Bill Lann Lee,
Acting Assistant Attorney General
John L. Wodatch, Chief
Renee M. Wohlenhaus, Deputy Chief
Philip L. Breen, Special Legal Counsel
Bebe Novich, Trial Attorney (D.C. Bar No. 431203)
Disability Rights Section
Civil Rights Division
United States Department of Justice
P.O. Box 66738
Washington, D.C. 20035-6738
Tel: (202) 616-2313
Attorneys for Plaintiff-Intervenor

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ELIZABETH CAMPOS, on behalf of herself and others similarly situated; STUDENTS TENACIOUSLY ADVOCATING for our Rights ("STARS"); CALIFORNIA FACULTY ASSOCIATION; Plaintiffs, v. SAN FRANCISCO STATE UNIVERSITY; BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY; CHANCELLOR BARRY MUNITZ, in his official and individual capacities; PRESIDENT ROBERT CORRIGAN, in his official and individual capacities; Defendants.	CASE NO. C-97-02326 MMC(PJH) CLASS ACTION UNITED STATES' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS Date: October 1, 1999 Time: 9:00a.m. Place: Courtroom of Hon. Maxine M. Chesney

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PRELIMINARY STATEMENT

The parties to this action have stipulated to the United States' intervention to address the constitutionality of Title II of the Americans with Disabilities Act ("ADA"),[1] and Section 504 of the Rehabilitation Act ("Section 504").[2] Plaintiffs brought this action, alleging, inter alia, that Defendants have failed to ensure program accessibility and to make reasonable modifications to their policies, practices, and procedures, in violation of ADA Title II and Section 504. Plaintiffs claim that Defendants have failed to remove barriers to access, required under Defendants' transition plan, from classrooms, restrooms, and other areas of Defendants' campus. Defendants have moved for judgment on the pleadings, claiming that the ADA and Section 504 do not constitutionally abrogate States' sovereign immunity under the Eleventh Amendment and that Section 504 does not effect a valid waiver of States' sovereign immunity. The United States Department of Justice, the primary enforcement agency designated within those statutes, respectfully requests that this Court uphold the ADA's and Section 504's abrogations of sovereign immunity and the State's waiver of sovereign immunity under Section 504.

[1/] 42 U.S.C. §§ 12131 et seq. The parties' stipulation was filed with this Court on September 10, 1999.

[2/] 29 U.S.C. § 794.

ARGUMENT

I. THE ABROGATIONS OF ELEVENTH AMENDMENT IMMUNITY CONTAINED IN THE ADA AND SECTION 504 ARE VALID EXERCISES OF CONGRESS' POWER UNDER THE FOURTEENTH AMENDMENT

In Seminole Tribe of Florida v. Florida, the Supreme Court articulated a two-part test to determine whether Congress has properly abrogated States' Eleventh Amendment immunity: "first, whether Congress has unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power." Seminole, 517 U.S. 44, 55 (1996) (citations, quotations, and brackets omitted). Defendants concede that both the ADA and Section 504 satisfy the first requirement, but challenge the statutes' validity under the Fourteenth Amendment. See Defendants' Brief at 8.

Applying the Seminole standard, the Ninth Circuit Court of Appeals has already decided the issue that is before this Court. Clark v. California, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998). The Clark Court upheld the abrogations of sovereign immunity in the ADA and Section 504, holding that Congress acted pursuant to a valid exercise of power under the Fourteenth Amendment when it enacted those laws. Defendants argue that Clark was wrongly decided, but this Court is not empowered to ignore or overturn controlling precedent.[3] Moreover, Clark was properly decided and is consistent with intervening decisions and the weight of judicial authority.

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[3] "District courts are bound by the law of their own circuit. They are not to resolve splits between circuits no matter how egregiously in error they may feel their own circuit to be." Hasbrouck v. Texaco, Inc. 663 F.2d 930, 933 (9th Cir. 1981), cert. denied, 459 U.S. 828 (1982) (citations omitted).

A. The Ninth Circuit Has Already Found the ADA and Section 504 to be Valid Legislation Under the Fourteenth Amendment

After Seminole, the Supreme Court's decision in City of Boerne v. Flores confirmed that Congress has broad discretion to enact legislation to redress what it rationally perceives to be widespread constitutional injuries against individuals with disabilities. Boerne, 521 U.S. 507 (1997). In Boerne, the Court held that in order for legislation to be a valid exercise of Congress' Fourteenth Amendment power it must be linked to constitutional violations and its remedies must be "congruent and proportional" to the evils sought to be addressed. Id. at 520. The Court explained that the authority to enforce the Fourteenth Amendment is a broad power to remedy past and present discrimination and to prevent future discrimination. Id. at 517-18. And it reaffirmed that Congress can prohibit activities that themselves are not unconstitutional in furtherance of its remedial scheme, id. at 518, 525-27, 532, acknowledging that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies." Id. at 519-20.

The Boerne reasoning was applied by the Ninth Circuit in Clark. The Ninth Circuit analyzed the ADA and Section 504 and found them both to be "congruent" and "proportional" to the discrimination they sought to remedy, and thus valid exercises of congressional power Clark, 123 F.3d at 1270. The Ninth Circuit has also manifested its broad deference to Congress' authority to enforce the Equal Protection clause in other contexts. For example, in Keeton v. University of Nevada System, the court held that the Age Discrimination in Employment Act was a valid exercise of Congress' authority to prohibit unconstitutional age discrimination. Keeton,

150 F.3d 1055, 1058 (9th Cir. 1998). And in Oregon Short Line Railroad Co. v. Department of Revenue, 139 F.3d 1259, 1266-67 (9th Cir. 1998), the court held that Congress could validly abrogate Eleventh Amendment immunity for claims of discrimination against railroads. Certainly if the Fourteenth Amendment permits Congress to enact prophylactic legislation to protect railroads from discrimination, Congress had the authority to enact the ADA and Section 504 to redress a well-documented history of widespread discrimination against people with disabilities.

B. The Supreme Court's Decision in Florida Prepaid Did Not Alter Boerne

Defendants claim that the Supreme Court's recent decision in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank overrules the previous authority and dictates that the ADA and Section 504 are not valid legislation within the Fourteenth Amendment's Equal Protection Clause. Florida Prepaid, 119 S. Ct. 2199 (1999). The Florida Prepaid decision invalidated an abrogation of immunity in the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act), because it deemed that the act was not valid legislation within the Fourteenth Amendment's Due Process Clause.

Defendant's application of Florida Prepaid to this case is misguided for several reasons. First and foremost, Florida Prepaid did not alter the Boerne test. In Florida Prepaid, there is no question that the Supreme Court followed the method outlined in Boerne. The Court in Florida Prepaid relied on Boerne as the guide for its decision, reaffirming as well that "' [l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States,"'" and that "'the line between measures that remedy or prevent unconstitutional actions and measures that

make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies.'" Id. at 2206 (quoting Boerne, 521 U.S. at 518, 519-20). Thus, the Ninth Circuit's application of the Boerne test in Clark remains valid after Florida Prepaid, and Clark's validation of the ADA and Section 504 should stand. Two circuit courts of appeals ruling on this issue since Florida Prepaid have upheld the ADA's and Section 504's constitutionality. Martin v. Kansas, Nos. 98-3102, 98-3118, 1999 WL 635916 (10th Cir. Aug. 19, 1999); Muller v. Costello, Nos. 98-7491, 98-7729, 1999 WL 599285 (2d Cir. Aug. 11, 1999).

Second, Defendant claims that the availability of State remedies causes the ADA and Section 504 to fail the Boerne test for congruence and proportionality. In Florida Prepaid, one factor in the Court's finding that the Patent Remedy Act was not congruent and proportional to the constitutional violation was that State patent infringement remedies were available. Florida Prepaid, 119 S. Ct. at 2208-09. However, the availability of State remedies is not relevant to a constitutional analysis of the ADA or Section 504. Those remedies are relevant to the validity of the Patent Remedy Act because it is grounded in the Fourteenth Amendment's Due Process Clause, which prohibits States from depriving property "without due process of law." U.S. Const. amend XIV. The ADA and Section 504, in contrast, are grounded in the Fourteenth Amendment's Equal Protection Clause, which has no similar language. Id. An Equal Protection violation is complete when a person acting under color of State law acts for an invidious reason. The existence or absence of State remedies is irrelevant. See United States v. Raines, 362 U.S. 17, 25 (1960) ("It is, however, established as a fundamental proposition that every state official, high and low, is bound by the Fourteenth and Fifteenth Amendments. We think this court has already made it clear that it follows from this that Congress has the power to provide for the

correction of the constitutional violations of every such official without regard to the presence of other authority in the state that might possibly revise their actions.") (citation omitted). Thus, Florida Prepaid in no way compels this Court to ignore the controlling authority of Clark and the vast weight of judicial authority.

C. Even if Clark Does Not Control, The ADA and Section 504 Should Be Upheld

Even if this Court decides to reexamine Clark in light of Florida Prepaid, this Court should uphold the abrogations of sovereign immunity in the ADA and Section 504 because they satisfy the Supreme Court's test for congruence and proportionality to the discrimination they seek to remedy.

1. Congress Found That Discrimination Against People With Disabilities Was Severe And Extended To Every Aspect Of Society

Congress enacted the ADA based on its findings of pervasive discrimination on the basis of disability, including:

> [H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> [D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services . . . .

42 U.S.C. § 12101(a)(2), (3).[4] Among these findings is discrimination in functions such as institutionalization, voting, education, and transportation, in which States have commonly played a principle role.

[4/] These findings are attached in their entirety to this brief.

The ADA's legislative history is also replete with findings of unconstitutional exclusion of and discrimination against people with disabilities. We cannot provide a complete summary of the 14 hearings held by Congress at the Capitol, the 63 field hearings, the lengthy floor debates, and the myriad reports submitted to Congress by the Executive Branch in the three years prior to the enactment of the ADA, see Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, 64 Temp. L. Rev. 393, 393-94 nn.1-4, 412 n.133 (1991) (collecting citations), as well as Congress' 30 years of experience with other statutes aimed at preventing discrimination against persons with disabilities, see Lowell P. Weicker, Jr., Historical Background of the Americans with Disabilities Act, 64 Temp. L. Rev. 387, 387-89 (1991) (discussing other laws enacted to redress discrimination against persons with disabilities). However, we will briefly sketch some of the relevant areas of discrimination Congress discovered and was attempting to redress.

First, the evidence before Congress demonstrated that persons with disabilities were sometimes excluded from public services for no reason other than distaste for or fear of their disabilities. See S. Rep. No. 116, 101st Cong., 1st Sess. 7-8 (1989) (citing instances of discrimination based on negative reactions to sight of disability) (Senate Report); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 28-31 (1990) (same) (House Report). The legislative record contained documented instances of exclusion of persons with disabilities from hospitals, theaters, restaurants, bookstores, and auction houses simply because of prejudice. See Cook, supra, at 408-09 (collecting citations). Indeed, the United States Commission on Civil Rights, after a thorough survey of the available data, documented that prejudice against persons with disabilities manifested itself in a variety of ways, including "reaction[s] of aversion," reliance on "false"

stereotypes, and stigma associated with disabilities that lead to people with disabilities being "thought of as not quite human." U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 23-26 (1983); see also Senate Report, supra, at 21. The negative attitudes, in turn, produced fear and reluctance on the part of people with disabilities to participate in society. See Senate Report, supra, at 16; House Report, supra, at 35, 41-43; Cook, supra, at 411. Congress thus concluded that persons with disabilities were "faced with restrictions and limitations . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a)(7).

These decades of ignorance, fear, and misunderstanding created a tangled web of discrimination, resulting in, and being reinforced by, isolation and segregation. The evidence before Congress demonstrated that these attitudes were linked more generally to the segregation of people with disabilities. See Senate Report, supra, at 11; U.S. Commission on Civil Rights, supra, at 43-45. This segregation was in part the result of government policies in "critical areas [such] as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3).

Similarly, there was evidence before Congress that, like most public accommodations, government buildings were not accessible to people with disabilities. For example, a study conducted in 1980 of state-owned buildings available to the general public found 76 percent of them physically inaccessible and unusable for providing services to people with disabilities. See 135 Cong. Rec. 8,712 (1989) (remarks of Rep. Coelho); U.S. Commission on Civil Rights, supra,

at 38-39. In another survey, 40 percent of persons with disabilities reported that an important reason for their segregation was the inaccessibility of buildings and restrooms. See Americans with Disabilities Act of 1989: Hearings on H.R. 2273 before the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 334 (1989) (House Judiciary Hearings). Thus, Congress concluded that even when not barred by "outright intentional exclusion," people with disabilities "continually encounter[ed] various forms of discrimination, including . . . the discriminatory effects of architectural, transportation, and communication barriers." 42 U.S.C. § 12101(a)(5).

Most relevant to this case are Congress' specific findings about pervasive discrimination in education, which is manifest in the history of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq. In enacting IDEA's predecessor in 1975, Congress found that one million disabled children were "excluded entirely from the public school system." 20 U.S.C. § 1400(c)(2)(C), while others were given permission to enter the schoolhouse, but were learning nothing because the schools failed to account for their disabilities. See Board of Educ. v. Rowley, 458 U.S. 176, 191 (1982); id. at 213 n.1 (White, J., dissenting). This state of affairs was rooted in decades of unwarranted discrimination against children with disabilities. See Marcia Pearce Burgdorf & Robert Burgdorf, Jr., A History of Unequal Treatment, 15 Santa Clara Lawyer 855, 870-75 (1975).

Not surprisingly, similar government practices were found to exist in higher education. See Senate Report, supra, at 7; House Report, supra, at 29. This is consistent with the conclusion of the United States Commission on Civil Rights, also before Congress, that the "higher one goes on the education scale, the lower the proportion of handicapped people one finds." U.S.

Commission on Civil Rights, supra, at 28; see also National Council on the Handicapped, On the Threshold of Independence 14 (1988) (29% of disabled persons had attended college, compared to 48% of the non-disabled population). Given the extensive discrimination by government actors in educating children, Congress had sufficient evidence from which it could infer similar discrimination in higher education, and thus that "discrimination against individuals with disabilities persists in such critical areas as . . . education." 42 U.S.C. § 12101(a)(3) (emphasis added); accord 29 U.S.C. § 701(a)(5). These government policies and practices, in tandem with similar private discrimination, produced a situation in which people with disabilities were largely poor, isolated, and segregated.[5]

Boerne requires courts to accord deference to such findings. So long as this Court can "perceive[] a factual basis on which Congress could have concluded" that there was "'invidious discrimination in violation of the Equal Protection Clause,'" then this Court must uphold the ADA and Section 504 as valid legislation. Boerne, 521 U.S. at 528 (citation omitted); see also Oregon v. Mitchell, 400 U.S. 112, 216 (1970) (Harlan, J.).

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[5]/ Since the enactment of the ADA, people with disabilities "have experienced increased access to many environments and services" and "[e]mployment opportunities have increased." National Council on Disability, Achieving Independence: The Challenge for the 21st Century 34 (1996). However, discrimination continues to be a significant force in the lives of people with disabilities. See id. at 14-16, 35-36; National Council on Disability, ADA Watch -- Year One: A Report to the President and the Congress on Progress in Implementing the Americans with Disabilities Act 36 (1993).

2. The ADA and Section 504 are Proportionate Responses By Congress To Remedy And Prevent The Pervasive Discrimination It Discovered

a. The ADA and Section 504 Are Remedial Legislation

In the ADA and Section 504, Congress sought to remedy the effects of the past discrimination described above and prevent like discrimination in the future by mandating that qualified individuals with disabilities be provided with "meaningful access to the benefit that the [entity] offers." Alexander v. Choate, 469 U.S. 287, 301 (1985) (emphasis added). Thus, Title II of the ADA and Section 504 prohibit States from unnecessarily excluding persons with disabilities, either intentionally or unintentionally, from their programs, services, and activities. 42 U.S.C. § 12132; 29 U.S.C. § 794.

These laws are remedial in that they attempt to counteract the effects of a long history of disability discrimination, including exclusion due to architectural barriers. Not surprisingly, given their profound segregation from the rest of society, see 42 U.S.C. § 12101(a)(2), the needs of persons with disabilities were not taken into account when buildings were designed, state and local building standards were set, and rules were promulgated. The ability of people in wheelchairs to use public buildings or of people with visual impairments to navigate within them was not likely considered. See U.S. Commission on Civil Rights, supra, at 21-22, 38. Even when considered, their interests may not have been properly weighed, since "irrational fears or ignorance, traceable to the prolonged social and cultural isolation of [persons with disabilities] continue to stymie recognition of [their] dignity and individuality." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 467 (1985) (Marshall, J.).

Congress believed that in order to remedy some types of disability discrimination, especially architectural discrimination, affirmative steps would be required. As Congress and the Supreme Court recognized, many of the problems faced today by persons with disabilities are a result of "thoughtlessness or indifference -- of benign neglect" to the interaction between those purportedly "neutral" rules and persons with disabilities.[6] As a result, Congress determined that for an entity to treat persons with disabilities as it did those without disabilities was not sufficient to eliminate the effects of years of segregation and to give persons with disabilities equally meaningful access to every aspect of society. See 42 U.S.C. § 12101(a)(5); see also U.S. Commission on Civil Rights, supra, at 99. When persons with disabilities have been segregated, isolated, and denied effective participation in society, Congress may conclude that affirmative measures are necessary to bring them into the mainstream. Cf. Fullilove v. Klutznick, 448 U.S. 448, 477-78 (1980).

The Supreme Court has recognized that the Equal Protection Clause is not limited to prohibiting unequal treatment of similarly situated persons. In enacting the ADA, Congress was acting within the constitutional framework that has been laid out by the Supreme Court. In City of Cleburne v. Cleburne Living Center, the Supreme Court unanimously declared unconstitutional as invidious discrimination a decision by a city to deny a special use permit for the operation of a group home for people with mental retardation. Cleburne, 472 U.S. 432 (1985). While a majority of the Court declined to deem classifications based on disability as

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[6]/ Senate Report, supra, at 6 (quoting without attribution Alexander v. Choate, 469 U.S. 287, 295 (1985)); House Report, supra, at 29 (same); 136 Cong. Rec. 10,870 (1990) (Rep. Fish); id. at 11,467 (Rep. Dellums).

suspect or "quasi-suspect," it elected not to do so, in part, because it would unduly limit legislative solutions to problems faced by the disabled. Id. at 444. The Court reasoned that "[h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals." Id. at 442-43. It specifically noted with approval legislation such as Section 504, which is aimed at protecting persons with disabilities. Id. at 444.

The Equal Protection Clause also guarantees "that people of different circumstances will not be treated as if they were the same." United States v. Horton, 601 F.2d 319, 324 (7th Cir.), cert. denied, 444 U.S. 937 (1979) (quoting Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law 520 (1978)). The Constitution recognizes this reality and, in certain circumstances, requires equal access rather than simply identical treatment. "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." Jenness v. Fortson, 403 U.S. 431, 442 (1971).[7]

Thus, there is a basis in constitutional law for recognition that discrimination exists not only by treating people with disabilities differently for no legitimate reason, but also by treating them identically when they have recognizable differences, and by failing to modify inaccessible buildings and discriminatory practices. As the Sixth Circuit has explained in a case involving

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[7]/ See also M.L.B. v. S.L.J., 519 U.S. 102 (1996) and Griffin v. Illinois, 351 U.S. 12 (1956) (cases holding that a State violates the Equal Protection Clause when it treats indigent parties appealing from certain court proceedings as if they were not indigent). Central to these holdings is the acknowledgment that "a law nondiscriminatory on its face may be grossly discriminatory in its operation." M.L.B., 519 U.S. at 569 (quoting Griffin, 351 U.S. at 17 n.11).

gender classifications, "in order to measure equal opportunity, present relevant differences cannot be ignored. When [people] are not in fact similarly situated and when the law is blind to those differences, there may be as much a denial of equality as when a difference is created which does not exist." Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 657 (6th Cir. 1981); see also Lau v. Nichols, 483 F.2d 791, 806 (9th Cir. 1973) (Hufstedler, J., dissenting from the denial of reh'g en banc), rev'd, 414 U.S. 563 (1974). Similarly, it is also a denial of equality when access to facilities, benefits, and services is denied because the State refuses to acknowledge the "real and undeniable differences between [persons with disabilities] and others." Cleburne, 473 U.S. at 444.

b. The ADA's and Section 504's Remedies and Preventative Measures Are Proportional to the Evil They Address

The vast majority of courts of appeals, including the Ninth Circuit, have upheld both the ADA and Section 504 under the Supreme Court's standard. These courts of appeals have found that the ADA and Section 504 are"congruent and proportional" responses to the pervasive discrimination Congress discovered and thus are "appropriate" Equal Protection legislation. See Clark, 123 F.3d at 1270-71; Martin v. Kansas, 1999 WL 635916 at *4; Muller v. Costello, 1999 WL 599285 at *23; Amos v. Maryland Dep't of Public Safety and Correctional Servs., 178 F. 3d 212, 217 (4th Cir. 1999); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (1997); Coolbaugh v. Louisiana, 136 F.3d 430, 438 (5th Cir. 1998), cert. denied, 119 S. Ct. 58 (1998); Seaborn v. Florida, 143 F.3d 1405, 1406 (11th Cir. 1998), cert. denied, 119 S. Ct. 1038 (1999); Kimel v. Board of Regents, 139 F.3d 1426, 1433,

1442-43 (11th Cir. 1998), petition for cert. filed on ADA issue, 67 U.S.L.W. 3364 (Nov. 16, 1998) (No. 98-829); see also Torres v. Puerto Rico Tourism Co., 175 F.3d 1, 6 n.7 (1st Cir. 1999)(in dictum, stating "we have considered the issue of Congress' authority to sufficiently to conclude that, were we to confront the question head-on, we almost certainly would join the majority of courts upholding the [abrogation] provision")[8]

The Second Circuit's recent decision in Muller v. Costello, which upheld the ADA's abrogation of state immunity as "proportional" and "congruent," highlighted the comprehensiveness of Congress' findings of pervasive discrimination against persons with disabilities and recognized Boerne's dictate to allow Congress "wide latitude" to determine the extent of measures necessary to prevent and remedy such discrimination:

> In light of Congress's findings of the extent of discrimination against people with disabilities, and with due regard to the deference owed to Congress in making such judgments, we will not second-guess Congress's judgment that the ADA was targeted to remedy and prevent irrational discrimination against people with disabilities.

Muller, 1999 WL 599285 at * 21 (citing Boerne 521U.S. at 519-20).

Similarly, in Coolbaugh v. Louisiana, the Fifth Circuit noted that unlike the statute at issue in Boerne, the ADA was accompanied by express factual findings by Congress based on an extensive legislative record. The Fifth Circuit did not hold the findings dispositive, but accorded

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[8/] But see Alsbrook v. City of Maumelle, No. 97-1825, 1999 WL 521709 (8th Cir. Jul. 23, 1999) (invalidating Title II's abrogation of immunity); Brown v. North Carolina Div'n of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999) (striking one provision in the Title II regulation as exceeding Congress' Fourteenth Amendment powers).

them "substantial deference" in determining the scope of the constitutional violations. Coolbaugh, 136 F.3d at 435. Given those findings, the Fifth Circuit held:

> In sum, the ADA represents Congress' considered efforts to remedy and prevent what it perceived as serious, widespread discrimination against the disabled. We recognize that in some instances, the provisions of the ADA will "prohibit[] conduct which is not itself unconstitutional and intrude[] into 'legislative spheres of autonomy previously reserved to the States.'" We cannot say, however, in light of the extensive findings of unconstitutional discrimination made by Congress, that these remedies are too sweeping to survive the Flores proportionality test for legislation that provides a remedy for unconstitutional discrimination or prevents threatened unconstitutional actions.

Id. at 437-38 (footnote and citations omitted).

The regulatory provisions at issue in this case demonstrate that the ADA and Section 504 fall well within the bounds established by Boerne. The principle provisions at issue in this action -- requirements to make "reasonable modifications to policies, practices, and procedures where necessary" to afford access to a program to persons with disabilities, 28 C.F.R. § 35.130(b)(7), and to make programs as a whole accessible, id. at § 35.150, — are balanced, reasonable, and flexible measures to ensure the persons with disabilities are no longer unreasonably excluded from public services and buildings.

In an attempt to convince this Court to decline to follow Clark, Defendant relies upon Alsbrook v. City of Maumelle, a recent decision from the United States Court of Appeals for the Eighth Circuit, the only circuit decision to find Title II an invalid use of power under the Fourteenth Amendment. Alsbrook, 1999 WL 521709.[9] We believe that the Alsbrook decision

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[9/] Brown v. North Carolina, the other appellate opinion to hold against the ADA's constitutionality, did not render an opinion on the entirety of the ADA or even the entirety of Title II. Brown found invalid one provision in the regulation promulgated under Title II, which provision is not at issue in this action. Brown, 166 F.3d 698. Defendant also cites Kilcullen v.

misreads the relevant ADA provisions. For instance, Alsbrook incorrectly interprets the word "reasonable" in the ADA Title II provision requiring "reasonable modifications of policies, practices, and procedures." 42 U.S.C. § 12131(2). The Alsbrook opinion states that "reasonable" is so "amorphous" as to expand the reach of Title II. In fact, the "reasonable" qualifier does just the opposite: it limits intrusion into government policies, practices, and procedures only to situations in which it would be reasonable to require modifications.[10] Similarly, Alsbrook argues that Title II is not congruent and proportional because it targets every state program or activity. Alsbrook, 1999 WL 51709 at *6. To the contrary, Title II affects only programs, services, or activities from which people with disabilities are otherwise excluded or denied an equal opportunity to participate, programs for which a modification is "necessary" for access. 28 C.F.R. § 35.130(b)(67). And for such programs, Title II requires only "reasonable modifications," and does not require the imposition of an undue burden or a fundamental alteration to States' programs. Id.

Alsbrook also failed to recognize the amount of discretion Congress has in determining appropriate remedies for unconstitutional discrimination. See Boerne, 521 U.S. at 519-20.

New York State Dep't of Trans., 33 F. Supp. 2d 133 (N.D.N.Y. 1999), a district court case whose holding on the ADA's abrogation of immunity effectively has been overruled by Muller v. Costello, 1999 WL 599285.

[10/] In fact, the Alsbrook decision contradicts itself by claiming that because Title II imposes "the amorphous requirement of providing reasonable modifications in every program, service, or activity," it prevents "states from making decisions tailored to meet specific local needs." Alsbrook, 1999 WL 521709 at *5 (emphasis added). The court did not acknowledge, as did the Fourth Circuit in Amos, that inherent in the term "reasonable" is the ability to assess particular modifications and particular local needs. See Amos, 178 F.3d at 222.

Alsbrook improperly narrowed Congress' power to prohibit some constitutional conduct where necessary in Congress' view to prevent constitutional violations. Alsbrook, 1999 WL 521709 at *5. This deference was explicitly reserved in Boerne and has been reaffirmed by other circuit courts. See Boerne, 521 U.S. at 519; Muller, 1999 WL 599285 at* 21; Amos, 178 F.3d at 219; see also Alsbrook 1999 WL 521709 at *10 ("[the majority] entirely ignores the Supreme Court's reference to legislation which 'deters' constitutional violations and only takes into consideration legislation which 'remedies' constitutional violations.") (dissenting in part). Instead, as the dissenters in Alsbrook aptly note, Boerne "acknowledge[s] Congress's broad discretion in fashioning remedial or preventative legislation." Alsbrook, 1999 WL 521709 at *10. The congruence between the evil to be remedied and the legislation's means exists in Title II. The "widespread and persistent discrimination against individuals that Congress found to exist throughout our society," id. at *12, is balanced by a "reasonable modifications" standard that requires States to change discriminatory practices, which Congress also found, that are "partially or entirely under the control of the state or local government." Id. At *13. We urge this Court not to follow Alsbrook, which we believe was wrongly decided. Instead, this Court should follow the controlling authority in this circuit, Clark v. California, which upheld Title II's abrogation of immunity.

Defendant also relies on Brown v. North Carolina, in which a divided panel of the Fourth Circuit found that the ADA's abrogation was unconstitutional as applied to a specific regulatory provision that prohibited imposing surcharges for services required to be provided by

the ADA. Brown, 166 F.3d 698 (4th Cir. 1999). We believe that the Fourth Circuit employed an improper standard in measuring the constitutionality of the ADA. The court demanded "support in the legislative record for the proposition that state surcharges for handicapped programs are motivated by animus toward the class." Brown, 166 F.3d at 707. The Fourth Circuit erred in requiring a "legislative record" at all, much less at the level of specificity it demanded. See United States v. Des Moines Nav. & Ry., 142 U.S. 510, 544 (1892) (quoting Thomas M. Cooley, A Treatise on Constitutional Limitations (5th ed.)); see also FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) ("legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"). Indeed, that court completely ignored the Court's admonition in Boerne that "[j]udicial deference, in most cases, is based not on the state of the legislative record Congress compiles, but 'on due regard for the decision of the body constitutionally appointed to decide.'" Boerne, 521 U.S. at 531. We believe that Brown was also wrongly decided, and, in any event, has no bearing on the provisions at issue here.[11]

c. Unlike the Religious Freedom Restoration Act, Neither The ADA Nor 504 Impose Strict Scrutiny

The Religious Freedom Restoration Act (RFRA), struck down in Boerne, required the highest level of scrutiny allowable under the Constitution: States would have to justify any substantial burden on a religious practice with a "compelling state interest," and to use the "least

[11/]The Fourth Circuit has since upheld the ADA's abrogation of immunity as to Title II as a whole. Amos, 178 F.3d 212. The language of the Amos decision suggests that Brown has been cabined by the Fourth Circuit. Id. at 221 n.8.

restrictive means" of accomplishing the state goal. Boerne, 521 U.S. at 507. Congress enacted this strict scrutiny in RFRA in the absence of a national pattern of unconstitutional interference with the exercise of religion. Id. at 530-31. Far from imposing such strict scrutiny or a "compelling interest" test, the ADA and Section 504, both of which are based on a well-documented history of unconstitutional discrimination and segregation, require only that public entities make "reasonable modifications to their policies, practices, and procedures," and only where it's "necessary" to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7). For preexisting facilities and programs, such as those at issue in this case, the ADA and Section 504 impose a similarly balanced standard. They obligate public entities to ensure that their programs as a whole are accessible to persons with disabilities, rather than requiring that every barrier to access be removed from every facility. 28 C.F.R. § 31.150. Such moderate measures surely cannot be construed to be the draconian and "sweeping" remedies disallowed in Boerne. Boerne, 521 U.S. at 532

The Ninth Circuit has held the ADA and Section 504 to remedy the very type of discrimination that Cleburne held unconstitutional under the rational basis test. See Bay Area Addiction Research and Treatment, Inc. v. City of Antioch, 179 F.3d 725 (9th Cir. 1999) (allegations of ordinance prohibiting methadone clinic within 500 feet of residential area state claims under the ADA and Section 504); see also Crowder v. Kitagawa, 81 F.3d 1480, 1485 (9th

Cir. 1996) (reasonable modifications to Hawaii's mandatory quarantine of carnivores are necessary to provide meaningful access to guide dog users).[12]

The ADA and Section 504 thus fall neatly in line with other statutes that have been upheld as valid Section 5 legislation. For when there is evidence of a history of extensive discrimination, as here, Congress may prohibit or require modifications of rules, policies, and practices that tend to have a discriminatory effect on a class or individual, regardless of the intent behind those actions. In South Carolina v. Katzenbach, 383 U.S. 301, 325-37 (1966), and again in City of Rome v. United States, 446 U.S. 156, 177 (1980), both cited with approval

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12/ Defendant claims that Title II's regulations related to architectural barriers intrude upon subjects of "even less of a Constitutional dimension" than facially neutral State policies. Defendants' brief at 14. However, such historical neglect can rise to constitutional proportions.

> [O]ften the difference between accommodating the disabled and leaving them segregated and excluded is only a difference of a few inches. But, for the disabled, "almost" is not good enough. From the perspective of a disabled American, the absence of these accommodations in a building, a hallway, a bathroom, or a state-run program is tantamount to a sign that says, "No disabled allowed." A state's failure to consider these necessary and often minor accommodations when designing buildings and programs is invidious discrimination in a most pernicious form . . . .
>
> [T]his deliberate ignorance is unreasonable and irrational. The disabled are as much a part of society as are those of us fortunate enough not to be challenged. The need to have a ramp for a building and accessible toilets and showers is as evident as the need to have doors and bathrooms in the first place. A state's decision to construct facilities and design programs as if the disabled are not a part of society stems from attitudes formed during a "'lengthy and tragic history,' of segregation and discrimination," which continues to affect the daily lives of the disabled.

Amos, 178 F.3d 224-25 (citations omitted) (Murnaghan, J., concurring).

Further, as discussed above, Title II does not necessarily require physical changes if policy modifications are sufficient. It does not, as Defendants claim, require States to allocate monies in a certain way. Instead, it requires something very reasonable -- access to the program as a whole -- and allows States to fashion the appropriate method of ensuring this.

in Boerne, the Supreme Court upheld the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which prohibits covered jurisdictions from implementing any electoral change that is discriminatory in effect.

All actions prohibited by the ADA and Section 504 need not rise to the level of constitutional violations in order to uphold those laws as valid Fourteenth Amendment legislation. So long as Congress, exercising its superior fact-finding power, could have rationally concluded that there were a substantial number of extant and incipient constitutional violations regarding people with disabilities, it is free to enact a prophylactic remedial scheme. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." Florida Prepaid, 119 S. Ct. at 2206 (quoting Boerne, 521 U.S. at 518); see Muller v. Costello, 1999 WL 599285 at 21 ("Congress may prohibit conduct that is not itself unconstitutional as prophylaxis against discrimination that may be subtle or difficult to detect," and courts should accord deference to Congress' judgment as to how to draw the line to prevent discrimination).

II. 42 U.S.C. § 2000d-7 VALIDLY WAIVES ELEVENTH AMENDMENT IMMUNITY FOR CLAIMS UNDER SECTION 504

The Ninth Circuit in Clark also upheld 42 U.S.C. § 2000d-7 as a valid exercise of the Spending Clause, holding that States waived their immunity if they continued to apply for and accept federal funds after the statute's effective date. Clark, 123 F.3d 1267. No intervening decision of the Supreme Court has drawn that holding into question. To the contrary, the

Supreme Court's recent decision in College Savings Bank v. Florida Prepaid Postsecondary Expense Board, 119 S. Ct. 2219 (1999), bolsters the Ninth Circuit's holding.

In College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, the Supreme Court held that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions. College Savings, 119 S. Ct. at 2231. Because "Congress has no obligation to use its Spending Clause power to disburse funds to the States," Congress is free "to extract 'constructive waivers' of state sovereign immunity" in exchange for the grant. Id.; see also Alden v. Maine, 119 S. Ct. 2240, 2267 (1999) (Nor, subject to constitutional limitations, does the Federal Government lack the authority or means to seek the States' voluntary consent to private suits.) Cf. South Dakota v. Dole, 483 U.S. 203 (1987).

Given this holding, defendants do not dispute Congress' power to require a waiver of immunity under Section 504. Instead they claim that Section 504's waiver language is insufficiently clear. But defendants fail to point to any controlling authority that would authorize this Court to reject the Ninth Circuit's explicit holding in Clark that Section 2000d-7 is sufficiently clear to be valid. Clark, 123 F.3d at 1271. Indeed, other courts of appeals to address this issue have followed the holding of Clark. See Litman v. George Mason Univ., No.

98-1742, 1999 WL 547910 (4th Cir. Jul. 28, 1999); In re Innes, No. 97-3363, 1999 WL 641865 at *7 (10th Cir. Aug. 24, 1999).[13]

Clark is thus controlling precedent on this issue and dictates that California waived its Eleventh Amendment immunity to Section 504 suits when it elected to accept federal funds after the effective date of Section 2000d-7.

[13/]Since Defendants' brief was filed, a panel of the Eighth Circuit held that Section 2000d-7 did not constitute a valid waiver because the condition was "impermissibl[y] coerci[ve]." Bradley v. Arkansas Bd. of Educ., No. 98-1010, 1999 WL 673228 (8th Cir. Aug. 31, 1999). This case is inapposite because Defendants have not argued that they were coerced into waiving their sovereign immunity. In any event, Bradley conflicts not only with Clark, which is binding precedent, but also with Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989), which held that the "coercion theory" was highly suspect as a method for resolving disputes between federal and state governments and was essentially non-justiciable.

CONCLUSION

The Eleventh Amendment is not a bar to Plaintiffs' action against the State Defendants, and Defendants' motion for judgment on the pleadings should be denied.

Dated: September 10, 1999

Respectfully submitted,

BILL LANN LEE
Acting Assistant Attorney General

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JOHN L. WODATCH
RENEE M. WOHLENHAUS
PHILIP L. BREEN
BEBE NOVICH
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66738
Washington, D.C. 20035-6738
(202) 616-2313

PUBLIC LAW 101 - 336

THE AMERICANS WITH DISABILITIES ACT OF 1990

(AS AMENDED)

TITLE V MISCELLANEOUS PROVISIONS

SEC. 2. FINDINGS AND PURPOSES. *42USC 12101.*

(a) Findings. The Congress finds that

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individual with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and crite-ria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are 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 sterotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. It is the purpose of this Act

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

SEC. 3. DEFINITIONS. *42 USC 12102*

As used in this Act:

(1) Auxiliary aids and services. The term "auxiliary aids and services" includes

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments:

(B) qualified readers, taped texts, or other effective methods of making visually delivered
materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability. The term "disability" means, with respect to an individual

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State. The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Island, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

TITLE I EMPLOYMENT

SEC. 101. DEFINITIONS. *42 USC 12111*

As used in this title:

(1) Commission. The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(2) Covered entity. The term "covered entity" means an employer, employment agency,

Bill Lann Lee,
Acting Assistant Attorney General
John L. Wodatch, Chief
Renee M. Wohlenhaus, Deputy Chief
Bebe Novich, Trial Attorney (D.C. Bar No. 431203)
Disability Rights Section
Civil Rights Division
United States Department of Justice
P.O. Box 66738
Washington, D.C. 20035-6738
Tel: (202)616-2313

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ELIZABETH CAMPOS, et al.,	)	
	)	
Plaintiffs,	)	CASE NO. C-97-02326 MMC(PJH)
	)	
v.	)	**CERTIFICATE OF SERVICE**
	)	
SAN FRANCISCO STATE UNIVERSITY, et al.,	)	
	)	
Defendants.	)	
	)	
_____	)	

CERTIFICATE OF SERVICE

I certify that today I served copies of the United States' Brief in Opposition to Defendants' Motion for Judgment on the Pleadings upon Plaintiffs' and Defendants' counsel in the above action, by causing the document to be sent via first-class mail to the following addresses:

Guy B. Wallace
Sarah Colby
The Employment Law Center
a Project of the Legal Aid Society of
San Francisco
1663 Mission Street, Suite 400
San Francisco, CA 94103

Laurence W. Paradis
Rhoda Benedetti
Rowena Gargalicana
Alison M. Aubry
Disability Rights Advocates
449 15th Street, Suite 303
Oakland, California 94612

Stephanie Proctor Miller
Beth Ross
Leonard, Carder, Nathan, Zuckerman,
Ross, Chin, & Remar, LLP
1188 Franklin Street
Suite 201
San Francisco, CA 94109-6839

Attorneys for Plaintiffs

Michael T. Lucey
Jack B. McCowan, Jr.
Brian P. Maschler
Gordon & Rees, LLP
Embarcadero Center West
275 Battery Street
Twentieth Floor
San Francisco, CA 94111

Attorneys for Defendants

Dated this 10th day of September, 1999.

_____

BEBE NOVICH (D.C. Bar No. 431203)
Attorney
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
P.O. Box 66738
Washington, D.C. 20035-6738
(202) 616-2313