No. 04-1203

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF GEORGIA, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

Ashcroft v. *ACLU*, 124 S. Ct. 2783 (2004) 3

Association for Disabled Americans, Inc. v. *Florida Int'l Univ.*, No. 02-10360, 2005 WL 768129 (11th Cir. Apr. 6, 2005) 5

Buckhannon Bd. & Care Home, Inc. v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001) 4

City of Boerne v. *Flores*, 521 U.S. 507 (1997) 9

Clark v. *Martinez*, 125 S. Ct. 716 (2005) 4

Cochran v. *Pinchak*, 401 F.3d 184 (3d Cir. 2005) 2, 5

FCC v. *Beach, Communications, Inc.*, 508 U.S. 307 (1993) 3

Florida Prepaid Postsecondary Educ. Expense Bd. v. *College Sav. Bank*, 527 U.S. 627 (1999) 9

Hardin v. *Straub*, 490 U.S. 536 (1989) 4

Hudson v. *McMillian*, 503 U.S. 1 (1992) 7

Kokkonen v. *Guardian Life Ins. Co.*, 511 U.S. 375 (1994) 4

Lytle v. *Household Mfg., Inc.*, 494 U.S. (1990) 4

MCI Telecomms. Corp. v. *American Tel. & Tel. Co.*, 512 U.S. 218 (1994) 4

Miller v. *King*, 384 F.3d 1248 (11th Cir. 2004) 2, 3, 8

Murphy v. *United Parcel Serv., Inc.*, 527 U.S. 516 (1999) 4

Cases—Continued: Page

National Archives & Records Admin. v. *Favish*, 541 U.S. 157 (2004) 4

Nevada Dep't of Human Res. v. *Hibbs*, 538 U.S. 721 (2003) 6

Old Chief v. *United States*, 519 U.S. 172 (1997) 4

Phiffer v. *Columbia River Corr. Inst.*, 384 F.3d 791 (9th Cir. 2004), petition for cert. pending, No. 04-947 (filed Jan. 11, 2005) 1, 2

Portland Golf Club v. *Commissioner*, 497 U.S. 154 (1990) 4

Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 9

Rose v. *Clark*, 478 U.S. 570 (1986) 4

Shalala v. *Schaefer*, 509 U.S. 292 (1993) 4

Spencer v. *Easter*, 109 Fed. Appx. 571 (4th Cir. 2004), cert. denied, 125 S. Ct. 1611 (2005) 9

Tennessee v. *Lane*, 541 U.S. 509 (2004) 3, 5, 7, 9

Things Remembered, Inc. v. *Petrarca*, 516 U.S. 124 (1995) 4

United States v. *Gainey*, 380 U.S. 63 (1965) 8

United States v. *Morrison*, 529 U.S. 598 (2000) 3

Wooddell v. *International Bhd. of Elec. Workers, Local 71*, 502 U.S. 93 (1991) 4

Constitution and statutes:

U.S. Const.:

Art. I, § 8, Cl. 3 (Commerce Clause) 8

Amend. VIII 7, 8

Constitution and statutes— Continued: Page

Amend. XI 3, 5, 9

Amend. XIV, § 5 . . . . . 2, 6, 8

Americans with Disabilities Act of 1990, Title II, 42 U.S.C. 12131 *et seq.* . . . . . *passim*

Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.* 6

28 U.S.C. 2403 7

42 U.S.C. 1983 7

Miscellaneous:

Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2003* (2004) 8

In the Supreme Court of the United States

No. 04-1203

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF GEORGIA, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

1. This Court's review is warranted because, in respondents' own words (Br. in Opp. 14), the Eleventh Circuit's holding and analysis of whether Title II of the Americans with Disabilities Act validly abrogates Eleventh Amendment immunity in the administration of prison systems "contrasts sharply with the Ninth Circuit's decision in *Phiffer* v. *Columbia River Correctional Institute*, [384 F.3d 791 (2004), petition for cert. pending, No. 04-947 (filed Jan. 11, 2005)]." Indeed, the conflict could hardly be more stark. In the prison context, Title II is a constitutional exercise of Congress's power in the Ninth Circuit; it is unconstitutional in the Third and Eleventh Circuits.

In the short time since the United States' and the plaintiff Tony Goodman's petitions were filed (see *Goodman* v. *Georgia*, No. 04-1236 (filed Mar. 9, 2005)), the

Third Circuit contributed to the split in its divided decision in *Cochran* v. *Pinchak*, 401 F.3d 184 (Mar. 15, 2005). In holding Title II's abrogation of state immunity unconstitutional in the prison context, the Third Circuit tracked the mode of analyzing Congress's power adopted by the Eleventh Circuit but eschewed by the Ninth Circuit. *Cochran*, 401 F.3d at 190-193 (citing *Miller* v. *King*, 384 F.3d 1248 (11th Cir. 2004)). The Third Circuit, like the Eleventh Circuit, restricted its analysis of Title II's appropriateness as Section 5 legislation to the particular constitutional violation made out by the facts of the plaintiff's individual case. The starting point for the court of appeals' analysis of Title II's congruence and proportionality was that "Cochran has alleged only the right to be free from invidious discrimination protected by the Equal Protection Clause." *Cochran*, 401 F.3d at 190. That was also the court's ending point. It held that Title II is not appropriate legislation as applied to prison administration because it "affects far more state prison conduct and prison services, programs, and activities than the Equal Protection Clause protects." *Id.* at 192-193. The Ninth Circuit, by contrast, addressed Title II's constitutionality as applied to the entire category of cases implicating prison administration, without reference to the particular claim of access to rehabilitative services asserted by the plaintiff there. See *Phiffer*, 384 F.3d at 792-793.

Respondents do not deny the conflict; they repeatedly acknowledge it (Br. in Opp. 6-8, 14-15). Respondents insist (*id.* at 7-8), instead, that the conflict is not sufficiently "ripe" to warrant review, in part because the Ninth Circuit's analysis is not as detailed as that undertaken by the Third and Eleventh Circuits. But that is precisely the point. The nature of the Ninth Circuit's

analysis is a direct product of the legal standard it has adopted and used to implement this Court's decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004). Respondents, like the Third and Eleventh Circuit, no doubt disagree with that mode of analysis. It is that disagreement that this Court should resolve.

Moreover, although respondents suggest (Br. in Opp. 6-7) that the Court often denies certiorari in cases implicating a shallow or nascent circuit split, that is rarely the case when the circuit split concerns the constitutionality of an Act of Congress. To the contrary, the Court frequently grants certiorari in cases in which a court has invalidated an Act of Congress even in the absence of a circuit conflict. See, *e.g.*, *Ashcroft* v. *ACLU*, 124 S. Ct. 2783 (2004); *United States* v. *Morrison*, 529 U.S. 598 (2000); *see also FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) ("Because the Court of Appeals held an Act of Congress unconstitutional, we granted certiorari.").

2. The present case and *Miller* v. *King*, *supra*, were argued the same day before the same panel of the court of appeals. The court then issued its decision holding that Title II, as applied to prisons, exceeds Congress's legislative authority in *Miller* and, two days later, relied upon *Miller* to sustain respondents' Eleventh Amendment immunity in this case. Pet. App. 19a. Respondents now insist (Br. in Opp. 5, 8-11) that the order of decision should immunize this case from certiorari review, reasoning (*id.* at 8-9) that a decision dictated by recently announced precedent lacks sufficient analysis to constitute a proper vehicle for resolution of the circuit conflict. See *ibid.* (arguing that the case "is a poor vehicle" because "[t]he Eleventh Circuit took eight pages in *Miller*

to analyze the legal issues involved * * * [and] took one sentence" in this case).

But surely the court of appeals meant what it said when it relied upon its holding in *Miller* to issue the identical holding in this case. Nothing in law or logic required the court of appeals to retype the text of the *Miller* decision into the *Goodman* opinion. Nor would this case be an appreciably better certiorari candidate if the Eleventh Circuit had taken that extraordinary (and extraordinarily redundant) step. The court's explicit and wholesale incorporation of *Miller* makes that decision as much a part of this case as it is in *Miller* itself. In any event, for manifold reasons relating both to the factors that animate this Court's certiorari practice and the vicissitudes of litigation, it is not uncommon for this Court to grant review in cases that involve the unelaborated application of circuit precedent in unpublished opinions rather than in the case where the rule of law originated.[1]

Respondents further argue (Br. in Opp. 9) that *Miller* is "still in the pipeline" because the government's petition for rehearing in that case remains pending.

---

[1] See, *e.g.*, *Clark* v. *Martinez*, 125 S. Ct. 716 (2005); *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157 (2004); *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001); *Murphy* v. *United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Old Chief* v. *United States*, 519 U.S. 172 (1997); *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124 (1995); *MCI Telecommunications Corp.* v. *American Tel. & Tel. Co.*, 512 U.S. 218 (1994); *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375 (1994); *Shalala* v. *Schaefer*, 509 U.S. 292 (1993); *Wooddell* v. *International Bhd. of Elec. Workers, Local 71*, 502 U.S. 93 (1991); *Portland Golf Club* v. *Commissioner*, 497 U.S. 154 (1990); *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545 (1990); *Hardin* v. *Straub*, 490 U.S. 536 (1989); *Rose* v. *Clark*, 478 U.S. 570 (1986).

That is true, but it does not provide a basis for denying review in *this* case. First, whatever the status of *Miller*, the holding in this case partially invalidating an Act of Congress is not "in the pipeline" and is not open to further reconsideration by the Eleventh Circuit. The same panel that decided *Miller* and applied *Miller* wholesale to this case has denied rehearing in this case and the full Eleventh Circuit has denied rehearing en banc. Pet. App. 29a-30a. That denial by the full court makes the possibility that the court will reconsider the constitutional holding in *Miller* too remote to counsel against certiorari. If the full Eleventh Circuit intended to revisit that constitutional holding, it presumably would have held the Goodman rehearing petition as well. There is no reasonable basis for holding that Title II is appropriate legislation in one case but not the other. *Miller* and the case at hand present the identical abrogation question, and were argued to the same panel the same day for just that reason. See 7/9/04 C.A. Order (court of appeals order aligning oral argument in the two cases because the cases concern the "similar, if not identical" legal question).[2] Thus, the circuit conflict concerning the constitutionality of an Act of Congress is fully joined.

Second, in light of the Third Circuit's *Cochran* decision, even in the unlikely event that the court of appeals altered its constitutional ruling in *Miller*, that would

---

[2] In addition, the Eleventh Circuit recently applied *Miller* in upholding Title II's abrogation of Eleventh Amendment immunity in the educational context. See *Association for Disabled Americans, Inc.* v. *Florida Int'l Univ.*, No. 02-10360, 2005 WL 768129 (11th Cir. Apr. 6, 2005). And the Third Circuit also relied upon *Miller* in expanding the circuit conflict on Title II's application in the prison context. See *Cochran*, 401 F.3d at 190-193.

neither eliminate the circuit conflict nor change its depth. Only the alignment of the courts of appeals in the two-to-one circuit split would change. The necessity for this Court's review to resolve the circuit conflict would remain, as would Goodman's and the United States' interest in having the judgment in this case overturned.

3. This Court's review is warranted because the court of appeals' decision is contrary to this Court's precedent. In sustaining Title II as applied in the context of access to the courts in *Lane*, this Court explicitly defined the relevant as-applied context comprehensively, analyzing the full range of constitutional rights and Title II remedies potentially at issue in cases involving access to judicial services. *Lane*, 541 U.S. at 522-523; see U.S. Pet. 11-16. Although the claims of the particular plaintiffs before the Court in *Lane* involved only an equal protection claim and a defendant's right to be present in criminal proceedings, *id.* at 513-514, the Court did not ask—as the Third and Eleventh Circuits have—whether Title II was a congruent and proportional means of enforcing Lane's and Jones's individually asserted constitutional rights. Rather, the Court framed the as-applied analysis in terms of the broad "*class of cases* implicating the accessibility of judicial services." *Id.* at 531 (emphasis added); see also *id.* at 525 (noting that Title II responds to a history of unequal treatment in, *inter alia*, the "administration of * * * the penal system"); *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003) (broadly upholding the family leave provisions of the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, as a proper exercise of Congress's Section 5 power to combat historic employment discrimination against women, in a case that involved a male employee's application for family leave and no constitutional claim other

than an asserted violation of substantive and procedural due process arising from the denial of a hearing).

Respondents cannot reconcile the holding below with this Court's precedent. Instead, after citing the controlling language concerning Title II's application to the entire "class of cases" implicated by the relevant context, in their very next breath (Br. in Opp. 12-13) respondents simply transmute that language into the "Title II claim in question." The two standards are not fungible, as the circuit conflict evidences.

4. This is the appropriate case and time to resolve the circuit conflict. Respondents' argument (Br. in Opp. 10) that petitioner Goodman has obtained the relief he sought in the court of appeals is without merit. First, Goodman's interests are not the only ones at stake in this case. The United States was a party in the court of appeals too, see 28 U.S.C. 2403, and the federal government's interest—to sustain the constitutionality and thus continued operation of federal law—is directly and distinctly impaired by the court's ruling.

Second, the remand to adjudicate constitutional claims for damages under 42 U.S.C. 1983 based on an asserted Eighth Amendment violation does not adequately protect Goodman's interests. The availability of monetary relief for constitutional violations under Section 1983—even assuming the qualified immunity hurdle can be overcome—is not coextensive with the standards or scope of relief available under Title II.[3]

---

[3] Compare, *e.g.*, *Hudson* v. *McMillian*, 503 U.S. 1, 8-9 (1992) (plaintiffs alleging deliberate indifference under the Eighth Amendment must prove both objective component as to conditions of confinement or medical treatment and subjective component as to state of mind of prison officials), with *Tennessee* v. *Lane*, *supra* (Title II requires public entities to make reasonable accommodations to avoid

Third, Goodman's claim for injunctive relief under Title II has now been imperilled because, if Title II is not proper Section 5 legislation, then he can only obtain injunctive relief if the application of Title II reflects a proper exercise of the Commerce Clause power. Respondents already have argued that it is not. *Miller*, 384 F.3d at 1268 n.23.

Fourth, an Act of Congress has been held unconstitutional in two circuits. The gravity of those rulings alone would warrant an exercise of this Court's certiorari jurisdiction. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965) ("We granted certiorari * * * to review the exercise of the grave power of annulling an Act of Congress."). Furthermore, the multi-circuit conflict encompasses jurisdictions housing one-third of the Nation's state prisoners. Bureau of Justice Statistics, U.S. Dep't of Justice, *Prisoners in 2003*, at 3 (2004). And the ability of nearly one-third of the States to invoke their sovereign immunity as a defense to direct federal regulation of an important governmental operation is now subject to competing and inconsistent rules. While Georgia is content to delay review because its immunity has been preserved, the state defendants denied immunity in *Phiffer* (and presumably others throughout the Ninth Circuit) are not. See generally *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627 (1999) (certiorari granted to review constitutionality of Section 5 legislation notwithstanding the absence of a circuit conflict and interlocutory status of

---

discriminating on the basis of disability in the provision of programs and services).

the proceedings); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (same).[4]

Finally, in the span of just six months, three divergent court of appeals' decisions have issued addressing Title II's application to prison administration, and a fourth court of appeals considered but then avoided deciding the question, see *Spencer* v. *Easter*, 109 Fed. Appx. 571 (4th Cir. 2004), cert. denied, 125 S. Ct. 1611 (2005). That demonstrates that this is the type of important and recurring question that warrants this Court's prompt resolution.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

APRIL 2005

---

[4] Cf. *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993) (States may immediately appeal denials of Eleventh Amendment immunity under the collateral order doctrine, in part because it is a "fundamental constitutional protection" the value of which "is for the most part lost as litigation proceeds").