No. 98-536

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

TOMMY OLMSTEAD, ET AL.
Petitioners,

vs.

L.C. AND E.W., EACH BY JONATHAN ZIMRING, AS GUARDIAN AD LITEM AND NEXT FRIEND,,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE,* DICK THORNBURGH AND THE NATIONAL ORGANIZATION ON DISABILITY IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Dick Thornburgh served as Attorney General of the United States from 1988 to 1991. As Attorney General, he oversaw the preparation of draft legislation that Congress eventually passed as the Americans With Disabilities Act, he testified before Congress as it considered the legislation, and he supervised the promulgation of the Department of Justice regulations at issue in this case.

The National Organization on Disability ("NOD") promotes the full and equal participation of America's 54 million men, women and children with disabilities in all aspects of life. NOD was founded in 1982 at the conclusion of the United Nations International Year of Disabled Persons. NOD is the only national disability network organization concerned with all disabilities, all age groups and all disability issues.*

SUMMARY OF ARGUMENT

The Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, *et seq.*, and the specific regulation at issue in this case, 28 C.F.R. § 35.130(d) (the "Integration Regulation"), define as unlawful discrimination the unnecessary segregation of persons with disabilities. Any contrary conclusion ignores the plain language of both the

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* Both Petitioners and Respondents have consented to the filing of this brief, and letters of consent are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than the named *amici* made a monetary contribution to the preparation of this brief.

statute and the regulation, the intent of Congress and this Court's well-established interpretive rules.

The Attorney General's interpretation of the Integration Regulation is both reasonable and consistent with congressional intent in enacting the ADA. The regulation requires that public entities, including the states, provide programs and services "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." In this case, the Eleventh Circuit held that the Integration Regulation requires that, when a state has established both institution-based services and community-based services for persons with disabilities, the state must allow the recipient to receive services in the most-integrated setting. That holding and its interpretation of the applicable regulation are mandated by the plain language of the Integration Regulation and with the broad scope of prohibited discrimination intended by the drafters of the ADA.

Petitioners seek to have this Court reverse the Eleventh Circuit's opinion on three principal grounds. None of Petitioners' arguments is persuasive or supports the reversal of the Eleventh Circuit's decision.

First, Petitioners argue that the Attorney General's regulations somehow exceed the statutory grant of authority. In fact, in the ADA, Congress directed the Attorney General to model his regulations on regulations promulgated by the Department of Health, Education and Welfare ("HEW") to implement Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, *et seq.* (those regulations will be referred to throughout this brief as the "Coordination Regulations" in order to distinguish them from other HEW regulations relating to Section 504). The Attorney General did so and the

resulting regulation almost mirrors the model Congress prescribed.

Second, Petitioners contend that the Attorney General's current interpretation of the Integration Regulation warrants no deference from this Court because it is of recent vintage and inconsistent with her previous position. In fact, no Attorney General has ever offered an interpretation at variance with the DOJ's current view and the Department of Justice argued more than 20 years ago that Section 504 required the result Respondents urge in this case. There being no inconsistency in the Attorney General's position regarding a regulation her agency was charged to draft and enforce, this Court's precedents require substantial deference to the agency's interpretation of its own regulation.

Third, Petitioners argue that Congress' intent regarding the Integration Regulation may be discerned from pre-ADA judicial decisions interpreting Section 504. Petitioners seek to portray the Section-504 cases as uniform in their interpretation and contrary to the Eleventh Circuit's interpretation of the Integration Regulation. In fact, the pre-ADA case law is far from uniform and the interpretive maxim on which Petitioners rely thus has no application. When Congress acts against a background of diverse judicial interpretations, its reference to the statute that caused that judicial diversity cannot reasonably be viewed as a legislative endorsement of any particular judicial interpretation. Moreover, those cases involved different statutory language.

Accordingly, the decision of the Eleventh Circuit should be affirmed.[1]

ARGUMENT

Congress' declaration of rights and obligations in the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, *et seq.*, was broad in its scope. *See Menkowitz v. Pottstown Memorial Medical Center,* 154 F.3d 113, 118 (CA3 1998). That mandate is best understood by reference to the history of the ADA and its regulations.

In 1973, Congress enacted the Rehabilitation Act, 29 U.S.C. §§ 701, *et seq.* Section 504 of that statute prohibited federal-fund recipients from discriminating against any qualified individual with a disability "solely by reason of her or his disability . . ." 29 U.S.C. § 794. In 1976, President Ford instructed the Department of Health, Education and Welfare ("HEW") to promulgate regulations for the enforcement of Section 504. Executive Order No. 11,914, 3 C.F.R. 117 (1977). On January 13, 1978, HEW published its regulations. 43 F.R. 2132 (1978). The HEW regulation described the forms of discrimination barred by Section 504 and included the following as a stand-alone provision:

> Recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

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[1] This brief does not address the specific facts of the case presented for review because those facts will be described thoroughly by Respondents and other *amici.*

45 C.F.R. § 85.51(d) (1978) (the "Coordination Regulations"). A year later, Congress reorganized and renamed HEW into what is now known as the Department of Health and Human Services ("HHS"). 20 U.S.C. § 3508 (1979). In 1980, President Carter directed that leadership and coordination of non-discrimination laws be transferred from HHS to the Department of Justice ("DOJ"). Executive Order No. 12,250, 45 F.R. 72995 (1980). DOJ adopted HEW's Coordination Regulations and transferred them to 28 C.F.R. Part 41.

In the late 1980s, Congress recognized a need to broaden both the scope and application of laws prohibiting discrimination based on disability. From the beginning, Congress sought to insure that individuals with disabilities be integrated into everyday life:

> there is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for ***the integration of persons with disabilities into the economic and social mainstream of American life.***

S. REP. No. 101-116 at 20 (1989) (emphasis added). In this environment, Congress drafted the ADA. After considerable debate, Congress enacted the ADA in 1990 and President Bush signed it into law in July of that year.

The ADA is a comprehensive law addressing discrimination against persons with disabilities in a variety of areas, including employment, public services and public accommodations provided by private entities. Title II, which

is at issue in this case, governs public services provided by the states. During the committee hearings and debates leading to the ADA's enactment, Congress heard from a great many sources, including then-Attorney General Dick Thornburgh:

> Over 15 years have gone by since the Rehabilitation Act of 1973 conferred on Federal and federally assisted programs the responsibility to accommodate Americans with disabilities. In that time, the doors of opportunity have been opened to persons with disabilities.
>
> Nevertheless, persons with disabilities are still too often shut out of the economic and social mainstream of American life.

Hearing on HR 2273 Before the Sen. Subcommittee on Civil and Constitutional Rights, 101st Cong. 58 (statement of Attorney General Dick Thornburgh).

Congress did not attempt to enumerate all forms of prohibited conduct in the text of Title II of the ADA. Instead, it directed the Attorney General to issue regulations within a year of the enactment of the ADA and it effectively incorporated those regulations by reference.

> **(a) In general**
>
> Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter that is within the scope of the authority

> of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.
>
> **(b) Relationship to other regulations**
>
> Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter ***and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978) applicable to recipients of Federal financial assistance under section 794 of Title 29.*** With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of Title 29.

42 U.S.C. § 12134 (1990) (emphasis added).

The precision with which Congress prescribed the drafting of ADA regulations is both important and unusual.[2]

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[2] Contrast the mandate in Section 12134 with that in Section 602 of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d-1. In Title VI, Congress directed federal agencies to promulgate regulations "to effectuate the provisions of section 2000d of this title." In that most general delegation, Congress neither gave more precise guidance nor pointed to models.

At the time Congress enacted the ADA, it could have chosen and incorporated into the statute a number of agency regulations interpreting the types of discrimination barred by Section 504. As noted, DOJ's coordination regulations, drawn from HEW's 1978 Coordination Regulations, offered one model. The Department of Education's regulations provided a somewhat different model. *See* 34 C.F.R. § 104.4 (1980).[3] Notably, the latter model includes the "most-integrated-setting" language as a qualification to other language that could be misunderstood to suggest that "separate-but-equal" programs meet the requirements of Section 504. In contrast, the HEW Coordination Regulations chosen by Congress established that the failure to provide services in the most appropriate integrated setting itself constituted a form of discrimination.

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[3] Section 104.4 provides, in pertinent part, that

> (2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

Some agencies used the HEW model. *See, e.g.*, 5 C.F.R. § 900.704 (Office of Personnel Management); 45 C.F.R. § 1170.12 (National Endowment for the Humanities). More agencies, however, opted for the model employed by the Department of Education. *See, e.g.*, 7 C.F.R. § 15b.4 (Department of Agriculture); 10 C.F.R. § 1040.63 (Department of Energy); 22 C.F.R. § 142.4 (Department of State).

In 1991, less than a year after passage of the ADA, Attorney General Thornburgh and DOJ complied with the congressional direction and promulgated regulations to interpret and enforce Title II of the ADA.[4] As instructed, DOJ patterned its regulations after the HEW Coordination Regulations. Indeed, one of those regulations provides as follows:

> (d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

28 C.F.R. § 35.130 (1991) (the "Integration Regulation"). That regulation is at the heart of this case.

Petitioners pursue three principal arguments in support of reversing the Eleventh Circuit's interpretation of the Integration Regulation. None is persuasive.

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[4] During his tenure as Governor of Pennsylvania between 1979 and 1987, Mr. Thornburgh and his administration emphasized the need for community-based services for persons with disabilities and oversaw the closure of the Pennhurst State School and Hospital. As Attorney General, Mr. Thornburgh regarded the promulgation of the ADA regulations as a particular priority and, under his supervision, DOJ issued those regulations ahead of the congressional deadline.

I. THE PLAIN LANGUAGE OF THE ADA, WHICH INCORPORATES THE DOJ INTEGRATION REGULATION, SUPPORTS THE ELEVENTH CIRCUIT'S HOLDING.

Petitioners argue that the plain language of the ADA does not support the Eleventh Circuit's interpretation. For at least the following three reasons, they are mistaken.

First, this Court has already held that unnecessary segregation constitutes discrimination. *See Brown v. Board of Education,* 347 U.S. 483, 495 (1954) ("Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."). There are, to be sure, distinctions between the setting of and the law applicable to *Brown* and this case, but the fundamental point retains its vitality: unlawful discrimination can exist without showing a disparity in treatment between a protected group and a non-protected group. When Petitioners write in their brief that "'discrimination' necessarily requires uneven treatment of similarly situated individuals," Pet. Br. at 21, they paint with too narrow a brush and ignore the teaching of *Brown* and other cases.[5]

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[5] In support of their argument, Petitioners cite three cases that do not support the proposition that discrimination exists ***only*** when there is different treatment between similarly situated members of protected groups and non-protected groups. *General Motors Corp. v. Tracy,* 519 U.S. 278 (1997), was a Commerce-Clause case in a setting wholly different from this. *Lorance v. AT&T Technologies, Inc.,* 490 U.S. 900 (1989), and *Bazemore v. Friday,* 478 U.S. 385 (1986), merely noted that ***one*** way in which discrimination could be proven was by comparison between

Second, Petitioners incorrectly construe the DOJ regulations implementing Title II of the ADA as a sort of "frolic and detour." *See* Pet. Br. at 16. In reality, those regulations reacted to and implemented express direction in the ADA from Congress for the Attorney General to adopt regulations patterned after other existing regulations. 42 U.S.C. § 12134. He did precisely that, and the regulation at issue in this case is modeled on the prescribed Section-504 Coordination Regulations. Since the ADA regulation has become incorporated into the statute by reference, *United States v. Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110, 135 (1978), there is no genuine question about whether Congress intended that the integration language in HEW's Section-504 Coordination Regulations become part of the ADA mandate.

Third, the ADA broadly prohibits "discrimination." 42 U.S.C. § 12132. Congress, in directing the Attorney General to issue regulations, made clear its view that discrimination against persons with disabilities takes many forms and cannot be simply defined:

> Unlike the other titles of this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Thus, the purpose of this section is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited. The Committee intends that the regulations under title II incorporate interpretations of the

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protected and non-protected persons. Neither case suggested in any sense that such comparisons are the only means to show discrimination.

> term discrimination set forth in titles I and III of the ADA to the extent that they do not conflict with the Section 504 regulations.

H. REP. No. 101-485(I) at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 475.[6] The House committee also noted that Section 504 "has served not only to open up public services and programs to people with disabilities ***but has also been used to end segregation.***" *Id.* at 49, 1990 U.S.C.C.A.N. at 472 (emphasis added). It is, therefore, clear that Congress viewed unnecessary segregation of persons with disabilities as discrimination and that Congress sought to prevent that form of discrimination.

Petitioners assert that "discrimination" refers only to different treatment between those who are members of a protected group and those who are not. Pet. Br. at 20. Although it is questionable whether such a bright-line definition could ever suffice, it most certainly does not in the context of persons with disabilities. The very term "disability" describes a broad spectrum. It is not unlike the group protected by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.* In the context of age, the Court has recently made clear that there can be discrimination "because of" age even if the two persons compared are both

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[6] Notably, among the statutory commands of Title III of the ADA is an integration mandate:

> **(B) Integrated settings.** Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

42 U.S.C. § 12182.

in the protected class. *O'Connor v. Consolidated Coin Caterers Corporation,* 116 S.Ct. 1307, 1310 (1996) (emphasis original) ("The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age.*"). In the same sense, given the continuum both of type and severity of disability, it is possible to discriminate against a person with disabilities by treating him somehow differently from another person with disabilities. The comparison to non-disabled persons is a useful, but not a necessary, yardstick. *See O'Connor,* 116 S.Ct. at 1310.

II. THE ATTORNEY GENERAL'S INTERPRETATION OF DOJ'S ADA TITLE II REGULATIONS MERITS SUBSTANTIAL JUDICIAL DEFERENCE.

There is, then, the question of whether the Court should afford deference to the Attorney General's interpretation of the ADA Title II regulations.

The Court has already held that DOJ's regulations implementing Title III of the ADA are due judicial deference:

> As the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions and to enforce Title III in court, the [DOJ's] views are entitled to deference.

Bragdon v. Abbott, 118 S.Ct. 2196, 2209 (1998) (citations omitted). The Court has also explained that

> [o]ur task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given controlling weight unless is it plainly erroneous or inconsistent with the regulation.

Thomas Jefferson University v. Shalala, 512 U.S. 504, 512 (1994) (quotations omitted); *see also, Cedar Rapids Community School District v. Garret F.,* No. 96-1793 at typeset 8-9 n.6 (March 3, 1999).

Petitioners' response to this basic principle is to assert that "[t]he Attorney General's present litigation position in the end represents a stark and unexplained departure from prior interpretations of § 504 and the ADA." Pet. Br. at 42. It is true that "an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference that a consistently held agency view." *Thomas Jefferson University,* 512 U.S. at 515 (quotations omitted). However, Petitioners have properly described the maxim but then misapplied it.

Petitioners argue that the Attorney General has changed her position about the meaning of the Integration Regulation, but they offer no support for that proposition. Instead, they point to a number of statements by DOJ that offer examples of how the Integration Regulation should be applied. *See* 28 C.F.R. Part 35 (App. D, 11a, 16a-20a), *The Americans With Disabilities Act, Title II Technical Assistance Manual, Covering State and Local Government Programs and Services* (1993) (the "Technical Assistance Manual"). The only argument Petitioners make about those statements is that they do not include the interpretation the

DOJ espouses in this case. Pet. Br. at 41-42.[7] That is not, however, an inconsistency. In *Thomas Jefferson University*, the Court was offered (and rejected) a similar argument.

> The intermediary letter detailed various categories and amounts of educational expenses . . . but did not mention the anti-redistribution limitation. Petitioners' attempt to infer from that silence the existence of a contrary policy fails because the intermediary letter did not purport to be a comprehensive review of all conditions that might be placed on reimbursement of educational costs. . . . It is not surprising, then, that the letter did not address the anti-redistribution principle, and the mere failure to address it here hardly establishes an inconsistent policy on the part of the Secretary.

512 U.S. at 516 (emphasis added). The same may be said of previous DOJ statements about the meaning of the ADA integration regulation. None of the statements Petitioners point to purports to be exhaustive and Petitioners' reliance on DOJ's silence to suggest an inconsistent application is no more compelling than was the petitioners' similar reliance in *Thomas Jefferson University*. In fact, then, there is no inconsistency in DOJ's interpretation of the ADA integration regulation.

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[7] Petitioners' argument is wrong for another reason. The Technical Assistance Manual offers examples for a different subsection of the regulation than the one in which the integration requirement is found.

To the contrary, DOJ has been consistent in its interpretation of that regulation in the circumstance presented in this case. When the *Pennhurst* case was first making its way to this Court, DOJ filed a brief in the Third Circuit addressing, *inter alia,* the requirements of Section 504.

> The services provided for Pennhurst residents are unnecessarily separate both from the community and from community mental retardation services which the district court found were more conducive to "normalization," a principle which defendants have accepted.
>
> ***
>
> Where the Congressional intent expressed is to broadly protect handicapped persons, and the discrimination is well within the Congressionally authorized regulations, the question is not – as defendants would state it – whether Congress has declared that all institutions for the mentally retarded should be closed forthwith, but whether Congress intended to allow federal funds to subsidize conditions such as those at Pennhurst, especially where the institutionalization results in separation of mentally retarded persons for no permissible reason. In our view, that is "discrimination," and a violation of Section 504 if it is supported by federal funds.

Brief for the United States, *Halderman v. Pennhurst State School and Hospital,* Nos. 78-1490, 78-1564 and 78-1602, at 40 and 45 (filed October 2, 1978). After this Court rendered

its first *Pennhurst* decision and remanded the case to the court of appeals, the Third Circuit had occasion again to consider the application of Section 504. In its brief, DOJ modified its position, but not in any way material to this case.

> At a minimum, Section 504 compels the state to determine that the person committed to an institution on account of handicap is not "otherwise qualified" to participate in some other available federally assisted program or activity providing more appropriate care and treatment. In the context of this case, this means that before determining that a handicapped individual should be placed in one federally assisted program rather than another the state must make an individualized judgment, based on reasoned professional advice.
>
> The issue here is not whether Section 504 would require Pennsylvania to create or expand a system of community facilities. Nor does the United States here urge any such interpretation of the statute. Indeed, Southeastern Community College v. Davis, 442 U.S. 397 (1979), suggests that Section 504 does not create such an obligation. But in this case, Pennsylvania already maintains such a system. In such circumstances, Pennsylvania violates section 504 by indiscriminately subjecting handicapped persons to Pennhurst without first making an individual reasoned professional judgment as

> to the appropriate placement for each such person among all available alternatives.

Brief for the United States, *Halderman v. Pennhurst State School and Hospital,* Nos. 78-1490, 78-1564 and 78-1602, at 26-27 (filed October 14, 1981). In other words, DOJ argued that Section 504 required an interpretation similar to the one Respondents have offered in this case for the ADA regulation.[8]

DOJ's *Pennhurst* briefs provide support for a number of conclusions. Foremost is the inescapable conclusion that the current DOJ interpretation of Section 504 (and the ADA) is not a recent creation born of politics or activism.[9]

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[8] Moreover, DOJ's modified view relied on an interpretation of *Southeastern Community College v. Davis,* 442 U.S. 397 (1979), that the Court essentially retracted in *Alexander v. Choate,* 469 U.S. 287, 301 n.20 (1985).

[9] In a number of cases in which she has provided briefs as an *amicus,* the Attorney General has offered courts the same interpretation of the ADA Integration Regulation urged by Respondents in this case. *See, e.g. Helen L. v. DiDario,* 46 F.3d 325 (CA3) *cert. denied,* 116 S.Ct. 64 (1995). The Attorney General's interpretation is not, as Petitioners would characterize it, merely a "litigating position." The Court rejected a similar argument just two years ago in *Auer v. Robbins,* 117 S.Ct. 905, 912 (1997) (citation omitted):

> Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference. The Secretary's position is in no sense a "post hoc rationalizatio[n]" advanced by an agency seeking to defend past agency action against attack. There

The Attorney General has determined that the regulations issued by her agency require that, under the ADA, where a state has a choice between institutionalized treatment and community-based treatment, the recipient is entitled to receive services in the most-integrated setting appropriate to his needs. That interpretation is an abundantly reasonable one. It is both consistent with the regulation, with the ADA and with the legislative history.[10]

The Court should apply its well-established rule that it "give[s] substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson University,* 512 U.S. at 515. The Court has held that its role is not to weigh the competing interpretations and substitute its judgment for that of the agency. *Id.* In *Thomas Jefferson University,* the Court explained that

> [t]he Secretary's interpretation of the anti-distribution principle is thus far more consistent with the regulation's unqualified language than the interpretation advanced by petitioner. ***But even if this were not so, the Secretary's construction is, at the very least, a reasonable one, and we are required to afford it "controlling weight."***

> is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.

10 As Respondents and other *amici* point out, the interpretation of the Attorney General and of the Eleventh Circuit does not impose an undue financial burden on the states and may, instead, result in a net savings.

512 U.S. at 515 (emphasis added) (quoting *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945)).[11]

III. PRE-ADA JUDICIAL INTERPRETATION OF SECTION 504 WAS NOT UNIFORM AND, SO, PROVIDES NO SUPPORT FOR PETITIONERS' ARGUMENT.

Petitioners correctly point to the rule of construction that, when there is uniformity in the administrative and judicial interpretation of statutory or regulatory language, the repetition of that language in a subsequent statute or regulation suggests an intent to incorporate those uniform interpretations as well. *Abbott,* 118 S.Ct. at 2208.

Again, Petitioners have correctly recited the rule but then misapplied it. The rule applies when there has been ***uniform*** interpretation of the language. *See Abbott,* 118 S.Ct. at 2207-8 ("Every court which addressed the issue before the ADA was enacted in July 1990, moreover, concluded that asymptomatic HIV infection satisfied the Rehabilitation Act's definition of a handicap . . . We find the uniformity of the administrative and judicial precedent construing the definition significant."); *Lorillard v. Pons,* 434 U.S. 575,

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[11] Petitioners' argument seeks to reverse the appropriate burdens. The Court has held that it is to afford substantial deference to the agency interpretation unless it is inconsistent with the agency's past interpretations. *Thomas Jefferson University,* 512 U.S. at 515. Petitioners ask the Court to find that the Attorney General's interpretation is due deference only if she can demonstrate that her interpretation has been consistently held by DOJ. Given the DOJ position in *Pennhurst* 20 years ago, even if Petitioners' theory represented the proper legal standard, the current DOJ standard should receive deference.

580-81 (1978) (". . . every court to consider the issue had so held"). In the case of the Section-504 integration regulation, one could not credibly claim that there was uniform judicial interpretation of that regulation in the years leading up to the enactment of the ADA.

Petitioners first point to this Court's pre-ADA construction of Section 504. The Court, however, has never addressed the Coordination Regulations and none of the decisions cited by Petitioners considers the issue presented in this case.[12]

Petitioners then address lower-court decisions and broadly announce that

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12 *Traynor v. Turnage,* 485 U.S. 535 (1988), merely noted that a central purpose of Section 504 was to assure even-handed treatment. It did not address every purpose of Section 504, it did not address the HEW Coordination Regulations and it did not even inferentially address the issue presented in this case. *Alexander v. Choate* has no application at all. That case stands for the proposition that a plaintiff does not state a claim of disparate-impact discrimination merely by noting that a uniformly distributed benefit need not bring about the same result for each individual. In *Davis*, the Court considered whether a college had an affirmative obligation under Section 504 to modify an existing program to, in effect, create a new program to accommodate a hearing-impaired applicant. The Court noted that "[w]e do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear." 442 U.S. at 412. And, of course, this Court explained and limited the language of *Davis* in *Alexander v. Choate*. 469 U.S. at 301 n.20.

> Prior to the 1990 passage of Title IIA of the ADA, many lower courts were invited to adopt an affirmative integration or "least restrictive treatment" requirement under § 504. None did.

Pet. Br. at 25-26. Petitioners offer a list of cases presumably in support of their assertion. That list, however, mischaracterizes many of the cases and omits others. It therefore provides small comfort for Petitioners' claim.

For example, three of the cases Petitioners cite were decided ***after*** Congress enacted and President Bush signed the ADA into law in July of 1990. *See, e.g., P.C. v. McLaughlin,* 913 F.2d 1033 (CA2 1990) (decided on September 6, 1990); *People First of Tennessee v. Arlington Developmental Center,* 878 F. Supp. 97 (M.D. Tenn. 1992); and *Jackson v. Fort Stanton Hospital & Training School*, 757 F. Supp. 1243 (D.N.M. 1990) (decided in December 1990), *rev'd on other grounds,* 964 F.2d 980 (CA10 1992). One of the decisions cited by Petitioners actually held that Section 504 requires a most-integrated environment. *See Jackson,* 757 F. Supp. at 1299 ("Where reasonable accommodations in community programs can be made, defendants' failure to integrate severely handicapped residents into community programs which presently serve less severely handicapped residents violated § 504.").[13]

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[13] Further, a number of the cases Petitioners cite merely held that the states have no affirmative obligation to provide services. *See, e.g., Clark v. Cohen,* 794 F.2d 79, 84 n.3 (CA3 1986). That is not the issue in this case. In addition, none of the courts cited in Petitioners' brief addressed the HEW Coordination Regulations,

Moreover, Petitioners have omitted from their brief a number of lower-court decisions that found a "most-integrated" environment requirement in Section 504. For example, the district court in *Pennhurst* found that Section 504 prohibits the sort of unnecessary segregation complained of in this case. *Halderman v. Pennhurst State School and Hospital,* 446 F. Supp. 1295 (E.D. Pa. 1978); *aff'd on other grounds,* 612 F.2d 84 (CA3 1979); *rev'd on other grounds,* 451 U.S. 1 (1981). The court of appeals in *Pennhurst* did not address Section 504 and, accordingly, this Court had no opportunity to address the question.[14] In *Homeward Bound, Inc. v. Hissom Memorial Center,* No. 85-C-437-E, 1987 WL 27104 (N.D. Okl. July 24, 1987), the court held that "Section 504 prohibits unnecessarily segregated services for retarded persons." *See, also, Lynch v. Maher,* 507 F. Supp. 1268 (D. Conn. 1981).

Even a brief survey of the pre-ADA case law demonstrates that there was no "uniformity" among the lower courts on the Section-504 integration mandate. In the end, Petitioners' reliance on the notion that Congress ratified any particular judicial interpretation of Section 504 strains reason and stretches the rationale of that interpretive rule to the breaking point. *See Helvering v. Highland,* 124 F.2d 556, 561 (CA4 1942) ("Certainly, lack of uniformity in prior court

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most likely because the defendants in those cases were not bound by that iteration of the Section 504 regulations.

[14] Indeed, although the *Pennhurst* case gave rise to two decisions of this Court and innumerable published decisions by the lower courts, the district court's Section 504 conclusion retains its vitality. *See Halderman v. Pennhurst State School and Hospital,* 784 F. Supp. 215, 224 (E.D. Pa. 1992).

decisions . . . preclude[s] any presumption of Congressional approval of judicial interpretations . . . by reenactment.").[15]

Indeed, although Congress' intent cannot fairly be gleaned from any particular pre-ADA court decision, it can be discerned in the legislative history. Although it is anticipated that Respondents and other *amici* will address the legislative history of both Section 504 and the ADA in detail, it is worth briefly noting that both the committee reports preceding enactment of the ADA and the legislative findings accompanying the ADA support Respondents' position. For example, the House Committee on Public Works and Transportation explained that

> By prohibiting discrimination against persons with disabilities in programs and activities of the federal government and by recipients of federal financial assistance, Section 504 of the Rehabilitation Act has served not only to open up public services and programs to people with disabilities but it has also been used to end segregation. The purpose of Title II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life.

H. REP. No. 101-485(I) at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 472-73. Congressman Miller, who was one of the sponsors of the ADA in the House of Representatives, explained that

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[15] Petitioners' argument is rendered all the more tenuous by the fact that Section 504 included the modifier "solely" to its prohibition and Congress did not include that word in the ADA.

> . . . it has been our unwillingness to see all people with disabilities that has been the greatest barrier to full and meaningful equality. Society has made them invisible by shutting them away in segregated facilities.

136 CONG. REC. H2447 (daily ed. May 17, 1990) (Statement of Rep. Miller). Senator Harkin, a sponsor in the Senate, explained that the ADA

> guarantees individuals with disabilities the right to be integrated into the economic and social mainstream of society; segregation and isolation by others will no longer be tolerated.

135 CONG. REC. S10713 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin).[16]

Finally, the legislative findings that accompany the ADA support Respondents' argument.

> The Congress finds that -
>
> (1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

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16 Many in Congress understood Section 504 to bar such isolation and segregation. *See Halderman v. Pennhurst State School and Hospital,* 612 F.2d 84, 108 n.30 (CA3 1979) (en banc) (collecting statements from the Congressional Record).

> (2) ***historically, society has tended to isolate and segregate individuals with disabilities***, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, ***institutionalization***, health services, voting, and access to public services;
>
> ***
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, ***segregation***, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

42 U.S.C. § 12101 (emphasis added).

In the end, there is simply no support in the pre-ADA cases or in the legislative history of the ADA for Petitioners' interpretation of the legislative intent underlying the Integration Regulation.

CONCLUSION

Amici curiae Dick Thornburgh and the National Organization on Disability respectfully request that the Court affirm the decision of the Eleventh Circuit.

Respectfully submitted,

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