No. 02-13348

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TRACY MILLER,

Plaintiff-Appellant

v.

RONALD KING,

Defendant-Appellee

WAYNE GARNER, et al.,

Defendants

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

PETITION FOR REHEARING EN BANC FOR THE UNITED STATES AS INTERVENOR

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Counsel for Intervenor United States hereby certifies, in accordance with F.R.A.P. 26.1 and 11th Cir. R. 26.1-1, that the following persons may have an interest in the outcome of this case:

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REGULATIONS:

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

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

1. Whether the statutory provision abrogating Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq*., is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, as applied to the class of cases implicating prisoners' rights.
2. Whether this Court is required to consider arguments in favor of a statute's constitutionality before striking down that statute when such arguments are offered by the United States, who has intervened as of right in the appeal for the express purpose of defending the constitutionality of the statute at stake.

_____

SARAH E. HARRINGTON
Attorney of Record for United States

STATEMENT OF THE ISSUE

Whether the statutory provision abrogating Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq*., is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, as applied to the class of cases implicating prisoners' rights.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

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

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

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

States to intervene as of right in any case in which the constitutionality of a federal statute is challenged for the purpose of presenting "argument on the question of constitutionality." After the United States Supreme Court issued its opinion in *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), the parties filed supplemental briefs addressing the application of *Lane* to this case, and the Court heard argument on July 20, 2004.

On September 14, 2004, the Court issued its opinion in this case affirming the district court's dismissal of Miller's claims for money damages against the state entity on the basis that the State is immune under the Eleventh Amendment from suits under Title II because Title II is not valid Section 5 legislation in the prison context. For the reasons stated in this petition, that conclusion was in error.

ARGUMENT

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

This Court should rehear this case en banc because the panel erred in two respects when it concluded that Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq*., is not valid legislation under Section 5 of the Fourteenth Amendment in the prison context. First, contrary to instructions from the Supreme Court in *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), the panel refused to consider the panoply of constitutional rights implicated in the class of cases

implicating prisoners' rights.[1] And second, the panel struck down the statute while explicitly refusing to consider arguments put forth by intervenor United States in defense of the statute, erroneously stating that the United States was not a party to the appeal.

1. In considering the constitutionality of Title II's abrogation of States' Eleventh Amendment immunity, the panel engaged in the three-part analysis set out in the line of Supreme Court cases stretching from *City of Boerne* v. *Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997), to *Tennessee* v. *Lane*. In the first step of the *Boerne* analysis, a court must "identify the constitutional right or rights that Congress sought to enforce when it enacted Title II." *Lane*, 124 S. Ct. at 1988. The Court in *Lane* determined that Title II "seeks to enforce [the Equal Protection Clause's] prohibition on irrational disability discrimination," and "seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Ibid.* The Court then identified the range of constitutional rights at issue in that case, which concerned the ability of persons with disabilities to access courts and judicial services.

The panel in *Miller* recognized that the *Lane* Court "adopted a[n] as-applied approach in which the constitutionality of Title II is considered context by context."

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[1] The panel's opinion also conflicts with that of the only other court of appeals to consider, post-*Lane*, the constitutionality of Title II's abrogation in the prison context. See *Phiffer* v. *Columbia River Corr. Inst.*, 384 F.3d 791 (9th Cir. Sept. 13, 2004).

Miller v. *King*, No. 02-13348, slip op. 55 n.34 (attached). The panel also noted that this case arose in the prison context. Slip op. 36, 41, 54. But the panel then refused to consider the full range of constitutional rights implicated by the prison context, finding that the Eighth Amendment right to be free of cruel and unusual punishment was the only right implicated in the prison context because that is the only right that this particular plaintiff seeks to vindicate through his Title II claims.

As the United States argued in our supplemental post-*Lane* brief before the panel, there is a wide array of constitutional rights at stake in the class of Title II cases implicating prisoners' rights, and many of those rights are subject to heightened constitutional review. The *Lane* Court specifically noted that Title II seeks to enforce rights "protected by the Due Process Clause of the Fourteenth Amendment," 124 S. Ct. at 1988, and noted that one area targeted by Title II is "unequal treatment in the administration of * * * the penal system." *Id.* at 1989.

Although incarceration in a state prison necessarily entails the curtailment of many of an individual's constitutional rights, the Supreme Court has repeatedly held that prisoners must "be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson* v. *Palmer*, 468 U.S. 517, 523, 104 S. Ct. 3194, 3198 (1984). In addition, the very nature of prison life – the constant and pervasive governmental regulation of and imposition on the exercise of every constitutional right retained by incarcerated individuals, and the perpetual intrusion of the state into every aspect of day-to-day life – makes the penal context an area of acute constitutional concern,

implicating a broad array of constitutional rights and interests on the part of inmates with disabilities. Thus, the Court has found that a variety of constitutional rights subject to heightened constitutional scrutiny are retained by prisoners, including the right of access to the courts, *Younger* v. *Gilmore*, 404 U.S. 15, 92 S. Ct. 250 (1971), aff'g *Gilmore* v. *Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970); *Johnson* v. *Avery*, 393 U.S. 483, 89 S. Ct. 747 (1969), the right to "enjoy substantial religious freedom under the First and Fourteenth Amendments," *Wolff* v. *McDonnell*, 418 U.S. 539, 556, 94 S. Ct. 2963, 2974 (1974), the right to marry, *Turner* v. *Safley*, 482 U.S. 78, 95, 107 S. Ct. 2254, 2265 (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, 94 S. Ct. 2800, 2804 (1974).

Prisoners also retain rights under the Due Process Clause. *Wolff*, 418 U.S. at 556, 94 S. Ct. at 2974. The Due Process Clause imposes an affirmative obligation upon States to take such measures as are necessary to ensure that individuals, including those with disabilities, are not deprived of their life, liberty, or property without procedures affording "fundamental fairness." *Lassiter* v. *Department of Soc. Servs.*, 452 U.S. 18, 24, 101 S. Ct. 2153, 2158 (1981). The Due Process Clause requires States to afford inmates, including individuals with disabilities, fair proceedings in a range of circumstances that arise in the prison setting, including administration of antipsychotic drugs, *Washington* v. *Harper*, 494 U.S. 210, 221-222, 110 S. Ct. 1028, 1036-1037 (1990), involuntary transfer to a mental hospital,

Vitek v. *Jones*, 445 U.S. 480, 494, 100 S. Ct. 1254, 1264 (1980), and parole hearings, *Young* v. *Harper*, 520 U.S. 143, 152-153, 117 S. Ct. 1148, 1154 (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, 99 S. Ct. 2100, 2103 (1979) (parole); *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S. Ct. 2963 (1974) (good time credits); *id.* at 571-572 & n.19, 94 S. Ct. at 2982 & n.19 (solitary confinement); *Gagnon* v. *Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756 (1973) (probation).

Moreover, all persons incarcerated in state prisons, including persons with disabilities, have a constitutional right under the Eighth Amendment to be free from "cruel and unusual punishments." The Supreme Court has held that the Eighth Amendment both "places restraints on prison officials," and "imposes duties on those officials." *Farmer* v. *Brennan*, 511 U.S. 825, 832-833, 114 S. Ct. 1970, 1976-1977 (1994). Among the restraints imposed under the Amendment are prohibitions on the use of excessive physical force against prisoners, *Hudson* v. *McMillian*, 503 U.S. 1, 112 S. Ct. 995 (1992), and the "unnecessary and wanton infliction of pain," *Hope* v. *Pelzer*, 536 U.S. 730, 737, 122 S. Ct. 2508, 2514 (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, 114 S. Ct. at 1976-1977, and the duty to "take reasonable measures to guarantee the

safety of the inmates," *Hudson*, 468 U.S. at 526-527, 104 S. Ct. at 3200. Prison officials also may not display "deliberate indifference to serious medical needs of prisoners." *Estelle* v. *Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291 (1976).

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

implicated by plaintiffs' claims more broadly to include all constitutional rights implicated by the court-access context:

> The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant such as respondent Lane the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." The Due Process Clause also requires the States to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings. We have held that the Sixth Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of "identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." And, finally, we have recognized that members of the public have a right of access to criminal proceedings secured by the First Amendment.

Id. at 1988 (internal citations omitted). Thus, a number of the rights that the Court found to be at stake in *Lane* were not implicated by the claims of the particular plaintiffs in the case. For instance, neither plaintiff alleged that he or she was unable to participate in jury service or was subjected to a jury trial that excluded persons with disabilities from jury service. Similarly, neither plaintiff was prevented by his or her disability from participating in any civil litigation.

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

2. In evaluating the congruence and proportionality of Title II in the third step of the *Boerne* analysis, the panel compounded its original error in adopting an unduly straitened conception of the rights enforced by Title II. More specifically,

having refused to consider Title II's enforcement of any right other than the particular Eighth Amendment right asserted by Miller, the panel then wrongly concluded that Title II is not congruent and proportional because it enforces more rights in the prison context than just the Eighth Amendment. Slip op. 52 ("Title II does not merely proscribe a 'somewhat broader swath of conduct' than the Eighth Amendment, but prohibits a different swath of conduct that is far broader and even totally unrelated to the Eighth Amendment in many instances."). The panel cannot artificially train its constitutional focus on just the one right being enforced by a Title II lawsuit in a particular case and then complain that Title II is overbroad because it enforces other rights in the prison context as well. If the context is to be narrowly defined up front – which it should not, for the reasons explained in Point 1, *supra* – then the congruence and proportionality analysis must have a similarly narrow focus on its end, addressing only whether Title II as applied to Eighth Amendment claims is a congruent and proportional means of enforcing the Eighth Amendment.

The requirements of Title II are a congruent and proportional means of enforcing the range of constitutional rights at stake in the prison context. Although Title II requires States to take some affirmative steps to avoid discrimination, it "does not require States to compromise their essential eligibility criteria," requires only "'reasonable modifications' that would not fundamentally alter the nature of the service provided," and does not require States to "undertake measures that would impose an undue financial or administrative burden * * * or effect a

fundamental alteration in the nature of the service." *Id*. at 1993-1994.

Title II's carefully circumscribed accommodation mandate is consistent with the commands of the Constitution in the area of prisoners' rights. Claims by inmates of violations of certain constitutional rights are generally subject to analysis under the standard set forth by the Supreme Court in *Turner* v. *Safley*, 482 U.S. 78, 107 S. Ct. 2254 (1987), which takes into consideration the State's penological justification for a challenged practice, the availability of alternative means of serving the State's interests, as well as the potential impact a requested accommodation to such a practice will have on guards, other inmates, and allocation of prison resources. The Due Process Clause itself requires an assessment of the importance of the right at stake in a particular case as well as the circumstances of the individual to whom process is due. See *Goldberg* v. *Kelly*, 397 U.S. 254, 267-269, 90 S. Ct. 1011, 1020-1021 (1970).

Just as the *Turner* test and the Due Process Clause require a court to weigh the interests of an individual against the interests of the State, Title II also requires a court to balance the interests of an inmate with a disability against those of state prison administrators. While *Turner* requires a court to consider what impact protecting a particular constitutional right will have on a prison's resources and personnel, so Title II requires a court to consider whether providing an accommodation would "impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service." *Lane*, 124 S. Ct. at 1994. Furthermore, just as the *Turner* test requires a court to consider whether

"there are alternative means of exercising the [constitutional] right [at stake] that remain open to prison inmates," 482 U.S. at 90, 107 S. Ct. at 2262, Title II does not require that a qualifying inmate necessarily be granted every requested accommodation with respect to every aspect of prison services, programs, or activities. Rather, Title II requires that a "service, program, or activity, when viewed in its entirety, is readily accessible and usable by individuals with disabilities." 28 C.F.R. 35.150(a). A determination of whether a particular program, service, or activity satisfies the requirements of Title II involves an evaluation of both the burden a requested accommodation will have on a state prison and the availability of accommodations that differ from a plaintiff's requested accommodation but nonetheless address the plaintiff's needs.

In addition, although the Due Process Clause itself does not require States to create prison programs such as the provision of "good time credits," once a State opts to create such a program, the Due Process Clause requires the State to provide procedural protections to inmates who are denied the opportunity to participate. See *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S. Ct. 2963 (1974). Similarly, although Title II does not mandate what programs or activities a State must offer within its prisons, it does require that such programs and activities be made available to persons with disabilities consistent with the ability of such individuals to participate in such programs and activities.

Such individualized consideration has also been required in order to avoid a violation of the Eighth Amendment or Due Process Clause. See *Farmer*, 511 U.S.

at 843, 114 S. Ct. at 1982; *Wilson* v. *Seiter*, 501 U.S. 294, 300 n.1, 111 S. Ct. 2321, 2325 n.1 (1991). Thus, the Constitution itself will require state prisons to accommodate the individual needs of prisoners with disabilities in some circumstances. See, *e.g.*, *Bradley* v. *Puckett*, 157 F.3d 1022, 1025-1026 (5th Cir. 1998); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993).

Moreover, given the history of unconstitutional treatment of inmates with disabilities, Congress was entitled to conclude that there exists a real risk that some state officials may continue to make decisions about how prisoners with disabilities should be treated based on invidious class-based stereotypes or animus that would be difficult to detect or prove. In such a situation, the risk of unconstitutional treatment is sufficient to warrant Title II's prophylactic response. See *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 732-733, 735-737, 123 S. Ct. 1972, 1980, 1981-1982 (2003).

Title II's prophylactic remedy acts to detect and prevent difficult-to-uncover discrimination against inmates with disabilities that could otherwise evade judicial remedy. By proscribing governmental conduct, the discriminatory effects of which cannot be or have not been adequately justified, Title II prevents covert intentional discrimination against prisoners with disabilities and provides strong remedies for the lingering effects of past unconstitutional treatment against persons with disabilities in the prison context. See *Lane*, 124 S. Ct. at 1986 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect,

if not in intent, to carry out the basic objectives of the Equal Protection Clause."). Further, by prohibiting insubstantial reasons for denying accommodations to persons with disabilities, Title II prevents invidious discrimination and unconstitutional treatment in the day-to-day actions of state officials exercising discretionary powers over inmates with disabilities. See *Hibbs*, 538 U.S. at 736, 123 S. Ct. at 1982.

3. Finally, the panel erred in refusing to consider arguments advanced by the United States as intervenor in support of the constitutionality of Title II and its abrogation of States' Eleventh Amendment immunity. Rather than considering whether and to what extent the range of rights identified by the United States is implicated in the prison context, the panel simply refused to entertain the United States' argument that such rights are at stake. The court erroneously asserted that arguments made by intervenor United States are not arguments made by "the parties" and therefore "need not" be considered by the court.[2] That is clearly wrong. The United States intervened in this case as of right pursuant to 28 U.S.C. 2403(a), which allows the United States to intervene in a case in which the constitutionality of a federal statute is challenged expressly for the purpose of presenting "argument on the question of constitutionality." The very purpose of a

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[2] The panel stated: "In this case, the United States (as intervenor on appeal) argues that Miller's case implicates a panoply of rights, but the parties do not. Accordingly, we do not consider the host of rights identified by the United States, and we limit our opinion to the Eighth-Amendment right to be free from cruel and unusual punishment." Slip op. 46 n.28.

statutory right to intervene is to allow the United States to put forth all reasonable arguments in favor of a statute's constitutionality even where the original parties to the litigation do not. Indeed, if in this case plaintiff decided not to defend the constitutionality of Title II's abrogation at all, the Court could not simply strike down the statute without considering the United States' arguments in defense of the statute. Nor may the panel refuse to consider a subset of our arguments. Declaring a federal statute to be unconstitutional is an extraordinary measure and should not be undertaken by a court when that court explicitly refuses to even consider some arguments that it acknowledges have been presented in defense of the statute's constitutionality.

CONCLUSION

Wherefore, this Court should rehear this case en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2004, two copies of the foregoing PETITION FOR REHEARING EN BANC FOR THE UNITED STATES AS INTERVENOR were served by overnight delivery on the following parties and counsel of record:

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