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Disabilities-Supreme Court Cases

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## DISABILITY CASES: ADA

9/15

### I. CASES

Cases post Sutton v. Murphy

Discrimination occurs because there is a record of a disability and the employer ~~will~~ thinks it may arise in the future again.

Justice has a working group of outside groups to educate members and courts - to look for cases that will help explain that people are still eligible.

EEOC - Centralized a decision making process on how to deal with these cases. Their feeling is that policy push should not be too hard because the Court has sent a message that they want to lead.

### II What is Our Litigation Strategy

Sutton - you are disabled unless mitigating circumstances can substantially impact underlying conditions.

EEOC - wants to develop conditions like diabetes or epilepsy cases b/c you can take medicine and control but there are still limited conditions.

Justice - Our strategy should be to educate the courts - maybe by using top govt experts - with etc.

EEOC has "instructions to the field" message was that Sutton has not eliminated definition of disability - it discussed what type of medical evidence should be developed.

Message - Eddy will craft

1. We are watching what courts are doing
2. We are trying to educate the courts
3. Try to protect the principles of ADA

1999 WL 407488 (U.S.)

(Publication page references are not available for this document.)

**KAREN SUTTON and KIMBERLY HINTON,  
PETITIONERS**

**v.**

**UNITED AIR LINES, INC.**

**No. 97-1943**

United States Supreme Court.

Argued April 28, 1999

Decided June 22, 1999

Syllabus [FN\*]

FN\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

Petitioners, severely myopic twin sisters, have uncorrected visual acuity of 20/200 or worse, but with corrective measures, both function identically to individuals without similar impairments. They applied to respondent, a major commercial airline carrier, for employment as commercial airline pilots but were rejected because they did not meet respondent's minimum requirement of uncorrected visual acuity of 20/100 or better. Consequently, they filed suit under the Americans with Disabilities Act of 1990 (ADA), which prohibits covered employers from discriminating against individuals on the basis of their disabilities. Among other things, the ADA defines a 'disability' as 'a physical or mental impairment that substantially limits one or more ... major life activities,' 42 U. S. C. § 12102(2)(A), or as 'being regarded as having such an impairment,' §12102(2)(C). The District Court dismissed petitioners' complaint for failure to state a claim upon which relief could be granted. The court held that petitioners were not actually disabled under subsection (A) of the disability definition because they could fully correct their visual impairments. The court also determined that petitioners were not 'regarded' by respondent as disabled under subsection (C) of this definition. Petitioners had alleged only that respondent regarded them as unable to satisfy the requirements of a particular job, global airline pilot. These allegations were insufficient to state a claim that petitioners were regarded as

substantially limited in the major life activity of working. Employing similar logic, the Tenth Circuit affirmed.

Held: Petitioners have not alleged that they are 'disabled' within the ADA's meaning. Pp. 4-21.

(a) No agency has been delegated authority to interpret the term 'disability' as it is used in the ADA. The EEOC has, nevertheless, issued regulations that, among other things, define 'physical impairment' to mean '[a]ny physiological disorder . . . affecting . . . special sense organs,' 'substantially limits' to mean '[u]nable to perform a major life activity that the average person in the general population can perform,' and '[m]ajor [l]ife [a]ctivities [to] mea[n] functions such as . . . working.' Because both parties accept these regulations as valid, and determining their validity is not necessary to decide this case, the Court has no occasion to consider what deference they are due, if any. The EEOC and the Justice Department have also issued interpretive guidelines providing that the determination whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as assistive or prosthetic devices. Although the parties dispute the guidelines' persuasive force, the Court has no need in this case to decide what deference is due. Pp. 4-7.

(b) Petitioners have not stated a §12102(2)(A) claim that they have an actual physical impairment that substantially limits them in one or more major life activities. Three separate ADA provisions, read in concert, lead to the conclusion that the determination whether an individual is disabled should be made with reference to measures, such as eyeglasses and contact lenses, that mitigate the individual's impairment, and that the approach adopted by the agency guidelines is an impermissible interpretation of the ADA. First, because the phrase 'substantially limits' appears in subsection (A) in the present indicative verb form, the language is properly read as requiring that a person be presently--not potentially or hypothetically--substantially limited in order to demonstrate a disability. A 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if corrective measures were not

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taken. Second, because subsection (A) requires that disabilities be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limits the individual's 'major life activities,' the question whether a person has a disability under the ADA is an individualized inquiry. See *Bragdon v. Abbott*, 524 U. S. 624, 641-642. The guidelines' directive that persons be judged in their uncorrected or unmitigated state runs directly counter to this mandated individualized inquiry. The former would create a system in which persons would often be treated as members of a group having similar impairments, rather than as individuals. It could also lead to the anomalous result that courts and employers could not consider any negative side effects suffered by the individual resulting from the use of mitigating measures, even when those side effects are very severe. Finally, and critically, the Congressional finding that 43 million Americans have one or more physical or mental disabilities, see §12101(a)(1), requires the conclusion that Congress did not intend to bring under the ADA's protection all those whose uncorrected conditions amount to disabilities. That group would include more than 160 million people. Because petitioners allege that with corrective measures their vision is 20/20 or better, they are not actually disabled under subsection (A). Pp. 7-15.

(c) Petitioners have also failed to allege properly that they are 'regarded as,' see §12101(2)(C), having an impairment that 'substantially limits' a major life activity, see §12102(2)(A). Generally, these claims arise when an employer mistakenly believes that an individual has a substantially limiting impairment. To support their claims, petitioners allege that respondent has an impermissible vision requirement that is based on myth and stereotype and that respondent mistakenly believes that, due to their poor vision, petitioners are unable to work as 'global airline pilots' and are thus substantially limited in the major life activity of working. Creating physical criteria for a job, without more, does not violate the ADA. The ADA allows employers to prefer some physical attributes over others, so long as those attributes do not rise to the level of substantially limiting impairments. An employer is free to decide that physical characteristics or medical conditions that are not impairments are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals

less than ideally suited for a job. In addition, petitioners have not sufficiently alleged that they are regarded as substantially limited in the major life activity of working. When the major life activity under consideration is that of working, the ADA requires, at least, that one's ability to work be significantly reduced. The EEOC regulations similarly define 'substantially limits' to mean significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The Court assumes without deciding that work is a major life activity and that this regulation is reasonable. It observes, however, that defining 'major life activities' to include work has the potential to make the ADA circular. Assuming work is a major life activity, the Court finds that petitioners' allegations are insufficient because the position of global airline pilot is a single job. Indeed, a number of other positions utilizing petitioners' skills, such as regional pilot and pilot instructor, are available to them. The Court also rejects petitioners' argument that they would be substantially limited in their ability to work if it is assumed that a substantial number of airlines have vision requirements similar to respondent's. This argument is flawed because it is not enough to say that if the otherwise permissible physical criteria or preferences of a single employer were imputed to all similar employers one would be regarded as substantially limited in the major life activity of working only as a result of this imputation. Rather, an employer's physical criteria are permissible so long as they do not cause the employer to make an employment decision based on an impairment, real or imagined, that it regards as substantially limiting a major life activity. Petitioners have not alleged, and cannot demonstrate, that respondent's vision requirement reflects a belief that their vision substantially limits them. Pp. 15-21.

130 F. 3d 893, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. GINSBURG, J., filed a concurring opinion. STEVENS, J., filed a dissenting opinion, in which BREYER, J., joined. BREYER, J., filed a dissenting opinion.

(Publication page references are not available for this document.)

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

JUSTICE O'CONNOR delivered the opinion of the Court.

The Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 328, 42 U. S. C. §12101 et seq., prohibits certain employers from discriminating against individuals on the basis of their disabilities. See §12112(a). Petitioners challenge the dismissal of their ADA action for failure to state a claim upon which relief can be granted. We conclude that the complaint was properly dismissed. In reaching that result, we hold that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment, including, in this instance, eyeglasses and contact lenses. In addition, we hold that petitioners failed to allege properly that respondent 'regarded' them as having a disability within the meaning of the ADA.

I

Petitioners' amended complaint was dismissed for failure to state a claim upon which relief could be granted. See Fed. Rule Civ. Proc. 12(b)(6). Accordingly, we accept the allegations contained in their complaint as true for purposes of this case. See *United States v. Gaubert*, 499 U. S. 315, 327 (1991).

Petitioners are twin sisters, both of whom have severe myopia. Each petitioner's uncorrected visual acuity is 20/200 or worse in her right eye and 20/400 or worse in her left eye, but '[w]ith the use of corrective lenses, each ... has vision that is 20/20 or better.' App. 23. Consequently, without corrective lenses, each 'effectively cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores,' id., at 24, but with corrective measures, such as glasses or contact lenses, both 'function identically to individuals without a similar impairment,' ibid.

In 1992, petitioners applied to respondent for employment as commercial airline pilots. They met respondent's basic age, education, experience, and FAA certification qualifications. After submitting their applications for employment, both petitioners

were invited by respondent to an interview and to flight simulator tests. Both were told during their interviews, however, that a mistake had been made in inviting them to interview because petitioners did not meet respondent's minimum vision requirement, which was uncorrected visual acuity of 20/100 or better. Due to their failure to meet this requirement, petitioners' interviews were terminated, and neither was offered a pilot position.

In light of respondent's proffered reason for rejecting them, petitioners filed a charge of disability discrimination under the ADA with the Equal Employment Opportunity Commission (EEOC). After receiving a right to sue letter, petitioners filed suit in the United States District Court for the District of Colorado, alleging that respondent had discriminated against them 'on the basis of their disability, or because [respondent] regarded [petitioners] as having a disability' in violation of the ADA. App. 26. Specifically, petitioners alleged that due to their severe myopia they actually have a substantially limiting impairment or are regarded as having such an impairment, see id., at 23-26, and are thus disabled under the Act.

The District Court dismissed petitioners' complaint for failure to state a claim upon which relief could be granted. See Civ. A. No. 96-5-121 (Aug. 28, 1996), App. to Pet. for Cert. A-27. Because petitioners could fully correct their visual impairments, the court held that they were not actually substantially limited in any major life activity and thus had not stated a claim that they were disabled within the meaning of the ADA. Id., at A-32 to A-36. The court also determined that petitioners had not made allegations sufficient to support their claim that they were 'regarded' by the respondent as having an impairment that substantially limits a major life activity. Id., at A-36 to A-37. The court observed that '[t]he statutory reference to a substantial limitation indicates ... that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved.' Id., at A36 to A37. But petitioners had alleged only that respondent regarded them as unable to satisfy the requirements of a particular job, global airline pilot. Consequently, the court held that petitioners had not stated a claim that they were regarded as

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substantially limited in the major life activity of working. Employing similar logic, the Court of Appeals for the Tenth Circuit affirmed the District Court's judgment. 130 F. 3d 893 (1997).

The Tenth Circuit's decision is in tension with the decisions of other Courts of Appeals. See, e.g., *Bartlett v. New York State Bd. of Law Examiners*, 156 F. 3d 321, 329 (CA2 1998) (holding self-accommodations cannot be considered when determining a disability), cert. pending, No. 98-1285; *Baert v. Euclid Beverage, Ltd.*, 149 F. 3d 626, 629-630 (CA7 1998) (holding disabilities should be determined without reference to mitigating measures); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F. 3d 933, 937-938 (CA3 1997) (same); *Arnold v. United Parcel Service, Inc.*, 136 F. 3d 854, 859-866 (CA1 1998) (same); see also *Washington v. HCA Health Servs. of Texas, Inc.*, 152 F. 3d 464, 470-471 (CA5 1998) (holding that only some impairments should be evaluated in their uncorrected state), cert. pending, No. 98-1365. We granted certiorari, 525 U. S. \_\_\_\_ (1999), and now affirm.

## II

The ADA prohibits discrimination by covered entities, including private employers, against qualified individuals with a disability. Specifically, it provides that no covered employer 'shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.' 42 U. S. C. §12112(a); see also §12111(2) ('The term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee'). A 'qualified individual with a disability' is identified as 'an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.' §12111(8). In turn, a 'disability' is defined as:

- '(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- '(B) a record of such an impairment; or
- '(C) being regarded as having such an

impairment.' §12102(2).

Accordingly, to fall within this definition one must have an actual disability (subsection (A)), have a record of a disability (subsection (B)), or be regarded as having one (subsection (C)).

The parties agree that the authority to issue regulations to implement the Act is split primarily among three Government agencies. According to the parties, the EEOC has authority to issue regulations to carry out the employment provisions in Title I of the ADA, §§12111-12117, pursuant to § 12116 ('Not later than 1 year after [the date of enactment of this Act], the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5'). The Attorney General is granted authority to issue regulations with respect to Title II, subtitle A, §§12131-12134, which relates to public services. See §12134 ('Not later than 1 year after [the date of enactment of this Act], the Attorney General shall promulgate regulations in an accessible format that implement this part '). Finally, the Secretary of Transportation has authority to issue regulations pertaining to the transportation provisions of Titles II and III. See § 12149(a) ('Not later than 1 year after [the date of enactment of this Act], the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart (other than section 12143 of this title)'); § 12164 (substantially same); §12186(a)(1) (substantially same); §12143(b) ('Not later than one year after [the date of enactment of this Act], the Secretary shall issue final regulations to carry out this section '). See also §12204 (granting authority to the Architectural and Transportation Barriers Compliance Board to issue minimum guidelines to supplement the existing Minimum Guidelines and Requirements for Accessible Design). Moreover, each of these agencies is authorized to offer technical assistance regarding the provisions they administer. See §12206(c)(1) ('Each Federal agency that has responsibility under paragraph (2) for implementing this chapter may render technical assistance to individuals and institutions that have rights or duties under the respective subchapter or subchapters of this chapter for which such agency has responsibility').

No agency, however, has been given authority to

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issue regulations implementing the generally applicable provisions of the ADA, see §§ 12101-12102, which fall outside Titles I-V. Most notably, no agency has been delegated authority to interpret the term 'disability.' §12102(2). JUSTICE BREYER'S contrary, imaginative interpretation of the Act's delegation provisions, see post, at 1- 2 (dissenting opinion), is belied by the terms and structure of the ADA. The EEOC has, nonetheless, issued regulations to provide additional guidance regarding the proper interpretation of this term. After restating the definition of disability given in the statute, see 29 CFR §1630.2(g) (1998), the EEOC regulations define the three elements of disability: (1) 'physical or mental impairment,' (2) 'substantially limits,' and (3) 'major life activities.' See id., at §§1630.2(h)-(j). Under the regulations, a 'physical impairment' includes '[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito- urinary, hemic and lymphatic, skin, and endocrine.' §1630.2(h)(1). The term 'substantially limits' means, among other things, '[u]nable to perform a major life activity that the average person in the general population can perform;' or '[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.' §1630.2(j). Finally, '[m]ajor [l]ife [a]ctivities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.' §1630.2(i). Because both parties accept these regulations as valid, and determining their validity is not necessary to decide this case, we have no occasion to consider what deference they are due, if any.

The agencies have also issued interpretive guidelines to aid in the implementation of their regulations. For instance, at the time that it promulgated the above regulations, the EEOC issued an 'Interpretive Guidance,' which provides that '[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to

mitigating measures such as medicines, or assistive or prosthetic devices.' 29 CFR pt. 1630, App. § 1630.2(j) (1998) (describing § 1630.2(j)). The Department of Justice has issued a similar guideline. See 28 CFR pt. 35, App. A, §35.104 ('The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services'); pt. 36, App. B, §36.104 (same). Although the parties dispute the persuasive force of these interpretive guidelines, we have no need in this case to decide what deference is due.

### III

With this statutory and regulatory framework in mind, we turn first to the question whether petitioners have stated a claim under subsection (A) of the disability definition, that is, whether they have alleged that they possess a physical impairment that substantially limits them in one or more major life activities. See 42 U. S. C. §12102(2)(A). Because petitioners allege that with corrective measures their vision 'is 20/20 or better,' see App. 23, they are not actually disabled within the meaning of the Act if the 'disability' determination is made with reference to these measures. Consequently, with respect to subsection (A) of the disability definition, our decision turns on whether disability is to be determined with or without reference to corrective measures.

Petitioners maintain that whether an impairment is substantially limiting should be determined without regard to corrective measures. They argue that, because the ADA does not directly address the question at hand, the Court should defer to the agency interpretations of the statute, which are embodied in the agency guidelines issued by the EEOC and the Department of Justice. These guidelines specifically direct that the determination of whether an individual is substantially limited in a major life activity be made without regard to mitigating measures. See 29 CFR pt. 1630, App. § 1630.2(j); 28 CFR pt. 35, App. A, §35.104 (1998); 28 CFR pt. 36, App. B, §36.104.

Respondent, in turn, maintains that an impairment does not substantially limit a major life activity if it is corrected. It argues that the Court should not defer to the agency guidelines cited by petitioners

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because the guidelines conflict with the plain meaning of the ADA. The phrase 'substantially limits one or more major life activities,' it explains, requires that the substantial limitations actually and presently exist. Moreover, respondent argues, disregarding mitigating measures taken by an individual defies the statutory command to examine the effect of the impairment on the major life activities 'of such individual.' And even if the statute is ambiguous, respondent claims, the guidelines' directive to ignore mitigating measures is not reasonable, and thus this Court should not defer to it.

We conclude that respondent is correct that the approach adopted by the agency guidelines--that persons are to be evaluated in their hypothetical uncorrected state--is an impermissible interpretation of the ADA. Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures--both positive and negative--must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act. The dissent relies on the legislative history of the ADA for the contrary proposition that individuals should be examined in their uncorrected state. See post, at 10-18 (opinion of STEVENS, J.). Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history.

Three separate provisions of the ADA, read in concert, lead us to this conclusion. The Act defines a 'disability' as 'a physical or mental impairment that substantially limits one or more of the major life activities' of an individual. §12102(2)(A) (emphasis added). Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is properly read as requiring that a person be presently--not potentially or hypothetically--substantially limited in order to demonstrate a disability. A 'disability' exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity. To be sure, a person whose physical or mental

impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not 'substantially limi[t]' a major life activity.

The definition of disability also requires that disabilities be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limits the 'major life activities of such individual.' §12102(2). Thus, whether a person has a disability under the ADA is an individualized inquiry. See *Bragdon v. Abbott*, 524 U. S. 624, \_\_\_\_ (1998) (declining to consider whether HIV infection is a per se disability under the ADA); 29 CFR pt. 1630, App. §1630.2(j) ('The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual').

The agency guidelines' directive that persons be judged in their uncorrected or unmitigated state runs directly counter to the individualized inquiry mandated by the ADA. The agency approach would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition. For instance, under this view, courts would almost certainly find all diabetics to be disabled, because if they failed to monitor their blood sugar levels and administer insulin, they would almost certainly be substantially limited in one or more major life activities. A diabetic whose illness does not impair his or her daily activities would therefore be considered disabled simply because he or she has diabetes. Thus, the guidelines approach would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals. This is contrary to both the letter and the spirit of the ADA.

The guidelines approach could also lead to the anomalous result that in determining whether an individual is disabled, courts and employers could not consider any negative side effects suffered by an individual resulting from the use of mitigating measures, even when those side effects are very

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severe. See, e.g., Johnson, *Antipsychotics: Pros and Cons of Antipsychotics*, RN (Aug. 1997) (noting that antipsychotic drugs can cause a variety of adverse effects, including neuroleptic malignant syndrome and painful seizures); Liver Risk Warning Added to Parkinson's Drug, FDA Consumer (Mar. 1, 1999) (warning that a drug for treating Parkinson's disease can cause liver damage); Curry & Kulling, *Newer Antiepileptic Drugs*, American Family Physician (Feb. 1, 1998) (cataloging serious negative side effects of new antiepileptic drugs). This result is also inconsistent with the individualized approach of the ADA.

Finally, and critically, findings enacted as part of the ADA require the conclusion that Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities. Congress found that '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.' § 12101(a)(1). This figure is inconsistent with the definition of disability pressed by petitioners.

Although the exact source of the 43 million figure is not clear, the corresponding finding in the 1988 precursor to the ADA was drawn directly from a report prepared by the National Council on Disability. See Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second- Generation Civil Rights Statute*, 26 Harv. Civ. Rights-Civ. Lib. L. Rev. 413, 434, n. 117 (1991) (reporting, in an article authored by the drafter of the original ADA bill introduced in Congress in 1988, that the report was the source for a figure of 36 million disabled persons quoted in the versions of the bill introduced in 1988). That report detailed the difficulty of estimating the number of disabled persons due to varying operational definitions of disability. National Council on Disability, *Toward Independence* 10 (1986). It explained that the estimates of the number of disabled Americans ranged from an overinclusive 160 million under a 'health conditions approach,' which looks at all conditions that impair the health or normal functional abilities of an individual, to an underinclusive 22.7 million under a 'work disability approach,' which focuses on individuals' reported ability to work. *Id.*, at 10-11. It noted that 'a figure of 35 or 36 million [was] the most commonly quoted estimate.' *Id.*, at 10. The 36 million number

included in the 1988 bill's findings thus clearly reflects an approach to defining disabilities that is closer to the work disabilities approach than the health conditions approach.

This background also provides some clues to the likely source of the figure in the findings of the 1990 Act. Roughly two years after issuing its 1986 report, the National Council on Disability issued an updated report. See *On the Threshold of Independence* (1988). This 1988 report settled on a more concrete definition of disability. It stated that 37.3 million individuals have 'difficulty performing one or more basic physical activities,' including 'seeing, hearing, speaking, walking, using stairs, lifting or carrying, getting around outside, getting around inside, and getting into or out of bed.' *Id.*, at 19. The study from which it drew this data took an explicitly functional approach to evaluating disabilities. See U. S. Dept. of Commerce, Bureau of Census, *Disability, Functional Limitation, and Health Insurance Coverage: 1984/85*, p. 2 (1986). It measured 37.3 million persons with a 'functional limitation' on performing certain basic activities when using, as the questionnaire put it, 'special aids,' such as glasses or hearing aids, if the person usually used such aids. *Id.*, at 1, 47. The number of disabled provided by the study and adopted in the 1988 report, however, includes only noninstitutionalized persons with physical disabilities who are over age 15. The 5.7 million gap between the 43 million figure in the ADA's findings and the 37.3 million figure in the report can thus probably be explained as an effort to include in the findings those who were excluded from the National Council figure. See, e.g., National Institute on Disability and Rehabilitation Research, *Data on Disability from the National Health Interview Survey 1983-1985*, pp. 61-62 (1988) (finding approximately 943,000 noninstitutionalized persons with an activity limitation due to mental illness; 947,000 noninstitutionalized persons with an activity limitation due to mental retardation; 1,900,000 noninstitutionalized persons under 18 with an activity limitation); U. S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States* 106 (1989) (Table 168) (finding 1,553,000 resident patients in nursing and related care facilities (excluding hospital-based nursing homes) in 1986).

Regardless of its exact source, however, the 43

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million figure reflects an understanding that those whose impairments are largely corrected by medication or other devices are not 'disabled' within the meaning of the ADA. The estimate is consistent with the numbers produced by studies performed during this same time period that took a similar functional approach to determining disability. For instance, Mathematica Policy Research, Inc., drawing on data from the National Center for Health Statistics, issued an estimate of approximately 31.4 million civilian noninstitutionalized persons with 'chronic activity limitation status' in 1979. Digest of Data on Persons with Disabilities 25 (1984). The 1989 Statistical Abstract offered the same estimate based on the same data, as well as an estimate of 32.7 million noninstitutionalized persons with 'activity limitation' in 1985. Statistical Abstract, *supra*, at 115 (Table 184). In both cases, individuals with 'activity limitations' were those who, relative to their age-sex group could not conduct 'usual' activities: e.g., attending preschool, keeping house, or living independently. See National Center for Health Statistics, U. S. Dept. of Health and Human Services, Vital and Health Statistics, Current Estimates from the National Health Interview Survey, 1989, Series 10, pp. 7-8 (1990).

By contrast, nonfunctional approaches to defining disability produce significantly larger numbers. As noted above, the 1986 National Council on Disability report estimated that there were over 160 million disabled under the 'health conditions approach.' Toward Independence, *supra*, at 10; see also Mathematica Policy Research, *supra*, at 3 (arriving at similar estimate based on same Census Bureau data). Indeed, the number of people with vision impairments alone is 100 million. See National Advisory Eye Council, U. S. Dept. of Health and Human Services, Vision Research--A National Plan: 1999-2003, p. 7 (1998) ('[M]ore than 100 million people need corrective lenses to see properly'). 'It is estimated that more than 28 million Americans have impaired hearing.' National Institutes of Health, National Strategic Research Plan: Hearing and Hearing Impairment v (1996). And there were approximately 50 million people with high blood pressure (hypertension). Tindall, Stalking a Silent Killer; Hypertension, Business & Health 37 (August 1998) ('Some 50 million Americans have high blood pressure').

Because it is included in the ADA's text, the

finding that 43 million individuals are disabled gives content to the ADA's terms, specifically the term 'disability.' Had Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings. That it did not is evidence that the ADA's coverage is restricted to only those whose impairments are not mitigated by corrective measures.

The dissents suggest that viewing individuals in their corrected state will exclude from the definition of 'disab[led]' those who use prosthetic limbs, see post, at 3-4 (opinion of STEVENS, J.), post, at 1 (opinion of BREYER, J.), or take medicine for epilepsy or high blood pressure, see post, at 14, 16 (opinion of STEVENS, J.). This suggestion is incorrect. The use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability under subsection A if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity. For example, individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run. The same may be true of individuals who take medicine to lessen the symptoms of an impairment so that they can function but nevertheless remain substantially limited. Alternatively, one whose high blood pressure is 'cured' by medication may be regarded as disabled by a covered entity, and thus disabled under subsection C of the definition. The use or nonuse of a corrective device does not determine whether an individual is disabled; that determination depends on whether the limitations an individual with an impairment actually faces are in fact substantially limiting.

Applying this reading of the Act to the case at hand, we conclude that the Court of Appeals correctly resolved the issue of disability in respondent's favor. As noted above, petitioners allege that with corrective measures, their visual acuity is 20/20, App. 23, Amended Complaint ¶ 36, and that they 'function identically to individuals without a similar impairment,' *id.*, at 24, Amended Complaint ¶ 37e. In addition, petitioners concede that they 'do not argue that the use of corrective lenses in itself demonstrates a substantially limiting impairment.' Brief for

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Petitioners 9, n. 11. Accordingly, because we decide that disability under the Act is to be determined with reference to corrective measures, we agree with the courts below that petitioners have not stated a claim that they are substantially limited in any major life activity.

#### IV

Our conclusion that petitioners have failed to state a claim that they are actually disabled under subsection (A) of the disability definition does not end our inquiry. Under subsection (C), individuals who are 'regarded as' having a disability are disabled within the meaning of the ADA. See § 12102(2)(C). Subsection (C) provides that having a disability includes 'being regarded as having,' § 12102(2)(C), 'a physical or mental impairment that substantially limits one or more of the major life activities of such individual,' §12102(2)(A). There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual--it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting. These misperceptions often 'resul[t] from stereotypic assumptions not truly indicative of ... individual ability.' See 42 U. S. C. §12101(7). See also *School Bd. of Nassau Cty. v. Arline*, 480 U. S. 273, 284 (1987) ('By amending the definition of 'handicapped individual' to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment'); 29 CFR pt. 1630, App. § 1630.2(l) (explaining that the purpose of the regarded as prong is to cover individuals 'rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities').

There is no dispute that petitioners are physically

impaired. Petitioners do not make the obvious argument that they are regarded due to their impairments as substantially limited in the major life activity of seeing. They contend only that respondent mistakenly believes their physical impairments substantially limit them in the major life activity of working. To support this claim, petitioners allege that respondent has a vision requirement, which is allegedly based on myth and stereotype. Further, this requirement substantially limits their ability to engage in the major life activity of working by precluding them from obtaining the job of global airline pilot, which they argue is a 'class of employment.' See App. 24-26, Amended Complaint ¶38. In reply, respondent argues that the position of global airline pilot is not a class of jobs and therefore petitioners have not stated a claim that they are regarded as substantially limited in the major life activity of working.

Standing alone, the allegation that respondent has a vision requirement in place does not establish a claim that respondent regards petitioners as substantially limited in the major life activity of working. See Post-Argument Brief for Respondent 2-3 (advancing this argument); Post-Argument Brief for the United States et al. as Amici Curiae 5-6 ('[U]nder the EEOC's regulations, an employer may make employment decisions based on physical characteristics'). By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical criteria. An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity. Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment--such as one's height, build, or singing voice--are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job.

Considering the allegations of the amended complaint in tandem, petitioners have not stated a claim that respondent regards their impairment as substantially limiting their ability to work. The ADA does not define 'substantially limits,' but 'substantially' suggests 'considerable' or 'specified to a large degree.' See Webster's Third New International Dictionary 2280 (1976) (defining

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'substantially' as 'in a substantial manner' and 'substantial' as 'considerable in amount, value, or worth' and 'being that specified to a large degree or in the main'); see also 17 Oxford English Dictionary 66-67 (2d ed. 1989) ('substantial': '[r]elating to or proceeding from the essence of a thing; essential'; 'of ample or considerable amount, quantity or dimensions'). The EEOC has codified regulations interpreting the term 'substantially limits' in this manner, defining the term to mean '[u]nable to perform' or '[s]ignificantly restricted.' See 29 CFR §§1630.2(j)(1)(i), (ii) (1998)

When the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs. Reflecting this requirement, the EEOC uses a specialized definition of the term 'substantially limits' when referring to the major life activity of working:

'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.' §1630.2(j)(3)(i).

The EEOC further identifies several factors that courts should consider when determining whether an individual is substantially limited in the major life activity of working, including the geographical area to which the individual has reasonable access, and 'the number and types of jobs utilizing similar training, knowledge, skills or abilities, within the geographical area, from which the individual is also disqualified.' §§1630.2(j)(3)(ii)(A), (B). To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.

Because the parties accept that the term 'major life activities' includes working, we do not determine the validity of the cited regulations. We note, however, that there may be some conceptual difficulty in defining 'major life activities' to include

work, for it seems 'to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap.' Tr. of Oral Arg. in *School Bd. of Nassau Co. v. Arline*, O. T. 1986, No. 85-1277, p. 15 (argument of Solicitor General). Indeed, even the EEOC has expressed reluctance to define 'major life activities' to include working and has suggested that working be viewed as a residual life activity, considered, as a last resort, only '[i]f an individual is not substantially limited with respect to any other major life activity.' 29 CFR pt. 1630, App. § 1630.2(j) (1998) (emphasis added) ('If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working' (emphasis added)).

Assuming without deciding that working is a major life activity and that the EEOC regulations interpreting the term 'substantially limits' are reasonable, petitioners have failed to allege adequately that their poor eyesight is regarded as an impairment that substantially limits them in the major life activity of working. They allege only that respondent regards their poor vision as precluding them from holding positions as a 'global airline pilot.' See App. 25-26, Amended Complaint ¶¶38f. Because the position of global airline pilot is a single job, this allegation does not support the claim that respondent regards petitioners as having a substantially limiting impairment. See 29 CFR § 1630.2(j)(3)(i) ('The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working'). Indeed, there are a number of other positions utilizing petitioners' skills, such as regional pilot and pilot instructor to name a few, that are available to them. Even under the EEOC's Interpretative Guidance, to which petitioners ask us to defer, 'an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working.' 29 CFR pt. 1630, App. §1630.2.

Petitioners also argue that if one were to assume that a substantial number of airline carriers have

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similar vision requirements, they would be substantially limited in the major life activity of working. See Brief for Petitioners 44- 45. Even assuming for the sake of argument that the adoption of similar vision requirements by other carriers would represent a substantial limitation on the major life activity of working, the argument is nevertheless flawed. It is not enough to say that if the physical criteria of a single employer were imputed to all similar employers one would be regarded as substantially limited in the major life activity of working only as a result of this imputation. An otherwise valid job requirement, such as a height requirement, does not become invalid simply because it would limit a person's employment opportunities in a substantial way if it were adopted by a substantial number of employers. Because petitioners have not alleged, and cannot demonstrate, that respondent's vision requirement reflects a belief that petitioners' vision substantially limits them, we agree with the decision of the Court of Appeals affirming the dismissal of petitioners' claim that they are regarded as disabled.

For these reasons, the decision of the Court of Appeals for the Tenth Circuit is affirmed.

It is so ordered.

JUSTICE GINSBURG, concurring.

I agree that 42 U. S. C. §12102(2)(A) does not reach the legions of people with correctable disabilities. The strongest clues to Congress' perception of the domain of the Americans with Disabilities Act (ADA), as I see it, are legislative findings that 'some 43,000,000 Americans have one or more physical or mental disabilities,' § 12101(a)(1), and that 'individuals with disabilities are a discrete and insular minority,' persons 'subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society,' §12101(a)(7). These declarations are inconsistent with the enormously embracing definition of disability petitioners urge. As the Court demonstrates, see ante, at 11-14, the inclusion of correctable disabilities within the ADA's domain would extend the Act's coverage to far more than 43 million people. And persons whose uncorrected eyesight is poor, or who rely on daily medication for their well-being, can be found in every social and economic class; they do not

cluster among the politically powerless, nor do they coalesce as historical victims of discrimination. In short, in no sensible way can one rank the large numbers of diverse individuals with corrected disabilities as a 'discrete and insular minority.' I do not mean to suggest that any of the constitutional presumptions or doctrines that may apply to 'discrete and insular' minorities in other contexts are relevant here; there is no constitutional dimension to this case. Congress' use of the phrase, however, is a telling indication of its intent to restrict the ADA's coverage to a confined, and historically disadvantaged, class.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

When it enacted the Americans with Disabilities Act in 1990, Congress certainly did not intend to require United Air Lines to hire unsafe or unqualified pilots. Nor, in all likelihood, did it view every person who wears glasses as a member of a 'discrete and insular minority.' Indeed, by reason of legislative myopia it may not have foreseen that its definition of 'disability' might theoretically encompass, not just 'some 43,000,000 Americans,' 42 U. S. C. §12101(a)(1), but perhaps two or three times that number. Nevertheless, if we apply customary tools of statutory construction, it is quite clear that the threshold question whether an individual is 'disabled' within the meaning of the Act--and, therefore, is entitled to the basic assurances that the Act affords--focuses on her past or present physical condition without regard to mitigation that has resulted from rehabilitation, self-improvement, prosthetic devices, or medication. One might reasonably argue that the general rule should not apply to an impairment that merely requires a nearsighted person to wear glasses. But I believe that, in order to be faithful to the remedial purpose of the Act, we should give it a generous, rather than a miserly, construction.

There are really two parts to the question of statutory construction presented by this case. The first question is whether the determination of disability for people that Congress unquestionably intended to cover should focus on their unmitigated or their mitigated condition. If the correct answer to that question is the one provided by eight of the nine Federal Courts of Appeals to address the issue, [FN1] and by all three of the Executive agencies that

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have issued regulations or interpretive bulletins construing the statute--namely, that the statute defines 'disability' without regard to ameliorative measures-- it would still be necessary to decide whether that general rule should be applied to what might be characterized as a 'minor, trivial impairment.' *Arnold v. United Parcel Service, Inc.*, 136 F. 3d 854, 866, n. 10 (CA1 1998) (holding that unmitigated state is determinative but suggesting that it 'might reach a different result' in a case in which 'a simple, inexpensive remedy,' such as eyeglasses, is available 'that can provide total and relatively permanent control of all symptoms'). See also *Washington v. HCA Health Servs.*, 152 F. 3d 464 (CA5 1998) (same), cert. pending, No. 98-1365. I shall therefore first consider impairments that Congress surely had in mind before turning to the special facts of this case.

# I

'As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve.' *Chapman v. Houston Welfare Rights Organization*, 441 U. S. 600, 608 (1979). Congress expressly provided that the 'purpose of [the ADA is] to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' 42 U. S. C. §12101(b)(1). To that end, the ADA prohibits covered employers from 'discriminat[ing] against a qualified individual with a disability because of the disability' in regard to the terms, conditions, and privileges of employment. 42 U. S. C. §12112(a) (emphasis added).

The Act's definition of disability is drawn 'almost verbatim' from the Rehabilitation Act of 1973, 29 U. S. C. §706(8)(B). *Bragdon v. Abbott*, 524 U. S. 624, 631 (1998). The ADA's definition provides:

'The term 'disability' means, with respect to an individual--

'(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

'(B) a record of such an impairment; or

'(C) being regarded as having such an impairment.' 42 U. S. C. §12102(2).

The three parts of this definition do not identify mutually exclusive, discrete categories. On the contrary, they furnish three overlapping formulas aimed at ensuring that individuals who now have, or

ever had, a substantially limiting impairment are covered by the Act.

An example of a rather common condition illustrates this point: There are many individuals who have lost one or more limbs in industrial accidents, or perhaps in the service of their country in places like Iwo Jima. With the aid of prostheses, coupled with courageous determination and physical therapy, many of these hardy individuals can perform all of their major life activities just as efficiently as an average couch potato. If the Act were just concerned with their present ability to participate in society, many of these individuals' physical impairments would not be viewed as disabilities. Similarly, if the statute were solely concerned with whether these individuals viewed themselves as disabled--or with whether a majority of employers regarded them as unable to perform most jobs--many of these individuals would lack statutory protection from discrimination based on their prostheses.

The sweep of the statute's three-pronged definition, however, makes it pellucidly clear that Congress intended the Act to cover such persons. The fact that a prosthetic device, such as an artificial leg, has restored one's ability to perform major life activities surely cannot mean that subsection (A) of the definition is inapplicable. Nor should the fact that the individual considers himself (or actually is) 'cured,' or that a prospective employer considers him generally employable, mean that subsections (B) or (C) are inapplicable. But under the Court's emphasis on 'the present indicative verb form' used in subsection (A), ante, at 9, that subsection presumably would not apply. And under the Court's focus on the individual's 'presen[t]--not potentia[l] or hypotetica[l]--condition, *ibid.*, and on whether a person is 'precluded from a broad range of jobs,' ante, at 18, subsections (B) and (C) presumably would not apply.

In my view, when an employer refuses to hire the individual 'because of' his prosthesis, and the prosthesis in no way affects his ability to do the job, that employer has unquestionably discriminated against the individual in violation of the Act. Subsection (B) of the definition, in fact, sheds a revelatory light on the question whether Congress was concerned only about the corrected or mitigated status of a person's impairment. If the Court is

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correct that '[a] 'disability' exists only where' a person's 'present' or 'actual' condition is substantially impaired, ante, at 9-10, there would be no reason to include in the protected class those who were once disabled but who are now fully recovered. Subsection (B) of the Act's definition, however, plainly covers a person who previously had a serious hearing impairment that has since been completely cured. See *School Bd. of Nassau Cty. v. Arline*, 480 U. S. 273, 281 (1987). Still, if I correctly understand the Court's opinion, it holds that one who continues to wear a hearing aid that she has worn all her life might not be covered--fully cured impairments are covered, but merely treatable ones are not. The text of the Act surely does not require such a bizarre result.

The three prongs of the statute, rather, are most plausibly read together not to inquire into whether a person is currently 'functionally' limited in a major life activity, but only into the existence of an impairment--present or past-- that substantially limits, or did so limit, the individual before amelioration. This reading avoids the counterintuitive conclusion that the ADA's safeguards vanish when individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations.

To the extent that there may be doubt concerning the meaning of the statutory text, ambiguity is easily removed by looking at the legislative history. As then-JUSTICE REHNQUIST stated for the Court in *Garcia v. United States*, 469 U. S. 70 (1984): 'In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.' ' Id., at 76 (quoting *Zuber v. Allen*, 396 U. S. 168, 186 (1969)). The Committee Reports on the bill that became the ADA make it abundantly clear that Congress intended the ADA to cover individuals who could perform all of their major life activities only with the help of ameliorative measures.

The ADA originated in the Senate. The Senate Report states that 'whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable

accommodations or auxiliary aids.' S. Rep. No. 101-116, p. 23 (1989). The Report further explained, in discussing the 'regarded as' prong:

'[An] important goal of the third prong of the [disability] definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.' Id., at 24.

When the legislation was considered in the House of Representatives, its Committees reiterated the Senate's basic understanding of the Act's coverage, with one minor modification: They clarified that 'correctable' or 'controllable' disabilities were covered in the first definitional prong as well. The Report of the House Committee on the Judiciary states, in discussing the first prong, that, when determining whether an individual's impairment substantially limits a major life activity, '[t]he impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation.' H. R. Rep. No. 101-485, pt. III, p. 28 (1990). The Report continues that 'a person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test,' *ibid.*, as is a person with poor hearing, 'even if the hearing loss is corrected by the use of a hearing aid.' Id., at 29.

The Report of the House Committee on Education and Labor likewise states that '[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids.' Id., pt. II, at 52. To make matters perfectly plain, the Report adds:

'For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.' *Ibid.* (emphasis added).

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All of the Reports, indeed, are replete with references to the understanding that the Act's protected class includes individuals with various medical conditions that ordinarily are perfectly 'correctable' with medication or treatment. See *id.*, at 74 (citing with approval *Straithe v. Department of Transportation*, 716 F. 2d 227 (CA3 1983), which held that an individual with poor hearing was 'handicapped' under the Rehabilitation Act even though his hearing could be corrected with a hearing aid); H. R. Rep. No. 101-485, pt. III, at 51 ('[t]he term' disability includes 'epilepsy, . . . heart disease, diabetes'); *id.*, pt. III, at 28 (listing same impairments); S. Rep. No. 101- 116, at 22 (same). [FN2]

In addition, each of the three Executive agencies charged with implementing the Act has consistently interpreted the Act as mandating that the presence of disability turns on an individual's uncorrected state. We have traditionally accorded respect to such views when, as here, the agencies 'played a pivotal role in setting [the statutory] machinery in motion.' *Ford Motor Credit Co. v. Milhollin*, 444 U. S. 555, 566 (1980) (brackets in original; internal quotation marks and citation omitted). At the very least, these interpretations 'constitute a body of experience and informed judgment to which [we] may properly resort' for additional guidance. *Skidmore v. Swift & Co.*, 323 U. S. 134, 139-140 (1944). See also *Bragdon*, 524 U. S., at 642 (invoking this maxim with regard to the Equal Employment Opportunity Commission's (EEOC) interpretation of the ADA).

The EEOC's Interpretive Guidance provides that '[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.' 29 CFR pt. 1630, App. § 1630.2(j) (1998). The EEOC further explains:

'[A]n individual who uses artificial legs would . . . be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.' *Ibid.*

The Department of Justice has reached the same conclusion. Its regulations provide that '[t]he question of whether a person has a disability should

be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services.' 28 CFR pt. 35, App. A, §35.104 (1998). The Department of Transportation has issued a regulation adopting this same definition of 'disability.' See 49 CFR pt. 37.3 (1998).

In my judgment, the Committee Reports and the uniform agency regulations merely confirm the message conveyed by the text of the Act--at least insofar as it applies to impairments such as the loss of a limb, the inability to hear, or any condition such as diabetes that is substantially limiting without medication. The Act generally protects individuals who have 'correctable' substantially limiting impairments from unjustified employment discrimination on the basis of those impairments. The question, then, is whether the fact that Congress was specifically concerned about protecting a class that included persons characterized as a 'discrete and insular minority' and that it estimated that class to include 'some 43,000,000 Americans' means that we should construe the term 'disability' to exclude individuals with impairments that Congress probably did not have in mind.

## II

The EEOC maintains that, in order to remain allegiant to the Act's structure and purpose, courts should always answer 'the question whether an individual has a disability . . . without regard to mitigating measures that the individual takes to ameliorate the effects of the impairment.' Brief for United States and EEOC as Amicus Curiae 6. '[T]here is nothing about poor vision,' as the EEOC interprets the Act, 'that would justify adopting a different rule in this case.' *Ibid.*

If a narrow reading of the term 'disability' were necessary in order to avoid the danger that the Act might otherwise force United to hire pilots who might endanger the lives of their passengers, it would make good sense to use the '43,000,000 Americans' finding to confine its coverage. There is, however, no such danger in this case. If a person is 'disabled' within the meaning of the Act, she still cannot prevail on a claim of discrimination unless she can prove that the employer took action 'because of' that impairment, 42 U. S. C. § 12112(a), and that she can, 'with or without

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reasonable accommodation, . . . perform the essential functions' of the job of a commercial airline pilot. See §12111(8). Even then, an employer may avoid liability if it shows that the criteria of having uncorrected visual acuity of at least 20/100 is 'job-related and consistent with business necessity' or if such vision (even if correctable to 20/20) would pose a health or safety hazard. §§12113(a) and (b).

This case, in other words, is not about whether petitioners are genuinely qualified or whether they can perform the job of an airline pilot without posing an undue safety risk. The case just raises the threshold question whether petitioners are members of the ADA's protected class. It simply asks whether the ADA lets petitioners in the door in the same way as the Age Discrimination in Employment Act of 1967 does for every person who is at least 40 years old, see 29 U. S. C. §631(a), and as Title VII of the Civil Rights Act of 1964 does for every single individual in the work force. Inside that door lies nothing more than basic protection from irrational and unjustified discrimination because of a characteristic that is beyond a person's control. Hence, this particular case, at its core, is about whether, assuming that petitioners can prove that they are 'qualified,' the airline has any duty to come forward with some legitimate explanation for refusing to hire them because of their uncorrected eyesight, or whether the ADA leaves the airline free to decline to hire petitioners on this basis even if it is acting purely on the basis of irrational fear and stereotype.

I think it quite wrong for the Court to confine the coverage of the Act simply because an interpretation of 'disability' that adheres to Congress' method of defining the class it intended to benefit may also provide protection for 'significantly larger numbers' of individuals, ante, at 13, than estimated in the Act's findings. It has long been a 'familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.' *Tcherepnin v. Knight*, 389 U. S. 332, 336 (1967). Congress sought, in enacting the ADA, to 'provide a . . . comprehensive national mandate for the discrimination against individuals with disabilities.' 42 U. S. C. §12101(b)(1). The ADA, following the lead of the Rehabilitation Act before it, seeks to implement this mandate by encouraging employers 'to replace . . . reflexive reactions to

actual or perceived handicaps with actions based on medically sound judgments.' *Arline*, 480 U. S., at 284-285. Even if an authorized agency could interpret this statutory structure so as to pick and choose certain correctable impairments that Congress meant to exclude from this mandate, Congress surely has not authorized us to do so.

When faced with classes of individuals or types of discrimination that fall outside the core prohibitions of anti-discrimination statutes, we have consistently construed those statutes to include comparable evils within their coverage, even when the particular evil at issue was beyond Congress' immediate concern in passing the legislation. Congress, for instance, focused almost entirely on the problem of discrimination against African-Americans when it enacted Title VII of the Civil Rights Act of 1964. See, e.g., *Steelworkers v. Weber*, 443 U. S. 193, 202-203 (1979). But that narrow focus could not possibly justify a construction of the statute that excluded Hispanic-Americans or Asian-Americans from its protection--or as we later decided (ironically enough, by relying on legislative history and according 'great deference' to the EEOC's 'interpretation'), Caucasians. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U. S. 273, 279-280 (1976).

We unanimously applied this well-accepted method of interpretation last Term with respect to construing Title VII to cover claims of same-sex sexual harassment. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U. S. 75 (1998). We explained our holding as follows:

'As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits 'discriminat[ion] ... because of ... sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.' *Id.*, at 79-80.

This approach applies outside of the discrimination context as well. In *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U. S. 229 (1989), we rejected

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the argument that the Racketeer Influenced and Corrupt Organization Act (RICO) should be construed to cover only 'organized crime' because Congress included findings in the Act's preamble emphasizing only that problem. See Pub. L. 91-452 §1, 84 Stat. 941. After surveying RICO's legislative history, we concluded that even though '[t]he occasion for Congress' action was the perceived need to combat organized crime, . . . Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.' 492 U. S., at 248. [FN3]

Under the approach we followed in *Oncale* and *H. J. Inc.*, visual impairments should be judged by the same standard as hearing impairments or any other medically controllable condition. The nature of the discrimination alleged is of the same character and should be treated accordingly.

Indeed, it seems to me eminently within the purpose and policy of the ADA to require employers who make hiring and firing decisions based on individuals' uncorrected vision to clarify why having, for example, 20/100 uncorrected vision or better is a valid job requirement. So long as an employer explicitly makes its decision based on an impairment that in some condition is substantially limiting, it matters not under the structure of the Act whether that impairment is widely shared or so rare that it is seriously misunderstood. Either way, the individual has an impairment that is covered by the purpose of the ADA, and she should be protected against irrational stereotypes and unjustified disparate treatment on that basis.

I do not mean to suggest, of course, that the ADA should be read to prohibit discrimination on the basis of, say, blue eyes, deformed fingernails, or heights of less than six feet. Those conditions, to the extent that they are even 'impairments,' do not substantially limit individuals in any condition and thus are different in kind from the impairment in the case before us. While not all eyesight that can be enhanced by glasses is substantially limiting, having 20/200 vision in one's better eye is, without treatment, a significant hindrance. Only two percent of the population suffers from such myopia. [FN4] Such acuity precludes a person from driving, shopping in a public store, or viewing a computer screen from a reasonable distance. Uncorrected

vision, therefore, can be 'substantially limiting' in the same way that unmedicated epilepsy or diabetes can be. Because Congress obviously intended to include individuals with the latter impairments in the Act's protected class, we should give petitioners the same protection.

### III

The Court does not disagree that the logic of the ADA requires petitioner's visual impairment to be judged the same as other 'correctable' conditions. Instead of including petitioners within the Act's umbrella, however, the Court decides, in this opinion and its companion, to expel all individuals who, by using 'measures [to] mitigate [their] impairment[s],' ante, at 1, are able to overcome substantial limitations regarding major life activities. The Court, for instance, holds that severe hypertension that is substantially limiting without medication is not a 'disability,' *Murphy v. United Parcel Service, Inc.*, post, p. \_\_\_ and--perhaps even more remarkably--indicates (directly contrary to the Act's legislative history, see *supra*, at 7) that diabetes that is controlled only with insulin treatments is not a 'disability' either, ante, at 10.

The Court claims that this rule is necessary to avoid requiring courts to 'speculate' about a person's 'hypothetical' condition and to preserve the Act's focus on making 'individualized inquiries' into whether a person is disabled. Ante, at 9-10. The Court also asserts that its rejection of the general rule of viewing individuals in their unmitigated state prevents distorting the scope of the Act's protected class to cover a 'much higher number' of persons than Congress estimated in its findings. And, I suspect, the Court has been cowed by respondent's persistent argument that viewing all individuals in their unmitigated state will lead to a tidal wave of lawsuits. None of the Court's reasoning, however, justifies a construction of the Act that will obviously deprive many of Congress' intended beneficiaries of the legal protection it affords.

The agencies' approach, the Court repeatedly contends, 'would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than individuals, [which] is both contrary to the letter and spirit of the ADA.' Ante, at 10. The Court's mantra regarding the Act's 'individualized approach,' however, fails to support its holding. I

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agree that the letter and spirit of the ADA is designed to deter decision making based on group stereotypes, but the agencies' interpretation of the Act does not lead to this result. Nor does it require courts to 'speculate' about people's 'hypothetical' conditions. Viewing a person in her 'unmitigated' state simply requires examining that individual's abilities in a different state, not the abilities of every person who shares a similar condition. It is just as easy individually to test petitioners' eyesight with their glasses on as with their glasses off. [FN5]

Ironically, it is the Court's approach that actually condones treating individuals merely as members of groups. That misdirected approach permits any employer to dismiss out of hand every person who has uncorrected eyesight worse than 20/100 without regard to the specific qualifications of those individuals or the extent of their abilities to overcome their impairment. In much the same way, the Court's approach would seem to allow an employer to refuse to hire every person who has epilepsy or diabetes that is controlled by medication, or every person who functions efficiently with a prosthetic limb.

Under the Court's reasoning, an employer apparently could not refuse to hire persons with these impairments who are substantially limited even with medication, see ante, at 14-15, but that group-based 'exception' is more perverse still. Since the purpose of the ADA is to dismantle employment barriers based on society's accumulated myths and fears, see 42 U. S. C. § 12101(a)(8); Arline, 480 U. S., at 283-284, it is especially ironic to deny protection for persons with substantially limiting impairments that, when corrected, render them fully able and employable. Insofar as the Court assumes that the majority of individuals with impairments such as prosthetic limbs or epilepsy will still be covered under its approach because they are substantially limited 'notwithstanding the use of a corrective device,' ante, at 14-15, I respectfully disagree as an empirical matter. Although it is of course true that some of these individuals are substantially limited in any condition, Congress enacted the ADA in part because such individuals are not ordinarily substantially limited in their mitigated condition, but rather are often the victims of 'stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.' 42 U. S.

C. §12101(a)(7).

It has also been suggested that if we treat as 'disabilities' impairments that may be mitigated by measures as ordinary and expedient as wearing eyeglasses, a flood of litigation will ensue. The suggestion is misguided. Although vision is of critical importance for airline pilots, in most segments of the economy whether an employee wears glasses--or uses any of several other mitigating measures--is a matter of complete indifference to employers. It is difficult to envision many situations in which a qualified employee who needs glasses to perform her job might be fired--as the statute requires--'because of,' 42 U. S. C. § 12112, the fact that she cannot see well without them. Such a proposition would be ridiculous in the garden-variety case. On the other hand, if an accounting firm, for example, adopted a guideline refusing to hire any incoming accountant who has uncorrected vision of less than 20/100--or, by the same token, any person who is unable without medication to avoid having seizures--such a rule would seem to be the essence of invidious discrimination.

In this case the quality of petitioners' uncorrected vision is relevant only because the airline regards the ability to see without glasses as an employment qualification for its pilots. Presumably it would not insist on such a qualification unless it has a sound business justification for doing so (an issue we do not address today). But if United regards petitioners as unqualified because they cannot see well without glasses, it seems eminently fair for a court also to use uncorrected vision as the basis for evaluating petitioners' life activity of seeing.

Under the agencies' approach, individuals with poor eyesight and other correctable impairments will, of course, be able to file lawsuits claiming discrimination on that basis. Yet all of those same individuals can already file employment discrimination claims based on their race, sex, or religion, and--provided they are at least 40 years old--their age. Congress has never seen this as reason to restrict classes of antidiscrimination coverage. Indeed, it is hard to believe that providing individuals with one more antidiscrimination protection will make any more of them file baseless or vexatious lawsuits. To the extent that the Court is concerned with requiring employers to answer in

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litigation for every employment practice that draws distinctions based on physical attributes, that anxiety should be addressed not in this case, but in one that presents an issue regarding employers' affirmative defenses.

In the end, the Court is left only with its tenacious grip on Congress' finding that 'some 43,000,000 Americans have one or more physical or mental disabilities,' 42 U. S. C. §12101(a)(1)--and that figure's legislative history extrapolated from a law review 'article authored by the drafter of the original ADA bill introduced in Congress in 1988.' Ante, at 11. We previously have observed that a 'statement of congressional findings is a rather thin reed upon which to base' a statutory construction. *National Organization for Women, Inc. v. Scheidler*, 510 U. S. 249, 260 (1994). Even so, as I have noted above, I readily agree that the agencies' approach to the Act would extend coverage to more than that number of people (although the Court's lofty estimates, see ante, at 13-14, may be inflated because they do not appear to exclude impairments that are not substantially limiting). It is equally undeniable, however, that '43 million' is not a fixed cap on the Act's protected class: By including the 'record of' and 'regarded as' categories, Congress fully expected the Act to protect individuals who lack, in the Court's words, 'actual' disabilities, and therefore are not counted in that number.

What is more, in mining the depths of the history of the 43 million figure-- surveying even agency reports that predate the drafting of any of this case's controlling legislation--the Court fails to acknowledge that its narrow approach may have the perverse effect of denying coverage for a sizeable portion of the core group of 43 million. The Court appears to exclude from the Act's protected class individuals with controllable conditions such as diabetes and severe hypertension that were expressly understood as substantially limiting impairments in the Act's Committee Reports, see *supra*, at 6-7--and even, as the footnote in the margin shows, in the studies that produced the 43 million figure. [FN6] Given the inability to make the 43 million figure fit any consistent method of interpreting the word 'disabled,' it would be far wiser for the Court to follow--or at least to mention--the documents reflecting Congress' contemporaneous understanding of the term: the Committee Reports on the actual legislation.

#### IV

Occupational hazards characterize many trades. The farsighted pilot may have as much trouble seeing the instrument panel as the near sighted pilot has in identifying a safe place to land. The vision of appellate judges is sometimes subconsciously obscured by a concern that their decision will legalize issues best left to the private sphere or will magnify the work of an already- overburdened judiciary. See *Jackson v. Virginia*, 443 U. S. 307, 326, 337-339 (1979) (STEVENS, J., dissenting). Although these concerns may help to explain the Court's decision to chart its own course--rather than to follow the one that has been well marked by Congress, by the overwhelming consensus of circuit judges, and by the Executive officials charged with the responsibility of administering the ADA--they surely do not justify the Court's crabbed vision of the territory covered by this important statute.

Accordingly, although I express no opinion on the ultimate merits of petitioners' claim, I am persuaded that they have a disability covered by the ADA. I therefore respectfully dissent.

FN1. See *Bartlett v. New York State Bd. of Law Examiners*, 156 F. 3d 321, 329 (CA2 1998), cert. pending, No. 98-1285; *Washington v. HCA Health Servs. of Texas*, 152 F. 3d 464, 470-471 (CA5 1998), cert. pending, No. 98-1365; *Baert v. Euclid Beverage, Ltd.*, 149 F. 3d 626, 629-630 (CA7 1998); *Arnold v. United Parcel Service, Inc.*, 136 F. 3d 854, 859-866 (CA1 1998); *Matcza v. Frankford Candy & Chocolate Co.*, 136 F. 3d 933, 937-938 (CA3 1997); *Doane v. Omaha*, 115 F. 3d 624, 627 (CA8 1997); *Harris v. H & W Contracting Co.*, 102 F. 3d 516, 520-521 (CA11 1996); *Holihan v. Lucky Stores, Inc.*, 87 F. 3d 362, 366 (CA9 1996). While a Sixth Circuit decision could be read as expressing doubt about the majority rule, see *Gilday v. Mecosta County*, 124 F. 3d 760, 766-768 (1997) (Kennedy, J., concurring in part and dissenting in part); *id.*, at 768 (Guy, J., concurring in part and dissenting in part), the sole holding contrary to this line of authority is the Tenth Circuit's opinion that the Court affirms today.

FN2. The House's decision to cover correctable impairments under subsection (A) of the statute seems, in retrospect, both deliberate and wise. Much of the structure of the House Reports is borrowed from the Senate Report; thus it appears

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that the House Committees consciously decided to move the discussion of mitigating measures. This adjustment was prudent because in a case in which an employer refuses, out of animus or fear, to hire an individual who has a condition such as epilepsy that the employer knows is controlled, it may be difficult to determine whether the employer is viewing the individual in her uncorrected state or 'regards' her as substantially limited.

FN3. The one notable exception to our use of this method of interpretation occurred in the decision in *General Elec. Co. v. Gilbert*, 429 U. S. 125 (1976), in which the majority rejected an EEOC guideline and the heavy weight of authority in the federal courts of appeals in order to hold that Title VII did not prohibit discrimination on the basis of pregnancy-related conditions. Given the fact that Congress swiftly 'overruled' that decision in the Pregnancy Discrimination Act of 1978, 92 Stat. 2076, 42 U. S. C. § 2000e(k), I submit that the views expressed in the dissenting opinions in that case, 429 U. S., at 146 (opinion of Brennan, J.), and *id.*, at 160 (opinion of STEVENS, J.), should be followed today.

FN4. J. Roberts, *Binocular Visual Acuity of Adults*, United States, 1960- 1962, p. 3 (National Center for Health Statistics, Series 11, No. 30 Department of Health and Welfare, 1968).

FN5. For much the same reason, the Court's concern that the agencies' approach would 'lead to the anomalous result' that courts would ignore 'negative side effects suffered by an individual resulting from the use of mitigating measures,' *ante*, at 10, is misplaced. It seems safe to assume that most individuals who take medication that itself substantially limits a major life activity would be substantially limited in some other way if they did not take the medication. The Court's examples of psychosis, Parkinson's disease, and epilepsy certainly support this presumption. To the extent that certain people may be substantially limited only when taking 'mitigating measures,' it might fairly be said that just as contagiousness is symptomatic of a disability because an individual's 'contagiousness and her physical impairment each [may result] from the same underlying condition,' *School Bd. of Nassau Cty. v. Arline*, 480 U. S. 273, 282 (1987), side effects are symptomatic of a disability because side effects and a physical impairment may flow from the same underlying condition.

FN6. See National Council on Disability, *Toward Independence* 12 (1986) (hypertension); U. S.

Dept. of Commerce, Bureau of Census, Disability, Functional Limitation, and Health Insurance Coverage: 1984/85, p. 51 (1986) (hypertension, diabetes); National Institute on Disability and Rehabilitation Research, *Data on Disability from the National Health Interview Survey 1983-1985*, p. 33 (1988) (epilepsy, diabetes, hypertension); U. S. Dept. of Commerce, Bureau of Census, *Statistical Abstract of the United States 114-115* (1989) (Tables 114 and 115) (diabetes, hypertension); Mathematica Policy Research, Inc., *Digest of Data on Persons with Disabilities 3* (1984) (hypertension, diabetes).

JUSTICE BREYER, dissenting.

We must draw a statutory line that either (1) will include within the category of persons authorized to bring suit under the Americans with Disabilities Act of 1990 some whom Congress may not have wanted to protect (those who wear ordinary eyeglasses), or (2) will exclude from the threshold category those whom Congress certainly did want to protect (those who successfully use corrective devices or medicines, such as hearing aids or prostheses or medicine for epilepsy). Faced with this dilemma, the statute's language, structure, basic purposes, and history require us to choose the former statutory line, as JUSTICE STEVENS (whose opinion I join) well explains. I would add that, if the more generous choice of threshold led to too many lawsuits that ultimately proved without merit or otherwise drew too much time and attention away from those whom Congress clearly sought to protect, there is a remedy. The Equal Employment Opportunity Commission (EEOC), through regulation, might draw finer definitional lines, excluding some of those who wear eyeglasses (say, those with certain vision impairments who readily can find corrective lenses), thereby cabining the overly broad extension of the statute that the majority fears.

The majority questions whether the EEOC could do so, for the majority is uncertain whether the EEOC possesses typical agency regulation-writing authority with respect to the statute's definitions. See *ante*, at 6-7. The majority poses this question because the section of the statute, 42 U. S. C. § 12116, that says the EEOC 'shall issue regulations' also says these regulations are 'to carry out this subchapter' (namely, §12111 to §12117, the employment subchapter); and the section of the statute that

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contains the three-pronged definition of 'disability' precedes 'this subchapter,' the employment subchapter, to which §12116 specifically refers. (Emphasis added).

Nonetheless, the employment subchapter, i.e., 'this subchapter,' includes other provisions that use the defined terms, for example a provision that forbids 'discriminat[ing] against a qualified individual with a disability because of the disability.' §12112(a). The EEOC might elaborate through regulations the meaning of 'disability' in this last-mentioned provision, if elaboration is needed in order to 'carry out' the substantive provisions of 'this subchapter.' An EEOC regulation that elaborated the meaning of this use of the word 'disability' would fall within the scope both of the basic definitional provision and

also the substantive provisions of 'this' later subchapter, for the word 'disability' appears in both places.

There is no reason to believe that Congress would have wanted to deny the EEOC the power to issue such a regulation, at least if the regulation is consistent with the earlier statutory definition and with the relevant interpretations by other enforcement agencies. The physical location of the definitional section seems to reflect only drafting or stylistic, not substantive, objectives. And to pick and choose among which of 'this subchapter['s']' words the EEOC has the power to explain would inhibit the development of law that coherently interprets this important statute.

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**ALBERTSONS, INC., PETITIONER**  
**v.**  
**HALLIE KIRKINGBURG**

**No. 98-591**

United States Supreme Court.

Argued April 28, 1999

Decided June 22, 1999

Syllabus [FN\*]

FN\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

Before beginning a truckdriver's job with petitioner, Albertsons, Inc., in 1990, respondent, Kirkingburg, was examined to see if he met the Department of Transportation's basic vision standards for commercial truckdrivers, which require corrected distant visual acuity of at least 20/40 in each eye and distant binocular acuity of at least 20/40. Although he has amblyopia, an uncorrectable condition that leaves him with 20/200 vision in his left eye and thus effectively monocular vision, the doctor erroneously certified that he met the DOT standards. When his vision was correctly assessed at a 1992 physical, he was told that he had to get a waiver of the DOT standards under a waiver program begun that year. Albertsons, however, fired him for failing to meet the basic DOT vision standards and refused to rehire him after he received a waiver. Kirkingburg sued Albertsons, claiming that firing him violated the Americans with Disabilities Act of 1990. In granting summary judgment for Albertsons, the District Court found that Kirkingburg was not qualified without an accommodation because he could not meet the basic DOT standards and that the waiver program did not alter those standards. The Ninth Circuit reversed, finding that Kirkingburg had established a disability under the Act by demonstrating that the manner in which he sees differs significantly from the manner in which most people see; that although the ADA allowed Albertsons to rely on Government regulations in setting a job-related vision standard, Albertsons could not use compliance with the DOT

regulations to justify its requirement because the waiver program was a legitimate part of the DOT's regulatory scheme; and that although Albertsons could set a vision standard different from the DOT's, it had to justify its independent standard and could not do so here.

Held:

1. The ADA requires monocular individuals, like others claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation on a major life activity caused by their impairment is substantial. The Ninth Circuit made three missteps in determining that Kirkingburg's amblyopia meets the ADA's first definition of disability, i.e., a physical or mental impairment that 'substantially limits' a major life activity, 42 U. S. C. §12101(2)(A). First, although it relied on an Equal Employment Opportunity Commission regulation that defines 'substantially limits' as requiring a 'significant restrict[ion]' in an individual's manner of performing a major life activity, see 29 CFR §1630.2(j)(ii), the court actually found that there was merely a significant 'difference' between the manner in which Kirkingburg sees and the manner in which most people see. By transforming 'significant restriction' into 'difference,' the court undercut the fundamental statutory requirement that only impairments that substantially limit the ability to perform a major life activity constitute disabilities. Second, the court appeared to suggest that it need not take account of a monocular individual's ability to compensate for the impairment, even though it acknowledged that Kirkingburg's brain had subconsciously done just that. Mitigating measures, however, must be taken into account in judging whether an individual has a disability, *Sutton v. United Airlines, Inc.*, ante, at \_\_\_, whether the measures taken are with artificial aids, like medications and devices, or with the body's own systems. Finally, the Ninth Circuit did not pay much heed to the statutory obligation to determine a disability's existence on a case-by-case basis. See 42 U. S. C. §12101(2). Some impairments may invariably cause a substantial limitation of a major life activity, but monocularity is not one of them, for that category embraces a group whose members vary by, e.g., the degree of visual acuity in the weaker eye, the extent of their compensating adjustments, and the ultimate scope of

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the restrictions on their visual abilities. Pp. 6-11.

2. An employer who requires as a job qualification that an employee meet an otherwise applicable federal safety regulation does not have to justify enforcing the regulation solely because its standard may be waived experimentally in an individual case. Pp. 11-22.

(a) Albertsons' job qualification was not of its own devising, but was the visual acuity standard of the Federal Motor Carrier Safety Regulations, and is binding on Albertsons, see 49 CFR §391.11. The validity of these regulations is unchallenged, they have the force of law, and they contain no qualifying language about individualized determinations. Were it not for the waiver program, there would be no basis for questioning Albertsons' decision, and right, to follow the regulations. Pp. 11-14.

(b) The regulations establishing the waiver program did not modify the basic visual acuity standards in a way that disentitles an employer like Albertsons to insist on the basic standards. One might assume that the general regulatory standard and the regulatory waiver standard ought to be accorded equal substantive significance, but that is not the case here. In setting the basic standards, the Federal Highway Administration, the DOT agency responsible for overseeing the motor carrier safety regulations, made a considered determination about the visual acuity level needed for safe operation of commercial motor vehicles in interstate commerce. In contrast, the regulatory record made it plain that the waiver program at issue in this case was simply an experiment proposed as a means of obtaining data, resting on a hypothesis whose confirmation or refutation would provide a factual basis for possibly relaxing existing standards. Pp. 15-20.

(c) The ADA should not be read to require an employer to defend its decision not to participate in such an experiment. It is simply not credible that Congress enacted the ADA with the understanding that employers choosing to respect the Government's visual acuity regulation in the face of an experimental waiver might be burdened with an obligation to defend the regulation's application according to its own terms. Pp. 21-22.

143 F. 3d 1228, reversed.

SOUTER, J., delivered the opinion for a unanimous Court with respect to Parts I and III, and the opinion of the Court with respect to Part II, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, THOMAS, and GINSBURG, JJ., joined. THOMAS, J., filed a concurring opinion.

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

JUSTICE SOUTER delivered the opinion of the Court. [FN\*]

The question posed is whether, under the Americans with Disabilities Act of 1990, 104 Stat. 327, as amended, 42 U. S. C. §12101 et seq. (1994 ed. and Supp. III), an employer who requires as a job qualification that an employee meet an otherwise applicable federal safety regulation must justify enforcing the regulation solely because its standard may be waived in an individual case. We answer no.

## I

In August 1990, petitioner, Albertsons, Inc., a grocery-store chain with supermarkets in several States, hired respondent, Hallie Kirkingburg, as a truckdriver based at its Portland, Oregon, warehouse. Kirkingburg had more than a decade's driving experience and performed well when Albertsons' transportation manager took him on a road test.

Before starting work, Kirkingburg was examined to see if he met federal vision standards for commercial truckdrivers. 143 F. 3d 1228, 1230-1231 (CA9 1998). For many decades the Department of Transportation or its predecessors has been responsible for devising these standards for individuals who drive commercial vehicles in interstate commerce. [FN1] Since 1971, the basic vision regulation has required corrected distant visual acuity of at least 20/40 in each eye and distant binocular acuity of at least 20/40. See 35 Fed. Reg. 6458, 6463 (1970); 57 Fed. Reg. 6793, 6794 (1992); 49 CFR §391.41(b)(10) (1998). [FN2] Kirkingburg, however, suffers from amblyopia, an uncorrectable condition that leaves him with 20/200 vision in his left eye and monocular vision in effect.

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[FN3] Despite Kirkingburg's weak left eye, the doctor erroneously certified that he met the DOT's basic vision standard, and Albertsons hired him. [FN4]

In December 1991, Kirkingburg injured himself on the job and took a leave of absence. Before returning to work in November 1992, Kirkingburg went for a further physical as required by the company. This time, the examining physician correctly assessed Kirkingburg's vision and explained that his eyesight did not meet the basic DOT standards. The physician, or his nurse, told Kirkingburg that in order to be legally qualified to drive, he would have to obtain a waiver of its basic vision standards from the DOT. See 143 F. 3d, at 1230; App. 284-285. The doctor was alluding to a scheme begun in July 1992 for giving DOT certification to applicants with deficient vision who had three years of recent experience driving a commercial vehicle without a license suspension or revocation, involvement in a reportable accident in which the applicant was cited for a moving violation, conviction for certain driving-related offenses, citation for certain serious traffic violations, or more than two convictions for any other moving violations. A waiver applicant had to agree to have his vision checked annually for deterioration, and to report certain information about his driving experience to the Federal Highway Administration, the agency within the DOT responsible for overseeing the motor carrier safety regulations. See 57 Fed. Reg. 31458, 31460-61 (1992). [FN5] Kirkingburg applied for a waiver, but because he could not meet the basic DOT vision standard Albertsons fired him from his job as a truckdriver. [FN6] In early 1993, after he had left Albertsons, Kirkingburg received a DOT waiver, but Albertsons refused to rehire him. See 143 F. 3d, at 1231.

Kirkingburg sued Albertsons, claiming that firing him violated the ADA. [FN7] Albertsons moved for summary judgment solely on the ground that Kirkingburg was 'not 'otherwise qualified' to perform the job of truck driver with or without reasonable accommodation.' App. 39-40; see id., at 119. The District Court granted the motion, ruling that Albertsons had reasonably concluded that Kirkingburg was not qualified without an accommodation because he could not, as admitted, meet the basic DOT vision standards. The court

held that giving Kirkingburg time to get a DOT waiver was not a required reasonable accommodation because the waiver program was 'a flawed experiment that has not altered the DOT vision requirements.' Id., at 120.

A divided panel of the Ninth Circuit reversed. In addition to pressing its claim that Kirkingburg was not otherwise qualified, Albertsons for the first time on appeal took the position that it was entitled to summary judgment because Kirkingburg did not have a disability within the meaning of the Act. See id., at 182-185. The Court of Appeals considered but rejected the new argument, concluding that because Kirkingburg had presented 'uncontroverted evidence' that his vision was effectively monocular, he had demonstrated that 'the manner in which he sees differs significantly from the manner in which most people see.' 143 F. 3d, at 1232. That difference in manner, the court held, was sufficient to establish disability. Ibid.

The Court of Appeals then addressed the ground upon which the District Court had granted summary judgment, acknowledging that Albertsons consistently required its truckdrivers to meet the DOT's basic vision standards and that Kirkingburg had not met them (and indeed could not). The court recognized that the ADA allowed Albertsons to establish a reasonable job-related vision standard as a prerequisite for hiring and that Albertsons could rely on Government regulations as a basis for setting its standard. The court held, however, that Albertsons could not use compliance with a Government regulation as the justification for its vision requirement because the waiver program, which Albertsons disregarded, was 'a lawful and legitimate part of the DOT regulatory scheme.' Id., at 1236. The Court of Appeals conceded that Albertsons was free to set a vision standard different from that mandated by the DOT, but held that under the ADA, Albertsons would have to justify its independent standard as necessary to prevent 'a direct threat to the health or safety of other individuals in the workplace.' Ibid. (quoting 42 U. S. C. §12113(b)). Although the court suggested that Albertsons might be able to make such a showing on remand, 143 F. 3d, at 1236, it ultimately took the position that the company could not, interpreting Albertsons' rejection of DOT waivers as flying in the face of the judgment about safety already embodied in the DOT's decision to grant them, id.,

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at 1237.

Judge Rymer dissented. She contended that Albertsons had properly relied on the basic DOT vision standards in refusing to accept waivers because, when Albertsons fired Kirkingburg, the waiver program did not rest upon 'a rule or a regulation with the force of law,' but was merely a way of gathering data to use in deciding whether to refashion the still-applicable vision standards. *Id.*, at 1239.

## II

Though we need not speak to the issue whether Kirkingburg was an individual with a disability in order to resolve this case, that issue falls within the first question on which we granted certiorari, [FN8] 525 U. S. \_\_\_\_ (1999), and we think it worthwhile to address it briefly in order to correct three missteps the Ninth Circuit made in its discussion of the matter. Under the ADA:

'The term 'disability' means, with respect to an individual--

'(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

'(B) a record of such an impairment; or

'(C) being regarded as having such an impairment.' 42 U. S. C. §12102(2).

We are concerned only with the first definition. [FN9] There is no dispute either that Kirkingburg's amblyopia is a physical impairment within the meaning of the Act, see 29 CFR §1630.2(h)(1) (1998) (defining 'physical impairment' as '[a]ny physiological disorder, or condition ... affecting one or more of the following body systems: ... special sense organs'), or that seeing is one of his major life activities, see §1630.2(i) (giving seeing as an example of a major life activity). [FN10] The question is whether his monocular vision alone 'substantially limits' Kirkingburg's seeing.

In giving its affirmative answer, the Ninth Circuit relied on a regulation issued by the Equal Employment Opportunity Commission, defining 'substantially limits' as '[s]ignificantly restrict[s] as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life

activity.' § 1630.2(j)(ii). The Ninth Circuit concluded that 'the manner in which [Kirkingburg] sees differs significantly from the manner in which most people see' because, '[t]o put it in its simplest terms [he] sees using only one eye; most people see using two.' 143 F. 3d, at 1232. The Ninth Circuit majority also relied on a recent Eighth Circuit decision, whose holding it characterized in similar terms: 'It was enough to warrant a finding of disability ... that the plaintiff could see out of only one eye: the manner in which he performed the major life activity of seeing was different.' *Ibid.* (characterizing *Doane v. Omaha*, 115 F. 3d 624, 627-628 (1997)). [FN11]

But in several respects the Ninth Circuit was too quick to find a disability. First, although the EEOC definition of 'substantially limits' cited by the Ninth Circuit requires a 'significant restrict[ion]' in an individual's manner of performing a major life activity, the court appeared willing to settle for a mere difference. By transforming 'significant restriction' into 'difference,' the court undercut the fundamental statutory requirement that only impairments causing 'substantial limitat[ions]' in individuals' ability to perform major life activities constitute disabilities. While the Act 'addresses substantial limitations on major life activities, not utter inabilities,' *Bragdon v. Abbott*, 524 U. S. 624, 641 (1998), it concerns itself only with limitations that are in fact substantial.

Second, the Ninth Circuit appeared to suggest that in gauging whether a monocular individual has a disability a court need not take account of the individual's ability to compensate for the impairment. The court acknowledged that Kirkingburg's 'brain has developed subconscious mechanisms for coping with [his] visual impairment and thus his body compensates for his disability.' 143 F. 3d, at 1232. But in treating monocularly as itself sufficient to establish disability and in embracing *Doane*, the Ninth Circuit apparently adopted the view that whether 'the individual had learned to compensate for the disability by making subconscious adjustments to the manner in which he sensed depth and perceived peripheral objects,' 143 F. 3d, at 1232, was irrelevant to the determination of disability. See, e.g., *Sutton v. United Air Lines, Inc.*, 130 F. 3d 893, 901, n. 7 (CA10 1997) (characterizing *Doane* as standing for the proposition that mitigating measures should be disregarded in

(Publication page references are not available for this document.)

assessing disability); *EEOC v. Union Pacific R. Co.*, 6 F. Supp. 2d 1135, 1137 (Idaho 1998) (same). We have just held, however, in *Sutton v. United Airlines, Inc.*, ante, at \_\_\_\_ (slip op., at 8), that mitigating measures must be taken into account in judging whether an individual possesses a disability. We see no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems.

Finally, and perhaps most significantly, the Court of Appeals did not pay much heed to the statutory obligation to determine the existence of disabilities on a case-by-case basis. The Act expresses that mandate clearly by defining 'disability' 'with respect to an individual,' 42 U. S. C. §12102(2), and in terms of the impact of an impairment on 'such individual,' §12102(2)(A). See *Sutton*, ante, at \_\_\_\_; (slip op., at 9); cf. 29 CFR pt. 1630, App., § 1630.2(j) (1998) ('The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual '); *ibid.* ('The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis'). While some impairments may invariably cause a substantial limitation of a major life activity, cf. *Bragdon*, supra, at 642 (declining to address whether HIV infection is a per se disability), we cannot say that monocular vision does. That category, as we understand it, may embrace a group whose members vary by the degree of visual acuity in the weaker eye, the age at which they suffered their vision loss, the extent of their compensating adjustments in visual techniques, and the ultimate scope of the restrictions on their visual abilities. These variables are not the stuff of a per se rule. While monocular vision inevitably leads to some loss of horizontal field of vision and depth perception, [FN12] consequences the Ninth Circuit mentioned, see 143 F. 3d, at 1232, the court did not identify the degree of loss suffered by *Kirkingburg*, nor are we aware of any evidence in the record specifying the extent of his visual restrictions.

This is not to suggest that monocular individuals have an onerous burden in trying to show that they are disabled. On the contrary, our brief

examination of some of the medical literature leaves us sharing the Government's judgment that people with monocular vision 'ordinarily' will meet the Act's definition of disability, Brief for United States et al. as Amici Curiae 11, and we suppose that defendant companies will often not contest the issue. We simply hold that the Act requires monocular individuals, like others claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial.

### III

Albertsons' primary contention is that even if *Kirkingburg* was disabled, he was not a 'qualified' individual with a disability, see 42 U. S. C. § 12112(a), because Albertsons merely insisted on the minimum level of visual acuity set forth in the DOT's Motor Carrier Safety Regulations, 49 CFR § 391.41(b)(10) (1998). If Albertsons was entitled to enforce that standard as defining an 'essential job function' of the employment position, see 42 U. S. C. §12111(8), that is the end of the case, for *Kirkingburg* concededly could not satisfy it. [FN13]

Under Title I of the ADA, employers may justify their use of 'qualification standards ... that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability,' so long as such standards are 'job-related and consistent with business necessity, and ... performance cannot be accomplished by reasonable accommodation ... .' 42 U. S. C. §12113(a). See also §12112(b)(6) (defining discrimination to include 'using qualification standards ... that screen out or tend to screen out an individual with a disability ... unless the standard ... is shown to be job-related for the position in question and is consistent with business necessity'). [FN14]

*Kirkingburg* and the Government argue that these provisions do not authorize an employer to follow even a facially applicable regulatory standard subject to waiver without making some enquiry beyond determining whether the applicant or employee meets that standard, yes or no. Before an employer may insist on compliance, they say, the employer must make a showing with reference to the particular job that the waivable regulatory standard is 'job-related ... and ... consistent with business

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necessity,' see §12112(b)(6), and that after consideration of the capabilities of the individual a reasonable accommodation could not fairly resolve the competing interests when an applicant or employee cannot wholly satisfy an otherwise justifiable job qualification.

The Government extends this argument by reference to a further section of the statute, which at first blush appears to be a permissive provision for the employer's and the public's benefit. An employer may impose as a qualification standard 'a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace,' §12113(b), with 'direct threat' being defined by the Act as 'a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation,' § 12111(3); see also 29 CFR §1630.2(r) (1998). The Government urges us to read subsections (a) and (b) together to mean that when an employer would impose any safety qualification standard, however specific, tending to screen out individuals with disabilities, the application of the requirement must satisfy the ADA's 'direct threat' criterion, see Brief for United States et al. as Amici Curiae 22. That criterion ordinarily requires 'an individualized assessment of the individual's present ability to safely perform the essential functions of the job,' 29 CFR §1630.2(r) (1998), 'based on medical or other objective evidence,' *Bragdon*, 524 U. S., at 649 (citing *School Bd. of Nassau Cty. v. Arline*, 480 U. S. 273, 288 (1987)); see 29 CFR § 1630.2(r) (1998) (assessment of direct threat 'shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence'). [FN15]

Albertsons answers essentially that even assuming the Government has proposed a sound reading of the statute for the general run of cases, this case is not in the general run. It is crucial to its position that Albertsons here was not insisting upon a job qualification merely of its own devising, subject to possible questions about genuine appropriateness and justifiable application to an individual for whom some accommodation may be reasonable. The job qualification it was applying was the distant visual acuity standard of the Federal Motor Carrier Safety Regulations, 49 CFR §391.41(b)(10) (1998), which is made binding on Albertsons by §391.11: 'a motor carrier shall not ... permit a person to drive a

commercial motor vehicle unless that person is qualified to drive,' by, among other things, meeting the physical qualification standards set forth in § 391.41. The validity of these regulations is unchallenged, they have the force of law, and they contain no qualifying language about individualized determinations.

If we looked no further, there would be no basis to question Albertsons' unconditional obligation to follow the regulation and its consequent right to do so. This, indeed, was the understanding of Congress when it enacted the ADA, see *infra*, at 17-18. [FN16] But there is more: the waiver program.

The Court of Appeals majority concluded that the waiver program 'precludes [employers] from declaring that persons determined by DOT to be capable of performing the job of commercial truck driver are incapable of performing that job by virtue of their disability,' and that in the face of a waiver an employer 'will not be able to avoid the [ADA's] strictures by showing that its standards are necessary to prevent a direct safety threat,' 143 F. 3d, at 1237. The Court of Appeals thus assumed that the regulatory provisions for the waiver program had to be treated as being on par with the basic visual acuity regulation, as if the general rule had been modified by some different safety standard made applicable by grant of a waiver. Cf. *Conroy v. Aniskoff*, 507 U. S. 511, 515 (1993) (noting the 'cardinal rule that a statute is to be read as a whole' (quoting *King v. St. Vincent's Hospital*, 502 U. S. 215, 221 (1991))). On this reading, an individualized determination under a different substantive safety rule was an element of the regulatory regime, which would easily fit with any requirement of 42 U. S. C. §§12113(a) and (b) to consider reasonable accommodation. An employer resting solely on the federal standard for its visual acuity qualification would be required to accept a waiver once obtained, and probably to provide an applicant some opportunity to obtain a waiver whenever that was reasonably possible. If this was sound analysis, the District Court's summary judgment for Albertsons was error.

But the reasoning underlying the Court of Appeals's decision was unsound, for we think it was error to read the regulations establishing the waiver program as modifying the content of the basic visual acuity

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standard in a way that disentitled an employer like Albertsons to insist on it. To be sure, this is not immediately apparent. If one starts with the statutory provisions authorizing regulations by the DOT as they stood at the time the DOT began the waiver program, one would reasonably presume that the general regulatory standard and the regulatory waiver standard ought to be accorded equal substantive significance, so that the content of any general regulation would as a matter of law be deemed modified by the terms of any waiver standard thus applied to it. Compare 49 U. S. C. App. §2505(a)(3) (1988 ed.) ('Such regulation shall ... ensure that ... the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely'), [FN17] with 49 U. S. C. App. §2505(f) (1988 ed.) ('After notice and an opportunity for comment, the Secretary may waive, in whole or in part, application of any regulation issued under this section with respect to any person or class of persons if the Secretary determines that such waiver is not contrary to the public interest and is consistent with the safe operation of commercial motor vehicles'). [FN18] Safe operation is supposed to be the touchstone of regulation in each instance.

As to the general visual acuity regulations in force under the former provision, [FN19] affirmative determinations that the selected standards were needed for safe operation were indeed the predicates of the DOT action. Starting in 1937, the federal agencies authorized to regulate commercial motor vehicle safety set increasingly rigorous visual acuity standards, culminating in the current one, which has remained unchanged since it became effective in 1971. [FN20] When the FHWA proposed it, the agency found that '[a]ccident experience in recent years has demonstrated that reduction of the effects of organic and physical disorders, emotional impairments, and other limitations of the good health of drivers are increasingly important factors in accident prevention,' 34 Fed. Reg. 9080, 9081 (1969) (Notice of Proposed Rule Making); the current standard was adopted to reflect the agency's conclusion that 'drivers of modern, more complex vehicles' must be able to 'withstand the increased physical and mental demands that their occupation now imposes.' 35 Fed. Reg. 6458 (1970). Given these findings and 'in the light of discussions with the Administration's medical advisers,' *id.*, at 6459, the FHWA made a considered determination about

the level of visual acuity needed for safe operation of commercial motor vehicles in interstate commerce, an 'area [in which] the risks involved are so well known and so serious as to dictate the utmost caution.' *Id.*, at 17419.

For several reasons, one would expect any regulation governing a waiver program to establish a comparable substantive standard (albeit for exceptional cases), grounded on known facts indicating at least that safe operation would not be jeopardized. First, of course, safe operation was the criterion of the statute authorizing an administrative waiver scheme, as noted already. Second, the impetus to develop a waiver program was a concern that the existing substantive standard might be more demanding than safety required. When Congress enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law. The Senate Labor and Human Resources Committee Report on the ADA stated that 'a person with a disability applying for or currently holding a job subject to [DOT standards for drivers] must be able to satisfy these physical qualification standards in order to be considered a qualified individual with a disability under title I of this legislation.' S. Rep. No. 101-116, pp. 27-28 (1998). The two primary House Committees shared this understanding, see H. R. Rep. No. 101-485, pt. 2, p. 57 (1990) (House Education and Labor Committee Report); *id.*, pt. 3, at 34 (House Judiciary Committee Report). Accordingly, two of these Committees asked 'the Secretary of Transportation [to] undertake a thorough review' of current knowledge about the capabilities of individuals with disabilities and available technological aids and devices, and make 'any necessary changes' within two years of the enactment of the ADA. S. Rep. No. 101-116, *supra*, at 27-28; see H. R. Rep. No. 101-485, pt. 2, at 57; see also *id.*, pt. 3, at 34 (expressing the expectation that the Secretary of Transportation would 'review these requirements to determine whether they are valid under this Act'). Finally, when the FHWA instituted the waiver program it addressed the statutory mandate by stating in its notice of final disposition that the scheme would be 'consistent with the safe operation of commercial motor vehicles,' just as 49 U. S. C. App. §2505(f) (1988 ed.) required, see 57 Fed. Reg. 31460 (1992).

And yet, despite this background, the regulations establishing the waiver program did not modify the

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general visual acuity standards. It is not that the waiver regulations failed to do so in a merely formal sense, as by turning waiver decisions on driving records, not sight requirements. The FHWA in fact made it clear that it had no evidentiary basis for concluding that the pre-existing standards could be lowered consistently with public safety. When, in 1992, the FHWA published an '[a]dvance notice of proposed rulemaking' requesting comments 'on the need, if any, to amend its driver qualification requirements relating to the vision standard,' *id.*, at 6793, it candidly proposed its waiver scheme as simply a means of obtaining information bearing on the justifiability of revising the binding standards already in place, see *id.*, at 10295. The agency explained that the 'object of the waiver program is to provide objective data to be considered in relation to a rulemaking exploring the feasibility of relaxing the current absolute vision standards in 49 CFR part 391 in favor of a more individualized standard.' *Ibid.* As proposed, therefore, there was not only no change in the unconditional acuity standards, but no indication even that the FHWA then had a basis in fact to believe anything more lenient would be consistent with public safety as a general matter. After a bumpy stretch of administrative procedure, see *Advocates for Highway and Auto Safety v. FHWA*, 28 F. 3d 1288, 1290 (CA DC 1994), the FHWA's final disposition explained again that the waivers were proposed as a way to gather facts going to the wisdom of changing the existing law. The waiver program 'will enable the FHWA to conduct a study comparing a group of experienced, visually deficient drivers with a control group of experienced drivers who meet the current Federal vision requirements. This study will provide the empirical data necessary to evaluate the relationships between specific visual deficiencies and the operation of [commercial motor vehicles]. The data will permit the FHWA to properly evaluate its current vision requirement in the context of actual driver performance, and, if necessary, establish a new vision requirement which is safe, fair, and rationally related to the latest medical knowledge and highway technology.' 57 Fed. Reg. 31458 (1992). And if all this were not enough to show that the FHWA was planning to give waivers solely to collect information, it acknowledged that a study it had commissioned had done no more than 'illuminate the lack of empirical data to establish a link between vision disorders and commercial motor vehicle safety,' and 'failed to provide a sufficient

foundation on which to propose a satisfactory vision standard for drivers of [commercial motor vehicles] in inter-state commerce,' ' *Advocates for Highway Safety*, *supra*, at 1293 (quoting 57 Fed. Reg., at 31458).

In sum, the regulatory record made it plain that the waiver regulation did not rest on any final, factual conclusion that the waiver scheme would be conducive to public safety in the manner of the general acuity standards and did not purport to modify the substantive content of the general acuity regulation in any way. The waiver program was simply an experiment with safety, however well intended, resting on a hypothesis whose confirmation or refutation in practice would provide a factual basis for reconsidering the existing standards. [FN21]

Nothing in the waiver regulation, of course, required an employer of commercial drivers to accept the hypothesis and participate in the Government's experiment. The only question, then, is whether the ADA should be read to require such an employer to defend a decision to decline the experiment. Is it reasonable, that is, to read the ADA as requiring an employer like Albertsons to shoulder the general statutory burden to justify a job qualification that would tend to exclude the disabled, whenever the employer chooses to abide by the otherwise clearly applicable, unamended substantive regulatory standard despite the Government's willingness to waive it experimentally and without any finding of its being inappropriate? If the answer were yes, an employer would in fact have an obligation of which we can think of no comparable example in our law. The employer would be required in effect to justify *de novo* an existing and otherwise applicable safety regulation issued by the Government itself. The employer would be required on a case-by-case basis to reinvent the Government's own wheel when the Government had merely begun an experiment to provide data to consider changing the underlying specifications. And what is even more, the employer would be required to do so when the Government had made an affirmative record indicating that contemporary empirical evidence was hard to come by. It is simply not credible that Congress enacted the ADA (before there was any waiver program) with the understanding that employers choosing to respect the Government's sole substantive visual acuity

(Publication page references are not available for this document.)

regulation in the face of an experimental waiver might be burdened with an obligation to defend the regulation's application according to its own terms.

The judgment of the Ninth Circuit is accordingly reversed.

It is so ordered.

FN\*. JUSTICE STEVENS and JUSTICE BREYER join Parts I and III of this opinion.

FN1. See Motor Carrier Act, §204(a), 49 Stat. 546; Department of Transportation Act, § 6(e)(6)(C), 80 Stat. 939-940; 49 CFR § 1.4(c)(9) (1968); Motor Carrier Safety Act of 1984 §206, 98 Stat. 2835, as amended, 49 U. S. C. §31136(a)(3); 49 CFR §1.48(aa) (1998).

FN2. Visual acuity has a number of components but most commonly refers to 'the ability to determine the presence of or to distinguish between more than one identifying feature in a visible target.' G. von Noorden, *Binocular Vision and Ocular Motility* 114 (4th ed. 1990). Herman Snellen was a Dutch ophthalmologist who, in 1862, devised the familiar letter chart still used to measure visual acuity. The first figure in the Snellen score refers to distance between the viewer and the visual target, typically 20 feet. The second corresponds to the distance at which a person with normal acuity could distinguish letters of the size that the viewer can distinguish at 20 feet. See C. Snyder, *Our Ophthalmic Heritage* 97-99 (1967); D. Vaughan, T. Asburg, & P. Riordan-Eva, *General Ophthalmology* 30 (15th ed. 1999).

FN3. 'Amblyopia,' derived from Greek roots meaning dull vision, is a general medical term for 'poor vision caused by abnormal visual development secondary to abnormal visual stimulation.' K. Wright et al., *Pediatric Ophthalmology and Strabismus* 126 (1995); see id., at 126-131; see also Von Noorden, *supra*, at 208-245.

FN4. Several months later, Kirkingburg's vision was recertified by a physician, again erroneously. Both times Kirkingburg received certification although his vision as measured did not meet the DOT minimum requirement. See 143 F. 3d 1228, 1230, and n. 2 (CA9 1998); App. 49-50, 297-298, 360-361.

FN5. In February 1992, the FHWA issued an

advance notice of proposed rulemaking to review its vision standards. See 57 Fed. Reg. 6793. Shortly thereafter, the FHWA announced its intent to set up a waiver program and its preliminary acceptance of waiver applications. See id., at 10295. It modified the proposed conditions for the waivers and requested comments in June. See id., at 23370. After receiving and considering the comments, the Administration announced its final decision to grant waivers in July.

FN6. Albertsons offered Kirkingburg at least one and possibly two alternative jobs. The first was as a 'yard hostler,' a truckdriver within the premises of Albertsons' warehouse property, the second as a tire mechanic. The company apparently withdrew the first offer, though the parties dispute the exact sequence of events. Kirkingburg turned down the second because it paid much less than driving a truck. See App. 14-16, 41-42.

FN7. The ADA provides: 'No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.' 42 U. S. C. §12112(a).

FN8. 'Whether a monocular individual is 'disabled' per se, under the Americans with Disabilities Act.' Pet. for Cert. i (citation omitted).

FN9. The Ninth Circuit also discussed whether Kirkingburg was disabled under the third, 'regarded as,' definition of 'disability.' See 143 F. 3d, at 1233. Albertsons did not challenge that aspect of the Court of Appeals's decision in its petition for certiorari and we therefore do not address it. See this Court's Rule 14.1(a); see also, e.g., *Yee v. Escondido*, 503 U. S. 519, 535 (1992).

FN10. As the parties have not questioned the regulations and interpretive guidance promulgated by the EEOC relating to the ADA's definitional section, 42 U. S. C. §12102, for the purposes of this case, we assume, without deciding, that such regulations are valid, and we have no occasion to decide what level of deference, if any, they are due, see *Sutton v. United Airlines, Inc., ante.*, at \_\_\_ (slip op., at 6-7).

FN11. Before the Ninth Circuit, Albertsons

(Publication page references are not available for this document.)

presented the issue of Kirkingburg's failure to meet the Act's definition of disability as an alternative ground for affirmance, i.e., for a grant of summary judgment in the company's favor. It thus contended that Kirkingburg had 'failed to produce any material issue of fact' that he was disabled. App. 182. Parts of the Ninth Circuit's discussion suggest that it was merely denying the company's request for summary judgment, leaving the issue open for factual development and resolution on remand. See, e.g., 143 F. 3d, at 1232 ('Albertson's first contends that Kirkingburg failed to raise a genuine issue of fact regarding whether he is disabled'); *ibid.* ('Kirkingburg has presented uncontroverted evidence showing that ... [his] inability to see out of one eye affects his peripheral vision and his depth perception'); *ibid.* ('if the facts are as Kirkingburg alleges'). Moreover the Government (and at times even Albertsons, see Pet. for Cert. 15) understands the Ninth Circuit to have been simply explaining why the company was not entitled to summary judgment on this score. See Brief for United States et al. as Amici Curiae 11, and n. 5 ('The Ninth Circuit therefore correctly declined to grant summary judgment to petitioner on the ground that monocular vision is not a disability'). Even if that is an accurate reading, the statements the Ninth Circuit made setting out the standards governing the finding of disability would have largely dictated the outcome. Whether one views the Ninth Circuit's opinion as merely denying summary judgment for the company or as tantamount to a grant of summary judgment for Kirkingburg, our rejection of the sweeping character of the Court of Appeals's pronouncements remains the same.

FN12. Individuals who can see out of only one eye are unable to perform stereopsis, the process of combining two retinal images into one through which two-eyed individuals gain much of their depth perception, particularly at short distances. At greater distances, stereopsis is relatively less important for depth perception. In their distance vision, monocular individuals are able to compensate for their lack of stereopsis to varying degrees by relying on monocular cues, such as motion parallax, linear perspective, overlay of contours, and distribution of highlights and shadows. See Von Noorden, n. 1, *supra*, at 23-30; App. 300-302.

FN13. Kirkingburg asserts that in showing that Albertsons initially allowed him to drive with a DOT certification, despite the fact that he did not meet the DOT's minimum visual acuity requirement, he produced evidence from which a reasonable juror could find that he satisfied the

legitimate prerequisites of the job. See Brief for Respondent 36, 37; see also *id.*, at 6. But Albertsons' argument is a legal, not a factual, one. In any event, the ample evidence in the record on Albertsons' policy of requiring adherence to minimum DOT vision standards for its truckdrivers, see, e.g., App. 53, 55-56, 333, would bar any inference that Albertsons' failure to detect the discrepancy between the level of visual acuity Kirkingburg was determined to have had during his first two certifications and the DOT's minimum visual acuity requirement raised a genuine factual dispute on this issue.

FN14. The EEOC's regulations implementing Title I define '[q]ualification standards' to mean 'the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.' 29 CFR §1630.2(q) (1998).

FN15. This appears to be the position taken by the EEOC in the Interpretive Guidance promulgated under its authority to issue regulations to carry out Title I of the ADA, 42 U. S. C. §12116, see 29 CFR pt. 1630, App., §§1630.15(b) and (c) (1998) (requiring safety-related standards to be evaluated under the ADA's direct threat standard); see also App. §1630.10 (noting that selection criteria that screen out individuals with disabilities, including 'safety requirements, vision or hearing requirements,' must be job-related, consistent with business necessity, and not amenable to reasonable accommodation); *EEOC v. Exxon Corp.*, 1 F. Supp. 2d 635, 645 (ND Tex. 1998) (adopting the EEOC's position that safety-related qualification standards must meet the ADA's direct-threat standard). Although it might be questioned whether the Government's interpretation, which might impose a higher burden on employers to justify safety-related qualification standards than other job requirements, is a sound one, we have no need to confront the validity of the reading in this case.

FN16. The implementing regulations of Title I also recognize a defense to liability under the ADA that 'a challenged action is required or necessitated by another Federal law or regulation,' 29 CFR § 1630.15(e) (1998). As the parties do not invoke this specific regulation, we have no occasion to consider its effect.

FN17. This provision is currently codified at 49 U. S. C. §31136(a)(3).

(Publication page references are not available for this document.)

FN18. Congress recently amended the waiver provision in the Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107. It now provides that the Secretary of Transportation may issue a 2-year renewable 'exemption' if 'such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.' See § 4007, 112 Stat. 401, 49 U. S. C. A. §31315(b) (Oct. 1998 Supp.).

FN19. At the time the FHWA promulgated the current visual acuity standard, the agency was acting pursuant to §204(a) of the Interstate Commerce Act, as amended by the Motor Carrier Act, 49 U. S. C. §304(a) (1970 ed.), see n. 1, *supra*, which likewise required the agency to regulate to ensure 'safety of operation.'

FN20. The Interstate Commerce Commission promulgated the first visual acuity regulations for interstate commercial drivers in 1937, requiring '[g]ood eyesight in both eyes (either with or without glasses, or by correction with glasses), including adequate perception of red and green colors.' 2 Fed. Reg. 113120 (1937). In 1939, the vision standard was changed to require 'visual acuity (either without glasses or by correction with glasses) of not less than 20/40 (Snellen) in one eye, and 20/100 (Snellen) in the other eye; form field of not less than 45 degrees in all meridians from the point of fixation; ability to distinguish red, green, and yellow.' 57 Fed. Reg. 6793-6794 (1992) (internal quotation marks omitted). In 1952, the visual acuity standard was strengthened to require at least 20/40 (Snellen) in each eye. *Id.*, at 6794.

FN21. Though irrelevant to the disposition of this case, it is hardly surprising that two years after the events here the waiver regulations were struck down for failure of the FHWA to support its formulaic finding of consistency with public safety. See *Advocates for Highway and Auto Safety v. FHWA*, 28 F. 3d 1288, 1289 (CA DC 1994). On remand, the agency 'revalidated' the waivers it had already issued, based in part on evidence relating to the safety of drivers in the program that had not been included in the record before the District of Columbia Circuit. See 59 Fed. Reg. 50887, 50889-50890 (1994); *id.*, at 59386, 59389. In the meantime the FHWA has apparently continued to want things both ways. It has said publicly, based on a review of the data it collected from the waiver program itself, that the drivers who obtained such waivers have performed better as a class than those who satisfied the regulation. See *id.*, at 50887, 50890. It has also recently noted that its medical

panel has recommended 'leaving the visual acuity standard unchanged,' see 64 Fed. Reg. 16518 (1999) (citing F. Berson, M. Kuperwaser, L. Aiello, and J. Rosenberg, *Visual Requirements and Commercial Drivers*, Oct. 16, 1998), a recommendation which the FHWA has concluded supports its 'view that the present standard is reasonable and necessary as a general standard to ensure highway safety.' 64 Fed. Reg. 16518 (1999).

The waiver program in which Kirkingburg participated expired on March 31, 1996, at which point the FHWA allowed all still-active participants to continue to operate in interstate commerce, provided they continued to meet certain medical and other requirements. See 61 Fed. Reg. 13338, 13345 (1996); 49 CFR §391.64 (1998). The FHWA justified this decision based on the safety record of participants in the original waiver program. See 61 Fed. Reg. 13338, 13345 (1996). In the wake of a 1996 decision from the United States Court of Appeals for the Eighth Circuit requiring the FHWA to justify the exclusion of further participants in the waiver program, see *Rauenhorst v. United States Dept. of Transportation, FHWA*, 95 F. 3d 715, 723 (1996), the agency began taking new applicants for waivers, see, e.g., 63 Fed. Reg. 66226 (1998). The agency has now initiated a program under the authority granted in the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107, to grant exemptions on a more regular basis, see 63 Fed. Reg. 67600 (1998) (interim final rule implementing the Transportation Equity Act for the 21st Century). The effect of the current exemption program has not been challenged in this case, and we have no occasion to consider it.

JUSTICE THOMAS, concurring.

As the Government reads the Americans With Disabilities Act of 1990, 104 Stat. 327, as amended, 42 U. S. C. §12101 et seq. (1994 ed., and Supp. III), it requires that petitioner justify the Department of Transportation's visual acuity standards as job related, consistent with business necessity, and required to prevent employees from imposing a direct threat to the health and safety of others in the workplace. The Court assumes, for purposes of this case, that the Government's reading is, for the most part, correct. *Ante*, at 13 and n. 15. I agree with the Court's decision that, even when the case is analyzed through the Government's proposed lens, petitioner was entitled to summary judgment in this case. As the Court explains, *ante*, at 21-22, it would be unprecedented and nonsensical to interpret

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§12113 to require petitioner to defend the application of the Government's regulation to respondent when petitioner has an unconditional obligation to enforce the federal law.

As the Court points out, though, ante, at 11, DOT's visual acuity standards might also be relevant to the question whether respondent was a 'qualified individual with a disability' under 42 U. S. C. § 12112(a). That section provides that no covered entity 'shall discriminate against a qualified individual with a disability because of the disability of such individual.' § 12112(a). Presumably, then, a plaintiff claiming a cause of action under the ADA bears the burden of proving, inter alia, that he is a qualified individual. The phrase 'qualified individual with a disability' is defined to mean:

'an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.' § 12111(8) (emphasis added).

In this case, respondent sought a job driving trucks in interstate commerce. The quintessential function of that job, it seems to me, is to be able to drive a commercial truck in interstate commerce, and it was respondent's burden to prove that he could do so.

As the Court explains, ante, at 14, DOT's Motor Carrier Safety Regulations have the force of law and bind petitioner--it may not, by law, 'permit a person to drive a commercial motor vehicle unless that

person is qualified to drive.' 49 CFR §391.11 (1999). But by the same token, DOT's regulations bind respondent who 'shall not drive a commercial motor vehicle unless he/she is qualified to drive a commercial motor vehicle.' Ibid.; see also §391.41 ('A person shall not drive a commercial motor vehicle unless he/she is physically qualified to do so'). Given that DOT's regulation equally binds petitioner and respondent, and that it is conceded in this case that respondent could not meet the federal requirements, respondent surely was not 'qualified' to perform the essential functions of petitioner's truckdriver job without a reasonable accommodation. The waiver program might be thought of as a way to reasonably accommodate respondent, but for the fact, as the Court explains, ante, at 15- 20, that the program did nothing to modify the regulation's unconditional requirements. For that reason, requiring petitioner to make such an accommodation most certainly would have been unreasonable.

The result of this case is the same under either view of the statute. If forced to choose between these alternatives, however, I would prefer to hold that respondent, as a matter of law, was not qualified to perform the job he sought within the meaning of the ADA. I nevertheless join the Court's opinion. The Ninth Circuit below viewed respondent's ADA claim on the Government's terms and petitioner's argument here appears to be tailored around the Government's view. In these circumstances, I agree with the Court's approach. I join the Court's opinion, however, only on the understanding that it leaves open the argument that federal laws such as DOT's visual acuity standards might be critical in determining whether a plaintiff is a 'qualified individual with a disability.'

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**VAUGHN L. MURPHY, PETITIONER**  
**v.**  
**UNITED PARCEL SERVICE, INC.**

**No. 97-1992**

United States Supreme Court.

Argued April 27, 1999

Decided June 22, 1999

Syllabus [FN\*]

FN\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

Respondent United Parcel Service, Inc. (UPS), hired petitioner as a mechanic, a position that required him to drive commercial vehicles. To drive, he had to satisfy certain Department of Transportation (DOT) health certification requirements, including having 'no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely.' 49 CFR §391.41(b)(6). Despite petitioner's high blood pressure, he was erroneously granted certification and commenced work. After the error was discovered, respondent fired him on the belief that his blood pressure exceeded the DOT's requirements. Petitioner brought suit under Title I of the Americans with Disabilities Act of 1990 (ADA), the District Court granted respondent summary judgment, and the Tenth Circuit affirmed. Citing its decision in *Sutton v. United Air Lines, Inc.*, 130 F. 3d 893, 902, *aff'd*, ante, p. \_\_\_, that an individual claiming a disability under the ADA should be assessed with regard to any mitigating or corrective measures employed, the Court of Appeals held that petitioner's hypertension is not a disability because his doctor testified that when medicated, petitioner functions normally in everyday activities. The court also affirmed the District Court's determination that petitioner is not 'regarded as' disabled under the ADA, explaining that respondent did not terminate him on an unsubstantiated fear that he would suffer a heart attack or stroke, but because his blood pressure exceeded the DOT's requirements for

commercial vehicle drivers.

Held:

1. Under the ADA, the determination whether petitioner's impairment 'substantially limits' one or more major life activities is made with reference to the mitigating measures he employs. *Sutton*, ante, p. \_\_\_. The Tenth Circuit concluded that, when medicated, petitioner's high blood pressure does not substantially limit him in any major life activity. Because the question whether petitioner is disabled when taking medication is not before this Court, there is no occasion here to consider whether he is 'disabled' due to limitations that persist despite his medication or the negative side effects of his medication. P. 4.

2. Petitioner is not 'regarded as' disabled because of his high blood pressure. Under *Sutton*, ante, at \_\_\_, a person is 'regarded as' disabled within the ADA's meaning if, among other things, a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities. Here, respondent argues that it does not regard petitioner as substantially limited in the major life activity of working, but, rather, regards him as unqualified to work as a UPS mechanic because he is unable to obtain DOT health certification. When referring to the major life activity of working, the Equal Employment Opportunity Commission (EEOC) defines 'substantially limits' as 'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.' 29 CFR §1630(j)(3)(i). Thus, one must be regarded as precluded from more than a particular job. Assuming without deciding that the EEOC regulations are valid, the Court concludes that the evidence that petitioner is regarded as unable to meet the DOT regulations is not sufficient to create a genuine issue of material fact as to whether he is regarded as unable to perform a class of jobs utilizing his skills. At most, petitioner has shown that he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle--a specific type of vehicle used on a highway in interstate commerce. He has put forward no evidence that he is regarded as unable to perform any mechanic job that does not

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call for driving a commercial motor vehicle and thus does not require DOT certification. Indeed, it is undisputed that he is generally employable as a mechanic, and there is uncontroverted evidence that he could perform a number of mechanic jobs. Consequently, petitioner has failed to show that he is regarded as unable to perform a class of jobs. Rather, the undisputed record evidence demonstrates that petitioner is, at most, regarded as unable to perform only a particular job. This is insufficient, as a matter of law, to prove that petitioner is regarded as substantially limited in the major life activity of working. Pp. 4-8.

141 F. 3d 1185, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BREYER, J., joined.

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

JUSTICE O'CONNOR delivered the opinion of the Court.

Respondent United Parcel Service, Inc. (UPS), dismissed petitioner Vaughn L. Murphy from his job as a UPS mechanic because of his high blood pressure. Petitioner filed suit under Title I of the Americans with Disabilities Act of 1990 (ADA or Act), 104 Stat. 328, 42 U. S. C. §12101 et seq., in Federal District Court. The District Court granted summary judgment to respondent, and the Court of Appeals for the Tenth Circuit affirmed. We must decide whether the Court of Appeals correctly considered petitioner in his medicated state when it held that petitioner's impairment does not 'substantially limi[t] one or more of his major life activities and whether it correctly determined that petitioner is not 'regarded as disabled.' See § 12102(2). In light of our decision in *Sutton v. United Air Lines, Inc.*, ante, p. \_\_\_\_, we conclude that the Court of Appeals' resolution of both issues was correct.

## I

Petitioner was first diagnosed with hypertension

(high blood pressure) when he was 10 years old. Unmedicated, his blood pressure is approximately 250/160. With medication, however, petitioner's 'hypertension does not significantly restrict his activities and . . . in general he can function normally and can engage in activities that other persons normally do.' 946 F. Supp. 872, 875 (Kan. 1996) (discussing testimony of petitioner's physician).

In August 1994, respondent hired petitioner as a mechanic, a position that required petitioner to drive commercial motor vehicles. Petitioner does not challenge the District Court's conclusion that driving a commercial motor vehicle is an essential function of the mechanic's job at UPS. 946 F. Supp., at 882-883. To drive such vehicles, however, petitioner had to satisfy certain health requirements imposed by the Department of Transportation (DOT). 49 CFR §391.41(a) (1998) ('A person shall not drive a commercial motor vehicle unless he/she is physically qualified to do so and . . . has on his/her person . . . a medical examiner's certificate that he/she is physically qualified to drive a commercial motor vehicle'). One such requirement is that the driver of a commercial motor vehicle in interstate commerce have 'no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial vehicle safely.' § 391.41(b)(6).

At the time respondent hired him, petitioner's blood pressure was so high, measuring at 186/124, that he was not qualified for DOT health certification, see App. 98a-102a (Department of Transportation, Medical Regulatory Criteria for Evaluation Under Section 391.41(b)(6), attached as exhibit to Affidavit and Testimony of John R. McMahon) (hereinafter Medical Regulatory Criteria). Nonetheless, petitioner was erroneously granted certification, and he commenced work. In September 1994, a UPS Medical Supervisor who was reviewing petitioner's medical files discovered the error and requested that petitioner have his blood pressure retested. Upon retesting, petitioner's blood pressure was measured at 160/102 and 164/104. See App. 48a (testimony of Vaughn Murphy). On October 5, 1994, respondent fired petitioner on the belief that his blood pressure exceeded the DOT's requirements for drivers of commercial motor vehicles.

Petitioner brought suit under Title I of the ADA in

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the United States District Court for the District of Kansas. The court granted respondent's motion for summary judgment. It held that, to determine whether petitioner is disabled under the ADA, his 'impairment should be evaluated in its medicated state.' 946 F. Supp., at 881. Noting that when petitioner is medicated he is inhibited only in lifting heavy objects but otherwise functions normally, the court held that petitioner is not 'disabled' under the ADA. *Id.*, at 881-882. The court also rejected petitioner's claim that he was 'regarded as' disabled, holding that respondent 'did not regard Murphy as disabled, only that he was not certifiable under DOT regulations.' *Id.*, at 882.

The Court of Appeals affirmed the District Court's judgment. 141 F. 3d 1185 (CA10 1999) (judgt. order). Citing its decision in *Sutton v. United Air Lines, Inc.*, 130 F. 3d 893, 902 (CA10 1997), *aff'd*, \_\_\_ U. S. \_\_\_ (1999), that an individual claiming a disability under the ADA should be assessed with regard to any mitigating or corrective measures employed, the court held that petitioner's hypertension is not a disability because his doctor had testified that when petitioner is medicated, he 'functions normally doing everyday activity that an everyday person does.' App. to Pet. for Cert. 4a. The court also affirmed the District Court's determination that petitioner is not 'regarded as' disabled under the ADA. It explained that respondent did not terminate petitioner 'on an unsubstantiated fear that he would suffer a heart attack or stroke,' but 'because his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles.' *Id.*, at 5a. We granted certiorari, 525 U. S. \_\_\_ (1999), and we now affirm.

## II

The first question presented in this case is whether the determination of petitioner's disability is made with reference to the mitigating measures he employs. We have answered that question in *Sutton* in the affirmative. Given that holding, the result in this case is clear. The Court of Appeals concluded that, when medicated, petitioner's high blood pressure does not substantially limit him in any major life activity. Petitioner did not seek, and we did not grant, certiorari on whether this conclusion was correct. Because the question whether petitioner is disabled when taking medication is not

before us, we have no occasion here to consider whether petitioner is 'disabled' due to limitations that persist despite his medication or the negative side effects of his medication. Instead, the question granted was limited to whether, under the ADA, the determination of whether an individual's impairment 'substantially limits' one or more major life activities should be made without consideration of mitigating measures. Consequently, we conclude that the Court of Appeals correctly affirmed the grant of summary judgment in respondent's favor on the claim that petitioner is substantially limited in one or more major life activities and thus disabled under the ADA.

## III

The second issue presented is also largely resolved by our opinion in *Sutton*. Petitioner argues that the Court of Appeals erred in holding that he is not 'regarded as' disabled because of his high blood pressure. As we held in *Sutton*, ante, p. 15, a person is 'regarded as' disabled within the meaning of the ADA if a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities. Here, petitioner alleges that his hypertension is regarded as substantially limiting him in the major life activity of working, when in fact it does not. To support this claim, he points to testimony from respondent's resource manager that respondent fired petitioner due to his hypertension, which he claims evidences respondent's belief that petitioner's hypertension--and consequent inability to obtain DOT certification--substantially limits his ability to work. In response, respondent argues that it does not regard petitioner as substantially limited in the major life activity of working but, rather, regards him as unqualified to work as a UPS mechanic because he is unable to obtain DOT health certification.

As a preliminary matter, we note that there remains some dispute as to whether petitioner meets the requirements for DOT certification. As discussed above, petitioner was incorrectly granted DOT certification at his first examination when he should have instead been found unqualified. See *supra*, at 2. Upon retesting, although petitioner's blood pressure was not low enough to qualify him for the one-year certification that he had incorrectly been issued, it was sufficient to qualify him for optional temporary DOT health certification. App. 98a-102a

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(Medical Regulatory Criteria). Had a physician examined petitioner and, in light of his medical history, declined to issue a temporary DOT certification, we would not second-guess that decision. Here, however, it appears that UPS determined that petitioner could not meet the DOT standards and did not allow him to attempt to obtain the optional temporary certification. *Id.*, at 84a-86a (testimony of Monica Sloan, UPS's company nurse); *id.*, at 54a-55a (testimony and affidavit of Vaughn Murphy). We need not resolve the question of whether petitioner could meet the standards for DOT health certification, however, as it goes only to whether petitioner is qualified and whether respondent has a defense based on the DOT regulations, see *Albertsons v. Kirkingburg*, post, p. \_\_\_\_--issues not addressed by the court below or raised in the petition for certiorari.

The only issue remaining is whether the evidence that petitioner is regarded as unable to obtain DOT certification (regardless of whether he can, in fact, obtain optional temporary certification) is sufficient to create a genuine issue of material fact as to whether petitioner is regarded as substantially limited in one or more major life activities. As in *Sutton*, ante, at 18-19, we assume, arguendo, that the EEOC regulations regarding the disability determination are valid. When referring to the major life activity of working, the Equal Employment Opportunity Commission (EEOC) defines 'substantially limits' as: 'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.' 29 CFR § 1630(j)(3)(i) (1998). The EEOC further identifies several factors that courts should consider when determining whether an individual is substantially limited in the major life activity of working, including 'the number and types of jobs utilizing similar training, knowledge, skills or abilities, within [the] geographical area [reasonably accessible to the individual], from which the individual is also disqualified.' § 1630(j)(3)(ii)(B). Thus, to be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than a particular job. See § 1630(j)(3)(i) ('The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working').

Again, assuming without deciding that these regulations are valid, petitioner has failed to demonstrate that there is a genuine issue of material fact as to whether he is regarded as disabled. Petitioner was fired from the position of UPS mechanic because he has a physical impairment--hypertension--that is regarded as preventing him from obtaining DOT health certification. See App. to Pet. for Cert. 5a (UPS terminated Murphy because 'his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles'); 946 F. Supp., at 882 ('[T]he court concludes UPS did not regard Murphy as disabled, only that he was not certifiable under DOT regulations'); App. 125a, ¶ 18 (Defendant's Memorandum in Support of Motion for Summary Judgment) ('UPS considers driving commercial motor vehicles an essential function of plaintiff's job as mechanic'); App. 103a (testimony of John R. McMahon) (stating that the reason why petitioner was fired was that he 'did not meet the requirements of the Department of Transportation').

The evidence that petitioner is regarded as unable to meet the DOT regulations is not sufficient to create a genuine issue of material fact as to whether petitioner is regarded as unable to perform a class of jobs utilizing his skills. At most, petitioner has shown that he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle--a specific type of vehicle used on a highway in interstate commerce. 49 CFR § 390.5 (defining 'commercial motor vehicle' as a vehicle weighing over 10,000 pounds, designed to carry 16 or more passengers, or used in the transportation of hazardous materials). Petitioner has put forward no evidence that he is regarded as unable to perform any mechanic job that does not call for driving a commercial motor vehicle and thus does not require DOT certification. Indeed, it is undisputed that petitioner is generally employable as a mechanic. Petitioner has 'performed mechanic jobs that did not require DOT certification' for 'over 22 years,' and he secured another job as a mechanic shortly after leaving UPS. 946 F. Supp., at 875, 876. Moreover, respondent presented uncontroverted evidence that petitioner could perform jobs such as diesel mechanic, automotive mechanic, gas-engine repairer, and gas-welding equipment mechanic, all of which utilize petitioner's mechanical skills. See App. 115a (report of Lewis Vierling).

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Consequently, in light of petitioner's skills and the array of jobs available to petitioner utilizing those skills, petitioner has failed to show that he is regarded as unable to perform a class of jobs. Rather, the undisputed record evidence demonstrates that petitioner is, at most, regarded as unable to perform only a particular job. This is insufficient, as a matter of law, to prove that petitioner is regarded as substantially limited in the major life activity of working. See Sutton, ante, at 19-20. Accordingly, the Court of Appeals correctly granted summary judgment in favor of respondent on petitioner's claim that he is regarded as disabled. For the reasons stated, we affirm the decision of the Court of Appeals for the Tenth Circuit.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, dissenting.

For the reasons stated in my dissenting opinion in Sutton v. United Air Lines, Inc., ante, p. \_\_\_, I

respectfully dissent. I believe that petitioner has a 'disability' within the meaning of the ADA because, assuming petitioner's uncontested evidence to be true, his very severe hypertension--in its unmedicated state--'substantially limits' his ability to perform several major life activities. Without medication, petitioner would likely be hospitalized. See App. 81. Indeed, unlike Sutton, this case scarcely requires us to speculate whether Congress intended the Act to cover individuals with this impairment. Severe hypertension, in my view, easily falls within the ADA's nucleus of covered impairments. See Sutton, ante, at 3-9 (STEVENS, J., dissenting).

Because the Court of Appeals did not address whether petitioner was qualified or whether he could perform the essential job functions, App. to Pet. for Cert. 5a, I would reverse and remand for further proceedings.

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**CAROLE KOLSTAD, PETITIONER**  
**v.**  
**AMERICAN DENTAL ASSOCIATION**

**No. 98-208**

United States Supreme Court.

Argued March 1, 1999

Decided June 22, 1999

**Syllabus [FN\*]**

**FN\*** The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

Petitioner sued respondent under Title VII of the Civil Rights Act of 1964 (Title VII), asserting that respondent's decision to promote Tom Spangler over her was a proscribed act of gender discrimination. Petitioner alleged, and introduced testimony to prove, that, among other things, the entire selection process was a sham, the stated reasons of respondent's executive director for selecting Spangler were pretext, and Spangler had been chosen before the formal selection process began. The District Court denied petitioner's request for a jury instruction on punitive damages, which are authorized by the Civil Rights Act of 1991 (1991 Act) for Title VII cases in which the employee 'demonstrates' that the employer has engaged in intentional discrimination and has done so 'with malice or with reckless indifference to [the employee's] federally protected rights.' 42 U. S. C. §1981a(b)(1). In affirming that denial, the en banc Court of Appeals concluded that, before the jury can be instructed on punitive damages, the evidence must demonstrate that the defendant has engaged in some 'egregious' misconduct, and that petitioner had failed to make the requisite showing in this case.

Held:

1. An employer's conduct need not be independently 'egregious' to satisfy § 1981a's requirements for a punitive damages award, although evidence of egregious behavior may

provide a valuable means by which an employee can show the 'malice' or 'reckless indifference' needed to qualify for such an award. The 1991 Act provided for compensatory and punitive damages in addition to the backpay and other equitable relief to which prevailing Title VII plaintiffs had previously been limited. Section 1981a's two-tiered structure--it limits compensatory and punitive awards to cases of 'intentional discrimination,' § 1981a(a)(1), and further qualifies the availability of punitive awards to instances of 'malice' or 'reckless indifference'--suggests a congressional intent to impose two standards of liability, one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award. The terms 'malice' and 'reckless indifference' ultimately focus on the actor's state of mind, however, and § 1981a does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind. Nor does the statute's structure imply an independent role for 'egregiousness' in the face of congressional silence. On the contrary, the view that §1981a provides for punitive awards based solely on an employer's state of mind is consistent with the 1991 Act's distinction between equitable and compensatory relief. Intent determines which remedies are open to a plaintiff here as well. This focus on the employer's state of mind does give effect to the statute's two-tiered structure. The terms 'malice' and 'reckless indifference' pertain not to the employer's awareness that it is engaging in discrimination, but to its knowledge that it may be acting in violation of federal law, see, e.g., *Smith v. Wade*, 461 U. S. 30, 37, n. 6, 41, 50. There will be circumstances where intentional discrimination does not give rise to punitive damages liability under this standard, as where the employer is unaware of the relevant federal prohibition or discriminates with the distinct belief that its discrimination is lawful, where the underlying theory of discrimination is novel or otherwise poorly recognized; or where the employer reasonably believes that its discrimination satisfies a bona fide occupational qualification defense or other statutory exception to liability. See *Hazen Paper Co. v. Biggins*, 507 U. S. 604, 616, 617. Although there is some support for respondent's assertion that the common law punitive awards tradition includes an 'egregious misconduct' requirement, eligibility for such awards most often is characterized in terms of a defendant's evil

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motive or intent. Egregious or outrageous acts may serve as evidence supporting an inference of such evil motive, but §1981a does not limit plaintiffs to this form of evidence or require a showing of egregious or outrageous discrimination independent of the employer's state of mind. Pp. 5- 11.

2. The inquiry does not end with a showing of the requisite mental state by certain employees, however. Petitioner must impute liability for punitive damages to respondent. Common law limitations on a principal's vicarious liability for its agents' acts apply in the Title VII context. See, e.g., *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742, 754. The Court's discussion of this question is informed by the general common law of agency, as codified in the Restatement (Second) of Agency, see, e.g., *id.*, at 755, which, among other things, authorizes punitive damages 'against a ... principal because of an [agent's] act ... if ... the agent was employed in a managerial capacity and was acting in the scope of employment,' §217 C(c), and declares that even intentional, specifically forbidden torts are within such scope if the conduct is 'the kind [the employee] is employed to perform,' 'occurs substantially within the authorized time and space limits,' and 'is actuated, at least in part, by a purpose to serve the' employer, §228(1), 230, Comment b. Under these rules, even an employer who made every good faith effort to comply with Title VII would be held liable for the discriminatory acts of agents acting in a 'managerial capacity.' Holding such an employer liable, however, is in some tension with the principle that it is 'improper ... to award punitive damages against one who himself is personally innocent and therefore liable only vicariously,' Restatement (Second) of Torts, § 909, Comment b. Applying the Restatement's 'scope of employment' rule in this context, moreover, would reduce the incentive for employers to implement antidiscrimination programs and would, in fact, likely exacerbate employers' concerns that 42 U. S. C. §1981a's 'malice' and 'reckless indifference' standard penalizes those employers who educate themselves and their employees on Title VII's prohibitions. Dissuading employers from implementing programs or policies to prevent workplace discrimination is directly contrary to Title VII's prophylactic purposes. See, e.g., *Burlington Industries, Inc.*, 524 U. S., at 764. Thus, the Court is compelled to modify the Restatement rules to avoid undermining Title VII's

objectives. See, e.g., *ibid.* The Court therefore agrees that, in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII. Pp. 11-18.

3. The question whether petitioner can identify facts sufficient to support an inference that the requisite mental state can be imputed to respondent is left for remand. The parties have not yet had an opportunity to marshal the record evidence in support of their views on the application of agency principles in this case, and the en banc Court of Appeals had no reason to resolve the issue because it concluded that petitioner had failed to demonstrate the requisite 'egregious' misconduct. Pp. 18-19.

139 F. 3d 958, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, Part I of which was unanimous, Part II-A of which was joined by STEVENS, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER JJ., and Part II-B of which was joined by REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which THOMAS, J., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which SOUTER, GINSBURG, and BREYER, JJ., joined.

#### ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JUSTICE O'CONNOR delivered the opinion of the Court.

Under the terms of the Civil Rights Act of 1991 (1991 Act), 105 Stat. 1071, punitive damages are available in claims under Title VII of the Civil Rights Act of 1964 (Title VII), 78 Stat. 253, as amended, 42 U. S. C. §2000e et seq. (1994 ed. and Supp. III), and the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 328, 42 U. S. C. §12101 et seq. Punitive damages are limited, however, to cases in which the employer has engaged in intentional discrimination and has done so 'with malice or with reckless indifference to the federally

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protected rights of an aggrieved individual.' Rev. Stat. §1977, as amended, 42 U. S. C. §1981a(b)(1). We here consider the circumstances under which punitive damages may be awarded in an action under Title VII.

# I A

In September 1992, Jack O'Donnell announced that he would be retiring as the Director of Legislation and Legislative Policy and Director of the Council on Government Affairs and Federal Dental Services for respondent, American Dental Association (respondent or Association). Petitioner, Carole Kolstad, was employed with O'Donnell in respondent's Washington, D. C., office, where she was serving as respondent's Director of Federal Agency Relations. When she learned of O'Donnell's retirement, she expressed an interest in filling his position. Also interested in replacing O'Donnell was Tom Spangler, another employee in respondent's Washington office. At this time, Spangler was serving as the Association's Legislative Counsel, a position that involved him in respondent's legislative lobbying efforts. Both petitioner and Spangler had worked directly with O'Donnell, and both had received 'distinguished' performance ratings by the acting head of the Washington office, Leonard Wheat.

Both petitioner and Spangler formally applied for O'Donnell's position, and Wheat requested that Dr. William Allen, then serving as respondent's Executive Director in the Association's Chicago office, make the ultimate promotion decision. After interviewing both petitioner and Spangler, Wheat recommended that Allen select Spangler for O'Donnell's post. Allen notified petitioner in December 1992 that he had, in fact, selected Spangler to serve as O'Donnell's replacement. Petitioner's challenge to this employment decision forms the basis of the instant action.

# B

After first exhausting her avenues for relief before the Equal Employment Opportunity Commission, petitioner filed suit against the Association in Federal District Court, alleging that respondent's decision to promote Spangler was an act of employment discrimination proscribed under Title

VII. In petitioner's view, the entire selection process was a sham. Tr. 8 (Oct. 26, 1995) (closing argument for plaintiff's counsel). Counsel for petitioner urged the jury to conclude that Allen's stated reasons for selecting Spangler were pretext for gender discrimination, *id.*, at 19, 24, and that Spangler had been chosen for the position before the formal selection process began, *id.*, at 19. Among the evidence offered in support of this view, there was testimony to the effect that Allen modified the description of O'Donnell's post to track aspects of the job description used to hire Spangler. See *id.*, at 132-136 (Oct. 19, 1995) (testimony of Cindy Simms); *id.*, at 48-51 (Oct. 20, 1995) (testimony of Leonard Wheat). In petitioner's view, this 'preselection' procedure suggested an intent by the Association to discriminate on the basis of sex. *Id.*, at 24. Petitioner also introduced testimony at trial that Wheat told sexually offensive jokes and that he had referred to certain prominent professional women in derogatory terms. See *id.*, at 120-124 (Oct. 18, 1995) (testimony of Carole Kolstad). Moreover, Wheat allegedly refused to meet with petitioner for several weeks regarding her interest in O'Donnell's position. See *id.*, at 112- 113. Petitioner testified, in fact, that she had historically experienced difficulty gaining access to meet with Wheat. See *id.*, at 114-115. Allen, for his part, testified that he conducted informal meetings regarding O'Donnell's position with both petitioner and Spangler, see *id.*, at 148 (Oct. 23, 1995), although petitioner stated that Allen did not discuss the position with her, see *id.*, at 127-128 (Oct. 18, 1995).

The District Court denied petitioner's request for a jury instruction on punitive damages. The jury concluded that respondent had discriminated against petitioner on the basis of sex and awarded her backpay totaling \$52,718. App. 109-110. Although the District Court subsequently denied respondent's motion for judgment as a matter of law on the issue of liability, the court made clear that it had not been persuaded that respondent had selected Spangler over petitioner on the basis of sex, and the court denied petitioner's requests for reinstatement and for attorney's fees. 912 F. Supp. 13, 15 (DC 1996).

Petitioner appealed from the District Court's decisions denying her requested jury instruction on punitive damages and her request for reinstatement and attorney's fees. Respondent cross-appealed

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from the denial of its motion for judgment as a matter of law. In a split decision, a panel of the Court of Appeals for the District of Columbia Circuit reversed the District Court's decision denying petitioner's request for an instruction on punitive damages. 108 F. 3d 1431, 1435 (1997). In so doing, the court rejected respondent's claim that punitive damages are available under Title VII only in 'extraordinarily egregious cases.' *Id.*, at 1437. The panel reasoned that, 'because 'the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable,' ' *id.*, at 1438 (quoting *Rowlett v. Anheuser-Busch, Inc.*, 832 F. 2d 194, 205 (CA1 1987)), the fact that the jury could reasonably have found intentional discrimination meant that the jury should have been permitted to consider punitive damages. The court noted, however, that not all cases involving intentional discrimination would support a punitive damages award. 108 F. 3d, at 1438. Such an award might be improper, the panel reasoned, in instances where the employer justifiably believes that intentional discrimination is permitted or where an employee engages in discrimination outside the scope of that employee's authority. *Id.*, at 1438-1439. Here, the court concluded, respondent 'neither attempted to justify the use of sex in its promotion decision nor disavowed the actions of its agents.' *Id.*, at 1439.

The Court of Appeals subsequently agreed to rehear the case en banc, limited to the punitive damages question. In a divided opinion, the court affirmed the decision of the District Court. 139 F. 3d 958 (1998). The en banc majority concluded that, 'before the question of punitive damages can go to the jury, the evidence of the defendant's culpability must exceed what is needed to show intentional discrimination.' *Id.*, at 961. Based on the 1991 Act's structure and legislative history, the court determined, specifically, that a defendant must be shown to have engaged in some 'egregious' misconduct before the jury is permitted to consider a request for punitive damages. *Id.*, at 965. Although the court declined to set out the 'egregiousness' requirement in any detail, it concluded that petitioner failed to make the requisite showing in the instant case. Judge Randolph concurred, relying chiefly on §1981a's structure as evidence of a congressional intent to 'limi[t] punitive damages to exceptional cases.' *Id.*, at 970. Judge Tatel wrote in dissent for five judges, who agreed

generally with the panel majority.

We granted certiorari, 525 U. S. \_\_\_\_ (1998), to resolve a conflict among the Federal Courts of Appeals concerning the circumstances under which a jury may consider a request for punitive damages under §1981a(b)(1). Compare 139 F. 3d 958 (CA DC 1998) (case below), with *Luciano v. Olsten Corp.*, 110 F. 3d 210, 219- 220 (CA2 1997) (rejecting contention that punitive damages require showing of 'extraordinarily egregious' conduct).

## II A

Prior to 1991, only equitable relief, primarily backpay, was available to prevailing Title VII plaintiffs; the statute provided no authority for an award of punitive or compensatory damages. See *Landgraf v. USI Film Products*, 511 U. S. 244, 252-253 (1994). With the passage of the 1991 Act, Congress provided for additional remedies, including punitive damages, for certain classes of Title VII and ADA violations.

The 1991 Act limits compensatory and punitive damages awards, however, to cases of 'intentional discrimination'--that is, cases that do not rely on the 'disparate impact' theory of discrimination. 42 U. S. C. §1981a(a)(1). Section 1981a(b)(1) further qualifies the availability of punitive awards:

'A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.' (Emphasis added.)

The very structure of §1981a suggests a congressional intent to authorize punitive awards in only a subset of cases involving intentional discrimination. Section 1981a(a)(1) limits compensatory and punitive awards to instances of intentional discrimination, while §1981a(b)(1) requires plaintiffs to make an additional 'demonstrat[ion]' of their eligibility for punitive damages. Congress plainly sought to impose two standards of liability--one for establishing a right to compensatory damages and another, higher standard

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that a plaintiff must satisfy to qualify for a punitive award.

The Court of Appeals sought to give life to this two-tiered structure by limiting punitive awards to cases involving intentional discrimination of an 'egregious' nature. We credit the en banc majority's effort to effectuate congressional intent, but, in the end, we reject its conclusion that eligibility for punitive damages can only be described in terms of an employer's 'egregious' misconduct. The terms 'malice' and 'reckless' ultimately focus on the actor's state of mind. See, e.g., Black's Law Dictionary 956-957, 1270 (6th ed. 1990); see also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton, Law of Torts* 212-214 (5th ed. 1984) (defining 'willful,' 'wanton,' and 'reckless'). While egregious misconduct is evidence of the requisite mental state, see *infra*, at 10-11; Keeton, *supra*, at 213-214, §1981a does not limit plaintiffs to this form of evidence, and the section does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind. Nor does the statute's structure imply an independent role for 'egregiousness' in the face of congressional silence. On the contrary, the view that §1981a provides for punitive awards based solely on an employer's state of mind is consistent with the 1991 Act's distinction between equitable and compensatory relief. Intent determines which remedies are open to a plaintiff here as well; compensatory awards are available only where the employer has engaged in 'intentional discrimination.' §1981a(a)(1) (emphasis added).

Moreover, §1981a's focus on the employer's state of mind gives some effect to Congress' apparent intent to narrow the class of cases for which punitive awards are available to a subset of those involving intentional discrimination. The employer must act with 'malice or with reckless indifference to [the plaintiff's] federally protected rights.' § 1981a(b)(1) (emphasis added). The terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination.

We gain an understanding of the meaning of the terms 'malice' and 'reckless indifference,' as used in §1981a, from this Court's decision in *Smith v. Wade*, 461 U. S. 30 (1983). The parties, as well as both the en banc majority and dissent, recognize that

Congress looked to the Court's decision in *Smith* in adopting this language in §1981a. See Tr. of Oral Arg. 28-29; Brief for Petitioner 24; 139 F. 3d, at 964-965; *id.*, at 971 (Tatel, J., dissenting). Employing language similar to what later appeared in §1981a, the Court concluded in *Smith* that 'a jury may be permitted to assess punitive damages in an action under §1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.' 461 U. S., at 56. While the *Smith* Court determined that it was unnecessary to show actual malice to qualify for a punitive award, *id.*, at 45-48, its intent standard, at a minimum, required recklessness in its subjective form. The Court referred to a 'subjective consciousness' of a risk of injury or illegality and a 'criminal indifference to civil obligations.' *Id.*, at 37, n. 6, 41 (quoting *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 214 (1859)); see also *Farmer v. Brennan*, 511 U. S. 825, 837 (1994) (explaining that criminal law employs subjective form of recklessness, requiring a finding that the defendant 'disregards a risk of harm of which he is aware'); see generally 1 T. Sedgwick, *Measure of Damages* §§366, 368, pp. 528, 529 (8th ed. 1891) (describing 'wantonness' in punitive damages context in terms of 'criminal indifference' and 'gross negligence' in terms of a 'conscious indifference to consequences'). The Court thus compared the recklessness standard to the requirement that defendants act with 'knowledge of falsity or reckless disregard for the truth' before punitive awards are available in defamation actions, *Smith*, *supra*, at 50 (quoting *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 349 (1974)), a subjective standard, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U. S. 657, 688 (1989). Applying this standard in the context of §1981a, an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages.

There will be circumstances where intentional discrimination does not give rise to punitive damages liability under this standard. In some instances, the employer may simply be unaware of the relevant federal prohibition. There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful. The underlying theory of discrimination may be novel or otherwise poorly

(Publication page references are not available for this document.)

recognized, or an employer may reasonably believe that its discrimination satisfies a bona fide occupational qualification defense or other statutory exception to liability. See, e.g., 42 U. S. C. § 2000e-2(e)(1) (setting out Title VII defense 'where religion, sex, or national origin is a bona fide occupational qualification'); see also §12113 (setting out defenses under ADA). In *Hazen Paper Co. v. Biggins*, 507 U. S. 604, 616 (1993), we thus observed that, in light of statutory defenses and other exceptions permitting age-based decisionmaking, an employer may knowingly rely on age to make employment decisions without recklessly violating the Age Discrimination in Employment Act of 1967 (ADEA). Accordingly, we determined that limiting liquidated damages under the ADEA to cases where the employer 'knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute,' without an additional showing of outrageous conduct, was sufficient to give effect to the ADEA's two-tiered liability scheme. *Id.*, at 616, 617.

At oral argument, respondent urged that the common law tradition surrounding punitive awards includes an 'egregious misconduct' requirement. See, e.g., Tr. of Oral Arg. 26-28; see also Brief for Chamber of Commerce of United States as Amicus Curiae 8-22 (advancing this argument). We assume that Congress, in legislating on punitive awards, imported common law principles governing this form of relief. See, e.g., *Molzof v. United States*, 502 U. S. 301, 307 (1992). Moreover, some courts and commentators have described punitive awards as requiring both a specified state of mind and egregious or aggravated misconduct. See, e.g., 1 D. Dobbs, *Law of Remedies* 468 (2d ed. 1993) ('Punitive damages are awarded when the defendant is guilty of both a bad state of mind and highly serious misconduct').

Most often, however, eligibility for punitive awards is characterized in terms of a defendant's motive or intent. See, e.g., 1 Sedgwick, *supra*, at 526, 528; C. McCormick, *Law of Damages* 280 (1935). Indeed, '[t]he justification of exemplary damages lies in the evil intent of the defendant.' 1 Sedgwick, *supra*, at 526; see also 2 J. Sutherland, *Law of Damages* §390, p. 1079 (3d ed. 1903) (discussing punitive damages under rubric of '[c]ompensation for wrongs done with bad motive'). Accordingly, 'a positive element of conscious wrongdoing is always

required.' McCormick, *supra*, at 280.

Egregious misconduct is often associated with the award of punitive damages, but the reprehensible character of the conduct is not generally considered apart from the requisite state of mind. Conduct warranting punitive awards has been characterized as 'egregious,' for example, because of the defendant's mental state. See Restatement (Second) of Torts §908(2) (1979) ('Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others'). Respondent, in fact, appears to endorse this characterization. See, e.g., Brief for Respondent 19 ('Malicious and reckless conduct [is] by definition egregious'); see also *id.*, at 28-29. That conduct committed with the specified mental state may be characterized as egregious, however, is not to say that employers must engage in conduct with some independent, 'egregious' quality before being subject to a punitive award.

To be sure, egregious or outrageous acts may serve as evidence supporting an inference of the requisite 'evil motive.' 'The allowance of exemplary damages depends upon the bad motive of the wrong-doer as exhibited by his acts.' 1 Sedgwick, *supra*, at 529 (emphasis added); see also 2 Sutherland, *supra*, §394, at 1101 ('The spirit which actuated the wrong-doer may doubtless be inferred from the circumstances surrounding the parties and the transaction'); see, e.g., *Chizmar v. Mackie*, 896 P. 2d 196, 209 (Alaska 1995) ('[W]here there is no evidence that gives rise to an inference of actual malice or conduct sufficiently outrageous to be deemed equivalent to actual malice, the trial court need not, and indeed should not, submit the issue of punitive damages to the jury' (internal quotation marks omitted)); *Horton v. Union Light, Heat & Power Co.*, 690 S. W. 2d 382, 389 (Ky. 1985) (observing that 'malice . . . may be implied from outrageous conduct'). Likewise, under § 1981a(b)(1), pointing to evidence of an employer's egregious behavior would provide one means of satisfying the plaintiff's burden to 'demonstrat[e]' that the employer acted with the requisite 'malice or . . . reckless indifference.' See 42 U. S. C. § 1981a(b)(1); see, e.g., 3 BNA EEOC Compliance Manual N:6085-N6084 (1992) (Enforcement Guidance: Compensatory and Punitive Damages Available Under §102 of the Civil Rights Act of

(Publication page references are not available for this document.)

1991) (listing '[t]he degree of egregiousness and nature of the respondent's conduct' among evidence tending to show malice or reckless disregard). Again, however, respondent has not shown that the terms 'reckless indifference' and 'malice,' in the punitive damages context, have taken on a consistent definition including an independent, 'egregiousness' requirement. Cf. *Morissette v. United States*, 342 U. S. 246, 263 (1952) ('[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed').

## B

The inquiry does not end with a showing of the requisite 'malice or . . . reckless indifference' on the part of certain individuals, however. 42 U. S. C. §1981a(b)(1). The plaintiff must impute liability for punitive damages to respondent. The en banc dissent recognized that agency principles place limits on vicarious liability for punitive damages. 139 F. 3d, at 974 (Tatel, J., dissenting). Likewise, the Solicitor General as amicus acknowledged during argument that common law limitations on a principal's liability in punitive awards for the acts of its agents apply in the Title VII context. Tr. of Oral Arg. 23.

JUSTICE STEVENS urges that we should not consider these limitations here. See post, at 6-8 (opinion concurring in part and dissenting in part). While we decline to engage in any definitive application of the agency standards to the facts of this case, see *infra*, at 18, it is important that we address the proper legal standards for imputing liability to an employer in the punitive damages context. This issue is intimately bound up with the preceding discussion on the evidentiary showing necessary to qualify for a punitive award, and it is easily subsumed within the question on which we granted certiorari--namely, '[i]n what circumstances may punitive damages be awarded under Title VII of the 1964 Civil Rights Act, as amended, for unlawful intentional discrimination?' Pet. for Cert. i; see also this Court's Rule 14.1(a). 'On a number of occasions, this Court has considered issues waived by the parties below and in the petition for certiorari

because the issues were so integral to decision of the case that they could be considered 'fairly subsumed' by the actual questions presented.' *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U. S. 20, 37 (1991) (Stevens, J., dissenting) (citing cases). The Court has not always confined itself to the set of issues addressed by the parties. See, e.g., *Steel Co. v. Citizens for a Better Environment*, 523 U. S. 83, 93-102 and n. 1 (1998); *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U. S. 229, 243-249 (1989); *Continental Ill. Nat. Bank & Trust Co. v. Chicago R. I. & P. R. Co.*, 294 U. S. 648, 667-675 (1935). Here, moreover, limitations on the extent to which principals may be liable in punitive damages for the torts of their agents was the subject of discussion by both the en banc dissent and majority, see 139 F. 3d, at 968; *id.*, at 974 (Tatel, J., dissenting), amicus briefing, see Brief for Chamber of Commerce of the United States 22-27, and substantial questioning at oral argument, see Tr. of Oral Arg. 11-17, 19-24, 49-50, 54-55. Nor did respondent discount the notion that agency principles may place limits on an employer's vicarious liability for punitive damages. See post, at 6. In fact, respondent advanced the general position 'that the higher agency principles, under common law, would apply to punitive damages.' Tr. of Oral Arg. 49. Accordingly, we conclude that these potential limitations on the extent of respondent's liability are properly considered in the instant case.

The common law has long recognized that agency principles limit vicarious liability for punitive awards. See, e.g., G. Field, *Law of Damages* §§ 85-87 (1876); 1 Sedgwick, *Damages* §378; McCormick, *Damages* §80; 2 F. Mechem, *Law of Agency* §§2014-2015 (2d ed. 1914). This is a principle, moreover, that this Court historically has endorsed. See, e.g., *Lake Shore & Michigan Southern R. Co. v. Prentice*, 147 U. S. 101, 114-115 (1893); *The Amiable Nancy*, 3 Wheat. 546, 558-559 (1818). Courts of Appeals, too, have relied on these liability limits in interpreting 42 U. S. C. §1981a. See, e.g., *Dudley v. Wal-Mart Stores, Inc.*, 166 F. 3d 1317, 1322-1323 (CA11 1999); *Harris, supra*, at 983- 985. See also *Fitzgerald v. Mountain States Telephone & Telegraph Co.*, 68 F. 3d 1257, 1263-1264 (CA10 1995) (same in suit under 42 U. S. C. §1981). But see *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F. 3d 581, 592-594 (CA5 1998), rehearing en banc ordered, 169 F. 3d 215 (1999).

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We have observed that, '[i]n express terms, Congress has directed federal courts to interpret Title VII based on agency principles.' *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742, 754 (1998); see also *Meritor Savings Bank, FSB v. Vinson*, 477 U. S. 57, 72 (1986) (noting that, in interpreting Title VII, 'Congress wanted courts to look to agency principles for guidance'). Observing the limits on liability that these principles impose is especially important when interpreting the 1991 Act. In promulgating the Act, Congress conspicuously left intact the 'limits of employer liability' established in *Meritor*. *Faragher v. Boca Raton*, 524 U. S. 775, 804, n. 4 (1998); see also *Burlington Industries, Inc.*, *supra*, at 763-764 ('[W]e are bound by our holding in *Meritor* that agency principles constrain the imposition of vicarious liability in cases of supervisory harassment').

Although jurisdictions disagree over whether and how to limit vicarious liability for punitive damages, see, e.g., 2 J. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice* §24.01 (1998) (discussing disagreement); 22 Am. Jur. 2d, *Damages* §788 (1988) (same), our interpretation of Title VII is informed by 'the general common law of agency, rather than . . . the law of any particular State.' *Burlington Industries, Inc.*, *supra*, at 754 (internal quotation marks omitted). The common law as codified in the Restatement (Second) of Agency (1957), provides a useful starting point for defining this general common law. See *Burlington Industries, Inc.*, *supra*, at 755 ('[T]he Restatement . . . is a useful beginning point for a discussion of general agency principles'); see also *Meritor*, *supra*, at 72. The Restatement of Agency places strict limits on the extent to which an agent's misconduct may be imputed to the principal for purposes of awarding punitive damages:

'Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if:

'(a) the principal authorized the doing and the manner of the act, or

'(b) the agent was unfit and the principal was reckless in employing him, or

'(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

'(d) the principal or a managerial agent of the principal ratified or approved the act.' Restatement (Second) of Agency, *supra*, §217 C.

See also Restatement (Second) of Torts §909 (same).

The Restatement, for example, provides that the principal may be liable for punitive damages if it authorizes or ratifies the agent's tortious act, or if it acts recklessly in employing the malfeasing agent. The Restatement also contemplates liability for punitive awards where an employee serving in a 'managerial capacity' committed the wrong while 'acting in the scope of employment.' Restatement (Second) of Agency, *supra*, §217 C; see also Restatement (Second) of Torts, *supra*, §909 (same). 'Unfortunately, no good definition of what constitutes a 'managerial capacity' has been found,' 2 Ghiardi, *supra*, §24.05, at 14, and determining whether an employee meets this description requires a fact-intensive inquiry, *id.*, §24.05; 1 L. Schlueter & K. Redden, *Punitive Damages*, §4.4(B)(2)(a), p. 182 (3d ed. 1995). 'In making this determination, the court should review the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished.' *Id.*, §4.4(B)(2)(a), at 181. Suffice it to say here that the examples provided in the Restatement of Torts suggest that an employee must be 'important,' but perhaps need not be the employer's 'top management, officers, or directors,' to be acting 'in a managerial capacity.' *Ibid.*; see also 2 Ghiardi, *supra*, §24.05, at 14; Restatement (Second) of Torts, §909, at 468, Comment b and Illus. 3.

Additional questions arise from the meaning of the 'scope of employment' requirement. The Restatement of Agency provides that even intentional torts are within the scope of an agent's employment if the conduct is 'the kind [the employee] is employed to perform,' 'occurs substantially within the authorized time and space limits,' and 'is actuated, at least in part, by a purpose to serve the' employer. Restatement (Second) of Agency, *supra*, §228(1), at 504. According to the Restatement, so long as these rules are satisfied, an employee may be said to act within the scope of employment even if the employee engages in acts 'specifically forbidden' by the employer and uses 'forbidden means of accomplishing results.' *Id.*, §230, at 511, Comment b; see also *Burlington Industries, Inc.*, *supra*, at 756; Keeton, *Torts* §70. On this view, even an

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employer who makes every effort to comply with Title VII would be held liable for the discriminatory acts of agents acting in a 'managerial capacity.'

Holding employers liable for punitive damages when they engage in good faith efforts to comply with Title VII, however, is in some tension with the very principles underlying common law limitations on vicarious liability for punitive damages--that it is 'improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously.' Restatement (Second) of Torts, *supra*, §909, at 468, Comment b. Where an employer has undertaken such good faith efforts at Title VII compliance, it 'demonstrat[es] that it never acted in reckless disregard of federally protected rights.' 139 F. 3d, at 974 (Tatel, J., dissenting); see also Harris, 132 F. 3d, at 983, 984 (observing that, '[i]n some cases, the existence of a written policy instituted in good faith has operated as a total bar to employer liability for punitive damages' and concluding that 'the institution of a written sexual harassment policy goes a long way towards dispelling any claim about the employer's 'reckless' or 'malicious' state of mind').

Applying the Restatement of Agency's 'scope of employment' rule in the Title VII punitive damages context, moreover, would reduce the incentive for employers to implement antidiscrimination programs. In fact, such a rule would likely exacerbate concerns among employers that §1981a's 'malice' and 'reckless indifference' standard penalizes those employers who educate themselves and their employees on Title VII's prohibitions. See Brief for Equal Employment Advisory Council as Amicus Curiae 12 ('[I]f an employer has made efforts to familiarize itself with Title VII's requirements, then any violation of those requirements by the employer can be inferred to have been committed 'with malice or with reckless indifference' '). Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII. The statute's 'primary objective' is 'a prophylactic one,' *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 417 (1975); it aims, chiefly, 'not to provide redress but to avoid harm,' Faragher, 524 U. S., at 806. With regard to sexual harassment, '[f]or example, Title VII is designed to encourage the creation of antiharassment policies and effective grievance

mechanisms.' *Burlington Industries, Inc.*, 524 U. S., at 764. The purposes underlying Title VII are similarly advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions.

In light of the perverse incentives that the Restatement's 'scope of employment' rules create, we are compelled to modify these principles to avoid undermining the objectives underlying Title VII. See generally *ibid.* See also Faragher, *supra*, at 802, n. 3 (noting that Court must 'adapt agency concepts to the practical objectives of Title VII'); *Meritor Savings Bank, FSB*, 477 U. S., at 72 ('[C]ommon-law principles may not be transferable in all their particulars to Title VII'). Recognizing Title VII as an effort to promote prevention as well as remediation, and observing the very principles underlying the Restatements' strict limits on vicarious liability for punitive damages, we agree that, in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.' 139 F. 3d, at 974 (Tatel, J., dissenting). As the dissent recognized, '[g]iving punitive damages protection to employers who make good-faith efforts to prevent discrimination in the workplace accomplishes' Title VII's objective of 'motiv[at]ing employers to detect and deter Title VII violations.' *Ibid.*

We have concluded that an employer's conduct need not be independently 'egregious' to satisfy § 1981a's requirements for a punitive damages award, although evidence of egregious misconduct may be used to meet the plaintiff's burden of proof. We leave for remand the question whether petitioner can identify facts sufficient to support an inference that the requisite mental state can be imputed to respondent. The parties have not yet had an opportunity to marshal the record evidence in support of their views on the application of agency principles in the instant case, and the en banc majority had no reason to resolve the issue because it concluded that petitioner had failed to demonstrate the requisite 'egregious' misconduct. 139 F. 3d, at 968. Although trial testimony established that Allen made the ultimate decision to promote Spangler while serving as petitioner's interim executive director, respondent's highest position, Tr. 159 (Oct. 19, 1995), it remains to be seen whether

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petitioner can make a sufficient showing that Allen acted with malice or reckless indifference to petitioner's Title VII rights. Even if it could be established that Wheat effectively selected O'Donnell's replacement, moreover, several questions would remain, e.g., whether Wheat was serving in a 'managerial capacity' and whether he behaved with malice or reckless indifference to petitioner's rights. It may also be necessary to determine whether the Association had been making good faith efforts to enforce an antidiscrimination policy. We leave these issues for resolution on remand.

For the foregoing reasons, the decision of the Court of Appeals is vacated, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

For the reasons stated by Judge Randolph in his concurring opinion in the Court of Appeals, I would hold that Congress' two-tiered scheme of Title VII monetary liability implies that there is an egregiousness requirement that reserves punitive damages only for the worst cases of intentional discrimination. See 139 F. 3d 958, 970 (CA DC 1998). Since the Court has determined otherwise, however, I join that portion of Part II-B of the Court's opinion holding that principles of agency law place a significant limitation, and in many foreseeable cases a complete bar, on employer liability for punitive damages.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring in part and dissenting in part.

The Court properly rejects the Court of Appeals' holding that defendants in Title VII actions must engage in 'egregious' misconduct before a jury may be permitted to consider a request for punitive damages. Accordingly, I join Parts I and II-A of its opinion. I write separately, however, because I strongly disagree with the Court's decision to volunteer commentary on an issue that the parties have not briefed and that the facts of this case do not

present. I would simply remand for a trial on punitive damages.

## I

In enacting the Civil Rights Act of 1991 (1991 Act), Congress established a three-tiered system of remedies for a broad range of discriminatory conduct, including violations of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e et seq., as well as some violations of the Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. § 12101 et seq. (1994 ed. and Supp II). Equitable remedies are available for disparate impact violations; compensatory damages for intentional disparate treatment; and punitive damages for intentional discrimination 'with malice or with reckless indifference to the federally protected rights of an aggrieved individual.' §1981a(b)(1).

The 1991 Act's punitive damages standard, as the Court recognizes, ante, at 7, is quite obviously drawn from our holding in *Smith v. Wade*, 461 U. S. 30 (1983). There, we held that punitive damages may be awarded under 42 U. S. C. §1983 (1976 ed., Supp. V) 'when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.' 461 U. S., at 56. [FN1] The 1991 Act's standard is also the same intent-based standard used in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §621 et seq. (1994 ed. and Supp. II). The ADEA provides for an award of liquidated damages--damages that are 'punitive in nature,' *Trans World Airlines, Inc. v. Thurston*, 469 U. S. 111, 125 (1985)--when the employer 'knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.' *Hazen Paper Co. v. Biggins*, 507 U. S. 604, 617 (1993); accord, *Thurston*, 469 U. S., at 126.

In *Smith*, we carefully noted that our punitive damages standard separated the 'quite distinct concepts of intent to cause injury, on one hand, and subjective consciousness of risk of injury (or of unlawfulness) on the other,' 461 U. S., at 38, n. 6, and held that punitive damages are permissible only when the latter component is satisfied by a deliberate or recklessly indifferent violation of federal law. In *Thurston*, we interpreted the

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ADEA's standard the same way and explained that the relevant mental distinction between intentional discrimination and 'reckless disregard' for federally protected rights is essentially the same as the well-known difference between a 'knowing' and a 'willful' violation of a criminal law. See 469 U. S., at 126-127. While a criminal defendant, like an employer, need not have knowledge of the law to act 'knowingly' or intentionally, he must know that his acts violate the law or must 'careless[ly] disregard whether or not one has the right so to act' in order to act 'willfully.' *United States v. Murdock*, 290 U. S. 389, 395 (1933), quoted in *Thurston*, 469 U. S., at 127. We have interpreted the word 'willfully' the same way in the civil context. See *McLaughlin v. Richland Shoe Co.*, 486 U. S. 128, 133 (1988) (holding that the 'plain language' of the Fair Labor Standards Act's 'willful' liquidated damages standard requires that 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute,' without regard to the outrageousness of the conduct at issue).

Construing §1981a(b)(1) to impose a purely mental standard is perfectly consistent with the structure and purpose of the 1991 Act. As with the ADEA, the 1991 Act's 'willful' or 'reckless disregard' standard respects the Act's 'two-tiered' damages scheme while deterring future intentionally unlawful discrimination. See *Hazen Paper*, 507 U. S., at 614-615. There are, for reasons the Court explains, see ante, at 8-9, numerous instances in which an employer might intentionally treat an individual differently because of her race, gender, religion, or disability without knowing that it is violating Title VII or the ADA. In order to recover compensatory damages under the 1991 Act, victims of unlawful disparate treatment must prove that the defendants' conduct was intentional, but they need not prove that the defendants either knew or should have known that they were violating the law. It is the additional element of willful or reckless disregard of the law that justifies a penalty of double damages in age discrimination cases and punitive damages in the broad range of cases covered by the 1991 Act.

It is of course true that as our society moves closer to the goal of eliminating intentional, invidious discrimination, the core mandates of Title VII and the ADA are becoming increasingly ingrained in employers' minds. As more employers come to

appreciate the importance and the proportions of those statutes' mandates, the number of federal violations will continue to decrease accordingly. But at the same time, one could reasonably believe, as Congress did, that as our national resolve against employment discrimination hardens, deliberate violations of Title VII and the ADA become increasingly blameworthy and more properly the subject of 'societal condemnation,' *McKennon v. Nashville Banner Publishing Co.*, 513 U. S. 352, 357 (1995), in the form of punitive damages. Indeed, it would have been rather perverse for Congress to conclude that the increasing acceptance of antidiscrimination laws in the workplace somehow mitigates willful violations of those laws such that only those violations that are accompanied by particularly outlandish acts warrant special deterrence.

Given the clarity of our cases and the precision of Congress' words, the common-law tradition of punitive damages and any relationship it has to 'egregious conduct' is quite irrelevant. It is enough to say that Congress provided in the 1991 Act its own punitive damages standard that focuses solely on willful mental state, and it did not suggest that there is any class of willful violations that are exempt from exposure to punitive damages. Nor did it indicate that there is a point on the spectrum of deliberate or recklessly indifferent conduct that qualifies as 'egregious.' Thus, while behavior that merits that opprobrious label may provide probative evidence of wrongful motive, it is not a necessary prerequisite to proving such a motive under the 1991 Act. To the extent that any treatise or federal, state, or 'common-law' case might suggest otherwise, it is wrong.

There are other means of proving that an employer willfully violated the law. An employer, may, for example, express hostility toward employment discrimination laws or conceal evidence regarding its 'true' selection procedures because it knows they violate federal law. Whatever the case, so long as a Title VII plaintiff proffers sufficient evidence from which a jury could conclude that an employer acted willfully, judges have no place making their own value judgments regarding whether the conduct was 'egregious' or otherwise presents an inappropriate candidate for punitive damages; the issue must go to the jury.

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If we accept the jury's appraisal of the evidence in this case and draw, as we must when reviewing the denial of a jury instruction, all reasonable inferences in petitioner's favor, there is ample evidence from which the jury could have concluded that respondent willfully violated Title VII. Petitioner emphasized, at trial and in her briefs to this Court, that respondent took 'a tangible employment action' against her in the form of denying a promotion. Brief for Petitioner 47. Evidence indicated that petitioner was the more qualified of the two candidates for the job. Respondent's decisionmakers, who were senior executives of the Association, were known occasionally to tell sexually offensive jokes and referred to professional women in derogatory terms. The record further supports an inference that these executives not only deliberately refused to consider petitioner fairly and to promote her because she is a woman, but they manipulated the job requirements and conducted a 'sham' selection procedure in an attempt to conceal their misconduct.

There is no claim that respondent's decisionmakers violated any company policy; that they were not acting within the scope of their employment; or that respondent has ever disavowed their conduct. Neither the respondent nor its two decisionmakers claimed at trial any ignorance of Title VII's requirements, nor did either offer any 'good-faith' reason for believing that being a man was a legitimate requirement for the job. Rather, at trial respondent resorted to false, pretextual explanations for its refusal to promote petitioner.

The record, in sum, contains evidence from which a jury might find that respondent acted with reckless indifference to petitioner's federally protected rights. It follows, in my judgment, that the three-judge panel of the Court of Appeals correctly decided to remand the case to the district court for a trial on punitive damages. See 108 F. 3d 1431, 1440 (CADC 1997). To the extent that the Court's opinion fails to direct that disposition, I respectfully dissent.

## II

In Part II-B of its opinion, the Court discusses the question 'whether liability for punitive damages may be imputed to respondent' under 'agency principles.' Ante, at 12. That is a question that neither of the parties has ever addressed in this litigation and that

respondent, at least, has expressly disavowed. When prodded at oral argument, counsel for respondent twice stood firm on this point. '[W]e all agree,' he twice repeated, 'that that precise issue is not before the Court' Tr. of Oral Arg. 49. Nor did any of the 11 judges in the Court of Appeals believe that it was applicable to the dispute at hand--presumably because promotion decisions are quintessential 'company acts,' see 139 F. 3d 958, 968 (CADC 1998), and because the two executives who made this promotion decision were the executive director of the Association and the acting head of its Washington office. Id., at 974, 979 (Tatel, J., dissenting). See also 108 F. 3d, at 1434, 1439. Judge Tatel, who the Court implies raised the agency issue, in fact explicitly (and correctly) concluded that '[t]his case does not present these or analogous circumstances.' 108 F. 3d, at 1439.

The absence of briefing or meaningful argument by the parties makes this Court's gratuitous decision to volunteer an opinion on this nonissue particularly ill advised. It is not this Court's practice to consider arguments--specifically, alternative defenses of the judgment under review-- that were not presented in the brief in opposition to the petition for certiorari. See this Court's Rule 15.2. Indeed, on two occasions in this very Term, we refused to do so despite the fact that the issues were briefed and argued by the parties. See *South Central Bell Telephone Co. v. Alabama*, 526 U. S. \_\_\_, \_\_\_ (1999) (slip op., at 10); *Roberts v. Galen of Virginia, Inc.*, 525 U. S. \_\_\_, \_\_\_ (1999) (per curiam) (slip op., at 4-5 ). If we declined to reach alternate defenses under those circumstances, surely we should do so here.

Nor is it accurate for the Court to imply that the Solicitor General as amicus advocates a course similar to that which the Court takes regarding the agency question. Cf. ante, at 12. The Solicitor General, like the parties, did not brief any agency issue. At oral argument, he correspondingly stated that the issue 'is not really presented here.' Tr. of Oral Arg. 19. He then responded to the Court's questions by stating that the Federal Government believes that whenever a tangible employment consequence is involved §1981a incorporates the 'managerial capacity' principles espoused by §217C of the Restatement (Second) of Agency. See Tr. of Oral Arg. 23. But to the extent that the Court tinkers with the Restatement's standard, it is

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rejecting the Government's view of its own statute without giving it an opportunity to be heard on the issue.

Accordingly, while I agree with the Court's rejection of the en banc majority's holding on the only issue that it confronted, I respectfully dissent from the Court's failure to order a remand for trial on the punitive damages issue.

FN1. Lest there be any doubt that Congress looked to Smith in crafting the statute, the Report of the House Judiciary Committee explains that the 'standard for punitive damages is taken directly from civil rights case law,' H. R. Rep. No. 102-40, pt. 2, p. 29, (1991) and proceeds to quote

and cite with approval the very page in Smith that announced the punitive damages standard requiring 'evil motive or intent, or ... reckless or callous indifference to the federally protected rights of others,' 461 U. S., at 56, quoted in H. R. Rep. No. 102-40, at 29. The Report of the House Education and Labor Committee echoed this sentiment. See H. R. Rep. No. 102-40, p. 74 (1991) (citing Smith with approval). Congress' substitution in the 1991 Act of the word 'malice' for Smith v. Wade's phrase 'evil motive or intent' is inconsequential; in Smith, we noted that 'malice ... may be an appropriate' term to denote ill will or an intent to injure. See 461 U. S., at 37, n. 6.

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**TOMMY OLMSTEAD, COMMISSIONER,  
GEORGIA DEPARTMENT OF HUMAN  
RESOURCES, et al.,  
PETITIONERS**

v.

**L. C., by JONATHAN ZIMRING, guardian ad  
litem and next friend, et al.**

**No. 98-536**

United States Supreme Court.

Argued April 21, 1999

Decided June 22, 1999

Syllabus [FN\*]

**FN\*** The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

In the Americans with Disabilities Act of 1990 (ADA), Congress described the isolation and segregation of individuals with disabilities as a serious and pervasive form of discrimination. 42 U. S. C. §§12101(a)(2), (5). Title II of the ADA, which proscribes discrimination in the provision of public services, specifies, inter alia, that no qualified individual with a disability shall, 'by reason of such disability,' be excluded from participation in, or be denied the benefits of, a public entity's services, programs, or activities. §12132. Congress instructed the Attorney General to issue regulations implementing Title II's discrimination proscription. See §12134(a). One such regulation, known as the 'integration regulation,' requires a 'public entity [to] administer ... programs ... in the most integrated setting appropriate to the needs of qualified individuals with disabilities.' 28 CFR §35.130(d). A further prescription, here called the 'reasonable-modifications regulation,' requires public entities to 'make reasonable modifications' to avoid 'discrimination on the basis of disability,' but does not require measures that would 'fundamentally alter' the nature of the entity's programs. § 35.130(b)(7).

Respondents L. C. and E. W. are mentally

retarded women; L. C. has also been diagnosed with schizophrenia, and E. W., with a personality disorder. Both women were voluntarily admitted to Georgia Regional Hospital at Atlanta (GRH), where they were confined for treatment in a psychiatric unit. Although their treatment professionals eventually concluded that each of the women could be cared for appropriately in a community-based program, the women remained institutionalized at GRH. Seeking placement in community care, L. C. filed this suit against petitioner state officials (collectively, the State) under 42 U. S. C. §1983 and Title II. She alleged that the State violated Title II in failing to place her in a community-based program once her treating professionals determined that such placement was appropriate. E. W. intervened, stating an identical claim. The District Court granted partial summary judgment for the women, ordering their placement in an appropriate community-based treatment program. The court rejected the State's argument that inadequate funding, not discrimination against L. C. and E. W. 'by reason of [their] disabilit[ies],' accounted for their retention at GRH. Under Title II, the court concluded, unnecessary institutional segregation constitutes discrimination per se, which cannot be justified by a lack of funding. The court also rejected the State's defense that requiring immediate transfers in such cases would 'fundamentally alter' the State's programs. The Eleventh Circuit affirmed the District Court's judgment, but remanded for reassessment of the State's cost-based defense. The District Court had left virtually no room for such a defense. The appeals court read the statute and regulations to allow the defense, but only in tightly limited circumstances. Accordingly, the Eleventh Circuit instructed the District Court to consider, as a key factor, whether the additional cost for treatment of L. C. and E. W. in community-based care would be unreasonable given the demands of the State's mental health budget.

**Held:** The judgment is affirmed in part and vacated in part, and the case is remanded.

138 F. 3d 893, affirmed in part, vacated in part, and remanded.

JUSTICE GINSBURG delivered the opinion of the Court with respect to Parts I, II, and III-A, concluding that, under Title II of the ADA, States

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are required to place persons with mental disabilities in community settings rather than in institutions when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. Pp. 11-18.

(a) The integration and reasonable-modifications regulations issued by the Attorney General rest on two key determinations: (1) Unjustified placement or retention of persons in institutions severely limits their exposure to the outside community, and therefore constitutes a form of discrimination based on disability prohibited by Title II, and (2) qualifying their obligation to avoid unjustified isolation of individuals with disabilities, States can resist modifications that would fundamentally alter the nature of their services and programs. The Eleventh Circuit essentially upheld the Attorney General's construction of the ADA. This Court affirms the Court of Appeals decision in substantial part. Pp. 11-12.

(b) Undue institutionalization qualifies as discrimination 'by reason of ... disability.' The Department of Justice has consistently advocated that it does. Because the Department is the agency directed by Congress to issue Title II regulations, its views warrant respect. This Court need not inquire whether the degree of deference described in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844, is in order; the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. E.g., *Bragdon v. Abbott*, 524 U. S. 624, 642. According to the State, L. C. and E. W. encountered no discrimination 'by reason of' their disabilities because they were not denied community placement on account of those disabilities, nor were they subjected to 'discrimination,' for they identified no comparison class of similarly situated individuals given preferential treatment. In rejecting these positions, the Court recognizes that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA. The ADA stepped up earlier efforts in the Developmentally

Disabled Assistance and Bill of Rights Act and the Rehabilitation Act of 1973 to secure opportunities for people with developmental disabilities to enjoy the benefits of community living. The ADA both requires all public entities to refrain from discrimination, see §12132, and specifically identifies unjustified 'segregation' of persons with disabilities as a 'for[m] of discrimination,' see §§ 12101(a)(2), 12101(a)(5). The identification of unjustified segregation as discrimination reflects two evident judgments: Institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life, cf., e.g., *Allen v. Wright*, 468 U. S. 737, 755; and institutional confinement severely diminishes individuals' everyday life activities. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice. The State correctly uses the past tense to frame its argument that, despite Congress' ADA findings, the Medicaid statute 'reflected' a congressional policy preference for institutional treatment over treatment in the community. Since 1981, Medicaid has in fact provided funding for state-run home and community-based care through a waiver program. This Court emphasizes that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings. Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it. In this case, however, it is not genuinely disputed that L. C. and E. W. are individuals 'qualified' for noninstitutional care: The State's own professionals determined that community-based treatment would be appropriate for L. C. and E. W., and neither woman opposed such treatment. Pp. 12-18.

JUSTICE GINSBURG, joined by JUSTICE O'CONNOR, JUSTICE SOUTER, and JUSTICE BREYER, concluded in Part III-B that the State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless. The reasonable-modifications regulation

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speaks of 'reasonable modifications' to avoid discrimination, and allows States to resist modifications that entail a 'fundamenta[l] alter[ation]' of the States' services and programs. If, as the Eleventh Circuit indicated, the expense entailed in placing one or two people in a community-based treatment program is properly measured for reasonableness against the State's entire mental health budget, it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail. Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities. The ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk. Nor is it the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter, a placement the State proposed, then retracted, for E. W. Some individuals, like L. C. and E. W. in prior years, may need institutional care from time to time to stabilize acute psychiatric symptoms. For others, no placement outside the institution may ever be appropriate. To maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow. If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met. In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions. The case is remanded for further consideration of the appropriate relief, given the range of the State's facilities for the care of persons with diverse mental disabilities, and its obligation to administer services with an even hand. Pp. 18-22.

JUSTICE STEVENS would affirm the judgment of

the Court of Appeals, but because there are not five votes for that disposition, joined JUSTICE GINSBURG's judgment and Parts I, II, and III-A of her opinion. Pp. 1-2.

JUSTICE KENNEDY concluded that the case must be remanded for a determination of the questions the Court poses and for a determination whether respondents can show a violation of 42 U. S. C. § 12132's ban on discrimination based on the summary judgment materials on file or any further pleadings and materials properly allowed. On the ordinary interpretation and meaning of the term, one who alleges discrimination must show that she received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic. Thus, respondents could demonstrate discrimination by showing that Georgia (i) provides treatment to individuals suffering from medical problems of comparable seriousness, (ii) as a general matter, does so in the most integrated setting appropriate for the treatment of those problems (taking medical and other practical considerations into account), but (iii) without adequate justification, fails to do so for a group of mentally disabled persons (treating them instead in separate, locked institutional facilities). This inquiry would not be simple. Comparisons of different medical conditions and the corresponding treatment regimens might be difficult, as would be assessments of the degree of integration of various settings in which medical treatment is offered. Thus far, respondents have identified no class of similarly situated individuals, let alone shown them to have been given preferential treatment. Without additional information, the Court cannot address the issue in the way the statute demands. As a consequence, the partial summary judgment granted respondents ought not to be sustained. In addition, it was error in the earlier proceedings to restrict the relevance and force of the State's evidence regarding the comparative costs of treatment. The State is entitled to wide discretion in adopting its own systems of cost analysis, and, if it chooses, to allocate health care resources based on fixed and overhead costs for whole institutions and programs. The lower courts should determine in the first instance whether a statutory violation is sufficiently alleged and supported in respondents' summary judgment materials and, if not, whether they should be given leave to replead and to introduce evidence and argument along the lines suggested. Pp. 1-10.

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GINSBURG, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III-A, in which STEVENS, O'CONNOR, SOUTER, and BREYER, JJ., joined, and an opinion with respect to Part III-B, in which O'CONNOR, SOUTER, and BREYER, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment. KENNEDY, J., filed an opinion concurring in the judgment, in which BREYER, J., joined as to Part I. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined.

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

JUSTICE GINSBURG announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III-A, and an opinion with respect to Part III-B, in which O'CONNOR, SOUTER, and BREYER, JJ., joined.

This case concerns the proper construction of the anti-discrimination provision contained in the public services portion (Title II) of the Americans with Disabilities Act of 1990, 104 Stat. 337, 42 U. S. C. §12132. Specifically, we confront the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions. The answer, we hold, is a qualified yes. Such action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. In so ruling, we affirm the decision of the Eleventh Circuit in substantial part. We remand the case, however, for further consideration of the appropriate relief, given the range of facilities the State maintains for the care and treatment of persons with diverse mental disabilities, and its obligation to administer services with an even hand.

## I

This case, as it comes to us, presents no constitutional question. The complaints filed by plaintiffs-respondents L. C. and E. W. did include

such an issue; L. C. and E. W. alleged that defendants-petitioners, Georgia health care officials, failed to afford them minimally adequate care and freedom from undue restraint, in violation of their rights under the Due Process Clause of the Fourteenth Amendment. See Complaint ¶¶ 87-91; Intervenor's Complaint ¶¶ 30-34. But neither the District Court nor the Court of Appeals reached those Fourteenth Amendment claims. See Civ. No. 1:95-cv-1210-MHS (ND Ga., Mar. 26, 1997), pp. 5-6, 11-13, App. to Pet. for Cert. 34a- 35a, 40a-41a; 138 F. 3d 893, 895, and n. 3 (CA11 1998). Instead, the courts below resolved the case solely on statutory grounds. Our review is similarly confined. Cf. *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 450 (1985) (Texas city's requirement of special use permit for operation of group home for mentally retarded, when other care and multiple-dwelling facilities were freely permitted, lacked rational basis and therefore violated Equal Protection Clause of Fourteenth Amendment). Mindful that it is a statute we are construing, we set out first the legislative and regulatory prescriptions on which the case turns.

In the opening provisions of the ADA, Congress stated findings applicable to the statute in all its parts. Most relevant to this case, Congress determined that

'(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 . . . institutionalization . . . ;

'(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . failure to make modifications to existing facilities and practices, . . . [and] segregation . . . ' 42 U. S. C. §§12101(a)(2), (3), (5). [FN1]

Congress then set forth prohibitions against discrimination in employment (Title I, §§ 12111-12117), public services furnished by governmental entities (Title II, §§12131-12165), and public accommodations provided by private entities (Title III, §§12181-12189). The statute as a whole is intended 'to provide a clear and comprehensive

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national mandate for the elimination of discrimination against individuals with disabilities.' §12101(b)(1). [FN2]

This case concerns Title II, the public services portion of the ADA. [FN3] The provision of Title II centrally at issue reads:

'Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.' § 12132.

Title II's definition section states that 'public entity' includes 'any State or local government,' and 'any department, agency, [or] special purpose district.' § 12131(1)(A), (B). The same section defines 'qualified individual with a disability' as

'an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.' §12131(2).

On redress for violations of §12132's discrimination prohibition, Congress referred to remedies available under §505 of the Rehabilitation Act of 1973, 92 Stat. 2982, 29 U. S. C. §794a. See 42 U. S. C. § 12133 ('The remedies, procedures, and rights set forth in [§505 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.'). [FN4]

Congress instructed the Attorney General to issue regulations implementing provisions of Title II, including §12132's discrimination proscription. See § 12134(a) ('[T]he Attorney General shall promulgate regulations in an accessible format that implement this part.'). [FN5] The Attorney General's regulations, Congress further directed, 'shall be consistent with this chapter and with the coordination regulations . . . applicable to recipients of Federal financial assistance under [§504 of the Rehabilitation Act].' 42 U. S. C. §12134(b). One of the §504 regulations requires recipients of federal funds to 'administer programs and activities in the

most integrated setting appropriate to the needs of qualified handicapped persons.' 28 CFR §41.51(d) (1998).

As Congress instructed, the Attorney General issued Title II regulations, see 28 CFR pt. 35 (1998), including one modeled on the §504 regulation just quoted; called the 'integration regulation,' it reads:

'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) (1998).

The preamble to the Attorney General's Title II regulations defines 'the most integrated setting appropriate to the needs of qualified individuals with disabilities' to mean 'a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.' 28 CFR pt. 35, App. A, p. 450 (1998). Another regulation requires public entities to 'make reasonable modifications' to avoid 'discrimination on the basis of disability,' unless those modifications would entail a 'fundamenta[l] alter [ation]'; called here the 'reasonable-modifications regulation,' it provides:

'A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.' 28 CFR § 35.130(b)(7) (1998).

We recite these regulations with the caveat that we do not here determine their validity. While the parties differ on the proper construction and enforcement of the regulations, we do not understand petitioners to challenge the regulatory formulations themselves as outside the congressional authorization. See Brief for Petitioners 16-17, 36, 40-41; Reply Brief 15-16 (challenging the Attorney General's interpretation of the integration regulation).

## II

With the key legislative provisions in full view, we summarize the facts underlying this dispute. Respondents L. C. and E. W. are mentally retarded women; L. C. has also been diagnosed with

(Publication page references are not available for this document.)

schizophrenia, and E. W., with a personality disorder. Both women have a history of treatment in institutional settings. In May 1992, L. C. was voluntarily admitted to Georgia Regional Hospital at Atlanta (GRH), where she was confined for treatment in a psychiatric unit. By May 1993, her psychiatric condition had stabilized, and L. C.'s treatment team at GRH agreed that her needs could be met appropriately in one of the community-based programs the State supported. Despite this evaluation, L. C. remained institutionalized until February 1996, when the State placed her in a community-based treatment program.

E. W. was voluntarily admitted to GRH in February 1995; like L. C., E. W. was confined for treatment in a psychiatric unit. In March 1995, GRH sought to discharge E. W. to a homeless shelter, but abandoned that plan after her attorney filed an administrative complaint. By 1996, E. W.'s treating psychiatrist concluded that she could be treated appropriately in a community-based setting. She nonetheless remained institutionalized until a few months after the District Court issued its judgment in this case in 1997.

In May 1995, when she was still institutionalized at GRH, L. C. filed suit in the United States District Court for the Northern District of Georgia, challenging her continued confinement in a segregated environment. Her complaint invoked 42 U. S. C. §1983 and provisions of the ADA, §§ 12131-12134, and named as defendants, now petitioners, the Commissioner of the Georgia Department of Human Resources, the Superintendent of GRH, and the Executive Director of the Fulton County Regional Board (collectively, the State). L. C. alleged that the State's failure to place her in a community-based program, once her treating professionals determined that such placement was appropriate, violated, inter alia, Title II of the ADA. L. C.'s pleading requested, among other things, that the State place her in a community care residential program, and that she receive treatment with the ultimate goal of integrating her into the mainstream of society. E. W. intervened in the action, stating an identical claim. [FN6]

The District Court granted partial summary judgment in favor of L. C. and E. W. See App. to Pet. for Cert. 31a-42a. The court held that the State's failure to place L. C. and E. W. in an

appropriate community-based treatment program violated Title II of the ADA. See *id.*, at 39a, 41a. In so ruling, the court rejected the State's argument that inadequate funding, not discrimination against L. C. and E. W. 'by reason of' their disabilities, accounted for their retention at GRH. Under Title II, the court concluded, 'unnecessary institutional segregation of the disabled constitutes discrimination per se, which cannot be justified by a lack of funding.' *Id.*, at 37a.

In addition to contending that L. C. and E. W. had not shown discrimination 'by reason of [their] disability[ies],' the State resisted court intervention on the ground that requiring immediate transfers in cases of this order would 'fundamentally alter' the State's activity. The State reasserted that it was already using all available funds to provide services to other persons with disabilities. See *id.*, at 38a. Rejecting the State's 'fundamental alteration' defense, the court observed that existing state programs provided community-based treatment of the kind for which L. C. and E. W. qualified, and that the State could 'provide services to plaintiffs in the community at considerably less cost than is required to maintain them in an institution.' *Id.*, at 39a.

The Court of Appeals for the Eleventh Circuit affirmed the judgment of the District Court, but remanded for reassessment of the State's cost-based defense. See 138 F. 3d, at 905. As the appeals court read the statute and regulations: When 'a disabled individual's treating professionals find that a community-based placement is appropriate for that individual, the ADA imposes a duty to provide treatment in a community setting--the most integrated setting appropriate to that patient's needs'; '[w]here there is no such finding [by the treating professionals], nothing in the ADA requires the deinstitutionalization of th[e] patient.' *Id.*, at 902.

The Court of Appeals recognized that the State's duty to provide integrated services 'is not absolute'; under the Attorney General's Title II regulation, 'reasonable modifications' were required of the State, but fundamental alterations were not demanded. *Id.*, at 904. The appeals court thought it clear, however, that 'Congress wanted to permit a cost defense only in the most limited of circumstances.' *Id.*, at 902. In conclusion, the

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court stated that a cost justification would fail '[u]nless the State can prove that requiring it to [expend additional funds in order to provide L. C. and E. W. with integrated services] would be so unreasonable given the demands of the State's mental health budget that it would fundamentally alter the service [the State] provides.' *Id.*, at 905. Because it appeared that the District Court had entirely ruled out a 'lack of funding' justification, see App. to Pet. for Cert. 37a, the appeals court remanded, repeating that the District Court should consider, among other things, 'whether the additional expenditures necessary to treat L. C. and E. W. in community-based care would be unreasonable given the demands of the State's mental health budget.' 138 F. 3d, at 905. [FN7]

We granted certiorari in view of the importance of the question presented to the States and affected individuals. See 525 U. S. \_\_\_\_ (1998). [FN8]

### III

Endeavoring to carry out Congress' instruction to issue regulations implementing Title II, the Attorney General, in the integration and reasonable-modifications regulations, see *supra*, at 5-7, made two key determinations. The first concerned the scope of the ADA's discrimination proscription, 42 U. S. C. §12132; the second concerned the obligation of the States to counter discrimination. As to the first, the Attorney General concluded that unjustified placement or retention of persons in institutions, severely limiting their exposure to the outside community, constitutes a form of discrimination based on disability prohibited by Title II. See 28 CFR § 35.130(d) (1998) ('A public entity shall administer services . . . in the most integrated setting appropriate to the needs of qualified individuals with disabilities.'). Brief for United States as Amicus Curiae in *Helen L. v. DiDario*, No. 94-1243 (CA3 1994), pp. 8, 15-16 (unnecessary segregation of persons with disabilities constitutes a form of discrimination prohibited by the ADA and the integration regulation). Regarding the States' obligation to avoid unjustified isolation of individuals with disabilities, the Attorney General provided that States could resist modifications that 'would fundamentally alter the nature of the service, program, or activity.' 28 CFR § 35.130(b)(7) (1998).

The Court of Appeals essentially upheld the Attorney General's construction of the ADA. As just recounted, see *supra*, at 9-10, the appeals court ruled that the unjustified institutionalization of persons with mental disabilities violated Title II; the court then remanded with instructions to measure the cost of caring for L. C. and E. W. in a community-based facility against the State's mental health budget.

We affirm the Court of Appeals' decision in substantial part. Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But we recognize, as well, the States' need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the States' obligation to administer services with an even hand. Accordingly, we further hold that the Court of Appeals' remand instruction was unduly restrictive. In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably.

### A

We examine first whether, as the Eleventh Circuit held, undue institutionalization qualifies as discrimination 'by reason of . . . disability.' The Department of Justice has consistently advocated that it does. [FN9] Because the Department is the agency directed by Congress to issue regulations implementing Title II, see *supra*, at 5-6, its views warrant respect. We need not inquire whether the degree of deference described in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984), is in order; '[i]t is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' ' *Bragdon v. Abbott*, 524 U. S. 624, 642 (1998) (quoting *Skidmore v. Swift & Co.*, 323 U. S. 134, 139-140 (1944)).

The State argues that L. C. and E. W. encountered no discrimination 'by reason of' their disabilities because they were not denied community placement

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on account of those disabilities. See Brief for Petitioners 20. Nor were they subjected to 'discrimination,' the State contends, because 'discrimination' necessarily requires uneven treatment of similarly situated individuals,' and L. C. and E. W. had identified no comparison class, i.e., no similarly situated individuals given preferential treatment. *Id.*, at 21. We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA. [FN10]

The ADA stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living. The Developmentally Disabled Assistance and Bill of Rights Act (DDABRA), a 1975 measure, stated in aspirational terms that '[t]he treatment, services, and habilitation for a person with developmental disabilities . . . should be provided in the setting that is least restrictive of the person's personal liberty.' 89 Stat. 502, 42 U. S. C. § 6010(2) (1976 ed.) (emphasis added); see also *Pennhurst State School and Hospital v. Halderman*, 451 U. S. 1, 24 (1981) (concluding that the §6010 provisions of the DDABRA 'were intended to be hortatory, not mandatory'). In a related legislative endeavor, the Rehabilitation Act of 1973, Congress used mandatory language to proscribe discrimination against persons with disabilities. See 87 Stat. 394, as amended, 29 U. S. C. §794 (1976 ed.) ('No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.' (Emphasis added)). Ultimately, in the ADA, enacted in 1990, Congress not only required all public entities to refrain from discrimination, see 42 U. S. C. § 12132; additionally, in findings applicable to the entire statute, Congress explicitly identified unjustified 'segregation' of persons with disabilities as a 'for[m] of discrimination.' See §12101(a)(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'); §12101(a)(5) ('individuals with disabilities continually encounter various forms of discrimination, including . . . segregation '). [FN11]

Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Cf. *Allen v. Wright*, 468 U. S. 737, 755 (1984) ('There can be no doubt that [stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action.').; *Los Angeles Dept. of Water and Power v. Manhart*, 435 U. S. 702, 707, n. 13 (1978) ('In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' (quoting *Sprogis v. United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (CA7 1971))). Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. See Brief for American Psychiatric Association et al. as Amici Curiae 20-22. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice. See Brief for United States as Amicus Curiae 6-7, 17.

The State urges that, whatever Congress may have stated as its findings in the ADA, the Medicaid statute 'reflected a congressional policy preference for treatment in the institution over treatment in the community.' Brief for Petitioners 31. The State correctly used the past tense. Since 1981, Medicaid has provided funding for state-run home and community-based care through a waiver program. See 95 Stat. 812-813, as amended, 42 U. S. C. § 1396n(c); Brief for United States as Amicus Curiae 20-21. [FN12] Indeed, the United States points out that the Department of Health and Human Services (HHS) 'has a policy of encouraging States to take advantage of the waiver program, and often approves more waiver slots than a State ultimately uses.' *Id.*, at 25-26 (further observing that, by

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1996, 'HHS approved up to 2109 waiver slots for Georgia, but Georgia used only 700').

We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings. Title II provides only that 'qualified individual[s] with a disability' may not 'be subjected to discrimination.' 42 U. S. C. § 12132. 'Qualified individuals,' the ADA further explains, are persons with disabilities who, 'with or without reasonable modifications to rules, policies, or practices, . . . mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.' §12131(2).

Consistent with these provisions, the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program. Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting. See 28 CFR § 35.130(d) (1998) (public entity shall administer services and programs in 'the most integrated setting appropriate to the needs of qualified individuals with disabilities' (emphasis added)); cf. *School Bd. of Nassau Cty. v. Arline*, 480 U. S. 273, 288 (1987) ('[C]ourts normally should defer to the reasonable medical judgments of public health officials.'). [FN13] Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it. See 28 CFR §35.130(e)(1) (1998) ('Nothing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept.'). 28 CFR pt. 35, App. A, p. 450 (1998) ('[P]ersons with disabilities must be provided the option of declining to accept a particular accommodation.'). In this case, however, there is no genuine dispute concerning the status of L. C. and E. W. as individuals 'qualified' for noninstitutional care: The State's own professionals determined that community-based treatment would be appropriate for L. C. and E. W., and neither woman opposed such treatment. See *supra*, at 7-8. [FN14]

## B

The State's responsibility, once it provides

community-based treatment to qualified persons with disabilities, is not boundless. The reasonable-modifications regulation speaks of 'reasonable modifications' to avoid discrimination, and allows States to resist modifications that entail a 'fundamenta[l] alter[ation]' of the States' services and programs. 28 CFR § 35.130(b)(7) (1998). The Court of Appeals construed this regulation to permit a cost-based defense 'only in the most limited of circumstances,' 138 F. 3d, at 902, and remanded to the District Court to consider, among other things, 'whether the additional expenditures necessary to treat L. C. and E. W. in community-based care would be unreasonable given the demands of the State's mental health budget,' *id.*, at 905.

The Court of Appeals' construction of the reasonable-modifications regulation is unacceptable for it would leave the State virtually defenseless once it is shown that the plaintiff is qualified for the service or program she seeks. If the expense entailed in placing one or two people in a community-based treatment program is properly measured for reasonableness against the State's entire mental health budget, it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail. See *Tr. of Oral Arg. 27* (State's attorney argues that Court of Appeals' understanding of the fundamental-alteration defense, as expressed in its order to the District Court, 'will always preclude the State from a meaningful defense'); cf. *Brief for Petitioners 37-38* (Court of Appeals' remand order 'mistakenly asks the district court to examine [the fundamental-alteration] defense based on the cost of providing community care to just two individuals, not all Georgia citizens who desire community care'); 1:95-cv-1210-MHS (ND Ga., Oct. 20, 1998), p. 3, App. 177 (District Court, on remand, declares the impact of its decision beyond L. C. and E. W. 'irrelevant'). Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.

When it granted summary judgment for plaintiffs in this case, the District Court compared the cost of caring for the plaintiffs in a community-based setting

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with the cost of caring for them in an institution. That simple comparison showed that community placements cost less than institutional confinements. See App. to Pet. for Cert. 39a. As the United States recognizes, however, a comparison so simple overlooks costs the State cannot avoid; most notably, a 'State . . . may experience increased overall expenses by funding community placements without being able to take advantage of the savings associated with the closure of institutions.' Brief for United States as Amicus Curiae 21. [FN15]

As already observed, see *supra*, at 17, the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk. Cf. *post*, at 2-3 (KENNEDY, J., concurring in judgment). Nor is it the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter, a placement the State proposed, then retracted, for E. W. See *supra*, at 8. Some individuals, like L. C. and E. W. in prior years, may need institutional care from time to time 'to stabilize acute psychiatric symptoms.' App. 98 (affidavit of Dr. Richard L. Elliott); see 138 F. 3d, at 903 ('[T]here may be times [when] a patient can be treated in the community, and others whe[n] an institutional placement is necessary.'). Reply Brief 19 (placement in a community-based treatment program does not mean the State will no longer need to retain hospital accommodations for the person so placed). For other individuals, no placement outside the institution may ever be appropriate. See Brief for American Psychiatric Association et al. as Amici Curiae 22-23 ('Some individuals, whether mentally retarded or mentally ill, are not prepared at particular times--perhaps in the short run, perhaps in the long run--for the risks and exposure of the less protective environment of community settings'; for these persons, 'institutional settings are needed and must remain available.'). Brief for Voice of the Retarded et al. as Amici Curiae 11 ('Each disabled person is entitled to treatment in the most integrated setting possible for that person-- recognizing that, on a case-by-case basis, that setting may be in an institution.'). Youngberg v. Romeo, 457 U. S. 307, 327 (1982) (Blackmun, J., concurring) ('For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know.').

To maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow. If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable- modifications standard would be met. See Tr. of Oral Arg. 5 (State's attorney urges that, 'by asking [a] person to wait a short time until a community bed is available, Georgia does not exclude [that] person by reason of disability, neither does Georgia discriminate against her by reason of disability'); see also *id.*, at 25 ('[I]t is reasonable for the State to ask someone to wait until a community placement is available.'). In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions. [FN16]

\* \* \*

For the reasons stated, we conclude that, under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. The judgment of the Eleventh Circuit is therefore affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

FN1. The ADA, enacted in 1990, is the Federal Government's most recent and extensive endeavor to address discrimination against persons with disabilities. Earlier legislative efforts included the Rehabilitation Act of 1973, 87 Stat. 355, 29 U. S. C. §701 et seq. (1976 ed.), and the Developmentally Disabled Assistance and Bill of Rights Act, 89 Stat. 486, 42 U. S. C. §6001 et seq. (1976 ed.), enacted in 1975. In the ADA, Congress for the first time referred expressly to

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'segregation' of persons with disabilities as a 'for[m] of discrimination,' and to discrimination that persists in the area of 'institutionalization.' §§ 12101(a)(2), (3), (5).

FN2. The ADA defines 'disability,' 'with respect to an individual,' as

'(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

'(B) a record of such an impairment; or

'(C) being regarded as having such an impairment.' §12102(2).

There is no dispute that L. C. and E. W. are disabled within the meaning of the ADA.

FN3. In addition to the provisions set out in Part A governing public services generally, see §§ 12131-12134, Title II contains in Part B a host of provisions governing public transportation services, see §§12141-12165.

FN4. Section 505 of the Rehabilitation Act incorporates the remedies, rights, and procedures set forth in Title VI of the Civil Rights Act of 1964 for violations of §504 of the Rehabilitation Act. See 29 U. S. C. § 794a(a)(2). Title VI, in turn, directs each federal department authorized to extend financial assistance to any department or agency of a State to issue rules and regulations consistent with achievement of the objectives of the statute authorizing financial assistance. See 78 Stat. 252, 42 U. S. C. §2000d-1. Compliance with such requirements may be effected by the termination or denial of federal funds, or 'by any other means authorized by law.' *Ibid.* Remedies both at law and in equity are available for violations of the statute. See §2000d-7(a)(2).

FN5. Congress directed the Secretary of Transportation to issue regulations implementing the portion of Title II concerning public transportation. See 42 U. S. C. §§12143(b), 12149, 12164. As stated in the regulations, a person alleging discrimination on the basis of disability in violation of Title II may seek to enforce its provisions by commencing a private lawsuit, or by filing a complaint with (a) a federal agency that provides funding to the public entity that is the subject of the complaint, (b) the Department of Justice for referral to an appropriate agency, or (c) one of eight federal agencies responsible for investigating complaints arising under Title II: the Department of Agriculture, the Department of Education, the Department of Health and Human Services, the Department of

Housing and Urban Development, the Department of the Interior, the Department of Justice, the Department of Labor, and the Department of Transportation. See 28 CFR §§35.170(c), 35.172(b), 35.190(b) (1998).

The ADA contains several other provisions allocating regulatory and enforcement responsibility. Congress instructed the Equal Employment Opportunity Commission (EEOC) to issue regulations implementing Title I, see 42 U. S. C. §12116; the EEOC, the Attorney General, and persons alleging discrimination on the basis of disability in violation of Title I may enforce its provisions, see §12117(a). Congress similarly instructed the Secretary of Transportation and the Attorney General to issue regulations implementing provisions of Title III, see §§12186(a)(1), (b); the Attorney General and persons alleging discrimination on the basis of disability in violation of Title III may enforce its provisions, see §§ 12188(a)(1), (b). Each federal agency responsible for ADA implementation may render technical assistance to affected individuals and institutions with respect to provisions of the ADA for which the agency has responsibility. See §12206(c)(1).

FN6. L. C. and E. W. are currently receiving treatment in community-based programs. Nevertheless, the case is not moot. As the District Court and Court of Appeals explained, in view of the multiple institutional placements L. C. and E. W. have experienced, the controversy they brought to court is 'capable of repetition, yet evading review.' No. 1:95-cv-1210-MHS (ND Ga., Mar. 26, 1997), p. 6, App. to Pet. for Cert. 35a (internal quotation marks omitted); see 138 F. 3d 893, 895, n. 2 (CA11 1998) (citing *Honig v. Doe*, 484 U. S. 305, 318-323 (1988), and *Vitek v. Jones*, 445 U. S. 480, 486-487 (1980)).

FN7. After this Court granted certiorari, the District Court issued a decision on remand rejecting the State's fundamental-alteration defense. See 1:95-cv-1210-MHS (ND Ga., Jan. 29, 1999), p. 1. The court concluded that the annual cost to the State of providing community-based treatment to L. C. and E. W. was not unreasonable in relation to the State's overall mental health budget. See *id.*, at 5. In reaching that judgment, the District Court first declared 'irrelevant' the potential impact of its decision beyond L. C. and E. W. 1:95-cv-1210-MHS (ND Ga., Oct. 20, 1998), p. 3, App. 177. The District Court's decision on remand is now pending appeal before the Eleventh Circuit.

FN8. Twenty-two States and the Territory of

(Publication page references are not available for this document.)

Guam joined a brief urging that certiorari be granted. Seven of those States filed a brief in support of petitioners on the merits.

FN9. See Brief for United States in *Halderman v. Pennhurst State School and Hospital*, Nos. 78-1490, 78-1564, 78-1602 (CA3 1978), p. 45 ('[I]nstitutionalization result[ing] in separation of mentally retarded persons for no permissible reason . . . is 'discrimination,' and a violation of Section 504 [of the Rehabilitation Act] if it is supported by federal funds. '); Brief for United States in *Halderman v. Pennhurst State School and Hospital*, Nos. 78-1490, 78-1564, 78-1602 (CA3 1981), p. 27 ('Pennsylvania violates Section 504 by indiscriminately subjecting handicapped persons to [an institution] without first making an individual reasoned professional judgment as to the appropriate placement for each such person among all available alternatives. '); Brief for United States as Amicus Curiae in *Helen L. v. DiDario*, No. 94-1243 (CA3 1994), p. 7 ('Both the Section 504 coordination regulations and the rest of the ADA make clear that the unnecessary segregation of individuals with disabilities in the provision of public services is itself a form of discrimination within the meaning of those statutes. '); *id.*, at 8-16.

FN10. The dissent is driven by the notion that 'this Court has never endorsed an interpretation of the term 'discrimination' that encompassed disparate treatment among members of the same protected class,' *post*, at 1 (opinion of THOMAS, J.), that '[o]ur decisions construing various statutory prohibitions against 'discrimination' have not wavered from this path,' *post*, at 2, and that 'a plaintiff cannot prove 'discrimination' by demonstrating that one member of a particular protected group has been favored over another member of that same group,' *post*, at 4. The dissent is incorrect as a matter of precedent and logic. See *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U. S. 308, 312 (1996) (The Age Discrimination in Employment Act of 1967 'does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age. '); *cf.* *Oncale v. Sundowner Offshore Services, Inc.*, 523 U. S. 75, 76 (1998) ('[W]orkplace harassment can violate Title VII's prohibition against 'discriminat[ion] . . . because of . . . sex,' 42 U. S. C. §2000e-2(a)(1), when the harasser and the harassed employee are

of the same sex. '); *Jefferies v. Harris County Community Action Assn.*, 615 F. 2d 1025, 1032 (CA5 1980) ('[D]iscrimination against black females can exist even in the absence of discrimination against black men or white women. ').

FN11. Unlike the ADA, §504 of the Rehabilitation Act contains no express recognition that isolation or segregation of persons with disabilities is a form of discrimination. Section 504's discrimination proscription, a single sentence attached to vocational rehabilitation legislation, has yielded divergent court interpretations. See Brief for United States as Amicus Curiae 23-25.

FN12. The waiver program provides Medicaid reimbursement to States for the provision of community-based services to individuals who would otherwise require institutional care, upon a showing that the average annual cost of such services is not more than the annual cost of institutional services. See §1396n(c).

FN13. Georgia law also expresses a preference for treatment in the most integrated setting appropriate. See Ga. Code Ann. §37-4-121 (1995) ('It is the policy of the state that the least restrictive alternative placement be secured for every client at every stage of his habilitation. It shall be the duty of the facility to assist the client in securing placement in noninstitutional community facilities and programs. ').

FN14. We do not in this opinion hold that the ADA imposes on the States a 'standard of care' for whatever medical services they render, or that the ADA requires States to 'provide a certain level of benefits to individuals with disabilities.' *Cf.* *post*, at 9, 10 (THOMAS, J., dissenting). We do hold, however, that States must adhere to the ADA's non-discrimination requirement with regard to the services they in fact provide.

FN15. Even if States eventually were able to close some institutions in response to an increase in the number of community placements, the States would still incur the cost of running partially full institutions in the interim. See Brief for United States as Amicus Curiae 21.

FN16. We reject the Court of Appeals' construction of the reasonable-modifications regulation for another reason. The Attorney General's Title II regulations, Congress ordered, 'shall be consistent with' the regulations in part 41

(Publication page references are not available for this document.)

of Title 28 of the Code of Federal Regulations implementing §504 of the Rehabilitation Act. 42 U. S. C. §12134(b). The § 504 regulation upon which the reasonable-modifications regulation is based provides now, as it did at the time the ADA was enacted:

'A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.' 28 CFR §41.53 (1990 and 1998 eds.).

While the part 41 regulations do not define 'undue hardship,' other §504 regulations make clear that the 'undue hardship' inquiry requires not simply an assessment of the cost of the accommodation in relation to the recipient's overall budget, but a 'case-by-case analysis weighing factors that include: (1) [t]he overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) [t]he type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) [t]he nature and cost of the accommodation needed.' 28 CFR §42.511(c) (1998); see 45 CFR §84.12(c) (1998) (same).

Under the Court of Appeals' restrictive reading, the reasonable- modifications regulation would impose a standard substantially more difficult for the State to meet than the 'undue burden' standard imposed by the corresponding §504 regulation.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

Unjustified disparate treatment, in this case, 'unjustified institutional isolation,' constitutes discrimination under the Americans with Disabilities Act of 1990. See ante, at 15. If a plaintiff requests relief that requires modification of a State's services or programs, the State may assert, as an affirmative defense, that the requested modification would cause a fundamental alteration of a State's services and programs. In this case, the Court of Appeals appropriately remanded for consideration of the State's affirmative defense. On remand, the District Court rejected the State's 'fundamental- alteration defense.' See ante, at 10, n. 7. If the District Court was wrong in concluding that costs unrelated to the treatment of L. C. and E. W. do not support such a defense in this case, that arguable error should be corrected either by the Court of Appeals or by this Court in review of that decision. In my opinion, therefore, we should simply affirm the

judgment of the Court of Appeals. But because there are not five votes for that disposition, I join JUSTICE GINSBURG's judgment and Parts I, II, and III-A of her opinion. Cf. *Bragdon v. Abbott*, 524 U. S. 624, 655-656 (1998) (STEVENS, J. concurring); *Screws v. United States*, 325 U. S. 91, 134 (1945) (Rutledge, J. concurring in result).

JUSTICE KENNEDY, with whom JUSTICE BREYER joins as to Part I, concurring in the judgment.

## I

Despite remarkable advances and achievements by medical science, and agreement among many professionals that even severe mental illness is often treatable, the extent of public resources to devote to this cause remains controversial. Knowledgeable professionals tell us that our society, and the governments which reflect its attitudes and preferences, have yet to grasp the potential for treating mental disorders, especially severe mental illness. As a result, necessary resources for the endeavor often are not forthcoming. During the course of a year, about 5.6 million Americans will suffer from severe mental illness. E. Torrey, *Out of the Shadows* 4 (1997). Some 2.2 million of these persons receive no treatment. *Id.*, at 6. Millions of other Americans suffer from mental disabilities of less serious degree, such as mild depression. These facts are part of the background against which this case arises. In addition, of course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility. See, e.g., *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 461-464 (1985) (Marshall, J., concurring in judgment in part and dissenting in part) (discussing treatment of the mentally retarded).

Despite these obstacles, the States have acknowledged that the care of the mentally disabled is their special obligation. They operate and support facilities and programs, sometimes elaborate ones, to provide care. It is a continuing challenge, though, to provide the care in an effective and humane way, particularly because societal attitudes and the responses of public authorities have changed from time to time.

Beginning in the 1950's, many victims of severe mental illness were moved out of state-run hospitals,

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often with benign objectives. According to one estimate, when adjusted for population growth, 'the actual decrease in the numbers of people with severe mental illnesses in public psychiatric hospitals between 1955 and 1995 was 92 percent.' Brief for American Psychiatric Association et al. as Amici Curiae 21, n. 5 (citing Torrey, *supra*, at 8-9). This was not without benefit or justification. The so-called 'deinstitutionalization' has permitted a substantial number of mentally disabled persons to receive needed treatment with greater freedom and dignity. It may be, moreover, that those who remain institutionalized are indeed the most severe cases. With reference to this case, as the Court points out, *ante*, at 7-8, 17-18, it is undisputed that the State's own treating professionals determined that community-based care was medically appropriate for respondents. Nevertheless, the depopulation of state mental hospitals has its dark side. According to one expert:

'For a substantial minority. . . . deinstitutionalization has been a psychiatric Titanic. Their lives are virtually devoid of 'dignity' or 'integrity of body, mind, and spirit.' 'Self-determination' often means merely that the person has a choice of soup kitchens. The 'least restrictive setting' frequently turns out to be a cardboard box, a jail cell, or a terror-filled existence plagued by both real and imaginary enemies.' Torrey, *supra*, at 11.

It must be remembered that for the person with severe mental illness who has no treatment the most dreaded of confinements can be the imprisonment inflicted by his own mind, which shuts reality out and subjects him to the torment of voices and images beyond our own powers to describe.

It would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act of 1990 (ADA) to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision. The opinion of a responsible treating physician in determining the appropriate conditions for treatment ought to be given the greatest of deference. It is a common phenomenon that a patient functions well with medication, yet, because of the mental illness itself, lacks the discipline or capacity to follow the regime the medication requires. This is illustrative of the factors a responsible physician will consider in

recommending the appropriate setting or facility for treatment. JUSTICE GINSBURG's opinion takes account of this background. It is careful, and quite correct, to say that it is not 'the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter . . . .' *Ante*, at 20.

In light of these concerns, if the principle of liability announced by the Court is not applied with caution and circumspection, States may be pressured into attempting compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition. This danger is in addition to the federalism costs inherent in referring state decisions regarding the administration of treatment programs and the allocation of resources to the reviewing authority of the federal courts. It is of central importance, then, that courts apply today's decision with great deference to the medical decisions of the responsible, treating physicians and, as the Court makes clear, with appropriate deference to the program funding decisions of state policymakers.

## II

With these reservations made explicit, in my view we must remand the case for a determination of the questions the Court poses and for a determination whether respondents can show a violation of 42 U. S. C. §12132's ban on discrimination based on the summary judgment materials on file or any further pleadings and materials properly allowed.

At the outset it should be noted there is no allegation that Georgia officials acted on the basis of animus or unfair stereotypes regarding the disabled. Underlying much discrimination law is the notion that animus can lead to false and unjustified stereotypes, and vice versa. Of course, the line between animus and stereotype is often indistinct, and it is not always necessary to distinguish between them. Section 12132 can be understood to deem as irrational, and so to prohibit, distinctions by which a class of disabled persons, or some within that class, are, by reason of their disability and without adequate justification, exposed by a state entity to more onerous treatment than a comparison group in the provision of services or the administration of existing programs, or indeed entirely excluded from state programs or facilities. Discrimination under

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this statute might in principle be shown in the case before us, though further proceedings should be required.

Putting aside issues of animus or unfair stereotype, I agree with JUSTICE THOMAS that on the ordinary interpretation and meaning of the term, one who alleges discrimination must show that she 'received differential treatment vis-&grave;vis members of a different group on the basis of a statutorily described characteristic.' Post, at 1-2 (dissenting opinion). In my view, however, discrimination so defined might be shown here. Although the Court seems to reject JUSTICE THOMAS' definition of discrimination, ante, at 13, it asserts that unnecessary institutional care does lead to '[d]issimilar treatment,' ante, at 16. According to the Court, '[i]n order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.' Ibid.

Although this point is not discussed at length by the Court, it does serve to suggest the theory under which respondents might be subject to discrimination in violation of §12132. If they could show that persons needing psychiatric or other medical services to treat a mental disability are subject to a more onerous condition than are persons eligible for other existing state medical services, and if removal of the condition would not be a fundamental alteration of a program or require the creation of a new one, then the beginnings of a discrimination case would be established. In terms more specific to this case, if respondents could show that Georgia (i) provides treatment to individuals suffering from medical problems of comparable seriousness, (ii) as a general matter, does so in the most integrated setting appropriate for the treatment of those problems (taking medical and other practical considerations into account), but (iii) without adequate justification, fails to do so for a group of mentally disabled persons (treating them instead in separate, locked institutional facilities), I believe it would demonstrate discrimination on the basis of mental disability.

Of course, it is a quite different matter to say that a

State without a program in place is required to create one. No State has unlimited resources and each must make hard decisions on how much to allocate to treatment of diseases and disabilities. If, for example, funds for care and treatment of the mentally ill, including the severely mentally ill, are reduced in order to support programs directed to the treatment and care of other disabilities, the decision may be unfortunate. The judgment, however, is a political one and not within the reach of the statute. Grave constitutional concerns are raised when a federal court is given the authority to review the State's choices in basic matters such as establishing or declining to establish new programs. It is not reasonable to read the ADA to permit court intervention in these decisions. In addition, as the Court notes, ante, at 6-7, by regulation a public entity is required only to make 'reasonable modifications in policies, practices, or procedures' when necessary to avoid discrimination and is not even required to make those if 'the modifications would fundamentally alter the nature of the service, program, or activity.' 28 CFR §35.130(b)(7) (1998). It follows that a State may not be forced to create a community-treatment program where none exists. See Brief for United States as Amicus Curiae 19-20, and n. 3. Whether a different statutory scheme would exceed constitutional limits need not be addressed.

Discrimination, of course, tends to be an expansive concept and, as legal category, it must be applied with care and prudence. On any reasonable reading of the statute, §12132 cannot cover all types of differential treatment of disabled and nondisabled persons, no matter how minimal or innocuous. To establish discrimination in the context of this case, and absent a showing of policies motivated by improper animus or stereotypes, it would be necessary to show that a comparable or similarly situated group received differential treatment. Regulations are an important tool in identifying the kinds of contexts, policies, and practices that raise concerns under the ADA. The congressional findings in 42 U. S. C. §12101 also serve as a useful aid for courts to discern the sorts of discrimination with which Congress was concerned. Indeed, those findings have clear bearing on the issues raised in this case, and support the conclusion that unnecessary institutionalization may be the evidence or the result of the discrimination the ADA prohibits.

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Unlike JUSTICE THOMAS, I deem it relevant and instructive that Congress in express terms identified the 'isolat[ion] and segregat[ion]' of disabled persons by society as a 'for[m] of discrimination,' § 12101(a)(2), (5), and noted that discrimination against the disabled 'persists in such critical areas as . . . institutionalization,' §12101(a)(3). These findings do not show that segregation and institutionalization are always discriminatory or that segregation or institutionalization are, by their nature, forms of prohibited discrimination. Nor do they necessitate a regime in which individual treatment plans are required, as distinguished from broad and reasonable classifications for the provision of health care services. Instead, they underscore Congress' concern that discrimination has been a frequent and pervasive problem in institutional settings and policies and its concern that segregating disabled persons from others can be discriminatory. Both of those concerns are consistent with the normal definition of discrimination--differential treatment of similarly situated groups. The findings inform application of that definition in specific cases, but absent guidance to the contrary, there is no reason to think they displace it. The issue whether respondents have been discriminated against under §12132 by institutionalized treatment cannot be decided in the abstract, divorced from the facts surrounding treatment programs in their State.

The possibility therefore remains that, on the facts of this case, respondents would be able to support a claim under §12132 by showing that they have been subject to discrimination by Georgia officials on the basis of their disability. This inquiry would not be simple. Comparisons of different medical conditions and the corresponding treatment regimens might be difficult, as would be assessments of the degree of integration of various settings in which medical treatment is offered. For example, the evidence might show that, apart from services for the mentally disabled, medical treatment is rarely offered in a community setting but also is rarely offered in facilities comparable to state mental hospitals. Determining the relevance of that type of evidence would require considerable judgment and analysis. However, as petitioners observe, '[i]n this case, no class of similarly situated individuals was even identified, let alone shown to be given preferential treatment.' Brief for Petitioners 21. Without additional information regarding the details

of state-provided medical services in Georgia, we cannot address the issue in the way the statute demands. As a consequence, the judgment of the courts below, granting partial summary judgment to respondents, ought not to be sustained. In addition, as JUSTICE GINSBURG's opinion is careful to note, ante, at 19, it was error in the earlier proceedings to restrict the relevance and force of the State's evidence regarding the comparative costs of treatment. The State is entitled to wide discretion in adopting its own systems of cost analysis, and, if it chooses, to allocate health care resources based on fixed and overhead costs for whole institutions and programs. We must be cautious when we seek to infer specific rules limiting States' choices when Congress has used only general language in the controlling statute.

I would remand the case to the Court of Appeals or the District Court for it to determine in the first instance whether a statutory violation is sufficiently alleged and supported in respondents' summary judgment materials and, if not, whether they should be given leave to replead and to introduce evidence and argument along the lines suggested above.

For these reasons, I concur in the judgment of the Court.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

Title II of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 337, 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 subjected to discrimination by any such entity.' (Emphasis added.)

The majority concludes that petitioners 'discriminated' against respondents-- as a matter of law--by continuing to treat them in an institutional setting after they became eligible for community placement. I disagree. Temporary exclusion from community placement does not amount to 'discrimination' in the traditional sense of the word, nor have respondents shown that petitioners 'discriminated' against them 'by reason of' their disabilities.

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Until today, this Court has never endorsed an interpretation of the term 'discrimination' that encompassed disparate treatment among members of the same protected class. Discrimination, as typically understood, requires a showing that a claimant received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic. This interpretation comports with dictionary definitions of the term discrimination, which means to 'distinguish,' to 'differentiate,' or to make a 'distinction in favor of or against, a person or thing based on the group, class, or category to which that person or thing belongs rather than on individual merit.' Random House Dictionary 564 (2d ed. 1987); see also Webster's Third New International Dictionary 648 (1981) (defining 'discrimination' as 'the making or perceiving of a distinction or difference' or as 'the act, practice, or an instance of discriminating categorically rather than individually').

Our decisions construing various statutory prohibitions against 'discrimination' have not wavered from this path. The best place to begin is with Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, the paradigmatic anti-discrimination law. [FN1] Title VII makes it 'an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.' 42 U. S. C. §2000e-2(a)(1) (emphasis added). We have explained that this language is designed 'to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.' *Griggs v. Duke Power Co.*, 401 U. S. 424, 429-430 (1971). [FN2]

Under Title VII, a finding of discrimination requires a comparison of otherwise similarly situated persons who are in different groups by reason of certain characteristics provided by statute. See, e.g., *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U. S. 669, 683 (1983) (explaining that Title VII discrimination occurs when an employee is treated 'in a manner which but for that person's sex would be different' ) (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U. S. 702, 711 (1978)). For this reason, we have

described as 'nonsensical' the comparison of the racial composition of different classes of job categories in determining whether there existed disparate impact discrimination with respect to a particular job category. *Wards Cove Packing Co. v. Atonio*, 490 U. S. 642, 651 (1989). [FN3] Courts interpreting Title VII have held that a plaintiff cannot prove 'discrimination' by demonstrating that one member of a particular protected group has been favored over another member of that same group. See, e.g., *Bush v. Commonwealth Edison Co.*, 990 F. 2d 928, 931 (CA7 1993), cert. denied, 511 U. S. 1071 (1994) (explaining that under Title VII, a fired black employee 'had to show that although he was not a good employee, equally bad employees were treated more leniently by [his employer] if they happened not to be black').

Our cases interpreting §504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, which prohibits 'discrimination' against certain individuals with disabilities, have applied this commonly understood meaning of discrimination. Section 504 provides:

'No otherwise qualified handicapped individual ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.'

In keeping with the traditional paradigm, we have always limited the application of the term 'discrimination' in the Rehabilitation Act to a person who is a member of a protected group and faces discrimination 'by reason of his handicap.' Indeed, we previously rejected the argument that §504 requires the type of 'affirmative efforts to overcome the disabilities caused by handicaps,' *Southeastern Community College v. Davis*, 442 U. S. 397, 410 (1979), that the majority appears to endorse today. Instead, we found that § 504 required merely 'the evenhanded treatment of handicapped persons' relative to those persons who do not have disabilities. *Ibid.* Our conclusion was informed by the fact that some provisions of the Rehabilitation Act envision 'affirmative action' on behalf of those individuals with disabilities, but §504 itself 'does not refer at all' to such action. *Ibid.* Therefore, '[a] comparison of these provisions demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those

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instances where it wished to do so.' *Id.*, at 411.

Similarly, in *Alexander v. Choate*, 469 U. S. 287, 302 (1985), we found no discrimination under §504 with respect to a limit on inpatient hospital care that was 'neutral on its face' and did not 'distinguish between those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having,' *id.*, at 302. We said that §504 does 'not ... guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed.' *Id.*, at 304.

Likewise, in *Traynor v. Turnage*, 485 U. S. 535, 548 (1988), we reiterated that the purpose of §504 is to guarantee that individuals with disabilities receive 'evenhanded treatment' relative to those persons without disabilities. In *Traynor*, the Court upheld a Veterans' Administration regulation that excluded 'primary alcoholics' from a benefit that was extended to persons disabled by alcoholism related to a mental disorder. *Id.*, at 551. In so doing, the Court noted that, '[t]his litigation does not involve a program or activity that is alleged to treat handicapped persons less favorably than nonhandicapped persons.' *Id.*, at 548. Given the theory of the case, the Court explicitly held: 'There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons.' *Id.*, at 549.

This same understanding of discrimination also informs this Court's constitutional interpretation of the term. See *General Motors Corp. v. Tracy*, 519 U. S. 278, 298 (1997) (noting with respect to interpreting the Commerce Clause, '[c]onceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities'); *Yick Wo v. Hopkins*, 118 U. S. 356, 374 (1886) (condemning under the Fourteenth Amendment 'illegal discriminations between persons in similar circumstances'); see also *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 223-224 (1995); *Richmond v. J. A. Croson Co.*, 488 U. S. 469, 493-494 (1989) (plurality opinion).

Despite this traditional understanding, the majority derives a more 'capacious' definition of

'discrimination,' as that term is used in Title II of the ADA, one that includes 'institutional isolation of persons with disabilities.' *Ante*, at 13-14. It chiefly relies on certain congressional findings contained within the ADA. To be sure, those findings appear to equate institutional isolation with segregation, and thereby discrimination. See *ante*, at 14 (quoting §§ 12101(a)(2) and 12101(a)(5), both of which explicitly identify 'segregation' of persons with disabilities as a form of 'discrimination'); see also *ante*, at 2-3. The congressional findings, however, are written in general, hortatory terms and provide little guidance to the interpretation of the specific language of §12132. See *National Organization for Women, Inc. v. Scheidler*, 510 U. S. 249, 260 (1994) ('We also think that the quoted statement of congressional findings is a rather thin reed upon which to base a requirement'). In my view, the vague congressional findings upon which the majority relies simply do not suffice to show that Congress sought to overturn a well-established understanding of a statutory term (here, 'discrimination'). [FN4] Moreover, the majority fails to explain why terms in the findings should be given a medical content, pertaining to the place where a mentally retarded person is treated. When read in context, the findings instead suggest that terms such as 'segregation' were used in a more general sense, pertaining to matters such as access to employment, facilities, and transportation. Absent a clear directive to the contrary, we must read 'discrimination' in light of the common understanding of the term. We cannot expand the meaning of the term 'discrimination' in order to invalidate policies we may find unfortunate. Cf. *NLRB v. Highland Park Mfg. Co.*, 341 U. S. 322, 325 (1951) (explaining that if Congress intended statutory terms 'to have other than their ordinarily accepted meaning, it would and should have given them a special meaning by definition'). [FN5]

Elsewhere in the ADA, Congress chose to alter the traditional definition of discrimination. Title I of the ADA, §12112(b)(1), defines discrimination to include 'limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee.' Notably, however, Congress did not provide that this definition of discrimination, unlike other aspects of the ADA, applies to Title II. Ordinary canons of construction require that we respect the limited applicability of this definition of

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'discrimination' and not import it into other parts of the law where Congress did not see fit. See, e.g., *Bates v. United States*, 522 U. S. 23, 29-30 (1997) ('Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion') (quoting *Russello v. United States*, 464 U. S. 16, 23 (1983)). The majority's definition of discrimination--although not specifically delineated--substantially imports the definition of Title I into Title II by necessarily assuming that it is sufficient to focus exclusively on members of one particular group. Under this view, discrimination occurs when some members of a protected group are treated differently from other members of that same group. As the preceding discussion emphasizes, absent a special definition supplied by Congress, this conclusion is a remarkable and novel proposition that finds no support in our decisions in analogous areas. For example, the majority's conclusion that petitioners 'discriminated' against respondents is the equivalent to finding discrimination under Title VII where a black employee with deficient management skills is denied in-house training by his employer (allegedly because of lack of funding) because other similarly situated black employees are given the in-house training. Such a claim would fly in the face of our prior case law, which requires more than the assertion that a person belongs to a protected group and did not receive some benefit. See, e.g., *Griggs*, 401 U. S., at 430-431 ('Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group').

At bottom, the type of claim approved of by the majority does not concern a prohibition against certain conduct (the traditional understanding of discrimination), but rather imposition of a standard of care. [FN6] As such, the majority can offer no principle limiting this new species of 'discrimination' claim apart from an affirmative defense because it looks merely to an individual in isolation, without comparing him to otherwise similarly situated persons, and determines that discrimination occurs merely because that individual does not receive the treatment he wishes to receive.

By adopting such a broad view of discrimination, the majority drains the term of any meaning other than as a proxy for decisions disapproved of by this Court.

Further, I fear that the majority's approach imposes significant federalism costs, directing States how to make decisions about their delivery of public services. We previously have recognized that constitutional principles of federalism erect limits on the Federal Government's ability to direct state officers or to interfere with the functions of state governments. See, e.g., *Printz v. United States*, 521 U. S. 898 (1997); *New York v. United States*, 505 U. S. 144 (1992). We have suggested that these principles specifically apply to whether States are required to provide a certain level of benefits to individuals with disabilities. As noted in *Alexander*, in rejecting a similar theory under §504 of the Rehabilitation Act: '[N]othing ... suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services ...' 469 U. S., at 307; see also *Bowen v. American Hospital Assn.*, 476 U. S. 610, 642 (1986) (plurality opinion) ('[N]othing in [§504] authorizes [the Secretary of Health and Human Services (HHS)] to commandeer state agencies ... . [These] agencies are not field offices of the HHS bureaucracy and they may not be conscripted against their will as the foot soldiers in a federal crusade'). The majority's affirmative defense will likely come as cold comfort to the States that will now be forced to defend themselves in federal court every time resources prevent the immediate placement of a qualified individual. In keeping with our traditional deference in this area, see *Alexander*, *supra*, the appropriate course would be to respect the States' historical role as the dominant authority responsible for providing services to individuals with disabilities.

The majority may remark that it actually does properly compare members of different groups. Indeed, the majority mentions in passing the '[d]issimilar treatment' of persons with and without disabilities. *Ante*, at 15. It does so in the context of supporting its conclusion that institutional isolation is a form of discrimination. It cites two cases as standing for the unremarkable proposition that discrimination leads to deleterious stereotyping, *ante*, at 15 (citing *Allen v. Wright*, 468 U. S. 737,

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755 (1984); *Manhart*, 435 U. S., at 707, n. 13)), and an amicus brief which indicates that confinement diminishes certain everyday life activities, ante, at 15 (citing Brief for American Psychiatric Association et al. 20-22). The majority then observes that persons without disabilities 'can receive the services they need without' institutionalization and thereby avoid these twin deleterious effects. Ante, at 15. I do not quarrel with the two general propositions, but I fail to see how they assist in resolving the issue before the Court. Further, the majority neither specifies what services persons with disabilities might need, nor contends that persons without disabilities need the same services as those with disabilities, leading to the inference that the dissimilar treatment the majority observes results merely from the fact that different classes of persons receive different services--not from 'discrimination' as traditionally defined.

Finally, it is also clear petitioners did not 'discriminate' against respondents 'by reason of [their] disabili[ties],' as §12132 requires. We have previously interpreted the phrase 'by reason of' as requiring proximate causation. See, e.g., *Holmes v. Securities Investor Protection Corp.*, 503 U. S. 258, 265-266 (1992); see also *id.*, at 266, n. 11 (citation of cases). Such an interpretation is in keeping with the vernacular understanding of the phrase. See *American Heritage Dictionary* 1506 (3d ed. 1992) (defining 'by reason of' as 'because of'). This statute should be read as requiring proximate causation as well. Respondents do not contend that their disabilities constituted the proximate cause for their exclusion. Nor could they--community placement simply is not available to those without disabilities. Continued institutional treatment of persons who, though now deemed treatable in a community placement, must wait their turn for placement, does not establish that the denial of community placement occurred 'by reason of' their disability. Rather, it establishes no more than the fact that petitioners have limited resources.

\* \* \*

For the foregoing reasons, I respectfully dissent.

FN1. We have incorporated Title VII standards of discrimination when interpreting statutes prohibiting other forms of discrimination. For example, *Rev. Stat. §1977*, as amended, 42 U. S.

C. §1981, has been interpreted to forbid all racial discrimination in the making of private and public contracts. See *Saint Francis College v. Al-Khazraji*, 481 U. S. 604, 609 (1987). This Court has applied the 'framework' developed in Title VII cases to claims brought under this statute. *Patterson v. McLean Credit Union*, 491 U. S. 164, 186 (1989). Also, the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. §623(a)(1), prohibits discrimination on the basis of an employee's age. This Court has noted that its 'interpretation of Title VII ... applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived in haec verba from Title VII.' ' *Trans World Airlines, Inc. v. Thurston*, 469 U. S. 111, 121 (1985) (quoting *Lorillard v. Pons*, 434 U. S. 575, 584 (1978)). This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U. S. C. §1681 et seq., which prohibits discrimination under any federally funded education program or activity. See *Franklin v. Gwinnett County Public Schools*, 503 U. S. 60, 75 (1992) (relying on *Meritor Savings Bank, FSB v. Vinson*, 477 U. S. 57 (1986), a Title VII case, in determining that sexual harassment constitutes discrimination).

FN2. This Court has recognized that two forms of discrimination are prohibited under Title VII: disparate treatment and disparate impact. See *Griggs*, 401 U. S., at 431 ('The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation'). Both forms of 'discrimination' require a comparison among classes of employees.

FN3. Following *Wards Cove*, Congress enacted the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, as amended, which, inter alia, altered the burden of proof with respect to a disparate impact discrimination claim. See *id.*, §105 (codified at 42 U. S. C. §2000e-2(k)). This change highlights the principle that a departure from the traditional understanding of discrimination requires congressional action. Cf. *Field v. Mans*, 516 U. S. 59, 69-70 (1995) (Congress legislates against the background rule of the common law and traditional notions of lawful conduct).

FN4. If such general hortatory language is sufficient, it is puzzling that this or any other court did not reach the same conclusion long ago by reference to the general purpose language of the Rehabilitation Act itself. See 29 U. S. C. §701

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(1988 ed.) (describing the statute's purpose as 'to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living, for individuals with handicaps in order to maximize their employability, independence, and integration into the workplace and the community' (emphasis added)). Further, this section has since been amended to proclaim in even more aspirational terms that the policy under the statute is driven by, *inter alia*, 'respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities,' 'respect for the privacy, rights, and equal access,' and 'inclusion, integration, and full participation of the individuals.' 29 U. S. C. §§701(c)(1) - (3).

FN5. Given my conclusion, the Court need not review the integration regulation promulgated by the Attorney General. See 28 CFR § 35.130(d) (1998). Deference to a regulation is appropriate only 'if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable.' *Reno v. Bossier Parish School Bd.*, 520 U. S. 471, 483 (1997) (quoting *Presley v. Etowah County Comm'n*, 502 U. S. 491, 508 (1992)). Here, Congress has expressed its intent in §12132 and the Attorney General's regulation-- insofar as it contradicts the settled meaning of the statutory term--cannot prevail against it. See *NLRB v. Town & Country Elec., Inc.*, 516 U. S. 85, 94 (1995) (explaining that courts interpreting a term

within a statute 'must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of that term') (internal quotation marks omitted).

FN6. In mandating that government agencies minimize the institutional isolation of disabled individuals, the majority appears to appropriate the concept of 'mainstreaming' from the Individuals with Disabilities Education Act (IDEA), 84 Stat. 175, as amended, 20 U. S. C. §1400 et seq. But IDEA is not an antidiscrimination law. It is a grant program that affirmatively requires States accepting federal funds to provide disabled children with a 'free appropriate public education' and to establish 'procedures to assure that, to the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled.' §§ 1412(1), (5). Ironically, even under this broad affirmative mandate, we previously rejected a claim that IDEA required the 'standard of care' analysis adopted by the majority today. See *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U. S. 176, 198 (1982) ('We think ... that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children') (internal quotation marks omitted).

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*from Cynthia*

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I am enclosing a quick analysis by the Department of Justice of the recent Supreme Court regarding ADA coverage.

**DRAFT**

The Supreme Court Americans with Disabilities Act Cases: Sutton v. United Air Lines, 97-1943; Murphy v. United Parcel Service, No. 97-1992; Albertsons, Inc. v. Kirkingburg, No. 98-591

On June 22, 1999, the Court issued three decisions concerning the interpretation of the definition of the term "disability" in the Americans with Disabilities Act (ADA). In each case, a majority of the Court rejected the arguments of the United States supporting the private plaintiffs.

Only persons with "disabilities" are protected by the statute. The ADA provides a tripartite definition of "disability," which includes:

- (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (2) a record of such an impairment; or
- (3) being regarded as having such an impairment.

The Court's opinions addressed the first and third definitions.

## I. Summaries

### A. Sutton v. United Air Lines

In Sutton v. United Air Lines, petitioners Sutton and Hinton are twin sisters with uncorrected visual acuity of 20/200 or worse who have 20/20 vision when wearing eyeglasses. Experienced pilots, they applied to United Air Lines for positions as commercial airline pilots but were rejected because they did not meet United's minimum requirement of uncorrected visual acuity of 20/100 or better. The Supreme Court held that the assessment of whether a plaintiff satisfies the first prong of the definition — whether the impairment "substantially limits one or more of the major life activities" — should be made considering any mitigating measures used by the plaintiff. Thus, these sisters were not disabled within the first prong of the definition because they completely mitigated their impaired vision by wearing eyeglasses.

The Court rejected the argument (pressed by the United States) that mitigating measures should not be considered in evaluating disability. The Court stated that such an interpretation was inconsistent with the language of the statute;

- 2 -

that, in many cases, it would require courts to engage in a hypothetical inquiry (i.e. what would this person be like if she wasn't on medication); and that it would inflate the number of disabled persons covered by the statute far beyond Congress's estimate of 43 million, the figure cited in the ADA's findings. In pressing the contrary position, the United States had urged the Court to defer to the EEOC's interpretation of its regulations. While not resolving this issue, the Court questioned whether agency regulations regarding the definition of disability are entitled to any deference.

The Court also found that the twins were not "regarded" as disabled by United within the meaning of the third prong. An employer, the Court held, may decide that it prefers candidates that meet certain physical or other criteria, so long as not meeting that criteria, in and of itself, is not an impairment that substantially limits a major life activity. Here, while the sisters did not meet the visual acuity standard, they were not regarded as substantially limited in the major life activity of working because there are a number of other positions utilizing their skills for which they qualify, such as pilot for a regional airline and pilot instructor. In its analysis of whether plaintiffs were regarded as limited in working, the Court questioned whether "working" was a major life activity, but did not issue a holding on this question.

B. Murphy v. United Parcel Service

In Murphy v. United Parcel Service, Murphy has high blood pressure but uses medication to control his condition. United Parcel Service (UPS) fired Murphy from his job as a mechanic, a position that required him to drive commercial vehicles, because UPS thought his high blood pressure disqualified him from receiving the Department of Transportation health certification required for driving commercial vehicles. The Supreme Court held that he was not disabled within the meaning of the ADA. While without the medication, Murphy would have been disabled, the Court relied on its decision in Sutton to hold that Murphy should be evaluated in his medicated state, and that when medicated his blood pressure did not substantially limit his major life activities.

The Court also found that Murphy was not "regarded" as disabled because Murphy showed only that he was regarded as unable to perform the job of mechanic when that job requires driving a commercial motor vehicle. Since there are many mechanic jobs that do not require certification for driving commercial vehicles, he failed to demonstrate that he was regarded as unable to perform a class of jobs.

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- 3 -

C. Albertsons, Inc. v. Kirkingburg

Albertsons, Inc. v. Kirkingburg presented the question of whether Albertsons violated the ADA when it fired Kirkingburg from his position as a truck driver because he had monocular vision and did not meet the federal vision standards set forth in DOT regulations. At the time of Kirkingburg's termination, DOT had initiated a waiver program for certain drivers with good vision in only one eye who had good driving records. Kirkingburg obtained a waiver from DOT, but Albertsons refused to reinstate him.

The Court first held that the Ninth Circuit had erred in concluding that Kirkingburg was disabled merely because he saw in a different manner than persons who have vision in both eyes. The Court held that while monocular vision "inevitably leads to some loss of horizontal field of vision and depth perception," the ADA requires individuals to prove, on an individualized basis, that these limitations are "substantial". The Court also held, consistent with its decisions in Sutton and Murphy, that the extent to which persons with monocular vision compensate for their condition by making subconscious adjustments to the manner in which they perceive depth and see peripheral objects was relevant to the determination of disability. The Court stated that it agreed with the United States' argument that people with monocular vision 'ordinarily' will meet the ADA's definition of disability and that it believed that "defendant companies will often not contest the issue."

The Court also held that Albertsons was not required to justify its decision to terminate Kirkingburg because it was merely implementing the federal vision standards established in DOT regulations. The fact that DOT had waived the regulation with respect to the respondent, the Court held, did not alter the analysis in this case. In making this determination, the Court found two facts significant. First, DOT admitted that it had no evidentiary basis for concluding that the pre-existing vision standards could be lowered consistent with public safety. Second, the waiver program "did not purport to modify the substantive content of the general acuity regulation in any way." Rather, DOT had acknowledged, according to the Court, that the purpose of the waiver program was to gather data to determine whether the existing standards could be lowered. The Court concluded that DOT's vision waiver program was simply an "experiment with safety" that the employer was not obligated to join. The Court expressed concern that requiring an employer to independently justify a federal regulatory standard was unfair, particularly where, as here, the government had determined that contemporary empirical evidence was difficult to develop. To the extent that an agency has information demonstrating that its waiver policy is consistent with public safety and incorporates its waiver policy into the substantive content of the general

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- 4 -

safety standards, it should meet the court's concerns and Albertsons should not excuse an employer from justifying a decision to terminate an employee who obtains such a waiver.

## II. Implications

The impact of these decisions is twofold. First, the Court has excluded from the Act's coverage those persons with less serious impairments that are easily and completely corrected. Second, by rejecting our argument that disability should be determined without consideration of mitigating measures, the Court has made it more difficult to prove that those with serious but correctable impairments are covered by the Act. Among those potentially at risk for coverage are those who use prosthetic devices, as well as persons with epilepsy, diabetes, and mental illness who take medication to control the effects of those conditions.

We believe that Congress intended for the ADA to protect this second group, and do not think the Court's decision necessarily excludes them from coverage. We are developing strategies for retaining coverage, focusing on the following areas:

- (1) What are the ways to prove that a person with a mitigated disability is still substantially limited in a major activity?
- (2) How can we best obtain information on the physiological and day to day effects of serious disabilities?
- (3) Can we expand the meaning of "major life activities?" Is that a legal or factual issue?
- (4) If one is regarded as having a disability, is he or she entitled to reasonable accommodations?
- (5) Is one whose disability is controlled by medication, but who is denied the opportunity to take that medication (in school or worksite), entitled to relief under the statute?
- (6) How does the Act deal with someone whose condition is sometimes, but not always, controlled by medication?
- (7) What proof is needed to establish a claim under the "regarded as" prong?
- (8) Are there limitations on the physical characteristics employers may impose as a job qualification.

## **Q's and A's on Yesterday's Disability Cases**

Q: What is the President's reaction to yesterday's Supreme Court disability decisions?

A: In regard to the Olmstead case, the President stated yesterday that he agrees with the Court's decision that unjustified isolation of institutionalized persons violates the ADA. That is the position that the Administration argued before the Court. We believe this decision will encourage the development of community-based alternatives to institutionalization. We want to work with the states and others to help that process go forward.

In regard to the other decisions, we are concerned that the Court inappropriately narrowed the coverage of the ADA by excluding persons simply because they are able to mitigate their disability through medication or use of a medical appliance. The problem is that employers may still conclude that the person is too disabled to work, even though under the law they are not disabled enough to be covered by the ADA. The result is a catch-22 for disabled persons.

[Example: In the Sutton case, United Airlines prohibited the plaintiffs from being pilots because their vision was not satisfactory, and they did not allow them to meet this requirement by using corrective lenses. On the other hand, since their vision could be corrected, the Court said that they are not covered by the ADA.]

Q: Will you seek a legislative change?

A: The President has asked the Department of Justice, the Department of Health and Human Services and the EEOC to examine the decisions and make recommendations as to address them.

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## Four ADA Cases Decided by the Court

By The Associated Press

The four cases involving the Americans with Disabilities Act decided Tuesday by the Supreme Court:

--Sutton vs. United Airlines. Twin sisters Karen Sutton and Kimberly Hinton, both regional airline pilots based in Colorado, sued after United rejected their job application because they are extremely nearsighted. The sisters have 20-200 vision when not wearing glasses or contacts, but 20-20 vision when wearing them. Supreme Court ruled the sisters are not protected by the law.

--Murphy vs. UPS. Vaughn Murphy of Manhattan, Kan., sued after United Parcel Service in Topeka, Kan., fired him from his job as a truck mechanic because he has high blood pressure. Supreme Court ruled Murphy is not protected by the law.

--Albertson's vs. Kirkingburg. Hallie Kirkingburg worked for a supermarket chain as a truck driver before he was fired for failing a Department of Transportation vision test. He is almost blind in one eye. A veteran driver, Kirkingburg had an impeccable driving-safety record. Supreme Court ruled he is not protected by the law.

--Olmstead vs. L.C. Mentally disabled patients Elaine Wilson and Lois Curtis sued Georgia to get out of a state hospital in Atlanta and be placed in a home-like setting. Supreme Court ruled both women are protected by the law and sent the case back to a federal appeals court to decide whether Georgia's treatment of them was justified. (PROFILE (CO:UAL Corp; TS:UAL; IG:AIR;) )

AP-NY-06-22-99 1753EDT

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06/22

## **Q's and A's on Yesterday's Disability Cases**

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[Example: In the Sutton case, United Airlines prohibited the plaintiffs from being pilots because their vision was not satisfactory, and they did not allow them to meet this requirement by using corrective lenses. On the other hand, since their vision could be corrected, the Court said that they are not covered by the ADA.]

Q: Will you seek a legislative change?

A: The President has asked the Department of Justice and the EEOC to examine the decisions and make recommendations about how to address them.



Cynthia A. Rice

06/23/99 04:20:07 PM

Record Type: Record

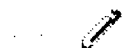
To: J. Eric Gould/OPD/EOP@EOP

cc:

Subject: Copy of Olmstead statement

----- Forwarded by Cynthia A. Rice/OPD/EOP on 06/23/99 04:20 PM -----

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Jonathan M. Young  
06/23/99 04:19:20 PM

Record Type: Record

To: Marie.P.Strahan@ssa.gov, Anna.plitt@ssa.gov, ogle-becky@dol.gov

cc: Edward W. Correia/WHO/EOP@EOP, Cynthia A. Rice/OPD/EOP@EOP

Subject: Supreme Court Q's and A's

FYI: Here's some Q and A about yesterday's Supreme Court decisions drafted by White House Counsel and DOJ, which can be used if questions come from the audience about the cases. I am also attaching the President's Statement on the Olmstead case.



Q's and A's on Disability Case

THE WHITE HOUSE

Office of the Press Secretary  
(Aviano, Italy)

For Immediate Release

June 22, 1999

STATEMENT BY THE PRESIDENT

I am pleased that the Supreme Court decision's in the Olmstead case upholds the purposes of the ADA by recognizing that unjustified isolation of institutionalized persons with disabilities is prohibited discrimination. This decision will increase access to home- and community-based long term care services and support for these persons.

My Administration is committed to finding affordable ways to enable people who need long term services and support to remain in the community if they choose and are able to do so. The best way to continue progress toward this goal is for State Governments, the Federal Government, and the affected communities to work together to develop cost-effective ways to provide these services. We must ensure that the quality of these services is excellent and that they are available to persons with disabilities of all ages.

Therefore, I am asking Secretary Shalala and Attorney General Reno to work with all interested parties to carry out today's decision in a fair and effective manner. Although this may not be easy in some cases, we can do it by working together in order to advance the goals of the ADA. Our ultimate goal is a nation that integrates people with disabilities into the social mainstream, promotes equality of opportunity, and maximizes individual choice.

## Disability Cases Before the Supreme Court

### Discrimination of Individuals with Disabilities

#### *Olmstead v. L.C.*

The Court reviewed an Eleventh Circuit opinion that Title II of the ADA and Department of Justice regulation 28 C.F.R. §35.130(d) prohibit states from confining individuals with mental disabilities in a state psychiatric hospital when those individuals could be appropriately treated in a more integrated community setting.

#### **Policy**

Unjustified segregation of persons in institutions, when community placement is appropriate, constitutes a form of discrimination (as defined by the Attorney General's Title II "integration regulation"). Unjustified segregation of persons in institutions constitutes a form of discrimination based on disability. Such segregation can stigmatize persons with disabilities as incapable or unworthy of participating in community life. Second, such discrimination can result in a form of dissimilar treatment, since persons with disabilities must give up participation in community life in order to receive the services they need, while persons without disabilities can receive the services they need without sacrificing that important interest.

The integration regulation does not impose undue costs on the State since it does not apply when compliance would require an unreasonable change in state policy or a fundamental change in the nature of the State's treatment program.

Also, note that labor unions have often resisted state efforts to move to community care in order to protect members' jobs.

**A1: The ADA has been invaluable in making it possible for millions of Americans to participate more fully in society. The Court's decision recognized that the segregation of people with disabilities in institutions, by stigmatizing them and depriving them of access to public services enjoyed by others, itself has discriminatory effects of the precise type banned by the ADA. This year's budget builds on the President's longstanding commitment to pursue the objectives of inclusion, empowerment and independence for people with disabilities. The \$70 million (24 percent increase) increase sought for the mental health block grant would assist states' community mental health services and help treat the most severe and hard-to-treat disorders, who are at particularly high risk of institutional placement.**

**A2: The ADA has been invaluable in making it possible for millions of Americans to participate more fully in society. The law has changed public attitudes and opened new opportunities to people with all types of disabilities. The Administration agrees with the Court's decision that disabled individuals have the right to live in a community setting if there are programs and services available. A goal of the ADA was to break down the barriers that separated disabled Americans from the non-**

**disabled community. We think that the Court took a step in helping to ensure full integration of disabled individuals into our communities.**

### **The Definition of Disability**

#### ***Albertson's Inc. v. Kirkingburg***

The Court reviewed in April a Ninth Circuit decision that a truck driver with monocular vision who received a Federal Highway Administration waiver of Department of Transportation vision standards for operating commercial vehicles was a qualified individual with a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 et seq.

#### **Policy**

Monocular vision is frequently a disability under the ADA, because it substantially limits both the amount and quality of an individual's major life activity of seeing. The fact that it may not also limit other "normal daily activities" of the individual is of no significance, because the ADA is largely premised on the principle that individuals who are limited in one or more major life activities can overcome those limitations to perform many activities competently and effectively.

#### ***Murphy v. United Parcel Serv., Inc.***

The Court reviewed a Tenth Circuit ruling that a mechanic whose hypertension, when medicated, did not substantially limit him in any major life activity was not protected by the ADA.

#### **Policy**

Mitigating measures, such as taking medication to control hypertension, are not relevant in the threshold question as to whether one is disabled under the ADA. Assessing the existence of a disability without regard to mitigating measures is consistent with the ADA's basic purpose to eliminate the exclusion of individuals from the workplace because of outdated stereotypes and myths about those individual's abilities.

#### ***Sutton v. United Air Lines, Inc***

The Court reviewed a Tenth Circuit decision that two airline pilot applicants whose visual impairments could be corrected with glasses or contact lenses were not substantially limited in the major life activity of seeing and, thus, were not disabled under the ADA.

#### **Policy**

Similar to *Murphy*, the question whether an individual has a disability under the ADA must be answered without regard to mitigating measures that the individual takes to ameliorate the effects of the impairment. Vision can be impaired to the point that, without eyeglasses, they can not see well enough to conduct everyday activities; thus having a physical impairment that substantially limits a major life activity.

**A: The ADA has been invaluable in making it possible for millions of Americans to participate more fully in society. The law has changed public attitudes and opened new opportunities to people with all types of disabilities. The Court's ruling, on**

**these three cases, is an important step in clarifying that the ADA is not just about protecting people in wheelchairs or those who are totally blind. The ADA is about protecting anyone with any significant impairment and giving them a fair opportunity to do their job.**

**At the same time, we are reminded that significant challenges still face the disabled. To address employment barriers for people with disabilities, the President issued an Executive Order last year establishing a task force to identify important ways to reduce barriers to work for people with disabilities. Furthermore, our budget contains a \$2 billion initiative that will remove significant barriers to work for people with disabilities.**

### **Consistency of Disability Benefits and the ADA in the Workplace**

#### ***Cleveland v. Policy Management Systems Corp.***

The Court reviewed a Fifth Circuit decision that the application or receipt of disability insurance benefits under SSDI creates a presumption that the applicant or recipient is estopped from asserting that she is a “qualified individual with a disability” under the ADA.

#### **Policy**

Neither application for nor recipient of SSDI warrants a presumption that the applicant can not assert that she is a “qualified individual with a disability” under the ADA. A person may have a medical condition that entitles her to disability benefits under the Social Security Act and nevertheless be a qualified individual with a disability under the ADA. The Social Security Act permits recipients to receive benefits in certain circumstances even though they are employed in order to encourage recipients to return to work if possible. Social Security benefits and the ADA are not necessarily alternative remedies between which people with disabilities must choose. Rather they are complementary measures that provide financial support to people with physical or mental impairments who face practical barriers to work while at the same time encouraging and facilitating their efforts to return to work.

**A: The ADA has been invaluable in making it possible for millions of Americans to participate more fully in society. Social Security benefits and the ADA are not necessarily alternative remedies between which people with disabilities must choose. The Social Security Act permits recipients to receive benefits in certain circumstances even though they are employed in order to encourage recipients to return to work if possible. Rather they are complementary measures that provide financial support to people with physical or mental impairments who face practical barriers to work while at the same time encouraging and facilitating their efforts to return to work.**

**The President’s budget contains new initiatives that will remove significant barriers to work for people with disabilities. This three-part budget initiative, which invests over \$2 billion over five years includes: (1) funding for the Work Incentives Improvement Act; (2) a new \$1,000 tax credit to cover work-related costs for people**

**with disabilities; and (3) expanded access to information and communication technologies. With these new proposals, the Administration will have taken action on every recommendation made in the report of the President's Task Force on the Employment of Adults with Disabilities.**

**In February, Vice President Gore announced a new regulation increasing the amount of income Americans with disabilities receiving SSDI or SSI can earn from \$500 to \$700 per month -- a 40 percent increase, and still receive critical cash and medical benefits.**

accommodated, taking into account the resources available to the state and the needs of others with mental disabilities."

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Tuesday June 22 10:28 AM ET

### High Court Upholds Rights Of Mentally Disabled

WASHINGTON (Reuters) - In an important disability rights decision, the U.S. Supreme Court ruled Tuesday that a state may be required to treat psychiatric patients by placing them in community homes instead of hospitals.

The court, by a 6-3 vote, said the nine-year-old federal law which prohibits discrimination against the disabled may require that states provide treatment in community-placement programs rather than in a ``segregated" mental institution.

``We confront the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions. The answer, we hold, is a qualified yes," said Justice Ruth Bader Ginsburg, speaking from the bench for the court majority.

She said such treatment was required when state professionals have determined that community placement was appropriate, the transfer was not opposed by the affected person, and it can be reasonably accommodated, taking into account the resources available to the state and the needs of others with mental disabilities.

Ginsburg made clear the state's responsibility, once it provides community-based treatment, was not ``boundless."

The ruling was a major victory for advocates of the mentally ill and for the U.S. Justice Department, which said states under the law must provide treatment in the most integrated setting that would be appropriate.

Message Sent To:

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Cynthia A. Rice/OPD/EOP@EOP  
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## Disability Cases Before the Supreme Court

### Discrimination of Individuals with Disabilities

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The Court reviewed an Eleventh Circuit opinion that Title II of the ADA and Department of Justice regulation 28 C.F.R. §35.130(d) prohibit states from confining individuals with mental disabilities in a state psychiatric hospital when those individuals could be appropriately treated in a more integrated community setting.

#### **Policy**

Unjustified segregation of persons in institutions, when community placement is appropriate, constitutes a form of discrimination (as defined by the Attorney General's Title II "integration regulation"). Unjustified segregation of persons in institutions constitutes a form of discrimination based on disability. Such segregation can stigmatize persons with disabilities as incapable or unworthy of participating in community life. Second, such discrimination can result in a form of dissimilar treatment, since persons with disabilities must give up participation in community life in order to receive the services they need, while persons without disabilities can receive the services they need without sacrificing that important interest.

The integration regulation does not impose undue costs on the State since it does not apply when compliance would require an unreasonable change in state policy of a fundamental change in the nature of the State's treatment program.

Also, note that labor unions have often resisted state efforts to move to community care in order to protect members' jobs.

**A1: The ADA has been invaluable in making it possible for millions of Americans to participate more fully in society. The Court's decision recognized that the segregation of people with disabilities in institutions, by stigmatizing them and depriving them of access to public services enjoyed by others, itself has discriminatory effects of the precise type banned by the ADA. This year's budget builds on the President's longstanding commitment to pursue the objectives of inclusion, empowerment and independence for people with disabilities. The \$70 million (24 percent increase) increase sought for the mental health block grant would assist states' community mental health services and help treat the most severe and hard-to-treat disorders, who are at particularly high risk of institutional placement.**

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**disabled community. We think that the Court took a step in helping to ensure full integration of disabled individuals into our communities.**

### **The Definition of Disability**

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#### **Policy**

Monocular vision is frequently a disability under the ADA, because it substantially limits both the amount and quality of an individual's major life activity of seeing. The fact that it may not also limit other "normal daily activities" of the individual is of no significance, because the ADA is largely premised on the principle that individuals who are limited in one or more major life activities can overcome those limitations to perform many activities competently and effectively.

#### ***Murphy v. United Parcel Serv., Inc.***

The Court reviewed a Tenth Circuit ruling that a mechanic whose hypertension, when medicated, did not substantially limit him in any major life activity was not protected by the ADA.

#### **Policy**

Mitigating measures, such as taking medication to control hypertension, are not relevant in the threshold question as to whether one is disabled under the ADA. Assessing the existence of a disability without regard to mitigating measures is consistent with the ADA's basic purpose to eliminate the exclusion of individuals from the workplace because of outdated stereotypes and myths about those individual's abilities.

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Similar to *Murphy*, the question whether an individual has a disability under the ADA must be answered without regard to mitigating measures that the individual takes to ameliorate the effects of the impairment. Vision can be impaired to the point that, without eyeglasses, they can not see well enough to conduct everyday activities; thus having a physical impairment that substantially limits a major life activity.

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Cynthia A. Rice

06/21/99 01:42:41 PM

Record Type: Non-Record

To: J. Eric Gould/OPD/EOP@EOP

cc:

Subject: Olmstead draft

pls look at this

----- Forwarded by Cynthia A. Rice/OPD/EOP on 06/21/99 01:42 PM -----

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Jonathan M. Young  
06/21/99 01:05:39 PM

Record Type: Record

To: Jeanne Lambrew/OPD/EOP@EOP, Cynthia A. Rice/OPD/EOP@EOP, Christopher C. Jennings/OPD/EOP@EOP, Devorah R. Adler/OPD/EOP@EOP

cc:

Subject: Olmstead draft

Here's a start for a statement win or lose. I'm suggesting the same first paragraph in either case, and then one of the two second paragraphs. We need a final sound bite sentence; please advise.

My Administration is committed to finding affordable ways to enable people who need long term services and supports to remain in the community or leave a long term care facility if they choose and are able to do so. Using the existing flexibility of Medicaid programs, several States have already made significant progress. In 1982, only about 2 percent of Medicaid long-term care dollars were spent on home- and community-based services. By 1997 almost 25 percent of these funds were spent on such services.

[If win...] Today's Supreme Court decision [specify vote] upholds the principles of the ADA and affirms the importance of increasing access to home- and community-based long term services and supports. The best way to continue progress is for State Governments, the Federal Government, and the disability and aging communities to develop mutually-agreeable, cost-effective ways to provide these services to people with disabilities of all ages. I am, therefore, asking Secretary Shalala and Attorney General Reno to work with all interested parties to carry out today's decision in a fair and effective manner. Although this may not be easy, it can be done by working together.

[If lose...] Today's Supreme Court decision [specify vote] will not prevent us from increasing

access to home- and community-based long term services and supports. The best way to continue progress is for State Governments, the Federal Government, and the disability and aging communities to develop mutually-agreeable, cost-effective ways to provide these services to people with disabilities of all ages. Although this may not be easy, it can be done by working together.

[We need a final sentence for either of the second paragraphs.]

# High Court Hears Arguments On States' Care of the Disabled

By LINDA GREENHOUSE

WASHINGTON, April 21 — Hearing arguments in an important disability rights case, Supreme Court Justices wrestled today with what they appeared to see as a pair of unpalatable alternatives: permit states to continue confining people with severe disabilities in big institutions, when such settings are not medically necessary, or prompt the mass discharge of people who actually need close supervision and care.

On the one hand, Justice Stephen G. Breyer told the lawyer for two Georgia women with mental disabilities, who won the right to care outside the big state hospital where they had lived for years, "What worries me about your position is writing something that, the way it works in the world, leads people to be thrown out and abandoned on the streets."

On the other hand, Justice Anthony M. Kennedy challenged a Georgia State lawyer, who argued that Federal law does not require states to provide alternatives to institutionalization: "You're saying if hospitalization is excessive, so be it; the state can make that judgment."

As presented to the Court, this case — the first of four disability cases to be heard over the next week — presents a relatively narrow legal issue. The question is whether the Justice Department is properly interpreting the Americans With Disabilities Act to require that once a state offers treatment to people with disabilities, the treatment must take place in a "community setting" if that is medically appropriate and not unreasonably expensive.

But in context, as part of the continuing struggle over the meaning of the sweeping yet vague disability law, no one regards this as a narrow case: not Georgia, which describes the Justice Department regulation as an unwelcome and unauthorized Federal intrusion into state prerogatives; not people with disabilities and their advocates, who have described this case as the *Brown v. Board of Education* of the disability rights movement; and, it was evident today, not the Justices, who were unusually engaged by the policy implications of the contrasting interpretations that were put before them.

The provision of the 1990 law at issue prohibits any public agency from discriminating against a person with a disability "by reason of such disability." Georgia takes the view that while this provision requires "even-handed treatment" of people who have disabilities and those who do not, it imposes no requirements for the actual treatment

of those with disabilities.

Justice David H. Souter, addressing Patricia Downing, Georgia's Senior Assistant Attorney General, objected that the state's interpretation seemed to assume that all people with disabilities are alike.

But not all disabilities are the same, Justice Souter went on. He asked Ms. Downing to consider two groups of people, one group "simply unsuited" to live outside an institution, and another group "who can live perfectly well" on the outside despite their disabilities. If the state keeps all members of both groups hospitalized on the ground that all have disabilities, isn't that discrimination on the basis of disability? Justice Souter asked.

Ms. Downing replied that it would not be discrimination as long as the people in the second group require some level of treatment and can benefit from being in a hospital.

"So if they can benefit, that renders irrelevant the fact that they can get appropriate treatment outside?" Justice Souter asked with evident skepticism.

Ms. Downing replied, "The mere fact that someone can be treated in the community does not constitute discrimination."

The state is appealing a ruling last year by the United States Court of Appeals for the 11th Circuit, in Atlanta, which held that if treatment in a group home or other non-institutional environment can be provided, it generally must be provided.

Although as many as 26 other states told the Court at one point that they supported Georgia's appeal, that number has dwindled to 7 as governors and state attorneys general responded to the anger their positions evoked in constituents with disabilities. The states still supporting a friend-of-the-court brief for Georgia are Colorado, Hawaii, Montana, Nevada, Tennessee, Texas, and Wyoming.

The Justice Department regulation, which the department calls an "integration mandate," requires states to provide services "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." That means, to the extent possible, that people should be able to live in neighborhoods and to have the chance to interact with those who are not disabled.

Irving L. Gornstein, an Assistant Solicitor General, told the Court that in passing the Americans With Disabilities Act, Congress "understood that the unjustified segregation of people with disabilities is a form of discrimination."

Bazelon Center Logo



# NEWS

FOR IMMEDIATE RELEASE, March 18, 1999

## **U.S. SUPREME COURT TO REVIEW CRUCIAL DECISION FOR INCLUSION OF PEOPLE WITH DISABILITIES; BRIEFS, OTHER RESOURCES ON WEB SITE**

### **Of 26 States that Supported Georgia Appeal, 15 Have Withdrawn**

On April 21, 1999, the U. S. Supreme Court will hear a case that could determine whether parochial concerns bureaucratic inertia, neighborhood resistance and the job concerns of state hospital workers take precedence over the civil rights of people with disabilities who could otherwise live and receive needed services in the community.

The case, *Olmstead v. L.C. and E.W.*, is the court's first review of the "integration mandate" of the Americans with Disabilities Act (ADA), which bans discrimination on the basis of mental or physical disability. The mandate requires public agencies to provide services "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." Advocates have used it, claiming unwarranted "segregation" in state institutions, to obtain community services for people with mental disabilities.

The case reached the Supreme Court, when the Georgia Department of Human Resources appealed a decision that it had violated the integration mandate by segregating two women with mental disabilities in a state psychiatric hospital long after the agency's treatment professionals had recommended their transfer to community care.

Both women, Lois Curtis, 31, and Elaine Wilson, 47, have mental disabilities. Each was hospitalized repeatedly over two decades, with periodic discharges to inappropriate settings--including a homeless shelter--followed by return to the hospital. Only after Atlanta Legal Aid attorney Susan Jamieson brought a lawsuit in 1995 were they moved to a small group home and enrolled in a life-skills program.

Curtis and Wilson, along with a former hospital nurse who operates the group home and a staff member of the day program Wilson attends, will be in Washington D.C. on April 20-21 for the Supreme Court argument. The women's biographies and photos, the legal brief on their behalf and various "amicus" (friend of the court) briefs are on the web site of the Bazelon Center for Mental Health Law: <http://www.bazelon.org/olmstead.html>.

"This case could be the *Brown v. Board of Education* for people with mental disabilities, integrating mental health and human services the way *Brown* did public education," points out Ira Burnim, legal director of the Bazelon Center, who coordinated the various amicus briefs for the women. "By affirming the lower court's ruling, the court could end the shameful and still far too common practice of needlessly segregating people in institutions.

"On the other hand," Burnim added, "a reversal by the Supreme Court would encourage recalcitrant state officials, NIMBY ['not in my back yard'] opponents, and business and labor interests that profit from institutions to continue resisting the inclusion in communities of people with mental disabilities."

### **States Withdraw Support for Georgia's Appeal**

When Georgia asked the Supreme Court to review the decision of the U.S. Court of Appeals for the 11<sup>th</sup>

Circuit, 22 state attorneys general, led by Florida's, filed a supporting brief. They contended that the ruling would lead to lawsuits forcing closure of all state hospitals and disrupting states' funding of services for people with mental disabilities.

However, by the deadline for filing on Georgia's behalf, 12 of the 22 states had withdrawn their support for Georgia's appeal. The 12 are Alabama, California, Delaware, Florida, Maryland, Michigan, Nebraska, New Hampshire, Pennsylvania, South Dakota, Utah and West Virginia, plus the territory of Guam. Four new states joined the remaining 10 backing Georgia, but three of them (Minnesota, Massachusetts and Washington) have since written to the court to withdraw their support. The state of Oregon, which did not take a position earlier, has signed onto a brief supporting the integration mandate.

To refute the argument made by the remaining 11 states, Oregon's director of human resources and 57 former commissioners of mental health and directors of developmental disabilities, representing 36 states and the District of Columbia, have submitted a brief on behalf of the women. They point out that at least three quarters of the states are already reorganizing their systems to provide most services for people with mental disabilities in the community, at less than half the cost of institutional care. Therefore, their brief asserts, Georgia and the states supporting its appeal are wrong to contend that the lower courts' decision would unreasonably burden states or result in "careless deinstitutionalization."

The commissioners' brief and another, filed by 30 national and seven Georgia organizations, document the cost differential between institutional and community care. For example, the daily cost of care in the mental retardation unit at Georgia Regional Hospital-Atlanta, where the women were confined, was \$283 in 1996, compared to the daily cost for community services of \$118 to \$124. National studies cited in the briefs show a similar pattern. For example, one compared community costs, including housing, of \$60,000 per year for a discharged psychiatric patient to \$130,000 for institutional care.

- 30 -

#### **For information and interviews:**

Reporters seeking interviews in Washington on April 20 or 21 with Lois Curtis and Elaine Wilson, their lawyers and people who work with them in the community, or for general information, may contact Lee Carty, communications director at the Bazelon Center: (202) 467-5730 ext. 21, [leec@bazelon.org](mailto:leec@bazelon.org).

For interviews in Atlanta: radio or TV, contact Narcel Reedus at the Georgia Advocacy Center, (404) 253-1070 ext 17, [nreedus@mindspring.com](mailto:nreedus@mindspring.com); print media, call Karen Addy, Atlanta Citizen Advocacy, (404) 523-8846.

Judge David L. Bazelon Center for Mental Health Law, 1101 15<sup>th</sup> Street N.W., Suite 1212, Washington D.C. 20005, 202/467-5730 (voice), 202/467-4232 (TDD), 202/223-0409 (fax). The Bazelon Center for Mental Health Law is the leading national legal-advocacy organization representing people with mental illness or mental retardation. Through precedent-setting litigation and in the public-policy arena, the center works to define and uphold the rights of adults and children who rely on public services and ensure them equal access to health and mental health care, education, housing and employment. The Bazelon Center was founded in 1972; its work is funded by private foundations and individual donors.

Specifically, the court ruled that "the application for or the receipt of Social Security disability benefits creates a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability.'" Pet App. 11a. The court opined that an individual would be able to overcome that presumption, if at all, only "under some limited and highly unusual set of circumstances." Id. at 9a. Applying that standard, the court ruled that petitioner had not "raised a genuine issue of material fact to rebut the presumption that, while she remains disabled for purposes of Social Security, she is estopped from asserting that she is a 'qualified individual with a disability.'" Id. at 12a.

Petitioner sought rehearing. The EEOC filed a brief as amicus curiae in her support. Pet. App. 18a-35a. The panel denied the petition for rehearing without explanation. Id. at 16a-17a.

## SUMMARY OF ARGUMENT

Neither application for nor receipt of Social Security disability benefits warrants a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" (42 U.S.C. [\*5] 12111(8)) under the ADA. A person may have a medical condition that entitles her to disability benefits under the Social Security Act and nevertheless be a qualified individual with a disability under the ADA for several reasons. First, an individual is "qualified" under the ADA if she could perform the essential functions of her job with "reasonable accommodation." Ibid. In contrast, a person may be entitled to benefits under the Social Security Act even if she could have performed her prior job with reasonable accommodation, because the SSA does not speculate whether the ADA might require an employer to make specific accommodations that the employer has not in fact made. Second, a person may qualify for Social Security disability benefits based on one of a series of regulatory presumptions that she is unable to work, even though the person is not actually prevented by her impairment from performing all jobs. In contrast, presumptions play no part in the ADA qualification analysis. Third, the Social Security Act permits recipients to receive benefits in certain circumstances even though they are employed in order to encourage recipients to return to work if possible. Finally, disability status may change over time, so that a person who was discharged in violation of the ADA because she was able to work at that time may become progressively more disabled and then properly apply for and receive disability benefits.

Because there is no necessary inconsistency between receipt of or application for Social Security disability benefits and status as a "qualified individual with a disability" under the ADA, there is no justification to presume that a benefit applicant or recipient is judicially estopped from asserting that she is "qualified" under the ADA. Indeed, the use of judicial estoppel to bar ADA actions would frustrate the purposes of both the ADA and the disability provisions of the Social Security Act. Social Security benefits and the ADA are not necessarily alternative remedies between which people with disabilities must choose. Rather, they are [\*6] complementary measures that provide financial support to people with physical or mental impairments who face practical barriers to work while at the same time encouraging and facilitating their efforts to move off the benefit rolls and to return to work.

Statements made in connection with a benefits application, where relevant, should be considered as evidence in a subsequent ADA action, but they should not trigger either a per se bar to the ADA suit or a heightened evidentiary burden on the plaintiff. General statements invoking the standard language of SSA benefit applications that the claimant is "unable to work" or "disabled" have little, if any, relevance to the issue of qualification in an ADA action, because the connotations of those terms under the Social Security Act are quite different from their meanings under the ADA. In certain cases, however, an applicant for disability benefits may make specific factual statements concerning her functional capacities. In some of those cases, there may be an inconsistency between those factual statements and her later statements in support of an ADA claim. In that case, the prior statements to the SSA may be relevant to the qualification issue in the ADA action and may lead to a determination that relief under the ADA is not available or should be limited.

## ARGUMENT

I. NEITHER APPLICATION FOR NOR RECEIPT OF DISABILITY INSURANCE BENEFITS UNDER THE SOCIAL SECURITY ACT CREATES A REBUTTABLE PRESUMPTION THAT THE APPLICANT OR RECIPIENT IS JUDICIALLY ESTOPPED FROM ASSERTING THAT SHE IS A "QUALIFIED INDIVIDUAL

## *From Eyeglasses to Wheelchairs*

# Adjusting the Legal Bar for Disability

By LESLIE KAUFMAN

**I**N 1994 Vaughn L. Murphy applied for a position as a truck mechanic with United Parcel Service in Topeka, Kan. Because the job included driving the vehicles he serviced, Mr. Murphy was required by Federal law to pass a Government physical. He did, and started working for U.P.S. He was by all accounts an able engine doctor but was soon asked by the company to take another blood-pressure test. This time, despite medication, Mr. Murphy's blood pressure slightly ex-

ceeded the limits — making him, in theory, a risk for stroke or heart attack on the road. The company gave him a pink slip.

Mr. Murphy sued. His charge? That U.P.S. had violated his rights under the Americans With Disabilities Act. Later this month, his case and two others — one involving a truck driver with vision in one eye and another involving two pilots who wear eyeglasses — will be heard by the United States Supreme Court.

Disability experts believe the Court is tackling one of the most critical questions that has arisen under the 1990 statute: What is the legal threshold for being

considered disabled?

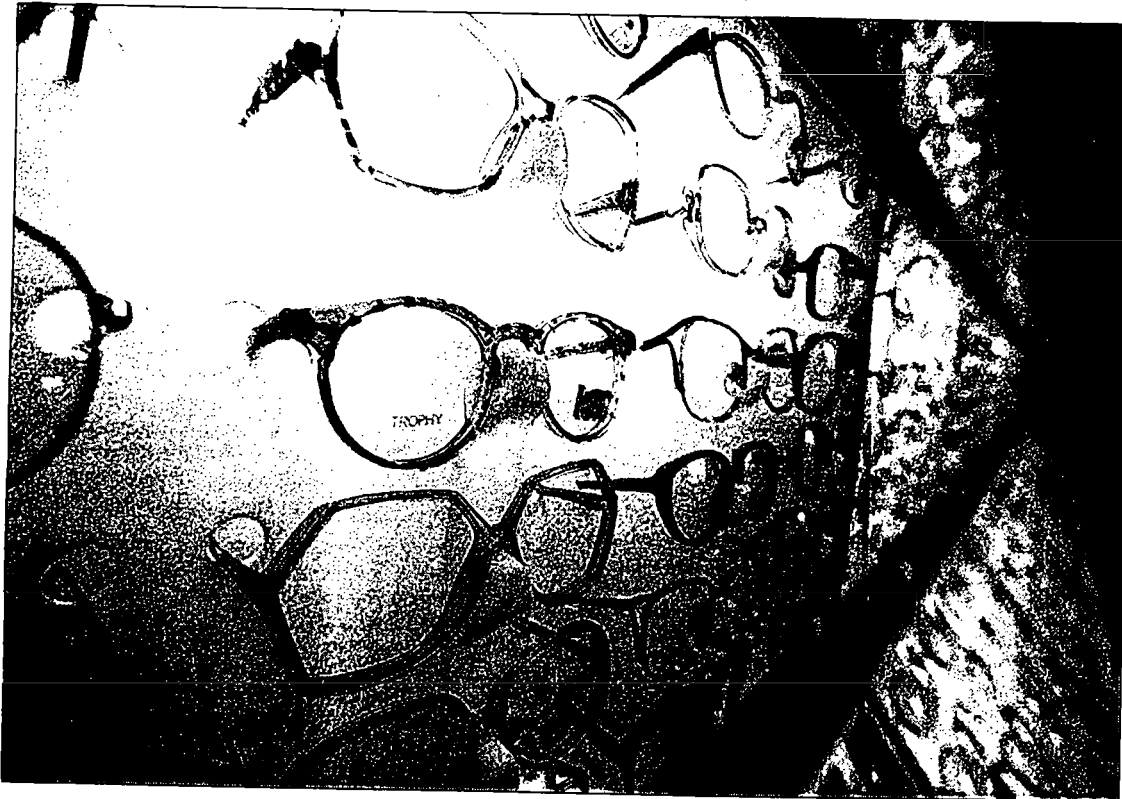
The issue before the Court is whether people whose conditions can be medically corrected so they can function normally — diabetics on insulin, for example — are still entitled to sue for discrimination.

The impending ruling could potentially reshape the workplace. Unlike other civil rights laws, which mandate equal treatment, the Americans With Disabilities Act requires businesses to make "reasonable accommodations" for disabled employees. So far, the Equal Employment Opportunity Commission, which monitors compliance with civil rights laws, has chosen to interpret that standard generously.

**E**XAMPLES from recent commission guidelines include reassigning an employee suffering from stress or depression to a new boss and offering a different job to a worker who becomes too disabled to perform his own, even if the disabled worker is not the best-qualified person for that post. If U.P.S. were forced to recognize Mr. Murphy as disabled, it might have to adjust duties in the mechanics pool, giving others responsibility for driving trucks while Mr. Murphy works in the grease pit or allowing him time off during periods when his blood-pressure rises above the Federal limit.

The thought that the Court might extend the law to cover a huge new segment of the population has some employers envisioning a flood of very-expensive lawsuits from disgruntled employees with minor impairments seeking special treatment. "If having a disability is the gate through which everyone must enter to get into the promised land of reasonable accommodation, the width of the gate is pretty important," said Christopher Bell, a former associate legal counsel for disability cases at the E.E.O.C. and a partner at Jackson Lewis, a New York-based law firm that represents employers.

Certainly, more Americans appear willing to be identified as disabled. The Social Security disability program, for example, which was created to give an income to working-age adults who are too handicapped to hold down a job, has more than tripled its outlays since its inception in 1975. The number of students who have been classified as "learning disabled" has skyrocketed as more parents have discovered the accompa-



Fred R. Conrad/The New York Times

Continued on Page 6

# Setting the Bar for Disability

*Continued From Page 1*

nying advantages — more one-on-one time with teachers, more time to complete exams and sometimes even taxpayer-financed tuition for private tutors.

The Clinton Administration and a spectrum of groups representing everyone from diabetics to the H.I.V.-positive have submitted supporting briefs to the Supreme Court arguing that the law was specifically intended to address correctable disabilities. After all, they say, it is the people with the most surmountable handicaps who are most likely to seek mainstream jobs. They maintain that it is absurd for employers to claim that a job applicant is too disabled to take a job and yet not disabled enough to sue for discrimination. As Mr. Murphy's lawyers wrote in their brief to the Court, "The A.D.A. does not permit U.P.S. to have it both ways."

**F**OR now, these advocates say, employers are benefiting from the courts' overly narrow interpretation of disability. John Parry, head of the Mental and Physical Disability Law Commission of the American Bar Association, says about 92 percent of the complaints that currently make it to court under the act are decided on behalf of employers, many simply on the grounds that the employee does not qualify for protection. "This is really about making the obstacles to justice less onerous," Mr. Parry said, referring to the three cases before the Supreme Court.

Employers like U.P.S. counter that for especially risky jobs they have the right to set high physical standards, even ones that average non-handicapped people might not meet. Norman Black, a spokesman for U.P.S., said: "We don't see this as a case about disability at all. This is a question about safety."

But lawyers for the workers in the three cases point out that their clients previously held jobs nearly identical to the ones they were denied and had solid service records. That suggests, the lawyers say, that the companies being sued may be insisting on physical standards beyond what is really required to do the work well.

Some advocates are even willing to go one step further and sacrifice a degree of safety for greater accommodation. "We live in a society with a lot of risks every day," said Chai Feldblum, a professor of law at Georgetown University Law

Center who helped draft the disabilities act in 1991. "If it only marginally increases the probability of harm" to hire a disabled person, she said, "then an employer should not be allowed to discriminate."

Looking back on the original debate over the disabilities act, it is hardly clear that Congress intended to pass a civil rights law for the nearsighted and the hypertense. The legislation's vague standard for disability is whether a condition "substantially limits life activities."

When the act was passed in 1990, Congress considered some 43 million Americans to be disabled — a number based on numerous surveys, none of which was definitive. It is certainly greater than the five million or so Americans who are deaf, blind or paraplegic, prompting advocates of a more expansive definition to claim that Congress meant to err on the side of generous interpretation.

On the other hand, 43 million falls well short of the more than 1 in 3 Americans who wear eyeglasses or contact lenses or the 50 million who have hypertension. United Airlines, which is being sued by two nearsighted women who were not accepted for jobs as pilots, wrote in its brief to the Court, "At the very least, the A.D.A. should be read to exclude individuals with widely shared and easily correctable impairments."

The Supreme Court, in the only significant decision it has ever made on the disabilities act, set a broad precedent for what is meant by limiting a life activity. In *Bragdon v. Abbott* in 1998, the Justices found that an asymptomatic H.I.V.-positive woman who had been denied care by her dentist could be considered disabled under the act. The Justices reasoned that because she felt constrained from becoming a mother by her fear of passing on the disease to her child (her reproductive system was perfectly healthy), she was substantially limited in the life activity of procreation and therefore could seek damages.

If the court decides that poor eyesight or hypertension are equally limiting, millions more Americans might wake up this spring to find themselves on the rolls of the disabled.

## **Disability Cases Before the Supreme Court**

### **Discrimination of Individuals with Disabilities**

#### ***Olmstead v. L.C.***

The Court will review on April 21 an Eleventh Circuit opinion that Title II of the ADA and Department of Justice regulation 28 C.F.R. §35.130(d) prohibit states from confining individuals with mental disabilities in a state psychiatric hospital when those individuals could be appropriately treated in a more integrated community setting.

#### **Policy**

Unjustified segregation of persons in institutions, when community placement is appropriate, constitutes a form of discrimination (as defined by the Attorney General's Title II "integration regulation"). Unjustified segregation of persons in institutions constitutes a form of discrimination based on disability. Such segregation can stigmatize persons with disabilities as incapable or unworthy of participating in community life. Second, such discrimination can result in a form of dissimilar treatment, since persons with disabilities must give up participation in community life in order to receive the services they need, while persons without disabilities can receive the services they need without sacrificing that important interest.

The integration regulation does not impose undue costs on the State since it does not apply when compliance would require an unreasonable change in state policy of a fundamental change in the nature of the State's treatment program.

Also, note that labor unions have often resisted state efforts to move to community care in order to protect members' jobs.

- A1: The ADA has been invaluable in making it possible for millions of Americans to participate more fully in society. The Court's decision recognized that the segregation of people with disabilities in institutions, by stigmatizing them and depriving them of access to public services enjoyed by others, itself has discriminatory effects of the precise type banned by the ADA. This year's budget builds on the President's longstanding commitment to pursue the objectives of inclusion, empowerment and independence for people with disabilities. The \$70 million (24 percent increase) increase sought for the mental health block grant would assist states' community mental health services and help treat the most severe and hard-to-treat disorders, who are at particularly high risk of institutional placement.**
- A2: The ADA has been invaluable in making it possible for millions of Americans to participate more fully in society. The law has changed public attitudes and opened new opportunities to people with all types of disabilities. The Administration agrees with the Court's decision that disabled individuals have the right to live in a community setting if there are programs and services available. A goal of the ADA was to break down the barriers that separated disabled Americans from the non-**

**these three cases, is an important step in clarifying that the ADA is not just about protecting people in wheelchairs or those who are totally blind. The ADA is about protecting anyone with any significant impairment and giving them a fair opportunity to do their job.**

**At the same time, we are reminded that significant challenges still face the disabled. To address employment barriers for people with disabilities, the President issued an Executive Order last year establishing a task force to identify important ways to reduce barriers to work for people with disabilities. Furthermore, our budget contains a \$2 billion initiative that will remove significant barriers to work for people with disabilities.**

### **Consistency of Disability Benefits and the ADA in the Workplace**

#### ***Cleveland v. Policy Management Systems Corp.***

The Court reviewed a Fifth Circuit decision that the application or receipt of disability insurance benefits under SSDI creates a presumption that the applicant or recipient is estopped from asserting that she is a “qualified individual with a disability” under the ADA.

#### **Policy**

Neither application for nor recipient of SSDI warrants a presumption that the applicant can not assert that she is a “qualified individual with a disability” under the ADA. A person may have a medical condition that entitles her to disability benefits under the Social Security Act and nevertheless be a qualified individual with a disability under the ADA. The Social Security Act permits recipients to receive benefits in certain circumstances even though they are employed in order to encourage recipients to return to work if possible. Social Security benefits and the ADA are not necessarily alternative remedies between which people with disabilities must choose. Rather they are complementary measures that provide financial support to people with physical or mental impairments who face practical barriers to work while at the same time encouraging and facilitating their efforts to return to work.

**disabled community. We think that the Court took a step in helping to ensure full integration of disabled individuals into our communities.**

### **The Definition of Disability**

#### ***Albertson's Inc. v. Kirkingburg***

The Court will review in April a Ninth Circuit decision that a truck driver with monocular vision who received a Federal Highway Administration waiver of Department of Transportation vision standards for operating commercial vehicles was a qualified individual with a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 et seq.

#### **Policy**

Monocular vision is frequently a disability under the ADA, because it substantially limits both the amount and quality of an individual's major life activity of seeing. The fact that it may not also limit other "normal daily activities" of the individual is of no significance, because the ADA is largely premised on the principle that individuals who are limited in one or more major life activities can overcome those limitations to perform many activities competently and effectively

#### ***Murphy v. United Parcel Serv., Inc.***

The Court reviewed a Tenth Circuit ruling that a mechanic whose hypertension, when medicated, did not substantially limit him in any major life activity was not protected by the ADA.

#### **Policy**

Mitigating measures, such as taking medication to control hypertension, are not relevant in the threshold question as to whether one is disabled under the ADA. Assessing the existence of a disability without regard to mitigating measures is consistent with the ADA's basic purpose to eliminate the exclusion of individuals from the workplace because of outdated stereotypes and myths about those individual's abilities.

#### ***Sutton v. United Air Lines, Inc***

The Court reviewed a Tenth Circuit decision that two airline pilot applicants whose visual impairments could be corrected with glasses or contact lenses were not substantially limited in the major life activity of seeing and, thus, were not disabled under the ADA.

#### **Policy**

Similar to *Murphy*, the question whether an individual has a disability under the ADA must be answered without regard to mitigating measures that the individual takes to ameliorate the effects of the impairment. Vision can be impaired to the point that, without eyeglasses, they can not see well enough to conduct everyday activities; thus having a physical impairment that substantially limits a major life activity.

**A: The ADA has been invaluable in making it possible for millions of Americans to participate more fully in society. The law has changed public attitudes and opened new opportunities to people with all types of disabilities. The Court's ruling, on**



Jonathan M. Young  
04/15/99 03:08:24 PM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP  
cc: Melinda D. Haskins/OMB/EOP, Jeanne Lambrew/OPD/EOP, Joanne Cianci/OMB/EOP, J. Eric Gould/OPD/EOP  
Subject: Re: URGENT : SAP on S331 -- Comments Due 3 :30 p.m. Today (4/15) -- Senate May Consider Bill Today

Good call, Cynthia. We can underscore some of the positive things about the bill. I'm attaching a form letter for people who write in about this (sent to Correspondence, I don't know if this was officially approved). Perhaps we could use language similar to some of the following.

= = = = =

Thank you for your letter of December 22, 1998, regarding your support for my Administration's efforts to enact the Work Incentives Improvement Act. I have shared your letter with my staff in the Office of Public Liaison, and I am grateful for your tireless work in advancing the causes of people with disabilities.

As you know, during this year's State of the Union Address, I declared: "No One should have to choose between keeping health care and taking a job." And I urged members of Congress to pass the landmark Work Incentives Improvement Act (WIIA), sponsored by Senators Kennedy and Jeffords, Roth and Moynihan.

This announcement, and inclusion of WIIA in my FY2000 budget, builds on a longstanding commitment of my Administration to pursue the objectives of inclusion, empowerment, and independence for people with disabilities. Last July, during a commemoration of the ADA's anniversary, I directed my staff to work intensely with the disability community and with Congress to develop a proposal that provides the services necessary to enable people with disabilities to work. The "ticket to work" program, which I have supported in previous budgets, helps address this need. The ticket alone, however, is not enough. It is also essential to ensure access to health insurance coverage. I am pleased that Senators Jeffords and Kennedy, and now with the collaboration of Senators Roth and Moynihan, have developed a proposal that accomplishes these policy goals while maintaining fiscal responsibility.

Last fall, my Administration urged inclusion of the Work Incentives Improvement

Act in the FY99 Omnibus budget bill. I thank you and others in the disability community for ensuring that members of Congress learned about the bill's importance. Although our efforts were blocked during negotiations with Republican leadership in Congress, we have been steadfast in continuing our support for this important legislation.

On January 13, 1999, in the East Room of the White House, and joined by senior Administration officials, members of Congress, and community advocates, I proudly unveiled a historic new initiative that will remove significant barriers to work for people with disabilities. The main feature of this three-part, \$2 billion initiative was full-funding for WIIA in my FY2000 budget.

WIIA, however, is only one part of a comprehensive Administration effort that seeks to promote employment of people with disabilities by addressing a diversity of work-related barriers, such as technology, transportation, health, and long term services and supports. On January 13, I announced a new \$1,000 tax credit to cover work-related costs for people with disabilities, and a doubling in our investment in expanding access to information and communications technologies.

On February 12, 1999, in Albany, New York, Vice President Al Gore unveiled a new proposal for increasing the monthly "Substantial Gainful Activity" (SGA) level by 40%--from \$500 to \$700. We expect this regulation will improve the economic opportunities for at least 250,000 recipients of SSDI or SSI, by enabling them to earn more money and still receive critical cash and medical benefits. These are only a few of our current disability initiatives. We are also seeking to assist consumers and caregivers with long term services and supports needs, including efforts to reduce the "institutional bias" in our Medicaid system. And Mrs. Gore is leading a campaign to address the mental health needs of our country, which will include the first-ever White House Conference on Mental Health.

Let us now press on with our commitment to pass the Work Incentives Improvement Act and other legislation, which will ensure that people with disabilities are given meaningful opportunities to be productive members of our workforce rather than be forced to survive on government assistance.

Again, thank you for your letter. I look forward to working with you in the coming months.



# Olmstead v. L.C.

Updated April 15, 1999

## Supreme Court Will Review ADA Community Integration Mandate

The U.S. Supreme Court has agreed to review *L.C. v. Olmstead*, a Georgia case interpreting the Americans with Disabilities Act as requiring community-based services for many people with disabilities. The case was brought by two women with both mental retardation and psychiatric conditions who were patients in a state hospital. Their treating professionals agreed that the women should be served in community programs, but no slots were available for them. Some states have argued that, while "virtually any person can safely and appropriately be served in his or her home (or in the most integrated community setting)," the cost of doing so would be unduly burdensome. Oral argument is scheduled on April 21, 1999.

- Overview of the case, with a link to the decision by the U.S. Court of Appeals for the 11th Circuit, which found "little question that the plain language of [the regulation] prohibits a state from providing services to individuals with disabilities in an unnecessarily segregated setting."
- Who are the plaintiffs? L.C. and E.W.
- News release about the appeal
- **L.C. and E.W.'s ("respondents'") brief** to the Supreme Court, written by Michael Gottesman of Georgetown University Law School and Atlanta Legal Aid attorneys Susan Jamieson and Steven Caley. Professor Gottesman will argue the case on April 21. In addition to countering the petitioner's (Georgia's) argument point by point, the brief describes the state's historic resistance to the national trend of shifting services for people with mental disabilities from institutions to the community. It documents the reasons LC and EW were kept in the state hospital long after the state's own treatment professionals had urged their placement in the community: not cost considerations but "incompetence and lack of knowledge," "the heavy lobbying of unions representing employees in institutions," and "the self-interest of the officials who run these institutions, who are reluctant to surrender their turf." [The respondent's brief is so large as a single file that we have divided it into three parts: as follows, in HTML format: Table of Contents and Table of Authorities; Text of Respondents' Brief; Appendix to Respondents' Brief.]

Some of the documents on this page are stored as Adobe Portable Format (PDF) files, marked .

To view these pages (and other such documents on the web), you will need Adobe Acrobat Reader version 3.xx, available free for downloading from Adobe. If you do not already have it, click on the button below to download. Restart your browser after the installation and you can view our documents in their original format, just as we published them. Some files are fairly large, so we encourage visitors to download them and use the Acrobat Reader offline to view and/or print the documents. We also encourage distribution of these materials to others.



[www.adobe.com/prodindex/acrobat/readstep.html](http://www.adobe.com/prodindex/acrobat/readstep.html)

- **The Solicitor General's brief for the United States** as friend of the court addresses each of Georgia's arguments, including the state's contention that discrimination on the basis of disability in the provision of services does not apply when a service is offered only to people with disabilities. The brief documents that Congress, when enacting the ADA, specifically recognized that the segregation of people with disabilities in institutions, by stigmatizing them and depriving

them of access to public services enjoyed by others, itself has discriminatory effects of the precise type banned in the ADA. [PDF format ] [HTML format]

- **An *amicus* brief by former United States Attorney General Dick Thornburgh** and the National Organization on Disability. As Attorney General from 1988 to 1991, Thornburgh oversaw congressional debate and passage of the Americans with Disabilities Act and issued its implementing regulations, including the rule spelling out the integration mandate. His brief documents Congress' intent to prohibit, as discriminatory, the unnecessary segregation of people with disabilities and, taking issue with Georgia's position in the case, describes as "consistent" the Justice Department's interpretation of the integration rule. [PDF format ] [HTML format]
- **An *amicus* brief by 58 former commissioners and directors of mentalhealth and developmental disabilities, representing 36 state.** In addition to an analysis of fiscal issues, the brief discusses some of the local economic and political interests that have perpetuated states' segregation of people with mental disabilities in institutions—"precisely the social ill the ADA and the integration mandate were meant to correct." These interests, the brief says, include "influential state legislators whose constituents' jobs or profits depend on institutions," labor unions that "have often stridently resisted state efforts to move to community care in order to protect... members' jobs," and local residents responding to stereotypes about mental disability with a "not in my back yard" objection to the inclusion of group homes in a community—an objection the Supreme Court found impermissible in a 1985 case involving a Texas group home. [PDF format ] [HTML format]
- **A brief by 30 national organizations and seven Georgia groups** examines the history of segregation of and discrimination against people with disabilities and documents the proven benefits of their inclusion in the community. Those signing the brief include broad-based national groups such as the American Association of Retired Persons (AARP) and Catholic Charities U.S.A., as well as leading professional associations and disability advocates. This brief, authored by the law firm of Howrey & Simon and the Bazelon Center, reviews the history of institutional segregation of people with disabilities and the professional literature that "overwhelmingly confirms" that those "who are placed in community settings can develop fuller, more enjoyable lives in ways non-disabled persons take for granted, but which are essentially impossible to achieve in an institution—they attend movies, go shopping, enjoy parks and recreation, and visit friends." Pointing out that the 11 states supporting Georgia's appeal "do so even though many of their own state statutes take a contrary position," the brief examines some specific state policies. [PDF format ] [HTML format]
- **A brief by 10 organizations of activist consumers/survivors** (consumers of mental health services and survivors of psychiatric illness) and eight individual consumers/survivors who have experienced both institutional and community mental health services and now live successfully in the community. Through their personal accounts, the brief describes the various types of community services available as a result of the integration mandate and details how access to these services has enabled formerly institutionalized individuals to become productive members of society. [PDF format ] [HTML format]
- **A brief by grassroots organizations of Americans with disabilities**, including an organization started in 1974 as People First and now known as Self-Advocates Becoming Empowered. Three fourths of the neatly 20,000 active members "were once segregated into institutions and now are not," states the brief written by the Public Interest Law Center of Philadelphia. The groups "write to put before the Court desegregation as they have experienced it, the weight of the invidious history as they have suffered it, and a sense of the freedom and responsibility of citizenship as they now live it." [PDF format ] [HTML format]

- **A link to the amicus brief of three national organizations** of people with disabilities: ADAPT, the National Council on Independent Living and TASH.
- **A link to the brief of the National Council on Disability**, the independent federal agency that played a lead role in drafting the legislation ultimately enacted as the ADA and has monitored its implementation in the eight years since. Citing the council's participation in development of the law, the brief concludes that "it would have protested vehemently" had there been "even a hint that Title II would not prohibit" unnecessary institutionalization. "But there was no such hint," it states, and the council "was quite comfortable lending its unequivocal support."
- **A link to the brief of the American Civil Liberties Union**, which likens discrimination against people with disabilities to racial and other forms of discrimination. On the ACUL site: [www.aclu.org/court/olmsteadvlc.html](http://www.aclu.org/court/olmsteadvlc.html)
- **A link to the brief of the American Psychiatric Association and the National Alliance for the Mentally Ill**, which takes the position that, while institutional care may be appropriate for some individuals with mental illness, it is discriminatory to deprive those who do not need it of the benefits of community integration. The brief is online at <http://www.nami.org/legal/finalbrf.html>
- A link to the press release and statement by the National Catholic Disability Office.
- Amicus Brief in the 11th Circuit

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*Bazelon Center for Mental Health Law - [bazelon@tidalwave.net](mailto:bazelon@tidalwave.net)*



# NEWS

February 1, 1999

## **Bazelon Center Lauds Proposed Budget Increase for Community Mental Health, Opposes Use of Funds for Coercion**

An unprecedented 24% increase in federal funding for states' community mental health services, in the fiscal year 2000 budget released by the Clinton-Gore Administration today, is "a constructive and appropriate response to the problems with our mental health systems," asserts the Bazelon Center for Mental Health Law. The \$70 million increase sought for the mental health block grant would be targeted to adults and children with the most severe and hard-to-treat disorders, who are at particularly high risk for adverse outcomes such as homelessness, arrest or institutional placement.

Recent highly publicized incidents involving individuals with serious mental illness who lacked access to mental health services, such as the shooting of two U.S. Capitol police officers last July, underscore the need to expand availability of services for this population. However, emphasizes Robert Bernstein, executive director of the Bazelon Center, "unless it offers mental health consumers access to a full array of services services that support their goals and engage them as partners in treatment this initiative would miss its target."

States could use the proposed funds, according to sources in the Department of Health and Human Services, to expand community services by including, for adults, psychiatric rehabilitation, peer support and consumer-run programs, integrated mental health and substance abuse services, assertive community treatment, effective hospital discharge with linkage to community housing and supports, family education and training, diversion programs to prevent arrest and case management. For children, added services could include day treatment and school-based services, behavioral aides, family support and family respite services.

Mental health consumer groups have expressed concern that assertive community treatment, which involves intensive outreach, may include coercive techniques such as forcing medication. Recent studies show, however, that when consumers have access to a full array of community service options, coercive approaches to treatment, such as involuntary hospitalization or court-ordered outpatient treatment, are unnecessary. "The Bazelon Center opposes coercion in the provision of services," Dr. Bernstein said, "and will vigorously oppose any efforts in Congress to legislate such an approach."

An approach being urged by the Bazelon Center is the use of advance psychiatric directives. People who may be subject to involuntary treatment can work with their providers ahead of time to complete a document expressing their preferences about treatment they will receive if they become incapable of making decisions. The Bazelon Center is urging Congress to allow states to use the additional dollars to incorporate advance directives into their mental health systems.

The requested budget increase was first announced in January by Tipper Gore, mental health advisor to the President, who has often expressed the need to expand community mental health services. Dr. Bernstein commended Mrs. Gore for her effectiveness as the Administration's point person on mental health, noting that the initiative "represents the largest increase in community mental health funding by the federal government since Jimmy Carter was President. A renewed emphasis on comprehensive, voluntary supports and services is long overdue," he added. "Now we call upon the states to match this action by increasing their own appropriations in turn."

The community mental health block grant was funded in FY 1999 at \$289 million. The \$70 million additional funds requested would bring the appropriation to \$359 million. Since it was enacted in 1981, spending on the mental health block grant has lost ground to inflation and consistently remained below

the targeted categorical program for community mental health centers that it replaced. With this request, the Administration proposes for the first time ever that the federal spending on community mental health top \$300 million.

The proposed increase would be spent, according to Administration sources, for targeted, effective services in the community for adults and children with the most serious and hard-to-treat illnesses. It is intended to help states address the problems which result in persons with mental illness ending up in jails or on the streets due to lack of access to necessary supports and services. It will target intensive services for youngsters and their families designed to avert future adverse outcomes, such as trouble in school or with the law.

For additional information: e-mail [Chris Koyanagi](mailto:chrisk@bazelon.org) ([chrisk@bazelon.org](mailto:chrisk@bazelon.org))

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The Bazelon Center for Mental Health Law is the leading national legal-advocacy organization representing people with mental illness or mental retardation. Through precedent-setting litigation and in the public-policy arena, the center works to define and uphold the rights of adults and children who rely on public services and ensure them equal access to health and mental health care, education, housing and employment. The Bazelon Center was founded in 1972; its work is Funded by private foundations and individual donors.

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*Bazelon Center for Mental Health Law - [bazelon@nicom.com](mailto:bazelon@nicom.com)*

## **Disability Cases Before the Supreme Court**

### **Discrimination of Individuals with Disabilities**

#### ***Olmstead v. L.C.***

The Court will review on April 21 an Eleventh Circuit opinion that Title II of the ADA and Department of Justice regulation 28 C.F.R. §35.130(d) prohibit states from confining individuals with mental disabilities in a state psychiatric hospital when those individuals could be appropriately treated in a more integrated community setting.

#### **Policy**

Unjustified segregation of persons in institutions, when community placement is appropriate, constitutes a form of discrimination (as defined by the Attorney General's Title II "integration regulation"). Unjustified segregation of persons in institutions constitutes a form of discrimination based on disability. Such segregation can stigmatize persons with disabilities as incapable or unworthy of participating in community life. Second, such discrimination can result in a form of dissimilar treatment, since persons with disabilities must give up participation in community life in order to receive the services they need, while persons without disabilities can receive the services they need without sacrificing that important interest.

The integration regulation does not impose undue costs on the State since it does not apply when compliance would require an unreasonable change in state policy of a fundamental change in the nature of the State's treatment program.

**A: The ADA has been invaluable in making it possible for millions of Americans to participate more fully in society. The law has changed public attitudes and opened new opportunities to people with all types of disabilities. The Administration agrees with the Court's decision that disabled individuals have the right to live in a community setting if there are programs and services available. A goal of the ADA was to break down the barriers that separated disabled Americans from the non-disabled community. We think that the Court took a step in helping to ensure full integration of disabled individuals into our communities.**

### **The Definition of Disability**

#### ***Albertson's Inc. v. Kirkingburg***

The Court will review in April a Ninth Circuit decision that a truck driver with monocular vision who received a Federal Highway Administration waiver of Department of Transportation vision standards for operating commercial vehicles was a qualified individual with a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 et seq.

#### **Policy**

Monocular vision is frequently a disability under the ADA, because it substantially limits both the amount and quality of an individual's major life activity of seeing. The fact that it may not

also limit other “normal daily activities” of the individual is of no significance, because the ADA is largely premised on the principle that individuals who are limited in one or more major life activities can overcome those limitations to perform many activities competently and effectively

***Murphy v. United Parcel Serv., Inc.***

The Court reviewed a Tenth Circuit ruling that a mechanic whose hypertension, when medicated, did not substantially limit him in any major life activity was not protected by the ADA.

**Policy**

Mitigating measures, such as taking medication to control hypertension, are not relevant in the threshold question as to whether one is disabled under the ADA. Assessing the existence of a disability without regard to mitigating measures is consistent with the ADA’s basic purpose to eliminate the exclusion of individuals from the workplace because of outdated stereotypes and myths about those individual’s abilities.

***Sutton v. United Air Lines, Inc***

The Court reviewed a Tenth Circuit decision that two airline pilot applicants whose visual impairments could be corrected with glasses or contact lenses were not substantially limited in the major life activity of seeing and, thus, were not disabled under the ADA.

**Policy**

Similar to *Murphy*, the question whether an individual has a disability under the ADA must be answered without regard to mitigating measures that the individual takes to ameliorate the effects of the impairment. Vision can be impaired to the point that, without eyeglasses, they can not see well enough to conduct everyday activities; thus having a physical impairment that substantially limits a major life activity.

**A: The ADA has been invaluable in making it possible for millions of Americans to participate more fully in society. The law has changed public attitudes and opened new opportunities to people with all types of disabilities. The Court’s ruling, on these three cases, is an important step in clarifying that the ADA is not just about protecting people in wheelchairs or those who are totally blind. The ADA is about protecting anyone with any significant impairment and giving them a fair opportunity to do their job.**

**At the same time, we are reminded that significant challenges still face the disabled. To address employment barriers for people with disabilities, the President issued an Executive Order last year establishing a task force to identify important ways to reduce barriers to work for people with disabilities. Furthermore, our budget contains a \$2 billion initiative that will remove significant barriers to work for people with disabilities.**

**Consistency of Disability Benefits and the ADA in the Workplace**

***Cleveland v. Policy Management Systems Corp.***

The Court reviewed a Fifth Circuit decision that the application or receipt of disability insurance benefits under SSDI creates a presumption that the applicant or recipient is estopped from asserting that she is a “qualified individual with a disability” under the ADA.

**Policy**

Neither application for nor recipient of SSDI warrants a presumption that the applicant can not assert that she is a “qualified individual with a disability” under the ADA. A person may have a medical condition that entitles her to disability benefits under the Social Security Act and nevertheless be a qualified individual with a disability under the ADA. The Social Security Act permits recipients to receive benefits in certain circumstances even though they are employed in order to encourage recipients to return to work if possible. Social Security benefits and the ADA are not necessarily alternative remedies between which people with disabilities must choose. Rather they are complementary measures that provide financial support to people with physical or mental impairments who face practical barriers to work while at the same time encouraging and facilitating their efforts to return to work.

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Copyright 1999 Globe Newspaper Company  
The Boston Globe

January 17, 1999, Sunday ,City Edition

SECTION: ECONOMY; Pg. H4

LENGTH: 796 words

HEADLINE: Disability debate at high court;  
Cases seek to expand number of workers protected by bias law;  
WORKING IT OUT / DIANE E. LEWIS

BYLINE: By Diane E. Lewis, Globe Staff

BODY:

Ever since the Americans with Disabilities Act went into effect more than eight years ago, lawyers and workplace specialists have debated the meaning of the word disability.

At issue: Whether workers with high blood pressure, nearsightedness, and other correctable conditions are disabled and deserve the same legal protections under the law as blind or wheelchair-bound employees with disabilities they cannot change.

When Congress passed the act in 1990, it noted that employers were barred from discriminating against "qualified individuals with a disability." Trouble is, some US courts aren't sure what "qualified" really means.

But two nearsighted pilots, a mechanic with high blood pressure, and a truck driver who is almost blind in one eye could put an end to the debate.

Earlier this month, the US Supreme Court said it would consider their lower court cases - a move that could determine whether millions of Americans with correctable disabilities are protected under the law. Currently, the law protects 43 million Americans with physical and mental disabilities.

Not surprising, employers and disabled employees are watching the cases closely and becoming caught up in the debate, with reason: Not only would a ruling in favor of the plaintiffs expand the number of people offered protection, it could also increase the number of bias complaints and lawsuits filed against employers.

"Think of how many Americans wear contact lenses, or eye glasses, or have high blood pressure," Christopher Bell, a partner in the national employment law firm Jackson, Lewis, Schnitzler & Krupman, said. "Virtually half of America would qualify as disabled under the ADA if courts insist that correctable conditions like nearsightedness and high blood pressure deserve protection, and that was never the intent of Congress when it enacted the law."

But one former Massachusetts advocate for the disabled believes expanding the number of people guaranteed protection would strengthen the law and

The Boston Globe, January 17, 1999

provide even more clout to a long-ignored group.

"If it expands the coverage, all the more power," said John Winske, 36, owner of Access First Travel of Malden, a travel agency and meeting planning firm that serves people with disabilities. "I welcome whatever anyone can do to empower the ADA and people with disabilities."

In one of the three cases now scheduled for review by the Supreme Court, a federal Appeals Court in Denver agreed with United Airlines' decision not to hire twin sisters Karen Sutton and Kimberly Hinton as pilots. The sisters, who currently fly for commuter airlines, argued that their eyesight is corrected to 20-20 by glasses, and they say each has federally certified medical certificates.

But the lower court ruled against them, saying they are not considered disabled because their poor sight can be corrected.

A separate suit involving United Parcel Service was brought by mechanic Vaughn Murphy after he was fired because of high blood pressure. Although Murphy had passed a medical exam and had received permission to drive, he said he was fired after a nurse at UPS learned he had high blood pressure. The third lawsuit was brought by a trucker who was fired by an Oregon firm because of poor vision in one eye.

Those cases are hardly the first that could clarify the scope of the disabilities act. Last month, the court said it would decide this year whether some mentally disabled people should be given a chance to live in group homes or other community-based programs, rather than institutions. Lower courts had already ruled that the state of Georgia had to provide group homes, a requirement 22 other states say would deplete their treasuries.

Last summer, the US Supreme Court ruled a Maine woman who had contracted the virus that causes AIDS is protected from bias under the act. In that case, a Bangor, Maine, dentist had refused to fill a cavity in the woman's mouth after learning she was HIV positive.

Still, experts say the cases involving the mechanic, the twin pilots, and the trucker are likely to have widespread impact on employees and US firms, which currently spend an estimated \$1 billion to \$2 billion on workplace accommodations.

"I really believe that requiring airline pilots to have 20-20 corrected vision is not unreasonable, given the severity of the potential harm to passengers," said Don Baldini, vice president for legislative policy at Associated Industries of Massachusetts, which represents 4,500 companies throughout the state.

"I also feel that any time you push the boundaries of the ADA to cover more rather than fewer people you increase the potential for litigation and more claims and that, from an employer's perspective, is troublesome," Baldini added.

GRAPHIC: PHOTO, John Winske, owner of Access First Travel of Malden, uses a disabled-accessible pay phone at State Transportation Building.

GLOBE FILE PHOTO

14TH STORY of Level 1 printed in FULL format.

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Successful Job Accommodations Strategies

March, 1999

LENGTH: 812 words

HEADLINE: U.S. Supreme Court to Answer 'What Is a disability?'

BODY:

The U.S. Supreme Court has accepted three separate cases involving alleged discrimination under the Americans with Disabilities Act and put them on a fast track toward resolution this term.

All three cases involve the issue of what constitutes being disabled under the act.

The Supreme Court has set absolute deadlines on all three cases. "It looks like we're headed for oral arguments the last two weeks of the term in April," according to Kirk Lowry of Palmer, Lowry & Leatherman of Topeka, Kan., whose client, Vaughn L. Murphy, is the plaintiff-appellant in Murphy v. United Parcel Service, one of the three cases.

Case #1: High Blood Pressure

Lowry's client is a mechanic who has had very high blood pressure since he was 10 years old. He alleges that UPS violated the ADA by terminating his employment, even though his blood pressure was controllable with medication. A district court granted summary judgment in favor of UPS and Murphy appealed.

That appeal was also decided in favor of the employer. The court rejected the ADA claim, saying that Murphy's high blood pressure was not a disability within the meaning of the statute because it did not substantially limit his major life activities when controlled by medication. The district court ruled that when determining whether someone's high blood pressure substantially limits a major life activity, the condition should be considered in its medicated state. Lowry argues just the opposite.

"The EEOC rules are clear that we should determine whether people are disabled in their unmedicated state," says Lowry. "Individuals should be evaluated as to whether they have disabilities as they actually are as people. Then, whether they can do the job. [E]mployees can do whatever they can and whatever is necessary to do the job, which includes taking medication or having some help."

Case #2: Monocular Vision

The second of the three cases, Kirkinburg v. Albertson's Inc., involves a truck driver with monocular vision (vision in only one eye) and an impeccable driving record, who alleges that his employer violated the ADA by terminating his employment because of his disability.

Here again, the district court granted summary judgment in favor of the employer, and the employee appealed. But in this case the circuit court held that monocular vision was a disability under the ADA because it substantially

limits one's ability to see. However, a factual issue existed as to whether the employee could perform the essential functions of a commercial truck driver. The employer argued that it was free to require the employee to comply with vision standards established by the federal Department of Transportation, but those standards include waiver provisions.

The district court's decision was reversed, and the case remanded.

Scott N. Hunt of Busse & Hunt, in Portland, Ore., who represents Kirkinburg, said, "We are optimistic that [the current decision] will be confirmed."

Corbett Gordon of Corbett Gordon & Associates P.C., the attorneys for Albertson's, said she presented three questions for consideration by the Supreme Court: (1) Whether a monocular individual is "disabled" per se under the ADA; (2) whether a monocular driver of a commercial motor vehicle who failed to meet the minimum Department of Transportation's vision requirements is a "qualified" individual under the ADA; and (3) whether an employer must adopt an experimental vision waiver program as a means of "reasonable accommodation."

Gordon added that the issue of corrective measures is not important here, because Kirkinburg was allowed to have corrective measures to meet the DOT standards for truck driving.

#### Case #3: Uncorrected Vision

Sutton and Hinton v. United Airlines Inc., the other case in the Supreme Court trio, involves two commercial airline pilots who are twin sisters with the same vision limitations.

United Airlines claimed that their uncorrected vision disqualified them for pilot positions, and the district court granted United's motion to dismiss.

The pilots appealed, but the court found that their vision impairments did not constitute disabilities under the ADA.

The uncorrected vision qualified as an impairment within the meaning of the statute, the court said, but it did not substantially limit the major life activity of seeing.

Van Aaron Hughes of Ireland, Stapleton, Pryor & Pascoe, in Denver, Colo., who represents the pilots, maintains that in this case the court "chose not to follow the EEOC interpretive guidance," which specifies that the existence of a disability should be determined without regard to available corrective measures.

Lisa Hogan of Brownstein Hyatt Farber & Strickland in Denver, attorneys for United Airlines, said that the airline does not comment on pending cases.

Source: LRP's Disability Compliance Bulletin.

LANGUAGE: ENGLISH

LOAD-DATE: March 3, 1999

3RD STORY of Level 1 printed in FULL format.

Copyright 1999 Daily Texan via U-Wire  
University Wire

March 31, 1999

LENGTH: 672 words

HEADLINE: Groups protest Texas position on disabled

BYLINE: By Sarah Gainer, Daily Texan

SOURCE: U. Texas-Austin

DATELINE: Austin, Texas

BODY:

Chanting for the governor and state attorney general to reconsider their position on a court case concerning disabled rights, about 50 people gathered for a rally and vigil Tuesday at the governor's mansion.

The protest was spurred by the fact that Texas is one of more than 20 states that originally signed the controversial Olmstead brief. Now, it is one of less than 10 remaining states -- the rest of which have withdrawn their support.

The Olmstead brief is a legal document supporting the reversal of the Olmstead vs. L.C. and E.W. decision, which stated that individuals, not the state, should have the right to choose a caregiving facility or service.

However, the case, decided in Georgia, is now headed for the Supreme Court, which will hear the appeal on the lower court's decision.

Groups like ADAPT, a statewide disability rights group that participated in the protest, said overturning the case would reverse the integration requirement, Title II, of the Americans with Disabilities Act.

About 20 people were arrested during similar protests of the Olmstead brief earlier this year. But the groups said they would not stop until Texas was removed from the brief.

"It's our intention to make our point and make the governor aware that this is still an issue," said Jennifer McPhail, organizer for ADAPT. "And we don't want the governor to think that because we have been arrested in the past, that this issue is of less importance."

Bob Geyer, director of the Disability Policy Consortium, said the main problem with the Olmstead brief is that it is a threat to the ADA.

"People, according to the Americans with Disabilities Act, have the right to live in a community setting if there are programs and services available," Geyer said. "And what Governor Bush is saying is that it is up to the state to determine where people with disabilities live and how they are served."

He said the goal Tuesday was to send a message to Bush that he needs to follow the example of the other 17 states, which originally signed the brief but have since withdrawn their support.

University Wire March 31, 1999

"The governor needs to direct the attorney general to withdraw the state of Texas from this case that is going before the Supreme Court," Geyer said, citing this as the main goal of the march Tuesday.

Geyer said this is a civil rights issue and Bush is making a blatant statement that the states have the right to decide the fate of disabled individuals. He said that is ironic, since Bush's father signed the ADA and his brother Jeb Bush, governor of Florida, has already withdrawn his state's support from the brief.

Geyer added this is a political statement from Bush to prove his support for states rights.

"You have a governor that wants to go back in time and discriminate," Geyer said. "I think [Bush] is trying to make a strong national statement that he is for states rights. And he is doing it because he is running for president ... I think this is one way he can prove his conservatism."

But Anne Friedenbergn Swanson, spokeswoman for the governor, said the issue is a legal matter, and the governor trusts John Cornyn, the attorney general, to best represent the state's interest.

"We have expressed to Attorney General John Cornyn the governor's general philosophy which is that decisions about appropriate levels of funding and types of care are better made by individual state legislatures, not the federal court," she said.

Swanson added the governor has supported and will continue to support increases in funding for community-based care for people with disabilities.

She added that Gov. Bush's budget includes \$ 390.3 million for community care at the Department of Human Resources to be granted if there is an 18 percent increase in enrollment for community-based alternative waiver programs.

"It's important for people to know that the governor's budget does include an increase for community care, but the legal matter is up the attorney general to handle," she said.

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LANGUAGE: ENGLISH

LOAD-DATE: March 31, 1999

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The Boston Globe

February 26, 1999, Friday ,City Edition

SECTION: METRO/REGION; Pg. A1

LENGTH: 878 words

HEADLINE: State's move enrages advocates for disabled

BYLINE: By Shelley Murphy, Globe Staff

BODY:

Just weeks after 13 states backed out of a hotly disputed Supreme Court case, Massachusetts stepped in to endorse the position that states have a right to decide whether mentally disabled people live in institutions or are treated in the community.

Advocates for disabled people are furious that Attorney General Thomas F. Reilly has signed on to a "friend of the court" brief backing Georgia's challenge of the Americans with Disabilities Act.

They say the case, which will be heard April 21, could take away the right of all disabled people to be part of the mainstream world.

But Massachusetts officials say they are merely reaffirming a position they took recently while defending the state against a class-action suit brought by seven families of mentally retarded and developmentally disabled people who are living in nursing homes.

They insist that the disabilities act does not give the federal government the power to mandate how the state spends its money on services.

"In the name of money, the right of people to live independently in the community is being challenged," said Bill Henning, chairman of the Cape Organization for the Rights of the Disabled.

"The way the states are pitching this, it's 'The federal government telling us what to do, it's going to cost us millions of dollars and we lose control,' " said Stephanie Thomas, a spokesman for ADAPT, a national group advocating disability and civil rights.

"What we're saying is by signing onto this you're signing onto something that will gut the Americans with Disabilities Act and deny people with disabilities the right to choose where they get their services. People should not be forced to go into an institution to get support services."

The Supreme Court case, *Olmstead v. L.C. & E.W.*, involves two mentally disabled patients at Georgia Regional Hospital.

The Boston Globe, February 26, 1999

Ruling in favor of the patients last year, the 11th US Circuit Court of Appeals found that the disabilities act requires states to offer treatment in the least restrictive appropriate environment, and that budgetary constraints are not a defense.

Led by Florida, 22 states filed a friend of the court brief last year, urging the US Supreme Court to consider Georgia's appeal of the Olmstead case.

In December, the high court announced that it would hear arguments in that case and four others that could profoundly affect the Americans with Disabilities Act, which was passed in 1990.

Amid protests across the country, 12 of the states that initially petitioned the Supreme Court to take the Olmstead case - including New Hampshire - declined to sign onto a second friend of the court brief filed Feb. 4 that argued why the high court should reverse the lower court ruling.

Another state withdrew its support after initially signing on.

Yet Massachusetts, which didn't support the initial petition, is one of three states to add its endorsement to Georgia's challenge in the brief filed this month.

Dean Richlin, the state's first assistant attorney general, said Massachusetts doesn't believe the disabilities act requires states to place people in the community instead of institutions.

"It's a question of how state tax money is allocated and who allocates it," Richlin said. "The state government in this instance should decide how it allocates its money."

Richlin said the state has taken the same position in defending Governor Paul Cellucci and the Department of Mental Retardation in a suit filed last October in federal court in Springfield on behalf of hundreds of mentally disabled people in nursing homes who may qualify for community care.

A recent review by the Massachusetts Department of Mental Retardation identified 900 people in nursing homes who may be appropriate candidates to live in group homes or other community settings.

There are 3,000 people on a waiting list for community care, according to Julie Ryan, a spokesman for the Department of Mental Retardation.

Defending Reilly's support of disabled people, Richlin noted that the attorney general filed a brief supporting another disabilities case currently before the Supreme Court.

In that case, Vaughn Murphy, a United Parcel Service mechanic from Pennsylvania, was fired after the company learned he had high blood pressure, even though he had had the condition since he was a boy and was taking medicine to control it.

Reilly's brief supported Murphy's contention that people who are discriminated against because of underlying medical conditions should be protected under the disabilities act, even when those conditions are

The Boston Globe, February 26, 1999

treatable.

"This office has always sought to stand with the disability rights community," Richlin said. "Sometimes we'll agree, sometimes we'll disagree, but the context in which we make our decisions is based on the issues that come before us in this Commonwealth."

But Henning wasn't appeased by Reilly's intervention in the Murphy case.

"It's not a selective matter - you either support disability rights or you don't," he said. "Let's pull Massachusetts off the Olmstead case and be consistent here."

In response to numerous calls, Reilly has agreed to meet next with Henning and other advocates, including the plaintiffs who filed the state lawsuit.

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February 21, 1999, Sunday, Final Edition

SECTION: A SECTION; Pg. A03

LENGTH: 1384 words

HEADLINE: Five Cases at Supreme Court Could Affect Disabilities Law; Job Opportunities, Employers' Responsibilities at Stake

BYLINE: Joan Biskupic, Washington Post Staff Writer

BODY:

Karen Sutton and Kimberly Hinton are twin sisters whose dream of flying for a big airline has made them a symbol of the legal morass that the nation's disabilities laws have become.

When the sisters from Spokane applied to be pilots for United Air Lines, they were turned away after the company contended they were both too nearsighted to take a place in the cockpit. So they sued under the Americans with Disabilities Act, but courts said the law does not cover people who can correct their disability (in their case, with glasses) and get along as well as anyone else.

To the sisters and others with serious handicaps that can be improved by taking medicine or using some device, it is a Catch-22: They lose out on jobs because of their condition but do not qualify as disabled under the law. In the view of many employers, the law was not designed for relatively common problems but rather to shelter a small, discrete group of disabled people who have long suffered discrimination.

Now, the sisters' case joins four others before the Supreme Court this term that could profoundly affect the landmark disabilities law passed by Congress nearly a decade ago. Eventual rulings in these disputes will determine how easily people with disabilities can find their way into the nation's work force and how much financial responsibility employers should bear to accommodate them.

"The statute is not just about protecting people in wheelchairs or those who are totally blind," contends the sisters' lawyer, Van Aaron Hughes. "It is about protecting anyone with any significant impairment who is being prejudged" about his or her ability to do the job.

The legal dilemmas as well as larger social policy questions about what the term "disabled" means and who the ADA truly benefits are just emerging. More than 20 percent of all job discrimination complaints filed with the Equal Employment Opportunity Commission now include grounds based on disabilities.

Advocates say the law has changed public attitudes, opened new opportunities to people with myriad disabilities and brought dignity to their lives. But critics say the ADA has become another tool of frivolous litigation wielded more by problem employees with minor ailments than by individuals truly shut out

The Washington Post, February 21, 1999

because of discrimination.

Since the law went into effect, about 100,000 complaints have been filed with the EEOC. About half of those were found to have no "reasonable cause," or grounds. Of those complaints that did go forward through EEOC proceedings, a relatively modest \$ 211 million was paid out by businesses to the handicapped.

Now, the Supreme Court is poised to pick up where Congress left off when it passed the law making it illegal for an employer to discriminate against a "qualified individual with a disability." The law also protects the disabled against bias in housing, medical care and places that serve the public.

A record five ADA disputes will be heard over the next two months, beginning next week when the justices take up the case of a stroke victim in Texas who says her boss refused to provide retraining, her colleagues mocked her speech impediment and she was fired after being told she would never be able to do anything again.

Soon after Carolyn Cleveland suffered a stroke, she applied for Social Security disability. With some rehabilitation, however, she was able to return to work part time at Policy Management Systems Corp., where she checked the backgrounds of prospective employees of the firm's clients. Cleveland notified the Social Security Administration she no longer needed benefits. Eventually, after what she says were continual taunts from co-workers and refusal by her company to help her accommodate her disability, her performance suffered and she was fired.

The question is whether an individual who has applied for Social Security disability benefits, but then returned to work, can claim in an ADA lawsuit that she was "qualified" for the job and discriminated against. A federal appeals court said the application for benefits creates a presumption that the person is not qualified.

The case, Cleveland v. Policy Management Systems Corp., is being closely watched by a variety of advocates, including those representing the mentally retarded, elderly and people with AIDS, and by employers, including the Equal Employment Advisory Council, which argues that courts should presume once someone has applied for Social Security benefits she is not "qualified" for the job under the ADA's coverage.

A larger issue to be addressed by the justices in three April cases is how to define "disabled"--the foundation of any ADA claim. If bad eyesight can be corrected, can it be the basis for a job discrimination lawsuit? If medicine can reduce high blood pressure, can a mechanic claim a trucking company fired him because of his hypertension?

Sutton and Hinton say it should not matter whether the disability can be corrected by drugs, glasses or something else. But United's lawyer points to the ADA's language specifically covering people whose impairment "substantially limits one or more major life activities," and says the availability of glasses and contact lenses means the sisters' myopia is not substantially limiting. "Congress did not intend that a minor and relatively common impairment such as nearsightedness . . . be a covered disability," United lawyer Lisa Hogan wrote in a brief.

The Washington Post, February 21, 1999

Ruling for the airlines in Sutton v. United Air Lines, the 10th U.S. Circuit Court of Appeals declared Sutton and Hinton "cannot have it both ways." The court said if they are "disabled" because their uncorrected vision substantially restricts their ability to see, they cannot be qualified for pilot jobs. And if they are qualified because their vision is correctable, the court said, they cannot be limited in "the major life activity" of seeing and are therefore beyond ADA protection. Other federal courts have ruled the opposite, that disabilities should be determined without any mitigating measures, and it will now fall to the Supreme Court to resolve the conflict.

Sutton and Hinton contend that not everyone who wears glasses should be considered disabled, but the severity of their bad vision (about 20/200 in the right eye, 20/400 in the left) qualifies them. The two other related cases involve a truck driver who is blind in one eye (Albertsons v. Kirkingburg) and a mechanic with high blood pressure (Murphy v. United Parcel Service).

In a fifth case, Olmstead v. L.C., the justices will address states' responsibility for providing treatment and rehabilitation in the community, rather than in institutions, for the mentally disabled.

It has taken nearly a decade for core questions of disability rights to advance to the court. Last term, the justices ruled in their first case on the ADA. In it they held, 5 to 4, that people who are HIV-positive, even those with no overt symptoms of the deadly disease, fall within the ADA shelter.

"If these new cases come out in favor of the persons with disabilities," said Georgetown law professor Chai Feldblum, who pressed for the legislation more than a decade ago, "that will make a huge difference to giving people a sense of comfort that the ADA truly protects their rights to be part of the community."

From the standpoint of employers, the court needs to make clear what physical conditions are covered so that businesses know what financial liability they face.

"Employers view the ADA as a very well-intentioned law with a very laudable purpose, but there are people who have tried to abuse it over the years," said Sussan Mahallati Kysela of the National Chamber Litigation Center. "It's become important for the Supreme Court to clarify who is disabled."

#### DEFINING DISABILITIES

From 1992 to 1998, there were 108,939 complaints filed with the Equal Employment Opportunity Commission under the the Americans with Disabilities Act.

Impairments most often cited (as a percentage of all cases)

Back: 16.7%

Emotional/psychiatric: 13.7%

Neurological: 10.8%

Extremities: 9.6%

8TH STORY of Level 1 printed in FULL format.

The Associated Press State & Local Wire

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January 9, 1999, Saturday, PM cycle

SECTION: State and Regional

LENGTH: 688 words

HEADLINE: Justices to review law barring discrimination against disabled

BYLINE: By RICHARD CARELLI, Associated Press Writer

DATELINE: WASHINGTON

BODY:

The Supreme Court soon may bring into sharper focus a law that protects the disabled from discrimination. One issue that needs clarification is how, if at all, the law applies to people with poor eyesight or other conditions that can be corrected.

The court said Friday it will use cases involving two very nearsighted pilots, a truck driver blind in one eye and a mechanic with high blood pressure to help decide the scope of the Americans with Disabilities Act. Decisions in the three cases from Colorado, Oregon and Kansas are expected by July.

The 1990 anti-bias law, best known for requiring handicap access to public buildings, has spawned hundreds of lawsuits nationwide - forcing judges to interpret just how far Congress intended the law to reach. The rulings have been conflicting and confusing.

The law bars employers from discriminating against a "qualified individual with a disability" because of that disability. A qualified individual is a person who can perform a job's essential functions when given reasonable accommodation. Disability is defined as a condition that substantially limits a major life activity.

In a case from Colorado, twin sisters who want to be pilots for United Airlines say their extreme nearsightedness should be considered a disability protected against employment bias.

Lower courts had ruled that Karen Sutton and Kimberly Hinton are not protected by the ADA because their poor vision is fully correctable when they use glasses or contact lenses.

The two sisters, now pilots for regional commuter airlines, unsuccessfully applied in Denver for jobs with United in 1992.

Both sisters have corrected vision of 20-20 in both eyes, but United refused to consider either because it requires all pilot applicants to have

## The Associated Press State &amp; Local Wire

uncorrected vision of 20-100.

A federal judge and the 10th U.S. Circuit Court of Appeals ruled against the women, concluding that although their poor eyesight was a disability it did not substantially limit a major life activity, and therefore was not protected by the federal law.

In the Oregon case, truck driver Hallie Kirkingburg says a supermarket chain violated the anti-bias law when it fired him after he flunked a vision test.

Kirkingburg had been a commercial truck driver since 1979 with a good driving record when he was hired in 1990 by Albertson's supermarkets in Portland, Ore.

He performed well on a road test. Although he is almost blind in one eye, medical examiners twice certified that he met federal Transportation Department vision standards.

In 1991, Kirkingburg suffered a non-driving injury and was off the job for almost a year. When he returned to work and took a new vision test, a doctor refused to certify that he met the vision standard. Albertson's fired him in 1992 for failing the standard.

Kirkingburg sued Albertson's, based in Boise, Idaho, saying it violated the ADA by refusing to let him return to work.

A federal judge ruled for Albertson's, but the 9th U.S. Circuit Court of Appeals reversed that ruling and said Kirkingburg must be given a chance to prove his discrimination claim in a trial.

Vaughn Murphy was a mechanic for United Parcel Service in Topeka, Kan., when fired because of the high blood pressure he has had since age 10.

Because UPS mechanics conduct road tests on trucks, the company requires them to have commercial drivers' licenses as well as health certification from the U.S. Transportation Department.

Murphy got Transportation Department approval, but shortly after he was hired, a company nurse reviewed his file and determined his blood pressure exceeded the federal standard. UPS decided his health approval was issued in error and fired him.

Lower courts ruled against Murphy's lawsuit.

In the appeal acted on Friday, Murphy said health conditions should be evaluated as possible disabilities covered by the 1990 law without taking into account the effects of medication.

UPS lawyers said Murphy's view would expand the disability law's coverage to millions of Americans with conditions that can be effectively treated, such as asthma, diabetes and even poor eyesight.

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The Augusta (Ga.) Chronicle

March 21, 1999, Sunday, ALL EDITIONS

SECTION: EDITORIAL, Pg. A4, JAMES J. KILPATRICK COLUMN

LENGTH: 766 words

HEADLINE: ADA SUITS FLOOD THE HIGH COURT'S DOCKET

BODY:

PRESIDENT GEORGE Bush signed the Americans With Disabilities Act on July 26, 1990. That was a Thursday. In all probability the first ADA lawsuit was filed the following Monday. The ensuing tidal wave of litigation finally is crashing upon the sands of the Supreme Court.

Next month the High Court will hear argument in four cases arising under the disabilities act. On April 21, the justices will take up the needs of mental patients in Georgia. On April 27, a mechanic with high blood pressure will have his day in court. On April 28, counsel will argue two cases involving disabling eyesight.

WHEN THE DUST settles, we should have the Supreme Court's guidance on two disputed elements of the 1990 law. That will leave only 498 to go. A host of lawyers will hang out their shingles, feed on the ADA in the courtrooms of America, and pass the final bar before the ocean of disability litigation dries up.

Tommy Olmstead, commissioner of human resources in Georgia, is appealing an opinion of the U.S. Court of Appeals for the 11th Circuit. He became the defendant in a suit brought by two patients at the Georgia Regional Hospital in Atlanta. Known at law only as L.C. and E.W., they represent a large class of mental patients who need treatment, but not necessarily treatment in a mental institution. Their charge is that by failing to provide them with outpatient treatment, Georgia has discriminated against them.

THE SUIT RAISES old questions of federalism. Care for the mentally ill has been a state function since our republic began. At one time every state had its institutions of treatment and confinement. These were known as lunatic asylums or even more cruelly. Some of them must have been competently run, but many others were dreadful.

NOT MANY remain. A brief filed by state and local officials notes that in 1970, roughly 368,000 persons were in public institutions for the mentally ill. That figure has dropped to fewer than 73,000. The states closed 37 mental hospitals in the 1990s. The trend is toward treatment through community health services, but community placement is hardly cost-efficient and the states' resources are finite.

The 11th Circuit held in the Georgia case that the Americans With Disabilities Act imposes a duty upon the state "to provide treatment in a community setting -- the most integrated setting appropriate to that patient's needs." It is puzzling. How did the specific treatment of state mental patients get to be the business of Congress? Is this truly what the act requires?

The Augusta (Ga.) Chronicle, March 21, 1999

ON APRIL 27, the High Court will hear from Vaughn Murphy, an automobile mechanic in Topeka. Under federal regulations, persons who drive commercial vehicles must maintain blood pressure less than or equal to 160/90. A testing clinic erroneously issued Murphy a health card, and United Parcel Service hired him. On a retest, Murphy was clocked at 164/104 and UPS dropped him.

With the help of medication, Murphy can maintain his blood pressure within the federal requirements. His own physician testified that Murphy "functions normally doing everyday activity that an everyday person does." The disabilities act applies only to persons suffering an impairment that "substantially limits a major life activity."

GIVEN THAT definition, is Murphy "disabled"? The 10th Circuit said no. Impairment should be considered in its medicated state, said the court, rather than an unmedicated state. As long as Murphy stays on his blood pressure medicine, he is not limited in a major life activity. The court granted summary judgment to UPS.

Substantially the same question of disabilities law is presented in the case of Karen Sutton and Kimberly Hinton. They are twin sisters who currently serve as commercial pilots for commuter airlines, but their ambition is to fly for a major global carrier. They applied to United Air Lines but were turned down.

United requires its pilots to have uncorrected vision of 20/100 or better in both eyes. The sisters tested 20/200 or worse in the right eye and 20/400 or worse in the left eye. With glasses or contact lenses, they are fine. Are they "disabled"? The federal district court said no, and the 10th Circuit affirmed. The pilots are not substantially impaired in a major life activity.

THE FOURTH CASE to be argued in April, Albertsons Inc. v. Kirkingburg, also involves disability by reason of impaired vision, but the legal questions are different and more complex. All in all, the High Court has a full plate. We will know more by the end of term in June.

Universal Press Syndicate

GRAPHIC: Kilpatrick mug

LANGUAGE: ENGLISH

LOAD-DATE: March 22, 1999

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

July 29, 1998

July 29, 1998

MEMORANDUM FOR THE ATTORNEY GENERAL  
THE SECRETARY OF HEALTH AND HUMAN SERVICES  
THE CHAIR OF THE EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION  
THE ADMINISTRATOR OF THE SMALL BUSINESS  
ADMINISTRATION

SUBJECT: Outreach Actions to Increase Employment  
of Adults with Disabilities

As we commemorate the eighth anniversary of the Americans with Disabilities Act of 1990 (ADA), we have much to celebrate. This landmark civil rights law is making it possible for millions of Americans to participate more fully in society -- through employment, access to public facilities, and participation in community and leisure activities -- and to do their part to make us a stronger and better country. At the same time, we are reminded that significant challenges remain. Far too many of the 30 million working-age adults with disabilities are still unemployed, especially those with significant disabilities.

To address employment barriers for people with disabilities, I issued Executive Order 13078 on March 13, 1998, establishing the National Task Force on Employment of Adults with Disabilities. The Task Force will issue in November the first in a series of reports on what the Federal Government can do to help bring the employment rate of adults with disabilities into line with that of the general population. The Task Force already has identified important ways to reduce barriers to work for people with disabilities, and I hereby direct you to act on these findings.

First, although awareness of the ADA is increasing among persons with disabilities, employers, and the general public, too many people still are not aware of their rights and responsibilities under the ADA. There is a particular need to educate the small business community, which employs most of the private work force and includes the vast majority of employers.

I therefore direct the Attorney General, the Chair of the Equal Employment Opportunity Commission, and the Administrator of the Small Business Administration to expand public education regarding the requirements of the ADA to employers, employees, and others whose rights may be affected, with special attention to small businesses and underserved communities, such as racial and language minorities that may not have ready access to information that is already available.

Second, lack of adequate private health insurance options is a disincentive to leave Social Security programs for work. Few private health plans cover the personal assistance and other types of services that make work possible for many people with disabilities. Recognizing this problem, I proposed and the Congress passed a new Medicaid option last year that allows people with disabilities to buy into Medicaid without having to receive cash assistance. A number of States have

expressed an interest in offering this new option and the Secretary of Health and Human Services has been working with them to do so. Much more, however, needs to be done to increase the public outreach and education activities about these important laws and options.

I therefore direct the Secretary of Health and Human Services to continue to take all necessary actions to inform Governors, State legislators, State Medicaid directors, consumer organizations, employers, providers, and other interested parties about section 4733 of the Balanced Budget Act of 1997. Section 4733 allows States to provide Medicaid coverage for working individuals with disabilities who, because of their earnings, would not qualify for Medicaid under current law. Additional guidance, letters, technical assistance, and other efforts by the Department of Health and Human Services about the enormous benefits of this option can go a long way in encouraging States to adopt and use this Medicaid buy-in.

This memorandum is for the internal management of the executive branch and does not create any right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

WILLIAM J. CLINTON

# # #

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

January 13, 1999

PRESIDENT CLINTON AND VICE PRESIDENT GORE  
UNVEIL NEW INITIATIVE TO IMPROVE ECONOMIC OPPORTUNITIES  
FOR AMERICANS WITH DISABILITIES

January 13, 1999

Today, President Clinton will unveil a historic new initiative that will remove significant barriers for people with disabilities to go back to work. This three-part budget initiative, which invests more than \$2 billion over five years, includes: (1) full funding of the Work Incentives Improvement Act which will be introduced by Senators Jeffords, Kennedy, Roth, and Moynihan next week; (2) a new \$1,000 tax credit to cover work-related costs for people with disabilities; and (3) expanded access to information and communications technologies. With these new proposals, the Administration will have taken action on every recommendation made in the report of the President's Task Force on the Employment of Adults with Disabilities, which the Vice President accepted last month. Justin Dart, one of the foremost leaders of the disability community, stated in response to today's proposals: "The Clinton-Gore Administration has a long history of supporting the disability community. This policy initiative is one of the boldest since the landmark passage of the ADA."

**CRITICAL NEED TO REMOVE BARRIERS TO WORK** Since President Clinton took office, the American economy has added 17.7 million new jobs, and unemployment is at a 29-year low of 4.3 percent. The unemployment rate among all working-age adults with disabilities, however, is nearly 75 percent. According to current estimates, about 1.6 million working-age adults have a disability that leads to functional limitations and 14 million working-age adults have less severe but still significant disabilities.

People with disabilities can bring tremendous energy and talent to the American workforce, but institutional barriers often limit their ability to work. Most critically, people with disabilities often become ineligible for Medicaid or Medicare if they work. This means that many people with disabilities are put in the untenable position of choosing between health care coverage and work. In addition, advances in technology and communications are often not accessible to people with disabilities.

**THREE-PART INITIATIVE TO IMPROVE ECONOMIC OPPORTUNITIES FOR AMERICANS WITH DISABILITIES**

Funding the Work Incentives Improvement Act in the President's budget. Health care -- particularly prescription drugs and personal assistance -- is essential for people with disabilities to work. Today, the President is announcing that his FY 2000 budget will fund the full cost of the Work Incentives Improvement Act. This proposal, which costs \$1.2 billion over 5 years, would:

- Improve access to health care by:
  - Expanding states' ability to provide a Medicaid buy-in to people with disabilities who return to work. This provision would enable states to offer the buy-in to people whose assets and/or income exceed current limits. It also would give states the option of

offering the buy-in to people with medical conditions, such as rheumatoid arthritis, who do not meet the current disability standard, but who can work only because of medical treatment. Finally, this provision would give health care grants to those states that do so.

- Extending Medicare coverage, for the first time, for people with disabilities who return to work. Although Medicare does not provide as comprehensive a benefit as Medicaid, this aspect of the proposal ensures that all people with disabilities who return to work have access to health care coverage, even if they live in a state that does not take the Medicaid option.
- Creating a new Medicaid buy-in demonstration to help people with a specific physical or mental impairment that is not yet severe enough to qualify for health care assistance, but that is reasonably expected to lead to a severe disability in the absence of medical treatment. This demonstration could help people with muscular dystrophy, Parkinson's Disease, HIV or diabetes who are able to work with appropriate health care.
- Modernize the employment services system by creating a "ticket" that will enable SSI or SSDI beneficiaries to go to any of a number of public or private providers for vocational rehabilitation. If the beneficiary goes to work and achieves substantial earnings, providers would be paid a portion of the benefits saved.
- Create a Work Incentive Grant program to provide benefits planning and assistance, facilitate access to information about work incentives, and better integrate services for people with disabilities working or returning to work.

Providing a \$1,000 tax credit for work-related expenses for people with disabilities. The daily costs of getting to and from work, and being effective at work, can be high if not prohibitive for people with disabilities. Under this new proposal, workers with significant disabilities would receive an annual \$1,000 tax credit to help cover the formal and informal costs that are associated with employment, such as special transportation and technology. Like the Jeffords-Kennedy-Roth-Moynihan Work Incentive Act, this tax credit, which will assist 200,000 to 300,000 Americans, will help ensure that people with disabilities have the tools they need to return to work. The credit will cost \$700 million over 5 years.

Improving access to assistive technology. Technology is often not adapted for people with disabilities and, even when it is, people with disabilities may not be able to afford it. This new initiative would accelerate the development and adoption of information and communications technologies that can improve the quality of life for people with disabilities and enhance their ability to participate in the workplace. The initiative would: (1) help make the Federal government a model user of assistive technology; (2) support new and expanded state loan programs to make assistive technology more affordable for Americans with disabilities; and (3) invest in research and development and technology transfer in areas such as text to speech for people who are blind, automatic captioning for people who are deaf, and speech recognition and eye tracking for people who can't use a keyboard. It would provide \$35 million in FY 2000, more than double the government's current investment in deploying assistive technology.

With these steps, the Administration has taken action on all Task Force Recommendations. In December, the Vice President accepted the report of the President's Task Force on the Employment of Adults with Disabilities, took action on some of their recommendations, and pledged that the Administration would review others in the budget process. With

the new steps taken today, as well as an announcement that Mrs. Gore will make tomorrow, the Administration has taken action on all the Task Force formal recommendations:

- Work to pass the Work Incentive Improvement Act.
- Work to pass a strong Patients' Bill of Rights.
- Examine tax options to assist with expenses of work.
- Foster interdisciplinary consortia for employment services.
- Accelerate development and adoption of assistive technology.
- Direct Small Business Administration to expand outreach.
- Remove Federal hiring barriers for people with mental illness
- Mrs. Gore will unveil this tomorrow.
- Direct OPM to develop model plan for Federal hiring of people with disabilities.

###

**PRESIDENT CLINTON AND VICE PRESIDENT GORE UNVEIL NEW INITIATIVE  
TO IMPROVE ECONOMIC OPPORTUNITIES FOR AMERICANS WITH DISABILITIES**  
**BACKGROUND: January 13, 1999**

Today, President Clinton will unveil an historic new initiative that will remove significant barriers to work for people with disabilities. This three-part budget initiative, which invests over \$2 billion over five years, includes: (1) full funding of the Work Incentives Improvement Act which will be introduced by Senators Jeffords, Kennedy, Roth, and Moynihan next week; (2) a new \$1,000 tax credit to cover work-related costs for people with disabilities; and (3) expanded access to information and communications technologies. With these new proposals, the Administration will have taken action on every recommendation made in the report of the President's Task Force on the Employment of Adults with Disabilities, which the Vice President accepted last month. Justin Dart, one of the foremost leaders of the disability communities, stated in response to today's proposals: "The Clinton-Gore Administration has a long history of supporting the disability community. This policy initiative is one of the boldest since the landmark passage of the ADA."

**BARRIERS TO WORK FOR PEOPLE WITH DISABILITIES**

- **Millions of working-age adults have disabilities.** About 1.6 million working-age adults have a disability that leads to functional limitations (i.e., needs help with at least one activity of daily living). About 14 million working-age adults are disabled using a broader definition (e.g., uses a wheelchair, or walker; has a developmental disability).
- **The unemployment rate among people with disabilities is staggering.** Nearly 75 percent of people with disabilities are unemployed. Not only is it more difficult for people with disabilities to work; when they do work, their earnings are lower. According to one study, the average earnings for men with disabilities are 15 to 30 percent below those of men without disabilities. These disparities are greater for those needing help with daily activities.
- **Multiple barriers to work.** People with disabilities face a number of challenges, including:
  - **Lack of adequate health insurance.** In most places in the U.S., people with health problems can be charged high premiums by private insurance companies or denied coverage altogether. Those who are insured may not be covered for some of their needs, such as personal assistance. Medicaid covers these services, but eligibility is generally restricted to people who cannot work. Thus, there is little incentive to return to work.
  - **Higher costs of work.** People with disabilities not only face lower than

average wages, but typically pay more to get to and from work and to function at work. Thus, for some, returning to work may decrease rather than increase their savings.

- **Disconnected employment service system:** A variety of vocational rehabilitation, educational, training and health programs exist to facilitate work for people with disabilities, but they rarely work together in a coordinated way.
- **Inaccessible or unavailable technology:** Technological advances facilitate work, improve productivity and reduce the costs of such technology. Yet, people with disabilities often lack information on what exists, how to use it, and how to afford it.

#### **ADMINISTRATION COMMITMENT TO IMPROVING OPPORTUNITIES**

The President has made expanding economic opportunities to all Americans -- particularly people with disabilities -- a priority. His accomplishments include:

- **Most diverse Administration in history** by appointing a large number of people with disabilities to senior positions. The Federal government now employs about 127,000 employees with some type of disability.
- **Strong efforts to end job discrimination.** In July 1998, the President directed key federal civil rights agencies (Department of Justice, Equal Employment Opportunity Commission and the Small Business Administration) to increase outreach and implementation efforts.
- **New Medicaid buy-in option for workers with disabilities.** The Balanced Budget Act of 1997 created an optional program whereby states could allow people with disabilities who were earning up to 250 percent of poverty to purchase Medicaid coverage.
- **Improving employment services.** On August 7, the President signed the Workforce Investment Act (WIA), including the Rehabilitation Act Amendments of 1998. It establishes better links between the vocational rehabilitation and the workforce development systems.
- **Expanding accessible transportation.** In September 1998, the Department of Transportation issued the final regulation implementing the Americans with Disabilities Act (ADA) provisions for over-the-road bus (OTRB) accessibility.
- **Reauthorizing and expanding the Assistive Technology Act.** In October, 1998, the President signed the "Tech Act" which provides assistive technology to low-income people with disabilities and encourages small businesses to design and market innovative ideas.

- **TASK FORCE ON EMPLOYMENT OF ADULTS WITH DISABILITIES.** One of the most important actions taken by President Clinton was the signing of the executive order establishing the Presidential Task Force on Employment of Adults with Disabilities on March 13, 1998. Led by Alexis Herman, Secretary of Labor, and Tony Coelho, this Task Force is charged with coordinating an aggressive national policy to bring adults with disabilities into gainful employment. It produced a set of interim recommendations in December, 1998, summarized below:

# **RECOMMENDATION**

# **ACTION**

- |                                                                                                   |                       |
|---------------------------------------------------------------------------------------------------|-----------------------|
| 1. Work to pass the Work Incentive Improvement Act<br>budget                                      | President includes in |
| 2. Work to pass the Patients' Bill of Rights<br>priority                                          | High Presidential     |
| 3. Examine tax options to assist with expenses of work<br>budget                                  | President includes in |
| 4. Foster interdisciplinary consortia for employment services<br>budget                           | President includes in |
| 5. Accelerate development/adoption of assistive technology<br>includes in budget                  | President             |
| 6. Direct Small Business Administration to start outreach<br>announced 12/98                      | Vice President        |
| 7. Remove Federal hiring barriers for people w/ mental illness<br>announced tomorrow              | Mrs. Gore             |
| 8. Develop a model plan for Federal hiring of people w/ disabilities<br>President announced 12/98 | Vice                  |

## WORK INCENTIVES IMPROVEMENT ACT

The Work Incentives Improvement Act is an historic bill produced through the bipartisan efforts of Senators Jeffords, Kennedy, Roth and Moynihan in collaboration with leaders in the disability community and staff throughout the Administration. It is the centerpiece of the President's initiative to provide economic opportunities to people with disabilities. Altogether, it would cost an estimated \$1.2 billion over 5 years. Its major components are described below.

### HEALTH INSURANCE PROTECTIONS

Health care -- particularly prescription drugs and personal assistance -- is essential to enabling people with disabilities to work. This proposal would: (1) expand option and funding for the Medicaid buy-in for workers with disabilities; (2) extend Medicare coverage for people with disabilities who return to work; and (3) create a demonstration of a Medicaid buy-in for people with disabilities that have not yet gotten severe enough to end work and qualify them for disability, Medicaid or Medicare.

- **Expanding the State Medicaid Buy-In Option for Workers with Disabilities.** Two new optional eligibility categories would allow states to expand Medicaid coverage to workers with disabilities beyond the current option created in the Balanced Budget Act of 1997 (BBA). Additionally, a new grant program would be provide \$150 million in funds to states taking these option to help them start their programs and outreach to eligible workers.

The BBA option allows people with disabilities who would be eligible for Supplemental Security Income (SSI) but for earned income up to 250 percent of poverty to buy into Medicaid at a premium set by the state. This would be expanded through two new options:

***Workers with higher earned income, unearned income, and assets.*** The first new option allows states to expand this Medicaid buy-in to people with disabilities with earned income above 250 percent of poverty with assets, resources and unearned income to limits set by the state. This is important since many workers with disabilities have either assets and resources that exceed the current limit of \$2,000 or are transitioning from Social Security Disability Insurance (SSDI) and have unearned income exceeding the limit of about \$500.

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with disabilities with assets, resources and unearned income below limits set by the state) to also extend the Medicaid buy-in to people who continue to have a severe medically determinable impairment but lose eligibility for SSI or Social Security Disability Insurance (SSDI) because of medical improvement. Often, such improvements are possible only with health care.

To give an example of who might be helped by this option, a person with rheumatoid arthritis whose condition prevents work could receive disability and health coverage. If, at the medical review, laboratory tests were still positive but the therapy and a new drug allowed the person to work, benefits would essentially end. Although this temporary remission is mostly attributable to health care coverage, the improvement would disqualify the person from disability and thus health benefits under current law.

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Both options would be treated like any other Medicaid eligibility option (e.g., same Federal matching rate, benefits rules). States could not supplant existing state spending with Medicaid funding under these options and would have to maintain effort for current spending for people made eligible under these options.

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premiums or deny them coverage altogether in many states. This option, which allows these workers to maintain their Medicare coverage so long as they remain disabled (as determined through continuing disability reviews), would remove a critical barrier to returning to work.

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This demonstration is intended to help people whose condition has not yet deteriorated enough to prevent work but who need health care to prevent that deterioration. For example, a person with muscular dystrophy, Parkinson's Disease, or diabetes may be able to function and continue to work with appropriate health care, but such health care may only be available once their conditions have become severe enough to qualify them for SSI or SSDI and thus Medicaid or Medicare. This demonstration would provide new information on the cost effectiveness of early health care intervention in keeping people with disabilities from becoming too disabled to work.

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recipient leaves the rolls).

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- **Changes in Continuing Disability Reviews (CDRs).** SSA uses CDRs to determine if a beneficiary continues to meet the definition of disability over time. This provision would prohibit using work activity as the sole basis for scheduling a CDR for individuals during the first 24 months of DDSI eligibility. Additionally, this proposal would provide an expedited eligibility determination process for SSDI applicants who received benefits for at least 24 months & engaged in substantial gainful activity during their extended periods of eligibility.

#### **WORK INCENTIVE GRANTS**

The Work Incentive Grant proposal would combine the strong ideas in Title IV of the Work Incentive Improvement Act with those of the Task Force on the Employment of Adults with Disabilities to improve the existing infrastructure for providing information and services to individuals with disabilities. The new grant program would build upon the *Workforce Investment Act (WIA)*, signed into law by the President last year, by ensuring that people with disabilities have access to the full range of employment and re-employment services in the One-Stop delivery system established by the WIA.

- **New partnerships.** Competitive grants (totaling \$50 million a year) would be awarded to partnerships of organizations (public and private), including organizations of people with disabilities in every state. These partnerships will be responsible for working with the One-Stop system to augment that system's capacity to provide a wide range of high quality services to people with disabilities working or returning to work, including:
  - Providing benefits planning and assistance;
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- **Building on current efforts.** The new grant program would build upon the solid base formed by the state and local workforce investment boards mandated by the Workforce Investment Act. The WIA sets forth a new priority on ensuring that individuals with disabilities are provided access to employment and training information and services. The Federally-funded Vocational Rehabilitation agencies are required to participate in the One-Stop delivery system of employment and training services. Further, the local workforce investment boards are required to include representatives of community-based organizations, including those that represent persons with disabilities. DOL will encourage local boards to include business leaders with experience in employing such individuals.
- **Administration.** As the lead Federal agency for employment and training services for all Americans, DOL would administer these grants. DOL would consult with National Council on Disability, the President's Committee on the Employment of People with Disabilities, and the Task Force on the Employment of Adults with Disabilities, the Education Department, the Department of Health and Human Services, the Social Security Administration, the Department of Veterans Affairs, the Small Business Administration, the Department of Commerce, and others on the development of its solicitation for grant applications, on review of applications for quality and comprehensiveness, and on monitoring and evaluating the grants and the operations of the One-Stop system.

HOUSE SIDE → Rick Lorio / Thuy Johnson  
Ben Cardon

2/3 - OK meeting

TITLE II - Ticket

SEC 201 - Ticket ~~person~~ <sup>new addition</sup> after five years - Providers want  
get involved if the rug could get pulled.  
Both is not a fan of the ticket.  
Loses savings b/c take up doesn't mature and start to  
save

Kennedy wants to add more to demo

SEC 103 - Grants  
add b(3) ~~infrastructure development~~  
want to add home + community based care

BUDGET ISSUE

Funding source has been changed in some  
places from Trust Fund + administrative charges

SSA looking at Sec 212 - trying to modify it.

Done

## WORK INCENTIVES IMPROVEMENT ACT

The Work Incentives Improvement Act is an historic bill produced through the bipartisan efforts of Senators Jeffords, Kennedy, Roth and Moynihan in collaboration with leaders in the disability community and staff throughout the Administration. It is the centerpiece of the President's initiative to provide economic opportunities to people with disabilities. Altogether, it would cost an estimated \$1.2 billion over 5 years. Its major components are described below.

### HEALTH INSURANCE PROTECTIONS

Health care -- particularly prescription drugs and personal assistance -- is essential to enabling people with disabilities to work. This proposal would: (1) expand option and funding for the Medicaid buy-in for workers with disabilities; (2) extend Medicare coverage for people with disabilities who return to work; and (3) create a demonstration of a Medicaid buy-in for people with disabilities that have not yet gotten severe enough to end work and qualify them for disability, Medicaid or Medicare.

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## **PRESIDENT CLINTON AND VICE PRESIDENT GORE UNVEIL NEW INITIATIVE TO IMPROVE ECONOMIC OPPORTUNITIES FOR AMERICANS WITH DISABILITIES**

**BACKGROUND:** January 13, 1999

Today, President Clinton will unveil an historic new initiative that will remove significant barriers to work for people with disabilities. This three-part budget initiative, which invests over \$2 billion over five years, includes: (1) full funding of the Work Incentives Improvement Act which will be introduced by Senators Jeffords, Kennedy, Roth, and Moynihan next week; (2) a new \$1,000 tax credit to cover work-related costs for people with disabilities; and (3) expanded access to information and communications technologies. With these new proposals, the Administration will have taken action on every recommendation made in the report of the President's Task Force on the Employment of Adults with Disabilities, which the Vice President accepted last month. Justin Dart, one of the foremost leaders of the disability communities, stated in response to today's proposals: "The Clinton-Gore Administration has a long history of supporting the disability community. This policy initiative is one of the boldest since the landmark passage of the ADA."

### **BARRIERS TO WORK FOR PEOPLE WITH DISABILITIES**

- **Millions of working-age adults have disabilities.** About 1.6 million working-age adults have a disability that leads to functional limitations (i.e., needs help with at least one activity of daily living). About 14 million working-age adults are disabled using a broader definition (e.g., uses a wheelchair, or walker; has a developmental disability).
- **The unemployment rate among people with disabilities is staggering.** Nearly 75 percent of people with disabilities are unemployed. Not only is it more difficult for people with disabilities to work; when they do work, their earnings are lower. According to one study, the average earnings for men with disabilities are 15 to 30 percent below those of men without disabilities. These disparities are greater for those needing help with daily activities.
- **Multiple barriers to work.** People with disabilities face a number of challenges, including:
  - **Lack of adequate health insurance.** In most places in the U.S., people with health problems can be charged high premiums by private insurance companies or denied coverage altogether. Those who are insured may not be covered for some of their needs, such as personal assistance. Medicaid covers these services, but eligibility is generally restricted to people who cannot work. Thus, there is little incentive to return to work.
  - **Higher costs of work.** People with disabilities not only face lower than

average wages, but typically pay more to get to and from work and to function at work. Thus, for some, returning to work may decrease rather than increase their savings.

- **Disconnected employment service system:** A variety of vocational rehabilitation, educational, training and health programs exist to facilitate work for people with disabilities, but they rarely work together in a coordinated way.
- **Inaccessible or unavailable technology:** Technological advances facilitate work, improve productivity and reduce the costs of such technology. Yet, people with disabilities often lack information on what exists, how to use it, and how to afford it.

### **ADMINISTRATION COMMITMENT TO IMPROVING OPPORTUNITIES**

The President has made expanding economic opportunities to all Americans -- particularly people with disabilities -- a priority. His accomplishments include:

- **Most diverse Administration in history** by appointing a large number of people with disabilities to senior positions. The Federal government now employs about 127,000 employees with some type of disability.
- **Strong efforts to end job discrimination.** In July 1998, the President directed key federal civil rights agencies (Department of Justice, Equal Employment Opportunity Commission and the Small Business Administration) to increase outreach and implementation efforts.
- **New Medicaid buy-in option for workers with disabilities.** The Balanced Budget Act of 1997 created an optional program whereby states could allow people with disabilities who were earning up to 250 percent of poverty to purchase Medicaid coverage.
- **Improving employment services.** On August 7, the President signed the Workforce Investment Act (WIA), including the Rehabilitation Act Amendments of 1998. It establishes better links between the vocational rehabilitation and the workforce development systems.
- **Expanding accessible transportation.** In September 1998, the Department of Transportation issued the final regulation implementing the Americans with Disabilities Act (ADA) provisions for over-the-road bus (OTRB) accessibility.
- **Reauthorizing and expanding the Assistive Technology Act.** In October, 1998, the President signed the "Tech Act" which provides assistive technology to low-income people with disabilities and encourages small businesses to design and market innovative ideas.

- **TASK FORCE ON EMPLOYMENT OF ADULTS WITH DISABILITIES.** One of the most important actions taken by President Clinton was the signing of the executive order establishing the Presidential Task Force on Employment of Adults with Disabilities on March 13, 1998. Led by Alexis Herman, Secretary of Labor, and Tony Coelho, this Task Force is charged with coordinating an aggressive national policy to bring adults with disabilities into gainful employment. It produced a set of interim recommendations in December, 1998, summarized below:

# **RECOMMENDATION**

# **ACTION**

- |                                                                                                   |                       |
|---------------------------------------------------------------------------------------------------|-----------------------|
| 1. Work to pass the Work Incentive Improvement Act<br>budget                                      | President includes in |
| 2. Work to pass the Patients' Bill of Rights<br>priority                                          | High Presidential     |
| 3. Examine tax options to assist with expenses of work<br>budget                                  | President includes in |
| 4. Foster interdisciplinary consortia for employment services<br>budget                           | President includes in |
| 5. Accelerate development/adoption of assistive technology<br>includes in budget                  | President             |
| 6. Direct Small Business Administration to start outreach<br>announced 12/98                      | Vice President        |
| 7. Remove Federal hiring barriers for people w/ mental illness<br>announced tomorrow              | Mrs. Gore             |
| 8. Develop a model plan for Federal hiring of people w/ disabilities<br>President announced 12/98 | Vice                  |

Cleveland - Already argued. - if disabled under SSI ~~is still not~~ SSDI but still be able to work under ADA. Should win

argued      Argued      argued in April  
1) Murphy & Sutton; 3) Albertson:

→ Pilot w/ bad eyesight - OK w/ glasses

→ Truck driver w/ bad eyesight - not totally corrected w/ two eyes

Whether this disability if correctable constitutes disability

Not a reasonable accommodation for airlines to change policy

What is a disability?

Extreme hypertension: mechanic

DOT:

1. Is he qualified
2. Is he disabled

DOT: he is entitled to a trial run

## Disability Cases

~~was~~ Solicitor General - taking pro disability stance  
filing Amicus Brief in all given

Arguments in April

Olmstead - Ga. retarded people in state institutions.

Drs said they could do better in community based setting.  
Discrim. provisions of ADA should apply  
- segregation of disabled people from normal people  
is discrimination - you must put people  
in situations that Drs feel is correct.

Integrated Setting Regulation.

DOT is saying that ADA requires disabled people  
be treated the same as non-disabled.

GA - is claiming that the Reg. goes farther than the  
law.

\* Law says no discrimination → Reg says  
discrimination is segregation - State says seg.  
is not discrimination + the reason they are being  
inst. is b/c they need care.

States are joining GA - b/c they want flexibility  
and costs could increase if they have to do both  
hospital + community setting.  
We should win but it's tough.

## **Disability Cases Before the Supreme Court**

### **Discrimination of Individuals with Disabilities**

#### ***Olmstead v. L.C.***

The Court will review on April 21 an Eleventh Circuit opinion that Title II of the ADA and Department of Justice regulation 28 C.F.R. §35.130(d) prohibit states from confining individuals with mental disabilities in a state psychiatric hospital when those individuals could be appropriately treated in a more integrated community setting.

#### **Policy**

Unjustified segregation of persons in institutions, when community placement is appropriate, constitutes a form of discrimination (as defined by the Attorney General's Title II "integration regulation"). Unjustified segregation of persons in institutions constitutes a form of discrimination based on disability. Such segregation can stigmatize persons with disabilities as incapable or unworthy of participating in community life. Second, such discrimination can result in a form of dissimilar treatment, since persons with disabilities must give up participation in community life in order to receive the services they need, while persons without disabilities can receive the services they need without sacrificing that important interest.

The integration regulation does not impose undue costs on the State since it does not apply when compliance would require an unreasonable change in state policy of a fundamental change in the nature of the State's treatment program.

### **The Definition of Disability**

#### ***Albertson's Inc. v. Kirkingburg***

The Court will review in April a Ninth Circuit decision that a truck driver with monocular vision who received a Federal Highway Administration waiver of Department of Transportation vision standards for operating commercial vehicles was a qualified individual with a disability under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 et seq.

#### **Policy**

Monocular vision is frequently a disability under the ADA, because it substantially limits both the amount and quality of an individual's major life activity of seeing. The fact that it may not also limit other "normal daily activities" of the individual is of no significance, because the ADA is largely premised on the principle that individuals who are limited in one or more major life activities can overcome those limitations to perform many activities competently and effectively.

#### ***Murphy v. United Parcel Serv., Inc.***

The Court reviewed a Tenth Circuit ruling that a mechanic whose hypertension, when medicated, did not substantially limit him in any major life activity was not protected by the ADA.

Mitigating measures, such as taking medication to control hypertension, are not relevant in the

threshold question as to whether one is disabled under the ADA. Assessing the existence of a disability without regard to mitigating measures is consistent with the ADA's basic purpose to eliminate the exclusion of individuals from the workplace because of outdated stereotypes and myths about those individual's abilities.

***Sutton v. United Air Lines, Inc***

The Court reviewed a Tenth Circuit decision that two airline pilot applicants whose visual impairments could be corrected with glasses or contact lenses were not substantially limited in the major life activity of seeing and, thus, were not disabled under the ADA.

**Policy**

Similar to *Murphy*, the question whether an individual has a disability under the ADA must be answered without regard to mitigating measures that the individual takes to ameliorate the effects of the impairment. Vision can be impaired to the point that, without eyeglasses, they can not see well enough to conduct everyday activities; thus having a physical impairment that substantially limits a major life activity.

**Consistency of Disability Benefits and the ADA in the Workplace**

***Cleveland v. Policy Management Systems Corp.***

The Court reviewed a Fifth Circuit decision that the application or receipt of disability insurance benefits under SSDI creates a presumption that the applicant or recipient is estopped from asserting that she is a "qualified individual with a disability" under the ADA.

**Policy**

Neither application for nor recipient of SSDI warrants a presumption that the applicant can not assert that she is a "qualified individual with a disability under the ADA. A person may have a medical condition that entitles her to disability benefits under the Social Security Act and nevertheless be a qualified individual with a disability under the ADA. The Social Security Act permits recipients to receive benefits in certain circumstances even though they are employed in order to encourage recipients to return to work if possible. Social Security benefits and the ADA are not necessarily alternative remedies between which people with disabilities must choose. Rather they are complementary measures that provide financial support to people with physical or mental impairments who face practical barriers to work while at the same time encouraging and facilitating their efforts to return to work.

# THE DISABILITY RIGHTS ACTIVIST

## WHAT'S HOT NOW?

### OLMSTEAD v. L. C. AND E. W.

Updated March 26, 1999.

- **ISSUE:**

Recent court decisions and a letter from Sally Richardson of the Department of Health and Human Services to state Medicaid directors are important steps towards enabling people with disabilities to leave institutions and live in various community settings. A case currently before the Supreme Court threatens to change that.

- **SUMMARY:**

Title II of the Americans with Disabilities Act states "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. Section 35.130(d).

Recently the 11th Circuit upheld several decisions supporting the right to services in the most integrated setting. Georgia's Commissioner of Human Resources, Tommy Olmstead appealed the ruling to the U.S. Supreme Court. The case is Olmstead vs. L.C., 98-536.

- ~~UPDATED~~ **STATUS:**

The Governors of the following states signed onto an amicus (friend of the court) brief: (Georgia is the original appellant) and Alabama, California, Colorado, Delaware, Florida, Hawaii, Louisiana, Maryland, Michigan, Montana, Nebraska, Nevada, New Hampshire, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia and Wyoming.

Of the original 22 states Alabama, California, Delaware, Florida, Maryland, Michigan, Mississippi, Nebraska, New Hampshire, Pennsylvania, South Dakota, West Virginia and Utah have dropped off the brief.

New states have signed on to the brief supporting Olmstead: Indiana, Massachusetts, Minnesota, And Washington. Of these four, Minnesota and Washington have dropped off.

**New!** The U.S. Solicitor General has submitted a brief supporting L.C. and E.W.

The Supreme Court will hear the case on April 21 10am.

- ~~UPDATED~~ **ACTION NEEDED:**

- Candlelight Vigil

"The U.S. Supreme Court will hear the Olmstead case on April 21, 1999 at 10:00 am. Disability rights advocates will will gather to hold a candlelight vigil on Tuesday, April 20, beginning at 8:00 pm, at the steps of the U.S. Supreme Court, 1 First Street, N.E., Washington, D.C. "

Contact TASH details.  
email: [mroth@tash.org](mailto:mroth@tash.org)  
web: TASH

phone: 410-828-8274 x104

- Contact the governors of the states that are still signed on to the amicus brief (**Colorado, Hawaii, Indiana, Louisiana, Massachusetts, Montana, Nevada, South Carolina, Tennessee, Texas, Wyoming**). Ask them to withdraw from Georgia's petition to the United States Supreme Court.

Tell them: DON'T MESS WITH OUR RIGHTS!!  
DON'T MESS WITH THE ADA  
SUPPORT "MOST INTEGRATED SETTING"

- Bazon Center: Memo to Advocates re L.C. case has useful information on getting states to withdraw from the brief.
- MAY 12 - RALLY IN D.C. - "Don't Tread On The ADA" for news from TASH on a rally on the steps of the U.S. Supreme Court, 1 First Street, N.E., Washington, D.C., Wednesday, May 12, 1999.
- Olmstead: Our Brown vs The Board of Education or something else from MadNation has MadNation's Action Alert on Olmstead include lots of information and links.
- ADAPT Bulletins and Upcoming Events has ADAPT's Action Alert on Olmstead.
- Join with other disability, aging, family and advocacy groups to organize 6 month statewide strategies (January '99 - June '99) to assure that people with disabilities have the RIGHT to live and receive services in the community!

For information:  
ADAPT  
512/442-0252  
303/733-9324  
[adapt@adapt.org](mailto:adapt@adapt.org)

#### • DETAILS:

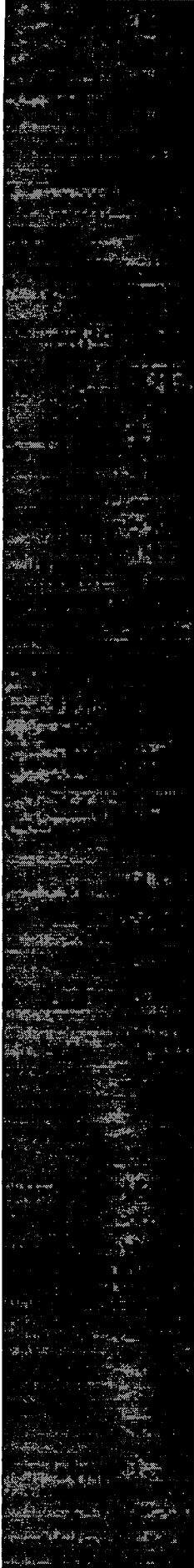
- The Electric Edge is hosting some pages from MOUTH on the Olmstead event.  
Catch it at ACTION EMERGENCY ALERT from Mouth.
- ~~ADAPT~~ Bazon Center: Olmstead v. L.C. provides details on the case and links to many briefs SUPPORTING L.C. and E.W.
- Most Integrated Setting by The Oaks Group has a very complete list of links related to the Olmstead case.
- L.C. v. Olmstead (4/8/1998, No. 97-8538)

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[HOME PAGE](#) | [WHAT'S NEW?](#) | [ACTION ALERTS!](#) | [LINKS - ORGANIZATIONS, INDIVIDUALS AND AGENCIES](#) | [LINKS - DISABILITY RIGHTS PUBLICATIONS](#) | [LINKS - DISABILITY META-SITES AND INDEXES](#) | [VOTE!](#) | [WEBSITE ACCESSIBILITY GUIDELINES](#) | [TABLE OF CONTENTS](#) | [SEARCH](#)

Maintained by Adrienne Rubin Barhydt.  
E-mail comments and suggestions to [abarhydt@disrights.org](mailto:abarhydt@disrights.org)

The URL for this page is <http://www.disrights.org/dr-hot-olmstead.html>

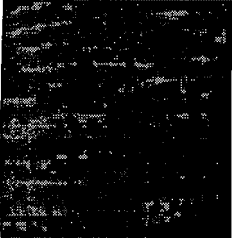


The Court reasoned that the determination as to whether someone has a disability should not depend on the name or diagnosis of the impairment, but on the effect of that impairment on the life of the individual. Some impairments may be disabling for certain individuals but not for others, and the presence of other impairments may combine to make any particular impairment disabling. It is impossible, therefore, to create a "laundry list" of impairments that would constitute a disability. Instead, the effect of any particular impairment on a person's life must be evaluated on a case-by-case basis.

As to impairments subject to correction, the Tenth Circuit Court concluded that if the individual can utilize corrective measures to mitigate the effects of a impairment to such extent as to eliminate any limitation on a major life activity, then the individual is not disabled within the meaning of the ADA. If nearsightedness can be fully corrected with vision glasses, it does not substantially limit a major life activity. Since the sisters themselves admitted they were able to function "identically to individuals without a similar impairment," the Tenth Circuit Court found that they were not disabled within the meaning of the ADA.

The Tenth Circuit Court similarly rejected the sisters' argument that United discriminated against them on the basis of disability because it regarded them as disabled, even if they were actually not. The Court agreed with United's position that the sisters did not meet a particular job-related safety requirement for the positions they sought. The Court held that an employer does not necessarily regard an employee as substantially limited in the major life activity of working simply because it believes that the individual is incapable of performing a particular job. To constitute discrimination on the basis of perceived disability, the Court said, the impairment must "substantially limit employment in general, not merely the particular job that the plaintiff may wish to hold."

The *Sutton* decision indicates that, at least in one Circuit physical impairments which are alleged to constitute disabilities protected by the ADA will be evaluated in their corrected state. However, in light of the marked split among the Circuits, employers are encouraged to review court decisions in their



particular jurisdiction to determine whether their Circuit is in agreement with the Tenth Circuit.

For additional information, contact Scott Robins ([sr@saslaw.com](mailto:sr@saslaw.com)).

*This article is provided for informational purposes only. Do not act upon this information without first consulting an attorney.*

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**[BACK TO THE TOP](#) / [NEXT ARTICLE](#) / [CURRENT ISSUE](#) / [ARCHIVES](#)**

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# EMPLOYMENT LAW BRIEFS

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## 10TH CIRCUIT HOLDS THAT ALLEGED DISABILITIES UNDER THE ADA MUST BE EVALUATED IN THEIR CORRECTED STATE

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**SPRING  
1998**

**T**he United States Court of Appeals for the Tenth Circuit, in Sutton v. United Air Lines, recently upheld the dismissal of an action brought under the Americans with Disabilities Act ("ADA") by nearsighted twin sisters whose applications for commercial airline pilots were rejected by United Air Lines.

The sisters were both licenced pilots working for regional commuter airlines. In 1992 they applied for pilot positions with United Air Lines. United rejected their applications, stating that their uncorrected vision disqualified them from flying for United because the airline's policy required a 20/100 vision for pilots. The sisters brought suit for discrimination under the ADA.

To state a claim for discrimination under the ADA, the plaintiff must initially establish that he or she is a disabled person within the meaning of the ADA. The Act defines "disability" as a "physical or mental impairment that substantially limits one or more of the major life activities." The twins argued that their uncorrected vision qualified them as "individual with disabilities" within the meaning of the ADA because it substantially limited their major life activity of seeing. They claimed that United discriminated against them because they were disabled, or, in the alternative, because

**FEEDBACK**

**THE FIRM**

**BIOGRAPHIES**

**ARCHIVES**

**PUBLICATIONS**

**LINKS**



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United perceived them as disabled.

The District Court in *Sutton* first examined whether the plaintiffs' poor vision constituted an "impairment" within the meaning of the ADA. Although the statute itself does not define "impairment," regulations promulgated by the EEOC define it as a disorder, condition, disfigurement or anatomical loss which affects one or more of the body's systems, such as neurological, musculoskeletal, or digestive. A Guide which the EEOC published to assist in the interpretation of the ADA, requires an evaluation of the condition which is alleged to constitute the impairment "without regard to measures such as medicines, assistive, or prosthetic devices." Accordingly, nearsightedness must be evaluated without regard to corrective measures such as glasses or contact lenses. The Court, therefore, concluded that in its uncorrected state, the sisters' condition qualified as a impairment because it affected the sense of sight.

The key issue for the District Court was whether the sisters' nearsightedness "substantially" limited their ability to see. The twins had the burden of proving that they were either unable to see or that they were significantly restricted as to the condition, manner, or duration of their ability to see as compared to the average person in the general population. On this point, the twins argued that their ability to see must be evaluated without respect to the mitigating measures of eye glasses or contact lenses, while United urged that corrective measures must be taken into consideration.

Other courts are split on this issue. Some Circuits, such as the Eighth, Ninth, Tenth and the District of Columbia, follow the EEOC Interpretive Guides which call for analysis of impairments without consideration of mitigating measures. Circuits, such as the Fifth, Sixth and Seventh, reject the EEOC Guides as being in direct conflict with the actual statute which calls for "substantial" impairment, and evaluate alleged disabilities as they exist in their corrected state.

The *Sutton* Court chose to align with the Circuits which have rejected the interpretation of the EEOC Guides. It therefore granted United's motion to dismiss for failure to state a claim.

### (CDC) Dentistry Guidelines.

Two justices---Stevens and Breyer---were convinced that, based on the CDC Guidelines, no significant risk had been demonstrated. Justices Kennedy, Ginsberg, and Souter were unsure about the evidence, but found that a public health authority's opinions should carry more weight than those of a national organization representing dentists. Justice O'Connor, along with Chief Justice Rehnquist, Scalia, and Thomas, disagreed that courts should "give some scientific views more credence than others simply because they have been endorsed by a politically appointed public health authority."

The majority remanded to the First Circuit to develop more evidence, consistent with the Court's objective analysis of harm in *Arline*, on whether the woman constituted a significant risk to the dentist. Justice O'Connor concurred.

Since *Bragdon*, the Court has decided to review three more U.S. Courts of Appeals decisions this term. These involve the ADA's definition of disability in the contexts of monocular vision and the Department of Transportation vision standards for drivers operating commercial vehicles, *Albertson's Inc. v. Kirkingburg*; airline pilot applicants with poor vision who use corrective lenses, *Sutton v. United Air Lines, Inc.*; and a mechanic with hypertension that is controlled by medication, *Murphy v. United Parcel Serv., Inc. Constitutionality of the ADA*

Another important issue that gained significant notoriety this past year, but has not yet been decided by the Court, is whether the ADA is constitutional. The more fundamental, but practically less significant, question is whether the ADA's enactment is consistent with Congress' power under Section 5 to enforce the Fourteenth Amendment. In *Enforcing the Fourteenth Amendment: City of Boerne v. Flores and the Americans with Disabilities Act*, 22 MPDLR 262, Professor Stephen L. Mikochik explained that even under a restrictive view of Congress' enforcement power as set out by the U.S. Supreme Court in the *Flores* case, 117 S. Ct. 2157 (1997), no persuasive argument can be made that the ADA is an unconstitutional use of that power.

As a practical matter, the more controversial question was raised in *Brown v. North Carolina Div. of Motor Vehicles*, 987 F. Supp.

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|-----------------------------------|-----|
| Total Title II cases for Vol. 22  | 102 |
| Total Title II cases for Vol. 21  | 85  |
| Total Title III cases for Vol. 21 | 60  |

***Definition of Disability; Direct Threat***

Perhaps the single most important disability law development of 1998 was the U.S. Supreme Court's deeply divided decision in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), 22 MPDLR 449, in which a woman with asymptomatic AIDS sued under the ADA Title III, 42 U.S.C. §12182, a dentist who insisted that he would only fill her cavity in a hospital setting. *Bragdon* addressed the ADA's definitions of disability and direct threat to health and safety. Justice Kennedy, writing for a 6-3 majority, expanded the ADA's reach by ruling that the woman had a covered disability. The majority reasoned that the immediate effect of her HIV infection on the hemic and lymphatic systems constituted a physical impairment. Moreover, her impairment affected the major life activity of reproduction by creating a risk of HIV infection to the woman's sexual partner and any unborn children.

In her concurrence, Justice Ginsberg pointed out that even if asymptomatic HIV was found not to constitute a covered disability, she would have found for the plaintiff because the dentist regarded her as having a disability. By contrast, Chief Justice Rehnquist and Justices Scalia and Thomas disagreed that reproduction was shown to be a major life activity, much less that HIV substantially limited reproduction since people with HIV are still able to engage in reproduction, even if they choose not to.

A 5-4 majority in *Bragdon* also addressed, but did not decide, whether the woman constituted a "direct threat" to the dentist and, thus, was not an otherwise qualified patient with a disability. The major point of disagreement on the "direct threat" issue was not the standard for deciding the issue---under *School Bd. Nassau County v. Airline*, 480 U.S. 273 (1987), 11 MPDLR 110, objective criteria must be used to determine whether the risk of harm is "significant"---but the evidence that should be used to meet that standard. In this case, the justices disagreed on how to weigh the conflicting views of the American Dental Association and the Center for Disease Control