1997 WL 33555335 (C.A.9) (Appellate Brief)
United States Court of Appeals,
Ninth Circuit.

Worth “Buttercup” HALE, Ivo Sutich, Cheryl Ellison, Gregory Michael Myketuk, Angela Lopez, Jonathan Tulin, and Mental Health Association of San Francisco, Plaintiffs-Appellees,
v.
Kimberly BELSHÉ, Director, California Department of Health Services, sued in her official capacity; Stephen Mayberg, Director, California Department of Mental Health, sued in his official capacity; Matthew Fong, Treasurer, State of California, sued in his official capacity; and Kathleen Connell, Controller, State of California, sued in her official capacity, Defendants-Appellants.

No. 97-15177.
March 31, 1997.

On Appeal from a Judgment of the United States District Court for the Northern District of California No. C-96-1804 (SAW) The Honorable Stanley A. Weigel, Judge

Brief of Plaintiffs-Appellees

Melinda Bird (No. 102236), Sandra Pettit (No. 54317), Marilyn Holle (No. 61530), Eva Casas-Sarmiento (No. 163175), Protection & Advocacy, Inc., 3580 Wilshire Boulevard, Suite 902, Los Angeles, CA 90010-2512, Telephone: (213) 427-8747, Michael Stortz (No. 153378), Leslie B. Morrison (No. 178750), Protection & Advocacy, Inc., 449 15th Street, Suite 401, Oakland, CA 94612, Telephone: (510) 839-0811, James J. Preis (No. 82690), Mental Health Advocacy Services, Inc., 1336 Wilshire Boulevard, Suite 102, Los Angeles, CA 90017, Telephone: (213) 484-1628, Inge Dietrich (No. 104092), Protection & Advocacy, Inc., 100 Howe Avenue, Suite 235N, Sacramento, CA 95825, Telephone: (916) 488-9950

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INTRODUCTION

By this Court’s order filed on March 6, 1997, briefing in this appeal was expedited and the appeal was ordered calendared together with *Armstrong v. Wilson,* 96-16870, and *Clark v. California,* 96-16952. Plaintiffs/Appellees (hereinafter, “plaintiffs”) have reviewed the briefs filed by the plaintiffs and the United States Department of Justice in *Armstrong* and *Clark,* which address many of the same questions of Eleventh Amendment immunity at issue in the instant appeal. Plaintiffs have attempted wherever possible to avoid repetition and instead reference in footnotes those relevant portions of the briefing in *Armstrong* and *Clark*.

Instead, plaintiffs’ briefing in the instant case focuses on several issues which are unique to this appeal. Since we have asserted claims under the Medicaid Act and the Nursing Home Reform Act provisions of Medicaid, our brief addresses the long history of applying *Ex Pane Young* in Medicaid actions against state officials for prospective and injunctive relief. Secondly, our claims under the Americans with Disabilities Act (“ADA”) arise in the context of the right of persons with disabilities to receive services in the most integrated setting appropriate to their needs - the ADA’s so-called “integration mandate.” Accordingly, our briefing focuses on this provision and its application to persons in nursing homes who seek access to community services. Finally, we address the state’s attempt to mis-characterize this as a “deinstitutionalization” case.

ISSUES PRESENTED

1. Whether the rule of *Ex parte Young,* 209 U.S. 123 (1908) permits this suit for prospective injunctive relief against state governmental officials for violating the federal Medicaid Act, 42 U.S.C. § 1396 *et seq.,* the Nursing Home Reform Act, 42 U.S.C. § 1396r *et seq*. and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq*.

2. Whether Congress has the power under Section 5 of the Fourteenth Amendment to enforce the Equal Protection Clause to remedy discrimination against people with disabilities and therefore has the authority to abrogate the state’s Eleventh Amendment immunity from suit under the ADA.

JURISDICTION

1. Plaintiffs/Appellees (hereinafter “plaintiffs”) agree with defendants/appellants (hereinafter “defendants”) that the district court had jurisdiction pursuant to 28 U.S.C. Sections 1331 and 1343.

2. Plaintiffs agree with defendants that this Court has jurisdiction to hear the appeal of the district court’s order denying them absolute immunity under the Eleventh Amendment. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,*

506 U.S. 139 (1993).

ATTORNEYS’ FEES

If successful, plaintiffs will seek their attorneys’ fees, costs and reasonable litigation expenses for defending this appeal pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 12205.

STATEMENT OF THE CASE

Plaintiffs brought this class action on behalf of a putative class of persons who presently reside in locked nursing facilities, known as “Institutions for Mental Disease” (“SNF/IMD”) and persons who reside in communities all over California but who are at risk of being placed in SNF/IMDs because of defendants’ practices which they contend violate the Medicaid Act, the Nursing Home Reform Act and the ADA. Excerpt of Record (“ER”) at 3,4. Plaintiffs’ claims under the state-federal Medicaid program challenge the defendants’ illegal administration of community mental health services. Specifically plaintiffs contend that defendants violate their statutory obligations under the federal Medicaid Act by: (1) allowing some Medi-Cal recipients to receive the services they need in the community while others are denied these services; (2) imposing illegal limitations on the amount, duration or scope of available mental health rehabilitative services; (3) allowing some counties to decide on a county-by-county basis whether to make the services available with the result that in some counties a full range of services is provided while in others there are few services available; and (4) not providing services promptly when and where needed. Having decided to seek and accept federal Medicaid funds for rehabilitative mental health services, defendants are obligated to deliver them fairly and in accordance with federal law. ER at 4.

Plaintiffs also contend that defendants have violated their duties under the federal Nursing Home Reform provisions of the Medicaid Act, 42 U.S.C. § 1396r. Through the process of Pre-Admission Screening and Annual Resident Review[1], or “PASARR,” individuals identified as having a psychiatric disability are evaluated to determine whether they need a nursing facility level of care or whether their needs can be met in the community. Defendants have failed to do any assessments whatsoever for many individuals, have failed to do timely assessments for others, have failed to consider community alternatives and have failed to provide necessary services when they were otherwise unavailable. Full implementation of defendants’ PASARR responsibilities is critically significant to persons being considered for placement in SNF/IMDs since it would compel utilization of alternative community services and would do much to close the “revolving door” which sends plaintiffs back to locked psychiatric nursing homes when they could remain safely in the community if appropriate services were provided.

Finally, underlying these claims are plaintiffs’ claims under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.,* which requires defendants to provide services to persons with disabilities in the most integrated setting appropriate to their needs. Here, since plaintiffs could receive state funded mental health services in the community, it is a violation of the ADA to provide services instead only in locked psychiatric nursing homes.

Contrary to defendants’ strident claims, this is not a “deinstitutionalization lawsuit.” *See* Appellants’ Opening Brief (hereinafter, “AOB”) at 3: “Plaintiffs allege that State Defendants failed to comply with the Medicaid Act, NHRA and the ADA, by failing to deinstitutionalize all of California’s Institutes for Mental Disease, ...” Plaintiffs did not raise the issues of “right to treatment” which were rejected in *Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed. 28 (1982), nor did they ever raise a substantive due process claim. Plaintiffs did not seek to shut down IMDs through this action because they recognize that these placements are necessary for some individuals. Nor did plaintiffs seek to compel defendants to create new programs in the community since the present scope of community-based rehabilitative services in the state Medicaid plan will meet their needs. Plaintiffs *did* seek to force state officials to remove the illegal funding constraints and assessment practices which have limited the availability of these programs and resulted in unnecessary institutional placement for many in violation of federal law. Plaintiffs moved for class certification on August 2, 1996. Concurrently,

defendants moved to dismiss all of plaintiffs’ claims pursuant to Federal Rule of Procedure 12(b)(6) on numerous grounds, one of which is at issue in this appeal: that defendants are immune from suit under the Eleventh Amendment.

On December 2, 1996, District Judge Stanley Weigel issued his decision which denied defendants’ motion to dismiss pursuant to their Eleventh Amendment immunity defense. Judge Weigel held[2]

The Eleventh Amendment does not bar Plaintiffs from seeking injunctive relief to prevent State officers from continuing to violate the Medicaid Act, the PASARR provisions of the NHRA, and the ADA.

Dist. Ct. Opinion, ER at 5. This appeal followed.

SUMMARY OF ARGUMENT

This action falls within the well-settled rule that the Eleventh Amendment does not bar actions against state officers in their official capacities if the plaintiffs seek only a declaratory judgment or injunctive relief. *Ex Pane Young,* 209 U.S. 123 (1908). Since defendants concede that plaintiffs seek only prospective declaratory and injunctive relief against state officials sued in their official capacities, this Court need not even reach the constitutional questions posed by defendants regarding Congressional authority to otherwise abrogate state immunity.

The Supreme Court has expressly and implicitly recognized the continued viability of the *Young* rule (*Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 1133 n.14 and n.16 (1996)) and lower courts, in decisions both preceding and postdating *Seminole,* have regularly applied the *Young* exception to cases, such as this, which challenge state officials’ failure to follow the mandates of federal statutes irrespective of potential ancillary impact of the decision on the state. Indeed, since the adoption of the federal-state program in the Medicaid Act, courts, including California district courts and this Court, have addressed systemic violations of the Medicaid Act by state officials and routinely allowed remedies which result in significant alterations of state procedures.

Congress acted pursuant to a valid exercise of its powers under Section 5 of the Fourteenth Amendment in abrogating state Eleventh Amendment immunity from suit under the ADA. Section 5 gives Congress broad powers to pass appropriate legislation to enforce the Equal Protection Clause of the Fourteenth Amendment. *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717 (1966). These sweeping powers clearly support Congressional legislation which requires that states affirmatively insure equal treatment for individuals subject to discrimination. Thus the integration mandate of the ADA is justified by Congressional findings that disability based discrimination is grounded in the segregation and isolation of individuals with disabilities. *Martin v. Voinovich,* 840 F.Supp. 1175 (S.D. Ohio 1993). *Helen L. v. DiDario,* 46 F.3d 333 (3d Cir. 1995).

Much of the authority relied on by defendants is support of their positions is based on the false premise that this is a deinstitutionalization case and thus must be dismissed as irrelevant.

STANDARD OF REVIEW

Plaintiffs agree with defendants that the issues raised herein are reviewed de novo.

ARGUMENT

I. *EX PARTE YOUNG* PERMITS THIS SUIT AGAINST STATE OFFICIALS TO REDRESS VIOLATIONS OF FEDERAL LAW

Defendants argue that the district court is without jurisdiction to issue declaratory and injunctive relief to compel state officials to comply with the Americans with Disabilities Act, the Medicaid Act, and the Nursing Home Reform Act, citing *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114 (1996). To the contrary, the Eleventh Amendment is no bar to this action. Defendants do not dispute that plaintiffs seek only prospective declaratory and injunctive relief against state officials sued in their official capacities. Consequently, since this action falls within the well-settled exception to Eleventh Amendment immunity set forth in *Ex Pane Young,* 209 U.S. 123 (1908), this Court need not even reach the constitutional questions posed by defendants regarding Congressional authority to otherwise abrogate state immunity. Indeed, abrogation is wholly unnecessary for plaintiffs’ suit to proceed on their Medicaid Act claims, since Congress has not purported to abrogate state immunity for alleged violations of the Medicaid Act. *Cf. Wilder v. Virginia Hosp. Ass’n,* 496 U.S. 498, 517 (1990) (Congress passed in 1975 and then repealed in 1976, a provision requiring states to waive any Eleventh Amendment immunity from suit for violations of the Medicaid Act).[3]

Because the Nursing Home Reform Act is one part of the federal Medicaid Act, any immunities or lack thereof that defendants enjoy are synonymous with those under the Medicaid Act. Plaintiffs readily concede that neither the Nursing Home Reform Act nor the Medicaid Act of which it is a part are promulgated pursuant to the Fourteenth Amendment: both are concededly Spending Clause enactments. Compare, AOB at 10-11 (arguing that the Nursing Home Reform Act should be construed in a manner similar to Titles VI and IX).

A. *Undisturbed by* Seminole. Ex Parte Young *Allows Plaintiffs To Seek Prospective Injunctive Relief*

It is well-settled that “[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. 1983). This recognized distinction between allowable actions for prospective relief versus disallowed actions for retroactive monetary relief traces its lineage to *Ex Parte Young,* 209 U.S. 123 (1908).

In *Young,* the Supreme Court upheld an injunction against a state attorney general on the grounds that when a state official acts unconstitutionally, he acts *ultra vires,* “stripped of his official or representative character,” and thus of any immunity the state might have been able to provide. *Id*. at 160.

The rule of *Ex Parte Young* “gives life to the Supremacy Clause”, by providing a pathway to relief from continuing violations of federal law by a state or its officers. *Green v. Mansour,* 474 U.S. 64, 69 (1985). 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.” *Id*. at 68 (citations omitted).

In *Seminole,* the Court expressly acknowledged that while its holding prohibits certain suits against the state *qua* state, the Court was not disturbing the “other methods of ensuring the State’s compliance with federal law.” *Seminole* at 1133 n.14. The Court held that: “an individual can bring suit against a state officer in order to *ensure* that *the officer’s conduct* is in compliance with federal law”. *Id*. (emphasis added). At another point, the Court underscored the fact that “several avenues remain open for ensuring state compliance with federal law: an individual may obtain injunctive relief under *Ex Parte Young* to remedy a state officer’s ongoing violation of federal law.” *Id*. at n.16. Thus, the majority in *Seminole* took great pains to emphasize the narrow scope and implications of its decision in a fashion that makes it unmistakably clear that the *Young* doctrine remains alive and well.

Lower courts interpreting *Seminole* have also agreed that it does not modify the *Ex Parte Young* doctrine. The Fifth Circuit looked at the doctrine in light of the Supreme Court’s pronouncements, concluding:

> It is well established that the federal courts have jurisdiction to hear suits against state officials where, as here, the plaintiffs seek only prospective declaratory or injunctive relief to prevent a continuing violation of federal law. Our conclusion is unaffected by the Supreme Court’s recent decision in *Seminole Tribe*.

Cigna Health Plan of Louisiana v. Louisiana, 82 F.3d 642, 644 n.l (1996) (citations omitted). *See also Clark v. Mercado,* 1996 WL 328170 at slip. op. p.l and n.l (June 3, 1996, W.D.N.Y.) (“The Eleventh Amendment does not, however, bar suits seeking prospective relief against state officials . . . defendants’ reliance on *Seminole* is wholly misplaced.”); *Leavitt v. Arave,* 927 F.Supp. 394, 396 (D.Idaho 1996) (same).

The instant action falls squarely within the doctrine of *Ex Pane Young*. Plaintiffs have sued state officers in their official capacities, rather than the state itself, seeking only declaratory and injunctive relief. Defendants raise two arguments in opposition: that the relief requested really runs against the State and that *Ex Parte Young* should be limited only to claims of federal constitutional, and not federal statutory, violations. We discuss each argument in turn below.

B. Ex Parte Young *Applies Even If There Is An Ancillary Impact On The State.*

Defendants claim that since this suit is “seeking wide-ranging reforms on the part of the state defendants,” it is really against the state and is thus barred by the Eleventh Amendment. AOB at 14. Since the state itself has already included in its state Medicaid plan the community mental health services to which plaintiffs claim an entitlement (ER at 61 - District Ct. Op.), ordering state officials to make these services available on an equitable, state-wide basis will not be a radical restructuring of the program. 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. *Papasan v. Allain,* 478 U.S. 265, 278 (1986). *Accord, Kostok v. Thomas,* 105 F.3d 65, 69 (1997) (Eleventh Amendment no bar to *Ex Parte Young* Medicaid suit for new wheelchair, despite ancillary fiscal impact on the state).

In fact, no Supreme Court case has ever held that injunctive or declaratory relief against state officers is barred because the state is the real party in interest.[4] Quite the contrary, the high court has frequently recognized that *Ex parte Young* actions are justified, “notwithstanding the obvious impact on the state itself.” *Pennhurst* //, 465 U.S. at 104. “Relief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury.” *Papasan, 478 U.S. at 278. Accord Milliken v. Bradley,* 433 U.S. 267, 288-90 (1977) (injunction requiring state officials to eliminate prospectively all vestiges of *de jure* segregated school system not barred by Eleventh Amendment, regardless of the impact on the state treasury).

Moreover, cases such as this one addressing systemic violations of the Medicaid Act necessarily result in statewide reforms. Courts have routinely and correctly permitted Medicaid cases to seek and secure injunctive relief under *Ex pane Young*. This has been true in other California Medicaid cases. Sweeping state-wide reforms were ordered in *Clark v. Kizer,* 758 F.Supp. 572 (E.D. Cal. 1990) (summary judgment), *aff’d and remanded sub nom. Clark v. Coye,* 967 F.2d 585 (9th Cir. 1992), *on remand,* No. S-87-1700 JFM, Medicare & Medicaid Guide New Dev. ¶ 40,888 (Oct. 14, 1992), reversed on other grounds, 60 F.3d 600 (9th Cir. 1995). There, the court ordered state officials to increase the reimbursement rates for dentists and maintain a toll-free number to link Medi-Cal recipients with dentists to address violations of the access and comparability provisions of the Medicaid Act, 42 U.S.C. §§ 1396a(a)(10)(A) and 1396a(a)(10)(B).

Valdivia v. Department of Health Services, Case No. S-90-1226 EJG/PAN (Order and Permanent Injunction August 11, 1992, Stipulated Order April 13, 1993), CCH Medicare & Medicaid Guide ¶ 41,959, addressed California’s failure to comply with the Nursing Home Reform portions of the Medicaid Act by broad orders affecting most aspects of care for persons in

nursing facilities including resident assessments, residents’ rights, licensing and certification requirements, standards for authorizing physical and occupational therapy, etc.

Charpentier v. Belshé addressed the problem of dual-eligibles who received both Medicare and Medicaid and were being denied power and custom wheelchairs in violation of Medicaid’s comparability provision. The district court issued a mandatory preliminary injunction barring the state from limiting its payment to 20% of Medicare’s reasonable charge. *Charpentier,* CCH Medicare & Medicaid Guide New Dev. ¶ 38,937 (S-90-758 EJG/PAN, Nov. 20, 1990). This order was expanded to include medical supplies and other equipment, CCH Medicare & Medicaid Guide New Dev. ¶ 39,791 (January 9, 1992), with the permanent injunction issuing December 21, 1994. New Dev. ¶ 43,123. Compliance with the *Charpentier* injunctive orders required significant changes in the tape-to-tape billing and payment procedures for Medicare-Medicaid claims and changes in the Medi-Cal procedures to accommodate supplemental payments.

Sobky v. Smoley, 855 F.Supp. 1123 (E.D. Cal. 1994), was another *Young* action for declaratory and injunctive against California Medicaid officials. As in this case, the plaintiffs in *Sobky* alleged violations of the statewideness, reasonable promptness, and comparability provisions of the Medicaid Act, 42 U.S.C. § 1396a(a)(1), 1396a(a)(8), and 1396a(a)(10)(B). The district court found that state officials had violated the Medicaid Act in their administration of the state methadone treatment system and ordered statewide system changes to insure Medi-Cal beneficiaries had access to methadone treatment services without a waiting list and without regard to their county of residence.

In *Sneede v. Kizer,* 758 F.Supp. 607 (N.D. Cal. 1990), the court ordered state officials not to attribute income from one person to another except spouse to spouse and parent to child in compliance with the Medicaid provision at 42 U.S.C. §§ 1396a(a)(17); the implementation required by this order was staggering, requiring the issuance of new manuals and directives, massive staff trainings, and substantial changes in computer programs.

Similarly, *Ex Pane Young* Medicaid cases against state officials in other jurisdictions also have sought relief which resulted in statewide reforms in the Medicaid system.[5]

C. Ex Parte Young *Has Never Been. Nor Should It Be. Limited To Constitutional Violations Alone.*

Defendants claim that *Ex Pane Young* permits a narrow exception to Eleventh Amendment immunity in cases seeking prospective injunctive relief against state officials for constitutional violations.” AOB at 4. In an apparent case of wishful thinking, defendants assert that “[t]his court believes, and Defendants agree, that extending *Ex Parte Young* to suits involving federal statutory violations, as alleged here, was a mistake.” AOB at 4. To the contrary, in *Almond Hill School v. U.S. Dept. of Agriculture,* 768 F.2d 1030, 1034 (9th Cir. 1985) and again in *Natural Resources Defense Council (NRDC) v. California Department of Transportation,* 96 F.3d 420, 422 (9th Cir. 1996), this Court found no reason to limit *Ex Pane Young* to constitutional violations alone.[6]

In fact, counsel have found no case in which the court has ever seriously questioned the applicability of *Young* to redress violations of federal statutory law. Even in *Almond Hill,* this Court identified no contrary authority and seemed to regard its conclusion as uncontroversial. The three cases which cite this holding in *Almond Hill* all conclude that *Young* applies to federal statutory violations and not just to constitutional violations. *NRDC,* 96 F.3d 420 (9th Cir. 1996); *Atlantic Health Care Benefits Trust v. Foster,* 809 F.Supp. 365 (M.D.PA. 1992), *aff’d,* 6 F.3d 778 (3rd Cir. 1993); *Strahan v. Coxe,* 939 F.Supp. 963 (D. Mass. 1996).

The Supreme Court was presented in *Seminole* itself with the opportunity to limit *Ex Pane Young* in the manner proposed by defendants. Since *Seminole* concerned alleged violations of federal statute, rather than constitutional violations, the court could have disposed of the *Ex Pane Young* issue on this ground, but did not. Similarly, *Edelman v. Jordan,* 415 U.S. 651.

664-668 (1974), *Quern v. Jordan,* 440 U.S. 332, 342, 99 S.Ct. 1139, 1146, 59 L.Ed. 358 (1979) and *Green v. Mansour* 424 U.S. at 69, were all *Ex Pane Young* suits against state officials to enforce provisions of the Social Security Act. In all three, the Supreme Court did not characterize this as an “extension” of *Ex Pane Young;* rather, it concluded this exception to state immunity was central to the balance of federalism.

Defendants seem to suggest that *Almond Hill* was an aberration - an “extension” of *Ex Pane Young* to novel and controversial realms. AOB at 15-16. In fact, every significant, reported Medicaid suit in the history of this major federal-state program has been an *Ex Pane Young* action against state officials for violation of the federal Medicaid statute, the most significant perhaps being *Wilder v. Va. Hospital Association,* 496 U.S. 498, 110 S.Ct. 2510-(1990). *Wilder* was a Section 1983 action against “several state officials, including the Governor,” in which plaintiffs sought declaratory and injunctive relief for violations of the Boren Amendment to the Medicaid Act. 110 S.Ct at 2514.[7]

Every court which has considered Eleventh Amendment immunity defenses post -*Seminole* has permitted an *Ex Parte Young* action involving statutory Medicaid claims against state officials: *Maryland Psychiatric Society, Inc. v. Wasserman,* 1996 WL 71882 n.1 (4th Cir., Dec. 16, 1996)*Maryland Psychiatric Society, Inc. v. Wasserman,* 1996 WL 71882 n.1 (4th Cir., Dec. 16, 1996) (court has jurisdiction to hear claims against state officials for violation of the federal Medicaid Act, despite *Seminole);* *Daniels v. Wadley,* 926 F.Supp. 1305, 1310 (M.D. Tenn. 1996) (*Seminole* “poses no barrier to Medicaid suit under *Ex Parte Young”);* *Hunter v. Chiles,* 944 F.Supp. 914, 917 (S.D.Fla. 1996) (permitting Medicaid claims against state officials under *Ex Parte Young* because “the relevant law in this area is unchanged” despite *Seminole*).[8]

Pre-*Seminole* Medicaid cases are equally consistent in permitting *Young* actions for prospective relief against state officials for violations of the Medicaid Act. *See, e.g.,* *Kimble v. Solomon,* 599 F.2d 599, 601 (4th Cir. 1979) (state officials reduced Medicaid benefits without complying with federal notice requirements in Medicaid statute; while retroactive relief was barred by Eleventh Amendment, prospective relief was permitted); *Granato v. Bane,* 74 F.3d 406, 410-413 (2nd Cir. 1996) (state agency violates Medicaid statute requiring notices of action and aid paid pending the hearing; damages barred by the Eleventh Amendment but court ordered prospective relief on statutory claims); *Rehabilitation Ass’n of Va. v. Kozlowski,* 42 F.3d 1444, 1449 (4th Cir. 1994) (suit against state Medicaid director is not barred by Eleventh Amendment because of *Young* and *Edelman);* *New York City Health and Hospitals v. Perales,* 954 F.2d 854 (2nd Cir. 1992) (where provider reimbursement scheme violated federal Medicaid statute, Eleventh Amendment is no bar to prospective relief).

D. *The Historical Development of the* Ex Parte Young *Doctrine Demonstrates Its Continued Viability.*

Defendants argue without reference or supporting citation that “extending *Ex Parte Young* to suits involving alleged violations of federal statutory rights frustrates the very reasons which led to the passage of the Eleventh Amendment, without substantially furthering the supremacy of the federal law.” AOB at 4-5. *Accord* AOB at 16.

Defendants refer to the “historically sound principle” that “the Eleventh Amendment prevents Congressional authorization of suits by private parties against unconsenting states.” AOB at 8, quoting *Seminole,* 116 S.Ct. at 1131-32. In fact, historical evidence is to the contrary. The rule we speak of under the name of *Ex Parte Young* has been recognized since the Middle Ages. Numerous commentators agree that it has been settled doctrine that a suit against an officer of the Crown permitted relief against the government despite the sovereign’s immunity from suit in its own courts and the maxim that the King can do no wrong. Jaffe, *Suits against Governments and Officers: Sovereign Immunity,* 77 Harv. L.Rev., at 3, 18-19. Thus the early English writs of disseisin and of attaint and later writs of certiorari and mandamus permitted actions against the “King’s man” even when the Sovereign himself was immune. Jaffe at 9, 16. As Jaffe notes in his commentary, the passage of the Eleventh Amendment in 1798

> might conceivably have been taken so to extend the doctrine as to exclude suits against state officers even

> in cases where the English tradition would have allowed them. There was a running battle as to where the line would be drawn. The [Eleventh] Amendment was appealed to as an argument for generous immunity. But there was the vastly powerful counterpressure for the enforcement of constitutional limits on the states.

Id. at 20-21. There began a series of cases permitting the English practice of permitting suits against officers, culminating in *Young* itself. Orth, *Judicial Power of the United States,* at 34-35, 40-41, 122. *Young* struck the time-honored balance: state officers never have authority to violate the Constitution or federal law, so any illegal action is stripped of state character and rendered an illegal individual act, since “[t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.” *Ex Pane Young,* 209 U.S., at 159-160, 28 S.Ct., at 453-454.

In sum, “the doctrine of *Ex Pane Young* seems indispensable to the establishment of constitutional government and the rule of law.” *Perez v. Ledesma,* 401 U.S. 94, 110 91 S.Ct. 674, 690 (1971) (Brennan, concurring in part and dissenting in part, quoting C. Wright, *Handbook of the Law of Federal Courts,* 292 (2nd ed. 1970). *See also E*. Chermerinsky, *Federal Jurisdiction* 393 (2d ed. 1994).

Given that *Ex Pane Young* represents a rule of such weight and longevity, it is the radical restriction of its scope, rather than its continued enforcement, that would upset federal/state relations. As the high court has repeatedly taught, such a change should come only with an extraordinarily “clear statement” before assuming a Congressional purpose to affect the federal balance.

> [I]f Congress intends to alter the “usual constitutional balance between the States and the Federal Government,” it must make its intention to do so “unmistakably clear in the language of the statute.”

Will v. Michigan Dept. of State Police, 491 U.S. 58, 65, 109 S.Ct. 2395, 2400-2402, 115 L.Ed2d 410 (1991), quoting *Atascadero State Hospital v. Scanlon,* 473 U.S. at 242, 105 S.Ct. at 3147.

II. THE ABROGATION OF ELEVENTH AMENDMENT IMMUNITY CONTAINED IN THE AMERICANS WITH DISABILITIES ACT IS A VALID EXERCISE OF CONGRESS’ POWER UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT.

Following the Supreme Court’s decision in *Seminole Tribe,* this Court concluded that the abrogation of state Eleventh Amendment immunity from suits under the ADA was a proper exercise of Congress’ enforcement power under the Fourteenth Amendment. *Duffy v. Riveland,* 98 F.3d 447, 452 (9th Cir. 1996). Every other court which has considered this issue following *Seminole* has reached the identical conclusion. *Hunter v. Chiles, supra,* 944 F.Supp. at 917 (ADA and the Medicaid program); *Mayer v. University of Minnesota,* 940 F.Supp. 1474, 1480 (D.Minn. 1996) (ADA and state university employment); *Niece v. Fitzner,* 941 F.Supp. 1497, 1504 (E.D. Mich. 1996) (ADA and prison telephone communications). *See also, Martin v. Voinovich,* 840 F.Supp. 1175, 1186-87 (S.D. Ohio 1993) (pre-*Seminole* decision that Congress had authority for ADA abrogation under Fourteenth Amendment).

Defendants concede, as they must, that Congress expressly abrogated Eleventh Amendment immunity with enactment of the ADA (42 U.S.C. § 12202 (express abrogation), 42 U.S.C. § 12101(b)(4) (constitutional authority)), but nevertheless contend “that Congress did not act pursuant to a valid exercise of power since it did not act pursuant to the Fourteenth Amendment.” AOB at 8. Thus, this Court’s inquiry is limited to whether Congress had authority under the Fourteenth Amendment to enact the ADA.

A. *Congress Has the Broadest of Plenary Powers to Adopt Statutes To Enforce The Fourteenth Amendment*

The Civil War amendments, including the Fourteenth Amendment, “were specifically designed as an expansion of federal power and an intrusion on state sovereignty.” *City of Rome v. United States,* 446 U.S. 156, 179, 100 S.Ct. 1548, 1563 (1980) decided April 22, 1980. The Fourteenth Amendment itself directly confers upon Congress expansive powers: “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. Const, amend. XIV, § 5.

When the Supreme Court first considered the meaning of Section 5 in *Ex Parte Virginia,* 100 U.S. 339 (10 Otto) (1879), it upheld the constitutionality of a statute enacted by Congress prohibiting disqualification of jurors based on race. In so holding, the court broadly defined the power granted Congress by Section 5:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 345-46.

In *Katzenbach v. Morgan,* 384 U.S. 641, 86 S.Ct. 1717 (1966), the Supreme Court upheld a Congressional enactment prohibiting literacy tests under the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e). The Supreme Court rejected an argument that under Section 5 Congress could only prohibit acts that would violate the substantive provisions of the Fourteenth Amendment. “Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.” 384 U.S. at 651, 86 S.Ct. at 1723-1724.

More recently, in *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666 (1976), the Supreme Court upheld another Congressional abrogation of state immunity, again based on Section 5 of the Fourteenth Amendment. The abrogation permitted employment discrimination suits brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). The high court noted that “the Eleventh Amendment, and the principle of state sovereignty that it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.” *Fitzpatrick,* 427 U.S. at 456, 96 S.Ct. at 2671.

> When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is “appropriate legislation” for purposes of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials “*which are constitutionally impermissible in other contexts.*”

Id. (citation omitted)(footnote omitted)(emphasis added). *Accord* *Schmidt v. Oakland Unified Sch. Dist.,* 662 F.2d 550, 557 n.8 (9th Cir. 1981) (under Section 5 of the Fourteenth Amendment, “Congress is not limited to prohibiting activities which would be held by the courts to violate the Fourteenth Amendment”).

In the course of judicial review of Congress’ authority in this area, “great deference is to be accorded Congress’ determination of what measures are appropriate” in exercising its enforcement powers under Section 5 of the Fourteenth Amendment. *Bond v. Stanton,* 555 F.2d 172, 175 (7th Cir. 1977). According to the high court in *Katzenbach,* “[i]t was for Congress, as the branch that made th[e] judgment, to assess and weigh the various conflicting considerations ... It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which Congress might resolve the conflict as it did.” 384 U.S. at 653, 86 S.Ct. at 1725.

Consistent with this principle, *post-Seminole* cases have upheld Congressional abrogation provisions in statutes other than the ADA, based on the Fourteenth Amendment. *Mockaitis v. Harcleroad,* 104 F.3d 1522 (9th Cir. 1997) (Religious Freedom Restoration Act); *Kimel v. Florida Board of Regents,* 1996 U.S. Dist. Lexis 7995 (N.D. Fla. May 17, 1996), *appeal pending,* No. 96-2788 (11th Cir.) (Age Discrimination in Employment Act); *Teichgraeber v. Memorial Union Corp.,* 946 F.Supp. 900 (D.Kan. 1996) (Age Discrimination in Employment Act); *Timmer v. Michigan Dep’t of Commerce,* 104 F.3d 833 (6th Cir. 1997) (Equal Pay Act); *Weaver v. Clarke,* 933 F.Supp. 831 (D. Neb. 1996) (Civil Rights Attorney’s Fees Awards Act).

B. *The ADA is Appropriate Legislation to Enforce The Fourteenth Amendment.*

In *Katzenbach,* the Supreme Court explained that a Congressional enactment is authorized by the Fourteenth Amendment if it “may be regarded as an enactment to enforce the Equal Protection Clause, ... is ‘plainly adapted to that end’ and ... is not prohibited by but is consistent with the ‘letter and spirit of the constitution.”’ 384 U.S. at 651, 86 S.Ct. at 1724 (citations omitted).

As legislation with an anti-discrimination focus, the ADA meets the *Katzenbach* test. In enacting the ADA Congress expressly invoked “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.” 42 U.S.C. § 12101(b)(4). *See also* 42 U.S.C. § 12101(b)(1) (purpose of the ADA is “the elimination of discrimination against people with disabilities”). Congressional findings in the ADA expressly reference problems of disability-based discrimination and segregation. 42 U.S.C. 12101(a)(2). Pursuant to Circuit Rule 28-2.7, plaintiffs have included relevant text of the ADA, which includes these findings, in an Addendum to this brief.

Congress itself characterized the ADA as “civil rights” legislation, harkening to its Fourteenth Amendment roots. S.Rep. No. 116, 101st Cong., 1st Sess. 19 (1989) (proposing “omnibus civil rights legislation” for people with disabilities); H.R.Rep. No. 485 (II), 101st Cong., 2nd Sess. 40 (1990) (ADA “will finally set in place the necessary civil rights protections for people with disabilities”).

In addition, the courts have consistently concluded that the ADA, as well as Section 504 on which it was based, have the purpose of furthering “the traditional Equal Protection goal of protecting a discrete class of individuals from arbitrary and capricious action.” *EEOC v. Calumet County,* 686 F.2d 1249, 1252 (7th Cir. 1982).[9]

Accordingly, the ADA is a valid exercise of Congress’ power to “enforce, by appropriate legislation,” the Fourteenth Amendment’s guarantee of equal protection.

C. *Defendants’ Arguments Against Congressional Abrogation Authority Are Unavailing.*

Defendants make two arguments that Congress exceeded its authority under the Fourteenth Amendment in enacting the ADA. First, they argue that the ADA is outside the scope of the Fourteenth Amendment because it imposes affirmative obligations and not merely equal treatment. AOB at 12. Second, defendants argue that this is really a “deinstitutionalization” case as in *Youngberg v. Romeo* and its progeny, and that because the Supreme Court held in *Youngberg* that there is no constitutional due process right to community treatment, integration mandates in the ADA are also outside the constitutional authority of the Fourteenth Amendment. AOB at 12-13. Both arguments are wrong.

1. Affirmative Obligations Under The ADA Are Consistent With Congress’ Broad Powers Under Section 5 Of The Fourteenth Amendment.

Defendants simplisticly focus on equal treatment as the sole remedy under the Fourteenth Amendment. AOB at 12. But the high court has never limited the remedial reach of the Equal Protection Clause to equal treatment alone.[10] To the contrary, in decisions concerning access to the courts by indigent people, the Supreme Court teaches that the Equal Protection Clause is sometimes violated by treating unlike persons alike. *See, e.g.,* *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. at 585 (1956); *M.L.B. v. S.L.J.,* 519 U.S. 102, 117 S.Ct. 555 (1996). In these cases, in which the states treated indigent parties appealing from certain court proceedings as if they were not indigent, the Supreme Court noted that “a law nondiscriminatory on its face may be grossly discriminatory in its operation.” 117 S.Ct. at 569, *quoting* *Griffin,* 351 U.S. at 17 n. 11, 76 S.Ct. at 590 n.11. Consequently, the Equal Protection Clause required that states affirmatively modify their policies to waive appellate fees in order to ensure equal “access” to appeal for indigent persons. *Id*. at 560.

Moreover, “[h]ere we deal, . . . not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is a fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress.” *Fullilove v. Klutznick,* 448 U.S. 448, 483, 100 S.Ct. 2758, 2777 (1980). In *Fullilove,* the Supreme Court affirmed Congress’ authority under the Fourteenth Amendment to enact the “minority business enterprise” provision of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2):

> Congress may not only induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has the authority to declare certain conduct unlawful, it may, as here, authorize and induce action to avoid such conduct.

Id. at 483-484, 100 S.Ct. at 2777. See also *Schmidt v. Oakland Unified Sch. Dist. 662, F.2d 550, 557 n.8 (9th Cir. 1981)*.

Instead of heeding the teachings of the Supreme Court itself, defendants base their interpretation of the scope of the Fourteenth Amendment exclusively on dicta from a single district court case from the Eastern District of North Carolina. *Pierce v. King,* 918 F.Supp. 932 (E.D.N.C. 1996); AOB at 12. *Pierce* was a prison employment case which involved facts and issues far afield from those in the instant case. The *Pierce* court concluded that the plaintiff inmate had no standing under the ADA to request accommodation because there was no covered employment relation. *Pierce,* 918 F. Supp. at 942. The *Pierce* court’s discussion of the Fourteenth Amendment and the ADA occurred in the course of its standing discussion and was not necessary to its ruling.

At the same time that defendants rely solely on dicta in *Pierce,* they fail to inform this Court of an ADA case which *is* directly on point both factually and legally. *Martin v. Voinovich,* 840 F.Supp. 1175 (S.D. Ohio 1993). Like this case, *Martin* was brought on behalf of persons with disabilities who were forced to remain in institutions and nursing homes, even though they were eligible for community placements. While the state had community placement programs, they were not

adequately funded, so that there were no openings for the *Martin* plaintiffs. As in this case, the *Martin* plaintiffs asserted violations of the ADA, as well as the Nursing Home Reform Act provisions of the federal Medicaid Act. Although pre-*Seminole, Martin* specifically considered whether Congress had constitutional authority to abrogate the state defendant’s Eleventh Amendment immunity under the ADA. Citing *Fitzpatrick v. Bitzer,* the *Martin* court concluded that the Fourteenth Amendment affords such authority. *Id*. at 1186-87.

Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1995) is another ADA case which, along with *Martin,* demonstrates the necessity for the affirmative remedies for disability-based discrimination which Congress fashioned in the ADA. In *Helen L.,* the plaintiffs lived in nursing facilities where they had no contact with members of the community and were segregated away from non-disabled persons. The plaintiffs sought to participate in the state’s existing program of home attendant care, for which they were qualified and which would have enabled them to return to live with their families and friends in the community. Scarce funding from the state created arbitrary limits on the numbers of persons who could participate in the attendant care program, resulting in a waiting list for these limited community services just as limited funding in California has resulted in the *de facto* waiting lists for rehabilitative mental health services in the community which are at issue in the instant case.

To support their claim for community based services, the plaintiffs in *Helen L.* relied on the “integration mandate” in the ADA. The ADA provides that “no qualified person with a disability shall, by reason of such disability, be excluded from participation in or be denied the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. §12132. In addition, public entities must make “reasonable modifications to rules, policies, or practices” for a “qualified individual with a disability.” 42 U.S.C. 12131(2). The implementing regulations are even more specific, requiring that “[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the individual needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d).

The Third Circuit carefully considered the purpose of the ADA in its review of the justification for plaintiffs’ claim of a right to services “in the most integrated setting appropriate.” *Helen* L., 46 F.3d at 332-333.
In enacting the ADA, Congress found that “[h]istorically, society has tended to isolate and segregate individuals with disabilities and ...*such forms of discrimination* ... continue to be a serious and pervasive problem.” 42 U.S.C. § 12101(a)(2) (emphasis added). Congress also concluded that “[individuals with disabilities continually encounter *various forms of discrimination, including ... segregation* ....”, 42 U.S.C. § 12101(a)(5) (emphasis added).

Id. at 332. “Thus, the ADA and its attendant regulations clearly define unnecessary segregation as a form of illegal discrimination against the disabled.” *Id*. at 333. *See also* Cook, “*The Americans with Disabilities Act: The Move to Integration,”* 64 Temp. L. Rev. 393, 409-410.

Congress’ concerns in fashioning the ADA fall squarely within the scope of the Fourteenth Amendment, since it is well-recognized that segregation and isolation are forms of discrimination prohibited under the Equal Protection Clause. For example, in *Brown v. Board of Education,* 347 U.S. 483 (1954), the Supreme Court found that state-supported school segregation may affect children’s “hearts and minds in a way unlikely ever to be undone”, and that “[s]eparate . . . facilities are inherently equal.” *Id*. at 494-495.

Since integration is the most effective remedy for this form of discrimination, the Justice Department’s commentary on the ADA regulations explains that “[i]ntegration is fundamental to the purposes of the Americans with Disabilities Act.” 28 C.F.R. Part 35, App. A Sec. 35.130.

In summary, Congress’ broad authority under 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.” *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 490, 109 S.Ct. 706 (1989) (emphasis in original), *citing Katzenbach v. Morgan,* 384 U.S. 651. The integration mandate in the ADA construed in *Martin v. Voinovich* and *Helen L.* is just such a “prophylactic

rule” which deals with the problems of discriminatory segregation and isolation faced by persons with disabilities and is squarely within Congress’ authority under the Equal Protection Clause.

2. This Is Not A Deinstitutionalization Case And Is Not Controlled By Youngberg V. Romeo.

Defendants mischaracterize this as a “deinstitutionalization” case, attempting to bring it within the ambit of *Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452 (1982) and its progeny.[11] The *Youngberg* line of due process cases, all of which were decided prior to the enactment of the ADA, are irrelevant to Congress’ broad authority to enforce the Equal Protection Clause of the Fourteenth Amendment.

In *Youngberg,* the Supreme Court ruled that the plaintiff was only entitled to minimally adequate treatment under the due process clause of the Fourteenth Amendment. 457 U.S. at 322. Here, plaintiffs have alleged no constitutional due process claim. First Amended Complaint, ER at 1-41. Instead, they have alleged claims under the ADA, legislation in which Congress was able to exercise its broader remedial power. Thus, Congress was able to fashion remedies -- the right to services in the most integrated community setting appropriate -- which the courts alone may not have been able to impose as a judicial remedy directly under the Constitution. *See. e.g., Fullilove,* 448 U.S. at 483-484.

It is also important to note that the “integration mandate” of the ADA does not require the creation of entirely new community based programs, one of the remedies sought and rejected in *Youngberg*. As the Third Circuit makes clear in *Helen L*., “’deinstitutionalization’ involves ‘massive’ changes in a state’s programs and is not required absent a clear statutory command.” *Helen L.,* 46 F.3d at 336 n. 22 (citing *Pennhurst State School and Hospital v. Haldeman,* 451 U.S. 1, 24, 101 S.Ct. 1531, 1543 (1981)). The state defendants in *Helen L.,* like the defendant here, attempted to defeat the plaintiff’s claim “by labeling it a claim for ‘community care’ or ‘deinstitutionalization’ --something which the ADA does not require.” *Helen L.,* 46 F.3d at 336 (citations and footnote omitted.) The court was unimpressed:

> [Plaintiff] Idell S. is not asserting a right to community care or deinstitutionalization *per se*. She properly concedes that [defendant] DPW is under no obligation to provide her with any care at all. She is merely claiming that, since she qualifies for DPW’s attendant care program, DPW’s failure to provide those services in the “most integrated setting appropriate” to her needs (without a proper justification) violates the ADA.

Id.

Martin v. Voinovich is also helpful in de-constructing defendants’ contention that the instant case is merely a “deinstitutionalization” case barred by *Youngberg*. With factual allegations very similar to those in the instant case, the *Martin* plaintiffs also asserted a due process claim based on *Youngberg. Martin,* F.Supp. at 1207. Not surprisingly, the *Martin* court ruled that since “*Youngberg* does not give rise to a right to residential placement,” plaintiffs had *not* stated a *Youngberg* claim based on “allegations such as defendants have failed to provide residential services or remove persons from institutions to community living arrangements.” *Id*.[12] Significantly, the *Martin* court simultaneously recognized that these identical facts *did* give rise to a valid claim under the ADA and the Nursing Home Reform Act provisions of the Medicaid Act. *Id*. at 1142, 1197 - 1202.

3. *Title II of the ADA is consistent with Congress’ Broad Powers under Section 5 of the Fourteenth Amendment*

Noting that Congress identified the Commerce Clause as well as the Fourteenth Amendment as its authority for the ADA, defendants argue that plaintiffs have not alleged any ADA obligations under the Fourteenth Amendment. AOB at 11, In enacting the ADA, Congress invoked its powers under the Commerce Clause because it wished to reach the conduct of private parties. 42 U.S.C. 12101(b)(4). The Fourteenth Amendment, rather than the Commerce Clause, is the traditional constitutional authority for prescribing state conduct. *EEOC v. County of Calumet,* 686 F.2d at 1253. Since it is plain that this action is brought pursuant to Title II of the ADA against public rather than private entities, the obligations of the ADA which plaintiffs seek to enforce are obviously traced to the Fourteenth Amendment rather than the Commerce Clause. Congress’ authority to reach private entities through its authority to enforce the Fourteenth Amendment need not be decided here.

CONCLUSION

The district court’s judgment should be affirmed.

Appendix not available.

Footnotes

1 With the passage of the Medicaid Nursing Homes Annual Resident Review Act of 1996, Congress eliminated the annual Resident Review portion of PASARR.

2 The district court did not rule on plaintiffs’ motion for class certification and all proceedings in this case have been stayed by order of the district court pending the resolution of this appeal.

3 The state has continued to accept federal Medicaid funds following enactment of 42 U.S.C. § 2000d-7. That section was enacted pursuant to Congress’ Fourteenth Amendment authority to abrogate states’ Eleventh Amendment immunity by “manifesting a clear intent to condition participation in the programs funded under the Act on a State’s consent to waive its constitutional immunity.” *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 247 (1985). As analyzed at pages 40-42 of the Department of Justice’s *amicus* brief in *Armstrong,* continued acceptance of federal Medicaid funds following the enactment of § 2000d-7 constitutes a consent to be sued and a waiver of immunity with respect to claims that can be brought under § 2000d-7. While this action was not brought under Section 504 but under the broader sweep of the Americans with Disabilities Act, to the extent Section 504 and ADA claims are congruent, the state has waived its immunity and consented to suit.

4 Defendants cite only one case - *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 687 (1949) - in their support. AOB at 14. While *Larson* is actually inapposite, since it concerns federal immunity, the opinion notes that an official acting outside of his or her authority is not acting on behalf of the sovereign. *Id*. at 689-90.

5 *White v. Beal,* 555 F.2d 11146 (3d Cir. 1977)(state standards for qualifying for eyeglasses ordered changed so that access based on need not diagnosis); *Smith v. Vowell,* 379 F. Supp. 139 (W.D. Tex. 1974), *aff’d mem*. 540 F.23d 759 (5th Cir. 1974); *Greenstein v. Bane,* 833 F.Supp. 1054 (S.D. NY 1993) (statewide changes in how retroactive Medicaid payments were made so that beneficiaries could be reimbursed for out-of-pocket expenses to enforce); *Ledet v. Fischer,* 638 F.Supp. 1288 (M.D. LA 10997) (State required to change eligibility criteria for eyeglasses so that all who needed them would qualify, not just those who need them following cataracts)

6 Even the concurrence of Justices O’Scannlain and Kleinfeld in *NRDC* merely expressed relief that “whatever the result of the Supreme Court’s review,” it had granted certiorari in *Coeur D’Alene Tribe of Idaho v. Idaho,* 42 F.3d 1244 (9th Cir. 1994), *cert. granted,* 116 S.Ct. 1415 (1996) and would turn its attention to the issue. *NRDC,* 96 F.3d at 424.

7 Defendants cite *Amisub, Inc. v. State of Colorado Department of Social Services,* 879 F.2d 789 (10th Cir. 1989) and

Gamboa v. Rubin, 80 F.3d 1338, 1339-50 (9th Cir. 1996) for the proposition that there is no express abrogation of state immunity in the Medicaid Act. AOB at 9. This is a non-sequitur which plaintiffs have never disputed, a fact which the district court itself noted. Opinion, ER at 51.
Gamboa is wholly irrelevant, as it concerns the Eleventh amendment bar on raising state law claims against state defendants in federal court. 80 F.3d at 1350. More to the point, *Amisub* only lends additional support for plaintiffs’ *Young* claims. In *Amisub,* the state Medicaid agency was dismissed on Eleventh Amendment grounds but the case proceeded against the state Medicaid director based on *Ex Parte Young. Id*. at 793 n.7. The *Amisub* court then ruled for plaintiffs, finding multiple violations of the Medicaid Act and ordering the state director to comply with federal law. *Amisub* was one of the many circuit court cases that led to the court’s decision in *Wilder. See, Wilder v. Va. Hospital Assoc.,* 110 S.Ct. at 2522 n. 16.

8 In the district court, defendants raised a third argument, now apparently abandoned on appeal: that the remedial schemes of the ADA and the Medicaid Act evince Congressional intent to preclude private enforcement through an *Ex Pane Young* action. This argument was considered and rejected by the district court in its opinion. ER at 52 - 54. It has also been considered and rejected in the *post-Seminole* Medicaid cases cited in the text above.

9 *See Armstrong,* Brief of the United States at 34-39; *Armstrong,* Brief of Appellees at 24-28 for a discussion of additional cases regarding the Fourteenth Amendment as the authority for § 504 and the ADA.

10 *See Armstrong,* Brief of the United States, 22-32; *Armstrong,* Brief of Appellees, 34-38 for further analysis of Congress’ powers to prohibit intentional discrimination and disparate impact.
In their reply brief defendants may argue that Congress lacks the power to impose affirmative obligations to remedy discrimination against people with disabilities because the Supreme Court has not recognized disability as a suspect class. However, it is in dispute that people with disabilities are protected under the Fourteenth Amendment. *See City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S.Ct. (1985) (striking down discriminatory zoning ordinance). Additionally, “[t]he fact that the Supreme Court has subjected governmental classifications involving suspect classes to a higher level of scrutiny than other classifications does not prevent Congress from finding that another class of persons has been subjected to a history of unequal treatment and legislating pursuant to its enforcement powers of the Fourteenth Amendment to protect that class of persons from arbitrary discrimination.” *Mayer,* 940 Fed. Supp. at 1479. *See Clark,* Brief of the United States at 8-14; *Armstrong,* Brief of the United States at 14-20; *Armstrong,* Brief of Appellees at 29-34 for analysis of this issue.

11 Defendants also cite *Society for Good Will to Retarded Children v. Cuomo,* 737 F.2d 1239 (2nd Cir. 1984); *Rennie v. Klein,* 720 F.2d 266, 269, 271 (3rd Cir. 1983); *Johnson v. Brelje,* 701 F.2d 1201, 1210 (7th Cir. 1983); *Association for Retarded Citizens of North Dakota v. Olson,* 561 F.Supp. 473, 486 (D.N.D. 1982), *aff’d on other grounds,* 713 F.2d 1384 (8th Cir. 1983); *Sanchez v. New Mexico,* 396 U.S. 276, 90 S.Ct. 588 (1970); *State v. Sanchez,* 80 N.M. 438, 441 (1969). AOB at 13.

12 The *Martin* court did find that plaintiffs had stated a valid claim under *Youngberg* for the state’s failure to provide services necessary to maintain the health and safety of persons who were involuntarily institutionalized. *Martin,* 840 F.Supp at 1207.