Nos. 04-1203 and 04-1236

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF GEORGIA, ET AL.,

Respondents.

TONY GOODMAN,

Petitioner,

v.

STATE OF GEORGIA, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

Question Presented in No. 04-1203

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied to the administration of prison systems.

Question Presented in No. 04-1236

Whether, and to what extent, Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, validly abrogates state sovereign immunity for suits by prisoners with disabilities challenging discrimination by state-operated prisons, a question on which the courts of appeals are in conflict.

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INTEREST OF THE AMICUS CURIAE[1]

With more than 400,000 members, the American Bar Association ("ABA") is the nation's leading organization of the legal profession. The ABA's primary mission is to "serve the public and the [legal] profession by promoting justice, professional excellence and respect for the law."[2] In furtherance of this mission, the ABA's goals include "promoting improvements in the American system of justice"[3] and "increas[ing] public understanding of and respect for the law, the legal process and the role of the legal profession."[4]

The ABA's interest in this matter is based upon its longstanding commitment to the protection of persons with disabilities from discrimination. Since 1976, the ABA has published the most comprehensive periodical available on disability law, now known as the Mental and Physical Disability Law Reporter.[5] In 1989, prior to the enactment of

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[1] This brief has not been authored in whole or in part by counsel for a party, and no person or entity, other than the American Bar Association, its members, and its counsel, has made a monetary contribution to the preparation or submission of this brief. Petitioners and respondents have consented to the filing of this brief.

Neither this brief, nor the decision to file it, should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[2] American Bar Association, *ABA Policy and Procedures Handbook* 1 (2005).

[3] ABA Goal I, *id*. at 2.

[4] ABA Goal IV, *id*.

[5] The Mental and Physical Disability Law Reporter publishes a number of articles each year outlining case law developments relating to the treatment of disabled prisoners and the conditions of their confine-

the Americans with Disabilities Act of 1990 (the "ADA"), the ABA House of Delegates resolved to support "federal legislation which prohibits discrimination on the basis of disabilities."[6] Recognizing that persons with disabilities were being systematically excluded from meaningful participation in society, the ABA recommended legislation that would "ensure equal opportunities for [the more than 43 million Americans] with disabilities in employment, public accommodations and services . . . and activities of State and local governments."[7]

In 2002, the ABA reaffirmed its dedication to protecting the rights of persons with disabilities by adopting a resolution urging courts to "ensure [persons with disabilities] equal access to justice" by providing them with reasonable accommodations in courthouses and court proceedings.[8] In the report supporting the resolution, the ABA observed that "active involvement by [the] court system[]" is necessary to ensure that the ADA is fully implemented and that individuals with disabilities meaningfully participate in the justice system.[9]

The ABA has also expressed concern for the humane and nondiscriminatory treatment of prisoners. In 1963, the ABA developed the *Standards for Criminal Justice* as a guide for policymakers and practitioners working in the

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ment. *See, e.g.*, John W. Parry, Highlights, 28 Mental & Physical Disability L. Rep. 819, 820 (2004) (discussing *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004), a companion case to this one in the Eleventh Circuit).

[6] ABA Section on Individual Rights & Responsibilities and the Young Lawyers Division, *Recommendation, Report No. 128* (Aug. 1989).

[7] *Id.*

[8] ABA Commission on Mental & Physical Disability Law, *Recommendation, Report No. 112* (Feb. 2002).

[9] *Id.*

criminal justice arena, and since then, ABA task forces consisting of prosecutors, defense attorneys, judges and academics have continued to update and refine the *Standards* to ensure that they provide for a "criminal justice system that is fair, balanced, and constitutionally responsive to the needs of today and the future."[10] The *Standards* have been cited widely, including by this Court, as an important guide to the administration of criminal justice.[11]

The *Standards* encourage correctional facilities to provide inmates with a decent, safe environment that meets basic constitutional norms and sound professional standards. They proscribe the "discriminatory treatment [of prisoners] based solely on race, sex, religion, or national origin," and recommend that prisons provide "appropriate facilities . . . for the physically handicapped" and "a range of mental health and mental retardation services for [mentally disabled] prisoners."[12] Moreover, the *Standards* recommend that prisoners be guaranteed access to rehabilitative programs, a "healthful place . . . to live," prompt and adequate medical treatment, access to legal materials, and the freedom to practice their

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[10] 1 ABA, *Standards for Criminal Justice*, preface at xx (2d ed. 1980). Many of the *Standards* are now in their Third Edition. A Task Force of the ABA Criminal Justice Section's Standards Committee is currently working on a revision to Chapter 23 of the *Standards*, dealing with the legal status of prisoners.

[11] *See, e.g.*, *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2806 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *McKaskle v. Wiggins*, 465 U.S. 168, 179 (1984); *Estelle v. Williams*, 425 U.S. 501, 504 (1976).

[12] 4 ABA, *Standards for Criminal Justice*, Standard 23-6.14 (2d ed. 1980); ABA, *Criminal Justice Mental Health Standards*, Standard 7-10.2 (1989).

religion in a manner consistent with "orderly confinement and . . . security."[13]

The ABA's commitment to the humane administration of prisons was further strengthened in 2003, when the ABA established the Justice Kennedy Commission to address the "inadequacies—and the injustices—in our prison and correctional systems."[14] In August 2004, the Commission issued its report, concluding that abusive conditions in prisons and the "absence of programming [to] prepare prisoners for release" are impediments to equitable and effective prison administration.[15] In adopting the Commission's recommendations as ABA policy, the ABA House of Delegates urged correctional authorities "to ensure that prisoners are effectively supervised in safe, secure environments; that correctional staff are properly trained and supervised; . . . that allegations of mistreatment are promptly investigated . . .; [and that prisoners receive] appropriate programming, . . . treatment . . . and services."[16]

As lawyers and judges, many ABA members are in daily contact with the criminal justice system. ABA members represent clients facing possible imprisonment or prisoners challenging the conditions of their confinement. Lawyers have an interest in ensuring that all of their clients are treated in a nondiscriminatory fashion in every aspect of our system of justice.

As the national representative of the legal profession, and a strong proponent of the nondiscriminatory and humane

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[13] 4 ABA, *Standards for Criminal Justice*, Standards 23-4.3, 23-6.9, 23-5.7, 23-2.3 and 23-6.5 (2d ed. 1980).

[14] ABA Justice Kennedy Commission, *Reports with Recommendations to the ABA House of Delegates* 78 (Aug. 2004).

[15] *Id.* at 81.

[16] *Id.* at 76.

administration of justice, the ABA respectfully submits the following perspective on the issues presented in this case.

SUMMARY OF THE ARGUMENT

This case concerns Congress' authority to remedy discrimination against persons with disabilities in state correctional facilities. The Americans with Disabilities Act of 1990 (the "ADA") is a landmark civil rights statute, which seeks to remove unreasonable barriers that exclude persons with disabilities from full participation in our society. Title II of the ADA, 42 U.S.C. §§ 12131-12165 (2000), addresses discrimination by state and local governments in the provision of public services, a particularly invidious type of discrimination because it often infringes on fundamental rights. One of the central applications of Title II is to correctional facilities.

The treatment of inmates in state prisons is an integral part of the administration of justice in this country. When a state denies equal protection of the laws to an inmate with a disability, the severity of his punishment is effectively increased by reason of his disability. Such discrimination undermines the fairness of the criminal justice system. When, as a result of deliberate indifference, a state refuses reasonable accommodations to an inmate with a disability and subjects him to degrading conditions, the state does more than violate individual rights; it diminishes the legitimacy of the justice system as a whole.

Discrimination against persons with disabilities is a serious problem in the nation's prisons. The treatment petitioner Tony Goodman suffered is far from unique. In some instances, states fail to make reasonable modifications to the physical design of prisons (such as providing wheelchair-accessible cells), resulting in inhumane conditions for inmates with disabilities. In other instances, states fail to make reasonable modifications to programs they offer to the prison population generally, resulting often in the outright

exclusion of inmates with disabilities. This pattern of state conduct was well documented in the congressional findings that led to the enactment of Title II of the ADA. Even though the ADA was signed into law fifteen years ago, discriminatory conduct unfortunately persists in prisons around the country.

Title II of the ADA is a congruent and proportional response to the documented problem of unconstitutional discrimination against persons with disabilities in state correctional facilities. Title II enforces certain constitutional rights implicated by such discrimination: principally, the right to be free from cruel and unusual punishment and the right to equal protection. Congress carefully circumscribed the Title II right to leave states considerable discretion in how they administer correctional facilities, so that the conduct prohibited by Title II is closely tethered to the core constitutional violations that Title II remedies.

In *Tennessee v. Lane*, 541 U.S. 509 (2004), this Court observed that, in examining congressional authority under Section 5 of the Fourteenth Amendment, "the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent." *Id.* at 523. In the class of cases before the Court, involving discrimination on the basis of disability in state correctional facilities, the harm to persons with disabilities is certainly grave. But the harm also includes the damage to the justice system that results from the unequal treatment of persons with disabilities. In cases involving prisoners' rights—as in the class of cases involving access to the courts, at issue in *Lane*—Title II of the ADA advances the profound interest in ensuring that our system of justice, from beginning to end, is free from invidious discrimination. Title II therefore lies within the scope of congressional authority under Section 5.

ARGUMENT

I. HUMANE AND NONDISCRIMINATORY TREATMENT OF PRISONERS WITH DISABILITIES IS ESSENTIAL TO ENSURING THE LEGITIMACY OF AND PUBLIC CONFIDENCE IN THE ADMINISTRATION OF JUSTICE.

The legitimacy of a system of justice "ultimately rests" upon the public's confidence that the laws are administered in a humane and nondiscriminatory fashion. *United States v. Johnson*, 323 U.S. 273, 276 (1944). Discrimination in the administration of justice "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979).

In *Tennessee v. Lane*, 541 U.S. 509 (2004), this Court recognized that one essential element of the fair administration of justice is access to the courts. Ensuring such access, however, is only one step toward achieving a fair criminal justice system. Ensuring that correctional facilities are administered in a nondiscriminatory manner is another.

The world of punishment is perhaps the least visible aspect of the justice system. Correctional facilities are nonetheless a fundamental component of the administration of justice, and in order to maintain the legitimacy of our justice system and the public's confidence in it, state correctional facilities should treat inmates with disabilities equitably; if they fail to do so, Congress should be able to provide the mistreated prisoner with an effective remedy.

In establishing the Justice Kennedy Commission in 2003 to study the current state of the nation's prisons, the ABA recognized the integral role played by correctional facilities in the justice system, and the responsibility that society bears for their fair administration. The Commission

observed that prison conditions and prisoner reentry "are a matter of public safety as well as sound public policy."[17] Accordingly, the Commission concluded that the bar as a profession, and society as a whole, must work to make prison conditions safe and humane, and to develop and implement programs to "prepare [prisoners] for their . . . reintegration into the community."[18]

Pursuant to the obligation to administer justice impartially, correctional facilities must treat inmates in a nondiscriminatory fashion. As this Court observed in *Johnson v. California*, 125 S. Ct. 1141, 1149 (2005), "compliance with the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system." Upon incarceration, prisoners do not "lose 'the right to have rights'"; they "remain[] member[s] of the human family," *Spaziano v. Florida*, 468 U.S. 447, 469 n.3 (1984) (Stevens, J., concurring in part and dissenting in part), and thus retain the right to be free from all forms of invidious discrimination.

State discrimination of any kind weakens the foundations of our system of justice. As Justice Brandeis remarked: "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). A state's failure to treat the individuals it imprisons in a nondiscriminatory manner undermines the public's confidence in the state's impartial and effective administration of justice.

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[17] ABA Justice Kennedy Commission, *Reports with Recommendations* 83.

[18] *Id.*

Discrimination based upon disability is particularly offensive in the prison environment, where "the government's power is at its apex." *Johnson*, 125 S. Ct. at 1150; *see also Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("the power to punish . . . [must] be exercised within the limits of civilized standards"). Although convicted criminals are rightly punished, "[p]ersons are sent to prison as punishment, not *for* punishment." *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977) (emphasis in original). The severity of the punishment the prisoner receives should not depend upon the mere fortuity of whether he has a disability. The prisoner suffers a total loss of freedom for a fixed period of time. The state should not be permitted effectively to enhance this punishment for certain classes of prisoners by deliberately neglecting the conditions of their confinement. The Constitution guarantees them more.

II. TITLE II OF THE ADA REQUIRES REASONABLE MEASURES TO SECURE THE RIGHTS OF PRISONERS WITH DISABILITIES.

A. Title II of the ADA Encompasses the Operations of State Correctional Facilities.

1. Congress Addressed a Long History of Unconstitutional Discrimination Against, and Exclusion of, Individuals With Disabilities in a Broad Range of Public Services, Including Correctional Facilities.

When enacting Title II of the ADA, Congress considered an extensive record of disability discrimination in the provision of public services. In fact, as this Court found in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 371 n.7 (2001), the "overwhelming majority" of the evidence before Congress relating to disability discrimination concerned "the provision of public services and public accommodations, which areas are addressed in Titles II and III." In *Tennessee v. Lane*, 541 U.S. 509, 524 (2004), this

Court found that Congress enacted the ADA in response to a history of states' constitutional violations and against "a backdrop of pervasive unequal treatment in the administration of state services and programs, including systemic deprivations of fundamental rights." The Court also concluded that lower-court decisions revealed a pattern of unequal treatment in a wide range of public services, including the penal system. *Id.* at 525 n.11.

The congressional findings underlying Title II document a pattern of discriminatory treatment of prisoners with disabilities. For example, Congress was presented with evidence that "jailers rational[ized] taking away [disabled inmates'] wheelchairs as a form of punishment." Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., in 2 *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 1190 (Comm. Print 1990). Likewise, the House and Senate Subcommittees received reports highlighting "[i]nadequate treatment and rehabilitation programs [afforded to inmates with disabilities] in penal and juvenile facilities," and "[i]nadequate ability to deal with physically handicapped accused persons and convicts (*e.g.*, accessible jail cells and toilet facilities)." U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* App. A at 168 (Sept. 1983). Further, a congressionally designated task force identified discrimination in the provision of public services, including the treatment of persons with disabilities in prisons and jails.[19]

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[19] *See Garrett*, 531 U.S. at 393, 405, 409, 414, 415 (appendix C to opinion of Breyer, J.) (in Alaska, "jail failed to provide person with disability medical treatment"; in Illinois, "deaf people arrested and held in jail overnight without explanation because of failure to provide interpretive services"; in Maryland, "public libraries, state prison, and other state offices lacked [telecommunications for the deaf]"; in New Mexico, "prisoners with developmental disabilities subjected to longer terms and abused by other prisoners in state correctional system"; in

2. This Court Has Held That Title II of the ADA Applies to the Operations of State Correctional Facilities.

By its terms, Title II of the ADA applies to discrimination against state prisoners. Title II covers "the services, programs, [and] activities of a public entity." 42 U.S.C. § 12132. This Court held in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 213 (1998), that state prisons are public entities, and concluded therefore that "Title II of the ADA unambiguously extends to state prison inmates."

Moreover, in enacting Title II, Congress found that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization." 42 U.S.C. § 12101(a)(3). Thus, when enacting the ADA, Congress clearly acted to remedy the discriminatory situation faced by prisoners with disabilities.

B. Title II of the ADA Requires States to Take Reasonable Measures to Remove Barriers to Accessibility in Correctional Facilities, and States' Failure to Do So Can Have the Effect of Outright Exclusion of Prisoners With Disabilities From Appropriate Services, Programs and Activities.

1. The Affirmative Responsibilities That Title II of the ADA Imposes on States Are Reasonable.

After documenting a compelling basis for action, Congress enacted the ADA's fairly limited obligations. Title II of the ADA prohibits the states from discriminating against qualified persons with disabilities in the administration of

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North Carolina, "police arrested and jailed deaf person without providing interpretive services").

services, programs or activities. 42 U.S.C. § 12132. The ADA's regulations require a state to make "reasonable modifications in [the state's] policies, practices, or procedures if necessary to avoid the exclusion of individuals with disabilities." 28 C.F.R. § 35.130(b)(7) (2005). However, the ADA's reach is limited in several ways.

First, the ADA applies only to "qualified individuals"—those eligible for the services, programs and activities offered by the state. A "qualified individual" under the ADA is an individual "who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). This limitation means that the ADA does not eliminate the ability of state prison administrators to exclude an individual from programs or activities based on factors other than disability.

Even if an individual is "qualified," the ADA's scope is further limited by the fact that the Act requires only "reasonable modifications." The Act does not require states to utilize any and all means to render services accessible; it requires only "reasonable modifications" to the rules, policies or practices of public entities, as well as the implementation of reasonable measures to remove architectural and other barriers to accessibility and the provision of auxiliary aids and services. *Id*. § 12131(2).

The Act's implementing regulations clarify the limited nature of states' affirmative responsibilities. For instance, modifications to accommodate persons with disabilities need not be made if the modifications would "fundamentally alter the nature of the service, program, or activity," 28 C.F.R. § 35.130(b)(7), or would impose "undue financial or administrative burdens," *id*. § 35.150(a)(3).

Title II's modest affirmative conduct requirement is needed to prevent discrimination on the basis of disability. Although anti-discrimination policies generally may dictate that similarly situated persons be treated the same way, treating everyone identically, without making reasonable accommodations, can *constitute* discrimination for persons with disabilities. For example, prison vocational training may be theoretically available to all inmates, but if it is held in a room that can be reached only by climbing up a flight of stairs, a person who uses a wheelchair cannot participate. Similarly, physical facilities such as showers, toilets and sinks that are adequate for most inmates can result in unhygienic and inhumane conditions for Mr. Goodman and similarly situated inmates. As the Civil Rights Commission has noted, "[s]uch an approach [of identical treatment] would give the form, but not the substance of equal opportunity." *Accommodating the Spectrum* 99.

Congress understood when enacting the ADA that addressing the needs of individuals with disabilities "would sometimes require not blindfolded equality, but responsiveness to difference; not indifference, but accommodation." *Lane*, 541 U.S. at 536 (Ginsburg, J., concurring).[20] Similarly, this Court in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 738 (2003), upheld the leave requirement of the Family and Medical Leave Act of 1993 because "simply mandat[ing] gender equality in the administration of leave benefits" would have been insufficient to overcome sex-role stereotypes about child-care responsibilities. Like the requirement of affirmative conduct by the states upheld in *Hibbs* to remedy discrimination against women, Title II of the ADA requires states to act affirma-

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[20] *See generally* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 Va. L. Rev. 825 (2003); Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642 (2001).

tively in order to prevent discrimination against persons with disabilities.[21]

2. States' Failure to Remove Barriers to Accessibility in Correctional Facilities Can Have the Effect of Outright Exclusion of Prisoners With Disabilities From Appropriate Services, Programs and Activities.

Inmates with disabilities encounter discrimination in many aspects of prison life. Reported cases document the failure of state prison administrators to remove "architectural . . . barriers." 42 U.S.C. § 12131(2). The ABA has urged, as part of nondiscriminatory treatment of prisoners, that "[a]ppropriate facilities . . . should be provided for the physically handicapped." *Standards for Criminal Justice*, Standard 23-614. Nonetheless, inmates with disabilities are often denied the most basic services, such as access to toilets, showers, recreational areas and meals. *See, e.g.*, *Kaufman v. Carter*, 952 F. Supp. 520 (W.D. Mich. 1996) (showers and commode were inaccessible for double amputee). Lack of sanitary facilities for prisoners with disabilities can lead to degrading conditions, such as in the case before the Court, where Mr. Goodman "was forced to sit in his own bodily waste." (Appendix of Petitioner Goodman 18a.)

Likewise, when state prison administrators fail to make the "reasonable modifications to rules, policies, or practices" required by the ADA, 42 U.S.C. § 12131(2), inmates with disabilities can be denied meaningful participation in prison

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[21] The same is true of other civil rights laws. For example, in *Lau v. Nichols*, 414 U.S. 563, 566 (1974), the Court ruled that a school system's failure to provide bilingual education to students whose primary language was not English constituted discrimination prohibited by Title VI of the Civil Rights Act of 1964 and declared that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."

programs. For example, one court found that prison officials had violated deaf and hearing-impaired inmates' rights under the ADA because they denied those inmates the benefits of participation in education, vocational and rehabilitative classes. Moreover, because the prison failed to provide an interpreter, the inmates could not participate meaningfully in disciplinary, grievance and parole hearings. *Clarkson v. Coughlin*, 898 F. Supp. 1019 (S.D.N.Y. 1995); *see also Kruger v. Jenne*, 164 F. Supp. 2d 1330 (S.D. Fla. 2000) (blind prisoner stated a claim of discrimination when prison's failure to accommodate him resulted in denial of access to law library).

These cases are directly analogous to the denial of court access this Court considered in *Lane* in that persons with disabilities are entirely excluded from state services, programs and activities. Congress' chosen remedy for this pattern of exclusion—Title II's requirement of program accessibility and the duty to accommodate—remains a "limited one." *Lane*, 541 U.S. at 531. However, Congress recognized "that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion," and thus "required the States to take reasonable measures to remove . . . barriers to accessibility." *Id.*

As Judge Posner observed in *Crawford v. Indiana Department of Corrections*, 115 F.3d 481, 486 (7th Cir. 1997): "Rights against discrimination are among the few rights that prisoners do not park at the prison gates." All prisoners should have meaningful access to prison programs, particularly those "designed to help [the inmate] become a productive member of society upon his release from prison." *Id.* As the ABA's Justice Kennedy Commission found, prison

rehabilitative programs help to reduce recidivism.[22] Permitting prisoners to be excluded on the basis of disability from such programs, which are an integral part of the justice system, contravenes the goals of the justice system.

C. States Can Comply With the Requirements of Title II of the ADA Consistent With the Need for Security in Correctional Facilities.

This Court has recognized that the challenges of prison administration require that some deference be given to prison officials, who are burdened with the tasks of protecting and controlling their prison populations while simultaneously managing large facilities on limited budgets. In *Turner v. Safley*, 482 U.S. 78, 89 (1987), the Court held that, when a prison regulation impinges on inmates' constitutional rights, "the regulation is valid if it is reasonably related to legitimate penological interests."

This Court's application of the *Turner* factors shows the standard of review to be deferential, but not toothless. In *Turner* itself, the Court upheld a ban on prisoner-to-prisoner correspondence, *id*. at 91, while striking down a ban on most inmate marriages, *id*. at 97. Although "legitimate security concerns may require placing reasonable restrictions upon an inmate's right to marry," *id*., this Court found that the scope of the ban in *Turner* was too expansive to be reasonable. *Turner* leaves room for meaningful judicial review of prison

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[22] The Commission emphasized the need to prepare prisoners for release back into the community, so as "to avoid recidivism, and to maximize the chances that former prisoners will work, pay taxes, rear families and become contributing members of their communities." ABA Justice Kennedy Commission, *Reports with Recommendations* 86. As a result of the Commission's report, the ABA last year adopted a resolution urging correctional authorities, "from the beginning of incarceration, [to] provide appropriate programming, including substance abuse treatment, educational and job training opportunities, and mental health counseling and services." *Id*. at 76.

practices as well as legislative involvement in prison affairs. *See, e.g.*, *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005) (upholding a federal statute requiring a "compelling governmental interest" before limits on prisoners' religious practices are permitted); *Johnson v. California*, 125 S. Ct. 1141 (2005) (applying strict scrutiny to a policy of segregating prisoners by race).

In keeping with the deferential constitutional standard set forth in *Turner*, the ADA provides prison officials with flexibility where there is some justification for their policies. "Terms like 'reasonable' . . . are relative to circumstances, and the circumstances of a prison are different from those of a school, an office, or a factory, as the Supreme Court has emphasized in the parallel setting of prisoners' constitutional rights." *Crawford*, 115 F.3d at 487. Although what qualifies as a "reasonable modification" depends upon the specifics of each situation, it is clear that the "reasonable modification" requirement does not require prison administrators to compromise on prison safety. For example, the ADA never requires the inclusion of an individual who poses a direct threat to the health or safety of others. *See Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921 (6th Cir. 2000). If a qualified prisoner can be safely included in a program or activity, prison officials can determine the best method of accommodation from the range of options available. *See* 28 C.F.R. § 35.150(b)(1) (allowing the use of "any other methods that result in [accessibility]").

Consistent with *Turner*, the ADA calls on prison officials to determine whether there is a legitimate reason for the exclusion of a disabled individual, consider the range of possible accommodations, and then evaluate the impact that the accommodations may have on prison management, all before requiring any action. In this way, the ADA ensures that the rights of persons with disabilities are served without interfering with effective prison administration.

III. THE REASONABLE MEASURES REQUIRED BY TITLE II OF THE ADA ARE ESSENTIAL TO PROTECTING FUNDAMENTAL RIGHTS OF PRISONERS WITH DISABILITIES.

The conduct covered by Title II of the ADA includes acts—or failures to act—that violate the prohibition on cruel and unusual punishments in the Eighth Amendment (as incorporated into the Fourteenth Amendment) and other fundamental constitutional rights, as well as the Equal Protection Clause of the Fourteenth Amendment. The "reasonable modifications" required by Title II represent a prophylactic measure designed to prevent constitutional violations, and, as a result, Title II represents a legitimate exercise of congressional authority.

A. States' Failure to Make Reasonable Modifications for Prisoners With Disabilities Results in Eighth Amendment Violations.

Title II of the ADA is Congress' chosen remedy to address the pattern of exclusion and discrimination that leads to "cruel and unusual punishment" of disabled inmates in violation of the Eighth Amendment. The Eighth Amendment prohibits "punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (internal citation omitted). By mandating reasonable modifications to prison rules, policies and procedures, Title II ensures that the medical care and other conditions of confinement for inmates with disabilities do not fall below the constitutional standard.

The Eighth Amendment imposes an affirmative obligation on state officials to provide for the basic needs of inmates. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). This affirmative obligation extends to inmates with disabilities. *See LaFaut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (Powell, J.) (state officials may "not ignore the basic needs of

a handicapped individual or postpone addressing those needs out of mere convenience or apathy"). In order to meet the basic physical and medical needs of inmates with disabilities, prison officials may need to make reasonable modifications to prison services, programs and activities. These modifications can range from the provision of physical aids that assist in movement, *see Weeks v. Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993), to ongoing therapeutic care, *see Langley v. Coughlin*, 888 F.2d 252, 254 (2d Cir. 1989), to selecting and training employees to recognize the needs of mentally ill prisoners, *see Young v. City of Augusta*, 59 F.3d 1160, 1171 (11th Cir. 1995).

The Eighth Amendment also prohibits prison officials from being "deliberately indifferent" to an inmate's conditions of confinement. *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). For inmates with disabilities, the deliberate failure of a prison official to make reasonable modifications can result in unhygienic and degrading conditions of confinement. *See, e.g.*, *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1243 (6th Cir. 1989) (finding Eighth Amendment violation where paraplegic inmate was "not bathed for several days" and "was forced to remain for long periods of time in his own urine due to inadequate catheter supplies and was given inadequate aid for his bowel training needs despite his repeated requests for help"), *cert. denied*, 495 U.S. 932 (1990). As Mr. Goodman's experience demonstrates, violations of the Eighth Amendment rights of prisoners with disabilities continue to this day.

Certain conditions of confinement "may establish an Eighth Amendment violation 'in combination' when each would not do so alone, [so long as] they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need." *Wilson*, 501 U.S. at 304. For example, in *Kiman v. New Hampshire Department of*

Corrections, 301 F.3d 13 (1st Cir. 2002), *vacated for reh'g en banc*, 332 F.3d 29 (1st Cir. 2003),[23] prison officials knew that an inmate had Lou Gehrig's disease but failed to make reasonable accommodations, such as "[p]ermitting him the means for his daily walks, cuffing his hands in front rather than in back, providing him with a chair for his shower, exempting him from food lines, and giving him a cell that did not require him to climb stairs." *Id*. at 24-25. Failure to do any one of these things may not alone have been a constitutional violation, but the court held that collectively they demonstrated "deliberate indifference" to the inmate's conditions of confinement and violated the Eighth Amendment. These types of accommodations—"matters of apparently small import to the prison yet of enormous significance" to the inmate, *id.* at 24-25—are required by Title II of the ADA.

The affirmative obligations required by Title II are congruent and proportional with those imposed by the Eighth Amendment. As the *Kiman* court observed, "many constitutional violations . . . overlap with Title II as it is applied to prisons." 301 F.3d at 23. Title II requires only that modifications for disabled inmates be "reasonable." Thus, like the Eighth Amendment, the ADA permits deference to legitimate state penological interests. *See Turner*, 482 U.S. at 89-90. Moreover, a number of courts of appeals have held that suits for money damages against the states under Title II require a showing that prison officials acted with "deliberate indifference" (similar to the standard for Eighth Amendment

[23] This Court granted the petition for writ of *certiorari*, vacated the judgment and remanded for reconsideration in light of *Lane*. 541 U.S. 1059 (2004).

violations). *See Duvall v. County of Kitsap*, 260 F.3d 1124, 1138-39 (9th Cir. 2001).[24]

The Eighth Amendment "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency." *Estelle*, 429 U.S. at 102 (internal citation omitted). When this Court first concluded that medical care for inmates was required under the Eighth Amendment, the Court looked to legislation that had been enacted by states at that time as validation that such a requirement was consistent with "contemporary standards of decency." *Id*. at 104 & n.8. So too, "the ADA reflects . . . contemporary standards of decency concerning treatment of individuals with disabilities." *Schmidt v. Odell*, 64 F. Supp. 2d 1014, 1031 (D. Kan. 1999). Title II of the ADA represents the current, national consensus on "contemporary standards of decency," *cf. Atkins v. Virginia*, 536 U.S. 304, 313-17 (2002) (examining the "national consensus" on capital punishment of mentally retarded persons), and failure to make the accommodations required by Title II will often result in Eighth Amendment violations.

B. States' Failure to Make Reasonable Modifications Deprives Prisoners With Disabilities of Other Fundamental Rights.

Title II of the ADA protects a number of other constitutional rights of prison inmates in addition to the prohibition against cruel and unusual punishment. These other constitutional rights buttress Congress' ability to enact Title II under Section 5 of the Fourteenth Amendment.

Prison inmates have constitutional rights to the free exercise of religion, *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972),

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[24] Similarly, recipients of federal funding are liable under Title IX of the Civil Rights Act of 1964 for "deliberate indifference" to sexual harassment. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

and to an adequate law library or other legal assistance, *Bounds v. Smith*, 430 U.S. 817 (1977). These rights are both vital to prisoners and consistent with sound prison administration: the ABA's *Standards for Criminal Justice* urge that prisoners be provided with the freedom to practice their religion, Standard 23-6.5, and have access to suitable legal materials, Standard 23-2.3. If Mr. Goodman and other inmates with disabilities are not reasonably accommodated such that they have meaningful access to these programs, there is a real risk that their constitutional rights will be infringed upon. By enacting Title II of the ADA, Congress ensured that these rights (among others) would be protected for inmates with disabilities.

Moreover, inmates with disabilities have liberty interests under the Due Process Clause, which Title II of the ADA protects. For example, the Ninth Circuit held that placing a paralyzed inmate who used a wheelchair into administrative housing, where he could not use the wheelchair, deprived him of a liberty interest without due process. *Serrano v. Francis*, 345 F.3d 1071, 1079 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 43 (2004). While "administrative segregation in and of itself does not implicate a protected liberty interest," a disabled inmate's "disability—coupled with administrative segregation in [a housing unit] that was not designed for disabled persons—gives rise to a protected liberty interest." *Id.* at 1078-79; *see also Bonner v. Arizona Dep't of Corr.*, 714 F. Supp. 420 (D. Ariz. 1989) (due process violation when sign language interpreter denied for inmate disciplinary hearing). Title II of the ADA serves to protect against due process violations of this kind.

Given the broad scope of constitutional rights implicated by failing to accommodate for an inmate's disabilities, Title II of the ADA represents "a reasonable prophylactic measure, reasonably targeted to a legitimate end." *Lane*, 541 U.S. at 533.

C. States' Irrational Exclusion of Prisoners With Disabilities From Prison Services, Programs and Activities Results in Equal Protection Violations.

Title II of the ADA is further supported by Congress' authority under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause. This Court's precedents make clear that the Equal Protection Clause prohibits discrimination based on irrational prejudice against members of a distinct minority group, even though the affected class may not be the result of a "suspect" or "quasi-suspect" classification, and even though the interests involved may not themselves be considered "fundamental." Classification on the basis of disability is subject to rational basis review. *See Garrett*, 531 U.S. at 366-68. But the nature of discrimination against persons with disabilities in state correctional facilities means that much of the conduct proscribed by Title II of the ADA is irrational, and therefore violates the Equal Protection Clause.

For example, in *Plyler v. Doe*, 457 U.S. 202 (1982), this Court held that a state statute denying public education to the children of illegal aliens violated equal protection. The Court made clear that illegal aliens are not a "suspect class," and a free public education is not a "fundamental right" under the Constitution. *Id.* at 223. Nonetheless, the Court struck down the statute because it failed to satisfy rational basis review. The Court observed that the statute "is directed against children, and imposes [a] discriminatory burden on the basis of a legal characteristic over which children can have little control." *Id.* at 220. The interest affected, although not constitutionally protected, is an important one: "education has a fundamental role in maintaining the fabric of our society." *Id.* at 221. As a result of the combination of the discrete nature of the affected class and the importance of the underlying interest, the Court concluded that "[i]t is . . . difficult to conceive of a rational justification for penalizing these children." *Id.* at 220.

This Court applied a similar approach in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), and *Romer v. Evans*, 517 U.S. 620 (1996). In each case, no "suspect" or "quasi-suspect" classification was involved, yet the Court found equal protection violations under rational basis review. In these cases, the importance of the individual interest involved informed the rationality review, and the Court concluded that the differential treatment was motivated by prejudice against the minority group. *See Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

Deliberate indifference to the plight of disabled prison inmates when reasonable modifications are available demonstrates irrational prejudice and violates the Equal Protection Clause. To be sure, prejudice against persons with disabilities is often the result of indifference, rather than animus. *Alexander v. Choate*, 469 U.S. 287, 295 (1985); *see also Garrett*, 531 U.S. at 375 (Kennedy, J., concurring) ("There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will."). But deliberate indifference to an individual's disability can amount to invidious discrimination. The failure to anticipate the presence of persons with disabilities in designing prisons and prison policies is not a neutral, rational act; it is based upon prejudice and stereotypes.

Unlike Title I of the ADA, which this Court held in *Garrett* is not congruent with the Equal Protection Clause, 531 U.S. at 365-68, Title II, as applied to state correctional facilities, involves significant liberty interests of individuals in state custody. The constitutional guarantee of equal protection applies more rigorously when individuals are

subjected, on the basis of disability, to harsher prison conditions and thereby experience what amounts to a more severe punishment. Moreover, the vital interest in the nondiscriminatory administration of justice in state correctional facilities leads, as in *Lane*, to more searching equal protection review.[25] In the area of state correctional facilities, Title II of the ADA therefore provides a congruent remedy to enforce the Equal Protection Clause.

[25] For similar reasons, two courts of appeals have held that Title II of the ADA is a valid exercise of Congress' Section 5 authority as applied to public education. As with nondiscrimination in prisons, full participation by persons with disabilities in education "is vital to the future success of our society," and "the gravity of the harm" from discrimination in such a core governmental function "is vast and far reaching." *Association for Disabled Americans, Inc. v. Florida Int'l Univ.*, 405 F.3d 954, 957-58 (11th Cir. 2005); *see also Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 490 (4th Cir. 2005) ("[I]t is more likely that disability discrimination in the context of a State's operation of public education programs will be unconstitutional than discrimination in the context of public employment.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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