No. 21-6507

IN THE UNITED STATES. COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAVID RICHARDSON,

Plaintiff-Appellant,

v.

HAROLD CLARKE et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA 3:18-cv-0023-HEH-EWH

PLAINTIFF-APPELLANT'S OPENING BRIEF

Oren Nimni
Samuel Weiss
RIGHTS BEHIND BARS
416 Florida Ave. #26152
Washington D.C. 20001
(202) 540-0029
oren@rightsbehindbars.org

Kelly Jo Popkin
RIGHTS BEHIND BARS
276 Stratford Road
Brooklyn, NY 11218
(917) 648-0848
kellyjo@rightsbehindbars.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 2

REQUEST FOR ORAL ARGUMENT 3

STATEMENT OF CASE 4

SUMMARY OF ARGUMENT 7

ARGUMENT 9

INTRODUCTION 9

STANDARD OF REVIEW 10

I. The District Court Erred in Concluding That Richardson Could Not Proceed Past Summary Judgement Because He Had Not Demonstrated a "Substantial Burden" on His Religious Exercise. 10

A. The District Court Erred in Holding that a Substantial Burden was Justified by Penological Interest 17

II. The District Court Erred in Dismissing Richardson's Claim for Damages Under Title II of the Americans with Disabilities Act on the Grounds of Sovereign Immunity. 19

A. The district court did not properly evaluate Richardson's claims under the test from *United States v. Georgia* test. 19

B. Title II of the ADA properly abrogates state sovereign immunity, and no companion constitutional pleading is required. 20

C. Even if this Court determines that Richardson needed to plead a companion constitutional violation, the district court should still be reversed. 29

III. The District Court Erred in Granting Summary Judgement for Defendants as to Richardson's ADA Claims Because it did not Appropriately Credit Evidence Set Forth by Richardson in Opposition. ... 32

A. The lower court improperly declined to consider Richardson's sworn statements as evidence. ... 33

B. Richardson set forth evidence that he was denied the benefit of medical care, the law library, and other programs, services, or activities due to his disabilities. ... 34

C. The lower court relied solely on Defendants' factual submissions and drew all inferences in their favor. ... 37

D. The lower court made an improper credibility determination of Richardson's evidence. ... 39

E. Richardson repeatedly requested, and Defendants ignored, reasonable accommodations for his disabilities. ... 41

IV. Richardson's Claims Under the Rehabilitation Act Should Proceed for the Same Reasons as His ADA Claims. ... 43

CONCLUSION ... 45

CERTIFICATE OF COMPLIANCE ... 46

CERTIFICATE OF SERVICE ... 47

TABLE OF AUTHORITIES

Cases

A.H. by Holzmueller v. Illinois High Sch. Ass'n, 881 F.3d 587 (7th Cir. 2018)..... 50

Ajala v. West, 106 F. Supp. 3d 976 (W.D. Wis. 2015).. 15

Ali v. Stephens, 822 F.3d 776 (5th Cir. 2016) 15, 21, 22

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).. 47

Argenyi v. Creighton Univ., 703 F.3d 441 (8th Cir. 2013)..................................... 40

Ass'n for Disabled Ams., Inc. v. Florida Int'l Univ., 405 F.3d 954 (11th Cir. 2005) 28

Baird v. Rose, 192 F.3d 462 (4th Cir. 1999) 51, 52

Betton v. Belue, 942 F.3d 184 (4th Cir. 2019).. 39

Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) 25, 32

Bounds v. Smith, 430 U.S. 817 (1977)... 27

Bratcher v. Clarke, 725 F. App'x 203 (4th Cir. 2018) 1

Burke v. Clarke, 842 F. App'x 828 (4th Cir. 2021)... 14

Carter v. Clark, 616 F.2d 228 (5th Cir.1980).. 41

Caruso v. Zenon, No. 95-MK-1578 (BNB), 2005 WL 5957978 (D. Colo. July 25, 2005) 16

Chase v. Baskerville, 508 F. Supp. 2d 492 (E.D. Va. 2007) 53

Chisolm v. McManimon, 275 F.3d 315 (3d Cir. 2001)... 48

City of Boerne v. Flores, 521 U.S. 507 (1997).. 26

City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985) 27

Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474 (4th Cir. 2005) .... passim

Couch v. Jabe, 679 F.3d 197 (4th Cir. 2012) 19

Cruz v. Beto, 405 U.S. 319 (1972)... 27

Cutter v. Wilkinson, 544 U.S. 709 (2005) 13

Dare v. California, 191 F.3d 1167 (9th Cir. 1999) 34

Duffy v. Riveland, 98 F.3d 447 (9th Cir.1996) 48

Duvall v. Cty. of Kitsap, 260 F.3d 1124, (9th Cir. 2001) 44, 49

Erickson v. Pardus, 551 U.S. 89 (2007)... 11

Estelle v. Gamble, 429 U.S. 97 (1976) 36

Finch v. Covil Corp., 972 F.3d 507 (4th Cir. 2020) 39

Goins v. Fleming, No. 7:16CV00154, 2017 WL 4019446 (W.D. Va. Sept. 12, 2017) 17

Gray v. Spillman, 925 F.2d 90 (4th Cir. 1991).. 47

Greenhill v. Clarke, 944 F.3d 243 (4th Cir. 2019) 19

Harris v. Wall, 217 F. Supp. 3d 541 (D.R.I. 2016) 17

Hogan v. Idaho State Bd. of Corr., No. 1:16-CV-00422-CWD, 2018 WL 2224045 (D. Idaho May 15, 2018)... 16

Holt v. Hobbs, 574 U.S. 352 (2015) 13

Holt v. Hobbs, 574 U.S. 352 (2015) 12, 21

Hughes v. Rowe, 449 U.S. 5 (1980)... 39

Hutto v. Finney, 437 U.S. 678 (1978) 26

Jihad v. Fabian, No. CIV. 09-1604 SRN LIB, 2011 WL 1641885 (D. Minn. Feb. 17, 2011) 18

Junaid v. Kempker, No. 4:04CV57 CDP, 2009 WL 881311 (E.D. Mo. Mar. 27, 2009) 18

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000)... 25

Klingler v. Director, Dep't of Revenue, 455 F.3d 888 (8th Cir. 2006) 28

Krieger v. Brown, 496 F. App'x 322 (4th Cir. 2012).. 13, 20

Lovelace v. Lee, 472 F.3d 174 (4th Cir. 2006) 12, 20

Madison v. Virginia, 474 F.3d 118 (4th Cir. 2006) 53

Malik v. Ozmint, No. 8:07-387-RBH-BHH, 2008 WL 701517 (D.S.C. Feb. 13, 2008) 15, 17

Marble v. Tennessee, 767 F. App'x 647 (6th Cir. 2019) 50

Nat'l Fed'n of the Blind v. Lamone, 813 F.3d 494 (4th Cir. 2016) 43

Nevada Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003) 31

Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) 25

Pell v. Procunier, 417 U.S. 817 (1974) 28

PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) 49, 51

Phiffer v. Columbia River Correctional Institute, 384 F.3d 791 (9th Cir. 2004) ... 34

Randolph v. Rodgers, 170 F.3d 850 (8th Cir.1999) 48

Schlemm v. Wall, 784 F.3d 362 (7th Cir. 2015) 15

Smith v. Ozmint, 578 F.3d 246 (4th Cir. 2009) 19

Spencer v. Earley, 278 F. App'x 254 (4th Cir. 2008) 35

Tennessee v. Lane, 541 U.S. 509 (2004) .... passim

Thomas v. Rev. Bd. of Indiana Emp. Sec. Div., 450 U.S. 707 (1981) 12

Thunderhorse v. Pierce, 418 F. Supp. 2d 875 (E.D. Tex. 2006) 18

Trejo v. Ryman Hosp. Properties, Inc., 795 F.3d 442 (4th Cir. 2015) 11

United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992) 45

United States v. Georgia, 546 U.S. 151 (2006) 22, 23, 28, 32

Willard v. IRS, 776 F.2d 100 (4th Cir.1985) 40

Wilson v. Prince George's Cty., Maryland, 893 F.3d 213 (4th Cir. 2018) 11

Wright v. N.Y. State Dep't of Corr., 831 F.3d 64 (2d Cir. 2016) 50, 51

Statutes and Regulations

28 C.F.R § 35.104(1) 42

28 C.F.R. § 35.130(b)(1)(iii) 37

28 C.F.R. § 35.160 .... 37, 42

28 C.F.R. § 35.160(a)(1) 36
28 C.F.R. § 35.160(b)(1) 36
28 C.F.R. Pt. 35, App. B (Section 35.102 Application) 32
28 U.S.C. § 1291 1
28 U.S.C. § 1331 1
28 U.S.C. § 1746 34
Americans with Disabilities Act 7
Rehabilitation Act 8
Religious Land Use and Institutionalized Persons Act ("RLUIPA"), Pub.L. 106–274, codified as 42 U.S.C. § 2000cc et seq. 7
Title 42 Section 2000(d)(7) 44

Other Authorities

California Dept. of Justice, *Attorney General's Commission on Disability: Final Report* 103 (Dec.1989) 27
H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990), Pt. 2 26
H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990), Pt. 3, at 50 26
House Committee on Education and Labor, Legislative History of Public Law 101–336: The Americans with Disabilities Act, 101st Cong., 2d Sess., 1331 (Comm. Print 1990) 27
Rep. No. 116, 101st Cong., 1st Sess. (1989) 26
S. Rep. No. 101-116, at 44 (1989) 43
U.S. Dep't of Justice, *The Americans with Disabilities Act Title II Technical Assistance Manual*, at II–7.1100 (1993) 34
United States Comm'n on Civil Rights, Accommodating the Spectrum of Individual Abilities 168 (1983) (Spectrum) 26

JURISDICTIONAL STATEMENT

As a civil suit based on federal statutory and constitutional claims, the district court had jurisdiction under 28 U.S.C. § 1331. The plaintiff, Mr. David Richardson, appeals from a final order issued by the District Court on May 5, 2021, and from the district court's order on Defendants' partial motion to dismiss that issued on August 17, 2020. JA 253-56.[1] Mr. Richardson filed a notice of appeal on May 31, 2021. This Court has jurisdiction under 28 U.S.C. § 1291.

---

[1] Although Richardson's Notice of Appeal solely indicates a challenge to the district court's grant of summary judgement for defendants, its decision granting, in part, defendants' motion to dismiss is also properly before this Court on appeal because Richardson raised deficiencies with the district court's motion to dismiss ruling in his informal brief. Appellant's Informal Br. 2-4; *Bratcher v. Clarke*, 725 F. App'x 203, 205 (4th Cir. 2018) (citing *Jackson v. Lightsey*, 775 F.3d 170, 176 (4th Cir. 2014) ("Generally, an appellant must 'designate the judgment, order, or part thereof being appealed' in the notice of appeal. Fed. R. App. P. 3(c)(1)(B)). Although Rule 3 is jurisdictional in nature, 'we construe the rule liberally and take a functional approach to compliance, asking whether the putative appellant has manifested the intent to appeal a specific judgment or order and whether the affected party had notice and an opportunity fully to brief the issue.' An appellant who fails to designate a specific order in his notice of appeal may manifest an intent to appeal the order by addressing the order in his informal brief.").

STATEMENT OF THE ISSUES

1. Whether the district court improperly granted summary judgement against Richardson's RLUPIA claim by holding that there was no substantial burden on his religious exercise.

2. Whether the district court erred in holding that Richardson's RLUPIA claim should be dismissed even if there was a substantial burden on his religious exercise.

3. Whether the district court improperly dismissed Richardson's claim for damages under Title II of the ADA after determining that state sovereign immunity had not been abrogated in the prison context.

4. Whether the district court improperly dismissed Richardson's claims for injunctive relief under the ADA and RA ignoring and making improper adverse credibility determinations as to evidence submitted by the Richardson at the summary judgement stage.

REQUEST FOR ORAL ARGUMENT

Mr. Richardson, through his counsel, respectfully requests oral argument be set on this matter. Oral argument would be beneficial in addressing the complex legal doctrines and concerns in this case.

STATEMENT OF CASE

Mr. Richardson is a prisoner incarcerated by the Virginia Department of Corrections ("VDOC"). He is currently held in Deerfield Correctional Center ("DCC"). He was transferred from Greensville Correctional Center ("GCC") to DCC on or about on April 19, 2019. His claims against arise out of his experiences at GCC and DCC.

Mr. Richardson lives with a number of disabilities. He is legally and visually impaired because of optical atrophy with 20/400 vision with severe photosensitivity and has, as a result, been prescribed dark 95% tinted glasses. JA14. Mr. Richardson began losing his hearing at the age of 14. JA 15-16. He is now unable to hear and communicates through a combination of American Sign Language and lip reading. *Id*. Mr. Richardson has orthopedic injuries to his spine, he suffers from a degenerative disc disease affecting his spine. JA 18-19. This series of disabilities requires significant accommodations.

Despite his disabilities and the need for accommodation, officials at GCC and DCC failed to accommodate Richardson. Despite his need for special corrective lenses Richardson has been unable to secure necessary eyewear for over two years after receiving a prescription. JA14-15. Despite his numerous requests for a medical mattress and a bed to alleviate some pain from his spinal injuries, he has not been provided the necessary accommodation. JA48-49. Despite his need for interpretation

services he has been provided inadequate or non-existent assistance. The lack of accommodations or the mal-provision of appropriate accommodations has left Mr. Richardson without necessary assistance to see, hear, sleep, function and live without severe pain in the VDOC system.

Mr. Richardson also has several sincerely held religious beliefs. Relevant for this appeal, Mr. Richardson abides by sincerely held religious beliefs "honoring the creator with a head covering." JA22. He accomplishes this by wearing a kufi. Prior to December 1, 2020, DCC policy and staff prevented Mr. Richardson from wearing a kufi in certain parts of the prison facility, including the dining area. *Id.* He grieved the restrictions on his religious garb to officials at DCC but was not allowed to wear his kufi in certain areas of the facility. *Id.* On December 1, 2020, DCC enacted a policy change regarding head coverings. JA97. The new DCC policy provided that prisoners may wear religious and state-issued head coverings anywhere inside the facility, but must remove the head covering at the request of security staff. *Id.*

Because of the lack of accommodations for his disabilities and his religious needs, on January 10, 2018, Richardson filed a complaint, *pro se*, with several other prisoners seeking relief. He later proceeded alone, *pro se*, in his claims. On August 17, 2020 the district court granted in part and denied in part Defendants' motion to dismiss. JA63-90. On September 2, 2020 and December 10, 2020 Richardson filed additional affidavits in support of his position. JA152-70; JA209-13. On November

5, 2020 Defendants moved for summary judgement. JA93-94. On March 5, 2021 the district court granted summary judgement for defendants on Richardson's remaining claims. JA252. And on March 31, 2021 Richardson timely appealed. JA253.

SUMMARY OF ARGUMENT

(1) The district court erred in dismissing Richardson's claims under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), Pub.L. 106–274, codified as 42 U.S.C. § 2000cc et seq. The court below erred in dismissing this claim for two reasons. First, the court erred by holding that preventing Richardson from wearing a religious head covering in many vital places in the prison did not constitute a substantial burden on his religious practice. The imposed restrictions did constitute a substantial burden on Richardson's religious practice and the district court's ruling is contrary to precedent established by this Court and other Circuit Courts. Second, the court erred in holding that, even if the restrictions on head coverings were a substantial burden, that they nonetheless passed constitutional muster. In making this ruling the district court applied the incorrect test to evaluate RLUIPA claims. Under the correct test, the restrictions clearly fail.

(2) The district court erred in dismissing Richardson's damages claims under Title II of the Americans with Disabilities Act ("ADA") on state sovereign immunity grounds. In dismissing Richardson's damages claim the district court failed to conduct the analysis required under *United States v. Georgia* and erroneously determined that no claim could succeed absent a

companion constitutional pleading. The district court was required to determine if, absent a companion constitutional pleading, Title II nonetheless abrogates state sovereign immunity in the prison context. It made no such determination. Had it conducted the required analysis the district court should have held that Title II is properly abrogated in the prison context. Even if the district court was proper in restricting Title II claims to claims where companion constitutional harms are pleaded, Richardson did in fact plead a viable Eighth Amendment claim that should have allowed his ADA claim to proceed even under the district court's incorrect application of the *Georgia* test.

(3) The district court erred in dismissing Richardson's ADA and Rehabilitation Act ("Rehab Act") claims. The district court ruled for defendants at the summary judgement stage on these claims but failed to consider evidence presented by Richardson rebutting Defendants' assertions and made credibility determinations that were invalid at the summary judgement stage.

ARGUMENT

INTRODUCTION

David Richardson is a prisoner in the VDOC system who lives with a series of disabilities, including blindness and deafness. Over the years of his incarceration in two VDOC facilities Mr. Richardson repeatedly requested numerous accommodations for his disabilities and was repeatedly denied. He also requested accommodations for his sincerely held religious beliefs which require him to wear a head covering at all times. This request too was denied, and Richardson was prevented from wearing head coverings even while eating in the dining hall. As a result, Mr. Richardson filed a complaint *pro se* against the VDOC and its officials for failing to uphold their statutory and constitutional obligations to him while he is in their custody. Richardson has been prevented from numerous activities because of the failure to accommodate his disabilities, has experienced pain, and has not been able to practice his religion in accordance with its tenets. Nonetheless, the district court dismissed some of Richardson's claims and granted summary judgement to Defendants on others. In doing so the district court misapplied applicable law and refused to credit evidence brought forth by a *pro se* plaintiff. The district court should be reversed for the following reasons.

STANDARD OF REVIEW

Appellate courts review the grant of a motion to dismiss under Rule 12(b)(6) *de novo*. *Trejo v. Ryman Hosp. Properties, Inc.*, 795 F.3d 442, 445–46 (4th Cir. 2015). Similarly, this Court reviews *de novo* a district court's award of summary judgment. *Wilson v. Prince George's Cty., Maryland*, 893 F.3d 213, 218 (4th Cir. 2018). In conducting that review, this Court construes the evidence in the light most favorable to the non-moving party. *Id*. This construal must be particularly liberal here, as "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

I. The District Court Erred in Concluding That Richardson Could Not Proceed Past Summary Judgement Because He Had Not Demonstrated a "Substantial Burden" on His Religious Exercise.

The district court incorrectly granted summary judgment against Richardson on his RLUIPA claim. It erred when it concluded that VDOC's policy, which required Richardson to choose between practicing his sincerely held religious beliefs by wearing a head covering and existing in certain parts of the prison including the cafeteria, did not constitute a substantial burden on his exercise of religion. JA245-51.

RLUIPA "prohibits a state or local government from taking any action that substantially burdens the religious exercise of an institutionalized person unless the

government demonstrates that the action constitutes the least restrictive means of furthering a compelling governmental interest." *Holt v. Hobbs*, 574 U.S. 352 (2015). The Fourth Circuit has clarified that a substantial burden "is one that "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs, or one that forces a person to choose between following the precepts of her religion and forfeiting [governmental] benefits, on the one hand, and abandoning one of the precepts of her religion ... on the other hand." *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (omission in original) (internal quotation marks and citations omitted). "Even where the compulsion is indirect, the restriction on religious exercise may nonetheless be substantial." *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981).

The religious exercise in question need not be a central tenet of the plaintiff's religious practice to constitute a substantial burden when deprived. *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005). Similarly, "the protection of RLUIPA … is "not limited to beliefs which are shared by all of the members of a religious sect."" *Holt*, 574 U.S. at 362–63 (quoting *Thomas* 450 U.S. 707, 715–716 (1981)). Nevertheless, the court may consider whether the plaintiff has other means to engage in the *specific* religious practice at issue. *See Krieger v. Brown*, 496 F. App'x 322, 325–26 (4th Cir. 2012).

In granting summary judgment, the District Court notes that Richardson failed to detail why the inability to wear his kufi in certain areas of the prison, including the dining hall, was a substantial burden on his religious exercise, given that he was permitted to wear it in other areas.[2] JA248-49. But the reason is clear: Richardson's religion required him to wear his head covering at all times, yet there are places where he was prevented from wearing it. This prohibition, in and of itself, is a substantial burden, but that burden becomes higher when restrictions on head coverings in the dining hall are considered. Because Richardson considers it his religious obligation to wear his head covering at all times he was thus forced to choose between violating a tenet of his religious practice or forfeiting a government benefit: his meals. JA22; *see Burke v. Clarke*, 842 F. App'x 828, 835 (4th Cir. 2021) (construing complaint liberally, plaintiff linked religious non-compliance with grooming policy to custody restrictions, preserving "impossible choice" argument on appeal).

The Court has not had occasion to determine when restrictions on religious headwear constitute a substantial burden on religious exercise, but sister circuits and district courts addressing similar policies have followed the Supreme Court's

[2] Although defendants have since changed their policy to permit wearing religious headwear throughout the prison, the District Court concluded that they did not produce sufficient evidence that they will not return to the prior policy. Thus, Richardson's claims for injunctive relief are not moot. JA242-43.

guidance in *Holt* that RLUIPA was conceived to offer "expansive protection for religious liberty." 574 U.S. at 358. In *Ali v. Stephens*, the Fifth Circuit considered a Texas policy similar to the one at issue here, which permitted incarcerated people to wear kufis only in their cells and at religious services. 822 F.3d 776, 794 (5th Cir. 2016). The court upheld the lower court's holding that prohibiting a Muslim individual from wearing his kufi throughout the prison constituted a substantial burden on religious exercise and was not the least restrictive means to achieve prison officials' security and management interests. *Id.* at 794–97. Similarly, in *Schlemm v. Wall*, the Seventh Circuit reversed a court that granted summary judgment to prison officials who had failed to justify the substantial burden on religious exercise imposed by an outright ban on Native American headbands. 784 F.3d 362, 366 (7th Cir. 2015); *see also Charles v. Frank*, 101 F. App'x 634, 635 (7th Cir. 2004); *Johnson v. Brown*, 581 F. App'x 777, 781 (11th Cir. 2014) (plaintiff made prima facie case that policy prohibiting wearing kufi to and from religious services constituted substantial burden).

A number of district courts have also found that restrictions on religious headwear that lead people to forego other privileges constitute a substantial burden. *See e.g.*, *Ajala v. West*, 106 F. Supp. 3d 976, 981 (W.D. Wis. 2015) (restricting kufis to use in cell in segregation unit constitutes substantial burden); *Malik v. Ozmint*, No. 8:07-387-RBH-BHH, 2008 WL 701517 at *11 (D.S.C. Feb. 13, 2008), *report*

and recommendation adopted, No. CIV.A. 8:07-387-RBH, 2008 WL 701394 (D.S.C. Mar. 13, 2008), *aff'd*, 289 F. App'x 662 (4th Cir. 2008) (prohibiting kufi during one hour of out-of-cell time constitutes substantial burden); *Hogan v. Idaho State Bd. of Corr.*, No. 1:16-CV-00422-CWD, 2018 WL 2224045 at *5 (D. Idaho May 15, 2018) (restricting kufis to use in cell and during religious services constitutes a substantial burden); *Garner v. Livingston*, No. CA-C-06-218, 2011 WL 2038581 (S.D. Tex. May 19, 2011), *aff'd in part sub nom. Garner v. Kennedy*, 713 F.3d 237 at *1 (5th Cir. 2013) ("The defendants do not seriously challenge the contention that [Texas Department of Criminal Justice] policies [prohibiting wearing a kufi to and from religious services and restricting beard length] impose a substantial burden on those religious exercises."); *Caruso v. Zenon*, No. 95-MK-1578 (BNB), 2005 WL 5957978 at *18 (D. Colo. July 25, 2005) (prohibiting kufis in general population areas constitutes substantial burden). Indeed, in a prior case, Virginia did not even dispute that its policy prohibiting kufis in the common area of a prison housing unit constituted a substantial burden on religious exercise. *See Goins v. Fleming*, No. 7:16CV00154, 2017 WL 4019446, at *4 (W.D. Va. Sept. 12, 2017).

The district court's conclusion that Richardson did not suffer a substantial burden on his religious exercise because he was permitted to wear his head covering *in some parts* of the prison mischaracterizes the nature of his religious practice.

JA248-49. As noted in *Harris v. Wall*, several courts have rejected the same reasoning, because when such a policy "is imposed on a prisoner who sincerely believes that [a head covering] should be worn at all times, the burden on religious practice is substantial because it still amounts to an outright ban." 217 F. Supp. 3d 541, 555 (D.R.I. 2016) (citing *Ajala*, 106 F. Supp. 3d at 981; *Malik*, 2008 WL 701517, at *9-11). Accordingly, depriving a person of his kufi even for a single hour each day has been held to constitute a substantial burden. *See Malik*, 2008 WL 701517, at *11.

Contrary holdings related to head coverings were delivered prior to the Supreme Court's ruling in *Holt* or were based on the individualized beliefs of the respective plaintiffs. *See Thunderhorse v. Pierce*, 418 F. Supp. 2d 875, 891 (E.D. Tex. 2006), *aff'd in part, vacated in part, remanded*, 232 F. App'x 425 (5th Cir. 2007) (restriction on color of headband and use only in-cell not substantial burden); *Junaid v. Kempker*, No. 4:04CV57 CDP, 2009 WL 881311 at *8 (E.D. Mo. Mar. 27, 2009); *Jihad v. Fabian*, No. CIV. 09-1604 SRN LIB, 2011 WL 1641885 at *17 (D. Minn. Feb. 17, 2011), *report and recommendation adopted*, No. CIV. 09-CV-1604 SRN, 2011 WL 1641767 (D. Minn. May 2, 2011) (plaintiff who believed a secular head covering sufficed for religious practice did not suffer substantial burden under restrictions on kufi).

Given that Richardson inherently did not have "other means" to wear a head covering at all times, his situation is similar to that raised in *Couch v. Jabe*, where the plaintiff had no way to maintain a beard in line with his religious practices without running afoul of prison grooming standards. 679 F.3d 197, 200 (4th Cir. 2012). The Fourth Circuit held that by inducing Muslim individuals to shave under threat of disciplinary sanction, VDOC's policies "fit squarely within the accepted definition of substantial burden." *Id.* (internal quotation marks omitted); *see also Greenhill v. Clarke*, 944 F.3d 243, 252 (4th Cir. 2019) (placement in restrictive unit upon non-compliance with grooming policy prohibiting four-inch beard constitutes substantial burden); *Smith v. Ozmint*, 578 F.3d 246, 252 (4th Cir. 2009) (forced head-shaving of Rastafarian constitutes substantial burden). Mr. Richardson likewise faced disciplinary sanction if he did not forego wearing his head covering. JA22.

The District Court likens Richardson's claim to *Krieger v. Brown* and other cases where alternative means were available for plaintiffs to practice their religion. JA247-48. But for the same reasons described above, this analogy is misguided. In *Krieger*, the literature submitted in support of plaintiff's claim confirmed that the prison was providing the mandatory items for the Asatru Blot ceremony and that worship could take place indoors, which led the court to conclude that, despite being deprived an outdoor worship circle, the plaintiff retained other means to pursue his religious practice. 496 F. App'x 322 at 325–6. By contrast, Richardson does not

retain any other means to engage in his religious practice; either he wears his head covering at all times or he does not. Thus, VDOC's policy, which forced Richardson to "choose between following the precepts of [his] religion and forfeiting [meals] on the one hand and abandoning one of the precepts of [his] religion ... on the other hand" falls squarely within the definition of a substantial burden under RLUIPA. *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006).

The burden imposed on Richardson's religious practice by not allowing him to wear a head covering in all areas was substantial. He was forced into a choice between practicing his faith, and eating in the dining hall. The weight of caselaw makes clear that this constitutes a substantial burden on practice and that the district court erred in holding otherwise.

A. The District Court Erred in Holding that a Substantial Burden was Justified by Penological Interest

The district court also incorrectly held that "even if Defendants' prior policy with respect to head coverings imposed a substantial burden on Richardson's religion it would pass constitutional muster." JA249. To reach this conclusion, the court applied the standard set forth in *Turner v. Safley*, which requires only that a burden on religious exercise be rationally related to a legitimate penological interest. *Id.* (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987). But this is the wrong standard. RLUIPA imposes a higher burden – the state's policy must be the "least restrictive means of furthering a compelling governmental interest." *Holt*, 574 U.S. at 356.

While prison officials retain a measure of due deference, the RLUIPA strict scrutiny standard is "exceptionally demanding" and requires the state to show that it "lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party." *Greenhill v. Clarke*, 944 F.3d 243, 250 (4th Cir. 2019) (quoting *Holt*, 574 U.S. at 364–65). The Court should remand with instructions to assess Mr. Richardson's religious headgear claim under the appropriate standard.

The Fifth Circuit's analysis in *Ali v. Stephens* demonstrates why Virginia's policy cannot survive under this standard. 822 F.3d at 794–97. In *Ali*, the court found that searching religious headwear offered a less restrictive means to control contraband than a ban imposed in certain areas of the prison. *Id.* at 794–95. The court similarly found that such a restriction was not justified by the need to rapidly identify people in custody because other permissible garments just as soon impede identification and there are other means by which people can quickly change their appearance such as shaving or cutting their hair. *Id.* at 795–96. Finally, the court determined that any additional costs imposed by searches of religious property were so marginal that they did not constitute compelling interest. *Id.* at 796-97. The inquiry, and the result, should be the same here.

The district court erred, and used the incorrect standard, in holding that even if the limitations placed on Richardson constituted a substantial burden, they nonetheless passed muster. This Court should reverse that erroneous holding.

II. The District Court Erred in Dismissing Richardson's Claim for Damages Under Title II of the Americans with Disabilities Act on the Grounds of Sovereign Immunity.

The district court granted defendants' motion to dismiss Richardson's damages claims under Title II of the ADA on the grounds that state sovereign immunity had not been abrogated for his claims. JA75. In doing so the district court misapplied the applicable abrogation test from *United States v. Georgia*, and even misapplied their own, more demanding standard. *Id.; see United States v. Georgia*, 546 U.S. 151 (2006). Because of these errors, the dismissal of Richardson's damages claim under Title II of the ADA was erroneous. This Court should reverse.

A. The district court did not properly evaluate Richardson's claims under the test from *United States v. Georgia* test.

In *United States v. Georgia*, the Supreme Court set out a three-part test for determining whether state sovereign immunity has been abrogated for particular claims under Title II of the ADA. 546 U.S. 151 (2006). The test requires district courts to 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.* at 159. The district court simply failed to conduct this analysis. After noting that Defendants did not dispute the substance of Richardson's claims, the district court cursorily concluded that Richardson's claim should be dismissed because he had not pleaded a companion ADA claim with his First Amendment claims or had not pleaded a separate companion constitutional claim with his ADA claims.[3] JA75. But there is no requirement for such "companion pleading". The district court was required to first determine if the alleged misconduct "actually violate[d] the Fourteenth Amendment" and, if the court determined that there was no underlying Fourteenth Amendment violation, the court was then required to determine "whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." *Georgia*, 546 U.S. at 159. No such determination was made. This Court should therefore remand this matter with instructions to the district court to conduct analysis under step three of the *Georgia* test and determine, in the first instance, whether, absent a companion constitutional harm, Congress's abrogation of sovereign immunity under Title II of the ADA is nevertheless valid.

B. Title II of the ADA properly abrogates state sovereign immunity, and no companion constitutional pleading is required.

[3] "…the only constitutional claim that Richardson has adequately pled is his First Amendment claim, denial of free exercise of his religion with respect to the wearing of a head covering. Richardson fails to state a companion ADA claim in conjunction with that claim."

To the extent this Court reaches the substantive underlying question of whether, for the class of conduct alleged here, Congress properly abrogated state sovereign immunity in enacting Title II of the ADA, it should rule that Congress has properly abrogated state sovereign immunity in the prison context. Because of this, prong three of the *Georgia* test is met, and Richardson's damages claim should be allowed to proceed even absent pleading a companion constitutional violation.

In order to determine whether Congress properly abrogated state sovereign immunity courts "'must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority.'" *Tennessee v. Lane*, 541 U.S. 509, 517 (2004) (*quoting Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 73 (2000)). The Supreme Court has repeatedly held that Congress expressly intended to abrogate state sovereign immunity in enacting Title II of the ADA. *See, e.g., Lane*, 541 U.S. at 518; *see also Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363-64 (2001). The only question, then, is whether Congress had the power to manifest that intent.

Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power, *see Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 80 (2000), that gives Congress the "'authority both to remedy and to deter violation of [Fourteenth Amendment] rights … by prohibiting a somewhat broader swath of conduct,

including that which is not itself forbidden by the Amendment's text,'" *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727 (2003) (*quoting Board of Trs. of the Univ. of Ala.*, 531 U.S. at 365). The Supreme Court has held that Section 5 "is a 'broad power indeed,'" *Lane*, 541 U.S. at 518 (citations omitted), empowering Congress not only to remedy past violations of constitutional rights, but also to enact "prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct," *Hibbs*, 538 U.S. at 727–728. Congress's power under Section 5 sweeps so broadly that it also may prohibit "practices that are *discriminatory in effect*, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Lane*, 541 U.S. at 520 (*emphasis added*). There is no exception to this broad authority for the state prison context. *See Hutto v. Finney*, 437 U.S. 678, 693–699 (1978).

Despite the sweeping nature of Congress's authority under Section 5, there are limits. Thus, in evaluating whether legislation enacted under Section 5 is proper courts look to the test set out by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997) and clarified in *Lane*. The Supreme Court laid out a three-step method for determining whether legislation enacted pursuant to Section 5 authority is valid: (1) identify the right(s) at issue, *Lane*, 541 U.S. at 522; (2) identify the pattern of violations that the legislation is designed to remedy and prevent, *id*. at

523-534; and (3) determine whether the legislation is congruent and proportional to the pattern of violations, *id*. at 530.

Lane specifically addressed this question for Title II of the ADA. Under step 1 of the *Boerne* test, the *Lane* Court recognized that Congress, upon enacting Title II, sought to enforce the Fourteenth Amendment's "prohibition on irrational disability discrimination." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 486 (4th Cir. 2005) (citing *Lane*, 124 S.Ct. at 1988). Primarily, Title II seeks to enforce the Constitution's prohibition on irrational disability discrimination under the Equal Protection Clause, *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 448 (1985), but many rights beyond equal protection are implicated for disabled people in prisons, including: the right to pursue a religious faith in a reasonable manner, *Cruz v. Beto*, 405 U.S. 319, 322 (1972); the right of access to the courts, *Bounds v. Smith*, 430 U.S. 817, 821 (1977); and the right to speech not inconsistent with penological objectives, *Pell v. Procunier*, 417 U.S. 817, 822 (1974). *See also United States v. Georgia*, 546 U.S. 151, 162 (2006) (Stevens, J. concurring) ("While it is true that cases involving inadequate medical care and inhumane conditions of confinement have perhaps been most numerous [challenges brought by prisoners], courts have also reviewed myriad other types of claims by disabled prisoners, such as allegations of the abridgment of religious liberties, undue censorship, interference with access to the judicial process, and

procedural due process violations.”). This Court has read *Lane* to establish that Congress identified a sufficient historical record of unconstitutional disability discrimination for Title II as a whole to survive step two. *Constantine*, 411 F.3d at 487; *see also Klingler v. Director, Dep't of Revenue*, 455 F.3d 888, 896 (8th Cir. 2006); *Ass'n for Disabled Ams., Inc. v. Florida Int'l Univ.*, 405 F.3d 954, 958 (11th Cir. 2005).

The remaining question, then, is “whether the remedial measures contained in Title II represent a congruent and proportional response to this demonstrated history and pattern of unconstitutional disability discrimination.” *Constantine*, 411 F.3d at 487–88. In evaluating whether Title II is an appropriate response to past unconstitutional treatment of individuals with disabilities, the Court in *Lane* declined to address the congruence and proportionality of Title II as a whole, upholding it instead as “valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services.” 541 U.S. at 531. Though *U.S. v. Georgia* failed to reach this analysis in the prison context, this Court's decision in *Constantine* provides a clear roadmap for holding the exercise of congressional authority valid for Richardson's claim and those of other prisoners with disabilities. In *Constantine*, a law student at George Mason University was denied extra time to take an exam when she suffered a migraine during the exam. *Constantine*, 411 F.3d at 478. In determining that Title II was congruent and proportional there, this Court looked

generally at the right to be free from arbitrary and unreasonable disability discrimination and generally at past discrimination against those with disabilities writ large. *Id.* at 487. This Court went on to note that "…the remedial measures employed in Title II are likely less burdensome to the States than those employed in Title I. Whereas Title I requires the States to "mak[e] existing facilities used by employees readily accessible to and usable by individuals with disabilities ... Title II imposes no such categorical requirement." *Id.* at 490 (quotations omitted). The Court then concluded that Title II was congruent and proportional, in part because courts give wide latitude to acts of Congress recognizing that "the remedial measures employed in Title II may not be a perfect fit for the pattern of discrimination that Congress sought to remedy and deter, but they need not be." *Id.*

Even if the past harms identified here only rose to the same level as this Court identified in *Constantine*, this Court should hold Title II equally valid in the prison context. But this case presents an even more compelling study of congruence and proportionality. First, in the prison context, a variety of rights subject to higher scrutiny are in play. This Court must consider not only the right to be free from arbitrary and unreasonable discrimination, as was considered in *Constantine*, but also the right to be free from cruel and unusual punishment and various other substantive and procedural Due Process rights. "Because the standard for demonstrating the constitutionality of [a heightened scrutiny test] is more difficult

to meet than the Court's rational-basis test," it is therefore "easier for Congress to show a pattern of state constitutional violations" which congruent and proportional legislation might address. *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

Second, the history of past discrimination specific to the prison context is clear and compelling. The information before Congress when enacting the ADA documented a widespread and deeply-rooted pattern of prisons and correctional officials' deliberate indifference to the health and medical needs of prisoners with disabilities. The relevant House Report concluded that persons with disabilities, such as epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990), Pt. 3, at 50. The report of the United States Civil Rights Commission that was before Congress, *see* S. Rep. No. 116, 101st Cong., 1st Sess. (1989) at 6; H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990), Pt. 2, at 28, also identified the "[i]nadequate treatment … in penal and juvenile facilities," and "[i]nadequate ability to deal with physically handicapped accused persons and convicts" as serious problems. *United States Comm'n on Civil Rights*, Accommodating the Spectrum of Individual Abilities 168 (1983) (Spectrum). Court decisions and the historical and legislative record are replete with specific patterns and examples of unconstitutional disability discrimination specific to prison, even outside of the Eighth Amendment context.

See e.g. United States v. Georgia, 546 U.S. 151, 161–62 (2006) (Stevens, J. concurring) ("[T]he history of mistreatment leading to Congress' decision to extend Title II's protections to prison inmates was not limited to violations of the Eighth Amendment.") For example, the Supreme Court has noted that prisoners with developmental disabilities were subject to longer terms of imprisonment than other prisoners. *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 391–424 (2001) (Appendixes to opinion of Breyer, J., dissenting) (listing submissions made to Congress by the Task Force on the Rights and Empowerment of Americans with Disabilities). Persons with hearing impairments, like Richardson, "have been arrested and held in jail over night without ever knowing their rights nor what they are being held for...." House Committee on Education and Labor, Legislative History of Public Law 101–336: The Americans with Disabilities Act, 101st Cong., 2d Sess., 1331 (Comm. Print 1990); *see also id*. at 1005 (stating that police arrested a man with AIDS and "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night"). Prisoners with disabilities have also been unnecessarily "confined to medical units where access to work, job training, recreation and rehabilitation programs is limited." California Dept. of Justice, *Attorney General's Commission on Disability: Final Report* 103 (Dec.1989).

As such, Title II is especially congruent and proportional to the prison context, where constitutional concerns pervade almost every aspect of daily life and where

unique affirmative obligations arise. Prisons are constitutionally required to provide people inside with adequate food, shelter, and medical care. But not only is the pattern of violations more pervasive in the prison context than in other contexts (including higher education), it is also more difficult and intractable. Violations against prisoners are also more difficult to regulate because they are hidden from the public eye, and prisoners are in many cases unable to defend themselves because of their inability to access the political process. Because of the legion and intractable constitutional concerns, the well documented past harms, and the targeting of Title II at addressing those harms, Title II is congruent and proportional in the prison context.

For the class of violations at issue here, Title II meets the test articulated in *Lane*. There are numerous important constitutional rights at issue in the prison context; there is strong evidence of past discrimination; and Title II is congruent and proportional to the need to address this discrimination in the prison context. Because of this, plaintiffs need not plead a companion constitutional violation to proceed with a Title II claim for damages. The district court declined to reach this question, and should this Court choose to reach it, this Court should hold in concert with the only other federal Court of Appeals to directly consider the issue — that Title II validly abrogates state sovereign immunity. *See Dare v. California*, 191 F.3d 1167, 1173-75 (9th Cir. 1999) ("[I]n enacting Title II of the ADA, Congress validly abrogated

state sovereign immunity pursuant to its Fourteenth Amendment powers"); *see also Phiffer v. Columbia River Correctional Institute*, 384 F.3d 791, 792–93 (9th Cir. 2004) (reaffirming *Dare*'s holding after *Tennessee v. Lane*, 541 U.S. 509, 530–31 (2004)).

C. Even if this Court determines that Richardson needed to plead a companion constitutional violation, the district court should still be reversed.

As detailed above, no companion constitutional claim is necessary for a prisoner to well-plead a claim under Title II of the ADA for disability discrimination. However, even if this Court elects to create this requirement, the district court should nonetheless be reversed as to Richardson's ADA damages claim because he well-pleaded a companion claim under the Eighth Amendment that ran concurrently with his claimed injuries under the ADA.

"The Supreme Court held in *Georgia* that Title II does abrogate such immunity in the prison context for claims that also allege constitutional violations."[4]. *Spencer v. Earley*, 278 F. App'x 254, 257 (4th Cir. 2008) (citing *Georgia*, 546 U.S. at 158–59). Here Richardson, at the very least, alleged a constitutional violation that directly links with his claims of disability discrimination.

---

[4] As detailed above *Georgia* also held that it *may* abrogate sovereign immunity even when a companion constitutional claim has not been pleaded.

First, Richardson pleaded a valid ADA claim alleging that VDOC had deprived him of reasonable accommodations in the provision of ASL interpretation services and an orthopedic mattress. *See* Section III, *infra*. Second, Richardson has pleaded that this misconduct has also violated the Eighth Amendment's bar on cruel and unusual punishment, as incorporated against the state of Virginia through the Fourteenth Amendment. JA45–50, JA81-84; *Estelle v. Gamble*, 429 U.S. 97, 101 (1976) (noting that the Eighth Amendment applies to the states through the Fourteenth Amendment). Richardson alleged, among other things, that staff at GCC and DCC were deliberately indifferent to his serious medical needs including his need for ASL interpretation services at medical appointments, JA47, and his need for an altered mattress to address orthopedic injuries suffered by Richardson. JA48-49 The district court cursorily dismissed these claims because "[t]he majority of allegations pertaining to Richardson's Eighth Amendment claim pertain to his incarceration at GCC prior to his incarceration at DCC. Richardson fails to coherently set forth any facts that indicate he faces a substantial risk of serious harm from his conditions at DCC." JA83. This dismissal was in error. The district court treated Richardson's Eighth Amendment claim as though he only sought prospective relief against DCC, JA 83, but Richardson sought damages for his past constitutional injuries under 42 USC § 1983. JA60. As such, even if the district court is correct that Richardson failed to set forth facts indicating substantial future risk, that analysis

has no bearing on Richardson's allegation for past harms and his claims for damages. The district court conducted no analysis of the validity of those claims. Richardson's Eighth Amendment claim should therefore be reinstated in its own right. Proper reinstatement of that claim would also mean that Richardson's pleadings suffice to meet the district court's standard for abrogation of state sovereign immunity because the Eighth Amendment claim should be read as a companion claim to Richardson's Title II claims for damages.

Even if this Court does not resurrect Richardson's Eighth Amendment claim as a claim for damages, there can be no question that, in his pleadings Richardson reasonably pointed to activities that *actually* violated the Constitution and that the pleading of the claim, even if later dismissed, should suffice for step two of the *Georgia* test. The district court cannot dismiss the companion claim and then, in analyzing his ADA claims, fault him for not pleading a companion claim.

If this Court determines that the district court need not have engaged in analysis under step three of *Georgia* and determines that Title II does not abrogate state sovereign immunity absent a companion constitutional claim, the district court should still be reversed. Even analyzed under the district court's articulation of *Georgia*'s step two, Richardson did, in fact, plead a companion constitutional claim when he pleaded violations of the Eighth Amendment. That claim was valid as a claim for damages and the district court's dismissal of that claim was improper. Even

if dismissal of the claim was proper, there can be no question that Richardson pleaded and articulated a constitutional violation in the first instance, which should itself satisfy prong two of the *Georgia* test. To demand a litigant to actually *succeed* on the merits of their constitutional claim in order to seek ADA damages under step 2 of *Georgia* would both establish an impossible evidentiary burden for litigants and impose an improper merits determination upon courts at the motion to dismiss stage.

III. The District Court Erred in Granting Summary Judgement for Defendants as to Richardson's ADA Claims Because it did not Appropriately Credit Evidence Set Forth by Richardson in Opposition.

The district court improperly dismissed Richardson's injunctive ADA claims and Rehabilitation Act claims at summary judgement by relying solely on Defendants' factual submissions and discrediting Richardson's submitted evidence. Relying solely on Defendants' evidence, the lower court improperly held that a genuine issue of material fact did not exist as to whether Richardson was denied the benefits of a public service, program or activity, or whether Richardson requested reasonable accommodations for his disabilities.[5] Because of this error, and because

[5] 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. While any argument to the contrary would be incorrect, Defendant did not argue below that this public entity's medical care or law library are not "services, programs, or activities" protected under Title II and therefore forfeited any argument to the contrary. It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. *See Finch v. Covil Corp.*, 972 F.3d 507, 515 (4th Cir. 2020) (quoting *Volvo Constr.*

a genuine issue of material fact exists, the district court should be reversed, and Richardson's claims should move forward.

A. The lower court improperly declined to consider Richardson's sworn statements as evidence.

At summary judgment, courts must construe the evidence in the light most favorable to the non-moving party. *Betton v. Belue*, 942 F.3d 184, 190 (4th Cir. 2019). Courts also much construe the papers of *pro se* plaintiffs liberally. *See Hughes v. Rowe,* 449 U.S. 5, 9 (1980) (per curiam). Rather than do so, the district court declined to consider evidence set forth by Richardson in the two affidavits he filed in response to Defendants' summary judgment motion: a motion for appointment of counsel brief and affidavit in support (JA152-70) and a legal update, rebuttal brief, and affidavit in support (209-13). JA230 at n.2.

These affidavits, signed under penalty of perjury, attest to how Defendants had failed to provide him with requested accommodations for his disabilities. *See* JA154; JA211. The district should have considered and credited Richardson's multiple declarations which were submitted and before the court. It is especially important to consider Mr. Richardson's evidence carefully because "the individual with a disability is most familiar with his or her disability and is in the best position

---

Equip. N. Am., Inc. v. CLM Equip. Co., 386 F.3d 581, 603 (4th Cir. 2004)) ("Absent exceptional circumstances"... "we do not consider issues raised for the first time on appeal.").

to determine what type of aid or service will be effective." U.S. Dep't of Justice, *The Americans with Disabilities Act Title II Technical Assistance Manual*, at II–7.1100 (1993); *see Argenyi v. Creighton Univ*., 703 F.3d 441, 446 (8th Cir. 2013). Nothing prevented the district court from examining the evidence presented by Richardson, even if it was not directly submitted in response to Defendants' motion. In fact, 28 U.S.C. § 1746 specifically provides that unsworn declarations can substitute for an affiant's oath if the statements contained therein are made "under penalty of perjury" and verified as "true and correct." 28 U.S.C. § 1746. Additionally, this Court has held that, for purposes of summary judgment, unsworn declarations "made under penalty of perjury[] are permitted in lieu of affidavits". *Willard v. IRS,* 776 F.2d 100, 102 n.3 (4th Cir.1985); *see also Carter v. Clark,* 616 F.2d 228 (5th Cir.1980) (striking down local district court rule requiring that all pleadings by prison inmates to be verified and notarized because it was in contravention of 28 U.S.C. § 1746).

B. Richardson set forth evidence that he was denied the benefit of medical care, the law library, and other programs, services, or activities due to his disabilities.

In these affidavits, Richardson sets forth evidence establishing a genuine issue of material fact as to whether Defendants deprived him of accommodations allowing him equal access to the programs, services, and activities available to all prisoners at VDOC. Because of Richardson's degenerating eyesight—which has deteriorated to more than five times the threshold for legal blindness—he is no longer capable of

seeing computer screens or reading printed material. JA153. In light of these limitations, Richardson twice implored the district court for appointed counsel, noting that the computer accommodations that VDOC had previously offered were "no longer a viable remedy" for his "disability needs in reading, researching, document preparation, or for response in the above cited case." JA153. Until August 2020 Richardson had relied on a prison caregiver to assist him with computer navigation—an accommodation that Defendants have since retracted despite Richardson's "repeated requests" that he receive assistance in navigating Microsoft Office Suite and other tools of the Deerfield Law Library. JA210. Indeed, Richardson alleges not only that VDOC has denied him effective auxiliary aids and services, but also that Defendant Blair actively *impeded* him from receiving assistance from his counselor in typing his legal documents. JA210.

The lower court also failed to consider Richardson's direct rebuttal to Defendants' statement of "undisputed" material facts pertaining to the prison's American Sign Language ("ASL") interpreter programming, of which he notes massive barriers to access. JA98-99. In response, Richardson set forth evidence that interpreters are solely available for five hours a week and estimated that it would take him approximately 25 weeks to receive translation for the 120 pages of legal documents he had received over the span of three months. JA211. This ASL program runs afoul of ADA implementing regulations that explicitly instruct public entities

to "take appropriate steps" to ensure that communications with individuals with disabilities are "as effective as communications with others." 28 C.F.R. § 35.160(a)(1). Public entities must "furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities … an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity," including meaningful access to the law library and courts. 28 C.F.R. § 35.160(b)(1). Richardson alleged that Defendants' current accommodations have fallen well short of this standard. When interpreters are unavailable, as they frequently seem to be, Richardson must rely on the "rudimentary sign language skills" of VDOC employees to interpret the legal documents of these proceedings and to assist him finding case law to rebut their own arguments. JA210. This is particularly onerous because this employee is employed by the parties that Richardson is suing. VDOC's proffered auxiliary services could not be considered "effective" accommodations for purposes of the ADA, whose regulations require auxiliary aids and services to be provided "in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability." 28 C.F.R. § 35.160.

That Richardson must rely on Defendants' faulty and intermittent translations of legal documents related to his ADA lawsuit against them serves to highlight the egregious denial of accommodations he has alleged. Without adequate translation

services, Defendants have clearly provided "an aid, benefit, or service [to disabled individuals] that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others." *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 506 (4th Cir. 2016); *see* 28 C.F.R. § 35.130(b)(1)(iii). In light of these assertions, a reasonable trier of fact could find that Defendants denied Richardson the ability to participate in his court proceedings to the same extent non-disabled individuals are able to participate. *See Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001), *as amended on denial of reh'g* (Oct. 11, 2001) (holding that disabled plaintiff presented sufficient evidence to create a material issue of fact about a court's failure to accommodate where he asserted that court's proposed assistive listening system was insufficient and he was experiencing difficulties in following the proceedings in his case).

C. The lower court relied solely on Defendants' factual submissions and drew all inferences in their favor.

Disregarding Richardson's sworn affidavits, and in sole reliance on Defendants' summary judgment motion, the lower court mischaracterizes Defendants as having "gone to extraordinary lengths" to accommodate Richardson, allowing him "to participate in the full variety of services and programs." JA242. Yet in their motion for summary judgment Defendants *themselves* acknowledge that Mr. Richardson has informed them repeatedly that their proposed accommodations

were ineffective to meet his particular needs. JA98-105. When Richardson informed staff that he could no longer see video screens for purposes of the medical department's video interpreter service, Defendants denied his request for an in-person interpreter and instead attempted to facilitate communication through another screen-based messaging accommodation. JA99. Though medical staff attempted to communicate with him by typing messages into a word processor, Richardson informed them that he could not read these messages and thus could not communicate with his doctors. *Id*. Defendants also acknowledge that Richardson has informed them that he is unable to use two of their auxiliary devices because he is hard of hearing and blind. JA104-05.

In reviewing a summary judgment motion, the court "must draw all justifiable inferences in favor of the nonmoving party." *United States v. Carolina Transformer Co.,* 978 F.2d 832, 835 (4th Cir. 1992) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The lower court instead drew all inferences in favor of Defendants. Despite Defendants' own concessions that their proposed accommodations were inadequate to meet Richardson's communication needs, the lower court ruled that Richardson had "failed to come forward with evidence reflecting that he was denied participation in any activity or program because of his disabilities." JA242. Yet Richardson has alleged that medical confidentiality is "routinely compromised" due to medical staff's attempts to communicate without

an interpreter. JA20. Unable to properly communicate with his doctors about medication renewals, Richardson's hypertension often went untreated. JA16. Richardson has therefore sufficiently alleged that he was denied medical health services on the basis of his disabilities because Defendants failed to provide reasonable accommodations to allow for effective communication with medical staff.

D. The lower court made an improper credibility determination of Richardson's evidence.

In holding that he had failed to meet his burden under the ADA, the lower court relied on Defendants' testimony and video footage of Richardson writing an email on a kiosk to perform a credibility determination of Richardson's assertions regarding his deteriorating vision. JA237-39. But this video footage does not "blatantly contradict[]" or "utterly discredit[]" Richardson's account of his disabilities because Richardson explicitly states under penalty of perjury that he is capable of writing emails without looking at the kiosk screen because he has "utilized the JPay kiosk since October of 2014 and has memorized its functions." JA209. Indeed the lower court even recognized that the video "d[id] not unequivocally demonstrate that Richardson was reading the text on the kiosk screen." JA238. Though Defendants baldly suggest that Richardson might not in fact be blind, despite concrete evidence to the contrary from their own medical staff, they do not for purposes of summary judgment challenge whether Richardson has a

qualifying disability. Nor does Richardson challenge any accessibility concerns surrounding the JPay kiosk system. Accordingly, extraneous details regarding Richardson's ability to use the JPay kiosk despite his disability are beside the point. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment, and factual disputes that are irrelevant or unnecessary should not be countenanced by this Court. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). At the summary judgment stage, it is not the court's function "to weigh the evidence and determine the truth of the matter" but instead "to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *see Gray v. Spillman*, 925 F.2d 90, 95 (4th Cir. 1991) ("It is not our job to weigh the evidence, to count how many affidavits favor the plaintiff and how many oppose him, or to disregard stories that seem hard to believe. Those tasks are for the jury."). The lower court thus erred as a matter of law in performing a credibility analysis of Richardson's allegations based on this video footage, thereby weighing the evidence in a light more favorable to Defendants rather than the nonmoving party.

Given Mr. Richardson's pleadings and declarations, and viewing the facts in the light most favorable to him as the nonmoving party, this Court must find that a question of material fact remains as to whether he was deprived equal access to medical services, the law library, and the court filings for this very case. Circuit

courts have generally construed the effectiveness of auxiliary aids or services to be a question of fact precluding summary judgment. *Randolph v. Rodgers*, 170 F.3d 850, 860 (8th Cir.1999) (reversing grant of summary judgment to deaf inmate because whether provision of a sign language interpreter during disciplinary hearing was an appropriate auxiliary aid was a fact question); *Duffy v. Riveland*, 98 F.3d 447, 454, 455 (9th Cir.1996) (holding that the qualifications of an interpreter and the deaf inmate's ability to communicate in prison disciplinary hearing were fact questions precluding summary judgment); *Chisolm v. McManimon*, 275 F.3d 315, 327–28 (3d Cir. 2001) (holding that plaintiff has presented evidence sufficient to raise genuine issues of material fact regarding the effectiveness of the alternative aids provided by MCDC).

E. Richardson repeatedly requested, and Defendants ignored, reasonable accommodations for his disabilities.

The lower court also determined that Richardson "fail[ed] to identify a reasonable accommodation he requested that Defendants ignored," overlooking Richardson's repeated requests for computer assistance and translation services. JA242. Though neither the lower court nor Defendants address the reasonableness of those requests, regulations promulgated by the Attorney General under Title II list sign-language interpreters as among the accommodations required, in appropriate circumstances, by the ADA. 28 C.F.R § 35.104(1). In determining what types of auxiliary aids and services are necessary, a public entity must "give primary

consideration to the requests of individuals with disabilities." 28 C.F.R. § 35.160; *see Duvall*, 260 F.3d at 1139, *as amended on denial of reh'g* (Oct. 11, 2001) ("[A] public entity does not "act" by proffering just any accommodation: it must consider the particular individual's need when conducting its investigation into what accommodations are reasonable."). In the context of Title III, the Supreme Court has held that, when an accommodation has been requested, an "individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances ..." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001). Courts have applied the individualized inquiry requirement in Title II cases. *Wright v. N.Y. State Dep't of Corr.*, 831 F.3d 64, 77 (2d Cir. 2016) (collecting cases and noting that such an extension is consistent with Title II's implementing regulations); *Marble v. Tennessee*, 767 F. App'x 647, 652 (6th Cir. 2019) ("[W]hen a disabled individual requests accommodation under Title II, the covered entity must give "individualized attention" to that request."); *A.H. by Holzmueller v. Illinois High Sch. Ass'n*, 881 F.3d 587, 594 (7th Cir. 2018) ("Whether a requested accommodation is reasonable or not is a highly fact-specific inquiry and requires balancing the needs of the parties."); *see also* S. Rep. No. 101-116, at 44 (1989) (noting that "[t]he forms of discrimination prohibited by [Title II] are comparable to those set out in the applicable provisions of [T]itles I and III….").

Title II of the ADA, therefore, requires that once a disabled prisoner requests a non-frivolous accommodation, the accommodation should not be denied without an individualized inquiry into its reasonableness. *Wright v. N.Y. State Dep't of Corr.*, 831 F.3d 64, 77 (2d Cir. 2016). The record is clear that Defendants have engaged in no such assessment as it pertains to his request for computer navigation assistance and in-person translation services that would allow for equal access to medical appointments, legal proceedings, and other services, programs, or activities provided by VDOC facilities. Defendants' "refusal to consider [an individual's] personal circumstances … runs counter to the clear language and purpose of the ADA" and raises a genuine question of material fact as to the reasonableness of the accommodations they have provided Richardson. *PGA Tour, Inc.*, 532 U.S. at 688.

IV. Richardson's Claims Under the Rehabilitation Act Should Proceed for the Same Reasons as His ADA Claims.

The ADA and Rehabilitation Act "generally are construed to impose the same requirements," and "[b]ecause the language of the Acts is substantially the same," this Court has applied same analysis to both. *Baird v. Rose*, 192 F.3d 462, 468 (4th Cir. 1999). A plaintiff seeking recovery under either statute must demonstrate "that (1) he has a disability; (2) he is otherwise qualified to receive the benefits of a public service, program, or activity; and (3) he was 'excluded from participation in or

denied the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of h[is] disability.'" *Id*. (quoting *Constantine v. George Mason Univ*., 411 F.3d 474, 498 (4th Cir. 2005)). As discussed above at length, Richardson has sufficiently alleged that he was denied the benefits of VDOC's services, programs, or activities on the basis of his disability because of their failure to provide adequate auxiliary aids to allow him effective communication with medical staff and access to reading materials related to his lawsuit.

Richardson seeks damages for his Rehabilitation Act claims. A state may waive its sovereign immunity "by voluntarily participating in federal spending programs when Congress expresses a clear intent to condition participation...on a State's consent to waive its constitutional immunity. *Constantine*, 411 F.3d at 491. Title 42 Section 2000(d)(7) provides that "[a] State shall not be immune under the Eleventh Amendment ... for a violation of section 504 of the Rehabilitation Act of 1973 ... or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." This statute "clearly and unambiguously conditions the receipt of federal funds on a waiver State sovereign immunity" for Rehabilitation Act Claims. *Madison v. Virginia*, 474 F.3d 118, 132 (4th Cir. 2006). Hence, VDOC knowingly waived its sovereign immunity from suit under the Rehabilitation Act when it accepted federal funds. *Chase v. Baskerville*, 508 F. Supp. 2d 492, 507 (E.D. Va. 2007), aff'd, 305 F. App'x 135 (4th Cir. 2008).

As such, the district court's ruling as to Richardson's claims under the Rehab Act should be reversed.

CONCLUSION

For the foregoing reasons Richardson respectfully requests that this Court reverse the district court's order and remand this matter for further proceedings and trial.

/s/ Oren Nimni
Oren Nimni
Kelly Jo Popkin
Samuel Weiss
RIGHTS BEHIND BARS
416 Florida Ave. #26152
Washington D.C. 20001
(202) 540-0029
oren@rightsbehindbars.org

CERTIFICATE OF COMPLIANCE

I hereby certify that Plaintiff-Appellant's Opening Brief meets the applicable type-volume limits. The brief was produced on a computer using Microsoft Word. The brief was produced in Times New Roman font size 14. The brief is 11, 320 words long, not including words excluded by rule 32(f) and is therefore in compliance with rule 32(a)(7)(B)(i).

/s/ Oren Nimni
Oren Nimni
RIGHTS BEHIND BARS
416 Florida Ave. #26152
Washington D.C. 20001
(202) 540-0029
oren@rightsbehindbars.org

CERTIFICATE OF SERVICE

I certify that, pursuant to Federal Rule of Appellate Procedure 31, I electronically filed the foregoing Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system on July 28, 2021.

/s/ Oren Nimni
Oren Nimni
RIGHTS BEHIND BARS
416 Florida Ave. #26152
Washington D.C. 20001
(202) 540-0029
oren@rightsbehindbars.org