No. 98-536

In the Supreme Court of the United States

October Term, 1998

TOMMY OLMSTEAD, Commissioner of the Department of Human Resources of the State of Georgia, et al.,

Petitioner,

v.

L.C., by Jonathan Zimring, Guardian Ad Litem and Next Friend, *et al.,*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS

SUSAN C. JAMIESON
ATLANTA LEGAL AID SOCIETY
246 Sycamore Street
Suite 120
Decatur, Georgia 30030
(404) 377-0701

DAVID A. WEBSTER
300 The Hurt Building
50 Hurt Plaza
ATLANTA, GEORGIA 30303
(404) 681-3070

MICHAEL H. GOTTESMAN
Counsel of Record
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9483

STEVEN D. CALEY
LEGAL AID SERVICES OF OREGON
700 S.W. Taylor
Suite 300
Portland, Oregon 97205
(503) 472-1126

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Does a plaintiff establish a prima facie case of discrimination, violative of the Americans with Disabilities Act, by showing that (1) a public entity administers a unified program of services for persons with mental disability, including treatment both in mental institutions and in the community, (2) the public entity's professionals have determined that the plaintiff can appropriately be provided the services in the community, where the plaintiff would enjoy meaningful opportunity to interact with nondisabled persons and participate in the economic and social life of the community, but (3) the public entity will furnish plaintiff the services only if she lives in a mental institution, thereby segregated from the community?

[The court below held, first, that the answer to this question is yes, but, second, that a public entity enjoys a defense to this requirement upon a showing that compliance would require a fundamental alteration in its services, programs or activities. Petitioners have brought the first of these holdings to this Court for review, but not the second.]

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES: Page

TABLE OF AUTHORITIES—Continued

BRIEF FOR RESPONDENTS

ADDITIONAL STATUTORY AND REGULATORY PROVISIONS

In the appendix to this brief, we set forth Section 2 of the Americans with Disabilities Act, 42 USC § 12101; and the full text of 28 CFR § 35.130.

COUNTER-STATEMENT OF THE CASE

I. The History of Institutionalization of Persons With Mental Disability.

Petitioners, without reference to anything in the record, depict the nation's, and Georgia's, history of institutionalization of persons with mental disability as a benevolent effort to provide the best treatment. But the historical record is in fact quite different, as a report upon which Congress relied in drafting the ADA recounts.

The report, U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983), explains that while in the 1850's reformers like Dorothea Dix had urged the creation of more institutional services for those who truly needed them, by the turn of the Century a more insidious phenomenon was underway: a movement to institutionalize a much larger population of persons with mental disabilities, so that society would not have them in its midst:

> The Social Darwinism of the late 19th century spawned a eugenics movement, which peaked in the United States in the 1920s. This movement was based on the notion that mental and physical disabilities were the underlying source of nearly all social problems and were occurring with ever-increasing frequency due to reproduction of unfit persons. . . .
>
> By the end of the 1920s, scientists had discredited many of the underpinnings of eugenics . . . . This undercut the primary rationale for segregating handicapped people from the rest of society, but the large

> State residential institutions had established a momentum of their own. [*Id.* at 19-20].

See also, *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 454 (1985) (concurring opinion of Justice Stevens, joined by Chief Justice Burger); *id.* at 461-64 (opinion of Justice Marshall, joined by Justices Brennan and Blackmun, concurring in part and dissenting in part).

Georgia was in the mainstream of the eugenics movement. In 1918, the state legislature adopted a resolution establishing a "commission on the feeble-minded" to make recommendations "to relieve the State of the menace of the uncared-for feeble-minded who are such a fertile source of crime, poverty, prostitution and misery not only to themselves, but to all with whom they are brought into contact." S.J. Res. 44, 1918 Ga. Gen. Assembly Ann. Sess., 1918 Ga. Laws 921. The commission's ensuing report lamented that these "anti-social groups" were "allowed to propagate their kind" and to "leave behind them a large progeny of Feebleminded," and recommended the "segregation" of these persons "into a state institution." Journal of the [Georgia] House, June 30, 1919, at 205, 206, 208, 261-62. A law so providing was promptly enacted. 1919 Ga. Laws 377.

From 1937 to 1970, Georgia law authorized the superintendents of such institutions to "submit to the State Board of Eugenics a recommendation that a surgical operation be performed . . . for the prevention of parenthood" on inmates "likely . . . to procreate a child." 1937 Ga. Laws 414. Since 1970, Georgia law conditions sterilization of institutionalized mentally retarded persons upon consent. 1970 Ga. Laws 683, § 3.

Expansion of institutional facilities for persons with mental disabilities continued unabated in Georgia until the early 1980's. This was long after most states had begun reducing their institutionalized populations by providing treatment in the community when appropriate.

II. The National Shift to Community-Based Services, and Georgia's Resistance.

In the past three decades, societal attitudes nationally have changed. Congress has been on record since 1975 as favoring a shift to community-based care wherever appropriate. *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 19-20 (1981). In 1981, a few months after this Court's decision in *Pennhurst,* Congress created the Home and Community Based Services Waiver Program, providing Medicaid reimbursement to States for the provision of community-based services to individuals with mental retardation or other related conditions who would otherwise require institutional care, upon a showing that the average cost of such services is not more than the cost of institutional services.[1] In 1986, Congress further expanded the waiver program to include certain community-based services for individuals with chronic mental illness as well.[2] In the case of mental illness (as distinguished from mental retardation), Medicaid reimbursement is available *only* when services are provided in the community.[3]

---

1 Pub. L. No. 97-35, § 2176, 95 Stat. 357, 812-813 (1981), codified as amended at 42 USC 1396n(c). The program is called a "waiver" program, because it authorizes the Secretary of HHS to waive certain Medicaid requirements to enable states to target services to a particular population. For example, ordinarily a Medicaid service that is covered by a state must be available in the same amount, duration, and scope to all "categorically needy" Medicaid recipients and all individuals within a covered group of "medically needy" recipients. 42 USC 1396a(a)(10)(B); 42 CFR 440.240(b). By obtaining a waiver of this requirement, states can configure their services so that they go only to persons who would otherwise need institutionalization, without having to provide them to persons who would not. 42 USC 1396n(c)(3).

2 Pub. L. No. 99-509, § 9411, 100 Stat. 1874, 2061-62 (1986).

3 Medicaid generally excludes coverage for institutional care for individuals with mental illness except for individuals 65 and older and children under 21. 42 USC 1396d(a)(27)(B), 1396d(a)(14), (16). In 1992, the Department of Health and Human Services concluded in a report to Congress that this exclusion should remain in

Accordingly, Georgia was eligible to receive federal reimbursement for nearly two-thirds of the cost of treating the mentally retarded whether in institutions or community-based settings, and nearly two-thirds of the cost of providing certain services for the mentally ill but only if provided in community-based settings. In the words of an annual report of the Georgia Department of Human Resources (hereinafter "DHR"), which petitioner Olmstead administers, "Medicaid stretches state dollars, for every $1 of state funds, Medicaid pays almost $2 toward the cost of services." (JA 181; see also, JA 189-90).

In light of these federal incentives, most states began rapidly restructuring their programs for treating the mentally disabled to enable substantial portions of the previously institutionalized population to receive treatment in the community.[4] Georgia, however, lagged far behind.

Georgia did not seek Medicaid waivers for community-based services until 1989, when, under pressure from an earlier lawsuit (*SH and PF v. Edwards,* 886 F.2d 292 (11th Cir. 1989); see also JA 170), Georgia first applied for Medicaid reimbursment in order to provide the plaintiffs in that suit with community placement. There followed a number of signs suggesting that Georgia might now be ready to move more broadly toward community-based services. In 1992, Georgia applied for and ob-

---

effect, as Medicaid funding is available to support community-based services, and these services are generally more cost-effective than institutional services. United States Department of Health and Human Services, Health Care Financing Administration, Report to Congress, *Medicaid and Institutions for Mental Diseases* (Dec. 1992). The report concluded that "cost-effectiveness research suggests that . . . inpatient care is used more frequently than it need be or should be." *Id.* at V-11.

[4] The dimensions of this phenomenon nationwide are suggested by data in briefs *amici curiae* for National Conference of State Legislatures ["NCSL"] *et al.*, supporting Petitioners, at 2-3, and for American Ass'n on Mental Retardation, *et al.*, Supporting Respondents.

tained advance authorization for Medicaid reimbursement to move another 1,000 persons out of institutions over a five-year period, 1992-97, at the rate of 200 per year. (JA 165; R79, Exh. 11). In 1993, the Georgia legislature amended its laws to allow state funds appropriated for mental disability programs to be transferred from institutional to community services. O.C.G.A. § 37-2-5.1(C)(3). The law also restructured the state service delivery system and gave it authority to contract with private providers of such services in the community. O.C.G.A. § 37-2-5.2 (A)(5).[5]

However, the promised movement did not materialize. By 1996, four years after it obtained the Medicaid authorizations, Georgia had moved only 147 of the promised 1,000 into the community. JA 165-66. When HCFA completed its audit of Georgia's compliance with the five-year undertaking in 1997, it found that Georgia had moved only 237 of the promised 1,000. (R79, Exh. 11). Meanwhile, Georgia had identified 523 institutionalized persons who could appropriately be treated in the community, but who remained in institutions. (JA 166; R105, Exh. 8, pp. 1-2). At the time this suit was filed, Georgia ranked 48th among the states in funding services for mental retardation in the community (JA 170-171).

III. The Respondents.

A. L.C. is age 31. She is mildly mentally retarded and has also been diagnosed with schizophrenia. She is a friendly person who loves to draw and write. (JA 12,

---

[5] With regard to persons with mental retardation who need a supervised environment, states contract with private entrepreneurs to establish community-based residential services supervised by on-site professionals. These private contractors rent or purchase residences, equip them, and charge a fixed fee per patient for treating those transferred to them. Residents pay their own room and board (usually out of their monthly federal SSI payments). The fixed fee covers personnel and treatment services. (JA 160-64).

46-48). She has lived more than half her life since age 14 in Georgia state institutions. (JA 12, 48, 49).

When she filed her complaint in May, 1995, L.C. had been confined for three consecutive years in a locked state psychiatric hospital (Georgia Regional Hospital, hereinafter "GRH-A") with more than 60 other persons, most of whom were in acute crisis. (JA 34, 49, 78, 90).[6] Most patients stay only a short time in this unit, until their acute symptoms of psychotic illnesses have been stabilized. (JA 90).

Although L.C. was hospitalized because of a mental illness (JA 14, 51), her psychiatric symptoms had been stabilized by 1993, and from that time forward the hospital's professional staff recognized that L.C. could appropriately be served in a community residential setting; this was conceded by petitioners. (JA 5, 32, 35, 36, 43, 46, 89, 91, 120, 205; Pet. Cert. App. 18a, 21a, 36a).

L.C.'s prolonged stay in the acute psychiatric unit was detrimental to her habilitation, as the professional staff recognized, and unnecessarily deprived her of the opportunity to participate in the social life of the community outside the locked doors of the institution. (JA 30, 31, 94, 97, 98, 204). Yet when the state's social worker urged the provision of treatment to L.C. in a community-based residential setting, his pleas were stonewalled by ignorance and outright resistance from the hospital administration. (JA 33, 39-41, 92, R59, SMF 161 & Exh. 29). Although appropriate community mental retardation services existed, the institutional staff had virtually no knowledge of these programs. (R59, SMF 42, 63, 66, 68, 69, 71; JA

---

[6] References to JA 88-93 in this brief are to the plaintiffs' statement of material facts (R59) filed with their motion for summary judgment. Other facts from that statement, not reprinted in the Joint Appendix, are cited herein as R59, SMF—. With one exception, identified when it occurs, all references cited are to facts which petitioners did not dispute in their response (R64).

205). Cost was never proffered as a reason for delaying L.C.'s placement in the community.

A few days after this suit was filed, L.C. was placed on a "trial visit" with her mother, who had a long history of inability to provide appropriate care for her. (R59, SMF 85-91, 113-14). The trial failed. L.C. was placed in another institution. (R59, SMF 117, 118, 124).

Despite the failed "visit," it was still the view of L.C.'s staff psychiatrist that she did not need institutionalization, and could be served in an appropriately supervised community-based placement. (JA 75, 90, 206). Finally, in February, 1996, nine months after suit was filed, L.C. was placed in a community-based program for people with mental retardation. (R59, SMF 134-135).

B. E.W. is mildly mentally retarded with an additional diagnosis of a personality disorder. (JA 63, 79). She had been confined in the same locked psychiatric ward as L.C. for more than a year when her request to intervene in this case was granted. (R11, R27; R59, SMF 7; JA 62, 78). The professional hospital staff knew that E.W. did not need to be institutionalized to receive appropriate treatment (JA 88, 89; R59 , SMF 50; Pet. Cert. App. 18a, 21a, 22a-23a, 36a). In the fall of 1995, the staff psychologist noted that she needed another environment to "climb out of her depression," as the institution was not a "long-term growth environment" and the community was the appropriate setting for E.W. to receive habilitation. (JA 101, 213-214). E.W.'s treating psychiatrist likewise concluded that community services were appropriate for her (JA 210-212). Petitioners have conceded that E.W. could appropriately be served in a community program (JA 118-120).[7] Her unnecessary institutionalization was pro-

[7] While E.W. waited, she had kidney surgery and recovered. Inpatient medical care was briefly necessary for this medical procedure, but her treating physician was adamant that institutionalization was not. (JA 125-126; Pet. Cert. App. 23a, n.8; Pet. Cert. App. 36a-37a, n.1).

foundly disturbing to her, and prevented the development of independent living skills (JA 99, 100, 214).

E.W.'s prolonged wait for appropriate services in a more integrated setting did not end until the district court ruled in this action; she was then transferred in July, 1997, to the same residential setting in which L.C. resided. (Pet. Cert. App. 2a, n.2). Both Plaintiffs have now been receiving disability services in community-based programs in regular neighborhoods, L.C. for three years and E.W. for nearly two years. Neither has experienced difficulties or the need for re-institutionalization, and each, according to her home provider, is "progressing steadily." (R105, Exh. 2).

IV. The Relative Access to the Community at Large of Those Who Are Institutionalized and Those Who Receive Services in the Community.

L.C. and E.W. were hospitalized "voluntarily" in a locked facility (JA 62, 78). This did not mean, however, that they were free to leave the institution. Under Georgia law, a voluntarily admitted patient who wishes to be released must file an application, and the State has 72 hours to decide whether to grant the application. (O.C.G.A. 37-3-22).[8] As a practical matter, respondents were unable to apply for release, as they needed the treatment the State was willing to proffer them only in an institutional setting. On at least four occasions, E.W. attempted to leave the premises but was forced by hospital authorities to return and her freedom was further restricted. (R59, SMF 24 (disputed); see excerpts from GRH-A records, R59, Exh. 5). Under Georgia law, a voluntary patient at a state hospital may be picked up and returned to the hospital by the hospital police if she leaves without permission. Ga. Op. Att'y Gen. No. U70-183 (1970); *Etheridge v.*

[8] The procedure in Georgia is identical to that described in *Wyatt v. Poundstone*, 892 F. Supp. 1410, 1421 n.65 (MDAla 1995); and *McNamara v. Dukakis*, 1990 WL 235439, at *4 (D. Mass. 1990).

Charter Peachford Hosp., 436 S.E.2d 669 (Ga. App. 1993).

The institution in which L.C. and E.W. were confined was never intended for long-term habilitation. (JA 101). Patients at GRH-A have virtually no contact with nondisabled persons, except the hospital staff, and prolonged confinement in the institutional environment is likely to result in regression or the development of maladaptive behaviors. (R59, SMF 99; JA 30, 31, 94, 97-99, 204, 214).

The conditions at GRH-A are typical of large State mental institutions. As described in the report of the U.S. Commission on Civil Rights, supra:

> Institutionalization almost by definition entails segregation and isolation. Not only is segregation of the sexes prevalent, but segregation from families, normal society and peer groups is also a product of institutionalization. Indeed, a desire to segregate handicapped people from the rest of society prompted the development of residential institutions. [*Accommodating the Spectrum, supra,* at 32-33].

By contrast, those placed in community-based supervised residences (such as "group homes") are able to participate in the life of the community. See, e.g., Brief *Amici Curiae* of National Mental Health Consumers Self-Help Clearinghouse, et al.; R111, Attachment E at 8; *The Hissom Outcomes Study: A Report on Six Years of Movement into Supported Living* (Conroy, 1995); B.K. Hill, et al., *The Quality of Life of Mentally Retarded People In Residential Care,* Social Work, 29(3), 275-81 (1984).

V. Cost Is Not the Reason Respondents Were Denied Services in the Community.

Although petitioners claim in their brief to this Court that cost is the explanation for their failure, despite the recommendations of the State's professionals, to provide services to respondents in the community, the record tells a different story. There was incompetence and lack of

knowledge on the part of the administrators and staff of the institution, who did not know that suitable group home opportunities existed in the community, and devoted little effort to researching what was there. (R59, SMF 42, 63, 65-66, 68-71). Top administrative officials at GRH-A, the institution in which respondents were housed, were reluctant to suffer a decline in the institution's population; as one administrator explained to staff professionals pressing for the release of respondent L.C., their mission was to " 'staff' the beds." (R59, Exh. 29; see also, JA 33-40). State officials were reluctant to downsize institutions because of the impact on employees in the institutions whose jobs would be jeopardized if the patient population declined. A state commission on mental disabilities appointed by the Georgia legislature insisted on an "[a]ssurance that no permanent state or county employee, classified or unclassified, will lose his or her job or benefits as a result of organizational change." (R111, Attachment A, at 19-20. See also, JA 172).

The cost to Georgia of maintaining patients in GRH-A ranged from $80,000 per year to $180,000 per year (JA 93). The cost to Georgia when respondents were moved to a group home in the community, after this suit was filed, was only $20,000 per year (JA 162, 164).

In contrast to petitioners' representations in this litigation, DHR, which petitioner Olmstead administers, has repeatedly declared in other venues that "We need to promote the downsizing [of institutions] for two reasons. . . . First is the cost of in-patient care and the overhead. The second reason is we find for most consumers that they do far better and are able to be more productive [in community settings]." (JA 174). DHR's 1997 2-year plan declares that mentally disabled persons are "too often . . . inappropriately housed in state hospitals. . . Treatment and support to consumers with serious mental illness can best be accomplished in community settings." (R111, Attachment E at 5. See also *Id.* at 6, 8, 28; R111, At-

tachment D at 8). Other DHR publications state that "Rather than rely on costly 'one size fits all' institutional care . . . individualized community services . . . offer a better quality of life." (JA 173); the average cost of serving patients in institutions far exceeds the cost of a full range of services in the community (JA 171); "[i]t is possible with the same level of funding to serve a larger number of individuals in community-based programs than at Brook Run [one of the state's institutions for the mentally retarded]" (R105, Exh. 8, p. 1); "expansion of services or enhancement of existing programs is expected to be funded from cost savings as a result of budget redirects and *use of more cost effective services options, such as the use of community services in lieu of more costly hospital services*" (R111, Exh. E, p. 28).[9] See also, *id.*, Exh. D, p. 8 ("reduce inpatient services in favor of less costly community services"); J.A. 193.

Petitioners argued below that the cost savings attendant upon moving services from institutions to the community can be realized only if institutional facilities are closed commensurate with the decline in population. (R85, Exh. B; see also R105, Exh. 9, pp. 2-3). Thus, they contended it was necessary to wait until enough persons were ready for transfer to community-based services to permit the closing of a hospital or hospital wing. But the record showed that the State had identified 523 mentally retarded persons in Georgia institutions who could appropriately be served in existing community programs (JA 166), a number that exceeded the combined capacity of several state institutions. (R59, Exh. 63, pp. 12-13).

VI. The Rulings Below.

The district court ruled that the State's insistence that services be provided to LC and EW only in an institution, despite petitioners' concession that they could appropriately be served in the community (Pet. Cert. App. 36a), violated the ADA. The court reasoned that " 'segrega-

[9] Throughout this brief, all emphasis is supplied.

tion' of individuals with disabilities is a 'form of discrimination' that Congress intended to eliminate," and "the regulations promulgated by the Attorney General to implement Title II plainly prohibit unnecessary institutionalization," *id.* at 37a, citing 28 CFR § 35.130(d). The court rejected petitioners' proffered defense that serving respondents in the community would require a "fundamental alteration" of its program, noting that "there is no dispute that defendants already have existing programs providing community services to persons such as plaintiffs" and "it is also undisputed that defendants can provide services to plaintiffs in the community at considerably less cost than is required to maintain them in an institution." *Id.* at 38a-39a.

On appeal, the Eleventh Circuit affirmed the district court's interpretation of the ADA, but reversed for further consideration of petitioners' fundamental alteration defense. The court of appeals unanimously ruled that the unnecessary institutionalization of mentally disabled persons is a prima facie violation of the ADA. Specifically, the court found that the ADA defines "discrimination" to include "segregation" and "exclusion and isolation" of individuals with disabilities from the community, *id.* at 11a, and that unnecessary institutionalization violates § 35.130(d) of the Attorney General's regulations implementing the ADA, which requires that services be provided in the "most integrated setting appropriate to the needs" of the individual, *id.* at 9a-10a. The court noted that Congress dictated that the Attorney General adopt this regulation (which is identical to § 41.51(d) of the "coordination regulations" adopted under the Rehabilitation Act of 1973), by including in § 204 of the ADA, 42 USC § 12134, a command that the Attorney General adopt regulations "consistent with" the earlier coordination regulations, *id.* The court also noted that Congress itself included an identical "most integrated setting" requirement in Title III of the ADA, the title governing pri-

vately-owned public accommodations, *id.* at 9a-10a, n.5. The court found this duty "analogous to the reasonable accommodation mandate in the employment setting," *id.* at 14a, and noted that it had previously applied Title I's reasonable accommodation mandate to Title II, *id* at 13a.

The court of appeals reversed the district court, however, with respect to its treatment of petitioners' claimed defense. The court held that the duty to provide services in the most integrated setting "is not absolute. . . [T]he State need not provide these services if to do so would require a fundamental alteration of its programs", *id.* at 25a. The issue, the court said, was whether providing service to respondents in the community would entail "additional expenditures . . . so unreasonable given the demands of the State's mental health budget that it would fundamentally alter the service it provides," *id.* at 29a. The district court had not expressly addressed petitioners' argument that "because of fixed overhead costs associated with providing institutional care, the State will be able to save money by moving patients from institutionalized care to community-based care only when it shuts down entire hospitals or hospital wings," *id.* at 28a-29a.

On remand, the district court rejected petitioners' contention that they should be relieved of the burden to move LC and EW if they could show that providing community services to *all* the institutionalized persons in Georgia who could appropriately be treated in the community would be so burdensome as to entail a fundamental alteration in the program. Petitioners conceded that they could not make that showing with respect to L.C. and E.W. alone, and the district court ruled accordingly that petitioners had failed to establish their defense. On February 26, 1999, petitioners filed a notice of appeal of this ruling to the Eleventh Circuit.

VII. Sharpening and Narrowing the Isssue Presented.

Before proceeding to the argument, it is important to identify what is *not* presented by the record of this case

and the ruling below, for the briefs of Petitioners and its suporting *amici curiae* address issues broader than are presented here.

First, in this case the State's own professionals concluded that respondents could be treated more appropriately in community-based group homes. Accordingly, this case does not present the question of how courts should resolve a claim when the State professionals have concluded otherwise and a plaintiff challenges the conclusion as erroneous. The court below was quite careful to limit its holding in this respect. (Pet. Cert. App. 21a).

Thus, this case has nothing to do with the State's choice of setting based on its professionals' assessment of persons' mental condition, degree of dangerousness, or ability to care for themselves, as erroneously postulated in Petitioners' formulation of the question presented.[10]

Second, the opinion below is clear that the ADA imposes no obligation upon States to transfer to community placements persons whose needs make such placement inappropriate. (Pet. Cert. App. 21a).

Third, the ADA does not compel any individual to accept a placement in a more integrated setting if he or she prefers to remain in an institutional setting offered by the State. 28 CFR § 35.130(e).

Fourth, nobody in this case contends, and the court below did not hold, that States are required to provide services. The only issue is whether a State that offers a service may insist that, as a price of receiving it, disabled persons must be unnecessarily segregated and isolated from the community.

---

[10] This Court has addressed the degree of deference owed the opinions of professionals employed by public entities in resolving issues under the Rehabilitation Act of 1973, *School Board of Nassau County v. Arline*, 480 U.S. 273, 287-88 (1987), and the deference owed a private professional sued as a defendant under the ADA, *Bragdon v. Abbott*, 118 S. Ct. 2196, 2209-13 (1998).

Finally, as it comes to this Court the case presents no question respecting the nature of the defense available to a public entity to resist providing services in the most integrated setting appropriate. The court below held that the State enjoys such a defense, and, indeed, reversed and remanded for the State to be afforded an opportunity to present that defense. Petitioners did not ask this Court to review the court of appeals' formulation of the defense, and will pursue that issue in their appeal of the district court's ruling, noticed on February 26, 1999.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents, because of their disability, require services they are too poor to afford. The State of Georgia operates a unified program, providing those services in both mental institutions and community-based settings. The State's professionals concluded that respondents could appropriately be provided those services in a community setting, where they would have greater interaction with society at large. Nonetheless, the State's administrators refused to provide the services to respondents unless they remained segregated from the community in the locked ward of a mental institution.

The issue presented is whether this showing states a prima facie case of discrimination by reason of disability violative of the ADA (i.e., a violation unless the State sustains a defense that providing the services in a community setting would be so burdensome as to require a fundamental alteration in its services.) Petitioners insist that requiring respondents to remain in the institution to receive the services does not violate the ADA, even if furnishing those services in the community would impose no burden on the State. This follows, petitioners argue, because the ADA requires only that public entities afford persons with disabilities access to services *that are also provided to the nondisabled.*

As we show in this brief, petitioners have a mistakenly crabbed conception of the ADA. Title II of the ADA requires that public entities provide all of their services, including those earmarked solely for individuals with disabilities, in the most integrated setting appropriate to the needs of those individuals. The ADA requires this, so that individuals with disabilities can be integrated into the mainstream of society and not unnecessarily be deprived of the opportunity to participate in *all the other* services, programs and activities in which the nondisabled *do* participate.

The Attorney General, charged by Congress with responsibility for implementing Title II of the ADA, has so interpreted it. So have both courts of appeals to consider the question. Pet. Cert. App. 1a-30a; *Helen L. v. DiDario,* 46 F.3d 325 (3d Cir. 1995), *cert. denied,* 516 U.S. 813 (1995).

In Part I, we deploy the customary tools of statutory construction to show that the ADA's requirement that services be provided in the "most integrated setting" applies to all such services, not just those furnished to the nondisabled. We show that provisions of the ADA, ignored in Petitioners' brief, make plain that public entities may not impose unnecessary segregation as the price for receiving disability services; and that the legislative history confirms that Congress fully intended that result.

Part II addresses a series of arguments advanced by Petitioners to suggest that Congress *could not have meant to* impose the obligation that so plainly appears in the text. Of principal importance, we show that petitioners' argument based on § 504 rests on faulty premises. The United States consistently argued that § 504 bans unnecessary institutionalization, the case law on that issue at the time the ADA was enacted was divided, and the ADA contains three important differences from § 504 that were chosen by Congress to assure that narrow interpretations of § 504's sweep could not be transported to the ADA.

ARGUMENT

I. APPLYING THE CUSTOMARY TOOLS OF STATUTORY CONSTRUCTION, THE ADA BANS ADMINISTRATION OF SERVICES, PROGRAMS, AND ACTIVITIES IN UNNECESSARILY SEGREGATIVE SETTINGS.

Petitioners' brief ignores critical language in the ADA that dictates the proper resolution of this case. That language illuminates the meaning of both "discrimination" and "by reason of . . . disability," and reveals that they have a quite different meaning than petitioners proffer. And, the legislative history confirms that Congress intended what the text of the ADA says, i.e., to ban public entities from requiring unnecessary segregation from the community as the price for receiving needed disability services.

A. The Text.

(1) *"Discrimination. . . ."*

Section 202 of the Act, 42 U.S.C. § 12132, provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, *by reason of such disability,* be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or *be subjcted to discrimination by such entity.*

The first part of § 202 forbids the exclusion of the disabled, by reason of their disability, from services, programs and activities available to the nondisabled. What, then, does the second part, italicized above, mean? Petitioners contend that "discrimination" means the "uneven treatment of similarly situated individuals." (Pet. Br. 21). That construction ignores other language that Congress placed in the statute to make clear that it intended a more sweeping conception of what constitutes discrimination against individuals with disabilities.

§ 2 of the ADA, 42 USC § 12101, includes several congressional findings. Their purpose, as explained by Senator

Harkin, the ADA's sponsor and floor manager in the Senate, was to "ensure once and for all that no Federal agency or judge will ever misconstrue *the congressional mandate to integrate people with disabilities into the mainstream.*" [11] The Findings state explicitly the meaning Congress accorded the term "discrimination:"

> *(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 a*gainst individuals with disabilities persists in such critical areas as . . . *institutionalization*;
>
> * * * *
>
> *(5) Individuals with disabilities continually encounter various forms of discrimination, including* outright intentional exclusion, . . . failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, [and] *segregation* . . . [§ 2(a)(2), (3), (5)].

Lest there be any doubt that the ban on discrimination in Title II prohibits the provision of disability services in unnecessarily segregative settings, Congress did not rest with the general command in § 202. In § 204, 42 USC § 12134—a critical section, which Petitioners ignore—Congress directed the Attorney General to "promulgate regulations . . . that implement" Title II, § 204(a), and cited specific Rehabilitation Act regulations that should be included in the ADA regulations:

> (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 Act and the coordination regulations under part 41 of title 28, Code of Federal Regulations* . . . applicable to

---

[11] 135 Cong. Rec. S4986 (daily ed. May 9, 1989).

> recipients of Federal financial assistance under section 504 of the Rehabilitation Act of 1973. . . . [§ 204(b)].

§ 204 left no discretion in the Attorney General to omit any of the cited Rehabilitation Act coordination regulations. The ADA regulations "*shall be* consistent with . . . the coordination regulations." Congress insisted upon this, because the "first purpose" of Title II of the ADA was:

> *to make applicable the prohibition against discrimination* on the basis of disability, *currently set out in regulations implementing Section 504 of the Rehabilitation Act of 1973,* to all programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto . . . .[12]

§ 204 "incorporated by reference" the Rehabilitation Act's coordination regulations,[13] so that those regulations would "apply as well" to the ADA.[14]

The § 504 coordination regulations cited in § 204 included the following provision:

---

[12] S. Rep. No. 101-116, 101st Cong., 1st Sess. (1989) (hereinafter "S. Rep.") at 44; H.R. Rep. No. 101-485, Part 2, 101st Cong., 2d Sess. (1990) (hereinafter "H. Rep. II"), at 84. See also, *id.*, Part 3 (hereinafter "H. Rep. III"), at 49-50.

[13] H. Rep. III, at 51.

[14] H. Rep. II, at 84. The text of § 204 also instructs the Attorney General to make the regulations "consistent with" the ADA, which the reports explain is a reference to incorporating the concepts articulated in Titles I and III of the ADA. S. Rep., at 44; H. Rep. II, at 84; H. Rep. III, at 51. The reports are explicit, however, that to the extent the § 504 regulations provide greater protections to persons with disabilities than the other titles of the ADA, those regulations are to be incorporated into the Title II regulations. "[N]othing in the other titles [of the ADA] should be construed to lessen the standards in the Rehabilitation Act regulations which are incorporated by reference in Section 204." H. Rep. III, at 51. "[T]he requirements of those regulations apply as well, including any requiremnts . . . that go beyond Title I and III." H. Rep. II, at 84.

> Recipients [of federal funds] shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons. [28 CFR § 41.51(d)].

In obedience to § 204 of the ADA, the Attorney General adopted the following provision in the ADA regulations:

> A public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. [28 CFR § 35.130(d)].[15]

§ 35.130(d) controls this case. It is as binding as if it appeared on the face of the statute, for Congress commanded its inclusion, indeed "incorporated [it] by reference." *United States v. Board of Comm'rs of Sheffield, Alabama,* 435 U.S. 110, 134 (1978).

Petitioners, who never acknowledge § 204, attempt to dismiss the regulation as a frolic of the Attorney General. See, e.g., Pet. Br. 6: "Nor can plaintiffs sidestep this conclusion by relying on an executive-branch regulation promulgated by the Department of Justice." But Congress in § 204 explicitly embraced the designated provisions of the § 504 regulations, choosing carefully from among the two dozen sets of regulations that had been issued by a variety of federal agencies to implement Section 504,[16] selecting one set of regulations for some issues and another for other issues.[17]

---

[15] The only changes from the text of the parallel 504 regulation were changes to conform to the different wording of the ADA, which applies to all public entities and not merely those receiving federal funds; uses "services, programs and activities" in lieu of 504's "programs and activities;" and uses "individuals with disabilities" in lieu of 504's "handicapped persons."

[16] The numerous sets of Rehabilitation Act regulations are cited in *Alexander v. Choate*, 469 U.S. 287, 297 n.17 (1985).

[17] See also, § 204(c), directing the Attorney General to pattern the ADA regulations respecting "facilities and vehicles covered by

Thus, the "plain language" that guides the resolution of this case is not only the broad term "discrimination," but the meanings of that term articulated in § 2 of the ADA ("isolate and segregate", "institutionalization"), and the "most integrated setting" requirement of § 35.130(d). We turn, now, to an examination of that regulation.

Although Petitioners argue that the ADA's ban on "discrimination" applies only to services, programs and activities in which the nondisabled participate, no such limitation appears in § 35.130(d). That section applies, by its terms, to all "services, programs, and activities." There is not a whisper that it is limited to only the subset of services, programs and activities enjoyed by the nondisabled. The universality of its application is consistent with Congress' declared intention to make applicable the 504 coordination regulations "to *all* programs, activities, and services provided or made available by state and local governments." See p. 19, *supra*, text at n.12.

§ 35.130(d) does not refer to "most integrated services, programs, and activities." Rather, it directs that "services, programs, and activities" be provided "in the most integrated *setting* appropriate to the needs of qualified individuals with disabilities." The focus of this provision, by its plain language, is not on whether the *service* is integrated, but on whether the *setting* in which the service is provided is integrated. As the Attorney General explained in the section-by-section analysis that accompanied issuance of the Title II regulations, an "integrated setting" within the meaning of § 35.130(d) is "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible . . ."

[Title II]" after yet a third source—"the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board." Title III of the ADA (privately-operated public accommodations) includes a "most integrated setting" command virtually identical to that which the Attorney General included in the regulations implementing Title II. See ADA, § 302(b)(1)(B).

56 Fed. Reg. 35705 (July 26, 1991). Petitioners do not dispute that furnishing the services Respondents need in a community-based group residence permits them greater interaction with nondisabled persons than furnishing those services in the locked ward of a mental institution. (Pet. Cert. App. 8a).

Confirmation that § 35.130(d) is not limited to "integrated services . . ." is provided by the structure of § 35.130 as a whole. That section enumerates all of the "prohibitions against discrimination" effected by Title II of the ADA. § 35.130(a) repeats the general prohibitory language of § 202 of the ADA. § 35.130(*b*) affords qualified individuals with disabilities the maximum possible access to services, programs and activities in which the nondisabled participate.[18] § 35.130(c) declares that the ADA does not forbid public entities from providing services that are earmarked exclusively for persons with disabilities. Having thus discussed the two categories of services—those in which the nondisabled participate [130(b)] and those which are disability-only [130(c)] —130(d) then states unqualifiedly that services are to be administered in the "most integrated setting appropriate to the individual."

Unlike 130(b), there is nothing in 130(d) that suggests it is limited to services in which the nondisabled participate. Nor is there any other justification for reading (d) to apply to the services discussed in (b), but not those discussed in (c) which immediately precedes it.

(2) "... *By Reason of Disability.*"

Petitioners contend that even if respondents are suffering "discrimination" within the meaning of § 202, it is not

---

[18] Most of the subsections in § 35.130(b) expressly mention that the services referenced are provided to, afforded to, or enjoyed by "others," i.e. persons without disabilities. See § 35.130(b)(ii), (iii), (iv), (vii). These words do not appear in (v) and (vi) because it is obvious from the text of these provisions that the services and programs referenced are enjoyed by non-disabled persons.

"by reason of [their] disability." This follows, petitioners say, because their failure to provide services in the most integrated setting appropriate was motivated by factors unconnected to respondents' mental disabilities.

The ADA reaches practices that have the effect of discriminating against individuals with disabilities, not just acts intended to do so.[19] Petitioners acknowledge that this is so as to Titles I and III, but assert that Congress was less ambitious in enacting Title II. (Pet. Br. 29). Again, petitioners overlook § 204, which incorporates by reference the § 504 regulations banning conduct with discriminatory effects and also states that the ADA regulations shall be "consistent with this Act." The Committee reports made clear that the latter directive was intended to incorporate into Title II the types of discrimination articulated in Titles I and III. See n.14, *supra.*

By directing the Attorney General to adopt "the most integrated setting" regulation, Congress indicated that the statutory language "by reason of disability" applied to a state's providing disability-only services in a needlessly segregated setting. Indeed, the statute's primary focus on ending the isolation of the disabled and integrating them into the mainstream of American life, commands that approach.

Respondents were deprived of access to the community because the State conditioned the provision of services

---

[19] This Court assumed that that was the correct construction of § 504, in *Alexander v. Choate*, supra, 469 U.S. at 292-97, noting that the lower courts and federal agencies uniformly had so held, *id.* at 297 n.17. So did the Rehabilitation Act coordination regulations that Congress directed the Attorney General to adopt for Title II, 28 CFR, Part 41. The specific enumeration of acts of discrimination in Titles I and III of the ADA include many practices that are innocently motivated. Congress directed the Attorney General to include the prohibitions of Titles I and III in the Title II regulations. (See note 14, supra). The congressional reports on the ADA expressly declare that Congress intends the ADA to ban conduct with discriminatory effects. S. Rep., at 6; H. Rep. II, at 29; H. Rep. III, at 26.

they needed on their living in an institution. It was "by reason of their disability"—their need for those services—that they were thus isolated. Other services, that the state provides to the nondisabled, do not carry as a condition that the recipients agree to unnecessary institutionalization. The State thus discriminates between the disabled and nondisabled, by effectively segregating some with disabilities from access to the community. When that segregation is not necessary for the provision of appropriate treatment, it is discriminatory. Can there be any doubt that AIDS patients would be suffering discrimination "by reason of [their] disability" if a state, without medical or public health justification, conditioned the provision of medical services for AIDS upon their agreeing to live in a locked ward?

Petitioners' contention—that segregation is not "by reason of disability"—would make sense if a disabled person were convicted of a crime and incarcerated in a prison. It would then be correct to say that that person's exclusion from the community is not "by reason of disability" (it is by reason of committing a crime). But disability —and the corresponding need to secure treatment therefor—is the *only* reason that respondents were segregated from the community.[20]

---

[20] Respondents' institutionalization was "by reason of disability" for a second reason. Petitioners' asserted non-disability-related justification for not providing services to respondents in the community is that the State would incur additional expense, still having to bear the fixed costs of operating the institution while also paying the community-based provider. See p. 13, *supra*. Petitioners did not prove that this was their justification, or even that the claim of additional expense is true. But even if they had, those institutional costs existed only because the State had earlier pursued a policy of institutionalizing disabled persons who did not need to be there, during an era in which isolating the mentally disabled from the community was official policy, and in consequence finds itself with more institutional facilities than are necessary to treat those who truly need institutionalization. The alleged transitional "cost" of moving services into the community thus is the product of an earlier history of antipathy for the disabled.

B. The Legislative History.

The legislative history of the ADA provides further proof that Congress intended the "most integrated setting" regulation to forbid the provision of disability-only services in unnecessarily segregative settings.

(1) ***The Hearings.***

Sen. Lowell Weicker had been the principal sponsor of the ADA when it was introduced in 1988, but was defeated for reelection that November. He testified as a witness at the Senate hearings in early 1989. His account of the problems that would be solved by enactment of the ADA included the following:

> For years, this country has maintained a public policy of protectionism toward people with disabilities. We have created monoliths of isolated care in institutions and segregated educational settings. It is that isolation and segregation that has become the basis of the discrimination faced by many disabled people today. Separate is not equal. It was not for blacks; it is not for the disabled.[21]

Attorney General Dick Thornburgh, testifying on behalf of President Bush, decried the "intolerable life of isolation" suffered by many individuals with disabilities,[22] who are "still too often shut out of the economic and social mainstream of American life" and who deserve "full participation in and access to all aspects of society." [23]

Many individuals testified about the brutal treatment and unnecessary isolation suffered by those in mental institutions.[24] This was echoed by the administrators of some state systems, who testified, inter alia:

---

21 Americans with Disabilities Act, Hearing before the Senate Committee on Labor and Human Resources and the Sub-Committee on the Handicapped, 101st Congress, 1st Session, at 215 (1989).

22 Quoted in S. Rep., at 9, and in H. Rep. III, at 32.

23 Hearing before the Senate Committee, supra n.21, at 195.

24 Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearings Before the Subcomm. On Select Educ. Of

People with mental disorders have been herded into jail-like asylums . . . . Mental patients have been isolated, chained and beaten, and abused . . . . Our clients face exclusion from jobs, housing, and the basic rights citizens enjoy.[25]

* * * *

But we—and now I am speaking as a person with a life-long disability—have never been recognized as full citizens. We have had to endure segregation in much the same way people of color and women have endured discrimination and segregation until recently, and, sadly, even today. *But the segregation and stigmatization of people with certain disabilities has been even greater. For people wih disabilities such as mental retardation, cerebral palsy, mental illness . . . we have been institutionalized. . . .* In protesting the right not be be segregated we also encourage the opportuniy for integration and learning.[26]

* * * *

The next powerful movement is the rising up of people with mental retardation locked up in institutions. . . . The Americans with Disabilities Act will provide . . . an opportunity to reach the most segregated members of our society.[27]

---

the House Comm. on Educ. And Labor, 100th Cong., 2d Sess. (1988) (hereinafter, *Oversight Hearing*), at 27-38, 173-75, 229-34; Staff of House Comm. on Educ. and Iabor, 101st Cong., 2d Sess., Report on P.L. 101-336, Legislative History of the Americans with Disabilities Act, (Comm. Print 1990) (hereinafter "*Leg. Hist.*"), at 1080-81, 1230-35, 1513-17.

[25] *Leg. Hist.*, at 1161-62 (statement of Marilyn Levin, on behalf of Edward M. Murphy, Commissioner, Massachusetts Department of Mental Health).

[26] *Id.*, at 1725-27 (statement of Deanna Durrett for Josef Reum, Commissioner, Indiana Department of Mental Health).

[27] *Oversight Hearing*, supra, at 65-66 (statement of Ed Preneta, Director, Connecticut Developmental Disabilities Office).

(2) *The Committee Reports.*

The Senate Report, and the four reports in the House, all confirm that Congress' intent was to go beyond simply mandating equal treatment for individuals with disabilities, and to break down barriers that unnecessarily prevented them from participating fully in society. The declared "purpose of the ADA" was to provide a:

> comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life. . . .[28]

The reports note that studies by federal agencies all "reach the same fundamental conclusions," the first of which is stated as follows:

> Historically, individuals with disabilities have been isolated and subject to discrimination and such isolation and discrimination is still pervasive in our society.[29]

The reports describe "segregation" as a form of discrimination prohibited by the ADA, and make clear that this is an evil distinct from the exclusion of individuals from programs in which the nondisabled participate. The Senate Report states:

> One of the most debilitating forms of discrimination is *segregation*. . . . Discrimination *also* includes *exclusion*, or denial of benefits, services, or other opportunities that are as effective and meaningful as those provided to others.[30]

House Report III states:

---

[28] S. Rep., at 2, 20; H. Rep. II, at 22, 50; H. Rep. III, at 23; *Id.*, Part 4, at 23 (hereinafter, "H. Rep. IV"). See also, *Id.*, Part 1, at 24 ("to welcome individuals with disabilities fully into the mainstream of American society") (hereinafter "H. Rep. I").

[29] S. Rep. at 6; H. Rep. II, at 28.

[30] S. Rep. at 6.

> [A]s in the finding 35 years ago by the Supreme Court in Brown v. Board of Education . . . segregation for persons with disabilities "may affect their hearts and minds in a way unlikely ever to be undone."
>
> * * * *
>
> The ADA is a comprehensive piece of civil rights legislation which promises a new future of inclusion and integration, and the end of exclusion and segregation.
>
> * * * *
>
> Section 504 of the Rehabilitation Act served *not only* to open up public services and programs to people with disabilities but 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.*[31]

The reports quote the following conclusions from the U.S. Commission on Civil Rights' report, *Accommodating the Spectrum*, supra:

> Despite some improvements . . . [discrimination] persists in such critical areas as education, employment, *institutionalization,* medical treatment, involuntary sterilization, architectural barriers, and transportation.[32]

The Civil Rights Commission report, at p. 33, explained that "[i]nstitutionalization almost by definition entails segregation and isolation." A section of the Commission's Report recounted "Forms of Handicap Discrimination:"

---

[31] H. Rep. III, at 26, 49. See also, H. Rep. I at 25 (ADA is a civil rights bill, required because the nation cannot "afford to *exclude, or segregate in any way,* the significant number of its citizens who have disabilities."); H. Rep. II, at 40 ("the unfortunate truth is that individuals with disabilities are a discrete, specific minority who have been insulated in many respects from the general public . . . . This Act will finally set in place the necessary civil rights protections for people with disabilities.")

[32] S. Rep. at 8; H. Rep. II at 31 (brackets in Committee report).

> Conduct, policies, and practices discriminate against handicapped people in several ways: intentional exclusion; unintentional exclusion; *segregation*; [et al.] . . . .
>
> Segregation singles out handicapped people and separates them from the rest of society, frequently as a condition for receiving some service or benefit. . . . *Mental health and mental retardation institutions that house residents in almost complete isolation from the non-handicapped community are perhaps archetypal examples of segregation.* [Id. at 40-41].

The breadth of Congress' purpose in enacting the ADA is also attested by its explanation for requiring accessible transportation for the disabled. Congress did not justify this requirement on the ground that, as the nondisabled use transportation, the disabled are entitled to equal access. (That is the rationale one would expect if the statute were as narrow as Petitioners contend.) Rather, the reports stressed that access to transportation was required because it was crucial to Congress' larger goal of mainsteaming those with disabilities into the larger community:

> Transportation is the linchpin which enables people with disabilities to be integrated and mainstreamed into society. [A]ccess to transportation is the key to opening up education, employment, recreation; and other provisions of the [ADA] are meaningless unless we put together an accessible transportation system in this country.[33]

Congress required public entities to provide "paratransit" systems for those unable to use public transportation, because this disability-only service was essential to achieving the ADA's overarching goal of mainstreaming persons with disabilities.[34]

---

[33] S. Rep. at 13. See also, H. Rep. II, at 37, 84; H. Rep. IV, at 25.

[34] S. Rep. at 13; H. Rep. I, at 24; H. Rep. II, at 38, 50-52.

(3) *The Floor Debates.*

The floor debates contain further evidence that Congress fully intended what the words of the ADA say. Senator Harkin declared, when he introduced the bill, that one of the ADA's purposes is "*getting people . . . out of institutions. . . .*" [35] During the floor debates, he 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.[36]

Senator Kennedy, a co-sponsor, and chair of the Senate committee that reported out the ADA, stated:

> The Americans with Disabilities Act will end this American apartheid. It will roll back the unthinking and unacceptable practices by which disabled Americans today are segregated, excluded, and fenced off from fair participation in our society by mindless biased attitudes and senseless physical barriers.[37]

Congressman Miller, a co-sponsor in the House, stated:

> [I]t 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.*[38]

President Bush, in signing the ADA, stated that its purpose is to:

> ensure that people with disabilities are given the basic guarantees . . . . Independence, freedom of choice, control of their lives, the opportunity to blend

---

35 135 Cong. Rec. S4986 (daily ed. May 9, 1989).

36 135 Cong. Rec. S10713 (daily ed. Sept. 7, 1989).

37 135 Cong. Rec. S4993 (daily ed. May 9, 1989).

38 136 Cong. Rec. H2447 (daily ed. May 17, 1990).

> fully and equally into the rich mosaic of the American mainstream.
>
> * * * *
>
> And [so] I sign legislation which takes a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse but not grasp. . . . .[39]

C. The Lessons of the Text and Legislative History.

As the text and legislative history make clear, Congress intended the ADA to strike at the whole range of problems that result from discrimination against individuals with disabilities and that have denied such individuals full participation in the economic and social life of this Nation. Petitioners acknowledge that the ADA requires them to make integrated services accessible to persons with disabilities. But, they contend, the ADA was not meant to address the most flagrant and pervasive of all engines of exclusion: the unnecessary segregation of some persons with mental disabilities, which prevents them from participating in *any* of those integrated services.

The statute that eventuates from this reasoning makes no sense: it is as if, during the era of slavery, Congress has enacted a law forbidding race discrimination in employment but leaving slavery in place. It would take a remarkably clear text to convince that Congress intended so illogical a dichotomy.

The reason Congress wanted those with disabilities to go to parks and museums side by side with the nondisabled, rather than merely in separate groups (Pet. Br. 41-42), was not that they would thus better appreciate the flowers and paintings, but because inclusion in the

---

39 Reprinted in National Council on Disability. *Equalty of Opportunity: The Making of the Americans with Disabilities Act* at App. G (1997).

"mainstream" was viewed by Congress as the entitlement of those with disabilities. *A fortiori*, Congress did not want persons with disabilities unnecessarily kept from attending parks and museums *altogether*, as petitioners have done here.

D. Petitioners' Contrary Account.

In the face of overwhelming evidence that Congress meant to impose upon public entities an obligation to administer disability-only services in the "most integrated setting" appropriate to individuals' needs, petitioners offer up, in support of a contrary interpretation, one smidgin of legislative history, and one passage in the Attorney General's section-by-section analysis of the ADA regulations. Neither supports petitioners' contentions.

(1) *The Chafee Bill.*

Petitioners contend that Congress' failure to adopt Senator Chafee's proposed amendments to the Medicaid law in 1990 reflects Congress' understanding that the ADA did not compel states to provide disability services in the community when institutionalization is an unnecessarily segregative setting. (Pet. Br. 32). This is a complete non-sequitur.

Congress had *already* amended the Medicaid law to permit states to secure Medicaid reimbursement for community-based treatment of mentally retarded and mentally ill persons who would otherwise be institutionalized. See p. 3, supra. By virtue of those amendments, Medicaid pays the same percentage of the state's costs of treatment of mental retardation, whether provided in an institution or in the community, and Medicaid *favors* provision of community-based treatment to persons with mental illness. See p. 3, supra. No new amendments thus were needed to enable states to secure Medicaid reimbursement for serving persons in community-based settings when appropriate, rather than in institutions, in obedience to the ADA's "most integrated setting" command.

Senator Chafee's bill [40] would have required the States to finance community-based services to all eligible Medicaid recipients who had developed an SSI-level disability (i.e., a disability that precluded working) before a certain age. The bill would have made these services mandatory Medicaid services, meaning that each state participating in the Medicaid program would have been required to provide such services to every Medicaid recipient who qualified for them—a much broader population than is protected by the "most integrated setting command" of the ADA, as it includes all those whose disabilities are not severe enough to qualify for institutionalization in the absence of community services.

Senator Chafee understood that the "ADA as it is currently drafted, will integrate fully those with disabilities into everyday American life." [41] He viewed his bill as a "logical partner" to the ADA [42] because it went beyond the ADA in three respects: (1) it would have mandated mental disability services, whereas the ADA is operative only if the states elect to provide these services; (2) it would have mandated these services for all qualifying Medicaid recipients meeting the SSI definition of disability, whereas the ADA integration mandate applies only to persons receiving services in unnecessarily segregated settings; and (3) its mandate was absolute, and not tempered by a fundamental alteration defense.

The respects in which the Chafee bill went beyond the ADA would have greatly increased the costs of mental disability services for both the federal and state governments. That Congress did not adopt this ambitious bill says nothing about the meaning of the ADA.

---

[40] The Chafee bill appears at 135 Cong. Rec. 1960-71 (Feb. 8, 1989).

[41] 135 Cong. Rec. 8519 (May 9, 1989).

[42] *Id.* at 8518.

(2) ***The Attorney General's Section by Section Analysis.***

Petitioners point to a passage of the section-by-section analysis in which the Attorney General cites examples of how persons with disabilities must be afforded the opportunity to participate in programs together with nondisabled persons. This, they argue, shows that the "most integrated setting" command applies only to activities in which the nondisabled participate. (Pet. Br. 41-42).

It would be a sufficient answer that two examples of a provision's operation do not justify an "infer[ence] from . . . silence" that those exhaust the provision's meaning. *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 516 (1994). But here there is a more compelling answer. The passage petitioners cite appears in the portion of the section-by-section analysis describing 130(b)(iv), and explains how 130(b)(iv) intersects with several other provisions, including 130(d). Not surprisingly, the examples used to show that intersection involved services in which the nondisabled participate, for it is to those services that 130(b)(iv) is addressed. See p. 22, *supra*. When the section-by-section analysis later arrives at its description of 130(d) *per se*, no examples are provided. Rather, the analysis states without qualification that services are to be provided in a setting that permits the maximum interaction with nondisabled persons consistent with the needs of the person with disabilities. See pp. 21-22, *supra*.

E. The Attorney General's Consistent Interpretation of the ADA.

The Attorney General, charged with primary responsibility for enforcing the ADA, has consistently interpreted the ADA to condemn unnecessary institutionalization when appropriate services can be provided in the community. [Indeed, as we show in Part II-A, infra, this was also the consistent Attorney General interpretation of

§ 504 of the Rehabilitation Act in the dozen years preceding enactment of the ADA. There is thus an unbroken line of Attorney General concurrence spanning four administrations and more than twenty years.]

Attorney General Thornburgh, who promulgated the implementing regulations following its passage, has confirmed his interpretation in an *amicus curiae* brief in this Court. His successor, the current Attorney General, has filed *amicus curiae* briefs in several cases, including in the court below, taking the same position.[43]

Surely, this conclusion is based on a "permissible construction of the statute," and as such is entitled to deference from the judicial branch. *Chevron v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). An agency's interpretation of its own regulation merits "substantial deference." *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *Martin v. OSHA*, 499 U.S. 144, 150-51 (1991).[44] Congress, by directing the Attorney General to adopt regulations spelling out the forms of discrimination forbidden by Title II, signalled its preference that the primary task of interpretation be entrusted to the executive branch. "[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Chevron*, 467 U.S. at 866. That duty is easiest to perform when, as here, the administrative interpretation is so faithful to the statutory text and the announced legislative purpose.

Petitioners attempt to dismiss the Attorney General's interpretation as a "litigation position" unworthy of deference (Pet. Br. 42). But as this Court held in *Auer v. Robbins*, 117 S. Ct. 905, 912 (1997), an agency's inter-

---

[43] See e.g., *Helen L.*, supra, 46 F.3d at 327, 335.

[44] These principles apply to administrative interpretations impacting states. *U.S. v. Alaska*, 503 U.S. 569 (1992); *Rust v. Sullivan*, 500 U.S. 173 (1991).

pretation of its own regulation in a legal brief is entitled to deference, so long as it is not a post-hoc rationalization for past agency action under attack. Absent that incentive to justify past action, "there is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment." *Id.*

F. Petitioners' Invocation of *Gregory v. Ashcroft.*

Petitioners assert that the interpretation of the Department of Justice and lower courts does not satisfy the "plain language" rule of *Gregory v. Ashcroft,* 501 U.S. 452 (1991). There is a serious question whether *Gregory* applies here, as we explain shortly, but the decisive point is that the interpretation here would satisfy the *Gregory* test even if applicable. The language of the ADA, and of the regulations it directed the Attorney General to adopt, clearly bans segregation, and requires that public entities administer their services in the most integrated setting appropriate to the needs of the individual. There are no exceptions, no equivocations.[45] Administrators of State mental health programs understand that "most integrated setting" means moving individuals with disabilities from mental institutions to community-based settings. *See,* Brief for Former Commissioners, et al., at n.3. See also, the NCSL Brief which attaches a statement of Kathryn Power, "the immediate Past President of State Mental Health Program Directors (ASMHPD), which represents all 50 states and 5 territorial state mental health agencies" (*id.* at 1a). Ms. Powers reports that there is

> a growing consensus within the mental health field that, whenever feasible, people with mental illnesses should receive *services in a community, rather than institutional, setting. The principle that services*

[45] By contrast, the statute in *Gregory* contained an exception for policy-making officials, and it was the ambiguity of this exception (as applied to state judges) that posed the interpretive task in that case.

> *should be provided in the most integrated setting* possible is supported by the values of those who administer our public mental health system. . . . [*Id.* at 2a].

To be sure, the ADA does not spell out *in haec verba* every application of the "most integrated setting" command, but as this Court noted in *Pennsylvania Department of corrections v. Yeskey,* 118 S. Ct. 1952, 1955-56 (1998). the ADA's breadth does not mean it is ambiguous. In *Yeskey,* the Court held that the ADA applies to state prisons, even if that application was "not expressly anticipated by Congress," *id.* at 1956. *See also, Sedima SPRL v. Imrex Co.,* 473 U.S. 479, 499 (1985). Here, there can be no doubt that Congress *did* contemplate the ADA's application to unnecessary institutionalization of persons with mental disabilities.

In any event, it is doubtful that *Gregory* applies here, a doubt this Court noted but did not resolve in *Yeskey,* 118 S. Ct. at 1954. Unlike *Gregory,* which involved a claimed congressional overriding of a state constitution on an issue at the core of the state's governance, this case involves a more mundane question: in which of two settings, both administered by the State, should respondents receive their services? Whatever the answer, it is unlikely to alter "the usual constitutional balance of federal and state powers," *Gregory,* 501 U.S. at 460, especially as the federal government is paying nearly two-thirds of the cost. See pp. 3-4, *supra.* The statute makes clear that States—indeed all public entities—are to be treated exactly the same as everyone else covered by the ADA.[46]

The extension of *Gregory* sought by petitioners would frustrate the application of all federal civil rights statutes to the States, even when, as here, Congress announces unequivocally that it intends States to be governed in

[46] *See* § 502 of the ADA, 42 USC § 12202.

exactly the same way as other parties. In particular, petitioners' approach would overrule significant decisions of this Court. For example, prior to 1991, there was no explicit statement in Title VII of the Civil Rights Act of 1964 that disparate impact was a form of prohibited discrimination. This Court concluded that it was, by applying typical tools of statutory construction in a case involving private parties, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and then applied that interpretation in suits involving States without a second thought. *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Connecticut v. Teal*, 457 U.S. 440 (1982).

II. PETITIONERS' ARGUMENTS—THAT CONGRESS COULD NOT HAVE INTENDED WHAT THE STATUTE PLAINLY SAYS—ARE UNPERSUASIVE.

We address, *seriatim*, a series of arguments advanced by Petitioners that are apparently designed to show that Congress did not mean what it said in the ADA. These arguments rest entirely on factual and analytical errors.

A. "The Dog That Didn't Bark:" The Contention That the History of Implementation of Section 504 of the Rehabilitation Act Shows That Congress Did Not Intend the "Most Integrated Setting" Command of the ADA to Apply to Disability-Only Services.

Petitioners make the following assertions: (1) prior to the enactment of the ADA, neither the United States, in implementing § 504 of the Rehabilitation Act, nor the courts, in construing it, thought that it banned unnecessary institutionalization; (2) the language of Title II of the ADA is identical in all meaningful respects to the language of § 504; and (3) the ADA regulations are identical to those that were at issue in the pre-ADA § 504 cases. (Pet. Br. 22-30). It follows, petitioners argue, that Congress must have intended the ADA not to ban unnecessary institutionalization. (*Id.* at 22).

All three of petitioners' assumptions are wrong. In consequence, the conclusion is wrong as well.

(1) ***Petitioners' Account of the Enforcement of § 504 Is Wrong.***

Petitioners are simply wrong in thinking that the United States did not interpret § 504 to forbid unnecessary institutionalization of persons with mental disabilities as a condition to their receiving services, and they are equally wrong that the pre-ADA decisional law under § 504 uniformly rejected that position.

From the start, the Department of Justice took the position that unnecessary institutionalization of the mentally-disabled violated § 504 of the Rehabilitation Act. This position was advanced by the United States as *amicus curiae* in cases brought by individuals with disabilities,[47] and as plaintiff in the *Pennhurst* litigation.

The district court in *Pennhurst* found "that § 504 of the Rehabilitation Act of 1973 . . . provided a right to minimally adequate habilitation in the least restrictive environment." [48]

On appeal in *Pennhurst,* the United States, as appellee, filed two briefs urging affirmance, arguing vigorously in both that unnecessary institutionalization violates § 504.[49] The Third Circuit affirmed the district court's judgment on the basis of another statute (the Developmentally Dis-

---

[47] See, e.g., Post-Trial Memorandum of the United States, in *Kentucky Association for Retarded Citizens v. Conn.*, Civ. Ac. No. C-78-0157-L(A), W.D. Ky. (filed June 18, 1979), at 5-26; Post-Hearing Brief of Plaintiffs and Amicus Curiae United States, in *Wyatt v. Hardin,* Civ. Ac. No. 3195-N, N.D. Ala. (filed Feb. 18, 1979), at 186-88.

[48] 451 U.S. at 7, describing *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1323-24 (E.D. Pa. 1977).

[49] Brief for the United States to the Court of Appeals for the Third Circuit, Nos. 78-1490 et al. filed Oct 2, 1978, at 39-45; Supplemental Brief for the United States filed Aug. 14, 1979, at 2-10.

abled Assistance and Bill of Rights Act, hereinafter the "DD Act"), and thus found it unnecessary to address § 504. *Halderman v. Pennhurst State Sch. & Hosp.*, 612 F.2d 84, 107-08 (3rd Cir. 1979) (en banc).

In this Court, the United States urged that if the Third Circuit were reversed in its interpretation of the DD Act, "the case should be remanded to the court of appeals to consider the district court holding[] concerning . . . Section 504." [50] This Court reversed the Third Circuit's interpretation of the DD Act, and remanded to that court "those issues it did not address," including "respondents' . . . claims under § 504." 451 U.S. at 31.

On remand, the United States, now the Reagan Administration, filed a brief in the Third Circuit that again contended that the unnecessary institutionalization of an individual when community facilities are available violates § 504.[51] This brief differed from the earlier ones in that it expressed doubt whether the obligation would apply if it required a state to "create or expand" existing community services, citing this Court's intervening ruling in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), that § 504 does not require "affirmative action." This time, the Third Circuit held that unnecessary institutionalization violated state law, and again found it unnecessary to decide the § 504 question. 673 F.2d 647, 660-61 (3rd Cir. 1982). This Court reversed the state law ruling as violative of the Eleventh Amendment, and once again remanded the § 504 claim. 465 U.S. 89, 125 (1984). The case was then settled.

This history shows, first, that the earliest and contemporaneous administrative interpretation of § 504 was that it forbade unnecessary institutionalization of persons with

---

[50] Brief for the United States in Nos. 79-1404 et al., at 4 n.5.

[51] Brief for the United States in the Third Circuit, Nos. 78-1490 et al., filed October 14, 1981, at page 27.

mental disabilities. Second, while a later administration slightly adjusted this position, that adjustment was made in perceived deference to this Court's declaration in *Davis* that § 504 does not require "affirmative action." A few years later, this Court clarified that it had not meant in *Davis* to suggest that § 504 does not require affirmative steps of accommodation, but only that it does not require substantial modifications that would fundamentally alter the program in question. *Alexander v. Choate, supra*, 469 U.S. at 300-01, n.20. With the Court's clarification in *Alexander*, the administration's perceived need to adjust its position disappeared.

Petitioners are also wrong in suggesting that the lower court decisional law was uniformly against an interpretation of § 504 that forbade unnecessary institutionalization. In addition to the district court in *Pennhurst*, at least two other district courts ruled that § 504 did so forbid. *Homeward Bound Inc. v. Hissom Mem. Ctr.*, No. 85-C-437-E, 1987 WL 27104 (N.D. Okla. July 24, 1987); *Lynch v. Maher*, 507 F. Supp. 1268, 1278-80 (D. Conn. 1981).

Although petitioners cite six decisions reaching the contrary result, three of those post-dated the enactment of the ADA in July 1990 and thus could hardly have affected Congress' understanding when it enacted the ADA.[52]

There were, therefore, three lower court decisions rejecting the United States' position prior to enactment of the ADA, but those do not merit the importance Petitioners attach to them, for two reasons. First, the fact that lower court decisional law was mixed removes entirely the claim that Congress "must have" intended to

---

[52] *P.C. v. McLaughlin*, 913 F.2d 1033 (2d Cir. Sept. 6, 1990); *Jackson v. Fort Stanton Hosp. & Training Sch.*, 757 F. Supp. 1243 (D. N.M. Dec. 1990), *rev'd on other grounds*, 964 F.2d 980 (10th Cir. 1992); *People First of Tenn. v. Arlington Developmental Ctr.*, 878 F. Supp. 97 (W.D. Tenn. 1992).

endorse the holdings Petitioners prefer. Indeed, Congress was explicit in the committee reports that it disapproved of much of the decisional law under the Rehabilitation Act. See H. Rep. IV at 24 ("Moreover, 17 years of experience with section 504 . . . and in the interpretation of [that] law have demonstrated the need for further legislative action in this area."); see also, Hearing before the Senate Committee, *supra* n.21, at 195 (Test. of Dick Thornburgh) ("Fifteen years have gone by since the Rehabilitation Act took effect. Nevertheless, persons with disabilities are still too often shut out of the economic and social mainstream of American life."). Congress included § 2, and another change in the statutory text cited below, for the express purpose of preventing similar misinterpretations of the ADA. See pp. 17-18 *supra*; pp. 42-44 *infra*. Finally, none of the cases cited by Petitioners is mentioned anywhere in the legislative history of the ADA.

(2) *Petitioners' Assumption That the Text of the ADA Is the Same as Section 504 Is Wrong.*

Those courts that construed § 504 not to ban unnecessary institutionalization were heavily influenced by three textual considerations that Congress changed in the ADA. Two related to the text of the statute, and are discussed in this section. The third related to the text of the regulations, and is discussed in the next section.

First, the Rehabilitation Act banned discrimination only if "solely by reason of . . . disability." The word "solely" was removed in the ADA, Congress explaining that it had led to decisions it did not approve.[53]

Second, § 504 of the Rehabilitation Act was a one-sentence statutory command, lacking both the definitions of "discrimination" that appear in § 2 of the ADA and the explicit congressional endorsement of a stand-alone "most integrated setting" regulation that appears in

[53] S. Rep. at 44; H. Rep. II, at 85.

§ 204(b) of the ADA. Courts regularly expressed uncertainty about the meaning of the non-specific § 504.[54]

(3) *Petitioners' Assumption That the § 504 Coordination Regulations Were at Issue in the Pre-ADA § 504 Cases Is Wrong.*

The third textual difference between the pre-ADA § 504 cases and the ADA itself is that the stand-alone "most integrated setting" command that appeared in the § 504 coordination regulations, and that was the model for the ADA § 35.130(d) regulation, was not at issue in the § 504 cases petitioners cite.

The applicable regulations in those cases (to the extent they were even raised) were HEW's Part 84 Rehabilitation regulations (codified at 45 CFR Part 84). Those were the regulations that applied to recipients of federal funds distributed by HEW. The Part 84 regulations did not have a clear stand-alone integration requirement. Rather, they had a reference to "most integrated setting" that was melded into the provisions directing that persons with disabilities be provided access to the programs in which the nondisabled participate, see 45 CFR § 84.4(b)(2), and that unfortunate placement led the courts in the cases invoked by petitioners to construe it (contrary to the United States' position) as limited to such programs.[55]

By contrast, the coordination regulations (adopted a year later, and codified at 45 CFR Part 85, and later recodified as 28 CFR Part 41 when coordination authority was transferred from HEW to the Attorney General in 1980) did contain a clear stand-alone integration requirement (which is quoted *supra* at p. 20). However, the coordination regulations served only as guidance to other federal agencies in fashioning their own regulations

---

[54] See, e.g., *ADAPT v. Skinner*, 881 F.2d 1184, 1193 (3rd Cir. 1989) (*en banc*) (there is an "absence of a clear congressional mandate" in § 504).

[55] In effect, the Part 84 regulations placed the "most integrated setting" obligation in the equivalent of what is now § 35.130(b).

to apply to the recipients of the federal funds they administered. See 45 CFR § 85.4. Because the coordination regulations were expressly addressed solely to federal agencies, they did not apply to the recipients of the federal funds who were sued in the cases cited by petitioners. Thus, the coordination regulations were not invoked by any party in those cases, and were not construed by the courts in any of those cases.

In the ADA, Congress expressly instructed the Attorney General to promulgate regulations that make operative the unqualified, stand-alone "most integrated setting" requirement of the coordination regulations. The fact that lower courts reached mixed rulings on the meaning of § 504 thus reflects nothing about the meaning of the words in the coordination regulations, for those words were never interpreted. They were made operative upon providers of disability services only with Congress' express embrace of them in the ADA.

Precisely because of the differences between § 504 and the ADA just recounted, two of the three courts which rendered pre-ADA decisions under § 504 cited by petitioners have reached the opposite result under the ADA. (Pet. Cert. App. 19a) (distinguishing the Eleventh Circuit's prior decision in *S.H. v. Edwards, supra,* as well as the other § 504 decisions invoked by petitioners, because "none of the cases cited by the State involved claims under the express integration regulation of either the ADA or the § 504 coordination regulations"); *Helen L., supra,* 46 F.3d at 333-34 (distinguishing the Third Circuit's prior decision in *Clark v. Cohen,* 794 F.2d 69 (3d Cir. 1985), *cert. denied,* 479 U.S. 962 (1986), on the same ground.)

B. "*Pennhurst* Lite:" The Contention That This Court's Decision in *Pennhurst* Controls the Disposition of This Case.

Petitioners contend that reversal of the decision below follows *a fortiori* from the decision in *Pennhurst,* which

construed the "bill of rights" provision of the DD Act as not imposing an enforceable obligation upon states to treat mentally retarded persons in the setting that is least restrictive of their personal liberty. (Pet. Br. 33-35). That contention overlooks the critical differences between the statutes in the two cases, as well as the changes in the funding of mental disability services and in the legislative climate in the fifteen years between enactment of the DD Act and the ADA.

The statute in *Pennhurst* was a spending statute. The funds made available were quite small, in relation to the overall cost of treating mentally retarded persons. The Court found "[n]oticeably absent from" the bill of rights in the DD Act "any language suggesting that [the furnishing of those rights] is a 'condition' for the receipt of federal funding." 451 U.S. at 13.

The Court concluded that the bill was predicated solely on the Spending Clause, and applied only to States that elected to receive the funds proffered in exchange for agreeing to accept the conditions imposed by the statute for such receipt. *Id.* at 15-16, 18-19. Such legislation, the Court explained, is quite different from traditional regulatory legislation, and "is much in the nature of a contract." *Id.* at 17. This requires a particular mode of interpretation to protect the voluntary nature of the State's participation:

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a State is unaware of the condition or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on

> the grant of federal moneys, it must do so unambiguously. [*Id.* at 17.] [56]

The Court concluded, from the precatory nature of the language in the bill of rights, that it was merely an expression of considerations that justified and supported Congress' appropriation of money under the Act, and as such was "hortatory, not mandatory." *Id.* at 24.

The Court was reinforced in this intrepretation by other considerations. First, the Secretary of HEW, the agency responsible for administering the statute, "has specifically rejected the position of the Solicitor General" that the bill of rights is mandatory. *Id.* at 23. Second, the Court thought it unlikely that Congress would mandate so compelling an obligation while proffering so small a portion of the cost:

> The fact that Congress granted to Pennsylvania only $1.6 million in 1976, a sum woefully inadequate to meet the enormous financial burden of providing "appropriate" treatment in the "least restrictive" setting, confirms that Congress must have had a limited purpose in enacting [the bill of rights]. When Congress does impose affirmative obligations on the States, it usually makes a far more substantial contribution to defray costs. . . . [*Id.* at 24.]

Every one of the considerations cited by this Court in *Pennhurst* as important to its decision cuts in the opposite direction here. Title II of the ADA is not an exercise of Congress' spending power, but a mandatory obligation imposed upon all public entities. Its language is not hortatory, but mandatory. The agency charged by Congress with responsibility to interpret and enforce the statute is

---

[56] See also, *Cedar Rapids Community School District v. Garret F.* No. 96-1793, 1999 WL 104410 (U.S. Mar. 3, 1999) (dissenting opinion of Justice Thomas, joined by Justice Kennedy) ("special rules of construction" for statutes "enacted pursuant to Congress' spending power").

in complete accord with the interpretation of the court below. And, Congress has assumed the lion's share of the cost.

C. "The Sky Is Falling:" The Contention That Congress Could Not Have Intended, Without Clearer Articulation, to Have Imposed on the States Massive Fiscal and Administrative Burdens.

Petitioners, and more emphatically the dwindling minority of states appearing as *amici curiae* in Petitioners' support,[57] conjure up enormous costs that would attend the interpretation reached by the court below. This, they suggest, could not have been what Congress intended, and points against a literal interpretation of the "most integrated setting" requirement. There are two discrete answers to this contention.

1. First, the massive costs prophesized are nonexistent, and Congress knew that when it enacted the ADA. There was, by 1990, overwhelming evidence that it is much less costly to provide mental disability services in the community than in institutions (as well as virtually unanimous professional opinion that treatment is better when provided in the community). Congress knew this well; indeed, it was what prompted Congress to amend the Medicaid program in 1981 and 1986 and thereby assume the primary burden of the costs of providing mental disability services in the community. See pp. 3-4, *supra*. The cost advantages of providing mental disability services in the community, and the knowledge thereof in 1990, are described at length in the Brief *Amici Curiae* of Former State Commissioners. See also, pp. 3-4, *supra*.

---

[57] The "sky is falling" tone of the states' brief is particularly curious, as, with the exception of one case in Montana, all of the pending cases it describes are from states that elected not to join the brief.

Because it is so much cheaper to do so, the vast majority of states have reallocated major portions of their mental health budgets to expanding community services and closing or downsizing institutions. See, Brief *Amici Curiae* of Former State Commissioners.

To be sure, a handful of states, including Georgia, have dragged their heels. The reasons for that have nothing to do with the quality of treatment and/or the relative costs of providing it in institutions or the community. Instead, they have everything to do with politics. There are strong forces resisting the move to community service, out of self-interest and/or antipathy to those with disabilities:

The Former State Commissioners' brief cites the heavy lobbying of unions representing employees in institutions. So here, the record shows that Georgia officials have hesitated to eliminate jobs in institutions. See p. 10, *supra.*

The Commissioners also note the self-interest of the officials who run these institutions, who are reluctant to surrender their turf. So here, the administrators' avowed mission was to " 'staff' the beds" in the institution. See p. 10, *supra.*

The interests mentioned so far are understandable, but they are not reasons for segregating persons whose disabilities do not require segregation. This Nation would not tolerate the continued imprisonment of persons known to be innocent, out of concern for jobs and administrative prerogatives. Nor did the economic advantages that accrued from slavery serve as justification for resisting the Thirteenth Amendment. The ADA's conferral of civil rights upon the disabled makes those interests equally irrelevant as justifications for resisting desegregation here.

But the reasons for heel-dragging in the holdout states include other less worthy considerations. As the Former State Commissioners note, and as this Court recognized in *Cleburne*, there are elements of the citizenry who pre-

fer the states' former policy of segregating persons with mental disabilities.[58] And, as the record of this case shows in abundance, bureaucratic indifference and ignorance has contributed to the unnecessary isolation of the mentally disabled in institutions. See pp. 6, 9-10, *supra.*

Costs are a pretext voiced in the courts by states seeking to delay compliance with the ADA. That they are pretextual is evidenced by the fact that the same state officials acknowledge in non-judicial settings the very opposite of what they proclaim in their brief *amici curiae* here. See pp. 10-11, *supra*; and see Brief *Amici Curiae* of American Ass'n on Mental Retardation *et al.*

2. Assuming, arguendo, that in a particular case (unlike this one) a state would have to incur increased costs to provide treatment in the community to a person who could appropriately be served there, the ADA contains provisions that would allow the court to consider the burden upon the state, and, where undue, to adjust relief to address it.

Congress clearly contemplated that states might have to absorb some additional costs to achieve compliance with Title II, especially costs of a transitional nature.[59] That is an inevitable consequence of superimposing a ban on impermissible discrimination upon a regime that was constructed in an era of discrimination and neglect.

However, Congress took precautions in the statute to protect public entities against burdens that would be undue, as the court below held. See pp. 12-13, *supra.*

---

[58] These political problems were also identified by Kathryn Power, quoted in one of the briefs supporting petitioners. NCSL Brief, at 3a.

[59] Senator Hatch observed that the ADA would "impose a lot of expenses and rightly so . . . It is time we brought persons with disabilities into full freedom, economic and otherwise, with other citizens in our society. This bill will do that. In doing so, we should be aware that it is going to be costly . . . ." 135 Cong. Rec. 19835 (1989).

Petitioners chose not to ask this Court to review the Eleventh Circuit's articulation of the defense afforded them, and, in these circumstances, it would be premature to explore the precise dimensions of the defense that public entities enjoy. Petitioners, of course, will be free to pursue that question further in their pending appeal from the district court's decision on remand, although the record in this case affords them little comfort no matter how that defense is ultimately defined.

D. Avoiding Constitutional Questions.

This Court limited its grant of certiorari to the issue of statutory interpretation. Petitioners nonetheless revive their constitutional claim by urging this Court to reject the construction below to avoid the constitutional question.

The asserted constitutional difficulty is a non-starter. The findings made by Congress, compiled after extensive hearings, identify a wide spectrum of discriminatory practices visited by public entities upon persons with disabilities, including isolation and segregation in mental institutions. This Court recognized in *Cleburne* that eliminating discrimination against persons with mental disabilities is an appropriate topic for remediation under the Equal Protection Clause.

Moreover, Congress also predicated the ADA upon the Commerce Clause, see § 2(b)(4), finding that discrimination against those with disabilities precludes their access to the community, depriving the economy of their working potential and their patronage. The ADA's most integrated setting requirement—which has as its declared purpose bringing persons with disabilities into "the economic and social mainstream of American life" (see p. 28, *supra*) is surely within Congress' power under the Commerce Clause.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

SUSAN C. JAMIESON
ATLANTA LEGAL AID SOCIETY
246 Sycamore Street
Suite 120
Decatur, Georgia 30030
(404) 377-0701

DAVID A. WEBSTER
300 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
(404) 681-3070

MICHAEL H. GOTTESMAN
Counsel of Record
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9482

STEVEN D. CALEY
LEGAL AID SERVICES OF OREGON
700 S.W. Taylor
Suite 300
Portland, Oregon 97205
(503) 471-1126

APPENDIX

ADDITIONAL STATUTORY AND REGULATORY PROVISIONS

Section 2 of the Americans with Disabilities Act, 42 USC § 12101, provides:

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—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;

(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;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, in-

cluding 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;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to com-

pete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) PURPOSE.—It is the purpose of this Act—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

28 CFR § 35.130 provides:

§ 35.130 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of 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 public entity.

(b) (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right,

privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections—

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, pro-

gram, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

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

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to

individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

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

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an inidvidual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.