No. 02-3657

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DONNA RADASZEWSKI, Guardian, on behalf of ERIC RADASZEWSKI,
Plaintiff-Appellant,

v.

JACKIE GARNER,
in her official capacity as Director of the Illinois Department of Public Aid,
Defendant-Appellee.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
THE HONORABLE JOHN W. DARRAH

BRIEF OF AMICI CURIAE ACCESS LIVING, THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, EQUIP FOR EQUALITY, INC. AND THE ILLINOIS NETWORK OF CENTERS FOR INDEPENDENT LIVING IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REQUESTING REVERSAL

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record for Amici hereby furnishes the following information pursuant to this Court's Rule 26.1:

1. The full names of Amici represented by counsel are as follows: Access Living of Metropolitan Chicago, the American Civil Liberties Union of Illinois, Equip for Equality, Inc., and the Illinois Network of Centers for Independent Living.

2. The full names of all law firms whose attorney represent Amici listed above are as follows: Access Living of Metropolitan Chicago, the American Civil Liberties Union of Illinois, and Equip for Equality, Inc.

3. All Amici are not-for-profit corporations.

Dated November 26 2002.

RESPECTFULLY SUBMITTED,

_____

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I. STATEMENTS OF INTEREST OF AMICI CURIAE

A. Access Living

Access Living is a Center for Independent Living for people with disabilities established under the Rehabilitation Act, 29 U.S.C. § 796f. It is the largest independent living center in Illinois and one of the largest in the nation. Access Living is governed and staffed by a majority of people with disabilities, including physical and cognitive disabilities. Its statutorily-mandated mission includes assuring that people with disabilities have equal access to and participation in services, programs, activities, resources and facilities, whether public or private. See id. § 796f-4(b)(1)(D).

Access Living has been actively involved in ensuring the rights of people with disabilities to be free from unwarranted isolation and confinement. Access Living's Community Integration Project has over the past five years enabled over 100 people with disabilities to move out of segregated nursing homes and into their own homes by helping them access home-and-community-based supports and services. These services are almost always more cost-effective than nursing homes. Eric Radaszewski is typical of the people Access Living has helped to move into the community. Because of its unique perspective as an organization of and for people with disabilities and its role in integrating people who, like Mr. Radaszewski, would otherwise be confined to nursing homes, Access Living believes its views will be of service to the Court.

B. American Civil Liberties Union of Illinois

The American Civil Liberties Union (ACLU) of Illinois, a statewide organization with

approximately 15,000 members, is dedicated to preserving the Bill of Rights and enforcing laws to protect civil rights and liberties. The ACLU of Illinois and its parent organization, the American Civil Liberties Union, have had a long history of defending the rights of people who depend on government services and institutions, including people with disabilities. In the U.S. District Court for the Northern District of Illinois, for example, ACLU staff and cooperating attorneys have participated in a constitutional challenge to the conditions and treatment provided to patients in state-operated psychiatric facilities in Illinois, K.L. v. Edgar, 948 F. Supp. 44 (N.D. Ill. 1996), and have challenged the care and services delivered to the state's foster children, B.H. v. Johnson, 715 F. Supp. 1387 (N.D. Ill. 1989). Because this case involves important issues affecting the lives of thousands of people with disabilities, the ACLU of Illinois believes its views will be of service to this Court.

C. Equip for Equality

Founded in 1985, Equip for Equality is an independent, not-for-profit organization that administers federally-mandated protection and advocacy services for Illinois. Its mission is to advance the human and civil rights of children and adults with physical and/or mental disabilities in Illinois. To this end, Equip for Equality provides information, referral, self-advocacy assistance and legal representation to people with disabilities throughout Illinois. Its public policy program promotes legislative reform, public policies and programs benefiting people with disabilities. Equip for Equality also has broad state and federal oversight powers over both public and private service providers for people with disabilities.

One of the statutory mandates under which Equip for Equality operates is the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 15001 – 15115. The

developmental disability protection and advocacy system of which Equip for Equality is a part was created by Section 15043 of the Act. One of the Act's main goals is to "provid[e] individuals with developmental disabilities with the information, skills, opportunities and support to … live in homes and communities in which such individuals can exercise their full rights and responsibilities as citizens." Id. § 15001(16). Because of its unique perspective as the legal advocate for people with disabilities in Illinois, Equip for Equality believes its views will be of service to the Court.

D. Illinois Network of Centers for Independent Living

The Illinois Network of Centers for Independent Living (INCIL) is a statewide membership organization comprised of, governed by and representing all 24 Centers for Independent Living serving Illinois. INCIL coordinates the activities and efforts of these centers to promote the needs and priorities of the people with disabilities they serve. Consistent with the missions and activities of its member centers, INCIL works to ensure that people with disabilities are fully integrated into their communities and, specifically, that they have the opportunity to avoid confinement in nursing homes and receive support in their own homes. Because of its unique perspective as a statewide representative of and advocate for people with disabilities who live or wish to live independently, INCIL believes its views will be of service to this Court.

II. SUMMARY OF ARGUMENT

Eric Radaszewski is typical of the thousands of children and adults with disabilities in Illinois on whose behalf Amici have advocated so that they can live in the community. He has severe disabilities – a result of a December 1993 stroke that followed surgery and chemotherapy for brain cancer – and requires round-the-clock nursing care. Until 2000, Mr. Radaszewski

received 16 hours per day of in-home nursing care from the state, with his parents caring for him the rest of the day. In that year, however, Defendant, the Director of the Illinois Department of Public Aid, cut these services to five hours, which are inadequate to allow Mr. Radaszewski to remain in his home. Mr. Radaszewski remains eligible for more extensive nursing care, but to receive it, he would have to leave his family and enter a nursing home.

Mr. Radaszewski's dilemma is shared by thousands of people with physical, psychiatric, and developmental disabilities in Illinois. Like Mr. Radaszewski, they are "persons who can handle and benefit from community settings," Olmstead v. L.C., 527 U.S. 581, 600 (1999), but nevertheless can access support services in segregated institutions and nursing homes only. Thus, to get the assistance they need, people with disabilities must "relinquish participation in community life" and be confined to institutions and nursing homes. This, the Supreme Court has held, is illegal discrimination. Id.

Nevertheless, the District Court below dismissed Mr. Radaszewski's case on two grounds. Radaszewski v. Garner, 2002 U.S. Dist. LEXIS 17077 (N.D. Ill. Sept. 11, 2002). First, the Court dismissed Mr. Radaszewski's claim under Title II of the Americans with Disabilities Act because, it held, Title II does not allow suits against state officers in their official capacity. Id. at *5. Second, the Court dismissed Mr. Radaszewski's claim under Section 504 of the Rehabilitation Act – which, the Court found, was identical to his Title II claim – because it believed that nursing, when provided in a person's home as opposed to a nursing home, was a "new" service and not required under Section 504. Id. at *6.

This brief argues the District Court should be reversed on both counts. First, the Supreme Court has effectively overruled the Seventh Circuit precedent the District Court

followed in dismissing Mr. Radaszewski's ADA claim. Second, because Mr. Radaszewski does not seek to change the substance of the nursing services Defendant provides, but only their location to an integrated community setting, he is not asking Defendant to provide a service that is not currently provided to people with disabilities. Thus, his claim for disability-based discrimination falls within the integration mandates of the ADA and Section 504. These are clear errors of law which require reversal.

III. ARGUMENT

A. INDIVIDUALS WITH DISABILITIES MAY MAINTAIN AN ACTION FOR PROSPECTIVE INJUNCTIVE RELIEF AGAINST STATE OFFICIALS FOR VIOLATIONS OF THE AMERICANS WITH DISABILITIES ACT

1. Under Ex Parte Young, the Eleventh Amendment Does Not Bar Actions to Enforce Federal Law Prospectively Against State Officials

In dismissing Mr. Radaszewski's claim under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, the District Court below relied on this Court's decision in Walker v. Snyder, 213 F.3d 344, 346-47 (7th Cir. 2000), cert. denied sub nom, United States v. Snyder, 531 U.S. 1190 (2001). Radaszewski v. Garner, 2002 U.S. Dist. LEXIS 17077, *5 (N.D. Ill. Sept. 11, 2002). However, the District Court's reliance on Walker and its rejection of the applicability to Title II of Ex Parte Young, 209 U.S. 123 (1908) directly contravenes two recent Supreme Court decisions as well as nearly one hundred years of federal jurisprudence.

Last term, in Verizon Md. v. Public Serv. Comm=n, 535 U.S. 635, 122 S. Ct 1753 (2002) (Scalia, J.), the Supreme Court upheld the federal courts' jurisdiction to enforce federal law against responsible state officials under the doctrine of Ex Parte Young, 209 U.S. 123 (1908). "In determining whether the doctrine of Ex Parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a >straightforward inquiry into whether [the] complaint alleges

an ongoing violation of federal law and seeks relief properly characterized as prospective.'"[1] Id. at 1760 (quoting Idaho v. Coeur d=Alene Tribe, 521 U.S. 261, 296 (1997) (O=Connor, J., concurring)).

In Board of Trustees v. Garrett, 531 U.S. 356 (2001), the Supreme Court affirmed application of this doctrine to actions to enforce the Americans with Disabilities Act. While holding that Congress lacked authority to abrogate the States= Eleventh Amendment immunity, id. at 360, the Court included the caveat that individual enforcement actions against state officials for prospective injunctive relief may proceed:

> Our holding here that Congress did not validly abrogate the States= sovereign immunity from suits by private individuals for money damages under Title I does not mean that people with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages as well as by private individuals in actions for relief under Ex Parte Young, 209 U.S. 123 (1908).

Id. at 374 n. 9 (emphasis added).[2]

This re-affirmation of Ex Parte Young is equally clear in the Court=s thrice-repeated limitation of its holding to cases seeking money damages, beginning with the majority opinion=s first sentence. Id. at 360 (AWe decide here whether employees of the State of Alabama may recover money damages by reason of the State=s failure to comply with the provisions of Title I ...@); see also id. at 363 (AWe granted certiorari ... on the question whether an individual may sue

[1] This includes relief that has an "ancillary effect on the state=s treasury" when necessary to ensure future compliance with federal law. Edelman v. Jordan, 415 U.S. 651, 667 (1974); Milliken v. Bradley, 433 U.S. 267, 289 (1977).

[2] The Supreme Court has granted certiorari on the question whether Congress validly abrogated the States' Eleventh Amendment immunity under Title II of the ADA. Medical Bd. v. Hason, 2002 U.S. LEXIS 8467 (Nov. 18, 2002).

a State for money damages in federal court under the ADA@) & 374 (A[I]n order to authorize private individuals to recover money damages against the States ...@) (emphases added).[3]

The Court=s embracement of Ex Parte Young is consistent with nearly a century of jurisprudence. See Rosie D. v. Swift, 2002 U.S. App. LEXIS 23147, *7 (1st Cir. Nov. 7, 2002). The doctrine holds that federal courts may enjoin state officials to conform their conduct to federal law, regardless of whether a cause of action exists against the State itself. Under this doctrine, a state official who acts in violation of the U.S. Constitution or federal laws has acted outside his or her role as a State officer and is stripped of the State=s immunity for that illegal act. As this Court has held,

> The states= immunity from federal suit does not extend to their officials sued for violations of federal law; illegal actions by state officials are not the acts of the state and do not share in its immunity. The state official who acts in violation of the federal Constitution is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." ... Under Young, state officials may be sued in their official capacities for injunctive relief, although they may not be sued for money damages.

MSA Realty Corp. v. Illinois, 990 F.2d 288, 291 (7th Cir. 1993) (quoting Ex Parte Young, 209 U.S. at 159-60); see also Will v. Michigan Dep=t of State Police, 491 U.S. 58, 71 n. 10 (1989) (suits against state officials "are not treated as actions against the State"); Kentucky v. Graham, 473 U.S. 159, 167 n. 14 (1985).

This doctrine remains a vital principle that "gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to permit the federal courts to vindicate the federal interest in assuring the supremacy of that law." Green v.

[3] Thus, this important limitation is decidedly not, as the District Court below opined, "dictum contained in a footnote". Radaszewski, 2002 U.S. Dist. LEXIS at *5.

Mansour, 474 U.S. 64, 68 (1985); see also Alden v. Maine, 527 U.S. 706, 747-48 (1999) (ACertain suits for declaratory and injunctive relief against state officers must ... be permitted if the Constitution is to remain the supreme law of the land@). This Court has recognized that AEx Parte Young was the culmination of efforts ... to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.@ Northeast Ill. Regional Commuter R.R. Corp. v. Hoey Farina & Downes, 212 F.3d 1010, 1016 (7th Cir. 2000) (quoting Perez v. Ledesma, 401 U.S. 82 (1971)); see also Westside Mothers v. Haveman, 289 F.3d 852, 860 (6th Cir. 2002) (A[A] suit that claims that a state official=s actions violate the constitution or federal law is not deemed a suit against the state@); Antrican v. Odom, 290 F.3d 178, 184 (4th Cir.), cert. denied, 2002 U.S. LEXIS 7803 (Oct. 21, 2002) (Ex Parte Young "is designed to preserve the constitutional structure established by the Supremacy Clause").[4]

2. State Officials are Proper Defendants in an Action to Enforce Title II

In Walker v. Snyder, 213 F.3d at 346-47, this Court held that Title II could not be enforced under the Ex Parte Young doctrine. In a decision that pre-dated the Supreme Court=s decision in Garrett, this Court reasoned that Title II=s use of the term "public entity" precluded state officials from being proper defendants in a Title II enforcement action. Whatever its previous validity, Walker now stands in conflict with the Supreme Court=s decision in Garrett[5]

[4] Cf. Marbury v. Madison, 5 U.S. (5 Cranch) 137, 163 (1803) (AThe government of the United States has been emphatically termed a government of laws and not men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for a violation of a vested legal right.@)

[5] Although Garrett concerned Title I of the ADA, its affirmation of Ex Parte Young applies with equal force to Title II. Indeed, Walker itself relies on Title I cases and thus does not

as well as the Eighth Circuit ruling upon which Walker relies. As such, this Court should hold that Walker is no longer valid law.[6]

Even at the outset, Walker conflicted with a plethora of earlier cases allowing Ex Parte Young actions against public officials under Title II and other similarly-worded civil rights laws, such as Section 504 of the Rehabilitation Act and Title VI of the Civil Rights Act. See e.g. J.B. ex rel Hart v. Valdez, 186 F.3d 1280, 1286-87 (10th Cir. 1999); Nelson v. Miller, 170 F.3d 641, 646-47 (6th Cir. 1999); Armstrong v. Wilson, 124 F.3d 1019, 1025-26 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); Brennan v. Stewart, 834 F.2d 1248, 1251-53 & 1260 (5th Cir. 1988).

Walker based its ruling that state officials are improper defendants in a Title II action on Alsbrook v. City of Maumelle, 184 F.3d 999, 1005 n. 8 (8th Cir. 1998). Although it cited Alsbrook for the proposition that no personal liability exists under Title II, Walker concluded from this that "institutional liability is exclusive," 213 F.3d at 346, and on this basis rejected Ex Parte Young=s application to Title II. Id. at 347 ("[T]he only proper defendant in an action under the provisions of the ADA at issue here is the State itself.").

Yet since Garrett, the Eighth Circuit has clarified that Alsbrook never proscribed Title II enforcement actions under Ex Parte Young. In Randolph v. Rogers, 253 F.3d 342 (8th Cir. 2001), the Court soundly rejected the interpretation of Alsbrook which Walker adopted:

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distinguish between Title I and Title II for Eleventh Amendment immunity purposes. 213 F.3d at 347 (citing Erickson v. Board of Governors, 207 F.3d 945 (7th Cir. 2000) & Stevens v. Illinois Dep=t of Transp., 210 F.3d 732 (7th Cir. 2000)).

[6] Although generally one panel cannot overturn another panel=s decision, this Court has authorized such reversals when the Supreme Court has effected an intervening change in law rendering the earlier decision erroneous. Devines v. Maier, 728 F.2d 876, 880 (7th Cir. 1984).

> The State finally argues that because the statutory language of the ADA provides only for "public entity@ liability, an Ex Parte Young claim against state officials in their individual capacities, premised upon an ADA violation, must fail. We agree that the public-entity limitation precludes ADA claims against state officials in their individual capacities, a conclusion we drew in Alsbrook ... but we never have held that the public-entity limitation in the ADA prohibits Ex parte Young claims against state officers in their official capacities. Nor have we held that the underlying federal statute relied upon in an Ex parte Young claim must provide explicit statutory authority to sue a state official in his official capacity. Ex parte Young simply permits an injunction against a state official in his official capacity to stop an ongoing violation of federal law.

Id. at 348 (emphasis added).

And in Gibson v. Arkansas Dep=t of Correction, 265 F.3d 718 (8th Cir. 2001), the Eighth Circuit stated that "[i]n Alsbrook, we did not address whether an action under Ex parte Young was available because the plaintiff=s claim for injunctive relief was moot ... Moreover, our decision in Alsbrook predated the Supreme Court=s decision in Garrett." Id. at 720 n. 2 (emphasis added).[7] The Sixth Circuit has similarly held that Garrett preserves Ex Parte Young actions to enforce Title II. Carten v. Kent State Univ., 282 F.3d 391, 396-97 (6th Cir. 2002); see also Doe v. Rowe, 156 F. Supp. 2d 35, 57 n. 34 (D. Me. 2001) (rejecting Walker in light of Garrett); Gregory v. Administrative Officers of N.J. Cts., 168 F. Supp. 2d 319, 329 (D.N.J. 2001) (same).

It is not inconsistent with Title II=s language to hold state officers liable in their official capacities. Both "[t]he States and their officers are bound by obligations" imposed by federal

[7] Garrett and these subsequent Eighth Circuit rulings also nullify the only other reported decision Amici know of that rejects Ex Parte Young=s applicability to Title II, Lewis v. New Mexico Dep=t of Health, 94 F. Supp. 2d 1217, 1232 (D.N.M. 2000), aff'd on other grounds, 261 F.3d 970 (10th Cir. 2001). As in Walker, Lewis is based on the assumption that ATitle II claims cannot be maintained against individual defendants@, which in turn is based on Alsbrook. Id. at 1230. Therefore, the Eighth Circuit=s subsequent holdings in Randolph and Gibson negate Lewis as well.

law. Alden, 527 U.S. at 747 (emphasis added). When a claim is brought solely to enjoin prospective state action, it is irrelevant, for purposes of fashioning relief, whether the defendant is the State or the official responsible for complying with the federal law in question. See Fed. R. Civ. Proc. 65(d) (injunction binds "the parties to the action, their officers, agents, servants, employees, and attorneys.@).

Therefore, under Ex Parte Young, state officers who violate federal law are stripped of their official capacity not for every purpose, but only for purposes of Eleventh Amendment immunity. Graham, 473 U.S. at 165 ("Official-capacity suits ... 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'"); Carten, 282 F.3d at 396-97 ("[A]n official who violates Title II of the ADA does not represent >the State= for purposes of the Eleventh Amendment, yet he or she nevertheless may be held responsible in an official capacity for violating Title II"); Randolph, 253 F.3d at 348 (same); Antrican, 290 F.3d at 184 ("A State officer acting in violation of federal law thus loses >the "cloak" of State immunity'") (quoting Bragg v. West Virginia Coal Mining Ass=n, 248 F.3d 275, 292 (4th Cir. 2001), cert. denied, 534 U.S. 1113 (2002)); Elephant Butte Irrigation Dist. v. Department of the Interior, 160 F.3d 602, 609 (10th Cir. 1998) ("[T]he states cannot authorize any act that violates federal law").

Additionally, Title II=s definition of a "public entity" easily encompasses the entity=s officers. A "public entity" is "any department, agency, special purpose district, or other instrumentality of a State …" 42 U.S.C. ' 12131(1)(B). The words "agency" and "instrumentality" in turn encompass "a person or thing through which power is exerted or an end is achieved." Merriam-Webster=s Collegiate Dictionary, <http://www.m-w.com> (visited Apr.

26, 2002) (emphasis added). Moreover, Title II=s definition is adopted from its precursor statute, Section 504 of the Rehabilitation Act, 29 U.S.C. ' 794(b)(1)(A), as well as other civil rights laws. It is well-settled that public officials may be liable in their official capacities under Section 504 notwithstanding its coverage of "programs or activities." Department of Transp. v. Paralyzed Veterans of America, 477 U.S. 597, 606 (1986) ("Congress imposed the obligations of § 504 upon those who are in a position to accept or reject those obligations as a part of the decision whether or not to 'receive' federal funds.").[8]

3. Title II Neither Implicates "Special State Sovereignty Interests" Nor Contains a Comprehensive Remedial Scheme

The Supreme Court has recognized only two limited exceptions to the Ex Parte Young doctrine: first, when a law implicates "special state sovereignty interests," Idaho v. Coeur d=Alene Tribe, 529 U.S. 261, 281-87 (1997), and second, when the law contains a "comprehensive remedial scheme" intended to substitute for individual enforcement actions, Seminole Tribe v. Florida, 517 U.S. 44, 75 (1996). Neither applies to Title II.

In Coeur d=Alene Tribe, the Supreme Court proscribed an Ex Parte Young action for ownership of state-held lands because it was the equivalent of an action to quiet title and thus implicated "special state sovereignty interests." 529 U.S. at 287. But this exception, arising out of unique circumstances, has been held inapplicable to Title II, see Carten, 282 F.3d at 397, as well as other laws implicating a State=s disability services. For example, this Court declined to

[8] Three Courts of Appeals have held the term "agency or instrumentality of a foreign state" under the Foreign Sovereignty Immunity Act, 28 U.S.C. ' 1603(b), includes government officials sued in their official capacities. Chiudian v. Philippine Nat=l Bank, 912 F.2d 1095, 1101-02 (9th Cir. 1990); Jungquist v. Sheikh Sultan bin Khalifa al Nahyan, 115 F.3d 1020, 1027 (D.C. Cir. 1997); Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999).

find "special sovereignty interests" in the States' administration of education for children with disabilities. Marie O. v. Edgar, 131 F.3d 610, 617 n. 13 (7th Cir. 1997).[9] It is beyond doubt Title II raises no such interests as well.

Nor does Title II contain a "comprehensive remedial scheme." In Seminole Tribe, the Court held Ex Parte Young inapplicable to the Indian Gaming Regulatory Act (IGRA) because "Congress has prescribed a detailed remedial scheme@ with "significantly fewer remedies than those available under Ex Parte Young, thus signaling Congress= intent to limit relief to that available under the statute." 544 U.S. at 75. But as with Couer d=Alene, Seminole Tribe is an unusual case and has not, to Amici=s knowledge, been extended to any other statute.[10] Indeed, last term the Court unanimously refused to extend this exception to the Telecommunications Act because it "places no restriction on the relief a court can award." Verizon Md., 122 S. Ct. at 1761. The same is true of Title II, into which Congress expressly incorporated the remedies of Section 504 of the Rehabilitation Act and, by extension, Title VI of the 1964 Civil Rights Act. 42 U.S.C. ' 12133. Title II's legislative history shows Congress intended to make available the

[9] See also Antrican, 230 F.3d at 184 (Medicaid services for people with disabilities); Lewis v. New Mexico Dep=t of Health, 261 F.3d 970, 978 (10th Cir. 2001) (same); Doe v. Chiles, 136 F.3d 709, 720 (11th Cir. 1998) (same); American Soc=y of Consultant Pharmacists v. Patla, 138 F. Supp. 2d 1062, 1070 n. 4 (N.D. Ill. 2001) (same); Bonnie L. v. Bush, 180 F. Supp. 2d 1321, 1327-28 (S.D. Fla. 2001) (Early Preventative Screening, Diagnosis and Treatment services); Robinson v. Kansas, 117 F. Supp. 2d 1124, 1136-37 (D. Kan. 2000) (public school financing).

[10] See e.g. Marie O., 131 F.3d at 617 (Individuals with Disabilities Education Act); Bradley v. Arkansas Dep=t of Educ., 189 F.3d 745, 753-54 (8th Cir. 1999), rev=d en banc in part on other grounds, Jim C. v. Arkansas Dep=t of Educ., 235 F.3d 1079 (8th Cir. 2000), cert. denied, 533 U.S. 949 (2001) (same); Rosie D., 2002 U.S. App. LEXIS at *14 (Medicaid); Westside Mothers, 289 F.3d at 862 (same); Cox v. City of Dallas, 256 F.3d 281, 308-09 (5th Cir. 2001) (Clean Water Act); Sofamor Danek Group v. Brown, 124 F.3d 1179, 1185-86 (9th Cir. 1997) (same); Ellis v. University of Kan. Med. Ctr., 163 F.3d 1186, 1197-98 (10th Cir. 1998) (employment discrimination).

"full panoply of remedies". H.R. Rep. No. 485 pts. 2-3, 101st Cong., 2nd Sess. 98 (1990); see also Gibson, 265 F.3d at 721 ("[T]he Supreme Court=s concern that an Ex Parte Young suit would permit a plaintiff to seek much stronger remedies than those specified in the IGRA itself does not apply to an ADA suit.")

B. PLAINTIFF DOES NOT ASK DEFENDANT TO CREATE A "NEW" SERVICE BUT RATHER TO PROVIDE EXISTING NURSING SERVICES IN THE MOST INTEGRATED SETTING – HIS HOME

In denying his claim for in-home nursing services under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), the District Court below misunderstood and misstated Eric Radaszewski's discrimination claim. 2002 U.S. Dist. LEXIS at **5-6. Mr. Radaszewski's claim is not based on a lack of "'evenhanded treatment of qualified handicapped persons' relative to those persons who do not have disabilities." Id. at *6 (quoting Alexander v. Choate, 469 U.S. 287, 307 (1985)). Rather, it is based on the fact that, under Defendant's system of care, Mr. Radaszewski may receive nursing services only if he is confined in a nursing home. He may not receive such care if he chooses to live independently in his own home. Thus, to receive the nursing care he needs to survive, Mr. Radaszewski must relinquish his freedom and enter a nursing home.

The question of whether this Hobson's choice constitutes illegal discrimination has been decided by the U.S. Supreme Court. In Olmstead v. L.C., 527 U.S. 581 (1999), plaintiffs were two women with developmental disabilities who wished to live and receive services in the community but were confined unnecessarily to a state hospital. Although their claim was not premised on the traditional notion of differential treatment between disabled and nondisabled people – because nondisabled people do not use institutions – akin to race and gender

discrimination cases, the Supreme Court held that "[u]njustified isolation … is properly regarded as discrimination based on disability." Id. at 596. The Court explained that discrimination occurs when "persons with … disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations …" Id. at 600.

Similarly, in Helen L. v. DiDario, 46 F.3d 325 (3rd Cir. 1995), the Third Circuit recognized that:

> Congress has stated that "discrimination against individuals with disabilities persists in such critical areas as … institutionalization." 42 U.S.C. § 12101(3). If Congress were only concerned about disparate treatment of the disabled as compared to their nondisabled counterparts, this statement would be a non sequitur as only disabled people are institutionalized.

Id. at 336; see also Rolland v. Cellucci, 52 F. Supp. 2d 231, 237 (D. Mass. 1999); Makin v. Hawaii, 114 F. Supp. 2d 1017, 1033-34 (D. Haw. 1999); Williams v. Wasserman, 937 F. Supp. 524, 530 (D. Md. 1996).

These cases interpreted the ADA regulation mandating that state services be provided in the "most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). Section 504 contains the same requirement. 45 C.F.R. § 84.4(2); 28 C.F.R. § 41.51(d).[11] These regulations focus on the setting in which the state official has chosen to provide state services and not on a simplistic comparison between disabled and non-disabled persons. Thus, the District Court's claim that "neither any type of handicapped individual nor

[11] Although Olmstead and Helen L. were decided under Title II, the District Court below recognized that cases under the ADA should apply with equal force to Section 504. "The RA [Section 504] is materially identical to and the model for the ADA except that it is limited to programs that receive federal financial assistance." Radaszewski, 2002 U.S. Dist. LEXIS at *6 (citations omitted).

any nonhandicapped individual over 21 is provided in-home nursing services" is irrelevant. Radaszewski, 2002 U.S. Dist. LEXIS at *6. The discrimination against Mr. Radaszewski results from the unjustified isolation he will suffer by virtue of Defendant's refusal to provide appropriate nursing services in his home.[12]

Preliminarily, it must be noted that the Court's assertion that Defendant does not provide in-home nursing to anyone over 21 is patently incorrect. The District Court acknowledged that Defendant "reduced … to the equivalent of five hours a day of private duty nursing …". Id. at *3. Thus, as a factual matter, the District Court cannot reject Mr. Radaszewski's claim on grounds he seeks a service Defendant does not provide in home at all. The dispute, rather, is

[12] Mr. Radaszewski clearly meets the other requirements for a valid claim for community services under Olmstead, 527 U.S. at 587. As evidenced by the fact that he has lived at home with in-home nursing care since 1995, Mr. Radaszewski does not, from a medical or treatment perspective, require institutionalization. Radaszewski, 2002 U.S. Dist. LEXIS at *3. There is no allegation he opposes placement in the community. Id.

Finally, continuing his in-home care would not fundamentally alter the state's disability services. On average, home-based services in Illinois cost three times less than nursing home placements. R. Newcomer et al., Medicaid Home and Community-Based Long Term Care in Illinois (Nov. 1999). Indeed, the State itself has recognized that moving people from nursing homes into the community saves money and provides better services. In June 2000, the Associate Director of the Illinois Department of Human Services determined the integration of 133 former nursing home residents into the community saved Illinois nearly $50 million over the residents' lifetimes. He also wrote the former nursing home residents "almost universally describe[d] their transition from these institutions back into the community as 'being freed from jail.'" Memorandum from Carl Suter to Linda Renee Baker (Jun. 12, 2000), attached hereto.

In addition, under the Medicaid Home and Community Based Services waiver program, the cost of Mr. Radaszewski's previous in-home nursing services was limited to what his placement in a nursing home would have cost. 42 U.S.C. § 1396n(c)(4)(B). Although Mr. Radaszewski no longer receives waiver services, the nursing services he seeks to maintain are the same services he received under the waiver and thus do not exceed the cost of a nursing home. It cannot therefore be said that continuing Mr. Radaszewski's in-home nursing services would be a financial burden on Defendant; to the contrary, it would probably save money.

whether the amount of in-home nursing hours Defendant proposes to provide is sufficient to ensure Mr. Radaszewski's right to avoid unnecessary institutionalization in a nursing home.[13]

But even if the District Court had been correct and Defendant did not provide nursing services in the home, the District Court's decision would still require reversal. By focusing on the words "in-home," the District Court incorrectly made the location of the provision of nursing services their defining aspect. Rather, the service at issue is "nursing," not "in-home nursing." Defendant does provide "nursing services" to people with disabilities – but only in institutions and nursing homes. This fact places Defendant's actions in clear violation of Olmstead and Helen L. Olmstead, 527 U.S. at 603 n. 14 ("States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide.").

Illinois' expenditures on segregated nursing facilities are extensive and far outweigh those spent on community care. In 2001, Illinois spent almost $1.5 billion to house over 82,000 Medicaid patients in nursing homes – four times more than it spent on home health care services. Home and Community Based Resources Network, Medicaid Long-Term Expenditures 1996-2001, <www.hcbs.org> (visited Nov. 15, 2002); see also J. Tilly et al., Urban Institute, Long-Term Care: Consumers, Providers and Financing 42 (Mar. 2001) (80 to 89 percent of Illinois'

[13] For this reason, the District Court's reliance on Alexander v. Choate is misplaced. Unlike this case, Choate did not involve a claim under Section 504's integration mandate. Rather, Choate decided whether a facially neutral reduction of Medicaid services would disparately impact people with disabilities. 469 U.S. at 290. While clarifying that Section 504 does not require proof of discriminatory intent or animus, id. at 295, the Supreme Court held the limitations at issue did not deny people with disabilities meaningful access to existing Medicaid services disproportionate to nondisabled people. Id. at 302. Choate is therefore easily distinguishable because it turned on a traditional disparate-impact analysis to determine whether discrimination occured. Mr. Radaszewski's case, on the other hand, is not based on whether he can access nursing services relative to people without disabilities, but rather the unnecessary segregation that will result from Defendant's decision to terminate his in-home nursing care.

Medicaid funds are spent on institutions). By federal law, nursing home funding must include state payments for "nursing services." 42 U.S.C. § 1396r(b)(4)(C)(i) ("[A] nursing facility … must provide 24-hour licensed nursing services which are sufficient to meet the nursing needs of its residents" and "must use the services of a registered professional nurse for at least 8 consecutive hours per day, 7 days a week.").

Thus, the fact that Defendant already provides adequate nursing services in segregated settings, but not integrated settings, distinguishes Mr. Radaszewski's case from Rodriguez v. City of New York, 197 F.3d 611 (2nd Cir. 1999). See 2002 U.S. Dist. LEXIS at *6. There, plaintiffs sought a service – safety monitoring for AIDS patients with cognitive disabilities – which had never been provided, whether in institutional or community settings. The Second Circuit made clear its holding applied only to cases where the plaintiff challenged "the substance of the services provided." Rodriguez, 197 F.3d at 618.

That is not the case here. Mr. Radaszewski is not asking for a service that is not provided by Defendant. Nor is he challenging the "substance" of nursing services by seeking to add to or modify them. Medically, a nurse's care does not and cannot differ by virtue of its provision in one's home or an institution or nursing home. Mr. Radaszweski asks only that same type of nursing care that he is currently eligible to receive in a nursing home be provided to him in an integrated, community setting – his home. This places Mr. Radaszewski's case squarely within Olmstead and clearly outside the boundaries of Rodriguez. See Henrietta D. v. Giuliani, 81 F. Supp. 2d 425, 432 (E.D.N.Y. 2000); cf. Hahn v. Linn Cty., 130 F. Supp. 2d 1036, 1048 (N.D. Ia. 2001).

The District Court's overly broad application of the narrow holding and facts in Rodriguez would, if adopted, eviscerate federal disability anti-discrimination laws contrary to their plain meaning. If the "substance" of a service turns on where it is provided, states would be free to isolate people with disabilities simply by eliminating any comparable services in the community. For example, a state might decide to restrict physical therapy and habilitation to nursing home residents by refusing to provide such services in community settings. Although this policy would undoubtedly force people with disabilities unnecessarily to "relinquish participation in community life" to receive needed therapy services, see Olmstead, 527 U.S. at 600, the state could justify such discrimination simply by claiming that community-provided physical therapy was a "new" service as opposed to institutionally-provided therapy services – even though the services are in every other respect identical. This is a loophole that Congress clearly had no intention of creating.[14] Id. at 599 ("Congress explicitly identified unjustified 'segregation' of persons with disabilities as a 'form of discrimination.'") (quoting 42 U.S.C. § 12101(a)(2)).

[14] This does not mean that Title II and Section 504 create an "entitlement" to services. States that provide no disability services at all – whether in institutions or in the community – do not transgress the ADA. If States do provide such services, however, they must ensure those services comply with the "most integrated setting" requirement of the ADA as interpreted by the Supreme Court in Olmstead.

IV. CONCLUSION

For the reasons stated above, Amici respectfully request this Court reverse the District Court below on Plaintiff's ADA and Section 504 claims.

Dated November 26 2002.

RESPECTFULLY SUBMITTED,

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CIRCUIT RULE 31(e)(1) CERTIFICATION

Pursuant to this Court's Rule 31(e)(1), I certify that the full content of this Brief Amici Curiae, from the cover to the conclusion, has been provided in digital form.

_____

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Dated November 26, 2002.

CERTIFICATION UNDER FED. RULE APP. PROC. 32(a)(7)

I certify that the foregoing Brief Amici Curiae complies with the type-volume limitation set forth in Rules 32(a)(7)(A) and 29(d) of the Federal Rules of Civil Procedure, in that it contains 6,122 words according to the word-processing system used to prepare the brief.

_____

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Dated November 26, 2002.

CERTIFICATE OF SERVICE

I certify that on November 27, 2002, I served two copies of the Motion for Leave to File a Brief Amici Curiae in Support of the Plaintiffs-Appellants, two copies of the Brief Amici Curiae in Support of the Plaintiffs-Appellants, and one digital version of the brief by first-class U.S. Mail, postage prepaid, upon the following counsel of record:

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