No. 19-1114

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NANCY MARKS,

Plaintiff-Appellant,

v.

COLORADO DEPARTMENT OF CORRECTIONS, COLORADO DIVISION OF CRIMINAL JUSTICE, SUSAN KELLER, Community Parole Officer, Colorado Department of Corrections, in her official capacity, and RICK RAEMISCH, Executive Director Colorado Department of Corrections, in his official capacity,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado
Civil Action No. 14-cv-01577-RPM
The Honorable Richard P. Matsch

Brief of *Amici Curiae* Disability Law Colorado, Colorado Cross-Disability Coalition, Disability Rights Center of Kansas, Disability Rights Advocates, Disability Rights Education and Defense Fund, American Civil Liberties Union, American Civil Liberties Union of Colorado, American Civil Liberties Union of New Mexico, American Civil Liberties Union of Utah, American Civil Liberties Union of Kansas, American Civil Liberties Union of Oklahoma, American Civil Liberties Union of Wyoming, and the Civil Rights Education and Enforcement Center in support of Plaintiff-Appellant.

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Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, all *Amici Curiae* state that they are private 501(c)(3) non-profit organizations, that they are not publicly held corporations or other publicly held entities, and that they have no parent corporations. No publicly held corporation or other publicly held entity owns ten percent (10%) or more of any *Amicus* organization.

Statement Pursuant to Fed. R. App. P. 29(a)(4)(E)

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person – other than the amici curiae, their members, or their counsel – contributed money that was intended to fund preparing or submitting the brief.

Statements of Interest of *Amici Curiae*

Disability Law Colorado ("DLC") is a non-profit organization designated by the Governor of the state of Colorado as the federally-mandated Protection and Advocacy System for the state. Through its federal grants and authority, DLC works to protect the rights of people with disabilities in facilities – including correctional facilities – and in the community through direct advocacy, systemic litigation and policy development. DLC works with individuals with all types of

disabilities from birth through death on issues including abuse, neglect, discrimination in employment and housing, physical accessibility in public accommodations, special education services in school and generally seeking to ensure that people with disabilities are included in the community to the maximum extent possible. DLC is part of a nation-wide system of Protection and Advocacy Systems.

The Colorado Cross-Disability Coalition ("CCDC") is a non-profit organization dedicated to promoting social justice for people and combining individual and systemic advocacy as effective agents for change that can benefit people of all ages with all types of disabilities. CCDC – Colorado's only social justice organization primarily led and staffed by people with disabilities – has developed a strong reputation for empowering people with the most significant disabilities to advocate for themselves and for others in difficult situations. CCDC promotes self-reliance and full participation by people with disabilities through organizing, advocacy, education, legal initiatives, training and consulting, policy development, and legislation. CCDC is committed to increasing the power of people with disabilities to participate effectively in the larger community.

The Disability Rights Center of Kansas (DRC), is a public interest legal advocacy organization empowered by federal law to advocate for the civil and legal rights of Kansans with disabilities. DRC is the official Protection and

Advocacy System for Kansas and is a part of the national network of federally mandated and funded protection and advocacy systems. DRC advocates for the rights of Kansans with disabilities under state or federal laws, including the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*., and the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq*. A core priority for DRC is to advocate on behalf of Kansans to challenge unlawful exclusion from public and private programs due to their disabilities. As such DRC has a strong interest in challenging attempts by public entities to avoid their obligations under the ADA and the Rehabilitation Act.

Disability Rights Advocates ("DRA") is a non-profit, public interest law firm that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, and housing. DRA's clients, staff and board of directors include people with various types of disabilities. With offices in New York City and Berkeley, California, DRA strives to protect the civil rights of people with all types of disabilities nationwide.

The Disability Rights Education & Defense Fund (DREDF), based in Berkeley, California, is a national nonprofit law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. Founded in

1979, DREDF remains board- and staff-led by people with disabilities and parents of children with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal and California disability civil rights laws. DREDF is among the party counsel for the plaintiff class in the ongoing litigation case currently styled *Armstrong v. Newsom*, 94-CV-02307-CW (N.D. Cal), representing a class of California inmates with disabilities.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit nonpartisan organization of more than 1.5 million members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. Since its founding, the ACLU has sought to ensure that the protections of the Constitution and the Bill of Rights apply equally to all persons and has been deeply involved in protecting the rights of detainees and prisoners. In 1972, the ACLU created the National Prison Project to further this work. The ACLU's Disability Rights Program envisions a society in which discrimination against people with disabilities no longer exists, and in which people understand that disability is a normal part of life. This means a country in which people with disabilities are valued, integrated members of the community. This means a country in which people with disabilities are no longer segregated into, and over-

represented in, institutions such as nursing homes , psychiatric hospitals, jails, and prisons.

The American Civil Liberties Union Foundation of Colorado is one of the ACLU's statewide affiliates with over 42,000 members. As an organization that works to protect and defend the civil and constitutional rights of individuals in prison and under other forms of state supervision across the state of Colorado, the ACLU of Colorado, and their members have a strong interest in ensuring that the Rehabilitation Act and the ADA adequately protect Colorado prisoners.

The American Civil Liberties Union Foundation of Kansas ("ACLU-KS") is an affiliate of the national ACLU with over 9,000 members across the State. ACLU-KS has a longstanding commitment to protecting the constitutional rights of Kansans with disabilities in the criminal justice system. The proper resolution of this case is a matter of substantial interest to ACLU-KS, its members, and supporters.

The American Civil Liberties Union of New Mexico ("ACLU-NM") is one of the ACLU's statewide affiliates with approximately 12,000 members. ACLU-NM has a strong and well-established interest in protecting the civil rights of the people of the State of New Mexico. ACLU-NM's interest in this matter centers around Plaintiff Nancy Marks, a formerly incarcerated disabled woman. This case

addresses interpretations of her rights under the Fourteenth Amendment and the American with Disabilities Act. ACLU-NM has been deeply involved in protecting and advancing the right of disabled persons in New Mexico. This year ACLU-NM led a campaign to help pass New Mexico House Bill 364, which limits the usage of solitary confinement for people with mental illness. ACLU-NM has a project dedicated to advocacy for incarcerated women.

The ACLU of Oklahoma ("ACLU-OK") is one of the ACLU's statewide affiliates. ACLU-OK is a nonprofit, non-partisan, privately funded organization devoted exclusively to the defense and promotion of the individual rights secured by the U.S. and Oklahoma constitutions. ACLU-OK has a proud history of advocating in Oklahoma for the rights of people who are institutionalized and incarcerated. ACLU-OK advocates for criminal legal reforms to end mass incarceration, including reforms in sentencing, cash bail, and pre-trial proceedings, and accountability for district attorney discretion.

The American Civil Liberties Union of Utah Foundation ("ACLU of Utah") is one of the ACLU's statewide affiliates and has close to 7,000 members. The ACLU of Utah works to protect and defend the constitutional rights, civil rights, and freedoms of all persons in Utah. ACLU of Utah is committed to reforming criminal justice in Utah and ensuring equality for all. The organization is particularly concerned with how incarcerated individuals with disabilities in State

custody are treated when contracted to be held in county facilities and has engaged in litigation in this area. Ms. Mark's case directly aligns with ACLU of Utah's dedication to upholding the core principles of equal treatment for all and protecting the foundational principles written in the Fourteenth Amendment and the ADA.

The ACLU of Wyoming ("ACLU-WY") is part of a three-state chapter that also includes South Dakota and North Dakota. ACLU-WY has a long history of fighting for the rights of individuals in the criminal legal system. In 2014, ACLU-WY released a report on incarceration in Wyoming that discusses the causes of overincarceration and endorses the expansion of community-based alternatives. In April 2019, ACLU-WY joined the Wyoming Campaign to End the Death Penalty in 2020.

The Civil Rights Education and Enforcement Center ("CREEC") is a national nonprofit membership organization based in Colorado whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC's efforts to defend human and civil rights extend to all walks of life, including ensuring that people with disabilities have full and equal access to and receive equal treatment in the justice and carceral systems. The decision under review threatens those efforts by permitting the State of Colorado to contract away its responsibility for compliance with anti-discrimination statutes.

All parties have consented to the filing of this *amicus* brief.

INTRODUCTION

While serving her prison sentence in the custody of the Colorado Department of Corrections ("CDOC"), Plaintiff-Appellant Nancy Marks was approved for placement in a community corrections facility, a lower-security program of the Colorado Division of Criminal Justice ("CDCJ") designed to help inmates transition to life after prison. She met all prerequisites for participation in the community-based program, including the parole eligibility and projected release date. As is common these days, while Ms. Marks remained in the legal custody and under the supervision of the state of Colorado – through its CDOC and CDCJ – the community corrections facility in which she was housed was private. After exacerbating her back injury because the facility lacked required accessibility features, however, Ms. Marks was sent back to prison – seven weeks after she arrived – based explicitly on the fact that she was disabled.

Amici disability rights and civil rights organizations write to underscore the importance of ensuring the state remains liable for – and required to prevent – disability discrimination in its community corrections program, even those programs operated under contract by private entities.

FACTS

In 2012, while serving a prison term in the custody of the CDOC, Nancy Marks was accepted into a residential program run by Intervention Community Corrections Services ("Intervention"), a community corrections agency. Colorado's community corrections program permits inmates to live in unlocked facilities with far less supervision than prison, with the goal of helping them transition to life in the community. As is the case with over 90 percent of the community corrections facilities in Colorado,[1] Intervention is a privately owned facility. Intervention is a contractor (or subcontractor) of the public entity defendants. Nevertheless, throughout her stay at Intervention, Ms. Marks remained in custody of the CDOC.[2]

At the time she was transferred from prison to Intervention's community corrections facility, Ms. Marks had several disabilities, including spinal stenosis requiring the use of a wheelchair or walker. Pl.-Appellant's App. ("Aplt. App.") 53. On December 22, 2012, shortly after arriving at Intervention, Ms. Marks fell in

[1] Of the 35 community corrections facilities in Colorado, 32 or 91 percent are privately run. Colorado Community Corrections Programs, https://www.colorado.gov/pacific/dcj/node/175751 (last visited June 29, 2019).

[2] *See, e.g., People v. Triplett*, 411 P.3d 1054, 1064 (Colo. App. 2016) (holding that plaintiff referred to community corrections by CDOC remained subject to its jurisdiction, citing C.R.S. § 17-27-102(7)).

the shower because it did not have required grab bars or a shower chair. *Id.* 708. Following this injury, Ms. Marks's doctor required that she be on bed rest. *Id.* 283. Intervention refused to accommodate her disabilities and, on January 24, 2013, sent her back to prison expressly based on her disability. In a letter dismissing Ms. Marks from the program, Intervention director Kristin Heath explicitly cited Ms. Marks's disability as the reason:

> Six of the eleven Conditions of Placement require physical activity on the part of the client: one of the more important conditions is that she is employed at a phone location. [Ms.] Marks's medical conditions make it apparent that she will not be able to obtain employment in the foreseeable future, as is required by the ICCS residential program. . . . ICCS has rejected placement after acceptances as her medical conditions no longer make her appropriate to remain in the ICCS residential program.

Id. 401. No one ever considered or discussed any method of including Ms. Marks in the program by modifying or waiving work requirements. *See id.* 272; *see also id.* 278-79. The record shows several plausible reasonable modifications that would have allowed Ms. Marks to continue in the community-based program rather than be sent back to prison. *Id.* 292, 295-96, 398-99. CDOC and CDCJ have no explanation for the violation of Ms. Marks's rights carried out by their contractor, Intervention.

Individuals with Disabilities and the Criminal Legal System.

The policy and practice at issue here – the exclusion of participants with disabilities who need work accommodations or work alternatives as a reasonable

modification – is contrary to federal law and to the needs of a substantial proportion of incarcerated individuals. By huge margins, incarcerated individuals are disproportionately persons with disabilities. Almost 10 percent have a mobility disability – around twice the rate of the general population.[3] Incarcerated individuals are three to four times as likely as the general population to be blind or to have another vision disability,[4] and are two to three times as likely to be deaf or hard of hearing.[5] More than half of all prison and jail inmates have a mental health problem.[6] Among jail inmates, 17.1 percent of males and 34.3 percent of females have a "serious mental illness" – a significant psychiatric disability.[7]

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[3] Jennifer Bronson, Ph.D., *Disabilities Among Prison and Jail Inmates*, 2011–12, Bureau of Justice Statistics, 3, Table 1 (2015), https://www.bjs.gov/content/pub/pdf/dpji1112.pdf (last visited July 1, 2019) (10.1 percent of prison inmates and 9.5 percent of jail inmates have an ambulatory disability, compared to 5.1 percent and 3.7 percent in the control groups).

[4] *Id*. at 3, Table 1 (reporting that 7.1 percent of prison inmates and 7.3 percent of jail inmates have a vision disability compared to 2.1 percent and 1.7 percent in the control groups).

[5] *Id*. at 3, Table 1 (reporting that 6.2 percent of prison inmates and 6.5 percent of jail inmates are deaf or hard of hearing, compared to 2.6 percent and 1.9 percent in the control groups).

[6] Doris J. James & Lauren E. Glaze, *Special Report: Mental Health Problems of Prison and Jail Inmates, Bureau of Justice Statistics*, 1 (2006), https://www.bjs.gov/content/pub/pdf/mhppji.pdf (last visited July 1, 2019) (showing that estimates from mid-year 2005 found a mental health problem for 56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of jail inmates). About two-thirds of female jail and prison inmates report a history of mental health problems – a rate significantly higher than the rates for incarcerated

Moreover, at each stage of the criminal process – arrest, booking, arraignment, trial, sentencing, probation, incarceration, parole, and reentry – individuals with disabilities face disability-related barriers. As a result, such individuals are more likely to be incarcerated, more likely to serve longer sentences,[8] and more likely to return to jail or prison after release.[9] Discriminatory

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men, which are significantly higher than the general public. Jennifer Bronson, Ph.D. & Marcus Berzofsky, Dr. P.H., *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates*, 2011-12, Bureau of Justice Statistics, 1 (June 2017), https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf (last visited July 1, 2019) (finding that 65.8 percent of female prisoners and 67.9 percent of female jail inmates report a history of mental health problems, compared to 34.8 percent of male prisoners and 40.8 percent of male jail inmates).

[7] Henry J. Steadman, Ph.D. *et al.*, *Prevalence of Serious Mental Illness Among Jail Inmates*, 60:6 Psychiatric Services 761, 764 (June 2009), https://csgjusticecenter.org/wp-content/uploads/2014/12/Prevalence-of-Serious-Mental-Illness-among-Jail-Inmates.pdf; (last visited July 1, 2019), *see also* Bronson & Berzofsky, *supra* note 6, at 1 (finding that 14 percent of state and federal prisoners, and 26 percent of jail inmates, reported experiences that met the threshold for serious psychological distress).

[8] Paula M. Ditton, *Special Report: Mental Health and Treatment of Inmates and Probationers*, *Bureau of Justice Statistics*, 8 (1999), http://www.bjs.gov/content/pub/pdf/mhtip.pdf (last visited July 1, 2019) (reporting that inmates with mental illness were sentenced to an average of fifteen more months in prison as compared to other inmates with similar criminal convictions); Stanford Justice Advocacy Project, *Prevalence And Severity Of Mental Illness Among California Prisoners On The Rise*, 4 (2017), https://www-cdn.law.stanford.edu/wp-content/uploads/2017/05/Stanford-Report-FINAL.pdf (last visited July 1, 2019) (indicating that, on average, prisoners with mental illness in California receive sentences that are 12 percent longer than prisoners convicted of the same crimes but without mental health diagnoses).

policies and practices such as the those challenged in this case are one reason for these adverse outcomes. Individuals with disabilities – and particularly those with significant disabilities such as Ms. Marks – already experience dramatically high rates of unemployment,[10] in large part due to the failure of employers and employment programs to accommodate, even without a criminal record.

(... *continued from previous page.*)

[9] Council of State Governments, *Criminal Justice/Mental Health Consensus Project*, 6, 121, 162 (June 2002), https://csgjusticecenter.org/wp-content/uploads/2013/03/consensus-project-full-report.pdf (last visited July 1, 2019) ("Without adequate planning to transition inmates with mental illness back into the community, many will quickly return to jail or prison; recidivism rates for inmates with mental illness can reach over 70 percent in some jurisdictions. … Offenders with mental illness recidivate at a higher rate than those without mental illnesses, and they often do so within the first months of release. … [I]ndividuals with mental illness leaving prison without sufficient supplies of medication, connections to mental health and other support services, and housing are almost certain to decompensate, which in turn will likely result in behavior that constitutes a technical violation of release conditions or a new crime."); *see also Paulone v. City of Frederick*, 718 F. Supp. 2d 626, 636 (D. Md. 2010) (denying defendants' motion to dismiss ADA and Rehabilitation Act claims based on state's failure to provide sign language interpreter to deaf probationer ordered to attend DUI education class; plaintiff was charged with a probation violation).

[10] Among all working-age people with disabilities, only 21 percent say they are employed full or part time, compared to 59 percent of people without disabilities – a gap of 38 points. *Kessler Foundation/NOD Survey of Americans with Disabilities* (July 2010) at 7, https://www.socalgrantmakers.org/sites/default/files/resources/Suvery%20of%20Americans%20with%20Disabilities.pdf (last visited July 1, 2019).

Colorado's Community Corrections System

Colorado Community Corrections "serves as an alternative to incarceration … designed to promote productive reintegration of [prisoners] back into the community."[11] It is administered by the Office of Community Corrections ("OCC"), a unit with in defendant CDCJ.[12] CDCJ is authorized by statute to administer and execute all contracts for the provision of community corrections programs and services, to establish standards for such programs, and to audit such programs for compliance with such standards.[13] "As part of its duties, the OCC audits, evaluates and monitors community corrections programs to ensure compliance with contracts, federal grant requirements and with the Colorado Community Corrections Standards."[14] Participation in community corrections is considered a "privilege" for individuals who "could otherwise be in prison."[15]

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[11] Office of Community Corrections, *Colorado Community Corrections 2017 Annual Report* ("*Annual Report*"), 6 https://spl.cde.state.co.us/artemis/psserials/ps7310internet/ps73102017internet.pdf (last visited June 30, 2019).

[12] *Id.* at 5.

[13] C.R.S. § 17-27-108(1), (2).

[14] *Annual Report* at 5.

[15] Community Corrections FAQ https://www.colorado.gov/pacific/dcj/community-corrections-faq (last visited June 30, 2019).

It has been the experience of the Colorado-based *Amici* that the community corrections process systematically discriminates against prisoners with disabilities. The program's focus on employment as the sole means of demonstrating preparation to "participate in conventional society"[16] excludes individuals who are ready and able to return to the community, but who – due to disability – are unable to work or require work-related modifications.

Even for disabled prisoners who are able to comply with work requirements, the process is replete with opportunities for discrimination. While the referral process officially starts with a prison's "Community Corrections Referral Unit" ("CRU"),[17] in practice each prisoner's case manager acts as the gatekeeper to this process. For example, the case manager identifies eligible prisoners, discusses the process with the prisoner, and helps prepare the forms for presentation to the CRU.[18] Some Colorado *Amici* have learned from clients and other investigations

[16] *Id*.

[17] Colorado Department of Corrections Administrative Regulation 250-03, "Community Corrections Referral and Placement Process," ¶ IV.A.1, https://drive.google.com/file/d/1p6NcSBq8Z3KBM1v8JEqdSg7rzAfGAB3k/view (last visited July 1, 2019).

[18] Colorado Department of Corrections, "Transitioning from Prison to Parole," http://hermes.cde.state.co.us/drupal/islandora/object/co:26784/datastream/OBJ/view (last visited June 30, 2019). This memo available from the Colorado Virtual Library's "Community Corrections in Colorado" page: https://www.coloradovirtuallibrary.org/resource-sharing/state-pubs-blog/community-corrections-in-colorado/ (last visited June 30, 2019).

that case managers often do not refer individuals with disabilities for community corrections, even when they are eligible, and discourage such prisoners from requesting referral.

Once a referral is made, both the county community corrections board and the private community corrections provider may reject the prisoner for any or no reason.[19] It is, again, the experience of some Colorado *Amici* that incarcerated individuals whose disabilities may be more expensive to accommodate – for example, a deaf person who requires a sign language interpreter or someone who uses a wheelchair who would require accessible facilities or assistance with activities of daily living – are rejected. Finally, as Ms. Marks's case demonstrates, a disabled participant who is accepted into a program can find herself dismissed and headed back to prison – based explicitly on her disability – with no attempt to provide required accommodations.

It is essential to confirm the state of Colorado's responsibility for ensuring that its community corrections program complies with federal anti-discrimination laws, and that it is open to individuals with disabilities ready to make the transition back to the community.

[19] C.R.S. §§ 17-27-103(5)(a) (community corrections board has authority to accept or reject any prisoner for placement a program within its jurisdiction); 17-27-104(3) (program has authority to accept or reject any prisoner for placement the program).

SUMMARY OF ARGUMENT

The district court held that CDOC and CDCJ were not responsible for Intervention's violations of Title II of the Americans with Disabilities Act ("Title II" or "ADA"), 42 U.S.C. § 12131 *et seq.*, and section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794, in sending Ms. Marks back to prison based on her disability. Slip Op. at 6. This is incorrect. Both Title II and Section 504 prohibit disability discrimination "directly or through contractual, licensing or other arrangements." 28 C.F.R. § 35.130(b)(1); 28 C.F.R. § 42.503(b)(1). This provision ensures that "an entity may not do indirectly through contractual arrangements what it is prohibited from doing directly under" the ADA. H.R.Rep. No. 101-485(II), at 104, *reprinted in* 1990 U.S.C.C.A.N. 303, 387. Based on this provision, CDOC and CDCJ are required "to ensure ADA-compliant conditions for [individuals] being held under [their] authority," whether housed in a state facility or that of a contractor. *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1069 (2010).

Further, sovereign immunity does not bar Ms. Marks's Title II claims. These claims are intertwined with her rights to due process and liberty under the Fourteenth Amendment. For this class of cases, Congress has validly abrogated sovereign immunity.

ARGUMENT

I. CDOC and CDCJ Are Liable for ADA and Section 504 Violations by Community Corrections Contractors Such as Intervention, Inc.

Title II prohibits disability discrimination by public entities such as CDOC and CDCJ. 42 U.S.C. § 12132. Section 504 prohibits disability discrimination by recipients of federal financial assistance such as CDOC and CDCJ.[20] 29 U.S.C. § 794.[21]

The Department of Justice ("DOJ") regulations implementing Title II – which have the force of law[22] – prohibit CDOC and CDCJ from denying disabled individuals the opportunity to participate in or benefit from their services, providing unequal or ineffective services, or "otherwise limit[ing] [disabled people] in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others." 28 C.F.R. § 35.130(b)(1)(i), (ii), (iii), (vii); *see also* 28 C.F.R. § 42.503(b) (Section 504 regulation). The decision to re-incarcerate Ms. Marks based on her disability violated these prohibitions. The district court held, however, that CDOC and CDCJ could not be responsible for ICCS's decision to

[20] CDOC and CDCJ admit in their Answer that they receive federal financial assistance. Aplt. App. 68, ¶ 8.

[21] This Court "look[s] to decisions construing the Rehabilitation Act to assist [it] in interpreting analogous provisions of the ADA." *Cohon ex rel. Bass v. New Mexico Dep't of Health,* 646 F.3d 717, 725 (10th Cir. 2011) (internal citation omitted).

[22] *Marcus v. Kansas Dep't of Revenue*, 170 F.3d 1305, 1306 n.1 (10th Cir. 1999) (internal citations omitted).

send Ms. Marks back to prison because "[n]one of them participated in the decision." Slip op. at 6. Based on the clear language of the implementing regulations, regulatory guidance, legislative history, and caselaw, this is incorrect.

The DOJ's Title II regulations prohibited CDOC and CDCJ from discriminating against Ms. Marks "directly or through contractual, licensing or other arrangements." 28 C.F.R. § 35.130(b)(1); *see also* 28 C.F.R. § 42.503(b)(1). In the legislative history of the identical language in Title III of the ADA,[23] Congress explained that "the reference to contractual arrangements is to make clear that an entity may not do indirectly through contractual arrangements what it is prohibited from doing directly under this Act." H.R.Rep. No. 101-485(II), at 104, reprinted in 1990 U.S.C.C.A.N. 303, 387 (emphasis added).[24]

The DOJ provided guidance when the Title II regulations were promulgated in 1991, explaining that

> [a]ll governmental activities of public entities are covered, even if they are carried out by contractors. For example, a State is obligated by title II to ensure that the services, programs, and activities of a

[23] *See, e.g.*, 42 U.S.C. § 12182(b)(1)(A)(i) (prohibiting disability discrimination by public accommodations "directly, or through contractual, licensing, or other arrangements").

[24] The legislative history explains that "[t]he Committee intends . . . that the forms of discrimination prohibited by [42 U.S.C. § 12132] be identical to those set out in the applicable provisions of titles I and III of this legislation." *Id*. at 84, *reprinted in* 1990 U.S.C.C.A.N. 303, 367.

> State park inn operated under contract by a private entity are in compliance with title II's requirements.

"Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services Originally Published July 26, 1991," 28 C.F.R. pt. 35, App. B at 695 (2018). When the regulations were amended in 2010 to add provisions specifically requiring physical and program access in correctional facilities, the DOJ took the opportunity to clarify:

> The Department is aware that some public entities are confused about the applicability of the title II requirements to correctional facilities built or run by other public entities or private entities. It has consistently been the Department's position that title II requirements apply to correctional facilities used by State or local government entities, irrespective of whether the public entity contracts with another public or private entity to build or run the correctional facility. The power to incarcerate citizens rests with the State or local government, not a private entity.

"Guidance to Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services," 28 C.F.R. pt. 35, App. A at 668 (2018).[25]

[25] Under these 2010 Regulations, CDOC and CDCJ are also responsible for the noncompliant shower that led to Ms. Marks's exacerbated injuries. *See* 28 C.F.R. § 35.152(b)(1) (requiring public entities to ensure that disabled inmates are not excluded from participation or denied benefits "because a facility is inaccessible to or unusable by" such inmates); *id.* § 35.152(b)(3) ("Public entities shall implement reasonable policies, including physical modifications to additional cells in accordance with the 2010 Standards, so as to ensure that each inmate with a disability is housed in a cell with the accessible elements necessary to afford the inmate access to safe, appropriate housing.); 2010 Standards 213.3.6, 608.3

This Court has had occasion to address the inverse of this issue and, in so doing, confirmed – in *dicta* – that the State of Colorado is liable for the Title II violations of its correctional contractors. In *Phillips v. Tiona*, a Colorado prisoner attempted to sue a private prison contractor under Title II. 508 F. App'x 737, 747 (10th Cir. 2013). This Court held that the private contractor was not a "public entity" and thus not covered by Title II, *id.* at 754, and explained that, rather than suing the private provider, "[t]he remedy . . . [is] to sue the state for failing to meet its own obligations under the ADA." *Id.* at 753 (citing *Armstrong*, 622 F.3d at 1069). That is precisely what Ms. Marks did in this case.

In *Armstrong*, the California state prison system had contracted with counties to house state prisoners. 622 F.3d at 1062. A class of disabled prisoners sought an order requiring the state to ensure accommodations for class members housed in county jails. The Ninth Circuit affirmed the district court's decision that "required the State to ensure ADA-compliant conditions for prisoners and parolees being held under its authority, whether it houses such persons in its own facilities or chooses to house them with the counties." *Id.* at 1069; *see also Latson v. Clarke*, 249 F. Supp. 3d 838, 853 (W.D. Va. 2017) (holding that the Virginia Department of Corrections "has an obligation to ensure that its prisoners' rights under the ADA

(*... continued from previous page.*)
(requiring grab bars in showers).

and [Section 504] are not being violated by the local and regional jails in which it chooses to house its prisoners. Although VDOC cannot control the actions of personnel at local and regional jails, it has the power and duty to house its prisoners where they will be free from discrimination and afforded required accommodations.").

The Ninth Circuit has also held that the state is responsible for ensuring accommodations when incarcerated individuals work for private employers under the auspices of the department of corrections. In *Castle v. Eurofresh, Inc*., 731 F.3d 901, 910 (9th Cir. 2013), the plaintiff was a prisoner in state custody, assigned to work for a private company. He requested accommodations which the company refused, and was then reassigned to a lower-paying prison job. *Id.* at 904. The district court held that the plaintiff did not have a Title II or Section 504 claim against the state because the state lacked the power to provide accommodations at the company, *id.* at 905, much the same holding as the district court made here, Slip op. at 6.

The Ninth Circuit reversed, holding that the state was "obligated to ensure that Eurofresh – like all other State contractors – complies with federal laws prohibiting discrimination on the basis of disability. . . . The law is clear – the State Defendants may not contract away their obligation to comply with federal discrimination laws." *Id.* at 910. *See also Henrietta D. v. Bloomberg*, 331 F.3d 261,

286 (2d Cir. 2003) (holding state liable for Title II and Section 504 violations of contracting service provider); *Hunter ex rel. A.H. v. District of Columbia*, 64 F. Supp. 3d 158, 169 (D.D.C. 2014) (holding that obligations of public entity to ensure ADA compliance by contractors "go beyond simply including particular language in its contracts;" instead, the public entity has the obligation to ensure compliance); *Kerr v. Heather Gardens Ass'n*, No. 09-cv-00409-MSK-MJW, 2010 WL 3791484, at *9 (D. Colo. Sept. 22, 2010) ("a public entity cannot escape its obligations under Title II by delegating its duties to a private entity. [T]he public entity remains subject to Title II despite its delegation of authority or duty to another, private entity").

The plain language of the applicable regulations, as well as relevant legislative history and regulatory guidance, as uniformly interpreted by courts that have addressed the issue, require that CDOC and CDCJ be held liable for Intervention's violations of the ADA and Section 504.

II. Sovereign Immunity Does Not Bar a Claim That a State's Discrimination In Violation of Title II of the ADA Caused a Qualified Disabled Individual to Be Summarily Removed From Community Corrections and Unnecessarily Re-Incarcerated for More Than Two Years.

Plaintiff-Appellant Marks was removed from her community corrections placement on the basis of her disability with no individualized process whatsoever. She was given no opportunity – no hearing, no representation, no meeting, no

phone call – to oppose her removal from the placement, or to explain how she could participate in the program with reasonable modifications to her disability. She was then re-incarcerated in prison – under guard and locked behind walls at all times – for two years, two months, and 20 days. All on the basis of her disability. And even though she was otherwise qualified to participate in a community corrections program. The Defendants argued that sovereign immunity bars her claim for damages under Title II of the ADA. Because Ms. Marks's claims under Title II are intertwined with her rights to due process and liberty under the Fourteenth Amendment, rights that Title II was enacted to enforce, this argument fails.

Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under section 5 of the Fourteenth Amendment to enforce the substantive guarantees of that Amendment. *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)). This enforcement power "[i]ncludes 'the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" *Id.* (quoting from *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000)). The U.S. Supreme Court has "repeatedly affirmed that 'Congress may enact so-called prophylactic legislation that proscribes facially

constitutional conduct, in order to prevent and deter unconstitutional conduct.'" *Lane*, 541 U.S. at 518 (quoting from *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003)). This congressional power is not unlimited. Section 5 legislation is valid if it exhibits "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520 (quoting from *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997)). Moreover, "no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the [Fourteenth] Amendment by creating private remedies against the States for actual violations of those provisions." *United States v. Georgia*, 546 U.S. 151, 158 (2006); *see also Havens v. Colorado Dep't of Corr.*, 897 F.3d 1250, 1256 (10th Cir. 2018) ("[T]he necessary implication of *Georgia* is that at least some Title II ADA claims that do not necessarily implicate constitutional guarantees can nevertheless fall within the category of claims for which Congress validly abrogated states' Eleventh Amendment immunity.") (quoting and affirming district court opinion).

Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. *Lane*, 541 U.S. at 510-11, 524-26. Relevant to the particular claims here, the historical experience that Title II reflects includes "unconstitutional treatment of disabled persons by state agencies in a variety of

settings, including unjustified commitment," "unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system," and "a pattern of unconstitutional treatment in the administration of justice." *Id.* at 524-25. In reviewing such unequal treatment, the high court in *Lane* cited specifically to a case analogous to Plaintiff's – where the failure to accommodate an individual made the difference between incarceration and community-based supervision. *Id.* at 525 n.11 (citing *Key v. Grayson*, 179 F.3d 996 (6th Cir. 1999) (deaf inmate denied access to sex offender therapy program allegedly required as precondition for parole)).

Plaintiff's case falls squarely into the "class of cases" brought under Title II to remedy such unequal and unconstitutional treatment in the penal system and in the administration of justice. Her case is not about an application of Title II that is ancillary to Fourteenth Amendment rights, such as required seating at state-owned hockey rinks. *See Lane*, 541 U.S. at 530. Rather, this case is about whether Ms. Marks was afforded due process and fair treatment, taking her disability into account as required by Title II, when she was summarily removed from her community corrections placement and sent back to prison. *See id.* at 522-23 ("Title II . . . seeks to enforce . . . a variety of . . . basic constitutional guarantees, . . . includ[ing] some . . . protected by the Due Process Clause of the Fourteenth Amendment."). It is about whether being re-incarcerated for more than two years –

despite being otherwise qualified to participate in community corrections but for her disability – violated Plaintiff's fundamental liberty interests and her rights under the ADA. *See Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) ("[L]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause …. This interest survives criminal conviction and incarceration.") (internal citations omitted).

Thus, as in *Lane*, the remedies of Title II are constitutionally valid for this class of cases. Plaintiffs like Ms. Marks seek access to and reasonable modifications in state-sponsored community corrections programs. *See* 28 C.F.R. §§ 35.130(b)(7)(i), 150(a). They seek individualized consideration for placement in – and removal from – such programs. *See* 42 U.S.C. § 12131(2). Considering a related class of cases in *Lane*, the Supreme Court found Title II's "affirmative obligation to accommodate persons with disabilities" and "requirement of program accessibility" to be congruent and proportional remedies. 541 U.S. at 530, 533; *see id.* at 533 (obligation to accommodate disabled individuals in the administration of justice is "a reasonable prophylactic measure, reasonably targeted to a legitimate end"). In finding these remedies valid under Congress's section 5 authority, the Court noted the balanced approach of Title II of the ADA:

> [Title II] does not require States to compromise their essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification

> is otherwise eligible for the service. As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways. . . . And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service.

Id. at 532 (citing 42 U.S.C. § 12131(2)). Ms. Marks's claim relies on these same remedies. Given the due process and liberty interests implicated, the ADA requirements are congruant, proportionate, and constitutionally valid here.

Moreover, "insofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." *Georgia*, 546 U.S. at 159 (2006); *see also id.* (directing lower courts to consider "which aspects of the State's alleged conduct violated Title II" and "to what extent such misconduct also violated the Fourteenth Amendment"). The misconduct alleged by Plaintiff – that she was denied individualized consideration of whether reasonable modification would enable her participation in the community program, and that she was instead unnecessarily incarcerated for more than two years – violated both the ADA and the Fourteenth Amendment. The application of Title II here abrogates sovereign immunity.

CONCLUSION

For the reasons set forth above, *Amici Curiae* respectfully request that this Court reverse the decision of the district court.

Respectfully submitted,

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Certificate Regarding Length of Brief and Typeface

The undersigned counsel provides the following certifications required by the Federal Rules of Appellate Procedure and/or the Tenth Circuit Rules:

1. As required by Rule 32(g) of the Federal Rules of Appellate Procedure, I certify that this brief complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains at most 6,499 words.

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/s/ Amy Farr Robertson
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July 3, 2019

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I hereby certify that, with respect to the foregoing:

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/s/ Amy Farr Robertson
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July 3, 2019

Certificate of Service

I certify that, on July 3, 2019, a true and correct copy of the foregoing Brief of *Amici Curiae* Disability Law Colorado, Colorado Cross-Disability Coalition, Disability Rights Center of Kansas, Disability Rights Advocates, Disability Rights Education and Defense Fund, American Civil Liberties Union, American Civil Liberties Union of Colorado, American Civil Liberties Union of New Mexico, American Civil Liberties Union of Utah, American Civil Liberties Union of Kansas, American Civil Liberties Union of Oklahoma, American Civil Liberties Union of Wyoming, and the Civil Rights Education and Enforcement Center in support of Plaintiff-Appellant was filed using the Court's electronic filing system which will generate notice and service on:

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