**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Richmond Division**

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| **UNITED STATES OF AMERICA,** | : | |
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| **Plaintiff,** | : | **CIVIL ACTION 3:12-CV-059** |
| | : | |
| **v.** | : | |
| | : | |
| **COMMONWEALTH OF VIRGINIA,** | : | |
| | : | |
| **Defendant.** | : | |

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**MEMORANDUM OF LAW**
**IN SUPPORT OF MOTION FOR INTERVENTION**
**BY PROPOSED INTERVENORS**

The dispute in this case relates to the five (5) training centers for the intellectually disabled in the Commonwealth of Virginia (also referred to as Intermediate Care Facilities for the Mentally Retarded "ICFs/MR"). The United States Department of Justice and the Commonwealth of Virginia have entered into a settlement agreement, the terms of which will adversely impact the civil rights of the Proposed Intervenors as guaranteed them by the Americans with Disabilities Act and other relevant law.

## I. Statement of Facts

The Proposed Intervenors are residents of the Commonwealth's five (5) training centers. On January 26, 2012, the United States Department of Justice ("DOJ") filed a civil action in the United States District Court for the Eastern District of Virginia, against the Commonwealth of Virginia ("Commonwealth"), alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134.[1] Simultaneously, the United States, with the concurrence of the

[1] Proposed Intervenors attached a proposed Motion to Dismiss challenging the ability of the United States to file an ADA lawsuit addressing statewide compliance with the ADA without addressing any conditions in any state-operated institution for the intellectually disabled.

Commonwealth of Virginia, filed a settlement agreement which the parties have submitted for approval by this Court. This settlement agreement, among other things, calls for the closure of four (4) of the five (5) training centers currently operated by the Commonwealth. Settlement Agreement at 11. The settlement agreement was executed by the Commonwealth and the United States without consideration of the individual needs and desires of the residents in the training centers. In fact, no resident, or parent or guardian of a resident, was ever consulted or provided with information as to the specific provisions of the agreement before it was executed. The central concern of the Proposed Intervenors is that the present parties have demonstrated that they are not protecting the interests of the residents of the training centers and, if the settlement agreement is approved by this Court, Proposed Intervenors will be forced to comply with the terms of the agreement, and will be unwillingly and inappropriately transferred or discharged from the centers. Proposed Intervenors will have their rights denied and their lives irrevocably harmed without having an opportunity to participate in defining the terms of the agreement and be unable to protect their interests in this litigation. Because of the serious harm that they will suffer if the settlement agreement is approved by this Court, the Proposed Intervenors seek to intervene in this matter.

## II. ARGUMENT

The proposed intervention relates to a larger debate taking place in courts specifically and in society generally across the country regarding the appropriate care of the intellectually disabled. The DOJ appears to be advancing an ideological agenda to eliminate all larger congregate settings, including ICFs/MR, and discharge some of the most medically-fragile and vulnerable individuals to settings that may not be appropriate or may even be dangerous. The Commonwealth of Virginia appears to advance an agenda of eliminating large ICF/MR services in an ill-conceived hope of

reducing costs of care for individuals with disabilities. Both of these agendas are being advanced at the risk of the Proposed Intervenors who reside at the training centers at issue. Proposed Intervenors believe that each individual is unique and that a continuum of residential care options should be available that includes both community-based care and ICF/MR homes. The Proposed Intervenors, as residents of ICF/MR facilities, wish to protect their rights guaranteed by the decision in Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999), which recognized that people with intellectual disabilities have the right to choose to live in the "most integrated setting" appropriate to their particular individual needs. "[A] key principle in the Olmstead decision [is] personal choice." Arc of Virginia, Inc. v. Kaine, 2009 U.S. Dist. LEXIS 117677 (E.D. Va. 2009). (Eastern District of Virginia Court ruling that the personal choice of the individuals being served is the controlling factor in determining whether any particular placement is inappropriate and correcting the United States for consistently failing to account for the choice of the individuals.)

The United States has entered into a settlement agreement with the Commonwealth of Virginia for which they seek Court approval. The settlement agreement calls for four (4) of the five (5) training centers in Virginia to cease operations by 2021. Settlement Agreement at 11, ¶9. (stating that "within one year of the effective date of this Agreement, a plan, developed in consultation with the Chairmen of Virginia's House of Delegates Appropriations and Senate Finance Committees, to cease residential operations at four of the five training centers by the end of State Fiscal Year 2021.") The DOJ has entered into this agreement with the Commonwealth and is now seeking the Court's approval without addressing how the 1,100 individuals residing at these training centers will be adversely impacted by the elimination of ICF/MR services and without considering the rights of these residents to approve services in any particular setting. This failure appears to be part of a strategic plan consistent with the politically correct, but factually incorrect,

belief that community-based care is the only appropriate option for the entire intellectually disabled population. Complaint ¶ 37. (stating that "all of the individuals in [Virginia's] training centers could be served in the community") (emphasis added).

The DOJ and the Commonwealth are asking that this Court incorrectly assume that non-ICF/MR community-based care is best for all individuals with disabilities and also to falsely assume that Olmstead requires community care. Complaint ¶ 9- 10. The law is clearly to the contrary. See Olmstead, 527 U.S. at 602 ("Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it.") The Supreme Court clearly ruled that "the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk." Id. at 604.

Justice Kennedy's concurring opinion in Olmstead recognized that ideological goals, such as those evidenced by the proposed settlement agreement, may have disastrous effects if applied in a Procrustean fashion to the entire intellectually disabled community:

> It would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act . . . to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision.

Olmstead, 527 U.S. at 610 (Kennedy, J., concurring in judgment). Apparently, the Plaintiff and Defendant will settle this case against the interests of the Proposed Intervenors, and essentially do what was feared by Justice Kennedy in his concurring opinion.

The parties seek to implement this settlement which calls only for community-based options and for the elimination of larger congregate care options. Accordingly, the Proposed Intervenors move to intervene in this matter in order to protect their own interests in choosing the most appropriate setting to meet their needs and to have the benefit of the recommendations of

treating professionals regarding the most appropriate setting to receive services. Should the parties obtain Court approval of this settlement agreement, the Proposed Intervenors will lose rights without having had an opportunity to be party to negotiations to define the terms of an agreement that will have a severe impact on their lives. Perhaps, more fundamentally, given the fragile condition of some of the residents involved, they could be forced to move into settings that do not provide adequate care and may result in serious harm, including death. It is not an exaggeration that this intervention may be a matter of life and death for some of the Proposed Intervenors.

As discussed below, the Proposed Intervenors qualify for intervention as of right. Alternatively, as further discussed in detail below, this Court should grant permission to intervene because the Proposed Intervenors have filed a timely motion and they share a common interest in law and in fact.

**A. Proposed Intervenors Are Entitled To Intervene As A Matter of Right**

Under Rule 24 of the Federal Rules of Civil Procedure, intervention as a matter of right is appropriate where: (1) the motion is timely; (2) the intervenor claims an interest relating to the property or transaction that is the subject of the action; (3) the intervenor is so situated that disposing of the action may, as a practical matter, impair or impede his ability to protect the interest; and (4) existing parties do not adequately represent the interest. Gould v. Alleco, Inc., 883 F.2d 281, 286 (4th Cir. 1989); Fleming v. Citizens for Albemarle, Inc., 577 F.2d 236 (4th Cir. Va. 1978); JLS, Inc. v. Pub. Serv. Comm'n of W. Virginia, 321 F. App'x 286, 289 (4th Cir. 2009). Because the Proposed Intervenors satisfy each element, this Court should grant their Motion to Intervene as a matter of right.

1. This Motion to Intervene is Timely

Because the Proposed Intervenors have filed their Motion to Intervene before this action has progressed beyond the initial pleading stage, and even before the Commonwealth has filed a responsive pleading, this Court should hold that the Motion to Intervene is timely filed.

Generally, in determining whether a motion to intervene is timely, courts consider: (1) how far the suit has progressed; (2) the prejudice that delay might cause other parties; and (3) the reason for the tardiness, if any, in moving to intervene. Scardelletti v. Debarr, 265 F.3d 195, 203 (4th Cir. 2001); Wright v. Krispy Kreme Doughnuts Inc., 231 F.R.D. 475, 478 (M.D.N.C. 2005). Ultimately, the purpose of the timeliness requirement "is to prevent a tardy intervenor from derailing a lawsuit within sight of the [case's] terminal." Id. (quoting United States v. South Bend Cmty. Sch. Corp., 710 F.2d 394, 396 (7th Cir. 1983)). The initial Complaint in this matter was just filed on January 26, 2012. This case is not past its initial pleading stage. Where a case has not progressed beyond the initial pleading stage, the motion to intervene is timely. Scardelletti at 203; see also, GMAC Mortg., LLC v. Flick Mortg. Investors Inc., 3:09-CV-125-RJC-DSC, 2011 WL 841409 (W.D.N.C. 2011). This is not an intervention that would "derail [] a lawsuit within sight of the terminal." Wright, 231 F.R.D. at 478. Thus, the Proposed Intervenors' Motion is timely.

2. The Proposed Intervenors Have a Substantial Interest in the Subject of this Action

Because the Proposed Intervenors have a substantial, concrete and protectable interest in their own care and in protecting their rights under the ADA as interpreted by Olmstead v. L.C., 527 U.S. 581(1999), which is the central issue of this litigation, the Court should hold that they have satisfied the second element necessary to obtain intervention as a matter of right.

With regard to the "interest" requirement for intervention, district courts in the Fourth Circuit have established that "in cases challenging various statutory schemes as unconstitutional

or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention." Cooper Techs., Co. v. Dudas, 247 F.R.D. 510, 514 (E.D. Va. 2007) (citing 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane; Federal Practice & Procedure: Civil § 1908) (2d ed. 1986). Although Federal Rule of Civil Procedure 24(a) does not articulate the nature of the interest in an action which is sufficient to permit intervention as of right, the Supreme Court of the United States has held that "[w]hat is obviously meant . . . is a significantly protectable interest." Donaldson v. United States, 400 U.S. 517(1971). "To be protectable, the putative intervenor's claim must bear a close relationship to the dispute between the existing litigants and therefore must be direct, rather than remote or contingent." Dairy Maid Dairy, Inc. v. United States, 147 F.R.D. 109 (E.D. Va. 1993).

The Proposed Intervenors currently reside in the training centers identified in the DOJ complaint and proposed settlement agreement, and they could have no closer relationship to the subject matter of this case. They are all residents of facilities who do not wish to be forced into community-based homes. Residents of the five (5) training centers have substantial and concrete interests in this litigation, which include interests in choosing where they receive services, exercising their right to oppose transfer or discharge, being provided information to make informed decisions, preserving a continuum of care, and being evaluated for the most integrated setting appropriate to meet their needs. In this case, the DOJ and the Commonwealth are attempting to redefine and reduce the care options available to the Proposed Intervenors in furtherance of the mistaken belief that all ICF/MR residents should and "could be served in the community." Complaint ¶37. The DOJ unfairly disparages institutional care as "unnecessary" and incorrectly suggests that those who reside in training centers are unnecessarily institutionalized. Complaint ¶39 (stating that "individuals are unnecessarily institutionalized due

to lack of adequate community-based supports and services"). Also, the DOJ and the Commonwealth inaccurately propose that serving individuals in community-based placements is necessarily more cost effective. Complaint ¶33 (stating that "[e]ven individuals with the most complex needs can be served appropriately in the community for significantly less than the cost of serving them in a training center…"). Although cost alone is not a sufficient basis to deny the Proposed Intervenors the services they require in ICFs/MR, the evidence will demonstrate that the highest care individuals who now remain in ICFs/MR are likely to cost a comparable amount to serve in community-based settings and that many services provided by ICFs/MR are not even readily available in community-based settings. The original parties have not adequately addressed these issues. The Court should not assume that any current resident of the subject training centers could receive the same type of services in any alternative setting for a lower cost.[2]

*a. Proposed Intervenors Have A Substantial Interest In Protecting Rights Afforded Them By The ADA, Olmstead And Virginia Law*

The Proposed Intervenors have a legally protectable interest in their own care, as well as an interest in retaining a meaningful right to choose continued residence at an ICF/MR setting. The Proposed Intervenors also have an interest in opposing the claims that ICFs/MR do not provide "the most integrated setting appropriate to their needs" and place residents "at risk of unnecessary institutionalization." Complaint ¶ 42. Olmstead acknowledged the existence of this specific interest possessed by the Proposed Intervenors in the right to choose whether community care or ICF/MR care is appropriate. Olmstead at 602. ("Nor is there any federal requirement that

[2] The anticipated savings resulting from an ICF/MR closure are highly questionable. In contrast to the all-inclusive ICF/MR cost figures, costs associated with community-based care routinely exclude significant items such as room and board, health care, transportation and day programs and employees are less trained and receive lower wages than ICF/MR employees. See Walsh, Kastner and Green, Cost Comparisons of Community and Institutional Residential Settings: Historical Review of Selected Research, Mental Retardation, Volume 41, Number 2, pp. 103-122 (April 2003; unpublished update, 2009). (A193)

community-based treatment be imposed on patients who do not desire it.") The Complaint and settlement agreement filed by the DOJ and the Commonwealth threatens the right of the Proposed Intervenors to choose to continue to receive ICF/MR care rather than community-based services. The fact that the Commonwealth has already concurred with the DOJ and executed the settlement agreement to close their ICF/MR homes, without Proposed Intervenors having any opportunity to negotiate the terms of the agreement, shows that this action will have concrete adverse consequences which will drastically affect the residents of these training centers.

In their Complaint, the Department of Justice has falsely represented the holding in Olmstead. For instance, the Department of Justice alleges:

> Under Olmstead, public entities are required to provide community-based services when (a) such services are appropriate, (b) the affected persons do not oppose community-based treatment, and (c) community-based services can be reasonably accommodated, taking into account the resources available to the entity and the needs of other persons with disabilities. Id. at 607.

Complaint at ¶ 10. This rendition of the holding in Olmstead, which the Commonwealth has impliedly endorsed, misstates the Supreme Court's first prerequisite to community placement, that "the State's treatment professionals have determined that community placement is appropriate." The DOJ's application of the other two prongs of the three-part test in this case also misrepresents Olmstead. In Olmstead, an action was filed on behalf of two women with mental retardation and co-morbid psychiatric disorders, known by their initials, L.C. and E.W. After being admitted voluntarily to the Georgia Regional Hospital in Atlanta in May 1992, L.C.'s schizophrenia was treated and stabilized. By May 1993, L.C. expressed a desire to leave the Georgia Regional Hospital and her treating professionals at the facility agreed that she could have her needs met in a state-supported community treatment program. However, L.C. remained in the Georgia Regional Hospital for nearly three more years. Plaintiff E.W. was voluntarily hospitalized at the Georgia Regional Hospital in February 1995 with a diagnosis of personality disorder. By 1996, E.W.

expressed a desire to leave the facility and her therapist concluded that she could be treated in a community-based treatment program. Both women argued that the state's failure to discharge them to a community-based treatment program violated Title II of the ADA.

Finding that L.C.'s and E.W.'s continued treatment against their wishes at the Georgia Regional Hospital violated the ADA, Olmstead developed a three-prong test to determine when the ADA "require[s] placement of persons with mental disabilities in community settings rather than in institutions." Id. at 587. The Court instructed that community placement is required when "the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." Id.

In interpreting the ADA and the Department of Justice's regulations issued under it, Olmstead emphasized that there is no "federal requirement that community-based treatment be imposed on patients who do not desire it." Id. at 602. The Department of Justice's allegations in the instant matter are diametrically opposed to this proposition. Olmstead further stressed that "nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings." Id. at 601-02. However, the DOJ and the Commonwealth fail to recognize that there are individuals in the training centers who cannot handle or cannot benefit from community settings. "[T]he ADA is not reasonably read to impel States to phase out institutions, placing patients, in need of close care, at risk." Id. at 605. Yet, the proposed settlement dictates closure of nearly all the Commonwealth's larger ICFs/MR without any consideration of the risk to those residents being transferred or discharged.[3] In fact,

[3] The Commonwealth's plan with regard to Southeastern Virginia Training Center is to reconstitute the facility to accommodate 75 residents at a time for short term, 30 day placements. Current residents will be displaced, which

Olmstead recognized that "for [some] individuals, no placement outside the institution may ever be appropriate." Id. (citing and quoting Brief for American Psychiatric Association et al. as *Amici Curiae* at 22-23 ("Some individuals, whether mentally retarded or mentally ill, are not prepared at particular times—perhaps in the short run, perhaps in the long run—for the risks and exposure of the less protective environment of community settings"); Brief for Voice of the Retarded et al. as *Amici Curiae* 11 ("Each disabled person is entitled to treatment in the most integrated setting possible for that person—recognizing that, on a case-by-case basis, that setting may be in an institution"); Youngberg v. Romeo, 457 U.S. 307, 327 (1982) (Blackmun, J., concurring) ("For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know"). The proposed settlement demonstrates deliberate indifference to the needs of residents of ICFs/MR who cannot be appropriately placed in a community-based setting without significant harm and maybe even death.

The settlement agreement ignores residents' right to have treating professionals render judgments as to where these individuals should receive services most appropriate to their needs. Indeed, each resident is evaluated annually to determine treatment needs and whether the training center remains the most appropriate home. These annual evaluations by the residents' treating professionals have been ignored by this settlement agreement. The Complaint does not allege that treating professionals have failed to render such judgments, that any treating professionals disagree in their recommendations about where residents should receive services, or that treating professionals fail to communicate those judgments to residents and guardians, but rather, the Settlement Agreement and the Complaint are both silent on the right of residents to receive and to

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implicates their rights in the very same way as the rights of the residents of the training centers which will be closing due to the settlement.

rely upon professional judgments as to the settings appropriate to meet their needs. The silence on the part of the DOJ and the Commonwealth demonstrates that the Proposed Intervenors must represent their own interests in this matter. In fact, Intervenors have a federally protected right to receive recommendations from treating professionals as to whether community placement is appropriate and to oppose that transfer, even if the proposed transfer is from institutional care to an appropriate community setting. In fact, the Virginia Code incorporates this federal right: "Pursuant to regulations of the Centers for Medicare & Medicaid Services and the Department of Medical Assistance Services, no consumer at a training center who is enrolled in Medicaid shall be discharged if the consumer or his legally authorized representative on his behalf chooses to continue receiving services in a training center." Va. Code. Ann. § 37.2- 837(A)(3).

Court decisions preceding Olmstead consistently recognized the rights of individuals to receive ICF/MR care. In Conner v. Branstad, a district court soundly reasoned that "if Congress had actually intended to require states to provide community-based programs for mentally disabled individuals currently residing in institutional settings, it surely would have found a less oblique way of doing so." Conner v. Branstad, 839 F. Supp. 1346, 1357 (S.D. Iowa 1993); see also U.S. v. Oregon, 782 F. Supp. 502, 514 (D. Or. 1991) ("[P]remature or inappropriate community placements would result in a much higher risk of potential harm than residents are exposed to at [the facility].").

Since Olmstead, courts around the country have made clear that the Olmstead decision cannot be twisted to require deinstitutionalization or the closure of residential facilities such as those within the Commonwealth. In the case of Ligas v. Maram, 2010 U.S. Dist. LEXIS 34122 (N.D. Ill., 2010), an Illinois district court recently relied on Olmstead to grant proposed intervenors the right to intervene in litigation that was similar to the instant matter. The plaintiffs

in that case were Illinois residents with mental retardation and other developmental disabilities who sought to enforce their rights as set forth in Olmstead, while the Intervenors were residents of ICF/MR facilities in Illinois who objected to the terms of the proposed consent decree presented by the plaintiffs. The district court noted that the Justices in Olmstead were very much aware of competing claims on limited State resources, stating:

> Justice Ginsburg's plurality opinion notes the States' obligation "[t]o maintain a range of facilities and to administer services with an even hand." Id. at 605. Similarly, Justice Kennedy's concurring opinion recognizes the "continuing challenge" that States face "to provide . . . care in an effective and humane way," and it is in this context that he stresses the "central importance" of deferring to decisions made by State policymakers. Id. at 608-10. Accordingly, the Olmstead Court directed the lower courts to "tak[e] into account the resources available to the State and the needs of others with mental disabilities" if the fundamental-alteration defense is raised. Olmstead, 527 U.S. at 607. Because the State Defendants apparently do not believe it is proper, necessary, or advisable to raise the fundamental-alteration defense at this point in the litigation, this court simply has no basis to address the third prong of the Olmstead equation. Yet, a settlement that does not consider the needs of the Proposed Intervenors—or a settlement promising relief to the Named Plaintiffs that the State admittedly cannot deliver—would run contrary to the rationale set forth in Olmstead. Accordingly, the court finds that the Proposed Intervenors have a right under Olmstead to have their needs considered before the Amended Proposed Consent Decree is approved. The interest the Proposed Intervenors have in this litigation is direct, significant, and legally protectable.

Ligas at 13-14.

"Olmstead's requirement that the court consider the needs of other individuals with mental disabilities must be read in its full intended context." Id. at 11. Ligas found that the proposed intervenors had a right under Olmstead to have their needs considered before the amended proposed consent decree between the plaintiffs and the State of Illinois was approved stating that "the interest the Proposed Intervenors have in this litigation is 'direct, significant, and legally protectable.'" Id. at 14, citing Solid Waste Agency of N. Cook County v. U.S. Army Corp. of Eng'rs, 101 F.3d 503, 506 (7th Cir. 1996). The Ligas Court noted that the Supreme Court in Olmstead "recognized that the needs of individuals with mental disabilities are often in conflict."

Ligas at 16, (citing Olmstead, 527 U.S. at 597). The Court went on to state that "the pending litigation threatens to impair the Proposed Intervenors' interest in having their needs considered before the Amended Proposed Consent Decree is approved." Id. The Ligas Court granted the intervention of residents who were similarly situated to the Proposed Intervenors in the case at hand.

Here, the settlement does not include any specific mention of the Proposed Intervenors' need for state-operated ICF/MR services. Moreover, the settlement agreement is slated to remain in effect for nine (9) years. [Dkt. #2-2, Settlement Agreement at 11]. If the needs of the Proposed Intervenors are not considered before the settlement is approved, the Proposed Intervenors' future ability to have their needs considered in balance with the State's obligations to the DOJ would "as a practical matter" be significantly impaired. Fed. R. Civ. P. 24(a)(2).

The issue of intervention in this type of litigation was taken up by the Ninth Circuit in U.S. v. Oregon, et al. 839 F.2d 635 (1988). In that matter, the DOJ sued the State of Oregon, alleging "failure to provide minimally adequate training, medical care, sanitation and trained staff[]" in its operation of the Fairview Training Center. Id. at 636. The residents of the Fairview Training Center moved to intervene in that action, alleging that their interests were not adequately represented by the DOJ or the State. Although the district court denied the residents motion to intervene, the Ninth Circuit reversed the lower court's decision and remanded. The Ninth Circuit concluded that, although the DOJ had only filed a complaint, "it [was] apparent that the government's arguments [would] not include the constitutional deficiencies raised by the applicants." Id. at 638. There was no proposed settlement agreement in the Oregon case, as there is in this matter. The settlement agreement reached by the DOJ and Commonwealth in this case make the Proposed Intervenors interest even more apparent. In admonishing the district court, the

Ninth Circuit noted that "[c]learly the district court's consideration of the United States' claims in isolation from the concerns of the applicants could have a powerful and immediate effect upon the practical ability of the applicants to affect in later litigation the distribution of resources available for mental health in the State of Oregon." Id. at 639.

It is clear that courts have upheld the right of institutionalized individuals to intervene in actions of this nature, finding that the residents of state-operated facilities have a substantial interest in their own care as well as in protecting their individual civil rights.

*b. The Proposed Intervenors Have A Substantial Interest In Protecting Themselves From Imminent Harm*

The Proposed Intervenors also have an interest in this litigation because of the risk of harm that is imposed by inappropriate transfer or discharge. National mortality studies show that Proposed Intervenors are at real risk if placed in community-based settings that the DOJ and Commonwealth seek to force them into, without regard for the rights or needs of Proposed Intervenors. Evidence shows that the medical care required for profoundly disabled individuals is often deficient in community settings. Perhaps the most thorough and recent study relating to the risks of abuse and neglect of people with intellectual disabilities upon their transfer from ICFs/MR to community placement was performed by Robert Shavelle, David Strauss, and Steven Day. See Deinstitutionalization in California: Mortality of Persons with Developmental Disabilities after Transfer into Community Care, 1997-1999, JOURNAL OF DATA SCIENCE 3 (2005). Using information that the authors gathered on 1,878 children and adults who were moved from the ICF/MR setting to community placement between April 1, 1993 and December 31, 1999, they analyzed the increased mortality rate between those that moved into community placement as compared to those that stayed in ICF/MR settings. The reason the authors studied mortality rates

was because it was a simple, unambiguous measure of the quality of health care that awaited these individuals upon deinstitutionalization. In performing their study, the authors compared the California Development Evaluation Report data base (1997-1999) with information from the California Department of Health Services (1999). They also took into consideration factors such as age, sex, feeding and mobility skills to predict the probability of death for each of the individuals involved. Based on the data they collected and analyzed, the authors found a 47% increase in mortality in community placement settings over that expected in ICFs/MR. The authors reasoned that the higher mortality rates for community placement individuals were due to lack of continuity of care, the absence of centralized record keeping, the reduction in intensive supervision, and limited access to immediate medical care. Although the article does not focus on the political issues often involved in the decisions to deinstitutionalize, it did touch on them, citing two primary factors: (1) the cost of savings of deinstitutionalization, as well as (2) the "social value" of integration. The authors noted that these issues needed to be weighed against the increased risk of mortality that was readily apparent from the years of studies they conducted.

In an article written by Shavelle and Strauss in 1998, the authors further point out there is no reason to believe that the problems of increased mortality are confined to California. See Strauss, David and Shavelle, Robert, Policy Implications of Mortality Research: Authors' Perspectives, What Can We Learn From the California Mortality Studies?, MENTAL RETARDATION, p. 407 (October 1998). They cite to a 1993 Congressional Report that documented shortcomings in four other states: Connecticut, Massachusetts, Michigan, and New York, which, Congressional investigators indicated, were "typical examples of abuse, neglect and profiteering," A 1996 article by P.D. Hall was also cited that highlighted the evolution of problems with the provision of medical care in various communities. Id. (citing, U.S. House of Representatives,

1993, and Hall, P.D., There's No Place Like Home: Contracting Human Services in Connecticut, 1970-1995 (Working Paper No. 234), New Haven, Yale University Program on Non-Profit Organizations). Both the Congressional Report and Hall's report were based on data collected on individuals who were deinstitutionalized and harmed, and some even died, as a result of receiving ineffective care and medical services after being placed in community settings.

The media has also reported extensively on tragedies due to ill-prepared community settings. See Media Coverage Highlighting the Increasing Need for More Effective Federal and State Protections in the Ever-Expanding Community System of Care for People with Mental Retardation (November 2011) http://www.vor.net/images/AbuseandNeglect.pdf. Recently, The *New York Times* exposed alarming mortality rates in the states' community homes for people with intellectual disabilities. According to *The Times*, there were 1,200 preventable mortalities ("from unnatural and unknown causes") in state-run group homes over a period of 10 years. See, 1,200 Deaths and Few Answers, THE NEW YORK TIMES, (November 6, 2011) (A552). These deaths, averaging more than 100 a year, occurred during a period of significant deinstitutionalization in New York, and remarkably occurred without raising any apparent concern or investigation by the federal or state government, which are supposed to protect and advocate for these vulnerable citizens. That apparent apathy may exist in relation to the proposed settlement agreement in that residents of ICFs/MR may be discharged without regard for their rights or needs, no matter the outcome.

There can be no doubt that community-based placements are often ill-equipped to service the needs of the Proposed Intervenors, who include individuals with profound intellectual disabilities, many of whom cannot speak for themselves, survive on feeding tubes, are confined to a bed, and have the measured intelligence score of an infant or one-year-old. These individuals

require 24-hour care and immediate medical assistance that is often not available to them in community-based settings. For Proposed Intervenors, discharge from a training center to a community-based setting likely could result in abuse, neglect, injury, and even death.

The Proposed Intervenors have a right under Olmstead to have their needs considered as interested parties. Their interests are similar to those of the Intervenors in both Ligas and US v. Oregon, in that they have a direct, significant and legally protectable interest pursuant to the ADA and Olmstead. The Proposed Intervenors have an interest in the continued availability of ICF/MR care and in the impact of the Commonwealth's allocation of resources that it has agreed to in the settlement agreement. That interest lies in enforcing the mandate of Olmstead, which is that the needs and wants of Proposed Intervenors and other ICF/MR residents must be considered in determining the State's obligation to provide the community-based services required by the proposed settlement agreement. Finally, the Proposed Intervenors have a substantial and concrete interest in protecting themselves from imminent harm in the case of inappropriate discharges. These interests satisfy the standard for intervention as of right.

3. Disposition of Action Impedes the Proposed Intervenors' Ability to Protect their Interests

The focus of the impairment requirement is whether the absentee will be practically disadvantaged if not permitted to intervene, not whether the absentee will be legally bound as a matter of res judicata. Spring Constr. Co. v. Harris, 614 F.2d 374 (4th Cir. 1980). However, most courts, including district courts in the Fourth Circuit, have held that *stare decisis* by itself supplies the practical disadvantage that is required for intervention under Rule 24(a)(2). Shenandoah Riverkeeper v. Ox Paperboard, LLC, 2011 U.S. Dist. LEXIS 52318 (N.D. W. Va. May 16, 2011); Stone v. First Union Corp., 371 F.3d 1305 (11th Cir. 2004); U.S. v. Oregon et al., 839 F.2d 635 (9th Cir. 1988)(stating that the factual and legal determinations regarding the institutions, when

upheld by an appellate ruling would have a *stare decisis* effect in any parallel or subsequent litigation).

This litigation, which directly involves the training centers in which the Proposed Intervenors reside, will, of necessity, result in factual and legal determinations concerning the closure of those centers and will result in a consent decree by which the Proposed Intervenors will be bound. Such determinations or consent decree, when upheld by an appellate ruling, will have a persuasive *stare decisis* effect in any parallel or subsequent litigation.

The Proposed Intervenors are so situated that the disposition of this action will as a practical matter impair or impede their ability to protect their interests. The DOJ and the Commonwealth have policy interests that they are both protecting by way of this settlement agreement. The present parties will no doubt conduct this litigation in a manner that best serves each of their narrow policy interests. The DOJ filed the Complaint in this matter simultaneously with the settlement agreement to possibly circumvent the opinions and views of the Proposed Intervenors. This backwards procedure is a conscious strategic choice by DOJ and by the Commonwealth to force policy changes without the inconvenient matter of determining how many interested persons actually favor that policy.[4] As a practical matter, however, individuals such as the Proposed Intervenors will be grossly adversely affected because these policy decisions will be just as binding on them, despite their non-participation. The outcome of this litigation could have tragic effects on those who rely upon ICF/MR care, and the Proposed Intervenors

[4] The DOJ and the Commonwealth's collusion has also served to essentially bind the Commonwealth's legislature de facto. The Commonwealth has agreed to allow the Court to impose sanctions on it if the Commonwealth is unable to comply with the terms of the settlement agreement. If the legislature is unable to appropriate funds for the settlement agreement in any given year, the court can impose sanctions on the Commonwealth to compel the Commonwealth's compliance. Arguably, the settlement agreement constitutes an unlawful usurpation of the legislature's authority by forcing the appropriation of funds for a result that was never submitted for legislative approval. VA Constit. Art. III § 1; Art. IV, Art. V.

cannot sit idly by while their alleged governmental "advocates" attempt to close Virginia's ICF/MR facilities before adequately assuring protection for the rights of the residents.

If the Settlement Agreement is implemented, Section III.C.1.a. will directly violate the rights of the Proposed Intervenors, as provided in the ADA and Olmstead. That section of the Settlement Agreement creates a quota system that dictates specific numbers of community waiver slots for current training center residents be discharged each year, for the next ten (10) years. [Dkt. #2-2, 5] That system violates the rights of the Proposed Intervenors because it ignores existing recommendations and does not allow for recommendations from treating professionals or for the residents' and guardians' possible opposition to transfer or discharge. For instance, that section requires the Commonwealth to create 60 waiver slots for Training Center residents to use upon discharge in 2012. There is no way the DOJ or Commonwealth could know that precisely sixty (60) training center residents would be appropriate for discharge in that year. Perhaps none of the residents would be appropriate for discharge in 2012 and perhaps more than sixty (60) residents would want to be discharged. The Court cannot assume that the DOJ and the Commonwealth intended to account for or respect Proposed Intervenors' rights as provided in the ADA and Olmstead. When Section III.C.1.a. is read with the Commonwealth's obligation to close its Training Centers, as provided in Section III.C.9., it is undeniable that the Settlement Agreement expressly violates the rights of the Proposed Intervenors. Section III.C.9. provides that by 2021, the Commonwealth will eliminate at least four (4) of its five (5) Training Centers and reconstitute the remaining Training Center for short-term 30-day replacements only. It is impossible to conceive how all residents of ICFs/MR in Virginia could all be served at one training center with limited capacity allowing only short term stays. The effect of Section III.C.1.a. is to create a quota system that simultaneously requires Proposed Intervenors to be

discharged according to a rigid, arbitrary system created by the DOJ and Commonwealth, without providing for the rights of Proposed Intervenors as protected by the ADA and Olmstead.

As a practical matter, this litigation may also impair the Proposed Intervenors' ability to obtain effective remedies in later litigation. The settlement agreement requires the creation of waiver slots for training center residents in unknown locations and commits the Commonwealth to come up with a plan for the closure of four (4) of the five (5) centers. The settlement agreement essentially requires the discharge of residents from the training centers into unknown locations and requires the closure of four (4) of the five (5) training centers. [[Dkt. #2-2, Settlement Agreement at 11 ¶ 9]. The Proposed Intervenors are concerned with all elements of this plan, including but not limited to, their due process rights and proper consideration of recommendations by treating professionals for where these individuals should receive services. The Commonwealth and the DOJ are mostly concerned with closing training centers. If this settlement agreement is approved without the Proposed Intervenors participation, it will have a powerful effect upon the practical ability of the Proposed Intervenors to have meaningful input in later litigation as to the distribution of resources available for ICF/MR services in the Commonwealth of Virginia. The position of this action, thus, "may as a practical matter impair or impede" their ability to protect their interests. Fed.R.Civ.P. 24(a). Thus, Proposed Intervenors satisfy the impairment requirement of Rule 24.

Allowing intervention now, as opposed to collateral attack later, will permit the Proposed Intervenors to protect their rights in an expeditious fashion without needlessly delaying or complicating the litigation. Capacchione v. Charlotte-Mecklenburg Bd. of Educ., 179 F.R.D. 505 (W.D.N.C. 1998) (noting the Court's policy preference which, as a matter of judicial economy, favors intervention over piecemeal litigation); Thomas v. Henderson, 297 F.Supp. 2d 1311 (S.D.

Ala. 2003) (When there is a common question of fact, the court may allow intervention in the interest of judicial economy); see also, Kleissler v. U.S. Forest Serv., 157 F.3d 964, 970 (3d Cir. 1998) (citing Brody v. Spang, 957 F.2d 1108, 1123 (3d Cir. 1992)) (noting a "policy preference which, as a matter of judicial economy, favors intervention over subsequent collateral attacks"). It would benefit the Court to allow the proposed intervention rather than have the Proposed Intervenors file their own lawsuit against the Commonwealth of Virginia in relation to their individual civil rights that are affected by the DOJ settlement agreement.

4. Existing Parties Do Not Adequately Represent the Proposed Intervenors Interests

Finally, it is beyond dispute that neither of the original parties adequately represents the interests of the Proposed Intervenors. The Proposed Intervenors have an interest in receiving appropriate services at the training centers in which they currently live. It is clear that it is the policy and the interest of both the DOJ and the Commonwealth to not consider the rights of the Proposed Intervenors since the proposed settlement is in direct opposition to the rights of the Proposed Intervenors. [Dkt. #2-2, Settlement Agreement at 11 ¶9].

When the party on whose side a movant seeks to intervene is pursuing the same result that the movant is urging, a presumption arises that the movant's interest is adequately represented, so that the movant must show "adversity of interest, collusion, or nonfeasance." Westinghouse Elec. Corp., 542 F.2d 214, 216 (4th Cir. 1976). However, the movant need not show that the representation by existing parties will definitely be inadequate in this regard. Trbovich v. United Mine Workers, 404 U.S. 528 (1972). Rather, he need only demonstrate "that representation of his interest 'may be' inadequate." Id. For this reason, the Supreme Court has described the applicant's burden on this matter as "minimal." Teague v. Bakker, 931 F.2d 259, 262 (4th Cir. N.C. 1991) (quoting Trbovich v. United Mine Workers, 404 U.S. 528 (1972); see also, JLS, Inc. v.

PSC of W. Va., 321 Fed. Appx. 286, 289 (4th Cir. W. Va. 2009) (citing In re Sierra Club, 945 F.2d 776, 780 (4th Cir. 1991)). If the proposed intervention is denied, the Commonwealth is likely, if not guaranteed, to settle this case in a manner that will harm the Proposed Intervenors' interests. Thus, the Commonwealth would inadequately represent the interests of training center residents. This inadequacy of representation is also a sufficient interest for intervention to be granted.

There is no doubt that the Proposed Intervenors would litigate the Complaint filed by the DOJ differently than the Commonwealth of Virginia. Clearly, the Commonwealth has resigned itself to accepting many requests made by the DOJ, including the closure of the training centers in the Commonwealth, which would not be accepted by the Proposed Intervenors. Not only do the interests of the Proposed Intervenors diverge from those of both the United States and the Commonwealth of Virginia, they are, in fact, openly antagonistic. The Proposed Intervenors do not desire the relief that is at the core of the proposed settlement agreement, and, rather, they seek to protect their rights to appropriate treatment based upon treating professionals' judgments, which in many instances will approve an ICF/MR setting as being appropriate. That view is not accepted by either the Commonwealth or by the United States, which is evident from their settlement agreement. [Dkt. #2-2, Settlement Agreement at 11 ¶9]. The belief of the Proposed Intervenors that each individual with a developmental disability should be treated as an individual with unique needs is not shared by the alleged governmental "advocates" that have agreed to an arbitrary quota system, the development of waiver slots earmarked for training center residents, and a Commonwealth plan for moving most residents out of their long term homes in ICFs/MR without their consent and without the exercise of professional judgment. In any event, the

Complaint and accompanying settlement make clear that the Proposed Intervenors must speak for themselves.

Like the Commonwealth, the DOJ is also not capable of adequately representing the interests of the Proposed Intervenors. The statutory language of the Civil Rights for Institutionalized Persons Act ("CRIPA") and its legislative history make clear that the DOJ does not represent private plaintiffs in such actions. The CRIPA statute, which is the only statute that authorizes the DOJ to even initiate this type of litigation, provides that "[t]he provisions of this [Act] shall in no way expand or restrict the authority of parties other than the United States to enforce the legal rights which they may have pursuant to existing law with regard to institutionalized persons." 42 U.S.C. § 1997j.

The House Conference Report on CRIPA stated that:

> [I]t should be emphasized that . . . the Attorney General's authority extends to initiating suit "for or in the name of the United States," in order to represent the national interest in securing constitutionally adequate care for institutionalized citizens. As a representative of the United States, the Attorney General does not directly represent any institutionalized plaintiffs, and the authority granted him is in no way intended to preclude, delay or prejudice private litigants from enforcing any cause of action they may have under . . . law.

H. Conf. Rep. No. 96-897, 96th Cong., 2d Sess. 13, reprinted in 1980 USCCAN 837. (emphasis added). Congress expressly provided that the DOJ shall not impinge on the ability of private parties to enforce their rights. The DOJ does not represent any individual's interest and it does not purport to represent any individual's interests. In fact, as stated in Proposed Intervenors Motion to Dismiss, (attached) the DOJ has not brought this case pursuant to CRIPA. Even if it had, its interest in this matter is significantly distinct from the interest of any private party. The DOJ's interest in this matter is insufficient to protect the interests of the individual training center residents who propose this intervention and who oppose the terms of the proposed settlement

agreement with regard to their care. The District Court in the Eastern District of Arkansas recently took notice of the awkward position the DOJ presents to courts with regard to these inappropriate actions:

> Most lawsuits are brought by persons who believe that their rights have been violated. Not this one. The Civil Rights Division of the Department of Justice brings this action on behalf of the United States of America against the State of Arkansas and four state officials in their official capacities alleging that practices at Conway Human Development Center violate the rights of its residents guaranteed by the Fourteenth Amendment, the Americans with Disabilities Act, and the Individuals with Disabilities Education Act. All or nearly all of those residents have parents or guardians who have the power to assert the legal rights of their children or wards. Those parents and guardians, so far as the record shows, oppose the claims of the United States. Thus, the United States is in the odd position of asserting that certain persons' rights have been and are being violated while those persons—through their parents and guardians—disagree.

United States v. Arkansas, 794 F. Supp. 2d 935 (E.D. Ark. 2011). In United States v. Arkansas, the State of Arkansas was advancing interests which were aligned with the residents of the center, and adamantly defended the suit which ultimately resulted in a trial on the merits of the DOJ's case. The DOJ's case in Arkansas proved to be inadequate. Thus, unlike the Proposed Intervenors, the residents of the Conway Human Developmental Center had no reason to intervene. Regardless, the District Court found that the DOJ failed to prove that they were adequately representing the choice of the residents at the Center. Id. at 935.

The fact that both the Commonwealth and the DOJ have already agreed to a settlement agreement, which is adverse to the Proposed Intervenors' interests, demonstrates that neither party has or will adequately represent the interests of the Proposed Intervenors thus providing support for the proposed intervention.

**B. Alternatively, This Court Should Exercise Its Discretion And Permit The Intervention**

1. The Proposed Intervention is Timely

Alternatively, Proposed Intervenors respectfully request that this Court allow them to intervene permissively, pursuant to Fed. R. Civ. P. 24(b). Permissive intervention under Rule 24(b) is also appropriate since the Court can permit anyone to intervene upon timely motion who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Permissive intervention lies within the discretion of this Court. Hill v. Elec. Co., Inc., 672 F.2d 381, 385-86 (4th Cir 1982).

"An application of intervention, whether permissive or of right, must meet the requirement of timeliness." Spring Const. Co. v. Harris, 614 F.2d 374, 377 (4th Cir. 1980). Under either scenario, the most important consideration is whether the delay in seeking to intervene could prejudice the parties. Id. Because this case has not progressed beyond the initial pleadings stage, the current Motion to Intervene is timely. GMAC Mortg., LLC v. Flick Mortg. Investors, Inc., 2011 WL 841409 (W.D.N.C. Mar. 7, 2011).

Rule 24(b) notes that in "exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the application of the rights of the original parties." Rule 24(b)(3). In re Sierra Club, 945 F.2d 776, 779 (4th Cir. 1991); Media General Cable of Fairfax, Inc. v. Sequoyah Condo. Council of Co-Owners, 721 F. Supp. 775, 780 (E.D.Va. 1989) (noting that in assessing potential prejudice, courts consider whether the addition of a party will significantly expand the issues in the litigation). Although the Proposed Intervenors do not foresee that it will expand the litigation issues in the instant matter, this Court may ensure that the issues are not significantly expanded. Id. Additionally, no formal discovery has occurred in this case, and, thus, the parties would not be prejudiced by the proposed intervention. See, Cox Cable

Communications, Inc. v. United States, 699 F.Supp. 917, 924 (M.D. Ga. 1988). Thus, the Court should therefore hold that the proposed intervention is timely.

2. There is a Common Question of Law or Fact

Permissive intervention is available upon timely application when an applicant's claim or defense and the main action have a question of law or fact in common. See Zimmerman v. Bell, 101 F.R.D. 329, 331 (D. Md. 1984).

As detailed above, the Proposed Intervenors share common and competing interests with the United States and with the Commonwealth of Virginia in relation to this case and with the proposed settlement agreement at issue. The common issues include whether individuals living in the training centers should be permitted to continue to receive services at these training centers or whether they should be discharged in violation of the rights guaranteed them under the ADA and by Olmstead.

Unlike intervention of right, where courts review whether the intervenor's interests are adequately represented, under permissive intervention, courts review the similarities between the claim asserted by the intervenor and the claim advanced in the main action. Id. In Zimmerman, the court found that the intervenor's claim was sufficiently similar to the plaintiff's claim because the intervenor's "claim was virtually indistinguishable[.]" Id. See also Capacchione v. Charlotte-Mecklenburg Bd. of Educ., 179 F.R.D. 505, 508 (W.D.N.C. 1998) (permissive intervention was appropriate where proposed intervenors sought to litigate the same issue regarding school desegregation).

According to the United States, this action relates to whether the Commonwealth of Virginia is complying with the ADA and the Supreme Court's decision in Olmstead. [Dkt. #1, Complaint ¶12]. Whether there was a violation of any of the provisions of the ADA will of course

depend on the application of those laws to the facts of this case and, if permissive intervention is granted, all parties will be advancing arguments with respect to the ADA and the tenets of Olmstead. Importantly, the facts in this case primarily center on the procedures utilized by the Commonwealth to provide services to developmentally disabled Virginians and, specifically, the residents of the training centers operated by the Commonwealth. As a result, the United States, the Commonwealth, and the Proposed Intervenors will be advancing arguments based primarily on the same set of operative facts. It is unlikely that there will be serious factual disputes about what procedures were used and the timing thereof. Additionally, the Proposed Intervenors have an interest in whether community-based care is appropriate for all of the residents of the five (5) training centers, and whether community-based care or an alternative setting is in fact desired by all residents of the training centers. Thus, their claim is common to the claims of the United States and the defenses of the Commonwealth of Virginia, if any exist.

Accordingly, this Court should conclude that the Proposed Intervenors will have a question of law and/or fact in common with the pending action before this Court and should grant the Motion to Intervene.

## III. CONCLUSION

This Court should grant the Motion to Intervene as of right because: (1) the Motion has been timely filed since the Complaint was just recently filed on January 26, 2012; (2) the Proposed Intervenors claim an interest in the subject of this Action in that they have a meaningful interest in their own care, their due process rights, and the rights afforded them by the ADA and the Olmstead; (3) the disposition of this action will impede the Proposed Intervenors' ability to protect their substantial interests since the settlement agreement bargains away their rights and may have a *stare decisis* effect in any parallel or subsequent litigation; and (4) the Proposed

Intervenors are not adequately represented by any current party, as the current parties have already executed a settlement agreement which, among other things, violates the Proposed Intervenors' rights by requiring the closure of four (4) of the five (5) training centers in which they live and discharge of these individuals without considering the needs or wishes of the residents living in those centers.

Alternatively, this court should, in its discretion, grant the proposed intervention permissively as: (1) the Motion has been timely filed; and (2) there is a common question of law and/or fact.

For the foregoing reasons, the Proposed Intervenors request that the Court grant their motion for intervention pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. In the alternative, the Proposed Intervenors respectfully request that the Court grant permission to intervene pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I, hereby certify that on the 2nd day of March, 2012 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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