No. 01-35689

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEVI TOWNSEND,

Appellant,

v.

Secretary of the State of Washington
Department of Social and Health Services (DSHS),

Appellee.

PLAINTIFF-APPELLANT'S REPLY BRIEF

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I. THE STATE'S ARGUMENT WOULD MAKE THE ADA'S APPLICATION TURN ON ADMINISTRATIVE LABELS, RATHER THAN REALITIES.

This Court "has cautioned against being governed by labels, rather than realities" in applying the Americans With Disabilities Act, 42 U.S.C. § 12101 et seq. Wells v. Clackamas Gastroenterology Assocs., 271 F.3d 903, 906 (9th Cir. 2001) (dissenting opinion of Judge Graber). Accord, Davoll v. Webb, 194 F.3d 1116, 1137 (10th Cir. 1999) ("labels cannot substitute for Congress' statutory mandate in the ADA."); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1167 (10th Cir. 1999) (same). The Brief of the Defendant-Appellee, the Secretary of Washington State's Department of Social and Health Services (hereinafter "State's Brief") provides an excellent illustration of how far an argument can stray from reality if that admonition is forgotten.

Much of the State's Brief consists of repetitions of the mantra that plaintiffs' argument cannot be accepted because it would require the State of Washington to provide "new services" or a "new program," something the State argues the ADA does not require. See State's Brief at 12-21. What those "new services" might be, and why a "new program" would be required to deliver them, is explained only by reference to administrative labels and definitions; the actual services at issue are never described. Neither are the disabilities the

plaintiff class suffers, nor the physical and social differences between the facilities in which the State is willing to provide them, and those in which plaintiffs here seek to have them provided.

We thus begin this reply by returning focus to these realities, where under the law it should be.

A. Plaintiffs Are Not Asking to Receive New Services But to Avoid Unjustified Isolation in Nursing Homes.

Levi Townsend and all the other members of the plaintiff class are disabled: they suffer "physical or mental impairment[s] that substantially limit[] one or more of the major life activities." 42 U.S.C. § 12102(2)(A); Toyota Motor Mfg. v. Williams, ____ S. Ct. _____, 2002 U.S. LEXIS 400 (2002); see ER 27-28. As a result of their ages and those disabilities, Mr. Townsend and the other class members are classified as "medically needy," and the State of Washington provides them with certain services to help them live, but only in a nursing home setting. Those services include help with meals, bathing, personal hygiene, medical monitoring, transportation, and the like.[1]

[1]The most recent "service plan" created by the State for Mr. Townsend in the record is dated December 6, 1999, and includes the following: health monitoring (as needed); incontinence care and toileting assistance (as needed); blood glucose checks, insulin syringe filling or insulin administration by a licensed nurse (2x daily); meal preparation; periodic skin checks; restorative therapy 2-3 times per week; 24-hour supervision for safety and comfort, due to short-term memory loss and confusion; close monitoring of blood glucose; ambulation

Unlike some "medically needy" individuals, Mr. Townsend and the other class members are not so severely disabled that they must be confined to a hospital or nursing home, for medical or safety reasons: the State's own examiners have determined that although eligible for nursing home care they are capable of living and receiving the care and services they need in a home care or community-based facility. See ER 43, 48, 49, 69, 71. The State has experience providing such services in community facilities to similarly-situated individuals (including Mr. Townsend himself) through its COPES waiver program, and doing that turns out to cost less per individual than nursing home care. ER 172.

Disabled persons confined in a nursing home are more isolated and less integrated with non-disabled people than those provided such services in community-based facilities. Olmstead v. L.C. by Zimring, 527 U.S. 581 (1999). Yet the State wants to move Mr. Townsend, and to keep the other class members, in nursing homes—not because of their needs, or even because of limits on the State's resources,[2] but because of its reading of a complex of administrative

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support in pushing wheelchair and putting on prostheses; assistance with all transfers; assistance with bathing; transportation to medical appointments. Plaintiff-Appellants' Supplemental Excerpt of Record ("Supp. ER") 1-18.

[2]State's Brief 10-11. The State has not raised an economic undue hardship defense to the class claim. Despite its protestations, State's Brief at 25-30, there is no evidence below that to comply with the integration regulation would

categorizations and regulations which was created before, and without regard to, the integration regulation of the ADA.

The plaintiffs do not wish to be isolated in nursing homes. They want, to the extent possible, to have their lives be integrated with those of non-disabled people. They do not seek any additional services[3] or a standard of care from the State—in fact, they object only to being forced to receive the services the State

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adversely impact State resources or the needs of other Medicaid recipients. See Appellant's Opening Brief at 19-24.

[3]Contrary to the State's assertions, State's Brief at 17-21, neither the Olmstead decision nor the ADA preclude a court from ordering new service configurations if that would bring Medicaid programs or services into compliance with the ADA. Because the State of Georgia already had established a particularized "waiver program" that would have enabled the plaintiff's placement in the community, the Olmstead court did not have to address whether seeking a "waiver" from CMS to provide the same services in a different setting is required under the ADA. Olmstead at 603 n.14. The Court wrote:

> We do not in this opinion hold that the ADA imposes on the states a "standard of care" for whatever medical services they render, or that the ADA requires States to "provide a certain level of benefits to individuals with disabilities . . . . We do hold however that states must adhere to the ADA's non-discrimination requirement with regard to the services they in fact provide.

Olmstead, 527 U.S. 603 n.14. As the GAO has noted,

> The Supreme Court's Olmstead decision left open questions about the extent to which states could be required to restructure their current long-term care programs for people with disabilities to ensure care is provided in the most integrated setting appropriate for each person's circumstances.

General Accounting Office September 24, 2001, Report to the Special Committee on Aging, "Long Term Care Implications of Supreme Court's Olmstead Decision are Still Unfolding," GAO-01-1167T. Supp. ER 39.

makes available to them in the isolation of a nursing home, segregated from families, friends, and others who are not disabled.

The ADA quite plainly forbids the State from imposing such isolation if it is "unjustified." Olmstead, 527 U.S. at 596. The fact that the State has historically made such isolation the price a medically needy person must pay to avail himself of the services for which he is qualified cannot, itself, be a justification for discrimination—even where that historical practice has hardened into state statutes and administrative regulations. The ADA was enacted to eliminate serious and pervasive forms of discrimination that were historically ignored or accepted. Olmstead, 527 U.S. 588-89 and n.1; 42 U.S.C. § 12101(a)(2), (3), (5).[4]

B. State Statutory and Regulatory Classifications of "Services" and "Programs" Cannot Supersede the ADA.

The State's Brief scoffs at plaintiffs' position that the Court should look beyond administrative labels and treat what they are seeking and what the State is offering as forms of "long term care services" administered in different physical locations. See State's Brief at 16. Even if the State were right and

[4]Olmstead recognized that historically the Medicaid statute had reflected a congressional policy preference for treatment in an institution but that had not been the case since 1981, and that the present policy encourages home- and community-based services. Olmstead, 527 U.S. at 601.

administrative labels were sacrosanct, however, the fact is that the State and federal governments use the same generic phrase— "long term care services"—to describe programs for elderly disabled individuals.

For example, the Washington legislature has declared that it is its intent that

> (1) Long-term care services administered by the department of social and health services include a balanced array of health, social, and supportive services that promote individual choice, dignity, and the highest practicable level of independence . . .
>
> (3) Long-term care services be responsive and appropriate to individual need and also cost-effective for the state.

RCW 74.39A.007. The federal government has also used the phrase "long term care services" to discuss implications of the Olmstead decision in Medicaid programs nationwide. In the General Accounting Office's (GAO) September 24, 2001, Report to the Special Committee on Aging, "Long Term Care Implications of Supreme Court's Olmstead Decision are Still Unfolding," GAO-01-1167T (hereinafter "GAO Report"), the GAO states: "Long term care includes many types of services that a person with physical or mental disabilities may need and encompasses a wide array of care settings." Supp. ER 23. The GAO Report notes that the Medicaid program "plays a dominant role for supporting long term care needs." Supp. ER 28. "Services through this long-term care

program have been provided primarily in institutional settings, but a growing proportion of Medicaid long-term care expenses in the past decade has been for home and community-based services." Ibid.

The Medicaid statute, and its implementing regulations, utilize the terms "programs," "services," and "nursing facility services" in different contexts to describe various aspects of the cooperative federal/state scheme for providing long-term care services. The Medicaid statute refers to "medical assistance programs" (42 U.S.C. § 430.0) and State "Medicaid program[s]" (§ 430.10). Medicaid "waivers" can be obtained to "enable States to try new or different approaches to the efficient and cost-effective delivery of health care services, or to adapt their programs to the special needs of particular areas or groups of recipients." 42 C.F.R. § 430.25(b) (emphasis added). These labels cannot control the application of the ADA. The ADA applies to both the "services" and the "programs" of public entities—and generally, without using either of those terms, prohibits such entities from "subject[ing] to discrimination" any qualified individual they serve. See 42 U.S.C. § 12132 (emphasis added).

A State agency may not avoid the reach of the law simply by pointing to the bureaucratic, programmatic configurations through which those services currently are funded, or by defining entitlements in terms of the location in

which, in the past, they have been delivered.[5] If that location is an unjustifiably isolated one, the State's insistence upon it is discrimination under the ADA. Engrafting that discrimination onto the titles of the agencies' program does not change what it is, or make it any less unlawful.

II. THE STATE'S ARGUMENT WOULD HAVE STATE ADMINISTRATIVE REGULATIONS AND STATUTES PREVAIL OVER FEDERAL LAW.

In its zeal to defend its bureaucratic status quo, the State seems to forget that what plaintiffs are seeking to enforce is a federal statute, the Supreme Law of the Land under Article VI, section 2, of the Constitution.

Federal statutes prevail over state laws, even state laws enacted with reference to federal regulatory and funding schemes. Cantwell v. County of San Mateo, 631 F.2d 631 (9th Cir. 1980). Washington's legislative categories

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[5]That conformance with the integration regulation may require State agencies to make some changes does not mean res ipsa that those changes are a "fundamental alteration" of the State's long term care plan. To avoid the integration regulation, the State must prove that to comply with the regulation would force it to make substantial changes to its programs and that those changes would adversely impact others who receive Medicaid services. See Olmstead, 527 U.S. at 603-07. Although the State has speculated about possible consequences should it be required to comply with the integration regulation, State's Brief at 26-29, there is no evidence below to support any of these conjectures.

and definitions therefore cannot stand against the ADA's mandate of nondiscrimination.

The ADA was enacted after the Medicaid Act and applies to state programs implementing the Medicaid Act. Olmstead, 527 U.S. at 601 (ADA prevails over congressional policy preferences at the time of enactment of the Medicaid statute and applies to Georgia's Medicaid Act program). The ADA explicitly states that its provisions apply to every "public entity." 42 U.S.C. § 12132. "Medicaid" programs and services are not excluded.

The State attempts to hide behind the Medicaid statute's policy preference for the categorically needy as justification for its policies, arguing that the Medicaid Act and the ADA's integration regulation are in conflict. State's Brief at 31-35. Yet, nowhere in its brief has the State identified anything that Congress said in the Medicaid Act that is inconsistent with its ADA non-discrimination mandate, or with plaintiffs' argument here. In this case, the statutes are not irreconcilable; the ADA includes a specific congressional policy directive to integrate state programs and services, and the Medicaid Act policies and programs, as implemented by states, are not explicitly excluded from its reach. Cf. Morton v. Mancari, 417 U.S. 535, 547-49 (1974) (finding affirmative statutory provisions excluding Title VII from coverage of tribal employment).

Congress made elaborate, and specific, findings that segregation is a form of discrimination and that integration is required as part of the ADA. 42 U.S.C. § 12101(a) et seq.[6] Because the ADA's integration regulation does not per se conflict with the Medicaid Act, and the Medicaid Act itself requires States to follow the non-discrimination provisions of federal law, there was no need to expressly or implicitly repeal any aspect of the Medicaid Act to enforce the integration regulation. Cf. State's Brief at 33; Traynor v. Turnage, 485 U.S. 535, 551 (1988). Further, the Medicaid Act requires compliance with federal anti-discrimination laws.[7]

The fact that the Medicaid statute includes definitions of "nursing home care," State's Brief at 13, neither means nor implies that states can provide long term care services only in nursing homes. The fact that the Medicaid statute distinguishes between "medically needy" and "categorically needy" Medicaid

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[6]By so doing, the ADA went beyond the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U.S.C. § 701 (1976), since § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a)(2) does not expressly recognize "isolation or segregation of person with disabilities [as] a form of discrimination." Olmstead, 527 U.S. at 600 n.11. Accordingly, Rehabilitation Act decisions cannot be used to limit the construction of the ADA's integration regulation.

[7]"The Medicaid agencies standards and methods for determining eligibility must be consistent with the objectives of the program and with the rights of individuals under the United States Constitution, the Social Security Act, title 6 of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and all other relevant provisions of Federal and State laws." 42 C.F.R. § 435.901.

recipients, State's Brief at 6, does not mean that the medically needy must be discriminated against, or forced to receive services in isolation from the rest of society.

The cases cited in the State's Brief at 24, 26, and 29-33, do not address the issue before this Court. The State cites these cases to argue that Mr. Townsend seeks a modification of the COPES eligibility cap, an argument that he no longer makes. Neither Aughe v. Shalala, 885 F. Supp. 1428 (W.D. Wash. 1995), nor Weinreich v. Los Angeles County, 114 F.3d 976, (9th Cir.), cert. denied, 522 U.S. 971 (1997), nor Does 1-5 v. Chandler, 83 F.3d 1150 (9th Cir. 1996), nor Costello v. City of New York, 946 F. Supp. 249 (S.D.N.Y. 1996), aff'd, 142 F.3d 58 (2d Cir. 1998), involve the integration regulation of the ADA and its reach. None of these cases addresses the issue of publicly-funded segregation of the disabled from community, family, and friends. Nor do Beckwith v. Kizer, 912 F.2d 1139 (9th Cir. 1990), and Skandalis v. Rowe, 14 F.3d 173 (2d Cir. 1994), support the State's argument. State's Brief at 26, 34. Both cases involve only construction of the Medicaid statute. Neither case involved the ADA or the integration regulation.

The State is correct that plaintiffs' argument would require it to change some of its current programs, regulations, and arrangements with the federal

government. Where federal statutes conflict with such lesser legal mandates, federal law is supreme. That may discomfit State agencies, but it is the nature of our federal system.

III. THE STATE'S ARGUMENT FORGETS THAT UNJUSTIFIED ISOLATION IS ITSELF DISCRIMINATION UNDER THE ADA.

Focusing on an argument plaintiffs are no longer pursuing, the State protests that it is not discriminating against Mr. Townsend and the class. Wholly ignored in its argument is the fact that, under the ADA, "unjustified isolation . . . is properly regarded as discrimination based on disability." Olmstead, 527 U.S. at 597.

> In the ADA, Congress not only required all public entities to refrain from discrimination, . . . Congress explicitly identified unjustified "segregation" of persons with disabilities as a "form of discrimination," through explicit statutory findings

Id. at 599-600.

> Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life . . . Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment . . . Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable ac-

> commodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice . . . .

Id. at 600-01 (internal citations omitted).

The State's position that plaintiffs cannot claim discrimination because they are not being denied services "by reason of [their] disability," State's Brief at 23-25, completely forgets this separate Congressional judgment. It also ignores (while it quotes) the ADA's separate injunction that "no qualified individual with a disability shall . . . be subjected to discrimination by any [public] entity." 42 U.S.C. § 12132. The plaintiffs are indisputably qualified to receive the services the State of Washington provides to the medically needy. They are therefore entitled under the ADA not to be subjected to discrimination by the public entity that administers those services. Unjustified isolation in a nursing home is, by Congressional definition, discrimination. Therefore, the isolation the State seeks to impose on the plaintiff class is, itself, discrimination, unless it is legally "justified".

Though the State chooses to ignore it, plaintiffs plainly made that claim, separately and distinctly from their challenge to the exclusionary criteria of the COPES program, in their Amended Complaint.[8] The District Court recognized

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[8]Paragraph 5.1 of the amended complaint alleged, in pertinent part, that By segregating him in a nursing home rather than providing him ongoing health care, residential and personal support services at the adult family

the separate nature of that argument, and addressed it as such. See ER 170; Appellant's Opening Brief at 7. The District Court erred, plaintiffs maintain, in failing to address that separate claim after recognizing it; the State's response is to ignore the argument altogether.

The Congressional mandate applied in Olmstead does not permit that. "States must adhere to the ADA's non-discrimination requirements with regard to the services they in fact provide." Olmstead at 604 n.14 (emphasis added).

> States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the state and the needs of others with mental disabilities."

Id. at 607 (emphasis added).

By the State's own individual assessments, it is medically and physically appropriate for Mr. Townsend, and other class members, to receive the care and

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> home where he now lives . . . Defendant discriminated against Plaintiff because of his disability in violation of Section II of the Americans with Disabilities Act, 42 U.S.C. §§ 12132 et seq. and 28 C.F.R. § 35.130(d).

Paragraph 6.2 of the amended complaint asked the District Court to declare and order that

> For as long as the State of Washington chooses to provide long-term care to the medically needy, that a permanent injunction be entered prohibiting defendant from violation of the Integration Mandate of the Americans With Disabilities Act, which requires that a public entity provide care in the most integrated setting appropriate to the needs of the individuals.

ER 161-62 (emphasis added).

treatment for which they are qualified in community-based facilities. Under Olmstead, to nonetheless isolate them is, by definition, to discriminate against them—however other groups of disabled, or Medicaid eligible, individuals are treated. Even if it were true that the State required all Medicaid recipients, in all categories and "programs," to accept nursing home isolation in order to get long term care services, that requirement would still constitute discrimination under Olmstead and the ADA. The fact that the State does not so discriminate against another group of disabled individuals—categorically needy COPES recipients—does not make the discrimination the plaintiff class is suffering any less real or unlawful under the ADA.

IV. THE STATE CANNOT LAWFULLY USE DISCRIMINATION AS A DETERRENT TO ENROLLMENT IN ITS MEDICAID PROGRAMS.

The State concedes here, as it did below, that it would cost less, on a per capita basis, to provide plaintiffs the services they are entitled to outside the isolation of a nursing home. State's Brief at 8; see also ER 140-142. In light of that, the Court may well wonder why the State is fighting so hard to refuse plaintiffs the nondiscriminatory, more integrated treatment they seek.

The shocking answer lies in the State's argument immediately following: that it would cost the State more not to isolate because of "the cost of serving additional persons in the community who would not otherwise avail themselves

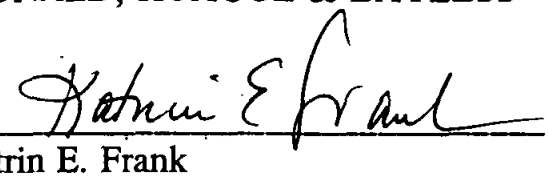
of Medicaid-funded nursing home care." State's Brief at 28. In other words, the State is making medically needy Medicaid recipients accept nursing home isolation—disability discrimination under the ADA—as a cost of receiving the long term care benefits to which they are entitled, in order to deter them from applying for those benefits. Isolation—discrimination under the law—is being used to make public benefits less desirable, thereby reducing the number of eligible people who will claim them. Such a strategy cannot be lawful.

CONCLUSION

For the foregoing reasons, Mr. Townsend requests that the Court reverse the District Court grant of summary judgment.

Respectfully submitted January 22, 2002.

MacDONALD, HOAGUE & BAYLESS

By 

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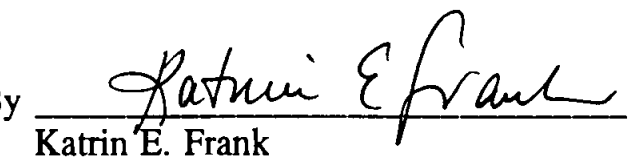
CERTIFICATE OF COMPLIANCE

Plaintiff-Appellant's Reply Brief filed in this case is proportionally spaced, using 14-point type, and according to the document information in the word processor on which it was written, contains 3,784 words.

Dated January 22, 2002.

MacDONALD, HOAGUE & BAYLESS

By 
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CERTIFICATE OF SERVICE

On January 22, 2002, I caused to be served on this Court and counsel for Defendant-Appellee, Plaintiff-Appellant's Reply Brief and Supplemental Excerpt of Record; service address, method of service, and number of copies served indicated below:

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