IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

THOMAS J. RIDGE, Governor of the Commonwealth of Pennsylvania; FEATHER HOUSTOUN, Secretary, Department of Public Welfare; NANCY THALER, Deputy Secretary of Mental Retardation, Office of Mental Retardation; ALAN M. BELL, M.D., Director, Embreeville Center; COMMONWEALTH OF PENNSYLVANIA,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AND THE ARC OF THE UNITED STATES AS AMICI CURIAE

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For Amici Curiae

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I. STATEMENT OF INTEREST OF THE AMICI CURIAE

The National Association of Protection and Advocacy Systems (NAPAS), founded in 1981, is a membership organization for the nationwide system of protection and advocacy (P&A) agencies. P&As are mandated under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 et seq., and related statutes, to provide legal representation and related advocacy services on behalf of all persons with disabilities. In fiscal year 1994 alone, P&As served well over 600,000 individuals with disabilities. NAPAS provides P&As with training and technical assistance and represents their interests before the Executive and

Legislative Branches of the federal government. P&A systems exist in every state and territory of the United States of America. In many of those jurisdictions, P&A systems are at the forefront of the struggle to protect the rights of persons with disabilities who are unnecessarily confined to institutions such as the Ebensburg Center. With some two decades of experience in institutional reform litigation and community integration litigation, P&As are uniquely situated to serve as friend of the court in its consideration of this profoundly disturbing district court opinion.

The Arc of the United States is a membership organization comprised of family members, friends, interested citizens, and individuals with professional interests in the field, as well as people who seek to speak for themselves despite their cognitive impairments. The more than 1,100 state and local chapters of the Arc of the United States across the country form the largest voluntary organization in the United States devoted solely to the welfare of the more than seven million people who have mental retardation and their families and to the prevention of this condition in future generations.

The Arc of the United States is committed to securing for all people with mental retardation the opportunity to choose and realize their goals of where and how they learn, live, work and play. The Arc is further committed to reducing the incidence and limiting the consequence of mental retardation through education, research, advocacy and the support of families, friends, and community. Since its founding in 1950, the Arc has been recognized in every forum including the Congress, state legislatures, rulemaking proceedings, and in the

courts, as representative of the interests of citizens with mental retardation and their families. As such, the Arc of the United States is well qualified to serve as friend of the court on behalf of those individuals residents of institutions who may be affected by the holding.

II. STATEMENT OF JURISDICTION

Amici adopt the statement of jurisdiction as presented in the appellant's brief.

III. STATEMENT OF THE ISSUES

Amici agree with the position offered by the Appellant United States as to the statement of the issues and offer the following additional issues for consideration by the Court:

1. Did the opinion correctly apply the standards enunciated in Youngberg v. Romeo, 457 U.S. 307 (1982)?

2. Does a series of negligent acts by State actors rise to more than "mere negligence" and therefore become actionable under the Fourteenth Amendment?

3. Did the opinion correctly apply a "policy or custom" standard to the facts before it?

IV. STATEMENT OF THE CASE

Amici adopt the statement of the case as presented by the Appellant United States of America.

Additionally, amici note that conditions at the Ebensburg Center, the subject of this litigation, are similar in many respects to the conditions which once existed at the Pennhurst State School. For example, as at Pennhurst more than twenty years ago, Ebensburg is overcrowded and not conducive to training programs of any sort. Compare Tr. 7/26/93 (Stark)

at 233-34; Exh. 870 at 57, with Halderman v. Pennhurst, 446 F. Supp. 1295, 1309 (1977). Ebensburg residents, like those of the former Pennhurst institution, are frequently injured while in defendants' custody, both from other residents' behaviors and from self-abuse. Compare Tr. 8/4/93 (Amado) at 76-77; Tr. 8/2/93 (Russo) at 75-79; Tr. 7/26/93 (Stark) at 105, with Pennhurst, 446 F. Supp. at 1309. The Third Circuit is very familiar with the Pennhurst litigation, which spanned some eleven years. See Halderman v. Pennhurst State School, 901 F.2d 311 (3d Cir. 1990), cert. den., 498 U.S. 850 (1990)(See 901 F. 2d at 315, n.1, for reference to procedural history). After many years of attempting to improve conditions there, "[u]ltimately, all parties conceded that Pennhurst was not providing adequate care and habilitation," Id. at 315. Pennhurst is now closed.

V. SUMMARY OF ARGUMENT

The opinion below reflects a diligent attempt to synthesize weeks of testimony by experts and professionals in a wide variety of disciplines and testimony by caregivers, administrators and others familiar with conditions at the Ebensburg Center and with services available in the surrounding communities. Because of the misapplication of key legal standards and because of misinterpretation of facts, however, the decision reached was incorrect and should be reversed.

The decision misapplied the holding of Youngberg v. Romeo, 457 U.S. 307 (1982), by failing to afford any weight to the individual liberty interests at stake in this matter. Instead, the decision treated Youngberg's "professional judgment" standard as though all decisions

about people with disabilities in state custody and care are conclusively valid. The opinion deems that "professional judgment" can include decisions no longer accepted by the professions, and can include treatment plans that are never implemented. Also, the opinion seems to excuse lapses of professional judgment that are the result of inappropriate staffing at Ebensburg. These distortions of the professional judgment measure cannot be supported by any reading of Youngberg.

Additionally, the opinion failed to recognize that proof of a series of negligent acts at Ebensburg constitutes much more than "mere negligence". While each act, examined in isolation, may not present a constitutional claim, clearly the pattern of negligent acts demonstrated at trial amounts to deliberate indifference, more than sufficient to establish liability here.

Finally, the decision imposes an impossibly high burden of proof by misapplying the "policy or custom" requirement originally articulated in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978). The Monell rule has no application in this case, because Monell was limited to defining municipal liability and is not applicable to an action against the state. Moreover, Monell does not apply to an action seeking injunctive relief only, and has no application to an action where the torts of the state itself are at issue. In any event, even if Monell did apply here, the United States clearly established numerous customs of violating individual rights at Ebensburg.

Amici support, also, the arguments advanced in Appellant's brief urging reversal. In particular, Appellant correctly argues that the Constitution protects an individual's right to training that will enable him or her to improve living skills, especially if that training will allow the individual to leave the institution. See Brief of Appellant at 28-32. As other courts have noted, if a person can demonstrate that a state's refusal to provide adequate training in an institution caused the loss of self-care skills, the state will be liable for that loss. See e.g., Jackson v. Ft. Stanton, 757 F. Supp. 1243, 1309 (D.N.M. 1990), rev'd on other grounds, 964 F.2d 980 (10th Cir. 1992).

VI. ARGUMENT

A. THE OPINION ERRED IN ITS APPLICATION OF YOUNGBERG V. ROMEO BY FAILING TO BALANCE INDIVIDUAL RIGHTS AGAINST ARTICULATED STATE INTERESTS AND BY SUBSTITUTING A "GOOD FAITH" STANDARD FOR PROFESSIONAL JUDGMENT.

The decision below misinterprets Youngberg v. Romeo, 457 U.S. 307 (1982) to allow for the application of outdated and dangerous treatment modalities under the guise of the "professional judgment" standard. This misapplication carries dangerous consequences for the rights of all persons with disabilities in institutions throughout the country.

1. The opinion below failed to afford sufficient weight to individual rights as opposed to the state's interests, as required by due process.

In Youngberg, the Supreme Court identified for the first time the protectable constitutional rights available to someone who has been entrusted to the care of an institution

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for persons with developmental disabilities. The Court began by noting that such an individual retains liberty interests protected by the Due Process clause that are not extinguished in the institution, 457 U.S. 307, 315-316. After identifying the rights at stake for the individual plaintiff in the Youngberg case, Nicholas Romeo, the Court noted that the next step in any due process analysis is to balance the individual's liberty interests with the demands of an organized society. 457 U.S. 307, 320, citing dissent of Justice Harlan in Poe v. Ullman, 367 U.S. 497, 542 (1961).

Rather than require the state to identify and defend its interest in each and every decision made concerning an individual, the Youngberg Court established the professional judgment standard: a decision made by a professional is a presumptively valid expression of the state's interest unless the decision is a substantial departure from accepted professional judgment, practice, or standards so as to demonstrate that the person responsible actually did not base the decision on such judgment. 457 U.S. 307, 321-323. The Youngberg Court intended this standard as a guide to lower courts in identifying the state's interests, hoping to minimize judicial involvement in the daily operation of institutions, and affording the professional decisions a rebuttable "presumption of correctness". Id. at 321-324.

The opinion in the case below has completely misinterpreted the Youngberg directive, essentially abandoning any responsibility to weigh professional decision-making against individual rights, and elevating professional decision-making to a conclusive, not rebuttable,

presumption of correctness.[1] Nowhere in the opinion's lengthy discussion of institutional practices is there any indication of the individual rights at stake. For instance, there is little acknowledgement of an individual's right to adequate medical care in the analysis of nursing practices or in consideration of medication administration procedures. The opinion does not weigh any individual right to privacy in its endorsement of Ebensburg's consistently unsuccessful plans to correct privacy deficiencies. Thus, clearly, the decision failed to afford any weight to the individual rights at stake as against the state's interests.

In light of the decision's apparent reluctance to give any weight to individual rights, the warnings offered by Justice Harlan in his Poe v. Ullman dissent hold special truth here. "[C]ertain [liberty] interests require particularly careful scrutiny of the state need asserted to justify their abridgment." Poe, 367 U.S. 497 at 543 (citations omitted.) Surely, the individual liberty interests at stake here require that level of careful scrutiny. Justice Harlan went on to advise that "due process has not been reduced to any formula...[n]o formula could serve as a substitute, in this area, for judgment and restraint." 367 U.S. 467, 543. Indeed, the decision

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[1] While abandoning the judicial task of weighing competing interests in this case, the court seems to have taken on new tasks. The court admits to going beyond the record presented to it in order to make its determination. At Footnote 11, the decision excuses this practice, stating that Rule 106 of the Federal Rules of Evidence permits an "adverse party" to introduce additional evidence for fair consideration. 902 F. Supp. 565, 585 n. 11 (W.D. Pa. 1995). It is alarming that any court might see itself as an adverse party and not a neutral arbiter. Likewise, at footnote 16, the opinion notes its sua sponte medical research, relying on the Physician's Desk Reference to excuse the facility's practice of injecting valium intramuscularly. Id., 593 n.16.

below seems to have substituted an unjustifiably broad reading of "professional judgment" for any exercise of judicial scrutiny.

2. Professional judgment cannot be satisfied by devising plans that are not implemented, by ignoring developments in the disciplines, or by staffing inappropriately.

The decision misapplied Youngberg's professional judgment standard throughout its opinion in many different ways. For example, in its discussion of nursing care, the opinion recites a long list of inadequately performed basic nursing practices which the United States' expert contends jeopardize residents' health at Ebensburg: auscultation of breath sounds, measurement of abdominal girth, testing for hidden blood in stools or vomitus, and taking and recording residents' vital signs. 902 F. Supp. 565, 628 (W.D. Pa. 1995). The opinion responds to only one of those inadequate nursing practices - testing for hidden blood - and ends its analysis there. Id. As another example, the opinion later responds to the United States' proof that Ebensburg fails to use "functional analyses" to develop individual plans of behavior treatment by stating that the Center is now beginning to use functional analyses. 902 F. Supp. 565, 638. Under this ruling, then, a court can fulfill the task of identifying whether professional judgment is satisfied in an entire professional discipline by examining only one aspect of it, or by noting that a particular practice may have been unacceptable in the past but will probably be better in the future now that Ebensburg knows it is unacceptable. See e.g. Id. at 611.

In fact, at one point, the opinion waters down the professional judgment standard even further. While Youngberg admonished that courts are to ensure that treatment decisions are made pursuant to "accepted professional standards," 457 U.S. at 323, the opinion here inserts new qualifying language, referring to "minimally" accepted professional standards, 902 F. Supp. 565, 584, (The opinion apparently borrowed the word "minimally" from Youngberg's description of the level of training that Romeo was entitled to, namely, minimally adequate training. 457 U.S. 307, 319 and 322. That the Constitution would allow "minimally accepted" professional standards appears nowhere in the Youngberg decision). Standards that are minimally accepted, in this opinion's interpretation, would apparently include standards that are simply not currently accepted or are not accepted by many professionals. For example, with respect to seizure treatment, the decision allowed an outdated, universally disregarded treatment method, understood to be dangerous, to satisfy the professional judgment standard. Id. at 592.

Surely, Youngberg never intended to permit such unreasonable action under the Fourteenth Amendment. Youngberg stresses that persons who have been confined through no fault of their own are entitled to greater protections than those confined for punishment purposes, but that the State need not meet the burden of proving "compelling" necessity. Youngberg v. Romeo, 457 U.S. 307, 321-322 (1982). In this fashion, the Court was relieving state institutions of the burden of ensuring absolute protections, but by no means relieving them of all of their responsibilities. The Court later states that a professional's treatment

decisions should be regarded as "presumptively," but not conclusively, valid. Id. at 323. The state is under a duty to ensure that decisions are made by appropriate professionals and that those decisions are reasonable. 457 U.S. 307, 324. "Reasonableness" is woven throughout the Youngberg Court's analysis of the rights enjoyed by Nicholas Romeo and its analysis of the obligations of the state. See e.g. 457 U.S. 307, 319, n. 25, and 322.

The decision found that the mere development of plans of correction satisfied the professional judgment standard, even if not implemented or even if not effective to resolve the problems addressed. e.g. 902 F. Supp. 565 at 590, 591, 594 and 597. The opinion holds that it was consistent with professional judgment for a professional to follow an older, even rejected, school of thought. e.g. Id. at 592, 596 (seizure treatments).[2] The opinion found no violation in the use, in residents' records, of diagnoses that have not been accepted since the very first Diagnostic and Statistical Manual of Mental Disorders (DSM) was published in 1952. Id. at 602-603. It did not find that professional judgment required psychiatrists and psychiatric

[2] The disciplines related to the care and training of persons with developmental disabilities, perhaps unlike any other fields, have experienced dramatic expansion of understanding of the capabilities of persons with developmental disabilities in recent decades. Tasks once thought impossible (by society at large) for someone with a developmental disability are now clearly attainable. For example, in 1982, when the Supreme Court issued its Youngberg decision, the parties to that action stipulated that "no amount of training would enable [Romeo] to live in the community." 457 U.S. 307, 317. However, less than two years later Romeo was successfully living in the community, eventually in his own apartment. See "Former Pennhurst Patient to Get Settlement," UPI, July 25, 1984, available in LEXIS, Nexis Library, UPI file.

service providers to keep abreast of changes in the Diagnostic and Statistical Manual[3]. Id. The decision did not require those responsible for medical treatment of the large number of people with epilepsy at Ebensburg to be aware of universally accepted developments in the treatment of epilepsy. Id. at 592. Under this insupportably broad application of the professional judgment standard, treatment of Ebensburg residents with leeches and magic charms might be an acceptable, albeit "older" school of thought.

Further, the opinion seems to regard this litigation as being against individual actors rather than the state itself. The decision excuses inadequate nursing care when delayed decisions to call the nurse are made by direct care staff. Id. at 629. The decision excuses errors made by doctors acting beyond their professional capacity because they are not neurologists. Id. at 592. No one intends to blame direct staff because they are not nurses; no one could blame a general practitioner for not being a neurologist. Id. at 592. But the state is to blame when it fails to put the proper decision makers in the proper places in its system. See e.g. Ramos v. Lamm, 639 F.2d 559, 578 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981) (inadequate and unqualified staff endanger prisoners' health and well-being and evince a deliberate indifference to health needs). See also, Scott v. Plante, 691 F.2d 634, 637 (3d Cir. 1982).

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[3] 902 F. Supp. at 602-3. The DSM was first published in 1952 and replaced by the DSM II in 1968. It has been revised three more times since then. Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (1994), Introduction at xvii; Third Edition-Revised (1987), Introduction at xviii.

Perhaps most distressing of all of the misapplications of the professional judgment standard are those relating to residential placement decisions for individual residents. The treatment officials most familiar with the Ebensburg residents found that many of them not only would be capable of living in the community but in fact would be better served in the community. While the holding acknowledged that to be true, it did not find any liberty interest to flow from that fact.[4] But see, Jackson v. Ft. Stanton, 757 F. Supp. 1243, 1311-1312 (D.N.M. 1990), rev'd in part, 964 F.2d 980 (10th Cir. 1992) (failure to implement community placement recommendations violates due process).

3. The opinion below impermissably created a "good faith" exception to Youngberg's professional judgment requirement.

Instead of giving any weight to individuals' rights, the opinion created a variation of a "good faith" standard, repeatedly concluding that any decision made at all by any institution staff would end the inquiry, even when made by someone unqualified (e.g. 902 F. Supp. 565, 629, medical response decisions made by RSA staff), even when made under outdated understandings of the discipline (e.g. 902 F.Supp. 565 at 592, 602, 622 and 633), or when a decision is made but not implemented or is ineffective (e.g. 902 F.Supp. at 590, at 594 and at 597).

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[4] Remarkably, the decision found it sufficient that the needs of residents for whom the community had been recommended were satisfied by the provision of grounds privileges to these residents. 902 F. Supp. 565, 587. It should go without saying that walking around the grounds of an institution can hardly be compared with the experience of living in a house in a neighborhood, with the freedom to come and go, and to make all of the everyday decisions that are denied institutional residents.

In this way, the decision abandons the task of giving sufficient weight to individual liberty interests against the state interests in being free from judicial intervention, and instead allows the state to have unchallengeable power.[5] Indeed, the Third Circuit warned against this practice in its Romeo decision: "appropriate deference to medical expertise does not diminish the judicial duty to safeguard liberty interests implicated in treatment decisions." Romeo v. Youngberg, 644 F.2d 147, 165 (3d Cir. 1980), vacated, 457 U.S. 307 (1982).

The decision in this case has already begun to have disastrous consequences in other parts of the country. The State of Maryland, for example, in a motion for summary judgment in the U.S. District Court of Maryland, cites U.S. v. Pennsylvania in taking the extraordinary position that because it has hired experts who will testify that the care provided to plaintiffs does not substantially depart from professional judgment standards, it has satisfied the professional judgment standard set forth in Youngberg v. Romeo, 457 U.S. 307 (1982).[6] Hunt v. Ebberts, et. al, Civ. No. CCB-91-2564, motion pp. 44-45 (D. Md. motion filed March 6,

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[5] For a thorough discussion of the relinquishment of the role of the judiciary in protecting individual liberty interests, see Susan Stefan, *Leaving Civil Rights to the 'Experts': From Deference to Abdication Under the Professional Judgment Standard*, 102 Yale L.J. 639 (1992).

[6] In Maryland's own words, "If the State can prove that any qualified professionals consider the State's care in these areas to meet or exceed existing professional standards, the State has demonstrated that it is exercising professional judgment. The State is then entitled to summary judgment on the due process claims." Hunt v. Ebberts, et al., Civ. No. CCB-91-2564, Memorandum in Support of Motion for Summary Judgment p. 43 (D. Md. motion filed March 6, 1996) (emphasis added). Maryland continues, "[T]he mere existence of the defendants' expert opinions demonstrates conclusively that the State is exercising professional judgment." Id. at 44 - 45 (emphasis in original)(citing U.S. v. Pennsylvania for the proposition that "for every alleged violation of CRIPA, court upheld state's judgment on basis of opinion of state's experts").

1996) (relevant pages attached). Essentially, the State of Maryland argues that, pursuant to U.S. v. Pennsylvania, whenever defendants' and plaintiffs' experts disagree, defendants' experts must win as a matter of law. This is an unreasonable application of the professional judgment standard because it improperly abdicates the function of the judiciary to determine if, in fact, professional judgment has been exercised. Youngberg v. Romeo, 457 U.S. 307, 321 (1982).

B. A SERIES OF NEGLIGENT ACTS CONSTITUTES MORE THAN MERE NEGLIGENCE AND VIOLATES RESIDENTS' CONSTITUTIONAL RIGHTS.

The trial opinion states that mere negligence is not enough to establish a violation of constitutional rights. While correct, that cannot end the analysis. While Fourteenth Amendment professional judgment liability may not arise with mere negligence, neither does it require a showing of deliberate indifference. This was, in fact, the very basis for reversal of the district court opinion in Youngberg[7]. As the Third Circuit has already established, a substantial departure from accepted professional standards "is an easier burden of proof than gross negligence" or deliberate indifference. Shaw v. Strackhouse, 920 F.2d 1135, 1146 (3rd Cir. 1990) ("professional judgment... remains somewhat less deferential than a recklessness or gross negligence standard".)

At trial, there was ample evidence of a series of negligent acts, even multiple acts of malpractice. In many circuits, repeated examples of what was found to be "mere negligence"

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[7]The district court erroneously used the deliberate indifference standard of Estelle v. Gamble, 429 U.S. 97 (1976). Youngberg, 457 U.S. 307, 312, n.11.

here, would be considered to be deliberately indifferent to the needs of inmates in a prison context. See, e.g., DeGidio v. Pung, 920 F.2d 525, 532-33 (8th Cir. 1990); White v. Napoleon, 897 F.2d 103, 109-110 (3d Cir. 1990); Rogers v. Evans, 792 F.2d 1052, 1058-59 (11th Cir. 1986); Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983), cert. denied, 468 U.S. 1217 (1984); Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); Todaro v. Ward, 565 F.2d 48, 52 (2d Cir. 1977)(finding patterns of abuse to be equal to deliberate indifference). Youngberg recognized that people with mental disabilities who are institutionalized through no fault of their own are due at least the same rights as prisoners, 457 U.S. 307, 315-316, and 321-322. If proof of a series of negligent acts is sufficient to establish deliberate indifference in the prison context, such proof must clearly establish a failure to exercise professional judgment, "an easier burden of proof," in a nonpenal setting. Shaw v. Strackhouse, 920 F.2d 1135, 1146 (3rd Cir. 1990). The holding of the opinion below, therefore, has denied the residents of Ebensburg rights which are guaranteed even to convicted prison inmates.

C. THE OPINION MISAPPLIED THE "CUSTOM OR POLICY" REQUIREMENT OF MONELL; THE PATTERNS AND PRACTICES OF THE EBENSBURG CENTER CLEARLY CONSTITUTE A "CUSTOM OR POLICY".

Several parts of the opinion demonstrate a profound misunderstanding of the § 1983 "policy or custom" standard. See e.g. 902 F.Supp. 565 at 591 (official policy or custom played no role in negligent basic care and ineffective plans of correction). The decision's

misapplication of the rule is perhaps most alarming in its evaluation of Ebensburg's routine failure to monitor the side effects of Dilantin, an anticonvulsant medication. The opinion finds that Ebensburg fails to monitor blood levels, a necessary step in preventing dangerous side-effects from the drugs and ensuring effectiveness of anti-seizure medication. The opinion notes that there is no justification for this failure to monitor and that Ebensburg does not attempt to offer one. The decision actually concludes that Ebensburg substantially departed from professional standards in treating patients with seizure disorders, 902 F.Supp. 565, 595-596. The opinion then states that no relief can stem from this failure as a matter of law because it was not proven that the practice was a result of the Commonwealth's "policy or custom." Id. at 596. That an established practice (or, in this case, absence of practice) is not a "policy or custom" not only defies simple common sense, but also offends the very purpose of the standard as articulated by the Supreme Court.

1. The "policy or custom" analysis is not applicable to an action against a state.

The "policy or custom" requirement for litigation brought under 42 U.S.C. § 1983 was first articulated by the Supreme Court in Monell v. New York City Department of Social Services, 436 U.S. 658, 690-691 (1978). Monell held that local governmental officials are "persons" within the meaning of 42 U.S.C. §1983, and that the municipality itself will be liable for the conduct of that official when the conduct is pursuant to the municipality's "policy or custom." 436 U.S. at 663. Monell overruled the municipal immunity established in Monroe

v. Pape, 365 U.S. 167 (1961). Id. The entire focus of the Monell opinion was on the liability of a local government, such as a city or a school board, under § 1983, concluding "Congress did intend municipalities and other local government units to be included" in §1983 application. Id. at 690 (emphasis in original). Monell and its progeny have no relevance to an action against the state.[8]

2. The "policy or custom" analysis does not establish an additional burden of proof where the government is sued for its own constitutional violations.

The opinion below seems to regard the "policy or custom" analysis as requiring some greater level of proof of constitutional violations. As discussed above, the opinion notes that even though there is an absence of a practice of properly monitoring blood levels at the Ebensburg Center, proof of this violation alone is not sufficient without some additional showing of "policy or custom."

As the Appellant's brief states, the "policy or custom" analysis was developed to define under what circumstances a municipal entity could be held vicariously liable for the conduct of individual governmental actors. Rejecting governmental liability under a traditional *respondeat superior* theory, the Court stated that a "municipality cannot be held liable solely

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[8]Kentucky v. Graham, 473 U.S. 159 (1984), cited below as the source for the "policy or custom" rule, did involve an action against a state entity. However, the "policy or custom" rule was not at issue in that case. Rather, it is cited among a dozen other examples of "basic distinction[s] between personal - and official-capacity actions." Id. at 166-167. In fact, Graham acknowledges that the Monell rule is limited to local governments. Id at 166 n.12 and n.14.

because it employs a tortfeasor." 436 U.S. at 691 (emphasis in original.) However, the legislative history of Section 1983 made it clear that a government is liable for its own violations of the Constitution. Id at 683.

Monell noted that actions by governmental entities must, of necessity, be carried out by individual actors but holds that there must be some causal connection between the action complained of and the governmental entity before liability under Section 1983 can lie. In Monell, the Supreme Court found a pregnancy-related policy to be illegal, then went on to explain the circumstances under which local governments can be vicariously liable. The Court stated that a government is surely liable "for its own violations of the Fourteenth Amendment," and will be liable for the actions of a state actor when the government has caused the state actor to deprive a person of his or her individual rights. 436 U.S. 658, 683. "Monell's policy or custom... requirement was intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers." Oklahoma City v. Tuttle, 471 U.S. 808, 821 (1985). However, the policy or custom analysis has little use here, where vicarious liability is not at issue. It is the state's own violations of the Constitution that are before the court here. When the state operates a facility such as Ebensburg, it is clearly responsible for, and liable for, the services rendered there.[9]

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[9]Appellant's argument, that Monell has no application in an action seeking only injunctive relief likewise is well taken. See brief at p. 49 n. 28. The question before the Monell Court was limited to relief in the nature of backpay. Monell, 436 U.S. at 662.

3. Where a pattern or practice of violations is shown, it may properly be inferred to be a "policy or custom" of the governmental entity.

Even if there were a need to establish "policy or custom" in this case, the United States easily satisfied that burden. This lawsuit was initiated pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (CRIPA).[10] CRIPA established the Attorney General's standing to sue under limited circumstances. See 42 U.S.C. § 1997b. Pursuant to CRIPA, the Attorney General must certify that the institutional conditions complained of are part of a pattern or practice, in order to have standing[11]. Id The decision below initially seems to imply that CRIPA's "pattern and practice" requirement is essentially the same as "policy or custom", See 902 F.Supp. 565, 580. The opinion later applies the "policy or custom" requirement in an inexplicable manner, increasing the Attorney General's burden of proof to establish, somehow, that the pattern or practice is also a custom or policy. In other words, the decision seems to state that a practice that offends professional standards must have some patina of official approval before a state can be held responsible. The holding below has thus reached an absurd result, making it unlikely that any plaintiff could ever meet this standard.

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[10] To the extent that the policy or custom rationale arises from the judiciary's recognition of 11th Amendment sovereign immunity for state governments, it is arguably inapplicable to an action initiated by the United States, to whom the 11th Amendment does not apply. See U.S. v. Mississippi, 380 U.S. 128, 140-41 (1965).

[11] Although the United States usually considers this part of its burden of proof, as it did at trial, "pattern and practice" is an element of the Attorney General's certification which courts are not authorized to look behind. See, e.g. United States v. Pennsylvania, 832 F. Supp. 122, 126 (E.D. Pa. 1993); United States v. Illinois, 803 F. Supp. 1338, 1340-41 (N.D. Ill. 1992); United States v. New York, 690 F. Supp. 1201, 1204 (W.D.N.Y. 1988).

This is an unjustifiably impossible burden of proof, clearly not intended by Congress or the case law.

The United States presented ample evidence to establish a "pattern or practice" of constitutional violations, held by the Third Circuit to be actionable under the Constitution. Shaw v. Strackhouse, 920 F.2d 1135, 1143 (failure to prevent pattern of injuries is actionable, citing to Romeo v. Youngberg, 644 F.2d 147, 163 (3d Cir. 1980)). In spite of the crushing weight of evidence of deplorable conditions, the opinion below rejects each instance as an "isolated example"[12]. Although the opinion selectively identifies random examples of evidence offered by the United States and then dismisses them as "isolated," the United States offered some three volumes -- nearly two thousand pages -- of proposed findings of fact. The holding dismissed proof after proof of unimaginable conditions at the institution as "isolated examples", refusing to see any pattern that the aggregation of examples provides.

Noting time after time that an isolated instance of inadequate care does not demonstrate a constitutional violation, citing to Shaw v. Strackhouse, 920 F.2d 1135 (3rd Cir. 1990) and Society for Good Will to Children v. Cuomo, 737 F.2d 1239 (2nd Cir. 1984), the opinion rejects a veritable parade of abuses as "isolated mishaps": residents covered with ants (902 F. Supp. 565, 588), maggots found in a resident's ear (Id.), resident covered with vomitus (Id. at 589),

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[12] It is curious that when the Commonwealth presents evidence of one situation, it is noted to be "an illustration" of a point, 902 F.Supp. at 612, yet when the United States presents a situation, it is rejected as an "isolated example". Similarly, as to each side's experts, when the Commonwealth's expert concedes a point, it is described as "candor", but when the United States' expert concedes a point, it "undermines his position," compare 902 F. Supp. at 601, n. 29 with 902 F.Supp at 610.

many residents smelling of urine (Id.), twelve urine-saturated residents confined to wheelchairs for five hours without a change of clothing (Id. at 589-901), repeated state surveys finding privacy violations (Id. at 590), and on and on through medical care[13], psychiatric treatment, feeding practices, staff training and therapy services. There was more than abundant evidence at trial to establish a pattern or practice of flagrant and egregious conditions of confinement. In light of the arbitrary rejection of this procession of violations, it is difficult to discern exactly what might constitute a pattern of egregious conditions before the "isolated mishap" excuse can be overcome. From maggot infestations, to preventable deaths and outright abuse of residents, to life-threatening administration of medications, the opinion appears to be announcing a standard of constitutional tolerance for these conditions.

It is possible that the failure to see a pattern in the facts at trial stems from the decision's misunderstanding of or disregard for the individuality of people with developmental disabilities. [14] The residents of Ebensburg Center are each unique individuals, with unique

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[13] In the area of medical care alone, the court found that the following conditions do not violate constitutional minimums: a) inadequate recordkeeping and documentation, 902 F.Supp at 605, but see Jackson v. Ft. Stanton, 757 F.Supp 1243, 1306 (D.N.M. 1990) rev'd in part on other grounds, 964 F.2d 980 (10th Cir. 1992). b) failure to monitor blood levels, c) intramuscular injections of valium, d) medical treatment decisions made by direct care staff, e) neurological care provided by general practitioners. (The trial court discussed nursing care separately, as though unconnected to medical care. 902 F. Supp. 565, 628-631.)

[14] The decision relies on stereotypical conclusions about people with developmental disabilities to excuse Ebensburg's failures, believing, for example, that physical injury is inevitable, 902 F. Supp. at 596, and that psychiatric diagnosis of "the mentally retarded is more of an art than a science" 902 F.Supp at 602.

problems, unique challenges and unique capacity for growth and development. No two individuals needs are exactly the same. Because of this uniqueness, it should be rare indeed that any two individuals will suffer the identical conditions of denied rights. Yet, the decision refuses to see any connection among the thousands of examples presented unless there is exact duplication. (In fact, there was evidence of exact duplication here, for example, in the proof of the twelve people who were urine soaked, and in the proof of failure to monitor dilantin blood-levels.) In essence, the opinion claims that the United States Constitution permits intolerable living conditions for those in state care, even with repeated examples of the identical kinds of abuse or neglect for many individuals[15]. If the opinion is left standing, courts will be free to dismiss any proof of harm to individuals as simply isolated examples.

In fact, the accumulation of the "isolated" examples presented clearly establishes a practice of gross negligence, even deliberate indifference, with regard to the treatment of the residents of the Ebensburg Center. The evidence was sufficient to establish a custom or policy under any plain understanding of those terms.

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[15] In one instance, the opinion dismissed a death by aspiration pneumonia as "an isolated example," although the record made clear that this was a preventable death, caused in part by the institution's failure to follow its own treatment plan. 902 F. Supp. at 608. Evidence at trial demonstrated that the woman had been left for fifteen minutes or more in a head-down position causing her death. Under the holding of this case, unless it was shown that virtually every individual at the Ebensburg Center endured this abuse, no pattern or practice would be found. Even then, there might still be no violation unless the state issued some formal endorsement of their suffering, in order to meet the much higher "policy or custom" standard. To the contrary, Monell warned that governments may be liable for violations "pursuant to governmental custom," even though such a custom has not received formal approval through the body's official decisionmaking channels. Monell, 436 U.S. at 691.

Notably, proof of even a single incident of unconstitutional activity is sufficient to impose liability under Monell if there is proof it was caused by an existing policy. Oklahoma v. Tuttle, 471 U.S. 808, 823-824 (stating that even just one application of the policy in Monell would suffice to establish Section 1983 liability, 471 U.S. 808, 822). "To establish the constitutional violation in Monell no evidence was needed other than a statement of the policy by the municipal corporation, and its exercise..." Id. at 822-23 (Rehnquist, concurring). In fact, even a single incident can create liability. "A rule that the city should be entitled to its first constitutional violation without incurring liability...would be a legal anomaly." Id. at 832, (Brennan, concurring). When a state has undertaken the care, treatment, and habilitation of persons with developmental disabilities, it is liable for each and every exercise of an unconstitutional practice. It would be anomalous, at the very least, to allow a rule that a state government is entitled to its first constitutional violation free of charge simply because the violation occurred in an institution.

VII. CONCLUSION

The opinion below examines conditions of confinement at an institution for persons with developmental disabilities and concludes, for the first time in judicial history, that no Constitutional violations exist. If the institution posed significantly fewer threats to the lives and liberty interests of its residents than does the Ebensburg Center, such a conclusion might actually be a hopeful sign. As it stands, however, the opinion will serve as a frightening smokescreen for tragic conditions in institutions which should not be tolerated in any court in

this land, and most certainly not in the Third Circuit, well-known for its tremendous accomplishments in protecting the rights of persons with developmental disabilities. This decision, if allowed to stand, threatens not only persons with developmental disabilities in Pennsylvania and the Third Circuit, but throughout the country. Amici join with Appellant and respectfully urge that the opinion below be reversed.

Respectfully submitted:

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professionals -- treating, evaluating, and administrative -- and, so long as qualified professionals opine that the State's care, treatment, and placement efforts reflect that professional judgment is being exercised, this Court may not "interfere with the internal operations of State institutions." Thomas S. IV, 902 F.2d at 252.

2. The Care, Treatment, and Placements Provided Meet Constitutional Standards

(a) Professional judgment has been exercised regarding care and treatment.

In order to prevail on their substantive due process claims, plaintiffs would have to prove that the safety measures, restrictive confinement, and minimally adequate habilitation afforded the plaintiffs deviate so substantially from accepted professional standards that the State cannot be said to be exercising professional judgment. Youngberg, 457 U.S. at 321-23. If the State can prove that any qualified professionals consider the State's care in these areas to meet or exceed existing professional standards, the State has demonstrated that it is exercising professional judgment. The State is then entitled to summary judgment on the due process claims in these three cases.

Discovery has been completed regarding the care and treatment being provided plaintiffs. The undisputed material facts prove that the State is exercising professional judgment, and is entitled to summary judgment.

(b) Defendants' experts opine that care and treatment meet professional standards.

(i) The Williams Case

In Williams, every defendant's expert agreed that the current placements of plaintiffs were appropriate, and that their care and treatment meets or exceeds professional standards of care. **Appendix B at 54-58.**

(ii) The Hunt Case

In Hunt, plaintiffs' experts have opined that care and treatment at the institute meets or exceeds professional standards of care. **Hunt Paper No. 170, Exhibit C, Baumeister Report, Paper No. 170, Exhibit D, Walsh Report; Hunt Paper No. 167, Exhibit F, Kastner Report; Hunt Paper No. 167, Exhibit B, Curtis Report; Hunt Paper No. 167, Exhibit E, Feinstein Report; Kastner Dep. at 63-66.**

(iii) The Hattie J. Case

Defendants' experts concluded that her needs require a NF level of care and placement and care at Deer's Head is appropriate. App. A at 26-28; infra, at 75-77.

Even if plaintiffs have experts who disagree with the opinions in defendants' expert reports referred to, the mere existence of the defendants' expert opinions demonstrates conclusively that the State is exercising professional judgment within the range of professional standards with respect to the care and treatment -- including safety, restriction, and habilitation -- of each plaintiff. See Society for Good Will to Retarded Children v. Cuomo, 737 at 1249 (where experts disagreed over appropriateness of

institutionalization, the court "cannot say that it is professionally unacceptable"); U.S. v. Oregon, 782 F. Supp. 502, 513 (D. Or. 1991) (the Department of Justice's criticism of State institutional care "reflects a difference of professional opinion rather than a violation of the constitutional standards"); U.S. v. Com. of Pennsylvania, 902 F. Supp. 565 (W.D. Pa. 1995) (for every alleged violation of CRIPA, court upheld state's judgment on basis of opinion of state's experts). In fact, however, reports of defendants' experts go further, and demonstrate conclusively that the care and treatment provided by the State does not substantially deviate from accepted professional standards.

3. **Plaintiffs' Experts Use An Incorrect Standard Of Care.**

Even if the State's experts' reports did not on their face dispose of the due process claims in these cases, the plaintiffs' expert reports cannot be used to rebut those of the State's expert opinions, for the plaintiffs' experts all used a legally incorrect standard of care.

(a) There is no accepted standard for TBI and NRDD patients.

Virtually every expert on both sides of the Williams case conceded that there is no objective, definitive standard of care for persons with TBI and NRDD. **Zasler Dep. at 86; Kutzer Dep. at 70-72; Culotta Dep. at 34-35; Brandt Dep. at 152; Cassidy Dep. at 57-58.** Rather, experts for both sides stated that programs of care and treatment must be gauged against the individual professional's own experience. **Culotta Dep. at 35-37; Voogt Dep.**

at 117; Taylor Dep. at 65; Horton Dep. at 35-36, 100; Lyketsos Dep. at 99-100; Joseph Dep. at 70-78. Thus, plaintiffs' experts' appraisals are no more valid than those of defendants' experts. Since defendants' experts' opinions that the State's care and treatment meet accepted professional standards were based upon their extensive training and experience in psychiatry, neuropsychiatry, psychology, neuropsychology, brain injury, and rehabilitation of brain injured persons, their conclusions cannot for the purposes of the legal standard in this case be disputed, and the matter is settled. See Bailey v. Gardebring, 940 F.2d 1150, 1155 (8th Cir. 1991) ("a condition for which there is no known or generally recognized method of treatment cannot serve as a predicate for the conclusion that failure to provide treatment constitutes 'deliberate indifference' to the serious medical needs of prisoners"); U. S. v. Charters, 863 F.2d 302, 313 (4th Cir. 1988) (the Youngberg standard "appropriately defers to the necessarily subjective aspects of the decisional process of institutional medical professionals").

(b) Plaintiffs' experts incorrectly used a standard of optimal care.

Youngberg and the cases following it uniformly hold that the Constitution does not guarantee persons in State custody a right to the best treatment available. See Society for Good Will, 737 F.2d at 1247-49[15]; Griffith v. Ledbetter, 711 F. Supp. 1108, 1108-1109

[15] "Where the state does not provide treatment designed to improve a mentally retarded individual's condition, it deprives the individual of nothing guaranteed by the Constitution; it simply

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v.

THOMAS J. RIDGE, Governor of the Commonwealth of Pennsylvania, et al.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

CERTIFICATE OF SERVICE

I certify that on this 23rd day of April, 1996, I did cause to be served by overnight delivery two copies of the brief of the proposed amici curiae in the above captioned case on each of the following counsel for the parties:

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