No. 20-6520

IN THE
Supreme Court of the United States

Paul Viriyapanthu,

Applicant

v.

State of California, State Bar of California, Orange County Bar Association, John Nelson, and Richard Green

Respondents

Petition for Writ of Certiorari
To The United States Court of Appeals For the Ninth Circuit

Petition for Writ of Certiorari

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The State Respondents here receive federal funding under Title IV of the Social Security Act which conditions receipt of federal grant funding to the ADA pursuant to 42 U.S.C. §608(d) which states:

> **Nondiscrimination provisions**
> The following provisions of law shall apply to any program or activity which receives funds provided under this part:
> ... (3) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).
> (4) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.).

Pursuant to 28 CFR § 42.105 the federal government requires the states to agree to a "Statement of Assurances" specifically enumerating the ADA in order to receive funding. The disabled are third party beneficiaries in an agreement between the state and federal government to provide federal funding in exchange for ADA compliance.[i] When the disabled attempt to enforce the protections of the ADA, the states have been reneging on their agreement and moving to dismiss on grounds that *U.S. v. Georgia* 546 U.S. 151 (2006) requires a 14th amendment violation to abrogate sovereign immunity. In *Georgia* the Supreme Court instructed the lower courts to evaluate:

> "(1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid."

Congress overcame the 11th Amendment in two ways, but the Supreme Court only addressed §5 abrogation, not Spending Clause waiver. There are over 1,450 citations to *Georgia*, with a split of authority on what satisfies a 14A violation and whether immunity applies where there is no violation. Similarly situated disabled are receiving different outcomes resulting in unpredictability and a lack of national uniformity. A large subset of the hundreds of dismissed ADA cases were unwarranted dismissals as the state received funding under Title IV and other statutes such as 7 U.S.C. §2020(c)(2)(C) and 49 U.S.C. §5302(3)(I) which also condition funding to the ADA as a result of Congress amending statutes. For example, see 122 Stat. 1109 (May 22, 2008).

The questions presented are:

1. Where Congress conditioned the Americans with Disabilities Act to the states' receipt of funding under Title IV of the Social Security Act pursuant to 42 U.S.C. §608(d)(3) or other similar statutes and/or where the states have agreed to a "statement of assurances" with the federal government specifically enumerating the ADA in order to receive funding, must a Title II plaintiff demonstrate a 14th Amendment violation under *U.S. v. Georgia* to avoid dismissal when the state's waiver of sovereign immunity is by voluntary agreement pursuant to Congress's spending clause powers, and not pursuant to Congress's §5 powers to abrogate sovereign immunity to enforce the 14th amendment as was analyzed in *Georgia*?

2. Does Noerr-Pennington immunity apply to arbitrations conducted by private nongovernmental entities as the Ninth Circuit held here and in conflict (e.g. a split) with the Colorado Supreme Court and other federal courts which have held that arbitrations do not constitute a "petition to government" protected by the First Amendment and Noerr-Pennington?

3. Where a private organization which conducts arbitrations is also given authority by the state to select candidates for judicial appointment does arbitral immunity extend to non-arbitral related acts of giving racial preferences for positions as was held here and in contravention of *Forrester v. White* 484 U.S. 219 (1988)?

[i] See *Barnes v. Gorman* 536 U.S. 181, 185-186 (2002), "We have repeatedly characterized...Spending Clause legislation as 'much in the nature of a *contract*: in return for federal funds, the [recipients] agree to comply with federally imposed conditions.'"

Cases

Statutes

Regulations

Contents

I.Introduction

Congress used a two prong approach for the ADA by *both* abrogating under §5 *and* conditioning under spending clause powers but the *Georgia* decision only addresses §5. Review should be granted because the Federal Circuits and State Supreme Courts are split on what constitutes a 14th Amendment violation or whether abrogation is valid without a violation. There is a lack of national uniformity or predictability and similarly situated disabled are receiving completely opposite outcomes. Sometimes the ADA is enforceable, other times the case is dismissed—when the facts are the same. The split and contradicting outcomes could be resolved on alternative grounds of federal funding. The statutes covers a large swath of governmental entities including state courts, social service agencies, hospitals and state universities that are all funded under Title IV.

The issue affects a large number. Approximately a dozen or so dismissed ADA cases are referenced in this petition where the state likely received ADA conditioned funding which could have saved the case from dismissal. The total number of dismissed cases where the plaintiffs may have had alternative grounds to avoid dismissal likely ranges from dozens to potentially hundreds of cases based upon the sampling of cases identified here. If only 5% of the 1,450 cases citing to *Georgia* involved a government entity that received funding, that would still be 72 cases affected by the issue. From my review of the cases citing to *Georgia*, I estimate the percentage to likely be closer to 80% where the governmental entity received funding conditioned to the ADA. I have attached an actual "statement of

assurances" and cited the statutes/C.F.R so *the Court itself* can evaluate the potential for large numbers of ADA plaintiffs to be in the same boat as me.

CVSG is respectfully suggested as it would allow the SG to elaborate on how many potential ADA cases are affected. The funding is pursuant to programs operated by the Federal government, of which the federal government has a vested interest in enforcing the conditions of the terms of its own programs. In addition 42 U.S.C §608 is not the only federal law waiving sovereign immunity; due to dismissal/lack of discovery it is unknown whether the state received funding under other statutes which also may waives immunity of which the SG has records access.

Review should also be granted here because the issue is predisposed to evading review such that other plaintiffs will be hampered in raising the issue in the future. In order to raise the issue, a plaintiff would need to know which funding is received so the corresponding statutes could be pled. The problem is that dismissals are occurring by applying *Georgia* at the FRCP 12(b)(6) stage (which also occurred here) so that case is dismissed *before* claimants are given an opportunity to conduct discovery to identify the states' federal funding sources, which explains why the issue has not been resolved previously. Here the State Bar referenced the judiciary budget in pleadings (see pg. 36 of the Bar's Brief) so it could be addressed. In addition review is necessitated as *Georgia* is binding on lower courts who are obliged to follow unless/until the Supreme Court recognizes an exception; §608 was raised here but not addressed by the Ninth Circuit and it is unknown how often the issue was raised but not addressed by other Circuit Courts of Appeal in other cases.

This is a disability and race discrimination (Title VI of the Civil Rights Act of 1964) suit. Orange County is predominantly (54%) nonwhite, with large number of Southeast Asians (Viet, Hmong, Cambodian, Lao and Thai) who settled in the area following the Vietnam War (of which I am one). The county has one of the largest populations of Vietnamese in the country. Whites at the county's bar association were excluding minorities from practicing law and from obtaining judicial positions.

The state delegates authority to private local bar associations to review and select candidates for judicial appointment. The bar associations were giving preferences to their own white members for appointment resulting in few minority judges in Orange County in comparison to other counties which have three times more nonwhite judges. The race discrimination is part of a "pattern or practice" of race discrimination that the state's nonwhite attorneys have been forced to endure from the State Bar. Appendix 5 contains a report from the State Bar itself which conducted an investigation which begins with the following sentence:

> "For years the State Bar has heard anecdotes regarding the over-representation of people of color in the attorney discipline system."

Per the State Bar's own report *infra*, minority attorneys faced discipline at rates higher than whites, with Afro-Americans three times more likely to be disciplined.

The State Bar authorizes local bar associations, like OCBA, to conduct compulsory arbitrations of attorney's fees which are enforced through license suspension. The arbitrations are statutory, *not* based upon a contract to arbitrate, and under California law are enforceable when the factual and legal basis is untrue. OCBA was applying the law disparately against nonwhites and using the scheme to

revoke the licenses of nonwhites by falsifying the basis of the awards. Members were also simultaneously receiving payments out of the awards the OCBA was rendering under the statute's attorney's fees provision. I was ordered to "refund" $17,758.38 (Appendix 30) when I had never charged any attorney's fees to begin with. I was unable to pay (in a lump sum as demanded by the Bar) as I was disabled/unable to work and requested an accommodation in the form of an extension to pay due to Thymus Cancer. Abating license suspension when someone is in treatment for Thymus Cancer is a "reasonable" accommodation.

The State Bar's program is operated and enforced via "state action" by a funding recipient and is statutorily required to comply with the provisions of Title VI. As it currently stands, bar associations under the program are free to apply the law differently to nonwhites. A minority attorney can lose their license for performing the exact same acts white attorneys were providing. Here Respondents Green and Nelson were advertising the same services I lost my license for. Title VI, on the other hand, mandates that nonwhites be treated no differently from whites.

The Ninth Circuit has been refusing to enforce discrimination law against the State Bar. Regardless of merit, all suits against the Bar have been summarily dismissed so that none of the state's 250,000 attorneys could enforce federal law. Appendix 31 is the first page of a search of all cases the State Bar was named as a defendant. There are 240 cases which were all dismissed on the FRCP 12(b)(6) stage on sovereign immunity. The threat of suit forces the state to abide with discrimination law, but with the Ninth Circuit's refusal to enforce there's no

incentive to comply. As a result the states' nonwhite attorneys were subject to discrimination so pervasive that it can be corroborated statistically. This case is not simply correcting injustice to one litigant, but addressing the need of the states' 250,000 attorneys to be able to enforce federal discrimination law against the state.

Pursuant to Rule 10 the Ninth Circuit so far departed from accepted and usual procedures by deliberately refusing to follow binding Supreme Court precedent—directly overruling this Court—to warrant this Court's supervision. The Ninth Circuit refused to allow amendment to allege Title VI, and held three acts of Congress unconstitutional/unenforceable against the state in contravention of prior Supreme Court precedent upholding the laws. Dismissal was not by summary adjudication, but on FRCP 12(b)(6) dismissal; even where race discrimination is accepted as true at the pleading stage, federal law was still held unenforceable.

II. Petition for Certiorari and Parties

All parties to the writ of certiorari are contained in the caption

III. Opinions Below

The Ninth Circuit denied the Petition for Panel Rehearing and Rehearing En Banc on August 28, 2020. Appendix 1. The Ninth Circuit decision is from July 23, 2020, and is attached as Appendix 2. The appeal arises from a FRCP 12(b)(6) dismissal of the entirety of the case. The order of the District Court dismissing the State Bar is attached as Appendix 3. The order of District Court dismissing the Orange County Bar Association, John Nelson, and Richard Green are attached as Appendix 4. There was never any order by the District Court as to the State of California as the state never filed a Motion to Dismiss.

IV. Jurisdiction And Applicable Statutes

28 U.S.C. §1254(1) provides jurisdiction. The statutes at issue are Title II of the ADA, Title VI of the Civil Rights Act of 1964, The Sherman Act, and 42 USC §1981.

V. Statement of the Case

1. STATE RESPONDENTS' RECEIPT OF FEDERAL FUNDING WAIVES SOVEREIGN IMMUNITY

Appendix 6 contains the records of federal financial grants made to the Judicial Council (which is a subunit of the state judicial branch), on behalf of the California Courts. Appendix 7 are excerpts of the California Judicial Branch budget which begins with the sentence:

> "The Judicial Branch consists of the Supreme Court, courts of appeal, trial courts, and the Judicial Council. The Judicial Council is responsible for managing the resources of the Judicial Branch."

The budget (pg.2) shows receipt of funding under Title IV of the Social Security Act:

> "Additionally, the recent federal Families First Prevention Services Act expanded the list of eligible Title IV-E reimbursable activities to include court-appointed dependency counsel costs. The Budget includes $1.5 million ongoing General Fund for the Judicial Council to administer these federal reimbursements, which are estimated to be $34 million annually."

The "Families First Prevention Services Act" refers to Public Law 115-123, which made amendments to Title IV-E of the Social Security Act (42 U.S.C. §670 et seq) to provide funding to the states to assist children placed into foster care and adoption. Racial preferences had been given to whites for dependency council positions, commissioner positions and for judicial appointments paid for by the funding.

> 28 CFR § 42.104 states:
> (1) Whenever a primary objective of the Federal financial assistance to a program to which this subpart applies, is to provide employment,

> a recipient of such assistance may not (directly or through contractual or other arrangements) subject any individual to discrimination on the ground of race, color, or national origin in its employment practices....

Because the funding under the Families First Prevention Act was specifically to provide employment, the racial preferences given to whites is actionable under Title VI of the Civil Rights Act of 1964 rather than Title VII.

The placement of §608 makes it clear that this section applies to all funding under Title IV. For reference, I have attached the section headings as Appendix 8, which shows by its placement it applies to all of Title IV. 42 U.S.C. §608(d) states:

> **Nondiscrimination provisions**
> The following provisions of law shall apply to any program or activity which receives funds provided under this part:
> ...(3) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).
> (4) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.).

The term "program or activity" denotes all activities of a department of a state which receives federal funding and results from Congress enacting the Freedom Restoration Act of 1987, in response to the decision in *Grove City Coll. v. Bell*, 465 U.S. 555 (1984) which previously limited the scope only to the activities of the specified program receiving funding. Congress enacted 102 Stat. 28, Public Law 100-259 and modified the definition of "program or activity" to mean all activities of a recipient which is codified at Chapter 21 ("Federally Assisted Programs"), 42 U.S.C. §2000d-4a "Program or activity" or "program" defined, and which states:

> "For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of—
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government;"

See *Thomlison v. City of Omaha*, 63 F. 3d 786, 789 (CA8 1995):

> "Although the Fire Division did not receive any federal assistance directly, other Public Safety Department divisions...received federal funds. Because the definition of program or activity covers all the operations of a department...the entire Department is subject to the Rehabilitation Act."

See *Haybarger v. Lawrence County* 551 F.3d 193, 202 (CA3 2008):

> "the DRS is a subunit of the Fifty-Third Judicial District, which is in turn part of the UJS. Consequently, we hold that the receipt of federal funds by the DRS effectuated a waiver of Eleventh Amendment immunity under the RA for not just the DRS, but for all subunits of the Fifty-Third Judicial District, including the LCAPPD."

The Judicial Council is a subunit of the courts responsible for the receiving and distributing the federal grants to the State Courts. As a subunit of a department, the Judicial Council's receipt of funds waives sovereign immunity for the entire department—and the State Bar is a subunit in the same department. The position of the Judicial Council within the state courts as a unitary "department" is defined under the California Constitution. The California Supreme Court is created under Article VI §1 of the California Constitution and Judicial Council under §6.

The State Bar states in its Answering brief at page 4:

> "The State Bar of California ("State Bar") is a...public corporation created as an administrative arm of the California Supreme Court for the purpose of assisting in matters of admission and discipline of attorneys. *See In re Attorney Discipline Sys.*, 19 Cal.4th 582, 598-99 (1998)."

As an administrative arm of the Supreme Court, which is part of the judicial branch as a department, the Judicial Council's receipt of funding effectuates waiver for the entire department including the State Bar as a subunit.

Appendix 9 contains the USDOJ Title VI Manual which explains:

> "An entity may receive grant money directly from an agency or indirectly through another entity. In either case, the direct recipient as well as the secondary or subrecipient are considered to have received federal funds....For

example, a college or university receives federal financial assistance indirectly where it enrolls United States military veterans for whom the federal government provides tuition payments. Although federal payments go directly to the veterans and indirectly to the university, the university is receiving federal financial assistance that neither it nor the students would have received but for students' enrollment and entitlement. See *Grove City Coll. v. Bell*, 465 U.S. 555, 564 (1984) (superseded by statute on other grounds by Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988));"[1]

The State Bar is also a direct subrecipient of federal funding, in addition to being a subunit. The Judicial Council obtains federal grants for legal aid programs statewide and distributes the aid—because the Judicial Council lacks its own staff attorneys—through the State Bar and reimburses it for administrative expenses.

The State Bar's Budget at Appendix 9 states:

"State Bar staff, together with the California Commission on Access to Justice and the LAAC [Legal Aid Association of California], also worked to unlock new federal funding sources for legal aid. As a result, over $20 million in new Requests for Proposals were issued...The funds are in the budget of the State Judicial Council for grants to be administered by the State Bar's Legal Services Trust Fund Commission through the Equal Access fund. The Judicial Council contracts with the State Bar for the administration of these funds, which currently consist of grants to approximately 100 nonprofit legal aid organizations, and reimburses the State Bar for its administrative expenses."

The State Bar's distribution of funds from the Judicial Council makes it a "subrecipient" and a link in the chain to the ultimate beneficiary. This meets the definition of a recipient as the State Bar financially benefits from the grants by keeping a portion of the funds for "administrative expenses". 28 C.F.R. §42.102(f):

[1] By analogy, hospitals such UCLA medical center which receives SSA Title IV payments for medical services pursuant to 42 U.S.C. §622(b)(15)(a), 42 U.S.C. §675(5)(h)—which funds medical for children in foster care or adoption—would waive immunity for the entire University of California system, which is what is alleged here as discussed *supra*. As a result hospitals and their respective universities are covered by the ADA as a condition of federal funding received under Title IV.

> "The term ***recipient*** means any State...any public...agency, Institution, or organization...to whom Federal financial assistance is extended, directly or through another recipient...but such term does not include any ultimate beneficiary."

By virtue of the State Bar's position as a subunit in a department which receives Title IV funding, and the State Bar's receipt of funding as a subrecipient, sovereign immunity does not bar suit for violations of the ADA or Title VI.

42 U.S.C. §2000d-7(a)(1) states:

> "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of...title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance."

The provisions of "any other Federal Statute prohibiting discrimination by recipients" is 42 U.S.C. §608(d)(3) and the ADA itself at 42 U.S.C. §12202:

> "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter...."

In addition to the ADA, §608 conditions SSA Title IV funding to Title VI, and 42 U.S.C. §2000d-7(a)(1) also requires a state recipient of *any* funding to comply with Title VI. It is black letter law under Title VI that nonwhites cannot be given treatment that is different from white counterparts, which would include applying the law differently to a nonwhite in a state sponsored arbitration. Discrimination by arbitrators is a very real phenomenon that has never been addressed by this Court.

Appendix 11 is a printout of a google search of the terms "race discrimination arbitration". There are numerous articles such as "How Forced Arbitration Can Hurt Black and Brown Workers", "Corporations, Congress must Examine

Arbitration and Racism", and "Black Workers Matter So End Forced Arbitration". As a result, in 2019 the House of Representatives passed the "Forced Arbitration Injustice Relief" ("FAIR") Act, H.R. 1423—116th Congress (2019-2020), which is now in the Senate. If passed, the Act would prohibit mandatory arbitrations for race discrimination claims. This is not simply one Petitioner complaining of discrimination, but the House of Representatives also believed discrimination by arbitrators was a sufficient problem to enact legislation to redress the phenomenon.

California's Mandatory Fee Arbitration Act ("MFAA"), California Bus. & Prof. Code §6200 et seq., requires all attorneys to participate in arbitration of attorney's fees charged. Arbitration under the MFAA is statutory and not based upon a contractual agreement of the parties. The MFA statute(s) prohibits "affirmative relief" for "malpractice" or "professional misconduct".

Cal. Bus. & Prof. Code §6200(b)(2):

> "This article shall not apply to any of the following: Claims for affirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct"

§6201(d)(2):

> "A client's right to request or maintain arbitration under the provisions of this article is waived by the client commencing an action or filing any pleading seeking either of the following: Affirmative relief against the attorney for damages or otherwise"

Despite the prohibition, arbitrators were bypassing the statutory provisions against awarding "affirmative relief" and were nonetheless awarding "affirmative relief" (ordering "refunds" when the attorney was not paid) by falsifying the factual and legal basis of the awards. Under California law, and the California Supreme Court's

decision of *Moncharsh v. Heile & Blaise* 3 Cal. 4th 1 (1992) mistake of law or fact is not grounds for vacating. *Moncharsh* 3 Cal. 4th at 11:

> "Thus, it is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law."

If errors of fact or law are not reviewable, that means that white arbitrators are free to apply the law disparately to nonwhites. Thus whites can revoke the license of a nonwhite for the same services that white OCBA members were providing.

There is also other federal law which is applicable: 42 U.S.C. §1981 which requires that contracts of nonwhites be treated the same as whites, and protects contract rights of nonwhites against both "impairment under color of state law", which would be applicable to "state action" MFAA proceedings, and "nongovernmental discrimination" such as private organizations like the OCBA.

> 42 U.S.C. §1981 states:
> **(a)Statement of equal rights**
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts... as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
> **(b)"Make and enforce contracts" defined**
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
> **(c)Protection against impairment**
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. §1981 is enforceable against the state pursuant to 28 C.F.R. §50.3 which is the provision of law that was circulated to Congress for the passage of Title VI. Appendix 12 is the portion of the DOJ Title VI Manual which references §50.3 and

states that any other anti-discrimination statute may be enforced through a Title VI judicial action pursuant to 28 C.F.R. §50.3 which authorizes a court under Title VI:

> "(2)...to enforce compliance with other titles of the 1964 Act, other Civil Rights Acts, or constitutional or statutory provisions requiring nondiscrimination"

28 CFR § 42.105 requires a personal representative of the state to physically sign a "statement of assurances" to the federal funding agency that the state will comply with the terms and conditions of the grant program being administered. Private parties have the right of judicial enforcement as, or in addition, to the United States. *Barnes v. Gorman*, 536 US 181, 184 (2002).

Appendix 13 is the sample Statement of Assurances from a sister Department, the California Department of Transportation, which utilizes the standard USDOT form. It should be noted that the form itself identifies that it is a *standard statement of assurances* used by the federal government. The statement *specifically identifies* Title VI of Civil Rights Act of 1964, 28 C.F.R. §50.3 and the ADA as requirements. The statement of Assurances signed here would be similar if not identical to the example. Federal law pertaining to grants to the states for public roadways and transportation also have the same prohibitions as 42 U.S.C. §608(d) against race discrimination (at 23 U.S.C. §140 and 49 U.S.C. §5332) and requires compliance with the ADA by grant recipients at 49 U.S.C. §5302(3)(I) and Section 223 of the ADA, 42 U.S.C. §12143, and pursuant to the USDOT C.F.R.s.

The enforcement of statutory and C.F.R. provisions in this case is by agreement of the state which assented by agreeing to the statement of assurances

which specifically included the ADA, Title VI, and 28 C.F.R. §50.3. The requirements of federal funding recipients are contained in the statutes and C.F.R. provisions which the state was obligated to be aware of. The state can make no complaint for the loss of sovereign immunity as it took federal money voluntarily with the understanding that it would have to comply per its signed agreement.

Disparate application of law to nonwhites under the MFAA also violates the provisions of 28 CFR § 42.104 applicable to Title VI of the Civil Rights Act of 1964:

> (1) A recipient to which this subpart applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:
> (i) Deny an individual any disposition, service, financial aid, or benefit provided under the program;
> (ii) Provide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

I was denied the provisions of service in that I was suspended, and the disposition of service was different from whites as Respondents Nelson and Green where performing and advertising the same immigration applications I lost my license for and they didn't lose their license or have to refund money when they weren't paid.

In addition allowing whites to apply the law disparately to nonwhite attorneys would be sufficient to establish a *prima facie* case of race discrimination under the *McDonnell Douglas* test as discussed *supra.*

During the lower court proceedings the State argued that it was not responsible for the race discrimination perpetrated by the OCBA and its members. The state entered into an agreement with the OCBA, and under the applicable C.F.R. provisions "a recipient to which this subpart applies may not, directly or through contractual or other arrangements" disavow its obligations. The state has

a responsibility to supervise the OCBA—which contracts with the State and State Bar to conduct MFAA arbitrations and review judicial candidates—complied with anti-discrimination law. See *Castle v. Eurotech* 731 F.3d 901, 910 (CA9 2013).

2. DEMONSTRATION OF RACIAL PREFERENCES IN APPOINTMENTS

California has a majority nonwhite population with Latinos being the largest racial group at 39%. Per the census, non-Latino whites are 36.5% of the population, Asians 15%, and Afro-Americans 6%.[2] Appendix 14 contains nonwhite enrollment at California law schools:

> Stanford-40%, UC Berkeley-46%, UCLA-41%, UC Irvine-48%, USC-47%, UC Davis-56%, UC Hastings-52%, Loyola Law School-46%, Santa Clara University Law-57%.

Orange County's population is (Appendix 15) 43.5% white, 33.6% Latino, 18.3% Asian, and 1.6% Afro-American.

Appendix 16 is the Judicial Roster of the Orange County Judicial bench which has 133 trial judges. There are only 11 Judges who are Asian or Latino. [3] There are 3 Asian judges and 8 Latino out of 133 or 8%. Appendix 17 is the Appellate Court for Orange County, 4th District Court of Appeals Division 3 which is 100% white, while other 4th District Courts having minority appellate judges.

In comparison, Appendix 18, contains the demographics of the County of San Francisco, along with the county Judicial Roster (Appendix 19) with the names of Asian and Latino judges highlighted. San Francisco has virtually identical racial demographics as Orange County, with only the percentage of Latinos to Asians

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[2] See https://en.wikipedia.org/wiki/Demographics_of_California

[3] Due to the difficulty in identify who is Afro-American based on surname, Asians and Latinos are focused on.

reversed; whites are 41.2%, Asians are 33.3% and Latinos 15% in San Francisco. San Francisco has 52 Trial Judges, 13 are Asian or Latino, which amounts to 25%, which is three times the percentage of Orange County. Appendix 20 is the Judicial Roster of Los Angeles County, which shares a border with Orange County and also has similar demographics. The Los Angeles Superior Court has 460 judges, 127 of which are either Asian or Latino (highlighted) or 27% Asian or Latino.

The fact that other counties with similar racial demographics have three times the percentage of Asian or Latinos (25%) is indicative that racial preferences had been given to whites in the Orange County (8%) area.

What is being seen in San Francisco and Los Angeles is the natural result when the state is majority nonwhite and half the state's law school graduates are nonwhite. It would be expected that roughly half the judges would be of color, and the numbers would suggest that minorities are on the road towards parity with whites and this was occurring without government intervention as there are no affirmative action programs or quotas for judicial appointments.

The State delegates the task of vetting and selecting candidates for judicial appointment to local bar associations, which are private entities. The members of the OCBA were giving preferences to their own white members for selection and were rating nonwhites as "less qualified" than whites. Appendix 21 is the board of directors and officers of the Bar Association of San Francisco which shows 14 out of 22 are nonwhite. In contrast Appendix 22 is the OCBA which has only 5 out of 25 Directors/Officers being nonwhite. Because the membership and officers of the

OCBA are primarily white, they had been giving preferences to white members, whereas in other counties which had a stronger minority presence in the association, nonwhites were given consideration.

3. STATEMENT OF FACTS AND DEMONSTRATION OF A PRIMA FACIE DEMONSTRATION OF DISCRIMINATION UNDER *MCDONNELL DOUGLAS*

The present matter arises from a series of three arbitrations involving OCBA Chair and President John Nelson and the Orange County Bar Association (OCBA). Two of the arbitration awards were simply paid. The one arbitration leading to suspension began in 2007, when the client, Cesar Viveros, contracted with *another* attorney, Kenneth Teebken to perform a PERM immigration adjustment of status through sponsorship by his employer La Rana Restaurant. Appellant's Excerpt of Record (EOR 20) is the PERM guide from USCIS itself which outlines the process:

> "...the process begins when the employer obtains an approved Application for Permanent Labor Certification from the U.S. Department of Labor (DOL)...the employer continues the process by filing Form I-140....The foreign national's place in line... will be based on the date you file the labor certification with DOL"

Both John Nelson and Richard Green, who were both Chairs of the OCBA, were performing PERM adjustments of status and were revoking the licenses of competing attorneys analogous to the circumstances of *Gibson v. Berryhill* 411 U.S. 564 (1973). The biography of Richard Green is attached as Appendix 23 and advertises performing the same service for which I lost my license:

> "Whether you are an employer or employee seeking an employment based visa for a highly skilled employee...Green puts his years of experience into play to assist his clients..."

Green represented Viveros in the enforcement action of the award, and his biography notes that Green served as an OCBA MFAA arbitrator. It is alleged that members of the OCBA, including Green and Nelson, were taking turns acting as arbitrators and arguing before the OCBA arbitration panel. Members had entered into a *quid pro quo* arrangement where members were rendering favorable awards in return for the same when they were arguing, and were receiving payments out of the awards that were rendered by OCBA.

EOR 37 is the OCBA MFAA committee, which only has 11 permanent members acting as arbitrators in the proceedings. The multiple arbitrations involved the same members as pictured. Members were benefitting themselves from the arbitration as the MFAA statute authorizes attorney's fees. $13,000 of the total amount is for fees payable to Green/Nelson as a result of the statutes attorney's fees provisions. Appendix 30. Thus under California law the attorneys operating the program where authorized to pay themselves out of the awards analogous to the circumstances of *Tumey v. Ohio* 273 U.S. 510 (1927).

In 2007 Teebken and Viveros entered into a contract for PERM representation in the amount of $4,500, and all payments were made to Teebken in 2007. In 2008, the labor certification submitted by Kenneth Teebken was *approved*, and an I-140 was submitted by Teebken. EOR 18 is the award which states pg.3¶2:

> "The labor certificate was approved on 1/14/08. Thereafter the application for permanent residency (i.e., a I-140 petition for alien worker) was submitted on 1/31/08. (Ultimately, on or about 4/8/09, the I-140 petition was denied for failure to submit evidence of Mr. Viveros' employer's ability to pay the proferred wage throughout the permanent residency application process. An

appeal was filed by Immigration West Law and was **still pending at the time of the arbitration hearing.**"

In late 2008, Teebken ceased practicing law, and I agreed to assume handling of a portion of his immigration practice and hire his staff, including his paralegal Marisela Dangcil who is Latina (Mexican).

As stated in the arbitration decision, in 2009 the I-140 application for adjustment of status was denied for Teebken's failure to attach proof the employer's ability to pay. Viveros was contacted to authorize the filing of an appeal with the required proof of ability to pay. Viveros was given a blank copy of the retainer to sign as authorization to file on his behalf. The retainer agreement identified a different law office from Teebken's firm (EOR 19) which was a sole proprietorship while my office was incorporated. The retainer from my office is contained in the Appellant's Excerpt of Record (EOR) 22, and the pleading from Green stating the retainer was not signed is EOR 23. Viveros was not charged, with the appellate fee paid for by the employer. The appeal was still pending at time of arbitration.

In 2009, Viveros' employer filed for bankruptcy. Viveros quit his job and refused to return to work. An employer sponsorship is not transferable to a new employer, and after Viveros quit the legal work was no longer useable.

The OCBA operates a telephone referral service which connects potential clients with member attorneys. Viveros was referred to John Nelson who instructed him to file an MFAA arbitration demand against me, and not Teebken due to the fact that since Teebken was no longer in practice, I was Nelson primary business competitor in Orange County. The Declaration of Cesar Viveros EOR 26 states:

> "In early November, 2009, I consulted with Jon C Nelson...With Mr. Nelson's assistance, or about November 30, 2009, I filed a Petition to Arbitrate...In this petition, I sought to obtain a refund of funds I paid to Ms. Dangcil from Paul Viriyapanthu."

The arbitration petition is at Appendix 24, and was ghost written by Nelson based on the fact that Viveros has difficulty with English and the petition fluctuates between perfect colloquial English to intentionally broken English including misspelling of the word "lawyer" as "layer". Viveros claims to have paid $10,010, but never attached proof of any such payment in the arbitration petition, or appeared at arbitration to testify or offer proof. Section 3, which identifies the attorney representing is intentionally left blank, though written by Nelson.

At the arbitration hearing Cesar Viveros himself never appeared, and the sole testimony was provided by John Nelson, who also testified as an expert witness. The problem with this is that, per Viveros' own declaration, Nelson had no involvement prior to 2009, and lacked knowledge to testify as it was hearsay. Nelson testified I had been aiding the unauthorized practice of law, but also lacked knowledge/basis as he has never been to my office. Arbitration award pg.6¶2:

> "Mr. Nelson argued that both Mr. Teebken and Mr. Viriyapanthu have been assisting Ms. Dangcil in the unauthorized practice of law.

In response to the allegations above, it should also be noted that I had employed six attorneys (myself included) at the office, including Rita Melnyk who is a retired U.S. Dept. of Homeland Security Immigration prosecutor who had over 20 years experience with DHS. The records of the attorneys employed are at EOR 28.

The award states at page 5 ¶2-3:

> "Although it could be argued that it is highly unlikely Mr. Viveros's petition, even if corrected, would ever be approved19, no evidence was submitted establishing that it was an impossibility....Mr. Nelson testified it should take approximately 2 hours ...Based on the evidence submitted, the arbitrators find the reasonable value of services rendered was $687.50....the arbitrators find that Immigration West Law should be responsible for the application fee of $475."

I would respectfully point out that finding the value of the services at $687.50 including the application fee of $475 would leave the portion paid to the attorney for services at $212.50 which no attorney would charge so little for an application.

The basis for imposing liability is found at p.6 ¶1:

> "Although Mr. Viriyapanthu did not provide the legal services at issue, his retainer agreement evidences an intent to assume liability for the services rendered. Specifically, both retainer agreements cover the exact same legal services. Additionally, both agreements identify Immigration West Law as the attorney and indicate that the attorney received a $4.500 deposit from Mr. Viveros. Most importantly, both agreements indicate that "any unused deposit at the conclusion of the Attorney's services will be refunded." Based on the above, Mr. Viriyapanthu is responsible for the reimbursement of any unused deposit to Mr. Viveros."

This is disparate application of state contract law. Under California law successor liability *only arises* when a successor makes recovery against the original party impossible. *Ray v. Alad Corp* 19 Cal.3d 22, 31 (1977 Cal. Sup Ct.) See *Lundell v. Sidney Mach. Tool Co.* 190 Cal. App. 3d 1546, 1553 (2nd Dist. 1987):

> "The successor, to be liable, must have "'played some role in curtailing or destroying the [plaintiff's] remedies.'" (*Kaminski v. Western MacArthur Co., supra*, 175 Cal.App.3d 445, 458, quoting *Hall v. Armstrong Cork, Inc.* (1984) 103 Wn.2d 258, 265-266 [692 P.2d 787].) In *Nelson v. Tiffany Industries, Inc.* (9th Cir. 1985) 778 F.2d 533, for example, the Ninth Circuit found that if a predecessor's good faith, voluntary reorganization petition destroyed plaintiff's remedies, a successor later purchasing predecessor's assets in a bankruptcy, court-approved sale was not liable..."

In this case, I had not destroyed any remedies available against Teebken as evidenced by the fact that Nelson also initiated another separate arbitration against Teebken on another client and Teebken paid the award.

The Supreme Court has previously held that arbitrators may not impose awards as "punishment". See *Steelworkers v. Enterprise*, 363 U.S. 593, 597 (1960)

> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice."

That the award was issued as punishment can be seen from at pg.6¶2:

> "One wonders how an attorney can be responsible for supervising and/or controlling the work of his paralegal when the attorney is relying on the paralegal to inform him on the law. Although Ms. Dangcil may have a Juris Doctorate, she is not a licensed attorney."

The disparate application of state law establishes a prima facie case of race discrimination under the McDonnell Douglas test as (1) I am a member of a protected class (nonwhite); (2) was "qualified" as I had (a) graduated an ABA law school (b) passed the bar examination (c) has violated no rule of professional conduct/is discipline free since admission (d) performed services to Cesar Viveros competently (the I-140 petition was still pending at the time of the arbitration and the reason it was not granted was because Viveros quit his job and refused to allow further representation); (3) I was excluded as my license was suspended; and (4) whites had been more favorably treated.

A demonstration that whites had been more favorably treated is that Appellees John Nelson and Richard Green were allowed to provide the same employer sponsorship PERM applications that the OCBA arbitration panel said

"would not work". EOR 32 contains the search results when the terms "PERM Immigration Adjustment of Status" are imputed into google search, with 11,000,000 results. Literally thousands of attorneys nationwide are performing the same service that I was excluded from and that Nelson and Green were performing.

It should be noted that I attempted to vacate the award, but Green made a misrepresentation to the State Court in pleadings and at oral argument that Nelson had no affiliation with OCBA. The misrepresentations prevented *vacatur* as under California law a member of the arbitral organization arguing without disclosure is grounds for *vacatur*. *Gray v. Chiu* 212 Cal.App.4th 1355, 1358 (2nd Dist. 2013):

> "Subsequent to commencing arbitration proceedings but prior to the hearing, counsel for the defendant doctor affiliates with the firm providing the arbitrator. Neither counsel nor the arbitrator discloses that relationship...section 1286.2, subdivision (a)(6) compels a trial court to vacate the arbitration award if the arbitrator fails to disclose that information."

I was unable to pay the $17,758.38 award due to disability. The State Bar demanded that I pay the amount in one lump sum. I had been diagnosed with Brugada Syndrome which is a cardiac arrhythmia which causes "syncope" or loss of consciousness and meets Social Security Disability Criteria 4.05 ("Cardiac Arrhythmia with Recurrent Syncope") as a permanent disability. As I potentially could lose consciousness while driving, it limits my ability to work. Also during this time period I was undergoing treatment for Thymus cancer, which also prevented me from working. The medical records are at EOR 53, and the Social Security disability transmittal forms identifying the cancer as "malignant neoplasm of the thymus" is dated within 6 months of the license suspension.

I made an ADA accommodation request to the State Bar in the form of an extension to make payment due to inability to work. The request was denied.

This violates 42 U.S.C. § 12132:

> "no qualified individual with a disability shall, by reason of such disability,[4] be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity..."

28 C.F.R. §35.130

> "(7)(i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability..."

4. PROCEDURAL HISTORY

The suspension occurred August 2016, suit was commenced in December 2017. Under *Dare v. California* 191 F.3d 1167 (CA9 1999), *Clark v. California* 123 F.3d 1267 (CA9 1997) and *Hason v. Medical Board of California* 279 F.3d 1167 (CA9 2002), which were decided prior to *U.S. v. Georgia*, the Ninth Circuit had upheld the entirety of the ADA such that a Title II plaintiff need not demonstrate a 14th Amendment violation under the law of the circuit. See O'Scannlain (who was a panelist here) dissent in *Phiffer v. Columbia River*, 384 F.3d 791 (CA9 2004):

> "Because *Dare* and *Clark* upheld the entirety of Title II...their continued vitality is uncertain. In the absence of en banc review, however, I acknowledge that these decisions remain binding on this panel..."

As follows are recent Ninth Circuit Cases holding that a 14th Amendment violation was not required to make an ADA claim in the Ninth Circuit:

[4] The ADA employs a "motivating factor" standard by its use of the term "by reason of" which differs from the Rehabilitation Act §504 which uses the term "solely by reason of". Title VI also employs a "motivating factor" standard.

Olson v. Allen, Case No. 3:18-cv-001208-SB (D. Or. Mar. 15, 2019) (Note 1 discusses that no Ninth Circuit Appellate decision has required the analysis under *Georgia/Lane*); *McCabe v. Idaho State Bd. of Corr.* Case No. 1:17-CV-00458-CWD (D. Idaho May. 29, 2020) ("...district courts in the Ninth Circuit have declined to adopt this argument, opting instead to apply the Ninth Circuit's straightforward holding that Title II abrogated sovereign immunity.") See *Olson v. Allen*, 2019 WL 1232834, at *3 (D. Or. March 15, 2019) ("Title II abrogates [the state's] Eleventh Amendment immunity regardless of whether [plaintiff]'s claim implicates a fundamental right.")" *Gosney v. Gower* Case No. 6:16-cv-01072-SB (D. Oregon April 1, 2019) *Karam v. Univ. of Ariz.*, No. 18-cv-00455-RCC, 2019 WL 588151, at *4 (D. Ariz. Feb. 13, 2019), *Fernandez v. Rice*, No. 15-cv-00487-LEK, 2017 WL 988103, at *4 (D. Haw. Mar. 14, 2017), *Miller v. Ceres Unified Sch. Dist.* 141 F. Supp. 3d 1038, 1043 (E.D. Cal. 2015),

The operative First Amended Complaint (FAC) alleged race discrimination as the 14th Amendment violation under *Georgia*. The allegation of race discrimination should have sufficed as Title II's wording "on the basis of disability" utilizes a "motivating factor" standard instead of "solely by reason of disability" that the Rehabilitation Act utilizes. See *A.G. v. Paradise Valley School Dist.* 815 F.3d 1195 (CA9 2016) at note 5. Here the "exclusion" would be based upon both race and disability and would fall within Congressional authority to enforce the 14th Amendment under section 5. However, as 42 U.S.C. §608(d) applies to condition the ADA to Title IV funding this argument need not be addressed here.

A *prima facie* showing of race discrimination under the *McDonnell Douglas* test was made at pg. 22-23 of the operative FAC, pg. 2 of Appendix 28. This is significant as under *Johnson v. City of Shelby* 574 U.S. 10 (2014) the Supreme Court reversed a summary judgment by the Fifth Circuit and ordered the lower courts to allow amendment to allege a §1983 claim as the Plaintiffs had plead

sufficient factual allegations in support of the claim despite the Plaintiffs not expressly naming a cause of action for §1983 in the complaint. *Johnson* at 10:

> "Our decisions in *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544 (2007) , and *Ashcroft* v. *Iqbal*, 556 U. S. 662 (2009), are not in point, for they concern the *factual* allegations a complaint must contain to survive a motion to dismiss. A plaintiff, they instruct, must plead facts sufficient to show that her claim has substantive plausibility. Petitioners' complaint was not deficient in that regard. Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement..."

The circumstances here are identical to *Johnson*. The factual allegations and *prima facie* demonstration of race discrimination under the *McDonnell Douglas* test was pled in the First Amended Complaint, and a request was made to amend to allege federal funding for the ADA claim, and to amend the complaint for Title VI and §504. The District Court and the Ninth Circuit outright overruled the Supreme Court and directly refused to follow binding Supreme Court precedent with identical facts.

At oral arguments it was raised to the district court with a request for leave to amend. See October 26, 2018 (Appendix 25) transcript which states:

> MR. VIRIYAPANTHU: Well, that's what I was going to explain. The State Bar also receives federal funds, and that is another exception to sovereign immunity, which was not considered and was not fully raised in the Complaint because I believed I had adequately pled the Eleventh Amendment, pled enough facts to overcome the Eleventh Amendment.

The request at oral arguments was followed up by a written objection (Docket 155, Appendix 26) alerting the District Court of the federal funding waiving sovereign immunity, and requesting leave to amend so as to allege federal funding, and claims under Title VI which states:

> "the State Bar's 2017 Budget Report which indicates that the State Bar requested and received Federal Funding for 2016 (the year in which Plaintiff's license was suspended). The receipt of Federal funds also abrogates sovereign immunity under 42 U.S.C. §2000d-7, which means that Plaintiff also has separate additional grounds (aside from U.S. v. Georgia) for an ADA claim, and in addition also has the ability to directly file an additional (separate) claim for race discrimination under Title VI of the Civil Rights Act of 1964."

The district court held that race discrimination did not satisfy the 14th Amendment violation requirement of *Georgia* and dismissed the ADA claim against the State Bar. (Docket 156.) The district court had held that the arbitration immunity applied to bar claims against the OCBA for the racial preferences in judicial appointments. (Docket 146).

The District Court also held claims against Nelson and Green pertaining to the arbitration were barred by the Noerr-Pennington doctrine as the arbitration by the OCBA constituted a "petition to government". Appendix 4 (Docket 146) page 12:

> "The Noerr-Pennington doctrine provides absolute immunity for statutory liability for conduct when petitioning the government for redress... *Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft*, 189 F. Supp. 2d 385, 392–93 (E.D. Va. 2002) (holding that Noerr-Pennington applies to the initiation and maintenance of World Intellectual Property Organization ("WIPO") arbitration proceedings, even though WIPO is only a quasi-public entity, because it is part of the adjudicatory process and warrants immunity)."

Whether Noerr-Pennington applies to arbitrations conducted by a nongovernmental entity (such as OCBA) is a matter for which there is a split of authority over. See *Ford Motor Co. v. Nat'l Indem. Co* 972 F.Supp.2d 862 (2013 E.D. Virginia) at 868:

> "[Arbitration] does not implicate the First Amendment's prohibition against establishing laws that abridge "the right of the people . . . to petition the

> Government for a redress of grievances" for the threshold reason that the arbitration here does not petition the Government at all."

The district court allowed amendment only for Nelson and Green for additional harassment (such as posting derogatory reviews of my office) that did NOT arise from the arbitration. Docket 146 at final page:

> "Viriyapanthu may file an amended complaint addressing the deficiencies identified in this order with respect to Defendants Nelson and Green. Viriyapanthu may not plead new legal claims against Defendants Nelson or Green; he may only replead the claims in this FAC if he shows that Noerr-Pennington immunity does not apply."

The order prohibited any further amendment as to the arbitration. A Rule 15 motion to amend the complaint to allege federal funding and allege Title VI and Rehabilitation Act claim, or in the alternative to waive additional amendment to proceed to appeal as to Nelson /Green for non-arbitration acts was filed. Docket 157.

The Ninth Circuit's decision states that leave to amend for §504 of the Rehabilitation Act would be futile as the suspension was not "solely based upon disability". I dispute that the exclusion was not based "solely" on disability because the inability to pay due to medical conditions was the actual cause of the suspension. However, for purposes of this petition, it simply does not matter as the ADA uses a "motivating factor" standard and does not use "solely" in the wording.

The issue of federal funding waiving sovereign immunity under the ADA is in the AOB at pg.41, the ARB at pg.24. It was raised again on the first page of the Petition for Panel Rehearing and En Banc Rehearing, Appendix 27:

> "The State Judicial Branch and the State Bar both receive federal funding, thus 11th Sovereign Immunity does not pose a bar under §504 of the Rehabilitation Act, Title VI of the Civil Rights Act of 1964 (race

discrimination), and Petitioner argues under Title II of the ADA pursuant to 42 U.S.C. §608(d)(3) (which applies to Title-IV funding at issue here)"

The Ninth Circuit decision states:

"The district court correctly dismissed Viriyapanthu's § 1981 claim against the Orange County Bar Association. The OCBA is entitled to immunity for decisional acts taken within its jurisdiction....Viriyapanthu's assertion that the OCBA discriminated against him in judicial nominations was not raised before the district court and is therefore waived."

The §1981 cause of action against the OCBA was for giving racial preferences to white OCBA members which frustrated/prevented my attempts to obtain a position when I applied for a position. Essentially the lower courts held that arbitrator immunity attaches to non-arbitral functions of vetting candidates for judicial appointment. Contrary to the Ninth Circuit's assertion that the issue was not raised before the district court, the allegations were contained in the operative FAC which referenced the racial demographics and judicial bench rosters as exhibits to the complaint. The FAC at page 4, beginning at line 7 (Appendix 28):

"The OCBA had been given authority by the State of California to make nominations/recommendations for judicial appointments, and maintains a judiciary committee for that purpose. The OCBA had been nominating less qualified white applicants over more qualified minority applicants seeking judicial appointment....The result is that the racial composition of the Orange County judicial bench is not representative of the actual racial makeup of the Orange County area."

In the Opposition to OCBA's MTD (Docket 132, Appendix 29), at pg.20 it states:

"The complaint being made is that the OCBA was giving preferential treatment to white/Caucasian members of the OCBA for judicial appointments over nonwhites. Attached as Exhibit 14 is the ratings given by the OCBA where the OCBA had been rating nonwhite candidates as less qualified than whites/Caucasians."

The Ninth Circuit decision also states:

> "The district court correctly dismissed Viriyapanthu's claim that John Nelson and Richard Green conspired in restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1, and the Clayton Act, 15 U.S.C. § 15....The substance of his claim is fraudulent conduct. However, Viriyapanthu's "averments of fraud" failed to meet Fed. R. Civ. P. 9(b)'s particularity requirement....All that remains are conclusory accusations of conspiracy, which fail to state a claim....The denial of leave to amend was an appropriate exercise of discretion because it was done at Viriyapanthu's request."

As discussed infra, the District Court prohibited any additional allegations as to the arbitrations as they were barred by Noerr-Pennington so it was not possible to allege additional facts pertaining as to the use of arbitrations to restrain trade.

VI. Reasons for Granting the Petition

1.There is a Split Among the Federal Circuit Courts/ State Supreme Courts On 14th Amendment Violations And Sovereign Immunity Under the ADA Resulting in Lack of National Uniformity and Unpredictability

Rule 10 criteria is met as the Ninth Circuit's decision is in conflict with other Circuit Courts of Appeal and State Supreme Court decisions which have held similar conduct is a violation of the Constitution or held the ADA enforceable when no 14th Amendment violation is present. There is a split among Federal Circuits and State Supreme Courts on the issue. This case involves loss of professional license due to disability, which is the loss of benefits or public servoces. The issue is phrased broadly to avoid inviting piecemeal adjudication requiring certiorari separately and each time for professional licenses, for students requiring accommodation, for prisoners denied access to prison programs, etc. All of the aforementioned ADA claims can be boiled down into the same overarching issue: loss of public benefits or services. The class of Plaintiffs affected here are those disabled that were denied ADA accommodations that may or may not be a 14th

Amendment violation but for which the state took funds which required ADA compliance as a condition of funding.

As it currently stands, the lower courts are in disarray and the same factual circumstances which were enforceable in one case by one disabled claimant are barred by sovereign immunity to another similarly situated ADA claimant. The disabled cannot be certain whether the ADA is enforceable. The law isn't uniform or predictable, but can be made uniform by turning to the statutes themselves.

For example contradictory results can be seen in the issue of imposing a surcharge for handicap parking placards and whether such would constitute a denial of public benefits or services. In *Klingler v. Director of Revenue Missouri* 455 F.3d 888, 892 (CA8 2006) the Eighth Circuit held the ADA did not abrogate sovereign immunity as to the state charging a fee for disabled parking placards, "Even though Title II may validly abrogate the states' sovereign immunity in some cases, we do not believe that the present case [requiring a fee for disabled placards] is one of them." In *Dare v. California* 191 F. 3d 1167, 1171 (CA9 1999) the Ninth Circuit came to a contradictory result and found that "that the $6 fee constitutes a surcharge for required measures in violation of the ADA and its implementing regulations." In direct contrast to the Ninth, the Nebraska Supreme Court in *Keef v. Nebraska State DMV* 716 N.W.2d 58, 61 (Nebraska Sup. Ct. 2006) held the same as the Eighth Circuit that "in the context of charging a fee for handicapped parking placards, Congress did not validly abrogate Nebraska's immunity under the 11th Amendment." The same identical circumstances resulted in different outcomes from different courts. The ADA is *national* legislation. The law should be uniform throughout each of the United States so the

disabled can ascertain whether the law is enforceable or not and be able to predict outcome. As elaborated *supra* this split shouldn't exist as all state DMVs receive ADA conditioned funding.

In *Fauconier v. Clarke*, 966 F. 3d 265, 270 (CA4 2020) the Fourth Circuit held that "in denying [a disabled prisoner under the prison program] a job, violated his rights under Title II of the Americans with Disabilities Act ('ADA') and the Fourteenth Amendment." In direct contrast, the Fifth Circuit in *Hale v. King* 624 F. 3d 178, 180 (CA5 2010) found the "Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12131-12165, does not validly abrogate state sovereign immunity with respect to the claims of disabled inmates who were denied access to prison educational and work programs." The Ninth Circuit came to a different result in *Castle v. Eurofresh* 731 F.3d 901, 909 (CA9 2013) and held that the Arizona Dept. of Corrections "must ensure that disabled prisoners are not discriminated against with regard to the provision of 'the benefits of [their] services, programs, or activities' on account of a prisoner's disability'" when it refused to give an accommodation in the plaintiff's prison work program. Three disabled prisoners with the same circumstances received different outcomes.

This illustrates the problem of ADA uniformity. Why should *Castle* and *Fauconier* receive ADA accommodation for their prison jobs, while *Hale* did not? All three were actually entitled to ADA accommodations as the state took conditioned funding. The Bureau of Justice Assistance (BJA) is within the USDOJ and provides grant funding to state prisons for the Residential Substance Abuse Treatment for State Prisoners (RSAT) program which likely required the prisons to comply with the ADA per the terms of the statement of assurances that was agreed to.

In *Toledo v. Sanchez*, 454 F. 3d 24, 32 (CA1 2006) the First Circuit held the University's failure to accommodate a student's schizophrenia violated the ADA: "Toledo properly alleges that he is a qualified individual with a disability as he alleges that he has a mental impairment, schizoaffective disorder, that substantially limits the major life activity of learning, and that save for his disability he was qualified to participate in the architecture program at the University." In contrast, the Fifth Circuit in *Shaikh v. Texas A&M University College of Medicine,* 739 Fed. Appx. 213, 225 (CA5 2018) held that a medical student who had a tumor which prevented him from passing the USMLE did not state a 14th Amendment violation to abrogate sovereign immunity under the ADA since enrollment was not a fundamental right. This is contrasted by the First Circuit's holding in *Dean v. University at Buffalo School of Medicine* 804 F.3d 178, 182 (CA2 2015) that the school's failure to accommodate a student's failure to pass the USMLE due to "mental-health condition and failed to provide a 'plainly reasonable' alternative" abrogated sovereign immunity under the ADA. But at the same time in *Buchanan v. Duby, Court of Appeals* 469 F.3d 158 (CA1 2006) "Title II does not validly abrogate a State's immunity as to claims of access to mental health services..." While in *Bowers v. NCAA* 475 F.3d 524, 553 (CA6 2007) the Sixth Circuit held that not giving the plaintiff a sports scholarship due to his learning disability "states a claim under Title II that he was denied access to a program at a public education institution because of his disability." However in *Rittenhouse v. Board of Trustees of Southern Illinois School of Law* 628 F.Supp.2d 887, 894 (S.Dist

Ill. 2008) a law student with ADHD and dyslexia dismissed for poor grades was not allowed to make an ADA claim on grounds "education is not considered by the Supreme Court to be a fundamental constitutional right." But in *Doe v. Board of Regents of the University of Nebraska* 788 N.W.2d 264, 272 (Neb. S.Ct. 2010) the Nebraska Supreme Court held that "Congress has validly abrogated 11th Amendment immunity for title II claims of discrimination in public education" and that a student who was dismissed as a result of major depressive disorder could pursue suit. In contrast the Tenth Circuit in *Guttman v. Khalsa* 669 F.3d 1101, 1118 (CA10 2012) held that the Title II did not abrogate New Mexico's sovereign immunity in the context of accommodations for a doctor with PTSD because "the right to practice medicine is not a fundamental right."

Rule 10 is met as the Ninth Circuit conflicts with Fourth Circuit in *Fauconier,* where the right to a job was a 14th Amendment violation. Of the dismissed cases here, all occurred on 12(b)(6) before discovery could be conducted of financial records which may have provided alternative grounds to avoid dismissal.

2. Funding Resolves the Split On Alternative Grounds In a Large Subset of Cases

Why should convicted prisoners (Castle, Fauconier) or students with Schizophrenia (Toledo) be able to enforce the ADA, while an attorney with Cancer, med student (Shaikh) with a tumor, or a doctor with PTSD (Guttman) not be? ADA compliance has become discretionary. The state has sole discretion whether to give an accommodation, and the courts have discretion under *Georgia* whether or not to dismiss an ADA suit. The disabled are no better off after the ADA than before.

Turning to the federal statutes is an easier test than *Georgia*. If the state receives conditioned funding and/or agrees to a statement of assurances to the federal government that they will comply with the ADA, then the state should be precluded from moving pursuant to FRCP 12(b)(6) to dismiss. The state should not be allowed to make representations to the federal government in order to obtain funding and then not perform its end of the bargain. States have the choice not to accept funding, but here states took funding and did not comply with requirements.

The statutes here cover a wide swath of governmental entities and services. 42 U.S.C. §608 covers all funding under Title IV of the SSA which is aid to families with dependent children. All state court systems in the United States receive funding under these provisions the same as California does. All courts receive funding under IV-D for child support enforcement and IV-E for juvenile dependency (foster care/adoption) and their respective state bars are thus already covered under the ADA. 7 U.S.C. §2020(c)(2)(C) covers food stamps under the SNAP program, and concurrently with §608 for aid to families with needy children, departments of social services/ human services/child welfare services are covered.

The following are sample cases which were dismissed on *Georgia* when the state by the nature of its government functions likely received Title IV funding:

> *Levy v. Kansas Dept of Social and Rehabilitation Services* 789 F.3d 1164 (CA 10 2015), *Nichols v. Alabama State Bar* 2:15-cv-179-WMA, April 15, 2015, (N.D. Alabama), *Richter v. Connecticut Judicial Branch*, March 27, 2014. (D. Connecticut), *Draper v. State of Maine Dept. of Health and Human Services* 2:13-cv-00028-JAW, August 27, 2013 (D. Maine) and *Brooks v. Onondaga County Dept. of Children & Family Services* 5:17-CV-1186 (GLS/TWD), April 9, 2018, (N.D. NY).

Title IV of the Social Security Act also covers *medical care* for children in foster care (IV-E) or adoption. (See 42 U.S.C. §622(b)(15)(a) et seq.. 42 U.S.C.

§675(5)(h)). Medicare and Medicaid both require ADA compliance. 42 CFR §§ 482–485, "Medicare Conditions of Participation", requires participants to "comply with state and federal law" (which would include the ADA) in order to participate in Medicare, and required to also sign a "statement of assurances" to that effect. Thus state hospitals and, in turn, state universities which they are a part of that receive Title IV funding for child medical care or participates in Medicaid/Medicare are also recipients who must comply. For example this would include the UCLA medical center, and the University of California or Texas A&M Medical Center and its university. The aforementioned students likely had alternative grounds of receipt of funding to avoid dismissal.

The sample "Statement of Assurances" attached herein is a *standard* USDOT form and specifically identifies the ADA. 49 U.S.C. §322 authorizes the Secretary of Transportation to implement regulations and 49 C.F.R. parts 37 and 38 require ADA compliance. Any grant provided by USDOT or its subunits is required to agree to this *exact* USDOT standard statement of assurances (attached) which identifies the ADA. The Federal Motor Carrier Safety Administration (FMCSA) is a subunit of the USDOT, and provides grants to the States' DMVs under the Motor Carrier Safety Assistance Program (MCSAP), Commercial Driver License (CDL) Program Implementation Grant, and High Priority (HP) Grant programs. There should be no split as to ADA on sovereign immunity for state DMVs which surcharge disabled placards because the state DMVs signed a "statement of assurances" specifically identifying and agreeing to comply with the ADA. Dismissal on 12(b)(6) before the financial records are obtained in discovery is resulting in the disabled being unable to enforce the protections of the ADA.

3. This Case is A Good Vehicle for Addressing the ADA Issue

(1) Whether funding waives sovereign immunity under the ADA will eventually need to be addressed to prevent the disabled from having their cases undeservedly dismissed; (2) The issue presented here is the same for countless other ADA plaintiffs that is heavily litigated with over 1,450 citations to *Georgia*; (3) This case is a good vehicle because it arises from 12(b)(6) and there are no factual disputes with any disputes being resolved in my favor; (4) The factual documents demonstrating receipt of conditioned funding are in the record; (5) The issue was raised to both the trial and appellate court, and the pleadings are attached to the petition to show that the issue of federal funding waiving sovereign immunity was properly raised so there are no vehicle problems; (6) Resolution of the issue is dispositive of the outcome as no alternative grounds exist supporting the decision; (7) Other disabled claimants are unable to raise the issue as a result of dismissal on 12(b)(6) before discovery preventing them from identifying and pleadings statutes.

4. There is A Split As to Whether Noerr-Pennington Immunity Applies to Arbitrations Conducted by Private, Non-Governmental Entities Meeting Supreme Court Rule 10(a) criteria

The District Court and the Ninth Circuit in affirming held that the claims against Nelson and Green arising from the arbitration were barred by Noerr-Pennington immunity. The decision of the Ninth Circuit conflicts with other courts and meets the criteria of Rule 10(a) in that "a United States court of appeals has entered a decision in conflict with the decision of a...state court of last resort." The Colorado Supreme Court in *General Steel Domestic Sales v. Bacheller* 291 P.3d 1, 3

(Colo. Sup. Ct. 2012) held Noerr-Pennington "does not apply where, as here, the underlying alleged petitioning activity was the filing of an arbitration complaint that led to a purely private dispute." However, the Colorado federal court in *Sunergy Communities, Inc. v. Aristek Properties, LTD* 535 F. Supp. 1327, 1329 (D. Colo. 1982) held that Noerr-Penninton does apply to arbitrations.

The District Court cited to *Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft*, 189 F. Supp. 2d 385, 392–93 (E.D. Va. 2002) in support of the proposition that arbitrations are Noerr-Pennington protected. In addition the court in *Oneida Tribe of Indians of Wis. v. Harms,* No. 05-C-0177, 2005 WL 2758038, at *3 (E.D.Wis. Oct. 24, 2005) also held Noerr-Pennington applicable to arbitrations. However, in *Ford Motor Co. v. Nat'l Indem. Co* 972 F.Supp.2d 862, 868 (2013 E.D. Virginia) at 868 the court found that Noerr-Pennington does not apply "for the threshold reason that the arbitration here does not petition the Government at all." Similarly in *Morrison v. Amway Corp.* (*In re Morrison*), No. 08-03260, 2009 WL 1856064 (Bankr.S.D.Tex. June 26, 2009) also found Noerr-Pennington inapplicable.

5. The Lower Courts Refused to Follow and Overruled Binding Supreme Court Precedent Meeting Rule 10 Criteria of So Far Departing From the Accepted Course of Proceedings As to Warrant Supervision

The District Court and Ninth Circuit intentionally disregarded binding Supreme Court precedent. *Foman v. Davis* 371 U.S. 178 (1962) already made it clear that leave to amend must be granted. The circumstances here are exactly identical to *Johnson v. City of Shelby* 574 U.S. 10 (2014). Facts sufficient to demonstrate a claim of race discrimination were already plead in the complaint,

and the excerpts are attached as Appendix X. The request for leave to amend for Title VI was made to the District Court, and was addressed in the very first question of the "questions presented" section of the AOB. The Ninth Circuit addressed amendment for §504, but deliberately failed to address Title VI. The Ninth Circuit was fully aware Supreme Court precedent required leave to amend and was refusing to enforce federal race discrimination law against the State Bar, which has occurred 240 times previously. There is no point in the Supreme Court specifically addressing the same identical situation if the lower Courts refuse to follow the Supreme Court's precedent. There is no point in Congress enacting Title VI or the Supreme Court formulating the *McDonnell Douglas* test to demonstrate a prima facie case when the lower courts won't follow.

In addition to the issue of leave to amend for Title VI, the Ninth Circuit also refused to address the application of 42 U.S.C. §608 to Title IV funding. The wording of the statute is clear. As was noted in *Simmons v. Himmelreich* 136 S. Ct. 1843, 1848 (2016) "we presume Congress says what it means and means what it says." The wording of the statute "The following provisions of law shall apply to any program or activity..." does not leave ambiguity as to what is required.

6. Five Acts of Congress Were Held Unenforceable and/or Unconstitutional

The Ninth Circuit did not address Title VI, but failure to allow amendment rendered the Act unenforceable. The Ninth Circuit held that the ADA was unconstitutional as violating the 11th Amendment. §504 was unenforceable because the suspension was not "solely" by way of disability. The Ninth Circuit

held that the Sherman/Clayton Acts were barred by Noerr-Pennington, and by definition held that the federal laws were unconstitutional because it violates the First Amendment from which the doctrine arises. The ability to arbitrate may be a "right" created under state law, but the Supreme Court has never held that the "right to arbitrate" derives from the First Amendment to which Noerr-Pennington would protect from governmental impingement. 42 U.S.C. §1981 for racial preferences was barred by Arbitral Immunity. Five Acts of Congress were held unenforceable and/or unconstitutional.

7. The Ninth Circuit Overruled the Supreme Court's Decision in *Forrester v. White* by Holding Arbitral Immunity Applied to Selections for Judicial Appointments

The most analogous case as to the issue of whether arbitrator immunity applies to non-arbitral acts of giving racial preferences to whites for judicial selection is *Forrester v. White* 484 U.S. 219 (1988) where the Supreme Court held that judicial immunity did not apply to a judge's ministerial functions of hiring and firing court personnel. Forrester was raised, but not addressed. The lower courts refused to follow binding Supreme Court precedent in this regard. The Supreme Court has never addressed arbitrator immunity in any case.

VII. Conclusion

Based upon the foregoing, a Writ of Certiorari is respectfully requested.

Dated: 11/24/20

By: _____
Petitioner, Pro Se