No. 04-1653

In The Supreme Court of the United States

JACQUELYN FINNEY,

Petitioner,

v.

THOMAS P. NUGENT ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PRO SE

QUESTIONS PRESENTED

1. Whether affirmance of *Popovich v. Cuyahoga County Court*, 539 U.S. 941 (2003), as decided in conjunction with *Tennessee v. Lane*, 124 U. S. 1978 (2004), means that the Rooker-Feldman doctrine and the doctrines of judicial and quasi-judicial immunity do not bar suit against:

    - The Judicial Council of California to challenge its enactment and application of California Rule of Court 989.3, and the policies, procedures and practices enacted pursuant to that rule of court, for compliance with the requirements of the Fourteenth Amendment and the Americans with Disabilities Act, Title II, 42 U.S.C. §§ 12131-12165?

    - California judges, court administrators and court entities for disability discrimination and retaliation, under color of state law, in violation of the Fourteenth Amendment and ADA Title II?

2. Whether it is consistent with the requirements of the Fourteenth Amendment and 28 U.S.C. § 455 for judges in the Ninth Circuit to consider facially and as-applied constitutional challenges to California Rule of Court 989.3, in that the rule was proposed, promoted, and extrajudicially affirmed by a Ninth Circuit district judge to be "…consistent with the Americans with Disabilities Act?"

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is an individual and resident of the state of California, who is totally disabled from polio.

Respondents

THOMAS P. NUGENT, Judge of the San Diego Superior Court; JOAN P. WEBER, Supervising Judge of the San Diego Superior Court (The North County Regional Center); RICHARD E. L. STRAUSS, Presiding Judge of the San Diego Superior Court; THE SAN DIEGO COUNTY SUPERIOR COURT; JUDITH MCCONNELL, Presiding Justice of the Court of Appeals, 4th Dist. Div. One; THE COURT OF APPEALS, 4th DIST. DIV. ONE; WILLIAM C. VICKREY, Administrative Director of the Courts; ADMINISTRATIVE OFFICE OF THE COURTS; THE JUDICIAL COUNCIL OF CALIFORNIA.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum disposition, Pet. App. 1a-3a, and the judgment, Pet. App. 5a, of the United States Court of Appeals for the Ninth Circuit are unreported. The judgment, Pet. App. 6a, and opinion, Pet App. 7a-19a of the United States District Court for the Southern District of California are unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254. The United States Court of Appeals for the Ninth Circuit had jurisdiction under 28 U.S.C. § 1291, entered its judgment in a memorandum disposition on January 13, 2005, and denied a timely petition for rehearing on March 14, 2005, Pet. App. 4a.

On January 23, 2004, the petitioner commenced this ADA Title II and §§ 1983, 1985 action pro se in the United States District Court for the Southern District of California, which had jurisdiction over this case under 28 U.S.C. § 1331. The District Court entered a final order on April 15, 2004, granting the California court's motion to dismiss with prejudice. The petitioner filed a notice of appeal in a timely fashion with the District Court on April 30, 2004.

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented implicate the following provisions of the United States Constitution:

Amendment XIV

No State shall… deny to any person within its jurisdiction the equal protection of the laws.

Amendment XIV

[N]or shall any State deprive any person of life, liberty, or property, without due process of law…

STATUTES AND REGULATIONS INVOLVED

> 28 U.S.C. §1257 provides: "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States…"

Title II of the Americans with Disabilities Act of 1990 provides in pertinent part:

> "The term 'public entity' means - (A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State . . . " 42 U.S.C. § 12131 " . . . no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services,

programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

28 U.S.C. § 455(a) states: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

28 U.S.C. § 455(b) states: "(b) He shall also disqualify himself in the following circumstances: 1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; 5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person, (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; (iv) Is to the judge's knowledge likely to be a material witness in the proceeding."

42 U.S.C. § 1983, which provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. § 1985(2), which provides, in pertinent part: "If two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice

> in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;"

STATEMENT OF THE CASE

Petitioner, who is totally disabled from polio and intractable pain, has been denied access to the California courts, as a litigant and prospective juror, under color of state law in violation of the Americans with Disabilities Act, Title II.

The Ninth Circuit's dismissal of petitioner's constitutional challenge to California Rule of Court 989.3 and its application, pursuant to the Rooker-Feldman doctrine, permits the California judiciary to deny disabled persons access to state courts in violation of their fundamental constitutional right, subject to the protection of the Fourteenth Amendment, which is the obligation of this Court to enforce. *Tennessee v. Lane*, 124 U. S. 1978 (2004).

A. Petitioner Suffered Court Sanctioned Disability Discrimination and Retaliation in the Conduct of a State Lawsuit

Petitioner's state lawsuit opposed the California Department of Managed Health Care's (DMHC) enforcement of an unconscionable Kaiser Permanente HMO subscriber contract condition that imposes prior restraint on her speech in the context of her doctor-patient relationships in order to obtain state mandated and contractual medical benefits.

DMHC, under color of state law, has sanctioned Kaiser Permanente's progressive denial of primary and specialist

medical care to petitioner and her husband for five years, because she has attempted to access state and federal courts to remedy "gagging" in her doctor-patient relationships.

During the conduct of her state lawsuit, petitioner attempted to enforce her ADA Title II (ADA) rights and protections pursuant to California Rule of Court 989.3 (CRC 989.3) and the San Diego Superior Court's Local Policy Against Bias. Rather than enforcing appellant's ADA rights, the California judiciary conspired to aid and abet DMHC attorneys' ADA violations in violation of 28 CFR § 35.130(b)(1)(v).

DMHC attorneys exploited petitioner's disability in the discovery process by imposing voluminous interrogatories and document production demands pursuant to a restrictive timeframe with which she was unable to comply. DMHC did not engage in the ADA's interactive process. Rather, petitioner's request to DMHC for a reasonable accommodation agreement to extend the deadline was answered by a written threat to move for terminating sanctions.

Petitioner was compelled to move for a protective order, as CRC 989.3 applies only to employees of the California court, not to opposing attorneys, and does not include an administrative complaint or grievance procedure in violation of U. S. Department of Justice regulations 28 CFR 35.174, implementing 42 U.S.C. § 12132.

Appellant is a member of the protected class of disabled persons. The burden was on Judge Nugent to engage in the ADA's interactive process, and to cause DMHC attorneys to engage in the interactive process. Judge Nugent did not do so. Moreover, he denied and rescinded accommodations that he had granted petitioner.

In violation of 28 CFR 35.134(b), Judge Nugent imposed an $1119.00 sanction on petitioner, because he determined that her request for protection from disability discrimination in court programs, services, and activities was without "substantial justification." Judge Nugent's order ignored any reference to petitioner's polio disability and that the motion requested that DMHC attorneys be ordered to comply with ADA Title II's accommodation mandate through the course of the proceedings.

Subsequent to multiple, burdensome motions to recuse him for cause, Judge Nugent recused himself. The case was reassigned to Judge Guy-Schall who had been publicly admonished for incarcerating a civil litigant in violation of the Fourteenth Amendment. Judge Guy-Schall caused petitioner to fear that she would subject petitioner to unlawful incarceration. *Under duress, petitioner dismissed her state lawsuit in February, 2004, one month subsequent to the filing of her federal claim.*

In violation of 28 CFR 35.130(b)(3)(iii), San Diego Superior Court Presiding Judge Strauss refused to review and investigate petitioner's complaint about Judge Nugent's possible bias and the sanction, because "…a presiding judge does not have any oversight… over other judges," even if they violate ADA.

In violation of 28 CFR 35.130(b)(3)(iii), Appeals Court Chief Justice McConnell refused to rule on petitioner's two requests to reasonably accommodate her polio disability. In order to proceed, petitioner would have been compelled to file a writ petition in the California Supreme Court, which was an undue burden and exercise in futility. Disability discrimination and retaliation denied petitioner access to the California appellate courts.

CRC 989.3 does not provide an administrative complaint procedure in violation of 28 CFR 35.130(b)(iii). The rule's only appeal mechanism is a writ petition, which causes accommodation decisions to be delayed for an indefinite time period to the prejudice of disabled persons.

> "If there is any evidence of foot-dragging, immediate judicial intervention will be required and judicial intervention at any stage in the proceedings must be expeditious." *City of Littleton v. Z. J. GIFTS D-4, L.L.C.*,124 U.S. 225, Justice Souter concurring.

In violation of 28 CFR 35,130(f), CRC 989.3 imposes a $655.00 filing fee to appeal each denial of an ADA accommodation request and imposition of sanctions. The filing fees to appeal both petitioner's accommodation denials and the sanction would have been $1310.00. In addition, petitioner was ordered to pay DMHC $1119.00. The total cost to petitioner for exercising her fundamental constitutional right to be free of disability discrimination would have been $2429.00, had she been permitted to access the court.

In violation of 28 CFR 35.130(b)(3)(iii), San Diego Court Executive Officer David Yamasaki expressly stated that the court does not provide "…access as contemplated by the Americans with Disabilities Act," because the court decided not to fund ADA compliance to provide access as required. He reaffirmed that the Presiding Judge has no duty to investigate disability discrimination and retaliation complaints.

CRC 989.3 puts petitioner and all disabled persons at risk of imminent harm from financial and other sanctions due to California judges' discriminatory animus and retaliation against disabled persons in violation of 28 CFR 35.134(a).

The Ninth Circuit's decision provides no remedy for the California court's disability discrimination under color of state law, confirming Solicitor General Olson's statements in the government's *Tennessee v. Lane* brief that:

> "Congress was equally justified in concluding that state laws against disability discrimination had generally been ineffective in combating the lingering effects of prior official discrimination and exclusionary laws, policies, and more importantly, in changing the behavior of individual state actors."

Prior to the submission of her appeal to the Ninth Circuit, petitioner was summoned for jury duty. The summons form did not refer to the availability of accommodations that would provide access as required by ADA.

The Assistant Jury Commissioner refused to assure petitioner that the court would provide access as required by ADA, subjecting her to the real threat of imminent harm to her life, liberty, and property from fines and other judicially-imposed sanctions.

Petitioner was denied the privilege of prospective jury service. She was compelled to invoke CRC 860, stating that the court's refusal to comply with ADA, put her at risk of imminent harm from physical injury and mental distress.

Petitioner included her jury service constitutional injury in her appeal pursuant to the relation back doctrine. This injury arose from the same nucleus of facts that caused her other ADA injuries. This Court declared in *Tennessee v. Lane* that disability discrimination in state court jury programs, services and activities is equally as repugnant to the Constitution as racial discrimination.

Prior to *Tennessee v. Lane,* this Court declared that:

> "The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system… The statutory prohibition on discrimination in the selection of jurors… makes race-neutrality in jury selection a visible and inevitable measure of the judicial system's own commitment to the commands of the Constitution. The courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition." *Powers v. Ohio, 499 U.S. 400 (1991),* citing *Peters v. Kiff,* 407 U.S. 507-509.

At no point in the proceedings did the California courts provide a full, fair, meaningful opportunity for petitioner to raise her ADA claims, which have never been litigated in state or federal court. Rather, the courts have inflicted unspeakable humiliation on petitioner by rubbing her nose in polio.

The Ninth Circuit has held that litigants seeking discovery may abuse the process by victimizing opposing litigants:

> "…In those circumstances, litigants are not without recourse… they may… apply for a protective order…" *Burlington Northern v. U.S. District Court,* 403 F.3d, 1042 (9th Cir. 2005).

However, the Ninth Circuit used the Rooker-Feldman doctrine to bar any remedy for disability discrimination and retaliation against petitioner by opposing attorneys and

judges that resulted in an $1119.00 sanction for requesting a protective order in the discovery process.

B. The Ninth Circuit Has Misinterpreted the Rooker-Feldman Doctrine to Expand Far Beyond Its Contours

The Ninth Circuit's application of the Rooker-Feldman doctrine to bar suit to remedy disability discrimination and retaliation by the California judiciary is not only inconsistent with its own precedent and with *Popovich, supra*, but is also inconsistent with this Court's declaration that:

> "If a federal plaintiff presents an independent claim, even one that denies a state court's legal conclusion in a case to which the plaintiff was a party, there is jurisdiction and state law determines whether the defendant prevails under preclusion principles." *Exxon Mobil Corp. v. Saudi Basic Industries,* 125 U.S. 1517 (2005).

Petitioner initiated her federal claim before she ended the state proceedings under duress. The litigation was parallel. The Rooker-Feldman doctrine did not deprive the court of jurisdiction. *Id*. at 1526-28.

The Ninth Circuit affirmed the district court's dismissal of this case with prejudice based solely on *Bianchi v. Rylaarsdam,* 334 F.3d 895 (9th Cir.2003*),* denying appellant any remedy to challenge CRC 989.3 and the constitutional harms caused by its discriminatory application. Bianchi's case was fully litigated in state court. Petitioner was denied access to state courts.

In conflict with the decisions of this Court, the Ninth Circuit, in an unpublished memorandum disposition, has held that the Rooker-Feldman doctrine bars suit to challenge

California Rule of Court 989.3's compliance with the Fourteenth Amendment and the Americans with Disabilities Act, Title II and to remedy the constitutional harms caused by the application of CRC 989.3.

Petitioner relied upon CRC 989.3's fraudulent misrepresentations to the public that:

> "[**Policy**] …Nothing in this rule shall be construed to impose limitations or to invalidate the remedies, rights, and procedures accorded to any qualified individuals under state or federal law."

Petitioner has suffered constitutional harms caused by her reliance on CRC 989.3. Her remedies, rights, and procedures under state and federal law have been invalidated by the Ninth Circuit on a Rooker-Feldman doctrine pretext in violation of this Court's commands in *Tennessee v. Lane* and *Exxon-Mobil v. Saudi, supra.*

C. The Ninth Circuit Has Stripped Federal Courts of Jurisdiction to Remedy Court Sanctioned Disability Discrimination and Retaliation Under Color of State Law

The Ninth Circuit's memorandum disposition has left petitioner without any remedy "under state and federal law." CRC 989.3 is a trap for all unwary disabled persons which is capable of repetition, yet has evaded review and will continue to evade review.

On April 21, 2005, the California Judicial Council advertised a proposed revision of CRC 989.3 that deletes "Drafters Notes" from the previous iteration, which stated that the rule is intended to comply with ADA. The Judicial Council's proposed revision deletes any reference that CRC

989.3 is intended to comply with ADA. The proposed rule defies this Court's command in *Tennessee v. Lane*.[1]

The Judicial Council's proposed revisions to CRC 989.3 serve only to reinforce the law's vagueness, overbreadth, delay and burden that denies six million disabled Californians' fundamental constitutional access to state courts. Especially repugnant to the Constitution is the law's failure to warn disabled persons that they are subject to sanctions for exercising their fundamental constitutional right.

The Ninth Circuit ignored undisputed direct evidence that Judge Nugent imposed an $1119.00 sanction in retaliation for petitioner's exercising her fundamental constitutional right to be protected from disability discrimination in California court programs, services and activities.

> "The threat of sanctions may deter the exercise [of freedoms] almost as potently as the actual application of sanctions… It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes… in such circumstances, a statute… may easily become a weapon of oppression, however evenhandedly its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of [disabled] citizens." *NAACP v. Button*, 371 U. S. 415, 433.

Justice Frankfurter stated:

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[1] CRC 989.3's proposed revisions are located at the internet address http://www.courtinfo.ca.gov/invitationstocomment/documents/spr05-01.pdf

> "I think that nothing would be worse than for this Court… to make an abstract declaration that segregation is bad and then to have it evaded by tricks." (oral argument), *Brown v. Board of Education*, 347. U. S. 483 (1954).

This Court must decide this case to remedy the California court's defiance of its command in *Tennessee v. Lane.* Nothing could be worse than for this Court to make an abstract declaration that disability discrimination is bad and then to have it evaded by tricks.

> "Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown v. Board of Education*, 349 U. S. 294 (1955).

> "Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken 'under color of state law.'" *Monroe v. Pape* 365 U. S. 167 (1961).

The California courts' defiance of this Court's command in *Tennessee v. Lane* is no different than the states' defiance of this Court's command in *Brown v. Board of Education*. *supra.*

The Ninth Circuit reframed petitioner's request for relief to invent a jurisdictional pretext to dismiss the entire case with prejudice. The Ninth Circuit ignored the complaint's plain statement for relief, which did not request

that the sanction order be overruled or that the protective order be granted.

Petitioner requested that the district court assume jurisdiction over her state lawsuit due to the futility of proceeding in the California courts without injunctive relief from court sanctioned disability discrimination and retaliation.

REASONS FOR GRANTING THE PETITION

The essential conflict in this case stems from the California judiciary's legislative enactment of a rule of court, proposed and affirmed by a federal judge to be "consistent with the Americans with Disabilities Act," and the application of that law to nullify disabled persons' fundamental constitutional right to access state courts in defiance of this Court's command in *Tennessee v. Lane.*

> "No state legislator or executive or judicial officer can war against the Constitution without violating his solemn oath to support it…" *Cooper v. Aaron*, 358 U.S. 1 (1958).

> "…Compliance with decisions of this Court, as the constitutional organ of the supreme Law of the Land, has often, throughout our history, depended on active support by state and local authorities. It presupposes such support. To withhold it, and indeed to use political power to try to paralyze the supreme Law, precludes the maintenance of our federal system as we have known and cherished it…" *Id*., Justice Frankfurter, concurring

In violation of 28 U.S.C. § 455, U. S. District Judge Dickran Tevrizian "originally proposed" CRC 989.3. Judge Tevrizian and the California Bar affirmed that CRC 989.3 "is

consistent with the Americans with Disabilities Act."[2] The California Judicial Council enacted CRC 989.3 in January, 1996. Although the U. S. Department of Justice ordered a California court to implement CRC 989.3 in a 1996 Settlement Agreement, DOJ did not then and has never stated that CRC 989.3 "is consistent with ADA."[3]

The amici brief submitted to this Court by the Disability Rights and Education Defense Fund on behalf of Dick Thornburgh et al. in support of respondents in *Tennessee v. Lane*, No. 02-1667, stated that:

> "…the Judicial Council took numerous affirmative steps, including… the adoption of Rule of Court 989.3, which is meant 'to assure that qualified individuals with disabilities have full and equal access to the judicial system…'"

However, the brief does not expressly state that CRC 989.3 complies with ADA Title II, only that it was "meant to insure... access."

The amici brief submitted to this Court by the Disability Rights and Education Defense Fund on behalf of Senators Dole, Kennedy, Harkin et al. in support of respondents in *Medical Board of California v. Hason*, No. 02-479, stated that "the Judicial Council's adoption of CRC 989.3 took numerous affirmative steps, including the adoption of Rule of Court 989.3, which is "meant 'to assure that qualified individuals with disabilities have full and equal access to the judicial system…' The ADA's accessibility

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[2]California Bar Journal, February 1996, is located at the following internet address: http://calbar.ca.gov/calbar/2cbj/96feb/2cbj12.htm

[3] Settlement Agreement Between The United States Of America And The Santa Clara County Superior Court, October 1996 is located at the following internet address: http://www.usdoj.gov/crt/ada/santacl.htm

requirements were the explicit impetus for bringing California court system much closer to accessibility."

However, the brief does not expressly state that CRC 989.3 complies with ADA Title II, only that it was "meant to assure… access."

Petitioner is the first party to ever challenge the constitutionality of CRC 989.3 and the California courts' compliance with ADA Title II in a federal civil action against the California Judicial Council, court entities, judges and administrators.

Attorneys who have briefed this Court in support of ADA Title II are aware that CRC 989.3 is unconstitutional and discriminatory. Their failure to challenge CRC 989.3 for a decade provides strong circumstantial evidence of a "gentlemen's agreement" to tolerate disability discrimination under color of state law.

A California judge's imposition of an $1119.00 sanction for requesting protection from disability discrimination in court programs, services and activities shocks the conscience. The California appellate court presiding justice's refusal to grant two requests for ADA accommodation to extend the deadline to appeal the sanction shocks the conscience. Conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level. *County of Sacramento v. Lewis, 523 U.S. 833* (1998).

> "[I]t has never been suggested that state court action is immunized from the operations of those [Fourteenth Amendment] provisions simply because the act is that of the judicial branch of state government." *Shelley v. Kramer*, 334 U. S. 1 (1948).

This Court has held that it is unconstitutional for state judges to be "bound by statute" to discriminate against women. *Reed v. Reed,* 404 U. S. 71 (1971). The Ninth Circuit directly contradicted this Court by holding that it has no jurisdiction to remedy disability discrimination, because the judge was bound by statute to impose the $1119.00 retaliatory sanction.

This Court has considered the issue of whether federal district courts "shall" impose sanctions, unless the losing party's conduct was "substantially justified," as applied to discovery abuse. *Cunningham v. Hamilton County, Ohio* 527 US 198 (1999). Nothing could be more antithetical to this Court's command in *Tennessee v. Lane* than permitting state judges to determine that requesting protective orders from disability discrimination is not "substantially justified" without due process of law and the application of strict scrutiny.

This Court cannot indulge an interpretation of the Rooker-Feldman doctrine that "would result in the anomaly of protecting only those [disabled] individuals who remain out of [California] court." *Lamar v. Steele,* 693 F. 2d 559, 562 (5th Cir. 1982).

This Court cannot leave these questions "in a state of uncertainty that can be resolved only by constant litigation," incorrectly subjecting six million disabled Californians to state sanctioned disability discrimination and retaliation.
U. S. Airways v. Barnett, 535 U.S. 391 (2002). Justice Scalia dissenting.

Nothing could be worse than for this Court to make an abstract declaration that disability discrimination is bad and then to have it evaded by legal "tricks," especially when the tricks were proposed and extrajudicially affirmed by a Ninth

Circuit district court judge and advertised by the California Bar.

This Court cannot permit 49 other states to evade compliance with ADA Title II by similar state sanctioned "tricks" that are repugnant to the Constitution.

This Court must remedy the Ninth Circuit's violation of Section 455, providing disabled persons with the "assurance of the impartiality that is a fundamental requirement of due process…" *Aetna Life Ins Co. v. Lavoie*, 475 U. S. 813 (1986), Justice Brennan concurring.

I. THE DECISION BELOW CONTRADICTS *TENNESSEE V. LANE*, 124 U. S. 1978 (2004), AND *POPOVICH V. CUYAHOGA COUNTY*, 539 U. S. 941 (2003).

This Court has decided *Tennessee v. Lane*, which is a "rare case," comparable to *Roe v. Wade*, 410 U.S. 113(1973), and *Brown v. Board of Education*. Like *Brown* and *Roe*, *Tennessee v. Lane* requires strong enforcement of a fundamental constitutional right:

> "…When the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable effects to overturn it and to thwart its implementation…" *Planned Parenthood of Southeastern PA. v. Casey*, 505 U.S. 833 (1992).

In his 2002 brief to the U.S. Supreme Court regarding *Popovich v. Court of Common Pleas of Ohio, supra*, Solicitor General Olson wrote:

> "The… Court raised the Rooker-Feldman defense before the district court, which rejected the argument… the Court renewed its argument

> in its initial brief to the court of appeals, but neither the panel nor the en banc panel addressed it. Neither the court nor Popovich mentions this issue in its petition…"
>
> "There is little relevant authority addressing the distinction between judicial and administrative acts for purposes of triggering the Rooker-Feldman doctrine. Because of the difficulty and relative novelty of that question, the United States takes no position on the ultimate question of whether Rooker-Feldman bars Popovich's claims."

Tennessee v. Lane, addressed that novel question. This Court affirmed the Sixth Circuit's en banc opinion in *Popovich* without considering, much less asserting, the Rooker-Feldman doctrine to bar the court's jurisdiction to review and reverse a judge's order during a judicial proceeding denying ADA accommodations. This Court has affirmed that ADA Title II access to court claims are not barred by Rooker-Feldman, specifically in judicial proceedings affecting due process and equal protection.

Tennessee v. Lane and ADA Title II presume that requests for accommodation and protection from discrimination in state courts are substantially justified, placing the burden on the state to prove otherwise.

Substantially justified does not mean "'justified to a high degree,' but rather 'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552(1988). Petitioner exercised her fundamental constitutional right to ADA protections, which are presumed to satisfy all objective indica of substantial justification. Denials of her requests are subject to strict scrutiny.

II. THE DECISION BELOW CONTRADICTS *EXXON MOBIL CORP. V. SAUDI BASIC INDUSTRIES*, 125 U.S. 1517 (2005).

The Ninth Circuit's application of the Rooker-Feldman doctrine to bar suit to remedy disability discrimination and retaliation by the California judiciary is not only inconsistent with its own precedent and with *Popovich*, but is also inconsistent with this Court's declaration in *Exxon,* that:

> "… The *Rooker-Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions…"
>
> "…If a federal plaintiff presents an independent claim, even one that denies a state court's legal conclusion in a case to which the plaintiff was a party, there is jurisdiction and state law determines whether the defendant prevails under preclusion principles…"
>
> "… Nor does §1257 stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff "present[s] some independent claim, albeit one that denies a legal conclusion

> that a state court has reached in a case to which he was a party ... , then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." *GASH Assocs.* v. *Village of Rosemont*, 995 F. 2d 726, 728 (CA7 1993); accord *Noel* v. *Hall*, 341 F. 3d 1148, 1163-1164 (CA9 2003)…"

Petitioner filed her federal claim during the course of the state lawsuit. If federal litigation is initiated before state proceedings have ended, then the litigation is parallel, and the Rooker-Feldman doctrine does not deprive the court of jurisdiction. *Exxon, supra*. at 1526-28. Petitioner ended her state lawsuit under duress due to unendurable disability discrimination and retaliation.

The Ninth Circuit has subjected petitioner to disparate treatment in that the court enjoined the California prison system to remedy harm that is part of an unconstitutional and discriminatory pattern of officially sanctioned behavior, violative of ADA Title II rights. *Armstrong v. Davis*, 275 F.3d 849, 879 (9th Cir. 2001).

The Ninth Circuit has subjected petitioner to disparate treatment in that the court never raised the Rooker-Feldman doctrine to bar federal jurisdiction in *Duvall v. County of Kitsap*, 271 F.3d 1124, 1133 (9th Cir. 2001). The court specifically reviewed the administration of a state lawsuit, a state judge's ADA accommodation actions during judicial proceedings, ADA court compliance policies and procedures, and the actions of court employees regarding both the application and violation of ADA Title II.

The Ninth Circuit ignored petitioner's jury service ADA claims, which are not barred under Rooker-Feldman, as they have never been reviewed in state court. The panel also ignored violations of ADA Title II by Judges Weber, Strauss,

McConnell, Director Vickrey and the court entity defendants, which have never been reviewed in state court.

The Ninth Circuit has subjected petitioner to disparate treatment in that, when constitutional questions are in issue, the availability of judicial review is presumed, and the court will not read a statutory scheme to take the extraordinary step of foreclosing jurisdiction, unless Congress' intent to do so is manifested by clear and convincing evidence. *Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998).

The Ninth Circuit has ruled that, when government rules, policies, procedures and practices are affirmatively and expressly misleading, constitutional due process violations are compounded. *Walters, supra*.

The Ninth Circuit has previously ruled on CRC 989.3 and its accommodations request form's referral requirement for accommodation decision to the trial presiding judge, but the court did not consider facially and as-applied constitutional and statutory violations. *Memmer v. Marin County Courts*, 169 F.3d 630, 633-34 (9th Cir. 1999).

The Ninth Circuit's opinion in *Fontana Empire Center, LLC v. City of Fontana*, 307 F.3d 987, 992 (9th Cir. 2002), supports petitioner's position that her claims are not barred under Rooker-Feldman, because they are separable from and collateral to the merits of the state-court judgment, citing *Pennzoil Co v. Texaco, Inc*, 481 U.S. 1, 25 (1987)., i.e.: petitioner's federal claims have never been raised in state court.

> "[A]n issue cannot be inextricably intertwined with a state court judgment if the plaintiff did not have a reasonable opportunity to raise the issue in state court proceedings. *Absent such an opportunity, it is impossible to conclude that the*

issue was inextricably intertwined with the state court judgment." Id. (emphasis supplied)

III. THE DECISION BELOW DISREGARDS THE ADA'S PLAIN LANGUAGE AND NULLIFIES CONGRESSIONAL INTENT.

The facts of this case have never been disputed. Other than Judge Tevrizian and the California Bar, no individual or group has ever affirmed that CRC 989.3 "is consistent with the ADA," not even the California Judicial Council, the U. S. Department of Justice and the Disability Rights and Education Defense Fund.

The panel ignored the salient issue that CRC 989.3 was drafted to achieve the nefarious purpose of barring suit under ADA Title II, although the Rule's policy and procedures expressly state that all acts pursuant to its application are "purely administrative" and permit a plaintiff to "…bring an action for injunctive relief in state or federal court."

Pursuant to CRC 989.3, the California court system, its judges, administrators and jury commissioners have conspired to violate the U.S. Constitution and ADA Title II by enacting a statute and policies reminiscent of states' defiance of this Court's desegregation command.

In 1962 this Court held:

1. "[T]he unconstitutionality of the state statutes requiring racial segregation in publicly operated facilities is so well settled that it is foreclosed as a litigable issue… and jurisdiction of this appeal is vested in the Court of Appeals…
2. There was no occasion for abstention from decision… appellant's jurisdictional statement is treated as a petition for certiorari prior to the

> judgment of the Court of Appeals under 28 U.S.C. 1254(1) and 2101 (e); the petition is granted; the order of the District Court is vacated; and the case is remanded to that Court with directions to enter a decree granting appropriate injunctive relief against the discrimination complained of." *Turner v. City of Memphis,* 369 U.S. 350 (1962) (per curiam).

The California court system has enacted a statute that is an affirmative state policy fostering disability discrimination in its programs, services and activities. "…[O]ur decisions have foreclosed any possible contention that such a statute or regulation may stand consistently with the Fourteenth Amendment. *Brown v. Board of Education*, 347 U.S. 483…" *Turner, Id.*

> "We see no reason why disposition of this case should await decision of the appeal by the Court of Appeals. On the merits, no issue remains to be resolved. This is clear from our prior decisions and the undisputed facts of the case. Accordingly, no occasion is presented for abstention, and the litigation should be disposed of as expeditiously as is consistent with proper judicial administration." *Turner, Id.*

The unconstitutionality of discriminatory statutes has been well settled in the Ninth Circuit for a decade. *Tennessee v. Lane* validated what was already the plain law of the Circuit.

This Court has commanded that the government fund its racial integration commands:

> "The District Court may require the County Supervisors to… raise funds for the nonracial operation of the county school system… *Griffin v. School Board,* 377 U.S. 218 (1964)… [T]his is

not a case for abstention… we hold that the issues here imperatively call for decision now…"

IV. "ISSUE RECUSAL," PURSUANT TO 28 U.S.C. § 455, IS A RECURRING SUBJECT OF EXTRAORDINARY IMPORTANCE AND FIRST IMPRESSION, WHICH CALLS FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

On April 1, 2002, this Court did not consider the question of "'…issue recusal', requiring disqualification whenever a judge has pre-judicial association with a legal position…§ 455(a) requires judicial recusal, if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge…" of his interest or bias in the case. *Sao Paulo State of the Federative Republic of Brazil v. American Tobacco Co., Inc.*, 535 U.S. 229, 232-233 (2002).

Ninth Circuit judges failed to disclose their conflict of interest and bias in reviewing constitutional challenges to a state law proposed, promoted and extrajudically affirmed in 1996 by their colleague, Judge Dickran Tevrizian, as being consistent with the Americans with Disabilities Act." Repudiation of CRC 989.3 would constitute *de facto* repudiation of Judge Tevrizian's extrajudicial activities.

These judges are subject to disqualification under § 455(b), due to a "…predisposed state of mind… [and] improper connections to the case, which make a fair hearing impossible." *Liteky v. United States*, 510 U.S. 540 (1994), Justice Kennedy, concurring. They could exhibit personal knowledge of disputed evidentiary facts in this proceeding, which may have an interest substantially affected by the

outcome of this proceeding and, as such, are likely to be material witnesses in this proceeding.

Judge Tevrizian's extrajudicial opinion regarding ADA's impact on the federal courts in 2004 carries an important "pejorative connotation." *Liteky*, 552.

> "This [ADA] is a law that Congress passed… it's causing a lot of court congestion… multiply that by all the federal judges in the country." The San Diego Union-Tribune, September 12, 2004.[4]

Judge Tevrizian's insuppressible extrajudicial animosity toward ADA in 2004 is indicative of his 1996 discriminatory mindset in proposing and affirming CRC 989.3. He and his colleagues may be providing extrajudicial advice to the California Judicial Council in revising CRC 989.3 for which they are compensated.

Judge Tevrizian's and his Ninth Circuit colleagues' animosity toward ADA, creates the appearance of influencing federal district and appellate judges to invent pretexts to enable the wrongful dismissal of the entire class of ADA Title II cases challenging disability discrimination and retaliation by state court judges.

Ninth Circuit judges failed to recuse themselves from deciding petitioner's case, ignoring their actual conflict of interest and an unrebuttable perception of bias that "…would make a fair judgment impossible." *Liteky, supra.*

> Section 455 imposes an affirmative duty upon judges to recuse themselves when "…a reasonable

[4] "Flood of ADA Lawsuits Irks Small Businesses," is located at the following internet address: http://www.signonsandiego.com/uniontrib/20040912/news_1n12litigant.html

> person with knowledge of all the facts would conclude that the judge's impartiality might be questioned." *Yagman v. Republic Ins*., 980 F.2d, 622, 626 (9th Cir. 1993).

Judge Tervizian's proposal and affirmance of CRC 989.3, enacted by The Judicial Council of California, constitutes an extrajudicial episode requiring recusal of his Ninth Circuit colleagues. Their repudiation of CRC 989.3 would constitute repudiation of a federal judge's improper relationship with the Judicial Council of California. The Judicial Council of California is one of the defendants against whom petitioner sought injunctive relief and damages in federal court for the enactment and application of CRC 989.3.

Ninth Circuit judges' failure to disclose and remedy this obvious and undeniable conflict of interest and presumption of bias creates the undeniable appearance of judicial misconduct. No judge voted to rehear petitioner's case en banc, not even Judge Reinhardt, who wrote *Duvall* and *Armstrong, supra,* affirming ADA Title II in state courts and prisons.

Petitioner was denied her right to move for recusal. In stark contrast to the Ninth Circuit, Judge Posner, writing for the Seventh Circuit, recused all district and circuit court judges from hearing *In re: Nettles* (7th Cir. Jan 21, 2005) to avoid even the perception of bias, stating:

> "…a more efficient method of proceeding is to recuse ourselves now, to be replaced by judges from other circuits who will be designated to hear any further proceedings."

This Court should exercise its supervisory powers over the lower courts under Sup. Ct. R. 10. See Robert L. Stern et

al., Supreme Court Practice 299 (5th ed. 1979) (the Court may grant review if the Justices "believe that proper supervision of the federal judiciary demands that the lower court be set aright").

The circumstances under which federal judges should be disqualified from hearing cases, and the appropriate remedy for their failing to do so, clearly fall within this Court's supervisory powers. *Cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 n.21 (1987)(the Court's exercise of supervisory authority is "especially appropriate" in an area that "concerns the functioning of the Judiciary"); id. ("we have not hesitated to find actual prejudice irrelevant when utilizing supervisory authority."). See *Calvaresi v. United States*, 348 U.S. 961 (1955) (granting certiorari "[i]n the interests of justice and in the exercise of the supervisory powers of this Court," and summarily "revers[ing] and remand[ing] to the District Court for retrial before a different judge" in a case where the court of appeals failed to disqualify the judge for alleged bias).

The pejorative comments made by Judge Tevrizian to the San Diego Union-Tribune have no place in our judicial system whether uttered on or off the bench. See *Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1992) (judge's critical views of the tobacco industry expressed in court's ruling disqualifies the trial judge).

To paraphrase this Court's observation in *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847, 859 (1988):

> "A finding by [the court of appeals] -- faced with the difficult task of passing upon the integrity of a fellow member of the bench -- that his or her colleague merely possessed [an appearance of bias] and not actual [bias], is unlikely to

> significantly quell the concerns of the skeptic." *Id.* at 865 n.12.

The public's confidence in the judicial process is the very purpose that Congress had in mind when it enacted § 455. The right to trial by an impartial judge "is a basic requirement of due process." In *re Murchison*, 349 U.S. 133, 136 (1955). "[T]o perform its high function in the best way, `justice must satisfy the appearance of justice.'" *Id.* at 136 (citation omitted). "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Continental Casualty Co*., 393 U.S. 145 (1968). The proper functioning of the judiciary and the public's confidence in the integrity and impartiality of the judicial process demand that these high standards be maintained.

Absent the retroactive disqualification of the judges in the Ninth Circuit, the public will conclude that the judges have "prejudged the merits of the controversy or [are] biased against. . . one of the parties," *Broadman v. Comm'n on Judicial Performance*, 959 P.2d 715, 727 (Cal. 1998), cert. denied, 525 U.S. 1070 (1999).

> "The participation of a judge[s] who has a substantial interest in the outcome of a case of which he knows at the time he participates, necessarily imparts a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process." *Aetna Life Insurance Co. v. Lavoie*, Justice Brennan, concurring.

> "A reviewing court may never discover the actual effect a biased judge had on the outcome of a

particular case." *Id*., Justice Blackmun and Justice Marshall, concurring.

This Court has stated in *Liljeberg, supra*, that:

> "…in determining whether a judgment should be vacated for a violation of 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process."

CONCLUSION

The Court below has profoundly erred in its application of the Rooker-Feldman doctrine, and if allowed to stand, will strip the Fourteenth Amendment and the Americans with Disabilities Act, Title II of any remedy.

For the reasons set forth above, petitioner JACQUELYN FINNEY respectfully prays that this Court grant the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in her case.

Respectfully submitted,

_____

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June 6, 2005

FILED
JAN 13 2005
CATHY A. CATTERSON,
CLERK,
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACQUELYN FINNEY, Plaintiff - Appellant, 04-00148-MJL v. THOMAS P. NUGENT, Judge of the San Diego Superior Court; et al., Defendants - Appellees.	No. 04-55769 D.C. No. CV- 04-00148-MJL MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
M. James Lorenz, District Judge, Presiding
Submitted December 6, 2004**

Before: GOODWIN, ALARCÓN, and TROTT, Circuit Judges.

Appellant Jacquelyn Finney appeals the district court's decision dismissing her action based on the *Rooker-Feldman* doctrine, Eleventh Amendment immunity, and judicial immunity. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim under Rule of Civil Procedure 12(b)(6).*Thompson v. Davis,* 295 F.3d 890, 895 (9th Cir. 2002) (per curiam), *cert. denied,* 538 U.S. 921, 155 L. Ed. 2d 311 (2003). We affirm.

The *Rooker-Feldman* doctrine provides that a federal district court may only exercise original jurisdiction, and thus may not exercise appellate jurisdiction over state court decisions. *Doe & Associates Law Offices v. Napolitano,* 252 F.3d 1026, 1029 (9th Cir. 2001). Ms. Finney argues that the district court did not properly apply *Rooker-Feldman* because her claim is an "arising under" federal claim under the ADA. The relief she requests, however, clearly indicates that the federal district court could not hear her claim without passing on the merits of the state court's decision. Ms. Finney requests that the federal district court "assume jurisdiction over this action" and order Judge Nugent to rule in her favor regarding the protective order.

This case is controlled by *Bianchi v. Rylaarsdam,* 334 F.3d 895 (9th Cir. 2003). In *Bianchi*, we explained that……...

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

> [i]f claims raised in the federal court action are "inextricably intertwined" with the state court's decision such that the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules, then the federal complaint must be dismissed for lack of subject matter jurisdiction.

Id. at 898. In this case, Ms. Finney has asked the federal district court to review the state court's denial in a judicial proceeding by asking the federal district court to assume jurisdiction of her lawsuit, reverse the state court judge's rulings on her protective order, and afford her the same individual remedy she was denied in state court. The district court properly dismissed Ms. Finney's claim under the *Rooker-Feldman* doctrine because Ms. Finney seeks to overturn the state court's denial of her request for accommodation and imposition of mandatory sanctions.

AFFIRMED.

FILED
MAR 14 2005
CATHY A. CATTERSON,
CLERK,
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACQUELYN FINNEY Plaintiff – Appellant, v. THOMAS P. NUGENT, Judge of the San Diego Superior Court; et al., Defendants – Appellees.	No. 04-55769 D.C. No. CV-04-00148-MJL ORDER

Before: GOODWIN, ALARCON, and TROTT, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Each member of the panel recommends rejection of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied. The Appellant's request for publication is also denied. No further filings will be accepted in this closed appeal.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACQUELYN FINNEY Plaintiff - Appellant, v. THOMAS P. NUGENT, Judge of the San Diego Superior Court; et al., Defendants - Appellees.	No. 04-55769 D.C. No. CV-04-00148-MJL **JUDGMENT**

Appeal from the United States District Court for the Southern District of California (San Diego).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California (San Diego) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

Filed and entered Thursday, January 13, 2005.

FILED
APR 19 2004
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: "/S/" DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE Case No. 3:04-cv-00148

Finney – PLAINTIFF

v.

Nugent – DEFENDANT

____ JURY VERDICT. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X DECISION BY COURT. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

Clerks Judgment: It is ordered and adjudged that defendant's motion to dismiss action for lack of subject matter jurisdiction is granted ……..

4/19/04 W. Samuel Hamrick, Jr.
Date Clerk

by R. Chambers, Deputy, Clerk "/s/"
Entered on 4/19/04
pre - Lorenz
ref - Porter

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JACQUELYN FINNEY, Plaintiff, v. THOMAS P. NUGENT, et al., Defendants	Civil No. 04-CV-0148-L(POR) **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT AND DIRECTING CLOSURE OF CASE** **[doc. #12-1, -2, -3]**

Defendants move to dismiss the above-captioned case on a variety of grounds including the *Rooker-Feldman* doctrine, Eleventh Amendment immunity, judicial immunity, lack of individual liability under the Americans with Disabilities Act or Rehabilitation Act, and failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Plaintiff opposes the motion. The matter having been fully briefed, and the Court finding this motion suitable for determination on the papers submitted and without oral argument pursuant to Civil Local Rule 7.1(d)(1), the Court enters the following decision.

DISCUSSION

1. Factual Background

Plaintiff, appearing *pro se*, filed this action on January 23, 2004, against Superior Court of California, County of San Diego Judge Thomas P. Nugent, Supervising Judge Joan P. Weber, former Presiding Judge Richard E. L. Strauss; Administrative Presiding Justice of the Court of Appeal, Fourth Appellate District, Judith McConnell; the Superior Court of California, County of San Diego; the California State Court of Appeal, Fourth Appellate District; William C. Vickrey, Administrative Director of the Courts; the Administrative Office of the Courts; and the Judicial Council of California. Plaintiff brings claims against all the defendants for violation of Title II of the Americans with Disabilities Act ("ADA" or "Title II"); Section 504 of the Rehabilitation Act; Article 1, section 7(a) of the California Constitution; Article 1, section 3 of the California Constitution; California Government Code section 11135; 42 U.S.C. § 1983; and 42 U.S.C. § 1985.

Plaintiff is disabled due to polio, intractable pain and osteoporosis. (Complaint at 2). Plaintiff filed an action against the California Department of Managed Health Care ("DMHC") on October 11, 2002, in the state court. *Id.* On August 4, 2003, she filed a motion for reconsideration of defendant Judge Nugent's July 24, 2003 ruling on what plaintiff characterizes as her motion for a protective order. which "includ[ed] but [was] not limited to the Court's ignoring her polio disability and failure to compel accommodation of plaintiff's polio disability by DMHC attorneys." *Id.* at 7. Judge Nugent denied the motion for reconsideration on October 9, 2003 noting that plaintiff misinterpreted the Court's February 20, 2003 ruling on the demurrer to the complaint and plaintiff failed to state the precise request for accommodation. Also on August 4, 2003, plaintiff filed "a confidential complaint and request for

investigation of bias, due to her disability, by defendant Nugent with Presiding Judge Richard E. L. Strauss ... through Supervising Judge Joan P. Weber." *Id.* at 8. Judge Weber responded to plaintiff's letter complaint. *Id.* at 8-9. Plaintiff then requested in writing that Presiding Judge Strauss respond to her, which he did on September 18, 2003. *Id.* at 9. Plaintiff also alleges that Judge Nugent wrongfully imposed sanctions upon plaintiff for requesting a protective order. *Id.* at 10.

On November 22, 2003, plaintiff filed a complaint with the Assistant Executive Officer of the Superior Court, County of San Diego, North County Division, David Yamasaki and Administrative Director of the Courts, defendant Vickrey. *Id.* at 13-14.

Plaintiff submitted a request for accommodation to change the Initial Case Management Conference before Judge Nugent which was granted. Plaintiff then made a request to have a status conference and case management conference combined and set for another date. Judge Nugent also granted that accommodation request.

On December 3, 2003, Plaintiff filed a peremptory challenge to Judge Nugent that was denied as untimely. She also requested, at that same time, to disqualify Judges Strauss and Weber from participating in the reassignment of her case. On January 5, 2004, Judge Nugent recused himself "in the interest of justice" and the case was reassigned to Judge Lisa Guy-Schall on January 7, 2004.

On January 23, 2004, plaintiff filed the present federal case. Since the filing of this action, plaintiff dismissed without prejudice her state court action on February 19, 2004.

2. Subject Matter Jurisdiction

Federal courts have limited jurisdictional power, and therefore, are under a continuing duty to confirm their subject matter jurisdiction over a particular case before reaching the merits of a dispute. *See Steel Co. v. Citizens for a Better Environ.,* 523 U.S. 83, 94 (1998); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 278 (1977). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.' *Steel Co.,* 523 U.S. at 94 *(quoting Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1868)); *see In re Mooney,* 841 F.2d 1003, 1006 (9th Cir. 1988) ("Nothing is to be more jealously guarded by a court than its jurisdiction. Jurisdiction is what its power rests upon. Without jurisdiction it is nothing."), *overruled on other grounds in Partington v. Gedan,* 923 F.2d 686, 688 (9th Cir. 1991).

The *Rooker-Feldman* doctrine provides that a federal district court may exercise only original jurisdiction and thus may not exercise appellate jurisdiction over state court decisions. *See Dubinka v. Judges of the Superior Court of California,* 23 F.3d 218, 221 (9th Cir. 1994), (citing *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482-86, 103 S. Ct. 1303, 1314-17 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 415-16, 44 S. Ct. 149, 150 (1923)); *see also 28* U.S.C. § 1257(a). "The purpose of the *[Rooker-Feldman]* doctrine is to protect state judgments from collateral federal attack. Because federal district courts lack power to hear direct appeals from state court decisions, they must decline jurisdiction whenever they are 'in essence called upon to review the state court decision.'" *Doe & Associates Law* Offices *v. Napolitano, 252* F.3d 1026, 1029 (9th Cir. 2001); *see also Board of Trustees of Leland Stanford Junior University v. Modual A/C Systems, Inc., 54* F.

Supp.2d 965, 969 (N.D.Cal. 1999) (noting that *Rooker-Feldman* doctrine derived from both federalism and comity)(citing *Howlett v. Rose,* 496 U.S. 356, 372-73, 110 S. Ct. 2430 (1990)); *Martin v. Wilks, 490* U.S. 755, 783, 109 S .Ct. 2180 (1989).

Federal courts "must give the same preclusive effect to a state court judgment that the judgment would be given in courts of the rendering state." *Fielder v. Credit Acceptance Corp.,* 188 F.3d 1031, 1034 (8th Cir. 1999); 28 U.S.C. § 1738. In *Rooker* and *Feldman,* the United States Supreme Court "took this principle a step further and held that lower federal courts lack jurisdiction to review state court judgments." *Fielder,* 188 F.3d at 1034. To allow the district court to review a state court judgment "would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Court is strictly original." *Rooker,* 263 U.S. at 416. Thus, when this doctrine applies, lower federal courts dismiss particular claims, or an entire action, based on lack subject matter jurisdiction. *See, e.g., Worldwide Church of God v. McNair,* 805 F.2d 888, 893 (9th Cir. 1986) (affirming district court's dismissal of an action for lack of subject matter jurisdiction under *Rooker-Feldman); see also* FED. R. C[v. P. 12(b)(1) (authorizing the court to dismiss an action for lack of subject matter jurisdiction).

The *Rooker-Feldman* doctrine "applies even when the challenge to the state court decision involves federal constitutional issues." *Worldwide Church of God,* 805 F.2d at 891. In contrast, a claim is not precluded where the plaintiff presents a "general" constitutional challenge that does not require review of a final state court decision in a particular case. *Id.*

The *Rooker-Feldman* doctrine also extends to bar lower federal courts from hearing claims that are "inextricably intertwined" with the claims adjudicated in the

state court action. *See Feldman, 460* U.S. at 482 n.16; *Fielder,* 188 F.3d at 1034. One Circuit has explained that "[a] claim is inextricably intertwined under *Rooker-Feldman if* it `succeeds only to the extent that the state court wrongly decided the issues before it [or] if the relief requested ... would effectively reverse the state court decision or void its ruling.' *Fielder,* at 1034-35 *(quoting Charchenko v. City of Stillwater,* 47 F.3d 981, 983 (8th Cir. 1995)).

Plaintiff contends *Noel v. Hall, 341* F.3d 1148 (9th Cir. 2003) supports her position that *Rooker-Feldman* is not applicable in this case. Plaintiff misreads and misconstrues the holding *of Noel.* In *Noel,* the federal district court dismissed plaintiff Noel's fiduciary duty claim against defendants under the *Rooker-Feldman* doctrine because of the pendency of defendant's action in a county superior court where the fiduciary duty claim was being litigated. The *Noel* court noted that the *Rooker-Feldman* doctrine comes into play as a contested issue "when a disappointed party seeks to take not a formal direct appeal, but rather its *de facto* equivalent, to a federal district court." *Noel,* 341 F.3d at 1155.

In reviewing the cause of action asserted on appeal, the *Noel* court determined that plaintiff's fiduciary duty claim did not fall within the *Rooker-Feldman* doctrine because the plaintiff was asserting as a legal wrong an allegedly illegal act or omission by an adverse party. *Id*. at 1164. The *Noel* plaintiff was not complaining of an injury caused by a state court decision as a result of a legal error committed by that court. *Id*. As the *Noel* court noted:

> [W]here the federal plaintiff does not complain of a legal injury caused by a state court judgment, but rather of a legal injury caused by an adverse party, *Rooker-Feldman* does not bar jurisdiction. If the federal plaintiff and the adverse party are simultaneously litigating the same or a similar dispute in state court, the federal suit may proceed under the long-standing rule permitting

parallel state and federal litigation.

Id. at 1163.

Further, in discussing the "inextricably intertwined" test associated with the *Rooker-Feldman* doctrine, the *Noel* court noted that "[o] nce a federal plaintiff seeks to bring a forbidden *de facto* appeal . . . that federal plaintiff may not seek to litigate an issue that is `inextricably intertwined' with the state court judicial decision from which the forbidden *de facto* appeal is brought." *Id*. at 1158. Moreover, a federal plaintiff is "forbidden to seek a declaratory judgment invalidating the state court rule on which the state court decision relied, for the plaintiff's `request for declaratory relief [was] inextricably intertwined with his request to vacate and to set aside the [state court] judgment.' *ld*. *(quoting Facio v. Jones, 929* F.2d 541, 543 (10th Cir. 1991))

The *Noel* court described a general formulation of "the distinctive role of the *Rooker-Feldman* doctrine:"

> If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker-Feldman* bars subject matter jurisdiction in federal district court. If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker- Feldman* does not bar jurisdiction.

Id. at 1164.

Here, plaintiff attempts to place her claims outside the *Rooker-Feldman* doctrine but is unsuccessful: plaintiff complains of legal wrongs allegedly committed by the state court and seeks relief in the nature of a review from the substantive decisions of that court. In her Complaint, plaintiff argues Judge Nugent wrongfully decided to dismiss three of her claims, imposed sanctions upon plaintiff, and denied her

request for a protective order. In order to assert subject matter jurisdiction, this Court would necessarily be required to review Judge Nugent's substantive legal rulings, his application of C.R.C. 989.3 and the administration of the state court action. Moreover, all of plaintiffs claims are inextricably intertwined with her claims seeking review of the state court decisions. Because of the *Rooker-Feldman* doctrine, this Court cannot undertake that review. Accordingly, this Court lacks subject matter jurisdiction over plaintiff's action and, therefore, must dismiss the case in its entirety.

3. Eleventh Amendment Immunity

In addition to lack of subject matter jurisdiction, the Court would dismiss much of this action on Eleventh Amendment immunity grounds. The Eleventh Amendment to the United States Constitution bars suits that seek either damages or injunctive relief against a state or an arm of the state.[1] *Kimel v. Fla. Bd. of Regents, 528* U.S. *62, 72-73 (2000); Franceschi v. Schwartz, 57* F.3d 828, 831 (9th Cir. 1995)(per *curiam); see also Brooks v. Sulphur Springs Valley Elec. Coop.,* 951 F.2d 1050, 1053 (9th Cir.1991) (stating that the Eleventh Amendment bars suits against state agencies regardless of the relief sought).

Plaintiff names the San Diego County Superior Court; the California Court of Appeals, Fourth District, Division One; the Administrative Office of the Courts, and the Judicial Council of California as defendants. These entity defendants are arms of the state and thus, under the Eleventh Amendment, they cannot be sued in federal court. *See, e.g.,*

[1] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against on of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State."

Simmons v. Sacramento County Superior Court, 318 F.3d 1156,1161 (9th Cir. 2003) (Eleventh Amendment bars suit against state superior court); *Hyland v. Wonder,* 117 F.3d 405, 413 (9th Cir.), amended, 127 F.3d 1135 (9th Cir.1997) (state case law and constitutional provisions make clear that California Superior Court is state agency); *Franceschi v. Schwartz,* 57 F.3d 828, 831 (9th Cir.1995) (California municipal court is arm of state protected from lawsuit by Eleventh Amendment immunity); *Greater Los Angeles Council on Deafness, Inc. v. Zolin,* 812 F.2d 1103, 1110 & n. 10 (9th Cir. 1987) (Eleventh Amendment bars suit against Superior Court of State of California regardless of relief sought). Thus, even if the Court had subject matter jurisdiction, which it does not, all claims against the entity defendants must be dismissed on an Eleventh Amendment immunity basis.

The *ex parte Young* doctrine provides that the Eleventh Amendment does not bar suits for prospective injunctive relief brought against state officers "in their official capacities, to enjoin an alleged ongoing violation of federal law." *Agua Caliente Band of Cahuilla Indians v. Hardin,* 223 F.3d 1041, 1045 (9th Cir. 2000); *see also Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 269, 117 S. Ct. 2028 (1997); *Seminole Tribe of Florida,* 517 U.S. at 73, 116 S. Ct. 1114; *Children's Hosp. and Health Ctr. v. Belshe,* 188 F.3d 1090, 1095 (9th Cir. 1999); *Armstrong v. Wilson,* 124 F.3d 1019, 1025 (9th Cir. 1997); *Cerrato v. San Francisco County. Coll. Dist., 26* F.3d 968, 973 (9th Cir. 1994)("It is well established that the Eleventh Amendment does not bar a federal court from granting prospective injunctive relief against an officer of the state who acts outside the bounds of his authority.).

Here, plaintiff asserts that she has named the individual defendants in their official capacity but she also seeks money damages on all claims asserted against all

defendants. The general rule is that "[s]tate officers in their official capacities, like States themselves, are not amenable to suit for damages under § 1983." *Arizonans for Official English, 520* U.S. at 69 n. 24; *see Lawrence Livermore Nat'l Lab.,* 131 F.3d at 839 ("[S]tate officials sued in their official capacities are not 'persons' within the meaning of § 1983."). Accordingly, plaintiff's claims against the individual defendants for money damages necessarily would be dismissed.

4. Judicial Immunity

Similarly, even if the Court possessed subject matter jurisdiction, the judges named in this action are entitled to judicial immunity. "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Pierson v. Ray,* 386 U.S. 547, 553-54 (1967). Judicial immunity is an immunity from suit for damages, not just from an ultimate assessment of damages. *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S. Ct. 2806 (1985). Whether an act by a judge is a judicial one relates to (1) the nature and function of the act and not the act itself, i.e., whether it is a function normally performed by a judge, and to (2) the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity. *Stump v. Sparkman,* 435 U.S. 349, 362, 98 S. Ct. 1099 (1978); *see, e.g., Mireles v. Waco, 502* U.S. 9, 11-13, *112 S.* Ct. 286 (1991) (judge's direction to court officers to forcibly bring person before him is function normally performed by judge and taken in aid of judge's jurisdiction over matter before him); *Simmons v. Sacramento County Superior Court,* 318 F.3d 1156, 1161 (9th Cir. 2003) (judge absolutely immune for entering default judgment against prisoner who was not permitted to attend civil trial because entry of default judgment in a pending civil case is unquestionably a judicial act); *Atkinson-Baker & Assocs., Inc. v. Kolts, 7* F.3d 1452 (9th Cir. 1993) (judge absolutely immune for decision to bar court reporter from continuing to provide services in case over which judge served as special master

because the decision was a judicial act). Other factors in determining whether a particular act is judicial include whether: (1) the events occurred in the judge's chambers, (2) the controversy centered around a case then pending before the judge, and (3) whether the events arose directly and immediately out of a confrontation with the judge in his or her official capacity. *Duvall v. County of Kitsap, 260* F.3d 1124, 1133 (9th Cir. 2001).

"A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" *Stump*, 435 U.S. at 356-57 (citing *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872)); *see also, Mireles v. Waco*, 502 U.S. at 11 (judicial immunity is not overcome by allegations of bad faith or malice). As long as the judge has jurisdiction to perform the "general act" in question, he or she is immune, however erroneous the act may have been, however injurious the consequences of the act may have been, and irrespective of the judge's claimed motivation. *Harvey v. Waldron*, 210 F.3d 1008, 1012 (9th Cir. 2000). Judicial immunity "is overcome in only two circumstances. First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991) (citations omitted).

Plaintiff contends that the acts of the judges were administrative rather than judicial in nature. The Court disagrees. Plaintiff bases her claims on substantive legal decisions made by Judge Nugent in the adjudication of plaintiff s state action, acts committed by Judge Nugent concerning accommodations made in the context of the proceedings of her state law action, and her subsequent attempts to have Judge Nugent's decisions reviewed by other

Judicial Officers. Finally, the events alleged arose directly and immediately out of a confrontation with the judge in his or her official capacity. The acts plaintiff challenges are judicial and accordingly, the judges are immune from suit.

Also, William C. Vickrey as Administrative Director of the Court is entitled to "absolute quasi-judicial immunity because his challenged activities were an integral part of the judicial process." *Sharma v. Stevens,* 790 F.2d 1486, 1486 (9th Cir. 1986).

All of plaintiff's claims against the individual defendants are subject to dismissal based on judicial immunity.

5. ADA Claim

At the present time, claims by individuals against states and their agencies can withstand an Eleventh Amendment immunity challenge if they are brought under Title II of the ADA.[2] *See Hason,* 279 F.3d at 1171; *Miranda B. v. Kritzhaber*, 328 F.3d 1181, 1184 (9th Cir. 2003). Plaintiffs may sue only a "public entity" for violations of the ADA, not government officials in their individual capacities, *See Vinson v. Thomas,* 288 F.3d 1145, 1155-56 (9th Cir. 2002); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005 n. 8, 1011-12 (8th Cir. 1999)(en *banc);* however, individuals may be named in their official or representative capacity. Nevertheless, as previously discussed, plaintiff has brought claims that clearly fall under the *Rooker-Feldman* doctrine in her Complaint and plaintiffs Title II claim, to the extent it is cognizable against the state entities and individual defendants in their official capacity, is inextricably intertwined with the forbidden *de facto* appeal of her state court action and must be dismissed.

[2] This issue currently is pending before the United States Supreme Court.

CONCLUSION

Based on the foregoing, **IT IS ORDERED** granting defendants' motion to dismiss this action for lack of subject mater jurisdiction. [doc. #12-1, -2, 3]

IT IS FURTHER ORDERED directing the Clerk of the Court to close this case.

IT IS SO ORDERED.

Dated: April 13, 2004

"/s/"
M. JAMES LORENZ
U.S. DISTRICT JUDGE

COPY TO:

HON. LOUISA S. PORTER
UNITED STATES MAGISTRATE JUDGE

ALL PARTIES/COUNSEL