UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MICHEAL LEE SPENCER, Plaintiff, v. MARK EARLEY, RONALD ANGELONE, GENE JOHNSON, ERIC MADSEN, VIRGINIA DEPARTMENT OF CORRECTIONS, BRUNSWICK CORRECTIONAL CENTER, OFFICE OF HEALTH SERVICES, Defendants.	)	Civil Action No. 1:01cv1578 (CMH)

BRIEF OF THE UNITED STATES AS INTERVENOR IN SUPPORT OF CONSTITUTIONALITY OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT

The United States[1] submits this brief in support of (1) the constitutionality of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, including the provision that abrogates States' Eleventh Amendment immunity, as applied in the context of prison administration, and (2) the constitutionality of Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794(a), and 42 U.S.C. 2000d-7, which conditions the receipt of federal financial assistance on a state agency's waiver of its Eleventh Amendment immunity to claims under Section 504.

[1] Along with this brief, the United States submits a Notice of Intervention pursuant to 28 U.S.C. 2403, which permits the United States to intervene as of right in cases in which the constitutionality of a federal statute has been challenged.

STATEMENT

1. The ADA established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found 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). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, Congress found that persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7). Based on those findings, 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).

The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by state and local governmental entities in the operation of public services, programs, and activities; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This case arises under Title II of the ADA, which 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. A "public entity" is defined to include "any State or local government" and its components, 42 U.S.C. 12131(1)(A) and (B). Title II's coverage of "services, programs, or activities," 42 U.S.C. 12132, includes the administration of prisons. *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 210-212 (1998). Title II may be enforced through private suits against public entities, and 42 U.S.C. 12133, and Congress expressly abrogated the States' Eleventh Amendment immunity to such suits in federal court, 42 U.S.C. 12202. Title II prohibits governments from, among other things, denying a benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii), and (vii).[2] In addition, while there is no absolute duty to accommodate individuals with a disability, a public entity must make reasonable

[2] Congress instructed the Attorney General to issue regulations to implement Title II, based on regulations previously promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. I 2001). See 42 U.S.C. 12134.

modifications to its policies, practices, or procedures if necessary to avoid the exclusion of individuals with disabilities, unless the accommodation would impose an undue financial or administrative burden on the government, or would fundamentally alter the nature of the service. See 28 C.F.R. 35.130(b)(7), 35.150(a)(2) and (3). The ADA does not normally require a public entity to make its existing physical facilities accessible. 28 C.F.R. 35.150(a)(1). Public entities need only 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). However, buildings constructed or altered after Title II's effective date must be designed to provide accessibility. 28 C.F.R. 35.151.

2. Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. 794(a). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. See 29 U.S.C. 794(a); *Barnes* v. *Gorman*, 536 U.S. 181 (2002); *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999).

In 1985, the Supreme Court held that the text of Section 504 was not sufficiently clear to evidence Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damages actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1845. Section 2000d-7 provides, in relevant part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], * * *.

> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. 2000d-7(a).

3. *Pro se* plaintiff Micheal Lee Spencer, who was incarcerated in a Virginia Department of Corrections facility at the commencement of this action, filed a complaint on October 17, 2001, alleging that the Department and various officials discriminated against him on the basis of his disabilities in violation of, *inter alia*, Title II of the ADA and Section 504 by denying his requests for reasonable accommodations in medical care, housing assignments, access to prison programs, and legal services.

On May 30, 2003, this Court entered an order granting defendants' motion to dismiss on various grounds. The Court dismissed plaintiff's ADA claim against the state officials in their personal capacities because the court found that personal capacity suits "are not cognizable under the ADA" (May 30, 2003 Order, p. 5). The Court further dismissed plaintiff's ADA claims against the state officials in their official capacities as well as plaintiff's ADA claims against the State and state agencies because the Court found that Title II of the ADA does not validly abrogate States' Eleventh Amendment immunity (May 30, 2003 Order, pp. 5-7). Finally, this Court dismissed plaintiff's Section 504 claims on the dual bases that (1) plaintiff failed to discuss his Section 504 claims in his brief and, therefore, failed to state a claim, and (2) in any event, plaintiff's Section 504 claims should be dismissed for the same reason as his ADA claims (May 30, 2003 Order, pp. 1-2 n.2).[3]

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[3] The court also held that plaintiff failed to state a claim of unconstitutional denial of medical care under 42 U.S.C. 1983 against the prison psychologist (May 30, 2003 Order, pp. 7-9).

Plaintiff appealed and the Fourth Circuit affirmed in an unpublished opinion "for the reasons stated by the district court." See *Spencer* v. *Earley*, 88 Fed. Appx. 599 (4th Cir. 2004). Plaintiff filed a petition for certiorari with the Supreme Court, and the Supreme Court granted the petition, vacated the Fourth Circuit's opinion, and remanded the case for consideration in light of *Tennessee* v. *Lane*, 541 U.S. 509 (2004), in which the Court held that Title II of the ADA validly abrogates States' Eleventh Amendment immunity as applied to the context of access to judicial services. See *Spencer* v. *Earley*, 543 U.S. 1018 (2004). The Fourth Circuit then remanded the case to this Court.

On May 25, 2005, the state defendant filed a motion to dismiss, asserting its Eleventh Amendment immunity to plaintiff's ADA and Section 504 claims. The State also suggested that this Court hold the case pending the Supreme Court's decision in *United States* v. *Georgia*, No. 04-1203, which presented the Court with the question whether Title II of the ADA validly abrogates States' Eleventh Amendment immunity in the prison context. The Supreme Court issued a decision in *Georgia* on January 10, 2006. *United States* v. *Georgia*, 126 S. Ct. 877 (2006). Virginia subsequently filed an additional motion to dismiss for lack of subject matter jurisdiction on March 24, 2006.

The United States is intervening in this case pursuant to 28 U.S.C. 2403[4] in order to defend the constitutionality of Title II of the ADA, as applied in the prison context, of Section

[4] 28 U.S.C. 2403 provides: "In any action, suit or proceeding in a court of the United States to which the United States * * * is not a party, wherein the constitutionality of an Act of Congress affecting the public interest is drawn in question, the court shall * * * permit the United States to intervene for * * * argument on the question of constitutionality.

504, and of the statutory provisions removing States' Eleventh Amendment immunity to suits under Title II and Section 504.

ARGUMENT

I

TITLE II OF THE AMERICANS WITH DISABILITIES ACT IS VALID SECTION 5 LEGISLATION AS APPLIED TO PRISON ADMINISTRATION

Although the Eleventh Amendment ordinarily renders States immune from suits in federal court by private citizens, Congress may abrogate States' immunity if it "unequivocally expressed its intent to abrogate that immunity" and "acted 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 States' sovereign immunity to claims under the Americans with Disabilities Act. See 42 U.S.C. 12202; *Tennessee* v. *Lane*, 541 U.S. 509, 518 (2004). Moreover, it is settled that "Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment." *Ibid*.

Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power, see *Kimel*, 528 U.S. at 80, that gives Congress the "authority both to remedy and to deter violation of [Fourteenth Amendment] rights * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 727 (2003) (quoting *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001)). Section 5 "is a 'broad power indeed,'" *Lane*, 541 U.S. at 518, empowering Congress not only to remedy past violations of constitutional rights, but also to

enact "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," *Hibbs*, 538 U.S. at 727-728. Congress also may prohibit "practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Lane*, 541 U.S. at 520. State prison operations are no exception to this power. See *Hutto* v. *Finney*, 437 U.S. 678, 693-699 (1978).

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

A. In United States v. Georgia, The Supreme Court Instructed That Courts Should Not Judge The Validity Of Title II's Prophylactic Protection In Cases Where That Protection Is Not Implicated

United States v. *Georgia*, 126 S. Ct. 877 (2006), presented the Supreme Court with the question presented in the instant case: whether Congress validly abrogated States' Eleventh Amendment immunity to claims under Title II of the ADA, as applied in the prison context. However, the Court declined to determine the extent to which Title II's prophylactic protection is valid in this context because the lower courts in *Georgia* had not determined whether the Title II

claims in that case could have independently constituted viable constitutional claims or whether the Title II claims relied solely on the statute's prophylactic protection. To the extent any of the plaintiff's Title II claims would independently state a constitutional violation, the Court held, Title II's abrogation of immunity for those claims is valid, and a court need not question whether Title II is congruent and proportional under the test first articulated in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). *Georgia*, 126 S. Ct. at 881-882. Because it was not clear whether the plaintiff in *Georgia* had stated any viable Title II claims that would not independently state constitutional violations, the Court declined to decide whether any prophylactic protection provided by Title II is within Congress's authority under Section 5 of the Fourteenth Amendment. *Ibid.*

In its most recent motion to dismiss (3/24/06 Motion to Dismiss, pp. 4, 7), Virginia mischaracterizes the Supreme Court's holding in *Georgia*, implying that the Court affirmatively held that Title II abrogates States' immunity for claims that would independently state a constitutional violation but not for other claims, and erroneously claiming that the "Court did not find error in the dismissal of claims that did not allege constitutional violations." In fact, the Supreme Court reversed the 11th Circuit's decision in its entirety and remanded the case for further proceedings. *Georgia*, 126 S. Ct. at 882. Moreover, the Court in *Georgia* explicitly declined to reach the question whether Title II validly abrogates States' immunity to claims in the prison context that would not independently state constitutional violations. See 126 S. Ct. at 882.

In *Georgia*, the Supreme Court included instructions to lower courts as to how Eleventh Amendment immunity challenges in Title II cases should be handled, admonishing that lower

courts must "determine in the first instance, on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Georgia*, 126 S. Ct. at 882. Thus, in order to resolve the immunity question in the instant case, this Court must first determine which of Spencer's allegations state a claim under Title II.[5] This Court must then determine which of Spencer's valid Title II claims would independently state constitutional claims. And finally, only if Spencer has alleged valid Title II claims that are not also claims of constitutional violations, this Court should consider whether the prophylactic protection afforded by Title II is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment as applied to "the *class* of conduct" at issue. *Ibid*. (emphasis added).[6]

B. Under The Boerne Framework, Properly Applied, Title II's Prophylactic Protection Is A Valid Exercise Of Congress's Authority Under Section 5 Of The Fourteenth Amendment

If this Court finds it necessary to decide whether Title II's prophylactic protection is a valid exercise of Congress's Section 5 authority, the third stage of the *Georgia* analysis requires

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[5] Although the Fourth Circuit in *Constantine* v. *Rectors and Visitors of George Mason University*, 411 F.3d 474 (4th Cir. 2005), found that it was required to consider the state defendant's Eleventh Amendment arguments before considering the merits of the plaintiff's claim, that holding was overruled by *Georgia* at least insofar as *Georgia* requires courts to first determine whether a plaintiff even states any valid statutory claims before determining whether a state defendant is immune from such claims.

[6] Because of the limited nature of our role as intervenor, we do not take a position on whether Spencer has stated valid Title II claims or on whether any of those claims would independently state a constitutional violation.

the Court to apply the *Boerne* congruence and proportionality analysis, as that analysis was applied to Title II in *Tennessee* v. *Lane*, 541 U.S. 509 (2004). In 2005 – after Virginia filed its motion to dismiss in the instant case – the Fourth Circuit applied the *Lane* analysis in *Constantine* v. *Rectors and Visitors of George Mason University*, 411 F.3d 474 (4th Cir. 2005), and held that Title II is valid Section 5 legislation, as applied to the context of public education. Although the instant case involves the application of Title II in a different context, this Court is bound to follow the analysis employed by the Fourth Circuit in *Constantine*.[7]

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

To reach this conclusion, the Court applied the three-part analysis for Fourteenth Amendment legislation created by *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). The Court considered: (1) the "constitutional right or rights that Congress sought to enforce when it enacted Title II," *Lane*, 541 U.S. at 522; (2) whether there was a history of unconstitutional disability discrimination to support Congress's determination that "inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at 529;

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[7] In *Constantine*, the Fourth Circuit explicitly held that the Supreme Court's decision in *Lane* supercedes the Fourth Circuit's prior holding in *Wessel* v. *Glendening*, 306 F.3d 203 (4th Cir. 2002), that Title II in its entirety is not valid Section 5 legislation. *Constantine*, 411 F.3d at 486 n.8 ("[T]he reasoning of *Lane* renders *Wessel* obsolete.").

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

With respect to the first question, the Court found that Title II enforces rights under the Equal Protection Clause as well as an array of rights subject to heightened constitutional scrutiny under the Due Process Clause of the Fourteenth Amendment. *Lane*, 541 U.S. at 522-523; accord *Constantine*, 411 F.3d at 486-487. With respect to the second question, the Court conclusively found a sufficient historical predicate of unconstitutional disability discrimination in the provision of public services to justify enactment of a prophylactic remedy pursuant to Congress's authority under Section 5 of the Fourteenth Amendment. *Lane*, 541 U.S. at 523-528; accord *Constantine*, 411 F.3d at 487. And finally, with respect to the third question, the Court found that the congruence and proportionality of the remedies in Title II should be judged on a category-by-category basis in light of the particular constitutional rights at stake in the relevant category of public services.[8] *Lane*, 541 U.S. at 530-534; accord *Constantine*, 411 F.3d at 487-490. Applying the holdings of the Supreme Court's decision in *Lane* and the Fourth Circuit's decision in *Constantine*, this Court should conclude that Title II is valid Fourteenth Amendment Legislation as it applies in the context of prison administration.

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[8] The Court in *Lane* did not examine the congruence and proportionality of Title II as a whole because the Court found that the statute was valid Section 5 legislation as applied to the class of cases before it. Because Title II is valid Section 5 legislation as applied to the class of cases implicating prisoners' rights, this Court need not consider the validity of Title II as a whole. The United States continues to maintain, however, that Title II as a whole is valid Section 5 legislation because it is congruent and proportional to Congress's goal of eliminating discrimination on the basis of disability in the provision of public services – an area that the Supreme Court in *Lane* determined is an "appropriate subject for prophylactic legislation" under Section 5. *Lane*, 541 U.S. at 529.

1. Constitutional Rights At Stake

The Supreme Court held in *Lane* that Title II enforces the Equal Protection Clause's "prohibition on irrational disability discrimination," as well as "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." 541 U.S. at 522-523. The *Lane* Court specifically noted that Title II seeks to enforce rights "protected by the Due Process Clause of the Fourteenth Amendment," *id.* at 523, and noted that one area targeted by Title II is "unequal treatment in the administration of * * * the penal system," *id.* at 525. In this case, in which constitutional rights in the penal system are implicated, Title II enforces the Equal Protection Clause's prohibition of arbitrary treatment based on irrational stereotypes or hostility,[9] as well as the heightened constitutional protection afforded to a variety of constitutional rights arising in the prison context. Indeed, the Supreme Court made clear in *Georgia* that Title II's application to the prison context implicates numerous constitutional protections, stemming from both the Eighth Amendment *and* "other constitutional provision[s]." *Georgia*, 126 S. Ct. at 882; *id.* at 884 (Stevens, J., concurring) (finding that there is a "constellation of rights applicable in the prison context").[10]

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

[10] The two courts of appeals that considered Title II's validity in the prison context prior to the Supreme Court's decision in *Georgia* both held that, in judging the validity of Title II's prophylactic protection, the courts could consider whether those protections are congruent and proportional to the specific constitutional right implicated by the claims of the particular plaintiffs in those cases *only* and could not consider any other constitutional rights that may be at

Although incarceration in a state prison necessarily entails the curtailment of many of an individual's constitutional rights, the Supreme Court has repeatedly held that prisoners must "be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson* v. *Palmer*, 468 U.S. 517, 523 (1984). In addition, the very nature of prison life – the constant and pervasive governmental regulation of and imposition on the exercise of every constitutional right retained by incarcerated individuals, and the perpetual intrusion of the state into every aspect of day-to-day life – makes the penal context an area of acute constitutional concern, implicating a broad array of constitutional rights and interests on the part of inmates with disabilities. Thus, the Court has found that a variety of constitutional rights subject to heightened constitutional scrutiny are retained by prisoners, including the right of access to the courts, *Younger* v. *Gilmore*, 404 U.S. 15 (1971), aff'g *Gilmore* v. *Lynch*, 319 F. Supp. 105 (N. D. Cal. 1970); *Johnson* v. *Avery*, 393 U.S. 483 (1969); *Ex parte Hull*, 312 U.S. 546 (1941), the right to "enjoy substantial religious freedom under the First and Fourteenth Amendments," *Wolff* v. *McDonnell*, 418 U.S. 539, 556 (1974) (citing *Cruz*

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stake in the prison context. See *Miller* v. *King*, 384 F.3d 1248 (11th Cir. 2004); *Cochran* v. *Pinchak*, 401 F.3d 184 (3d Cir. 2005). But the Supreme Court in *Georgia* made clear that such a narrow focus is incorrect and inconsistent with *Lane*, holding that Title II's application to the prison context implicates both Eighth Amendment protections *and* "other constitutional provision[s]." *Georgia*, 126 S. Ct. at 882; *id.* at 884 (Stevens, J., concurring) (finding that there is a "constellation of rights applicable in the prison context"). Moreover, the concurring opinion in *Georgia* explicitly stated that "it is clear that the Eleventh Circuit has erred in identifying only the Eighth Amendment right to be free from cruel and unusual punishment in performing the first step of the 'congruence and proportionality' inquiry set forth in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997)." *Id.* at 884. That focus, the concurring justices noted, was inconsistent with *Lane*, which considered "a constellation of 'basic constitutional guarantees.'" *Id.* at 883. The concurrence also stated that, in reversing this Court's decision in that case, the Supreme Court is providing this Court and the district court "the opportunity to apply the *Boerne* framework properly." *Id.* at 884.

v. *Beto*, 405 U.S. 319 (1972)); *Cooper* v. *Pate*, 378 U.S. 546 (1964)), the right to marry, *Turner* v. *Safley*, 482 U.S. 78, 95 (1987), and certain First Amendment rights of speech "not inconsistent with [an individual's] status as * * * prisoner or with the legitimate penological objectives of the corrections system," *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974).[11]

Prisoners also retain rights under the Due Process Clause. *Wolff*, 418 U.S. at 556 ("Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law."). The Due Process Clause imposes an affirmative obligation upon States to take such measures as are necessary to ensure that individuals, including those with disabilities, are not deprived of their life, liberty, or property without procedures affording "fundamental fairness." *Lassiter* v. *Department Social Serv.*, 452 U.S. 18, 24 (1981). The Due Process Clause requires States to afford inmates, including individuals with disabilities, fair proceedings in a range of circumstances that arise in the prison setting, including administration of antipsychotic drugs, *Washington* v. *Harper*, 494 U.S. 210, 221-222 (1990), involuntary transfer to a mental hospital, *Vitek* v. *Jones*, 445 U.S. 480, 494 (1980), and parole hearings, *Young* v. *Harper*, 520 U.S. 143, 152-153 (1997). The Due Process Clause also requires fair proceedings when a prisoner is denied access to benefits or programs created by state regulations and policies even where the liberty interest at stake does not arise from the Due Process Clause itself. See, *e.g.*, *Greenholtz* v. *Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) (parole); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) (good time

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[11] As discussed *infra* at p. 22, claims that certain constitutional rights of inmates have been violated are subject to review under the standard of *Turner* v. *Safley*, 482 U.S. 78, 89 (1987), which inquires whether a restriction on a particular right is "reasonably related to legitimate penological interests."

credits); *id.* at 571-572 & n.19 (solitary confinement); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (probation).

Moreover, all persons incarcerated in state prisons, including persons with disabilities, have a constitutional right under the Eighth Amendment to be free from "cruel and unusual punishments." The Supreme Court has held that the Eighth Amendment both "places restraints on prison officials," and "imposes duties on those officials." *Farmer* v. *Brennan*, 511 U.S. 825, 832-833 (1994). Among the restraints imposed under the Amendment are prohibitions on the use of excessive physical force against prisoners, *Hudson* v. *McMillian*, 503 U.S. 1 (1992), and the "unnecessary and wanton infliction of pain," *Hope* v. *Pelzer*, 536 U.S. 730, 737 (2002). Among the affirmative obligations imposed are the duty to "ensure that inmates receive adequate food, clothing, shelter, and medical care," *Farmer*, 511 U.S. at 832-833, and the duty to "take reasonable measures to guarantee the safety of the inmates," *Hudson*, 468 U.S. at 526-527. Prison officials also may not display "deliberate indifference to serious medical needs of prisoners." *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976); see also *Helling* v. *McKinney*, 509 U.S. 25, 32 (1993).

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

As described below, Title II's reasonable accommodation requirement is a valid means of targeting violations of these constitutional rights and of preventing and deterring constitutional

violations throughout the range of government services, many of which implicate fundamental constitutional rights. *Lane*, 541 U.S. at 540.

2. Historical Predicate Of Unconstitutional Disability Discrimination In The Provision Of Public Services

As the Fourth Circuit held in *Constantine*, 411 F.3d at 487, the Supreme Court in *Lane* left no doubt that there was a sufficient historical predicate of unconstitutional disability discrimination in the provision of public services to justify prophylactic legislation under Section 5 of the Fourteenth Amendment. In so holding, the Supreme Court found that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights," *Lane*, 541 U.S. at 524. The Court held that Congress's legislative finding of persistent "discrimination against individuals with disabilities * * * [in] access to public services," taken "together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." *Id.* at 529.

Although *Lane* ultimately upheld Title II as valid Fourteenth Amendment legislation only as applied to access to courts, the Fourth Circuit in *Constantine* held that the Supreme Court's conclusions regarding the historical predicate for Title II are not limited to that context. See 411 F.3d at 487. The *Lane* Court found that the record included not only "a pattern of unconstitutional treatment in the administration of justice," 541 S. Ct. at 525, but also violations of constitutional rights in the context of voting, marriage, jury service, zoning, the penal system, public education, law enforcement, and the treatment of institutionalized persons. *Id.* at 524-525.

This history, the Court held, warranted prophylactic legislation addressing "public services" generally. *Id.* at 529. The Fourth Circuit in *Constantine* found that the Supreme Court's holding as to the adequacy of this historical record applies to Title II as a whole, rather than to Title II's application to the court access context alone, stating:

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

411 F.3d at 487. Because that holding is binding on this Court, the adequacy of the historical predicate for Title II is no longer open to dispute.

But even if this Court were free to examine Title II's historical predicate anew, there is ample evidence of a history of unconstitutional discrimination against inmates with disabilities.[12] In fact, the Court in *Lane* specifically took notice of the historical record of disability discrimination in the penal system, as documented in the decisions of various courts. 541 U.S. at 525 & n.11 (citing *LaFaut* v. *Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (paraplegic inmate unable to access toilet facilities); *Schmidt* v. *Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999) (double amputee forced to crawl around the floor of jail); *Key* v. *Grayson*, 179 F.3d 996 (6th Cir. 1999) (deaf

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[12] Congress was also aware of the prevalence of unconstitutional conditions of confinement in prisons generally. See generally legislative history of the Civil Rights of Institutionalized Persons Act, H.R. Rep. No. 1058, 95th Cong., 2d Sess. (1978); S. Rep. No. 1056, 95th Cong., 2d Sess. (1978); see also, *e.g.*, *Pugh* v. *Locke*, 406 F. Supp. 318, 329 (M.D. Ala. 1976) ("The living conditions in Alabama prisons constitute cruel and unusual punishment."), aff'd as modified sub nom; *Newman* v. *Alabama*, 559 F.2d 283 (5th Cir. 1977), rev'd in part sub nom; *Alabama* v. *Pugh*, 438 U.S. 781 (1978); *Ramos* v. *Lamm*, 639 F.2d 559, 567-578 (10th Cir. 1980) (conditions at Colorado prison were such that prison was "unfit for human habitation"); *Spain* v. *Procunier*, 600 F.2d 189 (9th Cir. 1979) (conditions at California prison amounted to cruel and unusual punishment).

inmate denied access to sex offender therapy program allegedly required as precondition for parole)).[13] Moreover, in the hearings leading to the enactment of the ADA, Congress heard testimony of examples of disability discrimination in the provision of a vast array of governmental services, including services provided to inmates in state prisons. In the House Report issued in response to those hearings, Congress concluded that persons with disabilities, such as epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, *supra*, Pt. 3, at 50; see also 136 Cong. Rec.

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[13] See also, *e.g.*, *Kiman* v. *New Hampshire Dep't of Corr.*, 301 F.3d 13, 15-16 (1st Cir. 2002) (disabled inmate stated Eighth Amendment claims for denial of accommodations needed to protect his health and safety due to degenerative nerve disease), see note 10, *infra*, for subsequent history; *Armstrong* v. *Davis*, 275 F.3d 849 (9th Cir. 2001) (failure to conduct parole and parole revocation proceedings in a manner that disabled inmates can understand and in which they can participate); *Bradley* v. *Puckett*, 157 F.3d 1022, 1025-1026 (5th Cir. 1998) (failure for several months to provide means for amputee to bathe led to infection); *Koehl* v. *Dalsheim*, 85 F.3d 86 (2d Cir. 1996) (Eighth Amendment violated when inmate with serious vision problem denied glasses and treatment); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) ("squalor in which [prisoner] was forced to live as a result of being denied a wheelchair" violated the Eighth Amendment); *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986) (prison guard repeatedly assaulted paraplegic inmates with knife, forced them to sit in own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead"); *Miranda* v. *Munoz*, 770 F.2d 255, 259 (1st Cir. 1985) (failure to provide medications for epilepsy, which caused prisoner's death, violated Eighth Amendment); *Carty* v. *Farrelly*, 957 F. Supp. 727, 739 (D.V.I. 1997) ("The abominable treatment of the mentally ill inmates shows overwhelmingly that defendants subject inmates to dehumanizing conditions punishable under the Eighth Amendment."); *Kaufman* v. *Carter*, 952 F. Supp. 520 (W.D. Mich. 1996) (amputee hospitalized after fall in inaccessible jail shower); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1466 (M.D. Ala. 1994) (paraplegic prisoner denied use of a wheelchair and forced to crawl around his cell); *Nolley* v. *County of Erie*, 776 F. Supp. 715 (W.D.N.Y. 1991) (Constitution violated where inmate with HIV was housed in part of prison reserved for inmates who are mentally disturbed, suicidal, or a danger to themselves, and was denied access to prison library and religious services); *Bonner* v. *Arizona Dep't of Corr.*, 714 F. Supp. 420 (D. Az. 1989) (deaf, mute, and vision-impaired inmate denied communication assistance, including in disciplinary proceedings, counseling sessions, and medical treatment). For a more extensive list of cases in which state and local prisons and jails infringed upon the constitutional rights of inmates with disabilities, please see Appendix A to the United States' Brief as Petitioner to the United States Supreme Court in *United States* v. *Georgia*, No. 04-1203.

11,461 (1990) (Rep. Levine).[14] Furthermore, as the Court stated in *Nevada Department of Human Resources* v. *Hibbs*, 538 U.S. 721, 735-737 (2003), and reiterated in *Lane*, 541 U. S. at 529, it is "easier for Congress to show a pattern of state constitutional violations" where, as here, Congress is targeting conduct subject to heightened constitutional review.[15]

3. Title II's Congruence And Proportionality In Cases Implicating Prisoners' Rights

"The 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. The Court in *Lane* limited its consideration of this question to the class of cases implicating the right of "access to the courts" and "the accessibility of judicial services," finding that the remedy of Title II "is congruent and proportional to its object of enforcing the right of access to the courts." *Id.* at 530-534. In

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[14] See also U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 168 (1983) (noting discrimination in treatment and rehabilitation programs available to inmates with disabilities and inaccessible jail cells and toilet facilities); Cal. Att'y Gen., *Commission on Disability: Final Report* 103 (Dec. 1989) ("[A] parole agent sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though he explained that he could not make the appointments because he was unable to get accessible transportation."). A congressionally designated Task Force submitted to Congress several thousand documents evidencing discrimination and segregation in the provision of public services, including the treatment of persons with disabilities in prisons and jail. See *Garrett*, 531 U.S. at 393 (Appendix to Justice Breyer's dissent) (citing AK 55 (jail failed to provide person with disability medical treatment)); *id.* at 405 (citing IL 572 (deaf people arrested and held in jail overnight without explanation because of failure to provide interpretive services)); *id.* at 414 (citing NM 1091 (prisoners with developmental disabilities subjected to longer terms of imprisonment and abused by other prisoners in state correctional system)); *id.* at 415 (citing NC 1161 (police arrested and jailed deaf person without providing interpretive services)).

[15] Because the Fourth Circuit's decision in *Constantine* precludes this Court from reexamining the adequacy of the historical record of disability discrimination in prisons, we do not set out that history in full herein. A more complete account of that history can be found in the Brief for the United States as Petitioner before the Supreme Court in *Georgia*. See 2005 WL 1811401, at *18-*35.

Constantine, the Fourth Circuit limited its consideration of this question "to the class implicating the right to be free from irrational disability discrimination in public higher education." 411 F.3d at 488. In the instant case, this Court must decide whether Title II is congruent and proportional legislation as applied to the class of cases implicating prisoners' rights.

A statutory remedy is valid under Section 5 where it is "congruent and proportional to its object of enforcing the right[s]" at issue in the particular situation. *Lane*, 541 U.S. at 531. Thus, in the context of prisoners' rights, this Court should judge the appropriateness of Title II's requirement of program accessibility against the background of the panoply of rights implicated by incarceration and in light of the history of unequal or otherwise unconstitutional treatment of prisoners with disabilities. Where, as here, a statutory remedy is appropriately tailored to the constitutional rights at stake, it is valid under Section 5.

As was true in *Lane* with respect to cases implicating access to courts and judicial services, "Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the" rights of persons who are incarcerated in state prisons. 541 U.S. at 531. The Court in *Lane* found that the "unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts." *Ibid.* The same is true with respect to the treatment of persons with disabilities in the penal system. See *id.* at 525 (noting the "pattern of unequal treatment" of persons with disabilities in the administration of the penal system). In particular, Congress was aware that such problems existed despite several legislative efforts that apply directly to the penal context such as the Civil Rights of Institutionalized Persons Act and Section 504 of the Rehabilitation Act. Thus,

Congress faced a "difficult and intractable proble[m]," *id.* at 531, which it could conclude would "require powerful remedies," *id.* at 524.

Nevertheless, the remedy imposed by Title II "is a limited one." *Lane*, 541 U.S. at 531; see also *Constantine*, 411 F.3d at 488-489 ("We must also consider the limitations that Congress placed on the scope of Title II."). Although Title II requires States to take some affirmative steps to avoid discrimination, it "does not require States to compromise their essential eligibility criteria," requires only "'reasonable modifications' that would not fundamentally alter the nature of the service provided," and does not require States to "undertake measures that would impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service." *Lane*, at 531-533.

Title II's carefully circumscribed accommodation mandate is consistent with the commands of the Constitution in the area of prisoners' rights. Claims by inmates of violations of certain constitutional rights are generally subject to analysis under the standard set forth by the Supreme Court in *Turner* v. *Safley*, 482 U.S. 78 (1987), which takes into consideration the State's penological justification for a challenged practice, the availability of alternative means of serving the State's interests, as well as the potential impact a requested accommodation to such a practice will have on guards, other inmates, and allocation of prison resources.[16] The Due Process Clause itself requires an assessment of the importance of the right at stake in a particular case as well as the circumstances of the individual to whom process is due. See *Goldberg* v. *Kelly*, 397 U.S. 254, 267-269 (1970).

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

Just as the *Turner* test and the Due Process Clause require a court to weigh the interests of an individual against the interests of the State, Title II also requires a court to balance the interests of an inmate with a disability against those of state prison administrators. While *Turner* requires a court to consider what impact protecting a particular constitutional right will have on a prison's resources and personnel, so Title II requires a court to consider whether providing an accommodation would "impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service." *Lane*, 541 U.S. at 532. Furthermore, just as the *Turner* test requires a court to consider whether "there are alternative means of exercising the [constitutional] right [at stake] that remain open to prison inmates," 482 U.S. at 90, Title II does not require that a qualifying inmate necessarily be granted every requested accommodation with respect to every aspect of prison services, programs, or activities. Rather, Title II requires that a "service, program, or activity, when viewed in its entirety, is readily accessible and usable by individuals with disabilities." 28 C.F.R. 35.150(a). Title II also requires that public entities make "reasonable modifications in policies, practices, or procedures" in order to avoid discrimination where doing so does not "fundamentally alter the nature of the services, program, or activity," 28 C.F.R. 35.130(b)(7), and to "take appropriate steps to ensure" effective communication with program participants unless doing so "would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens," 28 C.F.R. 35.160, 35.164. A determination of whether a particular program, service, or activity satisfies these requirements involves an evaluation of both the burden a requested accommodation will have on a state prison and the availability of accommodations that differ from a plaintiff's requested accommodation but nonetheless address the plaintiff's needs.

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

Such individualized consideration has also been required in order to avoid a violation of the Eighth Amendment or Due Process Clause. See *Farmer*, 511 U.S. at 843 ("[I]t does not matter whether the risk [of harm] comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk."); *Wilson* v. *Seiter*, 501 U.S. 294, 300 n.1 (1991) ("[I]f an individual prisoner is deprived of needed medical treatment, that is a condition of *his* confinement, whether or not the deprivation is inflicted upon everyone else."). Thus, the Constitution itself will require state prisons to accommodate the individual needs of prisoners with disabilities in some circumstances. See, *e.g.*, *Kiman* v. *New Hampshire Dep't of Corr.*, 301 F.3d 13, 15-16, 25-26 (prison's refusal to provide accommodations to inmate with nerve disease, "in the context of his illness and its consequent disabilities, can easily be called deliberate indifference to his welfare");[17] *Bradley* v. *Puckett*, 157 F.3d 1022, 1025-1026 (5th Cir. 1998)

[17] The panel opinion in this case was vacated when rehearing *en banc* was granted. 310 F.3d 785 (1st Cir. 2002). The *en banc* court subsequently affirmed the district court's opinion by an equally divided vote. 332 F.3d 29 (1st Cir. 2003). The Supreme Court later granted the petition

(inmate amputee stated Eighth Amendment claim where prison officials were aware of his need for accommodation in use of shower facilities and failed for months to provide such accommodation); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) (refusal to allow prisoner who had lost the use of his legs to use a wheelchair violated Eighth Amendment).

Moreover, given the history of unconstitutional treatment of inmates with disabilities, Congress was entitled to conclude that there exists a real risk that some state officials may continue to make decisions about how prisoners with disabilities should be treated based on invidious class-based stereotypes or animus that would be difficult to detect or prove. In addition, the very nature of prison life – the constant and pervasive governmental regulation of and imposition on the exercise of every constitutional right retained by incarcerated individuals, and the perpetual intrusion of the state into every aspect of day-to-day life – makes the prison context an area of great constitutional concern, implicating a broad array of constitutional rights and interests on the part of inmates with disabilities. In such a situation, the risk of unconstitutional treatment is sufficient to warrant Title II's prophylactic response. See *Hibbs*, 538 U.S. at 732-733, 735-737 (2003) (remedy of requiring "across-the-board" provision of family leave congruent and proportional to problem of employers relying on gender-based stereotypes); see also *Constantine*, 411 F.3d at 490 (comparing Title II favorably to Title I of the ADA, the Court noted that "it is more likely that disability discrimination in the context of a State's operation of public education programs will be unconstitutional than discrimination in the context of public employment").

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for certiorari, reversed the court of appeals' judgment and remanded the case for further consideration in light of *Lane*. 124 S. Ct. 2387 (2004).

Title II's prophylactic remedy acts to detect and prevent difficult-to-uncover discrimination against inmates with disabilities that could otherwise evade judicial remedy. By proscribing governmental conduct, the discriminatory effects of which cannot be or have not been adequately justified, Title II prevents covert intentional discrimination against prisoners with disabilities and provides strong remedies for the lingering effects of past unconstitutional treatment against persons with disabilities in the prison context. See *Lane*, 541 U.S. at 520 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not intent, to carry out the basic objectives of the Equal Protection Clause."). Further, by prohibiting insubstantial reasons for denying accommodations to persons with disabilities, Title II prevents invidious discrimination and unconstitutional treatment in the day-to-day actions of state officials exercising discretionary powers over inmates with disabilities. See *Hibbs*, 538 U.S. at 736 (Congress justified in concluding that perceptions based on stereotype "lead to subtle discrimination that may be difficult to detect on a case-by-case basis").

In *Constantine*, the Fourth Circuit held that, although "Title II imposes a greater burden on the States than does the Fourteenth Amendment[,] * * * Title II and its implementing regulations limit the scope of liability in important respects and thus minimize the costs of compliance with the statute." 411 F.3d at 489. Those statutory and regulatory limitations, the Court held, "ensure Congress' means are proportionate to legitimate ends under § 5." *Ibid.* That holding, which applies to Title II in the context of education, is even more true in the prison context. Whereas the only constitutional right at stake in the education context is the Equal Protection right to be free of irrational discrimination, a wide range of constitutional rights –

many of which are subject to heightened scrutiny – are at stake in the prison context. Thus, the gap between Title II's statutory protections and the relevant constitutional protections is considerably narrower in the instant case than it was in *Constantine*. Because the Fourth Circuit found that Title II's prophylactic protection passes muster in the educational context, that protection must be valid in the prison context as well.

Accordingly, in the context presented by this case, Title II "cannot be said to be so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Lane*, 541 U.S. at 533 (citation and quotation marks omitted).

II

AS THE FOURTH CIRCUIT HAS HELD, STATE AGENCIES VALIDLY WAIVE THEIR ELEVENTH AMENDMENT IMMUNITY TO CLAIMS UNDER SECTION 504 WHEN THEY ACCEPT FEDERAL FINANCIAL ASSISTANCE

In its March 24, 2006, motion to dismiss, Virginia acknowledges (3/24/06 Motion to Dismiss, p. 8) that all of the arguments it previously advanced that the State did not validly waive its Eleventh Amendment immunity to claims under Section 504 of the Rehabilitation Act when it accepted federal financial assistance were rejected by the Fourth Circuit in *Constantine*.[18] In *Constantine*, the Fourth Circuit unequivocally stated that a state agency that accepts federal financial assistance waives its immunity to private suits to enforce Section 504. That decision is binding upon this Court unless or until it is overruled by the Supreme Court or by the Fourth Circuit. *Constantine* has not been overruled and Virginia does not contend that it has.

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[18] Virginia was also the defendant in *Constantine*, but did not petition for rehearing in that case and did not file a petition for certiorari.

Nevertheless, Virginia advances a new argument, apparently attempting to expand the holding of *Georgia* far beyond the bounds of that case by claiming that the State retains immunity to Section 504 claims because "it stands to reason" that Congress may not condition the receipt of federal funds on a waiver of immunity for statutory claims that would not independently state constitutional claims if Congress cannot unilaterally abrogate immunity for those claims. Not surprisingly, Virginia does not cite a single authority in support of this argument. Nor could it.

The question whether Congress may condition the receipt of federal funds upon a State's waiver of immunity to statutory claims is entirely distinct from the question whether Congress may abrogate States' immunity to such claims because in each situation Congress relies upon a different enumerated power. As discussed *supra*, when Congress *abrogates* States' immunity, it does so pursuant to its authority under Section 5 of the Fourteenth Amendment. However, when Congress conditions the receipt of federal funds on a State's *waiver* of its immunity, Congress relies on its authority under the Spending Clause. Even assuming that Congress could not unilaterally abrogate immunity to Section 504 claims that do not independently state constitutional violations – a contention the United States does not concede – any limitations that may exist on Congress's Section 5 authority to enact Title II or Section 504 have no bearing on Congress's Spending Clause authority to enact Section 504.

Congress's authority to enact legislation under Section 5 is limited to enacting legislation that "enforce[s]" the protections provided in Section 1 of the Fourteenth Amendment. U.S. Const. Amend. XIV, § 5. In establishing the *Boerne* test and refining that test in *Lane* and *Georgia*, the Supreme Court has attempted to ensure that Congress does not exceed this grant of

authority by providing statutory protections that are not congruent and proportional to the object of enforcing the constitutional protections provided in Section 1 of the Fourteenth Amendment. See *Boerne*, 521 U.S. at 516-520; *Lane*, 541 U.S. at 520-522; *Georgia*, 126 S. Ct. at 880-882. Indeed, it was the concept of congruence and proportionality that motivated the *Georgia* Court to bifurcate the plaintiff's statutory claims sounding in constitutional violations from the plaintiff's non-constitutional statutory claims: the Court held that statutory enforcement of the former claims is by definition congruent and proportional to enforcement of constitutional protections and declined to decide whether statutory enforcement of the later claims is. Concerns about congruence and proportionality are unique to the Section 5 context and have no place in the consideration of whether Section 504 is a valid exercise of Congress's Spending Clause authority. In fact, in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Supreme Court explicitly reiterated the long-standing principles "that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." 527 U.S. at 686-687. The Fourth Circuit in *Constantine* understood that resolution of the immunity questions regarding Title II and Section 504 requires distinct analyses, holding first that Title II is a valid exercise of Congress's Section 5 authority as applied in the education context, and then holding that Section 504 is a valid exercise of Congress's Spending Clause authority across the board.

Thus, under the Fourth Circuit's decision in *Constantine*, the state defendant has waived its immunity to plaintiff's Section 504 claims.[19]

CONCLUSION

For the above reasons, this Court should deny the defendants' motion to dismiss plaintiff's ADA and Section 504 claims as barred by the Eleventh Amendment.

Respectfully submitted,

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[19] Morever, as Virginia acknowledges (6/30/05 Motion to Dismiss, p. 18), if Congress has the power under the Fourteenth Amendment to abrogate a State's Eleventh Amendment immunity to claims under Title II of the ADA, it has the same power with respect to claims under Section 504. See, *e.g.*, *Reickenbacker* v. *Foster*, 274 F.3d 974, 977 n.17 (5th Cir. 2001); *Garcia* v. *SUNY Health Sciences Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001).

CERTIFICATE OF SERVICE

I certify that on the ___ day of April, 2006, copies of the foregoing BRIEF OF THE UNITED STATES AS INTERVENOR IN SUPPORT OF CONSTITUTIONALITY OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT were served by first class mail, postage prepaid, to the following counsel of record:

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