

**No. 04-5891**

**IN THE  
SUPREME COURT OF THE UNITED STATES**

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MICHEAL LEE SPENCER, SR.

*Petitioner,*

v.

MARK EARLEY, RONALD ANGELONE, GENE JOHNSON, ERIC M. MADSEN, the  
VIRGINIA DEPARTMENT OF CORRECTIONS, the VIRGINIA DEPARTMENT OF  
CORRECTIONS' BRUNSWICK CORRECTIONAL CENTER, and the VIRGINIA  
DEPARTMENT OF CORRECTIONS' OFFICE OF HEALTH SERVICES

*Respondents.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Fourth Circuit

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**RESPONDENTS' BRIEF IN OPPOSITION**

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**JERRY W. KILGORE**

Attorney General of Virginia

**WILLIAM E. THRO**

State Solicitor General

*Counsel of record*

**MAUREEN RILEY MATSEN**

Deputy State Solicitor General

**JOEL C. HOPPE**

Assistant Attorney General

900 East Main Street  
Richmond, Virginia 23219  
(804) 786-2436  
(804) 786-1991 (facsimile)  
*Counsel for Respondents*

November 3, 2004

## **QUESTION PRESENTED**

Whether Congress validly abrogated the sovereign immunity of the States for claims based on Title II of the Americans with Disabilities Act in the context of a state prison?

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The Respondents, Mark Earley (“General Earley”), Ronald Angelone (“Director Angelone”), Gene Johnson (“Director Johnson”), Eric M. Madsen (“Dr. Madsen”), the Virginia Department of Corrections, the Virginia Department of Corrections’ Brunswick Correctional Center, and the Virginia Department of Corrections’ Office of Health Services (collectively “the Commonwealth”), through their counsel, Virginia Attorney General Jerry W. Kilgore, and pursuant to this Court’s order of October 4, 2004, respond to the Petition for Writ of Certiorari. For the reasons set forth below, the Petition should be denied.

### **STATEMENT OF THE CASE**

The Petition presents an important issue of federalism—whether Congress has validly abrogated the States’ sovereign immunity for claims based on Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12131-12165, in the context of a state prison. Since this Court’s decision in *Tennessee v. Lane*, 124 S. Ct. 1978 (2004), two Circuits have reached different conclusions on this issue.<sup>1</sup> *See Miller v. King*, \_\_\_ F.3d \_\_\_, 2004 U.S. App. LEXIS 19250 (11<sup>th</sup> Cir. 2004) (finding that Title II of the ADA did not validly abrogate sovereign immunity for claims in the prison context); *Phiffer v. Columbia River Corr. Inst.*, \_\_\_ F.3d \_\_\_, 2004 U.S. App. LEXIS 19152 (9<sup>th</sup> Cir. Sept.

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<sup>1</sup> Of course, prior to *Lane*, the Circuits were divided on whether Congress had validly abrogated sovereign immunity for ADA Title II claims in *any* context. *See Wessel v. Gledening*, 306 F.3d 203 (4<sup>th</sup> Cir. 2002) (no abrogation); *Kiman v. New Hampshire Dep’t of Corr.*, 301 F.3d 13 (1<sup>st</sup> Cir. 2002) (abrogation), *aff’d en banc*, 332 F.3d 29 (1<sup>st</sup> Cir. 2003), *granted, vacated and remanded*, 124 S. Ct. 2387 (2004); *Thompson v. Colorado*, 278 F.3d 1020 (10<sup>th</sup> Cir. 2001); *Reickenbacker v. Foster*, 274 F.3d 974 (5<sup>th</sup> Cir. 2001) (no abrogation); *Alsbrook v. City of Maumelle*, 194 F.3d 999 (8<sup>th</sup> Cir. 1999) (en banc) (no abrogation); and *Clark v. California. Dep’t of Corr.*, 123 F.3d 1267 (9<sup>th</sup> Cir. 1997)(no abrogation)

2004) (sovereign immunity abrogated for some ADA Title II claims in the prison context). *See also Id.* at \_\_\_ (O’Scannlain, J., concurring) (agreeing with the majority that circuit precedent required a finding of valid abrogation, but urging the court to reexamine its prior decisions because of the “case by case analysis” adopted in *Lane*). Although this split should be resolved, this petition is a poor vehicle for resolving split. Accordingly, certiorari must be denied or, alternatively, this Court should grant certiorari, vacate the judgment, and remand for further proceedings in light of *Lane*.

While this case is saddled with numerous convoluted pleadings and factual assertions filings, the procedural history is relatively straightforward. The Petitioner, Micheal Lee Spencer, Sr., filed a Complaint in the district court alleging violations of Title II of the ADA and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (“§ 504”), and sought compensatory and punitive damages. When he filed this lawsuit, Spencer was an inmate at the Brunswick Correctional Center in Lawrenceville, Virginia. According to his pleadings, Spencer suffers from unspecified mental and physical impairments that are attributable to a self-inflicted gunshot wound to the head. Spencer’s claims, charitably construed, are as follows:

1. General Earley violated Spencer’s rights by advising the Department of Corrections that the ADA did not apply to state prisons.<sup>2</sup> Complaint at 3-4.
2. While enrolled in a rehabilitative program called “Breaking Barriers,” Spencer found that mental impairments prevented him from attending classes. *Id.* at 4. He sought to review course materials in his cell or in a private room in lieu of attending classes, but his request was denied. *Id.*

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<sup>2</sup> General Earley left office in January of 2002. Based on the petition, it appears that Spencer’s claims are against General Earley individually rather than against his Office.

3. When Spencer experienced a seizure, Nurse Easter required that he be examined in the infirmary. *Id.* at 5. Spencer was taken to the infirmary against his wishes. *Id.*
4. Spencer requested that staff tape record his psychological sessions because he had difficulty writing notes and remembering discussions during the sessions. *Id.* His request was denied. *Id.* at 6.
5. Spencer's requests for "reasonable accommodation" and access to the "prison's court-appointed attorney" were denied. *Id.*
6. Spencer was moved from single-cell housing to double-cell housing against his wishes. *Id.* at 6, 9.
7. Madsen prescribed inappropriate physical therapy that caused injury. *Id.* at 7
8. Dr. Jane DiCocco and Rex Miller required Spencer to obtain his medication from the regular "pill line" for 30 days. *Id.*
9. Madsen prevented access to legal services concerning Spencer's mental health records. *Id.*
10. The Respondents have failed to establish an evacuation plan for Spencer in the event of a fire. *Id.* at 8.
11. A corrections officer left Spencer locked in his cell during a fire drill because Spencer required assistance. *Id.*
12. Spencer must pay a fee for prescription medicine. *Id.*
13. A corrections officer removed, from his cell, two posters that Spencer used to remind him to undertake everyday tasks. *Id.*
14. Because his disabilities prevented Spencer from accessing the second floor law library, he requested permission to take a legal book to his cell. *Id.* at 9. The request was denied. *Id.*
15. Spencer is housed in a residential building that is far from the dining hall and medical services. *Id.* He has difficulty walking between his cell and these services. *Id.* at 9-10.
16. A prison employee told Spencer to sign a form indicating refusal of treatment but did not tell him the type of treatment he was refusing. *Id.* at 10.
17. Dr. DiCocco refused to treat Spencer and misdiagnosed his maladies. *Id.* at 10-11.
18. Spencer was placed in administrative segregation for false reasons. *Id.* at 11.

19. Spencer was housed in a double cell with a black inmate who had served 32 years for murdering three white people. *Id.* The inmate also had identified with the Black Panther movement. *Id.* When he refused to be housed with this inmate, Spencer was threatened with loss of good time credits, placement in segregation, disciplinary charges, and transfer to a higher security facility. *Id.* at 12.

Additionally, most of the above claims are punctuated with a derogatory remark made by a prison official about Spencer's disabilities.

Addressing the numerous claims in the Complaint, the Commonwealth filed Motions to Dismiss that raised the following defenses: (1) Spencer failed to exhaust all administrative remedies before filing suit as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e; (2) sovereign immunity bars suit against the State for damages; and (3) the ADA did not authorize suit against individuals.

On May 30, 2003, the district court entered an order dismissing Spencer's Complaint for failure to state a claim upon which relief may be granted. *Spencer v. Earley*, Civil Action No. 01-1578-AM (E.D. Va. May 30, 2003) (unpublished). After noting that Spencer had filed a voluminous list of complaints in the action, the district court characterized his complaints as involving discrimination in "prison programs, housing assignments, legal services and in treatment by various staff members" as well as claims against Dr. Madsen for improper medical treatment.<sup>3</sup> *Pet. App.* at B-2-3. However, the district court did not attempt to parse out those claims. *Id.* at B-2-3. The court also declined to address claims brought in Spencer's Amended Complaint because those claims were filed after the Commonwealth had filed responsive pleadings. *Id.* at B-3.

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<sup>3</sup> In a footnote, the district court reported that Spencer had filed two prior ADA claims, which were dismissed on sovereign immunity grounds. *Pet. App.* at B-1 n.1

Addressing the viability of the claims against General Earley, Director Angelone, Director Johnson, and Dr. Madsen in their individual capacities, the court found that Title II of the ADA did not subject individuals to liability. *Id.* at B-5. The district court also determined that sovereign immunity barred the claims against General Earley, Director Angelone, Director Johnson, and Dr. Madsen in their official capacities and against the Department of Corrections and its component parts. *Id.* at B-5-7. Additionally, the Court found that the claims of inadequate medical treatment did not rise to the level of constitutional violations. *Id.* at B-7-9.

On February 23, 2004, in an unpublished opinion, the Fourth Circuit Court of Appeals affirmed the decision, “for the reasons stated by the district court.” *Pet. App.* at A-3. Spencer filed a Petition for a Writ of Certiorari on May 21, 2004. In a letter dated June 24, 2004, this Court instructed Spencer to submit an amended petition, which was filed on or about August 13, 2004.

### **REASONS FOR DENYING THE WRIT**

#### **I. THIS PETITION IS A POOR VEHICLE FOR RESOLVING THE CIRCUIT SPLIT.**

As noted above, in the post-*Lane* era, the Circuits are divided as to whether Congress has validly abrogated sovereign immunity for ADA Title II claims in the context of a state prison. Although the Commonwealth recognizes that this Court needs to resolve this split, this petition presents an extraordinarily poor vehicle for resolving the issue. This is so for three reasons.

First, Spencer's petition involves factual allegations and legal arguments that have not been addressed by the lower courts. For example, Spencer, for the first time, claims that he was denied access to meals for thirteen months and that Dr. Madsen fabricated a psychological report to deny him access to legal services. Because these claims were not presented to or considered by the lower court, this Court should not be the first to scrutinize them.

Second, Spencer's claims against Nurse Belinda Easter and Dr. DiCocco are the subject of another lawsuit. *See Spencer v. Easter, cert. granted, judgment vacated, and remanded*, 124 S. Ct. 2386 (*Spencer I*), *on remand*, \_\_\_ Fed. Appx. \_\_\_ (4<sup>th</sup> Cir. 2004)(*Spencer II*). The Fourth Circuit recently resolved these claims by concluding that Spencer had failed to state a claim for disability discrimination. *Spencer II*, \_\_\_ Fed. Appx. at \_\_\_\_\_. While Spencer can certainly attempt to obtain this Court's review of *Spencer II* by filing a petition for certiorari in *that* case, he cannot use *this* petition to relitigate his claims.

Third, Spencer fails to state a claim for disability discrimination in violation of the ADA. This Court should not resolve the profound constitutional question of whether Congress has validly abrogated sovereign immunity in a case where the petitioner has failed to state a claim.

To explain Spencer's failure to state a claim, Title II of the ADA provides, "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 state a valid claim under the ADA, an individual must establish the following factors:

(1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities or was otherwise discriminated against; and (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.

*Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 5 (1<sup>st</sup> Cir. 2000). Yet, in the prison context, the rights of the aggrieved party to access services, programs, or activities are inherently limited by his incarceration. Accordingly, the factual sufficiency of Spencer's claims of exclusion from a public entity's services, programs, or activities must be assessed in light of the constitutional rights, conditions of confinement and access to the courts, underlying the prisoner's claims of discrimination.

"The Constitution ... 'does not mandate comfortable prisons,' and only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (citations omitted). As evidence that prison officials discriminated against him in the conditions of his confinement based on a disability, Spencer cites the following grievances: he was assigned to a double cell, he was placed in administrative segregation, he was housed in a building away from certain services, his posters that were not approved by prison officials were removed from his cell, he did not participate in a fire drill, he was not permitted to participate in rehabilitative programming from his cell, he was required to pay a percentage of the cost of his prescription medications, and his request to tape record counseling sessions was denied. This list of complaints demonstrates nothing more than the ordinary challenges confronted by prisoners, both disabled and non-disabled, as a result of their incarceration and loss of freedom. No benefit, service, or program was denied to Spencer based on his disability. Nor is there

evidence that the prison officials' actions were driven by a discriminatory intent. Thus, Spencer's Eighth Amendment claim under the ADA is factually untenable.

With respect to access to the courts, the Constitution does not require unfettered access to a law library or to legal services. *See Lewis v. Casey*, 518 U.S. 343, 351 (1996). Instead, the right mandates that a prisoner is afforded a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Bounds v. Smith*, 430 U.S. 817, 825 (1977). Spencer claims that his disabilities prevented him from accessing the second floor library and that a prison official refused his request to take a legal book to his cell. An inability to obtain one legal book does not exclude a prisoner from the service of a law library. Spencer also claims that his access to the "prison's court appointed attorney" was denied because of his mental disabilities. While this claim presents a closer question, it nonetheless fails to establish that Spencer was excluded from a legal service by virtue of his disability that other prisoners who were not disabled could access. Because Spencer has not asserted sufficient facts to establish a prima facie case of discrimination under the ADA, this Court should not consider the broader issue of abrogation.

**II. ALTERNATIVELY, THIS COURT SHOULD GRANT, VACATE, AND REMAND FOR FURTHER PROCEEDINGS IN LIGHT OF *TENNESSEE v. LANE*.**

Alternatively, this Court should grant certiorari, vacate the judgment below, and remand this case to the Fourth Circuit for further proceedings in light of *Lane*. At the time when the district court dismissed Spencer's complaint on sovereign immunity grounds and at the time when the Fourth Circuit affirmed the dismissal, this Court had not yet

decided *Lane* . While the Commonwealth believes that the outcome is the same even after *Lane*, the fact remains that the lower court did not have the benefit of this Court's decision in *Lane*. Indeed, this Court has already taken such a step in another case brought by Spencer.

**CONCLUSION**

The Petition for a Writ of Certiorari should be **DENIED**.

Respectfully submitted:

**MARK EARLEY,  
RONALD ANGELONE,  
GENE JOHNSON,  
ERIC M. MADSEN,  
THE VIRGINIA DEPARTMENT OF  
CORRECTIONS,  
THE VIRGINIA DEPARTMENT OF  
CORRECTIONS' BRUNSWICK CORRECTIONAL  
CENTER,  
and  
THE VIRGINIA DEPARTMENT OF  
CORRECTIONS' OFFICE OF HEALTH SERVICES**

By: /s/ William E. Thro  
Counsel

**JERRY W. KILGORE**  
Attorney General of Virginia

**WILLIAM E. THRO**  
State Solicitor General  
*Counsel of record*

**MAUREEN RILEY MATSEN**  
Deputy State Solicitor General

**JOEL C. HOPPE**  
Assistant Attorney General

Office of the Attorney General  
900 East Main Street  
Richmond, Virginia 23219  
(804) 786-2436  
(804) 786-1991 (facsimile)

*Counsel for Respondents*

November 3, 2004

### **PROOF OF SERVICE**

On November 2, 2004, I served one copy of the BRIEF IN OPPOSITION upon all parties required to be served, by the United States Postal Service in accordance with Rule 29(3), as follows:

Micheal Lee Spencer, Sr.  
2 Medical Center Floor  
LUCAS COUNTY JAIL  
1622 Spielbusch Ave.  
Toledo, OH 43624

/s/ William E. Thro  
Counsel