No. 12-17235

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATALIA A. SIDIAKINA,

Plaintiff – Appellant,

v.

JAMES G. BERTOLI, Judge; et al.,

Defendants – Appellees.

Appeal from the United States District Court
for the Northern District of California
Honorable Jeffrey S. White, District Judge, Presiding

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Natalia Sidiakina's action raises an important and complex issue: whether the California state courts' per se policy refusing appointment of counsel as an accommodation for qualified individuals with disabilities violates Title II of the Americans with Disabilities Act ("ADA"). Sidiakina's claim for declaratory and injunctive relief on this issue is stated clearly in her operative complaint, and is reiterated throughout her filings in the district court. Nonetheless, the district court overlooked the claim, lumping it together with several other claims challenging the application of the policy in Sidiakina's prior divorce proceedings in state court.

The district court erred by dismissing the entire complaint based on the *Rooker-Feldman* doctrine because Sidiakina's generalized ADA claim does not require review of the judgment or orders in her state court proceedings; it requires only review of the policy itself. Further, the district court erred by concluding in the alternative that Sidiakina failed to state a claim against the State defendants who implemented and carried out this per se policy. Accordingly, the judgment dismissing the action should be reversed and the case should be remanded for further proceedings on Sidiakina's ADA claim against the State defendants. On remand, counsel should be appointed under 28 U.S.C. § 1915(e)(1) given the complexity and strength of the claim, and Sidiakina's demonstrated need for representation.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. Final judgment was entered on September 7, 2012, and Sidiakina filed a timely notice of appeal on October 4, 2012. *See* Fed. R. App. P. 4(a)(1)(A); ER 25. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Did the district court err by overlooking Sidiakina's generalized ADA challenge to a state court policy when it dismissed the entire complaint as barred by the *Rooker-Feldman* doctrine?

2. Did the district court err by ignoring the state court policy and overlooking Sidiakina's cognizable ADA claim when it concluded in the alternative that Sidiakina failed to state a claim against the State defendants?

3. Did the district court abuse its discretion by failing to appoint counsel under 28 U.S.C. § 1915(e)(1) given the complexity and strength of Sidiakina's ADA claim and her demonstrated need for counsel?

FACTUAL BACKGROUND

Sidiakina suffers from well-documented cognitive disabilities that render her unable to function in stressful situations. ER 111, 113-15. Under stress, Sidiakina's IQ falls to 74 and her comprehension level falls within the bottom two percent of the population. ER 114. During her divorce proceedings in California

state court, Sidiakina was forced to represent herself pro se. ER 112. She sought various accommodations under the ADA throughout the proceedings due to her periods of incapacitation and inability to represent herself in any meaningful way. ER 112-16. Sidiakina sought several continuances, a change of venue, and, as is relevant here, appointment of counsel. *Id.*

California Rules of Court, Rule 1.100, addresses requests for accommodations by persons with disabilities. According to the rule, "[a] request for accommodation may be denied only when the court determines that: (1) The applicant has failed to satisfy the requirements of this rule; (2) The requested accommodation would create an undue financial or administrative burden on the court; or (3) The requested accommodation would fundamentally alter the nature of the service, program, or activity." Cal. R. Ct. 1.100(f). Rule 1.100 does not limit the types of accommodations that courts may provide. *See* Cal. R. Ct. 1.100(a)(3).

The Judicial Council of California provides a pamphlet with commentary on Rule 1.100, entitled "For Persons With Disabilities Requesting Accommodations – Questions and Answers About Rule of Court 1.100 for Court Users." ER 128; Request for Judicial Notice ("RJN"), Ex. A, p. 1. At the end of its list of possible accommodations, the pamphlet states that "the court cannot provide free legal counsel as a medical accommodation." RJN, Ex. A, p. 2. The pamphlet

acknowledges that "[f]or specific cases, free legal counsel is mandated by law to provide legal assistance," but reiterates that "it is not an accommodation for a disability." *Id.* Thus, despite the non-limiting language of Rule 1.100, the state court has a per se policy refusing appointment of counsel as an ADA accommodation.

Based on this per se policy, Sidiakina was denied her request for appointment of counsel as an accommodation in superior court. ER 115. Sidiakina sought review of the denial through a writ of mandate in the California Court of Appeal. ER 115-16. The Court of Appeal denied the writ, cited to Rule 1.100(f), and tersely asserted that the "request for accommodations . . . would create an undue financial burden and administrative burden on the court, and fundamentally alter the nature of court services." ER 70, 116. As a result, Sidiakina had to continue representing herself pro se at great cost to her health and, admittedly, very ineffectively. ER 116-17. The divorce proceedings were concluded and final judgment was entered. Sidiakina was left with very little money and without a home. ER 116-17.

PROCEDURAL BACKGROUND

Sidiakina filed this action pro se, alleging that the California state court's per se policy refusing appointment of counsel as an accommodation violates Title II of the ADA. ER 157-64. A second pro se plaintiff joined Sidiakina in the original

complaint, and they sought a class action on behalf of all cognitively disabled litigants. ER 159-60. The complaint sought declaratory and injunctive relief, as well as damages. ER 162. In addition to the generalized challenge to the per se policy, Sidiakina challenged the application of the policy in her own proceedings. ER 155-56, 160. Sidiakina filed a motion for appointment of counsel under seal, which was denied by the court. ER 21 (docket #18), 136. After two amendments to the complaint and a case management conference, the other plaintiff withdrew from the case, and Sidiakina filed the operative third amended verified complaint. ER 120-23.

The operative complaint maintains the generalized challenge to the per se policy. ER 125-26. It alleges that Rule 1.100 and the Judicial Council pamphlet violate the ADA because they make it impossible for "plaintiffs with cognitive disabilities to meaningfully participate in, and/or have equal and meaningful access to and the benefits of, the services of the court system and due process." ER 125-26. In the prayer for relief, Sidiakina seeks declaratory relief establishing that the per se policy reflected in the pamphlet is in violation of the ADA. ER 128, 130. She also seeks appropriate injunctive relief. ER 130. In addition, Sidiakina alleges several particularized claims about the application of the policy in her state divorce proceedings. ER 124-27.

Defendants moved to dismiss on several grounds. ER 77-101. Sidiakina opposed the motion, and filed another motion for appointment of counsel under seal. ER 25 (ex parte application filed on 8/7/12), 26-51. On September 7, 2012, the district court granted the motion to dismiss without leave to amend. ER 5-15. The court concluded that all of the claims were barred by the *Rooker-Feldman* doctrine. ER 8-10. The court alternatively concluded that Sidiakina failed to state a claim against the State defendants (the State of California, Superior Court, Court of Appeal, and California Judicial Council). ER 13. Although the district court noted that Rule 1.100 does not expressly preclude appointment of counsel, it failed to acknowledge the Judicial Council pamphlet referenced in Sidiakina's complaint, which does prohibit appointment of counsel. ER 13.

"[I]n light of the Court's ruling" on the claims, it denied Sidiakina's request for appointment of counsel as moot. ER 5. The court entered judgment the same day. ER 3. Sidiakina filed a timely notice of appeal on October 4, 2012. ER 1.

STANDARD OF REVIEW

This Court reviews de novo a dismissal under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). *Hebbe v. Pliler*, 627 F.3d 338, 341 (9th Cir. 2010) (Rule 12(b)(6) dismissal for failure to state a claim); *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (Rule 12(b)(1) dismissal based on the *Rooker-Feldman* doctrine). The allegations in the complaint are taken as true and in the

light most favorable to the plaintiff. *Id*. A dismissal under Rule 12(b)(6) is improper unless the complaint fails to "contain[] enough facts to 'state a claim to relief that is plausible on its face.'" *Hebbe*, 627 F.3d at 341-42. "[W]here the petitioner is pro se, particularly in civil rights cases," courts "construe the pleadings liberally and . . . afford the petitioner the benefit of any doubt." *Id*. (internal quotation marks and citation omitted).

SUMMARY OF THE ARGUMENT

Sidiakina's complaint and several of her filings, along with her attempt to bring class claims, clearly indicate that she is asserting a generalized ADA challenge to the State's per se policy refusing appointment of counsel as an accommodation for qualified individuals with disabilities. This ADA claim is not barred by *Rooker-Feldman* and is sufficiently stated to survive a motion to dismiss. Thus, the Court should reverse the judgment dismissing the action and remand for further proceedings on the generalized ADA claim. Additionally, counsel should be appointed on remand under the in forma pauperis statute, 28 U.S.C. § 1915(e)(1), given the complexity and strength of the ADA claim and Sidiakina's demonstrated need for counsel.

ARGUMENT

I. The District Court Erred by Dismissing Sidiakina's Generalized Challenge to the Per Se Policy as Barred by *Rooker-Feldman* Because It Does Not Require Review of Her State Proceedings

The district court concluded that all of Sidiakina's claims are barred by *Rooker-Feldman*. ER 8-10. *Rooker-Feldman* applies in limited circumstances to bar federal district courts from reviewing state court judgments. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005). The doctrine does not bar former state court litigants from asserting a general, or facial, challenge to a state rule that was applied to them in prior proceedings, as long as the federal court does not have to review the state court's application of the rule in prior proceedings. *See, e.g., id.* at 286-87; *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983) ("United States district courts . . . have subject-matter jurisdiction over general challenges to state . . . rules . . . which do not require review of a final state-court judgment in a particular case."); *Mothershed v. Justices of the Supreme Court*, 410 F.3d 602, 608 (9th Cir. 2005) (doctrine does not bar general challenge to the rules governing admission to Arizona bar); *Wolfe*, 392 F.3d at 363-64 (doctrine does not bar claims for relief against the future enforcement of a state statute); *Maldonado v. Harris*, 370 F.3d 945, 949-51 (9th Cir. 2004) (same); *Dubinka v. Judges of the Superior Court*, 23 F.3d 218, 222 (9th

Cir. 1994) (doctrine does not bar challenge to the general constitutionality of a state proposition).

The Supreme Court distinguished between impermissible de facto appeals of state court decisions and permissible generalized challenges to rules in *Feldman*. There, the plaintiff was denied state bar admission under a rule requiring graduation from an approved law school. 460 U.S. at 465-66. Two of the challenges brought by plaintiff in essence sought review of the state's application of the rule to his bar application. *Id.* at 486-87. The district court was barred from considering these claims. *Id.* However, the court could properly consider the remaining three claims that involved a generalized attack on the state rule, including whether the rule discriminated against applicants with equivalent credentials. *Id*. at 487. The court had to look only to the rule as promulgated to review these claims, not to the application of the rule in plaintiff's state proceedings. *Id*. at 486-87.

Similary, in both *Dubinka* and *Wolfe*, this Court rejected the application of *Rooker-Feldman* to plaintiffs' entire complaints because they in part challenged the general constitutionality of state laws. *Dubinka*, 23 F.3d at 222; *Wolfe*, 392 F.3d at 363-64. These challenges did not require review of any particular state court decisions. *Id*. The Court acknowledged that certain allegations in plaintiffs' complaints effectively challenged prior orders against plaintiffs in state

proceedings, but focused instead on the non-barred claims. *Dubinka*, 23 F.3d at 222 n.6; *Wolfe*, 392 F.3d at 363.

Here, Sidiakina asserts both generalized and particularized challenges to the per se policy refusing appointment of counsel as an accommodation for a disability. On appeal, Sidiakina does not dispute the dismissal of the particularized claims. However, the district court erred by entirely overlooking her generalized challenge to the policy, which is not barred by *Rooker-Feldman*.

Sidiakina's generalized challenge to the policy is stated clearly and succinctly in her eighth request for relief, which seeks "a ruling that California Rules of Court, Rule 1.100 and pamphlet of Judicial Council of California titled 'For Persons with Disabilities Requesting Accommodations' of 2007 are in violation of ADA Title II." ER 128. Sidiakina alleges that the state court's per se policy of denying appointment of counsel "make[s] it physically impossible for indigent plaintiffs with cognitive disabilities to meaningfully participate in, and/or have equal and meaningful access to and the benefits of, the services of the court system and due process in violation of [Title II of the ADA]." ER 125-26. The prayer for relief includes "declaratory judgment and injunctive relief to compel the State of California and other defendants to comply with the provisions of the Americans with Disabilities Act." ER 130.

Further, Sidiakina's attempts to bring class claims underscore that she is asserting a generalized challenge to the state court's per se policy, rather than a purely individualized attack on her own state proceedings. Initially, Sidiakina and a second plaintiff filed the complaint as a class action on behalf of all similarly situated, cognitively disabled individuals. ER 159-60. The complaint alleged that defendants continue to act, or refuse to act, "on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." ER 159-60. Even if she is unable to sustain a class claim because she is acting pro se, *see* 28 U.S.C. § 1654, the allegations show that Sidiakina is challenging the policy's general application to disabled persons.[1]

Throughout the proceedings, in fact, Sidiakina reiterated her generalized challenge. For example, in a proposed order, Sidiakina suggested that the court conclude "that the California Rules of Court, Rule 1.100 and pamphlet of the Judicial Council of California titled 'For Persons with Disabilities Requesting Accommodations' of 2007 are in violation of ADA Title II, particularly where they state legal counsel cannot be an accommodation for a disability." ER 134. And, in opposing the motion to dismiss, Sidiakina highlighted the statement in the Judicial

[1] Sidiakina should be permitted to reallege a class claim as part of amending her complaint if the Court remands to district court and counsel is appointed under 28 U.S.C. § 1915(e)(1). *See infra* Section III.

Counsel pamphlet that "legal counsel cannot be an accommodation for a disability" and requested that the court "make a decision, whether this statement and this pamphlet are in violation of the ADA Title II." ER 47.

Sidiakina's generalized challenge does not require the district court to review the state courts' application of the policy in prior proceedings. Rather, it requires the district court to evaluate whether the per se policy violates Title II of the ADA. The presence of Sidiakina's claims for individualized relief does not bar this independent, generalized challenge to the policy. *See Feldman*, 460 U.S. at 486-87; *Dubinka*, 23 F.3d at 222 n.6; *Wolfe*, 392 F.3d at 363.

The district court appears to have recognized the difference between a permissible generalized challenge and a prohibited de facto appeal of a state court judgment, but entirely overlooked Sidiakina's generalized claim and prayer for injunctive and declaratory relief. The court examined the application of *Rooker-Feldman* by this Court in *Wolfe*. ER 9. Distinguishing this case, the court erroneously stated that "Sidiakina does not seek prospective relief from the application [of the court rule]." ER 10. Sidiakina's allegations directly contradict this conclusion, as discussed.

Accordingly, the district court erred by concluding that each of Sidiakina's claims is barred by *Rooker-Feldman*.

II. Sidiakina States a Cognizable ADA Claim Against the State Defendants and Thus the District Court Erred by Concluding in the Alternative that Sidiakina Failed to State a Claim

In the alternative, the district court dismissed the claims against the State defendants for failure to state a claim. ER 13. The court rested its conclusion on two faulty rationales.

First, the court stated that Rule 1.100 "does not expressly preclude appointment of counsel." ER 13. But this rationale entirely ignores the Judicial Council's pamphlet about Rule 1.100, which expressly states a per se policy that "the court cannot provide free legal counsel as a medical accommodation." RJN Ex. A, p. 2. By specifically referring to the Judicial Council's pamphlet in her complaint and identifying the policy prohibiting appointment of counsel, *see* ER 125, 128, Sidiakina sufficiently alleged the policy that she is challenging. The district court should have considered the pamphlet as part of the complaint and assumed the truth of its contents in ruling on the motion to dismiss. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (explaining the incorporation by reference doctrine and stating that, "[e]ven if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim").

Second, the district court concluded that "Sidiakina has failed to allege that she was denied the benefits of the courts or discriminated against by the court by reason of her disability" or that "the Judicial Council discriminated against her." ER 13. This rationale reflects a fundamental misunderstanding about the nature of a Title II claim. As explained below, disabled persons are discriminated against by reason of their disability if a policy burdens them disproportionately because of their disabilities. Sidiakina sufficiently alleges that the denial of counsel for cognitively disabled individuals denies them meaningful access to the courts because they do not have the mental capacity to represent themselves. Moreover, appointment of counsel is a reasonable accommodation because it is available to civil litigants in other contexts. But the per se policy improperly assumes that it is never an appropriate accommodation despite the ADA's mandate requiring an individualized assessment of reasonable accommodations.

i. The per se policy refusing counsel as an accommodation discriminates against certain cognitively disabled individuals by reason of their disabilities

Title II of the ADA mandates that "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. To state a prima facie case under Title II, plaintiff must show exclusion or discrimination by

reason of a disability. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002) (per curiam) (listing elements of a prima facie claim under Title II). Disabled individuals are discriminated against by reason of their disability if they are denied meaningful access to state services, programs, or activities that remain open and easily accessible to others. *Crowder v. Kitagawa,* 81 F.3d 1480, 1484 (9th Cir. 1996). If a policy burdens disabled individuals "in a manner different and greater than it burdens others" because of the individuals' disabilities, then it discriminates against them "by reason of their disability." *Id.*

For example, this Court concluded that Hawaii's policy requiring a 120-day quarantine of all animals entering the island discriminated against visually impaired persons who relied upon guide dogs. *Id.* The Court looked to the effect of the policy to determine whether it discriminated against persons "by reason of their disability." *Id*. at 1484-85 & n.1. The quarantine policy effectively precluded visually impaired persons from being able to use a variety of public services, such as public transportation and facilities, because they could not access them without their guide dogs. *Id.* at 1485. Accordingly, it discriminated against them based on their disability. *Id.*

Here, the per se policy refusing counsel as an accommodation discriminates against individuals with cognitive disabilities who are incapable of representing themselves in court proceedings by reason of their disabilities. Cognitive

disabilities affect individuals in different ways and to different degrees, but it is beyond dispute that some individuals with cognitive disabilities are unable to participate in legal proceedings in any meaningful way as pro se litigants. Title II implicates and seeks to protect a variety of constitutional guarantees, including the due process rights of access to the courts and a meaningful opportunity to be heard in civil proceedings. *Tennessee v. Lane*, 541 U.S. 509, 522-23 (2004). The per se policy affects cognitively impaired individuals "in a manner different and greater than it burdens others" because they particularly lack the mental wherewithal to represent themselves.

The instant record provides a concrete example: Sidiakina faces significant barriers to participating in legal proceedings due to her disabilities. *See* ER 143-49. Sidiakina presented medical evidence that, when she is under stress, her cognitive disabilities cause her IQ to fall to 74 (which is in the fourth percentile of the population) and her comprehension level to fall within the bottom two percent of the population. *See* ER 114. Sidiakina's therapists opined that she is psychologically, physically, and cognitively incompetent to represent herself in any litigation and that litigation has exacerbated her disabilities. *See* ER 144, 146-49. This evidence makes tangible the burden that a cognitively disabled litigant

can face, and it is certainly greater than the burden faced by other litigants who are representing themselves pro se but do not have such disabilities.[2]

Thus, Sidiakina has sufficiently alleged that the per se policy discriminates against cognitively disabled individuals by reason of their disabilities. Further, she properly named the Judicial Council, who drafted the policy, and the courts, who implement it, as parties to the discriminatory policy. *See, e.g.*, *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (defining the public entities covered by Title II as including "'every possible agency of state or local government'"); *Memmer v. Marin County Courts*, 169 F.3d 630, 632 (9th Cir. 1999) (county court system is liable under Title II for claim that visually impaired litigant was denied reasonable accommodations under the ADA during civil proceedings).

[2] Defendants have fallaciously argued that Sidiakina's lack of access to the courts is a result of her financial status, rather than her disabilities. *See* ER 100 n.5. This argument is unfounded: the root cause of Sidiakina's inability to adequately represent herself is her combination of disabilities, which would be present regardless of her income level. The fact that Sidiakina could overcome these disabilities by hiring counsel, *if* she had the financial resources, does not liberate the State from its duty under the ADA to accommodate her disability. By analogy, an individual with a disability who needs an interpreter, videotext feed, special keyboard, or some other reasonable accommodation does not need the auxiliary aid because she is indigent, but because of her disability. The fact that the individual could buy her own aid, if she had more resources, does not change the root cause of the need, or an entity's obligation to provide it.

ii. The per se policy circumvents the fact-specific inquiry required under the ADA to determine whether the accommodation is reasonable under the circumstances

The per se policy also circumvents the requirement under the ADA that a public entity must assess the reasonableness of the requested accommodation in relation to each individual applicant. A public entity is required to make reasonable modifications to its policies or procedures when necessary to avoid denying meaningful access to a person with a disability. *Crowder*, 81 F.3d at 1485; *see also* 28 C.F.R. § 35.130(b)(7). "[T]he ADA imposes an obligation to investigate whether a requested accommodation is reasonable," and "'mere speculation that a suggested accommodation is not feasible falls short of the reasonable accommodation requirement.'" *Duvall v. County of Kitsap*, 260 F.3d 1124, 1136 (9th Cir. 2001) (citation omitted). When presented with a request for an accommodation, a public entity must "'gather sufficient information from the disabled individual and qualified experts as needed to determine what accommodations are necessary.'" *Id.* (citation omitted).

In particular, an entity must "take appropriate steps to ensure that communications" with participants in services are "as effective as communications with others." 28 C.F.R. § 35.160(a)(1). As part of this duty, a public entity must "furnish appropriate auxiliary aids and services when necessary to afford individuals with disabilities . . . an equal opportunity to participate in" the public

services. *Id.* at § 35.160(b)(1). The type of necessary auxiliary aid or service varies, depending upon the nature, length, complexity, and context of the communication, along with the needs of the individual with a disability. *Id.* at § 35.160(b)(2).

Here, the per se policy refusing appointment of counsel contravenes the required analysis of the needs of individuals seeking an accommodation, as well as the feasibility of appointment of counsel in a particular case. Consistent with the ADA's individualized assessment requirement, Sidiakina's challenge asserts that the State cannot refuse counsel as a reasonable accommodation without engaging in an individualized inquiry.

For certain cognitively disabled individuals who are unable to represent themselves, appointment of counsel is a reasonable accommodation. The State courts already appoint counsel in the civil context, and thus must do so in a nondiscriminatory fashion by permitting appointment of counsel as a reasonable accommodation where necessary. *See* Cal. Fam. Code § 7862 (appointment for parents in termination of parental rights proceedings); Cal. Gov. Code § 68651 ("Legal counsel shall be appointed to represent low-income parties in civil matters involving critical issues affecting basic human needs . . . as provided in this section."); Cal. Welf. & Inst. Code § 317(b) (appointment of counsel for parents in dependency proceedings where child placed in out-of-home care); *Salas v. Cortez*,

593 P.2d 226, 234 (Cal. 1979) (recognizing constitutional right to counsel for indigent defendants in paternity proceedings); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603 n.14 (1999) ("States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide."); *Townsend v. Quasim*, 328 F.3d 511, 517-18 (9th Cir. 2003) (examining whether the state "is already providing those very same services" in a different context).

Additionally, other courts have already recognized that appointment of counsel is a reasonable accommodation for qualified litigants with disabilities. *See, e.g.*, Wash. Gen. R. 33(a)(1)(C) (providing disabled litigants with accommodations, including "representation by counsel, as appropriate or necessary to making each service, program, or activity, when viewed in its entirety, readily accessible to and usable by a person with a disability");[3] *Pacheco v. Bedford*, 787 A.2d 1210, 1212-13 (R.I. 2002) (per curiam) (evaluating a disabled litigant's request for appointment of counsel as an accommodation in state family court under the factors considered in appointing counsel for a plaintiff bringing a Title VII ADA claim).

[3] *See also* Washington Courts publications, *Frequently Requested Accommodations*, at p. 5, *available at* http://www.courts.wa.gov/content/publicUpload/ADA%20Access%20and%20Accommodation%20Program/Frequently%20Requested%20Accommodations.docx (naming appointment of counsel as the "suggested accommodation" for people with cognitive disabilities).

Defendants misguidedly argued in their motion to dismiss that appointment of counsel is never required because it represents a personal service, which the ADA regulations exempt entities from providing. ER 100; 28 C.F.R. § 35.135 (public entities are not required to provide personal devices and services). However, the regulations indicate that exempted personal services and devices are those that are intimate or designed solely for an individual's own use. The examples in the regulation are "prescription eyeglasses or hearing aids; readers for *personal* use or study; or services of a personal nature including assistance in eating, toileting, or dressing." 28 C.F.R. § 35.135 (emphasis added). By comparison, the regulations require public entities to provide "auxiliary aids and services," including qualified interpreters. *Id.* at § 35.160. Like an interpreter, an appointed attorney is an appropriate auxiliary service and does not fall within the narrow scope of exempted services that are devoted to personal or intimate tasks. Moreover, the exemption does not apply because the State already provides appointment of counsel to certain litigants as described above. *See Olmstead*, 527 U.S. at 603 n.14 ("States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide.").

The per se policy violates the ADA by precluding a fact-specific inquiry into whether appointment of counsel is necessary and reasonable for requesting individuals with cognitive disabilities.

iii. The per se policy ignores the State's burden of demonstrating that appointment of counsel would fundamentally alter the nature of services or would present undue financial and administrative burdens, as well as its burden to offer alternatives

The State must provide the reasonable accommodation of appointment of counsel unless it can demonstrate that doing so would fundamentally alter the nature of court services or create undue administrative and financial burdens. *See* 28 C.F.R. § 35.164. Further, the State's denial of the accommodation must be made "after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion." *Id.* Additionally, the State must offer suitable alternatives to individuals requesting accommodations. *Id.* It must "take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity." *Id.* The per se policy ignores the State's burden of justifying its denial of the accommodation.

As an initial matter, the "fundamental alteration defense" is just that—a defense, which must be raised and proven by defendants. *See Townsend*, 328 F.3d at 520. In the context of this appeal, none of the defense factors are "pertinent to the question of whether [Sidiakina has] met [her] burden of demonstrating a prima

facie violation of the [ADA]." *Id*. at 518 n.1. Although the State raised the defense in its motion to dismiss, *see* ER 98-101, the district court did not consider it in concluding that Sidiakina failed to state a claim, s*ee* ER 13. At this stage in the proceedings, the record is insufficiently developed to assess whether the State meets the defense requirements. Thus, if the State raises this defense on appeal, the case must be remanded for further proceedings on the issue. *See Townsend*, 328 F.3d at 520 ("Because the current record does not provide us with sufficient information to evaluate the Secretary's fundamental alteration defense, we remand this case to the district court.").

However, even if the Court were to consider the defense, the State cannot show that the appointment of counsel for qualified individuals with disabilities would fundamentally alter the nature of court services, because courts already appoint counsel in other civil contexts as noted above. Thus, the State cannot argue that allowing for the appointment of counsel as an ADA accommodation would require them "to create new programs that provide heretofore unprovided services to assist disabled persons." *See id.* at 517-18 (recognizing that Title II does not require the creation of new services but examining whether the state "is already providing those very same services" in a different context).

In addition, the State must substantiate the financial burden in the context of its budget. *See* 28 C.F.R. § 35.164. Just because, as the State notes, specially

earmarked funding for appointment of counsel in some other civil contexts is presently unavailable, *see* ER 100 n.4, it does not mean that the State is unable to afford appointment of counsel for qualified individuals with disabilities or would be unable to fulfill some or all of the appointments with pro bono counsel. Moreover, in the context of Title II, the Supreme Court has emphasized that "ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts." *Lane*, 541 U.S. at 533.

Further, when the State denies an accommodation based on this defense, it must take other actions to ensure that individuals with disabilities have equal access to services. 28 C.F.R. § 35.164. But the per se policy does not reflect any attempt to do so. The policy does not provide for alternatives, such as the appointment of a guardian ad litem or other representative for qualified individuals with disabilities.

Neither the per se policy, nor the record below, satisfies the State's duty under the ADA to justify in a written report its fundamental alteration defense. In addition, the State's arguments supporting its defense are immaterial to whether Sidiakina has stated a prima facie ADA claim sufficient to survive the motion to dismiss.

III. Denial of Sidiakina's Motions for Appointment of Counsel for the Instant Proceedings Was an Abuse of Discretion Given the Complexity and Strength of Her ADA Claim, and Her Demonstrated Need for Counsel

Sidiakina requested counsel early in the proceedings and again after defendants filed their motion to dismiss. *See* ER 21 (docket #18), 25 (ex parte application filed 8/7/12). In support of the requests, Sidiakina provided extensive medical records detailing her inability to capably represent herself, and the profound detriment to her health in trying to do so. *See, e.g.*, Sealed ER 1, 3-4, 19. The district court denied both requests. ER 5, 136. Given the complexity and strength of the ADA claim, and the medical evidence supporting the requests, the denial of counsel was an abuse of discretion. On remand, counsel should be appointed.

Sidiakina has been granted IFP status and is thus eligible for counsel under 28 U.S.C. § 1915(e)(1). In IFP cases, the district court "may request an attorney to represent any person unable to afford counsel." *Id*. The court should consider "plaintiff's ability to articulate his [or her] claims 'in light of the complexity of the legal issues involved,'" and the likelihood of plaintiff's success on the merits, to determine whether exceptional circumstances exist for granting counsel. *Agyeman v. Corr. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004) (citation omitted).

In evaluating whether to grant Sidiakina's request, the court was unquestionably misguided by its failure to identify her generalized ADA claim.

The ADA claim is both complex and important. As previewed above, the State has asserted a fundamental alteration defense that will require discovery regarding the State's justifications. *See, e.g.*, *Townsend*, 328 F.3d at 520 (remanding for necessary fact-finding on the State's fundamental alteration defense). As a pro se litigant, Sidiakina is ill-equipped to conduct full discovery on the defense. Appointment of counsel would serve Sidiakina and the entire class of disabled individuals affected by her generalized challenge to the per se policy. And it would also help serve the district court's "obligation under the ADA and accompanying regulations . . . to ensure that the decision reached by the state authority is appropriate under the law and in light of proposed alternatives." *Crowder*, 81 F.3d at 1485 (noting that, "[o]therwise, any state could adopt [policies that discriminate against] the disabled, and when haled into court could evade the antidiscrimination mandate of the ADA merely by explaining that the state authority considered the possible modifications and rejected them").

The fact that Sidiakina's briefing is largely coherent does not detract from her need for counsel. *See Agyeman*, 390 F.3d at 1104 (noting that, although plaintiff was literate, educated, and able to read legal matter, he needed a lawyer to help him craft his colorable claims). As her motions for counsel reflect, Sidiakina made numerous attempts to find counsel and ultimately depended on drop-in legal

services. *See, e.g.*, Sealed ER 6. Her ability to patch together legal concepts with the help of these drop-in services is not a proper substitute for appointed counsel.

Moreover, Sidiakina's filings and requests for counsel reflect the immense physical and emotional toll that self-representation takes on Sidiakina because of her particular disabilities. *See, e.g.*, ER 53, Sealed ER 1,3-4. Sidiakina candidly attested that "[w]hen I try to write legal pleadings, I have repeated anxiety attacks, and my stomach remains cramped in a [knot], which causes persistent pain, vomiting, and diarrhea, so I cannot eat anything and my body becomes fully incapacitated." ER 53. These symptoms overcame her while she was working on the opposition to the motion to dismiss, and she had to be rushed to the emergency room for intravenous fluids and medications. ER 53. This additional factor enhances the grounds for counsel and makes this an exceptional case compelling the appointment of counsel. *Cf. Agyeman*, 390 F.3d at 1104 (considering other facts that weigh in favor of counsel, such as the treatment of the plaintiff during incarceration).

Accordingly, counsel should be appointed for Sidiakina on remand.[4]

[4] Sidiakina does not assert entitlement to counsel as an accommodation under Title II in these federal proceedings because Title II applies only to state and local governments. *See* 42 U.S.C. § 12131(1). Although Sidiakina could request counsel as an accommodation under the analogous Rehabilitation Act, 29 U.S.C. § 794, the appointment of counsel is warranted here under § 1915(e)(1) without considering this alternative basis.

CONCLUSION

For the foregoing reasons, Sidiakina requests that the Court reverse the dismissal of her generalized ADA claim against the State defendants and remand for further proceedings. In addition, counsel should be appointed for Sidiakina on remand.

Respectfully submitted,

Dated: July 26, 2013

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By: _____/s/_____
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I certify that the attached Appellant's Opening Brief contains 6,491 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and has been prepared in a proportionally spaced typeface using size 14 Times New Roman font.

LEAH SPERO
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NATALIA A. SIDIAKINA

STATEMENT OF RELATED CASES

Counsel is not aware of any related cases pending in this Court.

LEAH SPERO
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By: _____/s/_____
Leah Spero

Attorney for Plaintiff/Appellant
NATALIA A. SIDIAKINA

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 26, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

LEAH SPERO
SPERO LAW OFFICE

By: _____/s/_____
Leah Spero

Attorney for Plaintiff/Appellant
NATALIA A. SIDIAKINA

ADDENDUM OF AUTHORITIES

STATUTES

28 U.S.C. § 1915(e)(1)

The court may request an attorney to represent any person unable to afford counsel.

42 U.S.C. § 12132

Subject to the provisions of this subchapter, 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.

REGULATIONS

28 C.F.R. § 35.130(b)(7)

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.160(a)(1)

A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.

28 C.F.R. § 35.160(b)

(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.

(2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used

ADDENDUM OF AUTHORITIES (CONT.)

28 C.F.R. § 35.160(b) (cont.)

by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

28 C.F.R. § 35.164

This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

RULES

Cal. R. Ct. 1.100

(a) Definitions

As used in this rule:

(1) "Persons with disabilities" means individuals covered by California Civil Code section 51 et seq.; the Americans With Disabilities Act of 1990 (42

ADDENDUM OF AUTHORITIES (CONT.)

Cal. R. Ct. 1.100 (cont.)

U.S.C. §12101 et seq.); or other applicable state and federal laws. This definition includes persons who have a physical or mental impairment that limits one or more of the major life activities, have a record of such an impairment, or are regarded as having such an impairment.

(2) "Applicant" means any lawyer, party, witness, juror, or other person with an interest in attending any proceeding before any court of this state.

(3) "Accommodations" means actions that result in court services, programs, or activities being readily accessible to and usable by persons with disabilities. Accommodations may include making reasonable modifications in policies, practices, and procedures; furnishing, at no charge, to persons with disabilities, auxiliary aids and services, equipment, devices, materials in alternative formats, readers, or certified interpreters for persons with hearing impairments; relocating services or programs to accessible facilities; or providing services at alternative sites. Although not required where other actions are effective in providing access to court services, programs, or activities, alteration of existing facilities by the responsible entity may be an accommodation.

(b) Policy

It is the policy of the courts of this state to ensure that persons with disabilities have equal and full access to the judicial system. To ensure access to the courts for persons with disabilities, each superior and appellate court must delegate at least one person to be the ADA coordinator, also known as the access coordinator, or designee to address requests for accommodations. This rule is not intended to impose limitations or to invalidate the remedies, rights, and procedures accorded to persons with disabilities under state or federal law.

(c) Process for requesting accommodations

The process for requesting accommodations is as follows:

(1) Requests for accommodations under this rule may be presented ex parte on a form approved by the Judicial Council, in another written format, or orally. Requests must be forwarded to the ADA coordinator, also known as

ADDENDUM OF AUTHORITIES (CONT.)

Cal. R. Ct. 1.100 (cont.)

the access coordinator, or designee, within the time frame provided in (c)(3).

(2) Requests for accommodations must include a description of the accommodation sought, along with a statement of the impairment that necessitates the accommodation. The court, in its discretion, may require the applicant to provide additional information about the impairment.

(3) Requests for accommodations must be made as far in advance as possible, and in any event must be made no fewer than 5 court days before the requested implementation date. The court may, in its discretion, waive this requirement.

(4) The court must keep confidential all information of the applicant concerning the request for accommodation, unless confidentiality is waived in writing by the applicant or disclosure is required by law. The applicant's identity and confidential information may not be disclosed to the public or to persons other than those involved in the accommodation process. Confidential information includes all medical information pertaining to the applicant, and all oral or written communication from the applicant concerning the request for accommodation.

(d) Permitted communication

Communications under this rule must address only the accommodation requested by the applicant and must not address, in any manner, the subject matter or merits of the proceedings before the court.

(e) Response to accommodation request

The court must respond to a request for accommodation as follows:

(1) In determining whether to grant an accommodation request or provide an appropriate alternative accommodation, the court must consider, but is not limited by, California Civil Code section 51 et seq., the provisions of the Americans With Disabilities Act of 1990 (42 U.S.C. § 12101, et seq.), and other applicable state and federal laws.

ADDENDUM OF AUTHORITIES (CONT.)

Cal. R. Ct. 1.100 (cont.)

(2) The court must promptly inform the applicant of the determination to grant or deny an accommodation request. If the accommodation request is denied in whole or in part, the response must be in writing. On request of the applicant, the court may also provide an additional response in an alternative format. The response to the applicant must indicate:

(A) Whether the request for accommodation is granted or denied, in whole or in part, or an alternative accommodation is granted;

(B) If the request for accommodation is denied, in whole or in part, the reason therefor;

(C) The nature of any accommodation to be provided;

(D) The duration of any accommodation to be provided; and

(E) If the response is in writing, the date the response was delivered in person or sent to the applicant.

(f) Denial of accommodation request

A request for accommodation may be denied only when the court determines that:

(1) The applicant has failed to satisfy the requirements of this rule;

(2) The requested accommodation would create an undue financial or administrative burden on the court; or

(3) The requested accommodation would fundamentally alter the nature of the service, program, or activity.

(g) Review procedure

(1) If the determination to grant or deny a request for accommodation is made by nonjudicial court personnel, an applicant or any participant in the proceeding may submit a written request for review of that determination to the presiding judge or designated judicial officer. The request for review

ADDENDUM OF AUTHORITIES (CONT.)

Cal. R. Ct. 1.100 (cont.)

must be submitted within 10 days of the date the response under (e)(2) was delivered in person or sent.

(2) If the determination to grant or deny a request for accommodation is made by a presiding judge or another judicial officer, an applicant or any participant in the proceeding may file a petition for a writ of mandate under rules 8.485-8.493 or 8.930-8.936 in the appropriate reviewing court. The petition must be filed within 10 days of the date the response under (e)(2) was delivered in person or sent to the petitioner. For purposes of this rule, only those participants in the proceeding who were notified by the court of the determination to grant or deny the request for accommodation are considered real parties in interest in a writ proceeding. The petition for the writ must be served on the respondent court and any real party in interest as defined in this rule.

(3) The confidentiality of all information of the applicant concerning the request for accommodation and review under (g)(1) or (2) must be maintained as required under (c)(4).

(h) Duration of accommodations

The accommodation by the court must be provided for the duration indicated in the response to the request for accommodation and must remain in effect for the period specified. The court may provide an accommodation for an indefinite period of time, for a limited period of time, or for a particular matter or appearance.