Petitioners respectfully request that the members of this Honorable Court of Appeals for the Ninth Circuit grant rehearing *en banc*. In support thereof, Petitioners say:

(1) The panel decision uniquely holding Section 30(A) of Title XIX of the Social Security Act -- which requires that payments for medical assistance to individuals assure quality of care and sufficient providers-- does not create in anyone personal rights enforceable under Section 1983 conflicts with *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), and two decisions confirming the *Wilder* holding to be authoritative and binding, *Blessing v. Freestone*, 520 U.S. 329 (1997) and *Gonzaga University v. Doe*, 526 U.S. 273 (2002). By contrast, the panel dismisses *Wilder* as "anomalous" and treats *Blessing* as superceded.

(2) The panel decision conflicts with four decisions of this Court, *Price v. City of Stockton*, 390 F.3d 1105 (2004)(Hug, Alarcon, Grabel JJ.)(per curiam) (giving plenary consideration to *Gonzaga* , applying *Blessing,* and looking to companion provisions to find "an enforceable entitlement"); *Orthopaedic Hospital of Los Angeles v. Belshe*, 103 F.3d 1491 cert. denied 521U.S. 1116 (1997) (Fletcher, Tashima, Restani, JJ)(construing 30(A) and enforcing it); *Clark v. Coye*, 967 F.2d 585, 1992 U.S. App. LEXIS 23982 (Reinhardt, Kozinski, Ezra, JJ)

affirming as to liability and remanding as to relief *Clark v. Kizer*, 758 F.Supp. 572 (E.D. CA 1990); further proceedings, 1993 U.S. App. LEXIS 26615 (Wallace, Pregerson, Beezer JJ.)(enforcing Section 30(A) as an individual right); and *Withrow v. Concannon*, 942 F.2d 1385 (1991) (Canby, Kozinski JJ, Trott, J diss.)(holding individual compliance required under federal entitlement statutes). Consideration by the full Court and reversal is necessary to restore and maintain uniformity of this Court's decisions.

(3) The panel decision departs from the unbroken course of decisions by all of the other seven Courts of Appeal which, anticipating *Gonzaga*, have addressed the specific issue of whether Section 30(A) "unambiguously conferred" individual rights, to become the only decision to hold that no one at all, not individual recipients, not providers, can enforce 42 U.S.C. § 1396a(a)(30)(A).[1]

---

[1]The panel acknowledges (Slip Opinion at 8901) four Circuit Courts in conflict with its decision —the First, in *Visiting Nurse Association v. Bullen*, 93 F.3d 997, 1005 (1st Cir. 1996), cert. denied 519 U.S. 1114 (1997); the Fifth in *Evergreen Presbyterian Ministries v. Hood*, 235 F.3d 908, 927-28 (5th Cir. 2000) ; the Seventh in *Methodist Hospitals v. Sullivan*, 91 F.3d 1026, 1029 (7th Cir. 1996); the Eighth, in *Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519, 528 (8th Cir. 1993)(explicitly holding 30(A) is "a right that is unambiguously conferred"). In a post-*Gonzaga* opinion the 8th Circuit reiterated its conclusion, *Pediatric Specialty Care v. Arkansas Dept. of Human Services*, 364 F.3d 925, 930 (2004) ("We find it entirely appropriate for the Plaintiffs to base their procedural due process claim on their clearly established right to have equal access to quality medical care as defined by §1396a(a)(30)(A)."). In addition, there must be added three more Circuits: the Fourth, in *Antrican v. Odum*, 290 F.3d 178, 191 cert. denied 537

The panel decision directly conflicts with the existing, authoritative opinions of Courts of Appeals substantially affecting a rule of national application concerning enforcement of a provision applying to Home and Community Based Services for the disabled and medical services for the poor as well as disabled. There is an overriding need for national uniformity on this matter and, thus, for rehearing here and reversal.

(4) With regard to the Americans with Disabilities Act and Section 504, the panel decision drastically departs from *Olmstead v. J.C.*, 527 U.S. 581, 599-606 (1999), and the decision of the Third Circuit in *Frederick L. v. Dept. of Public Welfare*, 364 F.3d 487 (3rd Cir. 2004) gutting the specific conditions a state must meet before it may justify providing services in non- integrated institutional settings; it wrongly applied a post-trial standard of review to this summary judgment; and it is inconsistent with *Townsend v. Quasim*, 328 F.3d 511, 517-18 (9th Cir. 2003), *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10th Cir. 2003), and *Radaslewski v. Maram*, 383 F.3d 599 (7th Cir. 2004) which held

---

U.S. 973 (2002); the Sixth, *Westside Mothers v. Havemann*, 289 F.3d 852 cert. denied 537 U.S. 1045 (2002), and the Third, in *PA Pharmacists Assn. v. Houstoun*, 283 F.3d 531 (3rd Cir. 2002) (en banc) cert. denied, 537 U.S. 821. The panel dismisses the last as dicta but, petitioners submit, if it be dicta, it is dicta joined in unanimously by 11 judges en banc whose text and structural analysis are unavoidably powerful.

summary judgment inappropriate for determining whether a state has established a fundamental alteration defense. Rehearing and reversal is necessary to re-establish consistency in this Circuit and nationally in the standard for ADA/504 compliance .

Petitioners include seven individuals with severe developmental disabilities who need-- and under Title XIX of the Social Security Act are eligible for -- quality habilitation services in order to attain and retain their capabilities for independence and self-care, and to acquire, retain and improve the self-help, socialization and adaptive skills necessary to live successfully in home and community-based settings, rather than in segregated, isolate institutions. With several non-profit disability organizations, the disabled individuals and their class sued to remedy the radically high turnover among home and community-based workers in California—a 50% turnover annually with high unfilled vacancies caused by low wages, the California Auditor General reported in 2000—upon whose skills and knowledge of the developmentally disabled person, acquired only through the longevity of their relationship, depends the quality and the actual availability of the services these individuals are entitled to receive. Thus, petitioners have sought payments for home and community-based services which assure their quality and their sufficient provision in accordance with each of the

requirements of Title XIX, the ADA and 504. The relevant statutory provisions are set forth in the appendix to this petition.

I. This Court has twice previously enforced the requirements of §1396a(a)(30)(A), in *Clark* and *Orthopaedic*, supra, fulfilling the expectations of Congress[2] and demonstrating that quality of care and availability are judicially workable standards. Although whether the statute creates personal rights enforceable under Section 1983 was not raised in either case, in both this Court authoritatively construed the statute as requiring a mandatory level of payment and found the statutory criteria of efficiency, economy, quality of care and sufficiency to assure availability within judicial competence. Without benefit of any intervening change in law, the panel voids settled construction of this enactment and its remedies which have been found to be intended, necessary and workable to assure delivery of crucially important services to people who hold the "certain entitlements" which Title XIX created. *Pennhurst State Sch. & Hospital v. Halderman (Pennhurst I),* 451 U.S. 1, 17-18 (1981), set forth below.

In its several decisions in *Clark v. Coye*, supra, this Court sustained a 30(A) violation of the availability provision raised by a class of eligible recipients,

---

[2] "In instances where the states . . . fail to observe these requirements, the courts would be expected to take appropriate remedial action.'" H.Rep.No. 158, 97th Cong., 301. See *Pennsylvania Pharmacists*, 283 F.3d at 541.

found California's payments for dental services inadequate to assure availability, and directed enforcement. 1992 U.S.App. LEXIS 15044 *11.

In *Orthopaedic Hospital*, 103F.3d 1491, this Court held that California's payments for emergency outpatient hospital services did not assure the availability of quality care and services, and again enforced 30(A). *Orthopaedic* proceeds from the Boren Amendment governing inpatient rates(which *Wilder* held enforceable and found to create individual rights to payment), and notes the additional flexibility of 30(A)'s standard that payments assure economy, efficiency, quality of care and sufficiency to ensure availability.[3] It specifically reconciles those provisions, holds they are mandatory and applies them, holding California's rates in violation because they did not reflect consideration of "an efficient and economical hospital's costs in providing quality care." 103 F.3d at

---

[3]The Boren Amendment and its predecessor statutes were enforced by this Circuit in *Coos Bay Care Center v. Oregon Dept. of Human Resources*, 803 F.2d 1060, 1061-63 (9th Cir. 1986) and *California Hosp. Ass'n v. Obledo*, 602 F.2d 1357, 1363 (9th Cir. 1979), both approved and followed in *Wilder*, 496 U.S. at 518 n.16 and 516 n. 14.

Gonzaga's characterizations of the *Wilder* statute as "explicitly confer[ring] a specific monetary entitlements upon the plaintiffs" and "requir[ing] states to pay an 'objective' monetary entitlement to individual health care providers", 536 U.S. at 280, 289, must be understood to mean not a stated dollar figure, for the *Wilder* statute contains no such, but rather a right to an objective, calculable amount, as *Orthopaedic* holds 30(A) does also. 103 F.3d at 1499. Hence the panel's attempt to distinguish *Wilder* is no distinction.

500. Each hospital was entitled to payment of that rate in order to assure quality and availability for each individual eligible for Medicaid care and services.

Although the panel says "we do not need to consider the second and third [*Blessing*] prongs", Slip Op. at 8908,[4] nonetheless it does hold as part of its prong one analysis that "The broad and diffuse language of the statute [is not] amenable to judicial remedy" (8904), that "the interpretation and balancing of the statute's indeterminate and conflicting goals would involve making policy decisions for which this Court has little expertise and even less authority" (8904), and that "The flexible, administrative standards embodied in the statute do not reflect a Congressional intent to provide a remedy for their violation" (8902). The panel decision thus directly conflicts with the results of *Clark* and the careful analysis of *Orthopaedic* that (1) the terms of 30(A) <u>are</u> mandatory, (2) that they are <u>not</u> deleteriously flexible and (3) that the criteria set by 30(A) <u>are</u> reconcilable, do not strain judicial competence and are enforceable. 103 F.3d at 1496-1500. The panel made no reference at all to *Orthopaedic* or *Clark* (nor in this regard to the

---

[4]The panel correctly sets forth the 2nd and 3rd *Blessin*<u>g</u> tests, at 8898: "'that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence'" and "the statute must [un] ambiguously impose a binding obligation on the states. In other words, the provision giving rise to the asserted right must be couched in mandatory not precatory terms."

decisions by the other Circuit Courts of Appeals successfully applying this purportedly unamenable provision) and without analysis held that three criteria set forth in 30(A), efficiency, economy and quality of care, are too difficult to reconcile, despite this Court's holdings in those cases, and the explicit analysis of other courts, e.g., *Reynolds,* 6 F.3d at 530, *Pennsylvania Pharmacists,* 283 F.3d at 537-8.

That deprivations of quality of care and availability in violation of Section 30(A) go to the essence of Title XIX's entitlement is demonstrated by the seriousness of the deprivations of care and services to the individuals entitled to receive them found upon full trials (denied by the lower court here) in *Clayworth v. Bonta*, 295 F.Supp.2d 110 (E.D.Calif. 2003) (consolidated for argument on appeal), rev'd memorandum decision, Nos.04-15498, 04-15532 (Aug. 2, 2005), *Ball v. Biedess*, 2004 U.S. Dist. LEXIS 27044 (D.Ariz. 2004)(appeal pending), and *Memisovski v. Maram*, 2004 U.S. Dist. LEXIS 16772 (N.D. Ill. 2004).

II. Unlike the panel which is at pains to claim that *Gonzaga* has caused a radical break in what is enforceable under Section 1983, this Court has declared that *Gonzaga* has affirmed and not displaced the *Blessing* standard. Indeed, this Court in *Price v. City of Stockton*, 390 F.3d 105 (2004) takes *Gonzaga* for what it is, no

less and no more, not a sea change but as emphasizing *Blessing's* own articulate directive that it is rights which give rise to § 1983 actions and confirming the validity of *Wilder*.

Gonzaga itself makes clear that *Wilder* is not "anomalous". Slip Op. at 8897. *Gonzaga* holds precisely the opposite.[5] As the Third Circuit noted in *Sabree v. Richman*, 367 F.3d 180, 184 (2003), the *Gonzaga* Court "carefully avoided disturbing, much less overriding" *Blessing*, *Wright*, and *Wilder*. Rather, *Gonzaga* "*relied* on those cases." Id. (emphasis supplied). Thus courts of appeals, including this Court heretofore, have, post-*Gonzaga*, regularly looked to *Blessing* to determine whether a statute confers rights enforceable through Section 1983. See, e.g., *Price v. City of Stockton*, 390 F.3d 1105, 1109 (9th Cir. 2004); *Bryson v. Shumway*, 308 F.3d 79, 88 (1st Cir. 2002) and *Rolland v. Romney*, 318 F.3d 42, 48 (lst cir. 2003); *Rabin v. Coker-Wilson*, 362 F.3d 190, 201-02 (2nd Cir. 2004); *Schwier v. Cos*, 340 F.3d 1284 (11th Cir. 2003). The Fifth Circuit, noting that

[5] Moreover, Congress explicitly endorsed that "individuals who have been injured by a state's failure to comply with the state plan requirements are able to seek redress in the federal courts to the same extent they were able to prior to the decision in *Suter v. Artist M.*," i.e., as under *Wilder*. H.R. Conf. Rep. No. 102-1034 at 1304 (1992) quoting H.R. Rep. No. 102-631 at 366 (1992)(emphasis added). As long as *Gonzaga* continues to "simply require a determination as to whether Congress intended to confer individual rights upon a class of beneficiaries," 536 U.S. at 285, *Wilder* can not be "anomalous."

Gonzaga had said some lower courts had misinterpreted" one of the "prongs" of *Blessing*, continues to invoke *Blessing*, "as clarified by *Gonzaga*." *S.D. ex rel Dickson v. Hood*, 391 F.3d 581, 602, 604 (5th Cir. 2004).

The panel makes no suggestion even, let alone analysis, that the Courts of Appeals decisions holding 30(A) enforceable engaged in any analysis of the kind disapproved in *Gonzaga.* They did not.

Both before and after *Gonzaga*, courts have applied the *Blessing* test to examine the text and structure of sections of the Medicaid law other than 30(A) and correctly determined that some of those sections were directed at aggregate policies and programs or were directed at institutional concerns indicating that Congress had not intended to create individual rights enforceable by Medicaid recipients. *Bumpus v. Clarke*, 681 F.2d 679, 683-84 (9th Cir. 1982), opinion withdrawn as moot 702 F.2d 926 (9th Cir. 1983)(§1396a(a)(19): administration in "best interests" of recipients is vague and amorphous); *Bruggeman v. Blagojevich*, 324 F.3d 906, 911 (7th Cir. 2003) (§ 1396a(a)(19) is vague and amphorous); *Harris v. James*, 127 F.3d 993, 1011, (11th Cir. 1997) (§1396 a(a)(1) statewideness requirement not for recipients' benefit as long as they are provided care and services under §10(A)). See also this Court's opinion in *Price,* 390 F.3d at 1113, holding, in a non-Medicaid case, that 42 U.S.C. §§5304(d)(2)(A) (i)and

(ii), concerning maintaining an overall supply of housing, are expressed in aggregate terms, are explicitly nonreviewable, and are "without reference to individual displaced individuals." These provisions are all in stark contrast to Section 30(A) with its reference to the needs of beneficiaries and its requirement of specific payments sufficient to assure availability of quality care.

III The panel erred in finding that Section 30(A) does not create individual rights to payments which assure quality care and availablity. These individual rights are unambiguously created by the statute.

Section 30(A) begins with the same words that the Third Circuit in *Sabree*, 367 F.3d at 190 found to create individual rights:

> "We find it difficult if not impossible, as a linguistic matter, to distinguish the import of the relevant Title XIX language—'A State plan must provide'—from the 'No person shall' language of Titles VI and IX. Just as in Titles VI and IX, the relevant terms used in Title XIX are 'mandatory rather than precatory'."[6]

Unlike FERPA, *Gonzaga* 536 U.S. at 287, which is directed at setting the conditions for funding cut-off of the institution, Section 30(A) is directed at defining essential characteristics of services to individuals which payments must assure, and it is thus directed at the individuals benefitted, not the institutions

[6] *S.D. ex rel Dickson v. Hood*, 391 F.3d at 603, adopts *Sabree's* analysis.

regulated.

Although at first blush Section 30(A) may not seem to refer directly to individuals, the definition of "care and services available under the plan" –the statutory phrase used twice in 30(A)– is care and services "for individuals" who are eligible. §§1396a(a)(10) and 1396(d). See also §1396n(c)(4) and (5).

As the court in *Pennsylvania Pharmacists*, 283 F.3d at 538 noted:

> "[Section 30(A)] demands that payments be set at levels that are sufficient to meet recipients' needs. It is 'phrased in terms benefitting' recipients, and the adequacy of payment is measured in relation to the health needs of recipients. It manifests concern solely for the well-being of recipients."

The panel stopped reading Section 30(A) after the words "provide methods and procedures" ignoring that similar words marked the beginning of the Boren Amendment enforced in *Wilder*, and that the *Wilder* Court kept reading to see if the *rest* of the section creates rights for individuals.[7] The Third Circuit en banc in *Pennsylvania Pharmacists*, did read 30(A) in its completeness, concluding:

> ". . .the directives to provide 'quality of care' and adequate access are 'drafted . . . with an unmistakable focus on' Medicaid beneficiaries, not providers. Cannon, 441 U.S. at 691. They are 'phrased in terms

---

[7]The Boren Amendment required that states must: "use rates (determined in accordance with methods and standards developed by the State. . .)which the State finds. . .are reasonable and adequate. . . in order to provide care and services. . . and to assure that individuals have reasonable access. . . to services of adequate quality." 42 USC §1396a(a)(13)(A) (1982 ed.Supp.V).

> benefitting' Medicaid recipients, Wilder, 446 U.S. at 510, and these are the persons that Congress intended to benefit." 283 F.3d at 538.

The combination of mandatory, formal, Title XIX state plan language, the individual focus of the obligations created in 30(A), and that the obligations are for the benefit of recipients shows that 30(A) satisfies the *Gonzaga/Blessing* test for creating individual rights. This is confirmed by the fact that the important contra-indicators of individual rights present in FERPA do not exist here: there is here no provision for individuals to obtain administrative relief from a failure to comply, as there was in FERPA, 536 US at 289.[8]

Nor is Section 30(A) focused on aggregate programs, as opposed to individual rights. Unlike the provision at issue in *Gonzaga* which addressed only "institutional policy and practice." 536 US at 288, the quality of care and

---

[8] One of the reasons articulated in *Gonzaga* for the Court's confirmation that *Wilder* remains binding law is that the Medicaid statute provides no "administrative means of enforcing the requirement against states that failed to comply", 536 U.S. at 280-81 and that the "aggrieved individual lacked any federal review mechanism." Id. at 289-90. This was in sharp contrast to the FERPA statute in *Gonzaga*. Id. The lack of any mechanism giving individuals an avenue to obtain administrative review, which was equally important to the remand in *Blessing*, and the holding in *Rosado v. Wyman*, 307 U.S. 397, 420-1 (1970), applies equally here to 30(A). Moreover, unlike providers, who the First Circuit in *Long term Medical Care v. Ferguson*, 362 F3d 50, 59 (1st Cir. 2003) said could "vote with their feet" if denied their 30(A) rights, recipients can not do without these services and do not have that 'option.'

availability of services requirements of Section 30(A) are plainly directed at ensuring a specific level of care for the individuals. As to availability, the statute requires payments to assure enough providers so that "care and services [i.e., medical assistance to each eligible individual] are available under the plan at least to the extent that such care and services are available to the general population in the geographic area." Although the measure of availability is cast in terms common to all, the statute requires that the level of services be available to each individual, unlike the provision in *Blessing*, which required only systemwide performance and not for any one individual, or in *Gonzaga* which required only a general policy of compliance.

IV. Crucially, the panel failed to look at the "structure" of the act, as directed in *Gonzaga* and done by this Court in *Price*, to see if it provides any "indication that Congress intended to create new individual rights." Id. at 286 and 287.

In structure, the statute here is an entitlement. As *Pennhurst I*, 451 U.S. at 17-18, said

> "[I]n those instances where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly. See, e.g., *King v. Smith*, [392 U.S.] at 333 (Social Security Act creates a 'federally imposed obligation [on the States] to furnish aid to families with dependent children . . . with reasonable promptness to all eligible individuals', quoting the Act)."

Here in Title XIX of the Social Security Act Congress again did so explicitly. The language of §§ 1396a(a)(8) ("medical assistance under the plan . . . shall be furnished with reasonable promptness to all eligible individuals") is exactly what *Pennhurst* identifies as the archetype entitlement statute. See also § 1396a(a)(10) and the permanent authorization of appropriations in § 1396.[9]

In *Withrow v. Concannon*, 942 F.2d 1385 (9th Cir. 1991)this Court recognized that statutes conferring a 'certain entitlement' present the decisive earmarks of enforceability. Entitlement statutes are few. *Withrow* concerns a state plan requirement common to three of them, Medicaid, food stamps, AFDC. Individual entitlement statutes, *Withrow* holds, require "compliance, not 'substantial compliance'". Substantial compliance is the standard only for federal administrative fund cut-off. 942 F.2d at 1388. "From the standpoint of the applicants or recipients . . . it is no comfort to be told that there is no federal

---

[9]The panel circles around this plain teaching of *Pennhurst*. It never asks what the 'certain entitlements' in Medicaid is to, nor analyzes the structure of the entitlement to see that the payment requirement of 30(A) is focused upon individual rights, not upon programatic "policies". Instead the panel seeks refuge in the empirically doubtful assertion that "the typical remedy for state non-compliance with federally imposed conditions is not a private cause of action for non-compliance but rather action by the Federal government to terminate funds to the State". To the contrary, *Rosado v. Wyman*, 397 U.S. 397, 420 (1971)(Harlan, J.) noted individual enforcement is to be expected. See also the intent of Congress expressed in note 2 above.

remedy because the state is in 'substantial compliance' with the federal requirements." 942 F.2d at 1387. *Sabree*, based on *Blessing,* holds this remains true after *Gonzaga*. 367 F.3d at 192.

Indeed, *Gonzaga* twice is emphatically clear that the presence of "an individual entitlement to services" distinguishes a rights-creating statute which is enforceable from an aggregate, merely programatic focused statute which is not. 536 U.S. at 281-282 (quoting *Blessing*, "far from creating an *individual* entitlement to services, the standard [of substantial compliance] is simply a yardstick for the Secretary to measure the *systemwide* performance of a States Title IV-D program. Thus the Secretary must look to the aggregate services provided by the State, not to whether the needs of any particular person have been satisfied").

Here it is the quality and availability of the care and services furnished to individuals which is the focus of 30(A). Section 30(A) specifies essential characteristics of the care and services which must be furnished to individuals pursuant to §1396a(a)(8) and (a)(10), which clearly are individually enforceable rights. *Sabree*, 367 F.3d at 194 ("Current binding precedent supports the decision of the Court." Alito, J., concurring);*Townsend v. Quasim*, 328 F.3d 511, 514 (9th Cir. 2003)("A participating state must provide certain types of services to

categorically needy persons. *See* 42 U.S.C. §1396a(a)(10)(A), 1396d(a)(1)-(5), (17), (21).”); *Bryson v. Shumway*, 308 F.3d 79 (1st Cir. 2002); *Doe 1-13 v. Childs*, 136 F.3d 709 (11th Cir. 1998); *Pediatric Specialty Care, Inc. V. Arkansas Dep’t of Human Services*, 289 F.3d 472 (8th Cir. 2002); *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir.), cert. denied, 537 U.S. 1045 (2002). Similarly, Sections 1396n(c)(4) and (5) have an explicit individual focus.

The provisions of Section 30(A) to pay sufficiently to assure quality of care and availability of care clearly are intertwined with the requirement to furnish and to promptly provide care and services.[10] They do not stand alone, but must be read in pari materia– just as this Court did in *Price v. Stockton*. In *Price* this Court used terms of Section 104(d) to supply parameters for Section 104(k) to fill a crucial omission (what compensatory payments must be paid by the federally funded entity to displaced persons). Although it was a “difficult question” whether the Section 104(d)(2)(A)(iii) and (iv) plan requirements established individual rights, 390 F.3d at 1111, “Read together with Section 104(k) these provisions confirm Congress’s intent not only to impose a plan certification requirement on grantees,

[10]It is difficult to imagine how the question of delivery of a service can be resolved without considering whether its quality is sufficient to comply, otherwise a claim can be made that the actual service called for has not in fact been furnished. Similarly as to availability. Each provision –8(A), 10(A) and 30(A)– incorporates the boundaries of the other.

but also to confer upon persons displaced by redevelopment activities an enforceable entitlement to the specific benefits of such plans." 390 F.3d at 1113. Here, Sections 8 and10's individual entitlement provisions confer an enforceable entitlement to the specific quality and availability set forth in the Section 30(A) plan requirements. The panel decision, in its failure to examine the entire statutory structure, is in direct conflict with *Price*, *Evergreen*, 235 F.3d at 927-931 and *Pennsylvania Pharmacists*, 283 F.2d a 537-39, 543-44. This Court must join them to rule that the power and reach of Title XIX's entitlement is too strong to divorce the quality care and availability of services required by Section 30(A) from the individual rights enforceable under Section 1983.

V. The panel ruled that the District Court correctly granted summary judgment to the state on the ADA/Section 504 claims because "its conclusion that California's 'plan is comprehensive, effective, and is moving at a reasonable pace,' is supported by the record," Slip Op. at 8917 (emphasis supplied).[11] Unaccountably, this applies the standard for reviewing trial findings to a summary judgment motion, allowing the district court to resolve highly disputed issues of fact on a paper record and without reference to whether plaintiffs' evidence is sufficient to require a trial. By contrast, *Townsend*, *Fisher* and *Radaslewski,*

[11]It similarly holds "the record supports the district court's finding" at 8916 and 8918.

supra, all held summary judgment inappropriate for determining whether a state has established a fundamental alteration defense.

The panel decision moreover conflicts with the Supreme Court's highly specific directives for evaluating a state's 'reasonable modification' defense in *Olmstead v. Zimring*, 527 U.S. 581, 603-606. And it is in conflict with *Frederick L. v. DPW*, 364 F.3d at 499-500, which it does not ever cite, which holds an *Olmstead* plan defense requires a "commitment by the state which is communicated" in some manner so that persons with disabilities "can know where they stand."

In *Olmstead,* the Court set conditions for a reasonable modification justification:

> "If. . . the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated the reasonable-modifications standard would be met." 527 U.S. at 605-6.

Plaintiffs produced sufficient facts to warrant trial on each of those criteria on which the state bears the burden of proof:

– California has no *Olmstead* plan. It never identified any documents as its *Olmstead* plan. The panel, therefore could not cite to any plan, much less to a

"comprehensive" one. There are no schedules, no commitments and no waiting list. What California presented was merely an extrapolation of the most recent two year program. This is explicitly insufficient under *Olmstead* according to *Frederic L.*, 364 F.3d at 499-500, which requires a "commitment" by the state which is "communicated" in some manner.

–the so called 'plan' is not 'effective'. All of the progress in moving from institutions to integrated facilities in the community since 1991 cited in the opinion came because of state court orders in the *Coffelt* case which began in 1992 and expired in 1999. Thus all the progress cited by the court is due to a former plan. In the next three years, in the absence of state court orders, more people were admitted to than discharged from institutions. The existence and effect of the *Coffelt* case and its expiration is not mentioned in the opinion.

– the pace is not 'reasonable.' The panel acknowledges that there are 1125 persons awaiting placement out of 3800 institutionalized, but never acknowledges that it will take 12 years to place them at the current rates, not "the short time" *Olmstead* requires. 527 U.S. at 606 (The panel at 8918 selectively eliminates the Supreme Court's reference to a "short time" in quoting its approval of asking a person to wait for a placement.) Whether a 12 year wait is "a reasonable pace" should not be decided sub silentio nor on summary judgment. This Court should

not endorse such an expansive and disheartening reading of the Supreme Court's attempt to grant states some "reasonable" latitude and flexibility while ignoring its directives to also set boundaries and objective conditions on when states can ignore their obligations to provide disabled persons non-segregated services, obligations which Congress expressly placed on them.

–the slower pace of community placement is excused by the difficulty of the disabilities remaining in the institution, the panel says, without ever saying how slow the pace is and without acknowledging plaintiffs' evidence that many times more persons with the same severity of disabilities already are placed in the community.[12] Clearly whether the difficulty of placement justifies the extraordinary 12 year wait is a trial question.

Finally, the panel disregards *Olmstead's* requirement for "an effectively working plan" and instead says "*Olmstead* does not require . . .that a State's plan be always and in all cases successful." This eliminates concern for implementation. An academic commentator has already noted that this language "will surely be used by states to rationalize failed deinstitutionalization plans." http://disabilitylaw.blogspot.com/2005/08/ninth-circuit-rejects-olmstead.html

---

[12] Of course, discrimination on the basis of severity of disability is prohibited by the ADA and Section 504. *Messier v. Southbury Training School*, 1999 U.S.Dist. LEXIS 1479 at *32-3 (D.Conn. 1999), and cases cited there.

By endorsing the district court's procedure of deciding whether a reasonable modification defense has been made without trial, and by endorsing its conclusions on this record, the panel vitiates the criteria enunciated by the Supreme Court in *Olmstead* which a state must "demonstrate" in order to be entitled to a limited exception from providing services in the community.

For the foregoing reasons this Court should grant a rehearing *en banc*, reverse the decision below and remand for a full trial.

RESPECTFULLY SUBMITTED,
PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA

By: _____
Michael Churchill
Thomas K. Gilhool
James Eiseman, Jr.
Judith A. Gran

DISABILITY RIGHTS EDUCATION
AND DEFENSE FUND

Arlene Mayerson
Larisa Cummings

Dated: August 23, 2005