

**2003-2004**

**NATIONAL HEALTH LAW  
MOOT COURT COMPETITION**

---

**Transcript of Record  
Docket No. 03-2015**

**SUPREME COURT OF THE UNITED STATES**

**October Term, 2003**

**Myrtle Krebsbach, Secretary of the State of West Wobegon  
Department of Health and Social Services (DHSS), and the  
State of West Wobegon,**

**Petitioners,**

**v.**

**Pete Peterson,**

**Respondent.**

---

***SPONSORS:***

***Southern Illinois University School of Law***

***Southern Illinois University School of Medicine,  
Department of Medical Humanities***

***The American College of Legal Medicine***



exhausted, he had to move into a nursing home. Medicaid now pays for the cost of all of his care in the nursing home.

Medicaid is a joint federal-state program administered by the Department of Health and Human Services (DHHS) through which the states provide medical services to certain low-income residents, including women and children, the elderly, the blind, and the disabled. *Evergreen Presbyterian Ministries v. Hood*, 235 F.3d 908, 909 (5th Cir. 2000). States are not required to participate in the program, but if they decide to do so, in order to be eligible for federal funds, they are required to provide coverage to certain individuals deemed "categorically needy." These are individuals who receive federally assisted income maintenance payments. *See* 42 U.S.C. §§ 1396a(a)(10)(A)(i), 1396d(a)(1)-(5), (17), (21) (2000). States may also opt to provide services to "medically needy" individuals, which are certain individuals whose income makes them ineligible as "categorically needy" but who nonetheless need assistance with their health care costs. *See id.* § 1396a(a)(10)(A)(ii). Each participating state must create and submit to DHHS for approval a State Plan indicating which people and services its Medicaid program will cover that year. *See generally* 42 C.F.R. Part 430, Subpart B (2002).

West Wobegon opted to provide services to the medically needy. The Medicaid Act permits the State to use "reasonable standards" to determine eligibility and the extent of medical assistance these individuals are provided. *See* 42 U.S.C. § 1396a(a)(17). States can provide Medicaid assistance through community-based programs to individuals who would otherwise be required to reside in a nursing facility if they obtain a waiver from the federal government. *See id.* § 1396n(c)(1). West Wobegon obtained such a waiver, which was extended by the Secretary of Health and Human Services for a five year term in 2001.

Prior to January, 2002, West Wobegon provided the same menu of long-term Medicaid services to both the categorically and the medically needy. Included in that menu was a community-based program for which West Wobegon obtained the required Medicaid waiver from the federal government. The community-based aspect of the program was administered through CARES (Community Assistance REsidential Services). CARES administered all community-based Medicaid programs in West Wobegon. Generally, a single application to CARES is sufficient to qualify the individual for whatever services the State provided.

As with many states, however, West Wobegon experienced ever increasing costs associated with this program and a shrinking federal reimbursement. This was particularly problematic for the State, because it was experiencing an overall revenue shortfall as it planned its 2002 budget. West Wobegon is a largely rural state that relies on agriculture and light manufacturing, two sectors that have been hit hard in the recent economy. State legislators were looking to cut \$500 million out of a \$46 billion budget. During budget hearings, legislators expressed concern that "the Medicaid budget was out of hand," and suggested that "the problem was that people were over-utilizing the program." S. 202, 2d Sess., at 24 (W. Wob. 2001). The CARES program was specifically identified as having "experienced a 200% increase in utilization in just the past year alone." *Id.*

The state senate looked into cutting CARES altogether, commenting in its report on its expectation that “eliminating community based services would reduce the overall burden on the Medicaid program as fewer people would seek services if only nursing home services were covered.” *Id.* at 25-26. After hearing testimony that “there would not be enough nursing home beds to accommodate everyone who would likely continue to seek services” if the entire program was eliminated, however, the legislature ultimately decided to cut only the medically needy part of the CARES program. *Id.* at 27-28. The medically needy program was considerably smaller than the categorically needy program, and the senate report concluded that “there [would] be no problem finding nursing home facilities for anyone who continued to seek services.” *Id.* at 28. The legislative history does not specifically identify what, if any, anticipated costs savings would be obtained from the change in the program. *See id.* The medically needy aspect of the CARES program terminated when the new budget went into effect January 1, 2002. The DHHS approved the amended Medicaid plan submitted by the State.

Peterson brought suit against both Myrtle Krebsbach in her official capacity as Secretary of DHSS and the State of Memphis directly. He seeks, among other claims,<sup>1</sup> injunctive and declaratory relief under Title II of the Americans with Disabilities Act (ADA), asking that the State be required to pay the costs of the personal care services under the CARES program as long as he qualifies as “medically needy” under the Medicaid Act, as well as money damages for the costs of the personal care services he expended after the CARES program was eliminated and before he was required to move into the nursing home. He also seeks attorneys fees.

### LEGAL STANDARD

Summary judgment should be granted where “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Summary judgment will be denied where a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

### DISCUSSION

#### I. Eleventh Amendment Immunity

---

<sup>1</sup> Peterson also alleged the State’s actions violated the Equal Protection Clause of the Fourteenth Amendment and the Medicaid Act, 42 U.S.C. § 1396a(a)(17). The State’s motion for summary judgment did not request that those claims be dismissed.

Peterson's suit against the State of West Wobegon raises Eleventh Amendment issues. He seeks money damages against the State for the personal care services he paid out of his own pocket.<sup>2</sup> The Eleventh Amendment provides that

“[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens for Subjects of any Foreign State.”

U.S. Const. amend. XI. The Supreme Court has interpreted this Amendment to apply to suits by citizens against their own states. *See Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 363 (2001).

Congress can, however, abrogate a state's Eleventh Amendment immunity “when it both unequivocally intends to do so and ‘act[s] pursuant to a valid grant of constitutional authority.’” *Id.* (citing *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73 (2000)). In the ADA, Congress indeed included a provision purporting to abrogate states' Eleventh Amendment immunity. *See* 42 U.S.C. § 12202 (2000). However, Congress must have acted within its constitutional authority in attempting this abrogation.

In *Garrett*, the Supreme Court held that Title I of the ADA, which addresses disability discrimination in employment, did not validly abrogate states' Eleventh Amendment immunity. *Garrett*, 531 U.S. at 374. The Court first found that Congress based the ADA at least in part on its § 5 power to enforce the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 364 n. 3. Title I's terms reach beyond the actual guarantees of the Fourteenth Amendment, however, because the Equal Protection Clause is violated only when state action based on disability fails rational basis review. *Id.* at 366-367. Title I reaches many state employment actions that might otherwise be rational, such as failing to accommodate an individual with a disability by modifying job-qualification requirements. *Id.* at 367-368. Thus, in order to be constitutional, Title I needed to be based on an adequate legislative record of a “history and pattern of unconstitutional employment discrimination by States against the disabled,” *id.* at 368, and must “exhibit ‘congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’” *Id.* at 365 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)). The Court then found Title I did not meet that test because Congress failed to show a history and pattern of discrimination by states that justified imposing upon them a greater burden than the Equal Protection Clause already requires. *Id.* 370-372. Further, even if a pattern of discrimination could be shown, the scope of the ADA

---

<sup>2</sup> The parties have waived for purposes of this appeal any issues about whether money damages are available in a suit to enforce the integration mandate in the ADA regulations for Title II after the Supreme Court's ruling in *Alexander v. Sandoval*, 532 U.S. 275 (2001).

was neither congruent or proportionate, because of the breadth of the accommodation mandate. *Id.* at 372-373.

*Garrett* decided only that suits for money damages were not available under Title I of the ADA. *See id.* at 360. Whether such suits are available under Title II is an open question. The three questions in the congruence and proportionality test must therefore be answered: First, what is the precise scope of the constitutional right at issue? Second, has Congress identified a history and pattern of unconstitutional discrimination by states? Third, is the statute in question congruent and proportionate in its response to this history and pattern of unconstitutional discrimination? *See Wessel v. Glendening*, 306 F.3d 203, 209 (4th Cir. 2002).

The answer to the first question is the same as for Title I. As the Fourth Circuit has put it, “disabled people have a constitutional right not to be subject to arbitrary or irrational exclusion from the services, programs, or benefits provided by the state.” *Wessel*, 306 F.3d at 210. The answer to the second question is also the same. The record the Court found inadequate in *Garrett* likewise fails to support a finding of a history and pattern under Title II. *See id.* at 211-212. It is true that some of the examples in the record involve access to government services, but many of these involve access to local, as opposed to state, services, and the few incidents recounted, in any event, are not enough to add up to a “pattern.” *Id.* at 212-213.

Even assuming that a pattern was established, Title II fails the third part of the test, because it is also not congruent or proportionate in its response. This is not necessarily apparent from the language of Title II itself, which provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.” 42 U.S.C. § 12132. On its face, this could be construed to do no more than prohibit the same discrimination that the Equal Protection Clause prohibits. However, the regulations enacted to enforce Title II reflect that the breadth of Title II is similar to that of Title I, if not broader.

For example, Title II regulations provide that it is discrimination for a public entity to fail to make “reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination based on disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity.” 28 C.F.R. § 35.130(b)(7) (2002). The limitation of the State to a fundamental alteration defense is considerably more stringent than the rational basis standard of review would require. *Wessel*, 280 F.3d at 109.

The specific regulation at issue in this case, 28 C.F.R. § 35.130(d), which requires the public entity to “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities,” also illustrates the lack of congruence and proportionality. While perhaps it is not desirable to the individual with a disability that personal care services be provided only in nursing home settings, rather than on

a community basis, the State may have a rational basis for taking such action, including issues of funding.

Just as with Title I of the ADA, Congress failed to validly abrogate states' Eleventh Amendment immunity when it enacted Title II. Several Courts of Appeal have agreed with this finding. *See Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001); *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001); *see also Garcia v. SUNY Health Sciences Ctr. of Brooklyn*, 280 F.3d 98, 112 (2d Cir. 2001) (finding ADA invalid to extent it allowed suit for discrimination not motivated by either discriminatory animus or ill will due to disability). Accordingly, the Plaintiff is not entitled to sue for money damages in this case, and his claims in that regard are dismissed.

## II. ADA Integration Claim

Peterson seeks injunctive relief as well as money damages, for violation of Title II's so-called "integration mandate." The injunctive claim survives the Eleventh Amendment under the doctrine of *Ex Parte Young*, in that Peterson brought suit against Krebsbach in her official capacity as Secretary of DHSS. Therefore, it is necessary to address the Defendants' motion to dismiss the ADA claim in its entirety.

Title II generally prohibits discrimination in regard to the services, programs, and activities of public entities. The Department of Justice's Title II regulations more specifically provide that public entities "shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (2002). Further, as noted above,

[a] public entity shall make reasonable modifications in policies, practices or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

*Id.* § 35.130(b)(7).

In *Olmstead v. Zimring*, 527 U.S. 581 (1999), the Supreme Court recognized that "unjustified institutional isolation of persons with disabilities is a form of discrimination" under Title II of the ADA. *Id.* at 600. The plaintiffs in that case were persons qualified to be placed in community-based programs but who were forced to reside in a nursing home because the state failed to follow through on their placement. *Id.* at 593-594. The State's excuse was that it did not have sufficient funding to accommodate everyone who qualified for the community-based program. *Id.* at 594. The Court held that once the State found an individual qualified for placement in a community-based program, it was required to make that placement, but could defend its inability to do so by demonstrating that it has a "comprehensive, effectively working plan . . . and a waiting list that move[s] at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated." *Id.* at 605-606.

This case is distinguishable from *Olmstead*. There, the state in question had a program available, just no open slots. *See id.* at 594. Here, West Wobegon does not currently have a community-based placement program available to individuals like Mr. Peterson. As such, Peterson's request is more akin to that in *Rodriguez v. City of New York*, 197 F.3d 611 (2d Cir. 1999). In *Rodriguez*, the plaintiff sought to require the City of New York to provide safety monitoring as part of the personal care services in its community-based placement program. *Id.* at 614. Without those services, the plaintiffs would not be able to live in their homes. *Id.* The Second Circuit held that New York City did not violate the ADA by failing to provide those services, because *Olmstead* did not require public entities to provide services they were not otherwise already providing. *See id.* at 619. "*Olmstead* does not . . . stand for the proposition that states must provide disabled individuals with the opportunity to remain out of institutions. Instead, it only holds that 'States must adhere to the ADA's nondiscrimination requirement with regard to the services *they in fact provide.*'" *Id.* (quoting *Olmstead*, 527 U.S. at 603 n. 14 (emphasis added)).

West Wobegon does not provide community-based services to medically needy individuals. Unlike the plaintiffs in *Olmstead*, Peterson has not been found qualified for those services but institutionalized because the State is failing to follow through on the placement it has deemed appropriate. Consequently, *Olmstead* does not support Peterson's argument that the State's actions violate the integration mandate of Title II.

There is no evidence in this case that the State's actions are based on animus towards individuals with disabilities which would independently support a claim against the State. The only substantive claim Peterson has is that he would be better served if allowed to remain in his home. The integration mandate does not require the State to adopt new programs, which is what this Court would be requiring it to do if this Court granted a verdict in Peterson's favor. Peterson's ADA claim must, therefore, be dismissed in its entirety.

**SO ORDERED**

**Date: September 30, 2002**

**/s/ Clarence Bunsen**

**Honorable Clarence Bunsen**

**Entered: October 1, 2002**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TWELFTH CIRCUIT

No. 02-0905

Pete Peterson,

Plaintiff-Appellant

v.

Myrtle Krebsbach, Secretary of the  
State of West Wobegon Department  
of Health and Social Services  
(DHSS), and the State of West  
Wobegon

Defendant-Appellee

---

Appeal from the United States District Court for the Eastern District of West Wobegon  
Civil No. 02-C-62 – Clarence Bunsen, District Judge

---

Argued February 17, 2003 – Decided May 20, 2003

Before Ingqvist, Chief Judge, Skoglund, and Berge, Circuit Judges.

Ingqvist, Chief Judge. This action comes before the court on plaintiff's appeal of the district court's grant of summary judgment for defendants on his Americans with Disabilities Act (ADA) claims. The district court certified the judgment for appeal under 28 U.S.C. § 1292(b) and this court granted the petition for this appeal. The district court's judgment is reversed.

### **Facts**

The district court's opinion adequately sets forth the facts of this case. Pete Peterson is a "medically needy" person under the Medicaid Act who is currently residing in a nursing home because he needs personal care services that the State of West Wobegon provides only in that setting. Prior to 2002, the State provided in-home personal care services to both categorically needy and medically needy individuals under its Medicaid Act, through a community-based program called CARES. In its 2002 budget, however, the State terminated just the community-based services for the medically needy. The legislative history suggests that the decision was a deliberate one

to try to reduce demand on the Medicaid system without doing the politically unpopular act of actually cutting the number of people eligible for Medicaid itself.

Peterson sued the State of West Wobegon and the Secretary of the Department of Health and Social Services (DHSS) of the State of West Wobegon, alleging among other things that they violated the integration mandate of Title II of the Americans with Disabilities Act (ADA), found at 28 C.F.R. § 30.130(d) (2002). His suit requested both injunction relief and money damages. The Respondents moved for summary judgment, on the grounds that the Eleventh Amendment barred Peterson's claim for money damages under the ADA and that the State's actions did not violate Title II. The district court granted both aspects of the Respondent's motions, and Peterson appealed. We reverse the decision of the district court on both issues.

## **Analysis**

### Eleventh Amendment Immunity

The District Court correctly articulated the three part test for whether Congress validly abrogated the states's Eleventh Amendment immunity. The scope of the constitutional right at issue must first be identified "with some precision." See *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 365 (2001). Then, the legislative history must support a finding by Congress that a history and pattern of unlawful discrimination had been occurring. Finally, the legislation that Congress enacts must be congruent and proportionate to the injury it seeks to redress.

The District Court erred, however, in applying this three part test too rigidly. It is true that in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Court applied only a rational basis test to a claim challenging a city special use permit ordinance that discriminated based on disability. *Id.* at 446. Thus, under a strict Equal Protection Clause analysis, only irrational or invidious discrimination would be unconstitutional. But, the Court has also indicated that legislation enacted pursuant to Congress's authority under § 5 of the Fourteenth Amendment may prohibit "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000). A statute does not fail the congruence and proportionality test simply because it reaches some otherwise constitutional conduct. See *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

The record that Congress built regarding discrimination in public services shows a history and pattern of discrimination that supports the reach of Title II. As Judge Robert B. King correctly noted in his dissenting opinion in *Wessel v. Glendening*, 306 F.3d 203 (4th Cir. 2002) (King, J., dissenting), the record Congress built regarding discrimination in public services under Title II is considerably different than that for employment discrimination by public entities. *Id.* at 217-218. Indeed, Congress made an explicit finding that "discrimination still persists in such critical areas as employment in the private sector, public accommodations, *public services*, transportation, and

telecommunications.” *Id.* at 218 (citing S. Rep. No. 101-116, p. 6 (1989) with emphasis added). Congressional testimony and supporting documentation recounted several incidents of individuals being denied services from states based on their disability. *See id.* at 217 (summarizing the legislative evidence). Title II is a congruent response to that history.

Further, the scope of Title II is proportionate to the history and pattern of discrimination that Congress found to persist against individuals with disabilities. “Although Title II’s provisions may prohibit some State conduct which would pass muster under rational basis review, the Title’s focus is on eliminating the discrimination outlined in the factual findings.” *Dare v. California*, 191 F.3d 1167, 1175 (9th Cir. 1999). Title II’s requirement that public entities make reasonable modifications in policies and practices “charges states with an affirmative duty to address the sources of discrimination against the disabled in the operation of their public programs.” *Wessel*, 306 F.3d at 221 (King, J., dissenting) (citation omitted). Significantly in that regard, the scope of Title I and Title II are distinguishable in two respects. *See id.*

First, whereas Title I requires employers to make existing workplace facilities accessible unless it would pose an undue hardship, *see* 42 U.S.C. § 12112(b)(5)(A) (2000), Title II requires only that the public program as a whole be accessible. 42 U.S.C. § 12132; *Wessel*, 306 F.3d at 221 (King, J., dissenting). Title II, therefore, gives public entities more flexibility in how they comply with the accommodation requirements, thereby resulting in less interference with what would otherwise be constitutional discrimination by states. *See Wessel*, 306 F.3d at 221 (King, J., dissenting) (discussing example in 28 C.F.R. § 35.150(b)(1) of a state being able to use an alternative facility to offer its program rather than having to make an inaccessible facility accessible).

Second, whereas Title I interferes with a public entity’s acts as an employer, Title II addresses discrimination by the public entity when acting as a sovereign. *Id.* “[W]hile a state has a ‘significant’ interest in conserving resources and achieving its goals as effectively and efficiently as possible when it acts as an employer, the same interest in efficiency is ‘relatively subordinate’ when the state acts in its sovereign capacity by, for instance, operating its public programs.” *Id.* at 222 (quoting *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 676 (1996)). Since Title II addresses the provision of public services, it accordingly interferes less with constitutional discrimination against individuals with disabilities than does Title I. *Id.* Congress could validly have determined that Title II was necessary in order to identify and remedy the sources of unconstitutional discrimination, despite touching on some acts that would not in themselves violate the Constitution.

While it is true that some of the circuit courts to consider this issue have found Title II was not a valid abrogation of Eleventh Amendment immunity, those cases would limit the scope of Title II too narrowly. *See Garcia v. SUNY Health Sci. Ctr. of Brooklyn*, 280 F.3d 98, 111-112 (2d Cir. 2001) (concluding that Title II is valid only to

extent it reaches cases that would otherwise violate the Equal Protection clause); *Thompson v. Colorado*, 278 F.3d 1020, 1033-1034 (10th Cir. 2001) (finding legislative record flawed to extent it discussed failure of states to accommodate individuals with disabilities because that conduct does not violate the Equal Protection Clause). These cases fail to give sufficient deference to Congress' legislative determination that discrimination against individuals with disabilities is a "[d]ifficult and intractable [problem which] require[s] powerful remedies." *Kimel*, 528 U.S. at 88.

### ADA Integration Mandate

When it passed the ADA, Congress clearly had as a primary concern the unjustified isolation of individuals with disabilities. One of its expressed goals was to assure access by individuals with disabilities to "independent living." The ability to interact with others is a basic freedom in society, and, too often, individuals with disabilities were confined to institutional settings that limited them to interacting with hospital staff and visiting family members.

The "integration mandate" contained in the Department of Justice's regulation, found in 28 C.F.R. § 35.130(d), is an important adjunct to Title II's general prohibition on discrimination in the provision of government services, programs, and activities. The regulation requires that services be provided in the most integrated setting appropriate to the needs of the individual, thereby adopting a firm bias toward maintenance of independent living. This was recognized by the United States Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581, 600-01 (1999) (discussing the impact of unjustified institutional isolation).

To prove discrimination on the basis of disability under Title II, the claimant must show that "(1) he is a 'qualified individual with a disability'; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities or was otherwise discriminated against by the public entity; [and] (3) such exclusion, denial of benefits, or discrimination was by reason of his disability." *Townsend v. Quasim*, 328 F.3d 511, 516 (9th Cir. 2003) (quoting *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2000)). "Discrimination" includes "failure to provide Medicaid services in a community-based setting. . . ." *Id.* at 517. In this case, Peterson can prove discrimination by showing that the State forced him to choose between receiving government services or living independently. *See id.*

The Second Circuit case relied upon by the lower court is inapposite. In that case, the plaintiff was requesting the state to provide a service that it simply did not provide to anyone. *See Rodriguez v. City of New York*, 197 F.3d 611, 616 (2d Cir. 1999) (noting that requested benefit was one state "currently provides to no one"). A better approach is that taken just recently by the Ninth Circuit in *Townsend*, a case involving facts similar to those in this case.

In *Townsend*, the State of Washington provided personal-care services to both categorically needy and medically needy individuals, but only categorically needy individuals had the option of receiving those services in their own homes or adult group homes. *Id.* at 514. Medically needy individuals had to live in a nursing home setting in order to receive the services. *Id.* Mr. Townsend was a categorically needy individual receiving home-based services until his income increased and he moved to the medically needy category. *Id.* The Ninth Circuit held that the integration mandate required that the community-based services be provided unless the state could show that providing those services would fundamentally alter its Medicaid programs. *Id.* at 520. As the Ninth Circuit reasoned, even *Rodriguez* makes it clear that “where the issue is *location* of services, not *whether* services will be provided, *Olmstead* controls.” *Townsend*, 328 F.3d at 517.

In this case, the services at issue are personal care services. West Wobegon provides those services to both the categorically needy and the medically needy. It forces the medically needy into an institution, however, in order to receive those services. This is what Title II does not permit, as long as the individual is capable of living independently. Although Medicaid may make provision of community-based care discretionary on the part of the states, the ADA requires that once a state decides to provide services, it do so in a non-discriminatory manner. *Cf. Helen L. v. Didario*, 46 F.3d 325, 339 (3d Cir. 1995) (concluding that “since the Commonwealth has chosen to provide services to [the plaintiff] under the ADA, it must do so in a manner that comports with the requirements of that statute”).

While this case may not be fully squared with *Olmstead* on its facts, *Olmstead's* rationale nonetheless applies as forcefully here as it does to that case. This Court finds that the integration mandate requires a state to provide community-based care when it provides such services but simply chooses not to make them available to a class of individuals with disabilities who would otherwise be eligible for those services.<sup>3</sup>

## **Conclusion**

The judgment of the district court is reversed and the case remanded for further proceedings consistent with this opinion.

## **Berge, J., concurring in part and dissenting in part.**

---

<sup>3</sup> The State may have a strong argument that requiring it to reinstate its community-based care program for the medically needy fundamentally alters its Medicaid program. However, there are a number of factual questions that need to be answered about the program, including questions of cost and the actual structure and administration of the program, that have not been adequately developed in the record below. Both parties have an opportunity to brief these issues fully upon remand.

While I agree that Title I and Title II are distinguishable and Congress validly abrogated states' Eleventh Amendment immunity in cases involving the ADA's integration mandate, I disagree with the majority's holding on the substantive scope of that mandate. The majority relies on the Ninth Circuit's recent decision in *Townsend*, which does have similar facts. I do not, however, find the reasoning in that case persuasive.

The Ninth Circuit distinguished *Rodriguez*, suggesting that *Townsend*'s case was about location of services, not whether the services would be provided. *See id.* at 517. As I see it, however, this case *is* about whether services would be provided. It is beyond dispute that the State does not provide in-home personal care services to individuals such as Mr. Peterson. The Medicaid Act itself does not require that these services be provided. Thus, any ruling by this Court would require West Wobegon to provide a new service. *Olmstead* simply does not require this.

Instead, I believe the dissenting judge in *Townsend* correctly reasoned that the structure of the Medicaid Act, which makes provision of home health care services entirely optional whether provided to categorically needy or medically needy individuals, takes precedence. *See Townsend*, 328 F.3d at 524-525 (Beezer, J., dissenting). "The Medicaid Act treats nursing home care and community care as distinct services." *Id.* (citing 42 U.S.C. §§ 1396d(f), 1396n(c)). Requiring a state to modify its program to provide these services to the medically needy would not be a reasonable modification under the ADA because it ignores the deference given a state's decision whether to offer community based care programs. *Id.* at 525-26.

Therefore, I respectfully dissent from the majority's decision and would affirm the lower court's dismissal of the ADA claim.

**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM 2003**

**Myrtle Krebsbach, Secretary of the State of West Wobegon Department of Health and Social Services (DHSS), and the State of West Wobegon**

**PETITIONERS,**

**v.**

**Pete Peterson,**

**RESPONDENT.**

**ORDER GRANTING CERTIORARI**

Upon consideration of the Petition for Certiorari the Court hereby **GRANTS** the petition as to the following issues:

1. Whether a private citizen may maintain a suit in federal court for money damages against a state defendant under Title II of the Americans with Disabilities Act.
2. Whether making personal care services available to individuals who are "medically needy" under a state Medicaid program in a nursing home setting only violates the integration mandate of Title II of the Americans with Disabilities Act.

**IT IS SO ORDERED.**

**Date: June 26, 2003**