No. 11-3281

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DONALD E. JOHNSON,

Plaintiff-Appellant

v.

RONALD C. NEIMAN, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF JURISDICTION

The district court had jurisdiction over plaintiff's claims pursuant to 28 U.S.C. 1331. This court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

The United States will address the following questions:

1. Should this Court determine whether Johnson has adduced sufficient evidence to survive summary judgment on his claim pursuant to Title II of the Americans with Disabilities Act before reaching the constitutional question below?

2. Is Title II valid legislation under Section Five of the Fourteenth Amendment, such that it abrogates the States' sovereign immunity in cases involving prison conditions?

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).[1] 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). Any facility built in conformity with uniform federal standards is "deemed to comply" with this requirement, but such conformity is not required where it is "clearly evident that equivalent access to the facility or part of the facility is thereby provided." 28 C.F.R. 35.151(c).

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

[1] A new version of Title II's implementing regulations went into effect on March 15, 2011. We cite the new version in this brief.

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. Except as otherwise noted, the following facts are derived from the district court's opinion. See Memorandum and Order [District Court Doc. No. 287] (Opinion). The United States expresses no view as to whether the record supports the district court's findings.

Donald Johnson is a prison inmate in the custody of the Missouri Department of Corrections. He was convicted of sexual assault and deviate sexual assault in 2007 and sentenced to seven years' imprisonment. Opinion 3. Because he is a sex offender, state law provides that he may not be released prior to completion of his full sentence in 2014 unless he completes the Missouri Sex Offender Program (MoSOP). Opinion 13; see Mo. Rev. Stat. § 589.040.2.

In December 2007, Johnson was granted parole and a conditional release date of February 25, 2009, contingent on his completion of the MoSOP. However,

Johnson was discharged from the MoSOP in June 2008 for failure to comply with MoSOP rules, and so his early release was denied. Opinion 13. In 2010, he again was denied release solely because he did not complete the MoSOP. Johnson's next conditional release hearing is scheduled for April 25, 2013. Opinion 14.

Johnson suffered an injury in 1983 that required multiple surgeries to his leg and back. Opinion 2. During his time in prison, he has stated repeatedly that he has chronic pain and has difficulty walking and sitting for long periods of time. Opinion 8, 11-12. Johnson claims that this disability renders him unable to attend MoSOP classes, which he contends can be accessed only by stairs and require him to sit in a painful position. He requested a waiver of the MoSOP requirement for early release. Opinion 11-12, 14. MoSOP staff consulted with medical staff, who found no evidence that Johnson's physical condition was as disabling as he reported or that it warranted a waiver from MoSOP attendance. Opinion 11, 14. Accordingly, MoSOP staff denied Johnson's request for a waiver. Opinion 14. They did, however, permit Johnson to periodically stand up or shift in his chair. Opinion 14.

3. Johnson sued (1) the State's Department of Corrections, (2) a private company with which the State contracted to provide prison medical care, and (3) a variety of individual defendants in the Eastern District of Missouri, claiming Eighth Amendment and Title II violations. See Opinion 1, 16, 19, 21-23. Title II

bars public entities from discriminating against individuals with disabilities or excluding them from any "services, programs, or activities of a public entity." 42 U.S.C. 12132. A state prison's operations are covered by this non-discrimination mandate. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 210 (1998). Johnson claimed that, because the defendants neither made accommodations that permitted him to attend nor waived the MoSOP requirement for him, he was, because of his disability, denied the early release that he would have been granted upon his completion of the MoSOP. Opinion 21-23.

4. The district court granted the defendants summary judgment on all claims. In dismissing the Eighth Amendment claims against the company and its employees,[2] the court stated that the only medical evidence in the record contradicted Johnson's account of his physical limitations, indicating "that Plaintiff was able to sit and stand without difficulty, that he had a normal gait, and that he did not have any neurological defects." Opinion 19. The court held that the record, accordingly, did not support Johnson's contention that he was "physically unable to climb stairs or sit in chairs" and so was unable to participate in MoSOP without accommodation. Opinion 19. Nor could it support Johnson's allegation

[2] The Eighth Amendment claims against the State were barred by sovereign immunity, while the claims against the individuals failed because none of the named state employees had personal involvement in Johnson's medical care.

that defendants were "subjectively aware of a serious medical need requiring exemption of MoSOP" and nonetheless did not grant such an exemption. Opinion 19.

The district court did not apply these findings to reject the Title II claims on their merits. Instead, it held that Title II does not validly abrogate sovereign immunity under the circumstances of this case. Opinion 22-23. The district court held that "inmates do not have a liberty interest in participating in MoSOP"; accordingly, "the Fourteenth Amendment was not violated, and MoDOC, as a state agency, is entitled to sovereign immunity in relation to Plaintiff's ADA claim." Opinion 23 (citing *Jones* v. *Moore*, 996 F.2d 943, 845 (8th Cir. 1993)).

On appeal, the United States intervened to defend the constitutionality of Title II's abrogation of sovereign immunity.

SUMMARY OF ARGUMENT

1. The district court erred in deciding whether Title II validly abrogates sovereign immunity under the circumstances of this case without first determining whether Johnson has made out a Title II claim at all. As the Supreme Court held in *United States* v. *Georgia*, 546 U.S. 151 (2006), under longstanding principles of constitutional avoidance, a court should not decide the validity of Title II's abrogation of immunity until it decides (1) whether plaintiff has made out a Title II claim and (2) whether plaintiff's allegations also state a constitutional claim.

Accordingly, this Court should vacate the district court's constitutional ruling and remand for determination of whether Johnson adduced sufficient evidence to survive summary judgment on his Title II claim.

2. Should the Court reach the issue, it should find that Title II validly abrogates the States' sovereign immunity with respect to claims alleging disability discrimination in the prison context. In this context, Title II is a reasonable response to a long history of disability discrimination that has resulted in serious and systemic violations of fundamental rights. It is carefully tailored to protect against the proven risk of unconstitutional action, while respecting the States' legitimate interests. Accordingly, as applied to prison conditions, Title II's requirements represent a congruent and proportional response to official discrimination. They represent a good-faith effort to make meaningful the guarantees of the Fourteenth Amendment, not an illicit attempt to rewrite them.

ARGUMENT

I

THIS COURT SHOULD VACATE THE LOWER COURT'S RULING INVALIDATING TITLE II'S ABROGATION OF SOVEREIGN IMMUNITY AND REMAND FOR DETERMINATION OF WHETHER JOHNSON HAS A MERITORIOUS TITLE II CLAIM

The district court erred in reaching the constitutional validity of Title II's abrogation of sovereign immunity rather than first determining whether Johnson produced sufficient evidence to survive summary judgment on his Title II claim.

This Court should vacate the district court's constitutional ruling and remand for determination of whether Johnson has a meritorious Title II claim.

1. The Supreme Court in *United States* v. *Georgia*, 546 U.S. 151 (2006), mandated a procedure for a lower court to follow when confronted with a defense of Eleventh Amendment immunity to a Title II claim. In *Georgia*, the state defendants argued that Title II, as applied to prisons, failed to validly abrogate the States' Eleventh Amendment immunity. 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 Title II's validity, 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.*

Shortly after *Georgia*, the Sixth Circuit held in an unpublished opinion that a complaint failed to state a Title II violation, but nonetheless went on to hold also that Title II did not validly abrogate sovereign immunity in that context. See *Haas* v. *Quest Recovery Servs., Inc.*, 174 F. App'x 265 (6th Cir. 2006). The Supreme Court granted certiorari, vacated, and remanded for reconsideration. *Haas* v. *Quest Recovery Servs., Inc.*, 549 U.S. 1163 (2007); see *ibid.* (Ginsburg, J., concurring) ("The United States points out that had the Sixth Circuit attended to [*Georgia*], it might not have reached the [abrogation] question.").

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. If "the summary judgment record establishes that there is no Title II claim against the State," it was "error for the district court to reach the Eleventh Amendment issue." *Buchanan* v. *Maine*, 469 F.3d 158, 173 (1st Cir. 2006); accord *Natarelli* v. *VESID Office*, 420 F. App'x 53, 55 (2d Cir. 2011) (district court erred in considering Eleventh Amendment question when plaintiff failed to state Title II claim); see also *Hale* v. *King*, 642 F.3d 492, 498 (5th Cir. 2011) (finding that plaintiff failed to state Title II claim and declining to consider Eleventh Amendment defense, without opining on whether *Georgia* barred court from doing otherwise).

This rule 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." *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."). Moreover, this constitutional avoidance principle is at its apex when courts address the constitutionality of an Act of Congress, "the gravest and most delicate duty" that courts are "called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted); accord *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 204 (2009).

2. Ensuring that Johnson actually has produced evidence supporting his Title II claim before adjudicating the constitutional validity of Title II's abrogation of sovereign immunity is especially appropriate here, for three reasons.

First, Johnson's Title II claim closely overlaps with his Eighth Amendment claim, the evidentiary basis of which was decided by the district court and now is before this Court on appeal. The district court found that, in response to Johnson's request for an accommodation, the defendants evaluated his physical condition and determined that he was capable of attending the MoSOP. It further found that,

based on all the medical evidence in the record, this determination was objectively correct. Opinion 19. Finally, it found that the defendants did offer accommodations short of waiving their MoSOP attendance requirement, by permitting Johnson to stand or shift positions periodically. Opinion 14.

Assuming that the district court correctly characterized the record in evaluating Johnson's Eighth Amendment claim, these findings should directly apply to, and very well may defeat, Johnson's Title II claim as well. This Court has held that compensatory damages are available for a past Title II violation only if a plaintiff can show the defendant's deliberate indifference to the need for an accommodation. See *Meagley* v. *City of Little Rock*, 639 F.3d 384, 387-388 (8th Cir. 2011). Regardless of whether Johnson actually required an accommodation, the defendants are unlikely to have acted with deliberate indifference to his needs if they put the question to their medical experts and then relied on a medical opinion that conformed to the objective evidence.

Second, if Johnson's Title II claim does have a sufficient evidentiary basis, it may also describe a violation of his constitutional rights, in which case it automatically abrogates sovereign immunity. *Georgia* requires that this Court evaluate that constitutional question next. See *Georgia*, 546 U.S. at 159.

Johnson contends that the State's failure to accommodate his disability has prevented him from securing prison release to which he otherwise would be

entitled, a result that would seem to implicate his liberty interests under the Due Process Clause. To be sure, this Court has determined that Missouri state law creates no liberty interest for prisoners to attend MoSOP "at any particular time relevant to their presumptive parole dates" even where, as here, such attendance is required for early release. See *Jones* v. *Moore*, 996 F.2d 943, 945 (8th Cir. 1993). But *Jones* did not involve a prisoner indefinitely denied the opportunity to attend MoSOP, nor the denial of such opportunity because of disability discrimination. Moreover, any broader reading of *Jones* would make it questionable precedent in light of *Wilkinson* v. *Austin*, 545 U.S. 209, 224 (2005), in which the Supreme Court held that prisoners' due process liberty interests were implicated by placement in Supermax prisons, in part because such placement "disqualifies an otherwise eligible inmate [from] parole consideration." The United States does not take a position on whether Johnson's allegations make out a constitutional violation, but this Court would need to resolve that question before reaching the question of whether Title II validly abrogates sovereign immunity in the absence of a constitutional violation.

Finally, it is unclear that the district court's resolution of the abrogation question, which determines only whether damages are available for past conduct, can justify its outright dismissal of Johnson's Title II claim. Johnson remains imprisoned and has another conditional release hearing scheduled for April 25,

2013. Opinion 13. Whether or not he may seek damages, he has a live claim for an injunction barring the defendants from violating his rights in the future. See *Klingler* v. *Director, Dep't of Revenue*, 455 F.3d 888, 897 (8th Cir. 2006) (defendants were enjoined from future Title II violations, though State's sovereign immunity precluded damages for past violations).

Accordingly, not only is deciding the constitutional question regarding abrogation unnecessary to dispose of Johnson's Title II claim, it may not be sufficient. Only by deciding the sufficiency of the evidence underlying Johnson's claims – pursuant to Title II as well as the Eighth Amendment – can a court resolve this controversy.

3. For all these reasons, the district court should have determined whether Johnson adduced sufficient evidence to survive summary judgment rather than the constitutional question it actually decided. Because the question of whether Johnson made out a Title II claim was neither briefed nor decided below, and still has not been briefed on appeal, this Court should remand to the district court to decide that question in the first instance. While it may be in the State's interest to obtain a broad constitutional ruling in its favor, rather than a dismissal on narrow grounds, a State may not induce unnecessary constitutional adjudication by failing to provide briefing as to the preliminary *Georgia* steps.

This Court also should vacate the district court's unnecessary and unreliable ruling on the abrogation question. "[W]hen lower courts have unnecessarily reached issues concerning the constitutionality of the ADA's abrogation of sovereign immunity, the offending portions of their decisions have been vacated on appeal." *Brockman* v. *Texas Dep't of Criminal Justice*, 397 F. App'x 18, 24 (5th Cir. 2010); accord *Zibbell* v. *Michigan Dep't of Human Servs.*, 313 F. App'x 843, 847-848 (6th Cir.), cert. denied, 129 S. Ct. 2869 (2009). Should the validity of Title II's abrogation provision eventually need to be reached in this case, it should be decided properly, with participation by the United States, see 28 U.S.C. 2403(a) – particularly because the plaintiff is a pro se prisoner who cannot properly brief this complex question.

II

TITLE II VALIDLY ABROGATES THE STATES' SOVEREIGN IMMUNITY WITH RESPECT TO CLAIMS INVOLVING PRISON CONDITIONS

For the reasons described above, this Court need not decide the validity of Title II's abrogation provision. Should this Court nonetheless reach the question, it should hold that Title II of the Americans with Disabilities Act validly abrogates the States' sovereign immunity with respect to claims involving prison conditions. Pursuant to Section Five of the Fourteenth Amendment, Congress has broad authority to remedy a long and well-documented history of disability

discrimination. *Tennessee* v. *Lane*, 541 U.S. 509, 528-529 (2004). 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.

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." *Lane*, 541 U.S. at 524. Accordingly, Congress possessed authority under Section Five to pass broad legislation to protect the right of people with disabilities to receive all public services on an equal footing. *Id.* at 528-529. Most circuits – including this one – 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);

McCarthy v. *Hawkins*, 381 F.3d 407, 423 (5th Cir. 2004). But see *Guttman* v. *Khalsa*, 669 F.3d 1101, 1117 (10th Cir. 2012).

Accordingly, *Lane* concluded, "[t]he only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment." 541 U.S. at 530. In addressing this question – and only this question – *Lane* engaged in context-specific analysis, because Title II's remedy operates differently in different contexts. *Id.* at 530-531.

The only question, therefore, is whether Title II, in this context, is congruent and proportional to the constitutional violations it remedies.

2. The State offers little argument in support of its contention that Title II's abrogation of sovereign immunity is invalid in this context, instead asserting that this Court already has decided the question in its favor. See State Br. 16. And to be sure, this Court once held that Title II's abrogation is invalid for all public services. See *Alsbrook* v. *City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999) (en banc). But following *Lane* and *United States* v. *Georgia*, 546 U.S. 151, 159 (2006), a simple citation to *Alsbrook* no longer suffices.

As this Court has observed, its analysis in *Alsbrook* is inconsistent with that employed by the Supreme Court in *Lane*, and so it is "no longer confident" that *Alsbrook* is controlling law. See *Klingler*, 455 F.3d at 892. Accordingly, the State errs in asserting that *Alsbrook* controls except as to the narrow factual settings

(denial of access to judicial services and violation of a constitutional provision) in which the Supreme Court reached a contrary conclusion in *Lane* and *Georgia*.

Nor is this case governed by *Klingler*, which held that Title II does not validly abrogate sovereign immunity where it bars States from imposing small fees for disabled parking placards. *Klingler* reasoned that, in that limited context (unlike with respect to the access-to-courts claims at issue in *Lane*), the discrimination barred by Title II "is simply too trivial to amount to an impairment of any fundamental right." 455 F.3d at 894. Accordingly, in that context, Title II was not a congruent and proportional response to past or present constitutional violations. By contrast, as described below, in the prison context, Title II protects far more fundamental rights.

The State makes no further argument regarding the congruence and proportionality of Title II in this context; indeed, its brief does not even use the words "congruent and proportional." Accordingly, this Court need not consider this question other than to reject the State's incorrect argument that this Court already has decided the question in its favor. See Fed. R. App. P. 28 (requiring brief to contain party's "contentions *and the reasons for them*") (emphasis added); *United States* v. *Gonzales*, 90 F.3d 1363, 1369-1370 (8th Cir. 1996) (Rule 28 not satisfied by "cursory and summary assertion," and "[f]ailure to abide by this provision on an issue is deemed to be an abandonment of that issue"); see also

United States v. *Williams*, 400 F.3d 277, 283 (5th Cir. 2005) (court declined to consider government's request to reassign case where "[t]he government cites this court's caselaw concerning the extraordinary remedy of reassignment, but it does not argue explicitly how the standards set forth in the caselaw apply here"); *United States* v. *Ford*, 184 F.3d 566, 578 n.3 (6th Cir. 1999) ("Even appellees waive arguments by failing to brief them."), cert. denied, 528 U.S. 1161 (2000). But in any case, for the following reasons, Title II is congruent and proportional to the constitutional violations it remedies.

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"). The district court appears to have erroneously considered only the much narrower class of cases involving the MoSOP. Opinion 23. *Lane* neither engaged in nor endorsed such a narrow, as-applied congruence-and-proportionality analysis, as though every application of Title II were a wholly separate statute. Rather, it 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 *Lane*, 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. And in *Klingler*, this Court declined to confine its analysis to the specific regulation implementing Title II at issue, but instead considered all Title II applications that implicate only rational-basis equal protection scrutiny. See 455 F.3d at 896-897.

Georgia did not alter the "class of cases" mode of analysis set forth by *Lane* with respect to the congruence and proportionality inquiry. Rather, *Georgia* held that, where a particular plaintiff's Title II claim also constitutes a constitutional violation, Title II abrogates sovereign immunity for that claim alone, regardless of whether it does so for the larger class of cases of which that claim is a part. See 546 U.S. at 159.

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 *Georgia*, 546 U.S. at 162 (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); *Ex parte Hull*, 312 U.S. 546 (1941), the right to "enjoy substantial religious freedom," *Wolff* v. *McDonnell*,

418 U.S. 539, 556 (1974) (citing *Cruz* v. *Beto*, 405 U.S. 319 (1972)), 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). The Due Process Clause also requires fair proceedings when, as in this case, 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 this case illustrates, inmates with disabilities often are denied a fair and equal opportunity to benefit from these rights enjoyed by other inmates, including 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) (deaf inmate denied access to sex offender program that was required as a condition of parole), cert. denied, 528 U.S. 1120 (2000).

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).[3]

Imprisonment can represent a disproportionately harsh punishment for offenders with disabilities. 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.

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

[3] 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). 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.

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 *id.* at 524-525 & n.14, 527, as well as the evidence of unconstitutional leave policies presented in *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721, 730-732 (2003).

Between 1980 and the enactment of Title II in 1990, Department of Justice investigations alone found patterns or practices of unconstitutional treatment of individuals with disabilities in correctional facilities in 13 States.[4] 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,"[5] (2) engaged in the improper use of chemical agents on mentally ill inmates,[6] and (3) pervasively denied even minimally adequate medical

[4] 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*, 546 U.S. 151 (2006) (Nos. 04-1203 & 04-1236) (filed July 29, 2005).

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

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

care for both juvenile and adult detainees.[7] As the discussion below illustrates, these Department of Justice findings were representative of prison conditions for inmates with disabilities around the country.

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*.

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. This Court found that principle

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[7] Findings Letter Re: Western State Correctional Institution, MA (1981); Findings Letter Re: 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: 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).

compelling in *Klingler*, in which it held that Title II is not valid Section Five legislation to the extent that it bans States from charging a "small fee" for disabled parking placards that is "simply too trivial to amount to an impairment of any fundamental right." See 455 F.3d at 894, 896. That the banned practice implicated no constitutional concern convinced this Court that, "rather than seeking to enforce the constitution's guarantee against irrational discrimination based on disability, Congress was seeking to redefine the scope of protection offered by the Constitution." *Id.* at 896-897.

In the prison context, on the other hand, Title II remedies discrimination that causes the loss of liberty, the infringement of fundamental rights, and serious physical harm. Listed below are just a few of the many ways this discrimination has manifested.[8]

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*

[8] 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 & 04-1236 (July 29, 2005).

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 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.[9]

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*).[10] 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

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[9] 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."); NM 1091 (inmates with developmental disabilities are "more subject to physical and mental attacks by other inmates") (see footnote 11 on page 35 for explanation of this citation); 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).

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

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 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"). The Task Force on the Rights and Empowerment of Americans with Disabilities – a body appointed by Congress that took written and oral

testimony from numerous individuals with disabilities from every part of the country as to the obstacles they faced – was told of state prisons' lack of telecommunications for the deaf. MD 787.[11]

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").

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) (stereotypes about abilities of

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[11] In *Lane*, the Court relied on the Task Force's "numerous examples of the exclusion of persons with disabilities from state judicial services and programs." See 541 U.S. at 527. The materials collected by the Task Force were lodged with the Court in *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), and catalogued in Appendix C to Justice Breyer's dissent in that case. See *Lane*, 541 U.S. at 526-527. The *Garrett* appendix cites to the documents by State and Bates stamp number, *Garrett*, 531 U.S. at 389-424, a practice we follow in this brief. In addition, an addendum to this brief provides for the convenience of this Court and the parties a copy of all the Task Force documents cited herein.

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.").

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). That occurs even when interpreters are readily available. KS 673; see also 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").

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." *Weeks* 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.[12]

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[12] *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.[13] 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) (*H.R. 2439 Hearings*). 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

[13] See, *e.g.*, DE 331 ("There exists a gross lack of psychiatric care for juvenile[s] 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 (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.").

"constitutionally inadequate" care to inmates who are mentally retarded or suffer from mental illness).

Simply put, inmates with disabilities have broadly been denied "the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834 (citation omitted).[14]

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[14] 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."); *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 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

(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 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." *Hibbs*, 538 U.S. at 727-728. In particular, Congress permissibly banned "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.

(…continued)
superintendent locked this man in a cell and left him there," and "scoffed at" his pleas for help, until prisoner committed suicide).

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 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 itself directly and comprehensively regulated by the Constitution. And it focuses on government action that threatens fundamental rights in the ways described above.

Title II also prevents violations of equal protection in this context. Not only does it directly bar overt discrimination, but its requirements serve to detect and prevent 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. By prohibiting insubstantial reasons for failing to accommodate inmates with disabilities, Title II prevents covert discrimination against disabled applicants.

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.

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.

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.

While Eighth Amendment and Due Process Clause claims are not subject to the *Turner* test,[15] 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

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[15] See *Hope*, 536 U.S. at 738; *Hewitt* v. *Helms*, 459 U.S. 460, 474-477 (1983), modified by *Sandin* v. *Conner*, 515 U.S. 472 (1995).

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).[16]

[16] 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 vacate the district court's determination that Title II of the ADA is not valid legislation under Section Five of the Fourteenth Amendment and should remand for further proceedings. Should it reach the question, this Court should find that Title II of the ADA is valid Section Five legislation and thus abrogates sovereign immunity in cases involving prison conditions.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/Sasha Samberg-Champion
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CERTIFICATE OF COMPLIANCE

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 Microsoft Word 2007 and contains 11,606 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I also certify that an electronic version of this brief has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney

Date: July 23, 2012

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2012, 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 Eighth Circuit by using the appellate CM/ECF system. Additionally, a paper copy was sent to the appellant, Donald E. Johnson, at the following address via United States Certified Mail:

Donald E. Johnson, #103750
Northeast Correctional Center
13696 Airport Road
Bowling Green, MO, 63334-0000

I certify that the other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney

ADDENDUM

WCR:ASP:PSL:SBB:pmw
DJ 168-37-7

29 OCT 1982

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Honorable William G. Milliken
Governor of Michigan
Executive Office
Capitol Building
Lansing, Michigan 48909

Re: Notice of Findings Regarding State Prison of Southern Michigan, State House of Correction and Branch Prison (Marquette), and the Michigan Reformatory, 42 U.S.C. §1997b(a)(1)

Dear Governor Milliken:

As you will recall, on October 9, 1981, we wrote to inform you that pursuant to the Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. §1997, we were commencing an investigation of conditions of confinement at the State Prison of Southern Michigan ("Jackson"), the Michigan Reformatory ("Ionia"), and the State House of Correction and Branch Prison ("Marquette"). As contemplated by the statute, 42 U.S.C. §1997b, we are writing to tell you of the major findings of our investigation.

Our investigation consisted, first, of extensive tours of each of the facilities by five outside, independent experts. In connection with their tours, the experts interviewed many administrators, inmates, and staff. Second, we gathered several hundred documents, including applicable state prison regulations, state inspection reports, reports of critical incidents at the prisons, and medical and psychological records. Our attorneys interviewed a number of inmates at each prison on an individual basis. They also talked with many staff members at all administrative levels, including wardens, officers, line staff, and the legislative ombudsman.

cc: Records Chrono Peabody Lawrence Berlin Hendriksen Hold
Wilson
Varley
Reynolds
Wilkinson

Throughout our investigation, the Department of Corrections, the Attorney General's office, and the Legislative Ombudsman provided us with substantial assistance. Each of our experts expressed his appreciation to Michigan's officials for their cooperation, and we join our experts in thanking you.

In writing to apprise you of our findings, I have endeavored to focus on five (5) issues which pose conditions that seriously threaten the lives, health, and safety of inmates incarcerated in these facilities. We did not, of course, review other Michigan prisons. Director Perry Johnson was kind enough to invite our attorneys to tour the new men's facility at Ypsilanti. I am advised that this new facility is an impressive one and one which shows a commitment to maintaining lawful prison conditions. Moreover, in evaluating conditions at Jackson, Ionia, and Marquette (sharply different from those at Ypsilanti), we have not been unmindful that your ability to remedy deficiencies may have been hampered by the uncertain economic situation in Michigan.

After careful review, we regret to inform you that at Jackson, Ionia, and Marquette we have discovered what we believe to be a pattern or practice of egregious or flagrant conditions that are subjecting the prisoners incarcerated in each facility to grievous harm in violation of their Eighth Amendment rights. We believe that certain identified practices also violate the inmates' First and Fourteenth Amendment rights. These conditions, which we believe to have existed for some time, include the following:

1) Physical Plant and Environmental Conditions. These prisons consist of antiquated physical plants that over the years have fallen into disrepair and have become unsanitary. At this point, the facilities pose a threat to the health and safety of the inmates. Many of the facilities make it extremely difficult for guards to see enough cells to protect inmates against physical and sexual assault. Plumbing has become dangerously antiquated, especially at Jackson and Ionia, and it now exposes inmates to a threat of serious harm to personal health. Electrical wiring frequently is in a state of dangerous disrepair. Ventilation often is non-existent. Lighting in housing and work areas is so inadequate as to pose a serious accident hazard as well as a threat to inmate health. The facilities lack minimally necessary day rooms. Many areas throughout the system are so noisy as to threaten inmates' hearing. Basic housekeeping necessary to maintain sanitation in the facilities is grossly inadequate, with sewage leaking; windows opaque with filth; many deteriorated,

uncleanable, and at times, filthy cells and cell fixtures; numerous mice, rats, and cockroaches; and insufficient materials for personal hygiene in each of the prisons. Food service facilities suffer from many similarly unsanitary conditions and practices that threaten inmate health. In segregation units, temperature control, vermin control, basic housekeeping, lighting, ventilation, and idleness are worse than the already inadequate conditions in general population.

d) Fire Safety. Our life safety expert cautions that inadequacies in these prisons' provisions for fire safety threaten a disaster as major as any seen in a correctional facility. For example, facilities often lack necessary smoke separations, smoke detectors, alarms, remote exits, illuminated exit signs, posted evacuation procedures, and appropriate cell locking mechanisms. Fire safety and suppression equipment is inadequate, and professional inspections are too infrequent, if they occur at all. Staff training and staff and inmate drilling are inadequate, and certain areas often are understaffed or unstaffed at certain times, presenting a severe fire hazard to inmates locked in their cells. In addition, there is an alarming lack of professional fire safety supervision. Indeed, there is a critical overall lack of professional supervision of maintenance, sanitation, and fire safety.

e) Violence. Generally, we were impressed with the excellent potential of many of the staff, including line staff. Nonetheless, we concluded that in practice, guards cannot or do not provide adequate security to inmates against physical and sexual assault, other violence, and extortion. Staff efforts are thwarted by overcrowding, antiquated building designs, understaffing, the apparently unsuccessful application of the "team system," inadequate supervision and training of staff, ineffectual responses to low staff morale, and inadequate contact between staff and administration. Grave reports about the role of certain staff in the May, 1981, disturbances point to very serious problems in relations between administration and staff that endanger inmate lives. The high level of weapons and drugs in the institutions, and especially at Jackson, further exposes inmates to risks to their safety and well-being. Pervasive racial tension increases the need for protection from harm. Tension among the inmates is not being relieved as it might were provision for exercise adequate. The high rates of prisoners requesting protective custody status, especially at Jackson and Ionia, are a further indication of inadequate protection of inmates from harm, and the conditions to which protective custody inmates are subjected are unjustifiably harsh. In all, we

found that violence was pervasive in these prisons, and most markedly at Jackson and Ionia.

4) Mental Health Care. Mental health care for seriously disturbed inmates is inadequate at each of these facilities and is unavailable elsewhere. Psychiatrists either are not present at all, as at Marquette, or are so rare that they offer virtually no assistance to seriously ill inmates. At Marquette, a medical doctor who is not trained for psychiatric functions assesses suicide risks and administers hazardous psychotropic drugs. Jackson's psychiatric unit merely holds patients for observation; it provides no assistance. In some cases, psychotropic drugs are administered without necessary testing to diagnose extremely dangerous side effects. Ionia's practice of stripping naked psychotic inmates and inmates attempting suicide, shackling them, and placing them in a glazed cell without ventilation (or similar, if less dramatic, approaches) is in deliberate indifference to these inmates' serious mental health needs and is likely to worsen psychosis and self-destructive conditions.

There is no constitutional requirement for a program of psychiatric care for every inmate. There is however, a definite obligation not to act in deliberate indifference or neglect of inmates' serious and urgent mental health needs.

5) Overcrowding. Reviewing the totality of the conditions in these prisons we found that they suffer substantial overcrowding. Cells at Marquette and Ionia and trustee dormitories afford far too little space per inmate, and the huge cell blocks at Jackson house far too many inmates in a single environmental space. In these prisons, we have seen that overcrowding has strained support facilities, physical plants, equipment, and sanitation. It has impeded necessary classification practices, and it is associated with increased violence and the physical and mental deterioration of the inmates. Overcrowding exacerbates already inadequate fire safety measures and thus poses serious life threatening situations at each prison.

We also found that at Jackson the medical facilities, and at all three prisons, the medical staffing, procedures, and practices are inadequate to serve the inmates' serious needs. In addition, certain procedures for disciplinary and administrative segregation are inadequate as are certain restrictions on mail. Also deficient in certain respects are law libraries and services necessary to constitutionally mandated inmate access to courts and governmental officials.

We want to cooperate to the fullest extent possible with state officials in remedying these conditions. We

stand prepared with technical advice to aid the State of Michigan in taking steps designed to eradicate unconstitutional conditions in the subject facilities. We look forward to assisting Michigan in each of the areas of concern that we have identified.

For example, with regard to these prisons' physical plants, you would want to address the need for necessary surveillance and security, for minimally essential fire safety, procedures, design and equipment; for extensive improvement in environmental conditions including plumbing, ventilation, heating, temperature control, clean and cleanable cells, noise control, electrical wiring, lighting, and water temperature control; for improved supervision and inspection of sanitation, food sanitation, and fire safety; for noise reduction; and for minimal privacy in dormitories, cells, and visitation areas.

As another example, with regard to staffing, the need is for improved numbers of staff, staff training, organization and supervision of staff, responses to staff morale, contact between administrators and staff, and increased sensitivity towards hiring minority staff, all in an effort to give staff the necessary support, guidance, equipment, and attitudes to permit guards to offer minimally necessary protection to inmates, including the control of weapons and drugs. Similar measures are minimally necessary with regard to each of the areas that we have discussed.

Finally, we would look for your development of regular and continuous self-inspection to monitor performance of all necessary supervision, maintenance, improvements, and other needed conduct as well as your arrangement for regular outside inspections, to assure a continued provision of constitutionally mandated minimum conditions of confinement.

coverage for the mentally ill, while the more restrictive and expensive in-patient care is covered.

SOLUTION: A mandate which requires adequate out-patient treatment comparable to that available for other illnesses. EX. Out-patient psycho-therapy should equal out-patient physical therapy coverage.

CRIMINAL JUSTICE SYSTEM

There exists a gross lack of psychiatric care for juvenile and adult offenders. While the system provides other medical care, those in need of psychiatric treatment are often left with little or no intervention.

SOLUTION: Adequate state funding

HOSPITAL ADMITTANCE

Some general hospitals in the state are reluctant to admit someone who is mentally ill when that person is in need of treatment for another physical condition. The reverse is also true, as local hospitals have denied admission to a psychiatric unit due to a severe physical disability.

SOLUTION: Admittance to a hospital regardless of a pre-existing medical condition.

We thank you for the opportunity to present our concerns.

(1)

00572 Christi IL 51

2742 N
Chicago,

July 22, 19

Representative Dan Rostenkowski
2111 Rayburn HOB
Washington DC, 20515

Dear Rep. Rostenkowski,

I strongly urge you to support the Americans with Disabilities Act of 1988. It is unfortunate that we as a society require a law as this, but require it we do. As Director of Social Services and Advocacy at the Chicago Hearing Society, I and my staff are involved on a daily basis with severely hearing impaired persons who do not have access to public services. We have clients who are admitted into hospitals, undergo surgery and released without the benefit of a sign language interpreter to recieve information critical for their health. We have clients who have been arrested and held in jail overnight without ever knowing their rights nor what they are being held for. We have clients whose children have been taken away from them & told to get parent education but have no place to go because the services are not accessible. What chance do they have to ever get their children back? These are just 3 examples of the many we have where hearing impaired persons have had their basic human rights violated.

The Rehab. Act of 1973 has been in effect for 15 years and these violations occurred in 1988! We obviously need more: a stronger law, funding for compliance, & funding for prosecuting the violators, for enforcement. I believe the Americans with Disabilities Act is the best thing we have right now to provide more. Please support this Act.

Christi D Boyce

KA-3(5)

swimming unsupervised in swimming pools anyway. The couple still does not have a swimming pool in their back yard. They contacted several other companies, but their estimates for the work were all several hundred dollars higher. The couple was therefore barred from dealing with the company prepared to give the best price, because that company did not wish to deal with blind people.

A deaf man with whom I work was arrested for driving while intoxicated. He alleges to this day that he was not in fact intoxicated. A klood test was given because it was clear to the police that the man did not understand the charges which were being leveled against him. Nonetheless, the city police in Topeka made absolutely no effort to provide the gentleman with a qualified sign language interpreter in order that he might understand the charges against him and his rights. As it turned out, the gentleman was never actually charged with a crime. He was, however, held for several hours in jail without having been charged or without knowing what the problem was. The police had in their possession a list of qualified sign language interpreters so they could have made one available to the gentleman. They did not simply because they chose not to bother to do s.. Upon finally being released from jail, the gentleman did file a 504 complaint against the Topeka Police Department. The finding in this complaint was that the Topeka Police were not, at that time, receiving federal funds for any program. Therefore, even though this took place prior to Grove City, the 504 complaint was ruled without jurisdiction by the Office for Civil Rights and the police went unpunished for their discrimination.

A lady who is in a wheelchair chose to live in an apartment which had several steps leading up to it. She asked the landlord for no modifications because she was capable of getting out of the chair, crawling up the steps, and dragging the chair behind her. She liked everything else about the apartment and chose to live there. While her method of life was thus a bit unorthodox, she certainly was not endangering herself or anyone else by her actions. She paid her rent on time and was appropriate in her maintenance of the property. Nonetheless, she was evicted because the landlord, who was not willing to make any adaptations to the property even

DISCRIMINATION DIARY

Howard County, Maryland, has four or five large libraries of which only one has TDD since 1976. Most of the time this one is not accessible either. When we dial the No. we get a recording that asks us to leave our name, number and message; they will call us back. That seldom happens. They use volunteers to answer the TDD and use that as an excuse for not calling us back. It seems since TDD is there for more than ten years, the expense of making this acessible could have been worked into their budget long since. In reality, we deaf in Howard County are left without library service.

I wanted to call the Patuxent Institution - a prison - to drop off books for the library there. The letterhead provide a TDD No. to call but when I called, I found myself in contact with the State Police, who asked me whether this is an emergency. I said "No" because I was trying to reach the librarian in the prison and why am I talking with the police. I was told that all Maryland state letterhead has the same - police - number on the letterhead. We are made to feel that we are abusing an emergency number. The deaf inmates in the prison have no access to TDD at all.

Many Maryland state offices, departments of social services, places where people must go for food stamps, welfare, or other needs - where appointment is needed - are not accessible on TDD. Many places do advertise or list a TDD number but do not answer this phone when we try to call there. We have to ask a hearing person to call on voice to alert them of a TDD caller. Even the Better Business Bureau, In Baltimore, has a negative attitude on TDD, and do not have it easily available for calls. Some places use the excuse that the TDD is out of order which can only be due to rust from lack of use because they have not answered that phone.

votejust.2
votejust

01091 NM-25

A VOTE FOR JUSTICE.

I URGE THE CONGRESS TO ENACT, AND THE PRESIDENT TO SUPPORT AND TO SIGN, LEGISLATION SUCH AS THE AMERICANS WITH DISABILITIES ACT OF 1988, WHICH WILL EFFECTIVELY PROTECT ALL PERSONS WITH DISABILITIES AGAINST DISCRIMINATION ON THE BASIS OF HANDICAP.

I FURTHERMORE URGE THE ESTABLISHMENT OF THOSE BASIC SERVICES AND HUMAN SUPPORT SYSTEMS NECESSARY TO MAKE RIGHTS REAL IN EVERY DAY LIFE, AND WHICH WILL ENABLE ALL PEOPLE WITH DISABILITIES TO ACHIEVE THEIR FULL POTENTIAL FOR INDEPENDENCE, PRODUCTIVITY AND QUALITY OF LIFE IN THE MAINSTREAM OF SOCIETY.

I HAVE PERSONALLY EXPERIENCED AND/OR OBSERVED THE FOLLOWING DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES:

There are problems with in the NM Correctional system because of its handling of those inmates who have a developmental disabilities.
In general this inmates are serving time for lesser crimes. They serve longer times. They are more subject to physical and mental attacks by other inmates.
At the present time, there is no specific method or ~~way~~ legitimate means of rehabilitating or house these persons.
The State is just now beginning to recognizes and address this issue.

signed James P. Crews
address: DOPC
Harold Runnels Building
P.O. Box 968
Santa Fe 87504
tel: 1-505-827-2707

396 Jeducal System

Sept. 28, 1988

Dear Debbie Jackson

This concerns my son Paul Thomas Barnes. He has been discriminated in the Court systems, and by the law Officers by arresting him and putting him in jail and not providing him with an interpreter. His rights to him have been violated. And he has been discriminated by jobs. He worked at T.V.S. Transylvania Vocational Services here in Brevard from age 16 to Jan 26, 1985. He was fired there by Annie Clinginpeel. Because he was put in jail for a crime he did not do. Then he got a job at Hardee's and he worked there for 6 mos. Everyone liked him and he done just fine till a new Manager came there and she was a smart butt. And I don't know why she didn't like him but she started picking on him. Her name was Tammy Camp. Last May it came up a real bad storm and she made him go outside and sweep the whole parking lot and it was pouring down rain and lightening and I told him not to be out there that he might get struck with lightening. So he went back inside. Then she fired a woman