No. 98-536

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

OLMSTEAD,

Petitioner,

v.

L.C. ex rel. Zimring, *et. al.*,

Respondent.

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

**BRIEF *AMICUS CURIAE* OF
THE NATIONAL COUNCIL ON DISABILITY
IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. PROHIBITING UNNECESSARY ISOLATION AND SEGREGATION OF INDIVIDUALS WITH DISABILITIES IN TREATMENT AND HABILITATION PROGRAMS WAS A KEY COMPONENT OF THE ORIGINAL ADA PROPOSAL DEVELOPED BY *AMICUS* 5

A. The National Council on Disability and the Origins of the ADA 5

B. Conceptual Underpinnings of the Integration Mandate of the ADA 8

II. THE ADA PROHIBITS UNNECESSARY ISOLATION AND SEGREGATION OF INDIVIDUALS WITH DISABILITIES IN TREATMENT AND HABILITATION PROGRAMS 15

A. The Statutory Language of the ADA 15

B. The Legislative History 19

C. ADA Regulations 25

III. CONCLUSION 26

TABLE OF AUTHORITIES

Cases **Pages**

Alexander v. Choate, 469 U.S. 287 (1985) ..... [13]

Bragdon v. Abbott, 118 S.Ct. 2196 (1998) .....[4, 26]

Campbell v. Greer, 831 F.2d 700 (7th Cir. 1987) .....[20]

Chevron, U.S.A., Inc. v. Nuclear Regulatory Defense Council, Inc., 467 U.S. 837 (1984) .....[4, 25, 26]

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) .....[14]

Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) .....[20]

Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989). .....[20]

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) .....[20]

In re Marriage of Carney, 598 P.2d 36 (Cal. 1979) .....[13]

Pennsylvania Dept. of Corrections v. Yeskey, 118 S.Ct. 1952 (1998) .....[4, 18, 19, 25]

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) .....[19]

STATUTES

The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* (1994) .....*passim*

29 U.S.C. § 781 (1994) .....[1, 5]

42 U.S.C. § 12101(a)(2) (1994) .....[3]

42 U.S.C. § 12101(a)(3) (1994) .....[4, 18]

42 U.S.C. § 12101(a)(7) (1994) .....[16]

42 U.S.C. § 12101(a)(8) (1994) .....[3, 16, 19]

Pages

42 U.S.C. § 12101(a)(9) (1994) .....[17]

42 U.S.C. § 12101(b)(1) (1994) ..... [4, 19]

42 U.S.C. § 12131(1)(A) (1994) .....[18]

42 U.S.C. § 12131(1)(B) (1994) .....[18]

42 U.S.C. § 12132 (1994) .....[4, 17, 18]

42 U.S.C. § 12134(a) (1994) .....[3, 17, 25]

42 U.S.C. § 12134(b) (1994)..... [3, 17, 25]

Pub. L. No. 98-221, tit. I, § 142, 98 Stat. 27 (1984) (codified as amended at 29 U.S.C. § 781) .....[5]

Pub. L. No. 100-630, tit. II, § 205(a), 102 Stat. 3310 (1988) .....[5]

REGULATIONS

28 C.F.R. § 35.130(d) (1998) .....[4, 25, 26]

28 C.F.R part 41 ..... [17, 25]

28 C.F.R. § 41.51(d) (1998)..... [4, 17, 25]

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H.R. 4498, 100th Cong. 2d Sess. (1988) .....[7]

S. 2345, 100th Cong., 2d Sess., 134 CONG. REC. 9379-9382 (1988) .....[7]

H.R. REP. NO. 101-485 pt. 2 (1990) (Committee on Education and Labor), *reprinted in* 1990 U.S.C.C.A.N. 303 .....[17, 21, 22]

H.R. REP. NO. 101-485 pt. 3 (1990) (Committee on the Judiciary), *reprinted in* 1990 U.S.C.C.A.N. 445..... [20, 21, 22, 28]

S. REP. NO. 101-116 (1989) .....[17, 20, 21, 22]

117 CONG. REC. 45,974 (1971) (statement of Rep. Vanik) .....[13]

Pages

118 CONG. REC. 526 (1972) (statement of Sen. Percy)..... [13]

134 CONG. REC. 9375 (1988) (statement of Sen. Weicker) .....[17, 21]

134 CONG. REC. 9599 (1988) (statement of Rep. Coelho) .....[7]

135 CONG. REC. 8505 (1989) (statement of Sen. Harkin) .....[17, 21, 22]

135 CONG. REC. 8514 (1989) (statement of Sen. Kennedy) ..... [24]

135 CONG. REC. 19800 (1989) (statement of Sen. Harkin) [21, 23]

135 CONG. REC. 19878 (1989) (statement of Sen. Chafee) .....[21]

136 CONG. REC. 10868 (1990) (statement of Rep. Edwards) .....[21,22]

136 CONG. REC. 10872 (1990) (statement of Rep. Weiss) .....[21]

136 CONG. REC. 10877 (1990) (statement of Rep. Miller) .....[24]

136 CONG. REC. 11467 (1990) (statement of Rep. Dellums) .....[24]

Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcommittee on Select Education of the House Committee on Education and Labor, 100th Cong. (1988).....[22,23]

Americans with Disabilities Act of 1989: Hearing on S. 933 Before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped, 101st Cong. (1989) .....[24]

OTHER AUTHORITIES

RICHARD ALLEN, LEGAL RIGHTS OF THE DISABLED AND DISADVANTAGED (1969) .....[10]

Pages

ROBERT L. BURGDORF JR., THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS, AND TEXT (1980) .....[11]

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Harlan Hahn, *Paternalism and Public Policy*," 20 SOCIETY No. 3, 36 (March/April 1983) .....[11]

Leonard Kriegel, *Uncle Tom and Tiny Tim: Some Reflections on the Cripple As Negro*, 38 AM. SCHOLAR 412 (1969) .....[10]

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National Conference of State Legislatures, *Saving Medicaid Money*: *From Institutions to Community Care*, 25 STATE LEGISLATURES 7 (February 1999) .....[28]

NATIONAL COUNCIL ON DISABILITY, ACHIEVING INDEPENDENCE: THE CHALLENGE FOR THE 21ST CENTURY (1996) .....[27, 28]

NATIONAL COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT (1997) .....[7]

NATIONAL COUNCIL ON THE HANDICAPPED, ON THE THRESHOLD OF INDEPENDENCE (Andrea H. Farbman ed., 1988) .....[6, 7, 15, 17]

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Joseph P. Shapiro, No Pity (1993) .....[9]

Pages

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BRIEF *AMICUS CURIAE* OF THE NATIONAL COUNCIL ON DISABILITY IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

This brief amicus curiae is filed, pursuant to consents of the parties filed with the Clerk,[1] on behalf of the National Council on Disability. The Council is an independent federal agency comprised of 15 members appointed by the President of the United States and confirmed by the U.S. Senate. Pursuant to its statutory mandate, 29 U.S.C. § 781 (1994), the Council is charged with reviewing federal laws, regulations, programs, and policies affecting people with disabilities to assess the effectiveness of such laws, regulations, programs,

[1] Pursuant to this Court's Rule 37.6, none of the parties authored this brief in whole or in part and no one other than amicus or counsel contributed money or services to the preparation and submission of this brief.

and policies in meeting the needs of individuals with disabilities, and making recommendations to the President, the Congress, officials of federal agencies, and other federal entities, regarding ways to better promote equal opportunity, economic self-sufficiency, independent living, and inclusion and integration into all aspects of society for Americans with disabilities.

The Council plays a major role in developing disability policy in America, and, in 1986, first proposed the concept of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* (1994), the statute at issue in this case. In 1988, the Council developed the original ADA bill that was introduced in the 100th Congress. Congress relied on and acknowledged the influence of the Council and its reports during congressional consideration and passage of the ADA; members and staff of the Council testified at congressional hearings on the legislation. Under its current statutory mandate, the Council is responsible for gathering information about the implementation, effectiveness, and impact of the ADA. The Council is thus intensely interested in ensuring that the ADA is implemented in a manner consistent with the purposes for which it was proposed. It is also uniquely qualified to provide the Court with information about the background and framing of the ADA, implementation of the Act, and other information concerning policy issues affecting persons with disabilities. The Council is also particularly concerned with and uniquely informed about the central issue in this case -- the integration of individuals with disabilities in the community, and, since the enactment of the ADA, has continued to assess and report on progress in regard to this critical issue.

SUMMARY OF ARGUMENT

Amicus articulated the need for an Americans with Disabilities Act (ADA) and drafted the original ADA bill in response to statutory mission statements that directed it to

assess the effectiveness of federal laws, regulations, programs, and policies in meeting the needs of individuals with disabilities, and to make recommendations to the President and the Congress regarding ways to better promote inclusion and integration into all aspects of society for Americans with disabilities. Consequently, prohibiting unnecessary segregation and isolation of people with disabilities in various contexts, including state and local government facilities that provide treatment and habilitation services, was a central concern of the ADA proposal from its inception. This concern was reflected in express terms at each step of *amicus*'s efforts to call for an ADA, to draft an ADA bill, to get it introduced in Congress in 1988, and to participate actively in efforts in 1989 and 1990 to revise the legislation and ultimately have it enacted.

Amicus's efforts in regard to the ADA, the conceptual underpinnings of the Act, the legislative history, the language of the ADA, and the relevant federal regulations are all in agreement regarding certain major principles that are critical to the present case: First, that *unnecessary isolation and segregation of persons with disabilities is a form of discrimination with serious negative effects*. This principle is recognized in the ADA statutory finding that "historically, society has tended to isolate and segregate individuals with disabilities, and ... such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2) (1994). Second, that *integration of people with disabilities is a basic and vital objective*. This principle is embraced in the ADA's identification of "full participation" as one of "the Nation's proper goals regarding individuals with disabilities." *Id.*, § 12101(a)(8).

Third, that *Title II requires state and local governments and their instrumentalities to provide services in the most integrated setting appropriate to the needs of individuals with disabilities*. This is accomplished in Title II provisions that direct the Attorney

General to promulgate regulations to delineate forms of discrimination prohibited, which are to be consistent with a specific set of prior regulations. 42 U.S.C. §§ 12134(a) & (b) (1994). The referenced regulations include a specific requirement that services are to be provided in "the most integrated setting appropriate." 28 C.F.R. § 41.51(d) (1998). Accordingly, the ADA Title II regulations promulgated by the Attorney General in July 1991 declare in clear and specific language: "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) (1998). Pursuant to the analysis in *Chevron, U.S.A., Inc. v. Nuclear Regulatory Defense Council, Inc.*, 467 U.S. 837, 844 (1984) and *Bragdon v. Abbott*, 118 S.Ct. 2196, 2209 (1998), these regulations qualify for judicial deference and are to be given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Fourth, that *the prohibitions of discrimination in Title II of the ADA apply to all services, programs, and activities of state or local governments or their instrumentalities, including treatment and habilitation services for people with disabilities*. This principle is reflected in the plain meaning of Title II of the ADA's application to "the services, programs, or activities of a public entity," stated without any exception. 42 U.S.C. § 12132 (1994). It is underscored by the construction accorded these terms in *Pennsylvania Dept. of Corrections v. Yeskey*, 118 S.Ct. 1952 (1998). It is further buttressed by the ADA's stated purpose of providing a "comprehensive national mandate for the elimination of discrimination." 42 U.S.C. § 12101(b)(1) (1994). This principle is made manifestly clear in the congressional findings establishing the factual foundation for the ADA by the finding that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization," *id.*, § 12101(a)(3), and by unambiguous statements in the legislative history.

The plain language of the statute, its legislative history, its conceptual origins and pre-legislative history, the

implementing regulations, and the applicable judicial precedents all point to the same conclusion -- that Title II of the ADA requires state and local governments and their instrumentalities to provide treatment and habilitation services in the most integrated setting appropriate. In addition to all the legal signposts proclaiming such a requirement, *amicus* attests that it was, and is, good policy for individuals with disabilities and for the nation.

ARGUMENT

I. Prohibiting Unnecessary Isolation and Segregation of Individuals with Disabilities in Treatment and Habilitation Programs Was a Key Component of the Original ADA Proposal Developed by *Amicus*.

A. The National Council on Disability and the Origins of the ADA

The Americans with Disabilities Act originated as a proposal of *amicus* the National Council on Disability.[2] The statutory authorization of the Council expressly directed it to review Federal laws and programs affecting persons with disabilities and to assess the extent to which they "provide incentives or disincentives to the establishment of community-based services for handicapped individuals, promote the full integration of such individuals in the community, in schools, and in the workplace, and contribute to the independence and dignity of such individuals." Pub. L. No. 98-221, tit. I, § 142, 98 Stat. 27 (1984) (codified as amended at 29 U.S.C. § 781).

Based upon such assessment, the Council was charged, *inter alia*, with issuing, by February 1986, a report to the president and Congress analyzing federal laws and programs

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[2] The Council was initially named the National Council on the Handicapped. Its name was changed to the National Council on Disability in 1988. Pub. L. No. 100-630, tit. II, § 205(a), 102 Stat. 3310 (1988).

and presenting legislative recommendations to address shortcomings identified. *Id.* In response to this statutory mandate, the Council published a report to the president and Congress in January 1986. NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE (1986) (hereinafter TOWARD INDEPENDENCE). In the report, the Council presented 45 legislative recommendations in 10 broad topic areas. The first recommendation was that

> Congress should enact a comprehensive law requiring equal opportunity for individuals with disabilities, with broad coverage and setting clear, consistent, and enforceable standards prohibiting discrimination on the basis of handicap.
>
> TOWARD INDEPENDENCE at 18.

The Council suggested that the proposed statute should be named the Americans with Disabilities Act. *See id.* at 18.

Subsequent recommendations in the report described what should be included in such a statute. *See id.* at 19–21. These recommendations spotlighted the importance of integration as an integral component of prohibiting and eliminating discrimination on the basis of disability; the Council proclaimed bluntly that "[d]iscrimination should be defined to include: a) Intentional exclusion; b) Unintentional exclusion; c) Segregation . . ." *Id.* at 19, Recommendation 3, and App., p. A-52 (same).

In describing the need for such legislation, *amicus* noted persisting discrimination, "in such critical areas as . . . institutionalization . . . ." *Id.*, App. at A-3, quoting U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 159 (1983) [hereinafter ACCOMMODATING THE SPECTRUM] Elsewhere in TOWARD INDEPENDENCE, *amicus* complained of "the unnecessary and expensive institutionalization" of individuals with disabilities. TOWARD INDEPENDENCE at 37. *Amicus* also called for "community-based

independent living support services" as a cost-efficient alternative to large, isolated institutions. *Id.*, App. at G-3.

In the Council's 1988 follow-up report, ON THE THRESHOLD OF INDEPENDENCE, the Council fleshed out its concept of the ADA by publishing its own draft bill. NATIONAL COUNCIL ON THE HANDICAPPED, ON THE THRESHOLD OF INDEPENDENCE 27–39 (Andrea H. Farbman ed., 1988). The draft bill included a finding that "segregation" is one of the "forms of discrimination." *Id.* at 27, § 2(a)(4). It also included the Council's statements of proposed congressional findings, including that "society has tended to isolate and segregate persons with disabilities" both historically and on a continuing basis; and that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization." *Id.* at 27, §§ 2(a)(2) & (3).

With a few changes not relevant here,[3] the Council's draft bill was introduced in the Senate April 28, 1988, and in the House of Representatives on April 29, 1988. S. 2345, 100th Cong., 2d Sess., 134 CONG. REC. 9379-9382 (1988); H.R. 4498, 100th Cong. 2d Sess.; *see* 134 CONG. REC. 9599-9600 (1988) (statement of Rep. Coelho). The ADA eventually was enacted in the following Congress, after numerous congressional hearings, and considerable negotiations, compromises, and revisions. As subsection II.A below indicates, the final language of the ADA enacted into law in 1990 retained the central focus on integration and the prohibition of unnecessary isolation and segregation in services for individuals with disabilities that had characterized the Council's version.

Based upon a great quantity of statistical information about the numbers of persons with disabilities receiving treatment and

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[3] The nature of such changes and the circumstances surrounding the Council's decision to agree to the changes is described in NATIONAL COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT 64-66 (1997).

habilitation services in institutions and other settings, and cost data presented at various places in TOWARD INDEPENDENCE,[4] *amicus* decried "the costly institutionalization of persons with disabilities," and advocated for "community-based" services. *Id.*, App. at F-2, G-1. *See also id.* at 37 ("unnecessary and expensive institutionalization"). Synthesizing its cost analysis, *amicus* declared: "The question at hand, then, is not one of limited resources; it is one of orientation, priority reassessment, and funding reallocation to support community-based independent living services. *Id.*, App. at G-40.

At all times leading up to, during, and after developing its ADA proposal, the Council has understood integration as an inherent and indispensable element of prohibiting discrimination on the basis of disability.

B. Conceptual Underpinnings of the Integration Mandate of the ADA

The ADA did not suddenly emerge fully formed like Athena from the head of Zeus. The Council's crafting of the proposed legislation and later congressional revisions of the statutory language were informed by a conceptual framework that had developed over the years and decades that preceded it.

One of the earliest formulations of what has since come to be known as "disability rights" in America appeared in two law review articles published in 1966 by Jacobus S. tenBroek, a blind professor of political science and a distinguished legal and constitutional scholar. The first article outlined two basic approaches that a society can take regarding its citizens with disabilities: custodialism or integration:

> The older custodial attitude is typically expressed in policies of segregation and shelter, of special treatment and separate institutions. The newer integrative approach focuses attention upon the

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[4] *See id.* App at G-4, F-31, G-34 to G-40.

> needs of the disabled as those of normal people caught at a physical and social disadvantage. Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 816 (1966).[5]

Noting that integration emphasizes people with disabilities' "potential for full participation as equals in the social and economic life of the community" and "maximize[s] similarity, normality, and equality," tenBroek concluded that it was both the more equitable and the more practical option. *Id.* at 815, 816, 822, 824, 833–35. In the second article, tenBroek reiterated the endorsement of integration over custodialism, and went on to posit that people with disabilities have legal and constitutional rights and to argue that artificial barriers that keep such individuals from moving about in society, and thus prevent integration, are illegal. Jacobus tenBroek, *The Right to Live in the World: The Disabled and the Law of Torts*, 54 CAL. L. REV. 841, 842-43, 847-52, 912-18 (1966). TenBroek's ideas — the choice between custodialism and integration, and the legal system's role in protecting the rights of individuals with disabilities — accurately framed the issues that would later be addressed by what came to be termed "the disability rights movement." *See, e.g.*, JOSEPH P. SHAPIRO, NO PITY 5, 11, 13 (1993).

TenBroek envisioned unnecessarily segregated treatment institutions as the epitome of the evil that integration seeks to eliminate. The very term "custodialism" imparts a concept of unnecessarily segregated confinement. TenBroek described "policies of segregation and shelter, of special treatment and special institutions" as characteristic expressions of custodialism.[6] His concept of "the right to live in the world"

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[5] The U.S. Commission on Civil Rights has described this article as "seminal." Accommodating the Spectrum at 67.

[6] Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 816 (1966).

is directly opposed to being forced to live outside the world, *i.e.*, in an unnecessarily isolated and segregated setting; and he specifically referred to unnecessary confinement of individuals with disabilities to "asylums" and "institutions" as violations of "personal liberty" and contrary to the policy of integrationism.[7] To address the prevalent overly custodial practices, tenBroek proclaimed "Integrationism the Answer."[8]

In 1969, commentators suggested that the civil rights efforts of African Americans during the 1960s provided a possible model for people with disabilities in their efforts to achieve equality and integration in American society;[9] the critical focus upon requiring integration and eliminating segregation in this prototype is obvious. One of these publications dramatized the problems facing individuals with disabilities by describing a "Catalog of Horrors" featuring examples predominantly involving residential treatment facilities.[10] It went on to examine in some detail deprivations of rights resulting from "institutionalization" and "treatment in residential care facilities" for persons with mental retardation, "mental illnesses," and physical disabilities.[11] The author characterized some societal practices of relegating individuals with disabilities unnecessarily to such facilities as "put[ting] folks away in human warehouses."[12] As a remedy for such unnecessarily segregative practices, he advocated

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[7] Jacobus tenBroek, *The Right to Live in the World: The Disabled and the Law of Torts,* 54 CAL. L. REV. 841, 848-51, 847-48 (1966).

[8] *Id.* at 843.

[9] RICHARD ALLEN, LEGAL RIGHTS OF THE DISABLED AND DISADVANTAGED 79–98 (1969); Leonard Kriegel, *Uncle Tom and Tiny Tim: Some Reflections on the Cripple As Negro,* 38 AM. SCHOLAR 412 (1969).

[10] Richard Allen, Legal Rights of the Disabled and Disadvantaged 2–3 (1969).

[11] *Id.* at 11, 13-20, 32-37, 48-54-55.

[12] *Id.* at 37 (internal quotation marks omitted).

"normalization," a concept he defined as "to let the [person with a disability] obtain an existence as close to the normal as is possible" and called for it to be recognized as a legal right, citing tenBroek's writings.[13]

The first law school case book on the rights of people with disabilities, published in 1980, compiled cases and materials concerning discrimination involving almost every facet of life in the United States. ROBERT L. BURGDORF JR., THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS, AND TEXT (1980). The author summed up the "history of society's formal methods for dealing with [people with disabilities]" as "segregation and inequality," and observed that "[i]ndividuals with [disabilities] have faced an almost universal conspiracy to shunt them aside from the mainstream of society . . . . *Id.* at 51.[14] More than 100 pages of the book addressed the problems of unnecessary confinement of people with disabilities in state residential treatment facilities, including a section on community alternatives containing legal arguments for more integrated treatment and habilitation programs. *Id.* ch. 6, pp. 599-701 (1980).

The first comprehensive study by an agency of the U.S. government of discrimination faced by people with disabilities

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[13] *Id.* at 7-8; *id.* at 54-55, referring to tenBroek, *The Right to Live in the World: The Disabled and the Law of Torts,* 54 CAL. L. REV. 841 (1966). The bracketed phrase "person with a disability" is substituted in the text for the phrase "handicapped person" used in the original. This change substitutes currently preferred terminology in accordance with the preference of most individuals with disabilities and consumer organizations of persons with disabilities. Similar changes, identified in brackets, are made throughout this brief; these substitutions impart no difference in meaning of quoted materials.

[14] See also Harlan Hahn, Paternalism and Public Policy," 20 Society No. 3, 36, 38 (March/April 1983) ("the history of disabled persons in America and elsewhere has been primarily a history of segregation and discrimination").

and the laws addressing discrimination occurred in 1983 with the U.S. Commission on Civil Rights' publication of its influential report ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES. This report provided both a summary of case law and a conceptual framework for understanding and addressing discrimination on the basis of disability. As one of its findings, the U.S. Commission on Civil Rights declared:

> Historically, society has tended to isolate and segregate [people with disabilities]. Despite some improvements, particularly in the last two decades, discrimination against [persons with disabilities] continues to be a serious and pervasive social problem.
>
> *Id.* at 159.

The Commission also found that discrimination against persons with disabilities "persists in such critical areas as ... institutionalization ...." *Id.* It identified 21 major issue areas, described as "not exhaustive," in which people with disabilities suffer discrimination. *Id.* at 165–68. Among these issues, the Commission included "Institutions and Residential Confinement" and included as particular problem areas "large-scale institutions," "[d]enormalization," and the "[a]bsence of community alternatives." *Id.* at 166. The Commission fleshed out its outline of such issues in a specific section titled "Institutionalization" in a chapter on types of discrimination on the basis of disability. *Id.* at 32-35. The Commission observed that "even the better institutions suffer the ill effects of segregation" and that "[i]nstitutionalization almost by definition entails segregation and isolation." *Id.* Indeed, the desire to segregate people with disabilities from the rest of society was an express goal for the development of such facilities. *Id.* at 33-34. The Commission concluded that, despite "the fact that most training, treatment, and habilitation services can be better provided to [persons with disabilities] in small community-based facilities rather than in large, isolated institutions," a great many individuals with disabilities "remain in segregative facilities." *Id.* at 34-35.

The Commission devoted a major section of a chapter of ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES to examining "The Costs and Benefits of Full Participation" including a specific section on "Institutionalization." *Id.* at 69-82; 78-79. Before beginning such analysis, the Commission cautioned, however, that cost considerations should not be a determinative criterion for laws prohibiting discrimination: "Many such initiatives, particularly civil rights laws proscribing discrimination against [people with disabilities] can be justified as a matter of simple equity and basic human rights to which cost should not be used as an excuse. Generally, the cost of eliminating discriminatory practices does not justify continuing to discriminate . . . ." *Id.* at 69. The Commission also noted that "[p]rojected costs have frequently proven to be overestimated and contrary to common sense and practicality." *Id.* at 70. The Commission's conclusions about costs associated with treatment and habilitation facilities, however, are unequivocal:

> Virtually all the relevant literature documents that segregating [people with disabilities] 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.
>
> *Id.* at 78.

To respond to the various forms of discrimination, the Commission on Civil Rights called for the "full participation or total integration" of people with disabilities, and invoked federal nondiscrimination laws that "prohibit conduct, policies, and practices that currently exclude, segregate, or impede" people with disabilities. *Id.* at 68, 160, 164. The Commission quoted a 1979 decision in which the California Supreme Court observed that "[b]oth the state and federal governments now pursue the commendable goal of total integration of [persons with disabilities] into the mainstream

of society." *In re Marriage of Carney*, 598 P.2d 36, 44 (Cal. 1979); *see* ACCOMMODATING THE SPECTRUM at 68.

In *Alexander v. Choate*, 469 U.S. 287 (1985), this Court, in applying Section 504 of the Rehabilitation Act of 1973, recognized the existence of "well-cataloged instances of invidious discrimination against [persons with disabilities]," in addition to discrimination against such individuals that is the product "of thoughtlessness and indifference -- of benign neglect." *Id.* at 295-96 and n. 12. The Court also quoted congressional declarations that discrimination against people with disabilities is one of America's "shameful oversights" that causes individuals with disabilities "to live among society `shunted aside, hidden, and ignored ...'" *Id.* at 295-6 (quoting 117 CONG. REC. 45,974 (1971) (statement of Rep. Vanik); 118 CONG. REC. 526 (1972) (statement of Sen. Percy)). This vision of discrimination as the "shunting aside" of people with disabilities makes it clear why segregation and unnecessary separation from the rest of society are the essential evils that disability nondiscrimination laws are designed to prohibit.

In separate opinions in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), five justices acknowledged the history of severe and "grotesque" discrimination visited upon people with mental retardation because of prejudice against them. *Id.* at 454 (Stevens, J., joined by Burger, C.J., concurring) ("history of unfair and often grotesque mistreatment" arising from "prejudice and igorance"); *id.* at 461 (Marshall, J., joined by Brennan & Blackmun, JJ., concurring in part and dissenting in part) ("subject to a lengthy and tragic history of segregation and segregation that can only be called grotesque" (internal quotation marks and citation omitted)). In his partial dissent, Justice Thurgood Marshall also wrote of a "regime of state-mandated segregation and degradation." *Id.* at 462. He also observed that "[m]assive custodial institutions were built to warehouse the retarded for life," and that "lengthy and continued isolation . . . has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them." *Id.* at 462, 464.

This conceptual background, in which discrimination against people with disabilities was recognized as a serious problem, unnecessary segregation of people with disabilities was considered the essence of discrimination, and relegation of people with disabilities to unnecessarily isolated and segregated institutions was seen as an extreme form of such discrimination, colored the framing of the ADA proposal by *amicus* the National Council on Disability and the crafting and enacting of the legislation by the Congress. *Amicus*'s proposal of an ADA was strongly influenced by this conceptual background, including, particularly, the U.S. Commission on Civil Rights' report ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES. In its TOWARD INDEPENDENCE report and its draft ADA bill, *amicus* incorporated the Commission's findings that "society has tended to isolate and segregate persons with disabilities," that "discrimination against persons with disabilities persists in such critical areas as . . . institutionalization . . ."; and that "every day, people with disabilities encounter various forms of discrimination, including . . . segregation . . . ." TOWARD INDEPENDENCE, App. at A-3; ON THE THRESHOLD OF INDEPENDENCE, at 27, §§ 2(a)(2), (3), & (4).

Amicus also quoted tenBroek's articulation of the distinction between "custodial" and "integrative" approaches to disability, TOWARD INDEPENDENCE, App. at A-2, and recounted the Commission on Civil Rights' conclusion that "government bodies at all levels of modern American society have, with relative consistency, chosen full participation as the desired objective for people with disabilities." *Id.*, citing ACCOMMODATING THE SPECTRUM 67-69.[15]

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[15] In addition to discussing federal endorsements of the integrative or full participation approach, the Commission's report noted that many state laws incorporate similar language. *See id.* at 68 n.7. The integrative approach has been expressly adopted in United Nations declarations, in court decisions, and by the disability community and business leaders. *See, e.g.*, *id.* at 68–69. *See also* Mark E. Martin, Note, *Accommodating*

This societal objective was incorporated in *amicus*'s proposed ADA bill in the form of a finding that "full participation" is one of "the Nation's proper goals regarding people with disabilities." ON THE THRESHOLD OF INDEPENDENCE, at 28, § 2(a)(7). In proposing the ADA, *amicus* was fully aware of the problem of unnecessarily segregated treatment and habilitation facilities and intended its legislative proposal to address this problem.

II. The ADA Prohibits Unnecessary Isolation and Segregation of Individuals with Disabilities in Treatment and Habilitation Programs.

A. The Statutory Language of the ADA

Although the details of the final provisions of the ADA as enacted by Congress vary in many respects from the original ADA proposal developed by *amicus*, *amicus* believes that the final statute is fully consistent with its original proposal in terms of prohibiting placement of individuals with disabilities in unnecessarily isolated and segregated treatment and habilitation programs. Relevant to the present issues, wording contained in *amicus's* proposed ADA bill appears verbatim in the final Act regarding the following:

- Identification of "full participation" as one of "the Nation's proper goals regarding individuals with disabilities"
- Recognition that "historically, society has tended to isolate and segregate individuals with disabilities"
- Finding that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization"

42 U.S.C. §§ 12101(a)(8), (2), & (3) (1994).[16]

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the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act, 55 N.Y.U. L. REV. 881, 898-99 (1980).

[16] A related finding is that individuals with disabilities are

Another finding in the ADA derived word-for-word from *amicus*'s draft bill concerns costs attributable to discrimination: "the continuing existence of unfair and unnecessary discrimination . . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. § 12101(a)(9) (1994); ON THE THRESHOLD OF INDEPENDENCE, at 28, § 2(a)(8).[17]

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

Id. § 12101(a)(7).

Some commentators have argued that the ADA in effect creates a statutory requirement that government actions that segregate or otherwise disadvantage people because of disability should be subjected to strict judicial scrutiny similar to that applied to racial classifications. *See, e.g.*, Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 433–39 (1991).

[17] Congress was well aware of the cost data and fiscal conclusions of amicus in Toward Independence and On the Threshold of Independence as it considered the ADA. See, e.g., S. Rep. No. 101-116 at 16-18 (1989) [hereinafter Senate Report]; H.R. Rep. No. 101-485 pt. 2, at 43-47 (1990) (Committee on Education and Labor), reprinted in 1990 U.S.C.C.A.N. 303, 325-26 [hereinafter Education & Labor Committee Report]. In introducing the 1989 version of the ADA in the 101st Congress, Senator Harkin devoted a substantial portion of his introductory statement to discussing cost ramifications. 135 Cong. Rec. 8505, 8507-08 (1989) (statement of Sen. Harkin). Among other observations he stressed "the economic benefits to society in terms of reductions in the deficit from getting people . . . out of institutions . . . ." Id. at 8507-08 (emphasis added). See also 134 Cong. Rec. 9375, 9378 (1988) (statement of Sen. Weicker) ("the costs associated with this bill are a small price to pay for opening up our society to persons with disabilities").

Title II of the ADA, whose provisions apply in the current case, is very straightforward. It declares: (1) that "public entities" shall be prohibited from discriminating "by reason of disability," 42 U.S.C. § 12132 (1994); (2) that the dimensions of such prohibition shall be spelled out in regulations to be promulgated by the Attorney General, 42 U.S.C. § 12134(a) (1994); and (3) that such regulations shall be consistent with the Act and with prior regulations found at 28 C.F.R part 41, 42 U.S.C. § 12134(b) (1994). Regarding the issue of unnecessarily isolated and segregated services, the latter regulations, issued in 1978 and applicable to recipients of federal financial assistance, establish an unambiguous mandate to "administer programs and activities in the most integrated setting appropriate to the needs of qualified [persons with disabilities]." 28 C.F.R. § 41.51(d) (1998).

Congress could hardly have been clearer in requiring that services for individuals with disabilities must be provided in the most integrated setting appropriate.

Petitioner contends that this requirement does not apply to a certain category of services -- those designed and rendered specifically for individuals with disabilities and not for individuals without disabilities. *Amicus* notes that many state and local governments provide a variety of social service, housing, health care, and other programs some of whose services are arguably equivalent to services provided at treatment and habilitation facilities serving individuals with disabilities. Such a line of argument is superfluous, however, because the simple fact is that the Act does not admit of the exception the petitioners suggest.

By its terms, Title II's prohibitions of discrimination apply to "the services, programs, or activities of a public entity." 42 U.S.C. § 12132 (1994). The Act defines the term "public entity" comprehensively to include "any State or local government," and "any department, agency, special purpose district, or other instrumentality of a State or States or local

government." 42 U.S.C. §§ 12131(1)(A) & (B) (1994). A department, agency, or facility that provides treatment or habilitation services for people with disabilities clearly falls within the definition of "public entity."

The statutory phrasing does not admit exceptions. Title II's definition of "public entity" and the phrase "services, programs, or activities of a public entity" were construed in *Pennsylvania Dept. of Corrections v. Yeskey*, 118 S.Ct. 1952 (1998). This Court declared that "the ADA plainly covers state institutions without any exception that could cast the coverage of prisons into doubt." *Id.* at 1954. The petitioners in *Yeskey* argued that the ADA does not mention prisons and prisoners. The Court noted the ADA reference, clearly relevant in the present case, to discrimination in such critical areas as . . . institutionalization," 42 U.S.C. § 12101(a)(3) (1994), and concluded that, even if the term "institutionalization" were considered not to include penal institutions, the broad statutory definition of "public entity" would still encompass prisons, and the "services, programs, or activities" they provide. *Id.* at 1955-56. The Court ruled that, even assuming that Congress did not envision that the ADA would be applied to state prisoners, "in the context of an unambiguous statutory text that is irrelevant." *Id.* at 1956. The Court declared that "the fact that a statute can be `applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Id.* at 1956, quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985). The Court concluded that "the plain text of the ADA unambiguously extends to state prison inmates. . . ." *Id.* at 1956.

In accordance with the *Yeskey* decision, and the ADA statutory purpose of establishing a "comprehensive national mandate for the elimination of discrimination," 42 U.S.C. § 12101(b)(1) (1994), state residential treatment and habilitation facilities, *i.e.*, "institutions," and the "services, programs, or activities" they render are manifestly included within the scope of the integration and other

nondiscrimination requirements of Title II pursuant to "the plain text of the ADA." *Id.*

Indeed, Petitioners' suggestion of an exception for treatment and habilitation services for people with disabilities would undercut fundamental objectives reflected in statutory language, including the goals of "full participation," of addressing societal practices that "isolate and segregate individuals with disabilities," of eliminating persisting "discrimination against individuals with disabilities in such critical areas as ... institutionalization," and of establishing a "comprehensive national mandate for the elimination of discrimination." 42 U.S.C. §§ 12101(a)(8), (2), (3), & (b)(1) (1994). Petitioners' purported exception would exclude from the Act's coverage a class of services that can result in one of the most serious forms of isolation and unnecessary segregation of individuals with disabilities. Nothing in the Act supports such an anomaly.

B. The Legislative History

In reviewing federal laws, the standard is, of course, not what Congress should have said in legislation but rather what it did say; the courts are not to second guess the policy choices underlying clear legislative language.[18] The previous sections have all pointed to a single conclusion -- that the ADA mandates, clearly and unambiguously, that state and local government treatment and habilitation service programs for individuals with disabilities must provide such services in

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[18] *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) ("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, `that language must ordinarily be regarded as conclusive"), quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). An exception is where the plain language of a statute produces absurd results and the statute "can't mean what it says." Green v. Bock Laundry Machine Co., 490 U.S. 504, 511 (1989), quoting Campbell v. Greer, 831 F.2d 700, 703 (7th Cir. 1987).

the most integrated setting appropriate to the needs of the individual with a disability. The legislative history of the ADA only serves to reinforce the conclusion that Congress intended the Act to prohibit unnecessary isolation and segregation in treatment and habilitation services for individuals with disabilities provided by instrumentalities of state and local governments.

The legislative history makes clear that prohibiting unnecessary isolation and segregation of individuals with disabilities is a key objective of the Act as a whole and of Title II in particular. The Committee reports are quite explicit in this regard.[19] Numerous statements during congressional debates likewise stressed the fundamental importance of prohibiting segregation.[20] Two of the ADA Committee

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[19] *See*, *e.g.*, S. REP. NO. 101-116 at 6 (1989) ("One of the most debilitating forms of discrimination is segregation") [hereinafter SENATE REPORT]; *id.* at 20 (the ADA is "a clear and comprehensive national mandate for the elimination of discrimination and for the integration of persons with disabilities into the economic and social mainstream of American life"); H.R. REP. NO. 101-485 pt. 3, at 26 (1990) (Committee on the Judiciary), *reprinted in* 1990 U.S.C.C.A.N. 445, 449 (the ADA "promises a new future: a future of inclusion and integration, and the end of exclusion and segregation") [hereinafter HOUSE JUDICIARY COMMITTEE REPORT]; *id.* at 49-50 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 472-73 ("[t]he purpose of title II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life"; "integrated services are essential to accomplishing the purposes of title II").

[20] *See*, *e.g.*, 135 CONG. REC. 8505, 8506 (1989) (statement of Sen. Harkin, sponsor of 1989 version of ADA) (ADA "sends a clear message to ... State and local governments ... that the full force of the Federal law will come down on anyone who continues to subject persons with disabilities to discrimination by segregating them...."). *Similarly*, *see* 134 CONG. REC. 9375 (1988) (statement of Sen. Weicker); 135 CONG. REC. 19800, 19803 (1989) (statement of Sen. Harkin); 136 CONG. REC. 10872 (1990) (statement of Rep. Weiss); 135 CONG. REC. 19878 (1989) (statement of Sen. Chafee) (ADA "will integrate fully those with disabilities into everyday American life").

reports included distinct sections discussing the effects of segregation and other forms of discrimination upon individuals with disabilities,[21] and upon society as a whole.[22]

The legislative history underscores the conclusion compelled by the statutory language that Congress did not intend to exempt any category of programs, activities and services from the integration requirement of Title II. The Senate Committee report and the report of the House Committee on Education and Labor declared in identical language that the "first purpose" of Title II is "to make applicable the prohibition against discrimination on the basis of disability . . . to all programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto . . . ." SENATE REPORT at 44 (emphasis added); EDUCATION & LABOR COMMITTEE REPORT at 84, *reprinted in* 1990 U.S.C.C.A.N. at 366 (emphasis added). Similarly the House Judiciary Committee declared that Title II is intended "to cover all programs of

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[21] SENATE REPORT at 15-18; EDUCATION & LABOR COMMITTEE REPORT at 41-47, *reprinted in* 1990 U.S.C.C.A.N. at 323-29. The Committees cited testimony of various witnesses who described such effects on persons with disabilities in the following terms: "has stripped us as disabled people of pride and dignity," of which "[t]he stigma scars for life," SENATE REPORT at 16; EDUCATION & LABOR COMMITTEE REPORT at 42, *reprinted in* 1990 U.S.C.C.A.N. at 324; caused feelings of "isolation, the sense of helplessness and the sense of no ability to relate to other people" resulting from "being held separate" and other forms of discrimination, EDUCATION & LABOR COMMITTEE REPORT at 41, *reprinted in* 1990 U.S.C.C.A.N. at 323; "robbed of our dignity, of our self-respect . . ." and suffer "the elimination of dignity associated with being a human being . . . ." *Id.* The Committees concluded that such "[d]iscrimination results in social isolation and in some cases suicide." *Id.* at 42, *reprinted in* 1990 U.S.C.C.A.N. at 324; SENATE REPORT at 16.

[22] The Committee reports identified such consequences as the waste of human resources and the huge financial costs of maintaining individuals in "dependency." SENATE REPORT at 16-18; EDUCATION & LABOR COMMITTEE REPORT at 43-47, *reprinted in* 1990 U.S.C.C.A.N. at 325-29.

state or local governments, regardless of the receipt of federal financial assistance." HOUSE JUDICIARY COMMITTEE REPORT at 49, *reprinted in* 1990 U.S.C.C.A.N. at 472 (emphasis added). Nor did the Committee state any exception to its statement that "integrated services are essential to accomplishing the purposes of title II." *Id.* at 50, *reprinted in* 1990 U.S.C.C.A.N. at 473. In the statement accompanying his introduction of the ADA bill in the Senate, Senator Harkin noted that the Act was needed to address the absence of protection against discrimination in "all services provided by State and local governments. . . ." 135 CONG. REC. 8505, 8508 (1989) (statement of Sen. Harkin). Similarly, *see, e.g.*, 136 CONG. REC. 10868 (1990) (statement of Rep. Edwards) (ADA extends protections "to all programs, activities and services of State or local governments").

The legislative history of the ADA not only demonstrates that Congress intended to provide comprehensive protection from unnecessary isolation and segregation of people with disabilities under Title II, but also provides strong evidence that Congress intended treatment and habilitation programs to be subject to the integration mandate. One of the congressional hearings on the ADA legislation in the 100th Congress devoted considerable attention to institutionalization. *Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcommittee on Select Education of the House Committee on Education and Labor*, 100th Cong. (1988). Witnesses provided dramatic, and at times graphic, descriptions of the damaging effects of segregated treatment facilities.[23] Senator Harkin

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[23] *See, e.g.*, *id.* at 62 (statement of Bill Knight, Chairman, Greater Waterbury Consumer Action Forum) ("services are woefully inadequate and a segregated society is created due to institutionalization"); *id.* at 65 (statement of Ed Preneta, Director, Connecticut Developmental Disabilities Office) ("people with mental retardation locked up in institutions;" ADA is "an opportunity to reach the most segregated members of our society"); *id.* at 23 (statement of Elmer Bartels, Commissioner, Massachusetts Rehabilitation Commission) (advocating "a

made the intent to address segregated treatment programs crystal clear, when, in introducing the 1989 version of the ADA in the 101st Congress, he expressly listed, as one of the intended consequences of the legislation, "getting people . . . out of institutions . . . ." 135 CONG. REC. 8505, 8508 (1989) (statement of Sen. Harkin).

Subsequently during Senate hearings in 1989, former Senator Weicker testified that our country had "created monoliths of isolated care in institutions and in segregated educational settings" and that "that isolation and segregation" is "the basis of the discrimination faced by many disabled people today." *Americans with Disabilities Act of 1989: Hearing on S. 933 Before the Senate Committee on Labor and*

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reasonable level of services that cost less where people can live independently in the community than it costs to keep people in dependent settings within nursing homes, public health hospitals and institutions," and questioning "cost-effectiveness" of placing people with disabilities in treatment facilities equivalent to "consigning them ... to `terminal' care in an institution"); *id.* at 101 (statement of Stanley Koslowski, Connecticut Office of Protection and Advocacy) (describing the "stigma" associated with "institutionalization" for psychiatric disabilities as "probably more severe than any other stigma"); *id.* at 1066 (statement of William Cavanaugh, consumer of Massachusetts mental health services) (complaining of "abusive treatment and human rights violations" in mental institutions). One witness with a disability spoke of what she described as her "realistic," "constant fear" that she might be "institutionalized," and described in graphic terms her experience of residential treatment facilities:

> . . . I have seen these institutions. The smell of human waste and detergent has stuck in my throat. I have looked into the vegetative eyes of its inmates in their sterile environments, I have heard of the premature death ratio and prevalence of pneumonia and necrotic decubitus, literally allowing them to rot in their beds, these living dead, our imprisoned Americans with disabilities. *Id.* at 163 (statement of Cindy Miller).

She added her plea that Congress should "[p]lease enact the ADA quickly." *Id.* at 172.

Human Resources and the Subcommittee on the Handicapped, 101st Cong. 215 (1989) (statement of Hon. Lowell Weicker).

In congressional debates on the ADA, Representative Miller declared of people with disabilities that "[s]ociety has made them invisible by shutting them away in segregated facilities . . . ." 136 CONG. REC. 10877 (1990) (statement of Rep. Miller). Senator Kennedy referred to "American apartheid" and the "unthinking and unacceptable practices by which disabled Americans today are segregated, excluded, and fenced off from fair participation in our society . . . ." 135 CONG. REC. 8514 (1989) (statement of Sen. Kennedy). During the final passage of the ADA in the House, Representative Dellums declared:

> The history of different, separate, and unequal treatment of persons with disabilities could hardly be clearer. . . . The Americans with Disabilities Act is a plenary civil rights statute designed to halt all practices that segregate persons with disabilities and those that treat them inferior or differently. By enacting the ADA, we are making a conscious decision to reverse a sad legacy of segregation and degradation.
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> 136 CONG. REC. 11467 (1990) (statement of Rep. Dellums).

The inclusion of "institutionalization" in the list of areas of discrimination that the ADA would address was a considered and informed decision of the Congress. The legislative history further buttresses the conclusion mandated by the language of Title II and its implementing regulations, and the *Yeskey* decision, that Title II's integration mandate applies to state treatment and habilitation services for persons with disabilities as covered services, programs, or activities of a public entity.

C. ADA Regulations

Title II regulations promulgated by the Attorney General in July 1991 are clear, unambiguous, and comprehensive: "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) (1998).

These regulations were issued by the Attorney General pursuant to the explicit statutory directive in Title II of the ADA. 42 U.S.C. § 12134(a) (1994) ("Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this subtitle"). They also comport with the statutory directive that such regulations shall be consistent with the Act and with regulations found at 28 C.F.R part 41, implementing § 504 of the Rehabilitation Act. 42 U.S.C. § 12134(b) (1994). Regarding the issue of unnecessarily isolated and segregated services, the ADA Title II regulations track very closely the referenced regulations that required covered entities to "administer programs and activities in the most integrated setting appropriate to the needs of qualified [persons with disabilities]." 28 C.F.R. § 41.51(d) (1998). It is clear that 28 C.F.R. § 35.130(d) represents a conscientious response by the Attorney General to express congressional directives.

Because the Title II regulations were responsive to a direct statutory mandate that assigned the task of fleshing out the specific forms of discrimination contained in the broad statutory prohibition of discrimination in public services, these regulations qualify for "*Chevron* deference" and are to be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Nuclear Regulatory Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). *See*, *Bragdon v. Abbott*, 118 S.Ct. 2196, 2209 (1998) (Attorney General's regulations under Title III of the ADA entitled to *Chevron* deference).

The application and enforcement of 28 C.F.R. § 35.130(d) (1998) to prohibit unnecessary isolation and segregation in treatment and habilitation services for individuals with disabilities provided by instrumentalities of state and local governments is entirely consistent with the uniform and unwavering understanding of *amicus* in initiating the ADA proposal, of members of Congress in revising and passing the ADA, of the President in signing it into law, and of the Attorney General in issuing Title II regulations, that requiring integrated services and programs is a key component of prohibiting discrimination on the basis of disability.

III. Conclusion

In developing the ADA proposal and in producing the original version of the ADA first introduced in Congress, *amicus* intended that such a law would prohibit, *inter alia*, a most virulent and damaging form of discrimination -- unnecessarily isolated and segregated treatment and habilitation services for persons with disabilities. Congress repeatedly sought the input of *amicus* on the pending legislation, and several officers and staff of *amicus* were invited to and did testify at congressional hearings. If, as the legislation worked its way through Congress, there had been even a hint that Title II would not prohibit unnecessarily institutionalization, isolation, and segregation in treatment and habilitation services provided by state and local government entities, *amicus* would have protested vehemently. But there was no such hint. *Amicus* was quite comfortable lending its unequivocal support to the final version of the legislation.

Since the enactment of the ADA, *amicus* has continued to monitor progress in regard to integration of treatment and habilitation services for persons with disabilities. In a 1996 report to the President and Congress, *amicus* observed:

> Historically, many people with disabilities, particularly those with mental retardation or mental

> illness, could access long-term services only if they lived in institutional settings. Many people lived, and continue to live, away from their families and communities in institutions and nursing homes because the community-based long-term services they needed were not available to them. NATIONAL COUNCIL ON DISABILITY, ACHIEVING INDEPENDENCE: THE CHALLENGE FOR THE 21ST CENTURY 96-97 (1996) (hereinafter ACHIEVING INDEPENDENCE).

This despite the fact that numerous benefits -- to persons with disabilities, to persons without disabilities, and to society in general -- result from integrated services for people with disabilities.[24]

ACHIEVING INDEPENDENCE provides data regarding numbers of people with disabilities in treatment and habilitation facilities, and the costs associated with such services, *id.* at 99-100; after analyzing such information, *amicus* concluded:

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[24] *See, e.g.*, Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 407414, 439-457 (1991) and the authorities cited therein. Among the benefits of integrated programs the author identifies, are the following:

> 1. Integration Substantially Improves the Perspective of Nondisabled People Regarding Disability;
>
> 2. Integration Significantly Improves the Socialization of Persons with Disabilities with Non-Disabled Peers;
>
> 3. Integrated Educational and Training Programs Enhance the Skills Learned by Persons with Disabilities and Better Prepares Persons with Disabilities for Employment; and
>
> 4. Integration Improves the Health, Independence, and Affect of Persons with Disabilities, and Renders Persons with Disabilities More Likely to Live, Work, and Recreate in Regular Community Settings. *Id.* at 445-456.

> Thousands of individuals continue to live in large institutions and nursing homes when they could live in smaller community settings. Too many people with mental illness remain unserved or underserved in the community. States vary dramatically in their use of institutional services and in the amount of money they spend on alternative services.

Id. at 100.[25]

Vigorous implementation of the integration mandate of Title II of the ADA to prohibit unnecessary isolation and segregation in regard to treatment and habilitation services for individuals with disabilities provided by state and local government instrumentalities will bring to fruition the declaration of the House Judiciary Committee that the ADA "promises a new future: a future of inclusion and integration, and the end of exclusion and segregation." HOUSE JUDICIARY COMMITTEE REPORT at 26, *reprinted in* 1990 U.S.C.C.A.N. at 449.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges the Court to affirm the decision of the United States Court of Appeals for the Eleventh Circuit.

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[25] For current figures regarding institutional populations and comparisons of costs of institutions and community-based programs, see National Conference of State Legislatures, *Saving Medicaid Money: From Institutions to Community Care*, 25 STATE LEGISLATURES 7 (February 1999).

Respectfully submitted,

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