10-235-cv (L)

Nos. 10-235-cv (L), 10-767-cv (con), 10-251-cv (con), 10-1190-cv (con)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DISABILITY ADVOCATES, INC., and UNITED STATES OF AMERICA,

Plaintiffs-Appellees

v.

NEW YORK COALITION FOR QUALITY ASSISTED LIVING, INC., and
(*See inside cover for continuation of caption*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS APPELLEE

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
Principal Deputy Assistant
Attorney General

JESSICA DUNSAY SILVER
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4757

(*Continuation of caption*)

EMPIRE STATE ASSOCIATION OF ASSISTED LIVING,

Movants-Appellants

and

DAVID A. PATERSON, in his official capacity as Governor of the State of New York, RICHARD F. DAINES, in his official capacity as Commissioner of the New York State Department of Health, MICHAEL F. HOGAN, in his official capacity as Commissioner of the New York State Department of Mental Health, NEW YORK STATE DEPARTMENT OF HEALTH, NEW YORK STATE OFFICE OF MENTAL HEALTH,

Defendants-Appellants

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

REGULATIONS:

REGULATIONS (continued): **PAGE**

RULES:

PRELIMINARY STATEMENT

This case involves a straightforward application of *Olmstead* v. *L.C.*, 527 U.S. 581 (1999), and the Attorney General's integration regulation under Title II of the Americans with Disabilities Act (ADA). That regulation provides: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d). The State argues that once it discharges individuals from state psychiatric facilities and places them in adult homes—for-profit facilities licensed, regulated, and reimbursed by the State that provide care and supervision for people with mental or physical disabilities—it has no duty to ensure those individuals are receiving state mental health services in the most integrated setting. The State's argument is untenable. No legal or factual justification exists for relieving the State of its federal obligations under the integration regulation when it discharges people with mental illness into privately operated institutions. Indeed, the district court expressly found that adult homes are institutions, that the State's supported housing program offers a more appropriate and integrated setting than adult homes, that virtually all of Disability Advocates, Inc.'s (DAI's) constituents are qualified to receive mental health services in a more appropriate and integrated setting, and that they do not oppose receiving services in such a setting. The State does not—and cannot—argue that these findings are clear error.

The State also cannot show that the district court erred in concluding that the State failed to establish a fundamental alteration defense. As the district court found, each person with mental illness who moves from an adult home to supported housing will save the State $146 per year. That savings, the district court found, will take place immediately once the person moves to the new setting (because the State will at that point stop reimbursing an adult home and start reimbursing a supported housing provider), and it is a savings over and above any long-term savings that may occur because there will be less need for capital improvement programs and other overhead outlays to the adult homes.

Furthermore, contrary to the State's assertion, the Remedial Order does not compel the State to provide a particular level of benefits to individuals with disabilities. Like the district court's liability holding, the Remedial Order is a straightforward application of the integration mandate: it simply orders the State to offer supported housing units to qualified and willing DAI constituents. The Order is narrowly tailored to conform to the court's factual findings, which were well supported by evidence admitted at trial, and it incorporates the State's current procedures for developing supported housing. Accordingly, the Remedial Order is neither overbroad nor overly intrusive on state authority. This Court should affirm the judgment.

STATEMENT OF THE ISSUES

1. Whether the district court erred in concluding that Title II of the ADA applies to the State's administration of its mental health services programs.

2. Whether the district court erred in concluding that the State failed to establish a fundamental alteration defense.

3. Whether the district court abused its discretion in entering the remedial order.

4. Whether the district court erred in concluding that the plaintiffs have standing.

5. Whether the district court abused its discretion in denying the New York Coalition for Quality Assisted Living, Inc.'s motion to intervene.

STATEMENT OF THE CASE

1. Background

a. The Parties

Disability Advocates, Inc. (DAI) is a not-for-profit protection and advocacy organization authorized by the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI), 42 U.S.C. 10801 *et seq*., to pursue legal and other appropriate remedies to ensure the protection of individuals with mental illness. Its constituents consist of individuals with mental illness, as defined under PAIMI. 42 U.S.C. 10802(4). In 2003, DAI commenced this action on behalf of individuals

with mental illness residing in, or at risk of entering, 28 impacted adult homes in New York City with more than 120 beds. SPA-77-78, 85.[1] In 2008, 4,242 individuals with mental illness resided in the adult homes at issue. SA-64-82 (P-774 (2008 New York State Department of Health Adult Care Facility Annual Census Report (Census Report))).

DAI claimed that the Governor of New York, the New York State Department of Health (DOH), the New York State Office of Mental Health (OMH), and the DOH and OMH commissioners (collectively, the State) had violated the integration mandate of Title II of the Americans With Disabilities Act, 42 U.S.C. 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. 794, as expressed in 28 C.F.R. 35.130(d), by planning and administering the State's mental health service system in a manner that segregates people with mental illness in institutional adult homes and systematically excludes them from far more appropriate and integrated mental health service settings funded and offered by the

---

[1] "SPA-__" refers to the page number of the State's Special Appendix. "JA(__)-__" indicates the volume and page number of the parties' Joint Appendix. "SLX(__)-__" indicates the volume and page number of the deposition transcriptions admitted under seal. "PX(__)-__," "DX(__)-__," and "SX(__)-__," refer to the volume and page number in Plaintiff's Trial Exhibits, Defendants' Trial Exhibits, and the parties' Stipulated Trial Exhibits, respectively. "Br. __" indicates the page number of the State's opening brief. "Mov. ___" refers to the page number of the New York City Quality Assisted Living, Inc.'s brief. "SA-__" indicates the page number of the Supplemental Appendix. "Doc. __" indicates the docket entry number of documents filed in the district court.

State. SA-28-34. See *Olmstead* v. *L.C.*, 527 U.S. 581 (1999) (failure to provide services in the most integrated setting appropriate is discrimination under Title II of the ADA). DAI sought declaratory and injunctive relief requiring the State to take steps to ensure that its constituents at the 28 adult homes receive services in the most integrated setting appropriate to their needs. SPA-85-86; see also SA-8-9.

Plaintiff United States intervened in this action on November 23, 2009. In granting permissive intervention, the district court concluded that the United States "has an interest in the uniform interpretation and enforcement of its regulations under Title II." The court noted that Federal Rule of Civil Procedure 24(b)(2) "expressly provides for *permissive* intervention by a federal agency in lawsuits based on federal statutes or regulations within its administrative purview." SA-39 (emphasis in original). The district court found that the United States' intervention would not prejudice the parties or unduly delay the proceedings because the United States' complaint-in-intervention explicitly adopted the factual findings and legal conclusions the court had entered after trial, and the United States did not seek any extensions in the remedial proceedings. SA-40.

The appellants are the state entities obligated under state law to administer the State's mental health services for people with mental illness. New York law specifically requires the State "to develop a comprehensive, integrated system of treatment and rehabilitative services for the mentally ill." N.Y. Mental Hyg. L. §

7.01. "Such a system * * * should assure the adequacy and appropriateness of residential arrangements * * * and it should rely upon * * * institutional care only when necessary and appropriate." *Ibid*.

Pursuant to state law, "OMH is responsible for planning what mental health services the State will provide and allocating resources to those services." SPA-31. OMH funds and oversees the State's mental health housing and support programs, including community support and residential programs. SPA-31. It contracts with private providers to operate the State's housing programs and other mental health services. SPA-30-31. State law requires OMH to plan how and where the State's mental health services will be delivered. N.Y. Mental Hyg. L. § 7.07. In doing so, OMH must "develop an effective, integrated, comprehensive system for the delivery of all services to the mentally ill and * * * create financing procedures and mechanisms to support such a system of services * * * [and] shall make full use of existing services in the community including those provided by voluntary organizations." *Id*. § 7.01. State law, moreover, requires OMH to annually "formulate a statewide comprehensive five-year plan for the provision of all state and local services for persons with mental illness and developmental disabilities." *Id*. § 5.07. In addition, state law requires OMH to "advise and assist the governor in developing policies designed to meet the needs of the mentally ill and to encourage their full participation in society." *Id*. § 7.07(b).

In conjunction with the obligations imposed on OMH, state law requires DOH to promote the "development of sufficient and appropriate residential care programs for dependent adults." N.Y. Comp. Codes R. & Regs. Tit. 18 (18 NYCRR), §§ 485.3(a)(1), 487.1(b). DOH determines the number of adult homes in the State's residential care programs by issuing licensing certificates to private providers to establish and operate adult homes. *Id*. § 485.3(a)(3); SPA-301. These licensing certificates must be renewed every four years. 18 NYCRR § 485.5(c). DOH also monitors adult homes and enforces the statutes and regulations applicable to adult homes. JA-915. It may suspend, revoke, or terminate a licensing certificate if it determines that the facility is not complying with applicable state law or if such action is in the public interest because it would conserve resources. 18 NYCRR §§ 485.5(l), (m)(l)(i). State law further provides that OMH and DOH monitor and inspect adult homes. See N.Y. Const. Art. XVII, § 4 (requiring OMH to "visit and inspect * * * all institutions either public or private used for the care and treatment of persons suffering from mental disorder or defect"); 18 NYCRR § 485.3(b)(1) (authorizing DOH to inspect adult homes and permitting OMH to participate in inspections).

The governor of New York, as chief executive, must ensure that the State operates its mental health services in compliance with the ADA. He appoints the OMH and DOH commissioners; they serve at his pleasure. N.Y. Pub. Health L. §

204; N.Y. Mental Hyg. L. § 5.03. The governor's office has participated in policy decisions relating to adult homes, including determining funding levels for services provided at adult homes. SPA-73. The governor's office also worked with the interagency Task Force on Housing for People with Special Needs to increase access to existing housing and support services for people with special needs, and it created the Adult Care Facilities Workgroup, which "unanimously concluded that large numbers" of adult home residents in New York City and other parts of New York "could more appropriately be served in more integrated settings." SPA-147; see also SPA-73-74. Upon receiving the Workgroup's recommendations, the governor's office modified the recommendation and implemented the revised recommendation. SPA-73.

b. Adult Homes

Adult homes are large, for-profit facilities that provide long-term residential care and supervision for people with disabilities. JA(1)-205-206 (Rosenberg). The State continues to discharge individuals from state psychiatric hospitals to adult homes in New York City. JA(1)-204-206 (Rosenberg); PX(1)-155-156 (P-68 (Mem. from J. Stone to Members of the Mental Health Services Council (Nov. 22, 2006))); PX(2)-140-144 (P-363, P-364, P-365 (E-mails from Mitchell Dorfman to state psychiatric centers regarding referrals to adult homes)); JA(1)-497-498, 501 (Dorfman). In most of the impacted adult homes at issue, more than 90 percent of

residents have mental illness; at eight adult homes, 100 percent of the residents have mental illness. SA-64-82 (P-774 (2008 Census Report)); PX(2)-1-65 (P-283 (2004 Census Report)).

The district court found that adult homes are "institutions that impede residents' interaction with individuals in the community who do not have disabilities" (SPA-108), and the State does not challenge that finding on appeal. Adult homes fail to provide support, encouragement, or opportunity for residents to interact with non-disabled individuals or to become integrated into the community. JA(1)-62-63 (E. Jones); SX(4)-286 (S-150 (D. Jones Report (Apr. 4, 2006))). Adult home residents have very little interaction with people outside of adult homes. JA(2)-701 (Lockhart); SX(4)-327 (S-151 (E. Jones Report)). Instead, residents generally stay within the adult home facilities, playing games, puzzles, and other child-appropriate activities. JA(1)-62 (E. Jones); JA(2)-676 (Waizer); SX(4)-524 (S-166 (Surfside Manor May 2005 activities calendar)). Residents testified that they feel isolated living in adult homes. SLX(2)-709 (P-569 (G.H. Dep.)); SLX(1)-59-60 (P-535 (T.M. Dep.)); SLX(2)-452 (P-544 (C.H. Dep.)).

Adult homes often house over a hundred residents who must follow strict schedules for meals, taking medication, receiving public health benefits and other

daily activities.[2] Residents are assigned roommates and on-site treatment providers, as well as seats in the cafeteria.[3] The adult homes restrict the times and places in which residents may receive visitors or leave the premises, and they require that visitors sign in and state the purpose of their visit.[4]

Residents have no choice but to comply with the rules in adult homes because they "fear retaliation, especially psychiatric hospitalization, if they complain or do not follow the rules." SX(4)-331 (S-151 (E. Jones Report)); see SLX(1)-4 (P-534 (L.H. Dep.)); JA(1)-161 (G.L.); JA(1)-185 (S.P.); SLX(2)-461-462 (P-544 (C.H. Dep.)); SLX(2)-540, 559 (P-546 (A.M. Dep.)); see also JA(1)-465-466 (Wollner) (conceding that adult home residents feared retaliation by adult

---

[2] SX(3)-8-9 (S-54 (Kaufman Report (Apr. 2006))); JA(1)-205-206 (Rosenberg); JA(1)-247, 261 (Duckworth); JA(2)-759-760, 763-764 (Kaufman); JA(2)-634 (Geller); JA(1)-116-117 (Tsemberis); JA(1)-58-59 (E. Jones); SLX(2)-568-569 (P-546 (A.M. Dep.)); SLX(2)-732 (D-391 (D.W. Dep.)); JA(1)-138 (S.K.).

[3] JA(1)-58, 61 (E. Jones); SX(4)-329 (S-151 (E. Jones Report (Apr. 5, 2006))); JA(2)-561, 571 (Burstein); JA(1)-134, 138-139 (S.K.); JA(1)-160-161 (G.L.); JA(1)-184, 186 (S.P.); SLX(1)-359, 365 (P-542 (L.G. Dep.)); SLX(1)-405, 430-431 (P-543 (R.H. Dep.)); SLX(1)-20 (P-534 (L.H. Dep.)); SLX(2)-457 (P-544 (C.H. Dep.)); SLX(1)-94 (P-536 (D.N. Dep.)); SLX(2)-731 (D-391 (D.W. Dep.)); SLX(2)-553, 556-557 (P-546 (A.M. Dep.)); SLX(1)-103 (P-536 (D.N. Dep.)).

[4] JA(1)-60-61 (E. Jones); JA(2)-571 (Burstein); SLX(1)-309 (P-541 (S.B. Dep.)); SLX(1)-375 (P-542 (L.G. Dep.)); SLX(1)-21 (P-534 (L.H. Dep.)); SLX(2)-554 (P-546 (A.M. Dep.)); SLX(1)-95, 114 (P-536 (D.N. Dep.)); SLX(2)-517 (P-545 (J.M. Dep.)); SLX(1)-162 (P-537 (P.C. Dep.)); PX(4)-509-518 (P-744 (complaint by adult home providers against advocacy groups to enforce restrictive guidelines for visitor access)).

home staff for participating in the Adult Home Assessment Project). Moreover, adult home residents are discouraged, and even prohibited, from managing their daily activities. The mental health programs that adult home residents attend often have little focus on developing independent living skills, such as cooking, budgeting, and grocery shopping. JA(1)-269 (Duckworth). To the extent that adult residents are taught such skills, they have almost no opportunity to practice those skills in order to retain them. SX(4)-393-396 (S-152 (Duckworth Report (Apr. 6, 2006))); JA(1)-61, 87 (E. Jones).

The State's witnesses, in fact, agreed with DAI's experts that adult homes are similar to institutions. See JA(2)-585 (Newman); JA(2)-634, 651-652 (Geller); JA(2)-759-760 (Kaufman); SX(3)-8-9 (S-54 (Kaufman Report)). The State's expert, Alan Kaufman, also acknowledged that the institutional characteristics of adult homes impede community integration. JA(2)-760 (Kaufman).

c. Supported Housing

Supported housing is a means of providing mental health services in which individuals live in their own scattered-site "apartments and receive services to support their success as tenants and their integration in the community." SPA-108-109. The district court found that supported housing is a more integrated setting than adult homes (SPA-109, 113), and the State does not challenge that finding on appeal.

The State acknowledges (Br. 12) that supported housing is the "preferred community-housing model for many persons with mental illness." Michael Newman, OMH's Director of the Bureau of Housing Development and Support, testified that the State is currently focusing on supported housing over other forms of housing for individuals with mental illness because it is "successful," "cost-effective," and it is what consumers want. JA(2)-585 (Newman). Fundamental to supported housing is "[s]eparating housing from support services by assisting the resident to remain in the housing of his choice while the type and intensity of services vary to meet the changing needs of the individual." SX(1)-596 (S-11 (Supported Housing Implementation Guidelines)).[5]

OMH develops supported housing units by identifying a target "priority" population to receive preference for the housing, and awarding contracts to not-for-profit community providers to create units for members of the target population. JA(2)-566 (Newman); JA(1)-416 (Madan); SX(2)-86 (S-17 (2005 Request For Proposal)). The supported housing providers are responsible for selecting existing apartments in the community for their programs, choosing the individuals to accept into their programs, and determining the services needed to enable those

[5] Contrary to the State's assertion (Br. 16), the state legislature has not "capped" the number of supported housing units that could be created. The testimony cited by the State explains that the State has created an average of 713 supported housing units annually. JA(2)-590 (Newman).

individuals to live successfully. SA-62-63 (S-21 (Federation of Organizations, Admission Application Procedures For Residential Services)); SX(3)-134-135 (S-60 (Federal Employment & Guidance Services (FEGS), "Mental Health Residential Services, Intensive Supportive Apartment Program: Admission Policy")).

In addition, the State provides other services to supported housing residents, such as Assertive Community Treatment (ACT) or case management services. JA(1)-502-503 (Dorfman); JA(1)-398 (Reilly); JA(2)-828 (Myers). An ACT team is a multi-disciplinary team that generally includes members from the fields of psychiatry, nursing, psychology, and social work that provides services tailored to meet the client's specific needs, including the needs of those with severe mental illness. SX(4)-1-4 (S-97 (ACT description from OMH website)); see also JA(1)-258-259 (Duckworth). ACT teams can assist individuals with a wide range of services from assistance with daily activities, such as personal care and safety, grocery shopping, and cooking, to medication management. PX(2)-147-148 (P-372 (ACT Program Guidelines)); JA(1)-279 (Duckworth); JA(1)-428-429 (Madan).

Residents of supported housing, unlike adult home residents, can control their own schedules and daily lives. JA(1)-163-166 (G.L.); JA(1)-117 (Tsemberis). They can live with a significant other, marry and live with a spouse,

live with their children, invite guests over for dinner, decorate their apartments, and have overnight guests. JA(1)-107 (Tsemberis). At bottom, they have the same privacy rights and freedom as any other tenant in a landlord-tenant relationship. JA(2)-585 (Newman).

The State "has demonstrated it has the will and the ability to create additional supported housing slots" (JA(2)-911 (D. Jones); see also Br. 12), but the State has virtually shut out adult home residents from placement in supported housing. Between 2002 and 2006, only 21 adult home residents were allowed to move to supported housing in New York City. PX(1)-543-555 (P-149 (OMH FOIL Response (Jan. 2006))). Even after the State designated adult home residents as a target population for supported housing in 2005, members of other target populations received higher priority. JA(1)-209-210 (Rosenberg); JA(2)-586, 594-595 (Newman). The State does not dispute that other target populations have greater access to supported housing than adult home residents. JA(2)-911 (D. Jones). Indeed, the State acknowledged in an OMH document, "OMH Guiding Principles for the Redesign of the Office of Mental Health Housing and Community Support Policies," that "many people with a mental illness are * * * 'stuck' in * * * adult homes." PX(2)-66 (P-284).

2. District Court Proceedings

a. Summary Judgment Decision

On February 19, 2009, the district court denied DAI and the State's cross-motions for summary judgment. SPA-10. The State argued, *inter alia*, that DAI lacked standing to seek system-wide injunctive relief and that Title II of the ADA did not apply because adult homes are privately operated. SPA-10.[6]

With respect to standing, the district court concluded that PAIMI, 42 U.S.C. 10805(a)(1)(B), gave DAI authority to bring this suit. SPA-24-25. The court further held that DAI established associational standing under *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), and that DAI had standing to pursue system-wide relief because it alleged and provided evidence of on-going system-wide harm. SPA-27-28.

The district court concluded that DAI properly relied on Title II of the ADA. The court characterized DAI's claim as alleging that the State's "administration of services discriminates against adult home residents by unnecessarily segregating them, and * * * if [the State] allocated resources differently, adult home residents

---

[6] DAI sought partial summary judgment on the State's fundamental alteration defense, contending that the State's failure to develop an effective *Olmstead* plan precludes the State from asserting this defense. SPA-10. The district court, however, held "that *Olmstead* does not require a plan to comply with the integration mandate as a prerequisite to considering the other elements of a fundamental alteration defense." SPA-56.

could receive services in a more integrated setting." SPA-36. The district court found that this claim is proper under Title II because the State administers its mental health program by determining the settings in which state-provided and -funded services will be delivered. The court held that the "State cannot evade its obligation to comply with the ADA by using private entities to deliver some of those services." SPA-35. It explained that "Title II covers all programs, services, and activities of public entities 'without any exception,' and 'prohibits all discrimination by a public entity, regardless of the context.'" SPA-36 (citation omitted).

b. Liability Decision

After a five-week bench trial, the district court issued 210 pages of findings of fact and conclusions of law. The court held that the State's administration of mental health services for the 4,300 DAI constituents in, or at risk of entering, the "impacted" adult homes violates the integration mandate. SPA-77-78. First, the court held that the adult homes "are institutions that segregate residents from the community and impede residents' interactions with people who do not have disabilities." SPA-77; see also SPA-88, 93. The court pointed to testimony from witnesses on both sides, who explained that adult homes "house a large number of people with psychiatric disabilities in a congregate setting" and that the residents' lives are "highly regimented" with "inflexible schedules for meals, taking

medication, receiving public benefits, and other daily activities." SPA-89; see also SPA-90-108. The evidence showed that adult homes promote a sense of helplessness among residents by restricting their access to the community and providing *child*-appropriate activities such as games, puzzles, and coloring books. SPA-93-106. The State's witnesses agreed that the characteristics of adult homes impede the ability of residents to function more independently. SPA-107-108. Moreover, the court stated that the existence of a more appropriate and integrated setting in the form of supported housing demonstrates that adult homes are not the most integrated setting available. SPA-108-113, 117.

Second, the district court found that virtually all of DAI's constituents are qualified for supported housing. SPA-117-149. DAI's experts—who visited adult homes, interviewed residents, and reviewed residents' mental health records and other documents regarding the State's mental health services—testified that "'virtually all' [DAI constituents] could be served in a more integrated setting" (SPA-127) and that "there are no material clinical differences between adult home residents and supported housing clients" (SPA-125). See also SPA-124-130, 135-137. A former official at OMH concurred, based on her "firsthand observations from working in New York's mental health system." SPA-130-131. The State's own witnesses testified that "undisputedly," some adult home residents are qualified to move to supported housing. SPA-138. A 2002 study by the Adult

Care Facilities Workgroup (Workgroup Report), convened by the governor of New York, "unanimously concluded that large numbers" of adult home residents in New York City and other parts of New York "could more appropriately be served in more integrated settings." SPA-147; see also SPA-131-132. A separate 2002 report (Assessment Project) commissioned by the State assessed 2,611 residents in adult homes, including 15 of the homes at issue here, and revealed that a "vast majority of adult home residents are not seriously impaired and could be served in supported housing." SPA-132-134. Based on this evidence, the court concluded that many of DAI's constituents would need only minimal support. SPA-132-134; see also SPA-185. For those who need support, the court found that the State's supported housing program already provides individuals, including individuals with serious mental illness, with a wide range of support services. SPA-146-147.

Third, the district court found that many of DAI's constituents are not opposed to receiving services in more appropriate and integrated settings. SPA-149-157. DAI's experts and findings by the State's Assessment Project confirm that, when given "accurate information and a meaningful choice," a "large number" of adult home residents would choose to move out of adult homes. SPA-157; see also SPA-152-155. Testimony by adult home residents at trial, in addition to documents in the record, confirmed this conclusion. SPA-153-155, 157.

Fourth, the district court found that the State failed to show that it had made any meaningful efforts to enable adult home residents to receive services in the most integrated settings: (1) it did not have a plan to enable adult home residents to be served in more appropriate and integrated settings (SPA-162); (2) although the State had created 13,557 supported housing beds between 1995 and 2009, and adult home residents were finally added as one of the target populations for supported housing in 2005, the number of adult home residents that have moved to supported housing has been negligible (21 adult home residents in 2002-2006, and 11 since 2008, excluding a one-time legislative initiative that created 60 supported housing beds for adult home residents in 2007) (SPA-134, 163-165); (3) the State does not maintain a wait list for adult home residents who desire to move to supported housing (SPA-166); (4) the State's programs to improve the conditions at adult homes do not enable adult home residents to move to more appropriate and integrated settings (SPA-166-171); and (5) the State rejected the 2002 Workgroup Report's recommendation to move 6,000 adult home residents to supported housing (SPA-171-172).

Fifth, the district court rejected the State's fundamental alteration defense because the overwhelming evidence showed that "it would actually cost less to serve DAI's constituents in supported housing than in Adult Homes." SPA-191. See also SPA-172-188, 195-198, 201. Pursuant to the State's mental health

services program, adult home and supported housing residents pay for the cost of their housing with Supplemental Security Income (SSI), an income supplement for low-income individuals with disabilities. SPA-172. Adult home residents receive $16,416 each year in SSI (the federal government pays $8,088 of that amount and the State pays $8,328) to pay for their housing. SPA-172. Supported housing residents receive $9,132 each year in SSI, of which the State pays $1,044. SPA-173. The State also pays a rental subsidy ($14,654 per year) directly to supported housing providers for each supported housing unit. SPA-173. In addition to these amounts, the State pays half the costs of Medicaid-funded services for individuals with mental illness, including primary care, psychiatric care, and other medical services. SPA-173; see also SPA-181 (chart comparing average costs per person in adult home and supported housing).

The evidence showed that the State spends more on Medicaid and SSI payments for adult home residents than for individuals in supported housing. SPA-175-181. The New York Commission on Quality of Care for and Advocacy for Persons with Disabilities (CQC), an independent state agency, issued a report in 2002 examining the amount the State spends on Medicaid for adult home residents, an amount that far exceeds its Medicaid expenses for supported housing residents. SPA-176-179. A state study subsequently confirmed these findings. SPA-178-179 (citing PX(1)-109). Based on this evidence, the district court calculated that,

even taking into account the State's rental subsidy for supported housing residents, the State would save "$146 per year to serve an individual in supported housing instead of an Adult Home," a savings that would be realized as soon as an individual moved from an adult home to supported housing. SPA-181; see also SPA-175.

The court rejected the State's contrary argument. SPA-174-188. The State's cost expert ignored any Medicaid savings even though the State agreed that it spends more on Medicaid for adult home residents than individuals in supported housing. SPA-174-188. The court also rejected the State's argument that DAI's requested relief would impose costs associated with (1) providing additional support services to the former adult home residents in supported housing; (2) providing administrative services to assess adult home residents and oversee the additional supported housing; and (3) backfilling the beds vacated by adult home residents. SPA-184-187. The State failed to provide evidence to support these assertions. SPA-185-187.

c. Order Denying Intervention

After the district court's liability finding, and two months after the remedy proceedings were underway, the New York Coalition for Quality Assisted Living,

Inc. moved to intervene. SPA-206.[7] The district court granted amicus status to the Coalition pending resolution of the motion. SPA-206. As amicus, the Coalition filed a proposed remedial plan, detailing its positions with respect to the parties' proposed plans and offering specific proposals for inclusion in the remedial order. SA-51-61 (Doc. 391 (Nov. 25, 2009)).

On December 23, 2009, the district court denied the Coalition's motion to intervene as untimely. SPA-215-216. The district court rejected the Coalition's argument that it did not have reason to believe its interests would be adversely affected until the court issued the Trial Decision. SPA-209-212. The Coalition, the court stated, should have been on notice from DAI's 2003 complaint that DAI sought to move qualified and willing adult home residents to more appropriate and integrated settings. SPA-210-212. The court further noted the Coalition should have known of the consequences of a finding against the State as early as 2007 when, in summary judgment papers, the parties addressed the cost of moving DAI's constituents to supported housing at summary judgment. SPA-210-211. The court's February 2009 order, denying summary judgment, also discussed this

[7] Empire State Association for Assisted Living (ESAAL) also moved to intervene and has appealed from the denial of its motion (No. 10-251-cv). ESAAL, however, did not file a merits brief in support of its appeal; instead, it filed an amicus brief in support of the State's appeal. The arguments in this brief relating to the denial of the Coalition's motion to intervene apply equally to ESAAL's appeal.

issue "at length." SPA-210. In addition, the Coalition had been involved in the case by attending depositions of adult home staff members, responding to document requests before discovery closed in 2006, and sitting in on the trial beginning in May 2009. SPA-207.

The district court rejected the Coalition's argument that it believed that its interests were aligned with the State until the State lost on the merits, noting that the Coalition had no basis to believe that the State would represent the Coalition's interests. SPA-212. Although the district court recognized that the "lapse of time is only one of several factors to consider" in determining timeliness, it found that "the lengthy and intentional delay in this case weigh[ed] in favor of denying intervention." SPA-212.

The district court also found that allowing intervention would prejudice the parties and cause undue delay: the Coalition sought to "inject collateral issues regarding their economic entitlements into [this] civil rights action," and consideration of the Coalition's "newly presented claims might well require conducting evidentiary hearings or even reopening discovery." SPA-213. The motion to intervene "explicitly disput[ed] the court's [liability] findings," indicating that the Coalition would seek to "relitigat[e] issues which have already been decided after lengthy proceedings." SPA-213. By contrast, any prejudice to the Coalition from denying intervention was due to the Coalition's "tactical

decision," hoping that the State would prevail. SPA-214. Any prejudice, however, was "significantly mitigated" by Coalition's status as amicus and the fact that state law allows an adult home to challenge revocations of its operating certificate by the State. SPA-214. The court further found no "unusual circumstance[s]" to support granting intervention. SPA-215. Accordingly, the district court denied intervention as of right as well as permissive intervention. SPA-216.

d. Remedial Order

On March 1, 2010, the district court issued the remedial order and judgment, and a separate order, rejecting the State's proposed remedial plan as unreasonable. See SPA-232-242 (Remedial Order); SPA-218-231 (Remedial Decision). For example, despite evidence at trial that the State was capable of developing 1,500 supported housing units annually and that moving qualified adult home residents to supported housing would save the state money on net (see SPA-172-179, 190-191, 195-198, 201), the State proposed to create only 200 units annually due to, *inter alia*, its "fiscal crisis." SPA-220. Other parts of the proposed plan flatly contradicted the court's findings, such as the number of qualified adult home residents willing to go to supported housing. SPA-220-221. Because the State failed to propose a realistic remedy to address the violations the court found, the district court devised its own remedial order. SPA-228-230.

The district court's Remedial Order requires the State to take steps to ensure compliance with the integration mandate within four years of the order by, *inter alia*, (1) developing supported housing beds for DAI's constituents, at a rate of 1,500 beds annually; (2) securing necessary support services for supported housing residents; and (3) conducting in-reach to DAI's constituents to assist their transition to supported housing. SPA-236-238. The State must also deem DAI's constituents qualified for supported housing unless they have severe dementia, their needs cannot be met by the services that are provided by Medicaid home care or waiver services in supported housing, or they are likely to cause imminent danger to themselves or others. SPA-238-239. The district court provided for a court-appointed Monitor to oversee the State's compliance. SPA-239-240.

After four years, the State must ensure that any qualified adult home resident who desires placement in supported housing is offered such placement. SPA-235. At that time, the court may terminate its jurisdiction upon consent of the parties or motion of any party for good cause shown. SPA-236.

SUMMARY OF ARGUMENT

1. Far from usurping the State's policy choices, the district court simply ordered the State to comply with its federal obligations under Title II of the ADA and Section 504 of the Rehabilitation Act and place qualified and willing adult home residents in a more appropriate and integrated setting that is not only part of

an existing program, but also one that the State itself has made a priority. Like the plaintiffs in *Olmstead* v. *L.C.*, 527 U.S. 581, 592 (1999), DAI's constituents are segregated from the community in institutions based on their disability even though they could be served in a more appropriate and integrated community-based setting. Thus, the State's continued segregation of these individuals, through its "administration" of New York's mental services system, 28 C.F.R. 35.130(d), constitutes unlawful disability-based discrimination and must be remedied.

2. The State has not established a fundamental alteration defense. The district court expressly found that moving qualified and willing adult home residents to supported housing would result in a net cost savings, and the State has not shown that the factual findings supporting that determination are clearly erroneous. Moreover, *Olmstead* does not allow States to delay providing the relief where the State does not have any procedures, such as a waiting list, in place for complying with the integration mandate.

3. The Remedial Order is narrowly tailored to the State's violation and the court's factual findings. The State has not offered any facts or controlling law to the contrary.

4. The district court correctly found the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI), 42 U.S.C. 10801 *et seq.*, authorized DAI to bring this suit, and that, in any event, the organization satisfied the

requirements for associational standing under *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). The State and Coalition's reading of *Hunt's* indicia of membership analysis is overly narrow and inconsistent with *Hunt*. Moreover, it disregards the fact that, under PAIMI, Congress intentionally structured protection and advocacy organizations, such as DAI, to be tightly bound to the interests of the individuals that they represent. The Coalition's other standing arguments are also without merit: (1) the interests that DAI seeks to protect are not only germane to its purpose, but the reason for its existence and (2) DAI's constituents need not participate as plaintiffs because Congress explicitly authorized protection and advocacy organizations to sue on behalf of their constituents, see 42 U.S.C. 10805(a)(1)(B), and, in any event, individual constituent participation is not necessary because this action does not seek relief for any specific individual. Even if DAI does not have standing, this Court should exercise its discretion to allow the United States to continue this litigation under its complaint-in-intervention, which expressly adopts the district court's findings of fact and conclusions of law.

5. The district court did not abuse its discretion in denying the Coalition's motion to intervene as untimely. In addition, the Coalition cannot meet the interest requirement for intervention. At issue in this litigation is the State's obligation to administer its services for people with disabilities in the most integrated setting

appropriate for their needs, and not the operation of any particular adult home. The interests asserted by the Coalition are simply not relevant in this litigation.

ARGUMENT

I

THE UNNECESSARY SEGREGATION OF INDIVIDUALS WITH DISABILITIES IN ADULT HOMES IS A FORM OF DISCRIMINATION PROHIBITED BY TITLE II OF THE ADA, SECTION 504 OF THE REHABILITATION ACT, AND THEIR IMPLEMENTING REGULATIONS

A. Because The State Provides Services To DAI's Constituents In Segregated Adult Homes, Rather Than The More Appropriate And Integrated Alternative Of Supported Housing, The State Violates Title II And Section 504

The district court specifically found that the "overwhelming evidence" showed that the adult homes at issue are institutions that segregate individuals with mental illness from the community based on their disabilities (SPA-88-108)[8]; that

[8] The State does not challenge this finding as clearly erroneous, but it argues (Br. 36-37) that the institutional characteristics of the adult homes are irrelevant because they reflect the choices of the private owners of those facilities and "are not imposed by the State." That argument misunderstands the law. The State licenses, regulates, and pays for the services DAI's constituents receive in adult homes. And, as the State acknowledges (Br. 62), it is the State that "administer[s] services and benefits on a system-wide basis" and decides whether to fund services in adult homes or other, integrated settings. See 28 C.F.R. 35.130(d) (requiring States to "*administer* services * * * in the most integrated setting appropriate") (emphasis added). The State cannot avoid its Title II and Section 504 obligations by contracting with third parties to provide state services. See *Armstrong* v. *Schwarzenegger*, No. 09-17144, 2010 WL 3465279, at *4-6 (9th Cir. Sept. 7, 2010). The State also notes (Br. 37) some circumstances in which adult home

(continued . . .)

supported housing is a more integrated setting than adult homes (SPA-108-113); that DAI's constituents are qualified for supported housing (SPA-117-146); and that DAI's constituents are not opposed to receiving services in a more appropriate and integrated setting (SPA-149-157). The State does not challenge these factual findings as clearly erroneous. Together, they establish a violation of the integration mandate of Title II of the ADA and Section 504 of the Rehabilitation Act.

Title II prohibits state and local governments from discriminating against people with disabilities in the provision of public services. 42 U.S.C. 12132. Specifically, Title II mandates 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." 42 U.S.C. 12132. Section 504 of the Rehabilitation Act applies an identical nondiscrimination requirement to recipients of federal financial assistance. See 29 U.S.C. 794(a).

(…continued)
residents can participate in community life. But the district court recognized those circumstances and nonetheless concluded, based on the overwhelming weight of the evidence, that adult homes segregate DAI's constituents from the community. SPA-108. Those findings are not clearly erroneous, and the State makes no attempt to show otherwise.

Both Title II and Section 504 aim specifically at preventing the segregation of people with disabilities from the community. When Congress adopted Section 504 in 1973, it responded to what the provision's sponsors called the "invisibility of the handicapped in America"—the Nation's "shameful oversights" that caused individuals with disabilities "to live among society 'shunted aside, hidden, and ignored.'" *Alexander* v. *Choate*, 469 U.S. 287, 296 (1985) (citation omitted). The purpose of the statute was "to maximize" the "inclusion and integration [of individuals with disabilities] into society." 29 U.S.C. 701(b). Similarly, the ADA reflected Congress's finding that "institutionalization" is one of the "critical areas" in which discrimination against individuals with disabilities persists, 42 U.S.C. 12101(a)(3), and that "historically, society has tended to isolate and segregate individuals with disabilities, and despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem," 42 U.S.C. 12101(a)(2). These discriminatory practices continue today, Congress explained, through "outright intentional exclusion" and "segregation." 42 U.S.C. 12101(a)(5).

The regulations the Attorney General promulgated to implement Section 504 and Title II make explicit that States must "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d) (ADA Title II integration

provision); see 28 C.F.R. 41.51(d) (Section 504 coordination regulation applying same integration mandate to recipients of federal financial assistance). See also 42 U.S.C. 12134 (directing the Attorney General to promulgate regulations implementing Title II and requiring that those regulations be consistent with the regulations implementing Section 504). The Attorney General has explained that "the most integrated setting appropriate" means "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. Pt. 35, App. A at 452.

Pursuant to these statues and regulations, the Department of Justice has consistently maintained that unnecessary institutionalization qualifies as discrimination by reason of disability. "Because the Department is the agency directed by Congress to issue regulations implementing Title II," the Supreme Court has determined that "its views warrant respect" and that courts may properly look to the agency's views for "guidance" in interpreting the statute. *Olmstead* v. *L.C.*, 527 U.S. 581, 597-598 (1999) (citation omitted). Thus, the Department of Justice's interpretation of Title II and its regulations is entitled to deference. *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998); *Thomas Jefferson Univ*. v. *Shalala*, 512 U.S. 504, 512 (1994).

In *Olmstead*, the Supreme Court affirmed the Attorney General's construction of the ADA's anti-discrimination provision, and held that

"[u]njustified isolation * * * is properly regarded as discrimination based on disability." 527 U.S. at 597. The Court recognized that such segregation is a form of discrimination because unnecessary institutionalization "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and because "confinement in an institution severely diminishes the everyday life activities of individuals." *Id.* at 600-601. A violation of the integration mandate occurs where the institutionalized individual is "qualified" for community placement—that is, he or she can "handle or benefit from community settings"—and does not oppose community placement. *Olmstead*, 527 U.S. at 601-603. The Court stressed that States "are required" to provide community-based treatment for qualified persons who do not oppose such treatment unless the State can establish an affirmative defense. *Id.* at 607.

This case is a straightforward application of *Olmstead* and the Attorney General's integration regulation. Like the plaintiffs in *Olmstead*, DAI's constituents are segregated from the community in institutions (adult homes) based on their disabilities even though they could be served in an integrated community-based setting (supported housing). See SPA-157. The State's continued segregation of these individuals, through its "administration" of New York's mental services system, 28 C.F.R. 35.130(d), constitutes unlawful disability-based discrimination and must be remedied.

B. The State Requires DAI's Constituents To Live In Segregated Adult Homes As A Condition For Receiving Residential Services

The State contends (Br. 29 (emphasis added)) that it cannot be liable under Title II because it does not confine DAI's constituents in "segregated *state* institutions" or "condition[] access to state services on institutional confinement." That is incorrect. New York has determined that residential services are an integral part of health services for individuals who cannot live independently and has undertaken to provide housing for people with mental illness. See N.Y. Mental Hyg. L. §§ 7.01, 7.07; 18 NYCRR §§ 485.3(a)(1), 487.1(b). But it requires DAI's constituents to enter segregated adult homes to receive those services, even though supported housing is a more appropriate and integrated place in which to receive them. In New York, just as *Olmstead* forbids, people with mental illness must "relinquish participation in community life they could enjoy given reasonable accommodations" to receive state-provided services. *Olmstead*, 527 U.S. at 601.

The State argues (Br. 34-36) that residents can choose not to live in adult homes; to the extent that the residents cannot, the State argues, it is not because of their disabilities, but instead, it is due to their poverty and the high cost of living in New York City. The State's argument essentially boils down to this: Because it is not required to provide *any* residential services, whether in an adult home or supported housing, and because DAI's constituents are free to turn down the State's offer and fend for themselves if they do not wish to live in an adult home,

they cannot complain about the segregated nature of the setting in which the State chooses to provide services. That argument fundamentally misunderstands *Olmstead*. The Supreme Court recognized that a State is not required to provide any residential services. But the Court held that, having undertaken such responsibility, the State must provide those services in the most integrated setting appropriate. See *Olmstead*, 527 U.S. at 603 n.14. Because this case involves nothing more than a challenge to the segregated setting in which the State provides residential services to DAI's constituents, and not the State's threshold decision whether to provide those services at all, it does not involve the "[t]hreshold determinations about the scope and extent of different state programs" that could properly be considered "legislative and political judgments" (Br. 47).

The record is clear that *if they are to receive residential services* (the crucial question under *Olmstead*), DAI's constituents have no choice but to receive them in a state licensed and reimbursed adult home.[9] Adult home residents, including a witness for the State, "testified that they were given little or no choice about being placed in an Adult Home." SPA-136. For example, one former adult home

[9] Therefore, this case is not about the State "offer[ing] community services without also guaranteeing particular forms of community housing" (Br. 47). It is about the State offering housing and other services, but only in segregated adult homes that are not the most integrated setting appropriate. For that reason, the analogy to the federal Medicaid Act, 42 U.S.C. 1396 *et seq.* (Br. 46), which does not purport to provide housing and is in any event a separate federal statute of equal stature to the ADA and the Rehabilitation Act, is inapposite.

resident, I.K., testified that "an Adult Home was 'the only thing offered' to her as a housing option" when she was discharged from a psychiatric hospital, while another former adult home resident, G.L., testified that, upon his discharge from a hospital, the State offered him a choice between a "psychiatric facility" and an adult home. SPA-150; see also SPA-136 & n.426, 150 n.529 (listing testimony by adult home residents that they had little or no choice but to agree to enter adult homes). The State's own expert, Dr. Jeffrey Geller, conceded that residents were not adequately informed about other housing choices once they were placed in adult homes. SPA-151; see also SPA-150-152. Linda Rosenberg, a former OMH Senior Deputy Commissioner, testified that adult home residents were given "only the 'vaguest' information about other housing alternatives." SPA-151. Residents can hardly leave adult homes, as the State asserts, if they are not aware of other housing options and support services.

Even if adult home residents were aware of supported housing as an alternative housing option, the evidence shows that they are virtually shut out of consideration for supported housing. See SPA-163-166. In practice, supported housing units are available only for priority populations determined by the State, which did not designate adult home residents as a priority population until 2005. SPA-163-164. After adult home residents were added as a target population, adult home residents were still "denied access to supported housing because members of

other priority populations received higher priority." SPA-164; see also SPA-193. As the State admitted in an OMH document, many individuals with mental illness are "'stuck' in * * * adult homes" (SPA-88 (citing PX(2)-66 (P-284 (OMH Guiding Principles for the Redesign of the Office of Mental Health Housing and Community Support Policies)))), and the State's witnesses "testified that Adult Homes are considered *permanent placements* for individuals with mental illness" (SPA-192 (emphasis added)). The only "choice" adult home residents can make is between receiving residential services in an adult home and receiving no residential services whatsoever.

C. Plaintiffs Challenge The Provision Of Residential Services In Segregated Settings, Not The "Level Of State-Funded Benefits"

The State argues (Br. 39) that the Remedial Order requires it to create "'additional or different' benefits for 'the disabled.'" See *Rodriguez* v. *City of New York*, 197 F.3d 611, 616 (2d Cir. 1999) (stating that the non-discrimination provision in the Medicaid Act does not require the State to create "a benefit that it currently provides to no one"), cert. denied, 531 U.S. 864 (2000). As explained, the State already provides residential and mental health services to DAI's constituents in adult homes; DAI's constituents merely ask for the State to provide those services in supported housing. And supported housing is not a new state program. To the contrary, the State began developing supported housing in the early 1990's (Br. 12) and has been creating supported housing units ever since.

See JA(1)-530 (Newman). In fact, despite the State's asserted fiscal concerns, it continued, as recently as last year, to create new supported housing units and even issued a Request for Proposal (RFP) for supported housing, although it did not include adult home residents among the target groups. SPA-188, 193, 198.

Indeed, as OMH's Director of the Bureau of Housing Development and Support testified, creating more supported housing units is consistent with the State's "current focus" on developing supported housing. SPA-109 ("The State is currently focusing on supported housing more than other forms of OMH housing because it is cost-effective, a best practice, and what consumers want.") (quoting JA(2)-585 (Newman)). To require the State to issue RFPs and designate a particular priority population to receive those particular supported housing beds also comports with the State's current method for developing supported housing. SPA-109, 163 (describing RFP process); see also JA(2)-587, 591-592 (Newman) (stating that OMH had set aside supported housing beds for homeless individuals through a RFP).

While *Olmstead* does not impose a "standard of care" for the services that a State provides (see Br. 35-45), it requires States to "adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide." *Olmstead*, 527 U.S. at 603 n.14; see also SPA-117. All the plaintiffs seek is to make supported housing, which the State already offers, and the accompanying

support services that individuals in supported housing ordinarily receive, available to adult home residents who are qualified and willing to participate and are already receiving state-provided residential and mental health services in adult homes. SPA-110-113, 199-201. The State is offering residential and other service to DAI's constituents, but not in the most integrated setting appropriate. That is a violation of Title II and Section 504.

D. The Coalition's Additional Arguments Do Not Warrant Reversal

The Coalition raises two points that the State did not. Neither is availing.

1. The Coalition asserts (Mov. 45-50) that *Olmstead* requires courts to defer to the State's treatment professionals' judgment and that New York's "individualized assessment and referral" practice for placing individuals in adult homes is reasonable.

Although *Olmstead* itself involved two plaintiffs whose treatment professionals had determined community placement was appropriate, the integration mandate is not limited to that narrow fact setting. The regulation that creates the integration mandate does not refer to treating professionals; it simply requires services to be administered "in the most integrated setting appropriate to the needs of" the individual. 28 C.F.R. 35.130(d). The regulation does not in any way purport to limit the evidence on which a plaintiff may rely in showing that a more integrated setting is appropriate. Indeed, a requirement that *Olmstead*

plaintiffs come to court armed with the recommendations of a State's treating professionals would "allow States to avoid the integration mandate by failing to require professionals to make recommendations regarding the service needs of institutionalized individuals with mental disabilities." SPA-148-149 ("The court does not read *Olmstead* as creating a requirement that a plaintiff alleging discrimination under the ADA must present evidence that he or she has been assessed by a 'treatment provider' and found eligible to be served in a more integrated setting. * * * To find otherwise would render the ADA's integration mandate effectively unenforceable."). The Court in *Olmstead* was simply stating that, when treating professionals determine that an individual with mental disability is eligible for community placement, there is no reason not to place that person in a more integrated setting, barring a fundamental alteration defense. 527 U.S. at 603.

In any event, despite the Coalition's emphasis on the importance of the State's treatment professional's judgment, the reality is that the State does not place individuals with mental illness in adult homes, as opposed to supported housing, based on any clinical differences. Former OMH Senior Deputy Commissioner Rosenberg testified that the State's decision to place individuals in adult homes was "by 'luck of the draw for the most part' rather than by any clinical determination that it is an appropriate setting" and that adult home and supported

housing residents "by and large have similar characteristics." SPA-130; see also SPA-124-130, 135-137 (finding no material clinical differences between adult home and supported housing residents). The State's own studies, which concluded that most adult home residents—indeed, a "vast majority"— could be more appropriately served in supported housing, underscore the similarities between residents in adult homes and supported housing. SPA-133-134; see also SPA-131-132, 139, 147 (referring to the Workgroup Report and Assessment Project report).

Furthermore, under the State's current procedures, state "treatment professionals" are not even involved in evaluating applications for supported housing. SPA-124 n.322. The Human Resources Administration (HRA), the New York City agency that evaluates applications for supported housing, does not conduct individualized clinical assessments and relies solely on an electronic application form. SPA-124 n.322.[10] Accordingly, requiring DAI's constituents who wish to move to supported housing to ask the State for a reassessment, as the Coalition suggests (Mov. 51), would be futile.

2. The Coalition argues (Mov. 51-52) that the record does not show "either a large need or desire on the part of adult-home residents to move to supported

[10] The State's policy is consistent with the opinion of DAI's experts that individual assessments "are only necessary to determine the specific supports that each resident would need once placed in supported housing," and are not needed for determining whether an individual is qualified for supported housing. SPA-124 n.322.

housing," as evidenced by the fact that it "took two years just to fill 45 slots" of the 60 supported housing units created for adult home residents. The Coalition's reliance on the unused supported housing beds is misplaced. In 2007, a one-time legislative initiative created 60 supported housing beds exclusively for adult home residents. SPA-164. OMH did not propose the initiative. SPA-164-165. At the time of trial, in May 2009, 45 adult home residents had moved to supported housing under the initiative, and 15 adult home residents were in the process of securing the remaining slots. SPA-164.

The Coalition incorrectly attributes the time it took to fill the slots to a lack of interest by adult home residents in moving to supported housing. Although the supported housing units were authorized in 2007, OMH did not start informing adult home residents of the availability of these beds until March 2008. JA(1)-490-491 (Dorfman); see also SPA-153-154. OMH's outreach consisted mainly of holding housing forums to discuss supported housing options at 11 adult homes and one general forum conducted at the Brooklyn Public Library. JA(1)-491 (Dorfman); SPA-154. Only a handful of residents at those 11 adult homes were invited by the residential councils (composed of adult home residents) and case managers to attend the forums. JA(1)-491, 493, 504-505 (Dorfman). Even the general forum was limited to select adult home residents at adult homes with on-site OMH-funded case managers or residents who were known to the Coalition for

Institutionalized, Aged, and Disabled (CIAD), a volunteer organization consisting of adult home residents who advocate on behalf of adult home residents. JA(1)-505 (Dorfman); JA(2)-706 (I.K.). Thus, any individual in an impacted adult home that does not have on-site OMH-funded case managers, of which there are many, and was not known to CIAD, was excluded from the forums. JA(1)-505 (Dorfman). Despite this limited outreach, all of the 60 supported housing beds were filled or accounted for within a year from the time the State informed adult home residents about supported housing. SPA-164.

The difference in the success rate of adult home residents securing placement in supported housing under the legislative initiative (60 units in one year) and under the State's normal operating procedures (about 32 from 2002 to 2009) demonstrates not only that adult home residents are interested in receiving services in more appropriate and integrated settings, but also that they "[do] not have access to supported housing as a practical matter." SPA-165. The "enthusiastic responses" of adult home residents at the housing forums in connection with the 60 allocated beds are consistent with the findings of DAI's experts and the State's own Assessment Project that, once informed of more appropriate and integrated housing alternatives, individuals in adult homes would prefer a more independent setting. SPA-150-157.

The record also contains testimony by adult home residents that they would prefer to live in their own apartments. SPA-155. To be sure, some adult home residents have expressed "fear and reluctance" to leave adult homes, but, as the district court found, this phenomenon commonly occurs in institutional settings, where individuals fear leaving the institution even if they are capable of living independently. SPA-156. The court's order provides that none who opposed moving to supported housing will be forced to go. SPA-150. But the district court concluded that DAI's constituents, as a whole, are not opposed to moving to more appropriate and integrated settings, and the State does not argue that that finding was clearly erroneous. SPA-157.

* * *

In sum, this case is not about how adult home providers treat their residents (Br. 36) or about requiring the State to provide integrated housing whenever it provides any mental health services (Br. 45). Rather, it is about how this State has chosen to provide mental health services in residential settings—adult homes, which are segregated institutions, and supported housing, which is not—and how it has precluded adult home residents, who are qualified and willing, from moving to the more appropriate and integrated setting. That is what the integration mandate and *Olmstead* prohibit. The State cannot simply argue that the Court should respect its line-drawing decisions or its choices in allocating resources (Br. 43, 47,

58) when the State is already providing services to DAI's constituents but only in a segregated setting. The State has made a limited number of beds in supported housing available to those with mental illness living in adult homes. As the district court found, the State has no plan to remedy the segregation of the remaining adult home residents, and the governor, because of OMH's objections, vetoed a bill that would have required OMH to maintain a waiting list for community housing, including supported housing. SPA-193; see also SPA-166 (stating that the State does not maintain a waiting list for community housing programs).

II

THE DISTRICT COURT CORRECTLY HELD THAT THE STATE FAILED TO PROVE A FUNDAMENTAL ALTERATION DEFENSE

Where an institutionalized person with a disability is qualified for and does not object to a more appropriate and integrated placement, *Olmstead* requires the State to make that integrated placement if it can be "reasonably accommodated," unless the State can establish that the placement would work a "fundamental alteration" of the State's services. *Olmstead* v. *L.C.*, 527 U.S. 581, 607 (1999); *id.* at 603 (plurality opinion). The State contends that placing DAI's constituents in supported housing is not a reasonable accommodation and would fundamentally alter its mental health system. The district court correctly rejected those arguments.

A. Moving DAI's Constituents From Adult Homes To Supported Housing Would Work Only A Reasonable Modification

Moving adult home residents into supported housing would work only a reasonable modification of the State's current programs. As described above, the State already provides residential and supportive services to DAI's constituents who are in adult homes, and it already provides supported housing of the type that adult home residents could use. Considering that the State has not made supported housing accessible, in a meaningful way, to qualified and willing adult home residents, offering supported housing to these individuals will necessarily increase the number of supported housing units in New York City (Br. 54). Expanding a State's existing program, however, is not an unreasonable modification. See *Arc of Wash. State Inc.* v. *Braddock*, 427 F.3d 615, 621 (9th Cir. 2005) (stating that expansion of a State's Medicaid waiver program could be a reasonable modification required by the ADA). That is particularly true here, where moving adult home residents to supported housing will result in a net savings for the State. SPA-172-188, 191, 195-198, 201.

The State also contends that "[a] benefit may be required as a reasonable modification only if the plaintiff demonstrates that '"but for" its disability, it would have received the ultimate benefit sought'" (Br. 51 (quoting *Wisconsin Community Services, Inc.* v. *City of Milwaukee*, 465 F.3d 737, 755 (7th Cir. 2006) (en banc))). The Seventh Circuit's decision in *Wisconsin Community Services* did not involve

the integration mandate. In the integration context, it is clear that a plaintiff need not prove that sort of causation. In *Olmstead*, 527 U.S. at 598, the Court held that the plaintiffs could make out a case under the integration mandate even if they could identify "no comparison class" of "similarly situated individuals" without disabilities who received the community-based services they sought. It was enough that the State currently provided them services in an institutional setting that was not "the most integrated setting appropriate." 28 C.F.R. 35.130(d). And in *Henrietta D.* v. *Bloomberg*, 331 F.3d 261, 273-277 (2d Cir. 2003), cert. denied, 541 U.S. 936 (2004), this Court held that a Title II reasonable accommodation claim is distinct from a claim of disparate treatment or disparate impact and accordingly does not require proof of those forms of discrimination.

B. Defendants Have Not Carried Their Burden To Show A Fundamental Alteration

To prove a fundamental alteration, the State has the burden "to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Olmstead*, 527 U.S. at 604 (plurality opinion). The record does not support the State's fundamental alteration arguments.

1. The District Court Did Not Clearly Err In Finding That The State Will Save Money On Net By Placing Adult Home Residents In Supported Housing

The reasonable modification regulation specifically requires "the public entity" defendant to carry the burden to "demonstrate that making the [plaintiff's requested] modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7). And the *Olmstead* plurality made clear that it is up to "*the State* to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable." 527 U.S. at 605 (emphasis added).

After hearing extensive trial testimony, the district court ruled that the State had not satisfied that burden. SPA-198-201. The district court correctly took into account *all* of the costs of providing mental health services to adult home and supported housing residents. These costs include not just the rental subsidy for supported housing, but also Medicaid and SSI supplement costs. The district court found that the State's annual costs for an individual in an adult home consist of $15,750 for Medicaid services and $8,328 for the State's portion of the SSI (totaling $24,078), while the costs for supported housing consist of $8,234 for Medicaid services, $1,044 for SSI, and $14,654 for the rental subsidy (totaling $23,932). SPA-181. Based on these actual amounts that the State has paid, the district court found that the additional spending for rental subsidies for supported

housing recipients ($20 million in connection with the first 1,500 new supported housing beds) was more than offset by the savings in state Medicaid and SSI-supplement outlays and that allowing qualified and willing adult home residents to move to supported housing will result in a net savings of $146 per person per year. SPA-174-175, 181 (chart taking all relevant costs into account and showing that supported housing costs the State less).[11] This savings will occur immediately, as each DAI constituent moves from an adult home to supported housing, and that does not count the potential longer-term savings if the State can reduce the overhead expenses it reimburses for adult homes. SPA-181-184. Far from making it harder for the State to meet the needs of other people with disabilities (cf. Br. 58), moving DAI's constituents from adult homes to supported housing will at the margins free up additional resources for those other disability groups.

The State makes no effort to show that those findings are clearly erroneous. Instead, it seeks to flip the burden of proof—and to heighten it to demand certainty in the finding that the requested remedy will save money. Thus, the State criticizes the district court (Br. 60) for relying on "cost estimates [that] are precisely that—estimates, which rely on future savings and funding sources that *may or may not*

[11] The State asserts (Br. 54) that the first 1,500 supported housing units will cost $65 million. But that estimate, which appears to reflect the amount of the annual rental subsidy ($14,654) for *4,500* supported housing units, describes a gross, not a net, cost (Br. 52-66).

occur." But the fundamental alteration defense necessarily requires predictions about the future, and the district court did not pull those predictions out of thin air. The district court's findings of immediate and future cost savings were based on extensive testimony that relied on the State's experience with financing both adult homes and supported housing, and that considered the nature of the disabilities that adult home residents have, and the likely cost, based on the State's experience, of serving them in supported housing. SPA-172-201. That evidence was fully sufficient to support the district court's finding. A district court is not required to resolve all doubts—or even all reasonable doubts—in a civil case. Rather, district courts must make factual findings based on the preponderance of the evidence, applying the relevant burden of proof, and those findings cannot be overturned unless they are clearly erroneous. Fed. R. Civ. P. 52(a)(6).

The State has not come close to showing that the district court's cost-savings findings are clearly erroneous. The State is especially poorly positioned to challenge those findings, because it failed to provide any analysis comparing the costs of support services in adult homes with that in supported housing. SPA-184-185, 188; cf. Br. 59 n.8. The State in fact criticizes the district court (Br. 61) for relying on its failure in this regard. But it is the State's burden to establish a fundamental alteration defense, and a State cannot satisfy that burden by pointing only to "vaguely-defined fiscal constraints." *Frederick L.* v. *Department of Public*

Welfare, 364 F.3d 487, 496 (3d Cir. 2004). In any event, the State's cost expert, R. Gregory Kipper, conceded on cross-examination "that there were several ways that an estimate could have been done to arrive at approximate figures to determine the effect on the State's costs." SPA-174. For example, the State "could have used its own Medicaid database to compare services for former Adult Home residents before and after they moved to supported housing." SPA-174. Yet the State did not direct its cost expert to do such an analysis. JA(2)-744 (Kipper). Nor did OMH perform this analysis. OMH's Chief Fiscal Officer Martha Schafer-Hayes testified, "[OMH did] not perform[] any studies or any analysis about the impact * * * [creating] supported housing beds for adult home residents would have on the OMH budget." SPA-174.

As required by *Olmstead*, 527 U.S. at 604-605, the district court not only considered the real costs of providing services to individuals with mental disabilities in adult homes versus supported housing, but also any other costs associated with moving adult home residents to supported housing. The district court considered and rejected the State's arguments concerning future costs because the State failed to provide any evidence in support. The State ignored evidence that it is already paying for DAI's constituents to receive support services in adult homes and that many adult home residents would not require extensive support services to live in supported housing. The State also provided "no

evidence" concerning how the cost of administrative services would increase. SPA-186. Likewise, the State "did not offer any evidence that backfill, if it were to occur, would result in increased costs to the State." SPA-186. On the contrary, the district court said, the evidence showed that the vacated adult home beds would likely be provided to homeless persons and persons discharged from state psychiatric hospitals and that would result in a cost savings for the State. SPA-186. The State does not argue that the court erred, much less clearly erred, in making these factual findings.

Contrary to the State's suggestion (Br. 51, 64), the district court's cost-savings determination did not assume that the State would "divert money from other mental-health programs and close adult homes if necessary to fund a new entitlement for DAI's constituents," though the district court did note that the State could realize additional savings in the long term by taking such steps. SPA-181-184. Even on appeal, the State cannot point to any specific costs in the record that the district court should not have considered.[12]

[12] The Coalition incorrectly argues (Mov. 58) that supported housing providers may apply for financial assistance from the State and that the cost of debt financing adds $11,600 per year to the cost of each supported housing unit. Such debt financing is available only to providers of supportive housing (not supported housing), which is not at issue. DX(3)-552 (D-441 (chart comparing costs of the State's residential programs to adult homes)); see also SPA-165 n.635 (distinguishing supportive housing from supported housing).

2. The State's Fiscal Difficulties Provide No Basis For Rejecting A Remedy That Will Actually Save The State Money

Nor do the State and Coalition's arguments (Br. 61; Mov. 55-56) concerning its fiscal difficulties undermine the district court's cost savings calculation. As described above, implementation of the district court's order will impose no net costs, even in the short term. As the district court found, the State "did not present any evidence showing a nexus between the current state of the economy and the specific relief DAI seeks." SPA-198. The court said, "[t]he record is devoid of evidence showing that the current fiscal difficulties have limited OMH's ability to develop supported housing," which requires no outlay of capital because it relies on existing units in the community. SPA-188. That the State had issued a Request for Proposal for "230 beds of new supported housing, with conditional awards to be made in July 2009," demonstrates that the State is capable of developing new supported housing units notwithstanding its budget problems, even without the benefit of the cost savings associated with moving adult home residents to supported housing. SPA-188; see also SPA-142.

Although financial resources are relevant, general allegations of fiscal difficulties alone, such as the State's references to its "financial crisis" (Br. 61), are not sufficient to establish a fundamental alteration defense (SPA-198). See *Frederick L.*, 364 F.3d at 496; *Fisher* v. *Oklahoma Health Care Auth.*, 335 F.3d 1175, 1183 (10th Cir. 2003) (a State cannot choose to solve a fiscal crisis by taking

steps that impede integration when other available solutions would promote integration); *Townsend* v. *Quasim*, 328 F.3d 511, 519-520 (9th Cir. 2003) (budget constraints alone do not establish a fundamental alteration defense).

Furthermore, the record contradicts the State and Coalition's assertion (Br. 64-66; Mov. 55) that compliance with the Remedial Order would adversely affect other needy populations and force the State to cut programs and services for other groups to fund new supported housing units. Because moving DAI's constituents from adult homes to supported housing will save the State money on net, it will not require the State to cut back on any other state program. SPA-189 (finding that the State failed to provide sufficient evidence that the requested relief would force the State to cut back on state programs); see also SPA-195-201. Also, there is no evidence that the State has had to take funds away from others when it developed supported housing units in the past. SPA-188-189.

Pursuant to the State's practice, the State could "use funds currently spent on adult home residents to serve adult home residents in supported housing." SPA-71 (discussing the concept of "redirecting spending" or "money follows the person"). The State implies (Br. 15) that it would be difficult to reallocate funds between agencies in connection with transferring residents from adult homes to supported housing. The evidence contradicts this argument. As the district court found, "ample evidence in the record demonstrat[es] the State's ability to redirect funds as

individuals with mental illness move from one setting to another." SPA-187. The State had in fact reallocated funds between agencies for mental health services many times in the past and its witnesses testified that the State is capable of doing so in the future. SPA-187.

As for the State's argument (Br. 65) that downsizing or closing under-populated adult homes would adversely affect others remaining in the adult homes, it is entirely within the State's discretion to decide how to handle the vacancies. SPA-187. Providing those adult home spots to homeless individuals, for instance, would continue to populate those facilities while at the same time saving the State money. SPA-186-187.

3. The State Did Not Establish That It Has A Comprehensive, Effectively Working Plan To Move Adult Home Residents Into Integrated Settings

As the State points out (Br. 54), *Olmstead* allows a State to avoid liability if it has "a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated." *Olmstead*, 527 U.S. at 605-606 (plurality opinion). The district court correctly concluded that the State did not have *any* plan—let alone "a comprehensive, effectively working plan," *Olmstead*, 527 U.S. at 605—to enable adult home residents to move to more appropriate and integrated settings. SPA-

158-172. Nor does the State even maintain a waiting list for adult-home residents who seek supported housing. SPA-166.

Despite the State's commitment to developing supported housing, the record is clear that the State has not provided—and does not believe it is obligated to provide—qualified adult home residents with services in more integrated settings appropriate to their needs. SPA-191-195. The State cannot assert (Br. 57) that *Olmstead* allows it to provide mental health services to other needy groups without even a plan for serving individuals with mental illness who are "'stuck' in" institutional adult homes. SPA-88 (quoting PX(2)-66). Without showing that it has taken steps to place qualified and willing adult home residents in more appropriate and integrated settings, the State is not entitled to invoke the fundamental alteration defense. See *Frederick L.* v. *Department of Welfare*, 422 F.3d 151, 157 (3d Cir. 2005) (stating that "a comprehensive working plan is a necessary component of a successful 'fundamental alteration' defense"); *Pennsylvania Prot. & Advocacy, Inc.* v. *Pennsylvania Dep't of Public Welfare*, 402 F.3d 374, 381 (3d Cir. 2005) ("[T]he only sensible reading of the integration mandate consistent with the Court's *Olmstead* opinion allows for a fundamental alteration defense only if the accused agency has developed and implemented a plan to come into compliance with the ADA and RA."). Cf. *Braddock*, 427 F.3d at 620 ("So long as states are genuinely and effectively in the process of

deinstitutionalizing disabled persons 'with an even hand,' we will not interfere.") (citation omitted); *Sanchez* v. *Johnson*, 416 F.3d 1051, 1067-1068 (9th Cir. 2005) ("[W]hen there is evidence that a State has in place a comprehensive deinstitutionalization scheme, which, in light of existing budgetary constraints and the competing demands of other services that the State provides, including the maintenance of institutional care facilities, is 'effectively working,' the courts will not tinker with that scheme.") (citation omitted).

The State responds by sleight-of-hand. It asserts (Br. 55) that it has a plan to deinstitutionalize individuals from *state psychiatric facilities*. But it makes no effort to show that it has "a comprehensive, effectively working plan for placing qualified" *adult home residents* in less restrictive settings. *Olmstead*, 527 U.S. at 605-606 (plurality opinion). Instead, it contends (Br. 56) that *Olmstead* does not require such a plan because this case does not involve the State's "obligation to deinstitutionalize eligible patients." But that is exactly what this case is about. SPA-88-108 (finding that adult homes are institutions).

C. The State's Supported Housing Program Is Not Limited To Those Who Need "Minimal" Services

The Coalition contends (Mov. 53) that the remedy is a fundamental alteration of the State's supported housing program because supported housing is appropriate only for individuals with mental illness "who are able to live independently with minimal support services." See also Br. 59 n.8. To the

contrary, the State has not imposed such a requirement on individuals in supported housing. SPA-118, 122. OMH's 1990 Supported Housing Implementation Guidelines, which the State relied on at trial to argue that supported housing is for individuals with minimal needs, do not state "that supported housing is only for—or even targets—those with minimal needs." SPA-122. In fact, OMH has issued several RFPs for supported housing targeting populations with "significant needs." SPA-118. For instance, OMH issued a RFP in 2005, targeting individuals with "high needs," such as "a person who, as a result of psychiatric disability, presents some degree of enduring danger to self or others or has historically used a disproportionate amount of the most intensive level of mental health services." SPA-118. Robert Myers, OMH's Senior Deputy Commissioner, also testified that some supported housing residents have "extensive psychiatric needs." SPA-119. Indeed, the State's brief on appeal (Br. 68) says that supported housing is designed "to serve individuals with serious mental illness." Nor is supported housing only for individuals who are in "serious jeopardy" of being homeless (Mov. 53). Otherwise, the State would not have designated adult home residents as a priority population. SPA-164.

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THE REMEDIAL ORDER IS NARROWLY TAILORED TO THE STATE'S VIOLATION

As this Court has explained, "a district court has broad discretion to enjoin possible future violations of law where past violations have been shown." *Henrietta D.* v. *Bloomberg*, 331 F.3d 261, 290 (2d Cir. 2003). A remedy for unlawful discrimination must "aim[] to 'eliminate [so far as possible] the discriminatory effects of the past' and to 'bar like discrimination in the future.'" *United States* v. *Virginia*, 518 U.S. 515, 547 (1996) (quoting *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965)) (bracketed phrase in *Virginia*). The district court asked the State to submit a remedial proposal, as suggested in *Lewis* v. *Casey*, 518 U.S. 343, 362-363 (1996), but the court rejected that proposal because it would not provide complete relief. That determination was not an abuse of discretion.

1. The State contends (Br. 69-72) that the Remedial Order is, on the one hand, too intrusive on state authority because it subjects the State to the court-appointed monitor and the court's review and, on the other hand, too vague because it gives the State some discretion in implementing the court's order. With respect to the State's federalism argument, the Remedial Order does not unnecessarily intrude on state authority. It simply directs the State to comply with the integration mandate of Title II of the ADA and Section 504 of the

Rehabilitation Act by developing the necessary number of supported housing slots. SPA-234. The Remedial Order is narrowly tailored to ensure that the qualified and willing adult home residents are offered supported housing beds at a "reasonable pace," *Olmstead* v. *L.C.*, 527 U.S. 581, 606 (1999) (plurality opinion), based on the evidence at trial showing that the State is capable of creating 1,500 supported housing beds per year. SPA-190.

The Remedial Order also incorporates for the most part the State's current operating procedures for developing supported housing units. For example, it adopts the State's normal procedures for creating supported housing through the RFP process. SPA-236; see also SPA-109, 163 (describing RFP process). And it retains the State's eligibility requirements for supported housing. SPA-238-239. It does not require supported housing be offered to those who pose a danger to themselves or others, just as those individuals are excluded from adult homes. SPA-237. Likewise, the Remedial Order incorporates the State's process of allowing supported housing providers—not state treatment professionals—to assess individuals to determine their necessary supports and services. SPA-237-238; see also SPA-119, 148. Cf. Br. 67-68; Mov. 50. Also consistent with current procedures, supported housing providers make the "final determination" whether an individual is qualified to enter their programs. SPA-144.

To the extent that "changing circumstances" and "new policy insights" (Br. 72) affect the State's ability to comply with the injunction, the State may seek to modify the injunction under Federal Rule of Civil Procedure 60(b)(5) at that time. See *Horne* v. *Flores*, 129 S. Ct. 2579, 2593-2594 (2009) (bringing new policy insights to bear on institutional reform decrees is the role of Rule 60(b)(5)); *Rufo* v. *Inmates of the Suffolk Cnty. Jail*, 502 U.S. 367, 383-384 (1992) (party may seek to modify an injunction based on a significant change in factual conditions or the law). But the mere *possibility* that circumstances will change in the future does not warrant overturning the injunction at the outset.

Contrary to the State's argument (Br. 69-71), nothing in *Olmstead* requires courts to issue declaratory relief instead of injunctive relief. An injunction is especially appropriate here. Although the State has shown a commitment to developing community housing in general, it has shown an equally strong disregard of its obligation to adult home residents. SPA-193. Indeed, the State has given no assurance that, absent an injunction, it would make progress in enabling adult home residents to live in more appropriate and integrated settings. Even after being directed by the court to submit a proposed remedial order consistent with the court's findings of fact and conclusions of law, the State did not. The State's proposed remedial order did not merely seek to narrow the remedy, but "directly contradict[ed] the court's explicit findings of fact." SPA-220. For instance, it

proposed to create 200 supported housing beds each year despite the court's finding that it was capable of developing 1,500 beds per year. SPA-220-221. This proposal was not only inconsistent with the court's findings, but it also was based on arguments, such as generalized assertions about the State's fiscal problems, that the district court considered and rejected at trial. SPA-228-229.

The State's vagueness argument is also unavailing. "Although it is true that 'fairness requires that the litigants receive explicit notice of precisely what conduct is' required, * * * fairness does not require a district court to resolve every possible inquiry or contingency that an injunction might raise." *Laforest* v. *Former Clean Air Holding Co.*, 376 F.3d 48, 60 (2d Cir. 2004) (citation omitted). As this Court stated in *Laforest*, so long as the defendant "received notice of what it [has] to do, what standard would guide its conduct, and the time frame in which to do it," the court "need not specify * * * more precisely" how to comply with the injunction. *Ibid*. Here, the Remedial Order clearly requires the State to create the specified number of supported housing beds in four years, pursuant to its standard RFP procedure for developing supported housing units, and to give supported housing providers access to adult homes to conduct in-reach and to determine the necessary support services. SPA-236-238. As discussed *supra*, allowing support service providers to assess adult home residents is consistent with the State's current

practice. SPA-119. Accordingly, the State has adequate notice of what it needs to do to comply with the Remedial Order.

2. The State argued at trial that supported housing is designed for individuals with mental illness who require minimal support services, but it argues for the first time on appeal that the Remedial Order is overbroad because it would allow individuals who do not have a serious enough mental illness into supported housing. Compare Br. 68 with SPA-121-122. The State cannot raise a new argument for the first time on appeal. See *Katel Ltd. Liab. Co.* v. *AT&T Corp.*, 607 F.3d 60, 68 (2d Cir. 2010) ("An argument raised for the first time on appeal is typically forfeited."). The State also fails to cite to anything in the record showing that adult home residents do not qualify for supported housing in this respect. In any event, DAI's constituents in adult homes do have serious mental illnesses: they "have one or more major illnesses, such as schizophrenia, bipolar disorder, depression and others, which constitute mental impairments that substantially limit one or more major life activities." SPA-80 n.6. Moreover, the record is clear that there are no material differences between adult home residents with mental disabilities and supported housing residents. SPA-135 (finding that "[t]here is generally little distinction between the psychiatric characteristics of Adult Home residents and supported housing residents").

3. The State and Coalition's remaining arguments (Br. 73-74; Mov. 58-60) are similarly without merit. First, the district court stated that DOH and its commissioner are proper defendants because DOH participates in the administration of the State's mental health services, and their inclusion is necessary to afford full relief to DAI's constituents (*e.g.*, they will need to coordinate with adult homes and other state agencies to implement the Remedial Order). SPA-201-202. The State does not offer any facts or controlling law that supports a contrary conclusion.

Second, the remedial order is not based on only the testimony of a handful of adult home residents, as the Coalition asserts (Mov. 58-60). The district court correctly found that, even though a large number of adult home residents are uninformed about alternative housing options, most of them are not opposed to receiving services in a more appropriate and integrated setting. SPA-157. This is consistent with the opinion of DAI's expert, Elizabeth Jones, who spoke to 179 residents during her visits to adult homes, and the State's Assessment Project, which found that "56% of the residents * * * reported a preference to move out of their adult home[s]." SPA-153. This evidence, coupled with the court's finding that adult home residents are virtually shut out of the supported housing program, is sufficient to support the scope of the Remedial Order. Despite the State and Coalition's demands (Br. 73; Mov. 58-59), the identification of an individual who

has applied for and was denied supported housing is unnecessary in light of the foregoing evidence. Furthermore, the record shows that the filing of an application for supported housing is not an appropriate measure of whether an individual is qualified for (and interested in) supported housing. SPA-144-145. Adult home residents must rely on adult home staff or social workers employed by adult homes to help them file this electronic form and often residents are unable to find someone willing to file the form on their behalf. SPA-144-146. In fact, "[t]he record is replete with testimony from residents explaining that, when they expressed an interest to case managers or other mental health providers in moving to more independent housing, they received no help—and often outright discouragement—in exploring and securing alternative housing options." SPA-145.

Lastly, as this Court stated in *Henrietta D.*, 331 F.3d at 290, a district court is "free to assume that past misconduct is highly suggestive of the likelihood of future violations." The record supports enjoining any future violations. See SPA-235. Besides, the Remedial Order expressly provides that the parties may file a motion to terminate the court's jurisdiction upon a showing of good cause. SPA-236. If circumstances change—*e.g.*, the State shows that it has a comprehensive, working plan for ensuring that qualified and willing adult home residents are able to receive services in a more appropriate and integrated setting and a waiting list

that is moving at a reasonable pace—the State is free to move the district court to terminate its jurisdiction over the case. SPA-236. That provision of the order should remove any legitimate objection to the district court's decision to reach future adult home residents (cf. Br. 73-74).

IV

THE DISTRICT COURT CORRECTLY HELD THAT DAI HAS STANDING

The district court held that DAI has statutory authority under the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI), 42 U.S.C. 10805(a)(1)(B), to represent its constituents in this action, and that DAI has met the requirements for associational standing under *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). SPA-24-27. The State and Coalition (Br. 74-79; Mov. 28-44) contend that this Court lacks jurisdiction over this action because DAI has not suffered any injury, and that DAI fails to satisfy the requirements for associational standing. These arguments are unavailing. And even if DAI did not have standing, the intervention of the United States as a plaintiff supporting the district court's prospective remedial order is sufficient to permit that order, and the case, to continue.

A. DAI Has Standing

DAI's ability to bring this case is of considerable importance for enforcement of the ADA. The Department of Justice has limited resources and

cannot address every violation of the civil rights laws; private litigation is an integral component of their effective enforcement. See, *e.g.*, *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (where Attorney General's ability to enforce civil rights law is limited, the "main generating force must be private suits in which * * * complainants act not only on their own behalf but also 'as private attorneys general in vindicating a policy that Congress considered to be of the highest priority'") (citation omitted).

In the disability rights area, Congress created protection and advocacy systems to fill the gap left by the Department of Justice's limited resources. PAIMI specifically grants protection and advocacy systems, which serve as an essential part of the federal disability rights enforcement scheme, authority to "pursue administrative, legal and other appropriate remedies to ensure the protection of individuals with mental illness." 42 U.S.C. 10805(a)(1)(B). Protection and advocacy systems are created pursuant to federal statute and funded by federal appropriations; they have authority to "bring suits in [their] own right to redress incidents of abuse or neglect, discrimination, and other rights violations." 42 C.F.R. 51.6(f). PAIMI's specific authorization of protection and advocacy agencies to assert the rights of their constituents is "sufficient to rebut the usual presumption (in the statutory context, about Congress's intent) that litigants may

not assert the rights of absent third parties." *United Food & Commercial Workers Union Local 751* v. *Brown Grp., Inc.*, 517 U.S. 544, 557 (1996).

Even if PAIMI were not sufficient by itself to give DAI standing in this action, that statute does help demonstrate that DAI has associational standing to sue on behalf of its constituents in adult homes. In *Hunt*, the Supreme Court held that the Washington Apple Advertising Commission, a state agency charged with protecting and promoting Washington's apple industry, had associational standing to challenge a North Carolina statute on behalf of Washington apple growers and dealers even though the agency was not a traditional voluntary membership organization. 432 U.S. at 343-345. The Court confirmed that an association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id*. at 343. The first two prongs are Article III requirements, but the third prong is a prudential requirement. *United Food*, 517 U.S. at 555-558. Contrary to the State and Coalition's arguments, all three conditions are met here. SPA-25-27 & nn.22-23.

1. The State and Coalition argue (Br. 75-77; Mov. 30-32) that DAI does not meet the first prong of the *Hunt* test because DAI lacks "members."[13] They assert (Br. 76-78; Mov. 31-36) that the aspects of representation and control found in *Hunt*—the apple growers and dealers "alone elect the members of the Commission; they alone may serve on the Commission; [and] they alone finance its activities"—are the *only* indicia of membership that would convert DAI's constituents into "members" to justify granting associational standing. *Hunt*, 432 U.S. at 344. The Supreme Court, however, did not state that those were the only indicia of membership that would be sufficient to satisfy Article III requirements. To the contrary, the Court emphasized that a broad view of associational standing was necessary to avoid "exalt[ing] form over substance." *Id.* at 345.

The State and Coalition's argument is inconsistent with *Hunt*. PAIMI reflects Congress's determination that individuals with mental disabilities are a unique and vulnerable population. 42 U.S.C. 10801(a)(1). Institutionalized individuals, in particular, face significant pressure against complaining that their rights are violated by the staff members who control nearly every aspect of their daily lives. This is certainly true of adult home residents, who fear retaliation by

[13] Both here and in district court, the State only argues that DAI does not meet the first prong of the test. SPA-25 n.22 ("Defendants explicitly concede that DAI has met the second element and do not contend that DAI has failed to satisfy the third element.").

adult home staff for participating in this action. SX(4)-331 (S-151 (E. Jones Report)). Congress recognized these barriers when it authorized and funded protection and advocacy organizations and gave them the power to access facilities, view records, and litigate on behalf of individuals with mental disabilities. As the Ninth and Eleventh Circuits concluded, protection and advocacy organizations (including DAI) are analogous to the Commission in *Hunt* because they "serve[] a specialized segment of the * * * community which is the primary beneficiary of its activities, including prosecution of this kind of litigation." *Doe* v. *Stincer*, 175 F.3d 879, 886 (11th Cir. 1999) (quoting *Hunt*, 432 U.S. at 344); see also *Oregon Advocacy Ctr*. v. *Mink*, 322 F.3d 1101, 1111 (9th Cir. 2003).

The State and the Coalition's formalistic definition of membership also ignores the fact that Congress created a number of mechanisms of participation and accountability to ensure that protection and advocacy organizations would be responsive to the population they are charged with serving. Congress required those organizations to have a governing board "composed of * * * members * * * who broadly represent or are knowledgeable about the needs of the clients served by the system," including "individuals who have received or are receiving mental health services and family members of such individuals." 42 U.S.C. 10805(c)(1)(B). Congress also required protection and advocacy systems to seek

advice and guidance from a PAIMI advisory council, which must have "at least 60 percent [of its] membership * * * comprised of individuals who have received or are receiving mental health services or who are family members of such individuals; and * * * which shall be chaired by an individual who has received or is receiving mental health services or who is a family member of such an individual." 42 U.S.C. 10805(a)(6)(B)-(C). The statute also requires protection and advocacy systems to establish a grievance procedure for their clients to ensure that the organization is operating in compliance with the provisions of PAIMI. 42 C.F.R. 51.25(a)(1). In addition, the public must be given the opportunity to comment on all decisions made by the PAIMI advisory council, and procedures for public comment must be in a format accessible to individuals with mental illness. 42 C.F.R. 51.24(b).

Both the Ninth and Eleventh Circuits concluded that these statutory provisions establish a tight connection between protection and advocacy organizations and their constituents that fully satisfies Article III. See *Mink*, 322 F.3d at 1111-1113; *Stincer*, 175 F.3d at 886. In doing so, those courts specifically rejected the arguments made by the State and Coalition (Br. 77; Mov. 30-36)—"that without a direct membership linkage to incapacitated defendants, [the protection and advocacy organization] cannot rely on injuries to those mentally ill defendants to meet the injury in fact requirement and establish the personal stake in

the outcome of the litigation that the Constitution demands." *Stincer*, 322 F.2d at 885-886; see also *Mink*, 322 F.3d at 1111-1112.

Only one court of appeals, by contrast, has found that a PAIMI advocacy organization lacks associational standing. See *Missouri Prot. & Advocacy Servs., Inc*. v. *Carnahan*, 499 F.3d 803, 810 (8th Cir. 2007). The *Missouri Protection & Advocacy* court appeared to require the exact indicia of membership that were present in *Hunt*. But that court did not even acknowledge the extensive mechanisms of participation and accountability Congress established to make protection and advocacy systems responsive to their constituents, nor did it give effect to Congress's specific grant of authority to those systems to sue in their own right to seek remedies on behalf of their constituents.[14]

---

[14] Not surprisingly, most district courts to address the issue have held that protection and advocacy organizations have associational standing. See, *e.g.*, *Advocacy Ctr. for the Elderly & Disabled* v. *Louisiana Dep't of Health & Hosps.*, No. 10-1088, 2010 WL 3170072, at *7 (E.D. La. Aug. 9, 2010); *Office of Prot. & Advocacy for Persons with Disabilities* v. *Connecticut*, 706 F. Supp. 2d 266, 279-284 (D. Conn. 2010); *Indiana Prot. & Advocacy Servs. Comm.* v. *Commissioner, Indiana Dep't of Correction*, 642 F. Supp. 2d 872, 880 (S.D. Ind. 2009); *Laflamme* v. *New Horizons, Inc.*, 605 F. Supp. 2d 378, 396-398 (D. Conn. 2009); *Joseph S.* v. *Hogan*, 561 F. Supp. 2d 280, 307-309 (E.D.N.Y. 2008); *New Jersey Prot. & Advocacy, Inc.* v. *Davy*, No. 05-1784, 2005 WL 2416962, at *2-3 (D.N.J. Sept. 30, 2005); *University Legal Servs., Inc.* v. *Saint Elizabeth's Hosp*., No. 1:05-cv-585, 2005 WL 3275915, at *4-5 (D.D.C. July 22, 2005); *Ohio Legal Rights Serv*. v. *Buckeye Ranch, Inc.*, 365 F. Supp. 2d 877, 883 (S.D. Ohio 2005); *Unzueta* v. *Schalansky*, No. 99-4162, 2002 WL 1334854, at *3 (D. Kan. May 23, 2002); *Aiken* v. *Nixon*, 236 F. Supp. 2d 211, 224 (N.D.N.Y. 2002); *Risinger* v. *Concannon*, 117 F. Supp. 2d 61, 68-71 (D. Me. 2000); *Brown* v. *Stone*, 66 F. Supp. 2d 412, 425-427

(continued . . .)

The Fifth Circuit similarly declined to find associational standing in *Association for Retarded Citizens of Dallas* v. *Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994) (*ARC of Dallas*), because the organization did not demonstrate the indicia of membership found in *Hunt*. *ARC of Dallas* involved an organization authorized by the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. 6042, and is therefore inapposite. 19 F.3d at 244 n.5. Unlike in a protection and advocacy system, the constituents of the non-PAIMI organization in *ARC of Dallas*, the court found without elaboration, were "unable to participate and guide the organization's efforts." *Id*. at 244.

Both the State and Coalition's demand for additional proof that DAI's constituents *control* DAI is inconsistent with Supreme Court precedent. The Coalition argues (Mov. 31, 33) that DAI's constituents did not "choose" to be its constituents or "seek" DAI's assistance, but *Hunt* makes clear that membership need not be voluntary. *Hunt*, 432 U.S. at 345.

(…continued)
(E.D.N.Y. 1999); *Rubenstein* v. *Benedictine Hosp.*, 790 F. Supp. 396, 408-409 (N.D.N.Y. 1992); *Trautz* v. *Weisman*, 846 F. Supp. 1160, 1163 (S.D.N.Y. 1994); *Michigan Prot. & Advocacy Serv., Inc*. v. *Babin*, 799 F. Supp. 695, 702 n.12 (E.D. Mich. 1992), aff'd on other grounds, 18 F.3d 337 (6th Cir. 1994); *Protection & Advocacy, Inc.* v. *Murphy*, No. 90-569, 1992 WL 59100, at *10 (N.D. Ill. Mar. 16, 1992).

The State and Coalition also argue (Br. 77; Mov. 32) that any Article III problems could be avoided if DAI had filed this suit on behalf of specific individuals with mental disabilities and brought this action in their names.[15] Neither *Hunt* nor this Court imposes such a requirement. See *Disability Rights Wisconsin, Inc*. v. *Walworth Cnty. Bd. of Supervisors*, 522 F.3d 796, 802 (7th Cir. 2008) (stating that the first *Hunt* factor does not require organizations to name members on whose behalf the suit is filed).

2. The second *Hunt* factor requires only that the lawsuit bears a reasonable connection to the association's knowledge and expertise and to the members' general interests. See *Building & Constr. Trades Council* v. *Downtown Dev., Inc.*, 448 F.3d 138, 149 (2d Cir. 2006). The State concedes that DAI meets the second *Hunt* factor. The Coalition, on the other hand, portrays itself as protector of the interests of DAI's constituents. It contends (Mov. 37) that the relief sought by DAI would inevitably result in the State's closing a "large number [of], if not almost all, adult homes," which, it contends, would harm DAI's constituents who

[15] The Coalition's assertion (Mov. 35-36) that Article III requires "proof" that the State violated a DAI constituent's rights under the ADA incorrectly conflates standing with the merits. It is enough that DAI alleged such a violation and provided sufficient detail to make the claim plausible. For instance, the complaint alleged that the State's 2002 Workgroup Report found that at least 50 percent or 6,000 adult home residents could live in more integrated community settings. SA-25-26. In addition, DAI initially produced a list of 1,536 adult home residents who are unjustifiably segregated in adult homes and are qualified to receive services in more appropriate and integrated settings. SPA-26.

choose to remain in adult homes. And it argues (Mov. 39) that "conflicting interests within an association's membership * * * destroy the association's power to sue for any of its members."

But *Hunt* does not require unanimity within an organization. In fact, in *UAW* v. *Brock*, 477 U.S. 274, 289-290 (1986), the Supreme Court found associational standing despite evidence of the union members' conflicting interests. The Court noted that any conflicts between an organization's members were resolved through its internal procedures. *Id*. at 290; accord *National Mar. Union* v. *Commander, Military Sealift Command*, 824 F.2d 1228, 1233-1234 (D.C. Cir. 1987); *Associated Gen. Contractors of Cal., Inc*. v. *Coalition for Econ. Equity*, 950 F.2d 1401, 1409 (9th Cir. 1991), cert. denied, 503 U.S. 985 (1992). As a practical matter, it would be virtually impossible to obtain unanimous opinions among an organization's members, especially with respect to contested issues that are the subject of litigation. Such a rule would prevent associational standing in most cases and "would disserve the public interest, which frequently would not be represented but for these suits." *Coalition for Econ. Equity*, 950 F.2d at 1409.[16] Similarly, the procedural safeguards that tie DAI to the interests of the population

[16] The cases relied on by the Coalition (Mov. 39) not only failed to address *Brock*, but also considered serious conflicts among an organization's membership under *Hunt's* third prong, and not under germaneness.

it serves guarantee that this lawsuit is reasonably connected to the interests of DAI's constituents. Indeed, the interests that DAI seeks to protect are not only germane to its purpose, but the reason for its existence.[17]

3. The third *Hunt* factor demands that neither the claim nor the relief requested require participation of individual members. *Hunt*, 432 U.S. at 343. This factor is a prudential limitation, one "best seen as focusing on * * * matters of administrative convenience and efficiency, not on elements of a case or

[17] The Coalition's dire prediction, moreover, has no basis in the record. The State can provide newly vacated adult home spots to homeless individuals, which will save the State money without affecting the occupancy rate in adult homes. SPA-186-187, 195-198, 201. The Coalition's suggestion (Mov. 37) that "[t]he very premise of the court's financial calculations was that" adult homes would be closed is also refuted by the record. The court's calculation that the relief granted would save the State money was based solely on its determination that the additional spending for rental subsidies for supported housing recipients was more than offset by the savings in state Medicaid and SSI-supplement outlays. SPA-174-175 (noting that the State's cost comparison "ignores Medicaid costs" and that "[o]nce Medicaid costs are taken into account, it would *not* be more expensive to serve DAI's constituents in supported housing rather than Adult Homes: it would actually *save* the State of New York $146 per year to serve an individual in supported housing instead of an Adult Home"), SPA-181 (chart taking all relevant costs into account, including the rental subsidy and Medicaid and SSI supplement costs, and showing that supported housing costs the State less, on net). Similarly, although the amici families of adult home residents are concerned that their family members would be forced to move to supported housing, only qualified *and willing* adult home residents would move to supported housing under the district court's remedial order. See Amicus Curiae Brief Filed On Behalf Of Families Of Current Adult Home Residents In Support Of Appellants Arguing For Reversal Of Judgment, filed Aug. 2, 2010, at 18-22. Thus, far from denying individuals with disabilities a voice in deciding where and how they will live (cf. Mov. 44), the remedial order gives them a choice, whereas they had none before.

controversy within the meaning of the Constitution." *United Food*, 517 U.S. at 557. In *United Food*, the Supreme Court noted that Congress abrogated *Hunt*'s third prong by authorizing unions to sue on behalf of their members in the WARN Act. *Id*. at 558. Similarly, Congress abrogated this element in PAIMI by explicitly authorizing protection and advocacy organizations, such as DAI, to "pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness." 42 U.S.C. 10805(a)(1)(B). See *Mink*, 322 F.3d at 1113 ("[I]n light of the role Congress assigned by statute to advocacy organizations, * * * Congress abrogated the third prong of the *Hunt* test.").

Even if the Court finds that DAI must satisfy the third prong, participation by DAI's constituents is not necessary. In *Brock*, the Supreme Court held that, where the issue involves resolution of a question of law and leaves resolution of individual eligibility for benefits to be determined later, individual participation is not required. 477 U.S. at 288 (stating that the "unique facts" of each member's claim will be considered later before any member would receive benefits). This case similarly raises a legal question that does not necessitate individual assessments, a question that the State itself characterizes in its opening brief as one that does not require assessing individual claims. See *Bano* v. *Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) ("[W]here the organization seeks a purely legal ruling without requesting that the federal court award individualized relief to

its members, the *Hunt* test may be satisfied."); see also *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975) ("[S]o long as * * * individual participation of *each* injured party" is not necessary, the association may be an appropriate representative of its members" and entitled to invoke associational standing) (emphasis added). Here, the record contains overwhelming evidence by expert witnesses as well as state-commissioned reports that virtually all of DAI's constituents are qualified for and not opposed to receiving mental health services in a more appropriate and integrated setting. SPA-146-149. Those who choose to stay in adult homes may do so, SPA-157, but those placement decisions need not be made at this time.

B. The United States Has Standing To Continue Litigating This Action

Contrary to the State and Coalition's assertions (Br. 80-81; Mov. 44), this Court may exercise jurisdiction over this action even if it determines that DAI lacks standing. Although jurisdiction must generally exist at the time an action is commenced, the Supreme Court and this Court have recognized an exception to permit appellate courts to correct jurisdictional defects "when requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Newman-Green, Inc*. v. *Alfonzo-Larrain*, 490 U.S. 826, 836-837 (1989) (allowing court of appeals to dismiss non-diverse party to preserve jurisdiction); see also *Caterpillar, Inc*. v. *Lewis*, 519 U.S. 61, 75 (1996) (allowing intervenor to continue action after original

plaintiff settled because once a case "has been tried in federal court, * * * considerations of finality, efficiency, and economy become overwhelming"); *Mullaney* v. *Anderson*, 342 U.S. 415, 416-417 (1952) ("To dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration.").

This Court has long held that it may allow an additional party to continue an action even if the original plaintiff failed to properly invoke the district court's jurisdiction. In *Hackner* v. *Guaranty Trust Co.*, 117 F.2d 95, 98 (2d Cir.), cert. denied, 313 U.S. 559 (1941), this Court allowed the filing of an amended complaint adding a new plaintiff who alleged a sufficient amount in controversy where the original action was dismissed because the original plaintiffs did not allege such an amount. The Court concluded that "this action can continue with respect to [the new plaintiff] without the delay and expense of a new suit, which at long last will merely bring the parties to the point where they now are." This Court reaffirmed the vitality of *Hackner* in *Pressroom Unions-Printers League Income Sec. Fund* v. *Continental Assurance Co.*, 700 F.2d 889, 893 n.9 (2d Cir.), cert. denied, 464 U.S. 845 (1983), but found in that case that the district court did not abuse its discretion when it declined to allow amendment of the complaint due to statute of limitation problems.

The Third Circuit, relying on *Hackner*, held that although intervention cannot ordinarily cure a jurisdictional defect, courts have the discretion to avoid unnecessary delay and expense by allowing an intervenor to continue to pursue its claims even after dismissal of the original plaintiff. *Fuller* v. *Volk*, 351 F.2d 323, 329 (3d Cir. 1965) (citing *Hackner*, 117 F.2d at 98). In *Fuller*, the Third Circuit dismissed the appeal of the original plaintiff for lack of jurisdiction and remanded for the district court to exercise its discretion to grant permissive intervention, if there was an independent basis for jurisdiction for the intervention. *Id*. at 328-329; see also *McKay* v. *Heyison*, 614 F.2d 899, 907 (3d Cir. 1980) (reaffirming *Fuller*).

As in *Hackner* and *Fuller*, if this Court decides that DAI does not have standing, it should allow the United States to continue litigating this action as a separate action under its complaint-in-intervention. See *Pasadena City Bd. of Educ*. v. *Spangler*, 427 U.S. 424, 430-431 (1976) (stating that "[e]xcept for the intervention of the United States, we think this case would clearly be moot," but holding that "the presence of the United States as a party ensures that this case is not moot"). The fact that the United States' complaint expressly adopts the district court's findings of fact and conclusions of law (SA-45-48) eliminates any prejudice to the State. Indeed, allowing the United States, which has standing to pursue prospective relief under 42 U.S.C. 12133, to continue this action is consistent with the fundamental policy under Article III that a federal court decides

a legal issue only if the plaintiff has a sufficient "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult * * * questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). At bottom, "a present, live controversy" between the United States and the State exists, and the United States should be allowed to continue litigating this action. Cf. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983) (holding that plaintiff did not have standing to pursue injunctive relief because he was not likely to suffer from chokeholds from police officers in the future).

After seven years of litigation, a five-week trial, and hundreds of pages of findings of fact and conclusions of law, requiring the United States to file a new complaint and retry this case is exactly the kind of needless delay and expense that *Hackner* and *Fuller* cautioned against. The United States would end up submitting the same evidence at trial and the parties, as well as DAI's constituents who remain unnecessarily segregated from the community in adult homes, would no doubt end up in the same place as now after a new trial. See *California Credit Union League* v. *Anaheim*, 190 F.3d 997, 1001 (9th Cir. 1999) (relying on *Mullaney* and *Newman-Green*, court allowed joinder of the United States on appeal to cure a jurisdictional defect and "prevent needless judicial proceedings without any resulting prejudice to the remaining parties"), cert. denied, 528 U.S. 1154 (2000).

V

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE COALITION'S MOTION TO INTERVENE

A. Standard Of Review

The district court held that the Coalition's motion was untimely, and a determination of timeliness is committed to the sound discretion of the trial court to consider the totality of the circumstances. See *United States* v. *Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994). The deferential abuse-of-discretion standard of review is applied to denial of motions to intervene because they are based on "fact-intensive inquiries and a district court 'has the advantage of having a better "sense" of the case than we do on appeal.'" *Mastercard Int'l Inc.* v. *VISA Int'l Serv. Ass'n*, 471 F.3d 377, 389 (2d Cir. 2006) (citation omitted).

B. The Coalition Has Not Satisfied The Requirements For Intervention

1. To intervene as of right under Federal Rule of Civil Procedure 24(a)(2), the Coalition must satisfy four conditions: (1) file a timely motion; (2) claim an interest relating to the property or transaction that is the subject of the action; (3) be so situated that without intervention the disposition of the action may impair that interest; and (4) show that the interest is not already adequately represented by existing parties. *Mastercard*, 471 F.3d at 389. Intervention should be denied if even one of the requirements is not met. See *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 197-198 (2d Cir. 2000). Unlike the United States, which was

granted (permissive) intervention at the outset of remedial proceedings, the Coalition participated in discovery and sat in on parts of the trial, but did not seek to intervene at that time. The Coalition made a tactical bet that the State would prevail and its intervention would be unnecessary. When it lost that bet, the Coalition (unlike the United States) sought to expand the issues in a way that threatened to force new evidentiary hearings or even discovery. In this context, the district court did not abuse its discretion by denying that the Coalition's motion to intervene and instead granting the Coalition amicus status.

a. Factors to consider in determining timeliness include: (1) how long the applicant knew or should have known of its interests before moving to intervene; (2) prejudice to the parties resulting from the delay; (3) prejudice to the applicant if intervention is denied; and (4) presence of unusual circumstances weighing in favor or against intervention. See *Mastercard*, 471 F.3d at 390. The district court examined all four factors and concluded that the motion was untimely. SPA-216.

As the district court stated, the Coalition was "no stranger[] to this litigation." SPA-207. Its attorneys participated in discovery (attended depositions of adult home staff and responded to subpoenas for documents) and "sat in on portions" of the trial. SPA-207. Yet the Coalition waited until six years into the litigation and after the liability finding before it moved to intervene. SPA-205-206. The court found, however, that DAI's 2003 complaint and the parties' 2007

summary judgment motions put the Coalition on notice that its interests could be affected by this case. SPA-210-212. DAI's complaint requested the "[s]hifting [of] residents and funds from impacted adult homes to community-based residential programs." SPA-210 (quoting Compl. ¶ 118). Moreover, the parties and the court specifically addressed the cost of moving DAI's constituents from adult homes to supported housing, including potentially eliminating grant programs. SPA-211. The Coalition does not dispute these facts. Nor does it challenge the district court's determination that the Coalition's claims concerning its "economic entitlement[]" would delay the proceedings and prejudice the parties by requiring the court to "conduct[] evidentiary hearings or even reopen[] discovery." SPA-213.

The Coalition argues instead (Mov. 25-26) that the court abused its discretion by denying the Coalition's motion to intervene as untimely, while allowing the United States to intervene during the remedial proceedings. Unlike the Coalition, the United States' complaint-in-intervention explicitly adopted the court's factual findings and conclusions of law and the United States would not have (and has not) delayed the proceedings. SA-40. Furthermore, the rule for permissive intervention specifically allows intervention by a federal agency in lawsuits involving federal statutes or regulations within its purview. See Fed. R. Civ. P. 24(b)(2). The Coalition suggests (Mov. 27) that, if the district court was

concerned about the Coalition injecting collateral issues, it should have allowed the Coalition to intervene and limited the scope of the issues it could raise. But the Coalition does not explain how participating as an amicus during the remedial stage, as it did, prevented it from asserting the interests of adult home providers.

The Coalition further argues (Mov. 25) that, although the State did not formally represent its interests at any time during this lawsuit, its interests were "coterminous" with the State's interest until the remedial stage, and timeliness should be evaluated solely in terms of adequate representation. This argument impermissibly collapses the timeliness and adequate representation requirements of intervention into one, thereby eliminating the timeliness element. No court has approved such an analysis. *NRDC* v. *New York State Department of Environmental Conservation*, 834 F.2d 60, 61-62 (2d Cir. 1987), which the Coalition cites as support, concerns only the definition of "adequate representation." Timeliness was not at issue. The other cases cited by the Coalition are also inapposite (Mov. 26). *Bridgeport Guardians, Inc.* v. *Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010), and *Brody* v. *Spang*, 957 F.2d 1108, 1115-1116 (3d Cir. 1992), both involved only the interest requirement and did not address timeliness. In fact, the court in *Brody* stated that "there was no question" that the motion to intervene was timely because the intervenor filed its original motion to intervene one day after the complaint was filed and its amended motion two weeks

later. 957 F.2d at 1115. *Hodgson* v. *United Mine Workers of America*, 473 F.2d 118, 129 (D.D.C. 1972), is inapposite as well. Although the motion to intervene was filed after trial, the intervenor in *Hodgson*, unlike the Coalition, "expressly disavowed any desire to reopen any previously-litigated question," and consequently would not have "impose[d] any untoward burden" on the parties or the court. *Ibid*.

Instead, this case is similar to *United States* v. *Yonkers Board of Education*, 801 F.2d 593, 596 (2d Cir. 1986), where the putative intervenors moved to intervene three months into the remedial proceedings and sought to relitigate issues the district court had decided after lengthy proceedings. Affirming the denial of intervention as untimely, this Court stated that the motion to intervene "resemble[d] [a motion for] post-judgment intervention, which is generally disfavored." *Ibid*.; *Farmland Dairies* v. *Commissioner of N.Y. State Dep't of Agric. & Mkts.*, 847 F.2d 1038, 1044 (2d Cir. 1988) (same).

b. The Court can affirm the denial of the Coalition's motion to intervene based on untimeliness alone, see *Farmland Dairies*, 847 F.2d at 1045, but the motion also failed to meet the interest requirement for intervention. The Coalition asserts (Mov. 19-22) that it has a material interest in the appeal. But it is clear that the Coalition's pecuniary interest is not what this case is about. At issue in this litigation is the State's obligation to administer its services for people with

disabilities in the most integrated setting appropriate for their needs, and not the operation of any particular adult home. See 28 C.F.R. 35.130(d) ("A public entity shall administer services * * * in the most integrated setting appropriate to the needs of qualified individuals with disabilities."). The pecuniary interests of adult homes do not determine whether the State has violated the integration mandate and what the State needs to do to comply with Title II of the ADA and Section 504 of the Rehabilitation Act. The State has an obligation to comply with federal law, even when acting through private entities. See *Olmstead* v. *L.C.*, 527 U.S. 581, 607 (1999) (applying integration mandate to the State where State contracted with private provider to deliver mental health services); *Radaszewski* v. *Maram*, 383 F.3d 599, 614-615 (7th Cir. 2004) (same). Once a violation is proven, the State must take corrective action, subject only to the State's showing that such an action would constitute a *fundamental* alteration of *its* program. The pecuniary interest of private businesses is not part of the calculation.

The Coalition contends (Mov. 20-22) that the Remedial Order impairs its interests because it imposes obligations on adult homes, jeopardizing their ability to operate. But the court's order does not require adult homes to close. Furthermore, the fiscal difficulties cited by the Coalition, including having to close or losing operating certificates (Mov. 20-21), are contingent on future actions by the State. For that reason, the Coalition's asserted interests are not sufficiently

direct and substantial to justify intervention as of right. See *Washington Elec. Co-Op., Inc*. v. *Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990) ("An interest that is * * * contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy [Rule 24(a)(2)]."). See also *Person* v. *New York State Bd. of Elections*, 467 F.3d 141, 144 (2d Cir. 2006) (denying motion to intervene on appeal where the putative intervenor had only an "abstract interest" in the subject of the case); *United States* v. *Peoples Benefit Life Ins. Co.*, 271 F.3d 411, 415 (2d Cir. 2001) ("For an interest to be cognizable under Rule 24(a)(2), it must be 'direct, substantial, and legally protectable.'") (citation omitted).

An analogous case is *Restor-A-Dent Dental Laboratories, Inc.* v. *Certified Alloy Products, Inc.*, 725 F.2d 871, 877 (2d Cir. 1984), in which the Court affirmed the denial of a general liability insurer's motion to intervene as of right in a breach of contract action brought against one of its insureds. In holding that the insured did not have an interest justifying intervention, the Court relied in part on the reasoning that the insurer's interest was only in its potential liability following an adverse judgment against its insured, and not in the underlying breach of contract action. *Id*. at 875.

As for the Coalition's contention (Mov. 21-22) that the Remedial Order impairs its property and speech rights, the Remedial Order does not require adult

homes to do anything that they are not already obligated to do under state law. For instance, the Coalition argues (Mov. 21) that the Remedial Order requires adult home providers to allow supported housing providers to enter their facilities to conduct in-reach among the residents. State law, however, already requires adult home operators to give community organizations, such as supported housing providers, access to adult homes to provide "a service or educational program." N.Y. Soc. Serv. L. § 461-a(3)(b)(ii); 18 NYCRR § 485.14(a)(2). To the extent that the order requires that adult homes provide information to residents about supported housing (Mov. 22), that requirement is also consistent with existing state law. Under state law, adult homes must provide such case management services "as are necessary to support the resident in maintaining independence of function and personal choice," including assisting residents in "mak[ing] and execut[ing] sound discharge or transfer plans." 18 NYCRR § 487.7(g). Indeed, the Coalition's proposed remedial plan states that "[a]dult homes should provide residents information about supported housing and how to access that program" and "[c]ase managers should also be trained to address questions relating to supported housing, since responding to [those] inquiries * * * [is] part of the adult homes' already existing case management obligation." SA-56.

2. The Coalition's request (Mov. 27-28) for permissive intervention was also untimely. SPA-216. See *Mastercard*, 471 F.3d at 391 (affirming denial of

motion for permissive intervention as untimely); *United States* v. *Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 990 n.19 (2d Cir. 1984) ("[A] denial of permissive intervention has virtually never been reversed."); see also Fed. R. Civ. P. 24(b) (provides for permissive intervention "[o]n timely motion"). Moreover, "[t]he principal guide in deciding whether to grant permissive intervention is 'whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.'" *Pitney Bowes*, 25 F.3d at 73 (quoting Fed. R. Civ. P. 24(b)(2)). The Coalition seeks to inject arguments that have not been addressed by the parties or district court. It should not be permitted to raise new issues at this juncture. To the extent they wish to address the issues raised by the State, participation as amicus curiae should be sufficient. Accordingly, the court did not abuse its discretion in denying permissive intervention.

CONCLUSION

The Court should affirm the district court's judgment and denial of intervention by the Coalition and ESAAL.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
Principal Deputy Assistant
Attorney General

s/ Teresa Kwong
JESSICA DUNSAY SILVER
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4757

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation imposed by Rule 28.1(e)(2)(B)(i). The brief was prepared using Microsoft Word 2007 and contains 21,029 words of proportionally-spaced text. The type face is Times New Roman, 14-point font.

s/ Teresa Kwong
TERESA KWONG
Attorney

Dated: October 6, 2010

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2010, a copy of the foregoing Brief For The United States As Appellee was served by CM/ECF on:

Cecelia C. Chang
New York State Office of the Attorney General
120 Broadway, 25th Floor
New York, NY 10271

Andrew Gordon
Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019

Patricia A. Millett
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave., NW
Washington, D.C. 20036

David T. Luntz
Hinman & Staub, P.C.
121 State Street
Albany, NY 12207

s/ Teresa Kwong
TERESA KWONG
Attorney