No. 02-1047

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OLIVER COCHRAN,

Plaintiff-Appellant

v.

NEW JERSEY DEPARTMENT OF CORRECTIONS, STEVEN PINCHAK, Administrator of East Jersey State Prison, PATRICK ARVONIO, Administrator of East Jersey State Prison, ALFIERO ORTIZ, Assistant Administrator of East Jersey State Prison, TERRENCE MOORE, Assistant Administrator of East Jersey State Prison, DR. FREDERICK BAUER, LT. "JOHN" MILLER, SGT. "JOHN" TARZA, MICHAEL POWER, THOMAS FARRELL, Supervisor of Health Services Unit of the New Jersey Department of Corrections, SCOTT A. FAUNCE, Administrator of Bayside State Prison, CHARLES LEONE, Assistant Administrator of Bayside State Prison, "JANE" MERITT, Classification Supervisor at Bayside State Prison, Corrections Officers "JOHN" BLOUNT, "JOHN" ALLENDE, "JOHN" DAVENPORT, "JOHN" SNELL, SGT. "JOHN" PEGANSKI, SGT. "JOHN" DAVIS, CORRECTIONAL MEDICAL SERVICES, DR. HERTZEL ZACKAI, DR. "JOHN" CARLINO, LISA LITTLE, Hospital Administrator for Bayside State Prison, MARGE AMODEL, Director of Nursing at Bayside State Prison, individually and in their official capacities,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF THE ISSUE

Whether the statutory provision removing Eleventh Amendment immunity for suits under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq*., is a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment, as applied to the class of cases implicating prisoners' rights.

STATEMENT OF THE CASE

1. This case involves a suit filed under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq*. That Title provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) & (B). The term "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. 12102(2). A "qualified individual with a disability" is a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service. 42 U.S.C. 12131(2); 28

C.F.R. 35.140.[1]

The discrimination prohibited by Title II of the Disabilities Act includes, among other things, denying a government benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii), (vii). In addition, a public entity must make reasonable modifications in policies, practices, or procedures if the accommodation is necessary to avoid the exclusion of individuals with disabilities and can be accomplished without imposing an undue financial or administrative burden on the government, or fundamentally altering the nature of the service. See 28 C.F.R. 35.130(b)(7). The Act does not normally require a public entity to make its existing physical facilities accessible. Public entities need only ensure that each "service, program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities," unless to do so would fundamentally alter the program or impose an undue financial or administrative burden. 28 C.F.R. 35.150(a). However, facilities altered or

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[1] Congress instructed the Attorney General to issue regulations to implement Title II based on prior regulations promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. See 42 U.S.C. 12134.

constructed after the effective date of the Act must be made accessible. 28 C.F.R. 35.150(a)(1), 35.151.

Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

2. Plaintiff is a legally blind inmate serving a life sentence in a New Jersey State prison. (A.2).[2] In 1994, plaintiff filed a pro se action against the New Jersey Department of Corrections and various state officials (A.37-A.42), which was followed by several amended complaints (A.55-A.62, A.75-A.85, A.118-A.128), alleging that the defendants violated his rights under Title II of the ADA by failing to reasonably accommodate his disability. (A.127). Plaintiff sought damages and injunctive relief. (A.127-A.128).

On December 10, 2001, the district court entered summary judgment against plaintiff on his Title II claims in their entirety on the basis that New Jersey enjoys Eleventh Amendment immunity to private suits to enforce Title II of the ADA. (A.1-A.9). Plaintiff appealed. (A.10). After briefing on appeal was complete, the state defendant notified this Court that it was challenging the constitutionality of a

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[2] References to "A.__" are to pages in the Appendix filed by the plaintiff-appellant.

federal statute, and this Court certified that notice to the Department of Justice. After the Supreme Court issued its decision in *Tennesee* v. *Lane*, 124 S. Ct. 1978, on May 17, 2004, this Court ordered the parties to submit supplemental briefing addressing the impact of the holdings in *Lane* on the questions presented in this appeal.

The United States now intervenes pursuant to 28 U.S.C. 2403(a), which provides that "[i]n any action, suit or proceeding in a court of the United States to which the United States * * * is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court * * * *shall permit the United States to intervene * * * for argument on the question of constitutionality*" in order to defend the constitutionality of the abrogation of Eleventh Amendment immunity in Title II of the ADA (emphasis added).

SUMMARY OF ARGUMENT

In *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004), the Supreme Court upheld Title II of the Americans with Disabilities Act as a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment as applied to cases implicating the right of access to the courts. In so holding, the Court found that, unlike Title I of the ADA, which applies only to employment, Title II's prohibition of disability discrimination in the provision of public services protects not only the

rights of persons with disabilities secured by the Equal Protection Clause, but also a vast array of rights subject to heightened constitutional scrutiny under the Due Process Clause of the Fourteenth Amendment. In cases such as the instant case, these rights subject to heightened constitutional protection include rights arising under the Eighth Amendment, the First Amendment, and the Due Process Clause itself.

The Supreme Court in *Lane* also examined the historical record of unconstitutional discrimination against persons with disabilities in the provision of public services in general and determined that it was sufficient to justify Congress's enactment of prophylactic legislation in the area of public services. That holding applies to all areas of government services, including the treatment of inmates with disabilities. Moreover, even if this Court is inclined to examine the record of disability discrimination against inmates in particular, that record is sufficient to justify the remedy of Title II.

Finally, the *Lane* Court found that the question whether Title II is a congruent and proportional response to the constitutional problem of discrimination against persons with disabilities in the provision of government services should be analyzed on a context-by-context basis. The *Lane* Court found that Title II is such a valid remedy in the class of cases implicating the right of

access to courts and judicial services. Similarly, Title II is a congruent and proportional means of enforcing the constitutional rights of inmates with disabilities, both because its remedies are consistent with the commands of the Constitution in the area of prisoners' rights and because its remedies are a valid means of ferreting out hard-to-detect invidious discrimination.

ARGUMENT

TITLE II OF THE ADA IS VALID FOURTEENTH AMENDMENT LEGISLATION AS APPLIED TO THE CLASS OF CASES IMPLICATING PRISONERS' RIGHTS

The State has argued that the substantive requirements of Title II were beyond Congress's Fourteenth Amendment authority. The Supreme Court addressed that contention in *Tennessee* v. *Lane*, holding that "Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." 124 S. Ct. 1978, 1994 (2004). The Court also held that Congress's finding that "discrimination against individuals with disabilities persists in such critical areas as * * * institutionalization * * * and access to public services * * *, together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic

legislation." *Id.* at 1992 (emphasis omitted). Accordingly, the Court's decision in *Lane* requires a lower court to examine whether Title II is valid Fourteenth Amendment legislation as applied to the relevant category of cases. Viewed in light of the teachings and example of *Lane*, Title II is valid Fourteenth Amendment legislation as applied to the class of cases implicating prisoners' rights.

Lane applied the three-part analysis for Fourteenth Amendment legislation created by *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), asking (1) what "constitutional right or rights that Congress sought to enforce when it enacted Title II," *Lane*, 124 S. Ct. at 1988; (2) whether there was a history of unconstitutional disability discrimination to support Congress's determination that "inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id*. at 1992; and (3) "whether Title II is an appropriate response to this history and pattern of unequal treatment," *ibid*. With respect to the first question, the Court found that Title II enforces rights under the Equal Protection Clause as well as an array of rights subject to heightened constitutional scrutiny under the Due Process Clause of the Fourteenth Amendment arising from the "inadequate provision of public services and access to public facilities." *Id.* at 1992. With respect to the second question, the Court

conclusively found a sufficient historical predicate of unconstitutional disability discrimination in the provision of public services to justify enacting a prophylactic remedy pursuant to Congress's authority under Section 5 of the Fourteenth Amendment. And finally, with respect to the third question, the Court found that the congruence and proportionality of the remedies in Title II should be judged on a category-by-category basis in light of the particular constitutional rights at stake in the relevant category of public services.

A. Constitutional Rights At Stake

The Supreme Court held in *Lane* that Title II enforces the Equal Protection Clause's "prohibition on irrational disability discrimination," as well as "a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." 124 S. Ct. at 1988. The *Lane* Court specifically noted that Title II seeks to enforce rights "protected by the Due Process Clause of the Fourteenth Amendment," *ibid.*, and noted that one area targeted by Title II is "unequal treatment in the administration of * * * the penal system," *id.* at 1989. In this case, in which constitutional rights in the penal system are implicated, Title II enforces the Equal Protection Clause's prohibition of arbitrary treatment based on

irrational stereotypes or hostility,[3] as well as the heightened constitutional protection afforded to a variety of constitutional rights arising in the prison context.

Although incarceration in a state prison necessarily entails the curtailment of many of an individual's constitutional rights, the Supreme Court has repeatedly held that prisoners must "be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson* v. *Palmer*, 468 U.S. 517, 523 (1984). In addition, the very nature of prison life – the constant and pervasive governmental regulation of and imposition on the exercise of every constitutional right retained by incarcerated individuals, and the perpetual intrusion of the state into every aspect of day-to-day life – makes the penal context an area of acute constitutional concern, implicating a broad array of constitutional rights and interests on the part of inmates with disabilities. Thus, the Court has found that a variety of constitutional rights subject to heightened

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

constitutional scrutiny are retained by prisoners, including the right of access to the courts, *Younger* v. *Gilmore*, 404 U.S. 15 (1971), aff'g *Gilmore* v. *Lynch*, 319 F. Supp. 105 (N. D. Cal. 1970); *Johnson* v. *Avery*, 393 U.S. 483 (1969); *Ex parte Hull*, 312 U.S. 546 (1941), the right to "enjoy substantial religious freedom under the First and Fourteenth Amendments," *Wolff* v. *McDonnell*, 418 U.S. 539, 556 (1974) (citing *Cruz* v. *Beto*, 405 U.S. 319 (1972); *Cooper* v. *Pate*, 378 U.S. 546 (1964)), the right to marry, *Turner* v. *Safley*, 482 U.S. 78, 95 (1987), and certain First Amendment rights of speech "not inconsistent with [an individual's] status as * * * prisoner or with the legitimate penological objectives of the corrections system," *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974).[4]

Prisoners also retain rights under the Due Process Clause. *Wolff*, 418 U.S. at 556 ("Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law."). The Due Process Clause imposes an affirmative obligation upon States to take such measures as are necessary to ensure that individuals, including those with disabilities, are not deprived of their life, liberty, or property without procedures

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[4] As discussed *infra* at p.20, claims that certain constitutional rights of inmates have been violated are subject to review under the standard of *Turner* v. *Safley*, 482 U.S. 78, 89 (1987), which inquires whether a restriction on a particular right is "reasonably related to legitimate penological interests."

affording "fundamental fairness." *Lassiter* v. *Department Social Serv.*, 452 U.S. 18, 24 (1981). The Due Process Clause requires States to afford inmates, including individuals with disabilities, fair proceedings in a range of circumstances that arise in the prison setting, including administration of antipsychotic drugs, *Washington* v. *Harper*, 494 U.S. 210, 221-222 (1990), involuntary transfer to a mental hospital, *Vitek* v. *Jones*, 445 U.S. 480, 494 (1980), and parole hearings, *Young* v. *Harper*, 520 U.S. 143, 152-153 (1997). The Due Process Clause also requires fair proceedings when a prisoner is denied access to benefits or programs created by state regulations and policies even where the liberty interest at stake does not arise from the Due Process Clause itself. See, *e.g.*, *Greenholtz* v. *Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) (parole); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) (good time credits); *id.* at 571-572 & n.19 (solitary confinement); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (probation).

Moreover, all persons incarcerated in state prisons, including persons with disabilities, have a constitutional right under the Eighth Amendment to be free from "cruel and unusual punishments." The Supreme Court has held that the Eighth Amendment both "places restraints on prison officials," and "imposes duties on those officials." *Farmer* v. *Brennan*, 511 U.S. 825, 832-833 (1994).

Among the restraints imposed under the Amendment are prohibitions on the use of excessive physical force against prisoners, *Hudson* v. *McMillian*, 503 U.S. 1 (1992), and the "unnecessary and wanton infliction of pain," *Hope* v. *Pelzer*, 536 U.S. 730, 737 (2002). Among the affirmative obligations imposed are the duty to "ensure that inmates receive adequate food, clothing, shelter, and medical care," *Farmer*, 511 U.S. at 832-833, and the duty to "take reasonable measures to guarantee the safety of the inmates," *Hudson*, 468 U.S. at 526-527. Prison officials also may not display "deliberate indifference to serious medical needs of prisoners." *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976); see also *Helling* v. *McKinney*, 509 U.S. 25, 32 (1993).

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

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

services, many of which implicate fundamental constitutional rights. *Lane*, 124 S. Ct. at 1998.

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

The Supreme Court in *Lane* left no doubt that there was a sufficient historical precedent of unconstitutional disability discrimination in the provision of public services to justify prophylactic legislation under Section 5 of the Fourteenth Amendment. In so holding, the Court found that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Lane*, 124 S. Ct. at 1989. The Court held that Congress's legislative finding of persistent "discrimination against individuals with disabilities * * * [in] access to public services," taken "together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." *Id.* at 1992.

Although *Lane* ultimately upheld Title II as valid Fourteenth Amendment legislation only as applied to access to courts, its conclusions regarding the historical predicate for Title II are not limited to that context. The Court found

that the record included not only "a pattern of unconstitutional treatment in the administration of justice," 124 S. Ct. at 1990, but also violations of constitutional rights in the context of voting, marriage, jury service, zoning, the penal system, public education, law enforcement, and the treatment of institutionalized persons. *Id.* at 1989. This history, the Court held, warranted prophylactic legislation addressing "public services" generally. *Id.* at 1992.

Thus, the adequacy of the historical predicate for Title II is no longer open to dispute. But even if it were, there is ample evidence of a history of unconstitutional discrimination against inmates with disabilities.[5] In fact, the Court in *Lane* specifically took notice of the historical record of disability discrimination in the penal system, as documented in the decisions of various courts. 124 S. Ct. at 1989 & n.11 (citing *LaFaut* v. *Smith*, 834 F.2d 389, 394 (4th

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[5] Congress was also aware of the prevalence of unconstitutional conditions of confinement in prisons generally. See generally legislative history of the Civil Rights of Institutionalized Persons Act, H.R. Rep. No. 1058, 95th Cong., 2d Sess. (1978); S. Rep. No. 1056, 95th Cong., 2d Sess. (1978); see also, *e.g.*, *Pugh* v. *Locke*, 406 F. Supp. 318, 329 (M.D. Ala. 1976) ("The living conditions in Alabama prisons constitute cruel and unusual punishment."), aff'd as modified sub nom. *Newman* v. *Alabama*, 559 F.2d 283 (5th Cir. 1977), rev'd in part sub nom. *Alabama* v. *Pugh*, 438 U.S. 781 (1978); *Ramos* v. *Lamm*, 639 F.2d 559, 567-578 (10th Cir. 1980) (conditions at Colorado prison were such that prison was "unfit for human habitation"), cert. denied, 450 U.S. 1041 (1981); *Spain* v. *Procunier*, 600 F.2d 189 (9th Cir. 1979) (conditions at California prison amounted to cruel and unusual punishment).

Cir. 1987) (paraplegic inmate unable to access toilet facilities); *Schmidt* v. *Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999) (double amputee forced to crawl around the floor of jail); *Key* v. *Grayson*, 179 F.3d 996 (6th Cir. 1999) (deaf inmate denied access to sex offender therapy program allegedly required as precondition for parole), cert. denied, 528 U.S. 1120 (2000)).[6] Moreover, in the hearings leading to

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[6] See also, *e.g.*, *Kiman* v. *New Hampshire Dep't of Corr.*, 301 F.3d 13, 15-16 (1st Cir. 2002) (disabled inmate stated Eighth Amendment claims for denial of accommodations needed to protect his health and safety due to degenerative nerve disease), see note 10, *infra*, for subsequent history; *Armstrong* v. *Davis*, 275 F.3d 849 (9th Cir. 2001) (failure to conduct parole and parole revocation proceedings in a manner that disabled inmates can understand and in which they can participate), cert. denied, 537 U.S. 812 (2002); *Bradley* v. *Puckett*, 157 F.3d 1022, 1025-1026 (5th Cir. 1998) (failure for several months to provide means for amputee to bathe led to infection); *Koehl* v. *Dalsheim*, 85 F.3d 86 (2d Cir. 1996) (Eighth Amendment violated when inmate with serious vision problem denied glasses and treatment); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) ("squalor in which [prisoner] was forced to live as a result of being denied a wheelchair" violated the Eighth Amendment); *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986) (prison guard repeatedly assaulted paraplegic inmates with knife, forced them to sit in own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead"); *Miranda* v. *Munoz*, 770 F.2d 255, 259 (1st Cir. 1985) (failure to provide medications for epilepsy, which caused prisoner's death, violated Eighth Amendment); *Carty* v. *Farrelly*, 957 F. Supp. 727, 739 (D.V.I. 1997) ("The abominable treatment of the mentally ill inmates shows overwhelmingly that defendants subject inmates to dehumanizing conditions punishable under the Eighth Amendment."); *Kaufman* v. *Carter*, 952 F. Supp. 520 (W.D. Mich. 1996) (amputee hospitalized after fall in inaccessible jail shower); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1466 (M.D. Ala. 1994) (paraplegic prisoner denied use of a wheelchair and forced to crawl around his cell); *Nolley* v. *County of Erie*, 776 F. Supp. 715 (W.D.N.Y. 1991) (Constitution violated where inmate with HIV was housed in part of prison reserved for inmates

(continued...)

the enactment of the ADA, Congress heard testimony of examples of disability discrimination in the provision of a vast array of governmental services, including services provided to inmates in state prisons. For example, one witness testified: "I have witnessed their jailers rational[ize] taking away their wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs." Staff of House Comm. on Educ. & Labor, 101st Cong., 2d Sess. *Legislative History of the Americans with Disabilities Act* 1190 (Comm. Print 1990) (Cindy Miller).[7] Furthermore, as the Court stated in *Nevada Department of Human*

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[6](...continued)
who are mentally disturbed, suicidal, or a danger to themselves, and was denied access to prison library and religious services); *Bonner* v. *Arizona Dep't of Corr.*, 714 F. Supp. 420 (D. Az. 1989) (deaf, mute, and vision-impaired inmate denied communication assistance, including in disciplinary proceedings, counseling sessions, and medical treatment).

[7] See also U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 168 (1983) (noting discrimination in treatment and rehabilitation programs available to inmates with disabilities and inaccessible jail cells and toilet facilities); Cal. Att'y Gen., *Commission on Disability: Final Report* 103 (Dec. 1989) ("[A] parole agent sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though he explained that he could not make the appointments because he was unable to get accessible transportation."). A congressionally designated Task Force submitted to Congress several thousand documents evidencing discrimination and segregation in the provision of public services, including the treatment of persons with disabilities in prisons and jail. See *Garrett*, 531 U.S. at 393 (Appendix to Justice Breyer's dissent) (citing AK 55 (jail failed to provide person with disability medical treatment)); *id.* at 405 (citing IL 572 (deaf people arrested and held in jail

(continued...)

Resources v. *Hibbs*, 538 U.S. 721, 735-737 (2003), and reiterated in *Lane*, 124 S. Ct. at 1992, it is "easier for Congress to show a pattern of state constitutional violations" where, as here, Congress is targeting conduct subject to heightened constitutional review.

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

"The only question that remains is whether Title II is an appropriate response to this history and pattern of unequal treatment." 124 S. Ct. at 1992. The Court in *Lane* limited its consideration of this question to the class of cases implicating the right of "access to the courts" and "the accessibility of judicial services," finding that the remedy of Title II "is congruent and proportional to its object of enforcing the right of access to the courts." *Id.* at 1992-1993. In the instant case, this Court must decide whether Title II is congruent and proportional legislation as applied to the class of cases implicating prisoners' rights.[8]

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[7](...continued)
overnight without explanation because of failure to provide interpretive services)); *id.* at 414 (citing NM 1091 (prisoners with developmental disabilities subjected to longer terms of imprisonment and abused by other prisoners in state correctional system)); *id.* at 415 (citing NC 1161 (police arrested and jailed deaf person without providing interpretive services)).

[8] The Court in *Lane* did not examine the congruence and proportionality of Title II as a whole because the Court found that the statute was valid Section 5 legislation (continued...)

A statutory remedy is valid under Section 5 where it is "congruent and proportional to its object of enforcing the right[s]" at issue in the particular situation. *Lane*, 124 S. Ct. at 1993. Thus, in the context of prisoners' rights, this Court should judge the appropriateness of Title II's requirement of program accessibility against the background of the panoply of rights implicated by incarceration and in light of the history of unequal or otherwise unconstitutional treatment of prisoners with disabilities. Where, as here, a statutory remedy is appropriately tailored to the constitutional rights at stake, it is valid under Section 5.

As was true in *Lane* with respect to cases implicating access to courts and judicial services, "Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the" rights of persons who are incarcerated in state prisons. 124 S. Ct. at 1993. The Court in *Lane* found that

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[8](...continued)
as applied to the class of cases before it. Because Title II is valid Section 5 legislation as applied to the class of cases implicating prisoners' rights, this Court need not consider the validity of Title II as a whole. The United States continues to maintain, however, that Title II as a whole is valid Section 5 legislation because it is congruent and proportional to Congress's goal of eliminating discrimination on the basis of disability in the provision of public services – an area that the Supreme Court in *Lane* determined is an "appropriate subject for prophylactic legislation" under Section 5. 124 S. Ct. at 1992.

the "unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts." *Id.* at 1993. The same is true with respect to the treatment of persons with disabilities in the penal system. See *id.* at 1991 (noting the "pattern of unequal treatment" of persons with disabilities in the administration of the penal system). In particular, Congress was aware that such problems existed despite several legislative efforts that apply directly to the penal context such as the Civil Rights of Institutionalized Persons Act and Section 504 of the Rehabilitation Act. Thus, Congress faced a "difficult and intractable proble[m]," *id.* at 1993, which it could conclude would "require powerful remedies," *id.* at 1989.

Nevertheless, the remedy imposed by Title II "is a limited one." *Lane*, 124 S. Ct. at 1993. Although Title II requires States to take some affirmative steps to avoid discrimination, it "does not require States to compromise their essential eligibility criteria," requires only "'reasonable modifications' that would not fundamentally alter the nature of the service provided," and does not require States to "undertake measures that would impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service." *Id.* at 1993-1994.

Title II's carefully circumscribed accommodation mandate is consistent with the commands of the Constitution in the area of prisoners' rights. Claims by inmates of violations of certain constitutional rights are generally subject to analysis under the standard set forth by the Supreme Court in *Turner* v. *Safley*, 482 U.S. 78 (1987), which takes into consideration the State's penological justification for a challenged practice, the availability of alternative means of serving the State's interests, as well as the potential impact a requested accommodation to such a practice will have on guards, other inmates, and allocation of prison resources.[9] The Due Process Clause itself requires an assessment of the importance of the right at stake in a particular case as well as the circumstances of the individual to whom process is due. See *Goldberg* v. *Kelly*, 397 U.S. 254, 267-269 (1970).

Just as the *Turner* test and the Due Process Clause require a court to weigh the interests of an individual against the interests of the State, Title II also requires a court to balance the interests of an inmate with a disability against those of state prison administrators. While *Turner* requires a court to consider what impact protecting a particular constitutional right will have on a prison's resources and

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

personnel, so Title II requires a court to consider whether providing an accommodation would "impose an undue financial or administrative burden * * * or effect a fundamental alteration in the nature of the service." *Lane*, 124 S. Ct. at 1994. Furthermore, just as the *Turner* test requires a court to consider whether "there are alternative means of exercising the [constitutional] right [at stake] that remain open to prison inmates," 482 U.S. at 90, Title II does not require that a qualifying inmate necessarily be granted every requested accommodation with respect to every aspect of prison services, programs, or activities. Rather, Title II requires that a "service, program, or activity, when viewed in its entirety, is readily accessible and usable by individuals with disabilities." 28 C.F.R. 35.150(a). Title II also requires that public entities make "reasonable modifications in policies, practices, or procedures" in order to avoid discrimination where doing so does not "fundamentally alter the nature of the services, program, or activity," 28 C.F.R. 35.130(b)(7), and to "take appropriate steps to ensure" effective communication with program participants unless doing so "would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens," 28 C.F.R. 35.160, 35.164. A determination of whether a particular program, service, or activity satisfies these requirements involves an evaluation of both the burden a requested accommodation will have on a state

prison and the availability of accommodations that differ from a plaintiff's requested accommodation but nonetheless address the plaintiff's needs.

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

Such individualized consideration has also been required in order to avoid a violation of the Eighth Amendment or Due Process Clause. See *Farmer*, 511 U.S. at 843 ("[I]t does not matter whether the risk [of harm] comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk."); *Wilson* v. *Seiter*, 501 U.S. 294, 300 n.1 (1991) ("[I]f an individual prisoner is deprived of needed medical treatment, that is a condition of *his* confinement, whether or not the deprivation is inflicted upon everyone else.").

Thus, the Constitution itself will require state prisons to accommodate the individual needs of prisoners with disabilities in some circumstances. See, *e.g.*, *Kiman* v. *New Hampshire Dep't of Corr.*, 301 F.3d 13, 15-16, 25-26 (prison's refusal to provide accommodations to inmate with nerve disease, "in the context of his illness and its consequent disabilities, can easily be called deliberate indifference to his welfare");[10] *Bradley* v. *Puckett*, 157 F.3d 1022, 1025-1026 (5th Cir. 1998) (inmate amputee stated Eighth Amendment claim where prison officials were aware of his need for accommodation in use of shower facilities and failed for months to provide such accommodation); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) (refusal to allow prisoner who had lost the use of his legs to use a wheelchair violated Eighth Amendment).

Moreover, given the history of unconstitutional treatment of inmates with disabilities, Congress was entitled to conclude that there exists a real risk that some state officials may continue to make decisions about how prisoners with disabilities should be treated based on invidious class-based stereotypes or animus

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[10] The panel opinion in this case was vacated when rehearing en banc was granted. 310 F.3d 785 (1st Cir. 2002). The en banc court subsequently affirmed the district court's opinion by an equally divided vote. 332 F.3d 29 (1st Cir. 2003). The Supreme Court later granted the petition for certiorari, reversed the court of appeals' judgment and remanded the case for further consideration in light of *Lane*. 124 S. Ct. 2387 (2004).

that would be difficult to detect or prove. In addition, the very nature of prison life – the constant and pervasive governmental regulation of and imposition on the exercise of every constitutional right retained by incarcerated individuals, and the perpetual intrusion of the state into every aspect of day-to-day life – makes the prison context an area of great constitutional concern, implicating a broad array of constitutional rights and interests on the part of inmates with disabilities. In such a situation, the risk of unconstitutional treatment is sufficient to warrant Title II's prophylactic response. See *Hibbs*, 538 U.S. at 732-733, 735-737 (2003) (remedy of requiring "across-the-board" provision of family leave congruent and proportional to problem of employers relying on gender-based stereotypes).

Title II's prophylactic remedy acts to detect and prevent difficult-to-uncover discrimination against inmates with disabilities that could otherwise evade judicial remedy. By proscribing governmental conduct, the discriminatory effects of which cannot be or have not been adequately justified, Title II prevents covert intentional discrimination against prisoners with disabilities and provides strong remedies for the lingering effects of past unconstitutional treatment against persons with disabilities in the prison context. See *Lane*, 124 S. Ct. at 1986 ("When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation proscribing practices that are

discriminatory in effect, if not intent, to carry out the basic objectives of the Equal Protection Clause."). Further, by prohibiting insubstantial reasons for denying accommodations to persons with disabilities, Title II prevents invidious discrimination and unconstitutional treatment in the day-to-day actions of state officials exercising discretionary powers over inmates with disabilities. See *Hibbs*, 538 U.S. at 736 (Congress justified in concluding that perceptions based on stereotype "lead to subtle discrimination that may be difficult to detect on a case-by-case basis").

Accordingly, in the context presented by this case, Title II "cannot be said to be so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Lane*, 124 S. Ct. at 1994 (citation and quotation marks omitted).

CONCLUSION

The Eleventh Amendment is no bar to the plaintiff's claims under Title II of the Americans with Disabilities Act.

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached brief is proportionally spaced, has a typeface of 14 points, and contains 5,927 words.

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Date: July 8, 2004

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2004, two copies of the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR were served by overnight delivery on the following counsel of record:

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