10-235-cv(L)

10-251 (CON), 10-767 (CON), 10-1190 (CON)

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, 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.

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

BRIEF FOR PLAINTIFF-APPELLEE DISABILITY ADVOCATES, INC.

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RULE 26.1 STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiff-Appellee Disability Advocates, Inc. ("DAI") states that it has no parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. The district court entered a final judgment in favor of plaintiff DAI on March 1, 2010. Before this Court are four consolidated appeals:

(1) The State appealed from the final judgment on March 3, 2010, in Docket # 10-767. This Court has jurisdiction over that appeal pursuant to 28 U.S.C. § 1291.

(2) The New York Coalition for Quality Assisted Living ("NYCQAL") appealed from the denial of its motion to intervene on January 20, 2010, in Docket # 10-235. This Court has jurisdiction over that appeal pursuant to 28 U.S.C. § 1291.

(3) The Empire State Association of Assisted Living ("ESAAL") appealed from the denial of its motion to intervene in Docket #10-251, but has since abandoned its appeal.

(4) NYCQAL filed a separate appeal from the final judgment on March 31, 2010, in Docket # 10-1190. Because NYCQAL is not a party and has no standing to appeal, this Court has no jurisdiction over its appeal. *See Hispanic Soc'y of N.Y. City Police Dep't Inc.* v. *N.Y. Police Dep't*, 806 F.2d 1147, 1152 (2d Cir. 1986).

QUESTIONS PRESENTED

(1) Did the district court properly find that New York is discriminating against DAI's constituents by segregating them in institutional adult homes?

(2) Did the State fail to prove that the proposed remedy would work a "fundamental alteration" of New York's mental health services system when it has no plan to serve adult home residents in a more integrated setting such as supported housing, and the district court made a finding of fact that New York would actually ***save*** money by providing services to adult home residents in supported housing?

(3) Did the district court, after finding extensive violations of federal law at trial, act within its discretion in entering a Remedial Order that is narrowly tailored to remedy those violations?

(4) Does DAI, as an organization formed under the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"), 42 U.S.C. § 10801 *et seq*., and authorized by Congress to "pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State," *id.* § 10805(a)(1)(B), have standing to sue on behalf of individuals who are needlessly institutionalized in adult homes?

(5) Did the district court act within its discretion to deny intervention to NYCQAL, which moved to intervene more than six years after it became aware of

this litigation, and, as part of its proposed intervention, sought to challenge findings of fact made by the district court at trial?

STATEMENT OF THE CASE

This case, just like *Olmstead* v. *L.C.*, 527 U.S. 581 (1999), is about discrimination—in the form of needless and senseless institutionalization—against persons with mental illness in violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.*, and Section 504 of the Rehabilitation Act ("RA"), 29 U.S.C. § 794. Plaintiff-Appellee DAI is a statutorily created protection and advocacy ("P&A") organization representing individuals with mental illness residing in, or at risk of entry into, twenty-eight adult homes in New York City, which have more than 120 beds and in which 25% of the resident population or twenty-five residents (whichever is fewer) have a mental illness (the "Adult Homes").[1] The Defendants-Appellants, the New York State Department of Health ("DOH"), the New York State Office of Mental Health ("OMH"), Governor David A. Paterson, and the Commissioners of DOH and OMH (collectively, "the State") plan and administer the settings in which mental health services are provided and allocate resources among those settings, including to those individuals who reside in Adult Homes.

Adult Homes are large, regimented facilities in which residents live in close quarters almost entirely with other individuals with mental illness. As the district court found—just like the institutions at issue in *Olmstead*—Adult Homes "perpetuate[] unwarranted assumptions that persons so isolated are incapable or

[1] This brief uses the term "Adult Homes" in initial capitals to refer specifically to the twenty-eight impacted adult homes.

unworthy of participating in community life . . . [and] severely diminish[] the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." 527 U.S. at 600-01.

But DAI's constituents do not need to be consigned to Adult Homes. New York also offers mental health services to individuals just like DAI's constituents in supported housing—a far more integrated (and less expensive) setting in which residents live in their own apartments and receive services to support their success as tenants and their integration into the community. As one former Adult Home resident testified about supported housing: "It's freedom for me. It's freedom. It's being able to actually live like a human being again." SPA112; JA723:2751.

Relying on the overwhelming evidence presented at an eighteen-day trial—during which fifty-two witnesses testified and over 300 exhibits were admitted into evidence—the district court correctly found that New York's institutionalization of persons with mental illness in Adult Homes violates the ADA and the RA. In its 210-page opinion, the district court found that: (1) Adult Homes are institutional settings; (2) supported housing is a less restrictive, more integrated setting; (3) Adult Home residents are qualified to live in supported housing; and (4) New York State can afford to serve—and would indeed save money by serving—Adult Home residents in supported housing. Based on the foregoing, the district court found that the State

discriminates against individuals with mental illness in Adult Homes, in violation of federal law.

Strikingly, in its appellate brief, the State does not challenge *any* of the district court's detailed factual findings as error. On the contrary, the State fully concedes that "supported housing is considered the preferred community-housing model for many persons with mental illness." State Br. at 12. As such, the State's "development efforts are now centered" on creating precisely the remedy ordered by the district court—namely, more beds in "supported housing and other single-room-occupancy settings rather than older congregate housing models," such as Adult Homes. *Id.* at 12-13. Indeed, even the State's witnesses and a former high-ranking OMH official acknowledged that Adult Homes are "institutional living at, potentially, its worst"; they "impede community integration" and are "little ghettos" in which people are completely "defined by their illness." SPA93; JA205-06:644-46. Even the State's brief acknowledges that "sometimes significant problems" have existed in Adult Homes. State Br. at 11. Despite this recognition, the State continues to rely on institutional Adult Homes as mental health service settings. And, Adult Home residents have been categorically denied access to more integrated service settings. Only approximately 2% of Adult Home residents have *ever* obtained supported housing. To use the State's own words, residents are "stuck" in Adult Homes. SPA88-89; PX(2)-66.

As it did throughout trial, the State seeks to defend its needless institutionalization of Adult Home residents with the constant refrain that serving Adult Home residents in supported housing *could* cost too much. Yet the State was utterly unable to demonstrate at trial that providing mental health services to Adult Home residents in supported housing would cost more than the present system. Indeed, the district court made extensive factual findings—based on testimony from OMH's Chief Fiscal Officer, the State's cost expert, DAI's experts, and others—that the State has the means, the experience, and the resources to serve individuals with mental illness in a more integrated setting where they can begin to rebuild their lives. In fact, the district court found that serving Adult Home residents in supported housing would ***save*** the State $146 per person per year. This is because, unlike supported housing, Adult Homes use a dependency model that increases the use of mental health and other services. Unlike supported housing providers, Adult Homes have financial ties to medical providers, which over decades has resulted in unusually high Medicaid costs (including for fraudulent and unnecessary medical procedures), a fact that has been well documented by the State.

* * *

Having no legal or record support for their arguments, the State—and to a greater extent, NYCQAL—attempt to instill fear about the consequences of the district court's decision by misrepresenting the Remedial Order, ignoring the court's

findings of fact, and manufacturing arguments that are divorced from the record. But the findings below—supported by evidence developed over six years of litigation—belie all of their misplaced concerns. The district court properly held that the ADA entitles DAI's constituents to be free from the discrimination they are suffering. That decision should be affirmed.

SUMMARY OF ARGUMENT

Each of the State's arguments on appeal lacks merit.

First, the district court correctly held that Title II applies to the State's mental health services system. The State's arguments that Title II does not apply because the State does not "involuntarily confine" individuals to Adult Homes and has "decoupled" residential and medical services are unsupported by both the law and the facts. Residential care is an integral component of the State's mental health services system, N.Y. MENTAL HYG. LAW § 7.01, and there is no requirement that an individual be "involuntarily confined" by the State in order for Title II's integration requirement to apply. To the contrary, the Supreme Court in *Olmstead* expressly noted that the plaintiffs in that case had been "voluntarily" committed to institutions, and yet applied Title II to their claims.

The State's argument that the district court's decision creates "new, preferential entitlement[s]" to supported housing is similarly without merit. Consistent with *Olmstead*, the district court simply required the State, when it

provides residential services as part of its mental health services system, to provide services in "the most integrated setting."

Second, the district court properly found that the State failed to establish its affirmative defense that the proposed remedy would work a "fundamental alteration" of the State's mental health services system. The district court found, based on compelling evidence, that the State would ***save*** money by serving Adult Home residents in supported housing. The State simply ignores these detailed factual findings, and instead claims—without offering any record evidence—that the potential costs of the remedy could be enormous. Absent a showing that the district court's factual findings as to costs were clear error—which the State does not even attempt—those findings are fatal to the State's claim.

Third, the Remedial Order is not overbroad. Here, again, the State's arguments demonstrate a complete disregard for the district court's extensive findings of fact. Despite the State's overblown rhetoric, the Remedial Order is appropriately based on and tailored to specific findings of fact. Each aspect is no more burdensome or intrusive than necessary to ensure the State's compliance with federal law. Notably, the State was provided an opportunity to submit its own proposed remedial order in the first instance. But, as the district court observed, the State's proposed remedy was "egregiously deficient" and blatantly disregarded the court's factual findings.

Finally, in accordance with the decisions of the Ninth and Eleventh Circuits and every district court within this Circuit to have considered the issue, the district court properly held that DAI has standing to bring suit on behalf of its constituents. DAI is authorized under federal statute to "pursue administrative, *legal*, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State." 42 U.S.C. § 10805(a)(1)(B) (emphasis added). Pursuant to that Congressional authorization, and consistent with principles of Article III standing, DAI may pursue claims on behalf of its constituents.

STANDARD OF REVIEW

This Court reviews a district court's bench trial findings of fact for clear error and its conclusions of law *de novo*. *Ciaramella* v. *Reader's Digest Ass'n, Inc.*, 131 F.3d 320, 322 (2d Cir. 1997). This Court reviews a district court's grant of declaratory and injunctive relief under a deferential abuse of discretion standard. *Henrietta D.* v. *Bloomberg*, 331 F.3d 261, 290 (2d Cir. 2003). This Court reviews a district court's order denying intervention under a deferential abuse of discretion standard. *See Catanzano* v. *Wing*, 103 F.3d 223, 232 (2d Cir. 1996).

STATEMENT OF FACTS

The Parties

DAI

Plaintiff-Appellee DAI is a P&A organization authorized by federal statute to bring suit on behalf of individuals with disabilities—in this case, people with

mental illness residing in, or at risk of entry into, Adult Homes in New York City (collectively, "DAI's constituents"). SPA77. As of 2008, approximately 4,300 individuals with mental illness reside in the Adult Homes that are the subject of this litigation. SPA77, 86; Supplemental Appendix 64-97.

United States

Plaintiff-Appellee the United States intervened at the remedial phase of this litigation "to ensure that the broader public interest is represented in this litigation." JA37 (Amended Motion to Intervene by the United States (Docket Entry #358)).

Defendants

Defendants-Appellants are DOH and OMH, as well as Governor David A. Paterson and the Commissioners of DOH and OMH. SPA78. As required by New York law, they administer New York State's mental health services system, plan the settings in which mental health services are provided, and allocate resources within the mental health services system. *See, e.g.*, N.Y. MENTAL HYG. LAW §§ 5.07, 7.07, 41.03, 41.39, 41.42; N.Y. COMP. CODES R. & REGS. tit. 18, §§ 485.1(a), 487.1(b); *see also* SPA78. Defendants-Appellants are jointly responsible for implementing the "policy of the state . . . to develop a comprehensive, integrated system of treatment and rehabilitative services for the mentally ill. Such a system . . . should assure the adequacy and appropriateness of residential

arrangements . . . and it should rely upon . . . institutional care only when necessary and appropriate." N.Y. MENTAL HYG. LAW § 7.01; *see also* SPA78. DOH is responsible for promoting the "development of sufficient and appropriate residential care programs for dependent adults." N.Y. COMP. CODES R. & REGS. tit. 18, § 485.3(a)(1); *see also id.* § 487.1(b) (applying DOH's responsibilities to adult homes); SPA84. OMH is responsible for "assuring the development of comprehensive plans, programs, and services in the areas of research, prevention, and care, treatment, rehabilitation, education, and training of the mentally ill." N.Y. MENTAL HYG. LAW § 7.07(a); *see also* SPA84.

In its execution of these duties, the State administers New York's mental health services system in a manner that unnecessarily segregates people with mental illness in institutional Adult Homes and excludes them from the far more integrated mental health service setting of supported housing. SPA77, 92-93, 106-08, 192-93, 195.

New York Coalition for Quality Assisted Living

Movant-Appellant NYCQAL is a trade group of adult home operators. SPA206. Despite the Adult Homes' awareness of and participation in this litigation for more than six years, NYCQAL sought intervention only after trial, at which point it attempted to relitigate facts and introduce new evidence. SPA206, 213. NYCQAL's motion to intervene was denied by the district court. SPA217.

NYCQAL has appealed from the denial of its motion to intervene, and has also appealed from the judgment, claiming it has "non-party" standing to appeal.

Applicable Law

In *Olmstead*, the Supreme Court interpreted Title II of the ADA and section 504 of the RA as explicitly prohibiting "[u]njustified isolation," which "is properly regarded as discrimination based on disability." 527 U.S. at 597. The Court observed that "unjustified institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that the persons so isolated are incapable of or unworthy of participating in community life." *Id*. at 600.

Title II and the RA require that when a state provides services to individuals with disabilities it do so in the most integrated setting appropriate to their needs. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(d); 29 U.S.C. § 794(a); 28 C.F.R. §41.51(d). The Attorney General's regulations implementing Title II—which are entitled to deference—define "the most integrated setting" as a "setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. § 35.130(d), 28 C.F.R. pt. 35 app.

This Lawsuit

DAI initiated this action for declaratory and injunctive relief on July 1, 2003, seeking to end "New York State's practice of knowingly placing and

maintaining individuals with serious mental illnesses in . . . substandard adult homes rather than in superior, more integrated residential settings." Supplemental Appendix 3. Discovery continued for more than three years, during which more than 70,000 documents were produced, more than seventy-five third-party subpoenas were issued, seventy-one witnesses were deposed (including twenty-one current or former Adult Home residents), and seven expert reports were exchanged. On August 10, 2007, the State filed a motion for summary judgment and DAI filed a cross-motion for partial summary judgment. SPA10. In its motion, the State argued, among other things, that Title II does not apply to DAI's claims because Adult Homes are privately operated, and that DAI lacked standing. SPA10.

After considering the voluminous factual record presented by the parties (of more than 13,000 pages, including some 675 exhibits), the district court ruled on the parties' motions on February 19, 2009. SPA8, 11. In its 110-page opinion, the court denied the motions for summary judgment, holding, in relevant part, that (1) the ADA applies, and (2) DAI has standing. SPA24, 30. Specifically, the district court found that the State administers a mental health services system, governed by a "comprehensive statutory and regulatory scheme," which includes "residential and treatment services provided by public and private entities," such as Adult Homes and supported housing. SPA12, 31-32; JA915-20. The court thus found, consistent with *Olmstead*, that DAI's "claim falls squarely under Title II of the ADA." SPA36.

With respect to DAI's standing, the district court rejected the State's argument that Section 10805(a)(1)(B) of PAIMI does not authorize P&A organizations to sue on behalf of their constituents. SPA24-25. The court also rejected the State's argument that DAI lacks associational standing under *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). SPA25-27. The court found "substantial evidence" that many of DAI's constituents were suffering injuries-in-fact that were fairly traceable to the State's mental health services, and that the requested relief would redress these injuries. SPA26-27.[2]

The court identified three issues for trial: (1) whether Adult Homes are the most integrated setting appropriate to the needs of DAI's constituents; (2) whether DAI's constituents are "qualified" for supported housing; and (3) whether the relief sought would work a "fundamental alteration" of New York's mental health services system. SPA36-37, 48, 50, 78.

Trial

Over eighteen days, twenty-nine witnesses testified live, excerpts from the depositions of twenty-three additional witnesses were entered into the record, and more than 300 exhibits were admitted into evidence. SPA78-79. The district court received testimony from current and former Adult Home residents, the administrator

[2] The State did not argue below, as it does on appeal, that DAI lacks associational standing under *Hunt* because it lacks "indicia of membership," and the district court therefore did not address this issue.

of an Adult Home, persons who provide mental health services to current and former Adult Home residents, State officials, and experts. *Id.* DAI's experts, all of whom had run public mental health systems, interviewed approximately 250 Adult Home residents, reviewed 260 Adult Home resident records, and visited twenty-three Adult Homes as well as supported housing programs. SPA124, 126, 129. The State introduced the testimony of three experts. SPA106, 174.

On September 8, 2009, the district court entered its 210-page findings of fact and conclusions of law (including nearly 1,000 citations to the record), holding that the State unlawfully discriminates against DAI's constituents by segregating them in institutional Adult Homes. SPA77-78, 204. Specifically, through the evidence presented at trial, the district court made the following findings of fact, none of which the State contends are clearly erroneous:

Adult Homes Are Not the Most Integrated Setting for DAI's Constituents

The district court found based on "[t]he overwhelming evidence in the record" that Adult Homes, unlike supported housing, "are institutions" that "impede the ability of . . . residents to participate in their communities outside the Homes." In Adult Homes, residents "are completely 'defined by their illness.'" SPA88, 115, 93.

Adult Homes Are Institutions

Adult Homes are large, for-profit facilities, SPA83; JA205-06:644-45, that provide long-term residential care, personal care, and supervision. SPA83;

PX(4)-307 ¶ 2. Exclusively at issue in this litigation are twenty-eight Adult Homes in New York City. SPA85; JA785:2996-97; *see also* N.Y. MENTAL HYG. LAW §§ 45.09(a), 45.10(a); Supplemental Appendix 64-97.

An overwhelming number—*eighty percent*—of residents in Adult Homes have mental illness. SPA86. In eighteen of the Adult Homes, more than 95% of the residents have mental illness and in nine of those Homes, 100% of the residents have mental illness. SPA86; Supplemental Appendix 64-97. Adult Home residents do not require high levels of assistance with activities of daily living, do not need extensive medical care, and do not pose a danger to themselves or others. SPA136-37, 139-40; SX(4)-178:S-141.

As the evidence showed, Adult Homes were not developed for people with mental illness. SPA87; DX(3)-158:289. When the State began to reduce the census of its psychiatric hospitals in the 1960s and '70s, it made a policy decision to serve large numbers of former patients in Adult Homes because "community resources weren't up to speed with state operated bed reductions." SPA87; PX(1)-155; *see also* JA206:647-48. Despite the State's recognition that Adult Homes are "de facto" or "satellite mental institutions," SPA87; PX(1)-453; PX(1)-577, that are not desirable settings for individuals with mental illness, SPA87; JA206:648; PX(1)-104, the State continues to discharge patients from psychiatric hospitals, including those

who have been approved for supported housing, directly to Adult Homes, *see, e.g.*, SPA87; JA209:658; JA156:448; JA497:1809; JA566:2084; PX(2)-140; PX(2)-142.

Adult Homes bear little resemblance to a home. SPA90; JA116-17:289-290. The district court found, based on the testimony of witnesses for both DAI and the State, that Adult Homes are segregated settings that share many characteristics with state psychiatric hospitals.[3] Adult Home residents are forced to relinquish their privacy, autonomy, and connection to the community; are subjected to an extensive set of institutional rules; and are denied the opportunity to live independently and exercise choice. SPA89-93. As recently as September 2007, the State referred to Adult Homes as "institutional settings" in which "people with a mental illness are 'stuck.'" SPA88-89, 107 (n.214); PX(2)-66. The district court made the following findings:

- Residents must abide by regimented schedules for eating, taking medication, and other aspects of daily life,[4] which inhibits their ability to spend time outside the Homes. SPA89.
- Residents are assigned roommates and a specific seat in the cafeteria,[5] SPA89-90, which at times prohibits them from eating meals with friends or significant others. JA164:479-80.
- Meals, medication, phone calls, and mail deliveries are announced over a public address system.[6] SPA90.

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[3] *E.g.*, SPA88-89; SX(4)-326; JA205:642-43; JA296:1006-07; JA605:2241-42; PX(4)-483-84.

[4] *E.g.*, JA58-59:54-57; JA116-17:289-90; JA138-39:374-78.

[5] *E.g.*, JA138:375; JA184:558-59; SLX-359:98.

- Adult Homes have few or no private spaces, making it difficult to receive visitors or talk in private.[7] SPA90. Residents lack privacy even in their bedrooms.[8] SPA91.

- Adult Homes set curfews and place restrictions on when and where residents may receive visitors as well as when residents may be absent.[9] SPA91.

- Residents generally are prohibited from cooking, cleaning, doing their own laundry, and administering their own medication,[10] fostering what both DAI's and the State's experts referred to as "learned helplessness."[11] SPA104-05.

- Residents spend the great majority of their daily lives in the Adult Homes, where they usually are assigned on-site doctors[12] and participate in on-site activities.[13] SPA93-94.

- Residents fear retaliation, and some have been arbitrarily penalized for failure to comply with the Homes' stringent rules.[14] SPA92.

In short, as described by the State's own witness, Adult Homes are "community-based psychiatric ghettos in which . . . groups of individuals [are] located in a community, but [are] never helped to become part of it." SPA115; PX(4)-484;

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6 *E.g.*, SLX-404-05; SX(4)-328-29; SLX-130-31:236-38.

7 *E.g.*, JA167:489-90; JA59:57-58; JA260:863-65.

8 *E.g.*, JA164:480; JA186:565; JA188:574-75

9 *E.g.*, JA60-1:62-65; SLX-309:84-85; SX(4)-505.

10 *E.g.*, JA165:481; JA183:553-55; SLX-352:70-71.

11 *E.g.*, JA634:2358; SX(4)-395-96; JA108-09:257-59.

12 *E.g.*, JA81:148; JA160:462-63; SLX-102:125.

13 *E.g.*, JA62:69-70; SX(4)-513-24.

14 *E.g.*, JA161:467-68; SX(4)-331.

JA605:2236-38. In the words of a former high-ranking OMH official, they are "institutional living at, potentially, its worst." SPA93; JA206:645.

Supported Housing Is a Far More Integrated Setting Than Adult Homes

The State also uses supported housing as a service setting for people with mental illness. It funds and monitors supported housing, as it does Adult Homes. SPA108-09. In stark contrast to Adult Home residents, residents of supported housing live much like their non-disabled peers and are more integrated into the community: they live in their own apartments[15] scattered in buildings throughout the community.[16] SPA109; JA170:501; JA723:2751; SLX-580:204-05. They can control their daily lives, are free to come and go when they like, can choose to live with a spouse or their children,[17] can invite whomever they would like into their home,[18] and have privacy rights.[19] SPA109-10. According to the testimony of the Director of OMH's Bureau of Housing Development and Support, supported housing provides "maximum opportunities" for community integration. SPA113; JA585:2162. Indeed, the State acknowledged at trial (and again in its brief on appeal) that it is currently focused on supported housing because it is a "successful," "cost-effective" program that gives

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[15] JA123:316-17.

[16] JA103:236.

[17] JA107:251; JA117:290.

[18] JA163-64:475-77; JA117:290-91; JA107:251.

[19] JA585:2160; JA107:251.

residents "the same privacy rights as any other tenant in a landlord-tenant relationship." SPA109; JA585:2159; JA79:139; SX(4)-305; JA207:650-51; State Br. at 12.

One former Adult Home resident who moved to supported housing testified at trial:

> I do my own shopping. I do my own food selection. It's free. It's freedom for me. It's freedom. It's being able to actually live like a human being again.

SPA112; JA723:2751.

Virtually All of DAI's Constituents Are Qualified for Supported Housing

The district court found—and the State does not dispute on appeal—that virtually all of DAI's constituents are qualified for supported housing. SPA117. This is because "there are no material differences between residents of Adult Homes and residents of supported housing." SPA180. "[T]he support needs of Adult Home residents could, in virtually every case, be easily addressed in supported housing." SPA146.

Indeed, the State's own expert agreed with the findings of DAI's experts that "those who reside in adult homes could reside in apartments with varying degrees of support." SPA119; JA637:2370. And, in 2002, a "blue ribbon panel" of mental health experts organized by the State (including thirty-eight OMH and DOH employees selected by the Governor) recommended that 6,000 individuals with

mental illness in adult homes be served instead in more integrated settings. SPA131-32; JA464:1675; SX(4)-36, 102; JA387:1369; JA463:1672-73; JA916 ¶ 13; DX(3)-131:181. As the panel noted, "[a] great many people with many of the same issues and needs [as Adult Home residents] live every day in integrated, community settings across New York State." SPA132 (first alteration in original); SX(4)-33.

OMH's own former Senior Deputy Commissioner, Linda Rosenberg, testified that, in her experience, individuals were placed in Adult Homes based on "luck of the draw," and Adult Home residents "by and large have similar characteristics" to residents of supported housing. SPA130; JA222:709. In fact, Adult Homes offer "less support in many cases" than supported housing, "because you are left on your own devices . . . you are not connected to an ACT [(Assertive Community Treatment)] Team necessarily or even a case manager."[20] JA222:709; *see also* SPA128 (n.347), 130.

These conclusions are not surprising—individuals enter (and remain in) Adult Homes not for clinical reasons, but because they are the only residential service setting available to them. SPA135-36; JA206:646; JA222:709; DX(3)-89:10-11. Moreover, Adult Homes are prohibited from admitting people who, for example,

[20] An ACT Team is a multi-disciplinary unit that provides a wide range of service needs—from managing medications and finances to using transportation and other community resources— to those with "severe and persistent" mental illness in their natural living settings. SPA110-11; SX(4)-1-4; JA105-06:243-46; JA114:279; JA258-59:855-57; JA279:938; PX(2)-145-61.

require "continual medical or nursing care or supervision," pose a danger to themselves or others, or have an "unstable" medical condition requiring continual skilled observation. SPA137; N.Y. COMP. CODES R. & REGS. tit. 18, § 487.4; SX(4)-178.

The State Has No Plan for Serving Adult Home Residents in More Integrated Settings

Despite the State's recognition that supported housing is the "preferred" service setting for individuals with mental illness, the State has no comprehensive or effective plan (either written or unwritten) to enable Adult Home residents to receive services in supported housing or any other integrated setting. SPA158-60; PX(3)-553-54:29-30. To the contrary, the State considers Adult Homes permanent placements. SPA143, 149; JA439-40:1580-81; *see also* SX(3)-5-6; JA217:690-92. What is more, the State has categorically denied Adult Home residents the opportunity to enter more integrated service settings, such as supported housing. SPA193.

The State uses a Request for Proposal ("RFP") process to develop supported housing. SPA109. In each RFP, it identifies a target population for the housing, and only the target population may be admitted to supported housing. SPA118. For almost all supported housing RFPs, Adult Home residents have not been a target group, and hence have been systematically denied access to these beds. SPA164. As of 2008, despite *hundreds* of applications, only 0.5% of people with mental illness living in adult homes, and only 2.6% of those submitting applications,

were able to access supported housing in a five-year period.[21] Supplemental Appendix 64-97. While the Legislature did make sixty supported housing beds available specifically to adult home residents in 2007, OMH did not propose or advance this initiative, SPA137; JA409-10:1460-61; JA422:1510; JA580:2141-42; JA874:3354, and the State has made clear that no more supported housing beds for adult home residents are on the horizon.[22]

Supported Housing Providers Can Serve Adult Home Residents

It is not the case—as the State contends—that supported housing cannot be developed for individuals in Adult Homes.

Supported housing providers are capable of providing the necessary support services for virtually all Adult Home residents, including those with high needs. SPA118-19, 121; JA257-60:851-63; *see also* JA116:288-89; DX(3)-222:203; SX(2)-220-21; JA647:2409; JA370:1304; JA425:1521; JA566:2084; PX(3)-677-78:225-26; PX(4)-38:111. The supported housing providers that do serve high-need Adult Home residents have been successful. SPA118, 121-22; JA114-15:281-84;

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[21] In the period from January 2000 to January 2006, adult home residents submitted more than 800 applications for OMH-sponsored housing. SPA145 (n.507); JA523:1914. In the period from January 2002 to January 2006, *only twenty-one adult home residents* actually moved to supported housing in New York City. SPA145 (n.507); PX(1) 542-55.

[22] In 2005, the Legislature passed a law that would have required OMH to establish a community residential services waiting list for individuals, including those waiting for supported housing services. The Governor vetoed the bill "based on objections raised by OMH." SPA166; SX(2)-130.

PX(2)-87. In fact, the service needs of individuals entering supported housing from institutional settings such as Adult Homes *decrease* over time because supported housing helps individuals develop greater independent living skills. SPA119; SX(2)-216-49; JA101:229; JA223:715.

Supported housing providers also can create enough beds to serve Adult Home residents. The district court credited the testimony of DAI's expert, Dennis Jones, that New York providers are ready to develop supported housing beds for Adult Home residents at a rate of approximately 1,500 per year. SPA190; JA905:3478-79; JA906-07:3482-87. Indeed, when the State issued an RFP for the 60 supported housing beds the Legislature set aside for Adult Home residents, SPA190; SX(2)-216-49, supported housing providers responded by offering to create approximately 1,500 supported apartments in one year. SPA143 (n.486), 190; JA310-311:1064-65.[23]

Adult Home Residents Are Not Opposed to Receiving Services in Supported Housing

Nor is it the case that Adult Home residents live there by choice or because a mental health professional determined that it was the preferred setting for meeting their needs. SPA150. Adult Home residents generally are afforded no other choice, and are uneducated or intentionally misinformed by Adult Home operators

[23] The State also has a demonstrated ability to redirect funds as individuals move from one service setting to another. SPA187; JA851:3261-63; SX(4)-299-300; JA532:1947; JA448:1613; JA879:3373; *see also* JA878:3370.

about alternative housing options. As the district court found, they "ha[ve] nowhere else to go." SPA150; JA206:646; *see also* PX(1) 155-59; DX(3)-89:10-11.

The district court found "convincing evidence that many would choose to live in an independent setting such as supported housing if given an informed choice." SPA150. Among other things, a study commissioned by the State found that 75% of the approximately 2,000 residents with mental illness surveyed either expressed an interest in living elsewhere or did not express a preference for remaining in an Adult Home. SPA152; JA307:1050-51. These statistics significantly understate residents' interest in moving because Adult Home residents, who are generally uninformed about other options, were not provided relevant information about the services and financial supports in other settings before they were asked their preferences. SPA152; PX(4)-34-35:97-98.

DAI's experts concluded that the great majority of Adult Home residents would choose to move to supported housing if provided with the information necessary to make an informed choice. SPA152-53; JA263:874-75; SX(4)-333-35; *see also* JA55:44. Those opinions were confirmed by the Adult Home residents who testified at depositions and trial, who continually expressed a preference for living independently. SPA155; *see also* SLX-278-79:168-71; SLX-310-11:89:90; SLX-360:102-03; SLX-580:203-04.

Serving DAI's Constituents in Supported Housing Would Cost Less Than the Current System

"[F]unding and programmatic limitations" are also not a barrier to serving Adult Home residents in supported housing, contrary to the State's suggestion. State Br. at 14. The district court found that the State would actually ***save*** money by serving Adult Home residents in supported housing. SPA175, 198.

Currently, Adult Home residents in New York City receive a total of $16,416 per year in Supplemental Security Income ("SSI")—of which the State pays $8,328—to pay for room, board, three meals a day, personal care, and supervision. SPA172-73; JA918 ¶ 27. The $8,328 state supplement—the highest offered by the State—is available *only* to Adult Home residents and individuals in institutions for people with developmental disabilities. SPA172, 174, 181; DX(2)-368. Supported housing is funded directly by OMH with a stipend of $14,654. SPA173; JA919 ¶ 33. Individuals in supported housing receive SSI income of $9,132 per year, of which the State pays only $1,044. SPA173; DX(2)-368. Without considering other, relevant costs, the State contended at trial it would cost an additional $7,370 per year to serve an Adult Home resident in supported housing. SPA174-75; JA731:2780; DX(3)-552; DX(3)-170.[24]

[24] The State erroneously contends in its brief—without any record citation or support—that "[f]unding even just the first year's 1,500 [supported housing] units will require an additional $65 million in annual appropriations." State Br. at 50, 54. DAI is at a loss as to how the State arrived at that figure. Even accepting the

However, the State's analysis ignored considerable cost savings associated with supported housing. SPA175. Indeed, the Chief Financial Officer of OMH admitted at trial that the State performed *no* analysis to determine the financial impact of providing supported housing to Adult Home residents. SPA196. At DAI's request, the State produced an analysis of the annual Medicaid costs (of which the State pays half) for a person served in an Adult Home. The State's own analysis demonstrated that the average Medicaid cost for individuals in Adult Homes is roughly $15,000 per year *higher* than the average Medicaid cost for individuals served in supported housing in New York City, as the below chart indicates. SPA175; PX(1)-135-36; PX(6)-332.

	Medicaid Cost/Person	
Population	Supported Housing	Adult Homes
Resident Populations in SFY 2004-2005	$16,467	$31,530
Severely and Persistently Mentally Ill ("SPMI")	$20,370	$36,109
Not SPMI	$11,882	$25,289

Source for Table 1: PX(1)-135-36. SPA175-76.

"[T]he difference in Medicaid costs between Adult Homes and supported housing is not attributable to the characteristics of the persons living in Adult Homes." SPA179. Crucially, even when comparing spending for individuals with high mental health needs in supported housing with spending for individuals in Adult Homes, the

State's incorrect asserted additional cost of $7,370 per person, the first 1,500 beds would require only $11.055 million in additional appropriations.

Medicaid costs are still ***vastly*** higher for those in Adult Homes. SPA173; PX(1)-135-36. Whether a person lives in supported housing or an Adult Home is not determined by his or her functional abilities or medical needs, SPA180, but "the luck of the draw." SPA130; JA222:709.

The court found that these higher Medicaid costs are instead caused by the systemic high use of Medicaid services in Adult Homes. SPA176. *First*, Adult Homes foster dependency, increasing the need for services. SPA179; JA892:3425-26. *Second*, as is well documented, Adult Homes deliberately promote over-utilization of Medicaid because of their financial connections to service providers. SPA176-79; JA222:712; JA892:3425-26. Indeed, in August 2002, the New York State Commission on Quality of Care issued a report concluding that "many residents [in adult homes] received multiple layers of services from different providers that were costly, fragmented, sometimes unnecessary, and often appeared to be revenue-driven, rather than based on medical necessity." SPA177, 179-80; PX(1)-674; *see also* JA222:710-12; JA908-09:3491-92. Even the State's witnesses testified about unnecessary surgeries and medical treatment at the Adult Homes. SPA176-77; JA393-94:1395-98. Joseph Reilly, the former director of the OMH New York City field office, testified that he was aware that multiple residents in one Adult Home had received unnecessary prostate surgery, *id.*, and that residents in another Adult Home had received unnecessary cataract surgery. SPA178; JA394:1397-98.

Thus, when Medicaid costs are factored in, the State would actually ***save*** on average $146 for each individual served in supported housing instead of an Adult Home. SPA181; *see also* JA895:3439.

Average Annual Costs/Person in Supported Housing vs. Adult Homes

	Supported Housing		**Adult Homes**	
	Total Costs	State Portion of Total Costs	Total Costs	State Portion of Total Costs
SH Stipend	$14,654	$14,654	$0	$0
Medicaid	$16,467	$8,234	$31,530	$15,750
SSI	$9,132	$1,044	$16,416	$8,328
TOTAL	$40,253	**$23,932**	$47,946	**$24,078**

Source for Table 2: DX(6)-333.

These figures underestimate the savings from serving DAI's constituents in supported housing, because the State also invests millions of dollars in efforts to improve living conditions in Adult Homes—an undertaking that has not and will not be needed for supported housing. SPA182. If fewer people are served in Adult Homes, these State costs could be reduced as well. SPA181-84; JA463:1671; JA472:1709-10; *see generally* PX(6)334-43.

Trial Decision

Applying the Supreme Court's decision in *Olmstead*, the district court held that DAI had proven that its "constituents are not in the most integrated setting appropriate to their needs and are not opposed to moving to a more integrated setting." SPA157. As the court found, Adult Homes are institutional, segregated settings;

supported housing is a far more integrated setting; virtually all Adult Home residents are qualified for supported housing; and Adult Home residents would not object to receiving mental health services in more integrated settings. SPA157. The court also held that the State had failed to establish its affirmative defense that the relief DAI sought would fundamentally alter the State's mental health system, finding that the State "do[es] not have an effective or comprehensive plan to enable DAI's constituents to receive services in the most integrated setting appropriate to their needs, nor [has it] shown that the relief DAI seeks would increase the State's costs." SPA158.

Thus, in a straightforward application of *Olmstead*, the court held the State discriminates against Adult Home residents in violation of Title II and the RA. SPA78, 83, 204. In accordance with principles of federalism, and in deference to the State, the district court asked the State to propose a remedial plan. SPA202-04.

Intervention Motions

NYCQAL

In November 2009, more than six years after the complaint was filed, NYCQAL sought to intervene. NYCQAL purportedly moved to intervene solely with respect to the proposed remedy, but its brief, its proposed answer, and its proposed remedial order all demonstrated that it in fact sought to relitigate issues that had

already been resolved. SPA213; JA37 (NYCQAL Motion to Intervene (Docket Entry #362)); Supplemental Appendix 57-61.

The Adult Homes represented by NYCQAL were undisputedly familiar with this litigation—and all of the issues involved—from the outset. Among other things, they had participated in the multi-year discovery process and had monitored much of the trial. SPA207. As a result, the district court denied NYCQAL's motion to intervene, finding that it was untimely, that the Adult Homes were intent on relitigating factual issues that were established at trial and that any further delay in proceedings would unnecessarily harm Adult Home residents.[25] SPA209-17.

The United States

The United States also moved to intervene as a plaintiff after trial, citing its unique regulatory and enforcement responsibilities under Title II. The district court found that the United States' involvement would not prejudice the original parties or unduly delay litigation because, unlike NYCQAL, the United States had expressly adopted the court's prior findings of fact and conclusions of law. Thus, the district court granted the United States permissive intervention in accordance with Federal Rule of Civil Procedure 24(b)(2).

[25] A second trade group, ESAAL, also was denied intervention and filed a notice of appeal, but has since abandoned its appeal. *See In re NASDAQ Mkt.-Makers Antitrust Litig.*, 189 F.3d 461, 461 (2d Cir. 1999) (summary order) (dismissing appeal where appellant failed to submit a brief); Fed. R. App. P. 3(a)(2).

Remedial Order and Judgment

After considering the State's proposed remedy, and the counter-remedies proposed by DAI, the United States,[26] and NYCQAL, which participated as *amicus*, the district court entered a Memorandum and Order rejecting the State's proposed order as unreasonable and inadequate. The district court found that the State's proposal "scarcely beg[an] to address the violations identified by the court," SPA220, and "brazenly ignore[d] the court's factual findings and overtly attempt[ed] to relitigate issues lost at trial," SPA228. Among other things, the State proposed offering supported housing to only 200 Adult Home residents per year over a five-year period, SPA220—leaving thousands of Adult Home residents without a remedy.

The court entered its Remedial Order and Judgment on March 1, 2010 (the "Remedial Order" or "Order"). The Order directs that within four years all Adult Home residents be afforded the choice of supported housing if qualified, and that no individual with mental illness who is qualified for supported housing be offered services in an Adult Home unless he or she declines the opportunity to receive services in supported housing. SPA234. To effectuate the Order, the Court directed the State to create 1,500 supported housing beds for each of three years. SPA236.

[26] The United States gave its full support to the proposal submitted by DAI.

The Remedial Order does not require anyone to move out of an Adult Home who does not want to; it merely requires the State to provide Adult Home residents with a choice.

Proceedings on Appeal

The State appealed from the Remedial Order and filed a motion to stay the Order. NYCQAL filed an appeal of the denial of intervention and then filed a separate appeal from the Remedial Order. DAI moved to dismiss NYCQAL's appeal of the Remedial Order as an improper non-party appeal. One week later, NYCQAL filed a motion in this Court to intervene in the State's appeal, which DAI and the United States opposed.

On June 23, 2010, a three-judge panel denied the State's motion to stay the Remedial Order. The panel directed that DAI's motion to dismiss NYCQAL's appeal and NYCQAL's motion to intervene in the appeal would be determined by the panel hearing NYCQAL's appeal from the denial of its motion to intervene below.

ARGUMENT

I.

THE STATE DISCRIMINATES AGAINST DAI'S CONSTITUENTS

At trial, DAI proved that New York's needless institutionalization of Adult Home residents is discrimination in violation of Title II of the ADA. The district court properly held that (1) DAI's constituents are "qualified individuals" with disabilities, (2) the State is subject to Title II, and (3) DAI's constituents have been

discriminated against by the State on account of their disabilities.[27] *See Henrietta D.*, 331 F.3d at 272; SPA80.

A. Title II Applies to the State's Mental Health Services System

The district court correctly held that the State's mental health services system is subject to Title II of the ADA. SPA30-36. Title II applies to all "services, programs, or activities of a public entity," 42 U.S.C. § 12132, "*without* any exception." *Pa. Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998); *see also Innovative Health Sys., Inc.* v. *City of White Plains*, 117 F.3d 37, 45 (2d Cir. 1997) (stating that "programs, services, or activities" is a "catch-all phrase that prohibits all discrimination by a public entity, regardless of the context"). The federal regulations implementing Title II provide that 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) (emphasis added); *see also id.* § 35.130(b)(6) ("[A] public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability.").

Under New York law, DOH and OMH are required to "develop a comprehensive, integrated system of treatment and rehabilitative services for the

[27] Title II of the ADA and Section 504 of the RA impose identical requirements. *See, e.g.*, *Henrietta D.*, 331 F.3d at 272; SPA28, 80.

mentally ill. Such a system . . . should assure the adequacy and appropriateness of residential arrangements . . . and . . . should rely upon . . . institutional care only when necessary and appropriate." N.Y. MENTAL HYG. LAW § 7.01. The State is "responsible for determining what services to provide, in what settings to provide them, and how to allocate funds for each program." SPA36. The State "plan[s] how and where services for individuals with mental illness will be provided, and . . . allocate[s] the State's resources accordingly." SPA82.

Pursuant to these requirements, OMH and DOH plan, administer, and fund all aspects of New York's mental health services system, including Adult Homes. The State does not dispute the district court's finding that Adult Homes are an integral part of New York's mental health services system. SPA30-33. The State subsidizes Adult Homes, SPA174, and has spent millions of dollars in efforts to improve them. SPA182-84. The State licenses, monitors, inspects, and regulates Adult Homes, and has the power to determine their availability. SPA30-33. In fact, the State's brief devotes much space to defending the central role of Adult Homes in its mental health services system. *See, e.g.*, State Br. at 7-10. Thus, there can be no doubt that the State's conduct at issue here involves the administration of New York's mental health services system, including the allocation of State resources, and falls within the scope of Title II. *See Innovative Health*, 117 F.3d at 44-45; 28 C.F.R. § 35.130(d).

To the extent that the State argues that Title II does not apply or applies differently because Adult Homes are privately owned, it is mistaken.[28] SPA83 ("The State cannot evade its obligation to comply with the ADA by using private entities to deliver services that are planned, implemented, and funded as part of a statewide system of mental health care."); *see also* SPA 35. That a state happens to use private providers to deliver certain mental health services is, as the district court held, "immaterial." SPA34. In fact, the Georgia mental health system to which the Supreme Court applied Title II in *Olmstead* made use of private providers. *See* Resp. Br. in *Olmstead*, 1999 WL 144128, at *5 (noting that Georgia had restructured its mental health system to make use of private providers of community services). Federal courts routinely apply Title II to state service systems that rely on private contractors and facilities, and DAI is not aware of a single decision denying a Title II claim on this basis. *See, e.g.*, *Radaszewski* v. *Maram*, 383 F.3d 599, 614 (7th Cir. 2004); *State of Conn. Office of Prot. & Advocacy for Pers. with Disabilities* v. *Connecticut*, 706 F. Supp. 2d 266, 276-77 (D. Conn. 2010); *Martin* v. *Taft*, 222 F. Supp. 2d 940, 981 (S.D. Ohio 2002); *Rolland* v. *Cellucci*, 52 F. Supp. 2d 231, 237 (D. Mass. 1999).

[28] It is not clear whether the State has abandoned this argument on appeal. *See, e.g.*, State Br. at 6, 25.

B. The District Court Properly Found that the State Discriminates Against DAI's Constituents by Needlessly Institutionalizing Them in Adult Homes

The Supreme Court held in *Olmstead* that "unjustified isolation" and segregation are "properly regarded as discrimination based on disability." *Olmstead*, 527 U.S. at 597. The Court explained,

> Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from 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 options, economic independence, educational advancement, and cultural enrichment. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations.

Id. at 600-01 (citations omitted). Accordingly, a state violates the ADA by denying individuals mental health services in an integrated setting where "community placement is appropriate, the transfer . . . to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated." *Id.* at 587.[29]

[29] *See also* 42 U.S.C. § 12101(a)(2) ("[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such

Applying the principles set forth in *Olmstead*, the district court here found that Adult Homes are institutions that segregate people with mental illness from the community,[30] SPA88-108, that supported housing is a more integrated setting than Adult Homes, SPA108-13, that virtually all of DAI's constituents are qualified to live in supported housing, SPA117-49, and that DAI's constituents are not opposed to living in supported housing, SPA149-57. Accordingly, the district court properly held that the State discriminates against DAI's constituents by needlessly institutionalizing them in Adult Homes. *Olmstead*, 527 U.S. at 587.

The State does not contend that any of these findings were in error.[31] Instead, in the face of this application of Supreme Court precedent, the State offers a

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forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."); § 12101(a)(3) ("[D]iscrimination against individuals with disabilities persists in such critical areas as . . . institutionalization . . . ."); § 12101(a)(5) (finding that discrimination arises not only from "outright intentional exclusion," but also from "failure to make modifications to existing . . . practices").

[30] While a plaintiff need not prove that the setting at issue is an "institution" to establish a Title II violation (as DAI did here), *see, e.g.*, *Fisher* v. *Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003), the district court considered this finding "compelling evidence" that that Adult Homes "do[] not enable interactions with nondisabled people to the fullest extent possible." SPA114.

[31] Although the State does not challenge the district court's findings that DAI's constituents are not in the most integrated environment suitable to their needs, NYCQAL raises certain objections to the district court's straightforward application of *Olmstead*. NYCQAL Br. at 46-52. As an initial matter, this Court should not address issues that the State has elected not to pursue on appeal. *See Riverkeeper, Inc.* v. *Collins*, 359 F.3d 156, 163 n.8 (2d Cir. 2004). Even if NYCQAL is allowed to participate in this appeal, it cannot raise issues relating to

number of arguments that mischaracterize the district court's decision and ignore controlling law. Each of these arguments should be rejected.

First, the State argues that Title II requires the provision of integrated, community-based services only when a state is "forcing individuals to remain confined in segregated state institutions" or "conditioning access to state services on residence in an institution." State Br. at 24-25, 33-34. Although the State claims to derive this interpretation of Title II from *Olmstead*, it is nowhere to be found in that decision. To the contrary, like the Adult Home residents here, the plaintiffs in

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the merits of DAI's claims that the State has abandoned, because such issues are outside the purported scope of their intervention. *See United States* v. *Bd. of Educ.*, 605 F.2d 573, 576 (2d Cir. 1979) (stating that intervenors can participate in the lawsuit only "within the limitations of purpose imposed at the time of intervention"); *United States* v. *S. Fla. Water Mgmt. Dist.*, 28 F.3d 1563, 1567 n.1 (11th Cir. 1994) ("Intervenors lack standing to raise . . . issues . . . outside of the limited scope of the intervention.").

At any rate, NYCQAL's arguments are without merit. *First*, *Olmstead* does not, as NYCQAL suggests, require the State to make a formal recommendation concerning community placement in order for an individual to be deemed qualified for such placement. Were that the case, states could avoid the integration mandate by simply failing to require professionals to make recommendations regarding necessary services. *See*, *e.g.*, *Joseph S.* v. *Hogan*, 561 F. Supp. 2d 280, 290-91 (E.D.N.Y. 2008); *Frederick L.* v. *Dep't of Pub. Welfare*, 157 F. Supp. 2d 509, 540 (E.D. Pa. 2001). *Second*, NYCQAL's claim that "substantial evidence of the preferences of individuals with disabilities was lacking" is without basis. The district court made extensive findings of fact (based on, among other things, the testimony of current and former Adult Home residents) demonstrating that DAI's constituents want to—and if given the option would choose to—receive services in more integrated settings. SPA152-57. As discussed *infra* note 42, the length of time it took to fill the sixty supported housing beds allocated to Adult Home residents in 2007 was due to the State's lackluster effort at in-reach—not a reflection of residents' preferences.

Olmstead had been *voluntarily* admitted to Georgia Regional Hospital and were theoretically free to leave. *Olmstead*, 527 U.S. at 593. In addition, here, New York *is* conditioning services on being institutionalized in Adult Homes. Despite the State's insistence that DAI's constituents live in Adult Homes voluntarily, *see, e.g.*, State Br. at 34, that is not what the district court found. As the court explained, DAI's constituents remain in Adult Homes because the State has categorically excluded them from more integrated service settings, ensuring that Adult Homes are the only option for large numbers of people with mental illness. SPA150. Like the plaintiffs in *Olmstead*, they have been denied access to community-based treatment settings and they have nowhere else to go. *Olmstead*, 527 U.S. at 600-03; SPA150, 163-65, 193.

It is not the case, as the State suggests, that DAI's constituents can simply take their SSI payments and go live wherever they want. In addition to the myriad subsidies the State provides to Adult Homes as sponsorship of their major role in New York's mental health system, the State provides a much higher rate of SSI benefits to individuals living in Adult Homes than it does to individuals living independently. If a resident leaves the Adult Home, the State reduces its portion of that resident's SSI benefits by 87% (from $8,328 to $1,044). SPA172-73. Thus, the State has effectively conditioned support on living in institutions. *See Olmstead*, 527 U.S. at 601 (finding that discrimination exists where, "[i]n order to receive needed medical services, persons with mental disabilities must, because of those disabilities,

relinquish participation in community life they could enjoy given reasonable accommodations").

Ignoring the district court's factual findings, the State contends that it has "decoupled" mental health services from residential services and mischaracterizes DAI's complaint as concerning only "housing" options. State Br. at 33. But far from having "decoupled" mental health and residential services, residential services are an integral component of the State's comprehensive mental health system. SPA83-84. Pursuant to New York law, the mental health "system . . . should assure the adequacy and appropriateness of residential arrangements." N.Y. MENTAL HYG. LAW § 7.01. OMH's "guiding principles" acknowledge that "[h]ousing is a basic need and necessary for recovery." PX(1)-105; *see also* PX(3)-345; JA227:1010:23-25-1011:1. Moreover, while DAI's constituents might be eligible for Medicaid if they lived outside of an Adult Home, the State's "integrated system of treatment" (which includes mental health care, physical health care, and residential services), on which these individuals rely, *is available to them only in an Adult Home*. That is why the State itself has described Adult Home residents as "stuck." SPA88.

It is well settled that a State discriminates when it forces individuals to "choose" institutional confinement because of a lack of available alternatives. *See, e.g.*, *Radaszewski*, 383 F.3d at 614 (applying ADA where plaintiff's son would need to seek admission to a privately owned institution if defendants reduced level of

services received at home); *Fisher* v. *Okla. Health Care Auth.*, 335 F.3d 1175, 1179 (10th Cir. 2003) (applying ADA where plaintiffs would be forced to choose nursing home services to maintain current prescription drug levels); *Helen L.* v. *DiDario*, 46 F.3d 325, 327-28 (3d Cir. 1995) (finding ADA violated where plaintiff remained in nursing home because she lacked access to community-based services for which she was qualified).

Second, the State maintains that Title II does not allow challenges to a state's "resource-allocation decisions." State Br. at 47. But *Olmstead* did not declare such decisions to be beyond Title II's purview. In *Olmstead*, the plaintiffs sought an order directing Georgia's Department of Human Resources to fund community placements for them. 527 U.S. at 593-94. Making an argument reminiscent of the State's here, Georgia claimed that it had no liability because "inadequate funding, not discrimination" explained plaintiffs' needless institutionalization. *Id.* at 594. The Supreme Court rejected this argument. Indeed, the Court placed Georgia's budget decisions at the center of its analysis, holding that a state discriminates by denying plaintiffs community services if their placement could "be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." *Id.* at 592, 603-07. While the Supreme Court acknowledged that courts should give some deference to states' budgetary discretion, it instructed that

these considerations be addressed in the context of the fundamental alteration defense. *Id.* at 603-04.

Third, the State argues that the district court incorrectly "read into the integration regulation an affirmative mandate requiring the State to guarantee 'integrated' housing whenever it provides any service to an individual with a disability." State Br. at 45. This is not what the district court ordered and is a complete distortion of DAI's claims. DAI does not contend that the State must provide "integrated housing" services to every person receiving a mental health service from the State, nor does it seek "preferred housing" for its constituents. But where, as here, a state provides residential services as a component of its mental health services system, it is discrimination for the state to provide those services in segregated, institutionalized settings that "diminish[] the everyday life activities of individuals." *See Olmstead*, 527 U.S. at 601. That is the discrimination that *Olmstead* specifically addressed and that lies at the heart of Title II. *Id.*

The State also mischaracterizes DAI's claims as requiring "additional or different" mental health services, citing to this Court's decision in *Rodriguez* v. *City of New York*, 197 F.3d 611, 619 (2d Cir. 1999). State Br. at 39. But *Rodriguez* is inapposite. *Rodriguez* held that where "New York does not [provide a service] for *anyone*, it does not violate the ADA by failing to provide [the] benefit" to the plaintiff. 197 F.3d at 619 (emphasis added); *accord Leocata* v. *Wilson-Coker*, 343 F. Supp. 2d

144, 156 (D. Conn. 2004). The *Rodriguez* Court expressly distinguished the facts in that case from those in *Olmstead*, in which "the [Supreme] Court addressed only where Georgia should provide treatment, not whether it must provide it." 197 F.3d at 619; *see also Townsend* v. *Quasim*, 328 F.3d 511, 517 (9th Cir. 2003) ("[W]here the issue is the *location* of services, not *whether* services will be provided, *Olmstead* controls."). Here, as in *Olmstead*, New York *already* provides mental health services to DAI's constituents in Adult Homes, and *already* provides supported housing to individuals who are similar to DAI's constituents in every material respect. SPA124-26, 135-38, 201. Therefore, this case does not concern a new "level of benefits" or creation of a new "entitlement." As in *Olmstead*, this case concerns only *where* the State should provide treatment, not whether it must provide it at all.[32] *See* SPA157; 28 C.F.R. § 35.130(d); 28 C.F.R. § 41.51(d); *Radaszewski*, 383 F.3d at 612 ("[T]he fact that the State already provides for some private-duty nursing tends to belie the notion that providing such care to [plaintiff] . . . would require the State to . . . creat[e] an entirely 'new' service."); *Townsend*, 328 F.3d at 517 ("If services were determined to constitute distinct programs based solely on the location in which they were

[32] The State also cites to a host of additional inapposite cases for the proposition that there must be "something different about the way the plaintiff is treated 'by reason of . . . disability'." State Br. at 35. These arguments are all red herrings. The Supreme Court in *Olmstead* unequivocally held that "unjustified institutional isolation . . . is a form of discrimination" even if no disparate treatment is shown. *Olmstead*, 527 U.S. at 600-01.

provided, *Olmstead* and the integration regulation would be effectively gutted."); *see also Rodriguez*, 197 F.3d at 619.

Finally, the State suggests that the district court failed to recognize the deference that *Olmstead* gives to states in structuring their mental health policies. But while *Olmstead* recognizes that states are allowed leeway to balance conflicting needs, it does not sanction the unjustified institutionalization of thousands of individuals that can be corrected without fundamentally altering a state's service system. Nor does *Olmstead* sanction the exclusion of an entire population from access to community-based services. Rather, recognizing the importance of deference to the State, *Olmstead* permits defendants to establish an affirmative defense that the relief sought is a fundamental alteration. As set forth below, the State altogether failed to make such a showing here.

II.

THE STATE FAILED TO MEET ITS BURDEN OF PROVING A FUNDAMENTAL ALTERATION

The Supreme Court has explained that the fundamental alteration defense "would allow the State 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. The Court proposed that one way for a state to prevail on the fundamental alteration defense would be to

demonstrate that it already has a "comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that move[s] at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated." *Id.* at 605-06.

The district court properly found that the State failed at trial to meet its burden of establishing a "fundamental alteration" defense, because the State does not have a "comprehensive, effectively working plan" for placing Adult Home residents in the most integrated setting appropriate to their needs, SPA157-72, and had not shown that the relief sought would increase its costs or have an adverse impact on other individuals with mental illness, SPA172-90. *See Frederick L.* v. *Dep't of Pub. Welfare*, 364 F.3d 487, 492 & n.4 (3d Cir. 2004) (noting that defendant has burden of establishing fundamental alteration). The court's decision should be upheld.[33]

A. The State Has No Comprehensive, Effectively Working Plan to Enable Adult Homes Residents to Receive Services in More Integrated Settings

Based on "ample evidence," SPA192, the district court correctly found that the State has no working plan to enable Adult Home residents to receive services in a more integrated setting, much less a "comprehensive" or "effectively working"

[33] The State argues that the remedy sought is not a "reasonable modification" under Title II because DAI has not shown that "'but for' its [constituents'] disability, [they] would have received the ultimate benefit sought." State Br. at 51-52. *Olmstead* holds that unjustified isolation of people with disabilities is a form of discrimination that must be remedied unless it would require a fundamental alteration to the state's mental health system; there is no separate "but for" inquiry. 527 U.S. at 597-98; *see also* SPA191.

plan as required by *Olmstead*. SPA191-95. Far from it, the State has "routinely and systematically excluded Adult Home residents from [its] efforts to comply with *Olmstead*," SPA192, and has exhibited a "commit[ment] to maintaining the status quo," leaving DAI's constituents "stuck" in institutional Adult Homes. SPA88, 161. Indeed, the State admits in its brief that it views the placement of individuals in Adult Homes as the *end* of its *Olmstead* obligations. State Br. at 56. This argument underscores the State's lack of "commitment to . . . compliance with the ADA and RA."[34] *Pa. Prot. & Advocacy, Inc.* v. *Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 383 (3d Cir. 2005) (admission by defendant that it had no plan for community-based services for residents of facility at issue "foreclose[d] the genuine contention that it ha[d] made a commitment to . . . compliance with the ADA and RA").

The State argues that it is "effectively implementing a plan to 'deinstitutionalize disabled persons,'" citing *Sanchez* v. *Johnson*, 416 F.3d 1051 (9th Cir. 2005), and *Arc of Washington State, Inc.* v. *Braddock*, 427 F.3d 615 (9th Cir. 2005), because it claims to have a plan to move residents out of *state-operated psychiatric facilities*. State Br. at 55-56. But such a plan, if it exists, excludes Adult Home residents—the very population discriminated against—and cannot form the

[34] The State's claim that "DAI's constituents are in no way excluded" from its expansion of community-based services, State Br. at 57, is directly contradicted by the district court's findings of fact: "[W]ithout a specific allocation of beds for Adult Home residents, Adult Home residents will not have access to supported housing as a practical matter." SPA165.

basis of a fundamental alteration defense. *See Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 384-85 & n.9 (finding no fundamental alteration where state had "chosen not to make integration provisions" for the population at issue in the suit "by excluding them from participation in its varied, successful community treatment programs"). In *Sanchez* and *Arc of Washington*, unlike here, the defendants had demonstrated a detailed plan that included the specific facilities in which the plaintiffs were institutionalized. *Sanchez*, 416 F.3d at 1065-66 (addressing state plan to move plaintiffs out of institutional facilities called developmental centers); *Arc of Wash.*, 427 F.3d at 621 (addressing state plan to reduce the census of institutions in which plaintiffs lived). Because the State has no plan to serve Adult Home residents in a more integrated setting, *Sanchez* and *Arc of Washington* do not support its claims.

The State also argues that "*Olmstead* does not require such specific plans outside the context of unjustified institutionalization *in state facilities*." State Br. at 56 (emphasis added). This argument finds no support in the law. To the contrary, as set forth above, courts routinely apply Title II to state mental health systems that rely on private entities to deliver services. *See, e.g.*, *Rolland*, 52 F. Supp. 2d at 237 (finding it "immaterial" that plaintiffs lived in private rather than government-operated nursing facilities).

Because the State failed to show a "comprehensive, effectively working plan" to serve Adult Home residents in integrated settings, SPA195, it failed to meet

its burden of establishing the fundamental alteration defense. *See Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 381 (*Olmstead* "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").

B. The State Has Not Demonstrated that the Relief Sought Would Increase Its Costs or Fundamentally Alter Its Mental Health Services System

The State's appeal also fails because it did not establish at trial that the relief sought would increase its costs, let alone result in any "fundamental alteration" of its mental health system.

Brazenly ignoring the district court's finding that the State will save money by serving Adult Home residents in supported housing, SPA175, and with no citation to the record, the State asserts that it will be required to spend $65 million in additional appropriations in the first year of implementation of the remedy. State Br. at 54. This number is inconsistent with the State's own cost calculation at trial—the State argued that each supported housing bed would cost an additional $7,370 per year, totaling only $11.055 million in the first year, SPA174-75—and it flatly ignores the cost savings identified by the district court.

Following *Olmstead*'s mandate, the district court properly considered the fiscal impact of the proposed remedy by reviewing the full costs of services received by Adult Home residents and how the relief sought would affect those costs. SPA172-88; *Olmstead*, 527 U.S. at 603-06 & n.16 (rejecting simple comparison of

cost of community-based care with cost of institutional care, in favor of analysis of actual fiscal impact); *Townsend*, 328 F.3d at 520 (requiring concrete factual analysis of how proposed remedy would affect state's mental health budget); *Martin*, 222 F. Supp. 2d at 986 (fundamental alteration analysis requires consideration of "vast array of evidence"). The State's analysis improperly ignored much of the actual costs of serving DAI's constituents in Adult Homes. As the Chief Fiscal Officer for OMH admitted at trial, the State itself did no analysis to determine the financial impact of serving people in supported housing rather than Adult Homes. SPA174.

Based on the State's own data regarding Medicaid costs and other substantial evidence, the district court found that the State would ***save*** $146 annually per person by serving individuals in supported housing rather than in Adult Homes.[35] SPA174-81. The court also pointed to additional millions of dollars the State spent on capital improvements and programming in Adult Homes that could be reduced if individuals were instead served in supported housing.[36] SPA181-84.

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[35] The State does not contest the district court's finding that Adult Homes foster the over-utilization of Medicaid, SPA176-79, but rather argues that in lieu of making supported housing available, it "might instead choose to step up enforcement actions against the providers." State Br. at 64. The district court appropriately contrasted the costs of the relief sought with the State's actual spending. In addition, the court found that the State has long been aware of but unable to reduce the over-utilization of Medicaid in Adult Homes. SPA178-79.

[36] NYCQAL erroneously claims that the district court's order "is predicated on the redirection of [capital improvement and programming] funds from adult homes to the operators of supported housing." NYCQAL Br. at 20. However, the district

The State does not—because it cannot—claim that the detailed cost findings by the district court were in error. *See Fisher*, 335 F.3d at 1183 ("If every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed.").[37]

Paradoxically, the State faults the district court for having required the State to produce evidence supporting its assertion that the "scale" of the proposed remedy would fundamentally alter its mental health system. State Br. at 55, 61-63. But under *Olmstead*, it is precisely the State's burden to establish that the remedy sought would fundamentally alter the service system at issue. *See, e.g.*, *Olmstead*, 527 U.S. at 604-05; *Frederick L.*, 364 F.3d at 493-94. The State had every opportunity to present evidence to that end, but fell short.

The State also seeks to muddy the waters by citing to the current fiscal crisis and anticipated budget constraints. State Br. at 60-63. However, the State's current budget problems, standing alone, do not establish a fundamental alteration

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court identified substantial savings even without factoring in these potential cost reductions. SPA181-84.

[37] While NYCQAL contends that the district court "overlooked uncontroverted testimony that, when supported housing providers apply for financing assistance from the State, the cost of their supported housing increases by $11,600," NYCQAL Br. at 58, the State does not make this argument, and for good reason: it completely misinterprets the record. The testimony to which NYCQAL refers conflated the costs of *supportive housing* (which is not at issue in this case) and *supported housing* (which is at issue). JA729-30:2775-77; DX(3)-552. Supported housing providers do not use "debt services" and thus there were no costs "overlooked" by the district court. DX(3)-552.

defense.[38] *Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 380 ("[B]udgetary constraints alone are insufficient to establish a fundamental alteration defense."); *Frederick L.*, 364 F.3d at 495 (singular focus on state's short term fiscal constraints is "inconsistent with *Olmstead* and the governing statutes"); *Fisher*, 335 F.3d at 1182-83 (a state's fiscal crisis "does not lead to an automatic conclusion" that relief "will result in a fundamental alteration"). Moreover, the district court expressly considered the State's financial crisis when it entered the Order, and found that the State had failed to show a nexus between that crisis and the relief DAI seeks. SPA198. Importantly, the district court also found that the State's claim was belied by the cost savings the court identified.[39] SPA221.

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[38] The State also erroneously relies on the terms of the Remedial Order as purported evidence of a "fundamental alteration." But the relevant fundamental alteration inquiry concerns the relief sought, not the ultimate remedy ordered. Even assuming *arguendo* the Remedial Order were too broad—which it is not—that would not support disturbing the court's finding of unlawful discrimination. *See Pa. Prot. & Advocacy, Inc.*, 402 F.3d at 381 n.5 (distinguishing "sufficiency of budgetary constraints to establish a fundamental alteration defense to liability" from "the effect of budgetary constraints on a district court's analysis of the appropriate remedy").

[39] The State maintains that the district court's decision, if affirmed, might lead to additional lawsuits, thus subjecting the State to "responsibilities reaching far beyond this case." State Br. at 58. That the State may have other liabilities under Title II should not deter this Court from addressing violations where they exist. Of course, to the extent that the remedies sought in future lawsuits would fundamentally alter the State's mental health system, the State would not be found liable.

Finally, the State attempts to shirk its burden of proving its affirmative defense by labeling the district court's detailed findings as "estimates." State Br. at 60. The court's findings, however, were not mere conjecture. They were thoroughly considered and based on a voluminous trial record, including the testimony of multiple experts, about the costs of providing supported housing services to current Adult Home residents. Moreover, the State's argument that a defendant de facto establishes its affirmative defense whenever a district court calculates future costs (since its calculations may turn out to be wrong) is both illogical and contrary to the law. A court must necessarily consider future costs in the fundamental alteration analysis. *See Olmstead*, 527 U.S. at 606 n.16 (requiring analysis of fiscal impact of desired relief). Accepting the State's view would swallow Title II whole.

C. The Relief Sought Would Not Adversely Affect Other Individuals with Disabilities

Once again ignoring the district court's factual findings, the State suggests that the relief sought might jeopardize services for other individuals with disabilities. But the State's apocalyptic predictions are not supported by the evidence—as demonstrated by the complete lack of citation to the record for their claims.[40] State Br. at 62, 64-65; *see also* NYCQAL Br. at 55-56.[41]

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[40] Significantly, the Adult Homes are not as fiscally precarious as they claim. *See* PX(1)-670 (Often "operating profits were hidden through false or misleading financial statements, which included non-arm's length payments to the operator. Non-arm's length transactions often create 'costs' which in reality are 'off-the-

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Accordingly, the district court properly held that the State discriminates against DAI's constituents, entitling them to relief.

III.

THE REMEDIAL ORDER IS NARROWLY TAILORED TO ADDRESS THE VIOLATIONS FOUND BY THE DISTRICT COURT

In crafting a remedy for the violations of federal law found at trial, the district court appropriately deferred to the State and entered an order that is narrowly tailored—and no more intrusive of State prerogatives than necessary—to achieve compliance with federal law.

Injunctions issued to remedy civil rights violations should be (1) related to the "scope and nature" of the violation of federal law, (2) "designed as nearly as possible to restore the victims of discriminatory conduct to the position they would

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book' profits to the operators."). They also have a history of threatening closure in order to avoid reform, as they are here. JA219:698, 286:966. Moreover, the State has ample authority—which it has exercised before—to intervene when Adult Homes place residents at risk. SPA86 (n.38) (citing N.Y. COMP. CODES R. & REGS. tit. 18, § 485.9).

In addition, the State argued below that Adult Homes were likely to remain full even if DAI's constituents move to supported housing due to "backfill." SPA196. While the district court found this claim to be equally unsupported by evidence, it illustrates that the prospect of Adult Home closures is far from certain.

[41] For example, while NYCQAL raises the specter of a "zero sum game" in which the tight New York City housing market will only allow for some individuals with mental illness to live in supported housing, NYCQAL Br. at 56, such arguments are directly contradicted by the district court's finding that the State can create 1,500 supported housing beds each year. SPA189-90.

have occupied in the absence of such conduct," and (3) attentive to the interests of state and local authorities in managing their own affairs. *Milliken* v. *Bradley*, 433 U.S. 267, 280-281 (1977) (internal quotation marks and citations omitted).

Where discrimination has been found, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id*. at 281 (quoting *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)). A district court has "first-hand experience with the parties . . . [and] must be given a great deal of flexibility and discretion in choosing the remedy best suited to curing the violation." *United States* v. *Yonkers Bd. of Educ.*, 837 F.2d 1181, 1236 (2d Cir. 1987) (internal quotation marks omitted). A district court does not abuse or exceed its discretion unless its decision "rests on an error of law . . . or a clearly erroneous factual finding" or "cannot be located within the range of permissible decisions." *Zervos* v. *Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001). Here, the district court did not abuse its discretion.

A. The State's Proposed Remedy Was Inadequate

The State complains in its brief that the district court did not defer sufficiently to the State. That simply is not true. To the contrary, mindful of the important "principles of federalism," SPA219 (citing *Missouri* v. *Jenkins*, 495 U.S. 33, 51 (1990)), the district court turned to the State in the first instance to present a proposed remedy that comported with the court's findings of facts and conclusion of

law. However, as the district court found, the State proposed a remedy that was "grossly inadequate," SPA223, and "egregiously deficient," SPA220:

> The [State's] proposal brazenly ignore[d] the court's factual findings and overtly attempt[ed] to relitigate issues lost at trial. . . . First and foremost, it simply fail[ed] to address the civil rights violations found by the court.

SPA228. For example, among its other deficiencies, the State's proposal would have made supported housing beds available—over five years—to only 23% of the people that the district court found to be needlessly institutionalized in the Adult Homes. SPA223. Likewise, despite the district court's extensive factual findings that "residents are not adequately informed about housing alternatives to the Adult Homes," SPA151, the State proposed to conduct only a once-a-year "educational opportunity" to provide information to Adult Home residents about alternative options, SPA223. The court rightly found that an annual lecture or exhibition did not pass muster: "The idea that this token effort would sufficiently educate adult home residents is unsupported by the evidence, not to mention common sense."[42] SPA224. Not only did the State's proposal fail to address the discrimination DAI's constituents

[42] The importance of effective in-reach is highlighted by the State's bungled attempts at in-reach in 2007-2008 with respect to the sixty supported housing beds then made available to adult home residents. Although the sixty-bed initiative began in the summer of 2007, it took the State more than nine months to conduct any in-reach whatsoever, and only then with a select group of invited residents at a small number of adult homes. JA490-93. Once in-reach began, there was an "enthusiastic" response. SPA153. "[W]hen the administrator of the Adult Home asked the residents to indicate, by a show of hands, who wanted to move out of the facility, 'all of the residents raised their hands.'" SPA153-54.

suffer, but it also was contingent upon numerous factors, including passage by the New York State Legislature of budget legislation, contract bidding and approval, and performance of contracts without breach. SPA226-27.

Tellingly, the State does not now contend that it proposed an adequate remedy, but rather explains its failure to do so as a litigation tactic. State Br. at 71 n.10. While a district court should allow the state to propose relief in the first instance, "[i]t goes without saying that federal courts must vigilantly enforce federal law and must not hesitate in awarding necessary relief." *Horne* v. *Flores*, 129 S. Ct. 2579, 2594 (2009). This Court's decision in *United States* v. *Yonkers Board of Education*, 29 F.3d 40 (2d Cir. 1994) (per curiam), is directly on point. In *Yonkers*, this Court affirmed a district court's remedial order that did not adopt the City of Yonkers' proposed remedy, because, although the plan may have been put forward in good faith,[43] it was not effectual:

> [T]he defendant does not shoulder its burden at the remedy stage merely by coming forward with a plan. The defendant must come forward with a plan that promises realistically to work, and promises realistically to work *now*. The district court has not only the power but the *duty* to ensure that the defendant's proposal represents the most effective means of achieving desegregation.

[43] Here, the district court found the State's proposed remedy to be "so egregiously deficient as to arouse suspicion that [the State] submitted the proposal knowing full well that the court would have to reject it, thereby raising a question as to [its] good faith." SPA220.

29 F.3d at 43 (second emphasis added) (internal quotation marks and citation omitted). Consistent with these principles, the district court acted well within its discretion to reject the State's proposal as "unreasonable and inadequate." SPA230.

B. The Court's Remedial Order Is Narrowly Tailored

In the absence of a reasonable proposal from the State, the district court entered a Remedial Order that is consistent with the scope of the Title II violations found at trial.

In line with the district court's finding that the State needlessly discriminates against Adult Home residents by denying them access to supported housing, the Remedial Order requires the State to ensure within four years that "Adult Home Residents who desire placement in supported housing have been afforded such placement if qualified." SPA234 ¶ 1. Based on the court's extensive findings at trial, and its familiarity with this case after almost seven years of litigation, the Remedial Order sets forth requirements to ensure that this goal is accomplished meaningfully and expeditiously. Each of these concomitant requirements is based on a specific finding of fact, and each is a necessary component of ensuring that all of DAI's constituents receive relief. For example, the "in-reach" required by the Remedial Order is directly tied to the court's finding that residents lack adequate information

and are often misled about alternative housing.[44] The district court did not abuse its discretion by requiring such assistance. *See Yonkers*, 837 F.2d at 1236 (district courts have "first-hand experience with the parties and [are] best qualified to deal with the flinty, intractable realities of day-to-day implementation" (internal quotation marks omitted)).

Indeed, the injunctive and declaratory relief ordered here is remarkably similar to the relief affirmed by this Court in *Henrietta D.* v. *Bloomberg*, 331 F.3d 261 (2d Cir. 2003), a Title II discrimination case brought on behalf of HIV-positive recipients of New York City and State services. After plaintiffs established violations of Title II, this Court affirmed an injunction that required New York City to provide "intensive case management," maintain specified ratios of caseworkers and supervisors, provide meaningful explanation of benefit applications, and "appoint a representative to handle all problems that . . . clients are experiencing.'" *Id.* at 271. The plaintiffs also were granted the right "to conduct on-site inspections . . . to monitor compliance." *Id.* This Court noted that the relief may have been broad, but the "factual findings provide ample support" for the remedy. *Id.* at 290. Here as well, the district court's extensive factual findings support—and require—the measures set forth in the Remedial Order.

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[44] In-reach also is not a new concept: OMH itself has issued RFPs for supported housing that required plans for in-reach. *See*, *e.g.*, SX(4)-198.

C. The Remedial Order Does Not Impede Day-to-Day Management of the State's Affairs

Notably, the State does not argue that the Remedial Order is untethered to the record. Rather, the State erroneously contends that aspects of the Remedial Order "deprive[] state officials of authority to implement and administer the very program the court mandates." State Br. at 67. But this criticism is divorced from the text of the Order itself, which properly leaves discretion to State officials.

For example, the Remedial Order does not "den[y] the State the power to draft and negotiate its own contracts with private supported-housing providers," as the State contends. State Br. at 67. The State retains authority to draft RFPs and provider contracts, subject only to "comment[s]" from DAI "on the sufficiency of the RFPs to achieve adequate relief." SPA238 ¶ 7. Nor does the Remedial Order place "the administration of treatment programs . . . [in] the federal courts." State Br. at 69-70. Day-to-day decision-making remains squarely in the hands of State officials. The State acknowledges as much in its brief: "[T]he court's injunction leaves many practical questions about day-to-day implementation unresolved." *Id.* at 69.

The Remedial Order also does not deprive the State of its ability to determine eligibility for supported housing. At present, supported housing providers determine, within state guidelines, which individuals will be admitted into their programs. Under OMH's Supported Housing Implementation Guidelines, Supported Housing service providers, either alone or in coordination with existing case

managers, provide an "Eligibility Determination." SX(4)-19-20; *see also* N.Y. COMP. CODES R. & REGS. tit. 14, § 595.8(d) ("The provider of service shall make a decision with regard to an individual's application for admission no later than 15 working days after submission of all necessary documentation."). Accordingly, there is no independent clinical assessment. *See, e.g.*, SPA124 (n.322).[45]

Nor does the Remedial Order improperly intrude into the State's discretion by appointing a monitor.[46] "The power of the federal courts to . . . monitor compliance with their remedial order is well established." *Yonkers*, 29 F.3d at 44; *see also Henrietta D.*, 331 F.3d at 294. Moreover, the monitor's tasks are appropriately limited to tracking compliance with the Order, facilitating the resolution of disputes, and recommending appropriate action. *See Yonkers*, 29 F.3d at 44 ("[A] special master vested with authority to implement a court's order poses a greater threat of intrusion than one whose authority is limited to monitoring compliance with that order."). As the district court aptly noted, a monitor with experience in the development, management, and oversight of community programs is both useful and appropriate, because: (1) the remedy will affect thousands of mentally ill individuals; (2) implementing the Remedial Order will require coordination of OMH, DOH, and

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[45] The State also complains that the Remedial Order is overbroad in that it provides the option of supported housing to all DAI's constituents, not just those with "*serious* mental illness." State Br. at 68. Title II affords rights to individuals with disabilities whether they are *seriously* mentally ill or *less-seriously* mentally ill.

[46] Notably, the district court appointed the monitor nominated by the State.

the Governor's office; and (3) the State has demonstrated a resistance to the remedy. SPA230.

The State's complaint that the Remedial Order does not create an "out" in the event that costs are not what the court anticipated is also without merit. State Br. at 72. If any aspect of the Remedial Order becomes unworkable, or too costly in practice, the State may return to the district court and seek relief under Federal Rule of Civil Procedure 60(b)(5). *See, e.g.*, *Henrietta D.*, 331 F.3d at 281 ("[I]f at any time such hardship arises the defendants would undoubtedly have the ability to return to the District Court to seek a modification of its order to reflect that condition.").

Finally, the court properly granted relief for individuals with mental illness "at risk of entry" into Adult Homes to ensure that the Order is not a temporary bailout of current residents only. It is well established that "where past violations have been shown," a district court enjoys "broad discretion to enjoin possible future violations of law." *Id.* at 290; *United States* v. *Carson*, 52 F.3d 1173, 1183-84 (2d Cir. 1995) ("[District] [c]ourts are free to assume that past misconduct is highly suggestive of the likelihood of future violations." (internal quotation marks omitted)).[47] In this case, future violations are certain because of the State's categorical exclusion of Adult Home residents from supported housing.

[47] The State's assertion that the district court should have entered a declaratory judgment without a specific injunction is not supported by any authority. The district court correctly found injunctive relief proper in light of the length of time

IV.

DAI HAS STANDING

DAI has standing pursuant to PAIMI to assert claims on behalf of its constituents and also associational standing pursuant to *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

Courts routinely hold that P&A organizations, such as DAI, have standing to bring suit on behalf of their constituents. *See, e.g.*, *Or. Advocacy Ctr.* v. *Mink*, 322 F.3d 1101, 1116 (9th Cir. 2003); *Doe* v. *Stincer*, 175 F.3d 879, 886 (11th Cir. 1999); *State of Conn. Office of Prot. & Advocacy for Pers. with Disabilities*, 706 F. Supp. 2d at 283-84; *Laflamme* v. *New Horizons, Inc.*, 605 F. Supp. 2d 378, 396-97 (D. Conn. 2009); *Joseph S.* v. *Hogan*, 561 F. Supp. 2d 280, 307 (E.D.N.Y. 2008); *Aiken* v. *Nixon*, 236 F. Supp. 2d 211, 224 (N.D.N.Y. 2002); *Trautz* v. *Weisman*, 846 F. Supp. 1160, 1163 (S.D.N.Y. 1994); *Rubenstein* v. *Benedictine Hosp.*, 790 F. Supp. 396, 409 (N.D.N.Y. 1992).[48] The district court correctly found that DAI has standing here.

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that the State has been discriminating against Adult Home residents and the State's resistance to redressing it, as reflected by, *inter alia*, the State's inadequate remedial plan.

[48] *See also Hargrave* v. *Vermont*, 340 F.3d 27, 32-33 (2d Cir. 2003) (noting district court grant of P&A organization's motion to intervene); *Larkin* v. *State of Mich. Dep't of Soc. Servs.*, 89 F.3d 285, 288 (6th Cir. 1996) (same); *Univ. Legal Servs., Inc.* v. *St. Elizabeth's Hosp.*, No. Civ. 105CV00585TFH, 2005 WL 3275915, at *5 (D.D.C. July 22, 2005) (rejecting argument that PAIMI does not authorize suits on behalf of its organizations' constituents); *Ohio Legal Rights Serv.* v. *Buckeye*

A. DAI Is Statutorily Authorized to Bring Suit on Behalf of Its Constituents

DAI is authorized by PAIMI to bring suit in its own name on behalf of its constituents—"individuals with mental illness." 42 U.S.C. § 10805(a)(1)(B). In accordance with this Congressional authorization, DAI has standing to sue in its representative capacity.

In 1975, largely in response to the horrific conditions uncovered at New York's Willowbrook State School for persons with developmental disabilities, Congress enacted the Developmental Disabilities Assistance and Bill of Rights Act

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Ranch, Inc., 365 F. Supp. 2d 877, 883 (S.D. Ohio 2005) ("[PAIMI] provides [P&A] systems with the independent authority to pursue legal remedies to ensure the protection of individuals with mental illness."); *Office of Prot. & Advocacy for Pers. with Disabilities* v. *Armstrong*, 266 F. Supp. 2d 303, 312 (D. Conn. 2003) ("[PAIMI] alone has provided . . . P&As with the standing to bring actions for declaratory or injunctive relief in a judicial forum, and courts have awarded such relief simply on the basis of [PAIMI's] language."); *Unzueta* v. *Schalansky*, No. 99-4162-RDR, 2002 WL 1334854, at *3 (D. Kan. May 23, 2002) ("Congress may grant an organization standing. . . . In this case, [the P&A organization] is acting under the auspices of [PAIMI]."); *Risinger* v. *Concannon*, 117 F. Supp. 2d 61, 70 (D. Me. 2000) (holding Maine P&A organization had standing); *Ala. Disabilities Advocacy Program* v. *J.S. Tarwater Developmental Ctr.*, 894 F. Supp. 424, 427 (M.D. Ala. 1995) (holding Alabama P&A organization had standing), *aff'd*, 97 F.3d 492 (11th Cir. 1996); *cf. Tenn. Prot. & Advocacy, Inc.* v. *Metro. Gov't of Nashville & Davidson Cnty.*, No. 3-95-0793, 1995 WL 1055174, at *1 (M.D. Tenn. Nov. 14, 1995) (holding that the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.*, similar to PAIMI, authorized P&A standing); *Mich. Prot. & Advocacy Serv., Inc.* v. *Babin*, 799 F. Supp. 695, 702 n.12 (E.D. Mich. 1992) (same), *aff'd*, 18 F.3d 337 (6th Cir. 1994); *Prot. & Advocacy, Inc.* v. *Murphy*, No. 90 C 569, 1992 WL 59100, at *10 (N.D. Ill. Mar. 16, 1992) (same); *Goldstein* v. *Coughlin*, 83 F.R.D. 613, 614-15 (W.D.N.Y. 1979) (same).

("DD Act"),[49] 42 U.S.C. § 6000 *et seq*. (repealed and replaced by 42 U.S.C. § 15001 *et seq.*). Under the DD Act, a state that accepts federal financial assistance for services for individuals with developmental disabilities is required to have "a system to protect and advocate the rights of individuals with developmental disabilities." 42 U.S.C. § 15043(a)(1). These "P&A" systems were created in order to, among other things, pursue legal remedies "to ensure the protection of, and advocacy for, the rights of such individuals." 42 U.S.C. § 15043(a)(2)(A)(i).

Congress enacted PAIMI in 1985 to address similar concerns that "individuals with mental illness are vulnerable to abuse and serious injury." 42 U.S.C. § 10801(a)(1); *see also Robbins* v. *Budke*, 739 F. Supp. 1479, 1481 (D.N.M. 1990). Like the DD Act, PAIMI empowers P&A organizations to "pursue administrative, legal and other appropriate remedies to ensure the protection of individuals with mental illness" and "the enforcement of the Constitution and Federal and State statutes." 42 U.S.C. §§ 10805(a)(1)(B), 10801(b)(2)(A). The federal regulations implementing PAIMI provide that a P&A organization may "bring[] lawsuits in its own right to redress incidents of abuse or neglect, discrimination, and

[49] *See Ala. Disabilities Advocacy Program* v. *J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 494 (11th Cir. 1996).

other rights violations." 42 C.F.R. § 51.6(f). DAI is designated as part of New York State's P&A system under PAIMI.[50] SPA9; Supplemental Appendix 3.

The standing of P&A organizations, like DAI, to sue "as representatives of the segment of our society afflicted with mental illness is well-established in the law." *Stincer*, 175 F.3d at 884 (collecting cases). In *Brown* v. *Stone*, for example, this Court affirmed the district court's holding that PAIMI conferred standing on a P&A organization "to address systemic issues affecting the rights of multiple individuals." 66 F. Supp. 2d 412, 424, 425 (E.D.N.Y. 1999), *aff'd sub nom. Mental Disability Law Clinic, Touro Law Ctr.* v. *Carpinello*, 189 F. App'x 5, 7 (2d Cir. 2006) (summary order); *see also, e.g.*, *Goldstein* v. *Coughlin*, 83 F.R.D. 613, 614-15 (W.D.N.Y. 1979) (holding that P&A has standing to litigate on behalf of its constituents); *Naughton* v. *Bevilacqua*, 458 F. Supp. 610, 616 n.3 (D.R.I. 1978) ("[L]ike any agency charged with enforcement of statutory provisions, the [P&A] need not show injury to the agency in order to initiate suit. . . . Congress can charge an agency with representation and protection of the statutory rights of the particularly helpless developmentally disabled."), *aff'd*, 605 F.2d 586 (1st Cir. 1979). Consistent with this authority, courts in this Circuit have held specifically that DAI has standing under PAIMI to sue on

[50] The State and NYCQAL do not argue on appeal that PAIMI does not authorize P&A organizations to bring lawsuits on behalf of others.

behalf of its constituents. *See Trautz*, 846 F. Supp. at 1163; *Rubenstein*, 790 F. Supp. at 408-09; *Aiken*, 236 F. Supp. 2d at 224.

Congress re-affirmed the standing of P&A organizations, such as DAI, to sue on behalf of others when it amended the DD Act in 1994, citing the district court decisions in *Goldstein* and *Rubenstein* with approval:

> [T]he current statute is clear that P&A systems have standing to pursue legal remedies to ensure the protection of and advocacy for the rights of individuals with developmental disabilities within the State. The Committee has reviewed and concurs with the holdings and rationale in *Goldstein v. Coughlin*, 83 F.R.D. 613 (1979) and *Rubenstein v. Benedictine Hospital*, 790 F. Supp. 396 (N.D.N.Y. 1992).

S. Rep. No. 103-120, at 39 (1993), *reprinted in* 1994 U.S.C.C.A.N. 164, 202-03.[51] There can be no dispute that Congress has granted P&A organizations authority to sue as a representative on behalf of their constituents.

As the Supreme Court has explained:

> [A]lthough . . . a litigant will ordinarily not be permitted to assert the rights of absent third parties, we recognize[] . . . that the general prohibition on a litigant's raising another person's legal rights is a judicially self-imposed limi[t] on the exercise of federal jurisdiction, not a constitutional mandate. Indeed, the entire doctrine of "representational standing," of which the notion of

[51] *See* 132 Cong. Rec. H2642-02 (daily ed. May 13, 1986) (statement of Rep. Waxman) (discussing the language of what is now 42 U.S.C. § 10805(a)(1)(B) and stating that "[i]t is also clear that the conferees do not intend for questions of standing or jurisdiction to limit the effectiveness, range, or forums in which P&A agencies can work").

> "associational standing" is only one strand, rests on the premise that in certain circumstances, particular relationships (recognized either by common-law tradition or by statute) are sufficient to rebut the background 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) (internal quotation marks and citations omitted) (holding that there is a "wide variety of . . . contexts in which a statute, federal rule, or accepted common-law practice permits one person to sue on behalf of another"); *see also Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.* v. *Brock*, 477 U.S. 274, 288-90 (1986) (discussing advantages of organizational representation notwithstanding lack of Rule 23 "safeguards").[52]

The district court found that the State is discriminating against DAI's constituents, and the Remedial Order will redress this injury. In PAIMI, Congress authorized P&As to bring suits in such circumstances. Accordingly, DAI has standing under PAIMI to bring this action.

B. DAI Has Associational Standing

DAI also has associational standing under *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). In *Hunt*, the Supreme Court reaffirmed that an organization may assert claims on behalf of its members when

[52] Non-governmental as well as governmental entities have been permitted to sue on behalf of others. *United Food*, 517 U.S. at 557-58.

(1) at least one member has standing to sue on his own; (2) the interest the organization seeks to protect is germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[53] *Id.* at 343. The Court, however, rejected the claim that only membership organizations can have standing to sue in a representative capacity, holding that a non-membership association with "indicia of membership" could bring suit on behalf of its constituents. 432 U.S. at 344-45 (holding that organization that "serves a specialized segment of the . . . community which is the primary beneficiary of its activities, including the prosecution of . . . litigation" had standing).

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[53] The State does not challenge the district court's conclusions that DAI has at least one constituent with standing to sue on his own; that the interests it seeks to protect are germane to its purpose; and that the individual participation of DAI's constituents is not required. NYCQAL, on the other hand, challenges DAI's standing under the third element of *Hunt*, arguing that DAI's claims require individual participation. However, it is well settled that the third prong in *Hunt* is prudential and can be abrogated by Congress, as it has been here via PAIMI. *See, e.g.*, *United Food*, 517 U.S. at 557 (holding that the third prong is prudential and can be abrogated by Congress); *Mink*, 322 F.3d at 1112-13 (same); *see also Fulton* v. *Goord*, 591 F.3d 37, 42 (2d Cir. 2009) ("Because of the breadth of [the ADA's] provisions, we have held that . . . actions [under this statute] are not subject to any of the prudential limitations on standing that apply in other contexts.").

Moreover, the case on which NYCQAL relies, *Bano* v. *Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004), does not support its position. NYCQAL Br. 40, 40-44. In *Bano*, this Court found that the plaintiffs lacked associational standing because the organization sought monetary damages. 361 F.3d at 714-15; *see also, e.g.*, *Bldg. & Constr. Trades Council of Buffalo, N.Y.* v. *Downtown Dev., Inc.*, 448 F.3d 138, 150 (2d Cir. 2006) (finding standing because damages not sought). DAI does not seek any damages in this case.

In its brief, the State urges this Court to read into *Hunt* an overly strict standard for determining when a non-membership organization has standing: "Under *Hunt*, a nonmembership organization has associational standing only if its constituents enjoy . . . representation and control." State Br. at 75-77. But such an interpretation is inconsistent with *Hunt* itself, which specifically rejected a theory of representative standing that would "exalt form over substance." 432 U.S. at 345.

As the Ninth and Eleventh Circuits have held, P&A organizations have all the indicia of membership necessary under *Hunt*. *See Mink*, 322 F.3d at 1110; *Stincer*, 175 F.3d at 886. This Court, too, has recognized the standing of a non-membership organization statutorily designated to represent individuals with mental illness (like DAI) because it "'serves a specialized segment of the . . . community which is the primary beneficiary of its activities, including the prosecution of this kind of litigation.'" *Bernstein* v. *Pataki*, 233 F. App'x 21, 24 (2d Cir. 2007) (summary order) (quoting *Hunt*, 432 U.S. at 344).[54] In fact, this Court has *never* applied such a rigid, formalistic test as proffered by the State to determine associational standing. *See, e.g., Reg'l Econ. Cmty. Action Program, Inc.* v. *Middletown*, 294 F.3d 35, 46 n.2 (2d Cir. 2002) (holding that organization had associational standing where it "serve[d]

[54] The State attempts to distinguish *Bernstein* by noting that it was a putative class action. However, the fact that there was a putative class was not a factor the Court considered in reviewing the organization's associational standing under *Hunt*. *Bernstein*, 233 F. App'x at 24-25.

a class of individuals with discrimination claims"); *see also Brock*, 477 U.S. at 289 (recognizing the benefits to the judicial system and to those on whose behalf the organization sues).

In PAIMI, Congress ensured that state P&A systems are representative of their constituents and possess all of the "indicia of membership" required by *Hunt*. Among other things, PAIMI requires that P&A systems:

- Establish an advisory council, 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)(C);
- Ensure that the advisory counsel includes attorneys, mental health professionals, and individuals from the public who are knowledgeable about mental illness, and that at least 60% of its membership is composed of individuals who have received or are receiving mental health services or who are family members of such individuals, 42 U.S.C. § 10805(a)(6)(B); and
- Establish a grievance procedure for clients or prospective clients to "assure that individuals with mental illness have full access to the services of the system," 42 U.S.C. § 10805(a)(9).

Thus, every federal district court in this Circuit that has addressed the question has held that P&A organizations have all the "indicia of membership" necessary to support associational standing under *Hunt*. *See, e.g.*, *State of Conn. Office of Prot. & Advocacy for Pers. with Disabilities*, 706 F. Supp. 2d at 283-84; *Laflamme*, 605 F. Supp. 2d at 396-97; *Aiken*, 236 F. Supp. 2d at 224.

The Ninth and Eleventh Circuits have cogently explained why P&A organizations have associational standing. In *Mink*, the Ninth Circuit conducted a

thorough review of *Hunt* and the Supreme Court's jurisprudence on Article III standing, and held that P&A groups have standing to sue on behalf of their constituents because "'[i]n a very real sense' . . . [the P&A organization] represents those who suffer from mental illness . . . and 'provides the means by which they express their collective views and protect their collective interests.'" 322 F.3d at 1112 (quoting *Hunt*, 432 U.S. at 345). While the constituents of the P&A organization were not "members" and did not have all the same indicia of membership that the apple growers and dealers possessed in *Hunt*, the Ninth Circuit nevertheless found:

> [The P&A organization's] constituents do possess many indicia of membership—enough to satisfy the purposes that undergird the concept of associational standing: that the organization is sufficiently identified with and subject to the influence of those it seeks to represent as to have a personal stake in the outcome of the controversy.

Id. at 1111 (internal quotation marks omitted). The Ninth Circuit rejected the precise argument the State makes here: "We think [the state's] membership argument is overly formalistic. Given [the P&A group's] statutory mission and focus under PAIMI, its constituents . . . are the functional equivalent of members for purposes of associational standing." *Id.* at 1110.

The Eleventh Circuit reached the same conclusion in *Stincer*, holding that "under [PAIMI], individuals with mental illness possess the indicia of membership in an organization." 175 F.3d at 886 (internal quotation marks omitted). The Eleventh Circuit carefully analyzed the Supreme Court's decision in *Hunt* and the PAIMI

statute. *Id.* (citing 42 U.S.C. § 10805). Noting that Congress had explicitly designated P&As to serve a "specialized segment of the community" and to "perform[] the functions of a traditional . . . association," the court found that "[m]uch like members of a traditional association, [the P&A group's] constituents . . . possess the means to influence the priorities and activities the [P&A group] undertakes." *Id.*

The State urges this Court to reject the reasoned decisions of the Ninth and Eleventh Circuits and the legion of lower courts that have held that P&A organizations have standing, and instead follow the Fifth and Eighth Circuits. State Br. at 76-77; *see also Mo. Prot. & Advocacy Servs.* v. *Carnahan*, 499 F.3d 803, 810 (8th Cir. 2007); *Ass'n of Retarded Citizens of Dallas* v. *Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trs.*, 19 F.3d 241, 244 (5th Cir. 1994). These cursory decisions are inconsistent with *Hunt* and should not be followed by this Court.

Without performing any analysis of the PAIMI statute (or even citing to it), the Eighth Circuit in *Carnahan* adopted a formalistic approach to non-membership standing and held that because the plaintiff P&A did not have the same relationship with its constituents that the commission had with the apple growers in *Hunt*, it lacked standing. *Carnahan*, 499 F.3d at 810. Although the decision came *after* both *Stincer* and *Mink*, the Eighth Circuit did not address—or even refer to—those decisions. *Id.* The court relied instead on the Fifth Circuit's two-sentence holding in *Dallas County*, which did not contain any serious analysis and is distinguishable on the facts. *Id.*

In *Dallas County*, the Fifth Circuit held in two sentences that P&A "organization[s] bear[] no relationship to traditional membership groups because most of [their] 'clients'—handicapped and disabled people—are unable to participate and guide the organization[s'] efforts."[55] 19 F.3d at 244. In dismissing entirely the possibility that the advocacy group could ever have associational standing under *Hunt*, the court did not perform any analysis of the P&A's authorizing statute, nor did it cite to any legal authority for its holding. This decision is not only unpersuasive, but it is also inapposite here. The P&A at issue in *Dallas County* was not asserting standing under PAIMI. *Advocacy Ctr. for Elderly & Disabled* v. *La. Dep't of Health & Hosps.*, No. 10-1088, 2010 WL 3170072, at *7 (E.D. La. Aug. 9, 2010). As one district court within the Fifth Circuit recently noted, "a PAIMI organization . . . is statutorily obligated to have its constituents 'participate in and guide the organization's efforts'" and is thus "sufficiently analogous" to the commission in *Hunt* to have standing.[56] *Id.*

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[55] To the extent the court's analysis relied on the notion that people with disabilities are *incapable* of functioning like members in P&A organizations, *Dallas Cnty.*, 19 F.3d at 244, such a view is based on unfounded stereotypes about people with disabilities that Congress rejected when it enacted the ADA.

[56] Regardless, the United States indisputably has standing to enforce the ADA and continue this lawsuit. Whether an intervenor may continue the suit in the absence of the original party is a discretionary question for the court, which considers whether requiring the intervenor to begin a second, separate action would "result only in unnecessary delay." *Miller & Miller Auctioneers, Inc.* v. *G.W. Murphy Indus., Inc.*, 472 F.2d 893, 896 (10th Cir. 1973). There can be no doubt that requiring the United States to bring a second suit, following seven years of litigation, three years of discovery and a five-week trial, would unnecessarily delay

V.

DENYING NYCQAL'S INTERVENTION SIX YEARS INTO THE LITIGATION WAS NOT AN ABUSE OF DISCRETION

Having monitored this lengthy and very public litigation for more than six years, NYCQAL filed an untimely motion to intervene in order to thwart the remedy to which thousands of Adult Home residents are entitled. The district court properly denied intervention, finding that NYCQAL's motion was both untimely and a transparent effort to re-open issues that were conclusively established at trial, and that permitting intervention "would unnecessarily delay a remedial plan that is long overdue." *United States* v. *City of N.Y.*, 198 F.3d 360, 364 (2d Cir. 1999) (denial of intervention is reviewed for abuse of discretion).

A. The District Court Properly Denied Intervention as of Right

The district court properly found that NYCQAL had not satisfied the stringent requirements of Rule 24(a)(2) that a proposed intervenor: "(1) file timely, (2) demonstrate an interest in the action, (3) show an impairment of that interest arising from an unfavorable disposition, and (4) have an interest not otherwise adequately protected." *Farmland Dairies* v. *Comm'r of N.Y. State Dep't of Agric. & Mkts.*, 847 F.2d 1038, 1043 (2d Cir. 1988) (internal quotation marks omitted). Although denial of intervention is proper where a party does not meet any one of these

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a remedy to which DAI's constituents are entitled. This would result in not only a grievous harm to DAI's constituents, but also a needless waste of judicial and other government resources.

factors, it was especially appropriate here, where NYCQAL failed to meet all four. *Id.* ("Failure to satisfy *any one* of these requirements is a sufficient ground to deny the application." (emphasis added)).

1. NYCQAL's Motion to Intervene Was Untimely in the Extreme

"The determination of the timeliness of an application to intervene is committed to the sound discretion of the trial court." *Id*. at 1043-44. In reviewing the timeliness of a motion to intervene, this Court has instructed lower courts to consider, *inter alia*: "(1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *United States* v. *Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994). "[P]ost-judgment intervention is generally disfavored because it fosters delay and prejudice to existing parties." *Farmland Dairies*, 847 F.2d at 1044. Having considered each of these factors, the district court correctly concluded that NYCQAL's motion was untimely.

First, as the district court found, NYCQAL had been "fully aware of this litigation and the possible consequences to [its] interests . . . yet . . . made the conscious decision not to seek intervention until *after* the court found liability." SPA216 (emphasis added). NYCQAL does not—because it cannot—dispute that it had notice of its purported interests in this litigation for more than six years before it

made any attempt to intervene. Such an argument would be "disingenuous at best," SPA211, since DAI's complaint clearly set forth the nature and scope of the remedy it sought; the summary judgment order specifically addressed issues such as discharge planning and the cost effects of DAI's requested relief; and the Adult Homes were intimately involved at all stages of the litigation. The Adult Homes negotiated the parties' and their experts' visits to the Adult Homes, were present at such visits, attended depositions of Adult Home staff, responded to subpoenas for documents, and sat in the courtroom and monitored much of the trial. SPA207. Accordingly, the court did not abuse its discretion in holding that NYCQAL's motion was untimely. *See Catanzano*, 103 F.3d at 233 (explaining that notice of interests is measured from the point at which an issue giving rise to a proposed intervenor's interest is "present" in the case); *Mich. Ass'n for Retarded Citizens* v. *Smith*, 657 F.2d 102, 104-05 (6th Cir. 1981) (affirming denial of intervention of employees of institution subject to a consent decree where they should have been aware at the outset that their employment could have been affected by the litigation).

NYCQAL claims that its interests suddenly were not adequately represented by the State after trial, thus excusing its untimely attempt to intervene. The district court soundly rejected this argument, because the State *never* represented NYCQAL's interests. SPA212; *see also Pitney Bowes*, 25 F.3d at 70-71. NYCQAL simply ignores this Court's decision in *Farmland Dairies*, on which the district court

relied. In *Farmland*, this Court rejected the precise argument NYCQAL makes here, holding that private parties "should certainly have been aware . . . that the interests represented by the Attorney General are not coterminous with their own," because the Attorney General has a statutory obligation to protect the interests of the state. 847 F.2d at 1044. So too here, the State's interests and NYCQAL's interests diverged from the outset.[57] The State's interest in the liability phase centered on the operation of the state mental health services system, not on protecting Adult Homes' business.

Second, NYCQAL's late intervention would have significantly prejudiced the parties—particularly DAI's constituents—by unduly delaying the remedial proceedings. Not only did NYCQAL seek to inject collateral issues into the remedial stage (such as its members' operating certificates), but NYCQAL's intervention motion expressly disagreed with several of the district court findings, indicating it sought to relitigate issues the parties had spent six years analyzing and arguing. SPA213-14; *United States* v. *Yonkers Bd. of Educ.*, 801 F.2d 593, 596 (2d Cir. 1986) (upholding denial of intervention where proposed intervenors sought to relitigate issues already thoroughly reviewed through more than six years of

[57] NYCQAL mistakenly relies on *Brody* v. *Spang*, 957 F.2d 1108 (3d Cir. 1992). In *Brody*, the remedial stage of the litigation implicated interests that were "in no way" implicated in the merits phase. *Id.* at 1116-17. In contrast, all of the interests NYCQAL claimed to have in the remedial phase—essentially, interference with its members' businesses and loss of their operating certificates—were present throughout the course of the merits phase. NYCQAL Br. at 20-22.

litigation). As the district court explained, "[f]ull consideration of the adult homes' newly presented claims might well require conducting evidentiary hearings or even reopening discovery." SPA213.[58]

Third, NYCQAL suffered no prejudice from the denial of intervention, because the district court permitted it to contribute a remedial plan as *amicus curiae*, and expressly considered its proposed remedial plan. JA39, at DE389; *see also Pitney Bowes*, 25 F.3d at 73 ("[I]t is hard to fathom how [proposed intervenor] would suffer undue prejudice" when it "had an opportunity to express its concerns about the fairness of the consent decree during the public comment period, and availed itself of that opportunity by submitting written comments to the district court."). Moreover, as set forth below, NYCQAL does not have any interest in this litigation. And, as the district court pointed out, any prejudice to NYCQAL "may be attributed to [its] own failure to seek intervention when [it] first had reason to become aware" of its interests. SPA214 (quoting *Yonkers*, 801 F.2d at 595).

Fourth, there were no "unusual circumstances" militating in favor of a finding of timeliness.[59] *See Pitney Bowes*, 25 F.3d at 73.

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[58] Tellingly, NYCQAL's arguments on appeal are not limited to the scope of the Remedial Order, confirming that its true intent in seeking to intervene was to relitigate factual issues resolved by the district court.

[59] NYCQAL erroneously contends that "[i]f it was timely for the United States to seek intervention after the liability phase, it was also timely for [NYCQAL] to do so." NYCQAL Br. at 26. The United States and NYCQAL are situated very

2. NYCQAL Could Not Show Any Inadequacy of Representation

To the extent that NYCQAL believes that the Adult Homes' and the State's interests were "coterminous" during the litigation, NYCQAL Br. at 15, 22-23, their interests did not suddenly diverge after the district court entered its findings of fact and conclusions of law. NYCQAL mistakenly relies on *Smoke* v. *Norton*, 252 F.3d 468 (D.C. Cir. 2001), but *Smoke* supports DAI's position. NYCQAL Br. at 23. There, the court held that an inadequacy of representation arose "only when [the existing party] equivocated about whether it would appeal the adverse ruling of the district court." 252 F.3d at 471. Here, by contrast, the State has appealed the district court's judgment, on almost identical grounds to those asserted by NYCQAL.

3. NYCQAL Has No Interest in This Litigation

Denial of intervention also was proper because NYCQAL has no cognizable interest in this civil rights lawsuit. As this Court has explained, in order to satisfy the requirement of demonstrating an interest in the litigation, "a proposed intervenor must establish a 'direct, substantial, and legally protectable' interest in the subject matter of the action." *City of N.Y.*, 198 F.3d at 365 (quoting *Wash. Elec. Coop. Inc.* v. *Mass. Mun. Elec. Co.*, 922 F.2d 92, 96 (2d Cir. 1990)). "An interest that

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differently. Rule 24(b)(2) expressly contemplates permissive intervention for a government agency charged with administering the relevant statute. Further, in contrast to NYCQAL, the United States specified that it would rely only on the record developed at trial. JA37, at DE357.

is remote from the subject matter of the proceeding" does not suffice. *Wash. Elec.*, 922 F.2d at 97.

NYCQAL does not have any direct, substantial, and legally protectable interests that are affected by this litigation. Though NYCQAL claims the Adult Homes *might* lose money as a consequence of the Remedial Order, the Homes have no rights to the discretionary funding they receive from the State. *See* N.Y. PUB. HEALTH LAW § 2801-f (2010) (providing that "the department may make a payment"); *Lakeside Manor Home for Adults, Inc.* v. *Novello*, 843 N.Y.S.2d 108, 109 (App. Div. 2007) ("[T]he [State] possess[es] extremely broad discretion in awarding [QuIP] funds."). The State can choose, subject to the ADA and RA, to direct its funds to support individuals with mental illness in any number of settings.[60] Moreover, the Remedial Order does not, as NYCQAL suggests, order the State to revoke Adult Home operating certificates or reallocate subsidies. Rather, if either happens, it would result from the State's existing discretion to do so under state law.[61] Nor does the

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[60] Furthermore, NYCQAL's members can continue to operate if they find other customers, including people with physical disabilities, who want their "care." There is also no merit to the Adult Homes' unsupported assertion that, if their census declines, they will be unable to afford to provide services to those who remain. The Adult Homes are not as fiscally precarious as they claim. SPA176-77; *see also* PX(1)-670-72. Indeed, the adult homes have a history of threatening closure in order to avoid reform. JA219:698; JA286:966; *see supra* note 40.

[61] State laws authorize DOH to "revoke, suspend, or terminate an operating certificate if an adult home fails to comply with State regulations, or if [the State] determines that such an action is in the public interest." SPA84.

Remedial Order require Adult Homes to provide any information to the residents; it simply requires the State to use its existing enforcement powers to ensure that if Adult Homes choose to provide information, they do so accurately. SPA239. Adult Homes are highly regulated by the State, and must already open their doors to various inspections, including access by community organizations, that far exceed the intrusiveness of the contemplated in-reach. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 18, §§ 485-87; *N.Y. Coal. for Quality Assisted Living, Inc.* v. *MFY Legal Services, Inc.*, 895 N.Y.S.2d 84 (App. Div. 2010) (holding NYCQAL's limitations on access conflict with state statutes and regulations); *cf. United States* v. *Puerto Rico*, 227 F.R.D. 28, 31 (D.P.R. 2005) (denying motion by institutions to intervene in suit alleging civil rights violations, noting the inconsistency between the institutions' claimed financial interests and its interest in protecting residents' rights).

In any event, all of NYCQAL's purported interests are collateral to this litigation and do not support intervention. *City of N.Y.*, 198 F.3d at 365. DAI's claims concern only whether the State, in the operation of its mental health system, violates federal law by discriminating against individuals with mental illness. *See, e.g.*, *Rios* v. *Enter. Ass'n Steamfitters Local Union #638 of U.A.*, 520 F.2d 352, 354 (2d Cir. 1975) (upholding the denial of intervention of white union members, because "[t]he 'property or transaction which is the subject of the action' has at all times been the Union's duty under Title VII not to discriminate against non-whites in the admission

of new members"); *Oneida Indian Nation of N.Y.* v. *Madison Cnty.*, 605 F.3d 149, 161-63 (2d Cir. 2010) (upholding denial of intervention in case concerning foreclosure on certain property in which proposed intervenor claimed a property interest, because the property interest was "remote at best").

NYCQAL mistakenly relies on *New York Public Interest Research Group* v. *Regents of University of State of New York*, 516 F.2d 350 (2d Cir. 1975) (per curiam), NYCQAL Br. at 20-21, to support its interests, but that case is inapposite. *Regents* upheld intervention because, unlike here, the regulation at issue *directly* regulated the proposed intervenors. 516 F.2d at 351-52; *see also Sierra Club* v. *U.S. Army Corps of Eng'rs*, 709 F.2d 175, 176-77 (2d Cir. 1983) (distinguishing *Regents*, and affirming denial of intervention because "[h]ere a conclusion that the [defendant] has violated the court's prior orders would have . . . at most an indirect effect"). DAI's claims are aimed at State practices and the Remedial Order directs only the State's conduct and is enforceable only against the State. Indeed, DAI could not have brought this civil rights litigation against the Adult Homes, because as private entities, they are not subject to Title II.[62]

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[62] The two other cases NYCQAL cites are likewise inapposite. NYCQAL Br. at 20-21. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), involved intervention in an antitrust suit based on "the public interest in a competitive system," *id.* at 135, and has been significantly limited to "its own peculiar facts." 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1908.1 (3d ed. 2010). *Rosa-Lino Beverage Distributors Inc.* v. *Coca-Cola Bottling Co. of N.Y., Inc.*, 749 F.2d 124, 125-26 (2d

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Accordingly, the district court properly denied intervention as of right.

B. **The District Court Correctly Denied Permissive Intervention**

For all the reasons set forth above, the district court did not abuse its discretion by denying permissive intervention. *United States* v. *Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 991 n.19 (2d Cir. 1984) ("[A] denial of permissive intervention has virtually never been reversed."); *U.S. Postal Serv.* v. *Brennan*, 579 F.2d 188, 191 (2d Cir. 1978) (the principal consideration of a Rule 24(b)(2) motion is whether the intervention will unduly delay or prejudice the rights of the existing parties).[63]

Cir. 1984) (per curiam), concerned a preliminary injunction and has nothing to do with Rule 24 intervention.

[63] Various *amici curiae* have raised issues in their briefs in support of the State's position that have not been raised by the State itself. *Amici*'s arguments not only lack merit, but, because they have not been raised by the State, they are not properly before this Court. *Universal City Studios* v. *Corley*, 273 F.3d 429, 445 (2d Cir. 2001); *see also Schiller* v. *Tower Semiconductor, Ltd.*, 449 F.3d 286, 294 (2d Cir. 2006) (refusing to address an issue raised for the first time in an *amicus* brief on appeal); *Concourse Rehab. & Nursing Ctr., Inc.* v. *DeBuono*, 179 F.3d 38, 47 (2d Cir. 1999) (same).

CONCLUSION

For the foregoing reasons, Disability Advocates, Inc. respectfully requests that the Court affirm the Judgment of the district court in its entirety.

Dated: October 6, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Plaintiff-Appellee Disability Advocates, Inc. certifies that the foregoing brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(i), as modified by this Court's Order of October 4, 2010. This brief contains 21,022 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certificate, I relied on the word count program in Microsoft Word.

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Certificate of Service

I hereby certify that on October 6, 2010, I caused to be served a copy of the foregoing brief through the CM/ECF system upon the following counsel of record:

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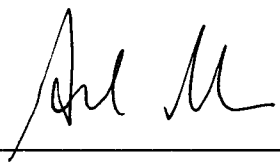

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