PUTTING THE AT-RISK AT RISK: *UNITED STATES V. MISSISSIPPI* AND DISABILITY DISCRIMINATION

Abstract: In 1999, the U.S. Supreme Court decided *Olmstead v. L.C. ex rel. Zimring*, providing the test for unjustified institutionalization required for claims under the Americans with Disabilities Act (ADA). On September 20, 2023, the U.S. Court of Appeals for the Fifth Circuit held in *United States v. Mississippi* that the *Olmstead* test does not establish claims for those merely at risk of institutionalization. This decision created a split between the Fifth Circuit and all other circuits that have ruled on the issue and included those at risk within *Olmstead*'s scope. This Comment argues that given other circuits' interpretations of *Olmstead* and principles of injury, the Supreme Court should resolve the circuit split at the next opportunity in favor of including at-risk individuals within *Olmstead*.

INTRODUCTION

Through the U.S. civil court system, parties seek to redress—or, if reasonable, prevent—injuries caused by another.[1] To prevent superfluous cases, courts limit standing to bring suit to those suffering from actual or certainly impending harm.[2] In doing so, courts direct their resources to those most in need of judicial redress.[3]

In 1990, Congress enacted the Americans with Disabilities Act (ADA), a law intended to prevent discrimination against those with physical or mental

[1] *See* Summers v. Earth Island Inst., 555 U.S. 488, 492 (2009) (describing how, according to Article III in the Constitution, the courts' power is restricted to redress or stop unlawful injury to persons, whether those injuries are actual or imminent).

[2] *See id.* (reasoning that to allow relief based on anything less than real need would grant courts outsized power over the legislature and the executive branch). In 1992, the U.S. Supreme Court established the modern framework of standing in *Lujan v. Defenders of Wildlife*. *See* 504 U.S. 555, 560–61 (1992) (analyzing the history of Article III analysis to summarize the elements of standing). For a plaintiff to have standing, the Court in *Lujan* held that, firstly, they must have suffered an "injury in fact" that is both concrete and not merely hypothetical; secondly, that the injury is reasonably traceable to the defendant's action that the plaintiff is challenging; and thirdly, that the court deciding in the plaintiff's favor would likely redress the alleged injury. *Id.* Upon the opinion's release, scholars criticized *Lujan* for misinterpreting the Constitution and expanding the judiciary's power in determining who could bring a claim before federal courts. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992) (arguing that there is no textual or historical basis for *Lujan*'s interpretation of Article III).

[3] *See Summers*, 555 U.S. at 493 (quoting Warth v. Seldin, 422 U.S. 490, 498–99 (1975)) (asserting that standing requires the plaintiff to allege a personal enough stake in a controversy's outcome that federal jurisdiction is warranted).

disabilities.[4] Under the ADA, plaintiffs may bring suits over both active discrimination and over systems that act as barriers blocking disabled people from fully integrating with the public.[5] In its enactment, Congress asserted that the ADA's purpose was to redress longstanding wrongs against a marginalized population.[6]

The U.S. Department of Justice (DOJ) promulgated regulations to further the aims of the ADA.[7] In 1999, the U.S. Supreme Court established in *Olmstead v. L.C. ex rel. Zimring* a test to determine whether public entities were unjustifiably institutionalizing certain individuals—and thus segregated—based on their disability.[8] Seven circuit courts—relying on various arguments—in turn

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[4] *See* Americans with Disabilities Act of 1990, Pub. L. No. 101–336, § 2(b)–(b)(1), 104 Stat. 327, 329 (codified as amended at 42 U.S.C. § 12101(b)–(b)(1)) ("It is the purpose of this Act . . . to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."). The original versions of the bill were first introduced in both houses of Congress in 1988. 134 CONG. REC. 9542, 9604 (1988). Sponsors of the bill emphasized the large number of disabled individuals in the United States and described how these individuals were often barred from full employment and participation in society—not because of the challenges of their disability, but because of discrimination against them by others. *See id.* at 9543, 9604 (noting how 36 million Americans have disabilities, but many could be gainfully employed if it were not for discrimination against them); *see also* Americans with Disabilities Act of 1990 § 2(a)(1) (updating the number of disabled Americans to 43 million and growing); *CDC Data Shows Over 70 Million U.S. Adults Reported Having a Disability*, CDC (July 16, 2024), https://www.cdc.gov/media/releases/2024/s0716-Adult-disability.html [perma.cc/X3U2-XTS2] (noting how the disabled population in the United States is estimated to exceed 70 million as of 2022). Opposition to the Americans with Disabilities Act (ADA) focused on the costs of accommodation by private entities and the scope of retrofitting requirements. *See* 134 CONG. REC. 9542–43 (1988) (statement of Sen. John McCain) (outlining Senator John McCain's reservations about the scope of the bill, despite becoming a cosponsor); Steven A. Holmes, *Measure Barring Discrimination Against Disabled Runs Into Snag*, N.Y. TIMES, Mar. 13, 1990, at A20 (describing the H.W. Bush administration's opposition to increasing the penalties noncompliant businesses would face under the ADA). Disability activists strongly supported the passage of the 1990 bill as a pathway to increased integration into society. *See* Steven A. Holmes, *The Disabled Find a Voice, and Make Sure It Is Heard*, N.Y. TIMES, Mar. 18, 1990, at E5 (describing how increases in private employment and advances in medicine have shifted disability activists' focus from merely gaining government support to wider protections).

[5] *See* Americans with Disabilities Act of 1990 § 203 (providing any individual who alleges discrimination based on disability the power to enforce the public service section of the ADA); *id.* § 102(b) (defining disability discrimination as inclusive both of limiting employment opportunities of those with disabilities, and of not making reasonable accommodations for employees with disabilities at work); *id.* § 202 (prohibiting a public entity's services from excluding or discriminating against individuals with disabilities); *id.* § 107(a) (providing both the federal Attorney General and any individual who alleges discrimination based on disability the power to enforce the employment section of the ADA).

[6] *See id.* § 2(b), (b)(4) ("It is the purpose of this Act . . . to address the major areas of discrimination faced day-to-day by people with disabilities.").

[7] *See* 28 C.F.R. § 35.101 (2026) (stating that the purpose of the following regulation is to implement the ADA, emphasizing broad protection of those with disabilities).

[8] *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 587 (1999) (summarizing the three parts of what would be titled the *Olmstead* test). To have a discrimination claim under *Olmstead*, the Court held that (1) public treatment professionals judge that community-based treatment is appropriate for an individual, (2) the affected individual is willing to utilize community treatment, and (3) the state's availa-

determined that those merely at risk of such institutionalization also have a tangible enough injury for a discrimination claim.[9] A 2023 case from the U.S. Court of Appeals for the Fifth Circuit, *United States v. Mississippi*, recently bucked traditional interpretation and excluded at-risk individuals from bringing a claim.[10]

In analyzing this new split with respect to the interpretation of the *Olmstead* test, this Comment proceeds in three parts.[11] Part I discusses the history of the *Olmstead* test and its interpretations, and introduces the facts of *Mississippi*.[12] Part II explores various circuits' reasoning on whether to include at-risk individuals within the scope of *Olmstead*.[13] Part III, finally, argues that the Fifth Circuit unnecessarily strayed from other circuits' holdings, and that the Supreme Court, at the next available opportunity, should resolve this circuit split in favor of previous rulings.[14]

I. BACKGROUND

In 2023, in *United States v. Mississippi*, the U.S. Court of Appeals for the Fifth Circuit held that public policies that put mentally ill individuals at risk of institutionalization were not discriminatory under Title II of the ADA.[15] Such a holding splits with other circuits' reasoning that those individuals fell within the test for discrimination that the U.S. Supreme Court developed in *Olmstead*

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ble resources for the mentally disabled population can reasonably accommodate the placement of the individual within the community. *Id.* Progress on actually stopping unjustified institutionalization is mixed. *See* Robyn Powell, *Disabled People Have Had The Legal Right to Live in Their Communities for 20 Years. But That's Still Not the Reality for Many*, REWIRE NEWS GRP. (June 19, 2019), https://rewirenewsgroup.com/2019/06/19/disabled-people-have-had-the-legal-right-to-live-in-their-communities-for-20-years-but-thats-still-not-the-reality-for-many/ [perma.cc/3L5J-DRWX] (noting how many states still practice unjustified institutionalization through both medical treatment and incarceration).

[9] *See* Isaac A. v. Carlson, 775 F. Supp. 3d 1296, 1347 (N.D. Ga. 2025) (describing the current circuit split on interpreting the *Olmstead* test). Out of the seven circuits that have taken up the issue, six have agreed that individuals at risk of institutionalization have claims under *Olmstead*. *Id.*; *see Olmstead*, 527 U.S. at 607 (providing the factors that the *Carlson* court seeks interpretation of).

[10] *See* United States v. Mississippi, 82 F.4th 387, 396 (5th Cir. 2023) (holding that Mississippi was not violating the ADA through its institutionalization standards, and acknowledging how the Fifth Circuit departs here from the common interpretation of the *Olmstead* test); *see also Olmstead*, 527 U.S. at 607 (providing the test factors that the Fifth Circuit newly interpreted).

[11] *See infra* notes 15–87 and accompanying text.

[12] *See infra* notes 15–44 and accompanying text.

[13] *See infra* notes 45–67 and accompanying text.

[14] *See infra* notes 68–87 and accompanying text.

[15] *See* Americans with Disabilities Act of 1990, Pub. L No. 101-336, § 202, 104 Stat. 327, 337 (codified as amended at 42 U.S.C. § 12132) (prohibiting public entities from discriminating against people with disabilities); *Mississippi*, 82 F.4th at 398 (holding that *Olmstead* should be interpreted more narrowly than the federal government attempts to read it); *see also Olmstead*, 527 U.S. at 607 (providing the factors that the Fifth Circuit discusses).

v. L.C. ex rel. Zimring in 1999.[16] Section A of this Part outlines Title II of the ADA and the test for discrimination through isolation under the title as devised in *Olmstead*.[17] Section B discusses various courts' analyses of the *Olmstead* test with regard to an individual's risk of institutionalization and showing of sufficient injury for standing.[18] Section C outlines the factual and procedural history of *Mississippi*.[19]

A. Discrimination Under the Americans with Disabilities Act and the Olmstead *Test*

The ADA's purpose is to eliminate discrimination against those with disabilities.[20] Title II of the Act focuses on public entities, prohibiting discrimination by such organizations against qualified individuals with disabilities.[21] Federal regulations define disability discrimination to include public entities neglecting to provide disability-integrated settings for their activities.[22] In 1999, in *Olmstead*, the U.S. Supreme Court held that in providing integrated settings, states must—when appropriate—place individuals with mental disa-

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[16] *See Olmstead*, 527 U.S. at 587 (summarizing the Supreme Court's test for determining whether institutionalization of mentally disabled persons constitutes discrimination under the ADA); *Mississippi*, 82 F.4th at 396 (acknowledging how the Fifth Circuit departs in this opinion from other circuits' interpretation of the *Olmstead* test); *see, e.g.*, Waskul v. Washtenaw Cnty. Cmty. Mental Health, 979 F.3d 426, 460 (6th Cir. 2020) (holding that plaintiffs may establish a claim for discrimination under Title II of the ADA by showing they are at severe risk of institutionalization for mental disability); Steimel v. Wernert, 823 F.3d 902, 906–08, 912 (7th Cir. 2016) (holding that plaintiffs have a discrimination claim when a change in their Medicaid waivers prevented them from affording care without institutionalization); Davis v. Shah, 821 F.3d 231, 263–64 (2d Cir. 2016) (holding similarly to *Waskul* and *Steimel*); *see also infra* notes 28–30 and accompanying text (explaining *Steimel* further); *infra* notes 34–36 and accompanying text (providing additional explanation of *Waskul*). *Davis* concerned New York's Medicaid program—which in 2011 limited provision of orthopedic footwear and compression stockings to its recipients, putting them at risk of requiring more intensive care. *See* 821 F.3d at 241–42 (outlining the change in New York's Medicaid program and the plaintiffs' diagnoses).

[17] *See infra* notes 20–25 and accompanying text.

[18] *See infra* notes 26–36 and accompanying text.

[19] *See infra* notes 37–44 and accompanying text.

[20] *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b)(1), 104 Stat. 327, 329 (codified as amended at 42 U.S.C. § 12101(b)(1)) (providing the ADA's purpose).

[21] 42 U.S.C. § 12132. A qualified individual with a disability is someone with a disability who meets the required eligibility standards to receive certain services from a public entity. *Id.* § 12131(2). A public entity is any State government or any local government, as well as those entities' agencies and departments. *Id.* § 12131(1).

[22] 28 C.F.R. § 35.130(d) (2026). Courts refer to this regulation as the "integration mandate." *See, e.g.*, United States v. Mississippi, 82 F.4th 387, 390 (5th Cir. 2023) (utilizing the term "integration mandate" in reference to the aforementioned regulation). Disability rights activists have recognized the importance of including integrated care within the scope of reform since shortly after the ADA's original passage. *See* Steven A. Holmes, *Disabled People Say Home Care Is Needed to Use New Rights*, N.Y. TIMES, Oct. 14, 1990, at 22 (describing how much of public disability care focuses more on nursing homes and larger institutions, instead of on in-home support that would allow greater integration into society).

bilities into community settings for care instead of institutionalizing them.[23] *Olmstead* triggers when (1) treatment professionals find community-based treatment appropriate, (2) affected individuals are not against the treatment, and (3) state disability resources can reasonably accommodate placement.[24] The Supreme Court structured the three-pronged test to minimize unjustified segregation without overreaching into unreasonable regulation of a state's services.[25]

B. Interpretations of the Olmstead *Test as Applied to an Individual's Risk of Isolation*

Several circuits have analyzed whether the *Olmstead* test can establish a claim for ADA discrimination not only for individuals unjustifiably institutionalized, but also for individuals merely at risk of such institutionalization.[26] In

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[23] *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 607 (1999) (outlining when community settings are appropriate for those with mental disabilities). *Olmstead* concerned two institutionalized women who could reside in community programs, as determined by treatment professionals. *Id.* at 581. The women filed suit against state officials when they refused to release the women into community care. *Id. Olmstead* does not strictly define "community settings"; states have, however, worked to comply with *Olmstead* through reforms allowing disabled individuals receiving care to live with others in the general community, participate equally in societal activities, and be meaningfully employed. *See* Samuel R. Bagenstos, *From Integrationism to Equal Protection: tenBroek and the Next 25 Years of Disability Rights*, 13 U. ST. THOMAS L.J. 13, 16–17 (2016) (discussing the impact of *Olmstead* on state systems for supporting those with disabilities).

[24] *Olmstead*, 527 U.S. at 607. Justice Kennedy concurred in the judgment, emphasizing the reasonableness aspect of the *Olmstead* test's third prong, and arguing the test should not require a state to create a community health program where none existed before, especially if its resources are limited. *Id.* at 612–13 (Kennedy, J., concurring). He also emphasized that in analyzing discrimination claims concerning institutionalization, courts should carefully consider the individual disabilities, regimens, and degrees of integration involved. *See id.* at 613–14 ("The issue whether respondents have been discriminated against under § 12132 by institutionalized treatment cannot be decided in the abstract, divorced from the facts surrounding treatment programs in their State.").

[25] *See id.* at 587, 600–03 (elaborating on the negative consequences of unjustified institutionalization grounding the *Olmstead* test, but also narrowing the lower court's interpretation of the "reasonable modifications" regulation to ensure a plaintiff's remedy is properly weighed against the state's mental health policies as a whole).

[26] *See, e.g.*, Waskul v. Washtenaw Cnty. Cmty. Mental Health, 979 F.3d 426, 460–61 (6th Cir. 2020) (holding that plaintiffs can establish Title II discrimination claims by showing major risk of institutionalization for mental disability); Steimel v. Wernert, 823 F.3d 902, 911–13 (7th Cir. 2016) (same); Davis v. Shah, 821 F.3d 231, 263–64 (2d Cir. 2016) (holding in concert with *Waskul* and *Steimel*, but discussing physical disability). The question of standing regarding disability discrimination claims is a continuing issue; circuit courts have also needed to analyze whether plaintiffs "testing" a party's compliance with the ADA held Article III standing to sue under the Act. *See* Laufer v. Naranda Hotels, LLC, 60 F.4th 156, 162 (4th Cir. 2023) (holding that a tester plaintiff with no concrete plans to use the defendant's services still had Article III standing to bring ADA claims); Lauren Pezzi, *Comment*, *Struggling to Stay Standing: Circuit Courts' Varying Approaches to Civil Rights Testers and Article III Standing Requirements*, 66 B.C. L. REV. 2019, 2019–20 (2025) (referencing *Laufer*'s holding). Unlike the issue of standing for risks of institutionalization, circuit courts are more split on the issue of tester plaintiffs having standing to sue under the ADA. *See* Pezzi, *supra*, at 2028–29 (noting how the First, Fourth, and Eleventh Circuits have held that ADA tester plaintiffs possessed standing, whereas the Second, Fifth, and Tenth Circuits have rejected that conclusion).

performing such an analysis, courts consider whether the risk of institutionalization constitutes an injury that creates standing according to Article III of the Constitution.[27]

In 2016, in *Steimel v. Wernert*, the U.S. Court of Appeals for the Seventh Circuit addressed the question with respect to a new Medicaid waiver standard preventing the mentally disabled plaintiffs from acquiring certain community-based health services.[28] In reversing the summary judgment ruling against the plaintiffs, the court held that being at risk of institutionalization was sufficient for a discrimination claim under *Olmstead*.[29] The Seventh Circuit based this holding partly on its own interpretation of federal regulations, and partly on guidance for the *Olmstead* test issued by the DOJ—which explicitly extended the integration mandate to cover at-risk individuals.[30] Several other courts—including the Second, Fourth, and Ninth Circuits—utilized this guidance to extend the integration mandate to at-risk individuals in a similar manner.[31]

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[27] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60 (1992) (providing the modern framework of injury and standing for federal courts); *see, e.g.*, United States v. Mississippi, 400 F. Supp. 3d 546, 552–53 (S.D. Miss. 2019), *rev'd*, 82 F.4th 387 (5th Cir. 2023) (discussing how Mississippi's argument that the federal government lacked standing, partially for only featuring at-risk individuals, implicated Article III).

[28] *See Steimel*, 823 F.3d at 908 (describing how changes in state medical care made the plaintiffs unable to live in the community as they once did). *Steimel* concerned three waiver programs under Indiana's Medicaid framework. *Id.* at 906. In 2011, the agency running the program switched many developmentally disabled individuals from an uncapped service waiver to a version capped at $16,545 annually. *Id.* Some were able to qualify for a different uncapped waiver, but not all. *Id.* The plaintiffs claimed that by depriving them of such services through the waiver system, the defendant state placed them at risk of undergoing institutionalization to attain the necessary level of supervision. *See id.* at 908 (describing the plaintiffs' claims that without their previous level of paid supervision, they were likely to injure themselves severely without institutionalization).

[29] *Olmstead*, 527 U.S. at 587; *see Steimel*, 823 F.3d at 914 (analyzing *Olmstead*'s three factors). The court also noted that isolation in the home from a lack of support could also constitute the unjustified isolation that *Olmstead* covers. *Steimel*, 823 F.3d at 910–11.

[30] *See Steimel*, 823 F.3d at 910–13 (discussing both the plain meaning of the text within 28 C.F.R. § 35.130(d), and the explicit guidance from the Department of Justice (DOJ) promoting a broad interpretation of the agency's regulation) (citing 28 C.F.R. § 35.130(d) (2026)); U.S. Dep't of Justice, *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., https://archive.ada.gov/olmstead/q&a_olmstead.htm [perma.cc/28Y2-22N8] (Feb. 25, 2020) (stating explicitly that ADA and *Olmstead* discrimination claims extend to those at risk of institutionalization); *see also Olmstead*, 527 U.S. at 583 (summarizing the purpose of the ADA that the Court bases the *Olmstead* test in). Despite the DOJ guidance not being an official regulation, the Seventh Circuit was comfortable deferring to it in its interpretation of its own regulations, given previous caselaw. *Steimel*, 823 F.3d at 911 (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).

[31] *See, e.g.*, *Davis*, 821 F.3d at 262–63 ("We find DOJ's and our sister circuits' interpretation of *Olmstead* both consistent with the integration mandate and well-reasoned, and we adopt it as our own."); Pashby v. Delia, 709 F.3d 307, 322 (4th Cir. 2013) ("[W]e are especially swayed by the DOJ's determination . . . ."); M.R. v. Dreyfus, 663 F.3d 1100, 1117–18 (9th Cir. 2011), *opinion amended and superseded on denial of reh'g*, 697 F.3d 706 (9th Cir. 2012) ("DOJ's interpretation is not only reasonable; it also better effectuates the purpose of the ADA . . . ."); *see also Olmstead*, 527 U.S. at 607 (providing the test factors that the Second Circuit in *Davis*, the Fourth Circuit in *Pashby*,

In 2019, the U.S. Supreme Court clarified the level of deference assumed to agency guidance in *Kisor v. Wilkie*—holding that courts should only give such deference in cases where the agency's regulations are ambiguous.[32] Despite this clarification, courts have continued to include individuals at risk of institutionalization within the scope of ADA discrimination under *Olmstead*.[33]

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and the Ninth Circuit in *Dreyfus* adopt interpretation of). *Pashby* concerned a Medicaid program in North Carolina offering in-home care services. 709 F.3d at 313–14. In 2011, the State switched to a framework with stricter eligibility for in-home services compared to patients in adult care homes, a system that the plaintiffs alleged was discriminatory under the ADA. *Id.* at 314–15. *Dreyfus* concerned a Washington Medicaid program and its provision of at-home medical support. 663 F.3d at 1102. In response to economic downturn, Washington's Department of Social and Health Services promulgated emergency regulations reducing available hours for at-home care. *Id.* at 1105. The plaintiffs, at least one of whom possessed severe mental disabilities, alleged discrimination under the ADA due to putting them at risk of institutionalization. *Id.* at 1106, 1108.

[32] *See* Kisor v. Wilkie, 588 U.S. 558, 574–75 (2019) (reasoning that if courts always gave deference to agency guidance, agencies would be able to remake the regulations into whatever they wish through reinterpretation). *Kisor* considered whether the courts should defer to regulatory interpretation by the Department of Veterans Affairs of rules on retroactive benefits. *Id.* at 564–65. The Supreme Court based the requirement for ambiguity in the doctrine outlined in its 1997 case, *Auer v. Robbins*. *See id.* at 563 (citing Auer v. Robbins, 519 U.S. 452 (1997)) (summarizing *Auer* deference as deference to reasonable agency readings of truly ambiguous regulations). The Court compared the level of ambiguity required to that needed for *Chevron* deference, a parallel doctrine for agency interpretation of statutes first developed in the Court's 1984 case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. See id.* at 575–76 (comparing ambiguity and interpretive analysis for *Auer* deference to that needed for *Chevron* deference); Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984), *overruled by,* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (holding the original requirement to deference to agencies interpreting ambiguous statutes). In 2024, the Court overturned *Chevron* deference through *Loper Bright Enterprises v. Raimondo*, requiring courts to interpret ambiguous law more independently of agency understanding. *See* 603 U.S. at 412 (overruling *Chevron*). The Court's *Loper Bright* ruling has raised concerns that *Auer* deference is also at risk. *See* Matthew P. Allen, *A Matter of Deference*, 34 SEC. LITIG. 7, 7–8 (2025) (arguing that the overturning of *Chevron* also likely undermines *Auer*).

[33] *See, e.g.*, Ind. Prot. & Advoc. Servs. Comm'n v. Ind. Fam. & Soc. Servs. Admin., 149 F.4th 917, 927 (7th Cir. 2025) (citing *Steimel*, 823 F.3d at 914) (carrying forward into 2025 *Steimel*'s pre-*Kisor* interpretation of the integration mandate to include those risking institutionalization); Waskul v. Washtenaw Cnty. Cmty. Mental Health, 979 F.3d 426, 460–61 (6th Cir. 2020) (finding the DOJ's guidance persuasive after *Kisor* in 2020, though also noting that the defendants did not contest including at-risk individuals as potential claimants). In 2025, the Seventh Circuit in *Indiana Protection & Advocacy Services Commission* utilized an *Olmstead* interpretation including at-risk individuals. *Ind. Prot. & Advoc. Servs. Comm'n*, 149 F.4th at 927. The case concerned an Indiana waiver program that paid two mothers in their roles as full-time caregivers for their severely disabled children. *Id.* at 920. In 2024, the Indiana Family and Social Services Administration began limiting possible reimbursement for parent providers of care. *See id.* at 922–24 (defining the types of assistance the Administration reimburses for, and describing the restrictions on higher pay placed on certain caretakers). Without the additional income and without access to skilled in-home nurse providers, the two mothers would likely have to place their children in institutions. *See id.* at 920–21 (describing the disabled children's needs and the possibility of institutionalization). In its opinion affirming a preliminary injunction against the Administration, the Seventh Circuit followed the inclusive *Olmstead* interpretation of *Steimel* but discussed neither *Kisor*'s 2019 holding nor the DOJ's guidance. *See id.* at 920, 927, 929–30 (affirming the district court's injunction, and discussing *Steimel*'s interpretation, but not citing

In 2020, in *Waskul v. Washtenaw County Community Mental Health*—as one example—the U.S. Court of Appeals for the Sixth Circuit analyzed a Medicaid budgeting scheme that reduced the amount of medically necessary services the plaintiffs could receive.[34] In *Waskul*, the plaintiffs alleged that the scheme—by depriving them of possible community-based services—put them at risk of requiring institutionalization to receive necessary aid.[35] On appeal, the Sixth Circuit held that *Olmstead* could still support discrimination claims of those at risk, observing that a contrary interpretation would require the institutionalization of plaintiffs before they could challenge a policy.[36]

C. History of United States v. Mississippi

Mississippi operated four psychiatric hospitals for mentally disabled individuals, and provides community mental health support for those not hospitalized.[37] In 2016, the United States filed suit against the State in district court, alleging that the State's practices discriminated against disabled individuals by unjustifiably denying them access to the most integrated community setting available.[38] In particular, the United States alleged that Mississippi's practices

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Kisor as a moderating development); *see also Olmstead*, 527 U.S. at 607 (providing the test factors that the Seventh Circuit interprets).

[34] *See Waskul*, 979 F.3d at 436, 438–39 (describing how a lower community living support budget forced aid recipients to reduce either caretaker payments or support hours).

[35] *See id.* at 439 (describing the plaintiffs' deteriorating health as due to reduced community care).

[36] *See id.* at 461 (citing Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1181 (10th Cir. 2003)) (following the Tenth Circuit's analysis of the issue).

[37] *See* Complaint at 9, 12, United States v. Mississippi, 400 F. Supp. 3d 546 (S.D. Miss. 2019), *rev'd*, 82 F.4th 387 (5th Cir. 2023) (No. 3:16-cv-622-CWR-FKB), 2016 WL 4260801 (claiming that Mississippi funds institutionalized care at the expense of mentally disabled individuals whom community services could care for). The United States emphasized in its complaint how the state was underfunding community care, despite its ability to direct Medicaid resources wherever they are most needed. *Id.* at 13. State performance reviews admitted the State's struggles with complying with integration requirements. *Id.* at 24–25. Thus, the federal government alleged that those in Mississippi with mental disabilities, but who did not live in an area with enough community services, were at risk of institutionalization, giving them grounds for a discrimination claim under Title II of the ADA. *Id.* at 25–26.

[38] *See Mississippi*, 400 F. Supp. 3d at 552 (summarizing the United States' allegations). In particular, the United States emphasized how the disparate funding between institutional and community care for the mentally disabled meant such individuals were unable to receive care in community settings, even if they qualified. *See* Complaint, *supra* note 37, at 3–4 (discussing the funding distribution across Mississippi's mental healthcare systems). Concerning the mental health institutions themselves, the United States also alleged that the state hospitals themselves unnecessarily secluded and regulated the lives of disabled patients. *See id.* at 9 (noting how disabled patients typically only interact with other patients and staff, how they have limits on visitation, travel, and scheduling, and how the hospitals are geographically distant from general society). Thus, those with mental disabilities must undergo isolated institutionalization for treatment, but upon release cannot access community care that would prevent future institutionalization. *See id.* at 10 (describing how many patients "cycle in and out" of Mississippi's psychiatric hospitals because of insufficient treatment in their own communities). In its investigation, the United States found that a random 2014 selection of adults in short-term

established *Olmstead* claims because the State does not adequately accommodate patients eligible for community-based treatment despite having the available resources.[39] Notably, the United States asserted claims under *Olmstead* both for people currently institutionalized and for those at risk of institutionalization.[40] Mississippi, during the trial, argued that individuals at risk of institutionalization did not fall within the scope of *Olmstead*.[41]

The district court held in 2019, based on other circuits' holdings, that those at risk of institutionalization did fall within *Olmstead* and ADA claims, and it found that Mississippi's systems violated the ADA's integration mandate.[42] Mississippi appealed the remedial order issued by the court.[43] The Fifth Circuit reversed the lower court's judgment, holding that the possibility of unjustified institutionalization alone does not establish a discrimination claim under Title II of the ADA, and that there was no evidence showing the State unjustifiably institutionalized anyone.[44]

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stay at Mississippi State Hospital featured a majority who had several previous admissions. *See id.* at 11 (finding that over 55% of adults on a particular day had more than two prior admissions, with 11% having more than ten prior admissions). One young adult at the hospital in 2015 had twenty-two prior admissions. *See id.* (recounting one young adult male's medical history).

[39] *See* Complaint, *supra* note 37, at 13–14, 25–26 (emphasizing that reasonable modification of Mississippi's medical care would allow disabled individuals to avoid institutionalization without unreasonable costs to the State).

[40] *See id.* at 26 (pairing discussion of those currently in state hospitals with those at risk of hospitalization); *see also* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 607 (1999) (stating the test that the federal government is applying to sue). The United States based its claims on an investigation into Mississippi's mental health services—which are summarized in a 2011 letter to the State. Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, Civil Rights Div., to Gov. Haley R. Barbour, State of Mississippi 3, 5–6 (Dec. 22, 2011) [hereinafter Mississippi Letter of Findings], https://www.justice.gov/sites/default/files/crt/legacy/2012/01/26/miss_findletter_12-22-11.pdf [perma.cc/ZKH9-MHCE] (describing the federal government's methodology and findings, particularly how the State has failed to implement its *Olmstead* plan fully); Complaint, *supra* note 37, at 26–27 (recounting how the federal government investigated Mississippi over alleged discriminatory practices and later reported its findings). This investigation included people with mental disabilities both in and out of psychiatric institutions. Mississippi Letter of Findings, at 5–6. The letter also discusses individuals with mental illnesses who "cycle"; people not currently institutionalized, but whom the State repeatedly institutionalized and discharged without providing sufficient support for their condition. *Id.* at 20.

[41] *See Mississippi*, 400 F. Supp. 3d at 553 (analyzing the State's argument that previous cases supporting at-risk claims were distinguishable from the case at hand).

[42] *See id.* at 553, 576–77 (utilizing holdings from the Second, Fourth, Seventh, and Ninth Circuits to find that Mississippi's services fulfilled the *Olmstead* test, and that the state lacked any affirmative defenses); *see also Olmstead*, 527 U.S. at 607 (summarizing the factors of the *Olmstead* test).

[43] *See* United States v. Mississippi, 82 F.4th 387, 391 (5th Cir. 2023) (providing the procedural history of the prior case, specifically the remedial order that predicated Mississippi's appeal).

[44] *See id.* at 398 (emphasizing that the United States had not based its discrimination claims on a risk of discrimination).

II. The Fifth Circuit's Split from the Majority on *Olmstead v. L.C. ex rel. Zimring*

The U.S. Court of Appeals for the Fifth Circuit in *United States v. Mississippi* in 2023 splits from past circuits on the 1999 *Olmstead v. L.C. ex rel. Zimring* test that the U.S. Supreme Court implemented.[45] Whereas other circuits allow both institutionalization and risk of institutionalization to establish ADA discrimination claims—*Mississippi* holds that only the former situation may establish such claims.[46] Section A of this Part describes other courts' reasoning on including risk of institutionalization within *Olmstead*'s scope.[47] Section B discusses the Fifth Circuit's reasoning in excluding that same group from *Olmstead*.[48]

A. Other Courts' Interpretations of the Olmstead *Test*

Circuit courts, interpreting the *Olmstead* test before *Mississippi* in 2023, have held that those at risk of institutionalization may have discrimination claims under Title II of the ADA.[49] Circuit courts reached this conclusion both in consideration and independent of the DOJ guidance on the matter.[50]

Since the DOJ issued its guidance on interpreting the *Olmstead* test and the integration mandate, several circuits have utilized the guidance to include those at risk of institutionalization under *Olmstead*.[51] *Steimel v. Wernert* is one

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[45] *See id.* at 392, 396–97 (referencing the Second, Fourth, Sixth, Seventh, Ninth, and Tenth Circuits all as jurisdictions that include at-risk individuals within the scope of *Olmstead*); *see also Olmstead*, 527 U.S. at 607 (providing the factors in the *Olmstead* test).

[46] *See Mississippi*, 82 F.4th at 392 ("Nothing in the text of Title II, its implementing regulations, or *Olmstead* suggests that a *risk of institutionalization*, without actual institutionalization, constitutes actionable discrimination."); *see also Olmstead*, 527 U.S. at 607 (providing *Olmstead*'s factors).

[47] *See infra* notes 49–59 and accompanying text.

[48] *See infra* notes 60–67 and accompanying text.

[49] *See, e.g.*, Waskul v. Washtenaw Cnty. Cmty. Mental Health, 979 F.3d 426, 435–36, 460–61 (6th Cir. 2020) (maintaining that the plaintiff Medicaid recipients may establish a claim for discrimination under Title II of the ADA by showing they are at severe risk of institutionalization for mental disability); Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1184 (10th Cir. 2003) (holding that Medicaid benefit recipients, at risk of entry into a nursing care home due to the ending of prescription benefits, would have a discrimination claim under the ADA).

[50] *See* Davis v. Shah, 821 F.3d 231, 262–63 (2d Cir. 2016) (applying the DOJ's statement to support including at-risk individuals within *Olmstead* and the integration mandate); *Fisher*, 335 F.3d at 1175, 1184 (coming to its inclusionary conclusion before the 2011 enactment of the DOJ's guidance); U.S. Dep't of Justice, *supra* note 30 (extending ADA and *Olmstead* discrimination claims to those at risk of the state institutionalizing them); *see also Olmstead*, 527 U.S. at 607 (outlining the factors both the *Fisher* court and the *Davis* court interpret).

[51] *See Davis*, 821 F.3d at 262–63 (utilizing the DOJ's guidance in its *Olmstead* analysis); *Olmstead*, 527 U.S. at 607 (providing the *Olmstead* factors); Steimel v. Wernert, 823 F.3d 902, 912–13 (7th Cir. 2016) (applying the guidance to its own interpretation of the integration mandate); Pashby v. Delia, 709 F.3d 307, 322 (4th Cir. 2013) ("[W]e are especially swayed by the DOJ's determination that 'the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings.'" (quoting U.S. Dep't of Justice, *supra* note 30)).

example from 2016, in which the U.S. Court of Appeals for the Seventh Circuit held it proper to defer to the DOJ in interpreting its own regulation, unless the interpretation is clearly inconsistent with the rule.[52] Also in 2016, the U.S. Court of Appeals for the Second Circuit ruled similarly in *Davis v. Shah*, holding that the cessation of providing orthopedic supports under New York's Medicaid plan placed the plaintiffs at risk of unjustified institutionalization.[53] The court used similar reasoning to that employed by the Seventh Circuit in *Steimel* and also discussed other circuits' comparable conclusions.[54]

Both before and after the DOJ's issuance of this guidance, circuit courts still included those at risk of institutionalization within the scope of the *Olmstead* test.[55] The first of these cases occurred in 2003—shortly after *Olmstead*—and the U.S. Court of Appeals for the Sixth Circuit most recently ruled on the issue in 2020.[56] In the 2003 case, *Fisher v. Oklahoma Health Care Authority*, the U.S. Court of Appeals for the Tenth Circuit ruled that the plaintiffs' need for certain prescriptions put them at risk of entry into a nursing home if the State halted a Medicaid program providing medication.[57] Although the plaintiffs would not willingly enter a nursing home for support if the program ended, the circuit court held that the risk of institutionalization still provided grounds for a discrimination claim.[58] In 2020, the Sixth Circuit ruled in *Waskul v. Washtenaw County Community Mental Health* that at-risk individuals could claim Title II discrimination, rather than requiring them to first suffer the institutionalization to then sue.[59]

B. The Split of United States v. Mississippi

In 2023, in *Mississippi*, the Fifth Circuit took a stance contrary to the other circuits, holding that the risk of institutionalization does not provide grounds

[52] *Steimel*, 823 F.3d at 911 (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).

[53] *See Davis*, 821 F.3d at 241–42, 261 (applying the *Olmstead* test to the controversy of New York restricting healthcare coverage for orthopedic products—without which some individuals' disabilities would worsen); *see also Olmstead*, 527 U.S. at 607 (listing the factors that the *Davis* court applies).

[54] *See Davis*, 821 F.3d at 263 (finding inclusive interpretations of the test by the DOJ and the other circuits well-reasoned).

[55] *See Olmstead*, 527 U.S. at 607 (providing the Supreme Court's factors in determining discriminatory institutionalization); Waskul v. Washtenaw Cnty. Cmty. Mental Health, 979 F.3d 426, 461 (6th Cir. 2020) (basing an expansive understanding of *Olmstead* on analysis published before the DOJ's 2011 guidance); Radaszewski *ex rel.* Radaszewski v. Maram, 383 F.3d 599, 599, 608, 614–15 (7th Cir. 2004) (moving forward on an opinion based on a plaintiff who is not currently institutionalized, but is at risk of being so, before the enactment of the DOJ guidance); *Fisher*, 335 F.3d at 1175, 1181, 1184 (interpreting *Olmstead* and the integration mandate before the 2011 guidance).

[56] *Waskul*, 979 F.3d at 461; *Fisher*, 335 F.3d at 1181.

[57] *Fisher*, 335 F.3d at 1175, 1184.

[58] *Id.* at 1184.

[59] *Waskul*, 979 F.3d at 461 (citing *Fisher*, 335 F.3d at 1181).

for a discrimination claim under the ADA.[60] The court based this holding on the text of ADA's Title II and the *Olmstead* opinion—which did not explicitly include the risk of institutionalization as grounds for a discrimination claim.[61] The court criticized other circuits' inclusion of those at risk as unjustifiably expanding the meaning of the statute.[62] The court also rejected relying on the DOJ's guidance concerning *Olmstead* that included at-risk patients in its scope, finding it non-binding on interpreting both the statute and the decision.[63]

In the court's interpretation of the *Olmstead* test, it determined that the test did not intend to include those at risk of institutionalization.[64] Analyzing the first two prongs of the *Olmstead* test, the court emphasized the input of state medical professionals and affected patients in finding whether isolation is unjustified.[65] Such input—in the court's view—is by necessity patient-specific and does not include systemic analysis of those merely at risk of institutionalization.[66] The

[60] *See Olmstead*, 527 U.S. at 607 (providing the test for unjustified institutionalization creating ADA claims); United States v. Mississippi, 82 F.4th 387, 398 (5th Cir. 2023) (holding that the federal government has not established any cognizable claim of discrimination against Mississippi and its mental health programs); *see, e.g.*, *Waskul*, 979 F.3d at 461 (holding within the Sixth Circuit that allowing those at risk of institutionalization to assert discrimination claims is the most reasonable interpretation of the ADA and *Olmstead*); *Radaszewski ex rel. Radaszewski*, 383 F.3d at 608, 614–15 (allowing a plaintiff at risk of institutionalization to move forward on a discrimination claim within the Seventh Circuit); *Fisher*, 335 F.3d at 1184 (holding within the Tenth Circuit that creating a risk of separation into institutions constitutes discrimination).

[61] *See* 42 U.S.C. § 12132 (prohibiting exclusion of disabled persons from a public entity's services or programs, not risk of exclusion); *Olmstead*, 527 U.S. at 607 (outlining the factors of the *Olmstead* test, and not explicitly mentioning risk of institutionalization as an injury states must avoid); *Mississippi*, 82 F.4th at 391–92 (analyzing the text of both Title II of the ADA and *Olmstead*).

[62] *See Mississippi*, 82 F.4th at 392 (criticizing the holding the U.S. Court of Appeals for the Tenth Circuit provided in *Fisher*). The court holds that the facts of Mississippi's commitment system make it a poor candidate for the *Olmstead* test, as Mississippi has several barriers in place to try and limit unjustified discrimination. *Id.* at 393; *see Olmstead*, 527 U.S. at 599 (discussing the "least restrictive" environment ideal the Fifth Circuit believes Mississippi meets). The court distinguishes several cases from the present facts by asserting they dealt with patients losing medical support for physical disabilities—which a court could more certainly link to future institutionalization, compared to losing individualized care for severe mental illnesses. *Mississippi*, 82 F.4th at 396–97.

[63] *Mississippi*, 82 F.4th at 393–94, 396–97. The Fifth Circuit emphasizes how the holding in *Kisor v. Wilkie* influenced this decision, reducing the deference granted to agencies' interpretations of their own regulations. *See id.* (citing Kisor v. Wilkie, 588 U.S. 558, 574–75 (2019)) (holding that opinions depending on the DOJ's guidance were now superseded by *Kisor*'s reduction of deference).

[64] *Id.* at 394. The Fifth Circuit discusses how Justice Kennedy conditioned his vote on a concurrence emphasizing reliance on the judgment of medical professionals in determining whether institutionalization was appropriate, thus making such determinations patient-specific and focused on those currently institutionalized. *Id.* at 394–95.

[65] *See id.* at 394–95 (holding that *Olmstead*'s requirement of the treating physician's testimony meant discrimination claims under *Olmstead* must necessarily be individual to the claimant*); see also Olmstead*, 527 U.S. at 610 (Kennedy, J., concurring) (qualifying the majority's list of factors).

[66] *See Mississippi*, 82 F.4th at 394 (interpreting that standards of professional evaluation and agreement to community care require analysis of a particular affected individual or group of individuals).

court also held that widely including anyone at risk goes against the requirement of definitive or impending harm to establish a claim in court.[67]

III. ANALYSIS: *UNITED STATES V. MISSISSIPPI* WAS WRONGLY DECIDED

Through *United States v. Mississippi* in 2023, the U.S. Court of Appeals for the Fifth Circuit created a circuit split for the U.S. Supreme Court's 1999 *Olmstead v. L.C. ex rel. Zimring* test and the DOJ's integration mandate.[68] The Supreme Court should grant certiorari at the next available opportunity and resolve the split in favor of the circuits including those at risk of institutionalization within *Olmstead*.[69] Part III of this Comment argues that both other circuits' particular arguments and wider principles of standing support such a conclusion by the Supreme Court.[70]

Firstly, whether the DOJ's guidance on *Olmstead* is binding has not impacted whether other courts adopted an inclusive interpretation of the test.[71] In *Mississippi*, the court criticized several opinions for relying on the DOJ's guidance, given the clarification the U.S. Supreme Court provided in 2019 with *Kisor v. Wilkie*.[72] Other circuits, however, have published opinions including

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[67] *See id.* at 397, 398 (concluding that neither the future possibility of Mississippi unjustifiably institutionalizing an unspecified individual, nor the mere possibility of Mississippi doing so to the whole state's population of mentally ill people, establishes a Title II discrimination claim); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (outlining the requirements for an actual injury or risk thereof to establish standing).

[68] *Mississippi*, 82 F.4th at 398; *see Olmstead*, 527 U.S. at 607 (summarizing the test for discriminatory institutionalization for mentally disabled individuals).

[69] *See, e.g.*, Davis v. Shah, 821 F.3d 231, 263 (2d Cir. 2016) (allowing at-risk disabled persons to state discrimination claims under *Olmstead*); Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1181 (10th Cir. 2003) (interpreting *Olmstead* to include those at risk of institutionalization); *see also Olmstead*, 527 U.S. at 607 (outlining the factors both the Tenth and Second Circuit are interpreting). Wider interpretation of *Olmstead* is not just judicially prudent; it is more likely to help those in need of disability support than any narrow analysis. *See, e.g.*, Venuri Siriwardane, *Study: Many Allegheny County Psych Hospitalizations Do More Harm Than Good*, PITT. PUB. SOURCE (July 28, 2025), https://www.publicsource.org/mental-health-study-reveals-dangers-of-302-commitments-allegheny-county/ [perma.cc/9KHG-8NN8] (describing a study linking involuntary hospitalization, especially of those with indefinite need of it, to negative outcomes for patients). Experts often link hospitalization to unnecessary trauma and suicidality, with decisions to hospitalize often showing racial biases against black patients. *See id.* (describing the personal account of a woman hospitalized at nineteen, as well as data collected from the official study).

[70] *See infra* notes 71–87 and accompanying text.

[71] *See* Waskul v. Washtenaw Cnty. Cmty. Mental Health, 979 F.3d 426, 461 (6th Cir. 2020) (agreeing with the holding in *Fisher* independent of the DOJ's guidance).

[72] *See Mississippi*, 82 F.4th at 393–94, 396–97 ("Legally, nearly all of the cases rely heavily, but mistakenly, on the DOJ guidance promoting the 'at risk' Title II discrimination claims."); U.S. Dep't of Justice, *supra* note 30 (providing the guidance serving as other courts' interpretive guidepost). Although the Fifth Circuit quotes "at risk" language in its argument, most of the cases it cites qualify the risk as serious. *Mississippi*, 82 F.4th at 396; *see* Steimel v. Wernert, 823 F.3d 902, 911 (7th Cir. 2016) (qualifying the level of required risk); *Davis*, 821 F.3d at 263 (qualifying similarly to *Steimel*); Pashby v. Delia, 709 F.3d 307, 322 (4th Cir. 2013) (qualifying similarly to other cases). The case

at-risk individuals within *Olmstead* both before the DOJ issued its guidance and after *Kisor*.[73] These cases did not rely on the agency guidance to reach their conclusions, instead relying on what they saw as a reasonable interpretation of *Olmstead* and the regulations at issue.[74] In focusing on the impact of the agency guidance, the Fifth Circuit ignores arguments other circuits have relied upon—arguments that, in the case of *Fisher v. Oklahoma Health Care Authority* from the Tenth Circuit in 2003, existed for twenty years by the time of *Mississippi*.[75]

Secondly, the Fifth Circuit, in refusing to adopt an expansive interpretation of *Olmstead*, unnecessarily holds counter to the general understanding of standing's injury requirement.[76] The Fifth Circuit, discussing a partial concurrence in the Sixth Circuit's 2020 *Waskul v. Washtenaw County Community Mental Health* decision, acknowledges that "risk of harm" may in fact provide standing for a claim.[77] This risk must be certain and impending to substitute justifiably for concrete injury, a requirement that by itself creates a balance between barring hypothetical claims and preventing excess harm from befalling the plaintiff.[78] The court, however, does not apply this idea to its interpreta-

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utilizing merely "at risk" language, *M.R. v. Dreyfus*, does so only in reference to a DOJ filing in the district court. *See* 663 F.3d 1100, 1117 (9th Cir. 2011), *opinion amended and superseded on denial of reh'g*, 697 F.3d 706 (9th Cir. 2012) (quoting Statement of Interest of the United States at 10, M.R. v. Dreyfus, 767 F. Supp. 2d 1149 (W.D. Wash. 2011) (No. 10-2052)) (discussing the deference the Ninth Circuit afforded the DOJ's interpretation in its analysis).

[73] *See, e.g.*, *Waskul*, 979 F.3d at 427, 461 (holding that the analysis in *Fisher* stood on its own, without relying on the DOJ's guidance); *Fisher*, 335 F.3d at 1175, 1181 (interpreting *Olmstead* and the integration mandate before 2011, the year the DOJ enacted its guidance); *see also Olmstead*, 527 U.S. at 607 (offering the subject of the *Fisher* and *Waskul* courts' analysis).

[74] *See Waskul*, 979 F.3d at 461 ("[T]he integration mandate's 'protections would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation.'" (quoting *Fisher*, 335 F.3d at 1181)).

[75] *See, e.g.*, *Fisher*, 335 F.3d at 1175, 1184 (deciding the matter of at-risk individuals in 2003).

[76] *See Mississippi*, 82 F.4th at 397 (quoting *Waskul*, 979 F.3d at 471 (Readler, J., concurring in part and dissenting in part)) (noting that courts customarily require a party's claim to show definitive harm, but also acknowledging Judge Readler's statement that mere risk may also establish a claim).

[77] *See id.* at 397 (summarizing Judge Readler's view that a "definitive harm" is required, but also noting Readler's admission that risk of harm is sufficient in some cases). The court in *Waskul* cites *Clapper v. Amnesty International, USA*, wherein the U.S. Supreme Court held that a statute allowing surveillance of certain non-U.S. citizens did not create an injury to organizations attempting to maintain confidentiality with targeted individuals. *See* Clapper v. Amnesty Int'l, USA, 568 U.S. 398, 406–07, 410–11 (2013) (describing the plaintiff organizations' claim of injury, and the Court's reasoning against it). The Court held, in particular, that the respondent organizations depended on a chain of inferences that authorities would approve, attempt, and be successful in surveillance, and that those organizations would be party to the particular surveilled communications. *Id.* at 410. As the respondents provided no proof that these inferences would certainly occur, they had not provided standing for their claim. *Id.* The Court held the respondents' other argument, that fear of surveillance caused them to implement costly confidentiality measures, groundless as well, as the Court reasoned actions out of fear for speculated conduct were not certainly impending enough for standing. *Id.* at 415–16.

[78] *Mississippi*, 82 F.4th at 397 (quoting *Waskul*, 979 F.3d at 471 (Readler, J., concurring in part and dissenting in part)).

tion of *Olmstead* and the integration mandate, instead emphasizing concrete harm and how the suit did not claim that Mississippi institutionalized any particular individual.[79] In doing so, the court restricts the scope of discrimination claims past the common conception of standing.[80] The Fifth Circuit did not need to adopt this restricted reading of *Olmstead* in order to reach its judgment—the court mentions several times how the federal government's survey does not prove imminent harm of institutionalization to any individual with mental illness in Mississippi.[81] Including those at risk of impending institutionalization claims within the ADA's scope would bring the Fifth Circuit in line with other federal jurisdictions and still allow the court to exclude the federal government's particular claims.[82]

Although the holdings of one circuit are not binding upon another, courts should presume such rulings—especially those in duplicate—as fairly reasoned opinions providing significant support to a particular perspective.[83] In doing so, circuits legitimize their own holdings by either agreeing with knowledgeable authority or by working in good faith to counter previous arguments.[84] Additionally, courts should rely not strictly on statutory wording for interpretation, but also on the constitutional principles shaping American jurisprudence; to do otherwise would be to ignore the fundamental roles the three federal branches are meant to fulfill.[85] In its interpretation of *Olmstead*, the Fifth Circuit in *Mississippi* neglected to consider fully both the breadth of reasoned opinions within other circuits and the constitutional elements of standing informing an independent reading.[86] The Supreme Court should thus realign

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[79] *Id.*

[80] *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 340–41 (2016) (noting how courts have historically recognized that injury requirements may be fulfilled by risks of harm, not just the harm itself).

[81] *See Mississippi*, 82 F.4th at 398 (emphasizing how the government's study does not name any individual that Mississippi unjustifiably institutionalized).

[82] *See Waskul*, 979 F.3d at 471 (Readler, J., concurring in part and dissenting in part) (noting the court could recognize "certainly impending" claims of institutionalization, without including a wider class of at-risk parties within *Olmstead*); *see, e.g.*, Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1181–82 (10th Cir. 2003) (interpreting *Olmstead* to include at-risk individuals, and describing the sufficient level of risk individuals face as them being "imperiled"); *see also Olmstead*, 527 U.S. at 607 (summarizing the test factors in question in *Waskul* and *Fisher*).

[83] *See* Stephen L. Wasby, *Intercircuit Conflicts in the Courts of Appeals*, 63 MONT. L. REV. 119, 129–30 (2002) (observing that circuit court judges carefully consider other circuits' opinions, especially when an opinion may result in a circuit split).

[84] *See id.* (noting how circuit opinions, in coming to their own conclusions on an issue, often discuss ongoing splits among the other circuits).

[85] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 559–60, 576–77 (1992) (discussing how fundamental the principle of standing is to Article III of the Constitution, and how Congress and the judiciary hold duties the other branches may not intrude upon).

[86] *See* Lauren Zipp, *Comment*, *To Be at Risk, or Not to Be at Risk? That Is the Question; What the Fifth Circuit Got Wrong About* Olmstead v. L.C. *ex rel.* Zimring, 74 AM. U. L. REV. F. 291, 317–18, 322–23 (2025) (discussing the flaws of the Fifth Circuit's decision both in isolation and in relation to other circuits' holdings).

the Fifth Circuit with its peers by including those at risk of institutionalization in the scope of *Olmstead* claims of discrimination.[87]

Conclusion

In 2023, in *United States v. Mississippi*, the U.S. Court of Appeals for the Fifth Circuit held that those at risk of unjustified institutionalization cannot bring discrimination claims based on the *Olmstead v. L.C. ex rel. Zimring* test. This decision split from circuits that interpreted the test more inclusively—both independently and in line with regulatory guidance from the Department of Justice. The Fifth Circuit's decision did not properly consider other circuits' interpretations and unnecessarily adopted a strict reading of the regulation counter to traditional Article III standing inquiries. In response, the Supreme Court should grant certiorari and resolve this split by siding with broad interpretations of *Olmstead* and allowing those at risk of unjustified institutionalization to sue for discrimination under the ADA.

Lucy T. Hanson

[87] *See, e.g.*, Davis v. Shah, 821 F.3d 231, 263 (2d Cir. 2016) (recognizing a widespread acceptance of allowing risk of institutionalization to support discrimination claims under *Olmstead*); Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1184 (10th Cir. 2003) (allowing risk of institutionalization brought about by a cap on prescriptions to establish a discrimination claim under *Olmstead*); *see also Olmstead*, 527 U.S. at 607 (outlining the test at the foundation of the circuit split).