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No. 97-536

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

TOMMY OLMSTEAD, ET AL., PETITIONERS

v.

L.C., ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Title II of the ADA, 42 U.S.C. 12132, provides that "no qualified individual with a disability shall, by reason of such disability * * * be subjected to discrimination by any [public] entity." The Attorney General's "integration regulation," 28 C.F.R. 35.130(d), provides that "a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." The Attorney General interprets that regulation to require a State that offers treatment to persons with disabilities to provide such treatment in a community setting that offers opportunities for interaction with persons without disabilities, rather than in an institution, when (1) the State's professionals have determined, in the exercise of reasonable professional judgment, that community placement of the individual is appropriate, and (2) such a placement would not require an unreasonable change in state policy or a fundamental alteration in the nature of the State's treatment program.

The question presented is whether the regulation as so interpreted validly implements the Americans with Disabilities Act.

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INTEREST OF THE UNITED STATES

The Attorney General has authority to enforce Title II of the Americans With Disabilities Act, 42 U.S.C. 12131, et seq. See 42 U.S.C. 12133. In addition to that enforcement responsibility, Congress has directed the Attorney General to issue regulations to set forth the forms of discrimination prohibited by Title II. 42 U.S.C. 12134(a). Pursuant to that mandate, the Attorney General has issued such regulations. See 28 C.F.R. pt. 35. One of those regulations requires a public entity to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d). The Attorney General has interpreted that regulation to require the State, in some circumstances, to treat persons with disabilities in a community setting rather than an institution. The validity of that interpretation is at issue here. The United States participated as an amicus curiae in this case in the court of appeals.

STATEMENT

1. Respondents L.C. and E.W. are mentally retarded individuals who also have mental disorders. Pet. App. 32-33. Before the present litigation began, L.C. and E.W were voluntary patients at the Georgia Regional Hospital at Atlanta (GRH-A) and were confined in a locked psychiatric unit. J.A. 2, 5, 45, 48, 62-63, 78-79. GRH-A is a large, state-run psychiatric institution whose programs are designed primarily to stabilize individuals during the acute phase of a mental illness so that treatment can be continued in the community on an outpatient basis. J.A. 13, 48-49.

L.C. was most recently admitted to GRH-A in May 1992. J.A. 14, 51. By May 1993, L.C.'s psychiatric condition had stabilized, and petitioners and L.C.'s treating physician agreed that she could appropriately be treated in a community setting. J.A. 5, 46, 89, 120, 205-207. L.C. nonetheless remained at GRH-A until after the present litigation began in May 1995. In July 1995, petitioners discharged L.C. to a state-run institution for treatment of the mentally retarded, and in February 1996. petitioners released L.C. to a community-based program. Pet. App. 33a.

E.W. was most recently admitted to GHR-A in early 1995. J.A. 64, 80. In March 1995, E.W.'s treating physician concluded that she could be appropriately treated in the community. J.A. 88-89, 210-212. In that same year, a clinical psychologist at GRH-A reached the same conclusion. J.A. 213-214; see also J.A. 101. E.W. nonetheless remained institutionalized until after the district court issued its judgment in 1997 at which point she was placed in a community-based program. Pet. App. 2a n.2.[1]

2. In 1995, L.C. filed suit against petitioners, alleging, inter alia, that petitioners violated Title II of the ADA and its implementing regulations by failing to offer her treatment in a community-based residential program after treatment professionals determined that such a placement was appropriate. J.A. 26, 28; Pet. App. 31a. E.W. intervened, raising the same claim. J.A. 61-73. The district court granted summary judgment in favor of respondents. Pet. App. 31a-42a. The court held that petitioners' refusal to place respondents in a community-based program violated Title II of the ADA, which prohibits a public entity from subjecting any qualified individual with a disability to discrimination by reason of such disability, 42 U.S.C. 12132, as well as the Title II integration regulation, 28 C.F.R. 35.130(d), which requires a public entity to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." Pet. App. 37a-39a. The court rejected petitioners' defense based on their assertion that they lacked funds to provide such placements to L.C. and E.W. Pet. App. 38a-39a.

3. The court of appeals affirmed the district court's

[1] The court of appeals correctly concluded that the placement of L.C. and E.W. in community placement programs did not make the case moot. Because both respondents have a history of instability, there is a reasonable likelihood that they may be returned to GRH-A, making the present controversy capable of repetition yet evading review. Honig v. Doe, 484 U.S. 305, 318-323 (1988).

judgment, but remanded for a reassessment of the State's cost-based defense. Pet. App. 1a-30. The court held that "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," unless such treatment would require a "fundamental alteration" in the State's treatment program. Pet. App. 21a-25a.

In reaching that conclusion, the court relied on the Attorney General's Title II integration regulation. The court concluded that "the plain language of § 35.130(d) prohibits a state from providing services to individuals with disabilities in an unnecessarily segregated setting" and that a State violates that mandate when "the State confines an individual with a disability in an institutionalized setting when a community placement is appropriate." Pet. App. 7a-8a.

The court rejected petitioners' contention that the integration regulation conflicts with the requirement in Title II that an individual must prove discrimination by reason of a disability. The court noted that Congress had instructed the Department of Justice to issue regulations that are consistent with the coordination regulations issued under Section 504 of the Rehabilitation Act, and that one of those regulations requires integration in terms that are substantially the same as those in Section 35.130(d). Pet. App. 9a (citing 28 C.F.R. 41.51(d) (1997)). The court further concluded that the integration regulation was consistent with Congress's specific findings that

Title II was intended to overcome discrimination in "institutionalization," and discrimination that takes the form of "segregation." Pet. App. 10a-11a (quoting 42 U.S.C. 12101(a)(3), (5)). The court also determined that "the legislative history makes clear that Congress considered the provision of segregated services to individuals with disabilities a form of discrimination prohibited by the ADA." Pet. App. 11a. The court of appeals concluded that "because § 35.130(d) finds direct support in the plain language of the ADA, its congressional findings, and the Act's legislative history, we must apply it here." Id. at 12a.

The court held that, under Title II and its implementing regulations, a State's duty to provide integrated services when a patient's care warrants such services is not absolute. Pet. App. 25a. In reaching that conclusion, the court relied on the Attorney General's reasonable modification regulation, which provides that "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." Pet. App. 25a-26a (quoting 28 C.F.R. 35.130(b)(7)).

The court concluded that the key question in this case was whether petitioners had shown that treating respondents in the community would cause a fundamental alteration in their program. Id. at 26a. Resolution of that question, the court concluded, turns on an assessment of "whether treating [respondents] would require additional expenditures and if so, whether the State had met its burden of proving that those expenditures were unreasonable in light of the State's mental health budget." Id. at 28a. Because the district court had not addressed those questions, the court of appeals remanded for further proceedings. Id. at 29a.[2]

SUMMARY OF ARGUMENT

[TO BE ADDED]

ARGUMENT

THE ATTORNEY GENERAL REASONABLY INTERPRETED HER INTEGRATION REGULATION TO PROHIBIT THE UNJUSTIFIED SEGREGATION OF PERSONS IN INSTITUTIONS, AND THE REGULATION AS SO CONSTRUED FALLS WITHIN THE ATTORNEY GENERAL'S AUTHORITY TO IMPLEMENT TITLE II

Title II Part A of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. Unlike Titles I and III of the Act, Title II does not spell out the forms of discrimination that are prohibited. Compare 42 U.S.C. 12112 (setting forth prohibited forms of discrimination in employment); 42 U.S.C. 12182(b) (setting forth prohibited forms of discrimination by public accommodations). Instead, Congress directed that "the Attorney General shall promulgate regulations in

[2] Following this Court's grant of the petition for a writ of certiorari, the district court issued a decision on remand, rejecting petitioners' fundamental alteration defense. Order of 1/29/99 at 1. The court found that the annual cost to the State of providing community-based treatment to L.C. and E.W. — about $20,000 each — was not unreasonable in relation to the State's overall mental health budget, which was $706.8 million in fiscal year 1998. Id. at 5.

an accessible format that implement this part." 42 U.S.C. 12134. That Section required the Attorney General "to issue regulations setting forth the forms of discrimination prohibited." H.R. Rep. No. 485, pt. 3, at 52 ().

The Attorney General issued such regulations in 1991. See 28 C.F.R. pt. 35. One of those regulations, the integration regulation, provides that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d). In the preamble to the regulations, the Attorney General explained that "the most integrated setting" is "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. Pt. 35, App. A, § 35.130 at 469 (1996).

The obligation set forth in the integration regulation is not absolute. Like other Title II obligations, when compliance would require a change in state policy, the integration obligation is subject to the reasonable modification standard set forth in 28 C.F.R. 35.130(b)(7). That regulation provides that "[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." Thus, a State must provide services to persons with disabilities in an integrated setting when that setting is appropriate to their needs, unless providing the service in that setting would require an unreasonable change in state policy or would fundamentally alter the nature of the program.

Consistent with its text, the Attorney General interprets the integration regulation to require States, in certain circumstances, to treat persons with disabilities in a community setting that offers opportunities for interaction with persons without disabilities rather than in an institution, where such opportunities are far more limited, if they exist at all. In particular, when state treatment professionals determine, in the exercise of reasoned professional judgment, that treatment in a community setting is appropriate (Youngberg v. Romeo, 457 U.S. 307, 323 (1982); see also School Bd. of Nassau County v. Arline, 480 U.S. 273, 288 (1987)), and such a placement would not require an unreasonable change in state policy or a fundamental change in the nature of a State's treatment program, a State must offer the individual an opportunity for placement in a community setting.

Petitioners challenge the Attorney General's interpretation of the integration regulation on two grounds. First, they argue that it reflects an impermissible reading of the regulation itself. Second, they argue that the interpretation exceeds the authority conferred on the Attorney General to define the forms of discrimination that are prohibited by Title II. As we demonstrate below, both arguments are without merit.

A. The Attorney General Has Reasonably Interpreted The Integration Regulation To Prohibit The Unjustified

Segregation Of Persons In Institutions

Petitioners contend (Br. 41-42) that the integration regulation applies only to services that a State provides to non-disabled persons. That limitation, however, cannot be found in the text of the regulation. The regulation facially applies to all services administered by a public entity, including those that are offered only to persons with disabilities. Under this Court's decisions, an agency's interpretation of its own regulations is "controlling," unless it is "plainly erroneous" or "inconsistent with the regulation." Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994). Because the Attorney General's interpretation accords with the plain language of the regulation, that deferential standard is satisfied here.

Petitioners incorrectly assert (Pet. Br. 41-42) that the Attorney General originally interpreted the integration regulation to apply only to those services that are offered to non-disabled persons. As petitioners note (Br. 41), the Attorney General has stated that requiring a disabled person to eat in the back of a government cafeteria, or requiring a blind person to go on a special museum tour rather than on the tour that is offered to the general public would violate the integration regulation. Pet. Br., App. D, 18a-20a. But the Attorney General never intimated that those are the only contexts in which the integration regulation is applicable. The Department of Justice is under no obligation when it promulgates a regulation to list all the conceivable examples of the contexts in which the rule will apply. Cf. Thomas Jefferson

University v. Shalala, 512 U.S. 504, 516 (1994) (refusing to attribute significance to an agency's failure to discuss in a statement of policy a particular application of a regulation where the statement of policy did not purport to deal comprehensively with all applications of the regulation). Indeed, such a requirement would be completely unworkable. See Pennsylvania Dep't of Corrections v. Yeskey, 118 S. Ct. 1952, 1955-1956 (1998).

Nor is there any merit to petitioners' suggestion (Pet. Br. 41-42) that the Attorney General's interpretation of her own regulation is not entitled to deference because it was publicly articulated for the first time in an amicus brief filed in Helen L. v. Didario, 46 F.3d 325 (3d Cir. 1995). This Court rejected a similar contention in Auer v. Robbins, 519 U.S. 462 (1997). There, the Court deferred to an agency's interpretation of its own regulation that appeared for the first time in a brief submitted to the Court. Id. at 462-463. The Court explained that the Secretary's position was not "a post-hoc rationalization advanced by an agency seeking to defend past agency action against attack," and that there was "simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." Id. at 462. Those requirements for deference are satisfied here. The Department of Justice brief in Helen L. was not a post-hoc effort to defend a previous agency action, but was instead a fair and considered judgment on the issue. Thus, as the court of appeals correctly concluded (Pet. 8a), the "express terms of § 35.130(d), supported by the Attorney General's consistent interpretation, plainly prohibit a state from treating individuals with disabilities in a segregated environment, where a more integrated environment would be appropriate."

B. The Attorney General Was Warranted In Concluding That The Unjustified Segregation Of Persons In Institutions Constitutes A Form Of Discrimination Based On Disability Prohibited By Title II

Because the Attorney General issued the integration regulation pursuant to an express grant of authority to give content to the general statutory prohibition against discrimination, it is entitled to "controlling weight," unless it is arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). This Court has also held that "[a]s the agency directed by Congress to issue implementing regulations, * * *, to render technical assistance explaining the responsibilities of covered individuals and institutions, * * * and to enforce [the ADA] in court, * * * the Department's views are entitled to deference.". Bragdon v. Abbott, 118 S. Ct. 2196 (1998). Such deference is particularly warranted in the present context. Through its long-standing role in protecting the rights of institutionalized persons. the Department of Justice has acquired special expertise on the effects of institutionalization on disabled persons See Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997-1997j.

Petitioners contend that the Attorney General acted outside the permissible limits of her authority to implement Title II. In particular, they argue (Br. 20-21) that Title II's prohibition on "discrimination" based on disability requires proof that similarly situated persons have been treated differently, and that, when a State offers a service only to persons with disabilities, such a showing of dissimilar treatment cannot be made. The term "discrimination," however, does not have a single meaning; its meaning therefore must be derived from the statutory context in which it appears. See Alexander v. Choate, 469 U.S. 287 (1987) (Section 504 prohibition on discrimination reaches practices that have the effect of denying meaningful access to persons with disabilities even when the practices are not animated by discriminatory intent); Southeastern Community College V. Davis, 442 U.S. 397, 413 (1979) (refusal to make a reasonable modification to accommodate persons with disabilities constitutes discrimination under Section 504); Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 592 (1983 (White, J.) (noting that the word "discrimination" is "inherently" ambiguous); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284 (Powell, J.) (noting that the concept of discrimination "is susceptible of varying interpretations"). The Attorney General was warranted in concluding that, in the context of the ADA, "discrimination" based on disability includes the unjustified segregation of a disabled person in an institution.

1. a. That statutory context includes the specific findings that Congress enacted as part of the ADA. Among other things, Congress found that "historically, society has tended to isolate

and segregate individuals with disabilities and * * * such forms of discrimination * * * continue to be a serious and pervasive social problem," 42 U.S.C. 12101(a)(2). It found that "individuals with disabilities continually encounter various forms of discrimination, including * * * segregation," 42 U.S.C. 12101(a)(5). And it found that such discrimination persists in a variety of contexts, including "institutionalization." 42 U.S.C. 12101(a)(3). Those findings make clear that Congress understood the concept of discrimination under the ADA to include the unjustified segregation of disabled persons in institutions.

b. The genesis of Congress's findings supports that conclusion. The relevant findings were drawn from the almost identical findings made by the U.S. Commission on Civil Rights in a report entitled Accommodating the Spectrum of Individual Disabilities. Compare id. at 159 with 42 U.S.C. 12101(a)(2) and (3)). One section of the report includes "institutionalization" as among the areas in which discrimination against persons with disabilities occurs. Accommodating the Spectrum, at 32-34. The report observed that "[i]nstitutionalization almost by definition entails segregation and isolation." The report further noted that, while "there has been increasing acceptance in recent years of the fact that most training, treatment, and habilitation services can be better provided to handicapped people in small, community facilities rather than in large isolated institutions," and "the number of handicapped persons in residential facilities has dwindled in the past two decades, * * * a great many handicapped persons remain in segregative facilities." Id. 34-35.

Another section of the report specifically identifies "segregation" as one of the forms of discrimination faced by persons with disabilities. Id. at 41. The report explains that "segregation singles out handicapped people and separates them from the rest of society, frequently as a condition for receiving some service or benefit," and goes on to state that "mental health and mental retardation institutions that house residents in almost complete isolation from the non-handicapped community are perhaps archetypal examples of segregation." Id. at 41.

c. The legislative debates and hearings corroborate that Congress's findings concerning "segregation" and "institutionalization" reflect an understanding that the unjustified segregation of persons with disabilities in large institutions constitutes a form of disability-based discrimination. Numerous statements attest to that understanding. E.g., 136 Cong. Rec. H 2447 (Rep. Miller) ("[I]t has been our unwillingness to see all people with disabilities that has been the greatest barrier to full and meaningful equality. Society has made them invisible by shutting them away in segregated facilities"); 134 Cong. Rec. S 5116 (Sen. Simon) (persons with disabilities "remain[] substantially hidden. They are hidden in institutions. They are hidden in nursing homes. * * *. Because they are hidden, we too easily ignore the problem and the need for change."); 135 Cong. Rec. S 4986 (1989) (Sen. Harkin) (a purpose of the ADA is get disabled persons "out of institutions"); Hearing on S. 933 Before the Senate Comm. on Labor and Human Resources and Subcomm. on the Handicapped, 101st Cong., 1st Sess. 215 (1989) (former Senator Weicker) ("For years, this country has maintained a public policy of protectionism toward people with disabilities. We have created monoliths of isolated care in institutions and in segregated educational settings. It is that isolation and segregation that has become the basis of the discrimination faced by many disabled people today. Separate is not equal."); Hearing on H.R. 4498 Before House Subcomm. on Select Educ., 100th Cong., 2d Sess. 193 (1988) (statement of Philip Campbell) ("Persons with mental retardation have experienced some of the grossest discrimination during the last 100 years. They have been relegated to segregated congregate facilities across the Nation").

2. Congress's understanding that Title II would prohibit the unjustified segregation of persons in institutions is also reflected its express instruction to the Attorney General to promulgate regulations consistent with (a) existing regulations under a related statute, and (b) the definitions of discrimination that appear in other titles of the ADA. Congress specified, 42 U.S.C. 12134(b), that, "[e]xcept for 'program accessibility, existing facilities', and 'communications', regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare [HEW] on January 13, 1978), applicable to recipients of Federal financial assistance

under section 794 of title 29 [Section 504 of the Rehabilitation Act]." That language requires the Attorney General, in issuing regulations to enforce Title II, to make the regulations consistent with other parts of "this chapter", i.e., Titles I(employment) and III(public accommodations) of the ADA, and with the coordination regulations that had been issued by HEW to enforce Section 504 of the Rehabilitation Act.

In adopting the integration regulation, the Attorney General carefully adhered to that mandate. The integration regulation is expressly modeled on a Section 504 coordination regulation that provides that "recipients shall administer programs and activities in the most integrated setting appropriate to the needs of qualified persons." 28 C.F.R. 45.51(d). The integration regulation also closely parallels a requirement in Title III of the ADA, which provides that "goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual." 42 U.S.C. 12182(b)(1)(B). By requiring the Attorney General to adopt regulations "consistent" with the HEW coordination regulations and with the ADA, Congress virtually mandated the integration regulation at issue here.[3]

Moreover, like the Attorney General's integration regulation,

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[3] Congress expressed the same integration mandate in the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1412(5)(B), requiring States that receive federal funds under that statute to "assure that, to the maximum extent appropriate, children with disabilities * * * are educated with children who are not disabled."

HEW's comparable coordination regulation and the requirement in Title III are not, by their terms, limited to those services that are offered to persons without disabilities; instead, they apply to all services that are offered. Nor is there any reason to believe that Congress [] understood the regulation or the statutory provision to contain an implicit limitation not found in the text. To the contrary, in a 1984 statute Congress had previously used the term "integration" in regard to individuals with developmental disabilities, and expressly defined the term to include not only the opportunity for persons with disabilities to use the same services and participate in the same activities as non-disabled persons, xxx now codified at 42 U.S.C. 6001(15)(A)&(C), but also "the residence by persons with developmental disabilities in home or home-like settings which are in proximity to community resources, together with regular contact with nonhandicapped citizens in their communities." xxx, amended ____, now codified at 42 U.S.C. 6001(15)(B). In light of Congress's mandate to formulate an integration regulation, and Congress's understanding of that term, the Attorney General was warranted in concluding that Congress viewed a State's unjustified decision to treat a disabled person in an institution, rather than in a community setting, as a form of discrimination based on disability.

3. Congress had ample basis to conclude that such a decision constitutes discrimination based on disability. Segregating persons with disabilities into institutions when they can be appropriately treated in community settings can have several

distinct discriminatory effects. First, the unjustified segregation of persons with disabilities can stigmatize them as incapable or unworthy of participating in community life. Congress understood that "[t]o be segregated is to be misunderstood, even feared," and that "only by breaking down barriers between people can we dispel the negative attitudes and myths that are the main currency of oppression." 136 Cong. Rec. H 2603 (Rep. Collins). Segregation always has the potential to engender or perpetuate negative attitudes, and when the segregation is unnecessary for treatment purposes, it is especially likely to result from and reinforce negative attitudes.

Second, the unjustified segregation of persons with disabilities into institutions imposes a substantial burden on persons with disabilities that the State does not impose on persons without disabilities: In order to obtain the medical or therapeutic services that they need, persons with disabilities must sacrifice their interest in community life, while persons without disabilities can obtain the services from the State that they need without sacrificing that important interest.

Finally, the unjustified segregation of persons with disabilities into institutions can defeat the statutory requirement -- not disputed by petitioner -- that the State make available to persons with disabilities the <u>same</u> services that they provide to non-disabled persons. 42 U.S.C. 12132. When persons with disabilities must obtain the treatment they need in an institution, rather than in a community setting, they are effectively deprived of equal access to parks, beaches, museums, and other similar public services.

4. The integration regulation's prohibition against unjustified segregation of persons in institutions is well designed to serve the important goals that Congress sought to further through the enactment of the ADA. In the text of the Act, Congress expressly stated that its goals "regarding individuals with disabilities" were to "assure" not only "equality of opportunity," but also "full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. 12101(a)(8). The Attorney General's integration regulation serves all those purposes, while petitioners' interpretation of Title II does not.

Indeed, as Congress knew, the isolation of persons with disabilities can breed fear and stereotypes about persons with disabilities, which in turn can generate additional discrimination that spills over into other areas, such as employment, public accommodations and transportation. See 42 U.S.C. 12101(5) (finding persistent discrimination in those areas); 42 U.S. 12101(a)(7) (finding that persons with disabilities face discrimination as a result of "the stereotypic assumptions"). The Attorney General properly recognized, as did Congress, that this cycle of discrimination could perpetuate itself indefinitely unless efforts were taken to increase interaction between persons with disabilities and non-disabled persons. The integration regulation promotes such interaction and thereby helps to erode the negative stereotypes that continue to impede equality of opportunity.

Prohibiting unjustified institutionalization thus goes hand-in-hand with all the other portions of the ADA, including the barrier-removal obligations, the reasonable accommodation requirements, and the prohibitions on denial of equal benefits and services. All those provisions promote the common objective of integrating persons with disabilities into the mainstream of society.

C. The Integration Regulation Does Not Intrude On The Professional Judgment Of State Treatment Professionals And Does Not Impose Undue Costs On the States

1. Petitioners mistakenly assert (Br. 38) that the integration regulation intrudes on the treatment decisions of the State's health professionals. The integration regulation does not require a State to provide a community placement when the State's treatment professionals determine that such a placement is not "appropriate," and that determination is based on a reasonable professional judgment that is not affected by extraneous considerations such as administrative convenience and costs. 28 C.F.R. 35.130(d); Youngberg v. Romeo, 457 U.S. at 323; Arline, 480 U.S. at 288 (1987). Petitioners' complaint that the integration regulation interferes with state treatment policy has a particularly hollow ring in this case, since the State's own treatment professionals determined that the placement of respondents in a community setting would be appropriate. See pp. , supra. And Georgia law expresses a preference for treatment in the most integrated environment appropriate. O.C.G.A. § 37-4-121. ("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").

2. Petitioners are similarly mistaken in their assertion (Br. 13) that the integration regulation imposes "massive costs" on the States. As we have noted, the integration mandate -- like other mandates of Title II(A) of the ADA -- does not apply when compliance would require an unreasonable change in state policy or a fundamental alteration in the nature of the State's treatment program. 28 C.F.R. 35.130(b)(7). Costs have a bearing on those inquiries. As the court of appeals concluded (Pet. App. 28a), if the costs of providing treatment in a community setting, rather than an institution were shown to be unreasonable in comparison to a State's overall mental health budget, a State would not be required to provide the treatment in a community setting. Cf. 42 U.S.C. 12111(10)(B) (factors for determining undue hardship under Title include cost and overall financial resources of the covered entity).[4]

Unsubstantiated claims of such costs, however, are no substitute for proof. Congress has expressed its understanding

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[4] In addition, it would be a fundamental alteration to require a State to create a new community-based program. For example, a State that has a community-based program to serve persons with mental retardation would not be required to create an entirely different program geared to the needs of mentally ill individuals who are not mentally retarded. A State, however, could be required to expand its existing community-based programs to serve additional eligible individuals to the extent that such an expansion did not require an unreasonable change in state policy or a fundamental alteration.

that community placements are less expensive, on average, than institutional care. S. Rep. No. 139, 97th Cong., 1st Sess. 481 (1981); S. Rep. No. 273, 101st Cong., 2d Sess. 7, 25-26 (1990). Numerous studies have confirmed the higher cost of institutional care on a per capita basis. U.S. Comm'n on Civil Rights, Accommodating the Spectrum of Individual Disabilities at 78 (1983) ("Virtually all the relevant literature documents that segregating handicapped people in large, impersonal institutions is the most expensive means of care. Evidence suggests that alternative living arrangements allowing institutionalized residents to return to the community can save money."). Petitioners also acknowledge that community-based care of persons with mental retardation is generally less expensive, on a per-patient basis, than institutional care. J.A. 84-85, 171. Georgia has estimated, for example, that it would cost \$30,000 to \$60,000 more per person per year to keep patients in a mental retardation institution instead of moving them to a community program and providing necessary support services. J.A. 171.

Moreover, in 1981, Congress enacted a Medicaid "waiver" program, which permits States to apply to HHS for a waiver of certain Medicaid rules in order to offer community-based services. See 42 U.S.C. 1396n(c). Under the program, the federal government provides between 50% and 83% of the total Medicaid costs for community-based care, the same federal contribution that is available for institutional care. 42 U.S.C. 1396d(b). As of 1996, at the States of Georgia's request, HHS had authorized matching funds for 2100 community placements. Georgia, however, used only 700 of the 2100 authorized "waiver slots." J.A. 93. When petitioners ultimately moved respondents to community placements, they used federal money from the Medicaid waiver program to offset a significant portion of the cost of such care. J.A. 161-164.

At the same time, we acknowledge that community placement may impose some costs on States. The federal government's experience in operating the Medicaid waiver program has revealed other costs that States may incur in the aggregate in moving patients from institutions to more integrated settings. To the extent that a State is unable to close or consolidate facilities, it may experience increased overall expenses by funding community placements without taking advantage of the savings associated with the closure of institutions. If a State is able to consolidate or close facilities in response to community placements, the State may still incur the transitional cost of operating institutions that are only partially full until the closure or consolidation can be completed. The fixed overhead costs involved in operating these facilities may negate the cost savings that States could otherwise achieve by treating persons in the community rather than in institutions. See Pet. App. 28a-29a; J.A. 171, 172. In addition, the availability of community placements may increase the aggregate demand for community services among those not currently in institutions, but who are on waiting lists or are otherwise eligible for long-term care services under the state-defined program. For example, persons eligible for treatment may not have sought it in the past because they were unwilling to receive it in an institution. The increased availability of community services may prompt such persons to seek treatment for the first time. See William Weissert & T. Lesnick, "Cost Savings From Home And Community Based Services: Arizona's Capitated Medicaid Long-Term Care Program," 22 Journal of Health Politics, Policy & Law 1337-1339, 1344 (1997); R. Kane, R. Kane & R. Ladd, The Heart Of Long-Term Care (1998).

Nonetheless studies dealing with the elderly suggest that those concerns can be anticipated and that it appears possible to design a community placement program that manages costs and need not produce unreasonable increases in the overall cost to the State of providing long-term care. Weissert, supra, at 1343, 1345-1347; R. Cane, supra, at 70-71; [J. Wiener & D.G. Stevenson, "State Long-Term Care Policy On Long-Term Care For The Elderly," 17(3) Health Affairs, 81-100 (1998)]. There is no reason to presume that States will not be up to the task.

Nothing in the ADA suggests that courts must ignore the States's legitimate administrative concerns in accomplishing the transition of eligible individuals from institutional to community-based care. The transfer of eligible patients from institutions to the community is a multifaceted process that sometimes cannot be accomplished all at once. Even when treating professionals have evaluated eligible patients and determined that a community setting is appropriate, States will need to locate proper community placements and determine which eligible patients should receive priority for available slots. In order to ensure that this occurs in an orderly fashion, States may appropriately adopt a plan that addresses various administrative issues, including the order in which eligible patients will be placed in the community, so as to proceed in an a systematic and prompt way. In determining whether a public entity has a fundamental alteration defense, a court may appropriately take into account whether the public entity has a adopted such a plan to achieve compliance with the ADA. If a State establishes that it has such a plan, that plan would serve as a valid defense in situations where a particular request for a community placement was inconsistent with the plan and responding to such a request and similar requests would so disrupt the orderly implementation of the as to constitute a fundamental alteration not required by the ADA.

Petitioners conceded below that the costs of treating respondents in the community "are, by definition, not unreasonable, nor could they 'fundamentally alter' the services provided by the State." J.A. 159. Petitioners contend, however, that the relevant inquiry is not the costs of providing community treatment to respondents, but the costs of providing treatment to all persons who desire such treatment. Petitioners argue (Br. 37-38) that the court of appeals erred in limiting the inquiry to the costs of providing treatment to respondents, but they are mistaken. If, as a result of this litigation or otherwise, many people now in institutions seek community treatment, the State may be able to show that cost considerations limit the number of persons to whom it can provide community treatment, and that to provide more would constitute an unreasonable modification of state policy or a fundamental alteration in the nature of the State's treatment program. Or if the State has an orderly transition plan for providing community placement within a reasonable period of time for all those persons for whom it would be appropriate, it may reasonably assert that quickening the pace or requiring it to jump particular individuals ahead of others would constitute an unreasonable modification of state policy or a fundamental alteration in the nature of the State's treatment program. But the record im this case shows neither a large number of applicants, creating an immediate need to prioritize among them, nor a transition plan that would be altered by providing relief to these two particular respondents. Therefore, the court of appeals appropriately directed the district court to focus on the costs of providing care to these particular respondents.

D. Petitioners' Remaining Arguments Are Unpersuasive

Petitioners offer a series of additional arguments intended to show that the Attorney General's integration regulation exceeds the authority conferred by Congress to implement the Title II mandate against discrimination based on disability. None is persuasive.

1. Petitioners first contend (Br. 22-29) that, prior to the enactment of the ADA, courts uniformly rejecting claims that Section 504 required placement of persons with disabilities in the community. Petitioners further contend that Congress intended to incorporate that settled interpretation when it enacted the ADA.

See Bragdon, 118 S. Ct. at 2208 ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."). The premise of petitioners' argument is incorrect: prior to the enactment of the ADA, there was no settled judicial understanding concerning whether Section 504 prohibited the unjustified segregation of persons with disabilities in institutions.

Petitioners rely (Br. 26) on several lower court decisions to support their view that there was a judicial consensus rejecting any right to community placement under Section 504. But of the six decisions cited by petitioners, three were decided after Congress enacted the ADA, P.C. v. McLaughlin, 913 U.S. 1033 (2d Cir. 1990); Jackson v. Fort Stanton Hospital & Training School, 757 F. Supp. 1243 (D.N.M. 1990), rev'd on other grounds, 964 F.2d 980 (10th Cir. 1992); People First of Tennessee v. Arlington Development Center, 878 F. Supp. 97 (M.D. Tenn. 1992)), and one of the cases did not decide the issue at all, S.H. v. Edwards, No. C81-877A (N.D. Ga. 1987 (reprinted at 860 F. 2d at 1046)). More important, petitioners ignore the decisions that held or assumed that Section 504 does require community placement in certain circumstances. Kentucky Ass'n for Retarded Citizens, Inc. v. Conn., 674 F.2d 582, 585 (6th Cir.), cert. denied, 459 U.S. 1041 (1982); Homeward Bound, Inc. v. Hissom Mem. Ctr. 1987 WL 27104, at *20-21 (N.D. Okla. 1987); Garrity v. Galen, 522 F. Supp. 171, 213-215 (D.N.H. 1981)'

Lynch v. Maher, 507 F. Supp. 1268, 1278-1280 (D. Conn. 1981); Halderman v. Pennhurst State Sch. & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1978). Thus, prior to the enactment of the ADA, the question whether Section 504 prohibited unjustified segregation of persons in institutions was an open one.

Traynor v. Turnage, 485 U.S. 535 (1988), relied upon by petitioners (Br. 23), does not suggest otherwise. That case held that Section 504 did not repeal a statute that prevented persons with a disability resulting from their own willful misconduct (in this case alcoholism) from using educational benefits provided by the GI bill after the statutory deadline. The Court found "nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons, also must be extended to other categories of handicapped persons." Id. at 549. Traynor [] does not remotely suggest that Section 504 permits the unjustified segregation of persons in institutions.

Petitioners are also incorrect in their assertion (Br. 28) that, prior to the enactment of the ADA, no federal administrative agency had interpreted Section 504 to prohibit segregation of persons in institutions. The Department of Justice argued in the Pennhurst litigation that, under certain circumstances, Section 504 would prohibit unnecessary institutionalization of persons with disabilities. See Brief for the United States at 36-45, in Halderman v. Pennhurst State School and Hosp., Nos. 78-1490, et al. (3d Cir. filed Oct. 2, 1978). Following this Court's decision in Davis, the Department again argued that Section 504 prohibits unnecessary institutionalization, but indicated that a State could not be required to create a new system of community facilities where none existed before. Brief for the United States in Halderman v. Pennhurst State School and Hosp., Nos. 78-1490, et al. (3d Cir. filed Oct. 14, 1981). The Department did not take any position on the question of a State's obligation under Section 504 to place persons in community settings after Alexander, 469 U.S. at 300-301 and Arline, 489 U.S. at 287 n.17 clarified the meaning of Davis. Because there was no settled judicial or administrative construction of Section 504 on the question presented in this case prior to the enactment of the ADA in 1990, the fact that Congress generally patterned Title II of the ADA on Section 504 has no significance here.

2. Petitioners contend (Br. 31) that the Attorney General's interpretation of Title II conflicts with the Medicaid Act, because that Act establishes a preference for care in institutions rather than the community. The Medicaid Act, however, provides a mechanism by which States may obtain waivers to treat persons in the community, and it has been the policy of the Department of Health and Human Services (HHS) to encourage States to take advantage of that waiver program. Indeed, HHS often approves more waiver slots than a State requests. For example, as we have noted, HHS approved 2100 waiver slots for Georgia, but Georgia used only 300. In any event, nothing in the Medicaid prevents the State from fulfilling its obligations under Title II. To the extent that the State is unable to obtain funding under the Medicaid Act to serve

all those who are eligible for treatment in the community, it may use its own resources for that purpose.

Petitioners also contend (Br. 31) that Title II conflicts with the Medicaid Act[] because the Medicaid Act does not provide funding for the community placement of persons who prefer institutional care. Neither Title II nor the Attorney General's regulations, however, require[] a State to treat an individual in the community if that individual prefers treatment in an institution. See 42 U.S.C. 12201(d); 28 C.F.R. 35.130(e)(1).

Petitioners also err (Br. 32) in attributing "great weight" to Congress's failure to pass legislation that would have made the treatment of persons in the community a requirement for receiving Medicaid funds. That legislation would have gone significantly beyond the requirements in Title II and the integration regulation. More fundamentally, failed legislative proposals do not provide a sound basis for determining the meaning of another statute. Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 187 (1994). The Constitution requires Congress to express its will through enacted bills, not through unenacted ones. INS v. Chadha, 462 U.S. 919, 945-959 (1983). Congressional inaction also "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." Central Bank, 511 U.S. at 187.

2. Petitioners contend[] (Pet. Br. 32-33) that the Attorney General's interpretation of the integration regulation is inconsistent with the "clear statement" rule set forth in Gregory

v. Ashcroft, 501 U.S. 452 (1991), In that case, the Court refused to construe ambiguous language in the Age Discrimination in Employment Act to require States to alter their practices concerning when state judges must retire. The Court relied on a canon of statutory construction that, absent an "unmistakably clear" expression of intent to "alter the usual constitutional balance balance between the States and the Federal Government," a court should interpret a statute to preserve rather than destroy the States' "substantial sovereign powers." 501 U.S. at 460-461. Gregory is applicable here for three reasons.

First, contrary to petitioners' understanding (Br. 33), the Gregory clear statement rule does not apply simply because a proposed interpretation of a federal statute would affect "an area traditionally regulated by the States." City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 732 n.5 (1995) (refusing to apply a clear statement rule to decide whether the Fair Housing Act applies to zoning restrictions that limit the number of unrelated persons that can occupy a home in a residential community). The clear statement rule applies only when the proposed interpretation would implicate "'a decision of the most fundamental sort for a sovereign entity.'" Ibid. The present case does not implicate the type of core sovereignty concerns that were at issue in Gregory. Instead, it is much more akin to the kind of imposition on traditional state functions at issue in City of Edmonds.

Second, Gregory's clear statement rule is merely "a rule of statutory construction to be applied where statutory intent is ambiguous." 501 U.S. at 470; Salinas v. United States, 118 S. Ct. 469, 475 (1997). As explained above, Congress's findings concerning "segregation" and "institutionalization" reflect Congress's clear understanding that the unjustified segregation of persons in institutions constitutes a form discrimination based on disability. And Congress's instruction to the Attorney General in 42 U.S.C. 12134, in essence, required the Attorney General to adopt an integration regulation covering all services provided by public entities, including the type of treatment services offered by petitioners in this case. Because there is no ambiguity with respect to Congress's intent on the question presented in this case, the Gregory clear statement rule does not apply.

Finally, even assuming that Congress's intent is ambiguous, Congress directed the Attorney General to issue regulations that would resolve any ambiguities on the scope of Title II's nondiscrimination prohibition. 42 U.S.C. 12134. Since the clear statement rule is nothing more than an aid to resolving Congress's intent on an issue, that rule is inapplicable when Congress expressly delegates authority to an administrative agency to give content to a general statutory prohibition. cf. Fidelity Fed. Sat. & Loan Assen v. De La Cesta, 458 U.S. 141, 154 (1982) (agency acting within the scope of its delegated authority may preempt state law, even though a court acting on its own would not conclude that Congress preempted state law unless Congress clearly manifested such an intent).

3. Petitioners' reliance (Br. 33-35) on Pennhurst State

School and Hospital v. Halderman, 451 U.S. 1 (1981) is also misplaced. The statutory provision at issue there stated that treatment "should be provided in the setting that is least restrictive of the person's personal liberty." 42 U.S.C. 6010(2) (1976 & Supp. III 1979) (emphasis added). In the absence of any clear indication that Congress intended through that language to impose a mandatory obligation on the States, the Court held that the provision was merely precatory. 451 U.S. at 19. By contrast, Title II of the ADA, 42 U.S.C. 12132, provides that "no qualified individual with a disability shall, by reason of such disability * * * be subjected to discrimination by any [state] entity." (emphasis added). And the integration regulation provides that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d) (emphasis added). "The contrast between the congressional preference at issue in Pennhurst and the antidiscrimination mandate of [Title II and the integration regulation] could not be more stark." Arline, 480 U.S. at 286 n.15. Pennhurst is therefore inapplicable here. Arline, 480 U.S. at 286 n.15 (holding that Pennhurst is not applicable to statutes, like Section 504, that clearly mandate action).

4. Finally, petitioners assert (Br. 44) that the Attorney General's interpretation should be rejected in order to avoid the constitutional question whether Title II as so construed would congressional authority under Section 5 of the Fourteenth

Amendment. Pet. Br. 44. The principle that a statute should be construed to avoid constitutional doubt is only implicated, however, when the statute is genuinely ambiguous. Salinas, 118 S. Ct. at 475. For the reasons we have given, there is no such ambiguity here.

In any event, the prohibition against unjustified segregation of persons in institutions readily satisfies constitutional standards. Legislation will be upheld as a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment if there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." City of Boerne v. Flores, 117 S. Ct. 2157, 2164 (1997). The integration mandate of Title II readily satisfies that test.

Irrational and invidious discrimination on the basis of disability violates the Equal Protection Clause. Cleburne, supra. Moreover, this Court in Cleburne recognized that "irrational prejudice," 473 U.S. at 450, "irrational fears," id. at 455 (Stevens, J.), and "impermissible assumptions or outmoded and perhaps invidious stereotypes," id. at 465 (Marshall, J.) existed against persons with disabilities and, at times, infected governmental decisionmaking. Congress similarly found that discrimination against persons with disabilities persists in many contexts and that such discrimination is often the product of impermissible stereotypes and misconceptions. 42 U.S.C. 12101(a)(2), (3), (5), and (7).

The integration regulation is a measured response to the discrimination identified by Congress. It is designed to increase the interaction between persons with disabilities and their non-disabled counterparts, thus hastening the breakdown of the stereotypes that have impeded full equality. The regulation also serves as a prophylactic safeguard against intentionally discriminatory efforts to exclude persons with disabilities from residential communities. Cf. Katzenbach v. Morgan, 384 U.S. 641, 654 (1966). At the same time, the regulation is carefully crafted to avoid undue burdens on the States. It requires public entities to serve persons with disabilities in integrated environments, including community programs, only when such settings are appropriate for the needs of such individuals and only if such placements do not require an unreasonable change in policy or a fundamental alteration in the nature of a State's program. The Title II integration mandate is therefore well within Congress's power under Section 5 of the Fourteenth Amendment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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