For Opinion See 114 S.Ct. 918 , 113 S.Ct. 2990

Supreme Court of the United States.
Irene M. IBARRA, in her official capacity as the Executive Director of the Colorado Department of Social Services; Henry Solano, in his official capacity as the Executive Director of the Colorado Department of Institutions; Robert Bauserman; Robbie L. Bean; Susanne D. Dosh; Dennis Fisher; Mary Kyer; Peggy Stokstad; John P. Stone and Richard F. Walker in their official capacities as members of the Colorado Board of Social Services, Petitioners,
v.
Duc VAN LE, on behalf of himself and the class of persons similarly situated, Respondents.
No. 92-1637.
October Term, 1992.
April 12, 1993.

On Certiorari to the Colorado Supreme Court Case No. 91SC189

Petition for Writ of Certiorari

Gale A. Norton[FN*], Attorney General, Raymond T. Slaughter, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Paul Farley, Deputy Attorney General, Wade Livingston, First Assistant Attorney General.Stacy L. Worthington, Assistant Attorney General, Human Resources Section, Attorneys for Petitioners, 1525 Sherman St., 5th Fl., Denver, Colorado 80203, Telephone: (303) 866-5660.

FN* Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

1. Whether a State may provide home and communitybased services to elderly, blind and physically disabled medicaid recipients and not to mentally ill medicaid recipients without violating § 504 of the Rehabilitation Act of 1973 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the mentally ill are a "suspect class" for the purpose of analyzing claims under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. Whether the right to receive services to avoid institutionalization is a "fundamental right" for the purpose of analyzing claims under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

***iii** TABLE OF CONTENTS

***v** TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

RULES

OTHER AUTHORITIES

***1** The petitioners named above respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Colorado entered in the above-entitled proceeding on December 14, 1992.

OPINIONS BELOW

The opinions of the Supreme Court of the State of Colorado are ***2** not published, and are reprinted in the appendix hereto, pp. B-1 and C-1.

The decision and order of the District Court of the City and County of Denver has not been published, and it is reprinted in the appendix hereto, p. A-1.

JURISDICTION

The opinion of the Colorado Supreme Court was delivered on December 14, 1992 and a timely petition for rehearing was denied on January 11, 1993.

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:
No state shall ... deny to any person within its jurisdiction equal protection of the laws.

42 U.S.C. § 1396n(c) (1988 & 1990 Supp.) provides in relevant part:
(1) The Secretary may by waiver provide that a State plan approved under this subchapter may include as "medical assistance" under such plan payment for part or all of the cost of home or ***3** community-based services....
(2) A waiver shall not be granted under this subsection unless the State provides assurances satisfactory to the Secretary that
....
(D) under such waiver the average per capita expenditure estimated by the State in any fiscal year for medical assistance provided with respect to such individuals does not exceed 100 percent of the average per capita expenditure that the State reasonably estimates would have been made in that fiscal year for expenditures under the State plan for such individuals if the waiver had not been granted
....
(7)(A) In making estimates under paragraph (2)(D) in the case of a waiver that applies only to individuals with a particular illness or condition ... the State may determine the average per capita expenditure that would have been made in a fiscal year for those individuals under the State plan separately from the expenditures for other individuals....

42 C.F.R. § 441.301 (1992) provides in relevant part:
***4** (b) If the agency furnishes home and community-based services ... under a waiver request granted under this subpart, the waiver must
....
(6) Be limited to one of the following target groups or any subgroup thereof that the State may define:
(i) Aged or disabled, or both.
(ii) Mentally retarded or developmentally disabled, or both.
(iii) Mentally ill.

29 U.S.C. § 794 (1988), popularly known as § 504 of the Rehabilitation Act of 1973, provides in relevant part:
(a) No otherwise qualified individual with handi-

caps in the United States ... shall, solely by reason of his or her handicap, be excluded from participation in, be denied the benefits of, or subjected to discrimination under any program or activity receiving Federal financial assistance....

STATEMENT OF THE CASE

Petitioners are officials of the State of Colorado who administer the medical assistance program under Title XIX of the Social Security Act and the Colorado Medical Assistance Act, §§ 264-101 to 26-4-661, C.R.S. (1992 Supp.), popularly known as "medicaid." Under medicaid, Colorado and the federal government pay for the medical care provided to poor, disabled and otherwise needy individuals. In order to qualify for matching federal funds, Colorado must pay for certain kinds of medical care and cannot pay for other kinds of care.

Among the services that Colorado must pay for are services provided by a nursing home. 42 U.S.C. §§ 1396a(a)(10)(A) and 1396d(a)(4)(A). Among the kinds of services that Colorado cannot pay for are services provided by an institution for mental diseases. *Connecticut Department of Income Maintenance v. Heckler,* 471 U.S. 524, 533 n.24 (1985) and accompanying text. This case involves a third kind of services: services that are neither required nor prohibited.

Pursuant to 42 U.S.C. § 1396n(c), a State may ask the federal government to waive certain requirements of the medicaid program in order to provide home and community-based services ("HCBS"). These services are provided to individuals who would otherwise require care in an institution, such as a nursing home. The cost of these services, however, must be less than medicaid would have paid for institutional services. HCBS can include services such as assistance with cooking, shopping, house cleaning, bathing and eating.

Pursuant to 42 U.S.C. § 1396n(c)(7)(A), a State may request a waiver limited to "individuals with a particular illness or condition ..." Indeed, federal regulations require that a waiver request be limited to one of three target groups: the physically disabled and elderly, the developmentally disabled, and the mentally ill. 42 C.F.R. § 441.301(b)(6)(1992). In 1982, Colorado obtained three different waivers to serve the three target groups. The waivers to serve the physically disabled and elderly and the developmentally disabled have operated continuously to the present, but Colorado's request to renew the waiver to serve the mentally ill was denied in 1985 and Colorado has not provided HCBS to mentally ill clients since that time.

Colorado is not unique in this regard. Several States have waivers to provide HCBS to physically disabled clients, but no State currently has a waiver to provide HCBS to mentally ill adults.[FN1] In large part, this is due to the difficulty of assuring that the cost of HCBS is less than the cost of institutional care. Inasmuch as medicaid does not pay for services provided by an institution for mental disease, clients who would otherwise receive services in an institution for mental disease are not appropriate for HCBS.

> FN1. According to CCH Medicare & Medicaid Guide, ¶ 14,625, pp. 634050 (8/92), there are approximately 148 waivers in effect in 48 states. The waivers are targeted to the developmentally disabled (68), elderly, blind and physically disabled (57), AIDS (13) and a number of narrower target groups defined by illness or condition. None of the waivers are targeted to mentally ill adults.

Colorado provides a number of non-institutional services for its mentally ill residents. These services include services under medicaid (such as clinic services and rehabilitation options) and services provided with only state funds (such as adult foster, home care allowance and community mental health centers). Respondent, nevertheless, brought an action alleging that providing HCBS to the elderly and physically disabled while denying HCBS to the mentally ill violated federal law.

The trial court entered judgment in favor of respondent. Specifically the trial court held that respondent and the class he represented were "otherwise qualified" to receive HCBS and that the failure to provide them with HCBS violated § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988). The trial court further held that the failure to provide HCBS to the mentally ill violated the Equal Protection Clause. According to the trial court, the mentally ill were a "suspect class" and HCBS was a "fundamental right" so that the failure to provide HCBS should be strictly scrutinized. Moreover, the trial court concluded that Colorado did not have even a rational basis for providing HCBS to the physically disabled but providing different non-institutional services to the mentally ill.

Petitioners appealed this decision to the Colorado Court of Appeals. Thereafter, the Colorado Supreme Court granted a pre-judgment writ of certiorari. The Colorado Supreme Court then reversed the trial court by a vote of five to two.

The Colorado Supreme Court held that the mentally ill were not a suspect class and that HCBS was not a fundamental right. The court also held that the slight chance of obtaining a waiver to serve the mentally ill and the cost of pursuing such a waiver provided a rational basis for Colorado's decision to offer different non-institutional services to the mentally ill.

After this decision, the Colorado Supreme Court granted respondent's petition for rehearing. On rehearing, one justice recused himself and the remaining justices divided equally. This equally divided vote had the effect of affirming the trial court's decision.

***8** REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW MISCONSTRUED THE REQUIREMENTS OF § 504 TO MEAN THAT BENEFITS GIVEN TO ONE GROUP OF HANDICAPPED INDIVIDUALS MUST ALSO BE GIVEN TO ALL OTHER HANDICAPPED INDIVIDUALS, DESPITE UNANIMOUS PRECEDENT TO THE CONTRARY.

The court below held that a State may not target benefits to one group of handicapped individuals and deny them to others without violating § 504. The courts, Congress and administrative agencies are unanimous in rejecting this position, and the decision hampers States in their efforts to provide benefits to handicapped individuals.

In *Traynor v. Turnage,* 485 U.S. 535, 549 (1988), this Court said, "There is nothing in the Rehabilitation Act that requires that any benefits extended to one category of handicapped persons be extended to all other categories of handicapped persons." This doctrine has been applied by every other court facing an issue similar to the one presented in this case. For example, in *Knutzen v. Eben Ezer Lutheran Housing Center,* 815 F.2d 1343 (10th Cir. 1987), the court held that a sponsor did not violate § 504 by offering subsidized housing to the elderly and mobility impaired but not to the mentally ill. *Accord Brecker v. Queens B'nai B'rith Housing Development Fund,* 607 F. Supp. 428 (E.D.N.Y. 1985), *aff'd,* 798 F.2d 52 (2d Cir. 1986). In *Bernard B. v. Blue Cross Shield of Greater New York,* 528 F. Supp. 125 (S.D.N.Y. 1981), *aff'd,* 679 F.2d 7 (2d Cir. 1982), the court held that an insurance company did not violate § 504 by paying for inpatient care but not for psychiatric inpatient care. Similarly, the court in *Doe v. Colautti,* 592 F.2d 704 (3d Cir. 1979) held that a State did not violate § 504 by providing unlimited general hospital care but only limited care in a mental institution. In *Duquette v. Dupuis,* 582 F. Supp. 1365 (D. N.H. 1984), the court ***9** held that a State did not violate § 504 by providing medical benefits to blind children while denying the benefits to all other handicapped children.

These decisions are consistent with the actions of Congress to target certain benefits to particular groups of handicapped individuals. For example, in the Rehabilitation Act itself, Congress created programs benefitting certain handicapped individuals

while excluding others. Pub. L. No. 93-112, 87 Stat. 355, § 305, *reprinted in* 1973 U.S. Code Cong. & Admin. News 409, 441, established a National Center for Deaf-Blind Youths and Adults. The 1986 amendments to the Rehabilitation Act renewed this program. Pub. L. No. 99-506, § 901, 100 Stat. 1807, 1840 "Reauthorization of Helen Keller National Center Act." in the recently enacted Housing and Community Development Act of 1992, Pub. L. 102-550, 106 Stat. 3813, § 622 Congress expressly allowed public housing agencies to designate projects for the elderly and exclude the disabled. The Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f (1988), gives blind individuals a preference in operating businesses within public buildings even though other handicapped individuals could also benefit from such a preference.

Administrative regulations implementing § 504 reinforce the view that benefits can be provided to some handicapped individuals without providing them to all handicapped individuals. 45 C.F.R. § 84.4 (1992) provides that "... the exclusion of a specific class of handicapped individuals from a program limited by federal statute or executive order to a different class of handicapped persons is not prohibited ...." Similarly, regulations implementing the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12213 (1990), provide that, "nothing ... prohibits a public entity from providing benefits ... to a particular class of individuals with disabilities ...." 28 C.F.R. § 35.130(c) (1992). The regulatory comments on this provision explain that, "... State and local governments may provide special benefits ... limited to ... a particular class of individuals with disabilities without thereby incurring additional obligations to ... other ***10** classes of individuals with disabilities." 56 Fed. Reg. 35705 (July 26, 1991).

In this case, federal regulations require waivers be limited to one of three defined target groups, and specifies that the physically disabled and the mentally are in different target groups. The statute authorizing the waivers expressly anticipates that waivers may be limited to "individuals with a particular illness or condition ...." 42 U.S.C. § 1396n(c)(7)(A). The legislative history underlying this section says without ambiguity that, "States are allowed to target their waivers to groups of individuals at risk of hospital care, as defined by illness or diagnosis (e.g., AIDS of {sic} AIDS related condition), or by condition (e.g., chronic mental illness, ventilator dependency)." H. Conf. Rep. No. 99-1012, *reprinted in* 1986 U.S. Code Cong. & Admin. News 4046.

Despite this wealth of authority from the courts, Congress and administrative agencies permitting States to target benefits to one group of handicapped individuals while excluding others, the court below held that Colorado could not limit its HCBS program to the physically disabled. Petitioners believe that this is a question of first impression in the state and federal courts. The decision is not only novel, it casts doubt on the legality of all 148 HCBS waivers operating in 48 States.

Moreover, the claim in this case is very odd. In the typical § 504 case, the plaintiff claims that he should receive some benefit *despite* his handicap. In this case, respondent claims he is entitled to a benefit *because* of his handicap. In short, he is not using § 504 as a shield to protect himself from discrimination, but as a sword to carve out a place for himself in a benefit program intended for entirely different group of handicapped individuals.

The decision substantially misconstrues the requirements of § 504, and effectively guts the usefulness of HCBS waivers. Under the decision of the court below, States can longer target benefits to ***11** particular groups as Congress intended but must choose between providing HCBS to all needy groups or to none. Accordingly, HCBS waivers will be inflexible and unwieldy and States will be less likely to utilize them. In the end, the decision of the court below will only result in fewer services for the disabled because States will have to weigh the risk of litigation and coverage of unintended groups any time it considers a program to serve any portion of the disabled community.

II. THE COURT BELOW, CONTRARY TO EVERY REPORTED DECISION ON THE ISSUE, HELD THAT THE MENTALLY ILL WERE A SUSPECT CLASS, SO THAT LEGISLATIVE ACTIONS REGARDING THE MENTALLY ILL MUST BE SUBJECTED TO STRICT SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE.

The court departed from well established judicial precedent by holding that the mentally ill are a suspect class. All other decisions on the issue have held that the mentally ill are not a suspect class. *Douglas v. Hugh A. Stallings, M.D. Inc.,* 870 F.2d 1242 (7th Cir. 1989); *United States ex rel. Weismuller v. Lane,* 815 F.2d 1106, 1110 n.7 (7th Cir. 1987); *Knutzen v. Eben Ezer Lutheran Housing Center,* 815 F.2d 1343 (10th Cir. 1987); *Cospito v. Heckler,* 747 F.2d 72, 82 (3d Cir. 1984), *cert. denied,* 471 U.S. 1311 (1985); *Benham v. Edwards,* 678 F.2d 511, 515 n.9 (5th Cir. 1982), *vacated on other grounds,* 463 U.S. 1222 (1983). On a closely related issue, this Court has held that mentally retarded individuals are not a suspect class. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985).

It is clear that the decision below is without support in any reported decision and that it imposes a substantial burden on all state ***12** and local governments that seeks to extend a benefit to any needy group without extending the same benefit to the mentally ill.

III. THE COURT BELOW CREATED A SIGNIFICANT NEW CONSTITUTIONAL RIGHT, BECAUSE IT HELD THAT INDIVIDUALS ARE ENTITLED TO SERVICES TO PREVENT INSTITUTIONALIZATION.

The court below held that individuals have a right to be free of undue bodily restraint and that Colorado infringed on this right by failing to provide HCBS to mentally ill persons. There is no support for this decision in the law, and it creates an unlimited liability for the States to provide services to their citizens.

In Youngberg v. Romeo, 457 U.S. 307, 317 (1982), this Court said, "As a general matter, a State is under no constitutional duty to provide substantive services for those within its borders." In this case, the court below held that the right to receive HCBS was a fundamental right, because it implicated liberty interests in freedom from bodily restraint. This holding dramatically expands the services a State must offer under the Constitution. In virtually all cases in which a person's liberty is restrained, one could credibly argue that the restraint would not be necessary if the State had only provided the appropriate services. Thus, there would be a fundamental right to marriage counseling to prevent incarceration for domestic violence, a fundamental right to treatment for substance abuse to avoid incarceration or hospitalization for drug related problems, and a fundamental right to family therapy to avoid placing children in foster care. Carried to its logical conclusion, the holding of the court below would mean that the States must provide every conceivable service that might prevent any loss of liberty.

Petitioners believe that the question of whether HCBS is a ***13** fundamental right is one of first impression in the state and federal courts. Inasmuch as 48 States offer HCBS to their citizens, this is an issue of great public importance that should be addressed by this Court.

IV. THERE IS A RATIONAL BASIS FOR COLORADO'S DECISION NOT TO OFFER HCBS TO THE MENTALLY ILL.

In *Schweiker v. Hogan,* 457. U.S. 569, 590 (1982), this Court said:

In establishing public assistance programs, Congress has often determined that the federal government cannot finance a program that provides meaningful benefits in equal measure to everyone. Both state and federal funds for such assistance are limited.

The same is true here. Funds to provide medical assistance are not limitless, and benefits cannot be

given to everyone in equal measure. This is why HCBS waivers can be limited to "... individuals with a particular illness or condition ..." 42 U.S.C. § 1396n(c)(7). In this way, States can control their expenditures for medical assistance and target benefits to particular groups.

In *Beckwith v. Kizer,* 912 F.2d 1139 (9th Cir. 1990) , the Ninth Circuit was presented with a challenge to an HCBS waiver that served persons that had been hospitalized but did not serve persons with identical physical conditions that had not been hospitalized. The court upheld the waiver against an equal protection challenge, and said:
Definition of any waiver class necessarily involves difficult policy ***14** judgments concerning where services would most efficiently be used. We lack the qualifications or the authority to pass upon the fiscal responsibility of California's waiver program in the manner plaintiffs request .... We cannot say that this decision is irrational. The statute is intended to alleviate the problem of unnecessary institutionalization, but it does not purport to solve it altogether.

In this case, Colorado was faced with a situation where its request for a waiver to serve the mentally ill had been denied by the federal government, no other State currently has such a waiver, and there are a number of other non-institutional services that it could offer to its mentally citizens. In such a case, it cannot be said that Colorado's decision to pursue other options than HCBS for the mentally ill was irrational.

CONCLUSION

Based on the above points and authorities, the petition for a writ of certiorari should be granted.

Appendix not available.

Irene M. IBARRA, in her official capacity as the Executive Director of the Colorado Department of Social Services; Henry Solano, in his official capacity as the Executive Director of the Colorado Department of Institutions; Robert Bauserman; Robbie L. Bean; Susanne D. Dosh; Dennis Fisher; Mary Kyer; Peggy Stokstad; John P. Stone and Richard F. Walker in their official capacities as members of the Colorado Board of Social Services, Petitioners, v. Duc VAN LE,
1993 WL 13076761 (U.S.) (Appellate Petition, Motion and Filing)

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