No. 98-9663

In the Supreme Court of the United States

ARION DAVIS, ET AL., PETITIONERS

v.

JOE S. HOPPER, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether, in an action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, the district court clearly erred in concluding that inmates who are HIV-positive pose a "significant risk" of transmission to other inmates under the standard set forth in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), if they are permitted to participate with non-HIV infected inmates in various prison recreational, religious, and educational programs.

2. Whether the interest in maintaining prison security that underlies this Court's accord of deference to prison officials under *Turner* v. *Safley*, 482 U.S. 78 (1987), in determining whether a prison regulation offends an inmate's constitutional rights, may be relied upon to justify a prison's determination that a disabled prisoner is not "otherwise qualified" to participate in particular prison programs under Section 504 of the Rehabilitation Act of 1973.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioners are a class of prison inmates in the Alabama prison system who have tested positive for the Human Immunodeficiency Virus (HIV). They brought suit against officials of the Alabama Department of Corrections alleging that exclusion of HIV-positive inmates from various prison programs violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. III 1997). The court of appeals affirmed the district court's rejection of petitioners' Section 504 claims, holding that there was a "significant risk"

of transmitting HIV in all of the programs if the prisoners were integrated, and that petitioners were therefore not "otherwise qualified" as required by the Act.

1. Section 504 of the Rehabilitation Act of 1973 prohibits a federally funded state program from discriminating against a disabled individual solely on the basis of the individual's disability. In order to obtain relief under this provision, a plaintiff must establish that: (1) he is "handicapped" within the meaning of the Act; (2) he is "otherwise qualified"; (3) he is excluded from the program or activity solely because of the "handicap"; and (4) the agency operating the program or activity receives federal financial assistance. See generally Pet. App. 538. In this case, the last two elements are not disputed, and in an earlier decision the court of appeals concluded that petitioners were "handicapped." *Harris* v. *Thigpen*, 941 F.2d 1495, 1522 (11th Cir. 1991); Pet. App. 538. In the current posture of the case, the only issue is whether the HIV-positive inmates are "otherwise qualified" for the programs or activities from which they have been excluded. *Ibid.*

In *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), the Court addressed the standard for determining whether a person with a contagious disease is "otherwise qualified" under Section 504 of the Rehabilitation Act. The Court stated that "[a] person who poses a significant risk of communicating an infectious disease to others * * * will not be otherwise qualified * * * if reasonable accommodation will not eliminate that risk." *Id.* at 287 n.16.[1] In determining whether a person poses a "significant risk," the Court stated that the inquiry should include "findings of facts, based on reasonable medical judgments given the state of medical knowledge," addressing four factors: "(a) the nature

[1] An "otherwise qualified" person must also be someone who is able "to meet all of a program's requirements in spite of his handicap." *Arline*, 480 U.S. at 287 n.17.

of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." *Id.* at 288. In making that determination, "courts normally should defer to the reasonable medical judgments of public health officials." *Ibid.*; see also *Bragdon* v. *Abbott*, 524 U.S. 624, 650 (1998) (discussing *Arline* and similar provision in the Americans with Disabilities Act).

The first three factors are not at issue. As the district court recognized, HIV is transferred by sex, intravenous drug use, and blood-to-blood contact. Pet. App. 6. Further, it was not disputed that "[i]n the state of medical knowledge and art at the time of trial, HIV infection inevitably progressed to AIDS [Acquired Immune Deficiency Syndrome] [, and] AIDS always led to death, often after lengthy suffering." Pet. App. 5. The remaining question is the "probabilit[y] the disease will be transmitted."

2. State law requires the Alabama Department of Corrections to test all entering inmates for infection with HIV. Pet. App. 4. Men testing positive for HIV are incarcerated at the Limestone Correctional Facility, and women testing positive for HIV are incarcerated at the Julia Tutwiler Prison for Women. Those prisons segregate the HIV-positive inmates from the general inmate population and house them in separate units. Pet. App. 4.

HIV-positive inmates are barred from participating in dozens of recreational, religious, and educational programs available to other inmates. The few programs that are available to HIV-infected inmates are segregated and in many cases are not comparable to those offered to non-HIV-infected inmates. Pet. App. 4-5, 28. See generally *id.* at 45-47 (index to district court decision listing all programs).

3. a. Petitioners are a class of inmates in the Alabama prison system who have tested positive for HIV. They brought suit against officials of the Alabama Department of Corrections alleging that the exclusion and segregation of HIV-positive inmates violates Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and seeking declaratory and injunctive relief. Pet. App. 4, 28.

After a bench trial, the district court held that petitioners were not "otherwise qualified" within the meaning of Section 504 as a result of their HIV-positive status. Pet. App. 542-551. The court found that, even with reasonable accommodations, a significant risk of HIV transmission would generally exist. Pet. App. 551. The court of appeals reversed and remanded the district court's dismissal of petitioner's Section 504 claims. Pet. App. 524-541. The court stated that "the district court should have determined the risk of transmission not merely with regard to prison in general, but with regard to each program from which [petitioners] have been automatically excluded." Pet. App. 526, 540.

b. Following a second trial, the district court again held that petitioners were not "otherwise qualified" for any of the programs from which they were excluded or segregated. In a 476-page decision individually addressing approximately 70 programs, the district court concluded that the risk of transmission is significant in all programs. Pet. App. 43-523.

The district court's conclusion was principally based on the court's finding that high-risk behaviors—sex, intravenous drug use and needle sharing, and violence that results in bloodshed—occur disproportionately in prison systems and that eliminating such behavior is impossible. *E.g.*, Pet. App. 109 (discussion of religious programs). The court also found that the general inmate population will not readily accept the integration of HIV-positive inmates, and that therefore the integration of HIV-positive inmates "would likely 'degenerate into active violence.'" *E.g.*, Pet. App. 86.

Although petitioners presented evidence that occurrence of high-risk behavior is rare in the programs in which they sought to participate, the court found that since high-risk activities can and do occur in prison, the risk of HIV transmission is significant where there is contact between HIV-positive and non-HIV-positive inmates, even in contexts in which no actual examples of high-risk conduct could be shown to have occurred. Pet. App. 61a-62a. The court also found that, with respect to the programs for which there were proposed reasonable accommodations (*e.g.*, restructuring of the prison program or hiring of additional guards to ensure an acceptable level of safety), such accommodations would pose an unreasonable administrative and financial burden. Pet. App. 100.

c. A panel of the Eleventh Circuit vacated and remanded the district court's decision. Pet. App. 26-42. Subsequently, the en banc court affirmed the judgment of the district court denying relief to petitioners and dismissing the case. Pet. App. 1-24.[2]

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[2] In their en banc brief, respondents alleged that Section 504 could not constitutionally be applied to prisons. The United States intervened to defend the constitutionality of the statute and filed a brief asserting that Section 504 is a constitutional exercise of Congress's power under the Spending Clause and Section 5 of the Fourteenth Amendment, and that Eleventh Amendment immunity did not apply in any event because petitioners sought only injunctive relief and the case therefore fell within the *Ex parte Young* exception. Brief for the United States as Intervenor, *Onishea* v. *Hopper*, No. 96-6213 (11th Cir.). The court of appeals addressed only Eleventh Amendment immunity, noting that respondents conceded the issue at oral argument. Pet. App. 22 n.11. Respondents once again raise their Eleventh Amendment claim in their Brief in Opposition (at 13-19), arguing that Section 504 is not a proper exercise of Congress's powers under the Fourteenth Amendment. They do not explain why this case, in which petitioners seek only injunctive relief, does not fit squarely within the *Ex Parte Young* doctrine. Nor do they claim that Section 504 is not a proper exercise of Congress's Spending Clause powers.

The en banc majority stated that it could "infer from *Arline*'s language that the significance of a risk is a product of the odds that transmission will occur and the severity of the consequences." Pet. App. 7. Noting that in this case the consequence is inevitably death, the court examined "how low" the odds be before a purported risk becomes non-significant. *Id.* at 8. The court cited several cases that involved surgeons or surgical technicians infected with HIV and that concluded that there was a significant risk of transmission. Although the risk of transmission from blood-to-blood was small in those cases, it remained possible given the use of needles and sharp instruments during invasive surgical procedures. Pet. App. 8. The court believed that the "cautious rule" adopted by those courts was at odds with what it took to be the view of other circuits that the risk of transmission must be more than theoretically possible and "must have been realized in at least several cases." *Ibid.*

The court, adopting the "cautious approach," held that although the risk of transmission must have a "sound theoretical basis," when "transmitting a disease inevitably entails death, the evidence supports a finding of 'significant risk' if it shows both (1) that a certain event can occur and (2) that according to reliable medical opinion the event can transmit the disease." Pet. App. 9. The court explained that this is not an "any risk" standard: "the asserted danger of transfer must be rooted in sound medical opinion and not be speculative or fanciful." *Ibid.* However, "evidence of actual transmission of the fatal disease in the relevant context is not necessary to a finding of significant risk." *Ibid.*

Under that standard, the court concluded that the district court's two unchallenged factual findings—(1) that violence, drug use, and sex "happen in prisons in the most unlikely and unexpected places and that it is impossible to know or watch much of what goes on," and (2) that blood-to-blood contact resulting from anal sex, needle sharing, and violence

"likely transmits HIV"—were sufficient to support the district court's conclusion "that the risk was significant in any program in which prisoners participate." Pet. App. 9. In reaching that conclusion, the court did not itself discuss each program, but instead cited the district court's review of the independent evidence for each program. *Id.* at 23 n.16.

Concerning the impact of the rule of *Turner* v. *Safley*, 482 U.S. 78 (1987), which held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests," *id.* at 89, the court agreed with petitioners that *Turner* "does not, by its terms, apply to statutory rights." Pet. App. 9. The court noted, however, that Section 504 protects only disabled individuals who are "otherwise qualified" for the program at issue, 29 U.S.C. 794(a), and it held that the district court "was entitled to find on this record * * * that the requirements for participation in prison programs are determined in part by the same 'legitimate penological interests'" to which *Turner* accorded deference. Pet. App. 10.[3]

Three judges dissented. Two judges joined in an opinion disagreeing with the majority's standard for establishing significant risk, its application of *Turner*, and its conclusion that petitioners failed to propose any reasonable accommodations. Pet. App. 14-19. In a separate opinion, one judge dissented from the majority's rejection of Alabama's inmate risk classification system as a reasonable accommodation. Pet. App. 19-22.

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[3] The court also found that the district court correctly rejected petitioners' arguments that there were reasonable accommodations that would render petitioners "otherwise qualified." Pet. App. 11-14. Petitioners do not seek review of the court of appeal's "reasonable accommodation" holding. See Pet. i.

DISCUSSION

The petition for a writ of certiorari should be denied. As an initial matter, Alabama is apparently one of the very few states that categorically exclude all HIV-infected prisoners from the general prison population.[4] Further, the decision in this case is not in conflict with the other court of appeals' decisions involving HIV-positive individuals in other contexts, nor are the existing circuit decisions in conflict with each other in their application of the standard for significant risk.

First, the court's suggestion that the appellate decisions addressing the transmission of HIV reflect two inconsistent approaches to the determination of "significant risk" is mistaken. Pet. App. 8-9. The courts of appeals do not disagree over the fundamental "significant risk" inquiry under *Arline*, and their fact-bound decisions are not in conflict. Even if

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[4] Petitioners assert (Pet. 3) that at the time of the 1994 trial in this case, "Alabama was the only state in the union that categorically excluded all HIV-positive prisoners from general prison population programs." In 1999, the National Institute of Justice (United States Department of Justice, Office of Justice Programs) issued a study indicating that by 1997 only Alabama and Mississippi completely segregated all known HIV-infected inmates. *1996-1997 Update: HIV/AIDS, STD's, and TB in Correctional Facilities*, Ch. 6, "Housing and Correctional Management," at 63. It is our understanding that, since that study, South Carolina has also begun to segregate HIV-positive prisoners.

The United States Bureau of Prisons does not generally provide special housing for HIV-positive inmates or restrict their participation in prison programs. See 28 C.F.R. Pt. 541. An inmate who tests positive for HIV may be placed in "controlled housing status * * * when there is reliable evidence that the inmate may engage in conduct posing a health risk to another person." 28 C.F.R. 541.60. Even there, however, "[t]o the extent consistent with available resources and the security needs of the institution, an inmate in controlled housing status is to be considered for activities and privileges afforded to the general population." 28 C.F.R. 541.66. See also 28 C.F.R. 549.16(b) (generally addressing duty and housing restrictions of inmates with infectious diseases).

there were a conflict regarding the proper analysis, the other cases cited by petitioners and the court of appeals concern the evaluation of medical and scientific evidence that certain behavior (*e.g.*, the treatment of a patient by a doctor) poses a "significant risk" of transmission of the HIV virus. That issue is not directly presented in this case, since the dispute here does not turn on medical or scientific evidence. Instead, petitioners' claims turn on a practical evaluation of whether inmates are likely to engage in—or, more to the point, can be prevented from engaging in—behavior that indisputably poses a substantial risk of transmission of the HIV virus.

The question whether the standard set forth in *Turner* for inmates' constitutional claims applies to statutory claims under Section 504 is neither fairly presented in this case nor suitable for review at this time. The court of appeals disavowed direct application of *Turner* in addressing the statutory claims, but relied more generally on deference to the penological interests underlying *Turner* in determining whether petitioners were "otherwise qualified" within the meaning of Section 504. The courts of appeals generally agree that some such deference is appropriate in analyzing claims under Section 504 and the ADA. The question whether the court below properly analyzed the evidence of security risks and other penological concerns in this particular case does not warrant further review.

Finally, further review is not warranted to consider whether the increased risk of prejudice-based violence if HIV-positive prisoners are integrated into the general prison population could be sufficient to justify segregation of HIV-positive prisoners. The court of appeals' decision did not rely specifically on the increased risk of prejudice-based violence as an independent basis for concluding that the segregation of HIV-positive prisoners was permissible. Instead, the court relied on the increased risk of transmission

of HIV that it believed would result from the violence that is an inescapable part of prison life. Even if the court of appeals may have erred in assessing that risk throughout the range of programs at issue here, its fact-bound assessment of the record in this case does not warrant further review.

1. a. There is no conflict in the circuits concerning the extent or weight of scientific or medical evidence that is necessary to show that a particular behavior poses a "significant risk" under Section 504 or a "direct threat" under the ADA. Contrary to the court of appeals' suggestion (Pet. App. 8-9), the cases addressing the transmission of HIV infection reflect a general agreement on approach, with differing results depending on the facts of particular cases.

The Fourth, Fifth, and Sixth Circuits have held, in cases involving surgeons or surgical technicians who were infected with HIV and were therefore not permitted by their employers to perform certain surgical or surgery-related procedures, that the surgeon or technician was not "otherwise qualified" because there was a significant risk of transmission. See *Estate of Mauro* v. *Borgess Med. Ctr.*, 137 F.3d 398 (6th Cir.), cert. denied, 119 S. Ct. 51 (1998); *Doe* v. *University of Md. Med. Sys. Corp.*, 50 F.3d 1261 (4th Cir. 1995); *Bradley* v. *University of Tex. M.D. Anderson Cancer Ctr.*, 3 F.3d 922 (5th Cir. 1993), cert. denied, 510 U.S. 1119 (1994). For example, in *Doe*, the Fourth Circuit held that a neurosurgical resident posed a significant risk to his patients because HIV could be transmitted to a patient through blood-to-blood contact resulting from a cut sustained by a surgeon during an invasive medical procedure. 50 F.3d at 1263. Following *Arline*'s instruction that courts "should defer to the reasonable judgments of public health officials," 480 U.S. at 288, the court emphasized that the Centers for Disease Control and Prevention (CDC) recommendations regarding HIV-positive health care workers and "exposure prone" procedures provide that medical institutions should make

their own case-by-case determinations regarding whether particular procedures are in the high-risk, "exposure prone" category. *Doe*, 50 F.3d at 1266. The court concluded that the employer had permissibly concluded that neurosurgery inevitably involves "exposure prone" procedures and that the court should not substitute its judgment for the employer's careful determination. *Ibid.*[5] The Sixth Circuit in *Mauro* and the Fifth Circuit in *Bradley* reached the same conclusion, based on similar reasoning, in cases involving surgical technicians whose duties included placing their hands upon or in a surgical opening. See *Mauro*, 137 F.3d at 403-404, 407; *Bradley*, 3 F.3d at 924.[6]

Although the First and Ninth Circuits in *Abbott* v. *Bragdon*, 107 F.3d 934 (1st Cir. 1997), aff'd in part and vacated and remanded in part, 524 U.S. 624 (1998), and *Chalk* v. *United States Dist. Court*, 840 F.2d 701 (9th Cir. 1988), see also *Bragdon* v. *Abbott*, 163 F.3d 87 (1st Cir. 1998) (decision after remand), cert. denied, 119 S. Ct. 1805 (1999), reached the conclusion that there was no "significant risk" or "direct

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[5] The fact that there was no documented case of transmission from an HIV-positive surgeon to a patient, *id.* at 1263 n.5, did not affect the court's conclusion that the defendant reasonably relied on the CDC recommendations and other evidence in concluding that there was significant risk.

[6] Although we believe the decisions in *Doe*, *Mauro*, and *Bradley* are correct to give deference to the reasonable judgments of public health officials, we take no position on the results reached on the facts of each of those cases. In particular, we do not read those cases to suggest that the mere possibility of catastrophic consequences from transmission is sufficient to render any theoretical risk of transmission a "significant risk." It also bears emphasizing that because patients and doctors are not similarly situated with respect to the risk of transmission, the results in those cases do not readily carry over to cases in which an HIV-infected patient seeks care from a doctor. Since patients cannot control whether infected health care providers scrupulously employ procedures to avoid transmission of infectious diseases, patients bear all of the risk of transmission without having any ability to assure that the risk is minimized.

threat" on their particular facts, those cases—like *Mauro*, *Doe*, and *Bradley*—relied on the expertise of public health authorities in reaching that conclusion. In *Bragdon*, the First Circuit rejected a dentist's argument that providing routine dental care to an HIV-positive patient in his office would create a direct threat to himself or others. The court found that the plaintiff had produced competent evidence of reasonable medical judgments by public health officials that providing such care does not pose a direct threat to the dentist's health, and that that evidence was not contradicted by other health authorities. 107 F.3d at 946; see also 163 F.3d at 89-90.[7] In *Chalk*, the Ninth Circuit held that an HIV-positive teacher had shown that he did not pose a significant risk of transmission, citing conclusions by the Surgeon General of the United States and the United States Public Health Service that there was no known risk of infection to individuals exposed through non-sexual social contact. 840 F.2d at 706-707. In noting the "overwhelming weight of medical evidence" in this regard, *id.* at 708, the court stated that in these circumstances the plaintiff did not have to disprove every theoretical possibility of harm, *id.* at 709.[8]

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[7] The court stated that "[e]vidence of HIV transmission to health-care workers outside the dental field does not prove a direct threat to a practicing dentist in the absence of any evidence showing that the magnitude of risk to a dentist is comparable to the risk to other health-care workers in other settings." 107 F.3d at 947.

[8] In an earlier case, the Eleventh Circuit had suggested that a child with AIDS did not pose a significant risk to other children at school based only the "remote theoretical possibility" of transmission from tears, saliva, and urine. *Martinez* v. *School Bd. of Hillsborough County*, 861 F.2d 1502, 1506 (11th Cir. 1988). The court noted that there were no findings with respect to the overall risk of transmission from bodily substances to which other children might be exposed in the classroom. *Ibid.* Although the decision below suggested (Pet. App. 8) that the court intended to distance itself from the reasoning of *Martinez*, that reasoning is consistent with the

In short, the courts of appeals have applied a generally consistent analysis to "significant risk" and "direct threat" cases and they have generally agreed as well on the application of that analysis in similar factual settings.[9] The differences between what the court of appeals termed the "more cautious" results in *Doe*, *Mauro*, and *Bradley* and the results in *Bragdon* and *Chalk* is explained by the different factual settings in which the various cases arose.

b. Even if there were a disagreement among the courts of appeals regarding whether the scientific and medical evidence of risk of transmission arising from particular kinds of known behavior (including the foreseeable mishaps that may occur while engaging in that behavior) is sufficient to constitute a "significant risk" or "direct threat," this case arises in a substantially different context in which any such

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court's central notion that the risk of transmission must be "rooted in sound medical opinion." Pet. App. 9.

[9] Petitioners assert (Pet. 16-17) that the recent Fourth Circuit decision in *Montalvo* v. *Radcliffe*, 167 F.3d 873 (4th Cir.), cert. denied, 120 S. Ct. 48 (1999), conflicts with *Bragdon* and *Chalk*. We read *Montalvo*, however, merely to apply the generally settled analysis to the particular facts of that case. In *Montalvo*, the court held that an HIV-positive martial arts student posed a significant risk to others because the particular type of combat-oriented martial arts involved (which includes substantial body contact) created "a high frequency of minor but bloody abrasions among the students and that the blood from such injuries is extremely likely to spill onto the hands, uniforms, and mouth of other students." *Id.* at 878 (internal quotation marks omitted). The court stated that since "[t]he experts in th[e] case agreed that HIV can be transmitted through blood-to-blood contact, and the evidence showed that this type of contact occurred frequently in the karate classes," the evidence supported a finding of significant risk. *Ibid.* The Fourth Circuit in *Montalvo* expressly recognized that the facts in *Bragdon* present a different context for assessing significant risk. The court stated that "the studies of HIV transmission between dentists and patients are irrelevant to ascertaining the risk of transmission existing during hard-style karate sparring. The likelihood of exposure to blood is different for the two activities." *Ibid.*

disagreement would not be directly at issue. The question here does not concern the degree of deference that should be given to public health authorities in assessing the risks of certain kinds of behavior—the issue that underlay the analysis in *Doe*, *Mauro*, *Bradley*, *Bragdon*, and *Chalk*. This case presents instead the question whether behavior that is concededly high-risk is likely to occur if HIV-positive and non-HIV-positive prisoners are integrated in a number of prison programs. The answer to that question turns not on medical judgments about the risk inherent in certain behaviors, but on prison management judgments about the ability of prison authorities to control prisoners in various settings and programs. Accordingly, this case would not present an appropriate vehicle for addressing any question arising from those other cases that concerns the nature of the "significant risk" or "direct threat" inquiries, where those inquiries turn on the scientific and medical assessment of the risk involved in particular behavior.

To be sure, the court of appeals' broad affirmance of the district court's conclusion that participation by HIV-positive inmates in each and every program conducted by the prison would pose a "significant risk" is subject to question. Although the court correctly disavowed adoption of an "'any risk' standard," see Pet. App. 9, the court did rely on the theoretical possibility that high-risk behavior could occur whenever HIV-positive inmates and others participated in the same program.[10] Moreover, the court did not find that prison authorities treat the risk of HIV transmission in prison similarly to other risks faced by prison inmates, such as the threat of injury from the violence that the court believed was inevitable in prison life; if prison authorities do not view similar risks in other contexts as being "signifi-

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[10/] The court of appeals did not review the district court's findings with respect to each program, but simply cited to the district court's discussion of the evidence for each program. Pet. App. 23 n.16.

cant," the justification for doing so here is at least weakened. Moreover, with respect to some programs, the district court's opinion relies on somewhat improbable events to support its finding that prisoners would be at risk of infection from HIV-positive prisoners. For example, with respect to out-of-prison programs, the district court relied on the possibility that "[a]n automobile or other accident may incapacitate a guard," thus "leav[ing] the inmates on the out-of-prison detail free to proceed without an escort." Pet. App. 200. See also *id.* at 199 (possibility that prison would be sued if HIV-positive prisoner on out-of-prison detail escaped and then transmitted AIDS to member of the general population). The possibility of such mishaps may well be too remote to support a finding of significant risk, but the court of appeals apparently accepted the district court's analysis of those risks in affirming the finding that there was significant risk in *all* programs.

If the court of appeals thus erred, however, the error consisted in a failure to assess properly the strength of petitioners' particular claims on the facts of this case with respect to each of the specific programs addressed by the district court. Any such fact-bound error would not warrant further review by this Court.

2. Petitioners suggest that the court of appeals' decisions are at odds over whether this Court's decision in *Turner* v. *Safley*, addressing inmates' assertion of constitutional rights to challenge prison regulations, applies to statutory rights. That question, however, is not squarely presented here, and further review to address that issue is therefore not warranted.

In concluding that there was a significant risk of transmission of HIV if inmates were integrated in any of the programs at issue here, the court emphasized that this case arises in the context of prison life, where legitimate security concerns necessarily color the analysis. But the court

declined to apply this Court's decision in *Turner* directly to petitioners' Section 504 claim, noting that *Turner* "does not, by its terms, apply to statutory rights." Pet. App. 9. At the same time, the court deferred to prison officials' legitimate penological security interests in determining whether petitioners met "all of a program's requirements in spite of [their] handicap[s]." *Ibid.* (citing *Southeastern Community College* v. *Davis*, 442 U.S. 397, 406 (1979)). The court concluded that they did not, because maintaining internal security in prison has long been recognized as a legitimate interest and violence among prisoners could have dire consequences in the transmission of HIV. *Id.* at 10 (citing cases).

The few cases that have addressed the application of *Turner* to statutory rights have all agreed that some deference is due to legitimate penological concerns. The Ninth Circuit squarely held that the applicable standard for reviewing the Rehabilitation Act's statutory rights in a prison setting is equivalent to the review of constitutional claims under *Turner*. *Gates* v. *Rowland*, 39 F.3d 1439, 1447 (1994). The Seventh Circuit suggested that the *Turner* principles may apply to determining the feasibility of reasonable accommodations that disabled prisoners might request to have access to various prison programs. *Crawford* v. *Indiana Dep't of Corrections*, 115 F.3d 481, 487 (1997). And the Fourth Circuit, although initially suggesting that *Turner* applied with equal force to statutory claims, *Torcasio* v. *Murray*, 57 F.3d 1340, 1355-1356 (1995), cert. denied, 516 U.S. 1071 (1996), has more recently declined to "graft the standard for constitutional claims onto the ADA and Rehabilitation Act," *Amos* v. *Maryland Dep't of Pub. Safety*, 178 F.3d 212, 222 (1999). At the same time, the court in *Amos*, citing *Crawford*, stated that in the "special context of prison administration" it was appropriate to defer to prison officials' judgment as what may constitute a reasonable accommodation. *Ibid.*; see also *Yeskey* v. *Commonwealth of Pa.*

Dep't of Corrections, 118 F.3d 168, 174-175 & n.8 (3d Cir. 1997) (raising but not resolving "whether principles of deference to the decisions of prison officials in the context of constitutional law apply to statutory rights"), aff'd on other grounds, 524 U.S. 206 (1998). In sum, there is no dispute that in resolving statutory claims by inmates courts may consider the legitimate penological concerns raised by prison officials, particularly security concerns.[11]

3. Petitioners allege that the court of appeals erred in concluding that "the policy of categorical segregation of HIV-positive prisoners is justified, *entirely apart from the risk of HIV transmission*, because of 'the danger of violence that might arise from inmate prejudice toward and fear of HIV-positive prisoners.'" Pet. 23 (quoting Pet. App. 6). The court of appeals did not reach the conclusion attributed to it by petitioners.

First, nothing in the court of appeals' opinion suggests that the court believed that the danger of violence could justify segregation of HIV-positive inmates "entirely apart from the risk of HIV transmission." To the contrary, the court stated that the district court had found that "violent *exchanges of blood* raise the specter of transmission," Pet. App. 9 (emphasis added), and it noted respondent's evidence regarding the possibility of AIDS transmission "in sporting accidents and during fights—wherever there is a large exchange of blood between an infected person and an uninfected one," Pet. App. 6. See also *ibid.* (referring to district court's findings that "bloodshed [is] a perpetual possibility in prison" and that "HIV is transmitted by * * * blood-to-

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[11] Before this Court's decision in *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206 (1998), much of the litigation in this area centered on the more basic question whether Section 504 and the ADA applied at all to state prisons. See, *e.g.*, *Torcasio*, 57 F.3d at 1349-1350 (addressing Rehabilitation Act cases); *Crawford*, 115 F.3d at 483-487 (addressing ADA).

blood contact"). The court also engaged in an extensive discussion of the degree of risk of HIV transmission (including its transmission during violent incidents), not the degree of risk of violence between inmates that is unaccompanied by possible HIV transmission. See *id.* at 7-9. All of those references demonstrate that the court of appeals affirmed the district court's conclusions based its understanding that the "significant risk" in this case was the risk of HIV transmission, and that the risk of prison violence is relevant only insofar as the blood-to-blood contact that may occur in a violent episode could lead to HIV transmission.

Second, we do not read the court of appeals to have endorsed the view that the risk of prejudice-based violence against disabled persons can justify segregating them from non-disabled persons, even in prisons. The court stated that two factual findings were sufficient for the district court, "sitting as a fact-finder, to conclude that the risk was significant in any program in which prisoners participate." Pet. App. 9. Those findings were that "violence, intravenous drug use, and sex may cause blood-to-blood contact and happen in prisons in the most unlikely and unexpected places and that it is impossible to know or watch much of what goes on," and that "blood-to-blood contact raise[s] the specter of transmission [of HIV]." *Ibid.* Regardless of whether the court of appeals was correct in holding that those findings were sufficient to justify exclusion of petitioners from each and every prison program, see pp. 14-15, *supra*, those findings—which the court stated were sufficient to support the district court's judgment—did not depend on the particular risks posed by prejudice-related violence. See also Pet. App. 6 (noting that "bloodshed [is] a perpetual possibility in prison whenever a security guard trained to stop it is not watching"). Accordingly, the court of appeals' holdings were based on its view of the general likelihood of violence and other high-risk behavior in prison, and its

further comments on the risk of prejudice-based violence, see *id.* at 10, do not appear to have been necessary to its resolution of the case.

To be sure, the court of appeals' discussion of the possibility of violence, like its wholesale approval of the district court's conclusions that participation by HIV-positive prisoners in each and every prison program poses a "significant threat," may well be overbroad. In particular, the court should have carefully examined the circumstances and effect of petitioners' participation in each program in light of credible objective evidence—including, of course, the opinions of prison authorities—of the threat of violence in that program. Had the court done so, it may well have concluded that a finding of a threat of violence and disorder could not have been made based on credible objective evidence with respect to, for example, the religious programs (Pet. App. 106-110), GED testing (*id.* at 217-219), and data processing programs (*id.* at 219-244) at issue in this case. Nevertheless, the court of appeals' conclusions based on the facts and evidence in this case that a credible threat of violence had been shown in each of the programs at issue does not conflict with any decision of any other court of appeals and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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