



1 the objectives and remedies of the ADA and RA can be reconciled with the CAA's  
2 standards, which are the result of "compromise and consensus." Since that time,  
3 the parties have been engaged in settlement discussions. Because the parties have  
4 not succeeded in reaching agreement, the United States now files this brief as  
5 amicus curiae.

6 The Department of Justice has authority to interpret and enforce the ADA  
7 and the RA. In addition, the Environmental Protection Agency, in cooperation  
8 with the individual states, has primary responsibility for the implementation and  
9 enforcement of the CAA; the Department of Justice also has authority to enforce  
10 the CAA. EPA has authority to set National Ambient Air Quality Standards, 42  
11 U.S.C. § 7409 ("NAAQS"), and to approve state plans implementing those  
12 standards. 42 U.S.C. § 7410(k). Accordingly, the United States has a strong  
13 interest in addressing the interrelationship of these statutes. The United States  
14 urges the Court to find that the two statutes should be read harmoniously, so that  
15 this Court has jurisdiction to hear plaintiffs' ADA claims; however, the remedies  
16 available under the ADA may need to be modified to avoid conflict with the CAA  
17 scheme.

#### 18 STATEMENT

19 Plaintiffs are a nonprofit organization, Save Our Summers, and two  
20 children, one with serious asthma and one with cystic fibrosis. The children state  
21 that they suffer serious health problems from the effects of seasonal wheat stubble  
22 burning in the vicinity of their homes. The smoke that results from burning  
23 assertedly renders them unable to avail themselves of various public facilities,  
24 including schools and roads. Instead, they must either remain at home or leave the  
25 region altogether.

1       Wheat stubble burning is a method that farmers in eastern Washington State  
2 use to clear their fields. Some farmers choose to use this method because it  
3 effectively removes stubble and vegetation, while also eliminating pests (thus  
4 reducing the need to use pesticides). Burning is fairly widespread in the area, and  
5 is performed by hundreds of farmers each season. The burning produces large  
6 quantities of smoke.

7       The State of Washington has imposed a permitting program on crop  
8 burning. Under this program, farmers must apply in advance for a permit to burn  
9 crop stubble. The State will determine whether burning is "reasonably necessary  
10 to carry out the enterprise;" "[a] farmer can show it is reasonably necessary when  
11 it meets the criteria of the best management practices and no practical alternative  
12 is reasonably available." Wash. Admin. Code § 173-430-040. If the State or its  
13 delegates conclude that these conditions are met, it will grant a permit. A permit  
14 also "must be conditioned to minimize air pollution" and may be denied "during  
15 periods of adverse meteorological conditions." *Id.* See also Plaintiffs'  
16 Memorandum of Authorities Supporting Motion for Reconsideration, Exh. C  
17 (specimen of permit).

18       Plaintiffs brought suit against the Washington State Department of Ecology  
19 under the ADA and the RA, seeking a preliminary injunction against the issuance  
20 of further crop burning permits. This Court denied the injunction, tentatively  
21 concluding that it lacked jurisdiction to consider the suit. After plaintiffs moved  
22 for reconsideration, this Court issued an order providing the United States an  
23 opportunity to file a brief as amicus curiae.

## STATUTORY AND REGULATORY BACKGROUND

### A. The Americans with Disabilities Act and the Rehabilitation Act

Title II of the ADA generally prohibits discrimination on the basis of disability by public entities. The nondiscrimination provision states 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. Section 504 of the Rehabilitation Act contains a similar prohibition that states:

[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a).

Title II has broader applicability than Section 504, as it applies to all State activities and Section 504 applies only to programs or activities that receive Federal financial assistance. See 42 U.S.C. § 12131(1)(B); 29 U.S.C. 794(a); Pennsylvania Department of Corrections v. Yeskey, 118 S. Ct. 1952, 1954 (1998) (title II covers State prisons); Armstrong v. Wilson, 124 F.3d 1019, 1023 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998) (finding that title II encompasses "all facets" of state government). The broad coverage of title II is supported by the ADA's legislative history. H.R. Rep. No. 485(II), 101st Cong., 2d Sess., at 84 (1990) ("[t]he Committee has chosen not to list all the types of actions that are included within the term 'discrimination,' as was done in titles I and III, because this title essentially simply extends the anti-discrimination prohibition embodied in section 504 to all actions of state and local governments.")<sup>1</sup>

<sup>1</sup> Section 504 now defines a covered "program or activity" to include "all of

1 Title II requires public entities to make reasonable modifications to their  
2 usual policies, practices, and procedures where necessary to avoid discrimination  
3 on the basis of disability. See 42 U.S.C. § 12131(2)(defining "qualified individual  
4 with a disability" as "an individual with a disability who, with or without  
5 reasonable modifications to rules, policies, or practices . . . meets the essential  
6 eligibility requirements for the receipt of services or the participation in programs  
7 or activities provided by a public entity"); 28 C.F.R. § 35.130(b)(7) (1999)  
8 (requiring reasonable modifications when necessary to avoid discrimination).<sup>2</sup>  
9 Reasonable modifications in policies, practices, or procedures are required in  
10 order to avoid discrimination; "unless the public entity can demonstrate that  
11 making the modifications would fundamentally alter the nature of the service,  
12 program, or activity." *Id.* The Supreme Court has suggested that analysis of a  
13  
14 the operations of" a department, agency, or other instrumentality of a State or local  
15 government receiving Federal financial assistance. 29 U.S.C. § 794(b).

16 <sup>2</sup> The Attorney General was assigned the duty to issue regulations  
17 implementing title II. 42 U.S.C. 12134(a). With limited exceptions not relevant  
18 herein, Congress specified that those regulations were to be consistent with titles I  
19 and III of the ADA and with the coordination regulations issued under section  
20 504. 42 U.S.C. § 12134(b). The Supreme Court recently noted that "[b]ecause the  
21 Department [of Justice] is the agency directed by Congress to issue regulations  
22 implementing Title II, . . . its views warrant respect. . . . [T]he well-reasoned  
23 views of the agencies implementing a statute constitute a body of experience and  
24 informed judgment to which courts and litigants may properly resort for  
25 guidance." *Olmstead v. L.C.*, 527 U.S. 581, 597-598 (1999) (internal quotations  
26 and citations omitted).

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1 defense of fundamental alteration would include consideration of "undue  
2 hardship" elements such as the costs of the modification, the budget of the  
3 program or activity, and the overall size and type of the program. See Olmstead v.  
4 L.C., 527 U.S. 581, 606 n.16 (1999). This reasonableness standard also applies to  
5 the section 504 claim. Alexander v. Choate, 469 U.S. 287, 300, n. 20 (1985).<sup>3</sup>

6 **B. The Clean Air Act**

7 1. General Framework

8 The provisions of the CAA that are most relevant to this case are those  
9 relating to the establishment and attainment of the NAAQS.<sup>4</sup> Under the NAAQS  
10 scheme, "the States and the Federal Government [are] partners in the struggle  
11 against air pollution." General Motors Corp. v. United States, 496 U.S. 530, 532  
12 (1990). See also Commonwealth of Virginia v. EPA, 108 F.3d 1397, 1406-09  
13 (D.C. Cir. 1997). EPA first sets the national ambient air quality standards for  
14 specific pollutants at levels necessary to protect public health and welfare. Then  
15 States have the primary responsibility for selecting and implementing the pollution

16  
17 <sup>3</sup> Given this similarity of standards, and for ease of discussion, subsequent  
18 text that discusses the nondiscrimination statutes in greater detail generally will  
19 focus only on the text and analysis of the ADA.

20 <sup>4</sup> The CAA has several other major components, addressing, *inter alia*,  
21 pollution from new stationery sources, 42 U.S.C. § 7411, hazardous air pollutants,  
22 42 U.S.C. § 7412, mobile sources, 42 U.S.C §§ 7521-7590, acid rain deposition,  
23 42 U.S.C. §§ 7651-7661, and stratospheric ozone protection, 42 U.S.C. § 7671.  
24 The operation of these provisions differs significantly from that of the NAAQS,  
25 and the discussion in this brief is not necessarily applicable to those statutory  
26 provisions.

1 control measures necessary to attain the NAAQS within their boundaries; they do  
2 so by establishing State Implementation Plans ("SIPs"). Only if a State fails  
3 regarding its obligations with respect to these SIPs can EPA promulgate a Federal  
4 plan for the area in question. 42 U.S.C. § 7410(c).

5 Sections 108 and 109 of the CAA, 42 U.S.C. §§ 7408, 7409, authorize EPA  
6 to establish, review and revise NAAQS. After an extensive review of the  
7 scientific literature, EPA is to promulgate "primary" and "secondary" NAAQS to  
8 protect against "adverse" health and welfare effects for specific pollutants.

9 § 7409(a)(1), (b), (d). "Primary" standards are set at levels which protect public  
10 health with "an adequate margin of safety." EPA must review the scientific  
11 literature with respect to NAAQS for a pollutant at least once every five years,  
12 and make any revisions and promulgate any new standards that may be  
13 appropriate. § 7409(d)(1).<sup>5</sup>

14 Once a NAAQS is set, each State has primary responsibility to ensure that  
15 areas within its borders attain the NAAQS. Within 3 years of promulgation of a  
16 new or revised NAAQS, EPA must designate areas as meeting ("attainment") or  
17 not meeting ("nonattainment") such standards. § 7407(d)(1)(B). For each  
18 nonattainment area, the State is to submit to EPA SIPs that contain control  
19 measures necessary to reduce air pollution so that the area will attain the NAAQS.  
20 States generally have 3 years from designation to submit such plans to EPA for  
21 approval. § 7502(b). The plans are to provide for attainment "as expeditiously as  
22  
23

24  
25 "Secondary" standards are "requisite to protect the public welfare from any  
26 known or anticipated adverse effects." 42 U.S.C. § 7409(b)(2). For each criteria  
27 pollutant, the primary and secondary standards are identical.

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1 | practicable, but no later than 5 years from the date . . . of designation.”

2 | § 7502(a)(2).<sup>6</sup>

3 | EPA’s discretion is limited in the approval process. See Union Electric Co.  
4 | v. EPA, 427 U.S. 246, 269 (1976) (“Congress plainly left with the States . . . the  
5 | power to determine which sources would be burdened by regulation and to what  
6 | extent”); Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 79 (1975)  
7 | (EPA has “no authority to question the wisdom of a State’s choices of emission  
8 | limitations if they are part of a plan which satisfies the standards of § 110(a)(2)”).  
9 | Once EPA approves a SIP, it becomes enforceable Federal law. § 7413(a).

10 | Moreover, when a previously designated nonattainment area has monitoring data  
11 | demonstrating that it is attaining the NAAQS, the area may be redesignated  
12 | “attainment.” To qualify for redesignation, the State must agree to continue to  
13 | implement its SIP, submit a plan for maintaining the NAAQS, and meet several  
14 | other requirements.

15 | In the present case, the pollutant of concern appears to be particulate matter  
16 | (“PM”). EPA has two different sets of ambient standards for PM -- one set of  
17 | standards for PM10 (particles 10 microns and smaller) and one set of standards for  
18 | PM2.5 (particles 2.5 microns and smaller). Some areas in the State of  
19 | Washington, including certain areas in which crop burning occurs, have been  
20 | designated nonattainment for PM10. 56 Fed. Reg. 56,694 (Nov. 6, 1991). In  
21 | 1993, EPA approved (in part) a SIP submitted by the State of Washington which  
22 |  
23 |

24 | \_\_\_\_\_  
25 | ‘ EPA has authority to grant limited extensions under certain  
26 | circumstances; also, the Act provides different deadlines for certain standards not  
27 | relevant here.

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1 included provisions relating to PM10 emissions from outdoor burning. 58 Fed  
2 Reg. 4578 (Jan. 15, 1993); WAC 173-425 (1990).

3 The United States is in the initial stages of controlling PM2.5. EPA set a  
4 separate standard for PM2.5 for the first time in July 1997.<sup>7</sup> Pursuant to the  
5 Transportation Equity Act for the 21st Century ("TEA-21"), Pub. L. No. 105-178,  
6 112 Stat. 463 (codified at 42 U.S.C. § 7407 note), and to a Presidential  
7 Memorandum issued when the PM2.5 standards were set, 62 Fed. Reg. 38,421  
8 (July 18, 1997), areas will not be designated as attainment or nonattainment until  
9 2003 to 2005,<sup>8</sup> which means that state plans to attain the PM-2.5 standard would  
10 not be required until 2006 to 2008. State plans will have to demonstrate that they  
11 are attaining the PM-2.5 NAAQS as expeditiously as practicable. Under the CAA,  
12

13 <sup>7</sup> The July 1997 standard for PM2.5 was challenged in court. The Court of  
14 Appeals for the District of Columbia Circuit remanded, but did not vacate, the  
15 standard based on constitutional concerns. The government sought, and the  
16 Supreme Court granted, certiorari. American Trucking Ass'n. Inc. v. EPA, 175  
17 F.3d 1027 (D.C. Cir. 1999), rehearing granted in part and denied in part, 195 F.3d  
18 4, cert. granted Browner v. American Trucking Ass'n Inc., 120 S.Ct. 2003  
19 (May 22, 2000) and American Trucking Ass'n. v. Browner, 120 S.Ct. 2193 (May  
20 30, 2000).

21 • TEA-21 required the EPA to ensure that the PM-2.5 monitoring network  
22 was established by December 31, 1999. § 6102(b). It then required that governors  
23 submit recommended designations 1 year after receipt of 3 years of monitoring  
24 data, and provided that EPA was to make the designation for a state by  
25 December 31, 2005 or 2 years from a governor's receipt of the monitoring data,  
26 whichever date was earlier. § 6102(c).  
27

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1 the attainment dates could not be set later than 2013 to 2015 (unless further  
2 extensions are granted).

3 **2. Federal Activities Addressing Crop Stubble Burning**

4 Although EPA does not directly regulate agricultural burning under the  
5 CAA, the federal government is involved in helping States decide whether and  
6 how they will regulate burning to attain and maintain the PM NAAQS. Under the  
7 CAA, for certain PM10 nonattainment areas, States may as a practical matter need  
8 to include in their SIPs control measures for agricultural operations that contribute  
9 to ambient concentrations of PM10. EPA is in the process of preparing guidance  
10 about what control measures would be acceptable. In preparing that guidance,  
11 EPA intends to take into account recommendations from the Department of  
12 Agriculture's ("USDA's") Agricultural Air Quality Task Force. This body, which  
13 includes industry representatives and other experts in the fields of agriculture and  
14 air quality, was established as a result of legislation enacted in 1996, in which  
15 Congress required USDA to establish an advisory body "to address agricultural air  
16 quality issues." 7 U.S.C. § 5405(d)(1). The legislation also included a  
17 Congressional finding that "recommendations that may be issued by any Federal  
18 agency to address air pollution problems related to agriculture or any other  
19 industrial activity should be based on sound scientific findings that are subject to  
20 adequate peer review and should take into account economic feasibility." 7 U.S.C.  
21 § 5405(a)(4). The Agricultural Air Quality Task Force has sent to USDA  
22 recommendations regarding a policy on agricultural burning, which USDA has  
23 recently forwarded to EPA. After reviewing these recommendations, EPA intends  
24 to develop proposed guidance and solicit public comment on it before issuing final  
25 guidance to the States.

## SUMMARY OF ARGUMENT

1  
2 Plaintiffs' ADA and RA claims are not barred by the CAA, notwithstanding  
3 the CAA's extensive remedial scheme.<sup>9</sup> These two statutory schemes can be  
4 interpreted in a manner that promotes both statutes' objectives; thus, neither  
5 scheme should be construed to displace the other.

6 The principles set forth in Middlesex County Sewerage Auth. v. National  
7 Sea Clammers Ass'n, 453 U.S. 1, 19-21 (1981), are not controlling here. First, 42  
8 U.S.C. § 1983 is distinguishable from the ADA. Section 1983 provides a vehicle  
9 to seek compliance with the standards set forth in a given statute, but the ADA  
10 provides rights and remedies that are distinct from other federal statutes. Second,  
11 the Supreme Court itself has significantly limited the application of Sea Clammers  
12 in the context of section 1983 actions.

13 While plaintiffs' claims may not be barred, the Court should take into  
14 account the statutory scheme of the federal Clean Air Act, as well as the State's  
15 own Clean Air Act, in determining what remedial relief is available under the  
16 ADA. The ADA and the RA require reasonable modifications, but do not require  
17 modifications that would constitute a fundamental alteration of an existing  
18 program. See Olmstead v. L.C., 527 U.S. 581, 603-607 (1999); Alexander v.  
19 Choate, 469 U.S. 287, 300, n. 20 (1985). In assessing what constitutes a  
20 "fundamental alteration," a court must examine the program in issue, including  
21 its policies and objectives. Because the CAA sets forth the Federal framework for  
22 air pollution control, in assessing what constitutes a fundamental alteration, the  
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26 <sup>9</sup> Except where stated otherwise, Plaintiffs' ADA and RA claims will be  
27 referred to collectively as the "ADA claims."

1 court must consider the CAA's policies and objectives as well as the State's clean  
2 air and agricultural burning laws.

3 Three elements of the Federal scheme are especially relevant to this  
4 analysis. The CAA establishes nationwide standards for air quality; it provides for  
5 State discretion in achieving the goals of the Act; and it generally provides States  
6 with substantial amounts of time in which to comply with the requirements of the  
7 Act. The Court should consider these three elements of the statutory scheme in  
8 determining whether particular remedies are reasonable modifications or  
9 fundamental alterations. The Court should also consider the policies and purposes  
10 of the State Clean Air Act. That Act seeks to permit crop burning where there is  
11 no practicable alternative, while minimizing adverse health effects.

#### 12 ANALYSIS

##### 13 A. This Court Has Jurisdiction to Consider Plaintiffs' Americans 14 With Disabilities Act and Rehabilitation Act Claims

15 The question whether this Court has jurisdiction to consider plaintiffs' ADA  
16 claims turns on ordinary principles of statutory interpretation. Under those  
17 principles, one remedy created by Congress is not lightly construed to displace  
18 another. "[W]hen two statutes are capable of co-existence, it is the duty of the  
19 courts, absent a clearly expressed congressional intention to the contrary, to regard  
20 each as effective." Morton v. Mancari, 417 U.S. 535, 551 (1974).

21 In some instances, it is not possible to give effect to one statute without  
22 thwarting the intent of Congress in enacting another. When this occurs, the court  
23 must determine which of the statutes Congress intended should be applicable. The  
24 latter task only becomes necessary, however, if there is no way of harmonizing the  
25 two statutes. "[T]o the extent that statutes can be harmonized, they should be."  
26 United States v. Trident Seafoods Corp., 92 F.3d 855, 862 (9th Cir. 1996); see also  
27 2A Sutherland Statutory Construction § 51.05 (4th ed. 1984) ("Where one statute

1 deals with a subject in general terms, and another deals with a part of the same  
2 subject in a more detailed way, the two should be harmonized if possible; but if  
3 there is any conflict, the latter will prevail, regardless of whether it was passed  
4 prior to the general statute, unless it appears that the legislature intended to make  
5 the general act controlling.”). The Court’s first task is thus to harmonize the two  
6 statutes; the feasibility of harmonizing them will often turn on the particular  
7 circumstances in which the case arises.

8 This Court previously concluded that it did not have jurisdiction to hear  
9 plaintiffs’ claims under the ADA and the RA, in light of the comprehensive nature  
10 of the federal scheme for the regulation of air quality. It appears based on the  
11 facts of this case that Congress’s purposes in enacting the CAA can be adequately  
12 taken into account in selecting a remedy under the ADA, as explained in more  
13 detail in part B, *infra*. Thus, the Court need not have determined whether, had  
14 there been a true conflict between the statutory schemes on the facts of this case,  
15 the ADA or CAA scheme would have yielded. Because the two statutes can be  
16 successfully harmonized, according to ordinary principles of statutory construction  
17 there is no occasion to inquire which statute Congress intended should be  
18 controlling.<sup>10</sup>

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20 <sup>10</sup> Section 12201(b) of the ADA also suggests that Congress generally  
21 intended that the ADA coexist with remedies, rights and procedures under other  
22 statutory schemes. See Watkins v. J & S Oil Co., 977 F. Supp. 520, 524 n.2  
23 (D. Me. 1997) (in discussing the relationship between the Family Medical Leave  
24 Act and the ADA, citing section 12201(b), and stating that a disabled employee is  
25 “simultaneously protected” by the two statutes); Wood v. County of Alameda, 875  
26 F. Supp. 659, 664 (N.D. Cal. 1995) (finding that this provision “is intended to  
27

1 This case is not governed by the analysis applied by the Supreme Court in  
2 Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1,  
3 19-21 (1981). In Sea Clammers, the Court considered whether plaintiffs could  
4 bring a claim under 42 U.S.C. § 1983 to recover damages for a violation of the  
5 Clean Water Act ("CWA"). Plaintiffs sought to enforce, pursuant to section 1983,  
6 the standards set forth in the CWA even though the CWA had its own statutory  
7 enforcement mechanisms. The Court found that relief pursuant to section 1983  
8 was not available because Congress had already created a "sufficiently  
9 comprehensive" remedial scheme under the CWA, and to allow claims under  
10 section 1983 would circumvent Congress's decision to allow only certain remedies  
11 and not others when implementing the CWA. Id. at 20.

12 The Supreme Court's analysis in Sea Clammers applies only to cases  
13 involving actions brought under section 1983, and should not be applied to claims  
14 under the ADA or the RA. Section 1983 provides a vehicle for plaintiffs to assert  
15 violations of federal law; it does not create a substantive right that exists  
16 independent of the statute in issue. In contrast, the ADA and the RA (and certain  
17 other disability discrimination statutes) provide protections against discrimination  
18 on the basis of disability that are governed by specific substantive standards and  
19 are independent of other federal protections.

20 The Court's analytical approach in Sea Clammers did not inquire into  
21 whether section 1983 and the CWA's statutory scheme could be reconciled.  
22 Instead, the Court focused its inquiry on the CWA's statutory scheme, and, finding  
23

24  
25 ensure that plaintiffs can avail themselves of *both* the applicable rights and  
26 remedies under the ADA *and* complimentary state rights and remedies") (italics in  
27 original).

1 that scheme to be comprehensive, concluded that Congress intended to foreclose  
2 reliance on section 1983 to enforce the CWA. That analytical approach has not  
3 been applied outside of the section 1983 context because section 1983 is unusual  
4 in providing an enforcement mechanism for substantive rights defined in another  
5 statute, so that in cases involving that provision there are not two distinct statutory  
6 schemes to be reconciled. Here, by contrast, the ADA and RA themselves define  
7 both substantive rights distinct from those contained in the CAA, and provide  
8 means of enforcing those rights. In cases like this one, involving potential  
9 conflicts between two distinct statutory schemes, the Sea Clammers analysis does  
10 not apply; instead, a court should seek to reconcile the two schemes, as explained  
11 above.

12 Indeed, the Court has concluded in only one instance besides Sea Clammers  
13 that a statute's remedial scheme is so comprehensive as to bar plaintiffs' claims  
14 alleging violations of the statute pursuant to section 1983. See Blessing v.  
15 Freestone, 520 U.S. 329, 346-347 (1997) (noting this fact in rejecting assertion  
16 that section 1983 provides no avenue for relief for claims challenging Social  
17 Security Act); Smith v. Robinson, 468 U.S. 992, 1012-1013 (1984) (finding that  
18 comprehensive remedial scheme of Education for Handicapped Act precluded  
19 section 1983 claim to enforce the same educational rights). Even when the Sea  
20 Clammers test is applicable, the Court has said that a "difficult showing" is  
21 required to demonstrate that Congress intended to divest plaintiffs of the ability to  
22 proceed under section 1983. See Blessing, 520 U.S. at 346.

23 **B. Identification Of Remedies Under the Americans with Disabilities Act**  
24 **Must Take Into Account the Purposes and Policies of the Federal And**  
25 **State Clean Air Acts**

26 The ADA requires a State or local government to make reasonable  
27 modifications to its programs for qualified individuals with disabilities, but not to

10 courts readily alter its programs. See 42 U.S.C. § 12132, 28 C.F.R.  
 11 § 35.130(b)(7). As we discuss in more detail below, the principle,  
 12 a court may reconcile any tension or conflict between the Federal Clean Air Act,  
 13 the State of Washington's Clean Air Act and the applicable regulatory schemes in its  
 14 assessment of what, if any, modifications to the State's permit scheme during  
 15 permit scheme are required. Because of the nature of this case and the limited  
 16 record before the Court, the United States will not address the appropriateness of  
 17 any particular program or scheme of modifications.

18 The "Reasonable Modification/Fundamental Alteration Standard"

19 The ADA requires only "reasonable" modifications, and does not require a  
 20 "fundamental alteration" in a state program. See Olmstead 527 U.S. at 603-607  
 21 (stating and applying the "fundamental alteration" standard). A proposed  
 22 modification is not required if it results in a fundamental alteration of a program or  
 23 imposes an undue burden or hardship on the defendant. See Easley v. Snider, 36  
 24 F.3d 297, 305 (3d Cir. 1994); see also Olmstead, 527 U.S. at 603-606 & n.16; 28  
 25 C.F.R. § 35.130(b)(7).<sup>11</sup> The burden of showing that a particular modification

26 <sup>11</sup> Courts examine whether a proposed modification imposes a fundamental  
 27 alteration to a program or an undue hardship on a defendant based on essentially  
 28 the same factors. What constitutes an undue hardship requires a "case-by-case  
 analysis." Olmstead, 527 U.S. at 606 n.16; see 42 U.S.C. § 12134(b) (Title II  
 ADA regulations shall be consistent with regulations implementing the RA);  
Helen L. v. DiDario, 46 F.3d 325, 338 (3d Cir. 1995) (rejecting assertions that  
 providing in-home attendant care services would cause a fundamental alteration or  
 undue burden since such services were consistent with the State's own program  
 objectives).

1 amounts to a "fundamental alteration" rests with the defendant. See *ibid.*; see also  
2 Johnson v. Gendreau Co., 116 F.3d 1052, 1059 (5th Cir. 1997).

3 "The determination of what constitutes reasonable modification is highly  
4 fact-specific, requiring case-by-case inquiry." Crowder v. Kitagawa, 81 F.3d  
5 1480, 1486 (9th Cir. 1996); see Martin v. PGA Tour, Inc., 204 F.3d 994, 999 (9th  
6 Cir. 2000) (applying reasonableness standard of Title III of the ADA); Stanton v.  
7 McDonald's Corp., 51 F.3d 353, 356 (2d Cir. 1995); Easley, 36 F.3d at 305.  
8 Therefore, it ordinarily is inappropriate to make an abstract determination that  
9 certain types of modifications either would be reasonable or would amount to  
10 fundamental alterations. Instead, a court must analyze and closely consider the  
11 facts of the case at hand, and assess whether a modification for the plaintiff, as  
12 opposed to individuals generally, is reasonable or constitutes a fundamental  
13 alteration of the program. See Martin, 204 F.3d at 1001 ("evidence must focus[]  
14 on the specifics of the plaintiff's or defendant's circumstances and not on the  
15 general nature of the accommodation"); quoting Johnson, 116 F.3d at 1050.

16 Assessing the reasonableness of a proposed modification may include  
17 considering whether it is effective and whether it is difficult, as a practical matter,  
18 to implement. See Martin, 204 F.3d at 999. Moreover, if a plaintiff seeks a  
19 modification to a statutory or regulatory scheme, the reasonable  
20 modification/fundamental alteration inquiry should examine the underlying  
21 purposes of the program, rules, and regulations at issue. See e.g., Easley, 36 F.3d  
22 at 303-305. By examining a program's or regulation's primary purposes and  
23 objectives, a court can determine whether these goals would be undermined if the  
24 modification were granted. See Martin, 204 F.3d at 1000 (allowing plaintiff the  
25 use of a golf cart was not a fundamental alteration of the nature of the golf  
26 competition since walking, and asserted fatigue resulting from walking, were not  
27

1 deemed significant elements of competition); compare Easley, 36 F.3d at 305-306  
2 (providing in-home attendant care services to non-alert physically disabled  
3 persons would alter essential purposes of the program, which is designed to  
4 increase opportunities for independent living, including employment), and  
5 Helen L. v. DiDario, 46 F.3d 325, 337-339 (3d Cir. 1995) (in-home attendant care  
6 services for physically disabled person currently served in nursing home and  
7 segregated from the community would be consistent with, and not fundamentally  
8 alter, the objectives of state attendant care program).

9 Thus, the fundamental alteration component of the reasonable modification  
10 analysis is not measured in the abstract. Instead, when dealing with activities of a  
11 public entity, the context of the regulatory scheme provides a critical backdrop,  
12 and the regulatory body's ability to pursue and achieve the purposes underlying  
13 the program or statutory scheme in question must be examined in light of the  
14 proposed modification. Thus, a court must examine whether the proposed  
15 modification is consistent with the objectives of the entire program in determining  
16 whether a modification is reasonable or a fundamental alteration. See Easley, 36  
17 F.3d at 305 (weighing extent to which the proposed modification would shift the  
18 focus of the program); Heather K. v. City of Mallard, Iowa, 946 F. Supp. 1373,  
19 1389 (N.D. Iowa 1996) (denying summary judgment; requiring assessment of  
20 whether a proposed modification to ordinance on backyard burning is reasonable,  
21 or fundamentally alters the objectives of the ordinance or imposes an undue  
22 hardship on the defendant).<sup>12</sup>

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24  
25 <sup>12</sup> In Heather K., 946 F. Supp. at 1384-1385, the district court cited a letter  
26 from the Department of Justice that addressed a different set of facts; that letter is  
27 not applicable in this case.

1 2. The Federal and State Clean Air Programs

2 The Court should consider the purposes and structure of the Federal and  
3 State clean air regulatory schemes in conducting its reasonable modification/  
4 fundamental alternation analysis. By following this approach, a court may  
5 reconcile any tension or conflict between the Federal Clean Air Act, the State of  
6 Washington's Clean Air Act, and the ADA's statutory schemes in its assessment of  
7 what, if any, modifications to the State's wheat stubble burning program are  
8 required.

9 a. The Purposes and Structure of the Federal Clean Air Program

10 The Federal clean air program as embodied in the CAA is particularly  
11 important to the Court's analysis, in light of the Court's obligation to harmonize  
12 Federal statutes. United States v. Trident Seafoods Corp., 92 F.3d 855, 862 (9th  
13 Cir. 1996). In establishing the national air pollution regulatory scheme, Congress  
14 carefully balanced a number of factors; the Court should attend carefully to this  
15 balancing in selecting a remedy under the ADA. We identify three especially  
16 important features of the Federal scheme that the Court should consider in  
17 analyzing possible modifications to the State program. These are: (1) the CAA's  
18 creation of distinctively national standards for air quality, the NAAQS, which  
19 protect sensitive populations, but not the most sensitive individual within a  
20 population; (2) the CAA's delegation to the States of discretion to select the means  
21 by which to achieve these standards; and (3) the timetables provided under the Act  
22 for State compliance with the NAAQS, which give States a substantial amount of  
23 time to attain the NAAQS, rather than requiring immediate compliance. In order  
24 to ensure that the ADA and CAA are interpreted harmoniously, the Court should  
25 consider each of these three features, and their role in the Washington State  
26 agricultural burning permit program, as part of its reasonable modification/  
27

1 | fundamental alteration analysis. Because of the posture of this case and the  
2 | limited record before the court, however, the United States will not address the  
3 | appropriateness of any particular proposed remedies or modifications in light of  
4 | this framework.

5 |       i. The Act's National Standards. Section 109(b)(1) of the Clean Air Act  
6 | requires that EPA set the NAAQS at levels that are "requisite to protect public  
7 | health" with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). In setting  
8 | the NAAQS, Congress intended that EPA consider the effects of air pollution on  
9 | sensitive populations, such as asthmatics. See Lead Industries Ass'n, Inc. v. EPA,  
10 | 647 F.2d 1130, 1153 (D. C. Cir. 1980) ("[S]ensitive persons, such as asthmatics  
11 | ... are [to be] included within the group that must be protected."); see also  
12 | American Lung Association v. Browner, 134 F.3d 388, 389 (D.C. Cir. 1998) ("In  
13 | its effort to reduce air pollution, Congress defined public health broadly. NAAQS  
14 | must protect not only average healthy individuals, but also 'sensitive citizens' –  
15 | children, for example, or people with asthma, emphysema, or other conditions  
16 | rendering them particularly vulnerable to air pollution.") (quoting S. Rep. No. 91-  
17 | 1196, at 10 (1970)). However, Congress stated that EPA need not consider the  
18 | effects of air pollution on the most sensitive individuals within those populations.  
19 | See S. Rep. No. 91-1196, at 10 (EPA must consider the effects to a "representative  
20 | sample of persons comprising the sensitive group rather than to a single person in  
21 | such a group"), reprinted in 1 Staff of the Senate Comm. On Public Works, 93d  
22 | Cong., 2d Sess., *"A Legislative History of the Clean Air Act Amendments of 1970"*  
23 |  
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1 at 410. (Comm. Print 1974). EPA has promulgated NAAQS for particulate  
2 matter, which appears to be the pollutant at issue in this case. See 62 Fed. Reg.  
3 38,652 (1997) (establishing NAAQS for PM10 and PM2.5).<sup>13</sup>

4 EPA's standards thus establish the appropriate national level of "public  
5 health" protection for sensitive subpopulations with regard to these pollutants,  
6 recognizing the possibility that some sensitive individuals may continue to  
7 experience ill effects as a result of exposure to particulate matter. These standards  
8 were set by EPA pursuant to Congressionally delegated authority, and reflect basic  
9 scientific and societal choices that are properly reserved to Congress and to EPA.  
10 EPA has approved the State of Washington's SIP as consistent with achieving the  
11 PM-10 NAAQS.<sup>14</sup>

12 To the extent that this Court considers, or the plaintiffs seek, remedies that  
13 would require the State to achieve air quality standards more protective than those  
14 of the NAAQS, the fact that EPA has established the existing NAAQS levels is

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16 <sup>13</sup> As already noted, the Court of Appeals for the D.C. Circuit has remanded,  
17 but not vacated, the PM-2.5 standards. See *supra* note 7. Although the same court  
18 vacated EPA's revised PM-10 standard, *American Trucking*, 175 F.3d 1027, 1057,  
19 EPA had decided to revoke the preexisting PM-10 standard (codified at 40 C.F.R.  
20 50.6) only on an area-by-area basis. See 62 Fed. Reg. 38,652, 38,701 (July 18,  
21 1997). At the time the standard was vacated, EPA has only done so for one area  
22 (Boise, Idaho). Accordingly, the previous PM-10 standard, promulgated in 1987,  
23 remains effective in all other areas of the United States.

24  
25 <sup>14</sup> In 1993, EPA approved a SIP submitted by the State of Washington  
26 which included provisions relating to PM10 emissions from agricultural burning.  
27 58 Fed Reg. 4578 (Jan. 15, 1993); WAC 173-425 (1990).

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1 relevant to the analysis of whether those remedies constitute reasonable  
2 modifications or fundamental alterations.<sup>15</sup> To the extent that remedies amount to  
3 setting new standards for ambient air quality that are more stringent than the  
4 federal NAAQS, they might well be in tension with the CAA framework  
5 established by Congress, or the standards set by EPA pursuant to Congressionally  
6 delegated authority. The degree of tension would depend on, among other factors,  
7 the geographical reach of the remedy. Remedies that are site specific, localized and  
8 otherwise narrowly tailored to the circumstances of the plaintiffs would likely not  
9 raise concerns about the NAAQS. Without commenting on possible remedies  
10 specific to this case, those might include such actions as temporal or other  
11 limitations on permitted burning in specific areas, provision of prior notice of  
12 burning to affected individuals, and other actions that do not conflict with broad  
13 federal ambient air quality standards. On the other end of the spectrum, however, a  
14 remedy that effectively established a new ambient air quality standard statewide.  
15 would for example be a fundamental alteration and therefore would be precluded.<sup>16</sup>

16 ii. State Discretion. Second, as we have explained, the Clean Air Act makes  
17 the states and federal government regulatory "partners in the struggle against air  
18

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19 <sup>15</sup> Under the CAA, 42 U.S.C. § 7416, States may, however, set more  
20 stringent ambient air quality standards than Federal requirements. See *infra* n. 17.

21 <sup>16</sup> The present case involves the claims of only two individuals; it is  
22 unclear to what extent other such claims might be asserted in the future. The  
23 United States believes that it would be important, however, to monitor the  
24 aggregate effect of remedies that might be awarded in such cases, and that  
25 remedies that could be reasonable standing alone might be fundamental alterations  
26 when considered in the aggregate.  
27

1 pollution." General Motors Corp., 496 U.S. at 532. With respect to the NAAQS,  
2 EPA's role is generally to set national air quality standards and to ensure that these  
3 standards are observed. But "Congress plainly left with the States . . . the power to  
4 determine which sources would be burdened by regulation and to what extent."  
5 Union Electric, 427 U.S. at 269. EPA has "no authority to question the wisdom of  
6 a State's choices of emission limitations if they are part of a plan which satisfies  
7 the standards of § 110(a)(2)." Train, 421 U.S. at 79.

8       Accordingly, states are given considerable discretion to choose the  
9 appropriate mix of control strategies for reaching attainment under the CAA.  
10 States may choose varying levels of controls for specific industries or emitting  
11 sectors, depending upon the costs of control, the importance of those emitting  
12 sectors to the State, and other factors that a State may deem appropriate in  
13 determining who should bear the greatest burden of pollution control and how and  
14 when they should do so. This discretion is a vital element in the Federal/State  
15 balance established by the Act. The extent to which a remedy significantly disturbs  
16 that balance is relevant to assessing whether that remedy is a fundamental  
17 alteration or a reasonable modification. For example, a remedy that effectively  
18 required a given industry sector to shut down statewide would substantially alter  
19 the scope of the state's discretion in this regard, and would constitute a  
20 fundamental alteration.<sup>17</sup>

21  
22  
23       <sup>17</sup> Notably, under the CAA, 42 U.S.C. § 7416, States may elect to set more  
24 stringent air quality standards than Federal requirements. Therefore a State might  
25 choose on its own to adopt a more stringent ambient air quality standard or to  
26 heavily regulate a particular emitting sector, and even to do so in response to the  
27 types of concerns raised by plaintiff in this case. Because the Act seeks to provide

1        **iii. Time For Compliance.** Finally, Congress has established a detailed  
2 schedule for State and Federal efforts to attain the NAAQS. After EPA  
3 promulgates a new or revised NAAQS, the statute provides three years for EPA to  
4 identify attainment and nonattainment areas. 42 U.S.C. § 7407(d)(1)(B). States  
5 then have three years in which to submit SIPs for nonattainment areas, CAA  
6 § 7502(b), which are to provide for attainment "as expeditiously as practicable"  
7 and which EPA can set as late as 10 years after the date of designation (and which  
8 EPA can then extend by up to two years). § 7502(a)(2). As discussed above, in  
9 1998, Congress lengthened the timetable further for PM2.5. When States have  
10 been unable to meet certain attainment dates for a particular pollutant, Congress  
11 has provided even more time for States to achieve the NAAQS.<sup>18</sup>

12        Thus, in addition to setting an overall level of protection "requisite to protect  
13 public health" the overall framework of the CAA sets forth a comprehensive  
14 timetable for implementation and ultimate attainment of the air quality standards  
15 set forth in the NAAQS. This scheme provides the States with sufficient time to  
16 obtain and install appropriate air quality monitoring equipment, generate necessary  
17 monitoring data, and then develop, adopt, and implement appropriate plans for  
18 attainment. It also provides time for development of new control equipment and  
19 technological innovations, and time for sources to install new controls or otherwise  
20 change their methods of operation.

21 \_\_\_\_\_  
22 States with discretion to regulate air quality within their boundaries, however,  
23 remedies that would *require* such measures must be tested against the reasonable  
24 modification/fundamental alteration standard.

25  
26        <sup>18</sup> Congress extended the attainment date for ozone for a large number of  
27 areas in the 1990 Amendments. CAA § 181.

1 Congress thus intended that States have sufficient time to investigate and  
2 implement methods of controlling air pollution that bring the State into attainment  
3 while limiting the resulting burden on regulated entities. Accordingly, the fact that  
4 a remedy requires a State to implement changes rapidly should be considered as  
5 part of the reasonable modification analysis, particularly if that remedy also  
6 involves significant adjustments to the State program. Moreover, remedies that  
7 have the effect of altering specific timetables established pursuant to the CAA  
8 would warrant close attention in the reasonable modification analysis. For  
9 example, a remedy that required immediate attainment of a recently promulgated  
10 NAAQS would likely constitute a fundamental alteration. If a remedy were  
11 localized, site-specific, and carefully tailored for the affected individuals, it would  
12 be more likely that it could require prompt compliance without raising these timing  
13 concerns.

14 **b. The Purposes and Structure of the State Clean Air Program**

15 This brief focuses on the task of harmonizing the ADA and CAA schemes;  
16 the United States has particular expertise with these schemes. In assessing the  
17 State's reasonable accommodation obligation, however, the Court should also  
18 consider the purposes and policies underlying the State's clean air program.  
19 Although the purposes and policies of the State program have not yet been  
20 developed fully by the parties, we provide a preliminary overview in the margin.<sup>19</sup>

21  
22 <sup>19</sup> The wheat stubble burning program that the plaintiffs contest was  
23 developed and implemented by the State of Washington under the authority of the  
24 State Clean Air Act. The underlying purposes of that Act include:

25 ... to secure and maintain levels of air quality that protect human  
26 health and safety, including the most sensitive members of the  
27 population, to comply with the requirements of the federal clean air

1 A more complete analysis will be required when the Court considers particular  
2 remedies.

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7 act, to prevent injury to plant, animal life, and property, to foster the  
8 comfort and convenience of Washington's inhabitants, to promote the  
9 economic and social development of the state, and to facilitate the  
10 enjoyment of the natural attractions of the state.

11 Wash.Rev.Code § 70.94.011 (1998). It also states that "[i]t is the policy of the  
12 state that the costs of protecting the air resource and operating state and local air  
13 pollution control programs shall be shared as equitably as possible among all  
14 sources whose emissions cause air pollution." *Id.*

15 As implemented by regulation, the State's agricultural burning permit  
16 program seeks to "establish[] controls for agricultural burning in the state in order  
17 to minimize adverse health and the environment effects from agricultural burning"  
18 and to develop "economically feasible alternative methods to agricultural  
19 burning." Wash. Admin. Code § 173-430-010 (1999). The permit program  
20 regulations further provide that "[a]gricultural burning is allowed when it is  
21 reasonably necessary to carry out the enterprise. A farmer can show it is  
22 reasonably necessary when it meets the criteria of the best management practices  
23 and no practical alternative is reasonably available." Wash. Admin. Code § 173-  
24 430-040. "Best management practices" are those practices for reducing air  
25 contaminant emissions from agricultural activities as identified by a research task  
26 force established by the State's Department of Ecology. Wash.Rev.Code.  
27 §§ 70.94.650(4).

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1 **3. The United States Takes No Position At This Time As To The**  
 2 **Application of the Reasonable Modification Analysis To The Facts Of**  
 3 **This Case**

4 "The determination of what constitutes reasonable modification is highly  
 5 fact-specific, requiring case-by-case inquiry." Crowder v. Kitagawa, 81 F.3d 1480,  
 6 1486 (9th Cir. 1996). Given the early posture of the record, the scant evidence on  
 7 possible modifications does not render feasible a fair and complete analysis at this  
 8 point. The United States accordingly takes no position on the appropriateness of  
 9 any proposed modifications. The United States may seek an opportunity to  
 10 comment on any reasonable modifications suggested by the parties.

11 **CONCLUSION**

12 The district court has jurisdiction to consider plaintiffs' ADA and RA claims.  
 13 In determining an appropriate remedy, however, the Court should take into account  
 14 the key features of the applicable statutory schemes in order to ensure that any  
 15 remedy does not constitute a fundamental modification of those schemes.

16 DATED this 6<sup>th</sup> day of September 2000.

17 Respectfully submitted,

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