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.

TONY GOODMAN, PETITIONER

v.

STATE OF GEORGIA, ET AL.

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

BRIEF FOR THE UNITED STATES AS PETITIONER IN NO. 04-1203

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QUESTION PRESENTED

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.

PARTIES TO THE PROCEEDINGS

The petitioner in No. 04-1203, and the respondent supporting petitioner in No. 04-1236, is the United States of America. The United States intervened in the court of appeals, pursuant to 28 U.S.C. 2403, to defend the constitutionality of the abrogation of Eleventh Amendment immunity in Title II of the Americans with Disabilities Act of 1990.

The petitioner in No. 04-1236, and the respondent supporting petitioner in No. 04-1203, is Tony Goodman, who was the private plaintiff below.

The respondents in both cases are the same: the State of Georgia; the Georgia Department of Corrections; Johnny Sikes, the Georgia State Prison Warden; J. Wayne Garner, the Commissioner of the Georgia Department of Corrections; A.G. Thomas, the Director of Facilities Division of the Georgia Department of Corrections; J. Brady, the Deputy Warden of the Georgia State Prison; O. T. Ray, the supervisor of guard shifts at the Georgia State Prison; H. Whimbly, a guard at the Georgia State Prison; Margaret Patterson, a guard at the Georgia State Prison; and R. King, a staff member at the Georgia State Prison, all of whom were defendants below.

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OPINIONS BELOW

The opinion of the court of appeals (04-1203 Pet. App. 1a-22a) is unreported.[1] The order and judgment of the district court (Pet. App. 23a-28a) are unreported.

JURISDICTION

The court of appeals entered its judgment on September 16, 2004. A petition for rehearing was denied on December 9, 2004 (Pet. App. 29a-30a). The petitions for a writ of certiorari in No. 04-1203 and No. 04-1236 were filed on March 9, 2005, and were granted and consolidated on May 16, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] All "Pet. App." citations are to the petition appendix filed by the United States in No. 04-1203.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced at Pet. App. 31a-84a. The relevant regulatory provisions are reproduced at Addendum D.

STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, Congress found that persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifictions to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment," to enact the ADA. 42 U.S.C. 12101(b)(4).

The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by state and local governmental entities in the operation of public services, programs, and activities; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This case arises under Title II of the ADA, which 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) and (B). Title II's coverage of "services, programs, or activities," 42 U.S.C. 12132, includes the administration of prisons. *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 210-212 (1998). Title II may be enforced through private suits against public entities, and 42 U.S.C. 12133, and Congress expressly abrogated the States' Eleventh

Amendment immunity to such suits in federal court, 42 U.S.C. 12202.

Title II prohibits governments from, among other things, denying a 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), and (vii).[2] In addition, while there is no absolute duty to accommodate individuals with a disability, a public entity must make reasonable modifications to its policies, practices, or procedures if necessary to avoid the exclusion of individuals with disabilities, unless the accommodation would impose an undue financial or administrative burden on the government, or would fundamentally alter the nature of the service. See 28 C.F.R. 35.130(b)(7), 35.150(a)(2) and (3). The ADA does not normally require a public entity to make its existing physical facilities accessible. 28 C.F.R. 35.150(a)(1). 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." 28 C.F.R. 35.150(a). However, buildings constructed or altered after Title II's effective date must be designed to provide accessibility. 28 C.F.R. 35.151.

2. Tony Goodman is a paraplegic and is confined to a wheelchair due to multiple spinal fractures sustained in an automobile accident. Pet. App. 2a. Goodman, a Georgia state prison inmate, is housed in a "high/maximum security section" of the prison, at least in part because of "the special requirements associated with his being wheelchair

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[2] Congress instructed the Attorney General to issue regulations to implement Title II, based on regulations previously promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. I 2001). See 42 U.S.C. 12134.

bound." *Id.* at 4a. The "lock-up order" that sent Goodman to maximum security identified "inmate is in wheel chair" as the only reason for that detention decision. J.A. 90. He is kept in a cell measuring 12 feet by 3 feet for 23 to 24 hours per day. Pet. App. 4a. The cell's small size prevents Goodman from turning his wheelchair around, thereby rendering him functionally immobile for 23 to 24 hours every day. *Id.* at 5a, 17a. "[T]he size of his cell appear[s] to be unrelated to disciplinary issues." *Id.* at 4a. Goodman further alleges that the prison "lacks facilities for the disabled for hygiene, drinking and performing body excretion functions." *Ibid.* Goodman is unable to access his bed, his toilet, or the shower without assistance, and that assistance is often denied to him. *Id.* at 5a. As a result, Goodman has been "forced to live in a cell where the floor was smeared with defecation and urine" and "'required to live and sit in his own body waste,' while being refused repeated requests for cleaning supplies and assistance." *Id.* at 6a; see *id.* at 5a (Goodman "has been forced to sit in his own bodily waste for long periods of time because none of the guards was willing to assist him").

In addition, Goodman's only means of transferring himself between his wheelchair and his bed or toilet is by "hurl[ing]" himself, which often results in falls and injuries, such as broken toes, "crushed" knees, and a fall-induced seizure. Pet. App. 6a; J.A. 47, 108. On one occasion, a guard moved an unsecured toilet seat into a shower for Goodman to use. When he attempted to transfer to it, "the toilet seat turned over and he fell to the floor and was hurt at [the] head, neck, [and] left arm." Pet. App. 7a. Goodman further asserts that respondents have denied him catheters and "have failed 'to provide any assistance in preventing dangerous bedsores.'" Pet. App. 8a. When prison officials transported Goodman in a vehicle that was not wheelchair-accessible, he "fell to the

floor and lost consciousness several times," and "suffer[ed] injures [*sic*] and pains at head, neck, back, stomach and legs." *Id.* at 7a. Goodman further asserts that he was purposefully denied adequate medical care after many of those incidents. *Id.* at 7a-8a.

Goodman has also been deprived for "long periods" of time of such basic humanitarian needs as "showers, baths, adequate ventilation or heating, recreation, work, medical and [mental health] care, laundry service, cleaning service, and phone service." Pet. App. 5a. The lack of wheelchair accessibility also has prevented him from exercising the same religious rights as other prisoners, has precluded his use of the prison's law library, and has deprived him of the counseling services, educational services, vocational training, and freedom of-movement throughout the institution afforded other inmates. *Id.* at 5a-6a, 24a; see J.A. 65 ("Because of my disabilities I'm being denied of all 'privileges and rights' which other similar security inmates have access to, such as counseling services, educational servicess [*sic*], college program, vocational training, recreational activities, freedom of-movement [*sic*] in unit and the institution, television, phone calls, entertainment—and religious rights."); J.A. 105.

After repeated unsuccessful attempts to obtain relief through the prison's administrative grievance process, Pet. App. 2a, Goodman filed suit pro se against respondents, the Georgia Department of Corrections and numerous prison officials, seeking injunctive and monetary relief under the Constitution and Title II. *Id.* at 2a-3a. The district court granted summary judgment for respondents Georgia and the Department of Corrections on Goodman's ADA claims on Eleventh Amendment grounds, *id.* at 25a-26a, and granted summary judgment in favor of the individual respondents on Goodman's

claims for injunctive relief on mootness grounds, due to Goodman's transfer to another prison, *id.* at 27a.[3]

3. Goodman appealed, and the United States intervened to defend the constitutionality of Title II's abrogation of Eleventh Amendment immunity. J.A. 5. While the appeal was pending, this Court decided *Tennessee* v. *Lane*, 541 U.S. 509 (2004), which upheld, as legislation validly enacted under Section 5 of the Fourteenth Amendment, Title II's abrogation of the States' Eleventh Amendment immunity as applied to the class of cases implicating the accessibility of judicial services. *Id.* at 531.

The court of appeals subsequently affirmed the district court's grant of summary judgment for Georgia and its Department of Corrections on Eleventh Amendment grounds. Pet. App. 1a-22a. The court applied its recent decision in *Miller* v. *King*, 384 F.3d 1248 (11th Cir. 2004), in which it had held that Title II is not valid Section 5 legislation as applied to the administration of prisons. In *Miller*, the court read the relevant context for analyzing Congress's exercise of its Section 5 power under *Tennessee* v. *Lane* to be the particular constitutional right allegedly violated in the individual plaintiff's case, which, in Miller's case, was the Eighth Amendment. 384 F.3d at 1272. The court expressly refused to consider "the host of [additional] rights identified by the United States" as enforced by Title II in the prison context because it did not consider them to be "implicate[d]" by Miller's individual claims. *Id.* at 1272 n.28.

Having restricted the relevant constitutional context to the Eighth Amendment, the *Miller* court then concluded that Title II sweeps too broadly in the prison context because it proscribes "a different swath of conduct that is far broader and even totally unrelated to the Eighth Amend-

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[3] Counsel for Goodman advises that he has since been returned to the Georgia State Prison at Reidsville.

ment in many instances," such as equal access to other prison programs that might implicate different constitutional rights. 384 F.3d at 1274. The court reasoned that, "[e]ven if a documented history of disability discrimination specifically in the prison context justifies application of some congressional prophylactic legislation to state prisons," "this case [is] radically different from *Lane*" because of "the limited nature of the constitutional right at issue." *Id.* at 1273.

In the case at hand, the Eleventh Circuit extended *Miller*'s holding that Title II is not valid Section 5 legislation to Goodman's case, Pet. App. 19a, notwithstanding that Goodman presented claims implicating not just the Eighth Amendment, but also the Due Process Clause and the First Amendment, *id.* at 4a-6a, 24a. With respect to Goodman's Section 1983 action, however, the court of appeals reversed and remanded because Goodman's "filings evidence sufficient allegations to proceed with a limited number of Eighth-Amendment claims." *Id.* at 16a.

SUMMARY OF ARGUMENT

Application of Title II of the Americans with Disabilities Act to the administration of prisons falls squarely within Congress's comprehensive legislative power under Section 5 of the Fourteenth Amendment to prohibit, remedy, and prevent violations of the rights secured by that Amendment. This Court has already held that the Nation's tragic history and enduring problem of unconstitutional treatment of persons with disabilities in the administration of public services provides an appropriate basis for Congress's exercise of its Section 5 power to enact prophylactic legislation. That finding applies with particular force to prison administration, given the invidious historic uses of the penal system and the closely related practice of institutionalization to deprive the disabled of their most fundamental rights to life and

liberty. As a result of that history and the inherent difficulty of stanching its effects, Congress confronted an enduring and widespread problem of unconstitutional mistreatment of prisoners with disabilities. Congress had before it substantial evidence that disabled inmates continue to be denied basic medical care and humane conditions of confinement, with the States' indifference sometimes resulting in death. Congress also was aware that the design of prison facilities and programs often consigned inmates with disabilities to atypical and significant hardships in the terms and conditions of confinement, deprived them of the most basic privileges afforded similarly situated inmates, and left them without access to the programs that allow offenders to shorten their prison terms. That official mistreatment results not just in the denial of the equal protection of the laws and equal access to governmental benefits, but also in the deprivation of fundamental rights, such as the rights of access to the courts, to substantive and procedural due process, to petition government officials, to equal opportunity for religious exercise, and to humane conditions of confinement. Indeed, in the prison context, Title II applies in an environment in which the States' pervasive control over the prisoner and exclusion of other avenues of assistance impose unique and extensive constitutional duties on the States.

In Title II, Congress formulated a statute that, much like federal laws combating racial and gender discrimination, is carefully designed to root out present instances of unconstitutional discrimination, to undo the effects of past discrimination, and to prevent future unconstitutional treatment by prohibiting discrimination and promoting integration where reasonable. At the same time, Title II preserves the latitude and flexibility that States legitimately require in the administration of their prison programs and services. Title II accomplishes those

objectives by requiring States to afford inmates with disabilities genuinely equal access to services and programs, while at the same time confining the statute's protections to *qualified* individuals who, by definition, meet all of the States' legitimate and essential eligibility requirements. In addition, Title II requires only "reasonable" modifications and accommodations that do not impose undue burdens or fundamentally alter the nature or character of the governmental program. The statute is thus carefully tailored to prohibit state conduct that presents a substantial risk of violating the Constitution or that unreasonably perpetuates the exclusionary effects of prior unconstitutional treatment and isolation in the prison context.

ARGUMENT

TITLE II OF THE AMERICANS WITH DISABILITIES ACT IS VALID SECTION 5 LEGISLATION AS APPLIED TO PRISON ADMINISTRATION

Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power, see *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 80 (2000), that gives Congress the "authority both to remedy and to deter violation of [Fourteenth Amendment] rights * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 727 (2003) (quoting *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001)). Section 5 "is a 'broad power indeed,'" *Tennessee* v. *Lane*, 541 U.S. 509, 518 (2004), empowering Congress not only to remedy past violations of constitutional rights, but also to enact "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," *Hibbs*, 538 U.S. at 727-728. Congress also may prohibit

"practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Lane*, 541 U.S. at 520. State prison operations are no exception to this power. See *Hutto* v. *Finney*, 437 U.S. 678, 693-699 (1978).

Section 5 legislation, however, must demonstrate a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). In evaluating whether Title II is an appropriate response to past unconstitutional treatment of individuals with disabilities, the Court in *Lane* declined to address Title II as a whole, upholding it instead as "valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services," 541 U.S. at 531. Title II of the ADA likewise is appropriate Section 5 legislation as applied to prison administration because it is reasonably designed to remedy past and prevent future unconstitutional treatment of disabled inmates and deprivation of their constitutional rights in the operation of state penal systems.

A. Prison Administration Is The Relevant Context

In undertaking the as-applied analyses of Congress's exercise of its Section 5 power, the court of appeals looked only to Title II's relation to the Eighth Amendment, the constitutional amendment invoked by the plaintiff in that court's first case involving prison administration. *Miller* v. *King*, 384 F.3d 1248, 1272 (2004); see Pet. App. 19a. That asks the wrong question. The congruence and proportionality analysis assesses whether Section 5 legislation is an "appropriate response" to a "history and pattern of unequal treatment," *Lane*, 541 U.S. at 530, not whether the law is appropriately tailored to the legal claims of an individual plaintiff in a particular case more than a decade later. This Court has held that the history

and "pattern of unequal treatment," *id.* at 525, that underlay Congress's enactment of Title II evidenced violations not only of the constitutional "prohibition on irrational disability discrimination," but also of "a variety of other basic constitutional guarantees," *id.* at 522. Accordingly, the analysis of whether Title II is a congruent and proportional response to those problems must take into account that same history.

In *Lane*, the Supreme Court did not define the relevant context for its as-applied analysis as the specific constitutional provisions invoked by the plaintiffs or even the particular factual claims of physical access to courtroom proceedings presented by the case. Instead, this Court framed the relevant inquiry in terms of the entire "class of cases implicating the accessibility of judicial services" and considered the full range of constitutional concerns implicated by that class of governmental activity. 541 U.S. at 531. Indeed, plaintiff Lane had alleged only that he had been jailed for failure to appear in an inaccessible courthouse. The other *Lane* plaintiff, Beverly Jones, alleged only that her ability to work as a court reporter was limited because she could not enter a number of courthouses. *Id.* at 513-514. Lane's particular claims thus implicated the Due Process and Confrontation Clauses, and Jones's claims implicated only the Equal Protection Clause.

In analyzing Congress's power to enact Title II, however, this Court discussed the full range of constitutional rights implicated by the "administration" and "accessibility of judicial services," *Lane*, 541 U.S. at 531:

> The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant such as respondent Lane the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceed-

> ings." The Due Process Clause also requires the States to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings. We have held that the Sixth Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of "identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." And, finally, we have recognized that members of the public have a right of access to criminal proceedings secured by the First Amendment.

Id. at 523 (citations omitted).[4] Likewise, in *Hibbs*, *supra*, this Court broadly upheld the family-leave provisions of the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 *et seq.*, as a proper exercise of Congress's Section 5 power to combat historic gender discrimination in employment. And the Court did so in a case that involved a male employee's application for family leave to care for an ailing spouse, where the complaint contained no constitutional claim of gender discrimination at all. See 538 U.S. at 725; 01-1368 J.A. 6-18.[5]

Focusing the as-applied analysis of Congress's exercise of its Section 5 power on substantive categories of govern-

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[4] See *Lane*, 541 U.S. at 525 n.14 (considering cases involving the denial of interpretive services to deaf defendants and the exclusion of blind and hearing-impaired persons from jury duty); *id.* at 532-533 (noting, *inter alia*, the duty to waive filing fees in certain family-law cases).

[5] Notably, the complaint in *Lane* did not assert *any* constitutional claims. See 02-1667 Pet. App. 12-28. Nor, at least outside prisons, is there a fundamental constitutional "right of access to the courts" per se. Instead, that phrase is commonly used as a shorthand reference to the bundle of constitutional rights held by the public, criminal defendants, civil litigants, detainees, and jurors that are implicated by the governmental activity of judicial administration.

mental activity and the cluster of rights they may implicate makes sense. Congress is a national legislature and, especially when exercising its prophylactic and remedial Section 5 power, Congress necessarily responds to and addresses not the isolated claims of future litigants, but broad "pattern[s]" of unconstitutional conduct by government officials in the substantive areas in which they operate. *Lane*, 541 U.S. at 526. Indeed, in enacting Title II, Congress specifically found that unconstitutional treatment of individuals with disabilities "persists in such critical *areas* as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3) (emphasis added).

Beyond that, a central rationale for Congress's exercise of its prophylactic Section 5 legislation—one long endorsed by this Court—is that "[c]ase-by-case adjudication ha[s] proved too ponderous a method to remedy [past] discrimination." *City of Rome* v. *United States*, 446 U.S. 156, 174 (1980); see *Hibbs*, 538 U.S. at 736; *South Carolina* v. *Katzenbach*, 383 U.S. 301, 314-315 (1966). Making the constitutional claims in the plaintiff's complaint the measuring rod for legislation designed to address the ineffectiveness of such litigation gets the analysis exactly backwards.

For similar reasons, in light of Congress's conceded power to legislate prophylactically under Section 5, see *Lane*, 541 U.S. at 529, it would make little sense to focus on an individual plaintiff's claim in assessing whether the statute's prophylactic scope is valid. An individual's claim could fall exclusively within the prophylactic coverage of the statute and implicate no constitutional rights at all, and yet that would not render the statute unconstitutional. By the same token, the constitutional rights that are in fact implicated in any particular case may be

happenstance and should not govern the broad question of whether Title II's application to a context is valid.[6]

Tellingly, in enacting other civil rights legislation pursuant to its power under the Civil War Amendments, Congress has not proceeded on a claim-by-claim basis the way a court might, but instead has often targeted substantive categories of governmental conduct that implicate a constellation of constitutional rights and interests. See, *e.g.*, 42 U.S.C. 2000e *et seq.* (employment); 42 U.S.C. 1981 (contracts); 42 U.S.C. 2000c *et seq.* (education); 20 U.S.C. 1681(a) (same); 42 U.S.C. 1971 *et seq.* (voting); 42 U.S.C. 2000a *et seq.* (public accommodations); 42 U.S.C. 3601 *et seq.* (housing). Prisons, as a species of institutional detention, have also been an object of civil rights legislation. See, *e.g.*, 42 U.S.C. 1997 *et seq.* Indeed, under the Constitution itself, the operation of prison systems is a governmental activity that is subject to distinct constitutional restraints, and this Court's cases recognize that prison policies may implicate a variety of constitutional rights and interests.[7]

Finally, the artificiality and unworkability of the court of appeals' contrary approach is illustrated by that court's application of its *Miller* precedent to Goodman's claims, even though Goodman's claims implicate not just rights protected by the Eighth Amendment, but also the constitutional protections of the Due Process and Equal Protection Clauses and the First Amendment. See Pet. App.

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[6] See *Maher* v. *Gagne*, 448 U.S. 122, 132 (1980) ("Congress was acting within its enforcement power [under Section 5] in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim" pendent to a substantial but unadjudicated constitutional claim.).

[7] See generally *Johnson* v. *California*, 125 S. Ct. 1141 (2005); *Lewis* v. *Casey*, 518 U.S. 343 (1996); *DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 198-200 (1989); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Cruz* v. *Beto*, 405 U.S. 319, 321 (1972) (per curiam).

4a-6a, 24a; J.A. 65, 87-88, 103. After first holding in *Miller* that Title II is not appropriate Section 5 legislation *precisely because it remedies and deters violations of a broader categories of rights and interests* beyond the Eighth Amendment, 384 F.3d at 1273-1274, the court below applied that decision in a case that in fact implicated that broader category of rights and interests.

Accordingly, in evaluating whether Title II is an appropriate response to "pervasive unequal treatment in the administration of state services and programs," *Lane*, 541 U.S. at 524, this Court's decision in *Lane* directs courts to consider the entire "class of cases" and "variety of * * * constitutional guarantees" implicated by the category of governmental operations being regulated. *Id.* at 522, 531. Thus the question in this case is whether Title II is appropriate Section 5 legislation as applied to the entire "class of cases implicating" the "administration of * * * the penal system." *Id.* at 525, 531. It is.

B. Title II Responds To A Long History And A Continuing Problem Of Unconstitutional Treatment Of Individuals With Disabilities, Including In Prison Administration

1. Title II responds to a proven record of unconstitutional treatment

The constitutional predicate for Congress's enactment of Title II as Section 5 legislation is "clear beyond peradventure." *Lane*, 541 U.S. at 529. Congress passed Title II in response to an established record "of pervasive unequal treatment [of individuals with disabilities] in the administration of state services and programs, including systematic deprivations of fundamental rights." *Id.* at 524. Indeed, Congress and this Court have long acknowledged the Nation's "history of unfair and often grotesque mistreatment" of persons with disabilities. *City of Cle-*

burne v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 438 (1985).[8]

In contrast to the abrogation provisions struck down by this Court in *Kimel* and *Garrett*, which the Court viewed as intended "to place the States on an equal footing with private actors," *Lane*, 541 U.S. at 528 n.16, Title II of the ADA responds exclusively to the constitutional inadequacy of government action. Indeed, the Court's decision in *Lane* devoted two full pages to chronicling the history of unconstitutional treatment of individuals with disabilities by State and local governments. *Id.* at 524-526; see U.S. Br. at 17-36, *Lane*, *supra* (No. 02-1667). "Given the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," *Lane*, 541 U.S. at 528—evidence that "includ[ed] judicial findings of unconstitutional state action, and statistical, legislative, and anecdotal evidence of the widespread exclusion of persons with disabilities from the enjoyment

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[8] See *Olmstead* v. *L.C.*, 527 U.S. 581, 608 (1999) (Kennedy, J., concurring) ("[O]f course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility."); *Alexander* v. *Choate*, 469 U.S. 287, 295 n.12 (1985) ("well-cataloged instances of invidious discrimination against the handicapped do exist"); see also *Foucha* v. *Louisiana*, 504 U.S. 71 (1992) (unconstitutional confinement based on history of mental illness); *Cleburne*, *supra* (unconstitutional zoning discrimination); *Youngberg* v. *Romeo*, 457 U.S. 307, 315, 322 (1982) (institutionalized persons have due process "right to adequate food, shelter, clothing, and medical care," "safe conditions," and freedom from unreasonable physical restraint, and "such training as may be reasonable in light of [the resident's] liberty interests in safety and freedom from unreasonable restraints"); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 7 (1981) (undisputed factual findings that "[c]onditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the 'habilitation' of the retarded"); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) (unconstitutional confinement); *Jackson* v. *Indiana*, 406 U.S. 715 (1972) (same).

of public services," *id.* at 529—this Court held that the "inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." *Ibid.*

2. Congress had substantial evidence of unconstitutional treatment of the disabled in prisons

The record before Congress included substantial evidence of both historic and enduring unconstitutional treatment of individuals with disabilities by States and their subdivisions in the administration of their penal systems.[9] Moreover, in studying the problem of unconsti-

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[9] As in *Lane*, 541 U.S. at 527 n.16, evidence of unconstitutional treatment of individuals with disabilities by local governments is relevant to the Section 5 question presented here. As with the provision of judicial services, *ibid.*, there is substantial overlap and shared use of correctional facilities by state and local governments. See Ga. Code Ann. § 42-5-50(c) and (d) (1997 & Supp. 2004); *id.* § 42-5-51 (1997); Georgia Bd. of Pardons and Paroles, *Georgia Offender Summary: May 2005* (June 16, 2005) <http://www.pap.state.ga.us/ cjb's.htm>; Addendum B at 6b (local jail used to house inmates awaiting transfer to a state institution); *Civil Rights of Instit. Persons: Hearings on S. 1393 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 121 (1977) (discussing transfers of disabled inmates between local and state facilities). Indeed, in Georgia and other jurisdictions, sheriffs operating county jails are deemed to be acting as "arms of the state." See *Manders* v. *Lee*, 338 F.3d 1304, 1318-1328 (11th Cir. 2003) (en banc) (Georgia), cert. denied, 540 U.S. 1107 (2004); *Marsh* v. *Butler County*, 268 F.3d 1014, 1028 (11th Cir. 2001) (en banc) (Alabama); *Cromer* v. *Brown*, 88 F.3d 1315, 1331-1332 (4th Cir. 1996) (South Carolina); *Blankenship* v. *Warren County*, 931 F. Supp. 447, 449 (W.D. Va. 1996) (Virginia). Finally, unless Title II as applied to prison administration is appropriate Commerce Clause legislation—and respondents argue that it is not, *Miller*, 384 F.3d at 1268 n.23—this case draws into question the *substantive* power of Congress to remedy and deter unconstitutional treatment of inmates with disabilities by both State and local governments, regardless of whether the law is enforced through private damages actions, private injunctive actions, or suits by the United States itself. Accordingly, because resolution of this case will directly impact Congress's legislative authority

tutional treatment of the disabled in prisons, Congress confronted an area of state activity in which constitutional concerns and limitations pervade virtually every aspect of governmental operations, and where unconstitutional treatment, biases, fears, and stereotypes can have much more severe and far-reaching repercussions than in society at large, because of the inmates' reduced capacity for self-help or to seek the assistance of others.

Congress enacted Title II based on (i) more than forty years of experience studying the scope and nature of discrimination against persons with disabilities and testing incremental legislative steps to combat that discrimination[10]; (ii) two reports from the National Council on the Handicapped, an independent federal agency that was commissioned to report on the adequacy of existing federal laws and programs addressing discrimination against persons with disabilities[11]; (iii) thirteen con-

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to require local governments to comply with Title II at all, the actions of local governments of necessity must be factored into the Section 5 calculus, just as they were in *South Carolina*, 383 U.S. at 308-313, and *Lane*, 541 U.S. at 527 & n.16.

[10] See, *e.g.*, Act of June 10, 1948, ch. 434, 62 Stat. 351 (prohibiting employment discrimination by the United States Civil Service against World War II veterans with disabilities); Architectural Barriers Act of 1968, 42 U.S.C. 4151 *et seq.*; Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*; Education of the Handicapped Act, Pub. L. No. 91-230, Title VI, 84 Stat. 175 (reenacted in 1990 as the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*); Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq.*; Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. 1973ee *et seq.*; Air Carrier Access Act of 1986, 49 U.S.C. 41705; Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. 10801; 42 U.S.C. 1437f (lower income housing assistance for, *inter alia*, individuals with disabilities); 38 U.S.C. 1502, 1524 (vocational rehabilitation for disabled veterans); Education of the Handicapped Act Amedments of 1983, Pub. L. No. 98-199, § 10, 97 Stat. 1367; Fair Housing Amendments Act of 1988, 42 U.S.C. 3604.

[11] See Rehabilitation Amendments of 1984, Pub. L. No. 98-221, Title I, § 141(a), 98 Stat. 26; Rehabilitation Act Amendments of 1986, Pub. L. No.

gressional hearings devoted specifically to consideration of the ADA, see *Garrett*, 531 U.S. at 389-390 (Breyer, J., dissenting) (listing hearings); (iv) evidence presented to Congress by nearly 5000 individuals documenting the problems with discrimination persons with disabilities face daily, which was collected by a congressionally designated Task Force that held 63 public forums across the country[12]; and (v) several reports and surveys.[13]

That evidence led Congress to find that individuals with disabilities have been "subjected to a history of purposeful unequal treatment," 42 U.S.C. 12101(a)(7), and that "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for

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99-506, Title V, § 502(b), 100 Stat. 1829; see also National Council on the Handicapped, *On the Threshold of Independence* (1988); National Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities* (1986).

[12] See Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 18 (1990) (*Task Force Report*); 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act* 1040 (Comm. Print 1990) (*Leg. Hist.*). The Task Force submitted those "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" to Congress, 2 *Leg. Hist.* 1324-1325, as part of the official legislative history of the ADA. See *id.* at 1336, 1389; *Lane*, 541 U.S. at 516. In *Garrett*, the United States lodged with the Clerk a complete set of those submissions. See 531 U.S. at 391-424 (Breyer, J., dissenting). As in *Garrett*, those submissions are cited herein by reference to the State and Bates stamp number.

[13] See S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 28 (1990); *Task Force Report* 16; United States Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* (1983); Louis Harris & Assoc., *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (1986); Louis Harris & Assocs., *The ICD Survey II: Employing Disabled Americans* (1987); *Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic* (1988).

the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination." S. Rep. No. 116, 101st Cong., 1st Sess. 8-9 (1989). And Congress specifically identified "institutionalization" as one "critical area[]" in which "discrimination * * * persists." 42 U.S.C. 12101(a)(3). That targeted finding of past and enduring unconstitutional treatment of institutionalized individuals with disabilities by States and their political subdivisions can naturally "be thought to include penal institutions." *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998).

The substantial record of mistreatment of disabled prisoners confirms that Congress meant what the statute naturally says. The very nature of the prison environment imposes unique constitutional duties on States to take affirmative steps to protect inmates that have no analog outside the prison walls.[14] For example, the Eighth Amendment requires prison officials to provide inmates with "humane conditions of confinement," "adequate food, clothing, shelter, and medical care," and "reasonable measures to guarantee the[ir] safety." *Farmer* v. *Brennan*, 511 U.S. 825, 832 (1994).

But information before Congress documented a widespread and deeply rooted pattern of correctional officials' deliberate indifference to the health, safety, suffering, and medical needs of prisoners with disabilities. In fact, the House Report concluded that persons with disabilities, such as epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, *supra*, Pt. 3, at 50; see also 136 Cong. Rec. 11,461 (1990) (Rep. Levine). The report of the United States Civil Rights Commission that was before

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[14] See generally *Helling* v. *McKinney*, 509 U.S. 25, 32 (1993); *DeShaney*, 489 U.S. at 198-199; *Youngberg*, 457 U.S. at 315-316, 322.

Congress, see S. Rep. No. 116, *supra*, at 6; H.R. Rep. No. 485, *supra*, Pt. 2, at 28, also identified as problems the "[i]nadequate treatment * * * 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." United States Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 168 (1983) (*Spectrum*).[15] Likewise, a report by the California Attorney General's Commission on Disability acknowledged (consistent with Goodman's allegations here, Pet. App. 4a-7a) problems with police officers removing individuals "unsafely from their wheelchairs to transport them to jail." California Att'y Gen., *Commission on Disability: Final Report* 102 (Dec. 1989) (*Calif. Report*); *id.* at 110; see also *Barnes* v. *Gorman*, 536 U.S. 181, 183-184 (2002) (unsafe transportation of paraplegic by police caused "serious medical problems").[16]

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[15] A recent survey of state prisons revealed that only *one* out of 38 responding States had grab bars or chairs in the prison shower to accommodate inmates with physical disabilities. Only ten provide accessible cells. J. Krienert et al., *Inmates with Physical Disabilities: Establishing a Knowledge Base*, 1 S.W. J. of Crim. Just. 13, 20 (2003).

[16] See also Kentucky Legis. Research Comm'n, *Research Report No. 125*, *Mentally Retarded Offenders in Adult and Juvenile Correctional Institutions*, at A-3 (1975) ("Kentucky Corrections offers no appropriate treatment to the retarded and subjects them to varied institutional abuse"); *id.* at A-29 to A-34 (documenting widespread problem across more than half of the States in dealing with mentally retarded inmates); AK 55 (jail failed to provide person with disability medical treatment); De. 331 ("There exists a gross lack of psychiatric care for juveniles and adult offenders. While the system provides other medical care, those in need of psychiatric treatment are often left with little or no intervention."); National Inst. of Corrections, U.S. Dep't of Justice, *The Handicapped Offender* 4 (1981) (noting the lack of appropriate treatment facilities for mentally ill and mentally retarded offenders, inadequate training of personnel to treat the disabled offender, and inadequate diagnostic services); L. Teplin, *The Prevalence of Severe Mental Disorder Among*

In addition, persons with hearing impairments "have been arrested and held in jail over night without ever knowing their rights nor what they are being held for." 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act* 1331 (Comm. Print 1990) (*Leg. Hist.*). That occurs even when interpreters are readily available. Kansas 3(5). Congress further heard that "jailers rational[ize] taking away [inmates'] wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs." 2 *Leg. Hist.* 1190. Congress also was aware that "[m]edical care at best in most State systems barely scratches the surface of constitutional minima," leaving prisoners with disabilities without adequate treatment for their needs.[17]

Moreover, "[i]n identifying past evils," for which Section 5 legislation is appropriate, "Congress obviously may avail itself of information from any probative source," *South Carolina*, 383 U.S. at 330, including

> the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or pro-

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Male Urban Jail Detainees: Comparison with the Epidemiologic Catchment Area Program, 80 Am. J. Pub. Health 663, 666 (June 1990) ("[S]ince disorders such as schizophrenia, major depression, and mania require immediate attention, jails must routinely screen all incoming detainees for severe mental disorder. Interestingly, although the courts mandate that jails conduct routine mental health evaluations, many jails do not do so.").

[17] *AIDS and the Admin. of Justice: Hearing Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 39 (1987); see *ibid.* (medical system in Illinois prisons had been held unconstitutional).

> longed debate when Congress again considers action in that area.

Fullilove v. *Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring). Prior congressional hearings had documented extensive and profound constitutional problems with the conditions of confinement and medical care afforded to disabled prisoners.

Congress was aware that "the confinement of inmates who are in need of psychiatric care and treatment * * * in the so called psychiatric unit of the Louisiana State Penitentiary constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution." *Civil Rights for Instit. Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 320-321 (1977) (*H.R. 2439 Hearings*). The lack of treatment of mentally ill patients in other jurisdictions was found to be equally constitutionally deficient.[18] One inmate "who had suffered a stroke and was partially incontinent"

> was made to sit day after day on a wooden bench beside his bed so that the bed would be kept clean. He frequently fell from the bench, and his legs became

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[18] *Civil Rights of Instit. Persons: Hearings on S. 1393 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 1066-1067 (1977) (*S. 1393 Hearings*) (the Alabama Board of Corrections employs "one clinical psychologist, who works one afternoon each week," to treat 2400 inmates who are mentally retarded or suffer from mental illness; if psychotic inmates become violent, "they are removed to lockup cells which are not equipped with restraints or padding and where they are unattended"; "the large majority of mentally disturbed prisoners receive no treatment whatsoever. It is tautological that such care is constitutionally inadequate") (quoting court findings in *Newman* v. *Alabama*, 349 F. Supp. 278, 284 (M.D. Ala. 1972), aff'd in relevant part, 503 F.2d 1320, att'y fee award vacated, 522 F.2d 71 (5th Cir. 1974) (en banc), cert. denied, 421 U.S. 948 (1975)).

> blue and swollen. One leg was later amputated, and he died the following day.

S. 1393 Hearings 1067. As a result of the denial of the most basic medical care, "[a] quadriplegic [inmate] * * * suffered from bedsores which had developed into open wounds because of lack of care and which eventually became infested with maggots." *Ibid.* "Days would pass without his bandages being changed, until the stench pervaded the entire ward. The records show that in the month before his death, he was bathed and [h]is dressings were changed only once." *Ibid.* That, unfortunately, was not an isolated incident.[19] In another facility, correctional officers served "mental patients" a "'stew' (containing no meats or vegetables) that was lacking in nutritional quality" because corrections officials reasoned that "'mental cases don't know what they eat anyway.'" *Id.* at 234. Indeed, inmates with disabilities have broadly been denied "the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834.[20]

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[19] *S. 1393 Hearings* 232-233 (noting repeated instances of bedridden inmates suffering from "lack of medical treatment, living in filth with rats, substandard conditions, draining bedsores, inmates that are catheterized and the catheters have not been changed in weeks with urinary tract infections, human suffering"); *id.* at 233 (bedridden inmates are "incarcerated 24 hours a day with bedsores, a lack of medical and nursing treatment, poor nutrition, poor food service, exposed to rats, bad ventilation, exorbitant temperatures"); *id.* at 234 (inmates with "draining bedsores that had not been treated" were "locked up in a cellblock area that was unquestionably a firetrap").

[20] See, *e.g.*, *H.R. 2439 Hearings* 293 ("The lack of adequate medical care in state and local correctional institutions is another serious condition which we have found." "Untrained inmates often are allowed to provide medical treatment to other inmates, and rarely are professional medical, dental, or psychiatric services available on a regular basis."); *id.* at 316-317 (at Louisiana State Penitentiary, inmates with psychiatric problems "are incarcerated in a so called psyschiatric [*sic*] unit which consists of nothing more than overcrowded cells. Because of the lack of proper facilities and

supervising staff, these psychiatric patients do not receive adequate medical care, exercise, and other treatment"); *S. 1393 Hearings* 121 ("Most persons charged with felonies" in the Los Angeles County Jail "are not eligible for transfer" to the state hospital for treatment of disabilities and, even when transferred, may be "returned precipitously to the jail regardless of treatment needs"; one such inmate "who was returned to jail was found shivering under the bed covers at the jail hospital unit in an acutely psychotic state"); *id.* at 234 ("In one institution a mental patient (stripped of clothing) in a 7 ft. by 5 ft. cell, with a room temperature of 102 [degrees] F and no air movement, was sleeping on urine- and fecal-soaked floors"; the corrections officer advised that the "patient had been confined under these conditions * * * about 6 to 8 weeks"); *id.* at 569-570 ("[T]here are not proper facilities in the Maryland prisons * * * to treat mentally retarded, geriatrics or psychologically disturbed prisoners"); *id.* at 1107 ("Though approximately one half of the average in-patient population at the penitentiary is hospitalized for psychiatric reasons, there is no professional psychiatric staff available for treatment on a regular basis. * * * The only 'treatment' available at the penitentiary consists of temporary relief from 'distress' through sedation.") (quoting *Battle* v. *Anderson*, 376 F. Supp. 402, 415 (E.D. Okla. 1974)); *Civil Rights of the Institutionalized: Hearings on S. 10 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 474 (1979) (*S. 10 Hearings*) ("The overtly psychotic were housed without treatment or supervision in dimly-lit, unventilated and filthy 5' x 8' cells for 24 hours a day."); *Corrections: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. Pt. 8, at 92 (1972) ("Inmates with serious medical conditions do not receive necessary medical care. * * * [N]o psychological treatment is usually provided."); *id.* at 131 (mentally ill inmates are segregated into "areas [that] are known as mental wards, although no psychiatric treatment is given, other than the administration of tranquilizing drugs"); *Drugs in Institutions: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 2 (1975) (discussing the "chemical straitjacketing of thousands"—the use of psychotropic drugs to control the behavior—of mentally retarded persons within the "juvenile justice system" and other institutions); *Juvenile Delinquency: Hearings Before the Subcomm. to Investigate Juvenile Deliquency of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. Pt. 20, at 5012 (1969) (although superintendent of state penitentiary "knew the man was psychotic and could not be locked in his cell without being let out periodically * * *, the

"Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" *Farmer*, 511 U.S. at 834 (quoting *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981)). Indeed "[t]he State's first obligation must be to ensure the safety" not just of prison personnel, but also of "the prisoners themselves." *Wilkinson* v. *Austin*, 125 S. Ct. 2384, 2396 (2005). Yet Congress learned that inmates with disabilities are uniquely susceptible to being raped, assaulted, and preyed upon by other inmates, and that prison officials have repeatedly failed to provide adequate protection. See *S. 10 Hearings* 474 (noting repeated rape of mentally retarded inmates; "The mentally retarded were victimized and given no care.").[21] "[H]aving stripped [inmates with disabilities] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Farmer*, 511 U.S. at 833.

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superintendent locked this man in a cell and left him there," and "scoffed at" his pleas for help, until prisoner committed suicide).

[21] See 126 Cong. Rec. 3713 (1980) (Sen. Bayh) (noting prison conditions that permit the "gang homosexual rape of paraplegic prisoners"); *id.* at S1860 (daily ed. Feb. 26, 1980) (similar); *Spectrum* 168 (noting the persistent problem of "[a]buse of handicapped persons by other inmates"); National Institute of Corr., U.S. Dep't of Justice, *The Handicapped Offender* 4 (1981) (noting the problem of abuse and exploitation of inmates with disabilities); *H.R. 2439 Hearings* 240 ("Physical abuse at the hands of officers and other inmates is a frequent occurrence, most often inflicted upon those who are young, weak and mentally deficient."); NM 1091 (inmates with developmental disabilities are "more subject to physical and mental attacks by other inmates"); M. Santamour & B. West, *The Mentally Retarded Offender and Corrections* 9 (Dep't of Justice 1977) (discussing the widespread abuse of mentally retarded inmates as "a scapegoat or a sexual object"); Prison Visiting Comm., Corr. Ass'n of N.Y., *State of the Prisons 2002-2003: Conditions of Confinement in 14 New York State Corr. Facilities* 15, 19 (June 2005) (*NY Report*).

The Fourteenth Amendment's Due Process and Equal Protection Clauses also prohibit the imposition of significantly harsher conditions of confinement based on disability, rather than the inmate's conduct. Just as a State cannot make it a "criminal offense for a person to be mentally ill," *Robinson* v. *California*, 370 U.S. 660, 666 (1962), States may not subject individuals with physical or mental disabilities to "atypical and significant hardship within the correctional context" just because they are disabled, *Wilkinson*, 125 S. Ct. at 2395. Yet respondents' own records document that Goodman was placed in maximum security "lock-up" because "inmate is in wheel chair." J.A. 90; see *Miller*, 384 F.3d at 1254 ("Able-bodied inmates in disciplinary isolation are housed in less stringent units than the 'high maximum' security K-Building" where Georgia places inmates with physical disabilities). Consigning inmates with disabilities to maximum security, lock-down facilities, or other atypically harsh conditions of confinement because of their disability is not uncommon. When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." 2 *Leg. Hist.* 1005. In California, inmates with disabilities often are unnecessarily "confined to medical units where access to work, job training, recreation and rehabilitation programs is limited." *Calif. Report* 103.[22]

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[22] See *Calif. Report* 111; NM 1091 (prisoners with developmental disabilities subjected to longer terms of imprisonment); Del. 345 (denial of equal access to prison facilities); *NY Report* 15 ("most inmates with mental illness are housed * * * in maximum security facilities"); *id.* at 23 (in some units, "over half of the inmates in solitary confinement were identified as seriously mentally ill); *id.* at 24 (one seriously mentally ill man "had accumulated a total of 35 *years* in solitary confinement"); Addendum B at 8b; IL 572 (deaf people arrested and held in jail overnight without explanation because of failure to provide interpretive services), NC 1161 (police failed to provide interpretive services to deaf person in jail); KS

Congress also was aware that many States structure prison programs and operations in a manner that has the effect of denying persons with disabilities the equal opportunity to obtain vital services and to exercise fundamental rights, such as attending religious services, accessing the law library, or maintaining contact with spouses and children who visit. Indeed, for inmates with disabilities, the failure to provide accessible programs and facilities has the same real-world effect as incarcerating them under the most severe terms of segregation and isolation. See *S. 1393 Hearings* 639 (wheelchair-bound inmate "had not been out of the second floor dormitory in the Draper Prison for years").[23] Where programs required for parole or good time credits are inaccessible, disabled inmates directly suffer longer prison sentences solely because of their disability.[24]

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673 (deaf man jailed and held without a sign language interpreter for him to "understand the charges against him and his rights").

[23] See *S. 10 Hearings* 474 ("The mentally retarded were * * * given no care, educational or special programs."); *Spectrum* 168 (identifying widespread problem of "[i]nadequate * * * rehabilitation programs"); *Calif. Report* 102 ("jail visiting rooms and jails have architectural barriers that make them inaccessible to people who use wheelchairs"); *id.* at 102-103 (documenting the inaccessibility of "visiting, showering, and recreation areas in jails and prisons"); *id.* at 110-111; MD 787 (state prison lacks telecommunications for the deaf). Addendum C to this brief records actions taken by the Department of Justice's Civil Rights Division to enforce Title II's provisions in correctional facilities. Those efforts document that numerous facilities lack accessible cells, toileting facilities, and telephones, thereby subjecting inmates with disabilities to disproportionately harsh conditions of confinement and deprivation of the most basic inmate privileges.

[24] See *Yeskey*, 524 U.S. at 208 (disabled inmate denied admission to boot camp program "which would have led to his release on parole in just six months" rather than serving 18-36 months); *Key* v. *Grayson*, 179 F.3d 996 (6th Cir. 1999) (deaf inmate denied access to sex offender program that allegedly was required as a condition of parole), cert. denied, 528 U.S. 1120 (2000).

Beyond that, because "most offenders will eventually return to society, [a] paramount objective of the corrections system is the rehabilitation of those committed to its custody." *McKune* v. *Lile*, 536 U.S. 24, 36 (2002) (plurality) (quoting *Pell* v. *Procunier*, 417 U.S. 817, 823 (1974)). Inmates with disabilities have the same interest in access to the programs, services, and activities provided to the other inmates as individuals with disabilities outside of prison have to the counterpart programs, services, and activities. At a minimum, they have a due process right not to be treated worse than other inmates solely because of their disability. Negative stereotypes about the abilities and needs of inmates with disabilities often underlie that selective denial of services that other inmates routinely receive.[25]

3. Court decisions and federal enforcement efforts confirm the problem

Other sources available to Congress corroborated the historic and enduring problem of unconstitutional treatment of individuals with disabilities within state penal systems. In *Garrett*, Justices Kennedy and O'Connor suggested that, if a widespread problem of disability discrimination existed, "one would have expected to find * * * extensive litigation and discussion of the constitutional violations." 531 U.S. at 376. Numerous courts, in fact, have found discrimination and the deprivation of fundamental rights on the basis of disability. In one case, a prison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead." *Parrish* v. *Johnson*, 800 F.2d

[25] See *Handicapped Offender*, *supra*, at 4 (stereotypes about abilities of mentally ill offenders impair their access to work programs); *Calif. Report* 102 ("Too many criminal justice policies" remain the product of "erroneous myths and stereotypes.").

600, 603, 605 (6th Cir. 1986). In another, a mentally ill inmate's due process rights were violated when he was confined without notice or an opportunity to be heard for 56 days in solitary confinement in a "strip cell" with no windows, no interior lights, no bunk, no floor covering, no toilet beyond a hole in the floor, no articles of personal hygiene, no opportunity for recreation outside the cell, no access to reading materials, and frequently no clothing or bedding material. *Littlefield* v. *Deland*, 641 F.2d 729, 730-732 (10th Cir. 1981). Another case found constitutional violations where mentally ill and impaired inmates were confined to the prison's "special needs unit" and subjected to unjustified uses of physical force and brutality by prison guards. *Kendrick* v. *Bland*, 541 F. Supp. 21, 26 (W.D. Ky. 1981). Scores of other cases echoed the problem, while more recent cases document its enduring and intractable nature.[26] "[I]t is not only appropriate but also realistic to presume that," in enacting Title II, "Congress was thoroughly familiar with th[o]se unusually important precedents" that predated the enactment of Title II and that addressed in constitutional terms the very problem under study by Congress. *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979); see also *Lane*, 541 U.S. at 524 n.7, 525 & nn.11-14.

Federal efforts to enforce the rights of individuals with disabilities offer still more evidence. Between 1980 and the enactment of Title II in 1990, Department of Justice

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[26] See Addendum A, *infra*. Many of those cases specifically found constitutional violations. In others, courts found, sometimes while adjudicating statutory claims, a substantial factual basis from which Congress could conclude that constitutional rights were at risk—which is a sufficient basis for congressional action under Section 5, *City of Rome*, 446 U.S. at 177; see *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (plurality) ("The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.").

investigations found unconstitutional treatment of individuals with disabilities in correctional facilities in 13 States. See Addendum B, *infra*.[27] Those findings include institutions that (i) had the practice of "stripping naked psychotic inmates and inmates attempting suicide, shackling them, and placing them in a glazed cell without ventilation," Addendum B at 2b, (ii) engaged in the improper use of chemical agents on mentally ill inmates, *id.* at 3b, and (iii) pervasively denied even minimally adequate medical care for both juvenile and adult detainees, *id.* at 2b-8b. In addition, mentally disabled detainees in a county jail in Mississippi were routinely left for days shackled in a "drunk tank" without any mental health treatment or supervision. Addendum B at 6b-7b. Such findings properly inform the Court's evaluation of the propriety of Section 5 legislation. See *South Carolina*, 383 U.S. at 312-313.

4. That extensive pattern of unconstitutional treatment warrants congressional enforcement

The "propriety of [any § 5 legislation] must be judged with reference to the historical experience . . . it reflects." *South Carolina*, 383 U.S. at 308. That foregoing record of extensive unconstitutional treatment of inmates with disabilities by state and local governments reaffirms this Court's holding in *Lane* that "the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities," 541 U.S. at 528—evidence that this Court

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[27] That number and the accompanying addendum include violations that were found in state mental health institutions that also served as detention facilities for mentally disabled inmates at the relevant time. See Cal. Penal Code § 2684 (1978); 730 Ill. Comp. Stat. 5/5-2-6(d) (1981); La. Rev. Stat. Ann. § 15:830 (West 1980); Mich. Comp. Laws § 791.265b(2) (1981); Tenn. Code Ann. § 33-3-402 (1984); Va. Code Ann. § 53.1-40.1 (1988).

agreed "document[ed] a pattern of unequal treatment in the administration of * * * the penal system," *id.* at 525—"makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation," *id.* at 529, especially in the prison context. Indeed, the evidence of unconstitutional treatment exceeds both the evidence of violations of the rights of access to the courts presented in *Lane*, see *id.* at 524 & n.14, 527, and the evidence of unconstitutional leave policies in *Hibbs*, 538 U.S. at 730-732. Given that solid evidentiary predicate for congressional action, application of the congruence and proportionality analysis must afford Congress the same "wide berth in devising appropriate remedial and preventative measures," *Lane*, 541 U.S. at 520, that Congress was afforded in *Hibbs* and *Lane*.

Indeed, there is a close practical nexus between unconstitutional treatment in access to the courts and in penal administration. In the administration of justice, courts and correctional facilities work as tandem components of the criminal justice system, and the imperative of rooting out and remedying unconstitutional treatment applies equally to both. See *Johnson* v. *California*, 125 S. Ct. 1141, 1149 (2005). "[P]ublic respect for our system of justice is undermined when the system discriminates," whether in court proceedings or prison administration. *Ibid.*; see *id.* at 1150 ("[T]he integrity of the criminal justice system depends on full compliance with the Eighth Amendment.").

Accordingly, this Court's holding in *Lane* that Title II is appropriate prophylactic Section 5 legislation in the context of judicial administration informs the analysis of Title II's constitutionality in the prison context. Beyond that, the unfortunate reality is that "[p]rejudice, once let loose, is not easily cabined." *Cleburne*, 473 U.S. at 464 (Marshall, J., concurring). There is no basis in logic or

human experience for concluding that the widespread pattern of unconstitutional treatment that pervades the administration of public services and access to public facilities—including in particular the judicial system, *Lane*, 541 U.S. at 529—stops at the prison doors. The evidence before Congress proved the opposite.

In addition, Congress was well aware of the critical role that abusive penal administration played in the Nation's "lengthy and tragic history" of discrimination against the disabled. *Cleburne*, 473 U.S. at 461 (Marshall, J., concurring). "[T]orture, imprisonment, and execution of handicapped people throughout history are not uncommon." *Spectrum* 18 n.5. In colonial times, "[i]ncarceration in jail was the common solution" for dealing with the mentally ill. A. Deutsch, *The Mentally Ill in America* 41 (2d ed. 1949).[28] From the 1920s to the 1960s, the eugenics movement labeled persons with mental and physical disabilities as "sub-human creatures" and "waste products" responsible for crime. *Spectrum* 19-20. "A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Cleburne*, 473 U.S. at 462 (Marshall, J., concurring).[29] Even after that,

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[28] See also Deutsch, *supra*, at 55 ("The jails * * * into which the insane were thrown were bad beyond description."); *id.* at 165 (discussing the "catalogue of miseries and horrors" in jails housing the mentally ill); M. Burgdorf & R. Burgdorf, *A History of Unequal Treatment*, 15 Santa Clara Lawyer 855, 885 (1975) ("The mentally disabled person prone to violent behavior was placed in prison and subjected to physical and mental tortures.") (footnotes omitted).

[29] See 2 *Legis. Hist.* 1161 ("People with mental disorders have been herded into jail-like asylums along with the poor and criminals. Mental patients have been isolated, chained and beaten, and abused. At one time, tickets were sold to the public to watch the, quote, lunatics, as entertainment, adding to the degradation and brutality. Is it any wonder, then, that the legacy today are views of the mentally ill as dangerous and criminal, objects of ridicule and blame, people to be shunned and abused.").

"[t]hroughout the United States, especially in rural districts, it is quite common to confine mental patients in jails, lockups and police stations pending their commitment to state hospitals," even when state laws direct otherwise. Deutsch, *supra*, at 434-435. This Court's own cases record the unconstitutional treatment of individuals with disabilities as part of the criminal process.[30]

That common heritage is important. This Court upheld the family-leave provisions of the Family and Medical Leave Act as appropriate Section 5 legislation in *Hibbs* in a case concerning a husband's request to take leave to care for an ailing spouse. 538 U.S. at 725. In so holding, the Court acknowledged that the vast majority of the evidence before Congress pertained to "parenting leave" and not to spousal leave. *Id.* at 731 n.5. The Court concluded, however, that "[e]vidence pertaining to parenting leave is relevant here * * * because parenting and family leave address very similar situations * * * [and] they implicate the same stereotypes." *Ibid.* Even more so here, penal administration and judicial administration are closely intertwined in the criminal justice system. And not only do the problems of unequal treatment in both contexts share the same roots and build upon the same stereotypes, but in fact the prison system played a unique role in spawning them.

C. Title II of the Americans With Disabilities Act Is Reasonably Tailored To Remedying And Preventing Constitutional Violations In The Prison Context

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[30] See, *e.g.*, *Foucha*, *supra* (Louisiana statute unconstitutionally allowing the continued confinement of the mentally ill, who were acquitted by reason of insanity); *Vitek* v. *Jones*, 445 U.S. 480 (1980) (due process protections required to transfer prisoner to state mental hospital); *Jackson*, *supra* (pre-trial detention of deaf and mentally retarded defendant).

While Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified, *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 639 (1999), "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies," *Flores*, 521 U.S. at 519-520. Thus, the relevant inquiry is not whether Title II "prohibit[s] a somewhat broader swath of conduct," *Garrett*, 531 U.S. at 365, than would the courts. "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Ibid.* The question is whether, in light of the scope of the problem identified by Congress, the enactment "is 'so out of proportion to a * * * remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Kimel*, 528 U.S. at 86. As applied to prison administration, Title II is appropriate legislation, for three reasons.

1. The constitutional harm addressed is grave

"[T]he appropriateness of the remedy depends on the gravity of the harm it seeks to prevent." *Lane*, 541 U.S. at 523. As in *Lane* and *Hibbs*, Title II's application to prison administration legislates in an area where the States' conduct often "triggers a heightened level of scrutiny," *Hibbs*, 538 U.S. at 736, and where their ability to infringe those rights generally, let alone to deny them disparately to one particular segment of the population, is constitutionally curtailed. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner* v. *Safley*, 482 U.S. 78, 84 (1987). "[P]risoners retain the constitutional right to petition the government for the redress of grievances, *John-*

son v. *Avery*, 393 U.S. 483 (1969), * * * and they enjoy the protections of due process, *Wolff* v. *McDonnell*, 418 U.S. 539 (1974)." *Turner*, 482 U.S. at 84. The Due Process Clause requires States to afford inmates with disabilities fair proceedings in a range of circumstances, including the administration of antipsychotic drugs, *Washington* v. *Harper*, 494 U.S. 210, 221-222 (1990), involuntary transfer to a mental hospital, *Vitek*, *supra*, 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. *Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979) (parole); *Wolff*, *supra* (good-time credits and solitary confinement); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (probation). In addition, "[p]risoners must be provided 'reasonable opportunities' to exercise their religious freedom guaranteed under the First Amendment," *Hudson* v. *Palmer*, 468 U.S. 517, 523 (1984), and they have a "fundamental constitutional right of access to the courts" to challenge their convictions or conditions of confinement. *Lewis*, 518 U.S. at 346.

While many of those constitutional claims are invoked with appropriate deference to prison officials, see *Turner*, *supra*, that is not true of Eighth Amendment claims, race-based equal protection claims, and other claims that are not inconsistent with proper incarceration. See *Johnson*, 125 S. Ct. at 1149. Moreover, *Turner* review is more exacting than rational-basis review, as *Turner* itself demonstrates. See 482 U.S. at 94-99 (striking down marriage restrictions). More importantly, while the special nature of prisons requires appropriate deference, the ubiquity and exclusivity of state control that characterize prison life mean that the State has constitutional duties to inmates that have no counterpart outside prison walls.

Indeed, prison administration is an area in which the "government exerts a degree of control unparalleled in civilian society and severely disabling" to the exercise of the inmates' basic rights. *Cutter* v. *Wilkinson*, 125 S. Ct. 2113, 2121 (2005). "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Helling* v. *McKinney*, 509 U.S. 25, 32 (1993) (quoting *DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989)). That principle applies with even greater force when, as rarely occurs in other governmental operations, the failure to meet the basic medical and humanitarian needs of inmates with disabilities can have life-or-death consequences.

Accordingly, under the Constitution, the State's desire to save resources on cleaning bed sheets provides no basis for forcing a severely disabled inmate to sit on a wooden bench all day. Finances are no defense to the failure to provide basic medical care and humane conditions of confinement in a manner that avoids wanton suffering and that respects "the dignity of man." *Hope* v. *Pelzer*, 536 U.S. 730, 738 (2002) (quoting *Trop* v. *Dulles*, 356 U.S. 86, 100 (1958)); see *Wilson* v. *Seiter*, 501 U.S. 294, 301-302 (1991). Nor will "any reasonably conceivable state of facts that could provide a rational basis," *Garrett*, 531 U.S. at 367, justify subjecting inmates to "atypical and significant hardship within the correctional context," *Wilkinson*, 125 S. Ct. at 2395, or leaving them to serve longer or harsher prison sentences than non-disabled inmates due to the inaccessibility of critical programs.

Moreover, much of the identified conduct fails even rational basis scrutiny. Even that low constitutional threshold cannot justify the selective deprivation, due to nothing more than physical inaccessibility, of the same access to law libraries, religious services, and rehabilita-

tive programs afforded to other inmates. A purported rational basis for treatment of the disabled will fail if the State does not accord the same treatment to other groups similarly situated, *Garrett*, 531 U.S. at 366 n.4; *Cleburne*, 473 U.S. at 447-450, if it is based on "animosity" towards the disabled, *Romer* v. *Evans*, 517 U.S. 620, 634 (1996), or if it gives effect to private biases, *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984). It accordingly is not enough that the State can offer a rational basis for failing to offer special diets required by disability, see Addendum B at 4b, 16b, when the State already offers special diets for religious reasons or for non-disabling medical conditions, see Georgia Dep't of Corrs., *Standard Operating Procedures*, VA01-0011, § VI.4 (July 1, 2005). Nor can the State refuse to offer benefit information or services in handicap-accessible formats if the State is already accommodating the special communication needs of others (such as non-English speaking inmates). Programs and services that prisons already broadly provide to other inmates, by definition, are not "inconsistent with proper incarceration," *Overton* v. *Bazzetta*, 539 U.S. 126, 131 (2003), and thus cannot selectively be withheld from qualified disabled inmates without heightened justification. See *Johnson*, 125 S. Ct. at 1149 (*Turner* standard applies "*only* to rights that are 'inconsistent with proper incarceration'"). Thus, as applied to prison administration, Title II targets not isolated and unrelated instances of unfair treatment that may or may not amount to unconstitutional treatment, but an "across the board" pattern of governmental decisionmaking that implicates constitutional concerns. And, in the prison context, Title II does far more than regulate access to ice rinks or seek to put States on an equal footing with private actors. It addresses a quintessential governmental activity in an environment in which constitutional duties are pervasive and the history of unconstitutional treatment is extensive.

2. The problem is entrenched and intractable

In the prison context, Title II is an appropriate congressional response to an enduring and entrenched pattern of unconstitutional treatment. "Difficult and intractable problems often require powerful remedies," *Kimel*, 528 U.S. at 88; see *Hibbs*, 538 U.S. at 737. As the Court recognized in *Lane*, unconstitutional treatment of individuals with disabilities—including specifically in "administration of * * * the penal system"—"persisted despite several federal and state legislative efforts to address it." *Lane*, 541 U.S. at 525, 526. Indeed, in enacting Title II, Congress specifically found that existing state and federal laws were "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." S. Rep. No. 116, *supra*, at 18; see also *ibid.* (section of report entitled "CURRENT FEDERAL AND STATE LAWS ARE INADEQUATE"); H.R. Rep. No. 485, *supra*, Pt. 2, at 47 (same). The 50 State Governors' Committees "report[ed] that existing state laws do not adequately counter * * * discrimination." *Ibid.* And the Illinois Attorney General testified that "[p]eople with disabilities should not have to win these rights on a State-by-State basis" and that "[i]t is long past time * * * [for] a national policy that puts persons with disabilities on equal footing with other Americans."[31]

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[31] *Americans with Disabilities Act of 1989: Hearings on S.933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Res.*, 101st Cong., 1st Sess. 77 (1989) (*May 1989 Hearings*); see *id.* at 778 (Ohio Governor's testimony that "state and local governments must also be held to the same standards" of ensuring "that there is no discrimination against people with disabilities in any program under their jurisdiction"); 136 Cong. Rec. 11,455 (1990) (Rep. Wolpe); *id.* at 11,461 (Rep. Levine); 134 Cong. Rec. 9384-9385 (1988) (Sen. Simon); 2 *Leg. Hist.* 963; *id.* at 967 ("Too many States, for whatever reason, still perpetuate confusion. It is time for Federal action."); *id.* at 1050 (Elmer Bartels, Mass.

Both Congress and President George H. W. Bush likewise recognized that the prior piecemeal approach of federal legislation had not succeeded and, in fact, had created "a patchwork quilt * * * [with] serious gaps in coverage that leave persons with disabilities without adequate civil rights protections." S. Rep. No. 116, *supra*, at 19 (quoting Att'y Gen. Thornburgh); see 26 Weekly Comp. Pres. Doc. 1165 (July 26, 1990) ("Existing laws and regulations * * * have left broad areas of American life untouched or inadequately addressed").[32] The volume and persistence of constitutional violations documented in the legislative record, in the Justice Department's investigations under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997a, see Addendum B, and in civil rights actions under 42 U.S.C. 1983, see Addendum A, manifested the need for a congressional response that went beyond providing procedural mechanisms for directly enforcing the Constitution's prohibitions. As in *Hibbs*,

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Rehab. Comm'n); *id.* at 1455-1456 (Nikki Van Hightower, Treas., Harris Co., Tex.); *id.* at 1473-1474 (Robert Lanier, Chair, Metro. Transit Auth. of Harris Co., Tex.); *id.* at 1506 (Texas State Sen. Chet Brooks) ("We cannot effectively piece these protections together state by state, person by person."); *id.* at 1508; *id.* at 1642-1643) (noting variations and gaps in coverage of state laws); 3 *Leg. Hist.* 2245; AL 24; AK 52; see generally United States Dep't of Health & Human Servs., *Visions of: Independence, Productivity, Integration for People with Developmental Disabilities* 28 (1990) (19 States strongly recommended passage of the ADA).

[32] See *May 1989 Hearings* 77-78 (Illinois Attorney General) (the Rehabilitation Act's scheme of prohibiting discrimination by entities receiving federal funds "[u]nfortunately * * * translates [into] total confusion for the disabled community and the inability to expect consistent treatment"); H.R. Rep. No. 485, *supra*, Pt. 4, at 24; 134 Cong. Rec. 9385 (1988) (Sen. Simon); *id.* at 9357 (Sen. Weicker); 2 *Leg. Hist.* 1272 (Rep. Owens); 3 *Leg. Hist.* 2015 (Att'y Gen. Thornburgh); *id.* at 2244-2245 (James Ellis); *Toward Independence*, *supra*, at 7 ("[c]omplexities, inconsistencies, and fragmentation in the various Federal laws and programs" had created a confused and ineffective "patchwork quilt of existing policies and programs"); *On the Threshold of Independence*, *supra*, at 19-21.

constitutional problems that have proven resistant to prior remedial legislation "may justify added prophylactic measures." 538 U.S. at 737.

3. Title II's terms are sensitive to the unique security needs in prisons and tailored to the constitutional problems it remedies

In the prison context, Title II targets exclusively governmental action that is itself directly and comprehensively regulated by the Constitution. Title II in the prison context also focuses on government action that threatens fundamental rights or that is unreasonable. For those reasons, much of Title II's operation in prisons targets conduct outlawed by the Constitution itself or that creates a substantial risk that constitutional rights are imperilled, see *City of Rome*, 446 U.S. at 177. When, as in the case at hand, Title II applies to prison conditions that implicate the Eighth Amendment, due process, the right of access to the courts, or the right to an equal opportunity to exercise religion (see *Cutter*, 125 S. Ct. at 2121), Title II's requirements of equal access and reasonable accommodations track the Fourteenth Amendment's prohibition on the disparate deprivation of fundamental rights for invidious or insubstantial reasons. Furthermore, Title II targets discrimination that is unreasonable and, in so doing, ensures (as this Court did in *Cleburne*, 473 U.S. at 447-450) that the government's articulated rationale for differential treatment does not mask impermissible animus and does not result in the differential treatment of similarly situated inmates.

But Title II "does not require States to employ any and all means to make [prison] services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for [prison] programs." *Lane*, 541 U.S. at 531-532. Under Title II, the States retain their discretion to exclude inmates from

prison programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all. The ADA does not require preferences and permits the denial of benefits or services if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service, 42 U.S.C. 12131(2). But once an individual proves that he can meet all the essential eligibility requirements of a program or service, especially those programs and services that implicate fundamental rights, the government's interest in excluding that *qualified* individual solely "by reason of such disability," 42 U.S.C. 12132, is both minimal and constitutionally circumscribed. At the same time, permitting the States to retain and enforce their essential eligibility requirements protects their legitimate interests in structuring governmental activities.

Title II also requires "reasonable modifications" in public services. 42 U.S.C. 12131(2). But, as *Hibbs* makes clear, once Congress identifies a predicate of unconstitutional conduct that it seeks to remedy, Congress has flexibility in fashioning the remedy. See *Hibbs*, 538 U.S. at 734 n.10, 736-739. The requirement of reasonable modifications, moreover, comports with the unique needs of prison management in two ways.

First, Congress did not dictate a uniform and unbending response to the needs of inmates with disabilities. Rather, Title II's flexibility permits States to meet the statute's requirements in a variety of ways. *Lane*, 541 U.S. at 532. "And in no event is the [prison] required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service," *ibid.* (citing 28 C.F.R. 35.150(a)(2) and (a)(3)), in light of their nature or cost, agency resources, and the operational practices and structure of the program, 42 U.S.C. 12111(10), 12112(b)(5)(A); 28 C.F.R.

35.130(b)(7), 35.150(a)(3), 35.164; *Olmstead* v. *L.C.*, 527 U.S. 581, 606 n.16 (1999) (plurality). Title II is thus unlike the statutes at issue in *Kimel* and *Flores*, which, upon a minimal showing by a plaintiff, subjected constitutional state action to a level of rigid and probing review that this Court characterized as tantamount to strict scrutiny. See *Kimel*, 528 U.S. at 87-88; *Flores*, 521 U.S. at 534. Title II requires a more substantial showing by the plaintiff and offers the defendant a less stringent standard of justification, thus preserving the States' capacity to draw reasoned—and thus presumptively constitutional, see *Turner*, *supra*—distinctions based on disability or the genuine difficulty of accommodation.

Second, that reasonableness standard is, by its very nature, sensitive to context and capable of "be[ing] applied in an appropriately balanced way, with particular sensitivity to security concerns." *Cutter*, 125 S. Ct. at 2123. Indeed, in *Cutter*, this Court recognized that a federally imposed standard of strict scrutiny for religious accommodations was not inconsistent with the "urgency of discipline, order, safety, and security in penal institutions." *Ibid.* *A fortiori*, Title II's requirement of "reasonable" accommodations is workable in the prison context. Indeed, like the constitutional standard for protecting inmates' rights, *Turner*, *supra*, "Title II balances the interests of disabled inmates and the burden on prison administration" and, "[j]ust as *Turner* requires consideration of the impact on prison resources, Title II's reasonable modification requirement allows for consideration of cost and other burdens." *Cochran* v. *Pinchak*, 401 F.3d 184, 197 (3d Cir. 2005) (Scirica, CJ., dissenting); see *ibid.* ("Just as *Turner* considers available alternatives, Title II considers whether there are 'other methods for meeting the requirements' ") (quoting 28 C.F.R. 35.150(b)).

In fact, for nearly three decades, the federal Bureau of Prisons has managed the largest correctional system in

the Nation under the same accommodation obligation that Title II imposes on States. See 29 U.S.C. 794(a); 42 U.S.C. 12134. The Bureau of Prisons advises that compliance with the law has not imposed financial hardship and that, over the last five years, inmate claims under the Rehabilitation Act have represented, on average, less than 1% of all inmate grievances.[33] The Bureau has further advised that the cost of making new construction accessible has averaged less than 2% of a project. That is consistent with the testimony of witnesses and expert studies before Congress. One local government official stressed that "[t]his bill will not impose great hardships on our county governments" because "[t]he cost of making new or renovated structures accessible is less than 1 percent of the total cost of construction." 2 *Leg. Hist.* 1443 (Treasurer, Harris Co., Tex.).[34]

Moreover, Title II's remedies correspond closely to the constitutional problems Congress identified. Given (i) the history of segregation, isolation, and abusive detention, (ii) the resulting entrenched stereotypes, fear, prejudices, and ignorance about inmates with disabilities, (iii) the endurance of unconstitutional treatment, and (iv) the inability of prior legislative responses to resolve the problem, Congress reasonably determined that a simple ban on overt discrimination would be insufficient. It would do

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[33] In any event, the more effective way to combat abusive prisoner litigation is not to withhold substantive civil rights protections, but to impose procedural requirements that inhibit meritless filings, which Congress has already done. See Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e.

[34] See also S. Rep. No. 116, *supra*, at 10-12, 89, 92; H.R. Rep. No. 485, *supra*, Pt. 2, at 34; 2 *Leg. Hist.* 1552, 1077, 1388-1389, 1456-1457, 1560; 3 *Leg. Hist.* 2190-2191; *Task Force Report* 27; *Spectrum* 2, 30, 70; GAO, *Briefing Report on Costs of Accommodations*, *Americans with Disabilities Act: Hearing Before the House Comm. on Small Business*, 101st Cong., 2d Sess. 190 (1990).

little to combat the "stereotypes [that have] created a self-fulfilling cycle of discrimination" against inmates with disabilities, and which, in turn, lead "to subtle discrimination that may be difficult to detect on a case-by-case basis." *Hibbs*, 538 U.S. at 736. Prison officials' failure to make reasonable accommodations to the rigid enforcement of seemingly neutral criteria—especially the types of accommodations and adjustments that are made for non-disabled inmates—can often mask just such invidious, but difficult to prove, discrimination. At the same time, given the history and persistence of unconstitutional treatment in the administration of public services, the statute appropriately casts a skeptical eye over decisions made "because of" or "on the basis of disability."

In addition, a simple ban on discrimination would freeze in place the effects of States' prior official mistreatment of inmates with disabilities, which had the effect of rendering the disabled invisible to the designers of prison facilities and programs. See *Gaston County* v. *United States*, 395 U.S. 285 (1969) (constitutionally administered literacy test banned because it perpetuates the effects of past discrimination). While Title II goes further than the Constitution itself, it does so only to the extent that some disability discrimination in prison may have no impact on fundamental rights and may be rational for constitutional purposes, but still be unreasonable under Title II. But that margin of prophylactic statutory protection does not exceed Congress's authority here any more than it did in *Hibbs* and *Lane*. Like Title II's prophylactic application to courts in *Lane* and the Family and Medical Leave Act's application to *spousal leave* as a remedy for discrimination in *parenting leave* in *Hibbs*, Title II's extra level of statutory protection in prisons is necessary (i) to eliminate unreasoned reliance on stereotypes and "mere negative attitudes, or fear," *Garrett*, 531 U.S. at 367; see *Cleburne supra*; (ii) to reach unconstitutional conduct that would

otherwise escape detection in court; and (iii) to deter future constitutional violations.

Furthermore, "[a] proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) (internal quotation marks and brackets omitted). Section 5 thus empowers Congress to do more than simply prohibit the creation of new barriers to equality; it can require States to remedy enduring manifestations of past discrimination and exclusion. See *id.* at 550 n.19 (Equal Protection Clause itself can require modification of facilities and programs to ensure equal access); see *Hibbs*, 538 U.S. at 734 n.10. Accordingly, as applied to prisons, Title II is "a reasonable prophylactic measure, reasonably targeted to a legitimate end." *Lane*, 541 U.S. at 533.

D. Title II Is Constitutional Even If Evaluated In A Narrower Or Broader Context

As noted (see Section A, *supra*), this Court's decision in *Lane* makes clear that the proper focus for Section 5 analysis is the application of Title II to the overall context of prison administration and the constitutional rights implicated in that context. But, while Title II is appropriate legislation in the prison context, it is especially so in cases like the present where, in light of the plaintiff's allegations, Title II's protections overlap extensively with those of the Constitution. See Pet. App. 15a-18a (remanding for trial on potential Eighth Amendment violations). Thus, in this case, Title II serves largely to "provid[e] remedies where the judiciary has already found a set of facts to violate the Constitution."[35] At a

[35] *Kiman* v. *New Hampshire Dep't of Corr.*, 301 F.3d 13, 15-16 (1st Cir.) (upholding Title II "at least as * * * applied to cases in which a court identifies a constitutional violation by the state"), opinion withdrawn

minimum, Title II is constitutional as applied to Goodman's allegations concerning actual violations of the Constitution, much for the same reason that Title VII, 42 U.S.C. 2000e *et seq.*, reflects a constitutional exercise of the Section 5 power, cf. *Hibbs*, *supra*: the gap between the Constitution and the statute is negligible.

In addition, for the reasons explained in the brief for the United States in *Lane*, *supra*, Title II in its entirety is a proper exercise of Congress's Section 5 power. This Court held in *Lane* that the widespread history of discrimination against persons with disabilities in the provision of public services "makes clear beyond peradventure" that the entire subject—not just particular categories—of "inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." 541 U.S. at 529. Nor do Title II's mandates vary from context to context—the requirements of "reasonable" accommodation and accessible construction of new facilities apply across the board. And they are appropriate across the board because, by their very nature, they permit balancing of competing state interests, preserve governmental flexibility, and prevent fundamental alterations in governmental programs and the imposition of undue hardships.

Title II's coverage is broad, but no broader than necessary. Congress enacted a comprehensive remedy because it confronted a comprehensive problem, and it determined that only an equally comprehensive effort to integrate persons with disabilities would end the cycle of isolation, segregation, and second-class citizenship, and deter further discrimination. Ending discrimination and unconstitutional treatment in access to the judicial system prior

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pending reh'g en banc, 310 F.3d 785 (2002), district court aff'd by equally divided en banc court, 332 F.3d 29 (1st Cir. 2003), vacated and remanded in light of *Lane*, 541 U.S. 1059 (2004).

to conviction, while ignoring its selective deprivation post-conviction, would undercut the "legitimacy of the entire criminal justice system." *Johnson*, 125 S. Ct. at 1149. Allowing access to the courts while denying inmates the basic hygiene, medical attention, and safety necessary to preserve health and life would be an empty promise. And requiring fair, equal, and humane treatment in prisons is of little gain if neither government services, transportation, educational services, nor the social activities of public life are accessible to bring the disabled into the life of the communities into which they return.[36]

Furthermore, as a matter of human nature, discrimination, animosity, and stereotypes do not confine themselves to isolated compartments. The same mindset that has presumed that persons with disabilities cannot be educated, should not be parents, need not vote, and are too much trouble to accommodate within the judicial process also gives rise to the stereotype that "mental cases don't know what they eat anyway," *S. 1393 Hearings* 234, the animosity and negativism that cause prison guards to label paraplegic inmates "crippled bastard[s]" "who should be dead," *Parrish*, 800 F.2d at 603, 605, and the deliberate indifference that prefers maintaining clean linens to preserving the life of an inmate with a disability, *S. 1393 Hearings* 1067.

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[36] See *Hibbs*, 538 U.S. at 734 n.10 ("Congress did not create a particular leave policy for its own sake," but rather addressed leave policy as part of a broader effort to "dismantle persisting gender-based barriers to the hiring, retention, and promotion of women in the workplace.").

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings consistent with the decision of this Court.

Respectfully submitted.

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ADDENDUM A

Cases Evidencing the Problem of Unconstitutional Treatment of Individuals with Disabilities in Correctional Facilities:

Vitek v. *Jones*, 445 U.S. 480 (1980) (due process protections required to transfer prisoner to state mental hospital); *Miller* v. *King*, 384 F.3d 1248 (11th Cir. 2004) (reversing grant of summary judgment to defendants on Eighth Amendment claims by paraplegic inmate where inmate was housed in a cell so small that he could not turn his wheelchair around; where inmate did not have access to wheelchair-accessible toilets and showers, as a result of which inmate was not able to bathe regularly and was forced to urinate and defecate on himself; and where prison staff's failure to provide adequate medical care resulted in bed sores, serious atrophy, and deterioration of his spinal condition); *Serrano* v. *Francis*, 345 F.3d 1071 (9th Cir. 2003) (court of appeals found assignment of wheelchair-bound inmate to administrative segregation implicated protected liberty interest where inmate was not allowed to use his wheelchair while in segregation, forcing him to crawl around vermin and cockroach-infested floor to get to his bed and to hoist himself up by the toilet seat in order to use the toilet; was prevented from showering due to a lack of accessible showers; and was denied outdoor exercise due to inaccessible yard),

cert. denied, 125 S. Ct. 43 (2004); *Cole* v. *Velasquez*, 67 Fed. Appx. 252 (5th Cir. 2003) (reversing dismissal of blind inmate's ADA claim that he was denied access to the prison law library on the basis of his disability); *Kiman* v. *New Hampshire Dep't of Corr.*, 301 F.3d 13, 15-16 (1st Cir.) (disabled inmate stated Eighth Amendment claims for denial of accommodations needed to protect his health and safety due to his degenerative nerve disease), opinion withdrawn pending reh'g en banc, 310 F.3d 785 (2002), district court aff'd by an equally divided court, 332 F.3d 29 (2003) (en banc), vacated and remanded in light of *Tennessee* v. *Lane*, 541 U.S. 509 (2004); *Thompson* v. *Davis*, 295 F.3d 890 (9th Cir. 2002) (reversing dismissal of inmates' ADA claim where inmates were categorically excluded from consideration for parole), cert. denied, 538 U.S. 921 (2003); *Lawson* v. *Dallas County*, 286 F.3d 257 (5th Cir. 2002) (paraplegic inmate's Eighth Amendment rights violated where jail staff failed to follow medically prescribed procedures for treating skin condition causing inmate's skin to rot and die; and where he was placed in solitary cell with no supports, causing him repeatedly to fall to the floor and lie there for extended periods of time); *St. Amand* v. *Block*, 34 Fed. Appx. 283 (9th Cir. 2002) (finding that inmate's Eighth Amendment, ADA, and Section 504 claims were not frivolous where wheelchair-dependent amputee inmate claimed he was given inade-

quate medical care and was denied access to the prison's law library); *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); *Chisolm* v. *McManimon*, 275 F.3d 315 (3d Cir. 2001) (reversing grant of summary judgment to defendants on ADA and Section 504 claims where hearing-impaired jail inmate was not provided with any communication assistance and, as a result, was erroneously classified as a vagrant, was housed in solitary lock-down, was denied access to an accessible telephone, and was denied an interpreter at his extradition hearing); *Gorman* v. *Easley*, 257 F.3d 738, 742 (8th Cir. 2001) (paraplegic arrested for trespass improperly restrained in non-wheelchair-accessible police van, causing his urine bag to burst, "soaking him with his own urine" and resulting in serious medical problems), judgment rev'd in part on other grounds, 536 U.S. 181 (2002); *Beckford* v. *Portuondo*, 234 F.3d 128 (2d Cir. 2000) (reversing grant of summary judgment to defendants on Eighth Amendment, ADA, and Section 504 claims of wheelchair-bound inmate alleging he was denied access to drinking water for a long period of time, bedding and clothing, access to outdoor recreation, and access to adequate medical and mental health care); *May* v. *Sheahan*, 226 F.3d 876 (7th Cir. 2000) (affirming

denial of qualified immunity to constitutional claims of inmate with AIDS where inmate, who was taken to a hospital during his confinement, was shackled to his hospital bed 24 hours per day, was denied access to his attorney or other visitors who could assist him in his legal defense, and was denied transportation to assigned court dates); *Brown* v. *MDOC*, No. 98-1587, 2000 WL 659031 (6th Cir. May 10, 2000) (reversing grant of summary judgment to defendants on claim by inmate that his Eighth Amendment rights were violated when prison refused to provide a smoke-free environment, despite notice that inmate's polio-induced serious respiratory problems required such an environment, and when prison officials caused him to have a wheelchair accident through the use of excessive force); *Key* v. *Grayson*, 179 F.3d 996 (6th Cir. 1999) (deaf inmate denied access to sex offender program required as precondition for parole), cert. denied, 528 U.S. 1120 (2000); *Bradley* v. *Puckett*, 157 F.3d 1022, 1025-1026 (5th Cir. 1998) (failure to provide means for amputee to bathe for several months led to infection); *Simmons* v. *Cook*, 154 F.3d 805 (8th Cir. 1998) (Eighth Amendment violated when two paraplegic inmates placed in maximum security could not eat, because their wheelchairs could not pass the cell bunk to reach the barred door where food was set, and were denied accessible toilet facilities); *Love* v. *Westville Corr. Ctr.*, 103 F.3d 558, 558, 560-561 (7th Cir. 1996)

(quadriplegic inmate "was unable to participate in substance abuse, education, church, work, or transition programs available to members of the general inmate population"); *Duffy* v. *Riveland*, 98 F.3d 447 (9th Cir. 1996) (in an ADA and Rehabilitation Act suit brought by deaf inmate who was allegedly denied an interpreter at prison disciplinary and classification proceedings, fact issues as to qualifications of the interpreter provided by prison officials and the inmate's ability to communicate with her effectively and adequately precluded defendants' motion for summary judgment); *Koehl* v. *Dalsheim*, 85 F.3d 86 (2d Cir. 1996) (Eighth Amendment violated when inmate with serious vision problem was denied glasses and treatment); *Hicks* v. *Frey*, 992 F.2d 1450 (6th Cir. 1993) (upholding jury verdict finding violation of Eighth Amendment where jail employees placed paraplegic inmate in isolation cell with door closed for 23 hours per day, denied him access to his wheelchair, failed to change his soiled linens, and did not turn him for more than two months); *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); *Johnson* v. *Hardin County*, 908 F.2d 1280 (6th Cir. 1990) (Eighth Amendment violated when prisoner disabled by mobility impairment was denied prescribed medical care and denied access to a shower for 40 days after injuring

himself in a fall); *Leach* v. *Shelby County Sheriff*, 891 F.2d 1241 (6th Cir. 1989) (county jail maintained policy of deliberate indifference to serious medical needs of paraplegic inmates in violation of Eighth Amendment where paraplegic inmate was not bathed regularly, was forced to sit in his own urine, and was not given necessary help for bowel movements), cert. denied, 495 U.S. 932 (1990); *Mandel* v. *Doe*, 888 F.2d 783 (11th Cir. 1989) (evidence established that physician assistant's treatment of prisoner after he severely injured his leg constituted deliberate indifference to prisoner's serious medical needs); *Bonner* v. *Lewis*, 857 F.2d 559 (9th Cir. 1988) (reversing grant of summary judgment to defendant on inmate's Section 504 claim where inmate, who is deaf, mute, and suffers from a severe progressive vision loss, was not provided with a sign-language interpreter for counseling sessions, administrative or disciplinary hearings, or medical appointments); *Eng* v. *Smith*, 849 F.2d 80 (2d Cir. 1988) (upholding grant of preliminary injunction based on constitutionally inadequate provision of medical care to mentally ill inmates); *Cortes-Quinones* v. *Jimenez- Nettleship*, 842 F.2d 556 (1st Cir.) (Eighth Amendment violated when mentally ill prisoner was housed in a severely overcrowded cell where he was ultimately killed and dismembered by other inmates), cert. denied, 488 U.S. 823 (1988); *LaFaut* v. *Smith*, 834 F.2d 389 (4th Cir. 1987) (Powell, J.)

(failure to provide paraplegic inmate with an accessible toilet is cruel and unusual punishment); *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986) (prison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their 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); *Lynch* v. *Baxley*, 744 F.2d 1452 (11th Cir. 1984) (State subjected individuals awaiting civil commitment proceedings to unconstitutional conditions of confinement in county jails); *Bee* v. *Greaves*, 744 F.2d 1387 (10th Cir.) (genuine issue of material fact as to whether an emergency existed and as to whether forcible medication for an indefinite period was an exaggerated response, where pretrial detainee claimed he was forced to take antipsychotic drug thorazine against his will), cert. denied, 469 U.S. 1214 (1984); *Maclin* v. *Freake*, 650 F.2d 885 (7th Cir. 1981) (colorable claim for relief under the Eighth Amendment where paraplegic prisoner alleged that he had received no physical therapy for his condition over a period of some 11 months since he had entered prison); *Littlefield* v. *Deland*, 641 F.2d 729 (10th Cir. 1981) (Due Process violation where mentally ill inmate was confined without notice or an opportunity to be heard for 56 days in solitary

confinement in a "strip cell" with no windows, no interior lights, no bunk, no floor covering, no toilet beyond a hole in the floor, no articles of personal hygiene, no opportunity for recreation outside cell, no access to reading materials, and frequently no clothing or bedding material); *Williams* v. *Edwards*, 547 F.2d 1206, 1217 (5th Cir. 1977) (upholding finding of Eighth Amendment violations where prison provided no mental health care despite finding that 40% of inmates would benefit from psychiatric treatment); *Knecht* v. *Gillman*, 488 F.2d 1136 (8th Cir. 1973) (administration of drugs that induced vomiting to nonconsenting inmates on the basis of alleged violations of behavior rules constituted cruel and unusual punishment); *Mackey* v. *Procunier*, 477 F.2d 877 (9th Cir. 1973) (finding that disabled inmate sufficiently alleged being subjected to cruel and unusual punishment where inmate claimed he received without his consent a "fright drug" that caused him to regularly suffer nightmares and awaken unable to breathe); *Scott* v. *Garcia*, 370 F. Supp. 2d 1056 (S.D. Cal. 2005) (summary judgment was precluded on Eighth Amendment and ADA claims, where inmate diagnosed with esophageal erosion, possible Barrett's esophagus, multiple gastric erosions, gastric ulcer, pyloric channel ulcer, duodenal bulb ulcer, and multiple second duodenum ulcers was not allowed to transfer to a facility with an acute care hospital); *Ginest* v. *Board of County Comm'rs*,

333 F. Supp. 2d 1190 (D. Wyo. 2004) (Eighth Amendment violated by inadequate provision of medical and mental health care to mentally ill inmates); *Carrasquillo* v. *City of New York*, 324 F. Supp. 2d 428, 434, 438-440 (S.D.N.Y. 2004) (denying defendants' motion to dismiss in Eighth Amendment suit brought by prisoner alleging that, during a bus crash, he sustained injuries to his head, spine, back, neck, legs, and hips, and that a prison medical employee was deliberately indifferent to his serious medical needs, as well as that city administrative employees failed to respond to his complaints of inadequate medical care); *Simms* v. *Hardesty*, 303 F. Supp. 2d 656 (D. Md. 2003) (genuine issue of material fact existed as to whether brain-damaged pretrial detainee's due process right to be free of excessive force was violated, when he suffered severely debilitating facial and head injuries caused by a struggle with officers); *Bane* v. *Virginia Dep't of Corr.*, 267 F. Supp. 2d 514 (W.D. Va. 2003) (fact issues precluded summary judgment on disabled inmate's Eighth Amendment claims where he allegedly suffered injuries because he was handcuffed behind his back even though prison personnel were on notice that he was not to be cuffed behind his back); *Lavender* v. *Lampert*, 242 F. Supp. 2d 821 (D. Or. 2002) (in Section 1983 suit brought by inmate suffering partial spastic paralysis, allegations supported inmate's deliberate indifference claims against the superin-

tendent and health services manager and fact issues existed as to whether the care providers were deliberately indifferent to the prisoner's serious medical needs); *Terry* v. *Hill*, 232 F. Supp. 2d 934 (E.D. Ark. 2002) (constitutional rights of mentally ill pretrial detainees violated by inadequate mental health care and evaluation); *Mitchell* v. *Massachusetts Dep't of Corrs.*, 190 F. Supp. 2d 204 (D. Mass. 2002) (complaint sufficient to state an ADA claim in suit in which prisoner alleged that he was denied the opportunity to participate in certain inmate programs based on the fact that he suffered from diabetes and a heart condition); *Navedo* v. *Maloney*, 172 F. Supp. 2d 276 (D. Mass. 2001) (denied defendant's motion for summary judgment in ADA suit where defendants' refusal to allow disabled inmate access to wheelchair and to accessible facilities caused severe and irreparable damage to his leg); *Becker* v. *Oregon*, 170 F. Supp. 2d 1061 (D. Or. 2001) (denying defendants' motion to dismiss in ADA and Rehabilitation Act suit brought by below-the-knee amputee inmate who alleged he was denied handicapped shower facilities); *Kruger* v. *Jenne*, 164 F. Supp. 2d 1330, 1332 (S.D. Fla. 2000) (denying motion to dismiss blind county jail inmate's ADA suit where inmate was denied a cane or equivalent accommodations and, as a result, he was injured in three separate falls); *Jones'El* v. *Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (preliminary injunction

granted where plaintiffs showed likelihood of success on merits of claims that seriously mentally ill inmates were subject to cruel and unusual conditions of confinement); *Maynor* v. *Morgan County*, 147 F. Supp. 2d 1185 (N.D. Ala. 2001) (preliminary injunction granted based on showing that county jail is unconstitutionally indifferent to the medical needs of mentally ill inmates); *Hicks* v. *Armstrong*, 116 F. Supp. 2d 287 (D. Conn. 1999) (denying motion to dismiss paraplegic pretrial detainee's ADA and Rehabilitation Act suit where detainee had no access to supplies for using the toilet or an accessible shower and was given a carton to urinate in and forced to lie in his own feces); *Lawson* v. *Dallas County*, 112 F. Supp. 2d 616 (N.D. Tex. 2000) (jail officials' denial of adequate medical care to paraplegic inmate, which resulted in his developing decubitus ulcers, constituted cruel and unusual punishment); *Hallett* v. *New York State Dep't of Corr. Servs.*, 109 F. Supp. 2d 190 (S.D.N.Y. 2000) (denying defendants' motion to dismiss in suit where former inmate alleged that he was denied access to special programs while incarcerated due to his status as an HIV-positive amputee, in violation of the ADA and Rehabilitation Act, and was denied proper medical care in violation of the Eighth Amendment); *Rainey* v. *County of Delaware*, No. Civ. A. 00-548, 2000 WL 1056456 (E.D. Pa. Aug. 1, 2000) (denying defendant's motion to dismiss in suit brought by semi-

paraplegic inmate in which he alleged that he was denied food and medical treatment); *Candelaria* v. *Cunningham*, No. 98 Civ. 6273(LAP), 2000 WL 280052, at *5 (S.D.N.Y. Mar. 14, 2000) (triable issue of fact precluded defendants' motion for summary judgment in suit brought by paraplegic inmate alleging that defendants' delayed treatment and failure to provide him with his prescribed diet constituted a violation of his Eighth Amendment rights); *Roop* v. *Squadrito*, 70 F. Supp. 2d 868 (N.D. Ind. 1999) (in Section 1983 and ADA suit brought by HIV-positive inmate, evidence raised genuine issue of material fact as to whether deprivations suffered by inmate while in jail constituted a violation of his civil rights, precluding summary judgment on inmate's Section 1983 claim, and evidence raised genuine issue of material fact as to whether inmate's medical condition required that he be treated differently from other inmates in jail, precluding summary judgment on inmate's claim that defendants violated the ADA); *Schmidt* v. *Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999) (denying defendants' motion for summary judgment in double amputee inmate's ADA and Rehabilitation Act suit where inmate alleged that county jail deprived him of a wheelchair or other accommodation and forced him to crawl and pull himself about the jail on the floor); *Beckford* v. *Irvin*, 49 F. Supp. 2d 170 (W.D.N.Y. 1999) (prison officials violated wheelchair-dependent inmate's

Eighth Amendment rights by depriving him of the use of his wheelchair for extended periods of time and denying him access to a shower or any other effective means of bathing); *McNally* v. *Prison Health Servs.*, 46 F. Supp. 2d 49 (D. Me. 1999) (fact issues precluded summary judgment for defendant where detainee alleged deprivation of his due process rights and violation of the ADA arising out of denial of medication required for his HIV condition while he was incarcerated for three days); *Montez* v. *Romer*, 32 F. Supp. 2d 1235 (D. Colo. 1999) (denying motion to dismiss prisoners' ADA and Rehabilitation Act suit where prisoners alleged, *inter alia*, that prison refused to accommodate their disabilities, resulting in their being unable to use law libraries, visiting areas, yard areas, laundry facilities, dining halls, vocational training, recreational facilities, bathing and restroom facilities, and medical clinics); *Perri* v. *Coughlin*, No. 90-1160, 1999 WL 395374 (N.D.N.Y. June 11, 1999) (finding violation of the Eighth Amendment rights of inmate identified as mentally ill where inmate was housed in segregated unit without clothes or a blanket for two months, which caused him to develop body sores from sleeping naked on the cold floor; where inmate was denied access to personal items, legal materials, and mail while in segregated unit; where inmate was forced to live for ten days in cell smeared with urine and feces; and where inmate supposed to be on sui-

cide watch managed to sever an artery on one occasion and hang himself to the point of unconsciousness on two occasions); *Morales Feliciano* v. *Rosselló González*, 13 F. Supp. 2d 151 (D.P.R. 1998) (correctional system violated constitutional rights of inmates by failing to provide adequate medical and mental health care to inmates with chronic illnesses and to inmates with mental illness); *Hanson* v. *Sangamon County Sheriff's Dep't*, 991 F. Supp. 1059 (C.D. Ill. 1998) (denying motion to dismiss deaf arrestee's ADA and Rehabilitation Act suit where sheriff's department failed to provide arrestee with hearing impaired equipment that it had available in order to communicate with friends and/or relatives to post bond even though officers knew he was deaf); *Purcell* v. *Pennsylvania Dep't of Corrs.*, No. 95-6720, 1998 WL 10236 (E.D. Pa. Jan. 9, 1998) (denying defendants' motion for summary judgment on inmate's ADA claims where prison guards punished inmate suffering from Tourette's Syndrome for following doctor's orders to remain in his cell in order to release his tics in private when needed, and where prison refused to provide a plastic shower chair for inmate suffering from degenerative joint disease); *Herndon* v. *Johnson*, 970 F. Supp. 703 (E.D. Ark. 1997) (denying defendants' motion for partial judgment on the pleadings in inmate's ADA and Rehabilitation Act suit where inmate with fused spine who regularly uses mobility aids alleged

that sheriff refused to provide him with certain assistive devices needed to allow him to have bowel movements and to prevent bed sores and other problems with his fused spine); *Saunders* v. *Horn*, 960 F. Supp. 893, 896-897 (E.D. Pa. 1997) (denying motion to dismiss inmate's Eighth Amendment suit where prisoner alleged that an "officer discarded his doctor-prescribed orthopedic shoes and cane, that he did not obtain treatment * * *, that the standard-issue shoes he was required to wear caused him constant pain, that [he] wrote to [defendants] about his difficulties, and that [defendants] did acquiesce in the failure to address [inmate's] medical condition"); *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); *Armstrong* v. *Wilson*, 942 F. Supp. 1252 (N.D. Cal. 1996) (denying defendants' motion for summary judgment in inmates' ADA and Rehabilitation Act suit where parties stipulated that some prison facilities do not have visual alarms or strobe lights to warn prisoners with hearing impairments of emergencies); *Bullock* v. *Gomez*, 929 F. Supp. 1299 (C.D. Cal. 1996) (denying defendants' motion for summary judgment in suit brought by HIV-

positive inmate and his wife, alleging that refusal to allow overnight visits violated the ADA and Rehabilitation Act); *Young* v. *Breeding*, 929 F. Supp. 1103 (N.D. Ill. 1996) (inmate stated Eighth Amendment claim against nurse and correctional officers who allegedly refused to provide him with medical attention during an asthma attack); *Coleman* v. *Wilson*, 912 F. Supp. 1282 (E.D. Cal. 1995) (Eighth Amendment violated by inadequate provision of mental health care, unnecessary segregation of inmates with mental illness, and unjustified use of tasers against mentally ill inmates); *Clarkson* v. *Coughlin*, 898 F. Supp. 1019 (S.D.N.Y. 1995) (violation of deaf and hearing impaired inmates' Due Process and Eighth Amendment rights where such inmates could not meaningfully participate in proceedings to protect their rights, such as disciplinary and good-time proceedings, as well as parole board proceedings, and where failure to provide assistive or interpretive devices constituted deliberate indifference to inmates' medical needs); *Love* v. *McBride*, 896 F. Supp. 808 (N.D. Ind. 1995) (finding sufficient evidence to support a finding that prison officials violated ADA by intentionally discriminating against inmate on the basis of his disability in denying him access to prison programs such as educational opportunities, the law library, outdoor recreation, religious services, and job assignments); *Madrid* v. *Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995) (mentally ill

inmates subject to cruel and unusual punishment in violation of Eighth Amendment); *Lowrance* v. *Coughlin*, 862 F. Supp. 1090 (S.D.N.Y. 1994) (prison delay in providing surgery for inmate's knee, and deprivation of postsurgery rehabilitation, violated the Eighth Amendment); *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); *Noland* v. *Wheatley*, 835 F. Supp. 476 (N.D. Ind. 1993) (denying defendant's motion for summary judgment on semi-quadriplegic inmate's ADA claims where jail placed inmate in cell without a bed or any furniture, and with no toilet beyond an open drain in the floor; where jail staff did not provide inmate with sufficient water to drink as prescribed by a physician; where inmate was not permitted to shower for three months; where inmate was consistently denied the medical treatment he required; where inmate was forced to crawl along the floor because of needed wheelchair repairs; where inmate was forced to sit for prolonged periods of time against doctor's orders, which resulted in pressure sores developing on his body; and where inmate was denied access to the law library and other programs and services because of his disability); *Casey* v. *Lewis*, 834 F. Supp. 1569 (D. Ariz. 1993) (failure to provide accessible bathrooms, showers, and cells to inmates with mobility impairments violates Eighth Amendment); *Benter* v.

Peck, 825 F. Supp. 1411 (S.D. Iowa 1993) (deliberate indifference to serious medical need in violation of Eighth Amendment where prescription glasses intentionally withheld from visually impaired inmate); *Harris* v. *O'Grady*, 803 F. Supp. 1361, 1364 (N.D. Ill. 1992) (blind pretrial detainee stated claims against correctional officers in suit where he alleged that they were deliberately indifferent to his blindness, as he was not examined by a physician for his eye condition for the eight months he was incarcerated, was never provided corrective glasses and lens or other treatment, and was not provided appropriate services or housing for his blindness); *Arnold* v. *Lewis*, 803 F. Supp. 246 (D. Ariz. 1992) (prison officials' actions constituted deliberate indifference to serious medical needs of an inmate diagnosed with schizophrenia in violation of the Eighth Amendment); *Nolley* v. *County of Erie*, 776 F. Supp. 715 (W.D.N.Y. 1991) (Constitution violated where inmate with HIV was housed in the part of a prison reserved for inmates who are mentally disturbed, suicidal, or a danger to themselves, and was denied access to prison library and religious services because of her HIV-positive status); *Yarbaugh* v. *Roach*, 736 F. Supp. 318 (D.D.C. 1990) (preliminary injunction granted to inmate with multiple sclerosis who was not provided with assistance in daily life, as a result of which he had not showered in many months and had fallen several times

while transferring between his wheelchair and his bed); *Tillery* v. *Owens*, 719 F. Supp. 1256 (W.D. Pa. 1989) (prison officials showed deliberate indifference to inmates' medical, dental, and psychiatric care needs, in violation of the Eighth Amendment, where, due to overcrowding, officials had failed to provide adequate staffing and equipment, and failed to maintain an environment conducive to treatment of serious medical illness); *Maynard* v. *New Jersey*, 719 F. Supp. 292 (D.N.J. 1989) (family of deceased inmate who brought suit against prison medical personnel for failure to diagnose and refusal to treat inmate's AIDS stated a viable Section 1983 claim against prison medical personnel); *Inmates of Occoquan* v. *Barry*, 717 F. Supp. 854 (D.C.D.C. 1989) (housing inmates with mental health problems with punitive segregation inmates violated the Eighth Amendment); *Langley* v. *Coughlin*, 715 F. Supp. 522 (S.D.N.Y. 1989) (triable issues of fact existed as to whether there had been inadequate medical care for the serious needs of mentally ill inmates in violation of the Eighth Amendment); *Bonner* v. *Arizona Dep't of Corrs.*, 714 F. Supp. 420 (D. Ariz. 1989) (deaf, mute, and vision-impaired inmate denied communication assistance, including in disciplinary proceedings, counseling sessions, and medical treatment); *Doe* v. *Coughlin*, 697 F. Supp. 1234 (N.D.N.Y. 1988) (preliminary injunction granted in class action seeking to prohibit further implementation of

a program involving the involuntary transfer to a separate dormitory of inmates who had tested positive for HIV); *Waldrop* v. *Evans*, 681 F. Supp. 840 (M.D. Ga. 1988) (consulting psychiatrist's decision to remove inmate from antipsychotic drug abruptly raised material question of fact as to psychiatrist's alleged deliberate indifference to inmate's medical needs; prison doctor's failure to contact psychiatrist after he learned of inmate's depression and attempts to lacerate his arm likewise raised material question of fact as to doctor's alleged deliberate indifference to inmate's medical needs); *Duran* v. *Anaya*, 642 F. Supp. 510 (D.N.M. 1986) (inmates were entitled to a preliminary injunction prohibiting implementation of proposed staff reductions with respect to medical care, mental health care, and security, where there was no evidence that staffing reductions of the magnitude contemplated would permit the maintenance of minimal constitutional standards in those areas); *Thompson* v. *City of Portland*, 620 F. Supp. 482, 485-487 (D. Me. 1985) (police violated the constitutional rights of a blind diabetic who was in insulin shock by arresting him, transporting him on floor of police cruiser, jailing him, and ignoring his explanation that he was in insulin shock, despite fact that he wore a Medic-Alert necklace and carried a white cane); *Balla* v. *Idaho State Bd. of Corr.*, 595 F. Supp. 1558, 1568 (D. Idaho 1984) (Eighth Amendment violated where psychiatric care at

prison is "almost nonexistent"); *Lee* v. *McManus*, 543 F. Supp. 386 (D. Kan. 1982) (preliminary injunction granted in suit brought by paraplegic inmate alleging that he had received improper medical care in violation of the Eighth Amendment); *Kendrick* v. *Bland*, 541 F. Supp. 21 (W.D. Ky. 1981) (violation of Eighth Amendment where mentally ill and impaired inmates confined to prison's "special needs unit" were subject to unwarranted uses of physical force and brutality by prison guards); *Flakes* v. *Percy*, 511 F. Supp. 1325 (W.D. Wis. 1981) (locking persons confined in a maximum security mental hospital, for any significant time, in a cell lacking a flush toilet and wash bowl was cruel and unusual punishment); *Young* v. *Harris*, 509 F. Supp. 1111 (S.D.N.Y. 1981) (state prisoner's complaint stated an Eighth Amendment claim where, despite passage of over two years since a leg brace was ordered and over 16 months since the problem with his leg had been brought to the attention of the prison authorities, he had not been provided with a leg brace that was necessary to enable him to walk without substantial difficulty and discomfort); *Ruiz* v. *Estelle*, 503 F. Supp. 1265, 1344-1346 (S.D. Tex. 1980) (although 10-15% of prison population was mentally retarded, prison did not provide any assistance to such inmates; as a result, mentally retarded inmates were denied access to programs that could lead to early release and to education programs, were subject to

more discipline than other inmates, and were more vulnerable to attacks and injuries), aff'd in relevant part, 679 F.2d 1115 (5th Cir. 1982); *Inmates of the Allegheny County Jail* v. *Peirce*, 487 F. Supp. 638 (W.D. Pa. 1980) (lack of mental health treatment being given to mentally ill inmates in a county jail amounted to deliberate indifference); *Lightfoot* v. *Walker*, 486 F. Supp. 504 (S.D. Ill. 1980) (health care system and environmental conditions and practices at state prison violated Eighth and Fourteenth Amendments where they led to unnecessary suffering due to deliberate indifference and misadministration of prison officials which was so gross as to be deemed wilful); *Negron* v. *Ward*, 458 F. Supp. 748 (S.D.N.Y. 1978) (superintendent of state prison hospital had a duty to provide psychiatric treatment to patients which could not be withheld as a form of discipline without due process); *Nelson* v. *Collins*, 455 F. Supp. 727 (D. Md. 1978) (Eighth Amendment violated when prison confined mentally ill inmates to isolation cells where they did not have adequate access to needed psychiatric or other medical treatment); *Sykes* v. *Kreiger*, 451 F. Supp. 421, 426 (N.D. Ohio 1975) (in inmate suit seeking relief for violations of constitutional rights, county jail officials ordered to submit a plan for the creation of a psychiatric ward for the inmates); *Palmigiano* v. *Garrahy*, 443 F. Supp. 956, 971 (D.R.I. 1977) ("The deliberate indifference displayed

by the defendants to the serious medical needs of drug dependant inmates leads to unnecessary and inevitable suffering."); *Laaman* v. *Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977) (psychiatric treatment at prison was "basically nonexistent" in spite of the fact that as much as 40% of inmate population needed intensive psychiatric treatment); *Sites* v. *McKenzie*, 423 F. Supp. 1190 (N.D. W. Va. 1976) (state statute precluding inmates confined to mental institutions from parole eligibility violated Equal Protection Clause); *Delafose* v. *Manson*, 385 F. Supp. 1115 (D. Conn. 1974) (prison practice of paying inmates who were receiving treatment for physical ailments 38 cents per day hospital pay while denying such payment to those receiving treatment for mental ailments denied equal protection to those receiving treatment for mental illness); *James* v. *Wallace*, 382 F. Supp. 1177 (M.D. Ala. 1974) (denying defendants' motion to dismiss suit alleging that prisoners had been refused the opportunity to rehabilitate themselves, that prisoners had been arbitrarily and capriciously assigned to units which have no treatment facilities for mental or physical disabilities, and that unreasonable restrictions had been placed on prisoners' visitation rights); *Negron* v. *Preiser*, 382 F. Supp. 535 (S.D.N.Y. 1974) (preliminary injunction issued in suit brought by patient-inmates challenging the constitutionality of the hospital's use of isolation cells); *Battle* v. *Anderson*, 376 F.

Supp. 402, 415 (E.D. Okla. 1974) ("Though approximately one half of the average in-patient population at the penitentiary is hospitalized for psychiatric reasons, there is no professional psychiatric staff available for treatment on a regular basis. A visiting psychiatrist makes weekly visits pursuant to an informal agreement, but he has not assumed responsibility for the care of these patients. The only 'treatment' available at the penitentiary consists of temporary relief from 'distress' through sedation."); *Burchett* v. *Bower*, 355 F. Supp. 1278 (D. Ariz. 1973) (administrator of state hospital and director of its maximum security ward had to comply with requirements of due process and equal protection before right of mentally ill state prisoner to treatment at hospital could be terminated); *Newman* v. *Alabama*, 349 F. Supp. 278, 284 (M.D. Ala. 1972) ("The fate of those many prisoners who are mentally ill or retarded deserves special mention. Mental illness and mental retardation are the most prevalent medical problems in the Alabama prison system. It is estimated that approximately 10 percent of the inmates are psychotic and another 60 percent are disturbed enough to require treatment. To diagnose and treat these almost 2400 inmates, the Board of Corrections employs one clinical psychologist, who works one afternoon each week at the [Medical and Diagnostic Center]. There are no psychiatrists, social workers, or counselors on the staff. Se-

vere, and sometimes dangerous, psychotics are regularly placed in the general population. If they become violent, they are removed to lockup cells which are not equipped with restraints or padding and where they are unattended. While some do obtain interviews with qualified medical personnel and a few are eventually transferred for treatment to a state mental hospital, the large majority of mentally disturbed prisoners receive no treatment whatsoever. It is tautological that such care is constitutionally inadequate."), aff'd in relevant part, 503 F.2d 1320 (5th Cir. 1974), atty. fee award vacated, 522 F.2d 71 (en banc), cert. denied, 421 U.S. 948 (1975); *Evans* v. *Page*, 755 N.E.2d 105, 107-108 (Ill. App. Ct. 2001) (reversing trial court's dismissal of paraplegic inmate's claims that prison violated ADA in denying him both transportation to and from court in a wheelchair-accessible vehicle and a comprehensive physical examination); *Adams* v. *Kentucky*, No. 2001-CA-002313-MR, 2003 WL 22025869 (Ky. Ct. App. Aug. 29, 2003) (reversing trial court's dismissal of prisoner's ADA claim; inmate alleged that prison failed to accommodate his disability in its programs); *State* v. *Johnson*, 670 A.2d 1012 (Md. Ct. App. 1996) (state had duty to render reasonable medical care to quadriplegic inmate); *Shedlock* v. *Dep't of Corr.*, 818 N.E.2d 1022, 1028, 1040 (Mass. 2004) (reversing grant of summary judgment for defendants on claims brought under Section 504 of the

Rehabilitation Act, the ADA, and state law; prisoner alleged that prison officials denied his request for a first-floor cell after he obtained a medical order stating that prisoner should be housed on the first floor because his chronic lower back pain and arthritis in his ankle makes it difficult for him to climb stairs); *Shedlock* v. *Massachusetts Dep't of Corr.*, No. Civ.A. 98-03631, 1999 WL 221143 (Mass. Super. Ct. Mar. 23, 1999) (denying motion to dismiss inmate's claim under ADA, alleging prison officials refused to accommodate his request for first-floor cell, where inmate suffered from sciatica, arthritis, and ankle and back pain which severely impacted his ability to ascend and descend stairs; inmate chose to be housed in disciplinary segregation unit rather than risk falling while climbing stairs.); *Doe* v. *Michigan Dep't of Corr.*, 601 N.W.2d 696 (Mich. Ct. App. 1999) (reversing dismissal of inmate claims alleging denial of placement in community residential programs, camps, and farms based on HIV-positive status violated Michigan civil rights statutes); *Bailey* v. *Minnesota Dep't of Corr.*, No. C6-03-6996, 2005 WL 901835, at *10 (Minn. Dist. Ct. Feb. 18, 2005) (prison violated the Rehabilitation Act, the ADA, and the Minnesota Human Rights Act, Minnesota Statute § 363A.01 *et seq.*, in failing to provide a qualified sign-language interpreter for inmate during his participation in the prison's sex-offender-treatment program); *Walker* v. *State*, 68

P.3d 872 (Mont. 2003) (finding violation of Eighth Amendment where inmate with diagnosed mental illness was placed on Behavior Modification Plan involving placement in stripped-down solitary cell, where he was deprived of clothing or bedding for days at a time, in response to behavior such as attempting suicide); *Kellogg* v. *Nebraska Dep't of Corr. Servs.*, 690 N.W.2d 574, 577, 579, 582 (Neb. 2005) (prisoner stated an actionable claim under 42 U.S.C. 1983 when he alleged that prison officials failed to accommodate physical disabilities, which prevented the prisoner from being able to provide a urine sample required by the prison's drug-testing program); *Parkinson* v. *Columbia County Dist. Attorney*, 679 N.Y.S.2d 505 (Sup. Ct. 1998) (finding due process and Eighth Amendment violations where inmate's prosthetic leg was taken away from him for at least a year, causing inmate to be confined to his cell, depriving him of access to the prison law library and recreation opportunities, and putting him at risk for further deterioration of his amputated leg); *Baker* v. *Ohio Dep't of Rehab. & Corr.*, 761 N.E.2d 667, 675-676 (Ohio Ct. App. 2001) (reversing trial court's dismissal of inmate's Eighth Amendment claim; prisoner, who suffered from Charcot-Marie-Tooth disease, alleged several instances of prison officials being deliberately indifferent to his serious medical needs).

ADDENDUM B

Findings of Investigations by the United States Department of Justice under the Civil Rights of Institutionalized Persons Act 42 U.S.C. 1997 *et seq.*

Between 1980 and the enactment of Title II of the Americans with Disabilities Act in 1990, Department of Justice investigations under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, found unconstitutional treatment of individuals with disabilities in correctional facilities in thirteen different States. From 1980 until the present, unconstitutional conditions have been found in 88 different correctional facilities in 33 States and 2 territories throughout the Country. The tables below describe some of the findings issued by the Department of Justice pursuant to 42 U.S.C. 1997b(a)(1). Copies of the complete findings letters will be provided to the Court upon request, and have been served upon counsel for all parties to this case.

I. Investigations Prior to Enactment of the Americans with Disabilities Act

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Western State Correctional Institution	MA	1981	Inadequate mental health care	Facilities for housing and treating mentally ill inmates are inadequate. Mentally ill inmates who should be separated from the general population are not always separated. (p. 2)
East Louisiana State Hospital	LA	1982	Inadequate medical and mental health care	pp. 2-4
State Prison of Southern Michigan, Marquette Branch Prison, and Michigan Reformatory	MI	1982	Inadequate mental health and medical care	Mental health care for inmates with serious mental illness is either inadequate or unavailable. (p. 4) "Psychiatrists either are not present at all * * * or are so rare that they offer virtually no assistance to seriously ill inmates." (p. 4) One facility had practice of "stripping naked psychotic inmates and inmates attempting suicide, shackling them, and placing them in a glazed cell without ventilation," in deliberate indifference to the inmates' serious mental health needs. (p. 4) Medical facilities, medical staffing, medical procedures and practices all inadequate to address inmates' serious medical conditions. (p. 4)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Wisconsin Prison System	WI	1982	Inadequate mental health care	A number of "severely mentally disturbed prisoners" did not receive appropriate mental health care, and the facilities lacked appropriate facilities for such inmates. (p. 2) "[C]hemical agents have been inappropriately used upon mentally disturbed inmates" and inmates who have been subjected to such agents have thereafter been denied medical treatment or the opportunity to shower and have their cells cleaned. (p. 2)
Oahu Community Correctional Center and High Security Facility	HI	1984	Inadequate mental health and medical care	Conditions at facility "reflect deliberate indifference or neglect of inmates' serious mental health needs." (p. 5) "Psychiatric inmates who should be removed from the general population are denied admittance to medical units" due to overcrowding. (p. 5) Some inmates are denied access to prescribed psychoactive medications while others are inappropriately subjected to "potentially harmful polypharmacy." (p. 5) Facility's "neglect of inmates' serious mental health needs threatens their health and safety." (p. 6)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Inmates who are severely ill and in need of acute care have received no medical treatment. (p. 9)
Ada County Jail	ID	1984	Inadequate medical care	Facility does not provide special meals to inmates with diabetes. (pp. 4-5)
Elgin Mental Health Centers	IL	1984	Inadequate medical and mental health care; inadequate training; unreasonable use of physical restraints	Lack of professional staff leads to "inappropriate uses of drugs and serious treatment errors which have resulted in physical danger to, or unnecessary physical or chemical restraint of, the involved patients." (p. 3) Patients are further "endangered by inadequate medical care relating to serious and sometimes debilitating or life-threatening drug side-effects." (p. 4)
			Failure to provide reasonable supervision and safety	"Units in the facilities are overcrowded to a point that makes it virtually impossible for staff to maintain control without regular and extensive use of physical and chemical restraints." (p. 4)
			Unsanitary conditions	"Sanitation and maintenance in portions of the facilities are so inadequate as to present serious risks to patients of poisoning, infection, or disease." (pp. 4-5)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Logansport State Hospital	IN	1984	Inadequate medical and mental health care	pp. 1-2
			Failure to provide reasonable supervision and safety	"Patients are not being adequately monitored and supervised to prevent suicidal behavior or patient-on-patient violence, to notice and correctly diagnose symptoms of serious, physical or psychiatric dysfunctions, to monitor treatment responses and drug reactions, or to determine appropriate and reasonably safe modes of treatment for each patient." (pp. 2-3)
Napa State Hospital	CA	1986	Failure to provide reasonable supervision and safety; unreasonable use of physical and chemical restraints	Severe staffing shortages "result in patient management, in lieu of treatment, through the inappropriate use of seclusion, chemical restraint, and physical restraint." (p. 2) Restraint practices "pose significant hazards to the personal safety of NSH patients." (p. 4)
			Inadequate medical and mental health care; inadequate training	Certain medication practices at facility "violated all known standards of medical practice" resulting in great danger to patient safety. (p. 2) There was no monitoring of drug side effects and several patients exhibited an "antipsychotic drug-induced side effect, potentially

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				irreversible, that may result in permanent physiological damage." (p. 3) Facility failed to provide training programs adequate to protect patient safety and avoid need for restraint and seclusion. (p. 5)
Kalamazoo Regional Psychiatric Hospital	MI	1986	Inadequate training; unreasonable use of physical restraints	Inadequate staffing prevents the facility from providing treatment that could "reduce or eliminate unreasonable risks to [patients'] personal safety and the undue use of bodily restraint." (p. 2)
			Inadequate medical and mental health care	Facility fails to adequately monitor efficacy and side effects of potentially dangerous drugs, creating unjustifiable risk of "deleterious side effects, tardive dyskinesia, involuntary, abnormal muscle movements, akathisia, and parkinsonism." (p. 3)
Hinds County Detention Center	MS	1986	Inadequate medical and mental health care	County Jail was being used to house mentally ill persons awaiting civil commitment hearings or placement in a mental hospital for up to eleven days. At time of investigation, jail held 42 mentally ill detainees. (pp. 1-2) No mental health treatment was provided during period of confinement. (p. 3)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				"Male mentally-ill detainees were confined * * * in a small cell designed to serve as the 'drunk tank.' Some of the detainees were placed in hand and leg irons." (p. 3)
Sing Sing Correctional Facility	NY	1986	Inadequate medical care	Inmates afflicted with AIDS do not receive adequate medical care. (p. 3)
Crittenden County Jail	AK	1987	Inadequate mental health care	Seriously mentally ill inmates do not receive any treatment at all. (p. 2)
California Medical Facility (houses inmates who require medical and/or mental health care)	CA	1987	Inadequate medical and mental health care	Facility's medical staff "freely stated that many inmates with serious medical conditions experience substantial and undue delays in access to the sick call clinic." (p. 2) "Professional psychiatric staff at [the facility] is grossly inadequate," resulting in the facility's inability "to provide psychiatric care necessary to address the medical needs of inmates who are seriously mentally ill." (p. 3)
			Failure to protect from harm	Inmates with serious mental illnesses are rapidly discharged without proper treatment due to space shortages or other non-medical reasons. "Untreated, these inmates with serious mental illnesses are exposed to undue risks to their personal safety." (p. 3)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inhumane living conditions	In one unit housing more than 80 inmates, many of whom were in wheelchairs, there were only two toilets, three communal shower heads, and one bathtub that was not accessible to inmates with disabilities. (p. 4)
Los Angeles County Juvenile Halls	CA	1987	Inadequate mental health care	"Seriously mentally ill juveniles are denied necessary mental health care. By their own admission, [facility] staff often do not refer seriously mentally ill juveniles, including self-injurious juveniles who have been placed in restraints, to mental health staff." (p. 5)
Santa Rita Jail	CA	1987	Inadequate mental health care	Inmates classified as "mental health inmates," including inmates with serious mental illnesses, are housed in the maximum security area and do not have access to adequate mental health care. (p. 4)
Kansas State Penitentiary	KS	1987	Inadequate mental health care	Inmates placed in "mental protective custody" receive "grossly insufficient mental health services even though they have been identified as being seriously mentally ill and in need of mental health care." (pp. 2-3)

II. Investigations Subsequent to Enactment of the Americans with Disabilities Act

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Louisiana State Penitentiary at Angola	LA	1991	Inadequate medical and mental health care	Medical care for inmates with chronic illnesses "is grossly inadequate" and "can jeopardize inmates' health." (p. 3) Inmates who are "assessed as chronically or acutely mentally ill, mentally retarded, and/or lacking behavioral controls" are housed in an area of the prison that is "essentially an extended lockdown area." Such inmates "are locked within cells 24 hours a day, [and] are shackled in leg irons, cuffs and chains when transported or let out of their cells – even though they have not necessarily been determined to be violent, only mentally ill." (p. 4) Mentally ill inmates "do not receive any active psychiatric or psychological treatment." (p. 4) Facility's treatment of mentally ill inmates "significantly contributes to deterioration of their mental condition and does not approach accepted standards of care." (p. 4) Facility's failure to provide adequate mental health care

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				to mentally ill inmates "results in excessive chemical and physical restraint and jeopardizes their mental and physical health." (p. 5)
Pine Hill School for Boys	MT	1992	Inadequate mental health care	Facility "provides grossly inadequate mental health services to juveniles with serious mental health needs." (Attachment, p. 3)
Memphis Mental Health Institute	TN	1992	Inadequate medical and mental health care	Deficiencies in the facility's medical care system contributed to two recent deaths. (pp. 5-6) Lack of psychiatrists leads to serious errors in diagnosis and medication prescription. (pp. 7-8)
			Unreasonable use of physical and chemical restraints	"Patients at MMHI are subjected to both an undue amount of bodily restraint and dangerous restraint practices." (p. 9) "[S]taff members are placing patients inappropriately in physical restraints simply because they are confused or disoriented." Patients are also restrained while sedated, "a substantial departure from accepted standards of psychiatric care." (pp. 9-10)
Alcorn County Jail	MS	1993	Inadequate medical care	Facility has no provision for providing health maintenance care to inmates with chronic illnesses. (p. 3)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Corinth City Jail	MS	1993	Inadequate medical and mental health care	Inmates with AIDS and seizure disorders do not receive appropriate medical care. (p. 2) Access to mental health care and treatment is "nonexistent" at facility. (pp. 2-3)
Forrest County Jail	MS	1993	Inadequate mental health care	"There are no mental health services available at the jail and the holding cells into which disturbed or mentally-ill * * * prisoners are placed [who] pose a direct threat to their health and safety." (Attachment, p. 2) "During the course of our tour of the jail, our consultants observed a severely mentally ill inmate, clad only in an undershirt, housed in the general population" where he had been waiting for several weeks for a transfer to a mental health facility. "He had allegedly eaten some glass and was prone to defecate on the floor of the cell." (Attachment, pp. 2-3)
Harrison County Juvenile Detention Center	MS	1993	Inadequate mental health care	Youth identified as suicidal are not monitored adequately. (p. 2)
Jackson City - Hinds County Youth Detention Center	MS	1993	Inadequate medical and mental health care	Failure to detect or treat serious medical conditions in incarcerated youth. One juvenile who was mildly retarded heard voices telling him to kill himself but was not

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				seen by a psychiatrist. (p. 2)
Jones County Jail	MS	1993	Inadequate medical and mental health care	Mentally ill inmates and mentally ill persons detained pending civil commitment proceedings are housed in five-by-six foot steel cage, sometimes for months. (Attachment, p. 4)
Lauderdale County Jail	MS	1993	Inadequate medical and mental health care	Psychotropic medications are distributed to inmates without proper controls. (p. 4)
Lee County Jail	MS	1993	Inadequate mental health care	Facility "has no arrangements with an appropriate medical professional to provide necessary mental health services to inmates who need such services." (p. 5)
Neshoba County Detention Center	MS	1993	Inadequate mental health care	"Access to mental health services and treatment within the Detention Center is nonexistent." (p. 3)
Simpson County Jail	MS	1993	Inadequate mental health care	"Access to mental health services and treatment within the Jail is nonexistent." (p. 4)
Sunflower County Jail	MS	1993	Inadequate medical and mental health care	Medical care for inmates with chronic illnesses such as AIDS is inadequate. (p. 3) Facility "emphatically" refuses to provide any mental health care unless ordered to do so by a court. (p. 4)
Tupelo City Jail	MS	1993	Inadequate medical care	Provision of prescribed medicine to inmate with diabetes was erratic, putting inmate at risk of developing serious complications. (p. 3)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Montana State Prison	MT	1993	Inadequate medical and mental health care	Personnel assigned to provide medical care to inmates with serious medical conditions such as AIDS "did not appear to have the necessary medical expertise to treat such conditions." (p. 2) Inmates who are disabled or are unable adequately to describe their medical conditions in writing are likely to be left untreated by the medical staff, a failing that has had "particularly serious consequences for inmates with chronic diseases." (p. 3) Facility "also fails in providing minimally adequate care to patients with special medical needs." (p. 4) Inmates with mental illness do not receive adequate mental health care and are subject to conditions that "may tend to exacerbate mental illness." (p. 5) "The situation for [facility's] inmates who are psychotic is worse." Such inmates are housed in maximum security cells and are not allowed out of those cells. (pp. 5-6) Psychotropic and other medications are administered by personnel who lack appropriate training. (pp. 6-7)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Mountain View School for Girls	MT	1993	Inadequate mental health care	Failure to provide adequate treatment to youth who are suicidal or who have "clearly identifiable mental health problems, including depression, hallucinations, delusions, or paranoia." (Attachment, p. 1)
San Diego County Jails	CA	1994	Inadequate mental health care	Inmates with mental illness housed in "safety cells" for days at a time, a practice that poses an unreasonable risk of harm to those inmates. (p. 6)
Wayne County Juvenile Detention Facility	MI	1994	Inadequate mental health care	Insufficient number of mental health professionals to treat the number of incarcerated youth with mental health problems. (pp. 10-11) Failure to provide mental health services to youth who attempt suicide. (p. 11)
Onondaga County Jail	NY	1994	Excessive use of force	Pepper spray is used on prisoners who attempt suicide. When one prisoner attempted to hang himself in his cell, officers "entered the cell, untied the prisoner, cuffed him to his bunk, and sprayed him with pepper spray." (p. 3)
Tulsa County Jail	OK	1994	Inadequate medical care	Provision of medical care to inmates with HIV is inadequate. (p. 7)
Juvenile Facilities in Puerto Rico	PR	1994	Inadequate mental health care	"Suicidal and/or self-mutilating youths are harming themselves without staff intervention or psychiatric treatment." (p. 4)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Norfolk City Jail	VA	1994	Inadequate medical and mental health care	Failure to provide adequate treatment to inmates with chronic illnesses such as seizure disorders and HIV. (p. 8) Inadequate mental health services for inmates who are "seriously mentally ill." (p. 11)
Easterling Correctional Facility	AL	1995	Cruel and unusual punishment	"[I]nmates with medical conditions [that] prevent them from working can be placed on the hitching pole without medical clearances." (p. 3)
Julia Tutwiler Prison for Women	AL	1995	Inadequate mental health and medical care	Mental health care for a number of inmates "fails to meet even minimal professional standards." (p. 2) Mental health care at facility "almost nonexistent." (p. 2) "[S]everely[] mentally ill inmates in need of hospitalization remain at [facility] for months without adequate monitoring." (p. 2) "The use and management of psychiatric drugs is dangerously deficient." (p. 3) Significant deficiencies found in "facilities for physically disabled." (p. 3)
			Cruel and unusual punishment	Inmates who are unable to work for medical reasons may be punished by being placed on the "rail," an outdoor steel pole to which inmates are shackled while standing up for up to a day. (pp. 6-7)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Harris County Jail	GA	1995	Inadequate medical care	Inmates with chronic medical conditions receive inadequate health care. (p. 3)
Lee County Jail	GA	1995	Inadequate medical care	Facility does not provide special meals to inmates with diabetes. (p. 4)
Marion County Detention Center	GA	1995	Inadequate mental health care	No mental health services provided to inmates. (p. 4)
Mitchell County Jail	GA	1995	Inadequate mental health care	Facility has no staff trained to recognize mental illness or mental retardation, and houses suicidal inmates in a room without proper supervision. (p. 5)
Muscogee County Jail	GA	1995	Inadequate mental health care	Inmates with mental illness do not receive mental health care or prescribed psychotropic medications in a timely manner. (p. 5)
Turner County Jail	GA	1995	Inadequate medical care	Facility does not provide special meals to inmates with diabetes. (p. 4)
Kentucky Youth Detention Facilities	KY	1995	Inadequate mental health care	Youth identified as needing regular mental health services are not provided with such services. (p. 8) Two youth placed at facility "were seriously emotionally disturbed with histories of prior psychiatric hospitalizations" but were not seen by a mental health professional at facility. (p. 8)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Crane and Scott Correctional Centers	MI	1995	Inadequate medical and mental health care	"Inmates with specialized medical needs" – such as inmates with AIDS – fail to receive adequate medical care. (p. 7) "Mental health care is so grossly deficient that there is no real attempt to provide mental health services." (p. 8) Inmates who indicate that they are suicidal "are not taken seriously or are placed in punitive segregation." (p. 8) All mental health complaints treated with medication as inmates are told to "sleep it off." (p. 8)
Hampton City Jail	VA	1995	Inadequate medical care	Inadequate medical care for inmates infected with HIV. (p. 4)
Coffee County Jail	GA	1996	Inadequate mental health care	Suicidal inmates placed in cells where they are not properly monitored; placement in such cells "may even facilitate inmate suicide." (p. 6)
Maryland Correctional Adjustment Center	MD	1996	Inadequate mental health care	"[S]ystemic deficiencies render [prison's] mental health care system incapable of satisfying minimum constitutional standards." (p. 7) Failure to adequately screen for mental illness. (p. 7) Inmates "demonstrating active psychotic symptoms" remained in general population. (p. 7)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Mental health care limited to provision of medication only. (p. 8)
Los Angeles County Jail	CA	1997	Inadequate mental health care	Jail system housing approximately 1,700 mentally ill inmates provides virtually no treatment to most inmates other than medication. (p. 8)
			Failure to provide reasonable supervision and safety	Jail places many mentally ill inmates in general population, but requires them to wear uniforms that designate them as mentally ill. As a result, many inmates have suffered from beatings and sexual assaults. (pp. 14, 17)
			Failure to protect from physical harm	Inmates housed in mental health housing are "subject to an unacceptably high risk of physical abuse and other mistreatment at the hands of other inmates and custody staff." (p. 17)
Louisiana Juvenile Correctional Facilities	LA	1997	Excessive use of force	At least one youth was "hog-tied" as a means of suicide prevention. (p. 7) Youth with suicidal tendencies and self-mutilating behavior are disciplined with segregated isolation. (pp. 7-8)
			Inadequate mental health care	"[Y]outh with mental health problems that result in disruptive and/or self-destructive behaviors are transferred routinely to [facilities'] restrictive units where they experience prolonged periods of isolation and deprivation of a number of services without needed

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				treatment for underlying mental health problems. * * * Many of these youth increased their self-mutilation and disruptive behaviors as a result of the increased isolation." (p. 10) Management of psychotropic medications is inadequate. (p. 14)
Washington County Detention Center	MD	1997	Inadequate medical care	"Medical care for inmates infected with HIV is practically nonexistent, posing immediate danger to their health." (p. 4)
Mercer County Detention Center	NJ	1997	Inadequate mental health care	Inmates with mental illness are denied access to mental health professionals and prescription medication. (p. 4)
Georgia Juvenile Facilities	GA	1998	Inadequate mental health care	Inadequate mental health care provided throughout State's juvenile detention facilities and training schools. (pp. 9-11, 19-22) Many mentally ill youth "end up locked in security units where they spend large portions of their days isolated in small rooms with few activities. In these units, and elsewhere, they are often restrained, hit, shackled, put in restraint chairs for hours, and sprayed with [pepper spray] by staff who lack the training and resources to respond appropriately to the manifestations of mental illness." (p. 20)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Adult Correctional Facility and Hagatna Detention Facility	Guam	1998	Failure to protect from harm	Failure to classify and segregate inmates with physical or mental impairments, which leads to failure to house such inmates safely. "This failure results in vulnerable inmates being subject to predation in the general population." (p. 7)
Davies County Detention Center	KY	1998	Inadequate mental health care	Jail provides no mental health services. "During our tour, we observed several acutely mentally ill individuals at the main jail, obviously in need of psychiatric evaluation and treatment, being left for days at a time in 'observation' – *i.e.*, in a cell by themselves. One inmate was observed singing for hours on end, and eating his own feces." (p. 11) As a result of inadequate mental health and suicide prevention system, a 15-year-old boy killed himself. (p. 12)
			Failure to protect from harm	Inadequate inmate classification system fails to separate vulnerable inmates with physical or mental impairments from other inmates who are likely to abuse them. (p. 6)
Greenville County Detention Center	SC	1998	Inadequate mental health care	Facility fails to provide any treatment to inmates with mental illness. (p. 11)
Morgan County Jail and Sheriff's Department	TN	1998	Inadequate medical and mental health care	Inmates with conditions such as seizure disorders and mental health problems are frequently not seen for weeks after complaining of a medical problem. (p. 8)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Dickens County Correctional Center	TX	1998	Inadequate medical and mental health care	Inadequate provision of medical care to inmates with chronic illnesses such as seizure disorders. (p. 6) Facility uses restraints and seclusion for mental health purposes without appropriate medical or psychological evaluation of inmates. (p. 8)
Black Hawk County Jail	IA	1999	Inadequate medical and mental health care	Inadequate intake screening procedures result in delays in or lack of treatment of inmates with HIV. (p. 4) Inadequate mental health care leaves most mentally ill inmates without any mental health care at all. (pp. 6-11) "Because it lacks an adequate system for delivering mental health care, the Jail relies on punitive methods, including segregation and restraint, to control the behavior of inmates who are mentally ill." (p. 11)
McCracken County Regional Jail	KY	1999	Inadequate medical and mental health care	Inmates whose initial intake screenings disclose active medical or mental health problems are not referred to medical personnel for review. (pp. 3-4) One inmate who disclosed that he had HIV at the time of his intake was not medically evaluated for six months. Another inmate who disclosed that she had diabetes at the time of her intake and who requested medication on

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				numerous occasions did not receive her medication for a month. (p. 4) Facility "fails to provide inmates access to mental health care." (p. 8) "Because it has no system for delivering mental health care, the Jail relies on punitive methods such as segregation and restraint to manage inmates who are mentally ill." (p. 9)
Clark County Detention Center	NV	1999	Inadequate mental health care	Jail failed to adequately identify mentally ill inmates and provide appropriate treatment, resulting in serious harm and suicides. (pp. 5-6)
Western State Hospital	VA	1999	Inadequate medical and mental health care	Facility fails to identify and address mental health needs, leading to inadequate treatment and risk of harm. In one case, patient identified as suicidal was given no treatment to address suicidal urges and subsequently hanged himself in his room. (pp. 3-4) Physicians are not permitted to prescribe some medically-indicated drugs for budget reasons. (pp. 5-6) Inadequate medical care contributed to several recent deaths. (p. 8)
			Unreasonable use of physical and chemical restraints	Facility uses excessive and dangerous restraint techniques. (p. 7)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Failure to provide reasonable supervision and safety; inadequate training	Combination of inadequate staffing and training for patients results in high level of violence and injuries. Within one 90-day period, the facility of 370 patients "recorded 169 altercations, 81 instances of self-injurious behavior, and 128 falls" as well as 8 suicide attempts and 13 escapes. In the recent past, one patient committed suicide and was dead for an hour before being discovered. (p. 9)
Wyoming State Penitentiary	WY	1999	Inadequate medical and mental health care	Facility fails to provide prescribed medication to inmates, including inmates with HIV. (p. 4) Dangerous patterns of polypharmacy and excess prescription of psychotropic drugs found. (p. 5) Inadequate treatment of inmates with chronic illnesses such as HIV. (p. 6) Provision of mental health care is "critically deficient." (p. 7) Pattern of failing to provide mental health referrals to inmates with clearly documented histories of mental health problems, including histories of hospitalization. As a result, a number of the inmates "deteriorated into psychiatric crisis situations." (p. 9)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Pattern of failing to provide mental health services to inmates with history of mental illness and inmates who requested such services until such inmates were involved in a mental health crisis such as attempting suicide. (p. 9) Inmates in the general population who are receiving mental health care no longer receive such care when they are assigned to administrative segregation. (p. 10) Facility withheld certain mental health medication from inmates in the general population. Such inmates then became irritable and abusive, which led to punitive segregation placements. (p.10) Improper prescription and monitoring of psychotropic medication for the treatment of mental illness. (p. 11)
			Failure to protect from physical harm	Protective custody inmates such as inmates with mental retardation are housed with the most dangerous inmates in the facility, "thereby dramatically increasing the risk of harm to protective custody inmates." (p. 13)
Jackson County Correctional Facility	FL	2000	Inadequate medical and mental health care	Because of facility's policy of not paying for antidepressants, jail physicians often did not approve needed treatment unless the inmate could pay for it. (p. 5)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Inadequate provision of medical care to inmates with chronic illnesses such as AIDS and mental illness. (p. 6) Inmates with mental illness who experience episodes of psychotic outbursts or suicidal tendencies after being denied access to previously pre-scribed medications are locked in administrative segregation, sometimes by means of "significant uses of force and restraint devices." (p. 7)
Cape Girardeau County Jail	MO	2000	Inadequate medical and mental health care	Facility lacks capacity to provide medical care to inmates with chronic illnesses. (p. 5) Mental health care is rare or non-existent, which places inmates at risk for suicide and increased mental illness. (p. 5)
Nassau County Correctional Center	NY	2000	Excessive use of force	Inmates with mental illness are "often the targets of unjustified uses of force." (p. 3)
			Inadequate medical and mental health care	Inadequate provision of medical care for inmates with chronic illnesses such as seizure disorders and HIV. (p. 12) One inmate with HIV was not given his medication and subsequently was not seen by a physician when he developed a fever and productive cough. Inmate was then admitted to the

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				medical center, where he died of Pneumocystis pneumonia, a disease that is preventable with the medication he should have received. (p. 12)
Shelby County Jail	TN	2001	Excessive use of force	Five officers in riot gear pepper-sprayed an inmate who was known to be hearing-impaired and was lying quietly in his cell, forcibly removed him from his cell, strapped him into a five-point restraint chair, and covered his head with a solid canvas hood because he did not obey a verbal order to take a shower. (pp. 10-11) Many incidents discovered in which jail staff "used force, including pepper spray, against inmates displaying self-injurious behavior characteristic of mental illness, without consulting with mental health staff about appropriate intervention." (p. 19)
			Inadequate medical and mental health care	Inadequate intake medical screening results in significant delays in administering previously prescribed medications to inmates with conditions such as HIV and seizure disorders – delays that are "potentially life-threatening." (pp. 12-13) Inadequate intake evaluations also result in delays or failures in administering previously prescribed psychotropic medication. In

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				one case, an inmate who was not provided with his mood-stabilizing medication committed suicide. (p. 13) Inmates with chronic illnesses such as HIV receive inadequate health care. (pp. 16-17) Serious inadequacies in the administration of medication to inmates with chronic conditions such as serious mental illness and HIV. (pp. 17-18)
Alexander Youth Services Center	AK	2002	Inadequate medical and mental health care	Inadequate mental health care systems contributed to preventable suicides. (pp. 4-6) Facility provided no professional individualized treatment, other than medication, to seriously mentally ill incarcerated youth. (p. 7)
Baltimore City Detention Center	MD	2002	Inadequate medical and mental health care	Inmates who indicated mental illness or other medical condition at intake were not provided with medical care in a timely fashion. (p. 9) Provision of medical care to inmates with HIV is inadequate; prescribed medications frequently denied to such inmates. (p. 16) Inmates often denied access to previously prescribed psychotropic medication. (p. 17)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Mental health care is not provided to inmates in need of it in a timely fashion, which has led to "residents decompensating and requiring admissions, and sometimes multiple admissions to the inpatient mental health units." (p. 18) Men treated in the inpatient mental health unit are denied reasonable access to bathrooms and are required to urinate in bottles rather than in toilets. (p. 20)
Wicomico County Detention Center	MD	2002	Inadequate medical and mental health care	Inadequate provision of medical care to inmates with chronic illnesses such as AIDS, creating "risk that inmates and detainees will suffer serious and preventable medical harm." (p. 3) Facility's mental health unit "fails to provide any meaningful mental health treatment." (p. 6) Inmates with mental illness do not receive mental health care in a timely fashion; such delay in treatment poses the risk of "further deterioration and harm to inmates and detainees." (p. 6)
Nevada Youth Training Center	NV	2002	Inadequate medical and mental health care	When mentally ill youth are receiving psychotropic medications at the time of entry into the facility, those "medications are automatically and permanently discontinued

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				upon the youths' arrival" without individualized review by a medical professional. (p. 9)
Custer Youth Correctional Center	SD	2002	Inadequate mental health care	Some youth who are already taking psychotropic medication when they arrive at the facility are not seen by a psychiatrist for over 80 days. (p. 7)
McPherson and Grimes Correctional Units	AR	2003	Inadequate medical and mental health care	Inmates with chronic conditions such as HIV and seizure disorders do not receive adequate medical care. (p. 5) Facility failed to adequately diagnose serious mental illnesses. (p. 14) Failure to adequately monitor inmates who take psychotropic medications. (pp. 15-16) Facility set aside a special unit for the purpose of treating seriously mentally ill inmates. However, inmates assigned to that unit "do not receive meaningful treatment." (p. 17)
Los Angeles County Juvenile Halls	CA	2003	Inadequate medical and mental health care	Failure to treat estimated 75% of juveniles in need of mental health care. (p. 7) Failure to comport with professional standards regarding psychological counseling. (pp. 12-14)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Failure to administer psychotropic medications safely and effectively. (pp. 14-16) Failure to effectively treat youths on suicide watch. (pp. 17-18) Youth with chronic illnesses such as epilepsy and HIV/AIDS were often denied access to outside medical consultations due to lack of transportation. (p. 28)
			Excessive use of force	Unjustified use of Oleoresin Capsicum spray, including against juveniles with respiratory problems, suicidal youth, and youth diagnosed as psychotic. (pp. 20-22)
Metropolitan State Hospital	CA	2003	Inadequate mental health care	Psychiatric services "substantially depart from generally accepted professional standards of care and expose the children and adolescents [in the facility] to a significant risk of harm and to actual harm." (p. 3) Inappropriate use of psychotropic medications. (pp. 9-11)
			Unreasonable use of physical and chemical restraints	Use of physical and chemical restraints "substantially departs" from standards of care and exposes children to "excessive and unnecessary restrictive interventions." (p. 25)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Oakley & Columbia Training Schools	MS	2003	Excessive use of force	Incarcerated youth who exhibit suicidal behaviors are punished by being sprayed with a caustic substance. (p. 11)
			Inadequate mental health care	"Many youth on psychiatric medications are not allowed to continue to receive those medications when they are admitted." (p. 15) Facilities "fail to employ adequate suicide prevention measures" with regard to youth identified as suicidal. (p. 16)
Santa Fe County Adult Detention Center	NM	2003	Inadequate medical and mental health care	Facility fails to provide adequate medical care to inmates with chronic illnesses such as HIV. (p. 9) Facility failed to administer antipsychotic medication to inmates who arrived at the facility with a diagnosis and prescribed medication. (pp. 11-12) Facility provides no qualified medical staff to treat inmates with serious mental illness, permitting counselors to make medical decisions about psychotropic medications. (pp. 16-17)
Garfield County Jail & Garfield County Work Center	OK	2003	Inadequate medical and mental health care	Facility lacks capacity to segregate inmates for purposes of accommodating medical or mental health needs. (p. 7)

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Facility initially screens inmates in order to identify inmates with serious medical or other chronic conditions and to refer them for treatment. However, "[e]ven when detention officers identify an inmate with serious medical needs during the intake process, the Jail does not immediately refer those inmates to a medical professional." (p. 10) Provision of mental health care inadequate, particularly in regard to suicide prevention. (pp. 13-14)
LeFlore County Jail	OK	2003	Inadequate medical and mental health care	Facility lacks capacity to segregate inmates for purposes of accommodating medical or mental health needs. (p. 4-5) Failure to refer inmates with serious medical conditions to a medical professional at initial screening. (p. 8-9) Inadequate provision of mental health care. Facility has not contracted with any psychiatrist to provide care for mentally ill inmates. (p. 12)
Patrick County Jail	VA	2003	Inadequate medical care	Facility lacks capacity to segregate inmates for purposes of accommodating medical or mental health needs. (p. 5) Intake screening system ineffective in identifying inmates with chronic medical

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				conditions and inmates with mental illness. (pp. 8-9, 13) Inmates with pre-existing medical conditions are required to pay for the full cost of medical care, while other inmates in need of medical care are not. (p. 12)
Black Mountain School and Catalina Mountain School	AZ	2004	Inadequate mental health care	Inadequate mental health care and rehabilitative plans for incarcerated youth. (pp. 32-33)
Cheltenham Youth Facility and Charles H. Hickey, Jr. School	MD	2004	Failure to protect from harm	Youth inmates identified as mentally ill are housed with youth who have poor impulse control or other behavioral problems, putting mentally ill youth at "especially high risk of victimization." (p. 11)
			Inadequate mental health care	Youth inmates identified as suicidal are not provided with adequate mental health care and monitoring. (p. 14) Some youths with serious mental health needs that cannot be met at the facility are not transferred to an appropriate facility. (p. 19) Youth with diminished mental capacity and/or mental health conditions that make it difficult for them to follow orders are frequently disciplined for their inability to carry out staff orders. (p. 25) Psychotropic medications are frequently prescribed without appropriate evaluation and

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				without subsequent monitoring. (p. 27)
W.J. Maxey Training School	MI	2004	Inadequate mental health care	Incarcerated youth with mental illness too severe to be treated at facility were not transferred to an appropriate facility, and were therefore exposed to heightened degrees of danger and subjected to overly restrictive settings. (pp. 16-17)
L.E. Rader Center	OK	2005	Inadequate mental health care	Failure to monitor incarcerated youth with identified history of engaging in self-injurious behavior. (p. 12)

ADDENDUM C

The Department of Justice supplements private enforcement of Title II of the ADA through the Disability Rights Section of the Civil Rights Division. Below is a summary of some of the Civil Rights Division's efforts to enforce Title II in the context of correctional institutions.

Project Civic Access

As part of its enforcement of Title II of the ADA and Section 504 of the Rehabilitation Act, the Civil Rights Division operates a program called Project Civic Access (PCA). PCA is a wide-ranging effort to ensure that counties, cities, towns, and villages comply with the ADA by eliminating physical and communication barriers that prevent people with disabilities from participating fully in community life. The Department has conducted reviews in communities around the country and has entered into a number of settlement agreements to help cities and counties come into compliance with the ADA and Section 504. Those agreements are available at http://www.ada.gov/civicac.htm. Below is a chart summarizing the 45 settlement agreements in 31 different States that include provisions addressing prisons, jails, and other detention facilities.

Jurisdiction	***Type of Problem***	***Date of Settlement***
Monroe County, PA	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments. ▸ Cells at correctional facility inaccessible to persons with disabilities.	April, 2005
Sedona, AZ	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments. ▸ Holding cell inaccessible to persons with disabilities.	January, 2005
Hutchinson, KS	▸ Holding cell inaccessible to persons with disabilities.	January, 2005

Jurisdiction	***Type of Problem***	***Date of Settlement***
San Luis Obispo, CA	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments. ▸ Holding cells and associated bathroom facilities inaccessible to persons with disabilities.	December, 2004
Missoula County, MT	▸ Detention facility does not have auxiliary aids or interpreters for inmates with hearing and speech impairments. ▸ Detention facility telephones not accessible to inmates with hearing and speech impairments. ▸ Holding cell toilet inaccessible to persons with disabilities.	December, 2004
Cheshire County, NH	▸ Holding cell and associated bathroom facilities inaccessible to persons with disabilities. ▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	December, 2004
Washington County, UT	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	December, 2004
Gallup, NM	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	September, 2004
Bend, OR	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments. ▸ Holding cell toilet inaccessible to persons with disabilities.	September, 2004
Suffolk, VA	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	September, 2004

Jurisdiction	***Type of Problem***	***Date of Settlement***
Juneau, AK	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	August, 2004
Citrus County, FL	▸ Holding cell toilet inaccessible to persons with disabilities.	August, 2004
Lafayette County, FL	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	August, 2004
Frederick, MD	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	August, 2004
Burton, MI	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	August, 2004
Butler County, MO	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	August, 2004
Cape May County, NJ	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments. ▸ Correctional facility does not have any cells that are accessible to persons with disabilities.	August, 2004
Taos County, NM	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments. ▸ Detention center holding cell lacks accessible shower and toilet. ▸ Juvenile detention facility lacks accessible bathrooms for women. ▸ Recreation room and holding cells at juvenile detention facility not accessible to persons with disabilities.	August, 2004

Jurisdiction	***Type of Problem***	***Date of Settlement***
Highland County, OH	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	August, 2004
Deschutes County, OR	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments. ▸ Toilets, showers, and lavatories in jail inmate areas not sufficiently accessible to persons with disabilities. ▸ All inmate areas in county jail, including cells, exercise areas, holding rooms, and dressing rooms lack full accessibility.	August, 2004
Minnehaha County, SD	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments. ▸ Bathrooms at correctional facility are not accessible to persons with disabilities.	August, 2004
Lakewood, WA	▸ Toilet in holding cell at City Hall not fully accessible to persons with disabilities.	August, 2004
Green Bay, WI	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	August, 2004
Springfield, MA	▸ Police department lacks accessible holding cells. ▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	February, 2004
City of Detroit, MI	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	February, 2004

Jurisdiction	***Type of Problem***	***Date of Settlement***
Lincoln County, NE	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	February, 2004
Carson City, NV	▸ Jail lacks accessible inmate toilets and holding cells.	February, 2004
City of Binghamton, NY	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	February, 2004
Tillamook County, OR	▸ Holding cells do not have accessible toilet facilities.	August, 2003
Madison County, MS	▸ Detention facility has no accessible cells. ▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	July, 2003
Worcester County, MD	▸ Jail holding cells do not have showers that are accessible to persons with disabilities. ▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	July, 2003
City of Burlington, VT	▸ Police station holding cells are not accessible and do not have accessible toilet facilities.	December, 2002
Red Bank, NJ	▸ Toilet in holding cell inaccessible to persons with disabilities.	October, 2002
City of San Antonio, TX	▸ Holding cells do not have accessible toilet facilities.	January, 2002
Craig County, VA	▸ Sheriff's department holding cells not accessible to persons with disabilities.	January, 2002

Jurisdiction	***Type of Problem***	***Date of Settlement***
Warren County, IL	▸ Cells and cellblock at county jail not accessible to persons with disabilities. ▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	September, 2001
Perry County, KY	▸ County jail has no cells that are accessible to persons with disabilities.	September, 2001
Springfield, MO	▸ Holding cell not accessible to persons with disabilities.	September, 2001
Allendale County, SC	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	August, 2001
City of Seward, NE	▸ Sheriff's department holding cells not accessible to persons with disabilities.	June, 2001
Boulder City, NV	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments.	April, 2001
City of Ashland, OR	▸ Jail bathroom facilities and beds not accessible to persons with disabilities.	January, 2001
Pella, IA	▸ Holding cell restroom not accessible to persons with disabilities.	October, 2000
South Orange, NJ	▸ Police headquarters has no accessible holding cells.	October, 2000
Laramie, WY	▸ Detention facility telephones not accessible to inmates with hearing and speech impairments. ▸ Inmate holding cell lacks accessible bathroom facilities.	October, 2000

Formal Settlement Agreements

In addition, the Justice Department publishes quarterly status reports, which include information from a sampling of the Department's ADA enforcement efforts. The status reports can be found at http://www.ada.gov/enforce.htm. The reports include information on formal settlement agreements between the United States and state and local governments, entered in response to citizen complaints filed with the Department of Justice. The 40 reports published to date (and one that is forthcoming) list 21 formal settlement agreements in 15 different States plus the Distirct of Columbia dealing with accessibility problems in prisons, jails, and/or holding cells. Following is a list of those matters. Copies of the underlying settlement agreements can be provided to the Court or the parties upon request.

Jurisdiction	***Type of Problem***	***Status Report***
Saginaw County, MI	▸ Lack of TDD device for jail inmates with hearing impairments.	Oct. - Mar., 1996
Lackawanna County, PA	▸ Lack of TDD and other assistive communication devices for jail inmates with hearing impairments.	Oct. - Mar., 1996
Chester County, PA	▸ Lack of TDD and other assistive communication devices for prison inmates with hearing impairments.	July - Sept., 1996
Wood County, OH	▸ Lack of interpreter and auxiliary communication devices for jail inmates with hearing and speech impairments. ▸ Jail cells and programs not accessible to persons with disabilities.	Apr. - June, 1997
Tulsa County, OK	▸ Lack of TDD and other assistive communication devices for jail inmates with hearing impairments.	Apr. - June, 1997
Oakland, CA	▸ Lack of TDD and other assistive communication devices for jail inmates with hearing impairments.	Apr. - June, 1998
Fairfax County, VA	▸ Lack of TDD and other assistive communication devices for jail inmates with hearing impairments.	July - Sept., 1998

Jurisdiction	***Type of Problem***	***Status Report***
Johnson County, TN	▸ Jail lacks accessible toilets and bathing facilities, and failed to provide adequate health services to inmate with disabilities.	July - Sept., 1998
Harrison County, IA	▸ Jail programs, services, and activities inaccessible to persons with mobility impairments because of physical barriers in facility.	Apr. - June, 1999
Clayton, AL	▸ Jail failed to provide adequate medical and mental health care to inmates with mental disabilities.	July - Sept., 1999
Tillman County, AL	▸ Lack of TDD and other assistive communication devices for jail inmates with hearing impairments.	Oct. - Dec., 1999
Houston, TX	▸ Lack of TDD and other assistive communication devices for jail inmates with hearing impairments.	Jan. - Mar., 2000
Washoe County, NV	▸ Lack of TDD and other assistive communication devices for detention center inmates with hearing impairments.	Apr. - June, 2002
Austintown, OH	▸ Lack of TDD and other assistive communication devices for detention center inmates with hearing impairments.	Apr. - June, 2002
Bridgeport, CT	▸ Lack of TTY and other assistive communication devices for detention center inmates with hearing impairments.	July - Sept., 2002
Cheatham County, TN	▸ Jail's inmate showers cells are not accessible to persons with mobility impairments.	Jan. - Mar., 2003

Jurisdiction	***Type of Problem***	***Status Report***
District of Columbia	▸ Lack of TTY and other assistive communication devices for detention center inmates with hearing impairments.	Jan. - Mar., 2003
Pike County, AL	▸ Jail's cell designated for people with disabilities not accessible to people who use wheelchairs. ▸ Jail lacks TTY and other assistive communication devices for inmates with hearing impairments.	July - Sept., 2003
Walla Walla County, WA	▸ Lack of TTY and other assistive communication devices for jail inmates with hearing impairments.	Jan. - Mar., 2004
State of Maryland	▸ State juvenile detention facilities lack appropriate assistive communication devices for incarcerated youth with hearing impairments.	Jan. - Mar., 2004
Clackamas County, OR	▸ Lack of TTY and other assistive communication devices for persons with hearing impairments detained by sheriff's department.	Oct. - Mar., 2004 (***forthcoming***)

ADDENDUM D

Title 50, Code of Federal Regulations, provides in relevant part:

SUBPART B—GENERAL REQUIREMENTS

§ 35.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of 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 public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to

others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objec-

tives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections—

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a

disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

* * * * *

SUBPART D—PROGRAM ACCESSIBILITY

§ 35.149 Discrimination prohibited.

Except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a public entity's facilities are 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.

§ 35.150 Existing facilities.

(a) *General.* A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(b) *Methods*—(1) *General.* A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to

beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of § 35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of § 35.150(a) in historic preservation programs, a public entity shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required because of paragraph (a)(2) or (a)(3) of this section, alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance.* Where structural changes in facilities are undertaken to comply with the obligations established under this section, such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible.

(d) *Transition plan.* (1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.

(2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas.

(3) The plan shall, at a minimum—

(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

(4) If a public entity has already complied with the transition plan requirement of a Federal agency regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this paragraph (d) shall apply only to those policies and practices that were not included in the previous transition plan.

§ 35.151 New construction and alterations.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(b) *Alteration.* Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is

readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(c) *Accessibility standards.* Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR part 101-19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (Appendix A to 28 CFR part 36) shall be deemed to comply with the requirements of this section with respect to those facilities, except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of ADAAG shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(d) *Alterations: Historic properties.* (1) Alterations to historic properties shall comply, to the maximum extent feasible, with section 4.1.7 of UFAS or section 4.1.7 of ADAAG.

(2) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of § 35.150.

(e) *Curb ramps.* (1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

(2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.