LAWYERING AS A PUBLIC HEALTH TOOL: ENFORCING TITLE II OF THE AMERICANS WITH DISABILITIES ACT WITH PREVENTATIVE LITIGATION

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A recent ruling by the U.S. Court of Appeals for the Fifth Circuit held that plaintiffs cannot bring a claim alleging a risk of unnecessary institutionalization under Title II of the Americans with Disabilities Act (ADA). This directly contradicts the holdings of six other circuit courts and guidance issued by the Department of Justice (DOJ)—all of which maintain that Title II of the ADA (Title II), the integration mandate, and the U.S. Supreme Court's decision in Olmstead v. L.C. ex rel. Zimring *permit these claims. This Note explores how the circuit courts have evaluated risk of unnecessary institutionalization claims, including what it means to be "at-risk."*

Understandably, the Fifth Circuit's ruling has induced fear throughout the disability rights community. However, the U.S. Court of Appeals for the Eleventh Circuit has the opportunity in United States v. Florida *to join many of its fellow circuit courts and solidify* Olmstead*'s protections. This Note argues that risk of unnecessary institutionalization claims are actionable under Title II because the ADA's legislative history and the language of Title II, in conjunction with* Olmstead *and the integration mandate, explicitly allow such claims. Further, this Note insists that, at the very least, the statute is ambiguous on the issue, and some level of deference should be afforded to the DOJ's interpretation. This Note then argues that preventative litigation is important to support public health initiatives, especially in the context of the ADA. Finally, this Note argues for the "likely" at-risk standard and suggests risk determinations be made using a common risk assessment framework and public health professional testimony.*

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INTRODUCTION

"My son had a life before they took
him there and now, he has nothing."[1]

A recent forty-five-page study from the Department of Justice (DOJ) found that Missouri's healthcare institutions create highly restrictive settings that isolate residents "by severely limiting or entirely cutting off their relationships with loved ones and their community."[2] The report proved that Missouri systematically funneled people into state nursing facilities, though almost none of them required even short-term stays.[3] Missouri is not alone.[4] In 2023, twelve states were being investigated for "keeping people in institutional settings when they could benefit from less restrictive settings."[5] The phenomenon of institutionalizing individuals capable of living at home with the help of home and community-based services (HCBS) is known as unjust or unnecessary institutionalization.[6] For example, Elaine Shelly, a multiple sclerosis patient, has been in and out of nursing homes for twenty

1. U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF MISSOURI'S USE OF NURSING FACILITIES AND GUARDIANSHIP FOR ADULTS WITH MENTAL HEALTH DISABILITIES 7 (2024).
2. *Id.*
3. *See id.* at 2.
4. *See* Michael Loria, *Thousands with Disabilities Subjected to Segregation in These Three States*, USA TODAY (June 25, 2024, 12:25 PM), https://www.usatoday.com/story/news/nation/2024/06/24/thousands-with-mental-health-disabilities-segregated-in-missouri-nebraska-utah-doj-investigation/74175601007/ [https://perma.cc/65GZ-RNLQ] ("The report from the DOJ is one in a slew of investigations that have also gone after Utah and Nebraska for similar practices.").
5. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T HEALTH & HUM. SERVS, UPDATE ON *OLMSTEAD* LITIGATION 2 (2023).
6. *See id.* at 1–2.

years, despite being capable of maintaining adequate care through HCBS.[7] How did this happen? Care professionals often offered institutionalization as a catchall solution to her health problems.[8] Yet, "the facilities fell short of their promises. Not just one facility, but at least 20 facilities in different parts of the country. None of them felt safe. All of them were isolating."[9] Thus, it does not come as a surprise that some litigants who have challenged unnecessary institutionalization say, "they would rather die than be placed in a nursing home."[10]

Unnecessary institutionalization and other dire problems[11] continue to plague the disability community despite the protections afforded by the Americans with Disabilities Act[12] (ADA) and the U.S. Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring*,[13] in which the Court held that unjustified institutionalization of persons with disabilities constitutes discrimination.[14] Compounding the problem are recent successful efforts by politicians and courts to limit the ADA's reach.[15] Statutory amendments, regulatory changes, redirection of funds, and judicial decisions that narrowed the ADA's protections have all contributed to the attack on the ADA.[16] Professor Laura Rothstein concluded, "The vigilance of organized and

7. *See* Elaine Shelly, *What's Love Got to Do with It?: An Argument Against Institutionalizing People with Severe Mental Disabilities*, GENERATIONS (Oct. 15, 2021), https://generations.asaging.org/dont-institutionalize-people-disabilities [https://perma.cc/B3BG-V63K].

8. *See id.*

9. *Id.*

10. Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1184 (10th Cir. 2003).

11. *See* Robert L. Burgdorf Jr., *Why I Wrote the Americans with Disabilities Act*, WASH. POST (July 24, 2015, 6:00 AM), https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/ [https://perma.cc/394H-2KR7]; *see also It's the 30th Anniversary of the ADA. What's Changed?*, GAO: WATCHBLOG (July 27, 2020), https://www.gao.gov/blog/its-30th-anniversary-ada.-whats-changed [https://perma.cc/AL2M-UCEC] (explaining that the "GAO conducted a nationally-representative survey of school districts and found that about two-thirds of them had physical barriers that may limit access for people with disabilities."); Dulce Gonzalez, Genevieve M. Kenney, Michael Karpman & Sarah Morriss, *Four in Ten Adults with Disabilities Experienced Unfair Treatment in Health Care Settings, at Work, or When Applying for Public Benefits in 2022*, URB. INST. (Oct. 11, 2023), https://www.urban.org/research/publication/four-ten-adults-disabilities-experienced-unfair-treatment-health-care-settings# [https://perma.cc/6R6Y-BY5Y] ("In December 2022, 4 in 10 adults with disabilities (40 percent) reported experiencing unfair treatment in health care settings, at work, or when applying for public benefits because of their disabilities or other personal characteristics in the previous year. Adults with disabilities were more than twice as likely as adults without disabilities to report unfair treatment in one or more of these settings (40 percent versus 18 percent)."); James DeLano, *A History of Institutions for People with Disabilities: Neglect, Abuse, and Death*, UAB INST. FOR HUM. RTS. BLOG (Oct. 25, 2023), https://sites.uab.edu/humanrights/2023/10/25/a-history-of-institutions-for-people-with-disabilities-neglect-abuse-and-death/ [https://perma.cc/XU2A-EBXH] ("Between 2004 and 2010, 1,361 people with disabilities died in Connecticut. 82 of those deaths were caused by neglect or abuse.").

12. 42 U.S.C. §§ 12101–12213.

13. 527 U.S. 581 (1999).

14. *See id.* at 600.

15. *See* Laura Rothstein, *Would the ADA Pass Today?: Disability Rights in an Age of Partisan Polarization*, 12 ST. LOUIS U. J. HEALTH L. & POL'Y 271, 306–08 (2019).

16. *See id.*

thoughtful advocates to retain [the ADA's] protections will be essential because if it is repealed, it is hard to imagine how it could be passed again today."[17]

Recently, in *United States v. Mississippi*,[18] the U.S. Court of Appeals for the Fifth Circuit further narrowed the scope of protection for the disability community.[19] The Fifth Circuit held that before individuals with disabilities can challenge potentially harmful state systems,[20] they must first be institutionalized, even if the institutionalization is unnecessary.[21] Broadly, the court reasoned that the plain language of Title II of the ADA ("Title II") does not support an interpretation allowing at-risk litigation.[22] If the court's reasoning is largely adopted, plaintiffs will face drastic challenges bringing unjust institutionalization claims under *Olmstead*.[23] The Fifth Circuit is the first federal court of appeals to reject what is known as the "at-risk theory."[24] Comparatively, the U.S. Courts of Appeals for the Second, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits have all accepted the at-risk theory, ruling that an individual need not be first institutionalized and that the risk of unnecessary institutionalization is enough to preserve a claim of disability discrimination.[25] The U.S. Court of Appeals for the Eleventh Circuit is next to contemplate the issue. On January 24, 2024, the court heard oral arguments for a case addressing the at-risk theory. However, the appeal is still pending.[26]

Circuit courts vary in their exact wording of the at-risk standard but generally allow claims against policies likely to lead to unjust institutionalization.[27] Most circuits deferred to guidance from the DOJ when they held that the ADA's discrimination protections include the at-risk theory.[28] However, the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*[29] threatens to bolster the Fifth Circuit's interpretation because *Loper Bright* limits the extent to which courts may

17. *Id.* at 309.

18. 82 F.4th 387 (5th Cir. 2023).

19. McKenna S. Cloud & Cameron A. Cloud, *"At Risk" or Not?: Fifth Circuit Creates Circuit Split over ADA and* Olmstead *Interpretation*, HEALTH L. WKLY. (Mar. 1, 2024), https://www.americanhealthlaw.org/content-library/health-law-weekly/article/3d998d50-04cf-40c9-9cf9-1319cae551ec/at-risk-or-not-fifth-circuit-creates-circuit-split#_edn4 [https://perma.cc/Q6SY-GYEF].

20. States have no immunity from Title II claims when fundamental rights are implicated. *See* Tennessee v. Lane, 541 U.S. 509, 533–34 (2004).

21. *See Mississippi*, 82 F.4th at 392–93 ("Thus, 'at risk' claims of ADA discrimination are not within the statutory or regulatory language.").

22. *See id.*

23. *See* Rebecca Rodgers & Sam Wehrle, *Will the Court Decide Whether People at Risk of Institutionalization Are Protected by the Americans with Disabilities Act?*, AARP FOUND., https://www.aarp.org/aarp-foundation/our-work/legal-advocacy/2024-supreme-court-preview/disability-rights.html# [https://perma.cc/979N-7VN5] (last visited Feb. 14, 2025).

24. *See* Cloud & Cloud, *supra* note 19.

25. *See infra* Part II.A.1.

26. *See* United States v. Florida, No. 23-12331 (11th Cir. Jan. 24, 2024).

27. *See* discussion *infra* Part II.B.1.

28. *See* discussion *infra* Part II.A.1.

29. 144 S. Ct. 2244 (2024).

defer to an agency's interpretation of a statute.[30] Specifically, *Loper Bright* held that courts may not defer to an agency's statutory interpretation "simply because a statute is ambiguous."[31] This decision overturned the previously longstanding doctrine created in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[32] The *Chevron* doctrine gave reasonable agency interpretations of ambiguous statutes deference.[33] Now, more than ever, addressing this issue is critical for the disability community.

This Note examines the circuit split over whether Title II of the ADA, Title II regulations, and *Olmstead* permit risk of unjust institutionalization claims. Part I.A describes the ADA, its history, language, and associated regulations. Then, Part I.B discusses the deinstitutionalization movement, the *Olmstead* decision, and the relevant subsequent DOJ guidance. Next, Part II.A and Part II.B analyze the varying circuit court decisions, including the legal grounds relied upon and the standard for being at risk. Part II.C then discusses the U.S. District Court for the Southern District of Florida's decision, now on appeal, in *United States v. Florida*.[34] Finally, Part III argues why courts should permit the at-risk theory under Title II and provide a clear standard for risk of unnecessary institutionalization. In addition, Part III frames the issue using a public health lens and asks courts to favor decisions that stop dire health consequences from occurring, prior to their onset.

I. THE AMERICANS WITH DISABILITIES ACT AND DEINSTITUTIONALIZATION

Part I.A begins by describing the history of the ADA, the ADA's language, and relevant regulations. Next, Part I.B examines the deinstitutionalization movement, the *Olmstead* decision, and the DOJ's subsequent guidance.

A. The Americans with Disabilities Act

Part I.A.1 first describes the history of the ADA, legislative and otherwise. Then, Part I.A.2 delves deeper into the language and implications of Title II. Next, Part I.A.3 discusses the 2008 amendments to the ADA. Finally, Part I.A.4 explains two important Title II regulations.

30. *See id.* at 2273; *see also* Chad Squitieri, Auer *After* Loper Bright, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 15, 2024), https://www.yalejreg.com/nc/auer-after-loper-bright-by-chad-squitieri/# [https://perma.cc/JA4Q-X9DP].

31. *Loper Bright*, 144 S. Ct. at 2273.

32. 467 U.S. 837 (1984), *overruled by* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

33. *See id.* at 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.").

34. 682 F. Supp. 3d 1172 (S.D. Fla. 2023), *appeal docketed*, No. 23-12331 (11th Cir. argued Jan. 24, 2024).

1. History of the Americans with Disabilities Act

Drafter of the ADA, Robert L. Burgdorf Jr., described the act as "a response to an appalling problem: widespread, systemic, inhumane discrimination against people with disabilities."[35] Prior to the ADA's enactment in 1990, more than half of kids with disabilities did not receive adequate education, most transportation systems were inaccessible for persons with disabilities, and state facilities for people with disabilities were dangerous and inhumane.[36] Further, a number of laws restricted the freedoms of people with disabilities by limiting their right to vote, their right to obtain a driver's license, their right to hold office, and even their right to contract.[37]

As the civil rights movement unfolded in the 1950s and 1960s, disability rights activists began advocating for legislation protecting the disability community from discrimination.[38] In response, Congress enacted the Rehabilitation Act[39] in 1973.[40] Critically, § 504 of the Rehabilitation Act prohibited discrimination against people with disabilities in any federally funded program.[41] Few employers or public programs received federal funding, and therefore much of the private sector did not have to comply with § 504's discrimination policy.[42] Though limited in application, § 504 indicated a shift because, for the first time, "the exclusion and segregation of persons with disabilities was seen as stemming from discrimination."[43]

In 1987, Burgdorf began drafting what became the ADA.[44] The National Council on Disability (NCD), an independent federal agency, published his work in 1988.[45] In April 1988, Senator Lowell P. Weicker Jr. of Connecticut and Senator Tom Harkin of Iowa introduced the ADA of 1988[46] to the 100th Congress using the NCD's concept.[47] Shortly after, Representatives Tony Coelho of California and Silvio O. Conte of Massachusetts brought H.R.

35. *See* Burgdorf, *supra* note 11.
36. *See id.*
37. *See id.*
38. *See* Mikenzi Bushue, *The Americans with Disabilities Act: A Step Towards Equality*, 22 LEGACY 15, 15–17 (2022).
39. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. §§ 701–718).
40. *See* Bushue, *supra* note 38, at 17.
41. *See* 29 U.S.C. § 701 (stating "it is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter shall be carried out in a manner consistent with the principles of . . . respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities . . . [and] inclusion, integration, and full participation of the individuals").
42. *See* Rothstein, *supra* note 15, at 274.
43. *ADA History - In Their Own Words: Part One*, ADMIN. FOR CMTY. LIVING (July 25, 2023), https://acl.gov/ada/origins-of-the-ada [https://perma.cc/GBQ8-P2XH].
44. *See* Burgdorf, *supra* note 11.
45. *See id.*
46. Americans with Disabilities Act of 1988, S.2345, 100th Cong. (1988).
47. *See ADA History - In Their Own Words: Part One*, *supra* note 43.

4498,[48] the House of Representatives version of the ADA of 1988, to the House.[49] A hearing took place during a joint House and Senate session where many testified on discrimination throughout the disability community.[50]

In 1989, Senator Edward ("Ted") M. Kennedy introduced a new scaled-down version of the ADA.[51] Opponents previously called the ADA of 1988 a "flatten the earth" proposal, and therefore supporters worked to craft language more capable of passage.[52] After much deliberation and compromise, in July of 1990 the ADA passed in the House of Representatives 377 to 28.[53] President George H.W. Bush signed the bill into law on July 26, 1990.[54]

As it is known today, the ADA is a federal civil rights law forbidding discrimination on the basis of disability.[55] Entities such as state and local governments, private employers, businesses open to the public, commercial facilities, telecommunication companies, and transportation providers all must abide by the ADA's requirements.[56]

By insisting on societal changes, instead of putting the onus on persons with disabilities to change, the ADA paved the way for a more inclusive society.[57] Adhering to the law includes providing access to jobs, schools, transportation, and public spaces.[58] Access requires physical changes, such as providing ramps for individuals in wheelchairs.[59] Access also encompasses policy shifts.[60] For instance, schools must provide speech therapists and closed captioning to support hard-of-hearing students.[61] Having discussed the ADA's history and broad antidiscrimination mandate, this Note now turns to a more specific look at Title II's protections.

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48. Americans with Disabilities Act of 1988, H.R. 4498, 100th Cong. (1988).

49. *See ADA History - In Their Own Words: Part One*, *supra* note 43.

50. *See id.*

51. *See ADA History - In Their Own Words: Part Two*, ADMIN. FOR CMTY. LIVING (July 27, 2020), https://acl.gov/ada/the-senate-and-bush-administration [https://perma.cc/R62V-E5JN].

52. *Id.*

53. *See ADA History - In Their Own Words: Part Three*, ADMIN. FOR CMTY. LIVING (July 24, 2020), https://acl.gov/ada/the-ada-becomes-law [https://perma.cc/5VH5-GTUV].

54. *See id.*

55. *See Introduction to the Americans with Disabilities Act*, ADA.GOV, https://www.ada.gov/topics/intro-to-ada/ [https://perma.cc/6MJD-AHVY] (last visited Feb. 14, 2025).

56. *See id.*

57. *See* Joseph Shapiro & Emma Bowman, *One Laid Groundwork for The ADA; The Other Grew Up Under Its Promises*, NPR (July 26, 2020, 7:45 AM), https://www.npr.org/2020/07/26/895480926/the-americans-with-disabilities-act-was-signed-into-law-30-years-ago [https://perma.cc/2G47-VAM6].

58. *See id.*

59. *See* Allison Norlian, *30 Years Later: How the ADA Changed Life for People with Disabilities*, FORBES (July 23, 2020, 5:48 PM), https://www.forbes.com/sites/allisonnorlian/2020/07/21/30-years-later-how-the-ada-changed-life-for-people-with-disabilities/ [https://perma.cc/Z6LC-2NBS].

60. *See id.*

61. *See id.*

2. Title II

The ADA is structured into five titles.[62] At issue in this Note, however, is Title II, which ensures "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 any such entity."[63] Specifically, Title II extends the prohibition of discrimination, as implemented by § 504 of the Rehabilitation Act, to state and local government entities, regardless of whether they receive federal funding.[64] Under § 12134 of the ADA, the statute explicitly grants the attorney general authority to promulgate regulations to implement Title II.[65] These regulations must be consistent with the Rehabilitation Act.[66]

The statute describes discrimination as exclusion from participation in, or the denial of benefits from, services, programs, or activities of a public entity.[67] In addition, the ADA broadly defines discrimination as being subjected to discrimination by any public entity.[68] The ADA lists intentional exclusion, barriers to access, overprotective policies, failure to make modifications, exclusionary qualification standards, and segregation as examples of discriminatory acts.[69]

The ADA defines disability as a physical or mental impairment substantially limiting one or more major life activities of the individual, having a record of such an impairment, or being regarded as having an impairment.[70] Major life activities include caring for oneself, sleeping, eating, learning, thinking, speaking, and more.[71]

Title II of the ADA can be enforced by both a public and a private right of action.[72] If an interpretation of the ADA's meaning is challenged, it is up to the court to interpret the statute.[73] Generally, for Title II cases, a court begins

62. *See* John J. Coleman, III & Marcel L. Debruge, *A Practitioner's Introduction to ADA Title II*, 45 ALA. L. REV. 55, 56 (1993) ("Title I governs employment. Title II concerns public services, public employment, public communications, and public transportation. Title III addresses public accommodations, and Title IV deals with telecommunications. Finally, Title V contains miscellaneous provisions.").

63. 42 U.S.C. § 12132.

64. *See Guide to Disability Rights Law*, ADA.GOV, https://www.ada.gov/resources/disability-rights-guide/# [https://perma.cc/7LRA-HPF4] (Feb. 28, 2020).

65. *See* 42 U.S.C. § 12134.

66. *See id.*

67. *See id.* § 12132.

68. *See id.*

69. *See id.* § 12101.

70. *See id.* § 12102.

71. *See id.*

72. *See id.* § 12133.

73. VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 2 (2023).

with the plain language.[74] Then, a court looks to structure, context, purpose, history, and relationship to other statutes.[75]

3. ADA Amendments Act of 2008

The Supreme Court reviewed interpretations of the ADA shortly after the ADA was passed when a series of challenges questioned what it means to be a qualified individual with a disability. In conducting their statutory interpretation, the Court viewed the definition narrowly.[76] In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[77] the Supreme Court stated the terms "substantially" and "major" in the ADA's definition of disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled . . . ."[78] Further, the Court declared that to be substantially limited in performing a major life activity, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."[79] Then, in *Sutton v. United Air Lines, Inc.*,[80] the Supreme Court held that corrective and mitigating measures should be considered when determining whether an individual is disabled under the ADA.[81]

To overrule the Supreme Court's definition, Congress passed the ADA Amendments Act of 2008[82] (ADAAA), commanding courts to construe the definition of disability broadly.[83] Congress stated that a determination as to whether an impairment substantially limits life activities must be made without regard to the benefits one might receive from mitigating measures such as medication or assistive technology.[84]

4. Title II Regulations

After reviewing the history and language of Title II, this Note now examines Title II's regulations. Title II's goal to protect people with disabilities from discrimination is lofty. To do so effectively, Congress gave

74. Hamer v. City of Trinidad, 441 F. Supp. 3d 1155, 1166 (D. Colo. 2020) ("The court's starting point is the plain language of Title II . . . .").

75. *See id.*

76. *See* Marcy Karin & Lara Bollinger, *Disability Rights: Past, Present, and Future: A Roadmap for Disability Rights*, 23 UDC L. REV. 1, 1 (2020).

77. 534 U.S. 184 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2–3, 122 Stat. 3553, 3554.

78. *Id.* at 197.

79. *Id.* at 198.

80. 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2–3, 122 Stat. 3553, 3554.

81. *See id.* at 482–83.

82. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

83. *See* Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 994; *see also* 42 U.S.C. § 12102 ("The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.").

84. *See* 42 U.S.C. § 12102.

the attorney general the authority to promulgate regulations to implement Title II.[85] Relevant to this Note are two regulations in particular: the integration mandate[86] and the reasonable modifications regulation.[87] The integration mandate and the reasonable modifications regulation are final rules published in the Code of Federal Regulations.[88] Under the Congressional Review Act,[89] new final rules must be sent to Congress for review before they take effect.[90] Therefore, the integration mandate and the reasonable modifications regulation carry the force and weight of the law because they were promulgated pursuant to congressionally delegated authority.[91]

Part I.A.4.a first discusses the reasonable modifications regulation. Then, Part I.A.4.b discusses the integration mandate.

a. The Reasonable Modifications Regulation

The reasonable modifications regulation states that a public entity must "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."[92] The "fundamentally alter" segment of the reasonable modifications regulation established the fundamental alteration defense which limits the obligations of public entities.[93] The ADA and accompanying regulations do not define fundamental alteration "in monolithic terms to be applied across all cases and in all situations."[94] This analysis often ends in litigation because it tends to be fact intensive and deeply analyzed.[95]

b. The Integration Mandate

Another regulation is the integration mandate, also known as the integration regulation. Under the integration mandate, public entities must "administer services, programs, and activities in the most integrated setting

85. *See id.* § 12134.
86. 28 C.F.R. § 35.130(d) (2016).
87. *Id.* § 35.130(b).
88. *See id.* § 35.130.
89. 5 U.S.C. §§ 801–808.
90. *See id.* § 801(a)(1)(A).
91. *See* JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., R44468, GENERAL POLICY STATEMENTS: LEGAL OVERVIEW 2 (2004); *see also* 42 U.S.C. § 12134.
92. *See* 28 C.F.R. § 35.130(b)(7)(i).
93. *See id.* § 35.130(b)(7)(i).
94. Sara J. Rosenbaum, Joel Teitelbaum, D. Richard Mauery & Alexandra Stewart, *Reasonable Modification or Fundamental Alteration?: Recent Developments in ADA Caselaw and Implications for Behavioral Health Policy*, *in* 21 BEHAVIORAL HEALTH ISSUE BRIEF SERIES 1, 6 (2003).
95. *See id.* at 6.

appropriate to the needs of qualified individuals with disabilities."[96] The most integrated setting has been interpreted to mean one which "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible . . . ."[97] The integration mandate has been in effect since 1981[98] because it is included in both the ADA and the Rehabilitation Act of 1973.[99]

B. Deinstitutionalization

As explicitly stated in the integration mandate, the ADA requires services to be administered in the most integrated setting.[100] This regulation provided the legal basis for the Supreme Court to ultimately rule in *Olmstead* that unjust institutionalization is discrimination under the ADA.[101]

A long history of discriminatory institutionalization preceded the ADA and *Olmstead*, stirring a strong deinstitutionalization movement.[102] Part I.B.1 details the history of the deinstitutionalization movement. Then, Part I.B.2 summarizes the *Olmstead* decision. Finally, Part I.B.3 discusses the DOJ's 2011 post-*Olmstead* guidance.

1. The Deinstitutionalization Movement

Institutionalization stemmed from policymakers' desires to treat individuals in need of long-term care.[103] Many groups of individuals will need long-term care, including people with developmental disabilities, people with physical disabilities, and people with mental health conditions.[104] In the United States, 69 percent of people will use long-term services at some point in their lifetime.[105] Long-term care can be delivered in institutions such as nursing homes and hospitals.[106] Long-term care can also be delivered through HCBS which includes home health, personal care services, and other services that provide care but "allow an individual to

96. 28 C.F.R. § 35.130(d).

97. *Id.* pt. 35, app. A.

98. *See* Helen L. v. DiDario, 46 F.3d 325, 332 (3d Cir. 1995); *see also* 28 C.F.R. § 41.51(d).

99. *See* Bragdon v. Abbott, 524 U.S. 624, 631 (1998).

100. *See* 28 C.F.R. § 35.130(d) (2016).

101. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 596–97 (1999).

102. *See* CHRIS KOYANAGI, LEARNING FROM HISTORY: DEINSTITUTIONALIZATION OF PEOPLE WITH MENTAL ILLNESS AS PRECURSOR TO LONG-TERM CARE REFORM 1 (2007) ("The movement was further fueled by concerns over civil rights and the conditions in institutions.").

103. *History of Hospitals*, PENN NURSING, https://www.nursing.upenn.edu/nhhc/nurses-institutions-caring/history-of-hospitals/# [https://perma.cc/SMR8-TAMH] (last visited Feb. 14, 2025).

104. Hannah Maniates, *Why Did They Do It That Way?: Home and Community-Based Services*, NAT'L ASS'N OF MEDICAID DIRS. (Apr. 16, 2024), https://medicaiddirectors.org/resource/why-did-they-do-it-that-way-home-and-community-based-services/ [https://perma.cc/64NF-KRHX].

105. *See id.*

106. *See id.*

remain in their home or community . . . ."[107] Tasks supported via HCBS include, but are not limited to, shopping and cleaning.[108]

Historically, institutionalization of individuals with mental disabilities often resulted in societal segregation.[109] Segregated settings create an environment where "people with disabilities live, work, or spend most of their time with other people with disabilities, other than non-disabled paid staff."[110] Institutions often have been associated with human rights violations and social isolation.[111] Indeed, HCBS developed in the late twentieth century because of financial and human rights considerations.[112] HCBS allows individuals with disabilities to have autonomous lives integrated within the community.[113] This shift in preferred treatment style became known as deinstitutionalization.[114]

Some experts question the ethical implications of the "assumed trade-off" between HCBS and institutional services.[115] Other critics say, "the boundaries of community and institutional psychiatry are often permeable."[116] That being said, the World Health Organization (WHO) concludes "globally, the majority of mental health care continues to be provided in psychiatric hospitals, and human rights abuses and coercive practices remain all too common. But providing community-based mental health care that is both respectful of human rights and focused on recovery is proving successful and cost-effective . . . ."[117] When deinstitutionalization is carried out properly, the outcomes are neutral or favorable for the majority

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107. *Id.*

108. *See* Jacob Abudaram, *Deinstitutionalization, Disease, and the HCBS Crisis*, 122 MICH. L. REV. 419, 420 (2023).

109. MICHELLE FUNK & NATALIE DREW BOLD, WORLD HEALTH ORG., GUIDANCE ON COMMUNITY MENTAL HEALTH SERVICES: PROMOTING PERSON-CENTERED AND RIGHTS-BASED APPROACHES 140 (2021); *see also* Timmy Broderick, *Q&A: How This Federal Court Ruling Helps Nursing Home Residents with Disabilities*, STAT (Jan. 14, 2025), https://www.statnews.com/2025/01/14/nursing-home-residents-disability-community-based-care-olmstead/ [https://perma.cc/7NWM-WCHP].

110. *Community Integration*, ADA.GOV, https://www.ada.gov/topics/community-integration/# [https://perma.cc/CH64-JMZT] (last visited Feb. 14, 2025).

111. *See* KOYANAGI, *supra* note 102, at 1; *see also* Alex Green & Hezzy Smith, *Reckoning with the History of Institutions for Persons with Disabilities in Massachusetts*, HARVARD L. SCH. PROJECT ON DISABILITY (Aug. 16, 2021), https://hpod.law.harvard.edu/news/entry/reckoning-with-the-history-of-institutions-in-massachusetts [https://perma.cc/SXS6-LVD4]; LAURA MILLS, HUM. RTS. WATCH, US: CONCERNS OF NEGLECT IN NURSING HOMES 15 (2021).

112. *See* Isabel M. Perera, *The Relationship Between Hospital and Community Psychiatry: Complements, Not Substitutes?*, 71 PSYCHIATRIC SERVS. 964, 964 (2020).

113. *See id.* at 964–65.

114. *See id.* at 964.

115. *Id.* at 966; *see also* Graham Thornicroft & Michele Tansella, *The Balanced Care Model: The Case for Both Hospital- and Community-Based Mental Healthcare*, 202 BRIT. J. PSYCHIATRY 246, 246 (2013); Peter Tyrer, Steven Sharfstein, Richard O'Reilly, Stephen Allison & Tarun Bastiampillai, *Psychiatric Hospital Beds: An Orwellian Crisis*, 389 LANCET 363, 363 (2017).

116. Perera, *supra* note 112, at 965.

117. *New WHO Guidance Seeks to Put an End to Human Rights Violations in Mental Health Care*, WORLD HEALTH ORG. (June 10, 2021), https://www.who.int/news/item/10-06-2021-new-who-guidance-seeks-to-put-an-end-to-human-rights-violations-in-mental-health-care [https://perma.cc/WQ7X-Q3PS].

of patients.[118] At the very least, there must be a balance of community-based and institutional options to serve the needs of diverse patients.[119]

Studies show that the social disconnection of institutionalization worsens symptoms.[120] Therefore, by limiting unnecessary institutionalization and improving non-institutionalization-based care procedures, patient health is more likely to improve.[121] This is an example of primary prevention, which is the public health principle promoting the use of interventions to prevent health conditions from occurring.[122] Primary prevention interventions can target people, but they also can target environments to ensure good living and working conditions.[123] Secondary conditions prevalent in the disability community, such as depression and pain, can also be addressed by primary prevention.[124] The focus on such interventions is because, generally, experts agree that "prevention is better than cure."[125]

2. *Olmstead v. L.C. ex rel. Zimring*

Despite the integration mandate and the spreading deinstitutionalization movement, people with disabilities remained unnecessarily segregated from society.[126] The Supreme Court's decision in *Olmstead*, penned by Justice Ruth Bader Ginsburg, has been referred to as "the *Brown v. Board of*

118. *See* Thornicroft & Tansella, *supra* note 115, at 247.

119. *See id.* at 248.

120. *See* Kim Samuel, *Bringing Back Institutionalization Would Be Inhumane—and Ineffective*, PSYCH. TODAY (Nov. 21, 2023), https://www.psychologytoday.com/us/blog/the-power-of-belonging/202311/bringing-back-institutionalization-would-be-inhumane-and [https://perma.cc/9W7U-QQU6]; *see also* Ziggi Ivan Santini, Paul E Jose, Erin York Cornwell, Ai Koyanagi, Line Nielsen, Carsten Hinrichsen, Charlotte Meilstrup, Katrine R Madsen & Vibeke Koushede, *Social Disconnectedness, Perceived Isolation, and Symptoms of Depression and Anxiety Among Older Americans (NSHAP): A Longitudinal Mediation Analysis*, 5 LANCET PUB. HEALTH e62, e62, e67 (2020); Lasse Brandt, Shuyan Liu, Christine Heim & Andreas Heinz, *The Effects of Social Isolation Stress and Discrimination on Mental Health*, TRANSLATIONAL PSYCHIATRY, Sept. 2022, at 1, 2.

121. *See* WORLD HEALTH ORG., *supra* note 117; *see also* Izabela Fulone, Jorge Otavio Maia Barreto, Silvio Barberato-Filho, Cristiane de Cássia Bergamaschi, Marcus Tolentino Silva & Luciane Cruz Lopes, *Improving Care for Deinstitutionalized People with Mental Disorders: Experiences of the Use of Knowledge Translation Tools*, FRONTIERS PSYCHIATRY, Apr. 2021, at 1, 3.

122. *See* Yousif AbdulRaheem, *Unveiling the Significance and Challenges of Integrating Prevention Levels in Healthcare Practice*, 14 J. PRIMARY CARE & CMTY. HEALTH 1, 1–2 (2023).

123. Heather L. Storer, Erin A. Casey, Juliana Carlson, Jeffrey L. Edleson & Richard M. Tolman, *Primary Prevention Is?: A Global Perspective on How Organizations Engaging Men in Preventing Gender-Based Violence Conceptualize and Operationalize Their Work*, 22 VIOLENCE AGAINST WOMEN 249, 250 (2016).

124. *Related Conditions*, CTR. FOR DISEASE CONTROL, https://www.cdc.gov/disability-and-health/conditions/index.html# [https://perma.cc/BQ6A-J4ML].

125. Leszek Borysiewicz, *Prevention Is Better Than Cure*, 9 CLINICAL MED. 572, 583 (2009); *see also* Stephen Martin, James Lomas & Karl Claxton, *Is an Ounce of Prevention Worth a Pound of Cure?: A Cross-Sectional Study of the Impact of English Public Health Grant on Mortality and Morbidity*, BMJ OPEN, Aug. 2020, 1, 10.

126. Brittany S. Mitchell, *Expanding the Integration Mandate to Employment: The Push to Apply the Principles of the ADA and the* Olmstead *Decision to Disability Employment Services*, 30 ABA J. LAB. & EMP. L. 155, 158 (2014).

Education of the disability rights movement."[127] *Olmstead* examined the claims of two mentally disabled women known as E.W. and L.C.[128] L.C. was voluntarily admitted to the Georgia Regional Hospital (GRH) and confined for treatment in the psychiatric unit in May of 1992.[129] In May of 1993, L.C. stabilized, and her treatment team concluded her needs could be met in a community-based program.[130] However, L.C. remained institutionalized until February of 1996—two years and nine months longer than deemed necessary.[131] Similarly, E.W. was voluntarily admitted to GRH in February of 1995 and confined for treatment in the psychiatric unit.[132] In March of 1995, GRH attempted to discharge E.W. to a homeless shelter but received pushback from E.W.'s attorney through an administrative complaint.[133] In 1996, E.W.'s psychiatrist determined she could properly be treated in a community-based setting, but E.W. remained institutionalized until 1997.[134] The plaintiffs argued that the State violated Title II by failing to place them in HCBS once their care teams determined such placement was appropriate.[135]

The U.S. District Court for the Northern District of Georgia held that the State's failure to place L.C. and E.W. in appropriate community-based treatment programs violated Title II of the ADA.[136] The Eleventh Circuit affirmed their judgment but remanded on the issue of fundamental alteration costs.[137] In other words, although the Eleventh Circuit agreed discrimination occurred, a cost justification would succeed if the State could prove expenditures for an integrated setting "would be so unreasonable . . . that it would fundamentally alter the service [the State] provides."[138]

On appeal, the Supreme Court affirmed that unjustified isolation is discrimination based on disability.[139] The Supreme Court reasoned that under the integration mandate,[140] the unnecessary institutional placement of individuals "perpetuates unwarranted assumptions" that those individuals are unworthy and incapable of community life.[141] In addition, the Court determined that confinement "diminishes the everyday life activities of individuals."[142]

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127. Samuel R. Bagenstos, *Taking Choice Seriously in* Olmstead *Jurisprudence*, 40 J. LEGAL MED. 5, 5–6 (2020).
128. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 593 (1999).
129. *See id.*
130. *See id.*
131. *See id.*
132. *See id.*
133. *See id.*
134. *See id.*
135. *See id.* at 594.
136. *See* L.C. *ex rel.* Zimring v. Olmstead, No. 95-1210, 1997 WL 148674, at *5 (N.D. Ga. Mar. 26, 1997).
137. *See* L.C. *ex rel.* Zimring v. Olmstead, 138 F.3d 893, 905 (11th Cir. 1998).
138. *Id.*
139. *See Olmstead*, 527 U.S. at 597.
140. *See supra* Part I.A.4.
141. *See Olmstead*, 527 U.S. at 600.
142. *Id.* at 601.

To be clear, in *Olmstead* the defendants did not challenge the DOJ's authority to promulgate the integration mandate.[143] Instead, they challenged the plaintiffs' interpretation of the integration mandate and its application to the facts of the case.[144] Essentially, *Olmstead* is the Supreme Court's interpretation of the integration mandate.[145] Though an interpretation question, Justice Ginsburg made it clear that the Court came to their conclusion without discussing whether it was deferring to DOJ under the *Chevron* deference doctrine[146]—whereby, at the time, courts broadly deferred to agency guidance like the integration mandate.[147] The Court reasoned it was enough "to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[148]

In evaluating the fundamental alteration defense, the Court ordered lower courts to consider the resources available to the state, the cost of providing community-based care, the range of services, and the State's obligation to provide equitable services.[149] The Supreme Court reasoned that the State must have more leeway than the Eleventh Circuit determined so they have the freedom to demonstrate a comprehensive and effective plan.[150] The Court held that a person with a disability must be served in the community when community-based services are appropriate, the person does not oppose community-based services, and the government entity can reasonably modify its programs to provide services in the community.[151]

3. Subsequent 2011 DOJ Guidance

In honor of *Olmstead*'s twelfth anniversary, the DOJ promulgated a "technical assistance guide" to affirm its commitment to people with disabilities and explain the integration mandate's application.[152] The DOJ's guidance states that "individuals need not wait until the harm of institutionalization or segregation occurs or is imminent" to bring a claim for violation of the integration mandate.[153] The guidance extends protections

143. *See id.* at 592.
144. *See id.* at 592–94.
145. *See id.* at 592–93.
146. Therefore, *Olmstead*'s rationale remains intact after *Loper Bright*. *See infra* Part II.A.1.
147. *See Olmstead*, 527 U.S. at 598; *see also* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984), *overruled by* Loper Bright Enter. v. Raimondo, 144 S. Ct. 2244 (2024).
148. *See Olmstead*, 527 U.S. at 598 (quoting Bragdon v. Abbott, 524 U.S. 624, 642 (1998)).
149. *See id.* at 597.
150. *See id.* at 605.
151. *See id.* at 607.
152. *See Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and* Olmstead *v. L.C.*, ADA.GOV (Feb. 28, 2020), https://www.ada.gov/resources/olmstead-mandate-statement/ [https://perma.cc/V9UL-2Z2A].
153. *Id.*

"to persons at serious risk of institutionalization or segregation."[154] Protections are not limited "to individuals currently in institutional or other segregated settings."[155] The guidance provides an example, sharing that a plaintiff could show sufficient risk of institutionalization "if a public entity's failure to provide community services or its cut to such services will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution."[156]

II. THE CIRCUIT SPLIT: CAN YOU LITIGATE USING THE "AT-RISK" THEORY UNDER TITLE II?

Despite the specific DOJ guidance that advocates for allowing risk of unnecessary institutionalization claims under Title II, there is a circuit split on the issue.[157] The Tenth, Second, Fourth, Sixth, Seventh, and Ninth Circuits have held that at-risk claims are valid, whereas the Fifth Circuit held otherwise.[158] This part discusses those cases and the courts' decisions. Additionally, this part reviews *United States v. Florida*, a district court case currently on appeal at the Eleventh Circuit.

A. Olmstead *and Title II Interpretation*

At issue in this Note is the interpretation of Title II of the ADA and its accompanying regulations. Plaintiffs bringing ADA actions under Title II often argue that being placed at risk of unnecessary institutionalization violates the ADA, the integration mandate, and the Supreme Court's *Olmstead* decision.[159] Plaintiffs point to DOJ guidance, statutory interpretation, congressional intent, and the language in *Olmstead*.[160] Conversely, defendants often argue that being placed at risk of institutionalization does not give rise to a valid legal claim.[161] Defendants rely on standing,[162] alternative statutory interpretation, and the language of *Olmstead*.[163] Defendants often emphasize that the *Olmstead* Court explicitly

154. *Id.*
155. *Id.*
156. *Id.*
157. *See* Cloud & Cloud, *supra* note 19.
158. *See infra* Part II.A.
159. *See infra* Part II.A.1.
160. *See infra* Part II.A.1.
161. *See infra* Part II.A.2.
162. A plaintiff must have standing to successfully sue in federal court. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2202–03 (2021). One element of standing explicitly states that a plaintiff must demonstrate they have suffered or likely will suffer an injury in fact. *See id.* at 2204. An injury in fact must be real and not abstract. This threshold is meant to remove claims with only a "general legal, moral, ideological, or policy objection to a particular government action." FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1556 (2024). The Fifth Circuit noted the more customary practice is to wait and litigate until there is a definitive harm, not just a risk of one. *See* United States v. Mississippi, 82 F.4th 387, 397 (5th Cir. 2023) (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 136 (2016)). Further, the court stated the risk of harm must at least be impending. *See id.* However, ultimately the court did not hold that the plaintiffs lacked standing. *See id.* at 397.
163. *See infra* Part II.A.2.

did *not* hold that "the ADA imposes on the states a standard of care for whatever medical services they render."[164] Therefore, defendants say, courts cannot require certain levels of benefits.[165]

Though seemingly settled by the first six courts of appeals to address the issue, the debate was recently reopened in 2023 when the Fifth Circuit became the first court of appeals to reject the at-risk theory.[166] Part II.A.1 discusses how most of the circuit courts reached their conclusion to allow the at-risk theory. Then, Part II.A.2 discusses the Fifth Circuit's analysis in *United States v. Mississippi*.

1. The Majority of Circuit Courts Allow the At-Risk Theory of Unnecessary Institutionalization

This section divides the court decisions by timing, that is, before and after the DOJ released its guidance extending protections to those likely to be unnecessarily institutionalized in 2011. DOJ guidance impacted the decision-making of courts because guidance documents interpreting an agency's own regulation, in this case, the DOJ's integration mandate, receive some level of deference when ambiguity exists.[167] The level of deference afforded has evolved over the years. In 1997, the Supreme Court case *Auer v. Robbins*[168] ordered lower courts to defer to an agency's interpretation of its own regulation unless it is "plainly erroneous or inconsistent with the regulation."[169] This is commonly known as *Auer* deference.[170] In 2019, the Supreme Court case *Kisor v. Wilkie*[171] limited *Auer* deference.[172] Justice Kagan emphasized that *Auer* deference applies only when there is genuine ambiguity, carefully analyzed by courts.[173] Further, *Auer* deference applies only to official agency actions where the interpretation implicates the agency's expertise and reflects "fair and considered judgment."[174]

To be sure, *Auer* deference "bears a strong family resemblance to *Chevron* deference."[175] Therefore, some scholars believe that following *Loper Bright*,

164. Brief for Appellant at 56, Davis v. Shah, 821 F.3d 231 (2d Cir. 2016) (No. 14-543), 2014 WL 2639908, at *56 (quoting Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 603 n.14 (1999)).

165. *See id.*

166. *See Mississippi*, 82 F.4th at 392.

167. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997).

168. 519 U.S. 452 (1997).

169. *Id.* at 461.

170. *See, e.g.*, Sean Lyness, Chevron *Deference's Demise Suggests* Auer *Won't Last Much Longer*, BLOOMBERG L. (July 10, 2024, 4:30 AM), https://news.bloomberglaw.com/us-law-week/chevron-deferences-demise-suggests-auer-wont-last-much-longer [https://perma.cc/SZ7L-4BLL].

171. 139 S. Ct. 2400 (2019).

172. *Id.* at 2415–18.

173. *See id.* at 2415.

174. *Id.* at 2417.

175. 33 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 8437, Westlaw (database updated June 2024).

Auer is no longer good law.[176] However, the circuits all issued their decisions prior to *Loper Bright* and, therefore, did not worry about such a conundrum.[177] The Southern District of Florida also decided *United States v. Florida* prior to *Loper Bright*.[178] Conversely, the Eleventh Circuit's decision, yet to be released, will likely reach the issue. Following *Loper Bright*, courts turn to the deference standard established in *Skidmore v. Swift & Co.*[179] Commonly known as "*Skidmore* Deference," this level of scrutiny tells courts to consider the agency's interpretation but not view the agency's interpretation as controlling.[180]

From 2003 to 2020, six circuit courts held that plaintiffs could litigate using the at-risk theory of unnecessary institutionalization.[181] The Tenth Circuit and the Seventh Circuit addressed the issue prior to the DOJ's guidance issued in 2011.[182] The Seventh Circuit had the opportunity to address the issue again, following DOJ guidance.[183] Four additional circuits also addressed the issue after DOJ guidance.[184] The following analysis synthesizes court reasonings before and after guidance became available.

a. The Tenth and Seventh Circuits: Pre-DOJ Guidance

In *Fisher v. Oklahoma Health Care Authority*,[185] three individuals with disabilities, all of whom received state-funded medical care as part of the

176. Thomas E. Nielsen & Krista A. Stapleford, *What* Loper Bright *Might Portend for* Auer *Deference*, HARV. L. REV. BLOG (July 5, 2024), https://harvardlawreview.org/blog/2024/07/what-loper-bright-might-portend-for-auer-deference/ [https://perma.cc/WT5Q-PU5Y].

177. *Loper Bright* was decided in 2024. *See* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024). The most recent case in the circuit split was decided in 2023. *See* United States v. Mississippi, 82 F.4th 387 (5th Cir. 2023).

178. *Loper Bright* was decided in 2024. *See* Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024). *United States v. Florida* was decided in 2023. *See United States v. Florida*, 682 F. Supp. 3d 1172 (S.D. Fla. 2023).

179. 323 U.S. 134 (1944).

180. *See id.* at 140 ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

181. *See supra* Part II.A.1.

182. *Fisher v. Oklahoma Health Care Authority* was decided in 2003. *See* Fisher v. Oklahoma Health Care Authority, 335 F.3d 1175 (10th Cir. 2003). *Radaszewski ex rel. Radaszewski v. Maram* was decided in 2004. *See* Radaszewski *ex rel.* Radaszewski v. Maram, 383 F.3d 599 (7th Cir. 2004). The DOJ Guidance was released in 2011. *See Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and* Olmstead *v. L.C.*, *supra* note 152 (originally issued on June 22, 2011).

183. *See* Steimel v. Wernert, 823 F.3d 902, 911–12 (7th Cir. 2016).

184. *See infra* Part II.A.1.b.

185. 335 F.3d 1175 (10th Cir. 2003).

state's waiver program,[186] objected to Oklahoma's new five prescription limitation on medications for participants in the waiver program.[187] This limitation took effect regardless of medical necessity.[188] Per the policy shift, persons institutionalized would still receive all the prescriptions they medically need, even if they required more than five, whereas those receiving community-based care in the waiver program would not.[189]

Plaintiffs argued the prescription cap would force them out of their communities and into nursing homes because institutionalization would be the only way to afford their medications.[190] Defendants argued the plaintiffs were not institutionalized at the time of the complaint and, therefore, did not assert an adequate claim.[191]

The Tenth Circuit first looked at the text of the integration mandate.[192] Ultimately, the court found that nothing in the plain language of the integration mandate limited protection only to persons presently institutionalized.[193] The court reasoned that requiring the segregation of individuals into institutions as a prerequisite to bringing a claim would render the integration mandate's protections meaningless.[194]

Next, the Tenth Circuit responded to the defendant's argument distinguishing *Fisher* plaintiffs from *Olmstead* plaintiffs.[195] The court recognized that the plaintiffs in *Olmstead* were institutionalized at the time they brought their claim.[196] However, the Tenth Circuit clarified that "nothing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA's integration requirements."[197]

In *Radaszewski ex rel. Radaszewski v. Maram*,[198] Eric Radaszewski's mother sued the director of the Illinois Department of Public Aid (IDPA) for violating Title II of the ADA and § 504 of the Rehabilitation Act.[199] Radaszewski required "around-the-clock" medical care because brain cancer and a stroke he suffered at age thirteen impaired his physical and mental functions.[200] Through Medicaid, the IDPA funded sixteen hours per day of at-home private-duty nursing care for Radaszewski until he turned

186. *See id.* at 1178. The waiver program offers HCBS as an alternative to institutionalization. *See id.* A state obtains permission to offer a waiver program from Congress. *See id.* The state must certify that the cost of placing an individual in a waiver program will be less than if placing that individual in an institution. *See id.*
187. *See id.* at 1177–78.
188. *See id.* at 1177.
189. *See id.* at 1177–78.
190. *See id.* at 1181.
191. *See id.* at 1178.
192. *See id.* at 1181.
193. *See id.*
194. *See id.*
195. *See id.* at 1181–82.
196. *See id.*
197. *See id.* at 1181.
198. 383 F.3d 599 (7th Cir. 2004).
199. *See id.* at 600.
200. *See id.*

twenty-one.[201] Once he turned twenty-one, Radaszewski lost his eligibility for the program and, instead, enrolled in a separate program for adults.[202] However, this program capped funding at a level insufficient to pay for the level of private nursing Radaszewski needed.[203] Thus, this system placed Radaszewski at high risk of institutionalization, despite his prior success at home.[204]

The Seventh Circuit relied on the Tenth Circuit's opinion in *Fisher*.[205] The court stated "post-*Olmstead*, courts have recognized that a State may violate Title II when it refuses to provide an existing benefit to a disabled person that would enable that individual to live in a more community-integrated setting."[206]

b. The Second, Fourth, Sixth, Seventh, and Ninth Circuits: Post-DOJ Guidance

The five subsequent decisions commenting on the interpretation dispute relied, at least in part, on a statement of interest or published guidance issued by the DOJ.[207]

In 2012, the Ninth Circuit decided *M.R. v. Dreyfus*.[208] A group of Medicaid beneficiaries with severe disabilities sought to enjoin the Washington State Department of Social and Health Services from introducing a regulation reducing the amount of in-home personal care services available.[209] The plaintiffs argued that the reduction in hours would substantially increase their risk of unnecessary institutionalization because institutionalization would be required to receive adequate care, despite their current ability to receive adequate care using HCBS.[210]

The DOJ, the agency that promulgated the integration mandate, filed a statement in the district court supporting the plaintiff's preliminary injunction request, which would prohibit policies placing individuals at risk of unnecessary institutionalization.[211] Motivated by the desire to ensure a "proper interpretation," the Ninth Circuit gave the DOJ's guidance *Auer* deference.[212] The court treated the DOJ's interpretation with high regard and

201. *Id.*
202. *See id.*
203. *See id.*
204. *See id.* at 612 ("It is also undisputed that his home is an appropriate care setting for Eric—he has lived there since the onset of his disabilities with the support of the at-home services that he received through the . . . waiver program until he reached the age of 21—the very same services that he seeks to continue receiving as an adult.").
205. *See id.* at 609.
206. *Id.*
207. *See, e.g.*, M.R. v. Dreyfus, 697 F.3d 706, 734–35 (9th Cir. 2012) ("The United States Department of Justice . . . filed a statement of interest in the district court in which it argued in favor of a preliminary injunction.").
208. 697 F.3d 706 (9th Cir. 2012).
209. *See id.* at 724.
210. *See id.* at 726–27.
211. *See id.* at 734.
212. *Id.* at 735.

concluded it better effectuates the purpose of the ADA.[213] The court also relied upon expert guidance warning the court of the negative consequences of institutionalization.[214] Ultimately, the Ninth Circuit concluded that the clinical reality that "[i]nstitutionalization sometimes proves irreversible" aligned with the DOJ's interpretation.[215] Finally, the court cited the Tenth Circuit's analysis in *Fisher*, which stated that *Olmstead* does not imply a person must first be subjected to institutionalization to bring a Title II claim.[216]

The DOJ officially published guidance to their government website in 2011.[217] The Fourth Circuit in *Pashby v. Delia*[218] and the Second Circuit in *Davis v. Shah*[219] deferred to this guidance under *Auer* and found that Title II allowed litigation for policies placing plaintiffs at risk of unnecessary institutionalization.[220] In addition, the two courts cited the previous circuit court decisions to bolster their opinions.[221]

In 2016, the Seventh Circuit had the opportunity to reach the issue again post-DOJ guidance in *Steimel v. Wernert*.[222] This case addressed the issue of plaintiffs who were moved from an uncapped waiver program to a capped waiver program.[223] The plaintiffs argued that the new assignment violated the ADA and the integration mandate because "it deprive[ed] them of community interaction and put[] them at risk of institutionalization."[224] The court explicitly agreed with the DOJ's interpretation, concluding, "we have no reason not to follow the DOJ's interpretation of the mandate."[225]

The state argued that the word "setting" referred only to two types of physical structures—"an institution or a location in the community."[226] Therefore, the state contended that anyone at home in the community is out of scope.[227] However, in their decision, the court referred to the decision in *Pashby*, stating, "there is nothing in the plain language of the regulations that limits protection to persons who are currently institutionalized."[228] The court also used interpretation techniques to define "setting." The court began by stating neither the ADA nor its regulations specifically define "setting."[229]

213. *See id.*
214. *See id.* at 735–36.
215. *Id.*
216. *See id.* at 736 (quoting Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1182 (10th Cir. 2003)).
217. *See Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and* Olmstead *v. L.C.*, *supra* note 152.
218. 709 F.3d 307, 322 (4th Cir. 2013).
219. 821 F.3d 231, 263–64 (2d Cir. 2016).
220. *See Davis*, 821 F.3d at 263; *see also Pashby*, 709 F.3d at 322.
221. *See Davis*, 821 F.3d at 263; *see also Pashby*, 709 F.3d at 322.
222. 823 F.3d 902 (7th Cir. 2016).
223. *Id.* at 906.
224. *Id.*
225. *Id.* at 911.
226. *Id.*
227. *See id.*
228. *Id.* at 912 (quoting Pashby v. Delia, 709 F.3d 307, 322 (4th Cir. 2013)).
229. *See id.*

Therefore, they turned to its ordinary meaning which "denotes an environment or situation rather than any particular physical structure."[230] The court cited a wide range of dictionaries to support this proposition.[231]

Finally, the Sixth Circuit in *Waskul v. Washtenaw County Community Mental Health*[232] did not need to address the question because the defendants did not dispute that the "[p]laintiffs [could] sustain a claim simply by showing that they are at serious risk of institutionalization."[233] Regardless, the court referenced the DOJ guidance and the now extensive circuit court precedent.[234]

2. The Fifth Circuit Rejects the At-Risk Theory

Despite the DOJ's guidance, the Fifth Circuit adopted an alternative holding after conducting their analysis of Title II, the integration mandate, and *Olmstead*.[235] In *United States v. Mississippi*, the DOJ alleged that Mississippi's mental health system discriminated against adults with serious mental health issues in violation of Title II because "due to systemic deficiencies in the state's operation of mental health programs, every person in Mississippi suffering from a serious mental illness was *at risk* of improper institutionalization."[236] The court concluded that nothing in Title II, the integration mandate, or *Olmstead* "suggests that a *risk of institutionalization*, without actual institutionalization, constitutes actionable discrimination."[237]

First, the court looked to the ADA's definition of discrimination and emphasized language such as "excluded," "denied," and "subjected to discrimination."[238] By doing so, the court highlighted the past tense "ed" suffixes. This supported their argument that the statute refers to actual administration of public programs and not hypothetical events.[239] The court also used the omitted-case canon of textual interpretation to argue that the integration mandate does not mention risks of maladministration.[240] This canon rejects implications, and treats matters not covered as not covered.[241] Viewed in accordance with this principle, because at-risk claims are not within the statutory or regulatory language, they must not be permitted.[242] The Fifth Circuit determined it "need not say" whether the six circuits deciding in the alternative were wrong to hold that Title II prohibits the risk

230. *Id.*
231. *See id.*
232. 979 F.3d 426 (6th Cir. 2020).
233. *Id.* at 461.
234. *See id.* at 460–61.
235. *See* United States v. Mississippi, 82 F.4th 387, 392 (5th Cir. 2023).
236. *Id.* at 389.
237. *Id.* at 392.
238. *Id.*
239. *See id.* at 394.
240. *See id.* at 392.
241. *See* Antonin Scalia & Bryan Garner, *A Dozen Canons of Statutory and Constitutional Text Construction*, JUDICATURE, Autumn 2015, at 80, 80.
242. *See* Mississippi, 82 F.4th at 393–94.

of unnecessary institutionalization, stating those decisions are "significantly factually distinguishable."[243]

The Fifth Circuit addressed the DOJ's guidance using *Kisor* deference.[244] The court clarified that the guidance did not go through notice and comment,[245] and thus did not qualify as a binding regulation.[246] Per *Kisor*, the court explained the guidance document would only be given deference if the regulation was genuinely ambiguous.[247] Since their analysis indicated no ambiguity, deference was not warranted.[248]

Next, the court dismissed the government's *Olmstead* arguments by distinguishing the facts of *Olmstead* from the facts of *United States v. Mississippi*.[249] The court stated that in *Olmstead*, the plaintiffs' treating physicians recommended the plaintiffs be released from institutionalization.[250] Conversely, the plaintiffs here did not address the patients' past institutionalization, meaning they did not recommend release or acknowledge that institutionalization was unjustified.[251] Once more, the court condemned inferences and opined that because *Olmstead* did not address a risk of unjustified institutionalization claim, only claims based on actual institutionalization are permitted.[252]

The Fifth Circuit took an additional step to caution judges from implementing *Olmstead* without hesitation. The court stressed that the *Olmstead* decision only had a majority because of Justice Anthony M. Kennedy's concurrence.[253] In Justice Kennedy's concurrence, he asserted that "[g]rave constitutional concerns are raised when a federal court is given the authority to review the State's choices in basic matters such as establishing or declining to establish new programs."[254] This principle guided the Fifth Circuit's contextualization of the facts at hand.

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243. *See id.* at 396.

244. *See id.* at 393–94; *see also infra* Part II.A.1.

245. The Administrative Procedures Act (APA) was enacted in 1946 to establish the "procedures that federal agencies use for rulemakings and adjudications." JONATHAN M. GAFFNEY, CONG. RSCH. SERV., LSB10558, JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA) 1 (2024). Section 4 of the APA describes the procedure for notice-and-comment rulemaking. *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015). The agency must issue a general notice, ordinarily by publication in the Federal Register. *See* 5 U.S.C. § 553(b). Then, if notice is required, the agency must "give interested persons an opportunity to participate in the rule making through submissions of written data, views, or arguments." *Id.* § 553(c). During this time, the agency must consider and respond to significant comments. *See Perez*, 575 U.S. at 96.

246. *See Mississippi*, 82 F.4th at 393–94.

247. *See id.* (citing Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019)).

248. *See id.*

249. *See id.* at 394.

250. *See id.*

251. *See id.*

252. *See id.*

253. *See id.*

254. *See id.* at 395 (citing Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 612–13 (1999) (Kennedy, J., concurring)).

B. Defining the At-Risk Standard

Separate from the question "can you sue under Title II for risk of unnecessary institutionalization?" is the question "what does it mean to be at-risk?" The at-risk standard plays a critical role in circuit decisions because it defines the population at issue[255] and implicates a court's willingness to adopt the at-risk standard.[256] Part II.B.1 discusses the approach used by most of the circuit courts. These courts, generally, aligned with the standard set by the DOJ. Essentially, a plaintiff need only prove a policy would *likely* result in their unnecessary institutionalization, and as discussed in Part III, this Note argues that all courts should adopt the "likely" standard to make their determinations. The DOJ's ADA guidance webpage describes the standard as follows:

> [P]eople with disabilities could show serious risk of unnecessary segregation if a public entity's failure to provide supported employment services would likely lead to placement in a sheltered workshop. A serious risk of needless segregation may also exist when secondary school students with disabilities are not provided services to facilitate their post-school transition to adult supported employment.[257]

Part II.B.2 then discusses Ninth Circuit Judge Carlos T. Bea's dissent in *M.R. v. Dreyfus*. Judge Bea's dissent acknowledges the need for an at-risk standard but disagrees with the majority's definition and application.[258] Finally, Part II.B.3 reviews the Fifth Circuit's stance. Though the court expressly holds the at-risk standard does not apply to Title II of the ADA, the court conducts a brief analysis of the evidence provided by the plaintiffs to prove risk.[259]

1. The Majority of Circuit Courts Use a Variation of the "Likely" At-Risk Standard

When tasked with establishing if a patient was put at risk of unnecessary institutionalization, the Tenth, Fourth, Sixth, and Ninth Circuits, which allowed at-risk litigation, set the standard for being placed at risk and evaluated the evidence. The Seventh Circuit in *Radaszewski* and *Steimel* and the Second Circuit in *Davis* did not conduct an analysis because the

255. *See, e.g.*, M.R. v. Dreyfus, 697 F.3d 706, 732 (9th Cir. 2012).

256. *See, e.g.*, Waskul v. Washtenaw Cnty. Cmty. Mental Health, 979 F.3d 426, 470 (6th Cir. 2020) (Readler, J., concurring in part and dissenting in part).

257. *See Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and* Olmstead *v. L.C.*, *supra* note 152 (scroll down to "Questions and Answers on the ADA's Integration Mandate and Olmstead Enforcement"; then choose the plus sign next to the title "6. Do the ADA and Olmstead apply to persons at serious risk of institutionalization or segregation?").

258. *See infra* Part II.B.2.

259. *See infra* Part II.B.3.

defendants did not dispute the patients at issue were at risk of unnecessary institutionalization.[260]

In *Fisher*, the Tenth Circuit defined the at-risk standard as placing patients with disabilities at a "high risk for premature entry into a nursing home."[261] The court had to answer the daunting question: is choosing death over institutionalization a valid defense to quash at-risk claims? The court said no, even when plaintiffs state they would rather die than be placed in an institution, they can still assert an at-risk claim.[262] Because, as in all at-risk cases, the claim was for injunctive relief,[263] the *Fisher* court asked whether there would be irreparable harm.[264] Surely, the court reasoned, death could constitute irreparable harm, and therefore, a genuine issue of material fact was raised.[265]

The plaintiffs in *Fisher* argued against the five-prescription cap because the additional monetary impositions would force them into institutions.[266] The court used financial evidence in their determination, finding the additional medical costs used about 8 percent of two of the plaintiffs' incomes per month and 36 percent of the third plaintiff's income.[267] Ultimately, the court concluded the costs presented a "severe burden" or a "real effect on . . . finances given their poverty."[268] Thus, the high-risk threshold was met. Finally, the court utilized expert testimony which stated that under the prescription cap, some patients would choose to stay at home and die a premature death. The expert testified that the remaining patients would wait until their health further deteriorated and then end up in either a hospital or a nursing home.[269]

The Ninth Circuit in *M.R. v. Dreyfus* performed an in-depth exploration of the at-risk threshold. The court guided their analysis using the injunctive relief threshold "that irreparable injury is *likely* in the absence of an injunction."[270] The court held that a plaintiff need not show that institutionalization is inevitable.[271] The court further explained it does not matter whether a plaintiff would need to enter an institution immediately, or whether it causes them to decline in health and eventually enter an institution.[272] The Ninth Circuit stated the action does not have to be the sole

260. *See* Steimel v. Wernert, 823 F.3d 902, 913 (7th Cir. 2016); *see also* Davis v. Shah, 821 F.3d 231, 261 (2d Cir. 2016); Radaszewski *ex rel.* Radaszewski v. Maram, 383 F.3d 599, 612 (7th Cir. 2004).

261. Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1184 (10th Cir. 2003).

262. *See id.* at 1184–85.

263. The Supreme Court has held that a plaintiff seeking a preliminary injunction must establish they are likely to succeed on the merits and suffer irreparable harm in the absence of preliminary relief. *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

264. *See id.*

265. *See Fisher*, 335 F.3d at 1184–85.

266. *See id.* at 1179–80.

267. *See id.* at 1184.

268. *See id.*

269. *See id.* at 1184–85.

270. M.R. v. Dreyfus, 697 F.3d 706, 728 (9th Cir. 2012).

271. *See id.* at 734.

272. *See id.* at 734–35.

factor causing irreparable harm, but instead must only be a primary cause.[273] If it is a predictable consequence that a plaintiff will be put at serious risk of institutionalization, they have "shown a likelihood of irreparable injury."[274] In the context of one plaintiff, the court stated she was "not required to show that the emergency regulation was the exclusive cause of her injury. She need only show that, by depriving her of access to care that is critical to her health, the regulation exacerbates the risk that she will be institutionalized."[275]

In applying the above standard, the *M.R. v. Dreyfus* court leaned on professional testimony. Dr. Mitchell LaPlante, an expert in the demography and epidemiology of disability, stated that "having inadequate levels of help compromises the safety, comfort, and hygiene of individuals requiring help . . . reducing their ability to live independently and increasing their risk of institutionalization and death."[276] The court continued to cite examples of the plaintiffs' resulting deteriorating health.[277] One plaintiff, known as K.S. to the court, experienced a 13.5 percent decrease in monthly hours of care.[278] She developed sores from being unable to remove her compression socks and felt trapped from the world.[279] The court concluded these issues placed K.S. at high risk of unnecessary institutionalization because proper HCBS would sufficiently care for her needs.[280]

The Fourth Circuit in *Pashby* set a "significant risk" standard when evaluating the plaintiffs' claims.[281] The court relied upon patient declarations stating they could not live on their own without HCBS because it would be unsafe for them to do so and they have no friends or family members who could offer the same amount of care.[282] The declarations used language such as "may," "might," "probably" would, or were "likely" when describing an individual's change of being institutionalized if the HCBS ceased.[283] The court concluded that the declarations demonstrate that the plaintiffs "face a significant risk of institutionalization."[284]

Similarly, the Sixth Circuit in *Waskul* quoted the DOJ's standard and determined an at-risk claim is sufficient "if a public entity's failure to provide community services or its cut to such services will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual

273. *See id.* at 728.
274. *Id.* at 733.
275. *Id.* at 730.
276. *Id.*
277. *See id.* at 729–31.
278. *See id.* at 731.
279. *See id.*
280. *See id.*
281. Pashby v. Delia, 709 F.3d 307, 322 (4th Cir. 2013).
282. *See id.*
283. *Id.*
284. *Id.*

placement in an institution."[285] The court used language such as "reasonable inference" to qualify the "likely" standard.[286]

The court referenced the anecdotes found in the complaint. For instance, because of the budget methodology at issue, one plaintiff must rely on his aging and unwell grandparents for care.[287] After they can no longer care for him, he will be forced into an institution.[288] Another plaintiff alleged a decline in his health and safety because he is unable to pay for his at-home care staff.[289] The court held that "these facts suffice to show that Plaintiffs are at serious risk of institutionalization."[290]

2. Ninth Circuit Judge Bea's Dissent: The "Imminent" Standard

In his dissent, Circuit Judge Bea expressed concerns about implementing a looser standard for risk of institutionalization. Instead, his dissent advocated for "imminent institutionalization" in lieu of "likely" to be institutionalized.[291] The dissent also introduced a new hurdle for plaintiffs–explicit causation.[292] The dissent quoted the district court decision, stating, "the Court is unable to determine whether the alleged threat of institutionalization these particular plaintiffs face is the result of the State's reduction in personal care service hours or the deterioration in their medical conditions."[293]

In application, the dissent questioned the state of Washington's assessment mechanism, claiming that it did not "reflect the individual need of each program participant."[294] Instead, the dissent concluded the plaintiffs could not prove that a decrease in the number of at-home care hours resulted in the "required showing" of imminent institutionalization.[295] Judge Bea expressed a worry that a looser at-risk standard introduces a slippery slope that could result in plaintiffs arguing the integration mandate prohibits any reduction in services.[296] The dissent opined that if cutting at-home care hours presents a serious risk of institutionalization, providing no services at all presents an even greater risk.[297] This, the dissent said, will make states less likely to provide waiver programs in the first place.[298]

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285. Waskul v. Washtenaw Cnty. Cmty. Mental Health, 979 F.3d 426, 461 (6th Cir. 2020).
286. *See id.* at 461–62.
287. *See id.* at 461.
288. *See id.*
289. *See id.* at 462.
290. *Id.*
291. M.R. v. Dreyfus, 697 F.3d 706, 712 (9th Cir. 2012) (Bea, J., dissenting).
292. *Id.* at 713–14.
293. *Id.* at 718.
294. *Id.* at 739.
295. *Id.* at 740.
296. *See id.* at 717.
297. *See id.*
298. *See id.* at 719.

3. The Fifth Circuit's Approach: No Standard is Stringent Enough

As mentioned in Part II.A.2, the Fifth Circuit did not permit the at-risk theory of unjust institutionalization.[299] In part, this is because the court believes the risk is impossible to determine. The court stated it would be "hubristic for a federal court to predict the 'risk' that an 'unjustified' civil commitment process will commence against any individual."[300] In doing so, the Fifth Circuit rejected both the "likely" and "imminent" standards.

The court contextualized the plaintiff's claims within Mississippi's legal system.[301] The court explained that the only way to be admitted to a state mental health hospital is through a judicial proceeding.[302] These proceedings consult court-appointed physicians, medical doctors, and psychologists.[303] After being institutionalized, a patient may be discharged once they no longer pose a substantial threat, or a patient can move for discharge through a petition for writ of habeas corpus.[304] The court concluded the "carefully crafted structure" of this system leaves no room for risk of unnecessary institutionalization.[305]

C. United States v. Florida*: The District Court's Decision and Subsequent Eleventh Circuit Oral Arguments*

Prior to the Fifth Circuit's decision in *United States v. Florida*, the Southern District of Florida decided to allow risk of unjust institutionalization claims.[306] The Attorney General brought this case against the state of Florida on behalf of children under the age of twenty-one who have disabilities resulting in their need for daily medical services.[307] Discovery revealed that 140 of the children resided in nursing facilities, and 1,800 resided in the community but were at serious risk of institutionalization.[308] Ultimately, the court found that "[t]hose who are institutionalized are spending months, and sometimes years of their youth isolated from family and the outside world. They don't need to be there."[309]

The court allowed a risk of unjust institutionalization claim. First, the court noted that, at the time of the decision, every court of appeals to address the issue has held that *Olmstead* includes those at serious risk of institutional

299. *See supra* Part II.A.2.
300. United States v. Mississippi, 82 F.4th 387, 393 (5th Cir. 2023).
301. *See id.* at 393.
302. *See id.*
303. *See id.*
304. *See id.*
305. *Id.*
306. *See* United States v. Florida, 682 F. Supp. 3d 1172, 1185 (S.D. Fla. 2023).
307. *See id.* at 1181–82.
308. *See id.* at 1182.
309. *Id.* Judge Donald M. Middlebrooks went so far as to tour one of the facilities himself before coming to this conclusion. *See id.*

placement.[310] Second, the court quoted *Fisher*, reasoning that the integration mandate would be meaningless if individuals were required to be segregated before bringing a claim.[311]

When discussing the level of risk necessary, the court concluded that more than a generalized fear of institutionalization is necessary, but present or inevitable segregation is not required.[312] Instead, the court adopted the "likely" standard established in the Second Circuit case *Davis v. Shah*.[313] To be clear, this district court case does not bind any circuit or any other court in its jurisdiction. However, because the case is being appealed, it provides a helpful basis to understand the Eleventh Circuit's ultimate review.

On January 24, 2024, the Eleventh Circuit heard oral arguments on the matter.[314] The panel of judges asked both sides to address the Fifth Circuit's decision in *United States v. Mississippi*.[315] The United States distinguished the Fifth Circuit's case from the case at issue by clarifying that the Fifth Circuit limited the scope of their decision to the facts of their case and did not rule on the adequacy of the previous circuit decisions.[316] The government pointed out that the Seventh Circuit case *Radaszewski ex rel. Radaszewski v. Maram*, which allowed the at-risk theory, also concerned private-duty nursing.[317] Thus, the government reasoned, in reality the Fifth Circuit did not explicitly rule in opposition to the case at hand.[318] In comparison, Florida reasoned the Fifth Circuit ruled in opposition to the government's position.[319] Florida agreed with the Fifth Circuit's statutory interpretation, concluding the statutes and regulations do not mention at-risk individuals.[320] Further, Florida reiterated the Fifth Circuit's opposition to deference because the statute clearly prohibits at-risk claims, and the guidance document did not go through notice and comment.[321] Florida rebutted the government's case differentiation, stating "they did have one paragraph after that where they say, 'and by the way, the facts of this case are different from those in the other circuits,' but that was not the essence of that court's holding."[322]

The United States supported at-risk claims, but emphasized the court need not reach the issue in this case because the court has the authority to both

310. *See id.* at 1185.
311. *See id.*
312. *See id.* at 1185–86.
313. *See id.* at 1186.
314. *See* Oral Argument, United States v. Florida, No. 23-12331 (11th Cir. Jan. 24, 2024), https://www.ca11.uscourts.gov/oral-argument-recordings?title=23-12331&field_oar_case_name_value=&field_oral_argument_date_value%5Bmin%5D=2024-01-24&field_oral_argument_date_value%5Bmax%5D=2024-01-24 [https://perma.cc/C8JW-F6K2].
315. *See id.* at 35:09.
316. *See id.* at 35:24; *see also supra* Part II.A.2.
317. *See* Oral Argument, *supra* note 314, at 36:02.
318. *See id.*
319. *See id.* at 42:25.
320. *See id.*
321. *See id.* at 42:45; *see also* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015).
322. *See* Oral Argument, *supra* note 314, at 49:17.

"remedy current discrimination" and "prevent future discrimination."[323] Legally, the court could look to the group of children, find violations with respect to them, and then enter the same relief entered by the district court.[324] The United States similarly included this argument in its appellate brief, stating "even if a serious risk of unnecessary institutionalization were not itself actionable under Title II, the relief the district court granted the at-risk children would still be appropriate."[325] The Supreme Court has held this principle generally.[326]

In comparison, Florida reiterated the standard of imminent risk used by the Supreme Court in *Lujan v. Defenders of Wildlife*[327] when assessing standing under Article III[328] of the Constitution.[329] The Eleventh Circuit pushed on this issue of "imminent risk," asking Florida what does imminency mean and how many parents would need to testify at trial to prove imminency?[330] Florida could not provide a number, but concluded, "I think it could be a number of different things . . . but the way that it can't be proven is simply looking on a spreadsheet and saying this is the average percentage of nursing that each child out of 3000 utilized."[331]

III. TITLE II PERMITS RISK OF UNNECESSARY INSTITUTIONALIZATION CLAIMS USING THE "LIKELY" STANDARD

Since the Fifth Circuit's divergence from its fellow circuit courts, at least two cases have addressed the circuit split. The U.S. District Court for the Middle District of North Carolina in *Timothy B. v. Kinsley*[332] and the U.S. District Court for the District of Alaska in *Jeremiah M. v. Crum*[333] both acknowledged the Fifth Circuit's opinion but refused to deviate from their circuit's precedent allowing at-risk claims.[334] More litigation on this is sure to follow. In particular, the Eleventh Circuit has the opportunity in *United States v. Florida* to reaffirm the ADA's protections by holding that risk of unnecessary institutionalization litigation is permitted under Title II of the ADA.

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323. *See id.* at 36:49.

324. *See id.* at 37:33.

325. Brief for Plaintiff-Appellee at 42 n.10, United States v. Florida, 682 F. Supp. 3d 1172 (S.D. Fla. 2023), *appeal docketed*, No. 23-12331 (11th Cir. argued Jan. 24, 2024).

326. *See* United States v. W. T. Grant Co., 345 U.S. 629 (1953) (a Supreme Court case explaining that the purpose of injunctive relief is to prevent future violations when there is a risk of recurring violations).

327. 504 U.S. 555 (1992).

328. U.S. CONST. art. III.

329. *See* Oral Argument, *supra* note 314, at 49:17; *see also supra* note 162 and accompanying text.

330. *See* Oral Argument, *supra* note 314, at 45:21.

331. *Id.* at 44:13.

332. No. 22-1046, 2024 WL 1350071 (M.D.N.C. Mar. 29, 2024).

333. 695 F. Supp. 3d 1060 (D. Alaska 2023).

334. *See Timothy B.*, 2024 WL 1350071, at *15; *see also Jeremiah M.*, 695 F. Supp. 3d at 1107.

Part III argues that Title II's text, the integration mandate, and *Olmstead* allow claims for risk of unjust institutionalization. In other words, the Fifth Circuit got it wrong. That being said, the circuit courts adopting the at-risk theory heavily relied on the DOJ's guidance.[335] As Circuit Judge Chad A. Readler pointed out in his concurrence in part, dissent in part in *Waskul*, many courts have seized onto the DOJ guidance document.[336] Though legally sturdy at the time of decision-making, the current legal landscape post–*Loper Bright* requires a more thorough analysis.

Part III.A.1 argues that Title II, the integration mandate, and *Olmstead* allow claims for risk of unnecessary institutionalization. Part III.A.2 argues that, at the very least, Title II is ambiguous on the issue. If ambiguous, Part III.A.2 argues that the DOJ's guidance document deserves some level of deference. Then, Part III.A.3 recognizes using the injunctive relief standard as an alternative, albeit weaker, solution. Finally, Part III.B.1 advocates for the "likely" at-risk standard and Part III.B.2 recommends a test to make this determination.

A. The ADA Allows Risk of Unnecessary Institutionalization Claims

This section first looks to the language and legislative history of Title II, the integration mandate, and the *Olmstead* decision to prove that risk of unjust institutionalization claims are permitted. Next, this section acknowledges that if the statute is ambiguous, a level of deference to the DOJ applies. Finally, this section discusses using the injunctive relief standard as an alternative.

1. Title II, the Integration Mandate, the Reasonable Modifications Regulation, and *Olmstead* Allow At-Risk Litigation

This section first analyzes the text of Title II, the *Olmstead* decision, and accompanying regulations to conclude that at-risk litigation is permissible. This section looks to the language of Title II to rebut the Fifth Circuit's statutory interpretation. Then, this section uses the integration mandate, as interpreted by the Supreme Court in *Olmstead*, to prove being placed at risk of unnecessary institutionalization constitutes discrimination. Next, this section emphasizes the language of the reasonable modifications regulation to bolster the overall argument. Finally, this section looks at the statutory history of the ADA to understand Congress's intent.

335. *See supra* Part II.A.1.

336. *See* Waskul v. Washtenaw Cnty. Cmty. Mental Health, 979 F.3d 426, 468 (6th Cir. 2020) (Readler, J., concurring in part and dissenting in part).

a. The Language of Title II and its Accompanying Regulations Support Risk of Unnecessary Institutionalization Claims

Title II of the ADA states 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 any such entity."[337] The Fifth Circuit draws attention to the past tense words "excluded," "denied," and "subjected" to strengthen their argument that an individual must first experience a discriminatory consequence to bring a claim.[338] However, the Fifth Circuit fails to consider that being placed at risk of unnecessary institutionalization *is* discrimination under Title II. Therefore, even if individuals have not already been institutionalized, they have still been discriminated against.

Olmstead held that unjustified isolation is properly regarded as discrimination based on disability.[339] To determine if discrimination occurred, the court must ask if the State failed to provide community-based treatment when:

1. "[T]he State's treatment professionals determine that such placement is appropriate."[340]
2. "The affected persons do not oppose such treatment."[341]
3. "The placement can be reasonably accommodated."[342]
4. The court considers "the resources available to the State and the needs of others."[343]

Nothing in *Olmstead* requires that an individual must first be institutionalized.[344] On the contrary, the holding explicitly places the onus on states to provide community-based treatment. It does not emphasize the individual's status as institutionalized. Although it is true that the plaintiffs in *Olmstead* were institutionalized at the time they brought their claims, the holding does not depend on the plaintiff's institutionalization status. It is a cornerstone of lawyering that holdings apply to alternative fact patterns.[345] Without this principle, the legal system would cease to operate.

The integration mandate further supports this argument. The integration mandate states that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified

337. 42 U.S.C. § 12132.
338. *See* United States v. Mississippi, 82 F.4th 387, 392 (5th Cir. 2023); *see also supra* Part II.A.2.
339. Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 597 (1999).
340. *Id.* at 607.
341. *Id.*
342. *Id.*
343. *Id.*
344. Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1181 (10th Cir. 2003).
345. *See Stare Decisis*, BLACK'S LAW DICTIONARY (12th ed. 2024).

individuals with disabilities."[346] One important need for people with disabilities is to not feel at risk of unjust institutionalization. In fact, one of the core fears of disability itself is fear of losing control over the "details and direction" of one's everyday life.[347] Already, people with disabilities experience compromised emotional well-being due to a reduced sense of self-efficacy.[348] Being placed at risk of unnecessary institutionalization directly implicates a person with a disability's sense of autonomy and security within their community. Therefore, the "most integrated setting" should be one where individuals with disabilities do not feel at risk or in danger of a consequence outside their control.

Broadly, courts should consider the well-being of individuals with disabilities when defining the most integrated setting. Often, when people with disabilities express fears tied to ableism, abusive practices, or bad public policies, they are dismissed as overanxious or irrational.[349] The case *United States v. Mississippi* is an example of just that.[350] Though the Fifth Circuit frames its critiques against risk of unjustified institutionalization as one against the district court opinion, in reality the court criticizes the 154 individuals with disabilities brave enough to speak to the United States' "Clinical Review Team."[351] The court claims it is "hubristic" to predict risk of institutionalization and related discrimination.[352] However, this belittles the experiences of the individuals in the study. For example, Person 58 had been in and out of institutions five times over the past two years.[353] Between hospitalizations, Person 58 received no community-based services, despite being deemed to benefit from them.[354] Person 133 had been admitted into a state institution sixteen times.[355] He had a work history, a supportive family, and a strong desire to work.[356] He, too, never received community-based services and would have benefited from them.[357] Though not presently institutionalized, these individuals live in fear of the pattern they have been subjected to.

The reasonable modifications regulation, also known as the fundamental alterations defense, supports this argument. The fundamental alteration defense requires a public entity to make reasonable modifications when

346. 28 C.F.R. § 35.130(d) (2016).

347. Andrew Pulrang, *Understanding Fear in the Disability Community*, FORBES (May 28, 2022, 2:15 PM), https://www.forbes.com/sites/andrewpulrang/2022/05/28/understanding-fear-in-the-disability-community/ [https://perma.cc/PEG4-UGUY].

348. *See* Eun Ha Namkung & Deborah Carr, *The Psychological Consequences of Disability over the Life Course: Assessing the Mediating Role of Perceived Interpersonal Discrimination*, 61 J. HEALTH SOC. BEHAV. 190, 190 (2020).

349. *See id.*

350. *See* United States v. Mississippi, 82 F.4th 387 (5th Cir. 2023).

351. *See id.* at 389.

352. *See id.* at 393.

353. *See* Brief for the United States as Plaintiff-Appellee at 9, United States v. Mississippi, 82 F.4th 387 (5th Cir. 2023) (No. 21-60772), 2022 WL 1017186, at *18.

354. *See id.*

355. *See id.*

356. *See id.*

357. *See id.*

"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."[358] This regulation explicitly acknowledges the duty of public entities to *avoid* discrimination. In other words, there is an implied "at-risk" element baked into the language of the fundamental alteration defense. Even if a court does not want to explicitly acknowledge the risk of unnecessary institutionalization as discrimination, certainly this regulation solidifies the intention of the statute is to prevent harm. Additionally, to quell court concerns of severe state burdens, the fundamental alteration defense is already in place to defend against claims that are infeasible to implement. Courts should rely upon the fundamental alteration defense instead of introducing new hurdles for plaintiffs. This theory balances the competing interests of protecting state systems and supplying justice to the disability community.

b. The Legislative History Supports Risk of Unnecessary Institutionalization Claims

This next part looks to the congressional intent behind the ADA. The rule against absurdity proclaims that statutes should not be interpreted to yield an absurd result or result in something inconsistent with clear congressional intent.[359] The legislative history of the ADA strongly indicates the congressional motivation for the ADA—to eliminate discrimination on the basis of disabilities and improve life for people with disabilities.[360] The ADA was created to respond to an appalling problem of inhumane and systemic discrimination.[361] Being forced into institutionalization against your will, without true need, certainly fits that bill. As explained by the court in *Fisher*, it would be absurd to imply that Congress, which intended to eliminate unjust activity, would require such transgressions to occur to bring a claim.[362]

When signing the bill, President George H.W. Bush said, "[L]et the shameful wall of exclusion finally come tumbling down."[363] This mission reflected the goals of most of Congress at the time of passage. The ADA was not a single party effort. As demonstrated in Part I.A.1, the ADA reflected broad bipartisan compromise and passed by an overwhelming margin.[364] Further, when courts restricted the reach of the ADA, Congress took quick action to reinforce its protections.[365] In 2008, the ADAAA was passed mainly in response to the Supreme Court's limitations on the definition of

358. 28 CFR § 35.130(b)(7)(i) (2016).
359. *See* BRANNON, *supra* note 73, at 57.
360. *See supra* Part I.A.1.
361. *See* Burgdorf, *supra* note 11.
362. *See* Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1181 (10th Cir. 2003).
363. George H.W. Bush, U.S. President, Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990 (July 26, 1990) (transcript available at the National Archives).
364. *See supra* Part I.A.1.
365. *See supra* Part I.A.1.

disability.[366] Representative George Miller of California stated, "Yet when . . . [individuals with disabilities] seek justice for this discrimination, the courts rule that they are not disabled enough to be protected by the Americans with Disabilities Act. This is a terrible catch-22 that Congress will change with the passage of this bill today."[367] By not allowing risk of institutionalization claims, the Fifth Circuit ruled, essentially, that the individual with a disability was not discriminated against *enough*. This similarly operates as catch-22 because it forces an injury when it could be avoided.

Congress meant for the ADA to be a sweeping call to action for the nation to protect those with disabilities. Explicitly, a "broad scope of protection" is meant to be available under the ADA.[368] This certainly includes risk of over institutionalization claims. Further, the Tenth Circuit decided *Fisher* and the Seventh Circuit decided *Radaszewski* prior to the ADAAA's enactment.[369] If the legislators took issue with the courts' interpretations, they had the opportunity to correct them.

2. At a Minimum, Title II Is Ambiguous and a Level of Deference Applies

At the very least, the ranging circuit decisions and the above reasoning indicate ambiguity exists. If ambiguity is established, some level of deference will be given to the DOJ.[370] The current *Kisor* standard of deference requires that the agency's interpretation implicates expertise and reflects the considered judgment.[371]

To make this determination, a court may ask if the agency's interpretation creates an unfair surprise to a covered entity.[372] This could include conflicting with the agency's prior interpretation or imposing retroactive liability for well-established conduct.[373] In this case, the DOJ has not wavered in its support for the risk of unjust institutionalization litigation since it filed a statement of interest in the *M.R. v. Dreyfus*[374] district court case in 2011.[375] Further, this interpretation clearly does not come as a

366. 154 CONG. REC. 19432 (2008) (statement of Rep. George Miller).
367. *Id.*
368. *See* Pub. L. No. 110-325, 122 Stat. 3553 (2008).
369. *See* Radaszewski *ex rel.* Radaszewski v. Maram, 383 F.3d 599 (7th Cir. 2004) (decided in 2004); *see also* Fisher v. Okla. Health Care Auth., 335 F.3d 1175 (10th Cir. 2003) (decided in 2003).
370. *See supra* Part II.A.1.
371. Kisor v. Wilkie, 588 U.S. 558, 590 (2019).
372. *See id.* at 559.
373. *See id.* at 579.
374. 767 F. Supp. 2d 1149 (W.D. Wash.), *rev'd and remanded*, 663 F.3d 1100 (9th Cir. 2011), *opinion amended and superseded on denial of reh'g*, 697 F.3d 706 (9th Cir. 2012), *rev'd and remanded*, 697 F.3d 706 (9th Cir. 2012).
375. *See* Statement of Interest of the United States at 10, M.R. v. Dreyfus, 67 F. Supp. 2d 1149 (W.D. Wash.), *rev'd and remanded,* 663 F.3d 1100 (9th Cir. 2011), *opinion amended and superseded on denial of reh'g,* 697 F.3d 706 (9th Cir. 2012), *rev'd and remanded,* 697 F.3d 706 (9th Cir. 2012) (No. 10-2052).

surprise to public entities because it has been the majority interpretation since 2003. In fact, by agreeing with the Fifth Circuit's interpretation in *United States v. Mississippi*, a court would be imposing an undue burden of surprise on those in the disability community bringing claims under *Olmstead* they previously were entitled to bring.[376] The outcome of this factor certainly falls in favor of allowing claims for risk of unjust institutionalization.

Next, a court may look to see if the subject matter falls within the agency's substantive expertise.[377] The Civil Rights Division of the DOJ, the author of the guidance document, has worked to protect vulnerable members of society since 1957 when Congress enacted the Civil Rights Act of 1957.[378] The agency enforces federal statutes prohibiting discrimination. Specifically, the Disability Rights Section works to support "integration, full participation, inclusion, [and] independent living" for people with disabilities.[379] Their interpretation of the statute is in exact alignment with their area of expertise. Therefore, strong deference is warranted.

Finally, a court may ask if the interpretation is reasonable after considering the text, structure, history, and purpose of the regulation.[380] As per the analysis in Part III.A.1.a and III.A.1.b, the interpretation is not only reasonable but more accurate.

However, following *Loper Bright*, courts may decide the level of deference afforded to an agency's interpretations of their own regulations is closer to *Skidmore* Deference.[381] The Supreme Court in *Skidmore* viewed agency interpretation not as controlling, but as a source of guidance.[382] The Supreme Court reasoned that the weight of deference is based on the thoroughness of the agency's consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements.[383]

Though the latter two prongs are addressed above,[384] this Note has not yet provided proof of the agency's thoughtfulness in their interpretation. However, this is evident by the timing and circumstances of the 2011 DOJ guidance document supporting litigation for individuals at risk of unjust institutionalization. The guidance document is part of a "technical assistance document" published to the ADA's website to "provide critical information to individuals with disabilities, advocates and state and local officials

376. If the court's reasoning is more broadly adopted, *Olmstead* litigation will face substantial new hurdles. *See* Rodgers & Wehrle, *supra* note 23.

377. Kisor v. Wilkie, 588 U.S. 558, 577–78 (2019).

378. *See* Pub. L. No. 85-315, § 131, 71 Stat. 634, 637 (1957) (codified as amended in scattered sections of 42 U.S.C.).

379. *See Disability Rights Section*, DOJ.GOV, https://www.justice.gov/crt/disability-rights-section [https://perma.cc/J9NB-4HBV] (last visited Feb. 14, 2025).

380. GMS Mine Repair v. Fed. Mine Safety & Health Rev. Comm'n & Sec'y. of Lab., 72 F.4th 1314, 1320 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 1095 (2024).

381. Christopher R. Yukins, Kristen Ittig & Nicole Williamson, *The Sentinel Stirs: Government Procurement Law After* Loper Bright Enterprises, BRIEFING PAPERS, Aug. 2024, at 1, 19.

382. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

383. *See id.*

384. *See supra* Part III.A.1.

responsible for complying with the ADA's integration mandate."[385] The DOJ did not release this guidance on a whim, but instead as part of a division-wide project explicitly endorsed by the then-Assistant Attorney General for the Civil Rights Division, Thomas E. Perez.[386] The press release statement for the technical assistance guide expressed the motive for the guide, citing President Barack Obama's 2009 "Year of Community Living" which directed agencies to vigorously enforce *Olmstead*.[387] This all is strong evidence the agency put time and thought into this guidance, and thus stronger interpretive weight should be given.

3. The Injunctive Relief Standard as an Alternative Basis for Corrective Action

Though courts should solidify at-risk protections within Title II to protect all individuals with disabilities, it would be remiss not to acknowledge the profound impact injunctive relief can have and has had on protecting populations from dangers outside of the disability rights context. As the DOJ has acknowledged, "even if a serious risk of unnecessary institutionalization were not itself actionable under Title II, the relief the district court granted the at-risk children would still be appropriate to *prevent* the unnecessary institutionalization *Olmstead* indisputably proscribes."[388] Courts have long proscribed injunctive relief when there is a "cognizable danger of recurrent violation."[389]

This proposition supports the idea that attorneys can and should be critical team members in public health initiatives.[390] In particular, preventative litigation, or litigating before harm occurs, can benefit the Centers for Disease Control and Prevention's public health goals, such as addressing hazards that affect the population, creating equitable access to services needed to be healthy, and maintaining a strong organizational infrastructure for public health.[391]

B. How At-Risk Is At-Risk?

After determining that risk of unjust institutionalization litigation should be permitted, this part turns to the question, how at-risk is at-risk? This part

385. *See* Press Release, Off. of Pub. Affs., Justice Department Issues Technical Assistance Document on Enforcement of the Supreme Court Decision in Olmstead v. L.C. (Aug. 10, 2015), https://www.justice.gov/opa/pr/justice-department-issues-technical-assistance-document-enforcement-supreme-court-decision [https://perma.cc/MG5T-2AB4].

386. *See id.*

387. *See id.*

388. *See* Brief for Plaintiff-Appellee, *supra* note 325, at 42 n.10.

389. United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953).

390. Ellen M. Lawton & Megan Sandel, *Investing in Legal Prevention: Connecting Access to Civil Justice and Healthcare Through Medical-Legal Partnership*, 35 J. LEGAL MED. 29, 39 (2014).

391. *See 10 Essential Public Health Services*, CDC.GOV, https://www.cdc.gov/public-health-gateway/php/about/index.html [https://perma.cc/R985-8T9B] (last visited Feb. 14, 2025).

advocates for the "likely" standard by looking at the DOJ's guidance and general reasonableness compared to the "imminent" standard. Then, this part creates a workable test to determine who is at risk.

1. Advocating for the "Likely" Standard

Two main theories have emerged for the standard necessary to be at risk of unjust institutionalization. One calls for the individual or individuals to be likely to be unjustly institutionalized.[392] The other requires the individual or individuals to be imminently in danger of being unjustly institutionalized.[393] The DOJ describes the "likely" standard in context saying:

> [A] plaintiff could show sufficient risk of institutionalization to make out an *Olmstead* violation if a public entity's failure to provide community services or its cut to such services will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution.[394]

The "likely" standard is far more feasible in the context of disability rights law. To start, the imminency standard is highly dangerous for those at risk of unjust institutionalization. Litigation is a long, tiring, and tedious process. The *United States v. Florida* case, for example, took "9 years and 9 months before finally culminating in the bench trial."[395] If the imminency standard were widely adopted, at-risk individuals would all be institutionalized before a claim was viable.

During the *United States v. Florida* oral arguments, the representative for the state of Florida could not elucidate what evidence would suffice to prove imminency.[396] This indicates the line between likely and imminent is not as stark in context as one might expect. Even the definitions found in *Black Law's Dictionary* are not so different. *Black's Law Dictionary* defines likely as, "probable," "showing a strong tendency," or "reasonably expected."[397] Alternatively, *Black's Law Dictionary* defines imminent as "threatening to occur immediately."[398] For this reason, it would be unreasonable to require a showing of imminency when the "likely" standard is sufficient to indicate risk.

As argued in Part III.A.2, the DOJ's interpretation is afforded some level of weight, even if the strength of deference is questionable.[399] The DOJ advocated for the "likely" standard, a position that should not be overlooked for the reasons stated in Part III.A.2.[400]

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392. *See, e.g.*, M.R. v. Dreyfus, 697 F.3d 706, 734 (9th Cir. 2012).
393. *See id.* at 712 (Bea, J., dissenting).
394. *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and* Olmstead *v. L.C.*, *supra* note 152.
395. United States v. Florida, 682 F. Supp. 3d 1172, 1186 (S.D. Fla. 2023).
396. *See* Oral Argument, *supra* note 314, at 44:13.
397. *Likely*, BLACK'S LAW DICTIONARY (12th ed. 2024).
398. *Imminent*, BLACK'S LAW DICTIONARY (12th ed. 2024).
399. *See supra* Part III.A.2.
400. *See id.*

Finally, qualitative risk analyses generally contain "objective evaluations of the likelihood of exposure to a hazard and the likely consequences resulting from such exposure."[401] Thus, the "likely" standard is found in public health determinations of risk and should be mirrored in a court's analysis for reasons further described in Part III.B.2.[402]

2. Relying on Public Health Professionals' Determinations of Risk

Judge Readler provided an interesting take in his concurrence in part, and dissent in part in *Waskul*, questioning how courts could determine what it means to be "at-risk":

> One could theoretically define "at risk" with some temporal connection to actual institutionalization—for example, one is "at risk" of institutionalization if she is expected to be institutionalized in the next few months, perhaps even a year. But . . . appellants have been claiming a risk of institutionalization for over four years. Yet none have been institutionalized.[403]

The temporal analysis suggested does not make sense for risk of unjust institutionalization claims. Many individuals with a disability have professed that they would rather die than be placed in an institution.[404] Just because an individual makes good on this promise and keeps themselves out of an institution at great personal risk, does not mean that institutionalization is not imminent or likely. Death or risk of death should not be an acceptable alternative adopted by courts.

"At-risk" is not a vague term with no meaning. Public health professionals conduct risk assessments often within their line of work.[405] To determine if an individual, or group of individuals, with a disability are likely at risk of unjust institutionalization, the court should reason through a public health risk assessment in reliance upon public health professionals.

Risk assessments traditionally include four elements: hazard identification, hazard characterization, exposure assessment, and finally the output of a risk characterization.[406] Hazard identification is a qualitative analysis highlighting the hazards of concern.[407] Hazard characterization describes the severity and duration of the adverse health effects associated with the hazard.[408] Exposure assessments characterize the "source and

401. Kerry L. Dearfield, Karin Hoelzer & Janell R. Kause, *Review of Various Approaches for Assessing Public Health Risks in Regulatory Decision Making: Choosing the Right Approach for the Problem*, 77 J. FOOD PROT. 1428, 1429 (2014).

402. *See supra* Part III.B.2.

403. Waskul v. Washtenaw Cnty. Cmty. Mental Health, 979 F.3d 426, 470 (6th Cir. 2020) (Readler, J. concurring in part and dissenting in part).

404. *See* Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1184 (10th Cir. 2003).

405. *See* Dearfield, Hoelzer & Kause, *supra* note 401, at 1428.

406. *See id.* at 1429.

407. *See id.*

408. *See id.*

magnitude" of the exposure.[409] The final risk assessment integrates the three elements, while considering variables and uncertainties.[410]

Courts should adopt a version of this assessment. First, the court should identify the action accused of causing a risk of unjust institutionalization. Second, the court should identify the potential consequences of unjust institutionalization. This includes health risks, emotional risks, and economic risks. Third, the court should consider the severity and impact of the unjust institutionalization on the population in question. These steps should all take into consideration social determinants of health, or nonmedical factors that influence health, such as economic status, to gain a fuller picture of the consequences.[411] The three elements should be looked at together to qualitatively estimate the risk of unjust institutionalization.

Certainly, this type of analysis requires public health expertise that courts may not have. Many public health expert opinions will likely find their way into the briefings submitted to the court.[412] However, if bias is a concern, Federal Rule of Evidence 706[413] allows courts to designate an expert witness in complex cases to provide a neutral and expert view in line with public health principles, such as primary prevention also known as the use of interventions that prevent health conditions from occurring.[414]

Courts are not strangers to looking to public health expertise. In 1918, the court in *Hanford v. Connecticut Fair Association*[415] held that the contract at issue was contrary to public health policy because holding a "baby show" during an epidemic would be highly dangerous to the health of the community.[416] As a result, the contract was void. In *Jacobson v. Massachusetts*,[417] the court held that a state may enact a compulsory vaccination law to allow the legislature discretion to protect public health.[418] In *School Board of Nassau City v. Arline*,[419] the court held that courts should normally defer to the reasonable medical judgments of public health officials.[420] Even the Fifth Circuit in their circuit splitting opinion mentioned that Mississippi determines if an individual should be admitted to a state mental health hospital through a judicial proceeding that consults

409. *See id.*
410. *See id.*
411. *See Social Determinants of Health (SDOH)*, CDC.GOV, https://www.cdc.gov/about/priorities/why-is-addressing-sdoh-important.html [https://perma.cc/7EVQ-V7B6] (last visited Feb. 14, 2025).
412. *See, e.g.*, Brief for Plaintiff-Appellee at 9, United States v. Mississippi, 82 F.4th 387 (5th Cir. 2023) (No. 21-60772), 2022 WL 1017186, at *18.
413. FED. R. EVID. 706.
414. *See id.*
415. 103 A. 838 (1918).
416. *See id.* at 838.
417. 197 U.S. 11 (1905).
418. *See id.* at 361.
419. 480 U.S. 273 (1987).
420. *See id.* at 288 (citing Brief for American Medical Association as Amicus Curiae Supporting Petitioners, School Board of Nassau City v. Airline, 480 U.S. 273 (1987) (No. 85-1277)).

"court-appointed physicians, medical doctors, and psychologists."[421] It is unclear why the court then believes that public health professional opinions are moot.

CONCLUSION

The Fifth Circuit's recent *Mississippi* decision startled the disability advocacy world. The recent *Loper Bright* decision further amplified this fear by limiting the power agencies had over statutory interpretation. Many circuits previously relied on this interpretation when constructing their decisions regarding the at-risk theory. However, statutory interpretation, legislative history, binding precedent, and public health principles indicate that the Fifth Circuit is wrong. Indeed, the Eleventh Circuit can solidify the rights of people with disabilities by explicitly holding the risk of unnecessary institutionalization constitutes discrimination. It would be poetic justice if the circuit court whose decision was solidified in *Olmstead* reenforced protections today.

421. United States v. Mississippi, 82 F.4th 387, 393 (5th Cir. 2023).