No. 04-1203
No. 04-1236

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF GEORGIA, *et al.,*

Respondents.

TONY GOODMAN,

Petitioner,

v.

STATE OF GEORGIA, *et al.,*

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS

GREGORY A. CASTANIAS
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

JORDANA R. STERNBERG
JONES DAY
1420 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 521-3939

THURBERT E. BAKER
Attorney General
KATHLEEN M. PACIOUS
Deputy Attorney General
JOHN C. JONES
Senior Assistant Attorney General
DAVID E. LANGFORD*
Assistant Attorney General
STATE OF GEORGIA
Georgia Department of Law
40 Capitol Square SW
Atlanta, GA 30334
(404) 463-8850

**Counsel of Record*

QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 to 12165, validly abrogates state sovereign immunity for suits for damages by inmates alleging disability-based discrimination by state prison officials.

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STATEMENT

This case asks whether Congress validly abrogated the States' Eleventh Amendment immunity in Title II of the Americans With Disabilities Act of 1990 (the "ADA"), 104 Stat. 337, 42 U.S.C. §§ 12131-12165, as applied to suits for damages brought by disabled state-prison inmates. More specifically, it presents the question whether *Tennessee v. Lane*, 541 U.S. 509 (2004), which held that Congress, in enacting Title II of the ADA, validly abrogated state sovereign immunity "as applie[d] to the class of cases implicating the accessibility of judicial services," *id.* at 531, extends to state prison inmates who challenge the actions and omissions of state prison administrators.

As this Court's decisions in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny have demonstrated, one of the few limitations imposed by the United States Constitution on such otherwise-sensible measures as the ADA arises where one sovereign attempts to impose a money-damages remedy on another sovereign. No State could impose such an obligation upon the federal government, or upon another State. In our government of "dual sovereigns," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), the Eleventh Amendment similarly cabins (though it does not absolutely forbid) the power of Congress to pass laws that seek to give citizens the ability to sue an unconsenting state for damages. *See, e.g., Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

A State's Eleventh Amendment immunity may be abrogated only when Congress expresses its intent to do so, *and* properly acts pursuant to a constitutional provision granting it the right to abrogate. Section 5 of the Fourteenth Amendment, also known as the Enforcement Clause, provides the primary avenue through which Congress can abrogate a state's Eleventh Amendment immunity. *See Seminole Tribe v. Florida*, 517 U.S. 44, 59-66 (1996). Under § 5, Congress may enact legislation allowing private

individuals to sue the States for damages only if such legislation is limited to the purpose of "enforcing, by appropriate legislation" the substantive guarantees of the Fourteenth Amendment. *City of Boerne*, 521 U.S. at 517-18; *Lane*, 541 U.S. at 554 (Scalia, J., dissenting). That, in turn, requires the Court to determine what constitutional guarantee required remediation, whether Congress was in fact responding to a widespread and intractable problem of unconstitutional state discrimination, and if so, whether Congress's chosen remedy was proportional and congruent to these constitutional violations.

The resolution of each of these questions should lead the Court to conclude that Congress did not validly abrogate state Eleventh Amendment immunity as applied to the class of cases where disabled state inmates seek money damages for denial of access to "services, programs, or activities." *See* 42 U.S.C. § 12132. Accordingly, the Court of Appeals' judgment should be affirmed.

Briefly stated, the facts of this case are as follows:

1. Petitioner Tony Goodman, a paraplegic with a prior felony conviction, returned to a state prison in 1995 after being convicted of aggravated assault, possession of cocaine with intent to distribute, and possession of a firearm by a convicted felon. Goodman had a domestic dispute with his live-in girlfriend outside their home, and he shot at her with a gun. *Goodman v. State*, 237 Ga. App. 795, 516 S.E.2d 824 (1999). When the shot missed, the woman ran inside and called 911. According to trial testimony, the gun jammed and Goodman chased her down, got out of his wheelchair, and beat her with the gun. When police arrived, they found a fight in progress. The woman was cut and bruised and "her blood was splattered on the wall." *Id.*, 516 S.E.2d at 825. Police officers then found 22 pieces of crack cocaine. *Id.* at 795-96, 516 S.E.2d at 825. Goodman claimed at trial that he did not know where the drugs had come from, but "theorized that [his brother and girlfriend] were having an affair and

that they placed the gun and cocaine on him in an elaborate scheme to frame him." *Id.* at 796, 516 S.E.2d at 826. The jury convicted Goodman and he was sentenced to a term of years in the Georgia state prison system.

2. Goodman, who has filed more than 60 lawsuits since his incarceration in the Georgia State Prison (*see* Br. in Opp. to Cert. 1-2 n.1), filed this civil action in federal district court in January 1999. J.A. 27.

a. Goodman's *pro se* complaint alleged a variety of wrongs, ranging from the temperature in his cell in the Georgia State Prison (J.A. 38) to the lighting in the facility. J.A. 48. Relevant to the question before this Court are the following claims and allegations:

— That the Department of Corrections violated his ADA rights when they transferred him from a "medical prison" to Georgia State Prison and denied or excluded him from participation in Mental Health/Mental Retardation programs and activities. J.A. 34.

— That he is entitled to relief for "his continued confinement in segregated environment, on the grounds of unlawful disability-based discrimination. Defendants have confined Plaintiff to [the Georgia State Prison] where that Plaintiff could be appropriately treated in more integrated community setting." Goodman added that "the failure to provide the most integrated services appropriate to the needs of disabled persons constitutes unlawful disability-based discrimination. Here the Defendants has [*sic*] violated the core principle underlying the A.D.A.'s integration mandate." J.A. 35.

— That the unit he lived in "lacks facilities for the disabled 'for hygiene, drinking and performing body excretion functions.'" J.A. 39.

— That he was given no assistance by staff in using the toilet and getting to his bed and has thus suffered injuries. J.A. 39.

—That he was kept "in a very small cell (12 feet long and 3-feet wide) which he can not [turn] his wheelchair around in side of this cell." J.A. 38-39.

—That he has "been forced to sit in his own waste, denied of catheter, denied of rehabilitative exercises, denied of assistance in being transferred from his w/c [*sic*], to the bed all of which resulted, among other things, in the Plaintiff not getting a bath or a shower for (10) months." J.A. 43.

—That he could not access the prison law library. J.A. 41-42.

b. In other papers, which the Court of Appeals also considered, Goodman alleged that he was injured in transferring to or from his toilet. He says he fell and broke his right toe and crushed his right knee on five different occasions between August 1998 and April 1999. J.A. 55. He alleges that within one month between mid-March and mid-April 1999, he broke the same toe and crushed the same knee three times from toilet-transfer falls. J.A. 55. He also claims that, on August 26, 1998, the toilet seat in his cell was not stable, and so he fell when he "hurl[ed]" himself onto the toilet, in turn causing an epileptic seizure. J.A. 55. He alleges he once defecated and urinated on himself and, when he requested cleaning supplies and assistance from staff members, they refused. J.A. 65.

c. Finally, in his Statement of Undisputed Facts in support of his motions for Summary Judgment, Goodman alleged he had been denied certain "Privileges and Rights" granted to other inmates at his security level, including "counseling services, educational services, college program, vocational training, recreation activities, freedom of movement in the unit and institution, television, phone calls, entertainment, and religious rights, also we are being denied of medical supervision and education concerning 'diabetes and hypertension.'" J.A. 65, 83-84.

d. The State has continually denied Goodman's factual allegations (J.A. 72-73, 93-95), and has pointed out to the

courts that Goodman has at numerous times throughout this case contradicted his material factual allegations.

3. In 2001, the district court dismissed Goodman's complaint on summary judgment (Goodman Pet. App. 24a-28a), and in 2004, the Court of Appeals for the Eleventh Circuit affirmed that judgment in part, and reversed it in part. *Id.* at 1a-23a.

a. The district court granted summary judgment on Goodman's § 1983 claims against the individual defendants under the Eighth Amendment because, as the Eleventh Circuit later agreed, "Goodman's complaint was less than a model of clarity." Goodman Pet. App. 17a. The Eleventh Circuit reversed, holding that "the act of dismissal, without leave to amend, was too severe a sanction" for the complaint's deficiencies. *Id.* Thus, Goodman's Eighth Amendment claims were reinstated, on the condition that he file an Amended Complaint when the case returns to the district court. *Id.* at 17a-18a. [1]

b. The district court also granted summary judgment on Goodman's Title II ADA claims for damages, on the ground that Congress did not validly abrogate the States' Eleventh Amendment immunity in passing Title II of the ADA. Goodman Pet. App. 27a (citing *Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001)). The Eleventh Circuit affirmed "the magistrate judge's grant of summary judgment to all the defendants on Goodman's ADA claims for monetary damages as barred by the Eleventh Amendment." Goodman Pet. App. 19a. The Eleventh Circuit relied on its

[1] The Eleventh Circuit also held that some of Goodman's claims "are obviously frivolous," and it thus limited him to three claims on which to build a § 1983 case for trial, if he can sufficiently amend his Complaint so as to state claims of rights violations by individual Respondents: (1) that he cannot move his wheelchair in his cell; (2) that he was forced to sit in his own waste because prison officials refused to provide assistance; and (3) that the care given to him at GSP amounts to "'deliberate indifference' to his serious medical condition of being partially paraplegic." Goodman Pet. App. 18a.

prior decision in *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004), in which it had held: "A requirement of reasonable accommodations for a qualified, disabled prisoner in the prison's educational, recreational and job-training programs, for example, bears no permissible prophylactic relationship to deterring or remedying violations of disabled prisoners' right to be free from cruel and unusual punishment." *Id.* at 1275. Even while acknowledging "that § 5 authorizes Congress to deter Eighth Amendment violations by prohibiting 'a somewhat broader swath of conduct' than that prohibited by the Eighth Amendment," the court in *Miller* ultimately held that "Title II prohibits far more state conduct and in many more areas of prison administration than conceivably necessary to enforce the Eighth Amendment's ban on cruel and unusual punishment." *Id.* at 1274.

c. The Eleventh Circuit held that Goodman could proceed on his ADA Title II claim for injunctive relief. Goodman Pet. App. 19a-21a. The State has not cross-petitioned from that ruling.

4. The United States (which had intervened in the Eleventh Circuit to defend the validity of Title II's abrogation of the States' sovereign immunity) and Goodman each petitioned this Court to review the judgment of the Eleventh Circuit in this case, presenting questions regarding the validity of Congressional abrogation of sovereign immunity "as applied to the administration of prison systems" (No. 04-1203), "for suits by prisoners with disabilities challenging discrimination by state-operated prisons" (No. 04-1236). On May 16, 2005, this Court granted both petitions and consolidated the cases.

SUMMARY OF THE ARGUMENT

Title II of the ADA is not validly applied to allow state prisoners to bring suits for damages, as that title is not "appropriate legislation" under § 5 of the Fourteenth Amendment.

I. The first step in the congruence-and-proportionality inquiry prescribed by this Court's precedents is to "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Discrimination against the class of disabled persons has always been considered by this Court as subject only to constitutional rational-basis review, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985), and when prisons and prisoners are involved, constitutional rational-relationship review, and heightened deference to the actions of prison officials, is the norm. *Turner v. Safley*, 482 U.S. 78, 89 (1987). The claimed prisoner rights of access to services, programs, and activities would thus merit the lowest level of constitutional protection, which takes this case outside of this Court's decisions in *Tennessee v. Lane*, 541 U.S. 509 (2004) (access to courts), and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (gender-based discrimination), both of which involved classifications subject to heightened constitutional scrutiny, which in turn makes it "easier for Congress to show a pattern of state constitutional violations." *Id.* at 736.

II. Because "Congress' § 5 authority is appropriately exercised only in response to state transgressions," *Garrett*, 531 U.S. at 368, the next step in the congruence-and-proportionality analysis is to determine whether Congress had a record demonstrating a "widespread and persisting" pattern of unconstitutional discrimination against disabled state prisoners with respect to the provision of programs, services, and activities. It did not. The legislative history of the ADA, in fact, was concerned primarily with integrating "persons with disabilities into the economic and social mainstream of American life," H.R. Rep. No. 101-485, Pt. 2, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304, which is the polar opposite of the imprisoned inmate, who is by definition *removed from* society's "mainstream." *See Palmer v. Hudson*, 468 U.S. 517, 526 (1984). It is therefore not surprising that the legislative record demonstrates little

concern with inmates in state prisons; what few references to prisons and prisoners exist in the legislative record are scattered, anecdotal, or—in the case of the United States' reliance on the testimony of Cindy Miller (U.S. Br. 23)—demonstrably miscited.

Petitioners' efforts to overcome these deficiencies in the legislative record with a cataloging of judicial decisions also fail. Over two-thirds of the cases Petitioners cite for this purpose were decided *after* the passage of Title II of the ADA, and thus fail to demonstrate an existing constitutional problem. Of the few cases that were decided before passage of the ADA, even fewer of them found a constitutional violation at all, and most of the remaining ones involved preliminary rulings, generalized attacks on prison conditions or medical services applicable to disabled and non-disabled inmates alike, or challenges to conditions in non-State prisons. The few of Petitioners' judicial decisions that arguably demonstrate unconstitutional treatment of disabled state prisoners, *by reason of their disabilities*, are so few and sporadic that they cannot possibly constitute the "widespread and persisting" problems of state discrimination that would have to exist before Congress could abrogate the states' sovereign immunity in this area.

III. Title II of the ADA is not a proportionate and congruent remedy for any history of unconstitutional discrimination against disabled state prisoners. That statute demonstrates none of the hallmarks of calibrated remedial legislation; rather, the relevant portions of Title II appear in the part of that title entitled "generally applicable provisions." Moreover, there is no indication in the statute that Congress, in enacting Title II, took into account in any way the special context of prisons and prisoners—not the differences in the constitutional rights held by state prisoners, and not the deference accorded to prison administrators.

Nor is Title II proportional and congruent when considered against Goodman's alternative argument that Title II is a constitutional means for enforcing the Cruel and Unusual Punishments Clause. Even putting aside the issue of whether that argument is "fairly included" within the "discrimination"-based question presented by Goodman, Title II would not be "congruent" to that constitutional right, because it would reduce a disabled prisoner's burden of proof from "deliberate indifference to serious medical needs" to a simple denial of services, programs, or activities. Moreover, viewing Title II as a federal remedy for violations of the Cruel and Unusual Punishments Clause would make it a seriously disproportionate remedy: It would give prisoners with disabilities, and *only* prisoners with disabilities, the right to enforce the Cruel and Unusual Punishments Clause.

ARGUMENT

"Congress may subject nonconsenting States to suit in federal court when it does so pursuant to a valid exercise of its § 5 power." *Garrett*, 531 U.S. at 364. Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation," the substantive guarantees of § 1, including "by prohibiting a somewhat broader swath of conduct" than that "forbidden by the Amendment's text." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000). Nonetheless, to validly abrogate the States' historic immunity from money-damages suits, § 5 legislation that reaches beyond § 1's guarantees must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520; *see Garrett*, 531 U.S. at 365; *Lane*, 541 U.S. at 522. As the Court observed in *City of Boerne*, "Congress does not enforce a constitutional right by changing what the right is." 521 U.S. at 519.

Particularly in view of the fact that disability-based classifications have always been subject to rational-basis review, and in further view of this Court's decisions, relevant

in "the prison context," holding that "lawful incarceration brings about the necessary withdrawal of many privileges and rights," and that state prison officials are entitled to a broad range of discretion in the performance of their duties, *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (internal quotation marks and citation omitted), there is not a sufficient "congruence" or "proportionality" between Title II of the ADA and any "historical experience" (*South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)) with state prisoner access to programs and services. Indeed, there is little to no record of such constitutional violations of disabled prisoners' rights in the state-prison context.[2]

I. MOST ACTIONS BY STATE PRISON OFFICIALS, AND DISTINCTIONS BASED ON DISABILITY, ARE SUBJECT TO DEFERENTIAL CONSTITUTIONAL REVIEW

"[T]he first step" in the *City of Boerne* congruence-and-proportionality test is to "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S.

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[2] A suit "seeking to impose liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment," *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), for "[a] general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Alden v. Maine*, 527 U.S. 706, 750-51 (1999). Petitioner Goodman's Title II claims seek money damages that would be paid from public funds from the state treasury, and are thus barred for the reasons set forth in this brief. That is the only issue regarding relief before this Court, and Respondents invoke the Eleventh Amendment only to protect the public fisc.

Petitioners nonetheless blur the line between damages and injunctive relief as though the question of injunctive relief for prisoners is also before the Court. Respondents do not seek to take away from inmates the right to pursue appropriate injunctive relief, such as the injunction requiring the installation of a grab bar hypothesized by Petitioner Goodman. (Goodman Br. 37) It should be noted, however, that Goodman did not make such a direct request in his Complaint or in his emergency motion for a temporary restraining order. J.A. 53-58.

at 365; *Lane*, 541 U.S. at 522. Because Congressional power under § 5 is not "plenary" but is instead "remedial," *City of Boerne*, 521 U.S. at 522, judicial review of enforcement legislation must first include the identification of the Fourteenth Amendment "wrong" Congress sought to remedy. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999), *citing City of Boerne*, 521 U.S. at 525. Only then can the "proportionality and congruence" of the congressional remedy be evaluated. In this case, the rights at issue are the rights of disabled state prisoners to not be denied, "by reason of . . . disability," "participation" in or "benefits of the services, programs, and activities of a state entity." 42 U.S.C. § 12132; *see, e.g.*, *Garrett*, 531 U.S. at 365.

A. Disability-Based Classifications Are Subject To Rational-Basis Review

"[C]lassifications based on disability violate [the Fourteenth Amendment] if they lack a rational relationship to a legitimate governmental purpose." *Lane*, 541 U.S. at 522; *see Garrett*, 531 U.S. at 366; *City of Cleburne*, 473 U.S. at 446. There is no general fundamental constitutional right to state programs and services possessed by the class consisting of disabled persons. *Garrett*, 531 U.S. at 367-68; *Lane*, 541 U.S. at 522 ("Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination."); *see Hibbs*, 538 U.S. at 735-36 ("[I]n order to impugn the constitutionality of state discrimination against the disabled or elderly, Congress must identify, not just the existence of age- or disability-based state decisions, but a 'widespread pattern' of irrational reliance on such criteria.") (quoting *Kimel*, 528 U.S. at 90).

The fact that disability-based classifications receive only the most deferential constitutional review is an important consideration governing the congruence-and-proportionality inquiry in this case. In *Hibbs* and *Lane*, the only two of this Court's recent decisions to uphold congressional abrogation,

the fact that the asserted rights at issue were subject to heightened constitutional scrutiny made a critical difference in both analysis and result. In *Hibbs*, for example, the Court distinguished its prior decisions in *Garrett* and *Kimel* on the ground that, in the Family and Medical Leave Act of 1993, "Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny"; because the standard of constitutional review for gender-based discrimination "is more difficult to meet than our rational-basis test—it must 'serv[e] important governmental objectives' and be 'substantially related to the achievement of those objectives'—it was easier for Congress to show a pattern of state constitutional violations." *Hibbs*, 538 U.S. at 736 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996) (citation omitted, brackets in original)).

So, too, *Lane* upheld congressional abrogation of sovereign immunity under Title II of the ADA, as "applie[d] to the class of cases implicating the accessibility of judicial services," 541 U.S. at 531, on the ground that it was a congruent and proportional response to a legislative and historical record demonstrating the "'difficult and intractable proble[m]'" of disabled persons' "access to the courts." *Id.* (quoting *Hibbs*, 538 U.S. at 737) (brackets in original). As the Court explained, "Title II, like Title I, seeks to enforce this prohibition on irrational disability discrimination. But it also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Id.* at 522-23. Indeed, in concluding that there was a history and pattern of unequal treatment of the disabled with respect to access to the courts, the Court's opinion cited *Hibbs* and explicitly relied on the "heightened standard of judicial scrutiny" that applies both to gender-based distinctions and to burdens on the access to courts: "Title II is aimed at the enforcement of a variety of basic rights, including the right of access to the courts at issue in this case, that call for a standard of judicial review at least as searching, and in some cases more searching, than

the standard that applies to sex-based classifications." *Id.* at 529 (citing *Hibbs*, 538 U.S. at 735-37).

There is good reason for the distinction drawn by *Hibbs* and *Lane*. It is "easier for Congress to show a pattern of state constitutional violations" in areas where such heightened levels of scrutiny are applied (*Hibbs*, 538 U.S. at 736), because heightened constitutional scrutiny reflects a judicial judgment, based on history and experience, that such violations are more commonplace, more invidious, and thus in greater need of judicial remediation. A heightened standard of constitutional scrutiny carries with it a concomitantly lower burden of proof for plaintiffs—and, in the case of distinctions subject to the highest level of constitutional review, "strict scrutiny," history and experience teaches that the likelihood of invidious discrimination is so great that simply demonstrating the existence of the different treatment shifts the burden of disproving a violation to the government.

But this case—in sharp contrast to *Hibbs* and *Lane*—presents no distinction or other governmental action deserving of a heightened standard of constitutional scrutiny. A disabled state prisoner here seeks to enforce, via claims for money damages against the State, a wide array of claimed rights to programs and services, ranging from a right to adequate sanitation in his cell to a right to television. (J.A. 34-48) The differences in legal treatment between prisons and other public institutions, and between fundamental and non-fundamental rights, are crucial to understanding why the legislative and historical record before Congress shows no similar constitutional problem of access by the disabled in the context of State prisons for which Title II could be said to be a "congruent and proportional response."

B. Constitutional Review Of Disability-Based Classifications In The Prison Context Is Further Constrained By The Essential Nature Of Incarceration And The Rule Of Deference To Prison Officials' Actions

Even beyond the deferential rational-basis review generally provided to disability-based legal classifications, *see Garrett*, 531 U.S. at 366, there is an additional and critical factor that "applies to the class of cases implicating" access to programs and services in state prisons (*Lane*, 541 U.S. at 533-34): the historical deference granted to prison administrators in the performance of their duties and the classification of inmates.

Because of the basic nature of state imprisonment, it is difficult for any state prisoner, disabled or not, to advance a plausible constitutional claim for deprivation of access to programs and services. "'Lawful incarceration brings about the necessary withdrawal of many privileges and rights, a retraction justified by the considerations underlying our penal system.'" *O'Lone*, 482 U.S. at 348 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). "Prisons, by definition, are closed societies, populated by individuals who have demonstrated by their inability, or refusal, to conform their conduct to the norms demanded by a civilized society. Of necessity, rules far different from those imposed on society at large must prevail within prison walls." *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 137 (1977) (Burger, C.J., concurring). Indeed, some rights considered fundamental outside prison walls are nonexistent or virtually nonexistent within them.[3]

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[3] For example, "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." *Palmer v. Hudson*, 468 U.S. 517, 526 (1984). States may constitutionally prohibit convicted felons from voting. *See, e.g.*, *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974). And this Court has held that the Constitution creates no liberty interest in a prisoner seeking to

For these reasons, claimed deprivations of constitutional rights inconsistent with imprisonment are subject to review only for a rational relationship to legitimate government interests, even where the rights asserted may be said to be fundamental. "[A prison regulation] is valid if it is reasonably related to legitimate penological interests'." *Turner*, 482 U.S. at 89 (quoting *Jones*, 433 U.S. at 128). The "evaluation of penological objectives is committed to the considered judgment of prison administrators, 'who are actually charged with and trained in the running of the particular institution under examination.'" *O'Lone*, 482 U.S. at 349 (quoting *Bell v. Wolfish*, 441 U.S. 520, 562 (1979)). When a state correctional institution is involved, the deference of the federal courts is even more appropriate. *Turner*, 482 U.S. at 85.

Consistent with these principles, the Court in *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003), applied *Turner v. Safley* to reject an inmate's claim that Michigan prison regulations restricting or forbidding inmate "contact visits" violated his fundamental constitutional right to association. *See, e.g.*, *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984). The Court upheld the Michigan prison regulations, not on the basis of any heightened constitutional scrutiny, but because "the challenged regulations bear a rational relation to legitimate penological interests." *Overton*, 539 U.S. at 132. Rationality review, not heightened constitutional scrutiny, was appropriate because "[t]he very object of imprisonment is confinement," and "freedom of association is among the rights least compatible with incarceration." *Id.* at 131. *See also Johnson v. California*, 125 S. Ct. 1141, 1149 (2005) (noting that rational-relationship test has been applied to evaluation of asserted constitutional rights

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avoid transfer to more adverse conditions of confinement. *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

"'inconsistent with proper incarceration'") (quoting *Overton*, 539 U.S. at 131).[4]

Free and unfettered access to, and participation in, "services, programs, or activities of a public entity" (42 U.S.C. § 12132) are likewise inconsistent with the nature of incarceration, even though prisons would otherwise fall within the language of Title II of the ADA. *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209 (1998) (reserving question presented by this case). This is made even clearer by the ADA rights that Goodman claims in this case, which include asserted broad rights to placement in the general population at a medical prison, "adequate" access to the law library, access to the chapel, access to a television, counseling services, educational services, phone calls, entertainment, and vocational training. (J.A. 65, 105) Each of those asserted rights would be subject to the *Turner v. Safley* rational-relationship inquiry. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 351, 356 (1996) (holding that prisoners do not have a "abstract, freestanding right to a law library or legal

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[4] The United States nonetheless claims that "*Turner* review is more exacting than rational-basis review." (U.S. Br. 37) At best, this argument appears to be a semantic quibble. The *Turner* standard—"rationally related to legitimate penological interests"—obviously "echoes the rational-basis test" (*Kelo v. City of New London*, 125 S. Ct. 2655, 2669 (2005) (Kennedy, J., concurring)), which is frequently stated as "rationally related to a legitimate governmental purpose." *City of Cleburne*, 473 U.S. at 446. For another, the fact that *Turner*'s rational-relationship test resulted in "striking down marriage restrictions" imposed by a prison (U.S. Br. 37) demonstrates little, as the Equal Protection Clause's rational-basis test, too, has been used on occasion to strike down governmental enactments. *See, e.g., Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Cty.*, 488 U.S. 336 (1989). And, in all events, whatever minimal differences there might be between the *Turner* rational-relationship inquiry and the rational-basis test of the Equal Protection Clause, it would be unnecessary to resolve them in this case, as the more important point is that Title II of the ADA provides substantially greater legal protections to the rights of inmates with a disability than does the Constitution, even under *Turner*'s rational-relationship inquiry. *See* Section III, below.

assistance" and "leav[ing] it to prison officials to determine how best to ensure that inmates . . . have a reasonably adequate opportunity to file nonfrivolous legal claims challenging their . . . conditions of confinement"). Indeed, § 1983 prisoner suits seeking both monetary and injunctive relief for these types of claims have been roundly rejected by the courts.[5]

Decisions by state prison officials regarding whether to place an inmate within the general population or not are likewise subject only to rational-relationship review, with significant deference given to the prison officials' decisions. This is for good reason: Goodman says the State has discriminated against him under the ADA by *not* placing him in the general population. (J.A. 35) Yet the United States' Addendum B refers to at least three instances where prison administrators were cited for violating constitutional rights of inmates by placing disabled inmates in the general prison population.[6] *See also Cortes-Quinones v. Jiminez-Nettleship*,

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[5] *See, e.g., More v. Farrier*, 984 F.2d 269, 271 (8th Cir. 1992) (claimed right to television by disabled inmate: "[d]espite television's importance in modern society, appellees have no fundamental right to in-cell cable television, and wheelchair-bound inmates are not a suspect class"); *Elliott v. Brooks*, 188 F.3d 518 (10th Cir. 1999) (no constitutional right to watch television in prison) (table, text in Westlaw); *Baumann v. Ariz. Dep't of Corr.*, 754 F.2d 841, 846 (9th Cir. 1985) (no constitutional violation by prison's limitation of jobs and educational opportunities) (citing *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981)); *Hoptowit v. Ray*, 682 F.2d 1237, 1254-55 (9th Cir. 1982) ("Idleness and the lack of [vocational, recreational, and educational] programs are not Eighth Amendment violations. The lack of these programs simply does not amount to the infliction of pain.") (citing *Rhodes v. Chapman*, *supra*); *Gibson v. Fed. Bureau of Prisons*, 121 Fed. Appx. 549, 551 (5th Cir. 2004) (inmate has no protected liberty interest in eligibility for a prison drug treatment program) (citing *Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976)).

[6] The Department of Justice found that Pennsylvania (not Massachusetts, as the United States' Addendum erroneously states) prison authorities violated the Constitution at Western State Correctional Institution because "[m]entally ill inmates who should be separated from the general

842 F.2d 556, 560 (1st Cir. 1988) (finding defendant liable under Eighth Amendment for being "deliberately indifferent" to mentally disabled inmate's health and safety by failing to segregate him from general population, which led to his beating death in the general population).

All that said, State prison inmates like Goodman are certainly not void of basic rights while incarcerated. Prison inmates possess some level of Due Process and Equal Protection rights, as well as an Eighth Amendment right to be free of cruel and unusual punishments. "[P]rison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must take 'reasonable measures to guarantee the safety of the inmates.'" *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)). "[D]eliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . ." proscribed by the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Indeed, Goodman's Eighth Amendment claims, which are directed to his cell's size and sanitation conditions, and to prison officials' alleged deliberate indifference to his serious medical needs, will continue regardless of how this Court answers the questions presented. If those allegations are ultimately proven, Petitioner Goodman would be entitled to relief under the Eighth Amendment. *Hope v. Pelzer*, 536 U.S. 730 (2002).

The United States nonetheless claims that "[w]hile many of th[e] constitutional claims [by prisoners] are invoked with appropriate deference to prison officials, that is not true of Eighth Amendment claims . . . ." (U.S. Br. 37 (citation

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population are not always separated." U.S. Addendum B, 2b. Hawaii (*id.*, 3b) and Guam (*id.*, 20b) were similarly chastised by the United States' Addendum for failing "to . . . 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.'" *Id.*

omitted)) But even that constitutional guarantee is addressed with due regard for the needs and realities of prison administration: "A prison official's duty under the Eighth Amendment is to ensure '"reasonable safety,"' a standard that incorporates due regard for prison officials' 'unenviable task of keeping dangerous men in safe custody under humane conditions.'" *Farmer*, 511 U.S. at 844-45 (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993) and *Spain v. Procunier*, 600 F.2d 189, 193 (9th Cir. 1979) (Kennedy, J.) (citations omitted)). That is why the standard of liability under that amendment is the "more blameworthy" (*Farmer*, 511 U.S. at 835), "heightened" (*Corr. Servs. Co. v. Malesko*, 534 U.S. 61, 73 (2001)) standard of "deliberate indifference."

In sum: Claims directed to a disabled inmate's access to public services, programs, and activities would be subject to the most relaxed standard of constitutional review—the rational-basis test. Accordingly, Congress would have to have made the most substantial showing of a pattern of state constitutional violations in order to demonstrate that Title II is a proportional and congruent remedy, and thus "appropriate legislation" under § 5. *Cf. Hibbs*, 538 U.S. at 736. Congress did not make those findings, and it could not have made those findings, as no such record existed.

II. IN ENACTING TITLE II OF THE ADA, CONGRESS DID NOT IDENTIFY A HISTORY AND PATTERN OF UNCONSTITUTIONAL DISCRIMINATION BY THE STATES AGAINST DISABLED STATE PRISON INMATES

"Congress' § 5 authority is appropriately exercised only in response to state transgressions." *Garrett*, 531 U.S. at 368. Thus, Congress cannot pass legislation that abrogates the States' Eleventh Amendment sovereign immunity without identifying a "widespread and persisting" pattern of unconstitutional discrimination requiring a federal remedy. *Fla. Prepaid*, 527 U.S. at 645-46; *see also Garrett*, 531 U.S.

at 368-74; *Kimel*, 528 U.S. at 81-82; *City of Boerne*, 521 U.S. at 531. For Petitioners to succeed in showing that Congress meant to abrogate the States' historical immunity and allow claims by state prisoners for monetary damages against the State, they must demonstrate that Congress had a record before it that established such a pattern of state discrimination against disabled state prisoners with respect to the provision of public services, programs, and activities. This they cannot do.

A. The Proper Context For Evaluating The Abrogation Claim In This Case Is The Specific Prison Context, Not The General Area Of "State Services And Programs"

As Petitioners recognize, the issue before the Court—and the sole question presented—asks whether Title II was a valid exercise of Congress' § 5 authority *in the specific context* of state prison administration. (U.S. Br. 11-16; Goodman Br. 11-12.) Title II does not abrogate the States' sovereign immunity unless Congress determined, *when it passed the ADA*, that there existed a widespread pattern of discrimination with respect to the provision of public services, programs, and activities to the disabled *in state prisons*. *Compare, e.g., Lane*, 541 U.S. at 530-31 (noting "long history . . . [of] unequal treatment of disabled persons *in the administration of judicial services*" (emphasis added)) *with, e.g., Garrett*, 531 U.S. at 368 ("The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.").

Lane confirms this specific standard. In a series of footnotes, the Court outlined a "variety of settings" in which its own cases had previously identified unconstitutional treatment of the disabled by state agencies, including areas such as voting, marriage, and zoning. *Lane*, 541 U.S. at 524-25 nn. 5-14. Among these many and varied examples, the Court cited only three lower-court cases—two of which

could not have been before Congress when it passed Title II of the ADA, since they postdate its 1990 enactment by nearly a decade—where disabled inmates had claimed such violations. *Id.* at 525 n.11.[7]

But even having surveyed this broad range of examples, the Court declined "to consider Title II, with its wide variety of applications, as an undifferentiated whole." *Lane*, 541 U.S. at 530. Rather, the Court focused its analysis on "the class of cases implicating the accessibility of judicial services." *Id.* at 530-31 ("Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts."). The Court's inclusion of "the penal system" as one of "a wide range of public services, programs, and activities" discussed in *Lane*, 541 U.S. at 524, says little to nothing regarding the question presented here. As we show below, it is clear that Congress did not find—nor could it have found—"widespread and persisting" discrimination on the basis of disability with respect to the provision of services, programs, or activities to state prisoners.

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[7] The Court cited three cases: *LaFaut v. Smith*, 834 F.2d 389 (4th Cir. 1987); *Schmidt v. Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999); and *Key v. Grayson*, 179 F.3d 996 (6th Cir. 1999). Each is objectively inapposite. *LaFaut,* an Eighth Amendment deliberate-indifference case, is the only one of the three decided before the ADA, and it involved a *federal* prison. 834 F.2d at 389-90. *Schmidt,* also an Eighth Amendment case, is similarly inapposite because it involved a county jail, not a state prison. 64 F. Supp. 2d at 1016. And *Key* was an ADA case that did not address the abrogation issue at all, but simply assumed that a deaf inmate's claim that the denial of an interpreter to attend sex-offender therapy sessions violated his ADA and Rehabilitation Act rights; moreover, the Sixth Circuit in that case held that prison officials were entitled to qualified immunity since the application of those acts to prisons and prisoners was not "clearly established" in 1996. 179 F.3d at 1002.

B. The Legislative Record Does Not Show That Congress Enacted The ADA On The Basis Of Fourteenth Amendment Violations In The State Prison Context

Petitioners' briefs themselves reveal the lack of support for their position in the Congressional history. Petitioners' heavy reliance on hearings that took place in the 1970s and early 1980s in connection with *other* legislation Congress enacted to address prisoners' needs (including a scattering of lower court decisions cited there), together with their virtual silence as to the legislative record of the ADA itself, speaks volumes. This near-total dependence on oblique and circumstantial "evidence" comes nowhere close to satisfying the requirements of this Court's decisions in this area.

The Legislative History of the ADA Itself. The legislative history of the ADA reflects that Congress' central concern was integrating "persons with disabilities *into the economic and social mainstream of American life.*" H.R. Rep. No. 101-485, Pt. 2, at 50, *reprinted in* 1990 U.S.C.C.A.N. 303, 332 (emphasis added). *See also id.*, Pt. 1, at 24, *reprinted in* 1990 U.S.C.C.A.N. 267, 268 (describing the purpose of the ADA as to "permit the United States to take a long-delayed but very necessary step to welcome individuals with disabilities fully into the mainstream of American society"); *id.*, Pt. 2, at 22, *reprinted in* 1990 U.S.C.C.A.N. at 304 ("The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; . . . ."); *id.*, Pt. 3, at 1, *reprinted in* 1990 U.S.C.C.A.N. 445, 446 (same); *id.*, Pt. 4, at 2, *reprinted in* 1990 U.S.C.C.A.N. 512, 512 (same); S. Rep. No. 100-116 (1989) (same).

That concern, of course, is the polar opposite of a concern with the state prisoner, who is—as shown in Section I, above—by definition *removed from* society's mainstream.

See generally Palmer, 468 U.S. at 526 ("Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society . . . ."). Thus, the statements of legislative intent found in the printed history of the ADA demonstrate, if anything, a Congressional concern with disabled persons in the "mainstream" of American society, and not those who have been removed from that mainstream society and incarcerated—just as the ADA legislative history considered in *Garrett* demonstrated a Congress concerned with "'employment in the private sector,'" and not state employment. 531 U.S. at 371-72 (quoting H.R. Rep. No. 101-485, pt. 2, p. 28, *reprinted in* 1990 U.S.C.C.A.N. at 310) (emphasis removed).

In perhaps the most telling instance of Petitioners' scarce support, the United States' brief avers: "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.'" (U.S. Br. 23). The cited testimony had nothing to do with prisons. Instead, this quotation came from the testimony of Cindy Miller, a disabled woman from Boston employed as a "rehabilitation counselor." *See ADA: Joint Hearing on S. 2345*, 100th Cong. 1190 (statement of Cindy Miller). Ms. Miller's congressional testimony was styled as "a day in my diary of discrimination," and she began that "diary" by pointing out that to obtain the necessary assistance in getting in and out of bed, she lived—against her choice—with a roommate to whom she offered free rent, because the "personal care assistant rates of pay" were insufficient to attract qualified persons to work as overnight attendants. *Id.* She then spoke of her own fear of being "institutionalized"—not in a state prison, but in an institution for the disabled. Her references to "jailers" and "inmates" were harsh metaphors for disability-institution employees and patients:

> *I live in constant fear that* the economics argument subsidizing personal care assistants programs will be lost and *I will be institutionalized.* Because independent living is not a right to freedom for Americans with disabilities, this is a realistic fear. But it will not be my choice.
>
> *As a rehabilitation counselor, I have seen these institutions.* The smell of human waste and detergent has stuck in my throat. I have looked into the vegetative eyes of its inmates and the sterile environments. I have heard of the premature death rates and prevalence of pneumonia, literally allowing them to rot in their beds.
>
> *I have witnessed their jailers rational* [sic] *taking away their wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs. I have witnessed their jailers taking away their food as a form of punishment, as if that is different than starvation. I have witnessed their jailers talk about them in their third person and leave them naked to the public as if that does not strip them of their human dignity.*

Id. (emphasis added).

Indeed, a computer-database search of the legislative history of the ADA reveals several uses of this "prison" metaphor, but only one reference to conditions *in* prisons. That single reference is decidedly unhelpful to Petitioners.[8]

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[8] A search of the "ADA-LH" (Americans With Disabilities Act Legislative History) database on the Westlaw service, for documents containing *any* of the terms "prison!," "imprison!," "eighth amendment," or "cruel and unusual punishment!," returned only 17 references (none to "eighth amendment" or "cruel and unusual punishment"). Almost half of the 17 (eight) utilized the "imprisonment" metaphor to describe the challenges faced by persons with disabilities. *See, e.g., ADA: Joint Hearing on H.R. 2273*, at 49 (statement of Joseph L. Rauh, Jr.) ("The literal imprisonment of millions of disabled people because of an inaccessible transit system is a national disgrace."). Four more were references to reports explaining that the definition of "disability" did not extend to "having a prison record." *E.g.*, S. Rep. No. 101-116, at 22; H. Rep. No. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334;

Other Congressional Hearings and Reports. Petitioners cite liberally to research and hearings placed before Congress with respect to the Rehabilitation Act of 1973 (Pub. L. No. 93-112, 87 Stat. 394) and the Civil Rights of Institutionalized Persons Act of 1980 ("CRIPA") (Pub. L. No. 96-247, 94 Stat. 349). (U.S. Br. 24-27; Goodman Br. 21, 23-25.) Both of these enactments took place over a decade prior to the passage of the ADA.

Particularly with respect to the CRIPA—the Civil Rights of *Institutionalized Persons* Act—it is hardly surprising that Congressional hearings, task forces, and reports addressed certain challenges faced by disabled prisoners (part of the class of "institutionalized persons" covered by the Act). Even so, the findings that led to both CRIPA and the Rehabilitation Act hardly support Petitioners' abrogation claim here. If anything, the more logical inference would be that Congress thought it had already sufficiently addressed any problem that might have existed with respect to the provision of state services, programs, and activities to incarcerated state prisoners.

Petitioners place additional reliance on a 1983 report of the United States Commission on Civil Rights. (*See* U.S. Br. 20 n.13; Goodman Br. 25 (each citing U.S. Civil Rights Commission, *Accommodating the Spectrum of Individual Abilities* (1983) (the "1983 Report")). This report, of course, was not in any way specific to state prison services and programs, but more generally addressed all areas in which

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id., pt. 3, at 28, *reprinted in* 1990 U.S.C.C.A.N. at 451. The only reference to actual prison conditions among these 17 was Senator Helms' stated concern, in floor debates, that the ADA would require restaurants to allow HIV-positive workers to be food handlers; Senator Helms noted that the *federal* Bureau of Prisons had prohibited HIV-positive inmates from engaging in any aspect of prison food service operations, and that passage of the ADA would "let prisoners get along without having HIV positive people preparing food," but restaurants serving the public could not follow the same practice. 136 Cong. Rec. S9527-02, S9535-36 (daily ed. July 11, 1990).

the Commission determined disabled Americans faced issues at that time. Appendix A to that report demonstrates this: It listed the "Criminal Justice System" (an area that itself included, but was scarcely limited to, state prisons) as one of those 22 areas, which also included limits on participation in the military, as well as restrictions on insurance. 1983 Report, Appendix A. Even putting aside the fact that the 1983 Report came seven years prior to the ADA's enactment, it hardly constitutes a sufficient—let alone sufficiently specific—record on which to base § 5 authority for Petitioners' claims.[9]

Petitioners similarly misplace reliance on the accounts contained in the 1990 report entitled "Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment*" (the "Task Force Report"). (U.S. Br. 20 n.12; Goodman Br. 25) In *Garrett*, the Court dismissed the dissenting opinion's reliance on this very report, noting that it did not consist of legislative findings, but of "unexamined, anecdotal accounts of 'adverse, disparate treatment by state officials,'" which "were submitted not directly to Congress but to the Task Force on the Rights and Empowerment of Americans with Disabilities, which made no findings on the subject of state discrimination in employment." 531 U.S. at 370-71. The same can be said of the absence of findings on the subject of state discrimination on the basis of disability in providing services to incarcerated prisoners.

The United States calls attention to several other studies evaluating the prevalence of mistreatment of disabled prisoners. (U.S. Br. 22-23) There is, however, no evidence

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[9] Goodman also notes that this Court cited the 1983 Report in *Lane*. (Goodman Br. 25 (citing *Lane*, 541 U.S. at 527)) This does nothing to help his cause, as *Lane* cited this report for the proposition that disabled members of free society, not convicted prisoners, were being excluded from "the particular services at issue in this case"—access to the courts. 541 U.S. at 527.

that Congress considered these studies—especially the one that postdates the ADA by more than a decade (*id.* at 22 & n.16)—when it enacted the ADA. And even if one could reasonably draw an inference that Congress had considered such studies, Congress's failure—in the face of those studies—to mention state prisons specifically in the findings undergirding Title II of the ADA suggests a Congressional judgment that no pervasive pattern of unconstitutional discrimination with respect to the provision of services and programs to disabled state prisoners had been documented or detected. *See, e.g., Garrett,* 531 U.S. at 371-72.

In short, the assortment of studies sprinkled through Petitioners' briefs "fall[s] far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based." *Garrett,* 531 U.S. at 370 (citing cases).

C. Petitioners' Reliance On Eighth Amendment Decisions To Support Their Abrogation Claims Is Without Merit

Both Petitioners urge that money damages under Title II of the ADA should be viewed, *inter alia,* as an appropriate remedy for a history of Eighth Amendment violations inflicted by prisons upon disabled prisoners, in view of that Amendment's applicability to the States through the Fourteenth Amendment's Due Process Clause. (Goodman Br. 14-16; U.S. Br. 21) This contention is meritless.

There is no basis for viewing Title II of the ADA, an anti-discrimination command, as any kind of remedy for Eighth Amendment violations. The "by reason of . . . disability" language of Title II of the ADA plainly indicates that it is an anti-discrimination statute for persons with disabilities, requiring that the discrimination take place "because of" the person's disability. *Olmstead v. L.C. ex rel. Zimring,* 527 U.S. 581, 597-98 & n.10 (1999); *see* 42 U.S.C. § 12132 (prohibiting exclusion of "qualified individual with a disability" from or denial of services, programs, or activities

"by reason of such disability"); *see generally Smith v. City of Jackson*, 125 S. Ct. 1536, 1549-50 (2005) (O'Connor, J., concurring). Yet the Eighth Amendment's Cruel and Unusual Punishments Clause is not primarily an anti-discrimination command, nor is it aimed just at the class of prisoners with a disability.

While it is conceivable that a prison could discriminate against disabled state prisoners by inflicting cruel and unusual punishments upon them "by reason of" their disability, there is quite obviously no pre-ADA record of such discrimination—and certainly none so "widespread and persisting," *Florida Prepaid*, 527 U.S. at 645-46—to even remotely support such a claim. The most that could possibly be said of Petitioners' collection of judicial decisions is that a few of them involve Eighth Amendment claims where the class of prisoners subjected to Eighth Amendment violations *included* some prisoners with an arguable "disability." But that would not demonstrate (nor would it even suggest) that these pre-ADA Eighth Amendment violations came about "by reason of" those prisoners' disabilities. *See* Section II(D), below.

Moreover, it is difficult to imagine that Congress intended to use Title II of the ADA to enlarge state prisoners' rights to sue state governments for money damages in Eighth Amendment cases. Like so many of the modern Congresses, the Congress that enacted the ADA was also concerned with the overflow of prisoner suits that was clogging the administration of justice in the federal district courts, and which, in 1995, comprised over one-quarter of the federal district courts' dockets. *See* 141 Cong. Rec. S7256 (daily ed. May 25, 1995) (statement of Sen. Kyl). This concern, which continues today, was recognized only three Congresses later in the Prison Litigation Reform Act of 1995, P.L. 104-134, tit. VII, 42 U.S.C. § 1997e, which circumscribed the ability of state prisoners to initiate and maintain federal litigation.

Further, as *amici* State of Tennessee *et al.* explain in their brief, "inmates have long filed civil rights suits under 42 U.S.C. § 1983 to enforce the same constitutional rights that petitioners argue should now be enforced by a money damages remedy under the ADA." Tennessee *et al.* Amicus Br. 23. That fact provides even more reason to doubt that Congress identified a special Eighth Amendment problem, or that it intended to require a further federal remedy *only* available to prisoners with a disability.

All that said, even if every single one of the pre-ADA Eighth Amendment cases cited by Petitioners were included in the Court's consideration of the issue, that still would not demonstrate the existence of a "widespread and persisting" problem that mandated a federal money-damages remedy against the States. We turn now to that issue.

D. Petitioners' Collection Of Judicial Decisions Demonstrates No History Of "Widespread And Persisting Deprivation Of Constitutional Rights" Regarding Disabled State Prisoners

The heart of Petitioners' case lies in their efforts to demonstrate that a "massive body" (Goodman Br. 26) of decided cases demonstrates a wide and systematic deprivation of Fourteenth Amendment rights of which Congress must have been aware in passing Title II of the ADA. *Fla. Prepaid*, 527 U.S. at 642 ("[T]he legislative record still provides little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation in enacting the Patent Remedy Act."); *Garrett*, 531 U.S. at 374 ("there must be a pattern of discrimination by the States which violates the Fourteenth Amendment"); *Hibbs*, 538 U.S. at 735 ("Congress must identify . . . not just the existence of age- or disability-based state decisions, but a 'widespread pattern' of irrational reliance on such criteria"); *see also Lane*, 541 U.S. at 541 (Rehnquist, C. J., dissenting). But those cases do not show anything close to a "widespread pattern" of unconstitutional discrimination against disabled

state prisoners: Most of Petitioners' cases postdate the enactment of the ADA—and thus could not possibly have contributed to Congress' deliberations that led to the enactment of Title II; few of those that predate the ADA involve *state* prisons; and fewer still involve alleged discrimination with respect to services, programs, or activities against a class of disabled inmates (as opposed to other, generalized allegations of constitutional violations that included some disabled state inmates within their sweep). That leaves Petitioners with but scattered, isolated instances of claimed discrimination against state prison inmates with respect to prison services, programs, or activities. Under this Court's decisions, these cases cannot sustain Petitioners' § 5 abrogation claim.

1. Two-Thirds Of Petitioners' "Massive Body" Of Cases Could Not Have Been Considered By Congress Because They Postdate The 1990 Enactment Of The ADA

Petitioners must show that Congress was considering a pattern of widespread discrimination *when it enacted the ADA* in 1990. *See Fla. Prepaid*, 527 U.S. at 640 (noting that "the propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects'" and that Congress had not identified a pattern of unremedied patent infringement by the States when it enacted the Patent Remedy Act) (quoting *City of Boerne*, 521 U.S. at 525); *Kimel*, 528 U.S. at 90 (legislative record revealed that "Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age" and that, therefore, "Congress had no reason to believe that broad prophylactic legislation was necessary in this field."); *Garrett*, 531 U.S. at 368 (asking "whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled," and finding that it had not). The vast majority of Petitioners' cited cases postdates the 1990 enactment of the

ADA, and therefore cannot constitute evidence of Congress' review as a matter of objective fact.

Between them, Petitioners cite about 150 cases as "evidence" of data they claim Congress considered when it enacted the ADA in 1990. (U.S. Br. at Addendum A; Goodman Br. at 28-36 nn. 14-26) But, as shown in the Addendum to this brief, nearly two-thirds of those cited cases date *after* 1990. Only 54 of these cases pre-date the ADA. *See* Resps' Addendum, Table VII. In fact, these 54 decisions hail from only 35 States (plus the District of Columbia and Puerto Rico); 15 States are not even represented. Even if Congress had considered *all* of these pre-1990 cases—and there is no evidence that it did—their paucity alone may be the single greatest impediment to Petitioners' efforts to demonstrate abrogation. *Compare Garrett*, 531 U.S. at 370 ("Congress, in enacting the ADA, found that 'some 43,000,000 Americans have one or more physical or mental disabilities.' In 1990, the States alone employed more than 4.5 million people. It is telling, we think, that given these large numbers, Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against the disabled.") (quoting 42 U.S.C. § 12101) (citation omitted).

Even so, those 54 pre-ADA decisions suffer from additional problems that render even that fraction of Petitioners' cases not probative of Congressional authority to abrogate States' sovereign immunity in this precise area.

2. Most Of Petitioners' Pre-ADA Cases Are Facially Inapposite

As shown in the Addendum to this brief, the vast majority of Petitioners' 54 pre-ADA cases did not even involve claims of discrimination against disabled state prisoners under the Fourteenth Amendment. *See* Resps' Addendum, Table VII. To the contrary, most of Petitioners' pre-1990 cases finding *any* kind of constitutional violation involve complaints regarding general deficiencies in medical care,

psychiatric treatment or other prison conditions *as applied to all inmates*, not just disabled inmates. *See* Resps' Addendum, Tables I, III. These cases objectively fail to establish Congressional concern with the type of *intentional* discrimination against disabled state prison inmates (or even the "deliberate indifference" of the Eighth Amendment) that would be required to justify Title II of the ADA as appropriate § 5 legislation as applied to the class of cases implicating the prison context. *Garrett*, 531 U.S. at 375 (Kennedy, J, concurring) (noting that "the failure to act or the omission to remedy" is not typically "the purposeful and intentional action required to make out a violation of the Equal Protection Clause"); *Hibbs*, 538 U.S. at 751 (Kennedy, J., dissenting) (similar); *cf. Fla. Prepaid*, 527 U.S. at 645 (noting that "the evidence before Congress suggested that most state [patent] infringement was innocent or at worst negligent").

At the most general level, Petitioners' selection of cases is premised on several unwarranted assumptions. Included among them are the assumption that all prisoners who need medical or psychiatric care are "disabled" within the meaning of the ADA, as well as the assumption that failing to provide adequate medical or psychiatric treatment to a prisoner in need of such treatment amounts to unconstitutional discrimination even where other inmates had no access to better care. A significant number of these cases also highlight problems that Title II of the ADA would not address. Conversely, other cases describe circumstances in which a disabled inmate with ADA rights would have relief that a non-disabled inmate facing exactly the same unfavorable condition (*e.g.*, lack of medical care) would not have. Specifically, Petitioners' pre-1990 cases are inapposite to establish Congress' authority in the following ways:

Prison Conditions Applicable To All Inmates. Twenty of Petitioners' 54 pre-ADA cases challenged—often through class actions—conditions of the entire prison facility, and thus applied *equally* to non-disabled inmates as well as

disabled ones. *See* Resps' Addendum, Table I. For example, *Balla v. Idaho State Board of Corrections*, 595 F. Supp. 1558, 1561 (D. Idaho 1984), and *Battle v. Anderson*, 376 F. Supp. 402, 415 (E.D. Okla. 1974), *aff'd in part, rev'd in part*, 993 F.2d 1551 (10th Cir. 1993), challenged certain prison conditions as they applied to the entire population. The plaintiffs in *Balla* alleged deficiencies in, *inter alia*, the prisoners' nutrition, clothing, and medical care. In ordering relief, the court mentioned that three inmates had special dietary requirements as a result of their specific medical conditions, and ordered those needs to be met. 595 F. Supp. at 1575, 1583. In *Battle*, the plaintiffs alleged that their prison administrators mistreated the inmates through acts such as racial segregation, prohibitions on religious congregation, punishment with chemical agents, refusal to provide meals that adhered to religious beliefs, and restrictions on reading materials, and they complained that their medical care, including psychiatric care, was inadequate. 376 F. Supp. at 415. Noting that medical and psychiatric care was deficient and posed a threat to the health and well-being of the "inmate population," the court ordered improvements. *Id*. at 416, 434. Neither court found that any prisoner suffered discrimination or any kind of Fourteenth Amendment violation as a result of a disability, nor did either court even mention any such allegation. In addition to *Balla* and *Battle*, 18 more of Petitioners' pre-ADA cases involve facts inapposite for the same reasons. *See* Resps' Addendum, Table I.

Facility-Wide Deficiencies In Medical Or Psychiatric Care. Nineteen of Petitioners' pre-ADA cases involved claims regarding inadequate medical or psychiatric care for the entire facility. *See* Resps' Addendum, Table III. Even under the unwarranted assumption that all inmates who need such treatment are perforce "disabled," it would not follow that such an omission would be unconstitutional discrimination prohibited by the Fourteenth Amendment. *See Garrett*, 531 U.S. at 375 (Kennedy, J., concurring);

Hibbs, 538 U.S. at 751 (Kennedy, J., dissenting); *Fla. Prepaid*, 527 U.S. at 645. Many of these cases would at most demonstrate an adverse, but not deliberate, impact on disabled persons. *See City of Boerne*, 521 U.S. at 530-31 ("In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed *because of* religious bigotry . . . It is difficult to maintain that [these laws of general applicability] are examples of legislation enacted or enforced *due to animus or hostility to the burdened religious practices* or that they indicate some widespread pattern of religious discrimination in this country." (citations omitted; emphasis added)).

No Ruling On The Merits. Fourteen of Petitioners' pre-ADA cases did not even decide the merits of Plaintiffs' Constitutional claims. *See* Resps' Addendum, Table II. For example, 6 of Petitioners' pre-ADA cases are preliminary-injunction rulings, which by definition precede any determination of the merits of the constitutional claims. *Id.* In *Duran v. Anaya*, 642 F. Supp. 510 (D.N.M. 1986), the court's preliminary injunction prohibited scheduled staffing reductions that, if permitted, would render the facility "unable to meet their constitutional obligation to provide . . . medical care, dental care and psychiatric care"—therefore *preventing* any constitutional violation from occurring. *Id.* at 525. Similarly, in *Eng v. Smith*, 849 F.2d 80 (2d Cir. 1988), the court found no abuse of discretion in the trial court's grant of preliminary injunctive relief in connection with class-action claims of systemic deficiencies in the state prison's mental-health-care system, but specifically noted that "we do not decide at this stage whether defendants' actions actually met the 'deliberate indifference' standard . . . ." *Id.* at 82. Likewise, 8 other cases involved reversals or denials of summary-judgment motions, or were remanded for further proceedings for other reasons. *See* Resps'

Addendum, Table II. These cases obviously are not particularly probative of actual constitutional violations.

Non-State Prison Facilities. Sixteen of Petitioners' pre-ADA cases involved non-state facilities such as county jails. *See* Resps' Addendum, Table V. Two of these cases actually involved *federal* prisons, which obviously cannot establish a pattern of intentional discrimination by the *States*. As this Court held in *Garrett*, "units of local government . . . are subject to private claims for damages under the ADA without Congress' ever having to rely on § 5 of the Fourteenth Amendment to render them so. It would make no sense to consider constitutional violations on their part, as well as by the States themselves, when only the States are the beneficiaries of the Eleventh Amendment." *Garrett*, 531 U.S. at 369 (citations omitted). *See also Lane*, 541 U.S. at 542 (Rehnquist, C. J., dissenting) ("Even if it were proper to consider this broader category of evidence, much of it does not concern *unconstitutional* action by the *States*. The bulk of the Court's evidence concerns discrimination by non-state governments, rather than the States themselves. We have repeatedly held that such evidence is irrelevant to the inquiry whether Congress has validly abrogated Eleventh Amendment immunity, a privilege enjoyed only by the sovereign States." (footnote omitted; emphasis in original)). Even though local jailing authorities may, under *some* states' law, be regarded as "arms of the state" for Eleventh Amendment immunity purposes (*cf.* Goodman Br. 21-22 n.7, citing *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (en banc)), the fact remains that in 1990, when Congress enacted Title II of the ADA, "most courts and litigants assumed that county sheriffs . . . were indeed county officials for purposes of § 1983 litigation," and that only this Court's 1997 decision in *McMillian v. Monroe County*, 520 U.S. 781 (1997), spurred "a wave of litigation in which sheriffs have contested their status as local officials." Karen M. Blum, *Support Your Local Sheriff: Suing Sheriffs Under § 1983*, 34 STETSON L. REV. 623, 625-26 (2005).

Cases Where Non-Disabled Prisoners Claim The Same Problems Alleged By Petitioner Goodman. Twelve of Petitioners' pre-ADA cases involve circumstances where *non-disabled* inmates were subjected to conditions like those Goodman challenges, such as extremely constrained physical space, lack of cleaning products or assistance, insufficient toilet facilities, and exposure to human waste. *See* Resps' Addendum, Table IV. Aside from the paucity of these cases, this demonstrates—as shown in Section III—that a congressional response of granting a remedy only to *disabled* prisoners lacks both congruence and proportionality.

3. The Few Judicial Decisions Remaining Are Too Isolated And Sporadic To Demonstrate A "Widespread And Persisting" Pattern Of Unconstitutional Treatment Of Disabled State Prisoners

What is left of Petitioners' pre-ADA cases is few in number—11—and probative of little with any relevance to this case. *See* Resps' Addendum, Table VI. Even if one could reasonably reach the conclusion that these 11 cases had been specifically considered by Congress, this is far from sufficient to demonstrate a "widespread and persisting" problem in need of a federal remedy. *Fla. Prepaid*, 527 U.S. at 645-46.

It would be inappropriate to sustain Petitioners' abrogation claim based on this *post hoc* assemblage of a few judicial decisions, particularly when there is no evidence that Congress ever actually considered them. *Id.* at 647 ("The examples of States avoiding liability for patent infringement by pleading sovereign immunity in a federal-court patent action are scarce enough, but any plausible argument that such action on the part of the State deprived patentees of property and left them without a remedy under state law is scarcer still."). *See also Garrett*, 531 U.S. at 369-70 ("Respondents in their brief cite half a dozen examples from the record that did involve States . . . Several of these

incidents undoubtedly evidence an unwillingness on the part of state officials to make the sort of accommodations for the disabled required by the ADA . . . But even if it were to be determined that each incident upon fuller examination showed unconstitutional action on the part of the State, these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination upon which § 5 legislation must be based."); *id*. at 371 n. 7 ("Only a small fraction of the anecdotes Justice BREYER identifies in his Appendix C relate to state discrimination against the disabled in employment. At most, somewhere around 50 of these allegations describe conduct that could conceivably amount to constitutional violations by the States, and most of them are so general and brief that no firm conclusion can be drawn."); *id*. at 375-76 (Kennedy, J., concurring) ("If the States had been transgressing the Fourteenth Amendment by their mistreatment or lack of concern for those with impairments, one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the Constitutional violations. This confirming judicial documentation does not exist. That there is a new awareness, a new consciousness, a new commitment to better treatment of those disadvantaged by mental or physical impairments does not establish that an absence of state statutory correctives was a constitutional violation.").[10]

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[10] *See also Hibbs*, 538 U.S. at 754-55 (Kennedy, J., dissenting) ("The paucity of evidence to support the case the Court tries to make demonstrates that Congress was not responding with a congruent and proportional remedy to a perceived course of unconstitutional conduct. Instead, it enacted as substantive entitlement program of its own. If Congress had been concerned about different treatment of men and women with respect to family leave, a congruent remedy would have sought to ensure the benefits of any leave program enacted by a State are available to men and women on an equal basis."); *Lane*, 541 U.S. at 547-48 (Rehnquist, C. J., dissenting) ("The barren record here should likewise be fatal to the majority's holding that Title II is valid legislation enforcing due process rights that involve access to the courts. This

In sum, Petitioners' collection of largely inapposite cases fails to demonstrate the existence of—let alone Congressional consideration of—a serious, widespread, and pervasive problem involving disabled state prison inmates and their access to state programs, services, or activities, and certainly none meriting the federal remedy prescribed by Title II of the ADA.

III. TITLE II OF THE ADA IS NOT A PROPORTIONATE OR CONGRUENT REMEDY UNDER SECTION 5

Even if the condition of relevant State misconduct could somehow be established in this case—and Section II, above, demonstrates that it cannot—Title II of the ADA independently fails the requirement that "the remedy imposed by Congress must be congruent and proportional to the targeted violation." *Garrett*, 531 U.S. at 374. *See also Civil Rights Cases*, 109 U.S. 3, 13 (1883) (Section 5 requires that the legislation be "adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against"). The congruence-and-proportionality requirement ensures proper respect for "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *City of Boerne*, 521 U.S. at 519. As applied to the class of cases involving disabled state prisoners' access to programs, services, and activities, Title II is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532.

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conclusion gains even more support when Title II's nonexistent record of constitutional violations is compared with legislation that we have sustained as valid § 5 enforcement legislation. . . . Accordingly, Title II can only be understood as a congressional attempt to 'rewrite the Fourteenth Amendment law laid down by this court,' rather than a legitimate effort to remedy or prevent state violations of that amendment." (citations omitted)).

Title II of the ADA, as applied to state prisons, bears no markings of the sort of calibrated remedial legislation that could satisfy the § 5 requirement of "enforce[ment] by appropriate legislation." To begin, Title II contains not a word suggesting that any of its remedial provisions were directed specifically to the context of state prisons. Quite the contrary: Title II contains two parts—Part A, which is entitled "Prohibition Against Discrimination and Other *Generally Applicable Provisions*" (42 U.S.C. §§ 12131-12134) (emphasis added), and Part B, entitled "Actions Applicable to Public Transportation Provided by Public Entities Considered Discriminatory" (42 U.S.C. §§ 12141-12165). Viewed in that light, it is difficult to understand Part A's generalized remedial provisions "as responsive to, or designed to prevent unconstitutional behavior" as applied to state prisons and prisoners. *Garrett,* 521 U.S. at 532. Its "indiscriminate scope" confirms that it is anything but a proportionate response to a constitutional problem in state prisons. *Kimel,* 528 U.S. at 91.

Indeed, it is quite clear that in the ADA generally, and in Title II in particular, Congress was in fact changing the law to provide disabled persons with substantially greater legal rights and remedies than the Constitution afforded them: In the ADA's statement of findings and purpose, Congress declared that "individuals with disabilities are a discrete and insular minority . . . relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and . . . not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a)(7). Congress's use of the "discrete and insular minority" terminology, of course, is a direct quotation of the Court's famous footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), which made the case for "heightened scrutiny" of classifications burdening such "discrete and insular" groups; and Congress's further reference to "characteristics that are

. . . not truly indicative of the individual ability of such individuals to participate in, and contribute to, society" echoes the Court's rationale for viewing classification of "quasi-suspect" classes with similarly searching scrutiny. *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (illegitimacy has "no relation to the individual's ability to participate in and contribute to society").

Congress's intent to treat the disabled as at least a quasi-suspect class with respect to access to programs and services is clear. But that goes far beyond the Constitution's requirements, which treat the disabled as a non-suspect class entitled only to rational-basis constitutional scrutiny, and which further view prison officials' actions and classifications with significant deference. *City of Cleburne*, *supra*; *Turner*, *supra*. And it goes far beyond any such rights accorded by the Eighth Amendment, which, it bears repeating, requires "deliberate" indifference, not merely a denial of access.

A carefully calibrated remedy applicable to the constitutional claims of disabled state prisoners would have to take into account the significant deference to prison administration, and would further have to recognize the significant differences in the substance and scope of constitutional rights possessed by state prisoners—but there is not a hint of that anywhere in the statute. The ADA is thus policy-based social-advancement legislation that seeks to give the disabled substantially greater rights of access to public services, programs, and activities than any provision of the Constitution would. That is perfectly appropriate for Congress to do when it makes a generally applicable law, and it is indeed laudatory, but more is required before such laws of general application can be applied to permit access to a sovereign state's treasury. The careful calibration of remedy to wrong that would be required to allow state prisoners to bring Title II suits for money damages is just not present here.

The United States nonetheless claims that Title II's requirements of nondiscriminatory access, reasonable accommodations, and reasonable modifications are all "sensitive to the unique security needs in prisons and tailored to the constitutional problems it remedies." (U.S. Br. 42) That is not so. As we have shown, there is no evidence whatsoever that Congress in passing the ADA was intending to be "sensitive" to the States' substantial interest in prison administration, or that Title II was somehow specially "tailored" to prisons. Rather, Congress addressed most of Title II through "[g]enerally [a]pplicable [p]rovisions." Unsurprisingly, there is not a single provision in Title II that even attempts to take into account the "unique circumstance of incarceration," *McNeil v. United States*, 508 U.S. 106, 113 (1993), or "the peculiar and restrictive circumstances of penal confinement." *Jones v. N.C. Prisoners' Union*, 433 U.S. at 125.

Apparently recognizing the serious risk that Title II's provisions will not survive the Court's prescribed congruence-and-proportionality analysis, Petitioner Goodman offers an alternative, fallback argument. Goodman claims that Title II is validly applied to allow money damages against states at least "as applied to cases where the state actually violated a plaintiff's constitutional rights" (Goodman Br. 45), such that it should at a minimum be sustained as an appropriate statutory remedy for Goodman's constitutional claims under the Cruel and Unusual Punishments Clause.

There are several problems with this fallback argument. *First*, it is not "fairly included" within the question presented by Goodman, which asks whether Congress validly abrogated state sovereign immunity "for suits by inmates with disabilities *challenging discrimination by* state-operated prisons." Goodman Br. i (emphasis added); *see* S. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Goodman's claim of "deliberate indifference" to injury or

illness is not a disability-based "discrimination" claim, but a claim that sounds in individualized treatment. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

Second, Goodman's proposed approach is inconsistent with the approach taken by this Court in *Lane*, where abrogation was sustained "as it applies to the class of cases implicating the accessibility of judicial services." 541 U.S. at 531. While that is undoubtedly why Petitioners have framed the issue in this Court as one dealing with the application of Title II "in the prison context" (*see, e.g.*, Goodman Br. 14; *see also id.* at 12 ("in the class of cases implicating the accessibility of prisons and discrimination against inmates with disabilities"); U.S. Br. 9), Goodman's attempt to redefine the analysis as one appropriately done not just on a "class of cases," but on a case-by-case basis, is inconsistent with *Lane*, and inconsistent with the way in which Congress legislates, which is decidedly not on a "case-by-case" basis.

Goodman nonetheless claims (Goodman Br. 47) that his alternative case-by-case approach is supported by *United States v. Raines*, 362 U.S. 17 (1960), and *Griffin v. Breckenridge*, 403 U.S. 88 (1966). It is not. In *Raines*, the defendants were state actors who claimed that the Civil Rights Act of 1957, 42 U.S.C. § 1971, could not constitutionally be applied to them because subsection (c) of that statute reached beyond the Constitution and applied to "any person" who engaged (or was reasonably thought about to engage) in acts which would deprive any person of one of the rights guaranteed by subsection (a) of that act, and not just state actors. 362 U.S. at 19-20. The Court held that the state-actor defendants could not facially attack § 1971 on the ground that applying it to non-state-actor defendants exceeded the congressional power under § 2 of the Fifteenth Amendment (which contains the same "appropriate legislation" language as § 5 of the Fourteenth Amendment). *Id.* at 24-25. That holding was an unexceptional application of the rule that "facial" challenges to statutes are almost

never appropriate. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985) (explaining the holding of *Raines* in this fashion); *United States v. Booker*, 125 S. Ct. 738, 774 n.1 (2005) (Stevens, J., dissenting in part) (similar). Here, by contrast, there is no place for application of the principle that "a litigant may only assert his own constitutional rights or immunities," *Raines*, 362 U.S. at 22, as it is the State of Georgia, the Georgia State Prison, and the prison's officials and employees who are invoking the constitutional objection in this case.[11]

To the extent that *Raines* is at all instructive in this case, it only serves to demonstrate why Title II of the ADA is not a congruent or proportional congressional response to claims of cruel and unusual punishment. In *Raines*, subsection (a) of the challenged statute guaranteed the right to vote "without distinction of race, color, or previous condition of servitude." That is precisely the guarantee of § 1 of the Fifteenth Amendment ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."), so the rights protected by subsection (a) of the statute were perfectly congruent with the constitutional right.

But applying the ADA to enforce the Eighth Amendment's Cruel and Unusual Punishments Clause would be wildly incongruent and disproportionate to even that constitutional right. This Court's precedents require a prisoner claiming cruel and unusual punishment to prove an objective component—that the defendant's conduct objectively rises to the level of a constitutional violation by depriving the prisoner of the "minimal civilized measure of life's necessities"—and a subjective component, establishing

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[11] *Griffin v. Breckenridge*, 403 U.S. 88 (1971) is to the same effect. *Griffin* cited *Raines* as an example of a case that had "firmly rejected" the Court's ancient "severability rule that required invalidation of an entire statute if any part of it was unconstitutionally overbroad." *Id.* at 104.

that the defendant's state of mind was that of "deliberate indifference" to the prisoner's "serious medical needs." *See, e.g.*, *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 342 (1981) and *Estelle*, 429 U.S. at 106)). Yet allowing a disabled prisoner to enforce the Cruel and Unusual Punishments Clause through Title II of the ADA would lighten his burden of proof, from a "deliberate indifference"-to-serious-medical-needs standard to a simple denial-of-services standard. *See* 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services . . . of a public entity."). What is more, *only* prisoners with a "disability" within the meaning of the statute could enforce the Cruel and Unusual Punishments Clause and obtain money damages via the ADA; non-disabled prisoners suffering cruel and unusual punishment could not. This substantial expansion of constitutional rights, and the simultaneous underinclusive-ness of the class of individuals who could obtain the statute's remedies, demonstrates the statute's lack of proportion and congruence.

Third, for essentially the same reasons set forth in Section II, above, and illuminated by the Appendix to this brief, there was no evidence of "widespread and unconstitutional" cruel and unusual punishments of disabled state prisoners meriting a further federal remedy.

In sum, whether Title II of the ADA is evaluated with reference to "the prison context" generally, or as a statute seeking to remediate cruel and unusual punishments, that law lacks the proportionality and congruity demanded by this Court's decisions.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

GREGORY A. CASTANIAS
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

JORDANA R. STERNBERG
JONES DAY
1420 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 521-3939

THURBERT E. BAKER
Attorney General
KATHLEEN M. PACIOUS
Deputy Attorney General
JOHN C. JONES
Senior Assistant Attorney General
DAVID E. LANGFORD*
Assistant Attorney General
STATE OF GEORGIA
Georgia Department of Law
40 Capitol Square SW
Atlanta, GA 30334
(404) 463-8850

**Counsel of Record*