Plaintiff's Allegations State A Title II Claim.

In accordance with the Fifth Circuit's instructions, as well as Supreme Court caselaw, this Court should determine whether plaintiff's allegations state a Title II claim before reaching the constitutionality of Title II's abrogation of sovereign immunity. The United States takes no position on whether Hale's allegations now state a Title II claim.

The Fifth Circuit specifically found that consideration of the State's constitutional arguments "is unnecessary unless and until Hale has stated a violation of Title II." *Hale*, 642 F.3d at 503. Accordingly, it vacated this Court's constitutional ruling and instructed this Court on remand to instead determine first "whether Hale's amended allegations state a claim for relief under Title II," and only then to adjudicate "any other issues that flow from the court's determinations." *Id.* at 504.

The appellate court's instructions are consistent with *United States* v. *Georgia*, 546 U.S. 151 (2006). In *Georgia*, the state defendants argued that Title II failed to validly abrogate the States' Eleventh Amendment immunity in the prison context. The Court held that Title II validly abrogates that immunity for any claims that also constitute constitutional violations. It declined to decide any further questions about the validity of Title II's abrogation provision, instead remanding for lower courts to determine whether the plaintiff alleged any valid Title II claims that did not also state constitutional violations. *Id.* at 159.

In doing so, *Georgia* set forth a three-step process for how Eleventh Amendment immunity challenges in Title II cases should proceed. Courts must first determine "which aspects of the State's alleged conduct violated Title II." *Georgia*, 546 U.S. at 159. If plaintiff has made out a Title II violation, a court next should determine "to what extent such misconduct also violated the Fourteenth Amendment." *Ibid.* Finally, and only if a court finds that a State's "misconduct violated Title II but did not violate the Fourteenth Amendment," it should reach the question "whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Ibid.*

Accordingly, *Georgia* requires this Court, before deciding the abrogation question, to determine "if any aspect of the [state defendant's] alleged conduct forms the basis for a Title II claim." *Bowers* v. *NCAA*, 475 F.3d 524, 553 (3d Cir. 2007), amended on reh'g, Mar. 8, 2007; accord *Buchanan* v. *Maine*, 469 F.3d 158, 172-173 (1st Cir. 2006). As the Fifth Circuit observed in this case, proceeding in that order is in keeping with the "fundamental and longstanding principle of judicial restraint" that "courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Hale*, 642 F.3d at 503 n.38 (quoting *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988)); accord *Ashwander* v. *TVA*, 297 U.S. 288,

347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

## II. Title II Validly Abrogates Sovereign Immunity In The Prison Context.

Should this Court need to reach the question, it should find that Title II validly abrogates the States' sovereign immunity in the prison context. Title II was enacted "against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Tennessee* v. *Lane*, 541 U.S. 509, 524 (2004). Pursuant to Section Five of the Fourteenth Amendment, Congress has broad authority to remedy that long and well-documented history of disability discrimination. *Id.* at 528-529. Congress's response – to bar overt discrimination on the basis of disability and require reasonable accommodations with respect to all public services, including the prison services at issue here – was congruent and proportional to that record of discrimination.

1. As a preliminary matter, all other requirements for abrogation are satisfied here. Although the Eleventh Amendment ordinarily renders a State immune from suits in federal court by private citizens, Congress may abrogate that immunity so long as 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). There is no question that Congress unequivocally expressed its intent to abrogate the States' sovereign immunity with respect to claims under the ADA. See 42 U.S.C. 12202; *Lane*, 541 U.S. at 518. Similarly, 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.

Additionally, it is now settled that the long and broad history of official discrimination suffered by individuals with disabilities authorized Congress to pass legislation under its Section Five authority to protect their constitutional rights with respect to all public services and programs. See *Lane*, 541 U.S. at 524; accord *Bowers* v. *NCAA*, 475 F.3d 524, 554 & n.35 (3d Cir. 2007), amended on reh'g, Mar. 8, 2007. Section Five legislation "must be targeted at conduct transgressing the Fourteenth Amendment's substantive provisions." *Coleman* v. *Court of Appeals of Md.*, 132 S. Ct. 1327, 1333 (2012) (internal quotation marks and citation omitted). As the Supreme Court held in *Lane*, Title II as a whole satisfies this requirement. Most circuits have read *Lane*, correctly, as "foreclos[ing] the need for further inquiry" with respect to whether Congress compiled sufficient evidence of discrimination to trigger its authority to legislate. See *Klingler* v. *Director, Dep't of Revenue*, 455 F.3d 888, 896 (8th Cir. 2006); accord *Bowers*, 475 F.3d at 554-555 & n.35; *Constantine* v. *Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 487 (4th Cir. 2005); *Association for Disabled Ams., Inc.* v. *Florida Int'l Univ.*, 405 F.3d 954, 958 (11th Cir. 2005); see also *McCarthy* v. *Hawkins*, 381 F.3d 407, 423 (5th Cir. 2004) (Garza, J., concurring in part and dissenting in part). But see *Guttman* v. *Khalsa*, 669 F.3d 1101, 1117 (10th Cir. 2012).

Accordingly, "[t]he 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.

2. The State offers little argument in support of its contention that Title II's abrogation of sovereign immunity is invalid in the prison context. It argues only that Title II requires more in this context than the Constitution does. See State Br. 15. This statement is true but irrelevant, because in remedying the extensive history of public disability discrimination, Congress was not limited to barring actual constitutional violations. It was entitled to "enact so-called 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). In particular, Congress had the authority to ban "practices that are discriminatory in effect, if not in intent," notwithstanding that the Equal Protection Clause bans only intentional discrimination. *Lane*, 541 U.S. at 520. The only limit on this broad Section Five authority is that there must be "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).

The proper question, then, "is not whether Title II exceeds the boundaries of the Fourteenth Amendment" in this context, "but *by how much*." *Constantine*, 411 F.3d at 490. The State offers no argument at all as to this question. Nor is the State's position bolstered by *Baker* v. *University of Texas Health Science Center Houston*, No. 08-cv-1908, 2011 WL 1549263 (S.D. Tex. Apr. 21, 2011), on which it heavily relies. See State Br. 15-16. *Baker* did not engage in any congruence and proportionality analysis, but rather found that it was bound, by the Fifth Circuit's original decision in this case, to hold that Title II does not validly abrogate sovereign immunity. See *Baker*, 2011 WL 1549263, at *3-4 (citing *Hale* v. *King*, 624 F.3d 178, 184-185 (5th Cir. 2010)). The Fifth Circuit has withdrawn that original decision and replaced it with one that makes no finding regarding the validity of Title II's abrogation, see 642 F.3d 492, leaving no basis at all for *Baker*'s determination.

Given the State's failure to meaningfully brief this question, this Court can simply hold that it has waived any argument that Title II does not validly abrogate sovereign immunity. But in any case, for the reasons given below, Title II's abrogation is valid in this context.

3. Properly at issue here is the constitutionality of Title II's abrogation of sovereign immunity with respect to the broad "class of cases" involving prison conditions. See *Lane*, 541 U.S. at 531 (finding Title II's abrogation valid with respect to "the class of cases implicating the accessibility of judicial services"). *Lane* held that some classes of cases are so different from others, in the rights implicated and "the manner in which the legislation operates to enforce that particular guarantee," as to make those applications of Title II fully severable. See 541 U.S. at 530-531 & n.18. For example, Title II's protections for "the accessibility of judicial services" could readily be severed from those involving voting rights or access to hockey rinks, because it was "unclear what, if anything, examining Title II's application to hockey rinks or voting booths can tell us about whether Title II substantively redefines the right of access to the courts." *Id.* at 531 & n.18.

At the same time, *Lane* made clear that a court adjudicating the abrogation question must consider a broader context than the facts of the particular case before it. The plaintiffs in *Lane* both were paraplegics who contended that courthouses were inaccessible to individuals who relied upon wheelchairs. See 541 U.S. at 513. As a result, one plaintiff alleged that he was unable to appear to answer charges against him, while the other alleged that she could not perform her work as a court reporter. *Id.* at 513-514. The Supreme Court did not limit the abrogation question before it to either the specific judicial services (such as criminal adjudication) alleged to be inaccessible or the particular sort of access sought (wheelchair access to a courtroom). Rather, it framed the question broadly, with respect "to the class of cases implicating the accessibility of judicial services." *Id.* at 531.

Accordingly, the Court found relevant to its analysis a number of constitutional rights and fact patterns not implicated by the plaintiffs' claims. Neither of the *Lane* plaintiffs alleged that he

or she was excluded from jury service or subjected to a jury trial that excluded persons with disabilities. Neither was prevented from participating in civil litigation, nor did either allege a violation of First Amendment rights. The nature of plaintiffs' disabilities did not implicate Title II's requirement that government, in the administration of justice, make available measures such as sign-language interpreters or materials in Braille. Yet the Supreme Court broadly considered the full range of constitutional rights and Title II remedies potentially at issue in the broad "class of cases implicating the accessibility of judicial services." *Lane*, 541 U.S. at 531. Similarly, in *Constantine*, the Fourth Circuit considered Title II's application in "the context of public higher education," see 411 F.3d at 488, not with respect to the narrow facts of the plaintiff's case.

Following *Lane*, this Court should determine the congruence and proportionality of Title II within the entire "class of cases" involving prison conditions. See *Lane*, 541 U.S. at 531. Individuals with disabilities face similar discrimination in this class of cases, implicating similar Eighth Amendment, due process, equal protection, and other constitutional concerns, while "the manner in which the legislation operates" to remedy such discrimination is comparable in such cases. See *Lane*, 541 U.S. at 531 n.18. Moreover, individuals with disabilities often suffer multiple related discriminatory actions arising out of different aspects of their prison conditions. Accordingly, this class of cases meaningfully can be severed from other Title II applications and considered together for purposes of the congruence and proportionality analysis.

4. Having amply documented a history of disability discrimination in public services more generally, Congress was not required to repeat the exercise with respect to the specific context of prison conditions. However, the history of discrimination in this context provides evidence that Title II is a congruent and proportional remedy. Adjudicating the validity of Title II as Section Five legislation in any particular context requires consideration of: (1) the

constitutional rights Title II protects in that context, see *Lane*, 541 U.S. at 522; (2) the history of those rights being violated, see *id.* at 529; and (3) whether Title II is "an appropriate response to this history and pattern of unequal treatment," see *id.* at 530. Put differently, whether Title II validly enforces constitutional rights in a particular context "is a question that 'must be judged with reference to the historical experience which it reflects.'" *Id.* at 523 (quoting *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966)).

a. In the prison context, as in the access-to-courts context at issue in Lane, Title II protects not only the Equal Protection Clause's "prohibition on irrational disability discrimination," but also "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." See *Lane*, 541 U.S. at 522-523. The prison context implicates a "constellation of rights." See *United States* v. *Georgia*, 546 U.S. 151, 162 (2006) (Stevens, J., concurring).

Although incarceration in a state prison necessarily entails the curtailment of many rights, 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 Equal Protection Clause prohibits arbitrary treatment based on irrational stereotypes or hostility. And prisoners retain a variety of constitutional rights subject to heightened constitutional scrutiny, 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), the right to "enjoy substantial religious freedom," *Wolff* v. *McDonnell*, 418 U.S. 539, 556 (1974), the right to marry, see *Turner* v. *Safley*, 482 U.S. 78, 95 (1987), and that much of the First Amendment right of speech that is "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). Meanwhile, the Due Process Clause requires States to afford inmates fair proceedings in a range of circumstances that arise in the prison setting. These include 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); see also *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 have a constitutional right under the Eighth Amendment to be free from "cruel and unusual punishments." 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 it imposes are prohibitions on the use of excessive physical force, see *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) (citations omitted). 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).

b. A widespread and deeply-rooted pattern of official indifference (at best) to the health, safety, suffering, and medical needs of prisoners with disabilities has been well documented, including in materials before Congress when Title II was debated and enacted. The record of unconstitutional treatment of inmates with disabilities by state and local governments is extensive. Indeed, it arguably exceeds the evidence of violations of the right to access the courts presented in

*Lane*, see 541 U.S. at 524-525 & n.14, 527, as well as the evidence of unconstitutional leave policies presented in *Hibbs*, see 538 U.S. at 730-732.

Not only is the history of discrimination against individuals with disabilities in this context well documented, but the consequences of that discrimination are grave. The appropriateness of Section Five legislation turns not only on the pervasiveness of discrimination, but also on the "gravity of the harm [the law] seeks to prevent." See *Lane*, 541 U.S. at 523. The difficulties individuals with disabilities face in society are magnified in prisons, because a prison's regimented nature often means that an individual who cannot do something in the prescribed manner may not be permitted to do it at all. The rights of religious freedom and free speech, for example, mean little to an inmate if his or her disabilities preclude participation in those specific religious activities or other gatherings that are permitted. And the right of access to the courts may be hollow if an inmate cannot gain access to library resources. See *Lewis* v. *Casey*, 518 U.S. 343, 351 (1996). Moreover, the pervasive regulation of incarcerated individuals, as well as the perpetual and often discretionary intrusion into every aspect of day-to-day life, makes the penal context an area of acute constitutional concern.

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*. Listed below are just a few of the many ways this discrimination has manifested.[1]

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[1] For a more extensive list of cases in which state and local prisons and jails infringed upon the constitutional rights of inmates with disabilities, see Appendix A to the United States' Brief as Petitioner to the United States Supreme Court in *United States* v. *Georgia*, Nos. 04-1203

(continued…)

**Overtly discriminatory treatment**: Inmates with disabilities have regularly suffered overt and intentional discrimination at the hands of prison officials. A report by the California Attorney General's 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*); see also *id.* at 110 (recommending that a task force "establish policies and procedures for the safe arrest, transportation and detention of people with disabilities"). 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." *Civil Rights of Instit. Persons: Hearings on S. 1393 Before the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 234 (1977) (*S. 1393 Hearings*). 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).

**Permitting victimization**: Inmates with disabilities are uniquely susceptible to being raped, assaulted, and preyed upon by other inmates, and prison officials have repeatedly failed to provide adequate protection. For example, Congress was told at one hearing of the repeated rape of a mentally retarded inmate: "The mentally retarded were victimized and given no care." See *Civil Rights of the Institutionalized: Hearings on S. 10 Before the Senate Subcomm. on the*

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(…continued)
& 04-1236 (July 29, 2005).

*Constitution*, 96th Cong., 1st Sess. 474 (1979) (*S. 10 Hearings*). This problem has been well documented, yet prison officials regularly have shown little interest in addressing it.[2]

**Inaccessible living facilities**: Prisons around the country have shown an "[i]nadequate ability to deal with physically handicapped accused persons and convicts" in the most basic of needs, "e.g., accessible jail cells and toilet facilities." See United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 168 (Sept. 1983) (*Spectrum*).[3] A recent survey of state prisons revealed, even years after the passage of the ADA and other statutory protections, only one out of 38 responding States reported having grab bars or chairs in prison showers, while only ten provided wheelchair-accessible cells. J. Krienert, *et al.*, *Inmates with Physical Disabilities: Establishing a Knowledge Base*, 1 S.W. J. of Crim. Just. 13, 20 (2003). As a result, inmates with disabilities have suffered serious and preventable injuries. See, *e.g.*, *Kaufman* v. *Carter*, 952 F. Supp. 520 (W.D. Mich. 1996) (amputee hospitalized after fall in inaccessible jail shower).

**Segregation**: Rather than accommodate the needs of inmates with individuals, prison officials often have consigned them to maximum security, lock-down facilities, or other atypically

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[2] See 126 Cong. Rec. 3713 (1980) (Statement of 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"); National Inst. of Corr., U.S. Dep't of Justice, *The Handicapped Offender* 4 (1981) (noting the problem of abuse and exploitation of inmates with disabilities); *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. 240 (1977) ("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."); M. Santamour & B. West, U.S. 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).

[3] This report can be accessed at http://www.eric.ed.gov/PDFS/ED236879.pdf.

and inappropriately harsh conditions of confinement. For example, 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." *The Americans With Disabilities Act of 1988: Joint Hearing Before the Senate Subcommittee on the Handicapped and the House Committee on Select Education*, 100th Cong., 2d Sess. 77 (1988). In California, inmates with disabilities often have been unnecessarily "confined to medical units where access to work, job training, recreation and rehabilitation programs is limited." *Calif. Report* 103. One inmate with HIV was unconstitutionally housed in a 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. *Nolley* v. *County of Erie*, 776 F. Supp. 715 (W.D.N.Y. 1991). Elsewhere, 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. *Kendrick* v. *Bland*, 541 F. Supp. 21, 26 (W.D. Ky. 1981). One inmate with a mental illness was confined without notice or an opportunity to be heard for 56 days in solitary confinement. He was kept 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* v. *Deland*, 641 F.2d 729, 730-732 (10th Cir. 1981); see also *Carty* v. *Farrelly*, 957 F. Supp. 727, 741 (D.V.I. 1997) (inmate was placed in higher security prison, with other inmates who posed danger to him, solely because he used a cane).

**Denying access to services**: Many States have structured their prison programs and operations in a manner that denies 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. See, *e.g.*, *Spectrum* 168 (identifying widespread problem of "[i]nadequate * * * rehabilitation programs" for inmates with disabilities); *Calif. Report* 102 ("jail visiting rooms and jails have architectural barriers that make them inaccessible to people who use wheelchairs"); *id.* at 102-103 (pointing to the inaccessibility of "visiting, showering, and recreation areas in jails and prisons"). Along with inaccessible facilities, negative stereotypes about the abilities and needs of inmates with disabilities often underlie the selective denial of services that other inmates routinely receive. See National Inst. of Corr., U.S. Dep't of Justice, *The Handicapped Offender* 4 (1981) (*The Handicapped Offender*) (stereotypes about abilities of mentally ill offenders impair their access to work programs); *Calif. Report* 102 ("Too many criminal justice policies" regarding individuals with disabilities remain the product of "erroneous myths and stereotypes."); *S. 10 Hearings* 474 ("The mentally retarded were * * * given no care, educational or special programs.").

Inmates with disabilities have at least the same interest in access to the programs, services, and activities provided to other inmates as individuals with disabilities outside of prison have to the counterpart programs, services, and activities. Indeed, for many 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 (inmate in wheelchair "had not been out of the second floor dormitory in the Draper Prison for years"). Moreover, inmates with disabilities often are denied access to programs that are required for early release. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 208 (1998) (inmate with disability 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) (hearing-impaired inmate denied access to sex offender program that was required as a condition of parole), cert. denied, 528 U.S. 1120 (2000).

**Due Process violations**: Individuals with disabilities, particularly those with hearing and visual impairments, have suffered widespread deprivation of their due process and other rights in prison due to official failure to communicate with them. 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." *Joint Hearing on H.R. 2273, The Americans with Disabilities Act of 1989 Before the House Subcomms. On Select Education and Employment Opportunities*, 101st Cong., 1st Sess. 63 (1989). This failure to communicate vital rights continues during incarceration. For example, one case found a widespread failure to conduct parole and parole revocation proceedings in a manner that would allow inmates with various disabilities to understand and participate. See *Armstrong* v. *Davis*, 275 F.3d 849 (9th Cir. 2001), cert. denied, 537 U.S. 812 (2002). In another case, a deaf, mute, and vision-impaired inmate was denied communication assistance, including in disciplinary proceedings, counseling sessions, and medical treatment. *Bonner* v. *Arizona Dep't of Corr.*, 714 F. Supp. 420 (D. Ariz. 1989).

**Failure to provide medical care**: Finally, individuals with disabilities have suffered from the systematic denial of basic medical care, in violation of the Eighth Amendment. To some extent, this is a symptom of a larger problem, in that "[m]edical care at best in most State systems barely scratches the surface of constitutional minima." *AIDS and the Administration of Justice: Hearing Before the House Subcomm. on Courts, Civil Liberties, and the Admin. of Justice*, 100th Cong., 1st Sess. 39 (1987); see *ibid.* (medical system in Illinois prisons had been held unconstitutional). But the impact weighs particularly heavily on individuals with disabilities, who often suffer greatly from the denial of basic medical services.

For example, as noted in the House Report to the ADA, persons with disabilities, such as epilepsy, are frequently "deprived of medications while in jail." H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 50 (1990); see, *e.g.*, *Miranda* v. *Munoz*, 770 F.2d 255, 258-259 (1st Cir. 1985) (failure to provide medications for epilepsy caused prisoner's death and violated Eighth Amendment). One paralyzed inmate was "forced to live" in "squalor * * * as a result of being denied a wheelchair." *Week*s v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993).

A congressional investigation into prison conditions found that 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." *S. 1393 Hearings* 1067. "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.[4]

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[4] See *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 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").

Meanwhile, the systematic failure to provide meaningful psychiatric care in prison is well documented and has serious consequences, given the high number of prisoners with various forms of mental illness.[5] Rather than provide treatment, Louisiana confined "inmates who are in need of psychiatric care and treatment * * * in the so called psychiatric unit of the Louisiana State Penitentiary," a practice that Congress found "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). The lack of treatment of mentally ill patients in other jurisdictions has been found to be equally constitutionally deficient. See, *e.g.*, *S. 1393 Hearings* 1066-1067 (Alabama Board of Corrections provides "constitutionally inadequate" care to inmates who are mentally retarded or suffer from mental illness).

Simply put, inmates with mental disabilities have broadly been denied "the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834 (citation omitted).[6]

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[5] See, *e.g.*, *The Handicapped Offender* 4 (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.").

[6] See, *e.g.*, *S. 1393 Hearings* 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."); *S. 10 Hearings* 474 ("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*, Pt. 8, 92d Cong., 2d Sess. 92 (1972) ("Inmates with serious medical conditions do not receive necessary medical care. * * * [N]o psychological treatment is usually provided."); *id.* at

(continued…)

5. Against that background of discrimination, Title II of the ADA is well tailored in the prison context – as in others – to protect against and remedy constitutional violations without infringing on public entities' legitimate prerogatives. See *Coleman* v. *Court of Appeals of Md.*, 132 S. Ct. 1327, 1333 (2012) ("Congress must tailor legislation enacted under §5 to remedy or prevent conduct transgressing the Fourteenth Amendment's substantive provisions.") (internal quotation marks and citations omitted). It is a "limited" remedy that is "reasonably targeted to a legitimate end" in the prison context, just as it is in the context of judicial services. *Lane*, 541 U.S. at 531-533. Accordingly, it is an "appropriate response to this history and pattern of unequal treatment." *Id.* at 530.

In remedying the extensive history of public disability discrimination, Congress was entitled to "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Hibbs*, 538 U.S. at 727-728. What Congress may not do is pass legislation "which alters the meaning of" the constitutional rights purportedly enforced. *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997). "[T]he line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in

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(…continued)
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*, Pt. 20, 91st Cong., 1st Sess. 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).

determining where it lies." *Id.* at 519-520. The ultimate question is whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.

In the prison context, Title II regulates considerable conduct that is either outlawed by the Constitution itself or creates a substantial risk of constitutional violation. It targets exclusively governmental action that is directly and comprehensively regulated by the Constitution. And it focuses on government action that threatens fundamental rights in the ways described above.

That Title II requires States to take certain actions that the Constitution itself might not compel does not make it a disproportionate response. Having identified a constitutional problem, Congress was entitled to pass prophylactic legislation that requires state agencies and other public entities to reasonably accommodate individuals with disabilities in general, not simply in those encounters in which a court would find a due process or equal protection violation. The Supreme Court upheld the family leave provisions of the Family and Medical Leave Act as a valid exercise of Section Five authority, notwithstanding that the FMLA – meant to remedy the long history of employment discrimination against women – requires the "across-the-board" provision of family leave to men and women alike. See *Hibbs*, 538 U.S. at 737.

By prohibiting insubstantial reasons for failing to accommodate inmates with disabilities, Title II prevents difficult-to-uncover discrimination that could otherwise evade judicial review. See 42 U.S.C. 12101(a)(5) (describing "various forms of discrimination," including but not limited to "outright intentional exclusion," to which individuals with disabilities are subject). When public officials make discretionary decisions, as they often must do in this context, there is a real risk that those decisions will be based on unspoken, irrational assumptions, leading to "subtle discrimination that may be difficult to detect on a case-by-case basis." *Hibbs*, 538 U.S. at 736.

Furthermore, a "proper remedy for an unconstitutional exclusion" does not simply "bar like discrimination in the future," but also "aims to eliminate so far as possible the discriminatory effects of the past." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) (citation and alterations omitted). A simple ban on overt discrimination would have frozen in place the effects of States' prior official exclusion and isolation of individuals with disabilities, under which persons with disabilities were invisible to government officials and planners, resulting in inaccessible buildings and impassable procedures. In particular, it would have done nothing regarding prison procedures and facilities that were constructed without regard to whether they arbitrarily excluded qualified inmates with disabilities.

b. Title II accomplishes these critical objectives while minimizing the burden of compliance on States. Title II prohibits only discrimination "by reason of * * * disability," 42 U.S.C. 12132, and so States retain the discretion to exclude persons from programs, services, or benefits for any lawful reason unrelated to disability. Moreover, Title II "does not require States to employ any and all means" to make public services accessible for people with disabilities, but rather requires only certain "'reasonable modifications' that would not fundamentally alter the nature of the service provided." *Lane*, 541 U.S. at 531-532 (quoting 42 U.S.C. 12131(2)). Public entities need not "compromise their essential eligibility criteria for public programs." *Id.* at 532; see 28 C.F.R. 35.104 (defining "[q]ualified individual with a disability" as individual with a disability "who, with or without reasonable modifications to rules, policies, or practices, * * * meets the essential eligibility requirements"). Rather, they retain the power to set core eligibility standards, and an individual with a disability must meet such standards "before he or she can even invoke the nondiscrimination provisions of the statute." *Constantine*, 411 F.3d at 488.

In particular, a prison need not make any accommodation for an inmate that would "pose[] a direct threat to the health or safety of others," 28 C.F.R. 35.139(a), or otherwise compromise security. Title II simply requires that the "direct threat" inquiry be made even-handedly, without reliance on stereotypes about the capabilities of individuals with disabilities or refusal to reconsider requirements and procedures that unnecessarily exclude them. See, *e.g.*, *Doe* v. *County of Centre*, 242 F.3d 437, 449 (3d Cir. 2001) (finding that "analysis of the ADA's direct threat exception should involve an individualized inquiry into the significance of the threat posed").

Nor does Title II require States to "undertake measures that would impose an undue financial or administrative burden." *Lane*, 541 U.S. at 532; see *Olmstead* v. *L.C.*, 527 U.S. 581, 603-605 (1999) (describing limitations on State's responsibility); accord *Constantine*, 411 F.3d at 488-489. For example, Title II requires adherence to certain architectural standards only for new construction and alterations, when facilities can be made accessible at little additional cost. 28 C.F.R. 35.151. By contrast, a public entity need not engage in costly structural modification for older facilities if it can make services accessible in other ways, such as by "relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services." *Lane*, 541 U.S. at 532. And rather than requiring that a qualifying inmate necessarily be granted every requested accommodation, Title II simply requires that, "when viewed in its entirety," a prison program or service "is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). These important limitations on the scope of Title II "tend to ensure Congress' means are proportionate to ends legitimate under § 5." *Constantine*, 411 F.3d at 489 (quoting *City of Boerne*, 521 U.S. at 533).

Indeed, in requiring reasonable consideration of a prisoner's needs balanced against a prison's legitimate interests, Title II's carefully circumscribed accommodation mandate largely tracks the analysis required by the Constitution itself. Claims by inmates of violations of certain constitutional rights are subject to the standard set forth in *Turner* v. *Safley*, 482 U.S. 78 (1987). This analysis takes into consideration the State's justification for a challenged practice, whether the State's interests and those of the prisoner both can be served through "alternative means," and the potential impact changing the practice will have on security guards, other inmates, and allocation of prison resources, see *id.* at 90 – exactly the sort of considerations that are relevant to a Title II claim.

Individualized consideration of an inmate's needs also is 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 * * * 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 requires 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*, 984 F.2d at 187. Moreover, like Title II, 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).

To be sure, Title II sometimes requires somewhat closer scrutiny of the reasons for official action than does the Constitution itself. But Congress was entitled to impose such a prophylactic

remedy, given the history of unconstitutional treatment of inmates with disabilities. In the prison context, where the perpetual and often discretionary intrusion of official actors into every aspect of day-to-day life implicates a broad array of constitutional rights and interests, 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).

For all these reasons, Title II's requirements are congruent and proportional to the constitutional violations they remedy and prevent in the prison context. At a minimum, in this context as in others, 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).[7]

[7] The Court in *Lane* did not examine the congruence and proportionality of Title II as a whole because it found that the statute was valid Section Five legislation as applied to the class of cases before it. Similarly, because Title II is valid Section Five legislation as applied to discrimination in prison, this Court need not consider the validity of Title II as a whole. It remains the position of the United States, however, that Title II as a whole is valid Section Five 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 *Lane* determined is an "appropriate subject for prophylactic legislation." 541 U.S. at 529.

## CONCLUSION

This Court should determine first whether the plaintiff's allegations make out a claim under Title II of the Americans with Disabilities Act of 1990. If it needs to reach the question, this Court should find that Title II validly abrogates the States' sovereign immunity in the prison context.

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that, on August 13, 2012, the foregoing "Intervenor United States' Memorandum of Law" was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all counsel of record.

I further certify that on August 13, 2012, the United States served a copy of the foregoing document on the following party by first-class mail:

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