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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

JOAN ARMSTRONG, et al.,	**No. C-94-2307 CW**
Plaintiffs,	**UNITED STATES' AMICUS CURIAE MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
v.	
PETE WILSON, et al.,	
Defendants.	**Date: July 19, 1996** **Time: 10:30 a.m.** **Place: Courtroom 2**

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INTRODUCTION

This class action was filed against various California state officials by a certified plaintiff class comprising present and future state inmates and parolees with mobility, sight, hearing, learning, or kidney disabilities. Plaintiffs allege that Defendants have violated Title II of the Americans with Disabilities Act ("Title II" or "the ADA"), 42 U.S.C. §§ 12131-34, and Section 504 of the Rehabilitation Act of 1973 ("Section 504" or "the Rehabilitation Act"), 29 U.S.C. § 794, by building and/or renovating prison facilities that do not comply with federal accessibility standards, by excluding Plaintiffs from a wide range of correctional programs on the basis of Plaintiffs' disabilities, by failing to make reasonable accommodations to Plaintiffs in the programs and activities that Defendants provide to prison inmates, and by failing to provide appropriate auxiliary aids and services to Plaintiffs where necessary for effective communication.

Defendants have moved for summary judgment, arguing that the protections of the ADA and Rehabilitation Act do not extend to inmates in state correctional facilities, and that Defendants are immune from liability pursuant to the Eleventh Amendment. Both arguments should be rejected. As we demonstrate below, Title II of the ADA and Section 504 do apply to prisons, because the statutes apply to all public entities and all recipients of federal financial assistance, respectively. In addition, Defendants are not immune from suit because Congress has

abrogated the State's Eleventh Amendment immunity and, in any event, Defendants are state officials who can be sued in their official capacity for declaratory and injunctive relief under the doctrine of Ex Parte Young, 209 U.S. 123 (1908).

ARGUMENT

I THE ADA AND THE REHABILITATION ACT APPLY TO STATE CORRECTIONAL FACILITIES

The Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., is Congress' most extensive piece of civil rights legislation since the Civil Rights Act of 1964. Its purpose is to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The ADA's coverage is accordingly broad -- prohibiting discrimination on the basis of disability in employment, state and local government programs and services, transportation systems, telecommunications, commercial facilities, and the provision of goods and services offered to the public by private businesses. This action involves Title II of the ADA, which prohibits disability discrimination by state and local governments.

The ADA extends the protections of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the first federal statute to provide broad prohibitions against discrimination on the basis of disability. Plaintiffs also allege violations of Section 504, which prohibits discrimination in programs and activities receiving federal financial assistance (including

federally assisted programs and activities of state and local governments).

The substantive provisions of Title II of the ADA and Section 504 are strikingly similar. Section 504 provides in pertinent part:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a).

Title II provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

A. Ninth Circuit Case Law Holds That The Rehabilitation Act Applies to State Prisons And Suggests That The ADA Applies As Well

The Ninth Circuit has held that Section 504 applies to state correctional facilities. Bonner v. Lewis, 857 F.2d 559, 562 (9th Cir. 1988).[1] Bonner also supports the conclusion that Title II

[1] This conclusion was recently reaffirmed in Gates v. Rowland, 39 F.3d 1439, 1446-47 (9th Cir. 1994). Defendants assert that Gates suggests that the Ninth Circuit is "beginning to rethink its decision in Bonner that state prisons are subject to the Rehabilitation Act." Def.'s Mem. at 14 (quoting Torcasio v. Murray, 57 F.3d 1340, 1349 n.7 (4th Cir. 1995), cert. denied, 116 S. Ct. 772 (1996)). This suggestion is without merit. In Gates, the Court articulated the standard of review for determining how the Rehabilitation Act is to be applied in a prison setting, not whether the statute should be applied at all. Gates, 39 F. 3d at 1446-47.

of the ADA applies to state prisons. See Bullock v. Gomez, No. 95-6634 LGB (RMCx), slip op. at 5 (C.D. Cal. May 6, 1996) (attached hereto as Exhibit 1) ("Under the current law in the Ninth Circuit this court is led to conclude that the ADA applies to state correctional facilities.") (citing Bonner).[2]

Bullock explicitly rejected the same argument Defendants make here, that dicta in a recent Fourth Circuit decision is a basis to conclude, contrary to Bonner, that state prisons are not covered by Title II and Section 504. Defendants improperly rely on Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995), cert. denied, 116 S. Ct. 772 (1996), a qualified immunity case in which the Fourth Circuit held that the defendants were entitled to immunity because, "it was not then clearly established that either [the ADA or the Rehabilitation Act] applied to state

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[2] Numerous courts have applied the Rehabilitation Act and/or Title II of the ADA in the correctional facility context. See, e.g., Lue v. Moore, 43 F.3d 1203 (8th Cir. 1994) (Rehabilitation Act); Harris v. Thigpen, 941 F.2d 1495 (11th Cir. 1991) (Rehabilitation Act); Niece v. Fitzner, 922 F. Supp. 1208 (E.D. Mich. 1996) (Title II); Austin v. Pennsylvania Dep't of Corrections, 876 F. Supp. 1437 (E.D. Pa. 1995) (Title II and Rehabilitation Act); Love v. McBride, 896 F. Supp. 808 (N.D. Ind. 1995) (Title II); Rewolinski v. Morgan, 896 F. Supp. 879 (E.D. Wis. 1995) (Title II); Simmons v. Indiana, 904 F. Supp. 877 (N.D. Ind. 1995) (Title II); Clarkson v. Coughlin, 898 F. Supp. 1019 (S.D.N.Y. 1995) (Rehabilitation Act and Title II); Timmons v. New York State Dep't of Correctional Servs., 887 F. Supp. 576 (S.D.N.Y. 1995) (Rehabilitation Act); Outlaw v. City of Dothan, No. CV-92-A-1219-S, 1993 WL 735802 (M.D. Ala. Apr. 27, 1993) (Title II and Rehabilitation Act); Noland v. Wheatley, 835 F. Supp. 476 (N.D. Ind. 1993) (Title II); Donnell v. Illinois Bd. of Educ., 829 F. Supp. 1016 (N.D. Ill. 1993) (Rehabilitation Act); Casey v. Lewis, 834 F. Supp. 1569 (D. Ariz. 1993) (Rehabilitation Act); Sites v. McKenzie, 423 F. Supp. 1190 (N.D. W. Va. 1976) (Rehabilitation Act).

prisons." Id. at 1352. Torcasio queried, without holding, whether these statutes apply to state correctional facilities at all. However, Bonner, not Torcasio, is the law of this Circuit. See Bullock, slip op. at 3. Moreover, while determining that the defendants in Torcasio were entitled to qualified immunity, the Fourth Circuit acknowledged that federal guidelines provide evidence that it is now established that the ADA applies to state prisons. Torcasio, 57 F.3d at 1351; see also Bullock at 3.[3]

Defendants, relying on Torcasio, assert that prison management is an "integral state function" into which federal courts should not interfere. Def.'s Mem. at 3-4. This argument misstates the law. While federal courts have acknowledged that deference is due to the decisions of state officials, the courts cannot abdicate their duties to enforce important civil rights protections. Indeed, in a recent decision under Title II of the ADA, the Ninth Circuit reversed a district court that had refused to examine the lawfulness of a state legislative action. Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir. 1996). The Court of Appeals directed that the lower courts must apply federal law:

> We are mindful of the general principle that courts will not second-guess the public health and safety decisions of state legislatures acting within their traditional police powers. However, when Congress has passed antidiscrimination laws such as the ADA . . . , it is incumbent upon the courts to insure that the mandate of federal law is achieved.

Id. at 1485 (citation omitted). See also Garcia v. San Antonio

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[3] This Court should therefore reject the analysis of other courts that have found the ADA inapplicable to prisons (see cases cited in Def.'s Mem. at 8).

Metro. Transit Auth., 469 U.S. 528, 546-47 (1985) (states are not immune from federal regulation of their "integral state functions").[4]

Defendants argue that applying the ADA and Section 504 in the prison context will lead to absurd results.[5] But the only issue here is whether Title II and Section 504 apply to state correctional institutions, not how the nondiscrimination requirements should be applied to particular sets of facts. Neither the ADA nor Section 504 requires a fundamental alteration in the way prisons operate -- indeed, the unique features of any state program, including prisons, must be taken into account in determining what the statutes require in a particular situation.[6]

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[4] Not surprisingly, the Ninth Circuit and other federal courts have applied various federal anti-discrimination statutes to correctional facilities. See Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1994) (Title IX of the 1964 Civil Rights Act); Baker v. McNeil Island Corrections Ctr., 859 F.2d 124 (9th Cir. 1988) (racial discrimination) (Title VII of the 1964 Civil Rights Act). See also Women Prisoners of the Dist. of Columbia Dep't of Corrections v. District of Columbia, 877 F. Supp. 634, 672 (D.D.C. 1994) (Title IX), vacated in part on other grounds, 899 F. Supp. 659 (D.D.C. 1995); Klinger v. Nebraska Dep't of Correctional Servs., 824 F. Supp. 1374, 1431 (D. Neb. 1993) (same), rev'd on other grounds, 31 F.3d 727 (8th Cir. 1994), cert. denied, 115 S.Ct. 1177 (1995); Donnell v. Illinois Bd. of Educ., 829 F. Supp. 1016 (N.D. Ill. 1993) (Individuals with Disabilities Education Act); Canterino v. Wilson, 546 F. Supp. 174, 209 (W.D. Ky. 1982) (Title IX), aff'd, 875 F.2d 862 (6th Cir. 1989), cert. denied, 493 U.S. 991 (1989); Green v. Johnson, 513 F. Supp. 965, 976 (D. Mass. 1981) (Individuals with Disabilities Education Act); Cruz v. Collazo, 450 F. Supp. 235 (D. P.R. 1979)(same); Beehler v. Jeffes, 664 F. Supp. 931, 940 (M.D. Pa. 1986) (Title IX).

[5] See Def.'s Mem. at 10.

[6] Cf. Jeldness v. Pearce, 30 F.3d 1220, 1225 (9th Cir. 1994) (upholding application of Title IX of the Civil Rights Act of 1964 to state prisons but acknowledging that "Title IX's requirements

Put simply, neither statute calls for an abrogation of common sense.

Nor do the statutes mandate that prisons create particular programs or activities for prisoners or provide "special treatment" for inmates with disabilities. They simply require the state to provide as equal an opportunity as that provided to inmates without disabilities to participate in, and benefit from, the programs, activities, and services of the state prison system -- whatever they happen to be. Thus, in the end, Defendants' attempt to trivialize state inmates' right to non-discrimination must fail.

As the facts in this case and others demonstrate, the ADA and Section 504 protect the important civil rights of prison inmates. For example, without the protections of the ADA and Section 504, an inmate could be misdiagnosed and forced to take psychotropic medications for no other reason than that, because of his physical disability, he was unable to communicate with his physician. See, e.g., Bonner, 857 F.2d at 564; Clarkson v. Coughlin, 898 F. Supp. 1019, 1041 (S.D.N.Y. 1995). An inmate could be denied the benefit of his wife's visit for no other reason than that he has a disability. See, e.g., Bullock, slip op. at 1. An inmate could be denied the benefit of bathing for no other reason than that he has a disability. Outlaw v. City of Dothan, No. CV-92-A-1219-S, 1993 WL at 735802 *1-*2 (M.D. Ala. Apr. 27, 1993); Noland v. Wheatley, 835 F. Supp. 476, 480-81

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must be analyzed in the context of the prison environment").

(N.D. Ind. 1993). And without the ADA or Section 504, inmates could be denied the benefits of the educational, vocational, and/or rehabilitative programs that prisons offer -- and often use as the basis for early release or parole -- for no other reason than that the inmates have disabilities. Clarkson, 898 F. Supp. at 1030-31; Donnell v. Illinois Bd. of Educ., 829 F. Supp. 1016, 1018 (N.D. Ill. 1993).

B. The Plain Language Of The Statutes And Deference To The Department Of Justice Regulations Further Support The Conclusion That The Rehabilitation Act And The ADA Apply To State Prisons

Defendants suggest that neither the Rehabilitation Act nor the ADA should be applied to state correctional facilities, "absent unmistakable congressional intent to do so." Def.'s Mem. at 6. There is no support for this broad and conclusory statement. Indeed, the Ninth Circuit has found to the contrary. See Jeldness v. Pearce, 30 F.3d 1220, 1225 (9th Cir. 1994) (expressly considering and rejecting the argument that federal civil rights statutes should not apply to state correctional facilities absent clear expression of congressional intent). The plain language of Title II and Section 504 demonstrates that the statutes apply to state prisons. See infra. Furthermore, to the extent there is any question concerning the question of coverage, Department of Justice regulations -- most of which Defendants ignore[7] -- answer the question in the affirmative.

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[7] See Def.'s Mem. at 12 (suggesting that "there is nothing in the ADA or the federal regulations to indicate that the ADA is applicable to prison programs").

1. The plain language of the statutes demonstrates that the Rehabilitation Act and Title II apply to state correctional facilities

Section 504 prohibits disability-based discrimination by "any program or activity receiving federal financial assistance." 29 U.S.C. § 794(a) (emphasis added). Title II prohibits disability-based discrimination by any "public entity," i.e., "any State or local government" and "any department, agency, special purpose district, or other instrumentality of State or States or local government." 42 U.S.C. § 12131(1)(A)&(B) (emphasis added). State correctional facilities clearly fall within both definitions: they receive federal financial assistance,[8] and Departments of Corrections are "departments" of the state. See Outlaw, 1993 WL 735802 *3 ("under common usage and understanding of the terms [service, program, or activity,] the jail and all of its facilities, including the shower, constitute a service, program or activity of the City . . . to which the ADA applies"). See also Innovative Health Systems, Inc. v. City of White Plains, No. 95-CV-9642 (BDP), slip op. at 11 (S.D.N.Y. June 12, 1996) (attached hereto as Exhibit 2) (holding that Title II applies to the "normal function[s] or operation[s] of a governmental entity," including local zoning activities). In Innovative Health Systems, the court recited the broad language of Title II and found

> no suggestion in the statute that zoning or any other type of public action is to be excluded from this broad mandate.

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[8] See Statement of Stipulated Facts at 1 (California Department of Corrections receives federal financial assistance).

> Moreover, the last phrase of Title II's prohibition is even more expansive, stating simply that no individual with a disability may be 'subjected to discrimination' by a public entity.

Id., slip op. at 12 (emphasis added).

Defendants argue that because they have the discretion to determine what services, programs and/or activities they provide to prison inmates, such activities do not fall within Title II's mandate. See Def.'s Mem. at 9. Government activities, however, typically involve the exercise of such discretion. As Niece v. Fitzner, 922 F. Supp. 1208 (E.D. Mich. 1996), a case applying Title II in the prison context, explained:

> [Defendant's] argument . . . misses the point. The ADA does not require a government entity to provide any particular service. Rather, the ADA requires that, if the entity does in fact provide a service . . . "it must use methods or criteria that do not have the purpose or effect of impairing its objectives with respect to individuals with disabilities."

Id. at 1217 (quoting Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach, 846 F. Supp. 986, 991 (S.D. Fla. 1994).

Defendant's tortured textual reading of the ADA is equally without merit. The heading for Title II -- Public Services -- refers not to those services available to all members of the general public (see Def.'s Mem. at 8), but rather, to those services provided by public entities. See 42 U.S.C. § 12132. Similarly, Defendants' argument notwithstanding, prison inmates are clearly "qualified" for the programs Defendants offer. A "qualified individual with a disability" is

> an individual with a disability who, with or without

> reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2). Plaintiffs fall within this definition. See, e.g., Bonner, 857 F.2d at 562 ("As a prison inmate, Bonner is qualified (sometimes required) to participate in activities such as disciplinary proceedings, Honor Dorm Review Committee hearings, counseling, rehabilitation, medical services, and other prison activities."); Clarkson, 898 F. Supp. at 1035-36 (prisoners are "qualified individuals" under both Section 504 and Title II); Outlaw, 1993 WL 735802 at *3 (prison inmate is "qualified individual with a disability" within the meaning of Title II). Cf. Niece, 922 F. Supp. at 1217-18 (deaf individual who was denied effective means by which to communicate with her fiancé, a prison inmate, is otherwise qualified).

2. Deference to Department of Justice regulations requires the conclusion that the Rehabilitation Act and Title II apply to state correctional facilities

The implementing regulations for Section 504 and Title II make it even clearer that state correctional institutions are covered by these statutes. Congress explicitly delegated to the Department of Justice the authority to promulgate regulations under both Section 504 and Title II. 29 U.S.C. § 794(a); 42 U.S.C. § 12134. Accordingly, the Department's regulations and its interpretation thereof are entitled substantial deference. Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381, 2386 (1994);

Martin v. Occupational Safety & Health Review Comm'n., 499 U.S. 144, 150 (1991), citing Lyng v. Payne, 476 U.S. 926, 939 (1986); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (where Congress expressly delegates authority to an agency to issue legislative regulations, the regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"); United States v. Morton, 467 U.S. 822, 834 (1983). Indeed, "[a]s the author of the [ADA] regulation, the Department of Justice is also the principal arbiter as to its meaning." Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35, 38 (D.D.C. 1994), citing Thomas Jefferson Univ., 114 S. Ct. at 2386.[9]

As explained above, Section 504 provides that no otherwise qualified individual with a disability shall, solely because of his or her disability, be denied the "benefits" of any "program" receiving federal financial assistance. 29 U.S.C. § 794. DOJ regulations expressly define the term "program" to include the "operations of a department of corrections," 28 C.F.R.

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[9] See also Helen L. v. DiDario, 46 F.3d 325, 331-32 (3d Cir. 1995) (relying extensively on DOJ Title II regulations and its interpretation thereof), cert. denied sub nom. Pennsylvania Sec'y of Pub. Welfare v. Idell S., 116 S. Ct. 64 (1995); Kinney v. Yerusalim, 9 F.3d 1067, 1071-1073 (3d Cir. 1993) (same), cert. denied sub nom. Hoskins v. Kinney, 114 S. Ct. 1545 (1994); Innovative Health Systems, slip op. at 13-14, nn. 3 & 4 (same); Bullock, slip op. at 6-7 (same); Concerned Parents, 846 F. Supp. at 989 n.9 (same); Tugg v. Towey, 864 F. Supp. 1201, 1205 n.6 (S.D. Fla. 1994) (same); Bechtel v. East Penn School Dist. of Lehigh County, No. Civ. A. 93-4898, 1994 WL 3396, *2-*3 (E.D. Pa. 1994) (same); Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1279 (W.D. Wis. 1993) (same); Noland, 835 F. Supp. at 483 (N.D. Ind. 1993) (same).

§ 42.540(h), and define the term "benefit" to include "disposition," "sentencing," and "confinement," 28 C.F.R. § 42.540(j). Similarly, DOJ regulations promulgated under the ADA specifically list "correctional institutions" as one of the "programs, services, [or] regulatory activities relating to law enforcement, public safety, and the administration of justice" that are subject to the requirements of Title II. 28 C.F.R. § 35.190(b)(6). See Bullock, slip op. at 6-7.

The Department's interpretative analysis accompanying both regulations further demonstrates that the ADA and Section 504 apply to state prison facilities. The preamble to the Section 504 regulations requires that

> [f]acilities available to all inmates or detainees, such as classrooms, infirmary, laundry, dining areas, recreation areas, work areas, and chapels, must be readily accessible to any handicapped person who is confined to that facility. Beyond insuring the physical accessibility of facilities, detention and correctional agencies must insure that their programs and activities are accessible to handicapped persons. . . . In making housing and program assignments, such [correctional] officials must be mindful of the vulnerability of some handicapped inmates to physical and other abuse by other inmates. The existence of a handicap alone should not, however, be the basis for segregation of such inmates in institutions or any part thereof where other arrangements can be made to satisfy safety, security, and other needs of the handicapped inmate.

28 C.F.R. part 42 (G) Appendix B subpart (c) (2); 45 Fed. Reg. 37620, 37630 (June 3, 1980) (emphasis added).

Finally, the DOJ Title II Technical Assistance Manual specifically lists "jails and prisons" as types of facilities that, if constructed or altered after the effective date of the

ADA (January 26, 1992), must be designed and constructed so that they are readily accessible to and usable by individuals with disabilities. Title II Technical Assistance Manual at II-6.0000, II-6.3300(6). DOJ Technical Assistance Manuals are also entitled deference. See Innovative Health Systems, slip op. at 13-14 n.4; Fiedler, 871 F. Supp. at 37 n.4; Bechtel, 1994 WL 3396, *2-*3; Petersen, 818 F. Supp. at 1279; Chatoff v. City of New York, No. 92 Civ. 0604 (RWS), 1992 WL 202441 *2 (S.D.N.Y. June 30, 1992).[10]

II DEFENDANTS ARE NOT IMMUNE FROM SUIT UNDER THE ELEVENTH AMENDMENT

The Eleventh Amendment generally bars citizen suits against a state and its agencies and instrumentalities. Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114, 1124-25, 1127-28 (1996); Papasan v. Alain, 478 U.S. 265, 276 (1986); Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 100 (1984). Eleventh

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[10] The design standards applicable to facilities covered by Section 504 and Title II also include specific provisions relating to jails, prisons, and "other detention or correctional facilities." The Section 504 regulations adopt the Uniform Federal Accessibility Standards, which apply to all federal agencies and all entities receiving federal financial assistance. See 28 C.F.R. § 42.522 (b); 41 C.F.R. subpart 101-19.6, Appendix A. UFAS was promulgated in 1984. It was specifically incorporated into the DOJ Section 504 regulations, which apply to the construction of and/or alterations to prisons by DOJ-funded entities, in 1988. See 28 C.F.R. § 42.522(b) (as amended, February 4, 1988). Under Title II, covered entities building new facilities can choose to follow UFAS or the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG), 28 C.F.R. part 36, Appendix A, in meeting their obligations under the ADA. Proposed amendments to the Title II regulations include guidelines specific to "detention and correctional facilities." See 59 Fed. Reg. 31808, 31816 (June 20, 1994) (proposed amendments to DOJ Title II regulation) (adopting interim final rule of the Architectural and Transportation Barriers Compliance Board, at 59 Fed Reg. 31676, 31770 (June 20, 1994)).

Amendment immunity can be waived by the state, however, or Congress may expressly abrogate it. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241-42 (1985).

Citing to the Supreme Court's recent decision in Seminole, Defendants argue that Congress did not have the authority to abrogate Eleventh Amendment immunity for Section 504 or the ADA, and that they therefore are immune from liability. In Seminole, the Court held that the Indian Commerce Clause of the Constitution, Art. I, § 8, cl. 3, does not afford Congress the authority to abrogate Eleventh Amendment immunity. In reaching this conclusion, the Court also reversed Pennsylvania v. Union Gas, 491 U.S. 1 (1989), which held that Congress enjoyed such power under the Commerce Clause. Seminole recognized, however, that Congress does have such power pursuant to Section 5 of the Fourteenth Amendment.[11] We demonstrate below that Congress properly exercised this authority in abrogating state immunity under the ADA and Section 504.

Moreover, Seminole left undisturbed the doctrine of Ex Parte Young, 209 U.S. 123 (1908), which allows individuals to seek injunctive and declaratory relief in a federal suit against state officials without compromising a state's Eleventh Amendment immunity. Seminole, 116 S. Ct. at 1131 n.14 & n.16. The instant action falls within the doctrine of Ex Parte Young.

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[11] See Seminole 116 S. Ct. at 1125 (reaffirming Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), where the Court held that Congress may abrogate Eleventh Amendment immunity pursuant to the Fourteenth Amendment).

A. Congress Acted Within Its Constitutional Powers In Abrogating The State's Eleventh Amendment Immunity Under Both Section 504 and Title II

In Seminole, the Supreme Court articulated a two-part test to determine whether Congress has properly abrogated the States' Eleventh Amendment immunity:

> [F]irst, whether Congress has unequivocally expressed its intent to abrogate immunity; and second, whether Congress has acted pursuant to a valid exercise of power.

116 S. Ct. at 1123 (citations, quotations, and brackets omitted).

Section 504 and Title II both satisfy the "unequivocal expression" requirement. See 42 U.S.C. § 2000d-7 (" A State shall not be immune under the Eleventh Amendment . . . from suit in Federal Court for a violation of section 504 of the Rehabilitation Act of 1973 . . . ."); 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment . . . from an action in Federal or State court of competent jurisdiction for a violation of this chapter."). See also Lane v. Pena, No. 95-365, __ S. Ct. __, 1996 WL 335334 *5-*6 (June 20, 1996) (§2000d-7 is unequivocal waiver of States' Eleventh Amendment immunity).

Congress abrogated state immunity under Section 504 in 1986, when it enacted 42 U.S.C. § 2000d-7.[12] Congress enacted the statute in response to the Supreme Court's decision a year earlier in Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985), which held that Section 504 did not "specifically"

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[12] Section 2000d-7, although placed in the statute books with Title VI of the 1964 Civil Rights Act, was enacted as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845 (1986).

"subject the States to federal jurisdiction" and thus did not abrogate the Eleventh Amendment. Id. at 246. The legislative history is clear that in enacting § 2000d-7, Congress relied upon its Section 5 powers.[13] See, e.g., S. Rep. No. 388, 99th Cong. 2d Sess. 27 (1986); 131 Cong. Rec. 22,346 (1985); 132 Cong. Rec. 28,624 (1986);[14] see Fitzpatrick,427 U.S. at 453 n.9 (relying

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[13] Congress also enacted § 2000d-7 pursuant to its Spending Clause powers. See nn. 14 & 16, infra.

[14] The bill that became Section 2000d-7 was originally introduced by Senator Cranston on August 1, 1985 as the Civil Rights Remedies Equalization Act. S. 1579, 99th Cong, 1st Sess. (1985). See 131 Cong. Rec. 22,344 (Aug. 1, 1985). He explained that the bill was intended to respond to Atascadero by making it clear that Congress intended to subject states to suit under various civil rights provisions, including Section 504. He concluded his remarks by discussing the source of authority for such a law.

> Finally, I would note my understanding that, as has been clearly established in Supreme Court cases, including the Atascadero case, over the past 21 years, the Congress has the authority to waive the States' 11th amendment immunity under the following provisions of the Constitution: the commerce clause, the spending clause, and section 5 of the 14th amendment. In my view, this legislation is clearly authorized by at least the latter two provisions.

Id. at 22,346.

The bill was reported out of the Senate Committee on Labor and Human Resources as part of the Rehabilitation Act Amendments of 1986. The Report noted that Atascadero had held that Congress could "limit the [Eleventh] amendment when legislating pursuant to Section 5 of the Fourteenth Amendment and clearly implied that an exception could be provided under the Spending Clause." S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986).

The bill passed the Senate and was sent to conference to be reconciled with a House bill that did not contain a similar provision. The conference adopted the Senate provision. See H.R. Conf. Rep. No. 955, 99th Cong., 2d Sess. 78-79 (1986). On returning from conference, Senator Cranston reiterated that the purpose of the provision was to reverse the decision in Atascadero. 132 Cong. Rec. 28,622-28,623 (Oct. 3, 1986). He

on legislative history to determine that "Congress exercised its power under § 5 of the Fourteenth Amendment").

That Congress relied on its Section 5 powers in abrogating state immunity under Title II of the ADA is even clearer. In enacting the statute, Congress specifically invoked its "power to enforce the fourteenth amendment." 42 U.S.C. § 12101(b)(4).[15]

Finally, there can be little dispute that Congress' abrogation of state immunity in disability discrimination cases is a proper exercise of its Section 5 powers. The Supreme Court has held that persons with disabilities are entitled to protection from discrimination under the Fourteenth Amendment.

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also submitted for the record a letter from the Department of Justice supporting the provision and explaining that:

> Atascadero provides the blueprint for Congressional action to waive the eleventh amendment's ban to suit in Federal court under the fourteenth amendment and the spending power. The proposed amendment . . . fulfills the requirements that the Supreme Court laid out in Atascadero. Thus, to the extent that the proposed amendment is grounded on congressional powers under section five of the fourteenth amendment, S. 1579 makes Congress' intention "unmistakably clear in the language of the statute" to subject States to the jurisdiction of Federal courts. 105 S. Ct. at 3147. See Fitzpatrick versus Bitzer, 427 U.S. 445 (1976). To the extent that the proposed amendment is grounded on congressional spending powers, S. 1579 makes it clear to states that their receipt of Federal funds constitutes a waiver of their eleventh amendment immunity.

Id. at 28,624.

[15] In enacting the ADA, Congress also invoked its powers under the Commerce Clause, because the Act reaches the conduct of private entities as well as public entities. See 42 U.S.C. § 12101(b)(4). The Fourteenth Amendment, rather than the Commerce Clause, is the traditional constitutional authority for legislation proscribing state conduct. See EEOC v. County of Calumet, 686 F.2d 1249, 1253 (7th Cir. 1982).

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446-47 (1985). Moreover, the very premise of the Court's decision in Atascadero was that Congress had the authority under Section 5 to abrogate the states' immunity in cases brought pursuant to Section 504, but had failed to express its intent to do so unequivocally. Atascadero, 473 U.S. at 244 n.4.

The only case to consider specifically whether Congress had the constitutional authority to abrogate Eleventh Amendment immunity under the both Section 504 and the ADA thus has found that the Fourteenth Amendment affords such authority. Martin v. Voinovich, 840 F. Supp. 1175, 1186-87 (S.D. Ohio 1993). Cf. United States v. Yonkers Bd. of Educ., 893 F.2d 498, 503 (2d Cir. 1990) (Title VI action) (§ 2000d-7 is valid exercise of Congress' Section 5 authority); Santiago v. New York State Dep't of Correctional Servs., 945 F.2d 25, 31 (2d Cir. 1991) ("Acting under § 5, Congress has repeatedly enacted legislation that has clearly stated Congress' intention to abrogate states' immunity from damage actions in a variety of contexts, [including 42 U.S.C. § 2000d-7]."), cert. denied, 502 U.S. 1094 (1992); Stanley v. Darlington County Sch. Dist., 879 F. Supp. 1341, 1363-1364 (D.S.C. 1995) (Title VI action) (upholding abrogation under § 2000d-7), rev'd in part on other grounds, __ F.3d__, 1996 WL 278235 (4th Cir. May 28, 1996).[16]

[16] Moreover, at least with respect to Plaintiffs' Section 504 claims, the State has waived its immunity by accepting federal financial assistance. As noted above, states may waive their Eleventh Amendment immunity. Seminole, 116 S. Ct. at 1128. In Atascadero, the Court stated that if a statute "manifest[ed] a

Moreover, both the ADA and Section 504 are, themselves, as required by Section 5, "appropriate legislation" to enforce the Equal Protection Clause. Katzenbach v. Morgan, 384 U.S. 641, 649-50 (1966). First, both Title II and Section 504 prohibit discrimination on the basis of disability by government actors. And, as Congress has found, individuals with disabilities comprise:

> a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions . . .

42 U.S.C. § 12101(a)(7). As such, both statutes may be regarded as enactments to enforce the protections of the Fourteenth Amendment. Morgan, 384 U.S. at 651. Second, the substantive provisions of both statutes are "plainly adapted to that end [i.e., enforcing the Equal Protection Clause]," see id. -- they are designed to ensure that persons with disabilities, including prison inmates, are protected from discriminatory state conduct

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clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity," the federal courts would have jurisdiction because the states would have waived their Eleventh Amendment immunity by accepting funds. 473 U.S. at 247. It was in response to Atascadero that Congress enacted 42 U.S.C. § 2000d-7, making clear that Congress intended the States to be sued in federal court under Section 504 if they accepted federal funds. See 132 Cong. Rec. 28,624 (Oct. 3, 1986) ("To the extent that the proposed amendment is grounded on congressional spending powers, S. 1579 makes it clear to states that their receipt of Federal funds constitutes a waiver of their eleventh amendment immunity."). Thus, states accepting federal funds after 1986 know that as part of their "contract" with the federal government, they are consenting to suit in federal court.

and are provided an opportunity to benefit from the programs, services, and activities provided by covered entities equal to that provided to non-disabled individuals. Lastly, the statutes "are consistent with 'the letter and spirit of the constitution.'" Id. (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)); see id. at 648-49 (Section 5 authorizes Congress not only to provide remedies for violations of the Fourteenth Amendment, but also to amplify its substantive protections).[17] Both Title II and Section 504 are thus valid exercises of Congress' Section 5 powers. Id. at 651.[18]

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[17] Cf. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (O'Connor, J., concurring and dissenting)(Congress' power to enforce the Fourteenth Amendment includes "the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations").

[18] Citing case law under Title VI and Title IX, Defendants argue that Section 504 is not legislation enacted pursuant to the Fourteenth Amendment, but rather, to the Spending Clause. Def.'s Mem. at 18. Congress, however, may enact legislation pursuant to more than one source of constitutional authority. See, e.g., EEOC v. Wyoming, 460 U.S. 226, 243 (1983) (upholding Age Discrimination in Employment Act as an exercise of the Commerce Clause power without deciding whether it could also be upheld as an exercise of the Fourteenth Amendment); see also Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 280 (1964) (Douglas, J., concurring) ("In determining the reach of an exertion of legislative power, it is customary to read various granted powers together."). Here, Congress enacted Section 504 pursuant to both the Fourteenth Amendment and the Spending Clause. See e.g., Welch v. Texas Dep't of Highways and Public Transp., 483 U.S. 468, 471 n.2 (1987) ("The Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment."); Atascadero, 473 U.S. at 244-245 n.2 (same); River Forest Sch. Dist. No. 90 v. Illinois State Bd. of Educ., 1996 WL 89055, *6 (N.D. Ill. Feb. 28, 1996) (same); Rivera Flores v. Puerto Rico Telephone Co., 776 F. Supp. 61, 66 (D.P.R. 1991) (Spending Clause); Bradford v. Iron City C-4 School District, 1984 WL 1443, *7 (E.D. Mo. June 13, 1984) (Spending Clause and Fourteenth Amendment); Jones v. Illinois Department of Rehabilitative

B. Ex Parte Young Allows Plaintiffs To Seek Prospective Injunctive Relief

"[T]he Eleventh Amendment does not bar actions against state officers in their official capacities if the plaintiffs seek only a declaratory judgment or injunctive relief.'" Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist., 714 F.2d 946, 952 (9th Cir. 1993) (quoting Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982)), cert. denied sub nom., California State Dep't of Educ. v. Los Angeles Branch NAACP, 467 U.S. 1209 (1984). See also Papasan, 478 U.S. at 277-78; Green v. Mansour, 474 U.S. 64, 68 (1985). Actions against state officers in their official capacity for damages, however, are barred. See Edelman v. Jordan, 415 U.S. 651, 665-670 (1995).

The distinction between allowable actions for prospective relief versus disallowed actions for retroactive monetary relief has its basis in Ex Parte Young, 209 U.S. 123 (1908). In Young, a federal court had enjoined the Minnesota Attorney General from enforcing an unconstitutional state law. The Supreme Court upheld the injunction, on the grounds that when a state official acts unconstitutionally, he acts ultra vires and is "stripped of his official or representative character," and thus of any immunity the state might have been able to provide. Id. at 160. Under the Young doctrine, a federal court may enjoin state

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Services, 504 F. Supp. 1244, 1257 (N.D. Ill. 1981) (Fourteenth Amendment). Cf. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 n.8 (reserving judgment on "which power Congress utilized in enacting Title IX"); Guardians Ass'n v. Civil Service Comm'n of the City of New York, 463 U.S. 582, 596 (1983) (Title VI) (Spending Clause).

officials to conform their future conduct to the requirements of federal law. See Papasan, 478 U.S. at 277-78.

As noted above, suits against state officers for money damages are barred, under the theory that the judgment would in reality be one against the state. Edelman, 415 U.S. at 665-70. Suits for equitable relief, however, even if they will have an impact on state treasuries, are still viable. Id. at 667. See Milliken v. Bradley, 433 U.S. 267, 289 (1977) (Ex Parte Young "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and subsequential impact on the state treasury.") As the Court has explained, "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." Green, 474 U.S. at 68 (citations omitted).

The instant action falls squarely within the doctrine of Ex Parte Young. Plaintiffs have sued state officers in their official capacities, rather than the state itself. They have sought only declaratory and injunctive relief in order to remedy an ongoing violation of federal law. While the requested relief may have a subsequent impact on the state treasury, any such impact would be ancillary to bringing an end to a violation of federal law. See Papasan, 478 U.S. at 278.

Seminole does not disturb the principles of Ex Parte Young. Seminole, 116 S. Ct. at 1131 n.14 & n.16. The Court in Seminole indicated, however, that a suit against state officials is not

permissible under an Ex Parte Young theory where a statute provides for specific limited remedies against the state itself, which the Court found to be the case under the Indian Gaming Regulatory Act. Id. at 1132-33.[19] By contrast, Section 504 and Title II afford private litigants the full remedial powers of the federal courts. See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 71-73 (1992) (Title IX of the 1964 Civil Rights Act -- which, like Section 504 and Title II of the ADA, affords a private litigant the remedies available under Title VI of the 1964 Civil Rights Act -- provides a private litigant the full panoply of remedies).[20]

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[19] As the Court explained, the remedial scheme provided by Congress in IGRA is quite limited:

> For example, where the court finds that the state has failed to negotiate, the only remedy prescribed is an order directing the State and the Indian tribe to conclude a compact within 60 days. And if the parties disregard the court's order and fail to conclude a compact within the 60-day period, the only sanction is that each party then must submit a proposed compact to a mediator who selects the one which best embodies the terms of the Act. Finally, if the State fails to accept the compact selected by the mediator, the only sanction against it is that the mediator shall notify the Secretary of the Interior who then must prescribe regulations governing Class II gaming on the tribal lands at issue.

Seminole, 116 S. Ct. 1132-33 (emphasis added).

[20] See, e.g., W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995) (applying Franklin to Section 504 action); Rodgers v. Magnet Cove Public Schools, 34 F.3d 642, 645 (8th Cir. 1994) (same).

CONCLUSION

For the reasons set forth above, Defendants' Motion for Summary Judgment should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the Disability Rights Section of the Civil Rights Division of the U.S. Department of Justice, and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that she is causing a copy of:

UNITED STATES' AMICUS CURIAE MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT

JOAN ARMSTRONG, et at. v. PETE WILSON, et al.
Civil Action No. C-94-2307 CW

to be served this date on the parties in this action, by placing a true copy thereof in a sealed envelope, addressed as follows which is the last known address:

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