No. 07-60997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN HALE,

Plaintiff-Appellant

v.

RONALD KING, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

INTERVENOR UNITED STATES' PETITION FOR REHEARING EN BANC

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STATEMENT REGARDING NECESSITY OF EN BANC REHEARING

This appeal involves two questions of exceptional importance. As to both, the panel decision is contrary to decisions of the Supreme Court of the United States, this circuit, and other courts of appeals, such that consideration by the full court is necessary to secure and maintain uniformity of this Court's decisions.

1. Can a court determine whether Title II of the Americans with Disabilities Act is a congruent and proportional response to the constitutional problems that it remedies, and thus validly abrogates the States' Eleventh Amendment immunity as applied to plaintiff's allegations, without first determining whether Title II bars the conduct plaintiff alleges?

The panel's decision as to this question conflicts with the following Supreme Court decisions: *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 129 S. Ct. 2504 (2009); *United States* v. *Georgia*, 546 U.S. 151 (2006); *Vermont Agency of Natural Res.* v. *United States*, 529 U.S. 765 (2000). It conflicts with the following decision of this Court: *Brockman* v. *Texas Dep't of Criminal Justice*, No. 09-40940 (5th Cir. Sept. 30, 2010). Additionally, it conflicts with the authoritative decisions of a number of other circuits. See *Mingus* v. *Butler*, 591 F.3d 474 (6th Cir. 2010); *Bowers* v. *NCAA*, 475 F.3d 524 (3d Cir. 2007); *Buchanan* v. *Maine*, 469 F.3d 158 (1st Cir. 2006); *Guttman* v. *G.T.S. Khalsa*, 446 F.3d 1027 (10th Cir. 2006).

2. Is Title II a congruent and proportional response to the constitutional problems that it remedies, such that it validly abrogates States' sovereign immunity?

The panel's decision as to this question conflicts with the following Supreme Court decisions: *United States* v. *Georgia*, 546 U.S. 151 (2006); *Tennessee* v. *Lane*, 541 U.S. 509 (2004); *Nevada Dep't of Hum. Res.* v. *Hibbs*, 538 U.S. 721 (2003); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). Additionally, it conflicts with the following decisions of other courts of appeals: *Bowers* v. *NCAA*, 475 F.3d 524 (3d Cir. 2007); *Constantine* v. *Rectors and Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005).

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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INTERVENOR UNITED STATES' PETITION FOR REHEARING EN BANC

QUESTIONS PRESENTED

The United States urges this Court to grant rehearing *en banc* on the following questions:

1. Can a court determine whether Title II of the Americans with Disabilities Act is a congruent and proportional response to the constitutional problems that it remedies, and thus validly abrogates the States' Eleventh Amendment immunity, without first determining whether Title II bars the conduct plaintiff alleges?

2. Did the panel correctly find that Title II is not a congruent and proportional response solely because it bans more conduct and requires more searching review than the Fourteenth Amendment?

STATEMENT OF THE CASE

1. Plaintiff, a former inmate at the South Mississippi Correctional Institution, filed this complaint *pro se*, alleging violations of Title II of the ADA, 42 U.S.C. 12131 *et seq.*, and the Constitution. Only his ADA claims for damages remain at issue. Title II 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. To comply, public entities must ensure that each "service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities," unless doing so would fundamentally alter the program or impose an undue financial or administrative burden. 28 C.F.R. 35.150(a).

Plaintiff alleges that the prison refused to treat his Hepatitis C and various psychiatric conditions. Instead, solely because he suffered from those conditions, the prison denied him access to services. In particular, "the defendants prevented him from using the community work centers, accessing the satellite and regional prison facilities, working in the kitchen, and attending school." Slip Op. 3. As a

result, he had "fewer opportunities to earn 'meritorious earned time.'" *Ibid.* Plaintiff alleges that he could have participated in the programs and services in question, and thus earned earlier release, had the prison simply provided him proper medication and treatment. See Appellant's Supp. Br. 5.

2. The district court, without deciding whether Hale alleged a Title II violation, held that Title II does not validly abrogate the States' sovereign immunity for conduct in prisons that does not violate the Constitution. *Hale* v. *Mississippi*, No. 2:06-cv-245, 2007 WL 3357562, at *8 (S.D. Miss. Nov. 9, 2007). Hale appealed, still acting *pro se*. This Court appointed counsel to address only the question "whether Title II of the ADA validly abrogates Eleventh Amendment sovereign immunity for claims that violate Title II but are not actual violations of the Fourteenth Amendment." Slip Op. 3. The United States intervened to defend Title II's constitutionality. We urged the Court, in accord with *United States* v. *Georgia*, 546 U.S. 151 (2006), to determine first whether the complaint stated a Title II claim, and to find the abrogation valid should the panel reach that question. The State, meanwhile, argued that the complaint failed to state a claim under Title II and joined the United States' position that this argument should be decided first. It made no meaningful argument that Title II does not validly abrogate its immunity under the circumstances of this case.

3. By per curiam published opinion, the panel – without deciding whether plaintiff's claims state a Title II violation – affirmed on the ground that Title II does not validly abrogate sovereign immunity for claims seeking "equal access for disabled inmates to prison educational and work programs." Slip Op. 9. *Georgia* does not require a court to decide if a plaintiff has made "a *prima facie* showing of a title II claim," the panel held, but rather only requires the court to ensure that it "knows precisely what conduct the plaintiff intends to allege in support of his Title II claims." *Id.* at 4-5 (internal quotation marks and brackets omitted). To the contrary, it is the abrogation question that must be decided first, because the State is entitled to "an early determination" as to its immunity from suit. *Id.* at 6.

The panel then held that, where it requires "equal access to prison education and work programs," Title II "is not 'congruent and proportional' to Congress's goal of enforcing the Equal Protection Clause's prohibition on irrational disability discrimination." Slip Op. 7. The Constitution subjects the challenged conduct only to rational-basis review, the court reasoned, and, "for at least three reasons, title II limits state activity far more than does rational-basis review." *Id.* at 8. First, in the panel's view, the Constitution, unlike Title II, permits a prison to "rationally deny disabled prisoners access to certain programs, even where its reasons fall short of avoiding an 'undue burden' or preventing fundamental alterations to a program." Slip Op. 8-9. "For example, a state may seek to protect

the health of a disabled prisoner by preventing him from engaging in overly strenuous activity." *Id.* at 9. Second, "title II 'makes it the employer's duty to prove that it would suffer such a burden, instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision.'" *Ibid.* (quoting *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 372 (2001)). And third, rational-basis review is particularly toothless here, "because courts are not well positioned to second-guess the rationality of a state's administration of its prisons." *Ibid.*

ARGUMENT

I

THIS COURT SHOULD REHEAR THE PANEL'S DETERMINATION THAT IT COULD DECIDE THE VALIDITY OF TITLE II'S ABROGATION OF SOVEREIGN IMMUNITY WITHOUT DECIDING WHETHER THE ALLEGED CONDUCT VIOLATES TITLE II

1. The panel decision, which assumes a Title II violation and then finds that Title II does not validly abrogate sovereign immunity in this context, directly conflicts with *United States* v. *Georgia*, 546 U.S. 151 (2006), which set forth the three-step approach courts should follow under such circumstances. A court should determine the validity of Title II's abrogation of sovereign immunity only after determining "which aspects of the State's alleged conduct violated Title II." *Id.* at 159. If no conduct violated Title II, then the court may go no further. Indeed, the second and third steps of the *Georgia* analysis presuppose a Title II

violation. The second step is to determine "to what extent such misconduct *also* violated the Fourteenth Amendment," while the third is to determine whether Congress validly abrogated sovereign immunity, "*insofar as such misconduct violated Title II* but did not violate the Fourteenth Amendment." *Ibid.* (emphasis added). Neither the second nor the third step has meaning without a threshold ruling on whether, and to what extent, plaintiff alleges a Title II violation.

The panel misread *Georgia*'s first step to require only "that the court knows 'precisely what conduct [the plaintiff] intend[s] to allege in support of his Title II claims." Slip Op. 4-5 (quoting *Georgia*, 546 U.S. at 159). It is true that, in order to ascertain whether Title II has been violated, a court must determine what conduct is alleged to violate it. But *Georgia* makes clear that a court must go on to determine whether that conduct does, in fact, constitute a violation. Moreover, shortly after *Georgia*, the Supreme Court reaffirmed *Georgia*'s requirements. The Sixth Circuit held that a complaint failed to state a Title II violation and that Title II did not validly abrogate sovereign immunity in that context. See *Haas* v. *Quest Recovery Servs., Inc.*, 174 F. App'x 265 (6th Cir. 2006). The Supreme Court granted certiorari, vacated, and remanded for reconsideration. *Haas* v. *Quest Recovery Servs., Inc.*, 549 U.S. 1163 (2007); see *id.* at 1163 (Ginsburg, J., concurring) ("The United States points out that had the Sixth Circuit attended to [*Georgia*], it might not have reached the [abrogation] question.").

2. Every previous panel confronted with a similar situation has found, correctly, that *Georgia* precludes a court from deciding the abrogation question first. For example, the First Circuit held that a court first must determine "which aspects of the State's alleged conduct violated Title II." See *Buchanan* v. *Maine*, 469 F.3d 158, 172 (1st Cir. 2006). "If the State's conduct does not violate Title II, the court does not proceed to the next step in the analysis." *Id.* at 172-173. Accordingly, *Buchanan* affirmed the dismissal of a complaint for failure to state a claim, but held that the lower court erred in also adjudicating the abrogation question. *Id.* at 173. The Third, Sixth, and Tenth Circuits likewise held that a court must first determine "if any aspect of the [state defendant's] alleged conduct forms the basis for a Title II claim." *Bowers* v. *NCAA*, 475 F.3d 524, 553 (3d Cir. 2007); accord *Guttman* v. *G.T.S. Khalsa*, 446 F.3d 1027, 1035-1036 (10th Cir. 2006); see also *Mingus* v. *Butler*, 591 F.3d 474, 482 (6th Cir. 2010). [1]

[1] Also consistent with these decisions is *Klingler* v. *Director, Department of Revenue, Missouri*, 455 F.3d 888 (8th Cir. 2006), upon which the panel erroneously relied. Slip Op. 5. *Klingler* decided a motion for reconsideration of a decision finding a Title II violation but no valid abrogation. See *Klingler* v. *Director, Dep't of Revenue, Mo.*, 433 F.3d 1078, 1082 (8th Cir. 2006). The court was not asked to reconsider its previous determination that defendants' conduct violated Title II and its implementing regulations. 455 F.3d at 894. Accordingly, it proceeded to the second and third steps of *Georgia*, finding first that the alleged conduct was not unconstitutional, *ibid*., and then that Title II did not validly abrogate sovereign immunity in that context, *id.* at 896-897.

Moreover, just two weeks before the panel's decision, a different panel of this Court held in an unpublished opinion that *Georgia* requires "that when courts consider Title II claims, they should first address whether the conduct challenged by the plaintiff violates Title II." See *Brockman* v. *Texas Dep't of Criminal Justice*, No. 09-40940, 2010 U.S. App. LEXIS 20349, at *14 (5th Cir. Sept. 30, 2010). Accordingly, it vacated that much of a lower court's opinion that improperly reached the abrogation question first. *Id.* at *15.

3. And even if *Georgia* did not directly control this case, the panel reasoned incorrectly. It is a "fundamental and longstanding principle of judicial restraint" that "courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). This principle holds even more true where, as here, the constitutionality of an act of Congress is at issue. See, *e.g.*, *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 129 S. Ct. 2504, 2513 (2009); *Jordan* v. *City of Greenwood*, 711 F.2d 667, 669 (5th Cir. 1983). Moreover, the panel issued what amounted to an improper advisory opinion, holding, in effect, that *if* Title II bans the conduct alleged in this case, *then* its abrogation of sovereign immunity is unconstitutional. "A constitutional decision resting on an uncertain interpretation of state law is * * * of doubtful precedential importance." *Pearson* v. *Callahan*,

129 S. Ct. 808, 819 (2009). So, too, is this constitutional decision, invalidating a federal law without authoritative interpretation of its scope and meaning.

The panel asserted incorrectly that the usual rule of constitutional avoidance gives way where the State asserts Eleventh Amendment immunity as a defense. See Slip Op. 5-6. *Georgia* holds the opposite with respect to the very statute at issue here. And even before *Georgia*, the Supreme Court "routinely addressed *before* the question whether the Eleventh Amendment forbids a particular statutory cause of action to be asserted against States, the question whether the statute itself *permits* the cause of action it creates to be asserted against States." See *Vermont Agency of Natural Res.* v. *United States*, 529 U.S. 765, 779 (2000). That is because the statutory question is "logically antecedent to the existence of the Eleventh Amendment question." *Ibid.* (citation and internal quotation marks omitted). Moreover, deciding the statutory question first cannot deprive a State of its "right to an early determination" of its susceptibility to suit, Slip Op. 5-6. The court still decides immediately, given the allegations, "whether States can be sued under this statute." *Vermont Agency*, 529 U.S. at 779.

Following *Vermont Agency*, this Court ruled first on a statutory defense before reaching an Eleventh Amendment defense, "in order to, if possible, avoid a constitutional question." *Neinast* v. *Texas*, 217 F.3d 275, 277 n.6 (5th Cir. 2000). The panel's reasoning here cannot be squared with *Neinast*.

Finally, even if, under other circumstances, an Eleventh Amendment defense could be considered first, the abrogation inquiry requires nuanced statutory construction. As explained further in Point II, *infra*, until a court determines how broadly Title II sweeps, it cannot ascertain whether the statute's effect is congruent and proportional to the constitutional problems it remedies. Jumping straight to the "congruent and proportional" test without first determining the scope of the statute at issue does not simply result in *unnecessary* constitutional adjudication. It also results in *flawed* constitutional adjudication.

II

THIS COURT SHOULD REHEAR THE PANEL'S DETERMINATION THAT TITLE II DOES NOT VALIDLY ABROGATE IMMUNITY HERE

Having declined to determine what alleged conduct actually violated Title II, the panel compounded its error by performing an abbreviated and incomplete abrogation analysis that did not meaningfully engage with the actual question at hand – whether Title II's requirements are congruent and proportional to the constitutional concerns it remedies. The panel stated that Title II lacked congruence and proportionality simply because Title II review is more searching than rational-basis review under the Fourteenth Amendment, Slip Op. 8-9, but this observation should have begun rather than ended the panel's analysis. The panel never considered the full panopoly of constitutional rights protected by Title II or

the extent to which Title II's requirements extend beyond constitutional guarantees. Accordingly, this Court should rehear the panel decision.

Pursuant to its Fourteenth Amendment power, Congress "may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dep't of Hum. Res.* v. *Hibbs*, 538 U.S. 721, 727-728 (2003). In particular, it may ban "practices that are discriminatory in effect, if not in intent." *Tennessee* v. *Lane*, 541 U.S. 509, 520 (2004). Congress may not, however, pass legislation "which alters the meaning of" the constitutional right purportedly enforced. *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997). "[T]he line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies." *Id.* at 519-520. The ultimate question is whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. Put another way, "the question is not *whether* Title II exceeds the boundaries of the Fourteenth Amendment, but *by how much*." *Constantine* v. *Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 490 (4th Cir. 2005) (citation omitted).

Title II provides "limited" remedies; for example, the statute requires only "reasonable modifications" to public services to make them accessible to

individuals with disabilities, and public entities need not "undertake measures that would impose an undue financial or administrative burden" or "effect a fundamental alteration in the nature of the service." *Lane*, 541 U.S. at 532. Accordingly, where Title II requires access to courts, it is a congruent and proportional response notwithstanding that it requires more than does the Fourteenth Amendment. *Ibid.* Yet the panel held, with no explanation, that the same statute, as applied to claims for equal access to prison educational and work programs, imposes obligations so disproportionate as to redefine constitutional rights rather than enforce them. See *Hibbs*, 538 U.S. at 727-728.

Only by assuming an artificially inflexible Title II could the panel find the statute not to be congruent and proportional. It is irrelevant that, under rational-basis constitutional scrutiny, "a state may seek to protect the health of a disabled prisoner by preventing him from engaging in overly strenuous activity," Slip Op. 9, unless Title II somehow *precludes* a State from considering health risks – a dubious proposition. Similarly, it is irrelevant that rational-basis constitutional scrutiny is particularly deferential in prisons, *ibid.*, because courts give similar deference to the legitimate needs of prison administration in construing the ADA.[2]

[2] We did not take a position before the panel as to whether this particular plaintiff's allegations state a claim under Title II, and we take no position now. We do insist, however, that courts cannot have it both ways – they cannot assume

(continued…)

See, *e.g.*, *Crawford* v. *Indiana Dep't of Corr.*, 115 F.3d 481, 487 (7th Cir. 1997). Statutes should be construed to *avoid* constitutional problems, not *create* them. See, *e.g.*, *Gomez* v. *United States*, 490 U.S. 858, 864 (1989); *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971).

In reality, those cases in which Title II imposes liability on States in the prison context are generally those cases, such as *Lane* and *Georgia*, in which the constitutional concerns that undergird Title II loom largest and Congress's Fourteenth Amendment power thus is at its apex. Cf. *Bowers* v. *NCAA*, 475 F.3d 524, 555 (3d Cir. 2007) (Congress had authority to require equal access to public education, given "regrettable past history" in this area). The panel failed to grapple with the real constitutional concerns that Title II remedies in the prison context in a variety of factual settings, erroneously looking only to the facts of this case to decide a question with much broader ramifications.[3] In doing so, it failed to follow *Lane*, which considered the full range of constitutional rights implicated in the

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(…continued)
that Title II sweeps broadly for purposes of the abrogation analysis, without actually construing Title II so broadly.

[3] The space limitations on this petition prevent us from setting forth here the long and well-documented history of disability discrimination in prisons, and the manner in which Title II remedies such discrimination. Our brief to the panel, which lays out in great detail this history, is available at http://www.justice.gov/crt/briefs/hale.pdf.

court-access context, such as the right to serve on a jury, though not all of them were implicated by the particular plaintiffs' claims.[4] See 541 U.S. at 522-524. Instead, the panel extensively cited to *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), a case that addresses Title I of the ADA and has only limited relevance here. See Slip Op. 7-9.[5]

[4] Indeed, the panel failed even to fully explore those constitutional concerns raised in a case such as this one. It stated in conclusory fashion that plaintiff's claims implicate solely "the Equal Protection Clause's prohibition on irrational disability discrimination." Slip. Op. 6 (citation and internal quotation marks omitted). But the plaintiff's claim that he was not given needed medication also implicates the Eighth Amendment, see *Estelle* v. *Gamble*, 429 U.S. 97, 103-104 (1976), while denial of early release from prison as a result of disability also implicates the liberty interests protected by the Due Process Clause. See *Georgia*, 546 U.S. at 161-162 (Stevens, J., concurring) (prisoner Title II claims often implicate many constitutional concerns); *Lane*, 541 U.S. at 524-527 (same).

[5] In *Garrett*, with respect to the public employment covered by Title I, the Supreme Court found no record of "the pattern of unconstitutional discrimination on which [Fourteenth Amendment] legislation must be based," and so it did not need to proceed further. 531 U.S. at 370. By contrast, with respect to the public services covered by Title II, Congress compiled an extensive record of past state discrimination, and so it has authority to pass prophylactic legislation that goes beyond remedying actual constitutional violations. See *Lane*, 541 U.S. at 523-526.

CONCLUSION

This Court should grant the petition for rehearing *en banc*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2010, I electronically filed the foregoing INTERVENOR UNITED STATES' PETITION FOR REHEARING EN BANC with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney

CERTIFICATE REGARDING PRIVACY REDACTIONS AND VIRUS SCANNING

I certify (1) that all required privacy redactions have been made in this brief, in compliance with 5th Cir. Rule 25.2.13; (2) that the electronic submission is an exact copy of the paper document, in compliance with 5th Cir. R. 25.2.1; and (3) that the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Date: December 1, 2010

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
October 14, 2010

Lyle W. Cayce
Clerk

No. 07-60997

JOHN ASHLEY HALE,

Plaintiff-Appellant,

versus

RONALD KING,
Superintendent of Southern Mississippi Correctional Institution;
MARGARET BINGHAM,
Superintendent of Southern Mississippi Correctional Institution;
CHRISTOPHER EPPS,
Commissioner of Mississippi Department of Corrections;
MIKE HATTEN, Health Service Administrator
of Wexford for Southern Mississippi Correctional Institution;
JOHN DOE, Physician at Southern Mississippi Correctional Institution;
DOCTOR ZANDU, Psychiatrist at Central Mississippi Correctional Facility;
DOCTOR PATRICK ARNOLD, Physician for Correctional Medical Services
at Southern Mississippi Correctional Institution;
DOCTOR WILLIAMS, Psychiatrist of Correctional Medical Services
for Southern Mississippi Correctional Institution;
DOCTOR TRINCA,
Physician for Wexford at Southern Mississippi Correctional Institution;
MIRIAM MOULDS,
Kitchen Supervisor at Southern Mississippi Correctional Institution;
JOHN DOE 2, Chief Executive Officer of Correctional Medical Services
for Mississippi Department of Corrections;
JOHN DOE 3, Chief Executive Officer of Wexford at Southern Mississippi
Correctional Institution for Mississippi Department of Corrections;
DOCTOR MCCLEAVE; DOCTOR WOODALL;
WEXFORD HEALTH SERVICES,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi

Before JOLLY, SMITH, and OWEN, Circuit Judges.

PER CURIAM:

The district court held that the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12131-12165, does not validly abrogate state sovereign immunity with respect to the claims of disabled inmates who were denied access to prison educational and work programs. *Hale v. Mississippi*, No. 2:06-CV-245, 2007 WL 3357562 (S.D. Miss. Nov. 9, 2007). Because Congress's authorization of those claims is not "congruent and proportional" to the enforcement of the Equal Protection Clause, we affirm.

I.

While a state prisoner, John Hale filed a *pro se* complaint *in forma pauperis* against prison officials in their official capacity, alleging violations of the ADA.[1] Specifically, he claims they discriminated against him in violation of title II of the ADA[2] because he suffers from Hepatitis C, post-traumatic stress disorder, chronic depression, intermittent explosive disorder, and antisocial personality disorder. Under prison regulations, those health problems required Hale to be classified as "medical class III," a designation limiting his work and pro-

[1] Hale also raised claims under 42 U.S.C. § 1983 asserting inadequate medical treatment and denial of proper diet. Those were dismissed, and Hale does not appeal as to them.

[2] Title II provides that "[s]ubject to the provisions of this subchapter, 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.

gram assignments, thus giving him fewer opportunities to earn "meritorious earned time." Hale maintains that because of his classification, the defendants prevented him from using the community work centers, accessing the satellite and regional prison facilities, working in the kitchen, and attending school.

The district court dismissed on the ground that the officials are entitled to state sovereign immunity. The court acknowledged that Congress can abrogate state sovereign immunity under § 5 of the Fourteenth Amendment and that it did so in the ADA. *See United States v. Georgia*, 546 U.S. 151 (2004). Nonetheless, the court reasoned that Congress's § 5 powers do not extend to creating causes of actions for ADA violations that are not "congruent and proportional" to violations of the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

After Hale filed his *pro se* brief on appeal, we appointed counsel to file a supplemental brief to address the question "whether Title II of the ADA validly abrogates Eleventh Amendment sovereign immunity for claims that violate Title II but are not actual violations of the Fourteenth Amendment." The United States intervened and submitted a brief supporting Hale's position.

II.

The district court acted under 28 U.S.C. § 1915(e)(2)(B)(ii), which allows it to dismiss an *in forma pauperis* complaint if it "fails to state a claim on which relief may be granted." We review such dismissals *de novo*. *Praylor v. Tex. Dep't of Criminal Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005).

The ADA provides that "[a] State shall not be immune" from suits under the act because of sovereign immunity. 42 U.S.C. § 12202. Congress has the power to abrogate state sovereign immunity with such unequivocal statements, but only where it "act[s] pursuant to a valid grant of constitutional authority." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) (alteration in orig-

inal) (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000)). There is only one source of such authority: the enforcement provisions of § 5 of the Fourteenth Amendment. *Id.* at 364. "Accordingly, the ADA can apply to the States only to the extent that the statute is appropriate § 5 legislation." *Id.*

Nonetheless, "no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for actual violations of those provisions." *Georgia*, 546 U.S. at 158 (alteration in original). Thus, the ADA validly abrogates sovereign immunity insofar as it "creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment." *Id.* at 159.

The parties agree that none of the defendants' alleged misconduct violates the Fourteenth Amendment. Where there is no such violation, there is a three-step process for determining whether Congress validly abrogated sovereign immunity with respect to that conduct. The court must determine,

> on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

Id.

A.

The defendants and the United States contend that the district court failed to apply the first step of the *Georgia* test because it did not determine whether Hale had established a *prima facie* title II claim. Thus, they argue that we should remand to complete that inquiry.

Step one of *Georgia* does not require a *prima facie* showing of a title II claim. The purpose of step one, understood in context, is to ensure that the court

knows "precisely what conduct [the plaintiff] intend[s] to allege in support of his Title II claims." *Id.* Remand was necessary in *Georgia* because the *pro se* litigant had pleaded a number of "'frivolous claims'––some of which are quite far afield from actual constitutional violations . . ., or even from Title II violations." *Id.* Thus, it was not obvious which conduct the Court was supposed to evaluate as part of the sovereign immunity inquiry. By contrast, Hale's pleadings are pellucid, and the district court identified the precise conduct that he alleges violated the ADA.[3] Accordingly, "[w]e see little need for a remand when the issue before us is a purely legal one, namely, whether the ADA validly abrogated state sovereign immunity with respect to the claims of the type advanced by the plaintiff[]." *Klingler v. Dir., Dep't of Revenue, State of Mo.,* 455 F.3d 888 (8th Cir. 2006).

The United States contends that deciding the sovereign immunity question without ensuring that Hale has stated a proper ADA claim risks unnecessarily deciding a constitutional question.[4] That argument misunderstands the nature of sovereign immunity, which rests on the principle that "the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts."[5] To limit the indignity a state may suffer and to vindicate its "right not to be haled into court," "a state has a right

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[3] *Hale v. Mississippi*, 2007 WL 3357562, at *2 ("In his Amended Complaint, plaintiff also alleges claims for violations of the ADA against defendants Mr. Epps, Mr. Hatten, and Mr. King. Plaintiff claims he was discriminated and retaliated against. Specifically, he claims that he was denied access to the satellite and regional facilities, was denied the ability to work in the prison kitchen, and was denied the ability to go to school, because he was classified as 'medical class III' and/or a 'psychiatric C.'").

[4] *See Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

[5] *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); *accord P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-46 (1993) (holding that sovereign immunity "is an immunity from suit rather than a mere defense to liability").

to an early determination of the issue."[6] Consequently, courts often must rule on sovereign immunity even though further litigation might have resolved the suit on non-constitutional grounds.

B.

We thus proceed to the third prong of the *Georgia* test to determine whether Congress's § 5 power supports its purported abrogation of sovereign immunity. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . . ." *City of Boerne*, 521 U.S. at 518.

Congress's § 5 power, however, "is not unlimited." *Id.* To determine whether a particular application of the ADA falls within it, we must (1) "identify the constitutional right or rights that Congress sought to enforce when it enacted Title II"; (2) ascertain whether Congress enacted title II in response to a history and pattern of unconstitutional conduct; and (3) decide "whether the rights and remedies created by Title II are congruent and proportional to the constitutional rights it purports to enforce and the record of constitutional violations adduced by Congress." *Tennessee v. Lane*, 541 U.S. 509, 522-33 (2004) (describing *City of Boerne*'s application to title II).

Hale contends he was discriminated against when he was denied educational training and access to prison work programs because of his medical disability. Therefore, his claims implicate title II's attempt to enforce the Equal Protection Clause's "prohibition on irrational disability discrimination." *Id.* at 522.[7]

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[6] *Smith v. Reagan*, 841 F.2d 28, 31 (2d Cir. 1988); *accord Helton v. Clements*, 787 F.2d 1016, 1017 (5th Cir. 1986) ("[A] defendant's entitlement under immunity doctrine [is] to be free from suit and the burden of avoidable pretrial matters . . . .").

[7] There are "a variety of other basic constitutional guarantees" that title II attempts to enforce. *Lane*, 541 U.S. at 522-23. *Lane* particularly addressed the right implicated in that (continued...)

Congress enacted title II partially in response to governmental units' discrimination against the disabled, including "a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system." *Id.* at 525.

We may therefore move to step three of the *City of Boerne* test. When determining whether title II is an appropriate response to the history of unconstitutional treatment, we do not "examine the broad range of Title II's applications all at once," *id.* at 530, but instead focus on the particular application at issue, equal access to prison education and work programs, *see id.* That requirement is not "congruent and proportional" to Congress's goal of enforcing the Equal Protection Clause's prohibition on irrational disability discrimination. Under that clause, disabled individuals are not a suspect or quasi-suspect classification commanding heightened review of laws discriminating against them. *See Garrett*, 531 U.S. at 366 (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985).

Consequently, disability discrimination is subject only to rational-basis review, under which there is no constitutional violation so long as "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 367 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)). The state need not justify its own actions; rather, "the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* (citation and internal quotation marks omitted).

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[7] (...continued)
case, the "right of access to the courts" protected by the Due Process Clause and the Confrontation Clause. *Id.* at 523; *see also id.* at 540 (Rehnquist, C.J., dissenting) ("[B]ecause the Court ultimately upholds Title II 'as it applies to the class of cases implicating the fundamental right of access to the courts,' the proper inquiry focuses on the scope of those due process rights." (citation omitted)). We therefore focus on the Equal Protection Clause's prohibition of irrational disability discrimination.

In *Garrett*, *id.* at 373, the Court emphasized the deference afforded to states under rational-basis review in evaluating title I of the ADA under step three of *City of Boerne*. Title I requires employers to provide reasonable accommodations to disabled employees, a duty that fails step three because it "far exceeds what is constitutionally required":

> For example, whereas it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities, the ADA requires employers to "mak[e] existing facilities used by employees readily accessible to and usable by individuals with disabilities." The ADA does except employers from the "reasonable accommodatio[n]" requirement where the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." However, even with this exception, the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternative responses that would be reasonable but would fall short of imposing an "undue burden" upon the employer.

Id. at 372 (citations omitted, brackets in original). The same reasoning applies to title II's requirement that states provide disabled individuals access to state programs.

Hale and the United States object that the requirements of title II are limited in scope, because a state can show that it is entitled to certain exceptions, thus lessening the extent to which title II's protection surpasses that of the Equal Protection Clause. For example, the state need not comply with title II if it can show that providing access "would fundamentally alter the nature of the service, program, or activity," 28 C.F.R. § 35.130(b)(7), or "would result in . . . undue financial and administrative burdens," *id.* § 35.150(a)(3).

Nonetheless, for at least three reasons, title II limits state activity far more than does rational-basis review. First, a state prison may rationally deny disabled prisoners access to certain programs, even where its reasons fall short

of avoiding an "undue burden" or preventing fundamental alterations to a program. For example, a state may seek to protect the health of a disabled prisoner by preventing him from engaging in overly strenuous activity. Second, title II "makes it the employer's duty to prove that it would suffer such a burden, instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision." *Garrett*, 531 U.S. at 967. Finally, the Equal Protection Clause's requirements are even more minimal here than in *Garrett*, because courts are not well positioned to second-guess the rationality of a state's administration of its prisons.[8]

In summary, Congress's § 5 power is not congruent and proportional and therefore does not justify title II's requirement of equal access for disabled inmates to prison educational and work programs. It follows that title II does not validly abrogate state sovereign immunity for that class of claims. The judgment of dismissal is AFFIRMED.

[8] *See Woodford v. Ngo*, 548 U.S. 81, 94 (2006) ("[I]t is 'difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.'" (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973)); *Turner v. Safley*, 482 U.S. 78, 85 (1987) ("Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.").