1992 WL 12037091 (Colo.) (Appellate Brief)
Supreme Court of Colorado.

Duc VAN LE, on behalf of himself and the class of persons similarly situated, Petitioner,
v.
Irene M. IBARRA, et al., Respondents.

No. 91SC189.
July 7, 1992.

Original Proceeding, District Court, City and County of Denver Honorable Edward E. Carelli, Judge

Brief of Colorado Psychiatric Society As Amicus Curiae in Support of Petitioner Duc Van Le

Pendleton & Sabian, P.C., Richard F. Hennessey, Esq. (4381), William J. Martinez, Esq. (16734), Attorneys for Amicus Curiae, Colorado Psychiatric Society, 303 East Seventeenth Avenue, Suite 1000, Denver, Colorado 80203, Telephone: (303) 839-1204, Telefax: (303) 831-0786.

***ii** *TABLE OF CONTENTS*

***iv** *TABLE OF AUTHORITIES*

TABLE OF CASES

TABLE OF STATUTES

***v** *REGULATIONS*

LEGISLATIVE HISTORY

ADDITIONAL AUTHORITY

***1** *STATEMENT OF THE ISSUES PRESENTED FOR REVIEW*

1. Did the State of Colorado violate Section 504 of the Rehabilitation Act of 1973 as amended which prohibits denying benefits to individuals on the basis of their handicap when the state offered HCBS benefits to the elderly, blind, and physically disabled but denied HCBS benefits to the otherwise qualified mentally disabled?

2. Does the marginal social status, political powerlessness, severe disabilities, and unequal treatment of the mentally disabled compel the Court to recognize their suspect class status deserving of the judicial protection which strict scrutiny ensures under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

3. Does the state have a valid compelling interest in withholding HCBS benefits from the mentally disabled when it is significantly more expensive to continue to institutionalize the mentally disabled than to maintain them through the HCBS program?

STATEMENT OF THE CASE

Plaintiff Duc Van Le brought a class action against Irene M. Ibarra as Director of the Colorado Department of Social Services; Robert Bauserman, Robbie L. Bean, Suzanne D. Dosh, Dennis Fisher, Mary Kyer, Peggy Stokstad, John P. Stone, and Richard F. Walker as members of the Colorado Board of Social Services; and Henry Solano as Director of the Colorado Department of Institutions,

The District Court, City and County of Denver with Judge Carelli presiding certified the plaintiff class pursuant to Colo. R. Civ. P. 26 (b)(1) and (b)(2) as low income mentally ill Colorado residents who qualify for but are denied Home and Community Based Services ("HCBS") due to their mental illness by the state defendants ("State"). The State extends the

same federally funded HCBS benefits to elderly, blind, and physically and developmentally disabled individuals.

The district court ruled the State's segregation of the mentally disabled from the HCBS benefit program violated the ***2** plaintiff's and class members' rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988) ("Section 504") amended by Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified as amended at 20 U.S.C. § 1687 (1988)). *Le v. Ibarra,* No. 88CV22461, slip op. at 11 (Aug. 23, 1990). Citing *United States v. Carolene Products Co.,* 304 U.S. 144, 152 n.4 (1938) and *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307 (1976) inter alia, the district court also held the mentally ill constitute a suspect class under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Slip op. at 13.

On the basis of the stipulated facts and findings of fact, the district court ruled that the State failed to demonstrate a compelling governmental interest in segregating the mentally ill from the HCBS program at issue, and in its Decision and Order of August 23, 1990 the court ordered the State to provide HCBS benefits to the plaintiff class as long as the State continues the same benefits to the elderly, blind, and physically disabled. Slip op. at 14. The State appealed and this Court granted certiorari pursuant to C.A.R. 50 and ruled the State did not violate the plaintiff's and class members' rights under Section 504, nor did the mentally ill constitute a suspect class for equal protection purposes. *Lee v. Ibarra,* No. 91SC189, slip op. at 31 (Colo. Apr. 20, 1992). Citing *United States Dep't of Transp. v. Paralyzed Veterans of America,* 477 U.S. 597 (1986), this Court determined the anti-discrimination constraints of Section 504 did not apply to the State HCBS program. This Court reasoned that ***3** although the State receives federal funds for the HCBS program, the State did not receive federal funds to provide HCBS to the plaintiff class, so the anti-discrimination provisions of Section 504 were not triggered. Slip op. at 30.

Justice Lohr joined Justice Quinn in dissent and argued the majority erroneously reasoned Section 504 did not apply, and that the State's denial of federally funded HCBS benefits constituted an egregious and adverse impact on the mentally ill. Dissent, slip op. at 16. Citing *City of Cleburne v. Cleburne Living Center Inc.,* 473 U.S. 432 (1985), Justice Quinn maintained that the State's exclusion of the mentally ill from the HCBS program did not further any rational and legitimate State interest, and therefore was unlawful under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Dissent, slip op. at 12-14.

The Court granted plaintiff's petition for rehearing and accepted briefs of amici curiae in support of petitioner in its Order dated May 28, 1992. This order also specified five issues to be addressed by the parties in supplemental briefs. The Colorado Psychiatric Society's ("Society") arguments in this amicus brief will address only the following issues presented by the Court:

1. Did the respondents violate the petitioner, Duc Van Le, and the class members rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988), or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by granting benefits to the elderly, blind, physically disabled and developmentally disabled and not to the mentally ill?

***4** 3. Did the enactment of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), overturn the rationale of *United States Department of Transportation v. Paralyzed Veterans,* 477 U.S. 597 (1986), and other United States Supreme Court cases?

4. Did the enactment of section 2 of the Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12101 (West 1992), cause Duc Van Lee and the class to become a suspect class protected by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

INTEREST OF AMICUS CURIAE REGARDING THE SPECIAL STATUS OF THE SEVERE MENTALLY ILL

Individuals who suffer chronic major medical psychiatric illness, primarily schizophrenia and manic depressive illness, comprise the severe or chronic mentally ill. Historically the majority ostracized the severe mentally ill from mainstream society. Fear and misunderstanding relegate the mentally ill to a marginal existence on the periphery of society. Within the previous century, popular opinion held the mentally ill were the victims of demonic possession. *See* Norman Dain, *Concepts of Insanity in the United States, 1789-1965* xi (1964).

The severe mentally ill are not thought of the same way as individuals suffering from cardiovascular disease, cancer, diabetes, and other life long chronic illnesses, but are segregated and treated in institutions with entirely separate systems of maintenance and care. This institutionalization of the mentally ill began in the nineteenth century and continues today in large state hospitals. Period depictions of treatment of the mentally ill in early state institutions are characterized by horrific accounts of inhumane conditions. *See, e.g.* Emil ***5** Kraepelin, *One Hundred Years of Psychiatry* (1962). While isolated nineteenth century attempts to pursue a "moral treatment" policy of the mentally ill lead to some individual enlightened hospitals, such humane institutions largely benefited only upper-and upper-middle class patients. The majority of low-income or black mentally ill persons "found themselves in jails or workhouses." William C. Cockerham, *Sociology of Mental Disorder* 21 (2d ed. 1989). A contemporary description of the unfortunate conditions that persist in some institutions for the mentally disabled is recounted in *Homeward Bound, Inc. v. Hissom Memorial Center,* No. 85-C-437-E, 1987 WL 27104, at *9-13 (N.D. Okla. July 24, 1987).

All chronic illnesses, including severe mental illness, require ongoing treatment whether it be in the hospital, outpatient, or home health care. In addition to their mental disabilities, the mentally ill often suffer from physical illnesses, such as peptic ulcer and infection. However, it is often difficult for the severe mentally ill to access the current health care system due to both their discounted disability and their aggravating handicaps in thinking and processing information.

Various mistaken beliefs about the severe mentally ill limit their access to care. Public opinion and some caregivers feel these individuals are in some way responsible for their illness and could "help themselves." Others believe there is "no cure" despite dramatic advances due to psychotherapy, pharmaceutical treatment, and community mental health centers. *See* Cockerham, ***6** *supra* at 25-27. Additionally, although psychiatry is a sub-specialty of medicine, allocation of resources for the treatment of severe mental illness has been excluded from main stream funding.

Access to treatment for severe mentally ill individuals has steadily decreased in Colorado over the last thirty years. In the early 1960s, Colorado was a leader in the national trend of establishing community based health care, both for primary medical care as well as primary psychiatric care. This allowed mentally ill individuals to be treated and maintained in the community, and deinstitutionalized many who were previously segregated in remote state hospitals. Patients with severe mental illness often were integrated into the home care programs of the Visiting Nurse Association and the county nurses, who did not make a distinction between medical psychiatric illness and other physical illness. They visited homes, helped individuals with their psychiatric medications, socialization, transportation, and facilitated total health care. However, as the number of individuals with severe mental illness increased community programs have been reduced or eliminated.

As a result, the severe mentally ill are now in an impossible situation. Community programs have been sharply cut or eliminated. Despite their need for total health care, the severe mentally ill are unable to access mental health treatment programs, primary health care programs and social service programs. The unfortunate consequence is that without the home and community based services the state extends to other disabled ***7** individuals at issue in this case, the severe mentally ill become caught up in a recurring cycle of hospitalization, nursing home placement, placement in the community, and de-stabilization that renews the institutionalization process or leads to other unfortunate consequences. *See, e.g.,* Lisa Newell, Note, *America's Homeless Mentally Ill: Falling Through a Dangerous Crack,* 15 New Eng. J. on Crim. & Civ. Confinement 277 (1989).

Uniquely aware of this dark history of societal treatment of the severe mentally ill, the Society is particularly interested in the issues raised in this case. The Society possesses an informed professional perspective regarding chronic mental illness in Colorado and the characteristics of the severe mentally ill as a discrete group. The Society's brief amicus curiae is intended to demonstrate that the law as applied to the remarkable evidence available enables this Court to recognize the severe mentally ill as a special group, warranting extraordinary judicial vigilance and protection due to their severe disabilities, political powerlessness, and the historical discrimination against them.

SUMMARY OF ARGUMENT

1. As shown by the plain meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988) as amended, the implementing regulations, and the judicial interpretation of Section 504, the State violated the plaintiffs' rights by denying them the HCBS benefits offered to elderly, blind and physically disabled individuals.

2. The authority relied on by this Court to prevent the application of the anti-discrimination provisions of Section 504 ***8** was expressly overruled by Congress in the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified as amended at 20 U.S.C. § 1687 (1988)).

3. Under the criteria identified in *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307 (1976), plaintiffs constitute a suspect class for purposes of determining their rights to equal protection of the laws.

4. In the plain meaning and legislative history of the Americans with Disabilities Act of 1990, Congress recognized the severe mentally ill constitute a suspect class under the Fourteenth Amendment.

5. On the basis of the evidence available to this Court, the State has failed to demonstrate a compelling government interest in withholding HCBS benefits from plaintiffs.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT THE STATE'S DENIAL OF HCBS BENEFITS TO THE MENTALLY DISABLED UNACCEPTABLY VIOLATES THE PLAINTIFFS'RIGHTS UNDER Section 504 OF THE REHABILITATION ACT OF 1973, AS AMENDED.

A. *The Stipulations of Fact and the District Court's Findings of Fact Establish That the State Extends HCBS Benefits to the Elderly. Blind. Physically and Developmentally Disabled While Excluding Plaintiffs Solely on the Nature of Their Disability.*

The State of Colorado through the defendant Department of Social Services ("Social Services") currently extends HCBS benefits to elderly, blind, physically and developmentally disabled persons who meet applicable income requirements. Stipulation 45 (R. Vol. 2, p. 264). HCBS programs in the state provide a variety of health care services in a non-institutional ***9** setting, including personal care services, homemaker services, home medication monitoring, and non-medical transportation. Stipulations of Fact 40-43 (R. Vol. 3, pp. 263-264). The HCBS program at issue is statutorily authorized by Section 1915(c) of the Social Security Act which through its implementing regulations authorizes benefits for three classes of people:

a. elderly, blind and physically disabled persons;

b. mentally ill persons; and

c. developmentally disabled persons.

42 C.F.R. 441.301(b)(6).

The goal of federally funded HCBS programs is to prevent needless institutionalization of the three target populations of individuals. The federal government reimburses states between 50% and 75% of the cost of the state administered HCBS

programs through a Medicaid Title XIX waiver system. The waiver system conditions federal reimbursement upon the state's proof that the cost of Medicaid funded nursing home care for qualified individuals exceeds the cost of care through the HCBS program. 42 U.S.C. § 1396n(c)(2)(D); 42 C.F.R. 441.302.

Between 1982 and 1985, the State secured waivers from the federal government to provide HCBS services to elderly, blind, physically and developmentally disabled, *and* mentally ill individuals. In 1985 the federal government requested the State to withdraw and resubmit its HCBS mentally ill renewal application. Upon resubmission the federal government rejected the State's waiver application for the HCBS mentally ill program and outlined substantive areas that required revision before granting the HCBS mentally ill application. Stipulation 35 (R. ***10** Vol. 2, p. 263). The State made no documented attempts in the five years following 1985 to reapply for federal funds for an HCBS program for the mentally ill. Stipulations 35, 51 and 52 (R. Vol. 2, pp. 263, 265). In fact Social Services went so far as to prepare legislation that when passed successfully repealed the statutory authorization which allowed the mentally ill to participate in the HCBS program. *See* Home and Community Based Services for Person with Developmental Disabilities Act, ch. 217, secs. 1-8, §§ 26-4.5-201-to-209, 1990 Colo. Sess. Laws 1380-82 (current version at §§ 26-4-621 to -631, 11B C.R.S. (1991 Supp.)).

Social Services continued to extend HCBS benefits to elderly, blind, and physically disabled individuals with income levels equally as low as the plaintiff class. Stipulation 45 (R. Vol. 2, p. 264). Although plaintiffs' meet necessary income and medical requirements to qualify for the HCBS benefits currently offered the elderly, blind, and physically disabled, the State provides them no services. Stipulations 40-43, 46 (R. Vol.4, pp. 263-264). Rather plaintiffs are denied support of the HCBS benefits because their primary diagnosis is mental illness. Stipulation 45 (R. Vol. 4, pp. 263-264).

Without HCBS benefits, low income mentally ill individuals within Colorado that comprise the plaintiff class are shuttled among hospital, nursing home, community placement and subsequent de-stabilization that leads to renewed institutionalization. The absence of HCBS benefits for the low income mentally ill effectively prevents their stable maintenance in a dignified ***11** community setting and relegates them to the constraints of the institution. (R. Vol. 4, pp. 63-64, 89).

B. *Section 504 of the Rehabilitation Act of 1973 Requires the State to Extend HCBS Benefits to all Qualified Disabled Individuals.*

1. *Section 504.*

In *Southeastern Community College v. Davis,* 442 U.S. 397 (1979) the U.S. Supreme Court affirmed that the principle that statutory construction begins with the language of the statute itself applies in interpreting Section 504. *Id.* at 405. Analysis of the plain language of Section 504 and its implementing regulations demonstrate the unequivocal proscription against denying qualified disabled individuals participation in or withholding benefits from any federally funded program.

Section 504(a) provides:

> (a) No otherwise qualified *individual with handicaps* in the United States ... shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...

The Rehabilitation Act of 1973 ("Act"), § 504, 29 U.S.C. § 794(a) (1988)(emphasis added). A qualified handicapped individual within the scope of Section 504 is defined as one with either physical or mental impairment:

> (B) [T]he term "individual with handicaps" means, for purposes of titles IV and V of this Act [29 USCS §§ 780 et seq,. 790 et seq.], any person who (i) has a *physical or mental* impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

***12** 29 U.S.C.S. § 706(8)(B) (emphasis added). It is obvious that any distinction between physical and mental is solely for descriptive purposes in order to define impairment fully. The words do not create different categories justifying separate treatment. Therefore Congress mandated through the plain language of the Act that the mentally disabled are handicapped individuals and protected under the Act.

2. *Section 504 Regulations.*

The federal implementing regulations of Section 504 further emphasize the broad prohibition against discrimination directed towards qualified handicapped individuals, including by definition the severe mentally ill[1]. Discrimination that constitutes a violation of Section 504 is described in considerable detail:

a. Deny[ing] a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;
b. Afford[ing] a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

c. [Providing] a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

d. [Providing] different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless action is necessary to provide qualified handicapped persons with aid, ***13** benefits, or services that are as effective as those provides to others;

e. Otherwise limit[ing] a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or service.

45 C.F.R. 84.4(b)(1). It is evident based on the plain meaning of the implementing regulations of Section 504 and its implementing regulations, Duc Van Le and the class members constitute handicapped individuals who may not be excluded from any federally funded program solely on the nature of their disability.

3. *Judicial Interpretation of Section 504.*

Cases construing Section 504 also establish that the state's denial of HCBS benefits to plaintiffs violates their rights under the Act. In *Alexander v. Choate,* 469 U.S. 287 (1985), the United States Supreme Court addressed Section 504 in ruling that Tennessee's annual reduction from 20 days to 14 days of Medicaid reimbursed inpatient hospital care did not unfairly discriminate against the handicapped. *Id.* at 309. The Court rejected Tennessee's argument that Section 504 only prohibited purposeful discrimination against the handicapped and specifically noted that much of the discrimination Congress sought to outlaw resulted from insensitivity and apathy toward the plight of the handicapped. *Id.* at 296-97. However, the Court wisely rejected the argument that any untoward affect upon the handicapped constituted actionable discrimination under Section 504. *Id.* at 299.

In expressing its balanced interpretation in *Choate,* the Court held that Section 504 requires "that an otherwise qualified handicapped individual must be provided with meaningful access to ***14** the benefit that the grantee offers." *Id.* at 301. Significantly, the court also stated that an agency may not simply define the benefit offered in such a way to exclude participation by qualified handicapped individuals. *Id.* Finally the Court recognized that the policy directive behind Section 504 mandates that handicapped individuals receive "evenhanded treatment ... to participate in and benefit from programs receiving federal assistance." *Id.* at 304.

Thus, it is evident that the State's attempts to define the program as HCBS-EBD and to deny benefits solely on the basis of mental illness are contrary to both the policy directives and statutory requirements of Section 504. Therefore the State's attempt to exclude plaintiffs, otherwise qualified handicapped individuals, from participation in the HCBS program constitutes an actionable violation of Section 504 as recognized by the *Choate* Court.

This Court has also expressly recognized that the anti-discrimination protection of Section 504 extends to the chronic mentally ill in *Goebel v. Colorado Dept. of Institutions,* 764 P.2d 785 (Colo. 1988). In *Goebel* this Court held, *inter alia,* that the State withheld federally funded services from the plaintiff class of severe mentally ill individuals on the basis of the severity of their disability in violation of Section 504. *Id.* at 804. Additionally the Court ruled the plaintiffs were entitled to the injunctive relief necessary to permit significant access to the benefits and services then excluding otherwise qualified handicapped individuals. *Id.* at 805.

***15** Like the class in *Goebel,* the plaintiff class in the instant case are excluded from federally funded health care program benefits for disabled individuals because their primary diagnosis involves mental illness. As here, those excluded in *Goebel* were the severe mentally ill. This Court addressed precisely this prohibited and unfortunate discrimination by observing "we assume that the *severity* of the plaintiffs' handicaps is itself a handicap which, under Section 504 of the 1973 Rehabilitation Act, cannot be the sole reason for denying them [adult day care] funding." *Goebel,* 764 P.2d at 804, (emphasis in the original) (quoting *Plummer v. Branstadt,* 731 F.2d 574, 578 (8th Cir. 1984).

In *Goebel* this Court relied on the construction of Section 504 adopted in *Homeward Bound, Inc. v. Hissom Memorial Center,* No. 85-C-437-E, 1987 WL 27104 (N.D. Okla. July 24, 1987). *Goebel,* 764 P.2d at 804. In *Homeward Bound* the plaintiff class of retarded individuals who were or had been clients of the Hissom Memorial Center ("Hissom"), a large institution for the retarded, successfully brought action against Hissom for violation, inter alia, of Section 504. *Homeward Bound,* at *21. The court found that the State of Oklahoma provided the mentally retarded plaintiffs only separate, segregated institutionalized services, that insufficient services were provided to the most severely disabled based on the severity of their disability, and that the lack of community based services furthered a policy of discrimination and segregation, all in violation of Section 504. *Homeward Bound,* at *20-21. The court ordered the State of Oklahoma to develop community based services for the retarded ***16** residents of Hissom so as to deinstitutionalize many needlessly subjected to the dehumanizing and dangerous conditions present at Hissom. *Homeward Bound,* at *22.

The express recognition of the basic nature of community based services for the disabled in *Homeward Bound* directly addresses the plight of the plaintiff class. However, unlike *Homeward Bound,* plaintiffs in this case do not request the State to develop an entirely *new* program but to include all qualified handicapped individuals, which by definition includes the mentally ill, in the current HCBS program as required by Section 504.

The plain meaning of Section 504 and its implementing regulations, as well as the cases construing Section 504, lead to the same compelling conclusions: (1) the State's exclusion of plaintiffs from participation in Colorado's HCBS program is based solely on the nature of their handicap; and (2) such denial is clearly prohibited by Section 504.

C. *This Court's Prior Ruling That Section 504 of the Rehabilitation Act of 1973 Did Not Apply to the HCBS Program Relied on Authority Overturned By the Civil Rights Restoration Act of 1987.*

This Court recognized in its Order dated April 20, 1992 that the State receives federal funds for the HCBS program at issue. Slip op. at 4, 30. However the Court reasoned the anti-discrimination provisions of Section 504 were not triggered because

the State did not currently receive federal funds specifically earmarked for the mentally ill. As authority the Court relied on *United States Dep't of Transp. v. Paralyzed Veterans of America,* 477 U.S. 597, 605-06 (1986) and held that ***17** Section 504 only applied to individual programs actually receiving federal funds, not the overall agency or institution. Slip op. at 29. However, in the passage quoted, the Court omitted a section of *Paralyzed Veterans* which indicated its express reliance on the rationale of *Grove City College v. Bell,* 465 U.S. 555 (1984).

Congress expressly overruled *Grove City College* and therefore *Paralyzed Veterans* through passage of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified as amended at 20 U.S.C. § 1687 (1988) ("Civil Rights Act"). S. Rep. No. 64, 100th Cong., 2d Sess. 3-4 (1987). The purpose of the Civil Rights Act was "to overturn the Supreme Court's 1984 decision in *Grove City College"* and further, *inter alia,* to clarify application and coverage of Section 504. S. Rep. No. 64, 100th Cong., 2d Sess. 3 (1987). Congress intended the anti-discrimination constraints of Section 504 to apply broadly to an entire institution or agency, any part of which receives federal funding. S. Rep. No. 64, 100th Cong., 2d Sess. 8-9 (1987).

Therefore this Court's reading of the scope of Section 504 mistakenly relied on overruled authority. As the State and this Court both recognize the HCBS program is federally funded, Section 504 therefore manifestly applies, and the State may not discriminate on the basis of disability but must extend plaintiffs the same benefits currently offered the elderly, blind, and physically disabled.

II. THE DISTRICT COURT CORRECTLY RULED THAT THE MENTALLY ILL ARE A SUSPECT CLASS UNDER THE EQUAL PROTECTION CLAUSE.

A. *The Mentally Disabled as a Discrete Group Inherently Constitute a Suspect Class Under the Criteria* ***18** *Established in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).*

In *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307 (1976) the Supreme Court of the United States set out the characteristics of a suspect class for purposes of equal protection analysis under the Fourteenth Amendment to the United States Constitution. In *Murgia,* Massachusetts retired a fifty year old state policeman as required by state statute. In response the plaintiff sued the state, alleging the mandatory retirement statute denied him equal protection of the laws in violation of the Fourteenth Amendment. *Murgia,* 427 U.S. at 308-09. The *Murgia* court held that legislative classifications require strict scrutiny on judicial review only when the "classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Id.* at 312. The Court concluded that the plaintiff was neither a member of a suspect class, nor denied the exercise of a fundamental right, and held that the forced retirement statute passed muster under the Equal Protection Clause as it furthered a rational governmental interest in maintaining a physically fit police force for public benefit. *Id.* at 314-15 (Marshall, J., dissenting).

The *Murgia* court framed the following factors as identifying a suspect class: "[A] suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the ***19** majoritarian political process.' " *Id.* at 313 (quoting *San Antonio School District v. Rodriquez,* 411 U.S. 1, 28 (1973)). A suspect class may be subjected to disabilities due to "stereotyped characteristics not truly indicative of their abilities." *Id.* Additionally a suspect class constitutes a "discrete and insular" group within society. *Id.* (quoting *United States v. Carolene Products Co.,* 304 U.S. 144, 152-53, n.4 (1938)).

This Court relied on *Murgia* in *Lujan v. Colorado State Bd. of Educ.,* 649 P.2d 1005 (Colo. 1982). This Court ruled that the state's public school financing system did not create a wealth-based suspect class of school children and therefore the system was constitutional as it rationally furthered a legitimate state interest. *Id.* at 1025. In its analysis, this Court examined the characteristics of the plaintiff class of school children and determined the absence of *Murgia* suspect class factors

precluded suspect class status. *Id.* at 1020-22. The identifying characteristics which this Court sought as evidence of a suspect class were a "group marked by common attributes or characteristics," an identifiably distinct and insular class, "a history of purposeful unequal treatment with its attendant disabilities," and a "position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 1020-21.

1. ***The Severe Mentally Ill are Saddled With Such Disabilities As to Command Extraordinary Protection.***

The severe mentally ill as a discrete group constitute a suspect class under the *Murgia* test adopted by this Court in ***20** *Lujan.* It is undeniable the mentally ill are "saddled with such disabilities" they have difficulty surviving in an often indifferent society. The inability of the mentally ill to cope with everyday life forces them in to an endless cycle of hospitalization, nursing home placement, community placement, destabilization and subsequent reinstitutionalization. Stipulation 45 (R. Vol. 2, p. 264; R. Vol. 4, p. 36). Those who escape the revolving door syndrome become isolated in dismal boarding houses, homeless shelters, or another of America's burgeoning population of the homeless mentally ill. *See. e.g.,* Newel, *supra.* The low social status and bizarre behavior of the mentally ill often foster contempt among those who treat them in isolated institutional settings, further aggravating disabilities over which the victims have no control.

Popular conceptions stereotype the mentally ill in a manner not indicative of their true abilities. The "shadow of demonology" has plagued the treatment and popular view of the mentally ill until comparatively recently. Herschel A. Prins, *Attitudes Towards the Mentally Disordered,* 24 Med. Sci. Law. 181, 183 (1984). The *Homeward Bound* court recognized that social prejudice against the mentally retarded fostered segregated treatment in isolated institutions with abysmal conditions. *Homeward Bound* at *8. The same unfortunate social prejudice extends to the mentally ill, sequestered in institutions away from the public eye. Although past stereotypes maintain the mentally ill should be hidden away with other mentally impaired individuals, this institutional gulag is increasingly seen as ***21** ineffective, inhumane, and even immoral. *Homeward Bound,* at *16-18. Community based care is the revolution dignifying care of the mentally disabled. *See, e.g.* Cockerham, *supra,* at 27-28. The philosophy of community based care rejects the popular stereotype of the insane and recognizes the mentally ill as disabled individuals, who are able to live in society with dignity and enjoy relationships with others.

2. ***The Severe Mentally Ill Have Suffered a History of Purposeful Unequal Treatment.***

Prior to the growth of institutions in the eighteenth and nineteenth centuries, mentally ill individuals were often locked in tiny cells or driven from their community by a frightened population. The rise of institutions segregated the mentally ill in distant locations, often with violent criminals. The institutions were not maintained as places of treatment, but places of custody for the mentally ill. Institutional conditions lead nineteenth century reformers such as Dorthea Dix to campaign for moral treatment. However moral treatment was short lived in under-funded, isolated institutions, especially the large state hospitals. *See, e.g.* Thomas S. Szasz, M.D., *The Age of Madness. The History of Involuntary Mental Hospitalization* (1973).

This institutionalization purposefully denied the mentally ill their basic right to exist in a community, free of restraint. Without community based services, the only available treatment is within the confines of the institution. The complete absence of treatment alternatives which foster personal dignity continues the societal history of purposeful and unequal treatment of the ***22** mentally ill. The district court recognized the State, in a purposeful and unequal manner, violated plaintiffs' fundamental liberty interest in living free from restrictive institutional confines by refusing to extend to them the same HCBS benefits currently offered other disabled individuals. Slip op. at 13.

3. ***The Severe Mentally Ill Are Relegated to a Position of Political Powerlessness Within Society.***

The unique nature of the disability of the mentally ill is that the underlying impairment operates at a level and by means difficult to fathom from the perspective of the majority. The chronic nature of their illness is marked by a constant struggle to

cope with everyday life, to accomplish the basics of daily living and to process information essential to their basic functioning. This struggle remains unknown by society because mentally ill persons are put away and in different ways kept silent. Mentally ill individuals require continued assistance in personal care, homemaker services, and medication monitoring in order to survive in the community. Stipulations 40-43 (R. Vol. 3, pp. 263-264). When a class of individuals, living in such enforced isolation, requires such effort and assistance to meet such basic needs, it is apparent how completely unattainable is viable participation in our pluralistic political process. Therefore the courts should protect the interests and rights of the mentally ill as they are truly unable to do it themselves within our political process.

In summary, the mentally ill possess the characteristics of a suspect class as identified in *Murgia* and applied by this Court in ***23** *Lujan.* The disabilities and vulnerabilities of the mentally ill have subjected them to an unfortunate history of fear, confinement, and marginalization in institutions. This purposeful separate and unequal treatment of the mentally ill persists while other disabled individuals are treated in humane and dignified community settings similar to the HCBS program at issue. Societal stereotypes falsely depict the mentally ill as suited solely for life in an institution. The State perpetuates these stereotypes as a matter of policy by refusing to provide plaintiffs the care in a community treatment setting to which they are entitled.

B. *The Legislative History of the Americans With Disabilities Act of 1990 Considered With Section 504 Demonstrates Indisputable Congressional Recognition that the Mentally Disabled Are a Suspect Class Deserving the Judicial Protection Which Strict Scrutiny Ensures.*

President Bush signed the Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101-12213 (West 1992) ("ADA") on July 26, 1990, 28 days before the trial court's Decision and Order of August 23, 1990. Congress declared the purpose of the ADA with resounding national conviction and commitment:
It is the purpose of this Act:

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, *including the power to enforce the fourteenth amendment* and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C.A. § 12101(b)(West 1992)(emphasis added).

***24** As is evident from the underscored portion, Congress expressly referenced the Fourteenth Amendment to the United States Constitution. This statement, when viewed in light of both the legislative history of the ADA and its statutory content, demonstrates clear Congressional intent to recognize the disabled, including the mentally ill, as a suspect class for purposes of equal protection.

In its findings of fact Congress expressly described the disabled in language almost identical to that used by the United States Supreme Court to describe the criteria of a suspect class in *Murgia,* 427 U.S. 307.

> (7) individuals with disabilities are a discrete and insular minority who have been faced with restriction and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such

> individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society

42 U.S.C.A. § 12101(a)(7)(West 1992). The intention of Congress by virtue of the plain language of the ADA is certain: the disabled constitute a suspect class for purposes of equal protection. The ADA recognizes the unequal, inferior status of and the discrimination directed against the disabled in society and remedies the situation with statutory authority that expressly describes the disabled as a group inherently constituting a suspect class, necessarily deserving the extraordinary judicial protection ensured by applying the compelling interest, strict scrutiny test to justify state action.

***25** The legislative history of the ADA directly supports this conclusion. The House Committee on Education and Labor also expressly used the terms and concepts of *Murgia:*

> As the summary of the testimony before the committee demonstrates, the unfortunate truth is that individuals with disabilities are a discreet, specific minority, who have been insulated in many respects from the general public. Such individuals have been faced with a range of restrictions and limitations in their lives. Further, they have been subjected to unequal and discriminatory treatment in a range of areas, based on characteristics that are beyond the control of such individuals and resulting from stereotypical assumptions, fears and myths not truly indicative of the ability of such individuals to participate in and contribute to society. Finally such individuals have often not had the political power and muscle to demand the protections that are rightfully theirs. The simple fact that this Act has taken this long to pass Congress, twenty-five years after the other civil rights legislation has been passed, is a testimony to the fact.

H.R. Rep No. 485, 101st Cong., 2d Sess., pt. 3, at 322 (1990).

The Senate Committee on Labor and Human Resources wrote the major report on the ADA for the Senate. The report conducted extensive findings and in conclusion also described the disabled in *Murgia* suspect class terms:

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

S. Rep. No. 116, 101st Cong., 1st Sess. 15 (1989). The conclusion is inescapable: in the ADA Congress recognized the disabled, including the mentally ill, as a suspect class. Therefore enactment of the ADA confirmed that plaintiffs are a suspect class, entitled to special judicial protection by requiring the ***26** strict scrutiny analysis and compelling governmental interest test to justify the State's discriminatory action.

That the ADA recognized the suspect class status of the disabled comports with the policy of Section 504. Since Section 504 and the ADA share the common purpose to protect the same class of individuals from discrimination on the basis of disability, both statutes should be read harmoniously. The ADA corroborates an express Congressional mandate that the disabled are a suspect class. Logically, if the ADA and Section 504 are to be read harmoniously, Duc Van Le and the plaintiff

class constitute a suspect class under both statutes.

C. *On the Basis of the Stipulated Facts and District Court Findings of Fact the State Has Failed to Demonstrate a Compelling Governmental Interest In Withholding HCBS Benefits From Duc Van Le and the Plaintiff Class.*

Ordinarily, in order to pass judicial review under the Equal Protection Clause of the Fourteenth Amendment, government action or legislative classification merely must further some rational governmental interest. *Murgia,* 427 U.S. at 314. However, if the classification operates to the disadvantage of a suspect class or adversely affects the exercise of a fundamental right, then equal protection analysis requires strict scrutiny. *Id.* at 312. In order to pass muster under strict scrutiny, a legislative classification affecting a suspect class must further a compelling government interest. *Cleburne v. Cleburne Living Center,* 473 U.S. 432, 440 (1984).

As demonstrated above, this Court should find that the mentally ill constitute a suspect class. For these reasons, in ***27** order for the denial to be sustained, this Court must determine that the State's denial of HCBS benefits to the mentally ill based solely on the nature of their disabilities furthers a compelling government interest.

Although plaintiffs require the same HCBS benefits the State currently provides the elderly, blind, and physically disabled, the State refuses to reapply for a mentally ill HCBS waiver from the federal government. Stipulation 35 (R. Vol. 2, p. 263; Vol. 4, p. 132) The district court in its findings of fact stated the State made no attempt to correct its rejected 1985 waiver. Slip op. at 3.

The district court found that the State's cost of providing HCBS services to the mentally ill would be significantly less than the cost of continued hospitalization for the low income mentally ill. In fact HCBS services average $46.00 daily while hospitalization costs $400.00 daily. Slip op. at 3. As the federal government pays 50% to 75% of the cost of the HCBS program, the State's financial burden is clearly lower in a HCBS program.

Despite the obvious need for HCBS services, the State has not exercised reasonable diligence in seeking out existing federal funding for services for the mentally ill. Stipulations 35, 51 and 52 (R. Vol. 2, pp. 263, 265; R. Vol. 4, p. 132). In fact the State is currently underspending its federal funding for the current HCBS program, the same program from which plaintiffs are excluded solely on the basis of their mental disability. (R. Vol. 4, p. 41).

***28** Against these facts, the State's denial of HCBS benefits to plaintiffs, otherwise qualified handicapped individuals within the meaning of Section 504, furthers no compelling State interest and fails the strict scrutiny test. Quite to the contrary, the overwhelming evidence is that the State's interest is best served by providing plaintiffs access to a more economically efficient HCBS program. Such care fosters the same dignity and humanitarian treatment of the mentally ill as is provided other eligible persons under the HCBS program, in a manner consistent with the mandate of the ADA and Section 504.

In summary, because Duc Van Le and the plaintiff class constitute a suspect class, the State is required to establish a compelling State interest justifying its denying them HCBS benefits. The State has failed this requirement. This Court therefore must determine that the State's denial of HCBS benefits to plaintiffs violates plaintiffs' rights to the equal protection of the laws.

CONCLUSION

The State violated plaintiffs' rights under Section 504 by denying them HCBS benefits offered to elderly, blind and physically disabled individuals based solely on the nature of plaintiffs' disability. Plaintiffs are entitled to HCBS benefits under the plain meaning of Section 504, as well as the judicial decisions interpreting Section 504. The authority previously relied on by this Court to prevent application of the anti-discrimination provisions of Section 504 was expressly overruled by

Congress.

***29** Additionally, under the criteria identified in *Murgia,* supra, and the available evidence in this case, plaintiffs constitute a suspect class for purposes of determining their rights to equal protection of the laws. Similarly, in the ADA Congress recognized that the disabled, including the severe mentally ill, such as the plaintiff class possess the special characteristics of a suspect class under the Fourteenth Amendment. Such persons warrant extraordinary judicial vigilance to protect their legal rights due to their severe disabilities, political powerlessness, and the historical discrimination against them. The State's denial of HCBS benefits only furthers a history of discrimination against the mentally ill.

For these reasons, this Court should affirm the Order of the District Court.

Footnotes

[1] The application of section 504 is limited to those classes of handicapped individuals authorized by statute for participation in the individual program. 45 C.F.R. 84.4(c). This exception is not applicable in this case. The broad anti-discrimination protection provided by section 504 extends to the plaintiffs because section 1915(c) of the Social Security Act, through its implementing regulations, authorizes the HCBS program at issue for participation by the elderly, blind, physically disabled, *mentally ill,* and developmentally disabled. 42 C.F.R. 441.301(b)(6)(emphasis added).