IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

A.R., *et al.*,
Plaintiffs-Appellants

v.

SECRETARY, FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION, *et al.*,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF *AMICI CURIAE* NATIONAL ORGANIZATIONS REPRESENTING INDIVIDUALS WITH DISABILITIES IN SUPPORT OF NEITHER PARTY

STEVEN J. SCHWARTZ
ALISON BARKOFF
KATHRYN RUCKER
Center for Public Representation
22 Green Street
Northampton, MA 01060
(413) 586-6024
sschwartz@cpr-ma.org
abarkoff@cpr-us.org
krucker@cpr-ma.org

Counsel for Amici Curiae

IRA A. BURNIM
JENNIFER MATHIS
Bazelon Center for Mental Health Law
1101 15th Street NW, Suite 1212
Washington, DC 20005
(202) 467-5730
irab@bazelon.org
jenniferm@bazelon.org

Counsel for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1, counsel for Amici Curiae American Association of People with Disabilities, The Arc of the United States, National Alliance on Mental Illness, National Disability Rights Network, and Paralyzed Veterans of America hereby certify that the following persons and parties may have an interest in the outcome of this case:

A.G., by and through his next friend, Gamal Gasser, Plaintiff-Appellant

American Association of People with Disabilities, Amicus Curiae in this appeal and in related appeal No. 17-13595-BB

Annino, Paolo G., Counsel for Plaintiffs-Appellants

A.R., by and through her next friend, Susan Root, Plaintiff-Appellant

Autistic Self Advocacy Network, Amicus Curiae in related appeal No. 17-13595-BB

Bardos, Andy, Counsel for Defendant-Appellee Justin Senior and, in related appeal No. 17-13595-BB, for Defendant-Appellee State of Florida

Bazelon Center for Mental Health Law, Amicus Curiae in related appeal No. 17-13595-BB

Bond, Rebecca B., Counsel for the United States, Plaintiff-Appellant in related appeal No. 17-13595-BB

Burnim, Ira, Counsel for Amici Curiae Bazelon Center for Mental Health

Law, National Federation of the Blind, the National Disability Rights Network, Autistic Self Advocacy Network, The Arc of the United States, Disability Rights Education and Defense Fund, Inc., and National Alliance on Mental Illness in related appeal No. 17-13595-BB

Chandler, Thomas E., Counsel for the United States in related appeal No. 17-13595-BB

C.M., by and through his next friend, Norine Mitchell, Plaintiff-Appellant

C.V., by and through his next friends, Michael and Johnette Wahlquist, Plaintiff-Appellant

Deluca, Francesco A., Counsel for Amici Curiae Former Members of Congress in related appeal No. 17-13595-BB

Dietz, Matthew W., Counsel for Plaintiffs-Appellants

Disability Independence Group, Inc., Counsel for Plaintiffs-Appellants

Disability Rights Education and Defense Fund, Inc., Amicus Curiae in related appeal No. 13-595-BB

Esposito, Beth A., Counsel for the United States in related appeal No. 17-13595-BB

Florida State University College of Law, Public Interest Law Center, Counsel for Plaintiffs-Appellants

Gandy, William Eugene, Jr., Counsel for Celeste Philip and Cassandra Pasley, Defendants-Appellees

Goldstein, Daniel F., Counsel for Amici Curiae the Bazelon Center for Mental Health Law, National Federation of the Blind, National Disability Rights Network, the Autistic Self Advocacy Network, The Arc of the United States, Disability Rights Education and Defense Fund, Inc., and National Alliance on Mental Illness in related appeal No. 17-13595-BB

Goodman, Lisa C., Counsel for Plaintiffs-Appellants

Gore, John M., Counsel for the United States in related appeal No. 17-13595-BB

GrayRobinson, P.A., Counsel for Defendant-Appellee Justin M. Senior and, in related appeal No. 17-13595-BB, for Defendant-Appellee State of Florida

Greenbaum, Jon, Counsel for Amici Curiae Former Members of Congress in related appeal No. 17-13595-BB

Greenberg, Benjamin G., Counsel for the United States in related appeal No. 17-13595-BB

Grunewald, Edward J., Counsel for Plaintiffs-Appellants

Harrell-James, Veronica, Counsel for the United States in related appeal No.

17-13595-BB

Hunt, Patrick M., United States Magistrate Judge, Southern District of Florida

Lawyers' Committee for Civil Rights Under Law, Counsel for Amici Curiae Former Members of Congress in related appeal No. 17-13595-BB

Lukis, Ashley Hoffman, Counsel for Defendant-Appellee Justin M. Senior and, in related appeal No. 17-13595-BB, for Defendant-Appellee State of Florida

Mawhinney, Allison G., Counsel for Defendant-Appellee Justin M. Senior and, in related appeal No. 17-13595-BB, for Defendant-Appellee State of Florida

McDannell, Jennifer K., Counsel for the United States in related appeal No. 17-13595-BB

McDonald, Elizabeth E., Counsel for the United States in related appeal No. 17-13595-BB

McKittrick, Neil V., Counsel for Amici Curiae Former Members of Congress in related appeal No. 17-13595-BB

M.D., by and through her next friend, Pamela DeCambra, Plaintiff -Appellant

Meros, George N., Jr., Counsel for Defendant-Appellee

Moore, James Timothy, Jr., Counsel for Defendant-Appellee Justin M. Senior and, in related appeal No. 17-13595-BB, for Defendant-Appellee State of Florida

National Alliance on Mental Illness, Amicus Curiae in this appeal and in related appeal No. 17-13595-BB

National Disability Rights Network, Amicus Curiae in this appeal and in related appeal No. 17-13595-BB

National Federation of the Blind, Amicus Curiae in related appeal No. 17-13595-BB

North Florida Center for Equal Justice, Inc., Counsel for Plaintiffs-Appellants

Ogletree Deakins Nash Smoak & Stewart, P.C., Counsel for Amici Curiae Former Members of Congress in related appeal No. 17-13595-BB

Park, H. Justin, Counsel for the United States in related appeal No. 17-13595-BB

Paralyzed Veterans of America, Amicus Curiae in this appeal and in related appeal No. 17-13595-BB

Pasley, Cassandra G., Director of the Florida Department of Health's Children's Medical Service, Defendant-Appellee

Philip, Celeste, M.D., Surgeon General of the State of Florida and Secretary

of the Florida Department of Health, Defendant-Appellee

Raish, Anne S., Counsel for the United States in related appeal No. 17-13595-BB

Reynolds, J. Patrick, Counsel for Celeste Philip and Cassandra Pasley, Defendants-Appellees

Robin-Vergeer, Bonnie I., Counsel for the United States in related appeal No. 17-13595-BB

Rosenbaum, Robin S., Former United States District Judge, Southern District of Florida

Senior, Justin, Secretary of the Florida Agency for Health Care Administration, Defendant-Appellee

Sheeran, Andrew T., Counsel for Defendant-Appellee Justin M. Senior and, in related appeal No. 17-13595-BB, for Defendant-Appellee State of Florida

Street, Leslei Gayle, Counsel for Defendant-Appellee Justin M. Senior and, in related appeal No. 17-13595-BB, for Defendant-Appellee State of Florida

T.H., by and through her next friend, Paolo Annino, Plaintiff-Appellant

The Arc of the United States, Amicus Curiae in this appeal and in related appeal No. 17-13595-BB

Thomas, Victoria, Counsel for the United States in related appeal No. 17-13595-BB

United States of America, Plaintiff-Appellant in related appeal No. 17-13595-BB

Weinstock, Lindsey, Counsel for the United States in related appeal No. 17-13595-BB

Zachariasiewicz, Jean M., Counsel for Amici Curiae Bazelon Center for Mental Health Law, National Federation of the Blind, National Disability Rights Network, Autistic Self Advocacy Network, The Arc of the United States, Disability Rights Education and Defense Fund, Inc., and National Alliance on Mental Illness in related appeal No. 17-13595-BB

Zloch, William J., United States District Judge, Southern District of Florida

Pursuant to Fed. R. App. P. 26.1, counsel for Amici Curiae certifies that no parent corporation or publicly held corporation owns 10% or more of the stock of any of the Amici Curiae.

TABLE OF CONTENTS

TABLE OF AUTHORITIES……...x

INTEREST OF AMICI CURIAE……....1

INTRODUCTION AND SUMMARY OF ARGUMENT……..4

ARGUMENT……5

I. The Americans with Disabilities Act's "Integration Mandate" Is One of its Core Protections……..5

A. Congress Enacted the Integration Mandate to End the Long History of Isolation and Exclusion of People with Disabilities……..5

B. Community Integration Is a Key Priority for People with Disabilities……..7

C. Enabling Children with Disabilities to Avoid Institutionalization and Remain with their Families Is Critical to Child Development……8

II. Certification of At Risk Classes in *Olmstead* Cases Is a Well-Established and Important Vehicle for the Enforcement of the ADA's Integration Mandate……...10

A. Class Certification Is an Important Vehicle for Ensuring Enforcement of the ADA's Integration Mandate……12

B. Courts Have Routinely Certified Classes Under Fed. R. Civ. P. 23 in ADA Cases Seeking Services in Community Settings……..14

C. Courts Routinely Certify Classes in Olmstead Cases That Include Individuals At Serious Risk of Institutionalization……17

D. The Plaintiffs' Proposed "At Risk" Class…….20

III. CONCLUSION……..22

TABLE OF AUTHORITIES

Cases

A.R. v. Dudek, 2015 WL 11143082 (S.D. Fla, Aug. 8, 2015) 10, 11, 12

Auer v. Robbins, 519 U.S. 452, 461 (1997) 18

Chambers v. City & Cnty. of San Francisco, No. 06-cv-6346, slip. op. at 1-4 (N.D. Cal. July 12, 2007) 16

Colbert v. Blagojevich, No. 07 C 4737, 2008 WL 4442597 (N.D. Ill. Sept. 29, 2008) 16

Conn. Office of Prot. and Advocacy, 706 F. Supp. 2d at 266 16

Davis v. Shah, 821 F.3d 213, 263 (2nd Cir. 2016) 17, 18

Dunakin at *v. Quigley*, 99 F. Supp. 3d 1297 (W.D. Wa. 2015)..... 15, 22

Dunakin v. Quigley, No. 15-80076 (9th Cir., Aug. 10, 2015) 15-16

Fisher v. Oklahoma Health Care Auth., 335 F.3d 1175, 1182 (10th Cir. 2003).....17

Gray v. Golden Gate Nat'l Recreational Area, 279 F.R.D. 501 (N.D. Cal. 2011) .14

Gray v. Golden Gate Nat'l Recreational Area, 866 F. Supp. 2d 1129, 1142 (N.D. Cal. 2011) 15

Henderson v. Thomas, 289 F.R.D. 506, 508 (M.D. Ala. 2012).....14

Hutchinson ex. rel. Julien v. Patrick, 683 F. Supp. 2d 121 (D. Mass. 2010), *aff'd* 636 F.3d 1, 6 (1st Cir. 2011).....16

Kenneth R., 293 F.R.D. 254 (D.N.H. 2013) 11, 14, 17

Lane v. Kitzhaber, 283 F.R.D. 587 (D. Or. 2012) 11, 14, 18, 19

Long v. Benson, No. 08-cv-26, 2008 WL 4571904 (N.D. Fla. Oct. 14, 2008).....16

M.A. v. Norwood, 133 F. Supp. 3d 1093 (N.D. Ill. 2015) 17

M.R. v. Dreyfus, 663 F.3d 1100, 1116-1117 (9th Cir. 2011).....17

Makin ex rel. Russel v. Hawaii, 114 F.Supp.2d 1017, 1033 (D. Haw. 1999) 18

Murphy v. Piper, 2107 WL 4355970 (D. Minn., Sept. 29, 2017).....14

N.B. v. Hamos, 26 F. Supp. 3d 756, 776 (N.D. Ill. 2014 14

O.B. v. Norwood, 107 F. Supp. 3d 1186 (N.D. Ill. 2016).....17

Olmstead v. L.C., 527 U.S. 581 (1999)..... *passim*

Oster v. Lightbourne, No. C 09-4668 CW, 2012 WL 685808 (N.D. Cal. Mar. 2, 2012)..... 14, 18

Pashby v. Cansler, 279 F.R.D. 347, 353 (E.D.N.C. 2011)..... 11, 14

Pashby v. Delia, 709 F.3d 307, 321-322 (4th Cir. 2013) 17, 18

Rolland v. Cellucci, No. 98-30208-KPN, 1999 WL 34815562 (D. Mass. Feb. 2, 1999), *23(f) review denied*, Dkt No. 99-8089 (1st Cir., Mar. 2, 1999) 16, 22

Rolland v. Patrick, No. 98-30208-KPN, 2008 WL 4104488 (D. Mass. Aug. 19, 2008) 16

Steimel v. Wernert, 823 F.3d 902, 914 (7th Cir. 2016)..... 17, 18

Steward v. Janek, 315 F.R.FD. 472 (W.D. Tex. 2016).....15

Thorpe v. District of Columbia, 303 F.R.D. 120, 138 (D.D.C. 2014) 16

Van Meter v. Harvey, 272 F.R.D. 274 (D. Me. 2011) 16, 22

Wal-Mart Stores v. Dukes, 564 U.S. 338 (2011).....15

Williams v. Blagojevich, No. 05-C-4673, 2006 WL 3332844 (N.D. Ill. Nov. 13, 2006) 16

Statutes

42 U.S.C. § 1396r(e)(7) 15, 22

42 U.S.C. § 12134 18

Rules

Fed. R. Civ. P. 23 ..... 11, 12, 13, 14, 19, 20

Regulations

28 C.F.R. § 35.130(d) 5

42 C.F.R. § 483.112 22

Other Authorities

Statement of the Department of Justice on Enforcement of the integration mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* 18

INTEREST OF *AMICI CURIAE*[1]

Amici are national organizations advancing the interests of children and adults with disabilities. Each has expertise in, and works to secure, the inclusion of people with disabilities in society's mainstream. Each is familiar with the harms caused by needless institutionalization and is committed to full implementation of the Americans with Disabilities Act's "integration mandate."

The American Association of People with Disabilities (AAPD) works to increase the political and economic power of people with disabilities. A national cross-disability organization, AAPD advocates for full recognition of the rights of 50+ million Americans with disabilities.

Paralyzed Veterans of America ("PVA") is a national, Congressionally-chartered veterans service organization. PVA employs its expertise, developed since its founding in 1946, on behalf of armed forces veterans who have experienced spinal cord injury or dysfunction. PVA advocates for quality health care, research and education, veterans benefits, and for civil rights, accessibility and opportunities that maximize independence for its members and all veterans and

[1] No counsel for any party authored any part of this brief. No party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person (other than Amici Curiae and their counsel) contributed money intended to fund the preparation or submission of this brief. Plaintiffs-Appellants and Defendants-Appellees indicated that they have no objection to the filing of this brief.

non-veterans with disabilities. PVA has almost 20,000 members, all of whom are military veterans living with catastrophic disabilities.

The Arc of the United States ("The Arc") is the nation's largest organization of and for people with intellectual and developmental disabilities ("I/DD"). The Arc promotes and protects the human and civil rights of people with I/DD and actively supports their full inclusion and participation in the community. The Arc has a vital interest in ensuring that all individuals with I/DD receive the protections and supports to which they are entitled by law.

NAMI ("The National Alliance on Mental Illness") is the nation's largest grassroots mental health organization and is dedicated to building better lives for the millions of Americans affected by mental illness. A vital part of NAMI's mission is to promote equal and non-discriminatory access to community living for people with mental illness and other disabilities.

The National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American

Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Piute Nations in the Four Corners region of the Southwest.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court held that needless institutionalization is a form of discrimination prohibited by the Americans with Disabilities Act (ADA). The instant case underscores the importance and utility of litigation to enforce the right of people with disabilities to live and receive services in community settings, consistent with the ADA's "integration mandate."

In the district court, Plaintiffs challenged policies of the State of Florida that resulted in the unnecessary separation of children from their families and their unnecessary institutionalization in nursing facilities. The district court refused to dismiss the case until it was persuaded that these policies, with their devastating impact on children and their families, had been abandoned.

If, indeed, Defendants have abandoned the offending policies, there is no need for this Court to address the question, presented by Plaintiffs on appeal, of whether the district court properly declined to certify a class in this case. The case would be moot. No child or family would have standing to litigate if, as the district court found, children are not experiencing present effects from the abandoned policies.

In this brief, *amici* attest to the importance of community living for people with disabilities and the importance to children of growing up in a family home.

Amici also argue that the defects the Magistrate found in Plaintiffs' proposed class definition could have been cured.

As *amici* show, class actions are uniquely appropriate in *Olmstead* cases, which, by their nature, challenge systemic policies or practices. Accordingly, class certification is common and almost without exception in such cases.

Here, the district court found that Plaintiffs' proposed class, comprised of children "at risk" of institutionalization, was "too broad and over inclusive." As *amici* explain, the class could have been described in a way that would have resolved these concerns. Specifically, the proposed class could have been defined as comprising medically complex or medically fragile children who are at serious risk of institutionalization as a result of Defendants' challenged policies and practices.

ARGUMENT

I. The Americans with Disabilities Act's "Integration Mandate" Is One of its Core Protections.

A. Congress Enacted the Integration Mandate to End the Long History of Isolation and Exclusion of People with Disabilities.

The Americans with Disabilities Act's "integration mandate," requiring public entities to administer their services to individuals with disabilities in the most integrated setting appropriate, 28 C.F.R. § 35.130(d), is among the ADA's most critical protections.

In enacting the ADA, Congress aimed to end a long history of state-sponsored segregation and isolation of people with disabilities from the mainstream of society.[2] In the ADA itself, Congress declared 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," that "discrimination against individuals with disabilities persists in such critical areas as ... institutionalization," and that "the Nation's proper goals regarding individuals with disabilities" include "independent living."[3]

In urging passage of the ADA, former U.S. Attorney General Richard Thornburgh, testifying on behalf of then-President George H.W. Bush, highlighted the "intolerable life of isolation" suffered by individuals with disabilities who are "still too often shut out of the economic and social mainstream of American life."[4] Former Senator Lowell Weicker, one of the lead sponsors of the bill, highlighted the role of institutions in facilitating such "intolerable isolation:"

---

[2] Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration, 64 Temple L. Rev. 393 (1991)*, 64 Temple L. Rev. 393 (1991).

[3] 42 U.S.C. § 12101(a).

[4] Americans with Disabilities Act, *Hearing before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped*, 101st Cong., 1st Sess., at 215 (1989).

> For years, this country has maintained a public policy of protectionism toward people with disabilities. We have created monoliths of isolated care in institutions and segregated educational settings. It is that isolation and segregation that has become the basis of the discrimination faced by many disabled people today. Separate is not equal. It was not for blacks; it is not for the disabled."[5]

Against this backdrop, the Supreme Court affirmed in *Olmstead v. L.C.*, 527 U.S. 581 (1999), that the needless institutionalization of individuals with disabilities is a form of discrimination prohibited by the ADA. The Court explained that its holding reflected two evident judgments. First, institutionalizing individuals with disabilities who could be served in community settings "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." Second, "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work opportunities, educational advancement, and cultural enrichment." *Id.* at 600-601.

B. Community Integration Is a Key Priority for People with Disabilities.

Community integration is a high priority for people with disabilities. In 2013, on the occasion of the 23rd anniversary of the ADA, virtually every major national disability organization, including the national associations of state mental health directors and of state directors of developmental disabilities services, signed

[5] *Id.* at 195.

a set of principles prioritizing the full and meaningful inclusion of persons with disabilities in community life. That document, entitled "Community Integration for People with Disabilities: Key Principles" states that:

- Individuals with disabilities should have the opportunity to live like people without disabilities. They should have the opportunity to be employed, have a place to call home, and be engaged in the community with family and friends.

- Virtually all individuals with disabilities can live in their own home with supports. Like people without disabilities, they should get to decide where they live, with whom they live, when and what they eat, and who visits and when.

- To this end, individuals with disabilities should have access to housing other than group homes, other congregate arrangements, and multi-unit buildings or complexes that are primarily for people with disabilities.

- Government funding for services should support implementation of these principles.[6]

This consensus both supports and drives efforts, like the instant case, to secure implementation of the ADA's integration mandate.

C. Enabling Children with Disabilities to Avoid Institutionalization and Remain with their Families Is Critical to Child Development.

Unnecessary institutionalization is particularly harmful for children. Growing up in a family home, rather than in an institution, is critically important

[6] *Community Integration for People with Disabilities: Key Principles* is available at http://www.bazelon.org/our-work/mental-health-systems/community-integration/.

for the development of children. Children "need to grow up in a safe home with a stable continuous relationship with at least one adult who is a trusted, committed parent figure." and therefore "[g]roup settings should not be used as living arrangements, because of their inherently detrimental effects on the healthy development of children, regardless of age."[7] The American Academy of Pediatrics, among others, has made it a priority to "prevent out-of-home placement" and ensure "the use of supports necessary to enable a child to be raised in a home."[8] As the United Nations Children's Fund (UNICEF) has observed:

> Many children with disabilities in both industrialised and developing countries continue to spend much or all of their lives in institutions, nursing homes, group homes or other residential institutions. . . The implications for such children in terms of child development are profound.[9]

---

[7] Consensus Statement on Group Care for Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association, Am. J. Orthopsychiatry, vol. 84, no. 3, 219 (2014), https://www.apa.org/pubs/journals/features/ort-0000005.pdf.

[8] Chris Plauche Johnson et al., American Academy of Pediatrics, *Helping Families Raise Children with Special Health Care Needs at Home*, 115 Pediatrics 507, 509-10 (2005).

[9] UNICEF, *Children and Young People with Disabilities Fact Sheet* 23 (May 2013), https://www.unicef.org/disabilities/files/Factsheet_A5__Web_NEW.pdf. *See also* United Nations Committee on the Rights of Persons with Disabilities, General comment on article 19 (Advance Unedited Version, Sept. 27, 2017) ("[l]arge or small group homes are especially dangerous for children, for whom there is no substitute for the need to grow up with a family), https://www.unicef.org/disabilities/files/Factsheet_A5__Web_NEW.pdf.

The United States' findings regarding Florida's needless placement of children with disabilities in nursing homes echo these concerns:

> Hundreds of children are currently segregated in nursing facilities throughout Florida. They are growing up apart from their families in hospital-like settings, among elderly nursing facility residents and other individuals with disabilities. They live segregated lives—having few opportunities to interact with children and young adults without disabilities or to experience many of the social, educational and recreational activities that are critical to child development.[10] Given the purposes of the ADA and the critical importance of children

living with their families, *amici* would be greatly concerned – and *amici* submit, so should this Court – if Florida were continuing to needlessly segregate children in nursing homes by denying them needed community-based services.

II. Certification of At Risk Classes in *Olmstead* Cases Is a Well-Established and Important Vehicle for the Enforcement of the ADA's Integration Mandate.

Based upon his extensive familiarity with the facts and claims in this case, the Magistrate Judge properly concluded that class certification is appropriate in an ADA Title II case like this one that challenges a public entity's systemic policies and practices. *A.R. v. Dudek*, 2015 WL 11143082 *11 (S.D. Fla, Aug. 8, 2015). The Magistrate recognized that such systemic policies and practices are "the glue

[10] Letter of Thomas E. Perez, Assistant Attorney General, to Pamela Jo Bondi, Attorney General for the State of Florida (Sept. 4, 2012), at 2, https://www.ada.gov/olmstead/documents/florida_findings_letter.pdf.

that binds the class," citing *Pashby v. Cansler*, 279 F.R.D. 347, 353 ((E.D.N.C. 2011) and *Lane v. Kitzhaber*, 283 F.R.D. 587, 597 (D. Or. 2012). The Magistrate also correctly determined that if the class definition were found to be adequate, Plaintiffs' Renewed Motion for Class Certification satisfied each of the pre-requisites of Fed. R. Civ. P. 23(a) and (b)(2).

However, the Magistrate recommended denying the Renewed Motion, concluding that the class definition was "too broad and over inclusive." *A.R.*, 2015 WL 11143082 *6. Initially, the proposed definition included all individuals who were institutionalized or at risk of institutionalization, without regard to whether institutionalization was unnecessary. *Id.* at *5. The Magistrate modified the definition to limit the proposed class to those unnecessarily institutionalized or at risk of unnecessary institutionalization. *Id.* But the Magistrate declined to further modify the definition to cure a different defect – the lack of any means to identify who was "at risk", arising from the lack of a causal connection between the asserted risk and any deficient policies or practices.[11] Although many other *Olmstead* cases have certified classes including individuals at serious risk of

[11] As an example of an "at risk" class defined with more precision, the Magistrate pointed, with approval, to *Kenneth R. ex rel. Tri-City CAP v. Hassan*, 293 F.R.D. 254, 264 (D.N.H. 2013), where plaintiffs' proposed class definition included circumstances that identified who was at serious risk of institutionalization, namely, the number of prior admissions the class member had had to a state psychiatric hospital within a given time period.

institutionalization, the Magistrate found that Plaintiffs had not offered a viable method for identifying who was, in fact, "at risk," and who had experienced the alleged harm as a result of the State's practices. Hence, the proposed class, as modified, was not sufficiently definite to comply with Rule 23.[12]

A. Class Certification Is an Important Vehicle for Ensuring Enforcement of the ADA's Integration Mandate.

Class actions are uniquely appropriate for litigating *Olmstead* cases because, as required by Fed. R. Civ. P. 23(b), they focus on systemic practices and policies that violate the ADA's integration mandate. By their nature, *Olmstead* cases challenge policies or practices that unduly rely on institutions and other segregated settings for the delivery of services, denying people with disabilities the opportunity to live, work, or be educated in a community-based setting.[13]

Civil rights cases were a driving force behind Rule 23, which allows for the efficient resolution of cases alleging the government is acting in a manner that

[12] The District Judge agreed the proposed class was too vague, but did not reach or review the Magistrate's finding that the proposed class otherwise met the requirements of Rule 23. *A.R. v. Dudek*, 2016 WL 3766139 *1 (S.D. Fla., Feb. 29, 2016).

[13] Most *Olmstead* cases challenge a public entity's failure to reasonably modify a disability service system that: (1) unduly relies on institutions and other segregated settings to provide services; (2) does not offer opportunities to live, work, and/or be educated in integrated settings to a large number of qualified individuals with disabilities who are in, or at serious risk of entering, an institution or other segregated setting; (3) employs eligibility criteria and methods of administration that perpetuate and/or incentivize segregation.

denies the rights of a group of individuals. As the Advisory Committee that drafted the modern Rule 23 explained, the paradigm cases for (b)(2) treatment are "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Fed. Rule Civ. P. 23(b)(2), Advisory Committee Notes, 1966 amendments.

Certification of classes in *Olmstead* cases is common and almost without exception. That is precisely because these cases typically arise out of a common course of conduct by defendants, require a resolution of structural deficiencies in the State service system, and pose common questions including whether the defendants' systemic policies and practices result in the plaintiffs' unnecessary institutionalization. Moreover, the Supreme Court encouraged that *Olmstead* cases be litigated as class actions, expressing concern that an Olmstead action by individual plaintiffs might result in a form of "line jumping," that is, the plaintiffs jumping in line ahead of others who also desire to live in the community and are waiting for access to scarce community-based services. *Olmstead*, 527 U.S. at 606. Similarly, in *Olmstead*, the Court crafted a fundamental alteration defense designed for cases seeking systemic relief on behalf of a class. *Id.* at 603-04. Finally, although the United States may intervene in private *Olmstead* cases, or file

its own lawsuit, the presence of the United States is not a substitute for class certification, as this case well demonstrates.

B. Courts Have Routinely Certified Classes Under Fed. R. Civ. P. 23 in ADA Cases Seeking Services in Community Settings.

In almost every case of alleged noncompliance by government officials with Title II's integration mandate, courts have certified a class. *See Murphy v. Piper,* 2107 WL 4355970 (D. Minn., Sept. 29, 2017) (certifying class of persons in segregated residential settings), Rule 23(b) petition denied, No. 17-8028 (8th Cir., Nov. 15, 2017) ; *Kenneth R.*, 293 F.R.D. 254 (certifying class of individuals with mental illness who are unnecessarily admitted to, or at serious risk of being unnecessarily admitted to, state-operated psychiatric hospital); *N.B. v. Hamos*, 26 F. Supp. 3d 756, 776 (N.D. Ill. 2014) (class certification in action seeking relief for violations of Title II based on the denial of community-based services); *Lane*, 283 F.R.D. 587 (certifying a class of persons with I/DD in segregated employment workshops, and rejecting defendants' claims that class members' different abilities, skills, needs, and preferences preclude certification); *Henderson v. Thomas*, 289 F.R.D. 506, 508 (M.D. Ala. 2012) (certifying a class of 80 prisoners alleging discrimination claims based upon their HIV status); *Oster v. Lightbourne*, No. C 09-4668 CW, 2012 WL 685808, at *6 (N.D. Cal. Mar. 2, 2012) (certifying a class of persons whose services will be "limited, cut, or terminated" under California's home-care program; *Pashby*, 279 F.R.D. at 356 (same). *See also Gray v. Golden*

Gate Nat'l Recreational Area, 279 F.R.D. 501 (N.D. Cal. 2011) (certified class of people with mobility and vision disabilities claiming barriers in access to recreation area violate Title II of ADA), *Gray v. Golden Gate Nat'l Recreational Area*, 866 F. Supp. 2d 1129, 1142 (N.D. Cal. 2011) (denying request to decertify class).

Class certification is routine in Title II integration cases because they raise the common question of whether defendants' policies or practices systemically result in needless institutionalization. In addition, relief can be afforded in a single injunction that requires the public entity to modify its program to end the offending policies or practices and allow individuals to receive services in "the most integrated setting." Thus, the court can, "in a single stroke," correct the federal legal violations and provide class members the opportunity to receive services in the community rather than an institution.[14] *See Wal-Mart Stores v. Dukes*, 564 U.S. 338, 350 (2011).

Classes have been certified without exception in cases where individuals in or at risk of entering nursing facilities assert claims under the ADA's integration mandate or similar requirements in the Nursing Home Reform Act, 42 U.S.C. §

[14] The court need not decide the precise mix of services that each class member will receive. After the court enters its injunction, such decisions continue to be made by defendants, but freed from the fetters of the policies or practices that offend the ADA.

1396r(e), and these rulings have been left undisturbed by four different courts of appeals. *See Steward v. Janek*, 315 F.R.FD. 472 (W.D. Tex. 2016), *Rule 23(f) appeal denied*, Dkt. No. 16-90019 (5th Cir., Aug. 5, 2016); *Dunakin* at *v. Quigley*, 99 F. Supp. 3d 1297, 1324 (W.D. Wa. 2015), *23(f) review denied*, *Dunakin v. Quigley*, No. 15-80076 (9th Cir., Aug. 10, 2015); *Thorpe v. District of Columbia*, 303 F.R.D. 120, 138 (D.D.C. 2014), *leave to appeal denied by In re District of Columbia*, 792 F.3d 96, 98 (D.C. Cir. 2015); *Rolland v. Cellucci*, No. 98-30208-KPN, 1999 WL 34815562, at *2 (D. Mass. Feb. 2, 1999), *23(f) review denied*, Dkt No. 99-8089 (1st Cir., Mar. 2, 1999); *Rolland v. Patrick*, No. 98-30208-KPN, 2008 WL 4104488 (D. Mass. Aug. 19, 2008) (refusing to decertify the class based upon alleged differences in the needs and conditions of persons in nursing facilities); *Van Meter v. Harvey*, 272 F.R.D. 274, 282 (D. Me. 2011). *See also, Conn. Office of Prot. and Advocacy*, 706 F. Supp. 2d at 266; (certifying a class of individuals with mental illness unnecessarily segregated in nursing facilities); *Long v. Benson*, No. 08-cv-26, 2008 WL 4571904, at *3 (N.D. Fla. Oct. 14, 2008) (class of Medicaid-eligible adults with disabilities in nursing facilities "who could and would live in the community with appropriate community-based supports"); *Colbert v. Blagojevich*, No. 07 C 4737, 2008 WL 4442597 (N.D. Ill. Sept. 29, 2008) (class of Medicaid-eligible adults with disabilities needlessly segregated in nursing facilities); *Hutchinson ex. rel. Julien v. Patrick*, 683 F. Supp. 2d 121 (D. Mass. 2010), *aff'd* 636 F.3d 1, 6 (1st Cir.

2011) (affirming fee award); *Chambers v. City & Cnty. of San Francisco*, No. 06-cv-6346, slip. op. at 1-4 (N.D. Cal. July 12, 2007) (class of current and past Medicaid-eligible individuals unjustifiably institutionalized in nursing facilities); *Williams v. Blagojevich*, No. 05-C-4673, 2006 WL 3332844 (N.D. Ill. Nov. 13, 2006) (class of Medicaid-eligible individuals with mental disabilities unjustifiably institutionalized in nursing facilities).

C. Courts Routinely Certify Classes in Olmstead Cases That Include Individuals At Serious Risk of Institutionalization.

It is well-established that individuals at risk of unnecessary institutionalization may state a claim for discrimination under Title II's integration mandate. Courts "applying the disability discrimination claim recognized in *Olmstead* have consistently held that the risk of institutionalization can support a valid claim under the integration mandate." *Davis v. Shah*, 821 F.3d 213, 263 (2nd Cir. 2016); *Steimel v. Wernert*, 823 F.3d 902, 914 (7th Cir. 2016) (holding that "the integration mandate is implicated where the state's policies have . . . put [individuals with disabilities] at serious risk of institutionalization."); *Pashby v. Delia*, 709 F.3d 307, 321-322 (4th Cir. 2013) (same); *M.R. v. Dreyfus*, 663 F.3d 1100, 1116-1117 (9th Cir. 2011) ("an ADA plaintiff need not show that institutionalization is 'inevitable' or that she has 'no choice' but to submit to institutional care in order to state a violation of the integration mandate. Rather, a plaintiff need only show that the challenged state action creates a serious risk of

institutionalization"), *as amended on denial of rehearing en banc*, 697 F.3d 706 (9th Cir. 2012); *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003); *M.A. v. Norwood*, 133 F. Supp. 3d 1093 (N.D. Ill. 2015); *O.B. v. Norwood*, 107 F. Supp. 3d 1186 (N.D. Ill. 2016); *Kenneth R.*, 293 F.R.D. at 263; *Lane*, 283 F.R.D. at 598 (D. Or. 2012); *Oster v. Lightbourne*, No. C 09-4668, 2012 WL 685808, at *5 (N.D. Cal. Mar. 2, 2012); *Makin ex rel. Russel v. Hawaii*, 114 F.Supp.2d 1017, 1033 (D. Haw. 1999).

The U.S. Department of Justice, to which Congress delegated the authority to interpret and enforce Title II of the ADA, 42 U.S.C. § 12134,[15] has come to the same conclusion. In its 2011 "Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*," the Department makes clear that the protections of the ADA

[15] Because the Department of Justice issued the ADA's integration regulation pursuant to an express delegation of authority from Congress, its interpretation of that regulation is entitled to deference. *See, e.g.*, *Steimel*, 823 F.3d at 911 ("The DOJ's interpretation of the [integration] mandate 'warrant[s] respect' because Congress gave it the task of issuing the relevant regulation."); *Davis*, 821 F.3d at 236 (DOJ's interpretation of the integration regulation is "controlling unless plainly erroneous or inconsistent with the regulation") (internal quotation marks omitted; quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)); *Pashby*, 709 F.3d at 322 ("Because Congress instructed the DOJ to issue regulations regarding Title II, we are especially swayed by the DOJ's determination that 'the ADA and the Olmstead decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or segregated settings.'").

and its integration mandate extend to persons "at serious risk of institutionalization or segregation" and are not limited to individuals "currently in institutional or other segregated settings."[16] The Department goes on to clarify the types of circumstances under which a plaintiff could "show sufficient risk of institutionalization to make out an *Olmstead* violation," including "if a public entity's failure to provide community services or its cut to such services will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution." *Id*. at 5.

Consistent with the Department of Justice's guidance, courts certifying an "at risk" class have required that the probability of institutionalization be serious (and hence foreseeable). Consistent with standing and ripeness principles, it is appropriate for courts to include in an "at risk" class only individuals who face a serious or substantial risk of institutionalization. In addition, courts have required that proposed class members' "risk" be connected to an allegedly discriminatory systemic policy or practice. *See Lane*, 283 F.R.D. at 602 (approving "at risk" class members where risk was tied to the defendants' systemic policies and practices); *Kenneth R*, 293 F.R.D. at 265-6 (certifying a class that included individuals placed at risk by defendants' systemic failure to provide sufficient community service

[16] Available at https://www.ada.gov/olmstead/q&aolmstead.pdf.

options). When these conditions are met, a class of individuals "at risk" of institutionalization satisfies the requirements of Rule 23.[17]

D. The Plaintiffs' Proposed "At Risk" Class.

The Plaintiffs asked the court to certify a class that included both children in nursing facilities and those at risk of admission to these facilities. The proposed class definition, as modified by the Magistrate, included: All current and future Medicaid recipients in Florida under the age of 21, who are (1) unnecessarily institutionalized in nursing facilities or (2) medically complex or fragile and at risk of unnecessary institutionalization in nursing facilities.

By the time of the court's ruling on class certification, no class representative was living in a nursing facility, so the first subsection of the definition was no longer relevant.[18] The court declined to certify a class of "at risk" children, adopting the Magistrate's findings that such a class was too "broad and over inclusive;" hence the court could not determine who was in the class. Nor, in the Magistrate's judgment, did Plaintiffs show that the "risk" of institutionalization was directly related to the State's systemic policies and

[17] In most cases, a class that meets these two conditions satisfies the requirements of Rule 23. In addition, the class will also be ascertainable. The court will be able to identify the individuals who are "at risk" due to specific policies or practices of the defendants.

[18] All the named plaintiffs who had been living in nursing facilities had returned to their homes.

practices. Rather, the proposed class included *every* child for whom there was *any* risk of institutionalization, however slight, and without regard to a causal connection between the harm alleged and the State's policies or practices.

In *amici's* view, it would have been possible, for Plaintiffs to offer a definition of the class that would satisfy Rule 23. For example, Plaintiffs could have proposed the class be comprised of children "at serious risk of institutionalization as a result of the State's policies that deny medically necessary private duty nursing care."[19] Alternatively, Plaintiffs could have proposed other means of identifying the class. For example, Plaintiffs could have proposed the class be comprised of children whose serious risk of institutionalization was as a result of a reduction in in-home nursing services" or "a denial of community services found medically necessary by their physician" or "because the child has been referred for admission to a nursing facility." This last approach has been adopted in several cases, where courts have certified classes including individuals

[19] Plaintiffs contend that Defendants continue to place children at risk of needless institutionalization as a result of State policies or practices that deny them medically necessary, community-based services other than private duty nursing care. If the district court's holding that the case is moot is reversed, the Plaintiffs, upon remand, may seek certification of a class. *Amici* submit that certification of a class under Rule 23 would be appropriate if Plaintiffs can establish that the named Plaintiffs and the members of the proposed class are at serious risk of institutionalization and that risk is tied to State policies and practices that allegedly deny the named Plaintiffs and the members of the class access to medically necessary community-based services other than private duty nursing.

"at risk" of institutionalization in a nursing facility, since federal law requires a screening, after referral, and before adults or children are admitted to a nursing facility. *See Steward*, 315 F.R.D. at 493 (certifying class of "All Medicaid persons over twenty-one years of age with intellectual or developmental disabilities … who … reside in nursing facilities, or who are being, will be, or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 *et seq*."); *Rolland*, 1999 WL 34815562, at *2 (certifying class comprised of "all adults with mental retardation or other developmental disabilities … in nursing facilities on or after October 29, 1998, or who are or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 *et seq*."), *Dunakin v. Quigley*, 99 F. Supp. 3d at 1325-26 (certifying a class of individuals with intellectual disabilities who have been screened for admission to nursing facilities); *Van Meter v. Harvey*, 272 F.R.D. at 282.

III. CONCLUSION

For the foregoing reasons, this Court should not address the question of whether the district court properly denied class certification if it concludes that Plaintiffs' claims are moot. If it does address the class certification ruling, it should indicate that class certification is appropriate in cases brought under the ADA's integration mandate when the class is comprised of individuals

institutionalized or at serious risk of institutionalization as a result of a defendant's challenged policies or practices.

Respectfully submitted,

/s/ Ira A. Burnim
IRA A. BURNIM
JENNIFER MATHIS
Bazelon Center for Mental Health Law
1101 15th Street NW, Suite 1212
Washington, DC 20005
(202) 467-5730
irab@bazelon.org
jenniferm@bazelon.org

STEVEN J. SCHWARTZ
ALISON BARKOFF
KATHRYN RUCKER
Center for Public Representation
22 Green Street
Northampton, MA 01060
(413) 586-6024
sschwartz@cpr-ma.org
abarkoff@cpr-ma.org
krucker@cpr-ma.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Eleventh Circuit Rule 29(a)(5) because it contains no more than 6,500 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportional typeface with Times New Roman 14-point font, in text and footnotes, using Microsoft Word 2010.

Dated: Dec. 4, 2017

Respectfully submitted,

/s/ Ira A. Burnim
Ira A. Burnim

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2017, a copy of the foregoing brief was electronically filed through the appellate CM/ECF system with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit and that seven paper copies identical to the electronically filed brief were sent to the Clerk of the Court by certified First Class mail, postage prepaid. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Ira A. Burnim
Ira A. Burnim

Attorney for Amici Curiae