IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Intervenor-Appellant

MICHEAL LEE SPENCER, SR.,

Plaintiff

v.

MARK L. EARLEY; COMMONWEALTH OF VIRGINIA, DEPARTMENT OF CORRECTIONS; BRUNSWICK CORRECTIONAL CENTER; OFFICE OF HEALTH SERVICES; ERIC M. MADSEN; RONALD J. ANGELONE; GENE M. JOHNSON,

Defendants-Appellees

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

BRIEF FOR THE UNITED STATES AS APPELLANT

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No. 07-6460

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. 1331. The district court entered a final order disposing of all of plaintiff's claims on January 30, 2007. The United States filed a timely notice of appeal on March 28, 2007. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in dismissing plaintiff's claims under Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794, for failure to state a claim when his factual allegations deemed sufficient to state a claim under Title II of the Americans with Disabilities Act (ADA) necessarily state identical claims under Section 504.

2. Whether the district court erred in dismissing plaintiff's claims against the state agencies under Title II of the ADA, 42 U.S.C. 12131 *et seq.*, on the basis of the Eleventh Amendment.

STATEMENT OF THE CASE

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 various state agencies and officials discriminated against him on the basis of his disabilities in violation of, *inter alia*, Title II of the ADA and Section 504 of the Rehabilitation Act by denying his requests for reasonable accommodations in medical care and housing assignments, as well as in access to prison programs, facilities, and legal services.

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).

This case arises under Title II of the ADA, 42 U.S.C. 12131-12165, which addresses discrimination by state and local governmental entities in the operation of public services, programs, and activities. 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. 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). In addition, while there is no absolute duty to accommodate individuals with a disability, a public entity must make reasonable 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).

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), and imposes "the same requirements" on public entities as does Title II, *Baird* v. *Rose*, 192 F.3d 462, 468 (4th Cir. 1999). 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).

Defendants moved to dismiss this action, and, on May 30, 2003, the district court granted defendants' motion to dismiss on various grounds. The district 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." App. 77. The district court 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 it found that Title II of the ADA does not validly abrogate States' Eleventh Amendment immunity. App. 77-79. Finally, the district 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. App. 71-72 n.2.[1]

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[1] 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. App. 79-81.

Plaintiff appealed and this Court affirmed in an unpublished opinion "for the reasons stated by the district court." See *Spencer* v. *Earley*, 88 F. App'x 599 (4th Cir. 2004). Plaintiff filed a petition for certiorari with the Supreme Court, and the Supreme Court granted the petition, vacated this Court's decision, and remanded the case for consideration in light of *Tennessee* v. *Lane*, 541 U.S. 509 (2004), in which the Supreme 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). This Court remanded the case to the district court.

On May 31, 2005, the state defendant filed a new motion to dismiss, asserting its Eleventh Amendment immunity to plaintiff's ADA and Section 504 claims. The State also suggested that the district 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 validly abrogates States' Eleventh Amendment immunity in the prison context. The Supreme Court issued a decision in *Georgia* on January 10, 2006. 126 S. Ct. 877 (2006). Virginia subsequently filed an additional motion to dismiss for lack of subject matter jurisdiction on March 27, 2006.

The United States intervened in the district court on April 14, 2006, pursuant to 28 U.S.C. 2403 in order to defend the constitutionality of Title II of the ADA, as applied in the prison context, of Section 504, and of the statutory provisions removing States' Eleventh Amendment immunity to suits under Title II and

Section 504. The United States filed a brief responding to the State's assertion of Eleventh Amendment immunity.

On January 30, 2007, the district court issued an order and opinion granting defendants' motion to dismiss all of plaintiff's claims. The district court adhered to its prior order dismissing plaintiff's Section 504 claims, finding that plaintiff "presented no arguments in support of his claims under that Act, as opposed to the 'voluminous arguments' he made pursuant to the ADA." App. 86.

Turning to plaintiff's Title II claims, the district court, pursuant to the Supreme Court's instructions in *Georgia*, first examined plaintiff's allegations to determine whether any stated valid Title II claims. Among plaintiff's numerous allegations, the district court found twelve valid Title II claims. App. 93. Noting that plaintiff did not allege that any of the conduct he claims violates Title II also violates the Constitution, App. 93, the district court turned to the question whether Title II is valid Section 5 legislation in the prison context. After finding that the only right at stake in the prison context is an equal protection right "not to be subject to arbitrary or irrational exclusion from the services, programs, or benefits provided by the state," App. 95, the court held that Title II is not a congruent and proportional means of enforcing that right in the prison context. Both plaintiff and the United States appealed that decision.

STATEMENT OF FACTS

Plaintiff asserts numerous claims of disability discrimination in violation of Title II and Section 504. In his complaint, Spencer alleges that he "suffered a

traumatic brain injury from a gunshot through the brain in 1989," which left him with severe physical and mental disabilities, including a seizure disorder, neurological damage, an involuntary movement disorder, a memory deficit disorder, cognitive dysfunction, mobility impairments, and others. App. 19.

In its January 30, 2007, order, the district court found twelve valid Title II claims among plaintiff's allegations. Briefly, the court found the following (as numbered in plaintiff's complaint and amendment) to state valid Title II claims:

- Claims B and X allege that Spencer could not complete the prison's required "Breaking Barriers" program because defendants refused to accommodate his disability, and that he was punished for his inability to complete the program;
- Claim D alleges that his request to have meetings with his psychologist for future use was denied;
- Claims F, O, and W allege that defendants housed Spencer in a double-occupancy cell that was inaccessible to him, rather than in an accessible single-occupancy cell; Spencer also alleges in Claim F that he was not able to access the prison's mess hall because of his disability;
- Claim H alleges that Spencer was required to wait in an outdoor medication dispensing line, although he suffers from a disorder that causes him to fear open spaces;

- Claim K alleges that he was locked in his building during a fire drill and threatened with a disciplinary charge for delaying and interfering with the drill;
- Claim M alleges that the prison refused to allow Spencer to display placards on his wall that were necessary to remind him to attend to his personal hygiene;
- Claim N alleges that Spencer was denied access to the law library and that prison officials refused his request to borrow a book from the library;
- Claim P alleges that Spencer was housed in the building located farthest from all inmate services, and that he had great difficulty accessing such services because of his disability;
- Claim S alleges that Spencer was thrown into administrative segregation under false pretenses because a prison official did not want an inmate with Spencer's disabilities in his building.

See App. 20-28. Because this appeal stems from the district court's dismissal of Spencer's complaint, these allegations must be taken as true, and read in the light most favorable to Spencer. *Chaudhry* v. *Mobil Oil Corp.*, 186 F.3d 502, 504 (4th Cir. 1999).

SUMMARY OF ARGUMENT

The district court erred in considering the constitutionality of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, and the statutory provision abrogating States' Eleventh Amendment immunity to Title II claims, because it was not necessary to do so. Plaintiff Spencer alleged violations of Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794, as well as violations of Title II. The two statutes impose identical requirements on entities such as the state defendants, and this Court has already held that state agencies are not immune to private claims under Section 504. Had the district court not erroneously dismissed Spencer's Section 504 claims, it would have been wholly unnecessary to consider the constitutionality of Title II. And the Supreme Court has repeatedly held that federal courts should not consider the constitutionality of a federal statute where it is not necessary to do so. This Court should reverse the district court's decision, and remand this case with instructions both that the district court consider the merits of Spencer's claims under Section 504 and that the district court decline to reach the constitutionality of Title II because it is unnecessary to do so.

The district court also erred in concluding that Title II of the Americans with Disabilities Act does not abrogate States' Eleventh Amendment immunity in the prison context. As an initial matter, the district court failed to follow the Supreme Court's instructions in *United States* v. *Georgia*, 126 S. Ct. 877 (2006), regarding

how to avoid judging the validity of Title II's prophylactic protection in cases where that protection is not implicated.

Moreover, application of Title II to the administration of prisons falls squarely within Congress's comprehensive legislative power under Section 5 of the Fourteenth Amendment to prohibit, remedy, and prevent violations of the rights secured by that Amendment. This Court has already held that the Nation's tragic history and enduring problem of unconstitutional treatment of persons with disabilities in the administration of public services provides an appropriate basis for Congress's exercise of its Section 5 power to enact prophylactic legislation. In Title II, Congress formulated a statute that is carefully designed to root out present instances of unconstitutional discrimination, to undo the effects of past discrimination, and to prevent future unconstitutional treatment by prohibiting discrimination and promoting integration where reasonable. At the same time, Title II preserves the latitude and flexibility that States legitimately require in the administration of their prison programs and services. The statute is carefully tailored to prohibit state conduct that presents a substantial risk of violating the Constitution or that unreasonably perpetuates the exclusionary effects of prior unconstitutional treatment and isolation in the prison context.

ARGUMENT

I

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

1. The district court erred in considering the constitutionality of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, and the statutory provision abrogating States' Eleventh Amendment immunity to Title II claims, because it was not necessary to do so. The district court should not have dismissed Spencer's claims under Section 504 because those claims are substantively identical to his claims under Title II. As this Court has held, Title II and Section 504 "generally are construed to impose the same requirements due to the similarity of the language of the two acts." *Baird* v. *Rose*, 192 F.3d 462, 468 (4th Cir. 1999). As this Court noted, in the text of the ADA itself, Congress directed courts to construe the statute not to apply a lesser standard than the standard applied under Section 504. *Id.* at 468-469; see also 42 U.S.C. 12201(a); *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632 (1998); 28 C.F.R. 35.103(a). Congress further instructed that interpretation of the ADA and Section 504 be coordinated to "prevent[] imposition of inconsistent or conflicting standards for the same requirements," *Baird*, 192 F.3d at 469 (internal quotation marks omitted), and that the "remedies, procedures, and rights set forth in [the Rehabilitation Act] shall be the remedies, procedures, and rights" of Title II. *Barnes* v. *Gorman*, 536 U.S. 181, 185 (2002); 42 U.S.C. 12133. Thus, any allegation that states a Title II claim

against a state agency that receives federal funds necessarily states a Section 504 claim as well.

It is clear from the face of his complaint that Spencer intended to allege overlapping Title II and Section 504 claims. Indeed, Spencer's original complaint is titled "Complaint Under Title II of the Americans With Disabilities Act/Section 504 of the Rehabilitation Act of 1973." App. 18. Additionally, in Spencer's first amendment to his complaint, he specifically alleges that the state agency defendants "violated his rights under the Rehabilitation Act" with respect to claims B, H, and N. App. 47. That amendment also added claims W and X, both of which specifically mention Section 504. App. 45-47.

The Supreme Court has repeatedly held that, for purposes of motions to dismiss, district courts must construe pro se complaints liberally, holding such complaints to less stringent standards than those drafted by lawyers. *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972); see also *Boag* v. *MacDougall*, 454 U.S. 364, 365 (1982). Such complaints – "however inartfully pleaded" – should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Haines*, 404 U.S. at 520 (internal quotation marks omitted); *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976). Furthermore, this Court has noted that "liberal construction of pleadings is particularly appropriate where, as here, there is a Pro se complaint raising civil

rights issues." *Loe* v. *Moffitt*, 582 F.2d 1291, 1295 (4th Cir. 1978), cert. denied, 446 U.S. 928 (1980).[2]

Moreover, "whether a complaint states a cognizable claim depends ultimately on the applicable law." *Loe*, 582 F.2d at 1295. The "applicable law" in this case conflicts with the district court's decision to dismiss Spencer's Section 504 claims for failure to state a claim while simultaneously finding that Spencer's complaint stated twelve separate Title II claims. Section 504 and Title II impose identical requirements on federally funded public entities. The defendant conceded below that it receives federal funds for a "variety of purposes." May 26, 2005 Mem. in Supp. of Mot. to Dismiss. It simply cannot be the case that, although Spencer stated twelve claims under Title II, he "can prove no set of facts in support of his claim which would entitle him to relief" under Section 504. *Haines*, 404 U.S. at 520. Thus, the district court erred in concluding that Spencer failed to state a claim under Section 504 with respect to the twelve counts the court found stated Title II claims.

2. This Court has already held that a state agency such as defendant that receives federal financial assistance does not enjoy Eleventh Amendment immunity to claims under Section 504 because it waives any such immunity when it accepts clearly conditioned federal financial assistance. See *Constantine* v.

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[2] In light of this standard, it may be appropriate for the district court to reconsider its conclusion that some of Spencer's other allegations – *e.g.*, Counts E and I alleging that Spencer was denied access to the prison's legal services program on the basis of his disability – fail to state a claim under Title II.

Rectors & Visitors of George Mason Univ., 411 F.3d 474 (4th Cir. 2005). That holding is in accord with every other court of appeals, all of which have held that state entities that accept federal funds waive their immunity to private suits under Section 504. Because the Virginia Department of Corrections is subject to suit under Section 504, and because Section 504 provides to plaintiffs identical protection to that afforded under Title II, the district erred in considering Virginia's complex constitutional challenge to the validity of Title II's abrogation because resolution of that issue was unnecessary to resolution of the case.

Considering a constitutional challenge to an act of Congress is "the gravest and most delicate duty that [a] Court is called on to perform." *Blodgett* v. *Holden*, 275 U.S. 142, 147-148 (1927) (opinion of Holmes, J.). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable." *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944). Accordingly, a "fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988).

Had the district court not dismissed Spencer's Section 504 claims – claims to which the state defendants are not immune – it could, and should, have avoided considering the validity of Title II's abrogation of Virginia's Eleventh Amendment immunity. The Supreme Court has repeatedly admonished that federal courts have

a "'deeply rooted' commitment" and obligation "'not to pass on questions of constitutionality' unless adjudication of the constitutional issue is necessary." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004). That principle of constitutional avoidance is at its apex when courts address the constitutionality of an Act of Congress. *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981).

In sum, this Court should reverse the district court's decision, and remand this case with instructions to reinstate Spencer's Section 504 claims, to the extent the district court has found that particular counts state violations of Title II, and to dispose of those claims on their merits without considering the constitutionality of Title II and its abrogation of States' immunity.

II

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

In the event this Court disagrees that the district court erred in considering the constitutionality of Title II and its abrogation of States' immunity, it should reverse the district court's holding that Title II, as applied to the administration of prisons, does not validly abrogate States' Eleventh Amendment immunity. 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). 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* upheld Title II of the ADA 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 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. The District Court Did Not Properly Follow The Supreme Court's Instructions In United States v. Georgia Regarding How To Avoid Judging 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 potentially 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 *Boerne*. *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 explicitly 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 *Georgia*, the Supreme Court included instructions to lower courts as to how Eleventh Amendment immunity challenges in Title II cases should be handled, explaining 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.

Following the first step of *Georgia*,[3] the district court parsed Spencer's claims, separating the allegations that state a claim under Title II from those that do not. As detailed above, the district court concluded that 12 of

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[3] Although this Court in *Constantine*, 411 F.3d 474, 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 states any valid statutory claims before determining whether a state defendant is immune from such claims.

Spencer's claims stated a Title II violation. But the district court misconstrued the instructions of the Supreme Court when it applied *Georgia*'s second step. The district summarily concluded that, because "Spencer does not allege that defendants' conduct violated the Fourteenth Amendment," "none of Spencer's claims state a violation of the Fourteenth Amendment" App. 93. The Supreme Court in *Georgia*, however, did not instruct district courts to determine whether Title II plaintiffs *actually allege* that the discriminatory conduct of which they complain violates a provision of the Constitution. Rather, the Court instructed that courts must determine whether the "aspects of the State's alleged misconduct" that violated Title II "also violated the Fourteenth Amendment." *Georgia*, 126 S. Ct. at 882; see also *Bowers* v. *NCAA*, 475 F.3d 524, 553 (3d Cir. 2007); *Toledo* v. *Sanchez*, 454 F.3d 24, 32 (1st Cir. 2006).

The Supreme Court in *Georgia* unanimously held that, to the extent Title II prohibits conduct that would also violate the Constitution, its abrogation of States' Eleventh Amendment immunity is valid. 126 S. Ct. at 881. The question left open by the Court in *Georgia* is whether Congress validly abrogated States' immunity in providing Title II's prophylactic protection – protection that prohibits state conduct not prohibited by the Constitution. A plaintiff need not, however, allege that the statutory misconduct was also unconstitutional. Rather, as the Court made clear, the purpose of the *Georgia* inquiry is to determine whether any of plaintiff's allegations implicate Title II's prophylactic protection. The district court failed to make this determination.

Several of Spencer's claims allege misconduct that implicates important constitutional rights. For example, Spencer alleges that he was denied adequate access to the prison mess hall and was housed in a cell that was not compatible with his disabilities, which resulted in physical injury to him. Such claims could implicate an inmate's right under the Eighth Amendment to "humane conditions of confinement," including "adequate food, clothing, shelter, and medical care." *Farmer* v. *Brennan*, 511 U.S. 825, 832 (1994). His allegation that the prison did not include him in fire drills, but locked him in his cell because he was unable to evacuate unassisted could implicate Eight Amendment's requirement that prison officials not be "deliberate[ly] indifferen[t] to a substantial risk of serious harm to an inmate." *Id.* at 828. Moreover, Spencer's allegation that he was denied access to the prison law library might implicate his constitutional right of access to the courts. See *Wolff* v. *McDonnell*, 418 U.S. 539, 579 (1974). His allegation that he was subjected "to penalty of longer prison confinement by reason of his disabilities," App. 47, because his disability prevented him from completing the "Breaking Barriers" program without a reasonable accommodation could bear on his rights under the Due Process Clause. *Wolff*, 418 U.S. at 557. And his allegation that he was placed in administrative segregation because a prison official did not want a disabled person housed in his building could implicate the Equal Protection Clause's prohibition of treatment that is either based on an official's "animosity" towards an individual with a disability, *Romer* v. *Evans*, 517 U.S. 620,

634 (1996), or gives effect to private biases, *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984).

Spencer's claims parallel the claims presented by plaintiff Tony Goodman in *Georgia*. The Supreme Court found that Goodman's claims that prison officials violated Title II by "deliberate[ly] refus[ing] * * * to accommodate [his] disability-related needs in such fundamentals as mobility, hygiene, medical care, and virtually all other prison programs," were based, "at least in large part, on conduct that independently violated the provisions of § 1 of the Fourteenth Amendment." *Georgia*, 126 S. Ct. at 881. Against those claims, the Court unanimously found, the State had no immunity. As was the case in *Georgia*, the question whether Spencer's allegations, construed liberally as is required for pro se civil rights complaints, could independently state constitutional violations is a question for the lower court to answer in the first instance.

B. Under The Boerne Framework, Properly Applied, Title II Of The Americans With Disabilities Act Is Valid Section 5 Legislation As Applied To Prison Administration

If this Court finds it necessary to decide whether Title II's prophylactic protection is a valid exercise of Congress's Section 5 authority, the third stage of the *Georgia* analysis requires the Court to apply the *Boerne* congruence and proportionality analysis, as that analysis was applied to Title II in *Tennessee* v. *Lane*. In 2005, this Court applied the *Lane* analysis in *Constantine*, 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 in *Constantine*.[4]

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 articulated in *Boerne*. The Court considered: (1) the "constitutional right or rights that Congress sought to enforce when it enacted Title II," *Lane*, 541 U.S. at 522; (2) whether there was a history of unconstitutional disability discrimination to support Congress's determination that "inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at 529; and (3) "whether Title II is an appropriate response to this history and pattern of unequal treatment," as applied to the class of cases implicating access to judicial services. *Id.* at 530.

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[4] In *Constantine*, this Court explicitly held that the Supreme Court's decision in *Lane* supercedes this Court'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.").

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.[5] *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 this Court'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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[5] 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. Title II Implicates An Array Of Constitutional Rights In The Prison Context

The Supreme Court held in *Lane* that Title II enforces the Equal Protection Clause's "prohibition on irrational disability discrimination," as well as "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." 541 U.S. at 522-523. The *Lane* Court specifically noted that Title II seeks to enforce rights "protected by the Due Process Clause of the Fourteenth Amendment," *id.* at 523, and noted that one area 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,[6] as well as the heightened constitutional protection afforded to a variety of constitutional rights arising in the prison context.

The district court erroneously concluded that the only right at stake in applying Title II to the prison context is the "right not to be subject to arbitrary or irrational exclusion from the services, programs, or benefits provided by the state."

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[6] 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*, 517 U.S. at 634, or if it simply gives effect to private biases, *Palmore*, 466 U.S. at 433.

App. at 95 (quoting *Wessel* v. *Glendening*, 306 F.3d 203, 210 (4th Cir. 2002), superceded by *Lane*, as recognized in *Constantine*, 411 F.3d at 486 n.8). The Supreme Court made clear in *Lane* and in *Georgia* that a court must consider the full array of constitutional rights implicated by disability discrimination in a particular context. And the Supreme Court made clear in *Georgia* that Title II's application to the prison context implicates *numerous* constitutional protections in addition to rights under the Equal Protection Clause, including rights 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").

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*, 418 U.S. at 556 (citing *Cruz* 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).

Prisoners also retain rights under the Due Process Clause. *Wolff*, 418 U.S. at 556. The Due Process Clause imposes an affirmative obligation upon States to take such measures as are necessary to ensure that individuals, including those 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*, 418 U.S. at 557 (good time credits); *id.* at 571-572 & n.19 (solitary confinement); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (probation).

Moreover, all persons incarcerated in state prisons, 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. The Historical Predicate Of Unconstitutional Disability Discrimination In The Provision Of Public Services Is Sufficient To Justify Prophylactic Legislation

As this Court 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, this Court 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 U.S. 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. This Court 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 entities with respect to the provision of public services. This conclusion is sufficient to satisfy the historical inquiry into the harms sought to be addressed by Title II.

411 F.3d at 487. Thus, as the district court acknowledged and the defendants conceded below, App. 96, 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. The record before Congress included substantial evidence of both historic and enduring unconstitutional treatment of individuals with disabilities by States and their subdivisions in the administration of their penal systems. Moreover, in studying the problem of unconstitutional treatment of the disabled in prisons, Congress confronted an area of state activity in which constitutional concerns and limitations pervade virtually every aspect of governmental operations, and where unconstitutional treatment, biases, fears, and stereotypes can have much more severe and far-reaching repercussions than in society at large, because of the inmates' reduced capacity for self-help or to seek the assistance of others.

Congress enacted Title II based on (i) more than forty years of experience studying the scope and nature of discrimination against persons with disabilities and testing incremental legislative steps to combat that discrimination;[7] (ii) two

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[7] See, *e.g.*, Act of June 10, 1948, ch. 434, 62 Stat. 351; Architectural Barriers Act of 1968, 42 U.S.C. 4151 *et seq.*; Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*; Education of the Handicapped Act, Pub. L. No. 91-230, Title VI, 84 Stat. 175 (reenacted in 1990 as the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*); Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq.*; Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. 1973ee *et seq.*; Air Carrier Access Act of 1986, 49 U.S.C. 41705; Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. 10801; 42 U.S.C. 1437f; 38 U.S.C. 1502, 1524; Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199, § 10, 97 Stat. 1367; Fair Housing Amendments Act of 1988, 42 U.S.C. 3604.

reports from the National Council on the Handicapped, an independent federal agency that was commissioned to report on the adequacy of existing federal laws and programs addressing discrimination against persons with disabilities;[8] (iii) thirteen congressional hearings devoted specifically to consideration of the ADA, see *Garrett*, 531 U.S. at 389-390 (Breyer, J., dissenting) (listing hearings); (iv) evidence presented to Congress by nearly 5000 individuals documenting the problems with discrimination persons with disabilities face daily, which was collected by a congressionally designated Task Force that held 63 public forums across the country;[9] and (v) several reports and surveys.[10]

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[8] See Rehabilitation Amendments of 1984, Pub. L. No. 98-221, Title I, § 141(a), 98 Stat. 26; Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Title V, § 502(b), 100 Stat. 1829; see also National Council on the Handicapped, *On the Threshold of Independence* (1988); National Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities* (1986).

[9] See Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 18 (1990) (*Task Force Report*); 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act* 1040 (Comm. Print 1990) (*Leg. Hist.*). The Task Force submitted those "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" to Congress, 2 *Leg. Hist.* 1324-1325, as part of the official legislative history of the ADA. See *id.* at 1336, 1389; *Lane*, 541 U.S. at 516. In *Garrett*, the United States lodged with the Clerk a complete set of those submissions. See 531 U.S. at 391-424 (Breyer, J., dissenting). As in *Garrett*, those submissions are cited herein by reference to the State and Bates stamp number.

[10] See S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 28 (1990); *Task Force Report* 16; United States Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* (1983); Louis Harris & Assoc., *The ICD Survey of Disabled Americans: Bringing Disabled*

(continued...)

That evidence led Congress to find that individuals with disabilities have been "subjected to a history of purposeful unequal treatment," 42 U.S.C. 12101(a)(7), and that "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination." S. Rep. No. 116, 101st Cong., 1st Sess. 8-9 (1989). And Congress specifically identified "institutionalization" as one "critical area[]" in which "discrimination * * * persists." 42 U.S.C. 12101(a)(3). That targeted finding of past and enduring unconstitutional treatment of institutionalized individuals with disabilities by States and their political subdivisions can naturally "be thought to include penal institutions." *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998).

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 inmate denied

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[10](...continued)
Americans into the Mainstream (1986); Louis Harris & Assocs., The *ICD Survey II: Employing Disabled Americans* (1987); *Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic* (1988).

access to sex offender therapy program allegedly required as precondition for parole).[11] Numerous courts have found discrimination and the deprivation of fundamental rights on the basis of disability. In one case, a prison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead." *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986). In another, a mentally

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[11] 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); *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); *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. Ariz. 1989) (deaf, mute, and vision-impaired inmate denied communication assistance, including in disciplinary proceedings, counseling sessions, and medical treatment). For a more extensive list of cases in which state and local prisons and jails infringed upon the constitutional rights of inmates with disabilities, please see Appendix A to the United States' Brief as Petitioner to the United States Supreme Court in *United States* v. *Georgia*, No. 04-1203.

ill inmate's due process rights were violated when he was confined without notice or an opportunity to be heard for 56 days in solitary confinement 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 the cell, no access to reading materials, and frequently no clothing or bedding material. *Littlefield* v. *Deland*, 641 F.2d 729, 730-732 (10th Cir. 1981). Another case found constitutional violations where mentally ill and impaired inmates 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). Scores of other cases echoed the problem, while more recent cases document its enduring and intractable nature. "[I]t is not only appropriate but also realistic to presume that," in enacting Title II, "Congress was thoroughly familiar with th[o]se unusually important precedents" that predated the enactment of Title II and that addressed in constitutional terms the very problem under study by Congress. *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979); see also *Lane*, 541 U.S. at 524 n.7, 525 & nn.11-14.

Federal efforts to enforce the rights of individuals with disabilities offer still more evidence. Between 1980 and the enactment of Title II in 1990, Department of Justice investigations found unconstitutional treatment of individuals with disabilities in correctional facilities in 13 States.[12] Those findings include

[12] For a detailed accounting of the findings of those investigations, please see

(continued...)

institutions that (i) had the practice of "stripping naked psychotic inmates and inmates attempting suicide, shackling them, and placing them in a glazed cell without ventilation,"[13] (ii) engaged in the improper use of chemical agents on mentally ill inmates,[14] and (iii) pervasively denied even minimally adequate medical care for both juvenile and adult detainees.[15] In addition, mentally disabled detainees in a county jail in Mississippi were routinely left for days shackled in a "drunk tank" without any mental health treatment or supervision.[16] Such findings

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[12](...continued)
Appendix B to the United States' Brief as Petitioner to the United States Supreme Court in *United States* v. *Georgia*, No. 04-1203.

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

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

[15] Findings Letter Re: Western State Correctional Institution, MA (1981); East Louisiana State Hospital (1982); Findings Letter Re: State Prison of Southern Michigan, Marquette Branch Prison, and Michigan Reformatory (1982); Findings Letter Re: Wisconsin Prison System (1982); Findings Letter Re: Oahu Community Correctional Center and High Security Facility, HI (1984); Findings Letter Re: Ada County Jail, ID (1984); Findings Letter Re: Elgin Mental Health Centers, IL (1984); Findings Letter Re: Logansport State Hospital, IN (1984); Findings Letter Re: Napa State Hospital, CA (1986); Findings Letter Re: 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).

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

properly inform the Court's evaluation of the propriety of Section 5 legislation. See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 312-313 (1966).

Information before Congress documented a widespread and deeply rooted pattern of correctional officials' deliberate indifference to the health, safety, suffering, and medical needs of prisoners with disabilities. In fact, the House Report concluded that persons with disabilities, such as epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, Pt. 3, at 50; see also 136 Cong. Rec. 11,461 (1990) (Rep. Levine). The report of the United States Civil Rights Commission that was before Congress, see S. Rep. No. 116 at 6; H.R. Rep. No. 485 Pt. 2, at 28, also identified as problems the "[i]nadequate treatment * * * in penal and juvenile facilities," and "[i]nadequate ability to deal with physically handicapped accused persons and convicts (*e.g.*, accessible jail cells and toilet facilities)." United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 168 (1983) (*Spectrum*).[17] Likewise, a report by the California Attorney General's Commission on Disability acknowledged problems with police officers removing individuals "unsafely from their wheelchairs to transport them to jail." California Att'y Gen., *Commission on Disability: Final Report* 102 (Dec. 1989) (Calif. Report); *id.* at

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[17] A recent survey of state prisons revealed that only one out of 38 responding States had grab bars or chairs in the prison shower to accommodate inmates with physical disabilities. Only ten provide accessible cells. J. Krienert *et al.*, *Inmates with Physical Disabilities: Establishing a Knowledge Base*, 1 S.W. J. of Crim. Just. 13, 20 (2003).

110; see also *Barnes* v. *Gorman*, 536 U.S. 181, 183-184 (2002) (unsafe transportation of paraplegic by police caused "serious medical problems").[18]

In addition, persons with hearing impairments "have been arrested and held in jail over night without ever knowing their rights nor what they are being held for." 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act* 1331 (Comm. Print 1990) (*Leg. Hist.*). That occurs even when interpreters are readily available. KS 673. Congress also was aware that "[m]edical care at best in most State systems barely scratches the surface of constitutional minima," leaving prisoners with disabilities without adequate treatment for their needs.[19]

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[18] See also Kentucky Legis. Research Comm'n, *Research Report No.125*, Mentally Retarded Offenders in Adult and Juvenile Correctional Institutions, at A-3 (1975) ("Kentucky Corrections offers no appropriate treatment to the retarded and subjects them to varied institutional abuse"); *id*. at A-29 to A-34 (documenting widespread problem across more than half of the States in dealing with mentally retarded inmates); AK 55 (jail failed to provide person with disability medical treatment); DE 331 ("There exists a gross lack of psychiatric care for juveniles and adult offenders. While the system provides other medical care, those in need of psychiatric treatment are often left with little or no intervention."); National Inst. of Corrections, U.S. Dep't of Justice, *The Handicapped Offender* 4 (1981) (noting the lack of appropriate treatment facilities for mentally ill and mentally retarded offenders, inadequate training of personnel to treat the disabled offender, and inadequate diagnostic services); L. Teplin, *The Prevalence of Severe Mental Disorder Among Male Urban Jail Detainees: Comparison with the Epidemiologic Catchment Area Program*, 80 *Am. J. Pub. Health* 663, 666 (June 1990) ("[S]ince disorders such as schizophrenia, major depression, and mania require immediate attention, jails must routinely screen all incoming detainees for severe mental disorder. Interestingly, although the courts mandate that jails conduct routine mental health evaluations, many jails do not do so.").

[19] *AIDS and the Admin. of Justice: Hearing Before the House Comm. on the*

(continued...)

Congress was aware that "the confinement of inmates who are in need of psychiatric care and treatment * * * in the so called psychiatric unit of the Louisiana State Penitentiary constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution." *Civil Rights for Instit. Persons: Hearings on H.R. 2439 and H.R. 5791 Before the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 320- 321 (1977) (*H.R. 2439 Hearings*). The lack of treatment of mentally ill patients in other jurisdictions was found to be equally constitutionally deficient.[20] One inmate "who had suffered a stroke and was partially incontinent" was made

> to sit day after day on a wooden bench beside his bed so that the bed would be kept clean. He frequently fell from the bench, and his legs became blue and swollen. One leg was later amputated, and he died the following day.

S. 1393 Hearings 1067. As a result of the denial of the most basic medical care, "[a] quadriplegic [inmate] * * * suffered from bedsores which had developed into open wounds because of lack of care and which eventually became infested with maggots." *Ibid.* "Days would pass without his bandages being changed, until the stench pervaded the entire ward. The records show that in the month before his

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[19](...continued)
Judiciary, 100th Cong., 1st Sess. 39 (1987); see *ibid.* (medical system in Illinois prisons had been held unconstitutional).

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

death, he was bathed and [h]is dressings were changed only once." *Ibid.* That, unfortunately, was not an isolated incident.[21] 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." *Id.* at 234. Indeed, inmates with disabilities have broadly been denied "the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834.[22]

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[21] *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").

[22] See, *e.g.*, *H.R. 2439 Hearings* 293 ("The lack of adequate medical care in state and local correctional institutions is another serious condition which we have found."); *id.* at 316-317 (at Louisiana State Penitentiary, inmates with psychiatric problems "do not receive adequate medical care, exercise, and other treatment"); *S. 1393 Hearings* 121 ("Most persons charged with felonies" in the Los Angeles County Jail "are not eligible for transfer" to the state hospital for treatment of disabilities and, even when transferred, may be "returned precipitously to the jail regardless of treatment needs"); *id.* at 234 ("In one institution a mental patient (stripped of clothing) in a 7 ft. by 5 ft. cell, with a room temperature of 102 [degrees] F and no air movement, was sleeping on urine- and fecal-soaked floors"; the corrections officer advised that the "patient had been confined under these conditions * * * about 6 to 8 weeks"); *id.* at 569-570 ("[T]here are not proper facilities in the Maryland prisons * * * to treat mentally retarded, geriatrics or psychologically disturbed prisoners"); *id.* at 1107 ("Though approximately one half of the average in-patient population at the penitentiary is hospitalized for psychiatric reasons, there is no professional psychiatric staff available for treatment on a regular basis."); *Civil Rights of the Institutionalized: Hearings on S. 10 Before*

(continued...)

Congress also learned that inmates with disabilities are uniquely susceptible to being raped, assaulted, and preyed upon by other inmates, and that prison officials have repeatedly failed to provide adequate protection. See *S. 10 Hearings* 474 (noting repeated rape of mentally retarded inmates; "The mentally retarded were victimized and given no care.").[23] "[H]aving stripped [inmates with

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[22](...continued)
the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 474 (1979) (*S. 10 Hearings*) ("The overtly psychotic were housed without treatment or supervision in dimly-lit, unventilated and filthy 5' x 8' cells for 24 hours a day."); *Corrections: Hearings Before the House Comm. on the Judiciary*, 92d Cong., 2d Sess. Pt. 8, at 92 (1972) ("Inmates with serious medical conditions do not receive necessary medical care. * * * [N]o psychological treatment is usually provided."); 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"); *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 the behavior – of mentally retarded persons within the "juvenile justice system" and other institutions); *Juvenile Delinquency: Hearings Before the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. Pt. 20, at 5012 (1969) (although superintendent of state penitentiary "knew the man was psychotic and could not be locked in his cell without being let out periodically * * *, the superintendent locked this man in a cell and left him there," and "scoffed at" his pleas for help, until prisoner committed suicide).

[23] See 126 Cong. Rec. 3713 (1980) (Sen. Bayh) (noting prison conditions that permit the "gang homosexual rape of paraplegic prisoners"); *id.* at S1860 (daily ed. Feb. 26, 1980) (similar); *Spectrum* 168 (noting the persistent problem of "[a]buse of handicapped persons by other inmates"); National Institute of Corr., U.S. Dep't of Justice, *The Handicapped Offender* 4 (1981) (noting the problem of abuse and exploitation of inmates with disabilities); *H.R. 2439 Hearings* 240 ("Physical abuse at the hands of officers and other inmates is a frequent occurrence, most often inflicted upon those who are young, weak and mentally deficient."); NM 1091 (inmates with developmental disabilities are "more subject to physical and mental attacks by other inmates"); M. Santamour & B. West, *The Mentally Retarded Offender and Corrections* 9 (Dep't of Justice 1977) (discussing the

(continued...)

disabilities] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Farmer*, 511 U.S. at 833.

The Fourteenth Amendment's Due Process and Equal Protection Clauses also prohibit the imposition of significantly harsher conditions of confinement based on disability, rather than the inmate's conduct. Just as a State cannot make it a "criminal offense for a person to be mentally ill," *Robinson* v. *California*, 370 U.S. 660, 666 (1962), States may not subject individuals with physical or mental disabilities to "atypical and significant hardship within the correctional context" just because they are disabled, *Wilkinson* v. *Austin*, 545 U.S. 209, 224 (2005). Yet consigning inmates with disabilities to maximum security, lock-down facilities, or other atypically harsh conditions of confinement because of their disability is not uncommon. When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." *2 Leg. Hist.* 1005. In California, inmates with disabilities often are unnecessarily "confined to medical units where access to work, job training, recreation and rehabilitation programs is limited." *Calif. Report* at 103.[24]

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[23](...continued)
widespread abuse of mentally retarded inmates as "a scapegoat or a sexual object"); Prison Visiting Comm., Corr. Ass'n of N.Y., *State of the Prisons 2002-2003: Conditions of Confinement in 14 New York State Corr. Facilities* 15, 19 (June 2005) (*NY Report*).

[24] See Calif. Report 111; NM 1091 (prisoners with developmental disabilities
(continued...)

Congress also was aware that many States structure prison programs and operations in a manner that has the effect of denying persons with disabilities the equal opportunity to obtain vital services and to exercise fundamental rights, such as attending religious services, accessing the law library, or maintaining contact with spouses and children who visit. Indeed, for inmates with disabilities, the failure to provide accessible programs and facilities has the same real-world effect as incarcerating them under the most severe terms of segregation and isolation. See *S. 1393 Hearings* at 639 (wheelchair-bound inmate "had not been out of the second floor dormitory in the Draper Prison for years").[25] Where programs

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[24](...continued)
subjected to longer terms of imprisonment); Del. 345 (denial of equal access to prison facilities); *NY Report* 15 ("most inmates with mental illness are housed * * * in maximum security facilities"); *id.* at 23 (in some units, "over half of the inmates in solitary confinement were identified as seriously mentally ill"); *id.* at 24 (one seriously mentally ill man "had accumulated a total of 35 years in solitary confinement"); 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").

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

required for parole or good time credits are inaccessible, disabled inmates directly suffer longer prison sentences solely because of their disability.[26]

Beyond that, because "most offenders will eventually return to society, [a] paramount objective of the corrections system is the rehabilitation of those committed to its custody." *McKune* v. *Lile*, 536 U.S. 24, 36 (2002) (plurality) (quoting *Pell* v. *Procunier*, 417 U.S. 817, 823 (1974)). Inmates with disabilities have the same interest in access to the programs, services, and activities provided to the other inmates as individuals with disabilities outside of prison have to the counterpart programs, services, and activities. At a minimum, they have a due process right not to be treated worse than other inmates solely because of their disability. Negative stereotypes about the abilities and needs of inmates with disabilities often underlie that selective denial of services that other inmates routinely receive.[27]

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[26] See *Yeskey*, 524 U.S. at 208 (disabled inmate denied admission to boot camp program "which would have led to his release on parole in just six months" rather than serving 18-36 months); *Key* v. *Grayson*, 179 F.3d 996 (6th Cir. 1999) (deaf inmate denied access to sex offender program that allegedly was required as a condition of parole), cert. denied, 528 U.S. 1120 (2000).

[27] See *Handicapped Offender* at 4 (stereotypes about abilities of mentally ill offenders impair their access to work programs); *Calif. Report* at 102 ("Too many criminal justice policies" remain the product of "erroneous myths and stereotypes.").

3. Title II's Is A Congruent And Proportional Means Of Protecting The Constitutional Rights Of Inmates With Disabilities

"The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment." *Lane*, 541 U.S. at 530. The Court in *Lane* limited its consideration of this question to the class of cases implicating the right of "access to the courts" and "the accessibility of judicial services," finding that the remedy of Title II "is congruent and proportional to its object of enforcing the right of access to the courts." *Id.* at 530-534. In *Constantine*, this Court 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. Where, as here, a statutory remedy is appropriately tailored to the constitutional rights at stake, it is valid under Section 5.

The record of extensive unconstitutional treatment of inmates with disabilities by state and local governments reaffirms the Supreme Court's holding in *Lane* that "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities," 541 U.S. at 528 – evidence that the Supreme Court (and this Court in *Constantine*) agreed "document[ed] a pattern of unequal treatment in the administration of * * * the penal system," *id.* at 525 – "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, especially in the prison context. Indeed, the evidence of unconstitutional treatment exceeds both the evidence of violations of the rights of access to the courts presented in *Lane*, see *id.* at 524 & n.14, 527, and the evidence of unconstitutional leave policies in *Hibbs*, 538 U.S. at 730-732. Given that solid evidentiary predicate for congressional action, application of the congruence and proportionality analysis must afford Congress the same "wide berth in devising appropriate remedial and preventative measures," *Lane*, 541 U.S. at 520, that Congress was afforded in *Hibbs* and *Lane*.

As was true in *Lane* with respect to cases implicating access to courts and judicial services, "Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the" rights of persons who are incarcerated in state prisons. 541 U.S. at 531. In the prison context, Title II targets exclusively governmental action that is itself directly and comprehensively regulated by the Constitution. Title II in the prison context also focuses on government action that threatens fundamental rights or that is unreasonable. For those reasons, much of Title II's operation in prisons targets conduct outlawed by the Constitution itself or that creates a substantial risk that constitutional rights are imperilled, see *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980).

But Title II "does not require States to employ any and all means to make [prison] services accessible to persons with disabilities, and it does not require

States to compromise their essential eligibility criteria for [prison] programs." *Lane*, 541 U.S. at 531-532. Title II requires only "'reasonable modifications' that would not fundamentally alter the nature of the service provided," and does not require States to "undertake measures that would impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service." *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.[28] 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).

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

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[28] 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).

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).

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*, 418 U.S. 539. 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.

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.*, *Bradley* v. *Puckett*, 157 F.3d 1022, 1025-1026 (5th Cir. 1998); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993).

Moreover, given the history of unconstitutional treatment of inmates with disabilities, Congress was entitled to conclude that there exists a real risk that some state officials may continue to make decisions about how prisoners with disabilities should be treated based on invidious class-based stereotypes or animus that would be difficult to detect or prove. In addition, the perpetual intrusion of the state into every aspect of day-to-day life inherent in prison life makes the prison context an area of great constitutional concern, implicating a broad array of constitutional rights and interests on the part of inmates with disabilities. In such a situation, the risk of unconstitutional treatment is sufficient to warrant Title II's prophylactic response. See *Hibbs*, 538 U.S. at 732-733, 735-737 (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"). By proscribing governmental conduct, the discriminatory effects of which cannot be or have not been adequately justified, Title II's prophylactic remedy prevents covert intentional discrimination against prisoners with disabilities and provides strong remedies for the lingering effects of past unconstitutional treatment against persons with disabilities in the prison context.

Given (i) the history of segregation, isolation, and abusive detention, (ii) the resulting entrenched stereotypes, fear, prejudices, and ignorance about inmates with disabilities, (iii) the endurance of unconstitutional treatment, and (iv) the inability of prior legislative responses to resolve the problem, Congress reasonably determined that a simple ban on overt discrimination would be insufficient. Such a ban would do little to combat the "stereotypes [that have] created a self-fulfilling cycle of discrimination" against inmates with disabilities, and which, in turn, lead "to subtle discrimination that may be difficult to detect on a case-by-case basis." *Hibbs*, 538 U.S. at 736. Prison officials' failure to make reasonable accommodations to the rigid enforcement of seemingly neutral criteria – especially the types of accommodations and adjustments that are made for non-disabled

inmates – can often mask just such invidious, but difficult to prove, discrimination. At the same time, given the history and persistence of unconstitutional treatment in the administration of public services, the statute appropriately casts a skeptical eye over decisions made "because of" or "on the basis of disability."

In addition, a simple ban on discrimination would freeze in place the effects of States' prior official mistreatment of inmates with disabilities, which had the effect of rendering the disabled invisible to the designers of prison facilities and programs. See *Gaston County* v. *United States*, 395 U.S. 285 (1969) (constitutionally administered literacy test banned because it perpetuates the effects of past discrimination). "A proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) (internal quotation marks and brackets omitted). Section 5 thus empowers Congress to do more than simply prohibit the creation of new barriers to equality; it can require States to remedy enduring manifestations of past discrimination and exclusion. See *id.* at 550 n.19 (Equal Protection Clause itself can require modification of facilities and programs to ensure equal access); see *Hibbs*, 538 U.S. at 734 n.10. Accordingly, as applied to prisons, Title II is "a reasonable prophylactic measure, reasonably targeted to a legitimate end." *Lane*, 541 U.S. at 533.

In *Constantine*, this Court 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 this Court 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).

CONCLUSION

For the above reasons, this Court should reverse the district court's dismissal of plaintiff's claims under Title II of the ADA and Section 504 of the Rehabilitation Act.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The United States feels that oral argument would assist the Court in resolving the complex constitutional issues presented in this case.

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 WordPerfect 9.0 and contains no more than 13,819 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

May 30, 2007

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLANT were served by Federal Express, postage prepaid, on May 30, 2007, to the following party and counsel of record:

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