No. 08-16261-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WILLIAM LONG, *et al.*,

Appellees

v.

HOLLY BENSON, *et al.*,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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Long v. *Benson*
No. 08-16261-AA

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for *Amicus Curiae* United States of America hereby certifies, in accordance with Federal Rule of Appellate Procedure 26.1-1 and 11th Cir. R.26.1-1, that the following persons may have an interest in the outcome of this case:

1. AARP Foundation Litigation, counsel for plaintiffs and appellee;
2. Beach, Douglas, Secretary of Florida's Department of Elder Affairs, defendant-appellant;
3. Benson, Holly, Secretary of Florida's Agency for Health Care Administration, defendant-appellant;
4. Boyd, John, plaintiff;
5. Canan, Stacy, counsel for plaintiffs and appellee;
6. Chonin, Neil, counsel for plaintiffs and appellee;
7. Florida Health Care Association, Inc., *amicus curiae* in support of appellants;
8. Gold, Stephen, counsel for plaintiffs and appellee;
9. Goldsmith, Karen L., counsel for *amicus curiae* Florida Health Care Association, Inc.;

10. Griffin, Clayton, plaintiff-appellee;

11. Grout, Jonathan S., counsel for *amicus curiae* Florida Health Care Association, Inc.;

12. Harrington, Sarah E., United States Department of Justice, counsel for *amicus curiae* United States (added to certificate with this filing);

13. Hinkle, Hon. Robert L., Judge for District Court of the Northern District of Florida;

14. King, Loretta, Acting Assistant Attorney General, Civil Rights Division, United States Department of Justice, counsel for *amicus curiae* United States (added to certificate with this filing);

15. Lee, Charles Todd, plaintiff;

16. Long, William, plaintiff;

17. National Health Law Program, counsel for plaintiffs and appellee;

18. Peterson, Rodney, plaintiff;

19. Ruiz, Gabriela, counsel for plaintiffs and appellee;

20. Seigel, Jodi, counsel for plaintiffs and appellee;

21. Senior, Justin, counsel for appellants;

22. Silver, Jessica Dunsay, United States Department of Justice, counsel for *amicus curiae* United States (added to certificate with this filing);

23. Somers, Sarah, counsel for plaintiffs and appellee;

24. Southern Legal Counsel, Inc., counsel for plaintiffs and appellee;

25. United States of America, *amicus curiae* in support of appellee;

26. Vignery, Bruce, counsel for plaintiffs and appellee;

27. Waas, George, counsel for appellants;

28. Washington, Margaret, plaintiff;

29. Whitney, Enoch J., counsel for appellants;

30. York, Thomas, counsel for appellants.

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STATEMENT OF THE ISSUES

The United States will address the following two questions:

1. Whether the requirements of the "integration" regulation (28 C.F.R. 35.130(d)) implementing Title II of the Americans with Disabilities Act reasonably interpret the Act, and may therefore be enforced through the private right of action to enforce the statute.

2. Whether the Title II regulation providing that a public entity is not required to provide personal devices and services to individuals with disabilities (28 C.F.R. 35.135) means that, when a State operates a program that includes the provision of such services to individuals with disabilities, it does not have to do so in an integrated setting.

INTEREST OF THE UNITED STATES

The United States has a direct interest in this appeal, which involves the application and interpretation of the regulations implementing Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.* Pursuant to Congress's mandate, 42 U.S.C. 12134, the Attorney General promulgated regulations construing the nondiscrimination mandate of Title II. 28 C.F.R. Pt. 35. One of those regulations, 28 C.F.R. 35.130(d), states that public entities must provide services in the most integrated setting appropriate to the needs of qualified individuals with a disability. The state defendant in this case challenges the validity and enforceability of that regulation. The United States has an important interest in protecting the viability of that regulation and the ability of individuals to enforce its requirements.

The state defendant also bases an argument on another regulation. The State argues that 28 C.F.R. 35.135 categorically exempts the State from ever

having to provide personal services (such as assistance in dressing and toileting) in an integrated setting to individuals with disabilities. The United States believes that is a misconstruction of the regulation and has an interest in clarifying the interaction of that regulation with the other requirements of Title II and its implementing regulations.

STATEMENT

1. This appeal arises out of a class action seeking prospective injunctive relief against officials of the State of Florida. R.13[1] (First Amended Complaint); see also R.136 (order certifying class). Plaintiffs are Medicaid eligible adults with disabilities who desire to live in a community setting and allege that they are unnecessarily confined to nursing home facilities in violation of Title II of the ADA and Section 504 of the Rehabilitation Act, 29 U.S.C. 794. R.13. Relying on regulations implementing Title II and Section 504 that require covered entities to administer their services in "the most integrated setting appropriate" to the needs of qualified individuals, 28 C.F.R. 35.130(d); 28 C.F.R. 41.51(d), plaintiffs claim that they are being unnecessarily institutionalized because the services Florida

[1] Citations to "R.__" are to documents filed in the district court, identified by docket number; citations to "Pl. Br. __" are to pages in the plaintiff-appellee's Brief as Appellee; citations to "State Br. __" are to pages in the defendants-appellants' Brief as Appellant.

provides to plaintiffs in an institution can and should be provided in an integrated community setting. R.13 at 28-31. The current appeal by Florida involves a preliminary injunction requiring the State to pay for certain nursing and personal care services in a community setting for one named plaintiff, pending the outcome of the litigation. R.135 (Preliminary Injunction).

2. The individual involved, Clayton Griffin, is a 56 year-old man who is paralyzed on his left side as the result of a stroke in 2004. R.13 at 3, 16-17; R.135 at 1; Pl. Br. 3. Griffin uses a wheelchair and requires assistance to get in and out of bed, to shower, to dress, and to use the toilet. R.13 at 16; R.135 at 1-2. When this lawsuit was filed, Griffin resided in a nursing home – Beauclerc Manor – the cost of which was covered by Florida's Medicaid program. R.13 at 3, 16-17; R.135 at 1-2; Pl. Br. 3-4. Griffin applied for and was determined eligible for a Medicaid waiver program that would have allowed him to receive the services he requires in a community setting rather than in an institution. R.135 at 2. Because the State has a long waiting list for that waiver program, however, Griffin was not able to enroll and remained in Beauclerc Manor. R.135 at 2.

In June 2008, Griffin left Beauclerc Manor and moved into an accessible apartment in the community. R.135 at 2. Griffin employed a certified nursing assistant who went to his apartment for two hours in the morning and two hours in

the evening to assist Griffin with the daily life activities he cannot do on his own. R.135 at 2. Griffin also uses the services of a visiting nurse and visiting physician who provide any medical care he needs. R.135 at 2. Griffin has friends and relatives living in his apartment complex and goes out into the community, using public transportation. R.135 at 2. According to Griffin, his quality of life is substantially better in the community than it was in the nursing home. R.135 at 2.

Griffin lives on a limited monthly income of $996 in social security disability benefits. R.135 at 2. Four hours of care by a certified nursing assistant costs him $52 per day.[2] R.135 at 2. The cost to the State of Florida of his care in the nursing home was more than three times greater than the cost of the certified nursing assistant in the community. R.135 at 2. Although the State paid for services in a nursing home, it did not cover the cost of his care in the community. R.135 at 2-3. Before the preliminary injunction was granted, Griffin managed to pay for the services he required by relying on support from friends and family, and initially by relying on limited assistance from Medicare that is no longer available to him. R.135 at 2-3. By the time he requested the preliminary injunction, Griffin

[2] Although this amount does not cover the cost of medical care, the preliminary injunction requires the State to continue to pay for the same outside medical services Griffin received in the nursing home, R.135 at 8, and the State does not appear to be challenging its coverage of Griffin's medical care on appeal.

could no longer afford to pay for the services he requires and without State-funded services he would have had to return to a nursing home. R.135 at 3, 6.

In order to avoid the necessity of returning to a nursing home, Griffin sought a preliminary injunction requiring the State to pay for the services he requires to live in his apartment during the pendency of the lawsuit. R.123. After holding a hearing, the district court granted the injunction. R.135. Noting that "a state violates the Americans with Disabilities Act" as construed by the Supreme Court in *Olmstead* v. *Zimring*, 527 U.S. 581, 119 S. Ct. 2176 (1999), "if it unnecessarily isolates disabled individuals in institutions as a condition of providing them public assistance," the district court concluded that Griffin, at least, is likely to prevail on his claim. R.135 at 3-4. The court limited its order to Griffin, finding that he was likely to prevail because he could receive all the benefits he needed in a community setting at a fraction of what it would cost the State to provide those services in an institution. R.135 at 4-5. For purposes of the preliminary injunction, the court did not determine whether requiring the State to provide services in the community to other Medicaid beneficiaries who currently reside in institutions would constitute a "fundamental alteration" of the State's program, and would therefore not be required under Title II or Section 504. R.135 at 3-5.

The court also concluded that Griffin would suffer irreparable harm if he had to return to an institution pending the outcome of the suit because his quality of life would diminish and he could lose his accessible apartment. R.135 at 6. The court went on to find that issuing this limited preliminary injunction would cause no harm to the State and would serve the public interest. R.135 at 6-7. The injunction requires the State to pay for (1) four hours of personal attendant care per day, (2) isolated emergency personal attendant care, and (3) the same outside medical care that would be covered if Griffin resided in a nursing home. R.135 at 8. The State appealed. R.145.

SUMMARY OF ARGUMENT

The regulations enforcing Title II of the Americans with Disabilities Act (ADA) can be enforced through a private right of action. There is no doubt that there is a private right of action to enforce Title II itself and, as the Supreme Court has held, a private right of action to enforce a statute includes the right to enforce all authoritative regulations that reasonably interpret the statute. Title II's integration regulation directly implements the statute's prohibition on "discrimination," including "isolat[ion]" and "segregation." 42 U.S.C. 12101(a)(2), (a)(5). The Supreme Court in *Olmstead* v. *Zimring*, 527 U.S. 581, 597, 600, 119 S. Ct. 2176, 2185, 2187 (1999), held that "unjustified isolation" is

properly regarded as the type of disability discrimination prohibited by Title II. Thus, the plaintiffs may enforce the requirements of the integration regulation through the private right of action to enforce Title II itself.

The State argues that the personal services regulation (28 C.F.R. 35.135) – which states that public entities are not required to provide personal services – means that the State can never be required under Title II to provide such services in a community setting. That is a misinterpretation of the regulation. The regulation applies to situations in which the provision of personal services is not part of the program a State operates. But where a State operates a program that includes the provision of personal services, it must do so in compliance with Title II's nondiscrimination mandate, including the requirements of the integration regulation.

ARGUMENT

I

THE PRIVATE RIGHT OF ACTION TO ENFORCE TITLE II OF THE ADA ALSO INCLUDES THE RIGHT TO ENFORCE ITS IMPLEMENTING REGULATIONS

A. Statutory Scheme

Title II 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. Title II is modeled on Section 504 of the Rehabilitation Act of 1973, which provides that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a).[3] Both compactly-worded statutes contain a basic prohibition on disability-based discrimination and were designed by Congress to rely on more specific regulations to flesh out that prohibition.

In 1976, soon after Section 504 was enacted, President Ford issued an executive order instructing the Department of Health, Education, and Welfare

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[3] The plaintiffs filed suit under both Title II of the ADA and Section 504, and Griffin sought a preliminary injunction under both statutes. In its order granting the injunction, the district court does not specify whether it relied on Title II, Section 504, or both. However, the State asserts on appeal that the district court relied solely on Title II; consequently, it does not challenge the validity or enforceability of Section 504 or its implementing regulations, and has waived its right to do so. See, *e.g.*, *United States* v. *Silvestri*, 409 F.3d 1311, 1338 n.18 (11th Cir.), cert. denied, 546 U.S. 1048, 126 S. Ct. 772 (2005). Because Section 504 and Title II require the defendant in this case to provide identical accommodations – whatever those may be – it ultimately does not matter whether the district relied on one of the statutes or both. The requirements in the regulations enforcing Section 504 are enforceable through a private right of action to enforce the statute for the same reasons that the requirements in Title II's regulations are.

(HEW) to issue regulations implementing Section 504, including by "establish[ing] standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504." Exec. Order No. 11914, 41 Fed. Reg. 17,871 (Apr. 28, 1976). The President also instructed every federal agency that distributes federal funds to "issue rules, regulations, and directives, consistent with the standards and procedures established by" HEW. *Ibid.* As directed, HEW issued the first set of coordination regulations in 1978.[4] Those regulations included the requirement that recipients of federal funds "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 53 Fed. Reg. 2138 (Jan. 13, 1978). The preamble to the original coordination regulations explained that "separate" treatment of individuals with disabilities

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[4] HEW issued regulations governing recipients of federal financial assistance from HEW itself in 1977. Those regulations included the requirement that covered entities provide services to individuals with disabilities "in the most integrated setting appropriate to the person's needs." 42 Fed. Reg. 22,679 (May 4, 1977). In the appendix accompanying the regulations, HEW explained that, "although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory." 42 Fed. Reg. 22,687. When other agencies promulgated Section 504 regulations governing their recipients, they included the same integration requirement. See, *e.g.*, 45 Fed. Reg. 37,622 (June 3, 1980) (Department of Justice regulations) ("Recipients shall administer programs in the most integrated setting appropriate to the needs of qualified handicapped persons.").

"can be permitted *only where necessary* to ensure equal opportunity and truly effective benefits and services." Fed. Reg. 2134 (emphasis added). In 1981, pursuant to Executive Order 12250, the regulations coordinating implementation and enforcement of Section 504 among federal agencies were transferred to the Department of Justice. 45 Fed. Reg. 72,995-72,997 (Nov. 2, 1980). The recodified regulations maintained the integration mandate unmodified. See 46 Fed. Reg. 40,686-40,688 (Aug. 11, 1981) (28 C.F.R. 41.51(d)).

When Congress enacted the ADA in 1990, it explicitly modeled Title II on Section 504 in three respects. First, the basic prohibition on discrimination in Title II closely tracks that in Section 504. 42 U.S.C. 12132. Second, Title II explicitly adopts the "remedies, procedures, and rights" of Section 504 as the remedies, procedures, and rights of Title II. 42 U.S.C. 12133. Finally, Congress directed the Attorney General to promulgate regulations to implement Title II, and instructed that such regulations "be consistent" with the Department of Justice's coordination regulations governing the implementation and enforcement of Section 504. 42 U.S.C. 12134. Pursuant to Congress's instructions, the Attorney General issued final regulations in 1991. The regulations include the requirement that a public entity "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with

disabilities." 56 Fed. Reg. 35,719 (July 26, 1991) (28 C.F.R. 35.130(d)). The "Section-by-Section Analysis" accompanying the regulations explains the importance of the integration mandate to the purposes of the ADA: "Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status." 56 Fed. Reg. 35,703 (July 26, 1991) (28 C.F.R. Pt. 35, App. A, p. 540 (2004)).

The Supreme Court had occasion to consider the operation of Title II's integration mandate in the context of institutionalization in *Olmstead* v. *Zimring*, 527 U.S. 581, 119 S. Ct. 2176 (1999). In that case, the Court considered whether Title II's "proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions" and concluded that it does so require in some circumstances. *Id.* at 587, 119 S. Ct. at 2181. The Court reviewed the genesis of Title II's integration regulation (described in the preceding paragraphs), noting that the Attorney General did "[a]s Congress instructed" by issuing Title II regulations "including one modeled on the § 504 [integration] regulation." *Id.* at 591-592, 119 S. Ct. at 2182-2183; see also *id.* at 596, 119 S. Ct. at 2185. Because the parties in the case did not challenge the legitimacy of Title II's regulations, the Court expressly declined to rule on their

validity. The Court did, however, acknowledge the Attorney General's determination that "unjustified placement or retention of persons in institutions, severely limiting their exposure to the outside community constitutes a form of discrimination based on disability prohibited by Title II," and held that "[u]njustified isolation * * * is properly regarded as discrimination based on disability." *Id.* at 596-597, 119 S. Ct. at 2185. As to what constituted unjustified isolation in that case, the Court concluded that Title II required the State "to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Id.* at 607, 119 S. Ct. at 2190.

B. Because The Integration Regulation Reasonably Interprets Title II, It Is Enforceable Through The Private Right Of Action To Enforce The Statute

On appeal, the State argues (State Br. 35-37) that the plaintiffs cannot enforce Title II's integration mandate because that mandate is codified in the regulations, which are not themselves enforceable through a private right of action. The State's argument is misplaced. It is well established that Title II is enforceable through a private right of action. *Barnes* v. *Gorman*, 536 U.S. 181,

185, 122 S. Ct. 2097, 2100 (2002). Although the State does not explicitly dispute that, it argues (State Br. 36) that the "integration mandate cannot and does not create a private right of action." This argument misunderstands the nature of regulations such as those implementing Title II. The Supreme Court in *Alexander* v. *Sandoval*, 532 U.S. 275, 284, 121 S. Ct. 1511, 1518 (2001), held that regulations that implement a statutory prohibition "are covered by the cause of action to enforce that [statutory] section."[5] As the Court explained:

> Such regulations, if valid and reasonable, authoritatively construe the statute itself, and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.

532 U.S. at 284, 121 S. Ct. at 1518 (citations omitted); see also *Ability Center of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 905-913 (6th Cir. 2004); *S.D. ex rel. Dickson* v. *Hood*, 391 F.3d 581, 607 (5th Cir. 2004). Thus, if the

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[5] The holding in *Sandoval* was that the disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, may not be enforced through the private right of action to enforce the statute because they do not apply the statute's ban on intentional discrimination. 532 U.S. at 284-285, 121 S. Ct. at 1518-1519. That conclusion does not apply to Title II's integration regulation because it does apply the statute's ban on discrimination, for the reasons expressed in the text of this brief.

regulations implementing Title II – including the integration mandate – are valid and reasonable, they are enforceable to the same extent as the statute itself.

As discussed above, Title II expressly authorizes the promulgation of implementing regulations. 42 U.S.C. 12134. The Supreme Court has held that where "Congress explicitly delegated authority to construe the statute by regulation," courts "must give the regulations legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute." *United States* v. *Morton*, 467 U.S. 822, 834, 104 S. Ct. 2769, 2776 (1984); see also *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257, 115 S. Ct. 810, 813 (1995). The Supreme Court in *Olmstead* noted that, "[b]ecause the Department [of Justice] is the agency directed by Congress to issue regulations implementing Title II, its views warrant respect." 527 U.S. at 597-598, 119 S. Ct. at 2185-2186 (internal citation omitted). The Title II regulations, the Court acknowledged, "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* at 598, 119 S. Ct. at 2186.

On its face, the integration regulation, 28 C.F.R. 35.130(d), is a reasonable implementation of Title II. It is clear from the text of the ADA that Congress intended its prohibition on disability-based discrimination to encompass a

prohibition on the isolation and segregation of individuals with disabilities. In the "Findings" section of the statute, Congress defines the "forms of discrimination" it seeks to eliminate as including "isolat[ion]" and "segregation." 42 U.S.C. 12101(a)(2), (a)(5). Indeed, the Supreme court in *Olmstead* relied on the same findings in holding that prohibiting "unjustified isolation" is "properly regarded" as part of prohibiting "discrimination based on disability." 527 U.S. at 597, 600, 119 S. Ct. at 2185-2186.[6] Because the integration mandate directly implements Congress's prohibition on this type of discrimination, it is a valid construction of Title II and may be enforced by a private right of action to enforce Title II.

The evolution of the Title II regulations confirms that Congress intended Title II's nondiscrimination mandate to include the integration mandate. When Congress enacted Title II, the Section 504 integration regulation had existed for almost 15 years. By expressly ordering the Attorney General to promulgate regulations interpreting Title II, and to make those regulations consistent with the

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[6] That conclusion is consistent with the Supreme Court's treatment of other statutes' prohibitions on discrimination. For example, in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167, 173-178, 125 S. Ct. 1497, 1503-1507 (2005), the Supreme Court noted that it has held that the bare prohibition on "discrimination" "on the basis of sex" in Title IX of the Education Amendments of 1972 encompasses prohibitions on sexual harassment and retaliation. The Court noted that the term "discrimination" is broad and that, "by using such a broad term, Congress gave the statute a broad reach." *Id.* at 175, 125 S. Ct. at 1505. The same is true of Title II.

existing Section 504 regulations, Congress ratified those regulations – including the integration mandate – as a valid interpretation of the same nondiscrimination mandate in Section 504.[7] *Helen L.* v. *DiDario*, 46 F.3d 325, 332 (3d Cir.) (holding that Title II's integration mandate "has the force of law" because Congress "voiced its approval of" that requirement when it ordered the Attorney General to base the Title II regulations on existing Section 504 regulations), cert. denied, 516 U.S. 813, 116 S. Ct. 64 (1995); see also *Don E. Williams Co.* v. *CIR*, 429 U.S. 569, 574-577, 97 S. Ct. 850, 854-855 (1977) (reenactment of a statute expresses Congress's approval of existing regulatory construction of the statute).

That intention is confirmed in the congressional reports accompanying the ADA. The House and Senate reports both state that one of the purposes of Title II "is to make applicable the prohibition against discrimination on the basis of disability, *currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973*, to all programs, activities, and services provided or made available by state and local governments." H.R. Rep. No. 485 Pt. II, 101st

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[7] Indeed, Congress's familiarity with the Section 504 regulations is even more apparent in Title II because Congress instructed the Attorney General to base two of the provisions of the Title II regulations on existing Section 504 regulations promulgated by Department of Justice regarding "nondiscrimination on the basis of handicap in programs or activities conducted by the Department of Justice," instead of the coordination regulations that were to serve as the basis of the rest of the Title II regulations. 42 U.S.C. 12134; 28 C.F.R. Pt. 39.

Cong., 2d Sess. 84 (1990) (emphasis added); S. Rep. No. 116, 101st Cong., 1st Sess. 44 (1989). Moreover, the two courts of appeals to consider whether the integration mandate in 28 C.F.R. 35.130(d) is a reasonable interpretation of Title II, and therefore has the force of law, agree that it is. *Helen L.*, 46 F.3d at 331-333; *ARC of Washington State, Inc.* v. *Braddock*, 427 F.3d 615, 618 (9th Cir. 2005) (finding that Title II's integration mandate "serves one of the principal purposes of Title II of the ADA: ending the isolation and segregation of disabled persons"); see also *Townsend* v. *Quasim*, 328 F.3d 511, 516 (9th Cir. 2003) ("The Department of Justice's integration regulation implements the isolation and segregation concerns that, in part, underlie Title II.").

The State argues (State Br. 36) that, if Congress intended Title II's prohibition on disability discrimination to include an integration mandate, it would have said so in the statute itself, as it did in Title III, which applies to privately-owned places of public accommodation. See 42 U.S.C. 12182(b)(1)(B) ("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."). That argument is foreclosed by the Supreme Court's holding in *Olmstead* that unjustified isolation is properly regarded as a type of discrimination prohibited by Title II. 527 U.S. at 597, 119 S. Ct. at 2185.

In addition, the State's reasoning runs counter to the Supreme Court's recent observation – with respect to Title IX – that, "[b]ecause Congress did not list *any* specific discriminatory practices when it wrote [the statute], its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175, 125 S. Ct. 1497, 1501 (2005). With Title II, in fact, we can discern that Congress did intend Title II's prohibition on discrimination to include an integration mandate because such a mandate existed in the Section 504 regulations upon which Congress explicitly directed the Attorney General to rely. Where Congress expressly authorizes an agency to promulgate regulations to enforce a statutory prohibition, and especially where Congress directs that those regulations comport with a set of existing regulations, there is no need to spell out every aspect of that prohibition in the text of the statute.[8] But Congress did not have the option of relying on a preexisting regulatory scheme to enforce Title III's prohibition on

[8] The hollowness of the State's complaint that the integration regulation is not included in the text of Title II is made more clear by its heavy reliance (State Br. 25-26, 28, 37-42) on the "fundamental alteration" and "undue burden" defenses provided in Title II's regulations. 28 C.F.R. 35.130(b)(7); *id.* at 35.150(a)(3). If the State means what it says – *i.e.*, that the substance of Title II can be determined only by what is contained within the four corners of the statute itself – then it will find itself without any affirmative defense to a charge of discrimination.

disability discrimination in public accommodations. Congress therefore chose to specify in more detail the types of discrimination it intended to prohibit in Title III, and explicitly included the requirement that "[g]oods, 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). Congress's choice to specify the integration mandate in Title III reinforces the *Olmstead* Court's conclusion that a simple ban on "discrimination" based on disability reasonably includes a ban on unnecessary isolation and segregation of individuals with disability. There is no meaningful difference between Congress's spelling out of the integration mandate in Title III and its adoption of that mandate by reference in Title II – both have the force of law and may be enforced by individuals through a private right of action to enforce the statute.

II

WHEN A STATE OPERATES A PROGRAM THAT INCLUDES THE PROVISION OF PERSONAL SERVICES TO INDIVIDUALS WITH DISABILITIES, TITLE II'S REGULATIONS REQUIRE THE STATE TO PROVIDE THOSE SERVICES IN THE MOST INTEGRATED SETTING APPROPRIATE

The State argues (State Br. 26) that "the ADA's implementing regulations specifically preclude ordering a state to provide personal care assistance as a

program modification or reasonable accommodation." In support of this argument, the State points to 28 C.F.R. 35.135, entitled "Personal Devices and Services," which provides that the regulations do not:

> require a public entity to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, toileting, or dressing.

According to the State, this regulation categorically exempts States from having to provide any personal services (such as the types of services Griffin requires) to a qualified individual with a disability as part of a program modification. But the State over-reads this regulation.

The personal devices and services regulation is intended to make clear that public entities are not generally required to provide personal devices and services to individuals with disabilities where the provision of such devices and services is not a part of the program or service the entity provides. Thus, for example, a DMV is not required to provide wheelchairs or personal attendants to mobility-impaired individuals, though it is required to ensure that its services are available to people who require the assistance of wheelchairs or personal attendants.

It is apparent from the regulations themselves that the personal devices and services regulation is not categorical, as the State argues. In certain

circumstances, a public entity will be required to provide such devices and services to individuals with disabilities. That is made clear in the appendix to the Title II regulations, which states that, although a public entity is generally "not * * * required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities," it must do so "in special circumstances, such as where the individual is an inmate of a custodial or correctional institution." 28 C.F.R. Pt. 35, App. A, p. 542 (2004). More to the point, where the State operates a program or provide a service that includes the provision of personal services – such as a program providing nursing home services – it cannot discriminate against individuals with disabilities in the provision of those services. That self-evident requirement is made explicit in the Department's Title II Technical Assistance Manual, which states:

> A public entity is not required to provide individuals with disabilities with personal or individually prescribed devices, such as wheelchairs, prescription eyeglasses, or hearing aids, or to provide services of a personal nature, such as assistance in eating, toileting, or dressing. Of course, if personal services or devices are customarily provided to the individuals served by a public entity, such as a hospital or nursing home, then these personal services should also be provided to individuals with disabilities.

U.S. Dept. of Justice, *ADA Title II Technical Assistance Manual*, § II-3.6200.[9]

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[9] The Technical Assistance Manual represents the Department's

(continued...)

The State argues that the regulation offers an independent reason why it is not required to provide personal services in the community to the plaintiff. But the personal services regulation does not alter the State's obligations under the integration regulation. The two must be read together. As discussed *supra*, in order to have the force of law, the regulations implementing Title II – including the personal devices and services regulation – must reasonably enforce Title II's nondiscrimination mandate. And the Supreme Court has already held that the prohibition on discrimination in the statute itself encompasses a ban on unjustified isolation or segregation. *Olmstead*, 527 U.S. at 597, 600, 119 S. Ct. at 2185, 2187. The personal devices and services regulation cannot, therefore, exempt the State from Title II's requirement that public entities provide programs and services in a setting that is neither isolated nor segregated.

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[9] (...continued)
interpretation of its ADA regulations, and has been relied upon by the Supreme Court. See *Bragdon* v. *Abbott*, 524 U.S. 624, 646-647, 118 S. Ct. 2196, 2208-2209 (1998). The appendix to the Title II regulations also explains that the regulation "parallels an analogous provision" in the regulations implementing Title III. 28 C.F.R. Pt. 35, App. A, p. 546 (2004) (referring to 28 C.F.R. 36.306). The Appendix accompanying the Title III regulations, in turn, explains: "Of course, if personal services are customarily provided to the customers or clients of a public accommodation, e.g., in a hospital or senior citizen center, then these personal services should also be provided to persons with disabilities using the public accommodation." 28 C.F.R. Pt. 36, App. B, p. 704 (2004).

It is true that Title II would not require the State to provide personal services in a program that does not include such services. But the State already provides personal services both to individuals in need of such services who are living in nursing homes and to individuals in need of such services who are living in the community and are enrolled in the State's Aged and Disabled Waiver program. The issue in this case is whether, and to what extent, the integration mandate will require the State to provide services (including personal services) in the community to plaintiff class members who receive or received such services in nursing homes. If the district court determines that the integration mandate requires that the personal services provided in nursing homes be provided to class members in the community, the personal services regulation would not bar relief. Because the Department of Justice's interpretation of its own regulation merits substantial deference, see *Auer* v. *Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 911 (1997), this Court should reject the State's contrary interpretation of the personal services regulation.

CONCLUSION

This Court should hold that a private right of action to enforce Title II includes a right to enforce Title II's implementing regulations, and that the personal services regulation does not provide a defense to applications of the integration regulation.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation required by Fed. R. App. P. 29(d). This brief was prepared using WordPerfect X4 and contains no more than 5,736 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: April 2, 2009

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2009, the original and six copies of the BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE, as well as original appearance of counsel forms, were served by overnight mail, postage prepaid, on the Clerk of the Court for the 11th Circuit Court of Appeals. I also certify that one copy of the foregoing brief and one copy of appearance of counsel forms were served by overnight mail, postage prepaid, on the following:

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