

**FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES W. THOMPSON; STEPHEN  
BOGOVICH,

Plaintiffs - Appellants,

v.

GRAY DAVIS, Governor State of California;  
JOSEPH SANDOVAL,  
Secretary of Youth and Corrections Agency;  
JAMES GOMEZ, Director of the Dept. of  
Corrections; JOHN W. GILLIS,  
Commissioner of the Board of Prison Terms;  
JAMES W. NIELSEN, Chairman of the  
Board of Prison Terms

Defendants - Appellees.

No. 01-15091

D.C. No.

CV-96-00297-GEB(GGH)

ORDER AMENDING  
OPINION

Filed July 3, 2002

Before: Myron H. Bright,\* Betty Binns Fletcher, and Raymond C. Fisher,  
Circuit Judges.

The opinion of this court filed March 8, 2002, 282 F.3d 780, slip op. at 3859,  
is amended as follows:

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\* The Honorable Myron H. Bright, Senior United States Circuit Judge for the  
Eighth Circuit, sitting by designation.

On page 3863 of the slip opinion, add the following sentence to the end of the first full paragraph: "The plaintiffs' claim that the state parole board is categorically denying inmates consideration for parole because of their disability, drug addiction, survives the Defendants' Rule 12(b)(6) motion."

On page 3863 of the slip opinion, in the last paragraph delete "primarily due to" and replace with "because of."

On page 3869 of the slip opinion, in the paragraph starting with "Another flaw in the district court's reasoning . . .," delete "to determine parole release" and replace with "in the parole context." In the same paragraph, add "long" after "For example, circuit courts have." Delete "race is an impermissible criterion in the parole decision-making process" and replace with "parole boards may not exclude an inmate for consideration for parole based on race." Change "same constitutional promises" to "similar constitutional promises."

On page 3870 of the slip opinion, in the first full paragraph, change the first sentence to read (and add new footnote 4): "The same holds true in the parole context: since a parole board may not categorically exclude African-Americans from consideration for parole because of their race, and since Congress thinks that discriminating against a disabled person is like discriminating against an African-American, the parole board may not categorically exclude a class of disabled people from consideration for parole because of their disabilities.<sup>4</sup>"

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<sup>4</sup> Of course the practical operation of considerations of race and disability in the parole context will be different. Considerations of race, subject to the strictest scrutiny under the Constitution, are impermissible in parole decisions in part because that factor cannot be relevant to the assessment of a person's future dangerousness. Title II does not categorically bar a state parole board from making an individualized assessment of the future dangerousness of an inmate by taking into account the inmate's disability. Title II only prohibits discrimination against "qualified" people with disabilities. 42 U.S.C. § 12131 (defining a qualified person with a disability as a person who "meets the essential eligibility requirements for the receipt of services"). A person's disability that leads one to a propensity to commit crime may certainly be relevant in assessing whether that individual is qualified for parole. In addition, the parole board might show that legitimate penological interests justify consideration of an inmate's disability status beyond that

On page 3871, in the last line of the opinion add "AND REMANDED" after "REVERSED."

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appropriate in other settings. *See Gates v. Rowland*, 39 F.3d 1439, 1447 (9th Cir.1994). The parole board claims to have and undeniably does have legitimate penological interests in considering the plaintiffs' substance abuse backgrounds during the individualized inquiry for parole suitability. We hold only that plaintiffs may state a claim under Title II based on their allegations that the parole board failed to perform an individualized assessment of the threat they pose to the community by categorically excluding from consideration for parole all people with substance abuse histories.