No. 18-1758

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ROBERT FURGESS,

Plaintiff-Appellant

v.

PENNSYLVANIA DEPARTMENT OF CORRECTIONS,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL

JOHN M. GORE
Acting Assistant Attorney General

ERIN H. FLYNN
CHRISTINE A. MONTA
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 353-9035

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES: **PAGE**

REGULATIONS:

REGULATIONS (continued): **PAGE**

RULES:

MISCELLANEOUS:

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INTEREST OF THE UNITED STATES

This appeal concerns the scope of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, and Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794(a), in the context of a state prison's provision of showers to incarcerated inmates.

The United States has considerable responsibility over the enforcement of Title II of the ADA (Title II), Section 504, and their corresponding regulations. The Attorney General has authority to bring civil actions to enforce both Title II

and Section 504. See 42 U.S.C. 12133; 29 U.S.C. 794a. Congress also gave the Department of Justice (Department) express authority to issue regulations implementing Title II, see 42 U.S.C. 12133-12134, and directed all federal agencies to issue regulations implementing Section 504 with respect to programs or activities to which they provide federal financial assistance, see 29 U.S.C. 794(a). The Department is also charged with coordinating executive agencies' implementation and enforcement of Section 504. See 28 C.F.R. Pt. 41 & App. A (Exec. Order 12250 (Nov. 2, 1980)). Accordingly, the United States has a strong interest in ensuring that the statutes and their accompanying regulations are properly interpreted and applied.

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Our participation is limited to the following issue:

Whether a state prison's provision of showers to inmates incarcerated in its facilities is a service, program, or activity of the prison under Title II of the ADA, 42 U.S.C. 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. 794(a).

STATEMENT OF THE CASE

1. Statutory And Regulatory Background

Congress enacted the ADA in 1990 as a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Title II of the ADA prohibits disability-based discrimination by public entities. It provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. Title II "unmistakably" covers state prisons. *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 209 (1998); see also 28 C.F.R. 35.151(k), 35.152(a).

Title II was modeled closely on Section 504, which prohibits discrimination on the basis of disability "under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). Section 504 defines the phrase "program or activity" to encompass "all of the operations of" a "department, agency, special purpose district, or other instrumentality of a State or of a local government, * * * any part of which is extended Federal financial assistance." 29 U.S.C. 794(b)(1)(A).

The ADA directed the Attorney General to promulgate regulations implementing Title II based on regulations previously developed under Section

504. See 42 U.S.C. 12134. As relevant here, both the Department's Title II and Section 504 regulations make clear not only that public entities generally may not deny qualified individuals with disabilities "the benefits of the services, programs, or activities of [the] public entity," 28 C.F.R. 35.130(a); see 28 C.F.R. 39.130(a), but also, more specifically, that individuals with disabilities may not be denied those benefits "because a public entity's facilities are inaccessible to or unusable by individuals with disabilities," 28 C.F.R. 35.149, 39.149, 42.520.

In 2010, the Department promulgated an additional Title II regulation explicitly stating that correctional facilities are subject to this affirmative program-accessibility requirement. See 28 C.F.R. 35.152(a) and (b)(1). Under this regulation, public entities such as state prisons must ensure that qualified inmates with disabilities "shall not, *because a facility is inaccessible to or unusable by individuals with disabilities*, be excluded from participation in, or be denied the benefits of, the services, programs, or activities of a public entity." 28 C.F.R. 35.152(b)(1) (emphasis added).

The Department explained that it promulgated this regulation to address its concern that "inmates with mobility and other disabilities in detention and correctional facilities do not have equal access to prison services." 28 C.F.R. Pt. 35, App. A, at 660 (2017). The Department had found, based on complaints it received and its "substantial experience in investigations and compliance reviews

of jails, prisons, and other detention and correctional facilities," that "many detention and correctional facilities have too few or no accessible cells, toilets, and shower facilities to meet the needs of their inmates with mobility disabilities." *Ibid.* In focusing specifically on correctional facilities, the Department emphasized that "[i]nmates cannot leave the facilities and must have their needs met by the corrections system, including needs relating to a disability." 28 C.F.R. Pt. 35, App. A, at 663 (2017). Thus, the Department stated that "[i]t is essential that corrections systems fulfill their nondiscrimination and program access obligations by adequately addressing the needs of prisoners with disabilities," which "include, but are not limited to, * * * accessible toilet and shower facilities, devices such as * * * a shower chair, and assistance with hygiene methods for prisoners with physical disabilities." *Ibid.*

2. Facts And Procedural History

a. The complaint alleges the following facts, which this Court must accept as true at this stage. See *Evancho* v. *Fisher*, 423 F.3d 347, 350 (3d Cir. 2005). Plaintiff Robert Furgess is an inmate incarcerated in the Pennsylvania Department of Corrections (DOC) system. App. 11.[1] He suffers from Myasthenia Gravis, a neuromuscular disease that affects his vision, speech, and mobility. App. 11.

[1] Citations to "App. __" refer to the page number in the Appendix to plaintiff-appellant's principal brief. Citations to "Doc. __, at __" refer to

(continued…)

In 2014, Furgess was housed at the State Correctional Institution (SCI) in Albion, Pennsylvania. App. 11. There, he requested, and was granted, various disability-based accommodations and modifications, including being given access to an accessible shower stall, being housed in a cell closer to the medical unit and dining halls, and being fitted for leg braces to help him walk. App. 11.

In December 2015, Furgess was moved from SCI Albion's general population block to its Restrictive Housing Unit (RHU). App. 12. Unlike the general population block, the RHU did not have showers accessible to persons with mobility disabilities. App. 11-12. Furgess repeatedly requested a disability accommodation that would permit him to shower but was denied. App. 12. As a result, Furgess was unable to, and did not, shower for three months. App. 12.

After medical staff separately alerted the RHU's lieutenants to Furgess's disability-based needs, a lieutenant told the prison's superintendent, in Furgess's presence, that prison staff would begin escorting Furgess to accessible shower facilities in the prison's infirmary. App. 12-13. When this did not occur, Furgess filed an internal grievance. App. 13. Although his grievance was denied, the prison subsequently moved Furgess to an accessible cell in the RHU and, on

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(…continued)
documents in the district court record, as numbered on the docket sheet, and page numbers within those documents.

March 16, 2016, informed him that they were installing safety bars in the RHU showers. App. 13.

That same day, however, two prison staffers brought Furgess to a non-accessible shower, which had no rails or safety bars and only "a flimsy, armless plastic chair to sit on." App. 13. Furgess was also not permitted to wear his leg braces, which were deemed a safety risk. App. 13. When Furgess attempted to exit the non-accessible shower, he fell headfirst into the steel shower door and was knocked unconscious. App. 14. Furgess was treated for a large laceration, concussion, and extreme pain. App. 14. He continues to experience constant pain and remains confined to a wheelchair since his fall in the shower. App. 14.

b. Furgess sued the Pennsylvania DOC, arguing that SCI Albion's failure to grant him an accommodation that would have permitted him to shower while housed in the RHU violated Title II and Section 504. App. 15-17.

The DOC moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). App. 19; Doc. 7. The DOC did not dispute, for purposes of the motion, that Furgess is a qualified individual with a disability. Nor did it dispute that it is a recipient of federal financial assistance for purposes of Section 504. Rather, the DOC argued that the facts Furgess alleged did not constitute an actionable violation under Title II or Section 504. Doc. 7, at 5. As relevant here, the DOC argued that a prison's provision of showers to inmates is not a service, program, or

activity of the prison within the meaning of Title II, citing two Western District of Pennsylvania decisions reaching that same conclusion. Doc. 7, at 5-7.

Furgess argued in response that the two Western District of Pennsylvania cases the DOC cited represent "the extreme minority in both the Third Circuit and across the United States." App. 26. He noted that the First, Seventh, and Ninth Circuits, as well as many district courts, had concluded that a prison's failure to accommodate an inmate's disability in the provision of showers violates Title II of the ADA. App. 23-27. Furgess also highlighted language in *United States* v. *Georgia*, 546 U.S. 151, 157 (2006), seeming to endorse that conclusion. App. 23.

c. The magistrate judge, presiding over the case with the parties' consent, granted the DOC's motion to dismiss. App. 30-36. The court held that Furgess failed to state a claim that he was denied the opportunity to benefit from a service, program, or activity of the prison under Title II or Section 504. App. 35. The court relied primarily on three Western District of Pennsylvania magistrate judge opinions—the two the DOC had cited in its motion, along with a third opinion the magistrate judge herself wrote in another case after the motion in this case was briefed. App. 35 (citing *Harris* v. *Giroux*, No. 16-cv-38, 2017 WL 3075099 (W.D. Pa. July 19, 2017); *Thomas* v. *Pennsylvania Dep't of Corrs.*, 615 F. Supp. 2d 411 (W.D. Pa. 2009); and *Evans* v. *Rozum*, No. 07-cv-230, 2008 WL 5068963 (W.D. Pa. Nov. 24, 2008)). The court did not meaningfully address contrary case law or

the language of Title II or Section 504 and dismissed the Supreme Court's statements in *Georgia* as "merely dictum." App. 35 & n.3.

SUMMARY OF THE ARGUMENT

The district court erred in dismissing Furgess's Title II and Section 504 claims. A state prison's provision of showers to incarcerated inmates is a service, program, or activity within the plain meaning of those statutory terms. Substantial case law supports this interpretation, including decisions from three federal circuit courts, numerous federal district courts, and persuasive dicta from the Supreme Court. The three Western District of Pennsylvania magistrate judge decisions on which the district court relied were poorly reasoned and contradict both the plain language of the statutes and the ample precedent supporting Furgess's claims.

ARGUMENT

A STATE PRISON'S PROVISION OF SHOWERS TO INMATES INCARCERATED IN ITS FACILITIES IS A SERVICE, PROGRAM, OR ACTIVITY OF THE PRISON COVERED BY TITLE II AND SECTION 504

A. A Prison's Provision Of Showers To Incarcerated Inmates Falls Within The Plain Language Of Title II And Section 504

1. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. Congress

modeled Title II on Section 504, which prohibits disability discrimination in "any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a).[2]

These terms are intentionally broad. Section 504 expressly defines "program or activity" to mean "*all of the operations of* * * * a department, agency, special purpose district, or other instrumentality of a State or of a local government." 29 U.S.C. 794(b)(1)(A) (emphasis added). As this Court has recognized, this statutory definition indicates that the terms "program or activity" in Section 504 "were intended to be all-encompassing." *Yeskey* v. *Pennsylvania Dep't of Corrs.*, 118 F.3d 168, 170 (3d Cir. 1997), aff'd, 524 U.S. 206 (1998).

Although Title II does not define the phrase "services, programs, or activities," Congress directed that Title II should not be "construed to apply a lesser standard than the standards applied under [Section 504]" and its regulations. 42 U.S.C. 12201(a); see also Department of Justice, Title II Technical Assistance Manual, § II-1.4100 ("Title II may not be interpreted to provide a lesser degree of protection to individuals with disabilities than is provided under [the Rehabilitation Act.]"), https://www.ada.gov/taman2.html#II-1.4100; *McDonald* v. *Pennsylvania Dep't of Pub. Welfare*, 62 F.3d 92, 94-95 (3d Cir. 1995) (recognizing that courts

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[2] The DOC did not dispute that it is a recipient of federal financial assistance within the meaning of Section 504. See Doc. 7, 10; see also *Cutter* v. *Wilkinson*, 544 U.S. 709, 716 n.4 (2005) (observing that "[e]very State * * * accepts federal funding for its prisons").

construe Title II and Section 504 to impose the same substantive requirements). Thus, Title II's phrase "services, programs, or activities" must be construed to be at least as broad as Section 504's term "program or activity"—that is, to cover "all of the operations of" a public entity such as a state prison. 29 U.S.C. 794(b).[3]

Indeed, the Department of Justice—the federal agency tasked with administering Title II and promulgating regulations implementing it—has interpreted Title II to apply to "anything a public entity does." 28 C.F.R. Pt. 35, App. B (Section 35.102 Application), at 687 (2017); see generally *Yeskey*, 118 F.3d at 171. This Court has adopted the same interpretation, stating: "Our Court has made clear that the phrase 'service, program, or activity' is extremely broad in scope and includes 'anything a public entity does.'" *Disability Rights N.J., Inc.* v. *Commissioner, N.J. Dep't of Human Servs.*, 796 F.3d 293, 301 (3d Cir. 2015) (quoting *Yeskey*, 118 F.3d at 171). Other circuits have as well. See, *e.g.*, *Fortyune* v. *City of Lomita*, 766 F.3d 1098, 1101-1102 (9th Cir. 2014); *Oconomowoc Residential Programs* v. *City of Milwaukee*, 300 F.3d 775, 782 (7th Cir. 2002); *Johnson* v. *City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998); *Innovative Health Sys.* v. *City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997); see also

[3] Although the district court acknowledged that "[t]he substantive standards for determining liability under the ADA and [Section 504] are identical" (App. 34 (citing *McDonald*, 62 F.3d at 95)), it failed to recognize that Section 504 provides a statutory definition of the phrase "program or activity" that this Court has held to be "all-encompassing," *Yeskey*, 118 F.3d at 170.

Pennsylvania Dep't of Corrs. v. *Yeskey*, 524 U.S. 206, 210-212 (1998) (recognizing the breadth of Title II's "programs, services, or activities" language).

2. A state prison's provision of showers to inmates incarcerated in its facility falls squarely within this statutory language. Providing incarcerated inmates the opportunity and means to wash—a basic human need—is one of the "operations" of a state prison, 29 U.S.C. 794(b), and unquestionably something the prison "does," *Disability Rights*, 796 F.3d at 301. More specifically, the provision of showers and other hygiene essentials is a "service" the prison provides its inmates. See, *e.g.*, Webster's Third New International Dictionary Unabridged (2002) (defining "service" as, among other things, the "supply of needs"); see also *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220, 227 (2014) (noting that statutory terms that are not specifically defined "will be interpreted as taking their ordinary, contemporary, common meaning" (internal quotation marks and citation omitted)).[4] Indeed, "[b]ecause of the unique nature of correctional facilities, in which jail staff control nearly all aspects of inmates' daily lives, most everything provided to inmates is a public service, program or activity," including the opportunity to shower. *Hernandez* v. *County of Monterey*, 110 F. Supp. 3d 929,

[4] Other dictionaries similarly define "service" as "the action of helping or doing work for someone" or "an act of assistance," New Oxford American Dictionary (3d ed. 2010), and "assistance, help" or "[a]n act of assistance or benefit," American Heritage Dictionary of the English Language (5th ed. 2016).

935-936 (N.D. Cal. 2015); accord 28 C.F.R. Pt. 35, App. A, at 663 (2017) (noting that correctional facilities "are unique facilities under title II" in that "[i]nmates cannot leave the facilities and must have their needs met by the corrections system," such as by providing "accessible toilet and shower facilities").

In sum, under both Section 504's statutory definition of the phrase "program or activity" as well as the ordinary, common meaning of the word "service" in Title II, the opportunity to shower is plainly a service, program, or activity that state prisons provide inmates incarcerated in their facilities.

B. Substantial Case Law Supports The Conclusion That A State Prison's Provision Of Showers To Inmates Is Covered Under Title II And Section 504

1. The weight of case law authority supports the conclusion that a state prison's provision of showers to inmates is a service, program, or activity of the prison covered by Title II and Section 504. All three federal circuit courts that have addressed claims that a state prison failed to provide accessible showers to an inmate with a mobility disability—the First, Seventh, and Ninth Circuits—have concluded that such claims are cognizable under Title II and Section 504. See *Jaros* v. *Illinois Dep't of Corrs.*, 684 F.3d 667, 671-672 (7th Cir. 2012); *Armstrong* v. *Schwarzenegger*, 622 F.3d 1058, 1068 (9th Cir. 2010); *Kiman* v. *New Hampshire Dep't of Corrs.*, 451 F.3d 274, 287-288 (1st Cir. 2006); see also *Pierce* v. *County of Orange*, 526 F.3d 1190, 1196, 1218-1220, 1226 (9th Cir. 2008). An

even greater number of federal district courts have reached the same conclusion.[5] No federal court of appeals has ever held that a state prison's provision of showers to incarcerated inmates falls outside the scope of Title II or Section 504.

Although the Supreme Court has never directly addressed this issue, in *United States* v. *Georgia*, 546 U.S. 151 (2006), the Court indicated in dicta that it likely would find a prison's provision of showers a service, program, or activity within the meaning of Title II. *Georgia* involved a private damages suit brought under Title II and 42 U.S.C. 1983 by an inmate with paraplegia who alleged, among other things, that he was denied access to a toilet and shower while housed in the Georgia state prison system due to inaccessible facilities and a failure to accommodate his disability. *Id.* at 155. The question before the Supreme Court was whether Title II validly abrogated the State's Eleventh Amendment sovereign immunity with respect to the plaintiff's claims. *Id.* at 156. Observing that such abrogation would be plainly valid to the extent the conduct alleged "*actually* violates the Fourteenth Amendment," and that the State did not contest the

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[5] See, *e.g.*, *Reaves* v. *Department of Corr.*, 195 F. Supp. 3d 383, 424 (D. Mass. 2016); *Alster* v. *Goord*, 745 F. Supp. 2d 317, 338-339 (S.D.N.Y. 2010); *Phipps* v. *Sheriff of Cook Cty.*, 681 F. Supp. 2d 899, 916 (N.D. Ill. 2009); *Muhammed* v. *Department of Corrs.*, 645 F. Supp. 2d 299, 313-314 (D.N.J. 2008); *Schmidt* v. *Odell*, 64 F. Supp. 2d 1014, 1032-1033 (D. Kan. 1999); *Kaufman* v. *Carter*, 952 F. Supp. 520, 523-524, 532-533 (W.D. Mich. 1996); *Saunders* v. *Horn*, 959 F. Supp. 689, 697 (E.D. Pa. 1996); *Outlaw* v. *City of Dothan*, No. 92-cv-1219, 1993 WL 735802, at *4 (M.D. Ala. Apr. 27, 1993).

plaintiff's constitutional claims on certiorari review, the Court remanded for the lower courts to determine whether any of the plaintiff's Title II claims were "premised on conduct that does *not* independently violate the Fourteenth Amendment." *Id.* at 157-159. If so, those courts were to determine in the first instance whether Congress's abrogation of sovereign immunity as to those claims was valid. See *id.* at 159.

In doing so, the Court noted that the State did not dispute that the inmate alleged cognizable Title II violations. See *Georgia*, 546 U.S. at 157. The Court then observed that, "[i]n fact, it is quite plausible" that the prison's refusal to accommodate the inmate's disability "in such fundamentals as mobility, hygiene, medical care, and virtually all other prison programs" constituted "exclu[sion] from participation in or . . . deni[al of] the benefits of" the prison's "services, programs, or activities." *Ibid.* (quoting 42 U.S.C. 12132) (Court's alterations and omission). The Court cited as support for this proposition its prior decision in *Yeskey*, which observed that the statuory phrase "services, programs, or activities" plainly covers a prison's provision of recreational activities, medical services, and educational and vocational programs. *Ibid.*; see *Yeskey*, 524 U.S. at 210. This passage in *Georgia*, along with the Court's reading of the phrase "services, programs, or activities" in *Yeskey*, strongly suggest that, were it faced with the

question, the Court would conclude that a prison's provision of showers to inmates is a service, program, or activity of the prison under Title II.

2. The district court summarily dismissed this authority in a footnote, stating that the Supreme Court's observations in *Georgia* were "merely dictum" and that the numerous circuit and district court cases supporting plaintiff's claim "fail to directly address whether showering constitutes a service, program[,] or activity under the ADA." App. 35 n.3. But contrary to the district court's understanding, many circuit and district court cases *do* directly address the statutory interpretation question and resolve it in plaintiff's favor.[6] While some cases do not hold explicitly that a prison's provision of showers is a "service[], program[], or activit[y]" under Title II, 42 U.S.C. 12132, that conclusion is implicit

[6] See, *e.g.*, *Jaros*, 684 F.3d at 672 ("Although incarceration is not a program or activity, the meals and showers made available to inmates are."); *Armstrong*, 622 F.3d at 1068 (recognizing that "the fundamentals of life, such as sustenance [and] the use of toilet and bathing facilities" are among the programs and services prisons provide); *Alster*, 745 F. Supp. 2d at 338 (concluding that the denial of a wheelchair-accessible shower constitutes "exclusion from participation in services of a public entity" under Title II); *Phipps*, 681 F. Supp. 2d at 916 (concluding that "showering, toileting, and lavatory use" are "programs and/or services under the ADA"); *Saunders*, 959 F. Supp. at 697 (concluding that a prison's provision of bathroom and shower facilities is a "service" under Title II); *Outlaw*, 1993 WL 735802, at *4 (holding that "under common usage and understanding of the [statutory] terms," a "jail and all of its facilities, including the shower, constitute a service, program or activity of the [public entity] to which the ADA applies"); cf. *Pierce*, 526 F.3d at 1224 n.44 ("Providing inmates with appropriate and adequate bedding and bathroom facilities are 'services' of the jail.")

in, and inescapable from, the courts' conclusion that an inmate alleging the denial of accessible shower facilities stated a valid Title II claim.[7]

As for *Georgia*, the point is not that it is dispositive but that its observations about the petitioner's Title II claims are relevant here. Read in conjunction with the Court's broad reading of the phrase "services, programs, or activities" in *Yeskey*, the Supreme Court's remarks in *Georgia* provide strong indication that, should the issue reach the Court, it would conclude that the phrase "services, programs, or activities" encompasses a state prison's provision of showers to incarcerated inmates. This Court has admonished that lower courts "should not idly ignore considered statements the Supreme Court makes in dicta." *In re McDonald*, 205 F.3d 606, 612 (3d Cir. 2000).

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[7] See, *e.g.*, *Kiman*, 451 F.3d at 287-288 (holding that inmate presented sufficient evidence to survive summary judgment on claim that prison failed to provide him access to a shower chair and accessible shower facilities in violation of Title II); *Reaves*, 195 F. Supp. 3d at 424 (concluding that inmate was "likely to succeed in his claim that [prison] violated Title II" when it effectively denied him access to a shower for over 16 years); *Muhammed*, 645 F. Supp. 2d at 314 (inmate's allegation that prison placed him in a cell with "restricted access to the handicapped-accessible shower, when a reasonable accommodation appears to have been readily available, is sufficient to 'state [ ] a claim under Title II.'" (citation omitted)); *Schmidt*, 64 F. Supp. 2d at 1032 ("The court finds plaintiff has cited evidence that he was discriminated against or denied the benefits of some of the basic services of the jail by reason of his disability, including the use of the toilet, shower, recreational areas, and obtaining meals."); *Kaufman*, 952 F. Supp. at 532-533 (concluding that plaintiff survived summary judgment on claim that prison failed to provide him an accessible shower in violation of Title II).

C. The Decisions On Which The District Court Relied Were Wrongly Decided And Do Not Justify Departing From The Statutes' Plain Language Or Other Circuits' Precedent

Disregarding this substantial case law and persuasive commentary from the Supreme Court, the district court rested its decision on three Western District of Pennsylvania magistrate judge opinions concluding that the provision of showers is not a service, program, or activity under Title II or Section 504. See App. 35 (citing *Harris* v. *Giroux*, No. 16-cv-38, 2017 WL 3075099 (W.D. Pa. July 19, 2017); *Thomas* v. *Pennsylvania Dep't of Corrs.*, 615 F. Supp. 2d 411 (W.D. Pa. 2009); and *Evans* v. *Rozum*, No. 07-cv-230, 2008 WL 5068963 (W.D. Pa. Nov. 24, 2008)). But those opinions—two of which are unpublished—are all grounded in the same faulty analysis.

All three decisions rely on Judge Posner's opinion in *Bryant* v. *Madigan*, 84 F.3d 246 (7th Cir. 1996), holding that claims alleging the denial of medical treatment are not cognizable under Title II because "the ADA does not create a remedy for medical malpractice," *id.* at 249; see also *Iseley* v. *Beard*, 200 F. App'x 137, 142 (3d Cir. 2006) (denial of medical treatment for Hepatitis-C and other ailments is "not encompassed by the ADA's prohibitions"). Misconstruing the inmate's claim that the prison denied him access to a toilet or shower as an allegation that the prison "failed to attend to his medical needs," *Thomas*, 615 F. Supp. 2d at 426, the magistrate judges in *Thomas*, *Evans*, and *Harris* concluded

that the inmate in each of those cases failed as a matter of law to state a claim under Title II or Section 504. See *Thomas*, 615 F. Supp. 2d at 426-428; *Harris*, 2017 WL 3075099, at *9; *Evans*, 2008 WL 5068963, at *9-10.

These cases' reliance on *Bryant* to dismiss inmates' Title II and Section 504 claims in this context is misplaced. For starters, the Seventh Circuit itself has not relied on *Bryant* to preclude inmates' shower-denial claims under Title II or Section 504. To the contrary, the Seventh Circuit has held, notwithstanding *Bryant*, that the "meals and showers made available to inmates" are a "program or activity" under Section 504, and thus that an inmate with a mobility disability stated a valid Section 504 claim when he alleged that the prison's "refusal to accommodate [his] disability kept him from accessing meals and showers on the same basis as other inmates." *Jaros*, 684 F.3d at 672; see also *id.* at 671 (noting that the same analysis would apply to plaintiff's Title II claim).

More fundamentally, the three cases on which the district court relied misunderstand both the nature of the inmates' claims and what the ADA requires. A request by an inmate with a mobility disability for an accommodation that would permit him to shower—be it a shower chair, a grab bar, or access to a wheelchair-accessible shower stall—is not a request for "medical treatment," *Thomas*, 615 F. Supp. 2d at 427, akin to the inmate's request for Hepatitis-C drugs in *Iseley*, 200 F. App'x at 137. It is a request for the prison to provide the inmate access to a basic

human need—hygiene—equal to that of inmates who are not disabled. See *Armstrong*, 622 F.3d at 1068. Title II and Section 504 affirmatively *require* state prisons to make reasonable accommodations for an individual's disability where the failure to do so would result in the individual being denied the benefits of, or excluded from participation in, a program, service, or activity the prison provides. See 28 C.F.R. 35.130(b)(7)(i); cf. *Tennessee* v. *Lane*, 541 U.S. 509, 530-533 (2004); see also 28 C.F.R. 35.152(b)(1) (stating that a correctional institution may not deny "qualified inmates or detainees with disabilities" the benefits of the institution's services, programs, or activities because its facility "is inaccessible to or unusable by individuals with disabilities").

In short, *Harris*, *Thomas*, and *Evans* are poorly reasoned and contradict both the plain statutory language and the substantial persuasive precedent supporting Furgess's interpretation of Title II and Section 504. This Court should adopt the correct statutory interpretation set forth above to ensure that future district courts do not continue to rely on the incorrect analysis in *Harris*, *Thomas*, and *Evans*.

CONCLUSION

Because plaintiff stated cognizable claims under Title II and Section 504, this Court should reverse the judgment of the district court.

Respectfully submitted,

JOHN M. GORE
Acting Assistant Attorney General

s/ Christine A. Monta
ERIN H. FLYNN
CHRISTINE A. MONTA
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 353-9035

CERTIFICATE OF EXEMPTION FROM BAR MEMBERSHIP

Pursuant to Local Appellate Rules (L.A.R.) 28.3(d) and 46.1(e), I hereby certify that, as an attorney representing the United States, I am not required to be a member of the bar of this Court. See L.A.R. 28.3(d) and Committee Comments.

s/ Christine A. Monta
CHRISTINE A. MONTA
Attorney

Date: August 27, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL:

(1) complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because it contains 4832 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Local Appellate Rule 29.1(b); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in Word in a proportionally spaced typeface (Times New Roman) and in 14-point font.

I also certify under Local Appellate Rule 31.1(c) that the copy of this brief that has been electronically filed is an exact copy of what has been submitted to the Court in hard copy. I further certify that the electronic copy has been scanned with the most recent version of Symantec and is virus-free.

s/ Christine A. Monta
CHRISTINE A. MONTA
Attorney

Date: August 27, 2018

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2018, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the Appellate CM/ECF system and that seven paper copies identical to the brief filed electronically were sent to the Clerk of the Court by first class mail. I further certify that counsel of record are CM/ECF participants and will be served electronically by the Appellate CM/ECF system.

s/ Christine A. Monta
CHRISTINE A. MONTA
Attorney