No. 18-3765

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL STANSELL,

Plaintiff-Appellant

v.

GRAFTON CORRECTIONAL INSTITUTION,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING VACATUR AND REMAND FOR FURTHER PROCEEDINGS

ERIC S. DREIBAND
Assistant Attorney General

ERIN H. FLYNN
CHRISTINE A. MONTA
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-2195
Christine.Monta@usdoj.gov

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INTEREST OF THE UNITED STATES

This appeal concerns the application of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794(a), in the context of a state prison's inmate visitation program.

The United States has considerable responsibility over the enforcement of Title II of the ADA (Title II), Section 504, and their corresponding regulations.

The Attorney General has authority to bring civil actions to enforce both Title II and Section 504. See 42 U.S.C. 12133; 29 U.S.C. 794a. Congress also gave the Department of Justice (Department) express authority to issue regulations implementing Title II, see 42 U.S.C. 12133-12134, and directed all federal agencies to issue regulations implementing Section 504 with respect to programs or activities to which they provide federal financial assistance, see 29 U.S.C. 794(a). The Department is also charged with coordinating executive agencies' implementation and enforcement of Section 504. See 28 C.F.R. Pt. 41 & App. A (Exec. Order 12250 (Nov. 2, 1980)). Accordingly, the United States has a strong interest in ensuring that the statutes and their accompanying regulations are properly interpreted and applied.

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Whether Title II of the ADA, 42 U.S.C. 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. 794(a), require a state prison to provide reasonable accommodations to an inmate with a disability where failing to do so would deny him meaningful access to the prison's visitation program.

STATEMENT OF THE CASE

1. Statutory And Regulatory Background

Congress enacted the ADA in 1990 as a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Title II of the ADA prohibits disability-based discrimination by public entities. It 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 "unmistakably" covers state prisons. *Pennsylvania Dep't of Corr*. v. *Yeskey*, 524 U.S. 206, 209 (1998); see also 28 C.F.R. 35.151(k), 35.152(a).

Title II was modeled closely on Section 504, which prohibits disability-based discrimination "under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). Because Title II and Section 504's substantive standards are identical, courts generally analyze them the same way. See, *e.g.*, *S.S.* v. *Eastern Ky. Univ.*, 532 F.3d 445, 452-453 (6th Cir. 2008).

The ADA directed the Attorney General to promulgate regulations implementing Title II based on regulations previously developed under Section 504. See 42 U.S.C. 12134. As relevant here, both the Department's Title II and Section 504 regulations make clear that public entities generally may not deny

qualified individuals with disabilities "the benefits of the services, programs, or activities of [the] public entity." 28 C.F.R. 35.130(a); see 28 C.F.R. 42.503(a). More specifically, under Title II's program-accessibility regulation, individuals with disabilities may not be denied those benefits "because a public entity's facilities are inaccessible to or unusable by individuals with disabilities." 28 C.F.R. 35.149; see also 28 C.F.R. 42.520.

In 2010, the Department promulgated an additional Title II regulation stating explicitly that detention and correctional facilities, like all other public entities, are subject to this affirmative program-accessibility requirement. See 28 C.F.R. 35.152(a) and (b)(1). Under the regulation, public entities must ensure that "qualified inmates or detainees with disabilities shall not, because a facility is inaccessible to or unusable by individuals with disabilities, 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 public entity." 28 C.F.R. 35.152(b)(1).

The Title II regulations also make clear that the Department considers prison visitation to be a covered program under Title II. See 28 C.F.R. 35.151(k)(2)(iii) (listing visitation among various "programs that [a prison] offers to inmates or detainees"), 35.152(b)(2)(iv) (prohibiting public entities from "depriv[ing] inmates

or detainees with disabilities of visitation with family members by placing them in distant facilities where they would not otherwise be housed").

2. Facts And Procedural History

a. Plaintiff's pro se complaint alleges the following facts, which the court must accept as true at this stage. See *Jackson* v. *Professional Radiology Inc.*, 864 F.3d 463, 467 (6th Cir. 2017). Plaintiff Michael Stansell is an inmate housed in the Grafton Correctional Institution (GCI), a state prison in northern Ohio. (Complaint, R. 1, PageID# 1-2).[1] Stansell has a disability stemming from an emergency abdominal surgery in 2013 that makes it extremely difficult and painful for him to bend over. (Complaint, R. 1, PageID# 2-3; Complaint Exs. B-C, R. 1-1, PageID# 7-8).

Stansell's complaint concerns his access to GCI's visitation program. GCI's visiting hours run from 8 a.m. through 4:30 p.m., and Stansell receives two to three visitors per month who stay for the duration of the eight-hour visiting period. (Complaint, R. 1, PageID# 2-3). GCI's visiting room contains tables where inmates and their guests may place food, beverages, and other items during their visit. (Complaint, R. 1, PageID# 2). Initially, the tables in GCI's visiting room were approximately three feet tall. (Complaint, R. 1, PageID# 2). In May 2017,

[1] "R. __" refers to the document number on the district court docket sheet. "PageID# __" refers to the page numbers in the paginated electronic record.

however, GCI's new Deputy Warden replaced the existing tables with new tables that stood only 16 inches off the floor. (Complaint, R. 1, PageID# 2). Because of "the severe pain and discomfort" Stansell experienced bending to reach the new tables, prison staff initially permitted him to continue using a taller table in the visiting room. (Complaint, R. 1, PageID# 3). They advised him, however, that he would need permission from the prison's ADA coordinator to continue using the taller table long-term. (Complaint, R. 1, PageID# 3).

Accordingly, Stansell filed a Reasonable Accommodation Request form asking permission to continue using a taller table during visitation in light of his disability. (Complaint, R. 1, PageID# 3; Complaint Ex. B, R. 1-1, PageID# 7). The prison denied that request. (Complaint, R. 1, PageID# 3; Complaint Ex. C, R. 1-1, PageID# 8). In the written denial, which Stansell attached to his complaint, the prison's ADA coordinator stated that she verified Stansell's disability with the prison doctor and that the doctor "recommended a tall table order for him to use during visits." (Complaint Ex. C, R. 1-1, PageID# 8). Nevertheless, the prison denied the request, citing concerns by the prison's chief of security that the taller tables "create a perfect shield to hide inappropriate touching and passing of contraband." (Complaint Ex. C, R. 1-1, PageID# 8). Stansell states that he "offer[ed] to have clear see-through tables donated at no cost to the prison" (Complaint, R. 1, PageID# 3), to "alleviate any conceivable concerns over

security," but that this offer "was rejected out of hand" (Complaint Ex. D, R. 1-1, PageID# 9).

Stansell appealed the denial of his accommodation request to the Ohio Department of Rehabilitation and Correction (ODRC). (Complaint, R. 1, PageID# 3; Complaint Ex. D, R. 1-1, PageID# 9). The ODRC affirmed the denial of Stansell's accommodation request, stating that "the medical necessity for such an accommodation is not considered essential for you and would place the safety and security of visitors and staff at risk." (Complaint Ex. E, R. 1-1, PageID# 10). Although Stansell had noted in his appeal his offer to have clear tables donated to the prison, the denial letter did not address the possibility of using clear tables to accommodate Stansell's disability. (Complaint Ex. D, R. 1-1, PageID# 9; Complaint Ex. E, R. 1-1, PageID# 10).

b. Stansell filed a pro se action in federal court, arguing that GCI's refusal to accommodate his disability by allowing him to use a higher table violated Title II of the ADA, Section 504 of the Rehabilitation Act, and the Eighth Amendment. (Complaint, R. 1, PageID# 4-5). With respect to Title II, Stansell alleged that, "by refusing to provide a reasonable accommodation," GCI "deprive[d]" him of "the opportunity to participate in a service, program or activity provided by" the prison (Complaint, R. 1, PageID# 4). He identified "visitation" as the pertinent service, program, or activity throughout his complaint. (See Complaint, R. 1, PageID# 2

(stating that "[v]isiting * * * constitutes by definition a 'service, program or activity provided by a public entity'" under the ADA); Complaint, R. 1, PageID# 3 (referring to the "service[,] program and activity of visitation"); Complaint, R. 1, PageID# 4 (arguing that GCI's failure to accommodate his disability presented him with "a Hobson's choice of foregoing his regular visitation or suffer[ing] great and unnecessary pain")). Stansell requested declaratory and injunctive relief as well as compensatory and punitive damages. (Complaint, R. 1, PageID# 5).

Before GCI was served with Stansell's complaint, the district court dismissed his suit *sua sponte* under 28 U.S.C. 1915(e)(2).[2] (Order, R. 5, PageID# 19-22). The district court determined that Stansell failed to state a cognizable Title II or Section 504 claim because he does not allege that GCI completely "excluded him from visitation or any service, program or activity of GCI" but only that "he finds it more difficult to place his snacks and beverages on the shorter tables in the visiting area." (Order, R. 5, PageID# 21). That allegation, the court concluded, does not state a cognizable Title II or Section 504 claim because "[f]acilities and

[2] Subsection (e)(2) of 28 U.S.C. 1915 requires a district court to dismiss an *in forma pauperis* proceeding "at any time" if the court determines that the action "is frivolous or malicious" or "fails to state a claim on which relief may be granted." 28 U.S.C. 1915(e)(2)(B)(i)-(ii). Appeals from an order dismissing a case under 28 U.S.C. 1915(e)(2) are reviewed *de novo* and analyzed under the same standard as a dismissal under Federal Rule of Civil Procedure 12(b)(6). See *Davis* v. *Prison Health Servs.*, 679 F.3d 433, 437 (6th Cir. 2012).

design features of a room do not qualify as 'services' or 'activities' under the ADA." (Order, R. 5, PageID# 21 (citing *Babcock* v. *Michigan*, 812 F.3d 531, 535-536 (6th Cir. 2016))). The district court certified under 28 U.S.C. 1915(a)(3) that an appeal could not be taken in good faith. (Order, R. 5, PageID# 22; see 28 U.S.C. 1915(a)(3) (providing that "[a]n appeal may not be taken *in forma pauperis* if the trial court certifies that it is not taken in good faith")).[3]

Stansell filed a timely notice of appeal, along with a motion for leave to proceed *in forma pauperis* (IFP) under Federal Rule of Appellate Procedure 24(a)(5). On October 23, 2018, this Court granted Stansell's IFP motion and issued a briefing schedule. In so doing, this Court rejected the district court's certification that Stansell could not take an appeal in good faith—*i.e.*, that the action was "frivolous or malicious" or "fail[ed] to state a claim on which relief may be granted." See 10/23/18 Order. This Court explained that Title II and Section 504 "require public entities to 'provide qualified disabled individuals with meaningful access to public services.'" 10/23/18 Order 2 (quoting *Ability Ctr. of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 913 (6th Cir. 2004)). This Court concluded that the district court misread Stansell's complaint as alleging mere "design defects" when in fact it "alleged 'interference with a service,

[3] The court did not address Stansell's Eighth Amendment claim. (See Order, R. 5, PageID# 19-22).

program or activity'"—namely, that Stansell was "denied meaningful access to prison visitation hours as a result of the shorter tables." 10/23/18 Order 2 (quoting *Babcock*, 812 F.3d at 536).

SUMMARY OF THE ARGUMENT

The district court dismissed plaintiff's pro se complaint on erroneous grounds. Contrary to the district court's rationale, complete exclusion from a public entity's service, program, or activity is not required to state a valid Title II or Section 504 claim. Rather, a plaintiff need only allege that he was denied meaningful access to the service, program, or activity on account of disability. Here, Stansell's complaint concerns his access to GCI's visitation program, which is plainly a service, program, or activity of GCI covered under Title II and Section 504. The district court's reliance on this Court's decision in *Babcock* v. *Michigan*, 812 F.3d 531 (6th Cir. 2016), was also misplaced. Unlike in *Babcock*, where the plaintiff challenged only a public facility's "design features" without alleging interference with a service, program, or activity, *id.* at 532, 536, Stansell's complaint alleged interference with his ability to participate in visitation at GCI. Because the district court failed to apply the correct legal framework, this Court should vacate the judgment below and remand to allow the district court to determine in the first instance whether Stansell alleged sufficient facts to plausibly show a denial of meaningful access to GCI's prison visitation program.

ARGUMENT

DENYING AN INMATE WITH A DISABILITY MEANINGFUL ACCESS TO PRISON VISITATION BECAUSE OF HIS DISABILITY VIOLATES TITLE II AND SECTION 504, ABSENT APPLICABLE DEFENSES

A. Visitation Is A Service, Program, Or Activity Of GCI

Stansell's pro se complaint alleged that, "by refusing to provide a reasonable accommodation"—namely, permitting Stansell to use taller tables in the visiting room—GCI "deprive[d] [him] of the opportunity to participate in a service, program or activity provided by" GCI—visitation—"in which other similarly situated prisoners may participate" without "unnecessary pain and suffering." (Complaint, R. 1, PageID# 4). GCI's provision of visitation opportunities is undoubtedly a covered "service[], program[] or activit[y]" of GCI under Title II and Section 504. 42 U.S.C. 12132; see 29 U.S.C. 794(a). The statutory language, Title II regulations, and case law all support such a conclusion.

1. A prison's visitation program falls within the plain language of both Title II and Section 504. Section 504 expressly defines "program or activity" to mean "*all of the operations of* * * * a department, agency, special purpose district, or other instrumentality of a State or of a local government." 29 U.S.C. 794(b) (emphasis added). Although Title II does not define the phrase "services, programs, or activities," Congress directed that Title II should not be "construed to apply a lesser standard than the standards applied under [Section 504]" and its

regulations. 42 U.S.C. 12201(a); see also Department of Justice, Title II Technical Assistance Manual, § II-1.4100 ("Title II may not be interpreted to provide a lesser degree of protection to individuals with disabilities than is provided under [the Rehabilitation Act.]"), https://www.ada.gov/taman2.html#II-1.4100. Thus, Title II's phrase "services, programs, or activities" must be construed at least as broadly as Section 504's term "program or activity"—that is, to cover "all of the operations of" a public entity. 29 U.S.C. 794(b).

Indeed, this Court, like other federal circuit courts, has concluded that "the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does." *Johnson* v. *City of Saline*, 151 F.3d 564, 569-570 (6th Cir. 1998); see also 28 C.F.R. Pt. 35, App. B (Section 35.102 Application), at 687 (2017); *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 210-212 (1998) (recognizing the breadth of Title II's "services, programs, or activities" language). [4] A state prison's visitation program falls squarely within this statutory language. Providing incarcerated inmates and their visitors the opportunity to visit in person with family members, friends, and others is one of the "operations" of a state

[4] Accord *Disability Rights New Jersey, Inc.* v. *Commissioner, New Jersey Dep't of Human Servs.*, 796 F.3d 293, 301 (3d Cir. 2015); *Fortyune* v. *City of Lomita*, 766 F.3d 1098, 1101-1102 (9th Cir. 2014), cert. denied, 135 S. Ct. 2888 (2015); *Oconomowoc Residential Programs, Inc.* v. *City of Milwaukee*, 300 F.3d 775, 782 (7th Cir. 2002); *Innovative Health Sys., Inc.* v. *City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997).

prison, 29 U.S.C. 794(b), and unquestionably something the prison "does," *Johnson*, 151 F.3d at 569-570.

Even without reference to Section 504's statutory definition, a prison's visitation program fits easily within the plain meaning of Title II's terms "services, programs, or activities." See *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220, 227 (2014) (noting that statutory terms that are not specifically defined "will be interpreted as taking their ordinary, common meaning" (citation omitted)). The Ohio Department of Rehabilitation and Correction (ODRC) recognizes that visitation is a "program" its prisons offer. See ODRC Inmate Visitation Policy 1-2 (Jan. 8, 2018), available at https://go.usa.gov/xPFbh.[5] Visitation is also an important "service" the prison provides to both inmates and their family and friends who wish to interact with their incarcerated loved ones in person.[6] And

[5] See also, *e.g.*, *Program*, American Heritage Dictionary of the English Language (5th ed. 2016) (defining "program" as "a system of services, opportunities, or projects, usually designed to meet a social need," as in a "latch-key program").

[6] See, *e.g.*, *Service*, Webster's Third New International Dictionary Unabridged (2002) (defining "service" as, among other things, the "supply of needs"); *Niece* v. *Fitzner*, 922 F. Supp. 1208, 1217 (E.D. Mich. 1996) (prisons "provide a service to persons who are not inmates in * * * allowing them to visit inmates in person").

providing visitation opportunities for inmates and visitors, where offered, is certainly an "activity" of a prison.[7]

2. The Department's Title II regulation supports the conclusion that Title II covers prison visitation programs. As noted above, the regulation addressing correctional facilities specifically references visitation in two places and generally requires public entities to ensure that inmates with disabilities have access to visitation equal to that of other inmates. See p. 4, *supra* (citing 28 C.F.R. 35.151(k)(2)(iii), 35.152(b)(2)(iv)). It follows from the regulation's concern with equal access to visitation that visitation is necessarily a service, program, or activity covered by Title II; after all, if visitation were not covered, then prisons would have no obligation to ensure that inmates with disabilities have equal access to it. Indeed, Section 35.151(k)(2)(iii) explicitly identifies visitation as one of many "programs" that a prison facility "offers to inmates or detainees." 28 C.F.R. 35.151(k)(2)(iii).[8]

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[7] See, *e.g.*, *Activity*, New Oxford American Dictionary (3d ed. 2010) (defining "activity" as "a thing that a person or group does").

[8] Consistent with the statute and regulations, the Department has taken the position in federal court briefs that visitation is a service of state prisons covered by Title II and Section 504. See, *e.g.*, Gov't Intervenor Br. at 34, *Johnson* v. *Nieman*, 504 F. App'x 543 (8th Cir. 2013) (No. 11-3281) (recognizing visitation as one of the "vital services" state prisons provide); Gov't Intervenor Br. at 25, *Hale* v. *King*, 642 F.3d 492 (5th Cir. 2011) (No. 07-60997) (same); U.S. Mem. of Law

(continued…)

3. Finally, ample case law supports the conclusion that visitation is a covered service, program, or activity under Title II and Section 504. Several courts have addressed this question directly and concluded that visitation falls within the plain language of the statute.[9] Even more courts have implicitly

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(…continued)
as Amicus Curiae at 4 n.5, *Miller* v. *Smith*, No. 98-cv-109 (S.D. Ga. 2010) (listing visitation among the numerous programs, services, and activities prisons provide).

The Department has also, under its Title II authority, reached settlement agreements with state and local entities requiring them to address architectural barriers in prison visitation rooms, including providing visiting room tables that are accessible to inmates with disabilities. See, *e.g.*, Settlement Agreement Between the United States of America and the South Dakota Department of Corrections, Attach. A (Oct. 23, 2018), https://www.ada.gov/sd_atta.html; Settlement Agreement Between the United States of America and the Louisiana State Penitentiary, Louisiana Department of Public Safety and Corrections, Attach. A (Nov. 14, 2017), https://www.ada.gov/lsp_attA.html; Settlement Agreement Between the United States of America and Erie County, New York, Regarding the Erie County Holding Center and the Erie County Correctional Facility, Attach. A (Dec. 17, 2014), https://www.ada.gov/erie_county/erie_county_attachment_a.html.

[9] See, *e.g.*, *Herndon* v. *Johnson*, 970 F. Supp. 703, 706 (E.D. Ark. 1997) (finding it "clear that visitation programs" are "'services' provided to inmates"); see also *Onishea* v. *Hopper*, 171 F.3d 1289, 1293, 1295 n.10 (11th Cir. 1999) (describing visitation as both a program and an activity), cert. denied, 528 U.S. 1114 (2000); *Mercado* v. *Department of Corr.*, No. 3:16-cv-1622, 2018 WL 2390139, at *10 (D. Conn. May 25, 2018); *Harris* v. *Lanigan*, No. 11-cv-1321, 2012 WL 983749, at *5 (D.N.J. Mar. 22, 2012); *Niece*, 922 F. Supp. at 1217; cf. *Crawford* v. *Indiana Dep't of Corr.*, 115 F.3d 481, 484 (7th Cir. 1997) (noting in dictum state prison's concession that "a visit to a prison or a prisoner in the prison [is] an 'activity'" under Title II); *Bartolomeo* v. *Plymouth Cty. House of Corr.*, No. 99-1621, 2000 WL 1164261, at *2 (1st Cir. Aug. 16, 2000) (noting that
(continued…)

recognized that visitation is a covered service, program, or activity by permitting Title II and Section 504 claims alleging denial of meaningful access to visitation to proceed.[10] And while the Supreme Court has not addressed this question directly, language in *Yeskey* strongly indicates that the Court would deem visitation a covered service, program, or activity under Title II. See 524 U.S. at 210 (noting that "[m]odern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,'" and citing a prison's "contact visitation program" as an example (citation omitted)).

B. A Plaintiff Does Not Need To Allege A Complete Exclusion From A Public Entity's Service, Program, Or Activity To State A Cognizable Title II Or Section 504 Claim

The district court erred to the extent it dismissed Stansell's suit because he does not allege that GCI excluded him *entirely* from its visitation program. (Order, R. 5, PageID# 21). A plaintiff need not allege a complete exclusion from a public entity's service, program, or activity to state a cognizable claim under Title II or

(…continued)
"defendants have not disputed that prison visitation policies constitute 'services, programs, or activities' within the meaning of" Title II).

[10] See, *e.g.*, *Romero* v. *Board of Cty. Comm'rs*, 202 F. Supp. 3d 1223 (D.N.M. 2016); *Pierce* v. *District of Columbia*, 128 F. Supp. 3d 250 (D.D.C. 2015); *Durrenberger* v. *Texas Dep't of Criminal Justice*, 757 F. Supp. 2d 640 (S.D. Tex. 2010); *Bullock* v. *Gomez*, 929 F. Supp. 1299 (C.D. Cal. 1996).

Section 504. Rather, he need allege only that he was deprived of meaningful access to the service, program, or activity on the basis of his disability.

1. In *Alexander* v. *Choate*, 469 U.S. 287, 301 (1985), the Supreme Court held that Section 504 requires a federal funding recipient to provide qualified individuals with disabilities "meaningful access" to its programs and activities. Following *Choate*, this Court has recognized that Title II, like Section 504, "requires that public entities make reasonable accommodations for disabled individuals so as not to deprive them of *meaningful access* to the benefits of the services such entities provide." *Ability Ctr. of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 907 (6th Cir. 2004) (emphasis added).

The Department's Title II regulation affirms this "meaningful access" principle. It makes clear not only that a public entity may not completely "[d]eny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service," but also that a public entity may not afford such individuals either "an opportunity to participate in or benefit from the aid, benefit, or service that is *not equal to that afforded others*" or "an aid, benefit, or service that is *not as effective* in affording *equal opportunity*" to gain the same result or benefit as that provided to others. 28 C.F.R. 35.130(b)(1)(i)-(iii) (emphasis added).

Consistent with this case law and regulation, courts have routinely recognized that plaintiffs need not show that they have been "'completely

prevented from enjoying a service, program, or activity' to establish discrimination under Section 504 or Title II." *Disabled in Action* v. *Board of Elections in the City of New York*, 752 F.3d 189, 198 (2d Cir. 2014) (quoting *Shotz* v. *Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001)). In *Disabled in Action*, for example, the Second Circuit held that New York City's Board of Elections violated Title II and Section 504 by operating polling sites that were inaccessible to persons with mobility and vision impairments, *id.* at 198-202, even though there was "no evidence that any voter had been deprived of the right to participate in an election," *id.* at 194. The court held that persons with disabilities were entitled to the opportunity afforded other persons "to cast a private ballot on election days," and it was not sufficient that individuals with disabilities were permitted "the opportunity to vote at some time and in some way." *Id.* at 199.

Similarly, the Fourth Circuit has held that Maryland's absentee voting program—which required voters to download a ballot, print it, and mark their choices by hand—violated Title II and Section 504 because it did not provide blind individuals "an opportunity to participate * * * equal to that afforded others," insofar as blind voters could not mark their ballots without assistance. *National Fed'n of the Blind* v. *Lamone*, 813 F.3d 494, 506 (4th Cir. 2016) (quoting 28 C.F.R. 35.130(b)(1)(ii)). In both cases, the courts found a statutory violation

despite the fact that blind voters were not completely excluded from voting or denied the opportunity to cast a ballot.

Courts have recognized in the prison context as well that complete exclusion is not necessary to state a Title II or Section 504 claim. In *Randolph* v. *Rodgers*, 170 F.3d 850 (8th Cir. 1999), for example, the Eighth Circuit held that a deaf inmate who alleged that a state prison failed to provide him with a sign language interpreter during disciplinary proceedings stated a *prima facie* case under Title II and Section 504. In doing so, the court rejected the prison's argument that the inmate "was not excluded from prison services, programs, and activities" within the meaning of Title II and Section 504 because he could "physically attend them," noting that the inmate's "limited participation" in the prison's disciplinary process did not constitute "meaningful access" under *Choate*. *Id.* at 858. The Court explained that, "although he has been provided some form of those benefits, he has not received the full benefits solely because of his disability." *Ibid.*

Similarly, in *Jaros* v. *Illinois Department of Corrections*, 684 F.3d 667 (7th Cir. 2012), the Seventh Circuit held that an inmate with a mobility disability stated a valid Section 504 claim by alleging that the prison's "refusal to accommodate [his] disability kept him from accessing meals and showers *on the same basis as other inmates*." *Id.* at 672 (emphasis added). As in *Randolph*, the inmate did not allege that he was completely excluded from meals, showers, or other services,

programs, or activities of the prison. See *id.* at 669 (noting that the inmate "limited himself to taking only four showers monthly" due to fear of falling and "missed meals on occasion because he could not walk fast enough to the cafeteria"). Likewise, in *Pierce* v. *County of Orange*, 526 F.3d 1190, 1218-1219, 1226 (9th Cir.), cert. denied, 555 U.S. 1031 (2008), the court held that a state prison's inaccessible bathroom and shower facilities violated Title II and Section 504 although inmates with disabilities were able to use those facilities with their fellow inmates' assistance.

Finally, in *Wright* v. *New York State Department of Corrections*, 831 F.3d 64 (2d Cir. 2016), the Second Circuit held that an inmate's Title II and Section 504 claims survived summary judgment because there was evidence that he was "denied meaningful access to prison services, programs, and activities" due to his mobility impairment. *Id.* at 73. Specifically, the inmate testified that, because of his inability to move freely throughout the facility, he had "at times" been unable to visit the law library, had missed multiple doctor's appointments and meals, and "avoid[ed] recreational time in the prison yard because he fears he would be unable to escape quickly." *Ibid.* Although these services were not completely foreclosed to the inmate, and although the prison had provided some accommodations, the Second Circuit concluded that an accommodation is not reasonable "if it is so

inadequate that it deters the plaintiff from attempting to access the services otherwise available to him." *Ibid.*

As these cases demonstrate, a plaintiff need not allege a complete exclusion from a public entity's service, program, or activity to state a valid failure-to-accommodate claim under Title II or Section 504. Rather, a plaintiff states a cognizable Title II or Section 504 claim by alleging that the public entity's failure to accommodate his disability deprived him of "meaningful access" to the service, program, or activity, *Choate*, 469 U.S. at 297, or resulted in "an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others," 28 C.F.R. 35.130(b)(1)(ii). See *Ability Ctr.*, 385 F.3d at 907.

2. Here, plaintiff alleged that, by failing to accommodate his disability, GCI forced him "to undergo a Hobson's choice"—he could either "forego[] his regular visitation" or participate in it and experience "unnecessary pain and suffering"—that "other similarly situated prisoners" did not face. (Complaint, R. 1, PageID# 4). As this Court recognized in its order granting plaintiff IFP status, this was effectively a claim that plaintiff "was denied meaningful access to prison visitation hours as a result of the shorter tables." 10/23/18 Order 2. Because a denial of meaningful access, if plausibly shown with sufficient factual allegations, would state a claim for a violation of Title II and Section 504, the district court

erred to the extent it dismissed plaintiff's complaint for failure to allege a complete exclusion from GCI's prison visitation program.

The proper question at this stage is whether, applying the appropriate pleading standard for *pro se* litigants, plaintiff's complaint sufficiently alleged facts that, if true, would plausibly show a denial of meaningful access to GCI's visitation program. See *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678-680 (2009); *Williams* v. *Curtin*, 631 F.3d 380, 383 (6th Cir. 2011); *Franklin* v. *Rose*, 765 F.2d 82, 84-85 (6th Cir. 1985). Because the district court did not address that question, this Court should vacate the judgment below and remand to the district court for a determination of that question and any further proceedings. The district court should consider in the first instance whether plaintiff's factual allegations plausibly show that his use of a table is integral to his meaningful participation in GCI's visitation program, as opposed to a tangential aspect of his participation. To the extent GCI asserts any affirmative defenses—*e.g.*, that plaintiff's requested accommodation would have presented an undue burden or was not reasonable in light of GCI's proffered security concerns, see generally *Wright*, 831 F.3d at 78-

79—those issues are "fact-based" and "not capable of resolution on the basis of the pleadings alone." *Hindel* v. *Husted*, 875 F.3d 344, 347 (6th Cir. 2017).[11]

C. The District Court Misapplied Babcock *In Dismissing Plaintiff's Claims*

Finally, the district court erred in concluding that this Court's decision in *Babcock* v. *Michigan*, 812 F.3d 531, 535-536 (6th Cir. 2016), forecloses Stansell's Title II and Section 504 claims. In *Babcock*, a state employee with a mobility disability sued under Title II and Section 504 alleging that "various design features" in the office complex in which she worked "denied her equal access to her place of employment." *Id.* at 532. This Court affirmed the district court's dismissal of her claims, concluding that the plaintiff failed to identify a service, program, or activity of the public entity that she sought to access. *Id.* at 538-539. In doing so, this Court explained that Title II provides a private cause of action "to remedy the exclusion from participating in or deriving benefit from public services, programs, or activities," and not simply to "remedy the lack of certain design features of a facility." *Id.* at 535-536. In other words, a plaintiff may not

[11] The Department's recent settlement agreement with the South Dakota Department of Corrections accounted for potential security concerns by providing that the required accessible tables in its visitation rooms "can be enclosed on three sides to prevent the passing of contraband." South Dakota DOC Settlement, n.8, *supra*, https://www.ada.gov/sd_atta.html.

remedy a public facility's inaccessible design features under the ADA "without alleging interference with a service, program, or activity." *Id.* at 536.

Babcock does not preclude Stansell's suit. Unlike in *Babcock*, Stansell's complaint identified a service, program, or activity of GCI's that Stansell sought to access: GCI's visitation program. (See Complaint, R. 1, PageID# 2 (stating that visitation is "by definition a 'service, program or activity'" under Title II); Complaint, R. 1, PageID# 3 (referring to "the service program and activity of visitation"); Complaint, R. 1, PageID# 4 (alleging that GCI "deprive[d] Plaintiff Stansell of the opportunity to participate in a service, program or activity" and identifying "visitation" as the relevant service, program, or activity)). Thus, as this Court recognized in its order granting Stansell's IFP motion, Stansell's concern is not with the visiting room tables' "design defects" in and of themselves but with how those design features interfere with his ability to participate in GCI's visitation program. See 10/23/18 Order 2.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's judgment and remand for further proceedings.

Respectfully submitted,

ERIC S. DREIBAND
Assistant Attorney General

s/ Christine A. Monta
ERIN H. FLYNN
CHRISTINE A. MONTA
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-2195
Christine.Monta@usdoj.gov

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING VACATUR AND REMAND FOR FURTHER PROCEEDINGS:

(1) complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because it contains 5543 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in Word in a proportionally spaced typeface (Times New Roman) and in 14-point font.

s/ Christine A. Monta
CHRISTINE A. MONTA
Attorney

Date: December 12, 2018

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2018, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING VACATUR AND REMAND FOR FURTHER PROCEEDINGS with the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. Service on appellant, who is an incarcerated inmate and not a registered CM/ECF user, will be accomplished by certified mail at Michael Stansell, Prisoner #A355-967, Grafton Correctional Institution, 2500 S. Avon Belden Road, Grafton, OH 44044. Because appellee's counsel has not yet entered an appearance on the appellate CM/ECF system, service on appellee will also be accomplished by certified mail at Ohio Attorney General's Office, Criminal Justice Section, Corrections Unit, 30 E. Broad St., 14th Floor, Columbus, OH 43215.

s/ Christine A. Monta
CHRISTINE A. MONTA
Attorney

ADDENDUM DESIGNATING DISTRICT COURT DOCUMENTS

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