

Goodman and United States v. Georgia: The Supreme Court Hears Another Case Challenging the Constitutionality of Title II of the Americans with Disabilities Act

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Abstract

On November 9, 2005, the United States Supreme Court will hear oral arguments in *Goodman v. Georgia*, No. 04-1236. The *Goodman* case will determine whether Congress acted within its power under the Fourteenth Amendment to apply Title II of the Americans with Disabilities Act (ADA) to state prisons, jails, and other correctional facilities. This paper provides an overview of how the *Goodman* case fits into the larger context of federalism challenges to Congress's power to enact various parts of the ADA as well as other civil rights laws. It then examines the *Goodman* case in detail and concludes that Congress had ample authority to apply Title II to correctional facilities. Congress acted based on a long history of unconstitutional treatment of inmates with disabilities, including myriad forms of cruel and unusual punishment. In light of this disturbing record and the limited remedies that Congress put in place in Title II of the ADA, Title II's requirements are an appropriate way to remedy and prevent further unconstitutional treatment in this context.

The importance of *Goodman* extends beyond the question of whether Congress acted within its power under the Fourteenth Amendment. States have challenged Congress's power to enact parts of the ADA on multiple fronts, sometimes arguing that certain applications of the ADA are simply invalid because Congress lacks any authority to pass these applications. Thus, *Goodman* presents the opportunity for the Supreme Court to establish that correctional facilities have an obligation to comply with Title II of the ADA. Additionally, the case may have a significant impact on how courts view the constitutionality of other applications of Title II. In light of the extraordinary record of discrimination that Congress attempted to address in the ADA, it is critical that the ADA's protections be upheld.

I. Introduction

This paper discusses the significance of the latest case to be considered by the United States Supreme Court concerning Congress's power to enact the Americans with Disabilities Act (ADA), *Goodman v. Georgia*.¹ In *Goodman*, the Court will decide whether Congress acted within its authority under the Fourteenth Amendment in applying the ADA to state prisons. This is the third time that the issue of Congress's power to enact portions of the ADA has reached the Supreme Court, and it is not likely to be the last time. What the Court says in *Goodman* will determine whether the remedies of Title II of the ADA may be enforced against state prisons, jails, and other correctional facilities. More broadly, it may have a significant impact on the viability of claims under Title II of the ADA involving a variety of other issues as well.

It is NCD's position that Congress acted well within its authority in applying the ADA to prisons and jails. Congress acted based on a long and appalling history of discrimination against individuals with disabilities in correctional facilities. In fact, the discrimination experienced by people with disabilities at the hands of state and local correctional officials includes some of the most egregious conduct to which people with disabilities have been subjected in any context.

In prisons and jails, "the government's power is at its apex"² and consequently the Constitution imposes affirmative obligations on states to ensure that the medical and mental health needs of inmates with disabilities are met, and that they have access to correctional programs and services. Yet the record that was before Congress when it passed the ADA, and that continues to the present day, shows that states have frequently shown deliberate indifference to the needs of inmates with disabilities, failed to make simple accommodations that would allow these individuals to use the basic amenities such as toilet facilities and showers, failed to provide needed mental health services to inmates with psychiatric disabilities, and failed to protect inmates who have been targeted for abuse because of their disabilities. In some cases, state officials have themselves targeted inmates with disabilities for abuse. In one case, prison guards repeatedly taunted inmates with paraplegia, assaulted them with a knife, and called one of them a "crippled bastard" who "should be dead."³ States' treatment of inmates with disabilities has frequently resulted in severe injuries and broken bones, humiliation, extreme mental anguish, and even suicide. In light of this history, the ability to use the ADA to enforce the rights of inmates with disabilities to equal treatment and reasonable modifications is absolutely critical.

This paper discusses the basis for Congress's application of the ADA's requirements to state and local correctional facilities as well as the broader implications of the *Goodman* case for the rights of people with disabilities. The paper provides an overview of how the *Goodman* case fits into the larger context of federalism arguments and constitutional challenges to the ADA, a description of the *Goodman* case, an analysis of Congress's power to apply Title II of the ADA to state correctional facilities, and a discussion of the potential implications that a decision in *Goodman* may have for the future of the ADA.

NCD previously published papers discussing the implications of the Supreme Court's two previous cases concerning Congress's power to enact portions of the ADA. *The Americans with Disabilities Act: The Implications of the Supreme Court's Decision in Board of Trustees of the University of Alabama v. Garrett* (Feb. 26, 2003), was part of a series of policy briefs entitled *Righting the ADA*. It is available at <http://www.ncd.gov/newsroom/publications/2003/alvgarrett.htm>. *Tennessee v. Lane: The Legal Issues and the Implications for People with Disabilities* (Sept. 4, 2003) is available at <http://www.ncd.gov/newsroom/publications/2003/legalissues.htm>. Also relevant is the Council's recent paper, *The Civil Rights of Institutionalized Persons Act: Has It Fulfilled Its Promise?* (Aug. 8, 2005), available at <http://www.ncd.gov/newsroom/publications/2005/personsact.htm>

II. Background

The issue of Congress's power to enact the ADA has become increasingly important over the last several years, as states have routinely argued that Congress exceeded its authority in enacting various applications of the ADA. These challenges have been raised primarily by state entities trying to assert their sovereign immunity to ADA claims. Because the Supreme Court has said that Congress can only take away a state's sovereign immunity through its power to legislate under Section 5 of the Fourteenth Amendment,⁴ states have argued that Congress lacks the authority to enact portions of the ADA under the Fourteenth Amendment, and thus lacks the authority to take away their sovereign immunity. States' assertions of sovereign immunity are designed primarily to prevent damage suits, since state officials may be sued for prospective injunctive relief despite a state's sovereign immunity.

Nonetheless, the challenges to Congress's Fourteenth Amendment power to enact the ADA have far greater significance than simply the availability of damage claims against states. The Fourteenth Amendment is one of the two sources of authority that Congress invoked when it passed the ADA.⁵ If portions of the ADA are found to be invalid Fourteenth Amendment legislation, the remaining source of Congress's authority to enact these provisions is its power to regulate interstate commerce. If a court were to conclude that an application of the ADA is not authorized by Congress's Fourteenth Amendment power or its commerce power, that application would not be valid. This is particularly important in the area of correctional facilities, as states have challenged Congress's use of its commerce power in ADA Title II cases involving state prisons far more frequently than in any other type of ADA case.

Occasionally, courts have invalidated portions of the ADA altogether based on a conclusion that neither of the powers invoked by Congress authorized those portions of the ADA. For example, in *Klingler v. Director, Department of Revenue*,⁶ the Eighth Circuit invalidated the ADA's application to handicapped parking placard surcharges. It ruled that Congress lacked commerce authority for this application of Title II. Because the Eighth Circuit had previously held that Title II was not valid Fourteenth Amendment legislation,⁷ its decision in *Klingler* completely invalidated the application of Title II in this context. Fortunately, the Supreme Court has vacated this decision and ordered the

Eighth Circuit to reconsider its ruling. In *Pierce v. King*,⁸ a North Carolina district court ruled that Title II of the ADA was completely inapplicable to state prisons because it went beyond both the fourteenth Amendment and commerce powers of Congress.

As challenges to the commerce authority supporting various provisions of Title II of the ADA have become more common, the scope of Congress's power to enact these provisions under its Fourteenth Amendment authority has become increasingly important.⁹ Thus, what is at stake in *Goodman*, together with possible future cases, is whether Title II of the ADA applies at all to state prisons, jails, and other correctional facilities.

During the confirmation hearings of Supreme Court Chief Justice John Roberts, Senators from both sides of the aisle repeatedly expressed frustration, anger and disappointment about the Supreme Court's decisions narrowing the scope of Congress's power to pass civil rights laws and second-guessing Congress's judgment about the sufficiency of the massive record of disability-based discrimination compiled by Congress to support the need for the ADA. Senators pointed out seeming inconsistencies between *Board of Trustees of Univ. of Alabama v. Garrett*,¹⁰ where the Court ruled that Congress exceeded its Fourteenth Amendment authority in applying Title I of the ADA to the states, and *Tennessee v. Lane*,¹¹ where the Court ruled that Congress acted within its Fourteenth Amendment power in enacting Title II of the ADA insofar as it applies to access to the courts.

After the confirmation hearings, it remained unclear how Chief Justice Roberts would analyze the *Goodman* case or other potential challenges to the ADA's Fourteenth Amendment basis, but it was apparent that many members of Congress felt strongly that the Supreme Court had acted inappropriately in casting itself as Congress's fact-checker and substituting its own judgment for that of Congress.

With Justice O'Connor's recent announcement of her retirement, the future of the ADA hangs in the balance. Justice O'Connor was the deciding vote in both *Garrett* and *Lane*, voting against Congress's authority to enact Title I in *Garrett* and for Congress's authority to enact Title II in *Lane*. Because of Justice O'Connor's role as the "swing" voter on these issues, her views in each case have been extremely important. Her successor's views on Congress's power to enact the ADA could potentially work a dramatic shift in the Court's jurisprudence in this area.

III. Overview: The New Federalism

The challenges to the constitutionality of the ADA and other civil rights laws over the past decade are part of a movement sometimes called "the New Federalism" aimed at reducing federal power over the states. These challenges were fueled in part by a 1996 Supreme Court decision that overruled previous precedent allowing Congress to use its commerce power to take away states' sovereign immunity under the Eleventh Amendment.¹² The result of this 1996 case was that the only means available to Congress to take away states' immunity from suit was to use its power under Section 5 of

the Fourteenth Amendment to pass laws that enforce the guarantees of that Amendment. To make matters more difficult, in 1997 the Court issued another decision that set forth a stringent test for determining when Congress can validly legislate under Section 5 of the Fourteenth Amendment.¹³

Following these decisions, states began routinely challenging Congress's enactment of the ADA and other laws as outside of its authority. In a series of "federalism" cases, the Supreme Court concluded that Congress lacked the power under the Fourteenth Amendment to pass a number of important civil rights laws. In *Kimel v. Florida Bd. of Regents*,¹⁴ the Supreme Court concluded that the Age Discrimination in Employment Act was not a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. In *United States v. Morrison*,¹⁵ the Court held that Congress lacked authority under both Section 5 of the Fourteenth Amendment and the Commerce Clause to enact the civil remedies provisions of the Violence Against Women Act. In *Board of Trustees of Univ. of Alabama v. Garrett*,¹⁶ the Court held that Title I of the ADA, the ADA's employment title, was not a valid exercise of Congress's authority under Section 5 of the Fourteenth Amendment.

The *Garrett* case marked the first time that the Supreme Court considered the constitutionality of the ADA. In *Garrett*, the Court seemed to ignore the vast record of state discrimination against people with disabilities, concluding that Congress had assembled only "minimal evidence of unconstitutional state discrimination in employment against the disabled."¹⁷ Additionally, the Court found that Title I was not congruent and proportional to the history of state discrimination in employment. It came to this conclusion based primarily on the notion that the Fourteenth Amendment's Equal Protection Clause forbids disability-based discrimination in employment only where there is no rational basis for it, whereas Title I of the ADA forbids much more.¹⁸ For example, the Court believed that the Constitution would not forbid a state employer from acting "rationally" by conserving resources and hiring individuals who are able to use existing facilities rather than individuals with disabilities who would need accommodations. The ADA, on the other hand, requires employers to make reasonable accommodations for employees with disabilities unless it would be an undue hardship to do so.¹⁹ The ADA also bars the use of standards or criteria that have a disparate impact on individuals with disabilities, regardless of whether there is a rational basis for doing so.²⁰

In 2003, the Court finally issued a decision breaking from its trend of invalidating civil rights laws. In *Nevada Dep't of Human Resources v. Hibbs*,²¹ the Court concluded that Congress did have the power under Section 5 of the Fourteenth Amendment to enact the family leave provision of the Family and Medical Leave Act. That provision gave eligible employees the right to take up to 12 weeks of unpaid leave annually because of a serious health condition of a spouse, child or parent.

The difference between the Court's decision in *Hibbs* and its *Garrett* and *Kimel* decisions turned on the fact that *Hibbs* involved a history of gender discrimination in employment leave policies by the states, and this triggered a more stringent level of

review of state-based discrimination. Gender discrimination, unlike discrimination based on disability and age, is viewed by the courts with heightened scrutiny rather than being reviewed merely to determine whether there is some rational basis for it. The application of heightened scrutiny was important in *Hibbs* both because it meant that more of the history of discrimination was considered unconstitutional and because the Court considered the constitutional standard of review to be closer to the statutory requirement than in *Garrett* and *Kimel*.

The *Hibbs* decision suggested that legislation involving areas where the courts apply heightened scrutiny to state actions would be more likely to be upheld. Because heightened scrutiny is applied not only to decisions involving race or gender, but also to decisions implicating fundamental rights, Title II of the ADA stands on firm ground as Fourteenth Amendment legislation. Unlike the employment provisions of Title I, Title II – which prohibits discrimination in state and local government services, programs, and activities – applies to many areas that implicate fundamental rights, such as access to the courts, voting, marriage and family rights, institutionalization, and prisoners’ rights.

Indeed, Title II has fared better than Title I in the Supreme Court. In *Tennessee v. Lane*,²² the Supreme Court was asked to decide whether Title II of the ADA was a valid exercise of Congress’s power under Section 5 of the Fourteenth Amendment in a case involving access to the courts.²³ The Court upheld Congress’s Section 5 power, but limited its holding to the area of access to the courts. The primary reason *Lane* came out differently than *Garrett* is that the Court recognized that unlike Title I, which sought to enforce the guarantee of equal protection in the area of employment, Title II also sought to enforce “a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review.”²⁴

Chronicling the history of state and local government discrimination²⁵ against people with disabilities, the Court concluded in *Lane* that “Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systemic deprivations of fundamental rights.”²⁶ While the Court provided an expansive analysis of the history of governmental discrimination against people with disabilities in many different areas, it determined that the congruence and proportionality analysis must be limited to the application of the ADA at issue in the case before the Court rather than Title II in its entirety.²⁷ Thus, the Court considered the congruence and proportionality of Title II to the record of constitutional violations only with respect to access to courts. Based on the long history of unequal treatment of people with disabilities in this arena and the limited remedies of Title II, the Court found this application of the ADA congruent and proportional.²⁸

In the wake of *Lane*, many questions remain as to how the Court will analyze the Fourteenth Amendment basis for other applications of Title II. *Lane* contained many broad and helpful statements that suggest that all, or at least most, of Title II must be upheld as valid Fourteenth Amendment legislation. Yet by limiting its holding to the area at issue in *Lane* – access to the courts – the Court created a great deal of confusion among lower courts about how to apply *Lane*. A number of cases involving challenges to the

Fourteenth Amendment basis for other types of Title II claims have been percolating in the federal courts. As the first such case to reach the Supreme Court following *Lane*, *Goodman* is likely to determine how courts will address a number of important questions in analyzing constitutional challenges to the ADA's Fourteenth Amendment basis.

IV. The Case of *Goodman v. Georgia*

Facts

Petitioner Tony Goodman filed this suit about his treatment at the Georgia State Prison in Reidsville, Georgia, where he was incarcerated from 1996 to 1999 and from 2004 to the present.²⁹ Goodman has paraplegia and uses a wheelchair for mobility. While in the prison, Goodman has been held in a cell that is so narrow (12 by 3 feet) that he cannot turn his wheelchair. He is confined to that cell for 23 to 24 hours each day because other prison facilities are not wheelchair accessible. Because the bed in his cell is inaccessible, he often has to sleep in his wheelchair to avoid injuring himself by transferring to the bed.³⁰

Goodman also alleges that the prison has failed to provide toilet and bathing facilities that are accessible to him, and that he has injured himself numerous times trying to transfer from his wheelchair to inaccessible toilets and showers, sometimes breaking bones. He was sometimes forced to sit in his own waste because he could not reach the toilet, and he was denied cleaning supplies and help cleaning his wheelchair and his cell. He was even punished for not cleaning the waste in his cell.³¹

Because the showers are not accessible, Goodman has fallen and injured himself repeatedly while trying to transfer from his wheelchair to a shower stall seat. Goodman has been denied access to virtually all prison services, programs and facilities, including religious services and the prison law library, because of the inaccessibility of the prison's facilities.³² Finally, he claims that the prison has failed to provide him adequate medical care, including refusing requests for medical care and failing to provide him with the treatment and medication prescribed by his doctors.³³

The Legal Proceedings

Goodman filed suit *pro se* in the United States District Court for the Southern District of Georgia in 1999 against the State of Georgia, the Georgia Department of Corrections, and a number of Georgia prison officials. He alleged that the defendants had violated his Eighth Amendment right to be free of cruel and unusual punishment and discriminated against him on the basis of his disability in violation of Title II of the ADA. He sought money damages for both his constitutional and ADA claims and also sought injunctive relief on his ADA claim. In an unpublished opinion, the district court dismissed Goodman's constitutional claims but held that his ADA claims could proceed. Following the Supreme Court's decision in *Garrett*, the defendants filed a motion for summary judgment on Goodman's ADA claims, arguing that Goodman's ADA claim for money damages was barred by the Eleventh Amendment and that his ADA claim for

injunctive relief was rendered moot by Goodman's transfer from the prison. In an unpublished opinion, the district court granted the defendants' motion and dismissed Goodman's ADA claims.

Goodman appealed to the Eleventh Circuit, and the United States intervened to defend the constitutionality of the ADA. After the Supreme Court's decision in *Lane*, the Eleventh Circuit in an unpublished decision affirmed the dismissal of Goodman's ADA claim for money damages, but allowed his constitutional claims and his claim for injunctive relief under the ADA to proceed. The Eleventh Circuit found that he had stated a claim for violation of the Eighth Amendment based on the claims that the State imposed some form of total restraint 23 or more hours per day without justification; that he was forced to sit in his own waste because no one would assist him with toileting; and that the State was deliberately indifferent to his serious medical conditions by failing to provide adequate medical treatment.³⁴

The Eleventh Circuit affirmed the district court's dismissal of Goodman's ADA claim for money damages on Eleventh Amendment immunity grounds. The Court relied on its decision in *Miller v. King*,³⁵ which was argued on the same day as *Goodman* and involved another prisoner in the same facility. In *Miller*, the same three-judge panel that decided *Goodman* held that Title II of the ADA, as applied to Eighth Amendment claims in state prisons, was not valid Fourteenth Amendment legislation.³⁶ The Eleventh Circuit focused its analysis narrowly, stating that "the only right at issue in this particular case is Miller's Eighth-Amendment right to be free from cruel and unusual punishment."³⁷ The Court stated that it was bound by the Supreme Court's conclusion in *Lane* that Congress enacted Title II based on a sufficient history of constitutional violations:

[I]n applying the second step of the *Boerne* test, the Supreme Court in *Lane* considered evidence of disability discrimination in the administration of public services and programs generally, rather than focusing only on discrimination in the context of access to the courts, and concluded that Title II in its entirety satisfies *Boerne*'s step-two requirement that it be enacted in response to a history and pattern of States' constitutional violations.³⁸

However, the Court concluded that Title II was not an appropriate response to the history and pattern of unconstitutional treatment. The Court distinguished the case at hand from *Lane*, despite the documented pattern of disability discrimination in prisons, concluding that Title II's requirements were too far removed from the Eighth Amendment's requirements:

Even if a documented history of disability discrimination specifically in the prison context justifies application of some congressional prophylactic legislation to state prisons, what makes this case radically different from *Lane* is the limited nature of the constitutional right at issue and how Title II, as applied to prisons, would substantively and materially rewrite the Eighth Amendment.³⁹

The Eleventh Circuit characterized the Eighth Amendment as having no effect on most prison services, programs and activities and as being limited to punishment, whereas Title II of the ADA applies to all services, programs and activities of a public entity. The Court thus concluded that “Title II’s affirmative duty to accommodate qualified, disabled prisoners is markedly different than, and cannot be said to be perfectly consistent with, traditional protections afforded by the Eighth Amendment” and “fails to meet the requirement of proportionality and congruence.”⁴⁰

V. The History of Discrimination Against Prisoners with Disabilities

As the Supreme Court found in *Tennessee v. Lane*, Congress enacted the ADA against a backdrop of pervasive unequal treatment of people with disabilities in many different contexts, including in the “penal system.”⁴¹ The ADA was the culmination of many years of Congressional concern about, and efforts to address, discrimination against individuals with disabilities in prisons and jails as well as in other settings.

CRIPA Hearings

As early as 1971, Congress was gathering evidence about the mistreatment of state prisoners, including prisoners with disabilities. In a series of hearings about state prison conditions in 1971 and 1972, Congress considered evidence about an inmate with paralysis who was unable to take showers or use the sink in his cell, and was denied the right to use a wash basin; about a prison’s failure to move a suicidal inmate from an unsafe cell, resulting in the inmate taking his own life; and about a prison’s failure to make dietary accommodations for inmates with diabetes.⁴²

In 1980, Congress passed the Civil Rights of Institutionalized Persons Act (CRIPA) in order to address widespread violations of the rights of individuals in prisons, jails and other institutions. The law authorized the Department of Justice to bring suits to enforce the constitutional and statutory rights of individuals in state institutions.⁴³ The hearings held by Congress before the passage of CRIPA brought to light extensive violations of the constitutional rights of individuals with disabilities in prisons and jails. For example, Congress heard testimony about an inmate who used a wheelchair and was placed in an inaccessible cell that he could not leave for years, an inmate with quadriplegia who developed bedsores infested with maggots due to the facility’s failure to bathe him, and inmates who had to wait months or years for prosthetic devices.⁴⁴ An inmate who was partially incontinent due to a stroke was forced to sit day after day on a wooden bench beside his bed in order to keep the bed clean, even though he frequently fell from the bench and his legs became blue and swollen. One leg was eventually amputated and the inmate died the following day.⁴⁵ The CRIPA hearings also revealed that inmates with mental and physical disabilities were frequently subjected to physical abuse by officers and other inmates, and were sometimes raped.⁴⁶ Jailers took away inmates’ wheelchairs as a form of punishment.⁴⁷

During the CRIPA hearings, Congress heard testimony that prison inmates with psychiatric disabilities were deliberately given inadequate food that was different from the food given to other inmates, because the corrections officials believed that “mental cases don’t know what they eat anyway.”⁴⁸ Additionally, the CRIPA hearings contained extensive testimony that states had failed to provide inmates with psychiatric disabilities with basic mental health treatment required by the Constitution.⁴⁹ Congress heard about court findings in Alabama that inmates received constitutionally inadequate care where one psychologist working one afternoon per week treated 2400 inmates with mental retardation or mental illness, where psychotic inmates who became violent were left unattended in lockup cells unequipped with padding or restraints, and where “the large majority of mentally disturbed prisoners receive no treatment whatsoever.”⁵⁰

Congress also heard about repeated instances of bedridden inmates receiving no medical treatment, living in substandard and filthy conditions with rats; inmates with draining bedsores; inmates with urinary tract infections due to their catheters not being changed for weeks; untrained inmates being allowed to provide medical treatment to other inmates; an inmate with a mental disability confined for weeks in a 7 foot by 5 foot cell with a room temperature of 102 degrees and no air movement, sleeping on floors soaked with urine and feces; and overtly psychotic inmates housed without treatment or supervision in dimly lit, unventilated and filthy 5 foot by 8 foot cells 24 hours a day.⁵¹

Reports

A 1983 report of the United States Commission on Civil Rights detailed a long history of discrimination against individuals with disabilities, including discrimination occurring in prisons and jails. This history continued after the enactment of CRIPA. The Commission noted, for example, that many penal facilities had inadequate ability to deal with accused persons and convicts with physical disabilities because they lacked adaptations such as accessible jail cells and toilet facilities.⁵² Additionally, it highlighted abuse of inmates with disabilities by other inmates, and inadequate treatment and rehabilitation programs.⁵³ Congress referenced the Civil Rights Commission report throughout the legislative history of the ADA.

Other reports also documented the history of unconstitutional discrimination against individuals with disabilities in jails and prisons. A report of the California Attorney General’s Commission on Disability discussed an incident in which a parole agent sent a man who used a wheelchair back to prison because he did not show up for his appointments since he was unable to obtain accessible transportation.⁵⁴ The report also noted instances of police officers removing individuals “unsafely from their wheelchairs to transport them to jail.”⁵⁵ A Kentucky report stated that “Kentucky Corrections offers no appropriate treatment to the retarded and subjects them to varied institutional abuse,” and documented problems dealing with inmates with mental retardation in more than half of the states.⁵⁶ A study of inmates in the Chicago area noted that while the courts mandate that jails conduct routine mental health evaluations, given the immediate needs of inmates with mental illnesses, many jails do not do so.⁵⁷

Task Force on Rights and Empowerment of Americans with Disabilities

Widespread unconstitutional discrimination against prisoners with disabilities was also reported by a Task Force on the Rights and Empowerment of Americans with Disabilities appointed in 1988 by the chair of the House Subcommittee on Select Education and Civil Rights. The Task Force gathered information from every state concerning the proposed legislation that became the ADA. It heard numerous accounts of discrimination against people with disabilities in state programs and services, including jails and prisons. For example, the Task Force heard about inmates with developmental disabilities being subjected to longer prison terms and being placed in settings where they were particularly vulnerable to abuse by other inmates, inmates with disabilities being denied needed medical and psychiatric treatment, police arresting and jailing deaf individuals without providing interpreter services, state prisons failing to provide telecommunications services for deaf inmates, over half of inmates in solitary confinement having serious mental illness, and an inmate with serious mental illness being kept in solitary confinement for a total of 35 years.⁵⁸

ADA Hearings

Congress also heard testimony about unconstitutional treatment of prisoners with disabilities during hearings concerning the passage of the ADA. The House Judiciary Committee's report on the ADA observed that people with epilepsy and other disabilities are frequently deprived of medications while in jail, resulting in seizures.⁵⁹ Testimony at the hearings on the ADA revealed that adults with traumatic brain injury are often jailed based on aberrant behavior caused by their disability, that jail inmates who were deaf or hard-of-hearing were denied interpreters and could not understand their rights, and that jail inmates with HIV were isolated without reason and humiliated by corrections officers – including an inmate with HIV being forced to spend the night in a car in an open parking lot which attracted onlookers who stared and pointed.⁶⁰

Caselaw

In addition to all of the other evidence before Congress when it applied the ADA to prisons and jails, Congress acted based on an extraordinarily massive record of caselaw finding unconstitutional treatment of prison and jail inmates with disabilities. Many of these cases generated specific court findings of violations of these individuals' constitutional rights. This record of caselaw began long before the ADA was passed, and unconstitutional discrimination continues to the present.

Many courts have found violations of the Eighth Amendment rights of inmates with disabilities based on their confinement in cells that are not accessible to individuals who use wheelchairs, making them unable to move around in the cells; based on the refusal to provide accessible facilities such as toilets and showers; based on the denial of needed medical or psychiatric care; based on the refusal to provide interpreters; based on the failure to ensure that inmates with disabilities receive appropriate medical care; based on the failure to protect inmates with disabilities from harm by other inmates, by suicide,

or by poor conditions that aggravated inmates' disabilities; and based on abuse specifically targeted at inmates with disabilities. Courts have also found violations of the Due Process and First Amendment rights of inmates with disabilities, including failure to accommodate the needs of inmates with disabilities in disciplinary hearings and denial of access to prison law libraries based on disability.

We detail here only a small sampling of the cases involving unconstitutional treatment of individuals with disabilities in the penal system. In *Parrish v. Johnson*, 800 F.2d 600 (6th Cir. 1986), two inmates who were paraplegic were forced to sit in their own feces for hours, putting one of them at risk of infection of his decubitous ulcers; were denied supplies to clean themselves; were assaulted multiple times by a prison guard with a knife; were taunted by the guard and told he had contaminated their food; had their food placed out of reach by the guard; had private phone conversations interrupted by a guard shouting obscenities; and had food extorted at knifepoint by the guard. The prison guard called one of the prisoners a "crippled bastard" and told him he should be dead. *Id.* at 602-03. In *Lafaut v. Smith*, 834 F.2d 389, 392 (4th Cir. 1987), a prisoner who used a wheelchair was denied adequate toilet facilities, and had to drag his body across the floor and pull himself up onto the commode in order to use it. He would often slip into the commode, and one time fell off the toilet and broke his leg. *Id.* at 392-93. The inmate was forced to rely on a catheter because of these conditions, and developed a kidney infection. The prison could have assisted the inmate by simply installing a grab bar, but instead took no action for months. *Id.*

In *Owens-El v. Robinson*, 442 F. Supp. 1368, 1380 (W.D. Pa. 1978), inmates with epilepsy who experienced seizures and inmates with severe mental disorders were routinely and inappropriately shackled to cots while naked or in hospital gowns, and some were held in these restraints for as long as 29 days. In *Durham v. Nu'Man*, 97 F.3d 862, 866 (6th Cir. 1996), an inmate who was mentally ill was restrained by shackles and was refused access to a bathroom and then beaten for ten minutes and had his arm broken by two guards after he refused to clean up his urine from the floor. In *Ramos v. Lamm*, 485 F. Supp. 122, 142 (D. Colo. 1979), *aff'd in relevant part*, 639 F.2d 559 (10th Cir. 1980), the court found that the "emergency situation" for prisoners with mental health needs in a maximum security prison constituted a "time bomb ready to explode." The prison's psychology department had been abolished, and acutely psychotic inmates, suicidal inmates, inmates on psychotropic medication, and inmates with [intellectual disabilities] were housed in the most restrictive cellhouse along with prisoners in administrative and punitive segregation being punished for disciplinary violations. *Id.* at 144-45. Prisoners in that cellhouse were locked for more than 22 hours each day in small cells that were filthy, inadequately lighted, improperly ventilated and infested with vermin and rodents. *Id.* at 138, 145. In *Littlefield v. Deland*, 641 F.3d 729, 730-32 (10th Cir. 1981), an inmate with mental illness was confined for 56 days, without notice or opportunity to be heard, in a cell with no windows, no interior lights, no bunk, no floor covering, no toilet except for a hole in the floor, no personal hygiene articles, no access to reading materials, and frequently with no clothing or bedding material. In *Nolley v. County of Erie*, 776 F. Supp. 715, 717-18, 732-33 (W.D.N.Y. 1991), a prison automatically segregated all HIV-positive inmates, denied them access to the law library

and religious services, and identified them by placing red stickers on their personal items and documents.

Numerous other cases finding unconstitutional discrimination against inmates with disabilities are detailed in the various briefs filed with the Supreme Court in support of the plaintiff in *Goodman*.⁶¹ Additionally, the United States attached to its brief in *Goodman* addenda detailing findings of unconstitutional treatment of inmates with disabilities in some of its CRIPA investigations, as well as a summary of settlements of the Disability Rights Section of the Civil Rights Division of the Department of Justice in cases involving correctional institutions.⁶² From 1980 until the filing of its brief in *Goodman*, the Department of Justice had found unconstitutional conditions in 88 different correctional facilities in 33 states and two United States territories.⁶³

The Plight of Prisoners with Mental Disabilities

Individuals with mental disabilities face particularly troubling issues in the criminal justice system. These individuals frequently find themselves in jail or prison as a result of their mental disability.⁶⁴ While these individuals are not unusually likely to commit criminal acts, factors such as chronic underfunding of community mental health and mental retardation systems and the unavailability of needed services have contributed to the placement of individuals with mental disabilities in the criminal justice system.⁶⁵ Law enforcement officers have frequently responded to individuals with mental disabilities who violate minor criminal legislation with criminal charges rather than diversion to mental health services.⁶⁶ In recent years, it has been widely noted that prisons and jails have effectively become a large part of the mental health system.⁶⁷

Once people with mental disabilities are incarcerated, prison conditions can lead to a substantial worsening of the symptoms of prisoners with mental illness and to deterioration of the skills of prisoners with mental retardation.⁶⁸ Inmates with mental disabilities are particularly likely to suffer from certain types of mistreatment in correctional facilities, including the failure to provide them with needed mental health treatment or habilitation, failure to protect them from abuses by predatory inmates,⁶⁹ and placement in administrative segregation due to their mental disabilities.⁷⁰ Inmates with mental illness may have an increased risk of suicide, and are frequently at increased risk of becoming a victim and of decompensation and deterioration.⁷¹ The practice of routinely placing these individuals in administrative segregation may further exacerbate symptoms for inmates with mental illnesses.⁷²

VI. The Constitutional Rights At Issue

In determining whether a law is valid Fourteenth Amendment legislation, the Supreme Court has first identified the constitutional rights that Congress sought to enforce when it enacted the law.⁷³ The devastating record of unconstitutional treatment of individuals with disabilities in the correctional system shows that Congress was addressing a variety of constitutional concerns when it applied the ADA to correctional facilities. In addition to the prohibition on irrational discrimination in the Equal

Protection Clause, Congress was addressing a number of other constitutional rights triggering greater scrutiny, including the Eighth Amendment right against cruel and unusual punishment, the right to Due Process, and First Amendment rights.

These various constitutional protections require accommodation of inmates with disabilities because of the state's control over inmates and their environment. The state has affirmative constitutional obligations for the safety and general well-being of prisoners due to the state's absolute control over prisoners and their dependence on the state for their basic needs.⁷⁴ For example, the Eighth Amendment's prohibition on cruel and unusual punishment, which has been incorporated through the Fourteenth Amendment, imposes affirmative obligations on the state. The Supreme Court has held that the Eighth Amendment requires state prisons to provide humane conditions of confinement. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 832 (1994). "[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.'" *Id.* In particular, the Eighth Amendment forbids states to act with "deliberate indifference" to the serious medical needs of prisoners. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). For jail inmates, the Due Process Clause provides at least as much protection as the Eighth Amendment provides to convicted prisoners. *See, e.g., City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983).

Numerous courts have concluded that the Eighth Amendment requires states to make accommodations for prisoners with disabilities. *See, e.g., LaFaut v. Smith*, 834 F.3d at 394 (prison officials act with deliberate indifference in violation of the Eighth Amendment when they "ignore the basic needs of a handicapped individual or postpone addressing those needs out of mere convenience or apathy"); *Simmons v. Cook*, 154 F.3d 805, 807-08 (8th Cir. 1998) (placing inmates with paraplegia in inaccessible cells without accessible toilet violated Eighth Amendment); *Weeks v. Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) (refusal to provide wheelchair to inmate with paralysis, leaving him unable to shower independently or leave his cell, violated Eighth Amendment); *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1243 (6th Cir. 1989) (failure to bathe paraplegic inmate for several days, forcing him to remain in his own urine for long periods of time due to inadequate catheter supplies, and inadequate aid for his bowel training needs violated Eighth Amendment); *Beckford v. Irvin*, 49 F. Supp.2d 170, 180 (W.D.N.Y. 1999) (depriving inmate of use of his wheelchair for extended periods of time, leaving him unable to use the shower, and refusing to permit him to bathe by taking water out of his cell toilet or drinking fountain with a cup violated Eighth Amendment).

Additionally, the appeals court in the *Goodman* case held that Goodman stated an Eighth Amendment claim based on his confinement in a cell too small for him to move his wheelchair, his being forced to sit in his own waste, the prison's knowing failure to provide physical therapy and adequate medical treatment, and his exclusion from virtually all prison programs and activities because of his disability.

In addition to accommodations to avoid deliberate indifference to medical needs, the Eighth Amendment requires states to accommodate prisoners with disabilities in

order to ensure safety. “The fact that unusual accommodations may be necessary, in light of their special needs, to accomplish the provision of minimal conditions of incarceration does not absolve prison officials of their duty toward handicapped inmates.” *Ruiz v. Estelle*, 503 F. Supp. 1265, 1346 (S.D. Tex. 1980), *aff’d in relevant part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). In *Ruiz*, the court found that the state had violated the Eighth Amendment by, among other things, failing to protect prisoners with mental retardation from abuse and physical harm by other inmates. *Id.* In *Jacobs v. West Feliciana Sheriff’s Dep’t*, 228 F.3d 388, 395-96 (5th Cir. 2000), the court held that placement of a suicidal jail inmate in a cell with a significant blind spot and points from which she could hang herself, and from which a previous inmate had hung himself, was sufficient evidence for a jury to conclude that this was deliberate indifference. In *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995), the court found that placing individuals with mental illness, mental retardation, or brain damage in an isolation unit with windowless cells violated the Eighth Amendment because these inmates were at “particularly high risk for suffering very serious or severe injury to their mental health” in light of the extreme social isolation and reduced environmental stimulation.

Additionally, the Constitution provides inmates with First Amendment rights to have reasonable opportunities to practice religion, and adequate opportunities to present constitutional violations to the courts – for example by providing access to law libraries, legal assistance, or other means. *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987); *Lewis v. Casey*, 518 U.S. 343 (1996). While prison regulations that are reasonably related to legitimate penological interests may be permissible even if they impinge on certain rights of inmates, states may be required to provide inmates with accommodations to exercise their rights in alternative ways. *See, e.g., Turner v. Safley*, 482 U.S. 78, 89-90 (1987), *O’Lone*, 482 U.S. at 350. Finally, the Due Process Clause provides inmates with procedural protections when the state seeks to take certain actions, such as the involuntary administration of antipsychotic drugs. *Washington v. Harper*, 494 U.S. 210, 222 (1990). *See also Bonner v. Arizona Dep’t of Corrections*, 714 F. Supp. 420, 425-26 (D. Ariz. 1989) (inmate who was deaf and visually impaired had a constitutionally protected liberty interest in having the assistance of a sign language interpreter in disciplinary proceedings).

VII. Title II of the ADA is Congruent and Proportional to the Record of Unconstitutional Treatment of Inmates with Disabilities

As noted above, the Supreme Court has upheld Congress’s power to pass legislation to enforce the Fourteenth Amendment where Congress enacts a law that is congruent and proportional to a history of unconstitutional conduct.⁷⁵ In *Lane*, the Court concluded that Title II of the ADA was a congruent and proportional response to the “long history” of “unequal treatment of disabled persons in the administration of judicial services” that had “persisted despite several legislative efforts to remedy the problem of disability discrimination.”⁷⁶ Title II is similarly congruent and proportional to the history of discrimination in state correctional facilities.⁷⁷ As with the area of access to the courts, the record of discrimination in the area of correctional systems demonstrates a long history of intractable problems that have persisted despite other legislative efforts, such as the Civil Rights of Institutionalized Persons Act.

Moreover, Title II's requirements closely mirror the affirmative constitutional obligations of states toward inmates with disabilities described above. For example, Title II's prohibitions on targeting inmates for unequal treatment based on their disabilities and failure to make needed accommodations to inmates' disabilities bar conduct that would frequently violate inmates' constitutional rights. In light of the long and egregious record of unconstitutional treatment of inmates with disabilities, Title II's imposition of requirements that overlap substantially with constitutional requirements makes it an appropriate measure to "prevent and deter unconstitutional conduct."⁷⁸

As the Supreme Court described in *Lane*, Congress chose a very limited remedy in enacting Title II. The same limits described in *Lane* apply equally in this context. For example, "Title II does not require States to employ any and all means to make [correctional] services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for public programs. It requires only 'reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service."⁷⁹ Additionally, the reasonable modification requirement may be satisfied in a number of ways. While newly constructed facilities must comply with specific accessibility standards, "in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services."⁸⁰ And covered entities are not required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service.⁸¹ These limited requirements are consistent with the obligations the Constitution imposes on states with respect to inmates with disabilities.

VIII. Potential Implications of a Decision in *Goodman*

As discussed above, the decision in the *Goodman* case will be critical to determining the future of enforcement of Title II of the ADA with respect to state correctional facilities. While the case concerns Congress's Fourteenth Amendment power to apply Title II to state correctional facilities, its significance is broad. First, challenges to this application of Title II have not been limited to Congress's Fourteenth Amendment power, but also have been leveled at Congress's commerce power. With both sources of Congress's authority to apply the ADA to correctional facilities under attack, the *Goodman* case will help determine whether Title II of the ADA is enforceable at all in state prisons, jails, and other penal facilities.

Additionally, the *Goodman* case is likely to play an important role in defining how the constitutionality of other applications of the ADA is analyzed in the wake of *Tennessee v. Lane*. *Lane* left open many questions about the precise contours of the analysis for determining when Congress acted within its power under the Fourteenth Amendment, and the lower courts have applied *Lane* in differing ways. To the extent that

Goodman clarifies any of these issues, it will help determine the extent to which Congress's authority to apply the ADA in other areas will be upheld.

One question that has arisen in light of *Lane* is how broadly or narrowly the areas of application must be defined. ADA plaintiffs typically describe the areas of application broadly in order to point to an array of constitutional rights at issue and a broader history of constitutional violations, whereas states typically describe the areas of application as narrowly as possible.

Lane described the application it considered as access to the courts, and discussed a variety of constitutional rights that arise in this context – Due Process and Sixth Amendment rights of a criminal defendant to be present at all stages of a trial where his absence might frustrate the fairness of the proceedings, Due Process rights of certain civil litigants to have a meaningful opportunity to be heard and have obstacles to their full participation in judicial proceedings removed, the Sixth Amendment right of criminal defendants to a jury composed of a fair cross section of the community, and the First Amendment right of the public to have access to criminal proceedings.⁸² The Court's recitation of the record of discrimination relating to court access, however, was not specifically confined to those types of claims,⁸³ nor did the ADA claim of one of the *Lane* plaintiffs (Beverly Jones, a court reporter with paraplegia who had to be carried to inaccessible courtrooms) fit within those types of claims.

While some states have argued that *Lane*'s holding is limited to those areas of court access where the Court specifically identified fundamental rights at stake, at least one court has read *Lane* to apply to cases involving access to the courts generally. In *Badillo-Santiago v. Naveira-Merly*,⁸⁴ the First Circuit upheld the Fourteenth Amendment basis for an ADA claim involving a defendant in a civil case concerning a property sale.

Some states have argued that the abrogation analysis must be limited to the specific type of constitutional right that is asserted by the plaintiff or that is closest to the plaintiff's ADA claims. As noted above, the Eleventh Circuit held in *Miller v. King* and in *Goodman* that the constitutional right at issue was only the Eighth Amendment right to be free of cruel and unusual punishment, and rejected the Justice Department's argument that a broader panoply of constitutional rights was implicated in the prison context.⁸⁵

The Court's opinion in *Goodman* may shed some light on how broadly the application at issue should be framed. Notably, the application at issue in *Goodman* has been defined differently in the various briefs, including "state prisons," "the penal system," and "the system of administration of justice." In light of the obvious difficulty of determining precisely what the area of application is, it is possible that the Court may choose to offer some type of guidance about how this determination should be made.

Another issue that *Goodman* may help clarify is whether the Fourteenth Amendment basis for Title II may extend to applications that do not directly involve fundamental rights. Some states have argued that *Lane* supports Congress's Fourteenth Amendment authority to enact only applications of Title II that involve fundamental

rights. *Lane*'s analysis, however, suggests that it is not so limited. In fact, at least two appeals courts have relied on *Lane* to uphold Congress's Section 5 authority to enact the ADA's requirements with respect to higher education, despite the absence of allegations that a specific fundamental right was at stake.⁸⁶ These courts relied on *Lane*'s conclusion that Congress had amassed a sufficient record of constitutional violations in public services generally to justify a prophylactic remedy, and the limitations of Title II's remedies that made it congruent and proportional to the long history of constitutional violations in public education.

A decision in *Goodman* will likely also give guidance on whether the Supreme Court's decision in *Lane* decided the second abrogation step – whether Congress acted based on a sufficient record of a history and pattern of constitutional violations by states – for all Title II cases or only for cases involving access to courts. Plaintiffs and the Justice Department have argued, and several courts of appeals have agreed, that *Lane*'s analysis of the historical record applies to all Title II cases, regardless of the area at issue. For example, the Eleventh Circuit in *Miller* held that the second step of the abrogation analysis “already has been decided by the Supreme Court in *Lane*.”⁸⁷ The court noted that *Lane* had considered evidence of disability discrimination in public services and programs generally and concluded that “Title II in its entirety satisfies *Boerne*'s step-two requirement that it be enacted in response to a history and pattern of constitutional violations.”⁸⁸ Likewise, the Fourth Circuit in *Constantine* stated that “[a]fter *Lane*, it is settled that Title II was enacted in response to a pattern of unconstitutional disability discrimination by States and nonstate government entities with respect to the provision of public services,” and held that “[t]his conclusion is sufficient to satisfy the historical inquiry into the harms sought to be addressed by Title II.”⁸⁹

On the other hand, if a decision in *Goodman* makes clear that courts must examine whether a history and pattern of constitutional violations by states exists for the particular area at issue in each case, the question may then become how extensive and specific the history and pattern of constitutional violations must be. While the *Lane* Court considered the record supporting Title II as a whole, it also examined the historical record of discrimination against individuals with disabilities in access to courthouses and court proceedings.⁹⁰ It is unclear how a court would address step two of the abrogation analysis in a Title II case involving an area that is not specifically addressed, or is only briefly mentioned, in the legislative history or case law in existence at the time the ADA was passed.

Moreover, even if a decision in *Goodman* shows that *Lane* should be interpreted as having already determined that Title II meets the second abrogation step in all Title II cases, a decision in *Goodman* might set forth other ways in which the strength of the historical record of state discrimination in the particular area at issue is relevant. For example, states have argued, citing the Supreme Court's decision in *Hibbs* and *Kimel*, that in determining whether a statute is congruent and proportional, there is a relationship between the level of scrutiny applied by courts in a particular area and the strength of the record of discrimination required. That is, a less extensive record of discrimination is required for a fundamental right than for a right reviewed under rational basis scrutiny.

Finally, a decision in *Goodman* may clarify whether the third abrogation step – the congruence and proportionality analysis – turns primarily on how closely the statutory requirements mirror the constitutional standard in the relevant area, on how extensive the history of discrimination is in that area, or on how carefully tailored the statutory requirements are generally. In *Garrett*, the Supreme Court seemed to focus on how closely the statutory requirements mirrored the constitutional standards. The Court stated in *dicta* that the remedial provisions of Title I would raise serious congruence and proportionality concerns because they went far beyond what the constitution would require.⁹¹ States have relied on this line of reasoning from *Garrett*, including in *Goodman*, to argue that Title II is not congruent and proportional because the statutory requirements go beyond the constitution.

In contrast, while *Lane* relied on all of these factors, the Court’s analysis focused primarily on the limitations of Title II and the appropriateness of these limited remedies in light of the extensive history of discrimination in court access. Rather than discuss Title II’s requirements specifically with respect to courthouse access and compare them with the constitutional requirements, the Court discussed the requirements of “program access” and reasonable modification generally and observed that Title II’s requirements are limited, carefully tailored, and reasonable in numerous ways.⁹² While the Court compared Title II’s requirements to the due process standard of “meaningful opportunity to be heard” in certain judicial proceedings, its broad statements about the carefully tailored remedies of Title II would seem to be applicable in most other contexts as well. Plaintiffs - including the plaintiff in *Goodman* - as well as several courts of appeals, have relied on this analysis in *Lane* to demonstrate that Title II is congruent and proportional in other contexts. For example, the Fourth Circuit in *Constantine* “consider[ed] the limitations that Congress placed on the scope of Title II” in determining that Title II is a congruent and proportional response in the higher education context.⁹³

In sum, a lot is at stake in *Goodman*. What the Court says in *Goodman* may have a significant impact on the viability of claims under Title II of the ADA involving not only state prisons or other correctional facilities, but a variety of other areas as well. Moreover, a finding in *Goodman* that Title II in the prison context is invalid Fourteenth Amendment legislation would not only implicate claims for money damages but could also jeopardize application of Title II to all prison claims, even those only involving claims for injunctive relief, if courts take a restrictive view of Congress’s authority to use its interstate commerce power to enact Title II’s provisions. Finally, a decision in *Goodman* will likely impact the analysis for abrogating states’ sovereign immunity not only under the ADA, but also under other civil rights statutes.

Acknowledgement

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¹ No. 04-1236, *cert. granted*, 125 S.Ct. 2266 (2005).

² *Johnson v. California*, 125 S.Ct. 1141, 1150 (2005).

³ This case, *Parrish v. Johnson*, 800 F.2d 600 (6th Cir. 1986), is discussed in Section V.

⁴ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

⁵ See 42 U.S.C. § 12101(b)(4) (“It is the purpose of this Act . . . to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.”).

⁶ 366 F.3d 614 (8th Cir. 2004), *cert. granted, vacated and remanded*, 2005 WL 1383725 (June 13, 2005). The decision was vacated and remanded in light of both *Tennessee v. Lane* (concerning Congress's Fourteenth Amendment power) and also *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (concerning Congress's commerce power).

⁷ *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), *cert. granted*, 548 U.S. 1146 (2000), *cert. dismissed*, 529 U.S. 1001 (2000).

⁸ 918 F. Supp. 932, 938-42 (E.D.N.C. 1996), *aff'd on other grounds*, 131 F.3d 136 (4th Cir. 1997), *vacated and remanded on other grounds*, 525 U.S. 802 (1998).

⁹ In a very recent decision concerning Congress's power to regulate the growth and use of marijuana for medicinal purposes, the Supreme Court seemed to take a significantly more expansive view of Congress's commerce power than it had in recent years. This decision, *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), is likely to have an important impact on how courts view Congress's power to use the Commerce Clause to enact portions of the ADA. Indeed, the Court has already vacated and remanded an Eighth Circuit decision finding no commerce authority for ADA claims challenging the imposition of surcharges for handicapped parking placards, and directed the Eighth Circuit to reconsider its decision in light of *Raich*. *Klingler v. Department of Revenue*, 2005 WL 1383725 (June 13, 2005). See *supra* note 5.

¹⁰ 531 U.S. 356 (2001).

¹¹ 541 U.S. 509 (2004).

¹² *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The Court had previously held that Congress could use its commerce power to remove states' immunity.

Pennsylvania v. Union Gas, 491 U.S. 1 (1989).

¹³ *City of Boerne v. Flores*, 521 U.S. 507 (1997). It was in *Boerne* that the Supreme Court articulated the “congruence and proportionality test,” holding that Congress must have identified a history of constitutional violations and its legislation must “exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *Id.* at 520.

¹⁴ 528 U.S. 62, 91 (2000).

¹⁵ 529 U.S. 598, 619, 627 (2000).

¹⁶ 531 U.S. 356 (2001).

¹⁷ 531 U.S. at 371.

¹⁸ *Id.* at 372-73.

¹⁹ *Id.* at 372.

²⁰ *Id.*

²¹ 538 U.S. 721 (2003).

²² 541 U.S. 509 (2004).

²³ One plaintiff was a defendant in a criminal trial who was forced to crawl up the stairs to a second floor courtroom because of the court's refusal to accommodate his paraplegia by moving his hearing to an accessible courtroom. When he refused to crawl up the stairs on another occasion, he was arrested for failing to appear. The other plaintiff was a court reporter who used a wheelchair and was forced to ask strangers to carry her up stairs to inaccessible courtrooms on many occasions.

²⁴ 541 U.S. at 524.

²⁵ While the Court in *Garrett* refused to consider local government conduct in the congruence and proportionality analysis on the ground that the case was about whether Congress abrogated states' sovereign immunity, the Court in *Lane* did consider local government conduct because such conduct has always been considered relevant to the Section 5 inquiry (except in *Garrett* and *Kimel* because the purpose of using Section 5 authority in passing the employment statutes in those cases was solely to ensure that states could be sued). *Id.* at 527 n.16.

²⁶ *Id.* at 524.

²⁷ *Id.* at 530-31.

²⁸ *Id.* at 530-33.

²⁹ Brief for Petitioner Goodman ("Goodman Br.") at 1-4. All of the briefs filed with the Supreme Court in *Goodman* are available on the website of the Bazelon Center for Mental Health Law at

<http://www.bazelon.org/issues/disabilityrights/resources/goodman.htm>.

³⁰ *Id.* at 2.

³¹ *Id.* at 2-3.

³² *Id.* at 3.

³³ *Id.* at 4.

³⁴ *Goodman v. Ray*, No. 02-10168 (11th Cir. Sept. 16, 2004).

³⁵ 384 F.3d 1248 (11th Cir. 2004).

³⁶ *Miller*, 384 F.3d at 1272-76.

³⁷ *Id.* at 1272. The Court rejected the United States' contention that Miller's case involved a panoply of constitutional rights other than the Eighth Amendment right to be free from cruel and unusual punishment, stating that the parties themselves had agreed that the Eighth Amendment was the only right at issue. *Id.*

³⁸ *Id.* While the holding in *Lane* was limited to the area of access to courts, the Court appeared to conclude that the record of disability-based discrimination in state programs and services was sufficient to support Title II of the ADA in its entirety. *Id.* at 524.

³⁹ *Id.* at 1273.

⁴⁰ *Id.* at 1275.

⁴¹ *Lane*, 541 U.S. at 525 and n.11.

⁴² Goodman Br. at 22 & n.8 (citing *Corrections, Part VIII, Prisons, Prison Reform, and Prisoners' Rights: Michigan: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. 136, 153, 154 (1972)).

⁴³ 42 U.S.C. § 1997 *et seq.*

⁴⁴ Goodman Br. at 23 & n.9 (citing *Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 639, 1066, 1067).

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- ⁴⁵ Brief for United States as Petitioner in *Goodman* (“United States Br.”) at 24-25 (citing *Hearings on S. 1393*, at 1067).
- ⁴⁶ *Goodman Br.* at 23 & n.10 (citing *Civil Rights of the Institutionalized: Hearings on S. 10 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 474 (1979), 126 Cong. Rec. S1860 (daily ed. Feb. 27, 1980)).
- ⁴⁷ *United States Br.* at 23 (citing *House Comm. on Educ. & Labor, Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 1190 (1990) [“ADA Legislative History”]).
- ⁴⁸ *Goodman Br.* at 24 (citing *CRIPA: Hearings on S. 1393*, at 234 (statement of Dr. Bailus Walker)).
- ⁴⁹ *Goodman Br.* at 24 (citing several different CRIPA hearings between 1977 and 1979 containing testimony about inadequate mental health treatment in Louisiana, Los Angeles, Alabama, Oklahoma, and Florida jails and prisons).
- ⁵⁰ *United States Br.* at 24 n.18 (citing *Hearings on S. 1393*, at 1066-67).
- ⁵¹ *United States Br.* at 25-26 nn. 19-20 (citing various CRIPA hearings).
- ⁵² *United States Br.* at 22 (citing United States Comm’n on Civil Rights, *Accommodating the Spectrum* 168 (1983)).
- ⁵³ *Goodman Br.* at 24-25 (citing *Accommodating the Spectrum* at 168).
- ⁵⁴ *ADAPT Br.*, at 11 (citing California Attorney General, *Commission on Disability: Final Report* 103 (Dec. 1989)).
- ⁵⁵ *United States Br.* at 22 (citing California Attorney General, *Commission on Disability: Final Report*, at 110).
- ⁵⁶ *United States Br.* at 22 (citing Kentucky Legis. Research Commission, *Research Report No. 125, Mentally Retarded Offenders in Adult and Juvenile Correctional Institutions*, at A-3, A-29-A-34).
- ⁵⁷ *United States Br.* at 22-23 n.16 (citing Linda Teplin, *The Prevalence of Severe Mental Disorder Among Male Urban Jail Detainees: Comparison with the Epidemiologic Catchment Area Program*, 80 Am. J. Pub. Health 663, 666 (June 1990)).
- ⁵⁸ *Goodman Br.* at 25 (citing Lodging of United States in *Board of Trustees of Univ. of Alabama v. Garrett*, No. 99-1240, at 1091 (New Mexico), 55 (Alaska), 331 (Delaware), 572 (Illinois), 673 (Kansas), 787 (Maryland), 1161 (North Carolina); Brief of ADAPT and 18 other organizations as Amici Curiae in Support of Petitioners in *Goodman* [“ADAPT Br.”], at 11 (citing same); *United States Br.* at 28 n.22 (citing same at 23-24 (New York)).
- ⁵⁹ *Goodman Br.* at 26 (citing ADA Legislative History at 490)
- ⁶⁰ *Goodman Br.* at 26 (citing Legislative History at 1080 (testimony of Ilona Durkin), 1331 (testimony of Justin Dart, 1005 (testimony of Belinda Mason)).
- ⁶¹ See *Goodman Br.* at 26-36; *ADAPT Br.* at 11-22; *United States Br.* at 30-32 and Addendum A; Brief Amici Curiae for Paralyzed Veterans of America, Easter Seals, and Ten Other Organizations Supporting Petitioners, at 7-13; Brief of the American Association on Mental Retardation et al. in Support of Petitioners, at 14-20 [“AAMR Br.”].
- ⁶² *United States Br.*, Addenda B and C.
- ⁶³ *United States Br.*, Addendum B at 1b.

⁶⁴ See, e.g., AAMR Br. at 6-14 (citing studies and discussing numerous factors resulting in the placement of individuals with mental disabilities in the criminal justice system).

⁶⁵ See, e.g., T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 American Journal of Criminal Law 283 (1997); Robert D. Miller, *Economic Factors Leading to Diversion of the Mentally Disordered from the Civil to the Criminal Commitment Systems*, 15 International Journal of Law & Psychiatry 1 (1992).

⁶⁶ See, e.g., Linda Teplin, *Policing the Mentally Ill: Styles, Strategies, and Implications in Jail Diversion for the Mentally Ill* 10, 12-14 (Henry J. Steadman ed., 1990); American Bar Association, *Standards for Criminal Justice* § 7-2.5 cmt. at 40.

⁶⁷ See, e.g., Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (2003); Bureau of Justice Statistics, U.S. Department of Justice, *Mental Health and Treatment of Inmates and Probationers* (July 1999) (16% of state prison inmates have a “mental condition” or have received inpatient psychiatric treatment).

⁶⁸ AAMR Br. at 11-13 (citing Craig Haney, *Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement*, 49 Crime & Delinquency 124, 130 (2003); *Ford v. Wainwright*, 477 U.S. 399, 402-03 (1986); *Wilkinson v. Austin*, 125 S.Ct. 2384, 2394-95 (2005); *Youngberg v. Romeo*, 347 U.S. 307, 327 (1982)).

⁶⁹ AAMR Br. at 15 (citing Joel A. Dvoskin & Henry J. Steadman, *Chronically Mentally Ill Inmates: The Wrong Concept for the Right Services*, 12 International Journal of Law & Psychiatry 203, 205 (1989); Richard J. Freeman & Ronald Roesch, *Mental Disorder and the Criminal Justice System: A Review*, 12 International Journal of Law & Psychiatry 105, 110 (1989)).

⁷⁰ AAMR Br. at 19-20.

⁷¹ AAMR Br. at 15 (citing Marjorie Rock, *Emerging Issues with Mentally Ill Offenders: Causes and Social Consequences*, 28 Administration & Policy in Mental Health 165, 171 (2001)).

⁷² AAMR Br. at 20 (citing cases in which inmates with mental illnesses deteriorated due to conditions of confinement in supermax or segregation units that amounted to cruel and unusual punishment).

⁷³ See, e.g., *Lane*, 541 U.S. at 522.

⁷⁴ See *Cutter v. Wilkinson*, 125 S.Ct. 2113, 2121-22 (2005) (describing the “degree of control unparalleled in civilian society” that the government exercises in prisons, making inmates “dependent on the government’s permission and accommodation.”); *DeShaney v. Winnebago County Dep’t of Social Services*, 489 U.S. 189, 199-200 (1989) (Constitution imposes duty on state to assume some responsibility for a person’s “safety and general well-being” when it takes the person into custody and holds him involuntarily).

⁷⁵ See, e.g., *Lane*, 541 U.S. at 530.

⁷⁶ *Id.* at 531.

⁷⁷ Indeed, it is NCD’s position that Title II in its entirety is congruent and proportional to the history of discrimination against individuals with disabilities in a wide range of contexts, but here we discuss only the application to state correctional facilities.

⁷⁸ *Nevada v. Hibbs*, 538 U.S. at 728.

⁷⁹ *Lane*, 541 U.S. at 531-32.

⁸⁰ *Id.* at 532.

⁸¹ *Id.*

⁸² 541 U.S. at 523.

⁸³ *Id.* at 524-25 & n. 9, 14.

⁸⁴ 378 F.3d 1 (1st Cir. 2004).

⁸⁵ 384 F.3d at 1272.

⁸⁶ *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005); *Association for Disabled Americans, Inc. v. Florida International Univ.*, 405 F.3d 954 (11th Cir. 2005) (hereinafter ADA).

⁸⁷ *Miller*, 384 F.3d at 1272.

⁸⁸ *Id.*; *see also ADA*, 405 F.3d at 958 (citing *Miller*, 384 at 1272).

⁸⁹ 411 F.3d at 487.

⁹⁰ *Lane*, 541 U.S. at 527-29.

⁹¹ *Garrett*, 531 U.S. at 372 (stating, for example, that “the accommodation duty far exceeds what is constitutionally required”).

⁹² *Lane*, 541 U.S. at 530-32.

⁹³ *Constantine*, 411 F.3d at 488-89. *See also ADA*, 405 F.3d at 959 (discussing how Title II’s remedy is limited).