10-235-cv(L)

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

United States Court of Appeals for the Second Circuit

DISABILITY ADVOCATES, INC., 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 NEW YORK STATE APPELLANTS

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Dated: July 23, 2010

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PRELIMINARY STATEMENT

New York has been a national leader in developing community-based services for individuals with mental illness. Persons in New York with mental illness are eligible for a broad array of community-based programs, including a range of voluntary community-housing options. One housing option is an adult home: a privately owned and operated facility licensed by the State to provide residential care in a congregate setting. Another is supported housing, an arrangement where the State subsidizes individual apartments and supportive services offered by private providers. New York currently subsidizes one of the most generous allocations of supported housing in the country—over 15,000 supported-housing apartments, each of which costs the State more than $14,500 annually.

Plaintiff Disability Advocates, Inc. ("DAI") brought this action on behalf of persons with mental illness who reside in certain adult homes in New York City. DAI alleged that these private adult homes do not provide a sufficiently "integrated setting" to satisfy the Americans with Disabilities Act ("ADA"), and that the State must therefore ensure that residents receive private supported-housing apartments instead.

Following a bench trial, the United States District Court for the Eastern District of New York (Garaufis, J.) issued a permanent injunction requiring defendants—the Governor, the Department of Health ("DOH"), the Office of Mental Health ("OMH"), and the agencies' commissioners—to guarantee supported housing and whatever additional services are necessary to maintain residents safely and successfully in such housing to thousands of current and future adult-home residents in New York City.

The injunction rests on a fundamental misunderstanding of the scope of the ADA and the holding of *Olmstead v. L.C.*, 527 U.S. 581 (1999). The ADA prohibits discrimination "by reason of . . . disability." 42 U.S.C. § 12132. *Olmstead* recognized that unwarranted institutional confinement by the State can be a form of potential discrimination. But adult-home residents are not involuntarily confined by the State. New York does not require individuals to live in an adult home or condition any state services on adult-home residence.

At its core, DAI's complaint is that the State does not fund enough supported-housing benefits to guarantee subsidized private apartments to all individuals with mental illness who are dissatisfied with their

current housing options. But as *Olmstead* itself recognized, the ADA does not compel the State to provide any particular level of benefits to individuals with disabilities. Because the district court held otherwise, its judgment should be reversed, and the injunction vacated.

ISSUES PRESENTED

1. Does the State discriminate against adult-home residents with mental illness "by reason of . . . disability" because it does not offer all of them sufficient benefits to ensure that they can have private apartments?

2. Is it a reasonable modification under the ADA to require the State to increase supported-housing benefits and to grant adult-home residents a preferred entitlement to the new benefits?

3. If a violation of the ADA were established here, was it proper for the district court to enter an injunction whose terms go far beyond preventing discrimination and which deprives state officials of flexibility in deciding how to remedy the violation?

4. Does DAI have standing to pursue claims in its own name on behalf of alleged "constituents" when those individuals have no control over or input into DAI's litigation choices?

STATEMENT OF JURISDICTION

DAI invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1343. As explained in Point IV below, however, DAI lacks standing here. The district court entered a final judgment on March 1, 2010, and defendants filed a timely notice of appeal on March 3, 2010 (JA924). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

A. Background

New York has a large, multi-faceted mental health system that serves over 600,000 individuals annually through 2,500 licensed programs. SPA188; SX(1)-303.[1] Service models for individuals with mental

[1] Defendants', plaintiff's, and stipulated exhibits are cited as DX, PX, and SX (volume)-[page]. The trial transcript that appears in the Joint Appendix is cited JA[page]:[transcript page]. The deposition

(*continued on next page*)

illness have changed dramatically over time, evolving from an institutional paradigm to the modern trend of community-based treatment. New York has been at the vanguard of this transition, serving as a leader in developing community-based options for mental-health care. Defendants have successfully expanded a broad range of community-based programs statewide, which serve a diverse and growing number of individuals. As a result of those efforts, the number of persons with mental illness who are institutionalized has fallen from more than 90,000 in 1955 to less than 4,000 today. SPA162-63.

The State also generally attempts to increase housing options for individuals with special needs, including individuals with mental illness and other forms of disability. Many individuals with serious mental illness receive Supplemental Security Income ("SSI"), a federal benefit that provides recipients with cash to pay for food, shelter, and clothing. JA918 ¶ 26. Individuals whose sole source of income is SSI may not be able to obtain desired housing on the open market. This is

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transcripts admitted as sealed exhibits are similarly cited as SLX-[page]:[transcript page].

especially true in New York City, where there is a severe shortage of low-income housing. PX(4)-297; JA539:1976-77; JA774:2955. New York supplements federal SSI benefits for many recipients, increasing the amount of money they can use for housing. *See* Social Services Law §§ 207-212. The State also licenses and provides various forms of direct and indirect funding to support a wide range of community-housing options operated by private providers, which are available to persons with special needs, including those with mental illness. Options for individuals with mental illness include congregate housing in various types of group residences, as well as transitional housing in shared apartments, and extended-stay programs where residents have their own room in a multi-unit building or their own apartment. JA917-18 ¶¶ 17, 24-25; SPA108 n.221.

This case involves two of these living arrangements: adult homes and supported housing. Both options are purely voluntary and are offered by private providers, not the State itself. SPA83, 108-09; JA403: 1441-42.

B. Adult Homes

Adult homes are a type of privately operated "adult care facility," Social Services Law § 2(21), licensed by the State to provide "long-term residential care, room, board, housekeeping, personal care and supervision to five or more adults." 18 N.Y.C.R.R. § 485.2(b). They are meant for individuals who do not need the level of care provided by a hospital or nursing home, but who are nonetheless "unable or substantially unable to live independently" due to age or disability. Social Services Law § 2(21). As a result, adult homes must offer designated services to their residents such as assistance with personal care and medication management. 18 N.Y.C.R.R. § 487.7(e)-(f). The State does not directly pay for the housing or services provided by adult homes. Most adult-home residents use SSI benefits to pay for room and board in adult homes, and adult-home providers use the SSI funds to cover housing, meals, and the other services they must offer. The State's annual supplement to SSI for an individual in an adult home is $8,328. JA918-19 ¶¶ 26-28.

Although adult homes—like any congregate setting—may have some institutional features, like set mealtimes and assigned room-

mates, state regulations aim to make adult homes as integrated with the local community as possible. Residents have the right to come and go from the home into the community. 18 N.Y.C.R.R. § 487.5(a)(3)(xii). Homes must also provide services "to support . . . resident[s] in maintaining independence of function and personal choice," including "assisting each resident to maintain family and community ties and to develop new ones" as well as "encouraging resident participation in facility and community activities." *Id.* § 487.7(g); *see also* JA784:2992-93. Adult homes are also required to provide a program of activities in the community and to arrange "for resident participation in community-based and community-sponsored activities." *Id.* § 487.7(h); JA784:2992.

Consistent with these regulations, adult-home residents may—and in fact do—visit their families, sometimes overnight, and receive visits at the homes from family and friends.[2] While some residents may feel isolated (SPA99), others have formed relationships with people who

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[2] JA164:477; JA165:481,484; SLX-15:54-55; SLX-24-25:93-94; SLX-57:79; SLX-210:50-52; SLX-269-70:133-34; SLX-338:14-15; SLX-340-342:25-26, 29, 31; SLX-368:135-36; SLX-549:79-80; SLX-608:94-95; SLX-663-65:77-84; SLX-668-76:97-99, 102-28; SLX-719-20:25-28; SLX-749-50:153-54; SLX-756:181.

live in their neighborhoods,[3] and regularly engage in routine activities in the community, such as walking, visiting stores, doing laundry, eating out, going to the library, attending church, using public transportation, voting, having jobs, volunteering, and participating in advocacy organizations.[4]

In addition to regulating adult homes, New York has also used state funds to enhance the overall quality of homes, to encourage residents' engagement with the community, to make homes more integrated settings, and to ensure that residents who wish to leave receive assistance in gaining necessary skills and in applying for other housing options. Since the mid-1990s the Legislature has appropriated funds to assist adult homes in improving their physical infrastructure and to improve staff training. JA448-49:1614 & 1616; JA471:1704-05; JA880-81:3379-80. State agencies have also increased efforts to investi-

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[3] SLX-493-94:64-66, 72; SLX-549-50:79-82; SLX-721:32; SLX-754:172.

[4] JA176-78:526, 531-33; SLX-55:70-71; SLX-374:158-59; SLX-384:16-18; SLX-387-88:27-33; SLX-412:127-28; SLX-482-83:21-24; SLX-647-48:11-16; SLX-650-51:22-29; SLX-745:134.

gate resident complaints and to enhance oversight of adult-home services and quality of life. JA361-63:1265-74; PX(3)-626.

The State has also invested resources towards directly assisting adult-home residents. OMH, for example, has instituted independent case-management and peer-support programs in adult homes through contracts with private nonprofit service agencies. JA375-78:1323-29 & 1330-34; SX(1)-609-72; SX(2)-1-83 & 192-215. A major goal of these programs is to provide access to a wide variety of services, including housing, and case managers are expected to assist—and have assisted—residents who need or desire alternate forms of housing. JA374-75:1317-21; JA452-53:1630-31; JA482:1747-48; JA488:1772-73; JA674:2554.

Adult homes serve many different classes of individuals who need assistance with their daily activities, not just individuals with mental illness. Such individuals, however, constitute a substantial portion of the population in some adult homes. SX(4)-33 (noting that 25%-30% of adult-home residents have a psychiatric disability). Up until the 1990s, as DAI's own experts admit, supervised congregate facilities were widely seen as an appropriate housing option for individuals with mental illness, including those newly discharged from state hospitals.

JA119:298-99; JA329-30:1139-43. Accordingly, adult homes and similar options were seen nationally as well as in New York as a potential source of affordable community housing. JA205:642; JA209:660; JA527:1930.

In particular, adult homes proved highly valuable to residents known to have difficulty caring for themselves or taking medication, since well-run adult homes provide personal care, medication oversight, a safe environment, and typically access to a case manager from the mental-health system as well. JA836:3202-03. While past problems (sometimes significant) existed in individual homes that failed to meet state regulatory standards, the State took corrective measures and brought appropriate enforcement actions, closing non-compliant homes. *See* SPA167 (noting that the State's "strengthened monitoring and enforcement activities are commendable").

The State's oversight over adult homes is accordingly not challenged in this action. SPA227 (DAI "does not seek increased enforcement of State regulations applicable to Adult Homes"). Although DAI initially alleged that defendants had failed to bring enforcement actions to redress substandard conditions in adult homes,

it later conceded that this was not the case. DAI Mem. in Opp'n To Def. Mot. for S.J., at 79.

C. Supported Housing

Supported housing is not a defined statutory or regulatory term, but it is the common shorthand for a newer community residence model where individuals with mental illness live in their own apartments scattered throughout the community and receive supportive services. JA504:1441-42. Unlike adult homes, supported housing is targeted specifically towards individuals with mental illness and is available only to such persons. SX(3)-239. New York began to develop permanent supported housing for persons with mental illness in the early 1990s and was one of the first States to do so. Since then, New York has been a leader in expanding such housing. SX(1)-593-608; JA232-33:752-73, JA330:1142; SPA163.

In the 1990s many clinicians considered supported housing to be suitable only for a small group of high-functioning individuals. JA119:300). Today, however, supported housing is considered the preferred community-housing model for many persons with mental illness. OMH shares that conviction, and its development efforts are now

centered on supported housing and other single-room-occupancy settings rather than older congregate housing models. JA829:3172-73; PX(4)-299; SX(3)-271-72.

But expanding supported housing opportunities is challenging. PX(4)-297. The very feature that makes supported housing unique—the fact that residents are provided with their own apartments—also makes the expansion of supported housing and similar options particularly resource-intensive. PX(4)-299 (explaining that "OMH is working with residential providers to emphasize a supportive-housing model" within limits of "Federal and State funding constraints"). To expand supported housing, the State contracts with private providers to provide a set number of supported-housing apartments. SPA-109; JA356:1246-53). As in adult homes, supported-housing residents typically receive SSI, some of which they use to pay private providers for rent. JA919 ¶¶ 29-30. But SSI, even with the state supplement, is generally not enough to cover market rent for an apartment in New York City plus other living expenses. PX4-297; JA670:2538. To induce providers to offer supported housing to individuals with this level of income, OMH also pays providers an extra $14,654 per year for each supported-

housing apartment, up to the fixed number of apartments set by the contract with the provider. JA919 ¶ 33.

The supportive services necessary to maintain individuals safely in their own apartments are also costly and require a heavy investment of public resources. Although some supported-housing residents may require just a monthly or weekly visit from a case worker (JA405:1443-44, JA696:2642-43), others receive an intensive form of state-funded services known as assertive community treatment ("ACT"), which involves at least semi-weekly visits by a multidisciplinary team of specialists in psychiatry, nursing, psychology, social work, substance abuse, and vocational rehabilitation (SX(4)-1-4; JA101:228-29, JA258:855-57; SPA110). ACT services are in high demand statewide by many groups of individuals with mental illness, and each new ACT client requires thousands of dollars in additional state expenditures. JA824-25:3155-56; JA826:3162-63; SPA184-85.

The funding and programmatic limitations described above currently prevent OMH from expanding supported housing to all individuals with mental illness in New York who may desire such housing. JA551:2026. For a person in supported housing, the state

supplement to SSI and the supported-housing subsidy add up to $7,370 more than the state supplement to SSI for a person in an adult home.[5] And while OMH believes that supported housing will prove to be a "successful" and "cost-effective" option for many individuals and "fight[s] very hard to get new housing money" (JA232:749; JA585:2159-60), the agency is limited by its legislative appropriations, which determine the extent to which the agency can expand supported-housing benefits. JA534:1957; JA866:3323; JA884:3395 (explaining that funds cannot be transferred between state agencies or programs without legislative authorization); *see also N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 631 F.2d 162, 164-65 (2d Cir. 1980) (funding for programs is controlled by legislative appropriation); *County of Oneida v. Berle*, 49 N.Y.2d 515, 523 (1980) (same).

The State has made a genuine commitment to expanding options like supported housing. New York currently subsidizes over 32,000

[5] For a person living in an adult home, which is classified as Congregate Level III housing, the state supplement is $8,328. JA917-18 ¶¶ 14, 27. For a person living in supported housing, the state's supplement is $1,044, but the State also pays providers an extra $14,654 per bed, for a total cost to the State of $15,698. JA916, 919 ¶¶ 9, 30, 33. The difference is $7,370.

community-housing beds, including over 15,000 supported-housing apartments, one of the most generous allocations in the country. SPA163; JA530:1941 ("there are more housing units for persons with serious mental illness" and "more housing beds available per capita in New York State than any other state"). But the Legislature has capped the number of supported-housing apartments available and expanded the benefit in stages, subsidizing approximately 700 new apartments each year since the early 1990s. JA590:2180-81.

Because the State funds a limited level of supported-housing benefits, demand exceeds supply, particularly in popular and expensive areas like New York City. JA234:757; JA420:1503; JA551-52:2026-27. To allocate available benefits, OMH has focused on especially vulnerable "target populations," such as "individuals who are currently homeless, living in shelters, depots or on the streets," or people coming out of transitional housing or psychiatric hospitals who face imminent risk of becoming homeless. SX(1)-597; JA209:660; JA212:671-72. Since 2005, adult-home residents have also been included as a target population. JA428:1534; SX(2)-86.

In allocating supported-housing benefits, the State must balance competing and divergent needs. JA456:1645; JA539:1977, JA552:2027-30; JA582-83:2150 & 2152-53; JA682:2585; JA758:2891). Many individuals seek supported-housing apartments or similar subsidized housing. *See, e.g.*, *Messiah S. v. Alexander*, 07-cv-1367 (S.D.N.Y. complaint filed Feb. 22, 2007) (class action by New York City parolees with mental illness seeking "supportive housing"); *Joseph S. v. Hogan*, 561 F. Supp. 2d 280, 292-93 (E.D.N.Y. 2008) (suit by nursing-home residents seeking more integrated community-based housing). At the same time, the State also has ongoing obligations to other community-based programs, which serve individuals who may not need housing but who do need mental-health services to function successfully and avoid hospitalization. JA281:946; JA758:2891; JA762:2907; JA829:3174-3175.

D. Proceedings Below

In 2003, DAI filed this lawsuit on behalf of certain "constituents," individuals with mental illness who reside in or who are "at risk of being placed" in adult homes with more than 120 beds in which at least

25% of the residents have a mental illness (Compl. ¶¶ 33-34).[6] DAI alleged that defendants had "placed" these residents in these "impacted" adult homes instead of providing them with their own apartments through supported housing (Compl. ¶¶ 26-43). Complaining that the Legislature had not "shifted funding from adult homes to community-based residential services" (Compl. ¶¶ 114-116, 118), DAI asserted that the defendants had "require[ed] thousands of individuals to live and receive services in adult homes" (Compl. ¶ 124), thereby violating Title II of the ADA, 42 U.S.C. §§ 12131 and 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (Compl. ¶¶ 120-165).

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[6] DAI identifies these adult-home residents as "constituents" although they have no ability to vote on, participate in, or control any of DAI's actions (Compl. ¶ 9). DAI also claims authority to represent as a constituent *any* individual with mental illness receiving care or treatment in New York (Compl. ¶ 8).

For ease of reference, the State uses the term "DAI's constituents" to refer to the subset of individuals that DAI purports to represent in this action out the much larger class of individuals with mental illness that DAI claims as constituents.

1. Summary Judgment

After discovery, the defendants moved for summary judgment, challenging: (1) DAI's lack of standing, (2) DAI's ability to state cognizable discrimination claims, and (3) the scope of DAI's requested relief—an entitlement to supported-housing benefits—as impermissibly requiring a "fundamental alteration" of state programs and services. DAI also moved for partial summary judgment on defendants' fundamental-alteration defense. The district court denied both motions. SPA8-74.

The court concluded that DAI had standing to assert claims on behalf of adult-home residents and that DAI asserted cognizable discrimination claims because defendants had allegedly failed to "plan, fund, and administer the State's existing [mental health] service system," including by "allocate[ing] . . . resources differently," to ensure that adult-home residents could receive services in the most integrated form of community housing. SPA34-36. The court also declined to grant summary judgment on the State's fundamental-alteration defense, concluding that the State could establish a viable defense only

if defendants had a specific, targeted plan in place to move residents of impacted adult homes to supported-housing apartments. SPA58.

2. Bench Trial

The case proceeded to a five-week bench trial, and following the trial, the court ruled in DAI's favor. The court held that defendants violated the ADA and the Rehabilitation Act by not ensuring that adult-home residents were "receiving services in the most integrated setting appropriate to their needs." SPA77. The court found that adult homes were "institutions" that tended to segregate persons with mental illness from the community (SPA88-108), and that supported housing fostered greater integration with the community because people who lived there had greater independence, choice, and privacy (SPA108-13).

While DAI failed to present proof of any adult-home resident who had applied for and been denied supported housing, the court found that DAI's alleged constituents would want to live in supported housing if they were fully informed about it. SPA149-57. Relying in large part on testimony that virtually anyone could live in supported housing if provided with sufficient services (SPA117-48), the court also concluded that nearly all adult-home residents—including those who might move

to adult homes in the future—were qualified for supported housing and that individual assessment by a treating professional was unnecessary (SPA148-49).

Finally, the court held that requiring defendants to guarantee DAI's constituents supported-housing benefits would not fundamentally alter existing state programs and services. SPA157-201. Although it was undisputed that the State pays $7,370 more per year (in SSI supplements and rent subsidies) for an individual living in supported housing than for an individual residing in an adult home (see *supra* at 15 n.5), the court accepted DAI's claim that the significant cost difference could be made up in projected Medicaid savings. The State's average annual Medicaid expenses have historically been higher for adult-home residents than for persons in supported housing. PX(6)-332. The court adopted the conclusion of DAI's expert that the difference resulted from overuse of expensive and unnecessary treatment services in adult homes (due to a setting that fosters dependence), not because adult-home residents have greater medical needs. SPA179.

The Court accepted this theory even though defendants submitted evidence that DAI's cost projections were speculative. For example,

there are significant disparities in average Medicaid costs even for the categories of care that would seem to be least dependent on an adult-home setting, such as prescription costs and hospitalization. SX(4)-188-89. Moreover, DAI's witnesses had not done any assessments of the services adult-home residents moving to supported housing would need, although the witnesses conceded that such assessments would eventually be necessary. JA65:82; JA274:917; JA324:1119-20. The district court nonetheless credited DAI's argument, concluding that with predicted future Medicaid savings factored in the State would actually spend $146 less annually for each adult-home resident who moved to supported housing. SPA 181. The court also concluded that the State could cut other subsidies to adult homes, such as grants for capital improvements, to cover the cost of expanding supported housing for DAI's constituents. SPA181-84.

3. The Court's Injunction

More than a month after the district court issued its trial ruling, the United States and two adult-home associations moved to intervene. The court allowed the United States to intervene but denied the

contemporaneous motions of the adult-home associations as belated. SPA205-17.

Following the submission of proposed remedial plans, the court issued a permanent injunction granting DAI essentially all the relief it sought. The court ordered the State to create 1,500 new supported-housing beds annually for the next three years for DAI's constituents alone. SPA236 ¶ 4. Within four years, the State must guarantee supported housing to every current—or future—resident in an impacted adult home who desires such housing and who qualifies under a new court-imposed standard. SPA234-35 ¶¶ 1-2. That standard deems every resident qualified with narrow exceptions, such as individuals suffering from severe dementia or those likely to cause an imminent danger to themselves or others. SPA238-39 ¶ 10.

The determination of whether an individual meets the court's criteria is made not by the State or a medical professional, but rather by the private providers who offer supported housing. SPA239 ¶ 10. The State is also required to provide DAI's constitutents with whatever support services are necessary to maintain them successfully in supported housing without limitation, even at the risk of displacing

other persons who may need such services. Moreover, despite its predictions of future cost savings, the court declined to incorporate any cost-containment measures into its injunction—instead ordering the State to guarantee DAI's constituents supported housing regardless of the "ultimate[] increase [in] costs to the State" even if no legislative appropriation is available to fund expanded benefits. SPA226. To oversee implementation of the injunction, the court appointed a monitor whose salary and expenses (including a staff) will be paid by the State. SPA240-41 ¶ 15.

Defendants promptly appealed and sought a stay. A single judge of this Court granted a temporary stay; a motions panel later denied a stay but ordered expedited briefing. The State's appeal (No. 10-767) has been consolidated with three other appeals by the adult-home associations that were denied intervention.

SUMMARY OF ARGUMENT

1. This case does not involve any form of discrimination prohibited by Title II of the ADA. *Olmstead* held that two types of state action may constitute unlawful discrimination under Title II:

(1) conditioning access to state services on residence in an institution; and (2) forcing individuals to remain confined in segregated state institutions when such confinement is not medically warranted. But the State does not require anyone to live in an adult home as a condition of receiving state services or benefits. And adult homes are private residences, not state institutions. While some adult-home residents may lack other housing options, that is not because of state-imposed restrictions but rather because of their low incomes and the severe affordable-housing shortage in New York City.

DAI's claim for supported housing is thus not a claim of discrimination, but rather a claim that the State should provide a higher aggregate level of housing benefits. But the ADA does not require any particular level of benefits, so long as the State does not discriminate on the basis of disability in allocating those benefits. Indeed, the ADA does not require any benefits at all. Consistent with the ADA, the State may, as here, fund housing benefits on a limited basis to some individuals with disabilities while it evaluates whether and how quickly to expand the benefit to others.

2. DAI's claim for guaranteed supported housing plus all the services needed to ensure that individuals succeed in supported housing is not a request for a reasonable modification of any of the State's existing programs or services.

It is irrelevant that the district court predicted that funding supported housing plus services for an individual will be no greater than the cost of maintaining the individual in an adult home. The court's injunction orders expansion of supported housing benefits even if future costs exceed the court's estimates. Moreover, even if the court's cost projections were an accurate prediction, they would leave so little room for error that it would be reasonable for the State to proceed cautiously. The State may choose to expand benefits in stages rather than making an immediate and permanent commitment to thousands of new supported-housing apartments. Requiring an immediate expansion would deprive the State of the opportunity to test and assess concrete data about the actual costs of expanding benefits and to account for unforeseen future developments.

3. Even if the district court had correctly found a violation of the ADA and the Rehabilitation Act, its injunction would go far beyond

remedying any actual discrimination that might exist, essentially mandating a new court-created and court-supervised benefit program. If there were cognizable statutory violations, defendants should retain discretion in implementing the appropriate remedy, one that potentially affects many other state programs and services for other individuals with disabilities.

4. The judgment also should be vacated on the jurisdictional ground that DAI lacks standing to bring these claims in its own name, rather than on behalf of named individual plaintiffs. DAI cannot rely on associational standing to assert claims on behalf of those it claims as its "constituents" because those constituents have no voice in or control over its litigation choices. And the United States' intervention following trial and a ruling on liability cannot cure DAI's lack of standing at the outset.

STANDARD OF REVIEW

This Court "review[s] a district court's bench trial findings of fact for clear error and its conclusions of law *de novo*." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 271 (2d Cir. 2003). The Court may overturn

"an order granting a permanent injunction if the district court relied upon a clearly erroneous finding of fact or incorrectly applied the law." *Rodriguez v. City of N.Y.*, 197 F.3d 611, 614 (2d Cir. 1999) (quotation marks omitted).

ARGUMENT

POINT I

THE STATE HAS NOT DISCRIMINATED AGAINST DAI'S CONSTITUENTS BY FAILING TO GUARANTEE THEM SUPPORTED HOUSING

The ADA is a nondiscrimination statute. Title II of the ADA provides that "that no qualified individual with a disability shall, *by reason of such disability*, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[7] 42 U.S.C. § 12132 (emphasis added). In *Olmstead*, the Supreme Court held that two

[7] Section 504 of the Rehabilitation Act likewise prohibits discrimination against qualified persons with disabilities "under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Because the Rehabilitation Act and the ADA typically impose similar requirements, courts generally consider the claims in tandem. *Rodriguez*, 197 F.3d at 618; *Henrietta D.*, 331 F.3d at 272.

specific but narrow types of state action may constitute unlawful discrimination under Title II: (1) conditioning access to state services on institutional confinement, and (2) unwarranted confinement in segregated state institutions.

Neither form of discrimination is at issue here. New York does not limit state services and benefits to individuals in institutional care, nor does it mandate the institutionalization of individuals who reside in private adult homes. Instead, New York offers a broad array of community-based services and supports a range of community-housing options—like adult homes—that individuals with disabilities may choose but are not required to accept. As part of that effort, the State provides supported-housing benefits, although not at a level sufficient to guarantee supported housing to every individual with mental illness who may desire it.

The State's provision of a benefit to some but not all individuals with mental illness is not a violation of Title II. The ADA does not "require[] States to provide a certain level of benefits to individuals with disabilities." *Olmstead*, 527 U.S. at 603 n.14 (quotation marks omitted). Because DAI seeks increased levels of supported-housing benefits,

rather than the nondiscriminatory provision of those benefits, it fails to state a claim under Title II.

A. The ADA Claim Recognized by *Olmstead* Relied Upon a Showing of State-Mandated Segregation.

In *Olmstead*, the Court addressed discrimination claims by two women who had been confined for years in the locked ward of a Georgia psychiatric hospital although state doctors had determined that their treatment needs could be met in an existing community program with available, open slots. 527 U.S. at 593-94, 601; Brief for Respondent at 6-7, *Olmstead v. L.C.*, 1999 WL 144128. The women alleged that Georgia officials had violated Title II by refusing to offer them treatment in an available community-based setting rather than in an institution.

The Court held that the institutionalized plaintiffs had stated an ADA claim under two related theories. A majority of the Justices recognized that disparate treatment in the provision of services to persons with disabilities may violate Title II, a reading of the statute fully "consistent with the normal definition of discrimination" as prohibiting "differential treatment of similarly situated groups." 527 U.S. at 614

(Kennedy, J., concurring); *see id.* at 599-601. If a State provides essential services to individuals with mental disabilities *only* in segregated institutions, it subjects those individuals to state-mandated isolation, a burden not imposed on individuals without mental disabilities. *Id*. at 600-01.

A slimmer majority of the Court also concluded that the "unjustified institutional isolation" of persons with disabilities by the State "is a form of discrimination" even if no disparate treatment is shown, because state-mandated institutional confinement perpetuates the unwarranted and highly stigmatizing assumption that individuals with disabilities are incapable and unworthy of participating in community life. *Id*. Stigmatic injury is a type of harm often associated with government-sanctioned discrimination, and the harm is magnified if state officials reinforce damaging stereotypes about individuals with disabilities by segregating such individuals in institutions when an appropriate community placement is available. *Id*. at 599-600.

Only when one of these forms of underlying discrimination is shown will the State be required to move individuals with disabilities from institutions to community-based programs. And even then, the

affected individuals must also show that "the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated." *Id.* at 607.

The district court incorrectly read this latter language—which is a limitation of the State's responsibilities even when predicate discrimination has been shown—as a freestanding "integration mandate." SPA80. But *Olmstead* did not jettison the essential element of discrimination. Under *Olmstead*, when a State provides an existing service to individuals with disabilities, it cannot condition access to that service on residence in an institution or acceptance of institutional confinement. Similarly, state officials cannot continue to confine persons with disabilities in segregated state institutions if those individuals' needs could be appropriately accommodated in the community. Both requirements may be viewed as integration mandates, but they are mandates grounded in the specific forms of discrimination *Olmstead* recognized as covered by Title II.

B. State-Mandated Segregation Is Not at Issue Here.

Unlike other cases in which courts have allowed *Olmstead* claims to proceed, this case does not involve either form of discrimination recognized in *Olmstead*. *See, e.g., Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 378 (3d Cir. 2005) (conditioning medical care on residence in a state psychiatric facility); *Radaszewski v. Maram*, 383 F.3d 599, 600 (7th Cir. 2004) (conditioning around-the-clock care on nursing-home residence); *Frederick L. v. Dep't of Pub. Welfare*, 364 F.3d 487, 489-90 (3d Cir. 2004) (confining individuals unnecessarily at a segregated state institution); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003) (conditioning full prescription coverage on "agree[ment] to enter a nursing home").

New York has decoupled state services and benefits from institutional care. The State does not condition access to state services or benefits on residence in particular housing. Recipients of SSI or Medicaid, for example, remain eligible for those benefits regardless of where they live. And no state law, regulation, or policy forces individuals with mental disabilities to accept any form of community

residence, including adult homes. If residents are dissatisfied with living in an adult home, they may leave.

Contrary to the district court's suggestion (*see* SPA150), adult-home residence is not state-mandated institutionalization merely because residents may lack other, better options. *See Leocata v. Wilson-Coker*, 343 F. Supp. 2d 144, 151 & 154-56 (D. Conn. 2004) (rejecting claim that plaintiff was "confined" in violation of *Olmstead* because government benefits are insufficient to guarantee individuals optimal residential options), *aff'd sub nom. Loecata v. Leavitt*, 148 F. Appx. 64 (2d Cir. 2005). If adult-home residents lack better housing options, it is not—as in *Olmstead*—because of state-imposed restrictions, but because DAI's constituents rely on SSI to live in New York City, one of the most expensive housing markets in the nation. SSI alone—even with the state supplement—may not be sufficient to cover the market rent for an apartment as well as other living expenses. JA539:1976-77; JA670:2538.

New York invests significant resources towards increasing housing options for low-income individuals with special needs, including committing hundreds of millions of dollars each year to subsidize and

support community-housing options for individuals with mental illness. DX(2)-387. Even that funding, however, does not guarantee every person with mental illness the preferred housing of his or her choice. SPA187 (noting that "no state" including New York "has been able to provide subsidized housing for *all* . . . residents with mental illness). For individuals whose sole income is SSI, there may be no better option than a private adult home if that individual wants to live in New York City, use SSI to pay for room and board, and take advantage of the additional services that adult homes provide.

Individuals with mental illness who have family support, independent income, and additional financial resources will likely have a broader range of housing options, as will individuals willing to relocate to a less expensive housing market. The difference in the range of options, however, is caused by differences in income and location—not because defendants have engaged in discrimination "by reason of . . . disability." *See Henrietta D.,* 331 F.3d at 276 *("*[T]he ADA and Rehabilitation Act are addressed to rules . . . that hurt [individuals] by reason of their handicap, rather than that hurt them solely by virtue of what they have in common with other people. . . . [T]here must be

something different about the way the plaintiff is treated 'by reason of . . . disability.") (quotation marks and citations omitted). The ADA prohibits restrictions that harm individuals *because of their disability*. It does not mandate special benefits to cure pre-existing disadvantages that DAI's constituents share "with other people" who are not disabled, "such as [having] a limited amount of money to spend on housing." *Good Shepherd Manor Found., Inc. v. City of Momence*, 323 F.3d 557, 561 (7th Cir. 2003) (quotation marks omitted).

Nor does *Olmstead* impose liability on the State merely because some adult homes in New York City have "institutional" characteristics. SPA89. To the extent that homes may have a curfew, set meal times, or a "physical layout, furnishings, and decorations" that "give an appearance similar to . . . an institutional setting" (SPA89) (quotation marks omitted), those features are common in other congregate residential settings, and importantly those features are not imposed by the State. Title II of the ADA does not make the State liable for "[t]he programs or activities" of licensed entities. 28 C.F.R § 35.130(b)(6); SPA35. And while the State does regulate adult homes, DAI does not challenge the scope or enforcement of those regulations.

While the features noted by the district court—such as diminished privacy because of the presence of staff and other residents—may make adult homes and other forms of congregate housing less desirable to residents than individual apartments, they do not constitute discrimination or state-mandated segregation of individuals with disabilities. Adult-home residents have the ability to engage in community life and are encouraged rather than barred from participating in community activities. The evidence at trial confirmed, for example, that adult-home residents have jobs, visit family and friends, take classes, go shopping, and engage in other activities in the community. To be sure, "[s]ome residents testified that they feel isolated living in Adult Homes," but, as the court acknowledged, individuals can "feel isolated in *any* setting, including supported housing." SPA99 (emphasis added); JA132-33:352-53 & 355-56. And individual isolation by itself—when it is not mandated by the State—is not sufficient to establish unlawful discrimination. The ADA and the Rehabilitation Act seek to ensure evenhanded treatment, not to guarantee "equal results" in terms of actual community ties or actual community involvement for individuals

with disabilities. *See Alexander v. Choate*, 469 U.S. 287, 304 (1985); *Rodriguez*, 197 F.3d at 618.

C. Title II Does Not Encompass Challenges—Like DAI's Here—to the Level of State-Funded Benefits.

As explained above, DAI does not seek nonsegregated access to state benefits or services or the termination of unwarranted institutional confinement by the State, rights that *Olmstead* recognized are protected by Title II. Instead, DAI seeks to compel New York to increase its level of supported-housing benefits. But Title II does not encompass that type of claim.

Olmstead applied "the ADA's nondiscrimination requirement" to the services that States "in fact provide." 527 U.S. at 603 n.14. The Court interpreted the ADA as barring discrimination in the provision of *existing* services and benefits, not as prescribing what services and benefits that States must offer. *Id.* As this Court recognized in *Rodriguez*, *Olmstead* did not compel the provision of *any* service or benefit to individuals with disabilities even if the service or benefit may "provide . . . individuals with the opportunity to remain out of institutions." 197 F.3d at 619. Likewise, *Olmstead* emphasized: "We do

not hold . . . that the ADA imposes on the States a standard of care for whatever [] services they render, or that the ADA requires States to provide a certain level of benefits to individuals with disabilities." 527 U.S. at 603 n.14 (quotation marks omitted).

The law has long recognized *Olmstead*'s distinction between nondiscrimination in existing programs and the creation of a new subsidy—or a higher level of subsidy—for persons with disabilities. *See, e.g., Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 407-12 (1979); *Alexander*, 469 U.S. at 303. This Court has likewise routinely held that the ADA and the Rehabilitation Act require nondiscriminatory access to existing services and benefits but do not mandate "additional or different" services or benefits for "the disabled, no matter how great their need for the services" or benefits may be. *Wright v. Giuliani*, 230 F.3d 543, 548 (2d Cir. 2000); *see also Rodriguez*, 197 F.3d at 619; *Cercpac v. Health & Hosps. Corp.*, 147 F.3d 165, 168 (2d Cir. 1998) (the federal "disabilities statutes do not guarantee any particular level of medical care for disabled persons, nor assure maintenance of service previously provided").

Olmstead's narrow scope also reflects the Supreme Court's long recognition that States may address social welfare problems "one step at a time," *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972), "proceed[ing] cautiously" and incrementally in extending public welfare benefits, *Bowen v. Owens*, 476 U.S. 340, 348 (1986). Rather than immediately creating a statewide entitlement, New York has expanded supported housing in incremental steps, targeting the limited benefits towards individuals with the most acute needs such as persons at risk of homelessness. The State's choice to "concentrate limited funds where the need is likely to be greatest" is not discriminatory. *Califano v. Boles*, 443 U.S. 282, 296 (1979).

Although supported housing may be the preferred option for many individuals with mental illness, the State has legitimate, nondiscriminatory reasons to fund and develop a number of slots that is not unlimited. There are limited resources available for community housing of any form. And while the Medicaid waiver program partly reimburses States for providing "community-based services," Medicaid denies reimbursement for "room and board," 42 U.S.C. § 1396n(c)(1),

and restricts waiver services for adults with mental illness. *See* 42 C.F.R. § 440.180(d)(2).

The need for affordable housing options is great and affects many individuals beyond DAI's constituents. JA397:1410; JA539:1977; JA670:2538). New York invests significant state resources towards addressing those needs for many populations. *See, e.g.*, N.Y. State, *New York State Annual Action Plan: Program Year 2010* 49-54 (2010), *available at* http://nysdhcr.gov/Publications/ActionPlan10/ActionPlan2010_Approved.pdf. Individuals with mental illness are not excluded from those efforts. The State expends hundreds of millions of dollars each year to increase housing options for persons with mental illness by supplementing SSI, directly subsidizing over 32,000 community-housing beds, and offering other forms of assistance to community-housing providers. Supported-housing benefits are one part of that vast effort. SPA163; DX(2)-387.

But the very feature that makes supported housing desirable and "more integrated" in the district court's view—the fact that residents are provided with their own apartment—also makes the expansion of supported-housing particularly resource-intensive. To develop a single

supported-housing apartment, without even taking into account the additional services the court also ordered, OMH pays an annual stipend of over $14,500. JA919 ¶ 33. This is a significant financial investment not only for one year but also for the long term, since supported housing is designed to provide individuals "with a permanent place to live." SPA118. But there are over 350,000 people in New York with serious mental illness, and many more with less severe mental illness. Funding supported housing for all those individuals would exceed OMH's total annual budget, leaving no room for other mental health services and programs. If the State is to administer statewide services effectively and distribute benefits equitably, the level of supported housing benefits must be capped at some point. JA829:3174-75.

Absent invidious classifications, a State's decision about "allocating limited public welfare funds" is not "discrimination." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). When there are many competing demands for public assistance and only limited public funds, States "must necessarily engage in a process of line-drawing" in extending benefits. *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *accord Schweiker v. Wilson*, 450 U.S. 221, 243 (1981) ("the

apportionment of scarce benefits" for public welfare "requires painful but unavoidable line-drawing"). Where that line is drawn will necessarily disappoint some individuals who may desire and who could benefit from supported housing, but that decision is a policy choice "for legislative, rather than judicial, consideration." *Fritz*, 449 U.S. at 179.

Because "[n]o State has unlimited resources, . . . each must make hard decisions on how much to allocate" for state-funded benefits like supported housing. *Olmstead*, 527 U.S. at 612 (Kennedy, J., concurring). That "judgment, however, is a political one . . . not within the reach of the [ADA]." *Id.* As this Court has explained, absent proof of discrimination, "it is not [the court's] role to determine what . . . benefits New York must provide," *Rodriguez*, 197 F.3d at 619, or which individuals with disabilities should be given priority in the distribution of benefits.

Olmstead itself emphasized this point. Even when individuals are involuntarily institutionalized by the State, which none of DAI's constituents are, the Court explained that it would suffice for the State to have a "waiting list" for community placement. 527 U.S. at 606 (plurality op.). In other words, even actual, state-mandated

institutionalization is not unlawful if the reason for confinement is a level of services and benefits insufficient to guarantee all institutionalized individuals immediate community placement. *Id*. The Attorney General's Title II regulations likewise explain that public entities may provide "benefits, services, or advantages" to some persons with disabilities, 28 C.F.R. § 35.130(c), without "incurring additional obligations to . . . other classes of individuals with disabilities." 56 Fed. Reg. 35,694, 35,705 (July 26, 1991). Questions about the level of benefits and priority among classes of persons with disabilities implicate important policy concerns, and States may make wise or unwise policy choices. But those choices are not "discrimination" as defined by Title II of the ADA.

As Justice Kennedy noted in his *Olmstead* concurrence, it would raise "[g]rave constitutional concerns" if the ADA were read to "permit court intervention" in "basic" political decisions about state budgeting and resource allocation. 527 U.S. at 612-13 (Kennedy, J., concurring). While Congress may enact prophylactic legislation like the ADA "to remedy or prevent unconstitutional discrimination," *Tennessee v. Lane*, 541 U.S. 509, 520 (2004), the Constitution does not require States to

guarantee any level of benefits to persons with disabilities, nor does it authorize Congress to enact legislation that mandates such benefits. If the ADA were read to do so, it would raise serious constitutional questions. *Olmstead* prudently reads the ADA as avoiding potential constitutional conflict by addressing only discrimination, not level-of-benefits claims.

D. The Attorney General's Integration Regulation Does Not Require Increased Levels of Supported-Housing Benefits.

In finding a violation of Title II, the district court relied in part on the Attorney General's integration regulation, which requires public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). The district court erred to the extent it 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. Under that reading, public entities could not offer services in the community without also providing housing benefits for the recipients of those

services. The regulation does not compel that extraordinary and counterproductive result.

That conclusion is confirmed by decades of federal practice under parallel Rehabilitation Act regulations, which long have governed the activities of federal agencies and the recipients of federal funds. Those parallel regulations have never been interpreted as mandating housing benefits whenever the federal government provides other public services. For example, the Department of Health and Human Services, which administers Medicaid, has an almost identical Rehabilitation Act regulation that requires the agency to "administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps." 45 C.F.R. § 85.21(d). Many of the services at issue in this case are in fact Medicaid services jointly funded by the state and federal government. But Medicaid does not provide housing benefits, let alone ensure individuals with disabilities the "most integrated" housing possible. Even the Medicaid waiver program, which enables States to use a portion of their Medicaid funds to subsidize home and community-based services, specifically excludes reimbursement for room and board. 42 U.S.C. § 1396n(c)(1). Just as

the federal government's provision of Medicaid services without corresponding housing benefits would not violate the Rehabilitation Act's integration requirements, so too here there is no violation of Title II's integration requirement merely because the State offers community services without also guaranteeing particular forms of community housing.

Nor is it proper to apply the integration regulation to challenge decisions about how defendants administer the entire New York mental health system. *See* SPA34-36, 78, & 82-83. Threshold determinations about the scope and extent of different state programs and services are legislative and political judgments, *Olmstead*, 527 U.S. at 612-13 (Kennedy, J., concurring), not administrative decisions about the implementation of existing "services, programs and activities." 28 C.F.R. § 35.130(d). The integration regulation could not validly cover the type of threshold resource-allocation decisions DAI seeks to challenge. *Cf. Olmstead*, 527 U.S. at 592 (declining to determine the integration regulation's validity). The Attorney General's implementing regulations, however broad in scope, cannot permissibly impose liability

for conduct beyond the ADA's express reach. *See, e.g.*, *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

E. Public Policy Supports the Distinction Between Level-of-Benefit and Discrimination Claims.

Extending Title II to cover DAI's level-of-benefit claim is also flawed as a matter of public policy and would ultimately impair rather than advance the ADA's underlying goals. New York has been at the forefront in promoting a broad array of community-based services for individuals with disabilities. JA232:752; SPA162-63. But other States would have scant incentive to follow New York's lead if they risked a lawsuit every time they offered a new service or benefit but did not immediately extend that service or benefit to all potentially eligible persons with disabilities. *See Bowen*, 476 U.S. at 348 (a "rule that would invalidate . . . attempts to proceed cautiously in awarding increased benefits might deter [legislatures] from making any increases at all").

Deterring state and local governments in this fashion would be particularly harmful to the very individuals DAI purports to represent. Under the district court's broad view of "integration," individuals with mental illness could always be more integrated if more comprehensive

benefits and services were provided. *Cf.* JA637:2370 ("virtually anyone with a chronic, debilitating psychiatric disorder can be provided care and treatment" in the community "with sufficient services provided"). States would accordingly risk ADA liability if they attempted to test new community program models by funding additional benefits and services for a limited number of individuals through pilot projects or trial initiatives. A rule that called these programs into question would discourage the very type of "controlled experimentation" that has led to critical innovations like supported housing. *Cf. Aguayo v. Richardson*, 473 F.2d 1090, 1109 (2d Cir. 1973) (States should not be placed "in a vise where [their] only choices in dealing with the problems of welfare are to do nothing or plunge into statewide action"). By confirming the ADA's distinction between level-of-benefit and discrimination claims, this Court would allow States to continue to develop new programs that benefit individuals with disabilities.

POINT II

THE STATE NEED NOT MODIFY ITS PROGRAMS TO GRANT DAI'S CONSTITUENTS A PREFERENTIAL ENTITLEMENT TO SUPPORTED HOUSING

Reversal is also required because the relief that DAI requests, an entitlement to supported housing, is not a "reasonable modification" under the ADA as a matter of law. The new entitlement will cost $65 million the first year, taking into account only presently quantifiable costs, and costs will escalate sharply thereafter. Ordering preferential expansion of supported housing on such a vast and untested scale—for DAI's constituents alone—fundamentally alters existing levels of supported-housing subsidies and impermissibly dictates the State's "allocation of available resources" generally. *Olmstead*, 527 U.S. at 604 (plurality op.).

The district court nonetheless rejected defendants' fundamental-alteration defense based upon its prediction that the State might reap future cost savings by increasing supported housing. But the court's remedial order does not condition the State's obligations on whether that prediction is borne out. To the contrary, it requires defendants to guarantee supported housing to thousands of additional individuals—

including future adult-home residents—regardless of the "increase [in] costs to the State" and regardless of future resource constraints. SPA226. The court also assumed that defendants would divert money from other mental-health programs and close adult homes if necessary to fund a new entitlement for DAI's constituents. But those measures will decrease the services available to other persons with disabilities, perhaps eliminating services for some people entirely. *Olmstead* does not require that inequitable result.

A. An Entitlement to Enhanced Supported-Housing Benefits Is Not a Reasonable Modification under Title II.

Title II's regulations require public entities to "make reasonable modifications to policies, practices, or procedures . . . to avoid discrimination because of disability." 28 C.F.R. § 35.130(b)(7). A benefit may be required as a reasonable modification only if the plaintiff demonstrates that "'but for' its disability, it would have received the ultimate benefit sought." *Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 755 (7th Cir. 2006) (en banc). DAI's constituents are not being deprived of supported housing—or any housing, for that matter—because of their disabilities. Rather, they are not guaranteed supported

housing because of funding constraints that limit the number of available apartments. JA551-52:2026-27.

Rather than seeking a modification to avoid discrimination because of disability, DAI seeks to expand current levels of supported-housing funding and to set aside additional benefits for its constituents *alone*, a preferential entitlement no other individuals would have. But a grant of "special substantive rights" such as "enhanced rental assistance . . . provided only to the plaintiff class" is not a reasonable modification under the ADA as a matter of law. *Henrietta D.*, 331 F.3d at 282-83; *see also Wright* 230 F.3d at 548.

B. DAI's Requested Relief Would Fundamentally Alter Existing State Services and Programs.

Even if a new entitlement program with increased benefits were a reasonable modification, the State would not be required to make modifications that—like the modifications here—"fundamentally alter the nature of the service, program, or activity" at issue. 28 C.F.R. § 35.130(b)(7). The fundamental-alteration defense grants States broad "leeway" in attempting to meet the diverse needs of individuals with mental disabilities. *Olmstead*, 527 U.S. at 605 (plurality op.); *see also*

id. at 610 (Kennedy, J., concurring) (fundamental alteration should be evaluated "with appropriate deference to the program funding decisions of state policymakers").

For example, even when plaintiffs seek placement into an existing community program with open and available slots, States may weigh the broader impact of immediate transfer on other state programs and services. While it was undisputed in *Olmstead* that Georgia would save thirty to sixty thousand dollars by moving plaintiffs into an available community program, the Court nonetheless remanded for consideration of the need and desire for community placement of other individuals with mental disabilities, the State's ability to actually realize immediate cost savings, and the State's need to maintain institutional-care options even if community placement were offered. *Id.* at 604-05 & n.15 (plurality op.).

The Court also noted that Title II's reasonable-modification standard would be satisfied if a State has implemented an "effectively working plan" to move individuals from state institutions to "less restrictive settings." *Id.* at 605-06 (plurality op.). And an effective plan may include a waiting list "for community-based treatment," so long as

the waiting list "move[s] at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated." *Id.* In such circumstances, it would work a fundamental alteration to give plaintiffs immediate, preferential access to community placement, thereby displacing others. *Id.* at 606 (plurality op.).

Here, in contrast to *Olmstead*, DAI does not seek placement of individuals into an existing program with open slots. The modification in this case is the creation of thousands of additional supported-housing apartments—4,500 new units at a minimum. Funding even just the first year's 1,500 units will require an additional $65 million in annual appropriations beyond what the Legislature has currently authorized. And DAI's constituents would be granted preferential access to those newly funded benefits—displacing other persons with mental illness who also would want supported housing and whose current circumstances may be far more dire than those of the adult-home residents.

Olmstead does not require that result. It directs courts to measure fundamental alteration in light of the State's "allocation of available resources" and the "responsibility the State has undertaken," not by ordering sweeping new responsibilities and allocation of millions

in additional funds. *Id.* at 604 (plurality op.). By any measure, an expansion on DAI's requested scale for one target population alone fundamentally alters existing levels of supported-housing benefits.

DAI's request for a new, preferential entitlement to supported housing is especially inappropriate because New York has implemented "an effectively working plan" to deinstitutionalize individuals from state facilities. *Id.* at 605-06 (plurality op.). The State has successfully "downsized and closed" many state-operated psychiatric facilities, "reinvest[ing] funds toward community-based services." SPA162. Indeed, the State has been recognized as a national leader in successfully expanding community-based programs, including community services and housing options like supported housing. SPA162-64; PX(4)-299 (explaining that New York "has the nation's most extensive" community-housing program for individuals with mental illness).

Such uncontested proof that the State is effectively implementing a plan to "deinstitutionalize disabled persons," and to maintain a range of services for individuals with disabilities, is more than sufficient to sustain a fundamental-alteration defense when plaintiffs seek an award of special, enhanced benefits. *ARC of Wash. State, Inc. v. Braddok*, 427

F.3d 615, 620 (9th Cir. 2005) ("So long as States are genuinely and effectively in the process of deinstitutionalizing disabled persons 'with an even hand' we will not interfere."); *Sanchez v. Johnson*, 416 F.3d 1051, 1067-68 (9th Cir. 2005) ("when there is evidence that a State has in place a comprehensive deinstitutionalization scheme, which, in light of existing budgetary constraints and the competing demands of other services . . . is effectively working, . . . courts will not tinker with that scheme") (citations and quotation marks omitted).

The district court acknowledged that New York engages in appropriate "*Olmstead* planning in a broad sense" (SPA193), but faulted defendants for not having a specific plan with defined numerical targets for moving adult-home residents to supported housing (SPA194-95). But *Olmstead* does not require such specific plans outside the context of unjustified institutionalization in state facilities. This case is not about the State's "obligation to deinstitutionalize eligible patients." *Frederick L. v. Dep't of Pub. Welfare*, 422 F.3d 151, 157 (3d Cir. 2005). New York has already met that goal with respect to individuals who reside in adult homes, a form of community housing. And while States do not have to offer additional benefits like supported housing as well, New

York has voluntarily done so and has further expanded supported-housing subsidies to levels largely unmatched in the nation. JA530:1940-41. These are reasons to defer to the State's administration of its own programs and services, not justifications for greater intrusion.

In rejecting defendants' fundamental-alteration claim, the district court also found that adult-home residents had been "excluded" from supported housing because the State's initial supported-housing efforts targeted individuals with the most urgent needs: the homeless, individuals residing in state psychiatric hospitals, and individuals leaving state prisons. SPA164, 200. But the fact that other "persons with mental illness have received higher priority" (SPA193) is evidence of planning and priority-setting in the expansion of community-based services, not discrimination. This is precisely what *Olmstead* leaves in state hands so long as the State is making genuine efforts, as New York has undisputedly done here.

In any event, DAI's constituents are in no way excluded from the State's current efforts. Adult-home residents have been included as a target population for supported housing since 2005. SPA163. Even

when individuals remain institutionalized by the State, a form of discrimination absent in this case, see *supra* Point I(B), *Olmstead* confirms that it is reasonable to ask individuals to wait for available community-program slots if, as here, the delay is attributable to funding constraints and priority determinations. 527 U.S. at 606 (plurality op.); *Sanchez*, 416 F.3d at 1067.

Moreover, if DAI's legal theory were correct, the State might have responsibilities reaching far beyond this case that should be considered in the fundamental-alteration analysis. DAI itself, for example, has filed an almost identical Title II suit seeking "more integrated" community housing for nursing-home residents. *Joseph S.*, 561 F. Supp. 2d at 292-93. The possible needs of those individuals, however, were not considered in this action. As a result, DAI's claimed constituents in this case may receive benefits not based on the equitable distribution of state funds and available state resources, but simply because their complaint was filed first. But as *Olmstead* warned, benefits and services should not be distributed based on "who commenced civil actions" rather than the State's assessments of relative need and priority. 527 U.S. at 606 (plurality op.).

C. The State Is Not Required to Implement a New Entitlement Program Based on Projected Cost Savings that May Not Occur.

The district court justified its injunction by predicting, based on the analysis of DAI's experts, that the State would ultimately save money by expanding supported housing because adult homes "over-utilize Medicaid services," billing for costly and unnecessary medical care. SPA176-77. The court estimated that Medicaid usage would be so much lower if DAI's constituents moved to supported housing that even taking into account the additional $7,370 cost of funding rental subsidies, the State would save $146 annually for each individual that moved from an adult home into a supported-housing apartment. SPA176-77, 181.[8]

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[8] The court did not base its prediction on validated studies. To calculate $146 in savings, the court simply compared past Medicaid costs for adult-home and supported-housing residents. But adult-home residents may incur higher Medicaid costs not because they receive unnecessary services, but because they require more treatment than individuals in supported housing, a model designed for individuals with more minimal treatment and supervision needs. This Court need not resolve that issue, however, to conclude that the district court's analysis was flawed for the reasons stated in the text.

But if that prediction is the linchpin of the court's fundamental-alteration analysis, the prediction should also have been incorporated into the court's remedy. Instead, the court ordered defendants to guarantee supported housing regardless of cost even if projected savings fail to materialize. SPA226. The omission of the very cost-savings limitation the court found critical is itself legal error.

The omission also reveals the underlying flaw in the court's analysis. DAI's cost estimates are precisely that—estimates, which rely on predictions about future savings and funding sources that *may or may not occur*. The entitlement program that DAI seeks, after all, is new and untested. There is no data to show, for example, how many former adult-home residents will require ACT or other intensive services to function safely and successfully in supported housing. Similarly, while the district court projected Medicaid savings, even maintenance of current Medicaid funding is not assured. *See* Devlin Barret & M.H. Saul, *State Budget In for a Loss*, Wall St. J., July 20, 2010, at A21 (explaining that "New York's budget took another blow . . . as Congress pulled away from providing more than $1 billion in expected [Medicaid] health-care funding"). Nor is stable funding for any

other mental-health program guaranteed in the current financial crisis; a recent emergency spending bill enacted over $325 million in cuts to mental hygiene and social services. *See* Press Release, N.Y. State Assembly, Significant Action Taken on State Budget (June 14, 2010), *available at* http://assembly.state.ny.us/Press/20100614/. The district court built in none of those unknown funding contingencies when it attempted to predict what future expenditures will ultimately be required.

The district court did not ignore the inherent uncertainty of DAI's predictions. But rather than finding this uncertainty a reason to refrain from ordering sweeping changes to state programs and services, the court faulted *the State* for failing to rebut DAI's claims about future savings. SPA184. That is a deeply flawed way to apply the fundamental-alteration defense. Conclusive proof about future cost and impact—particularly when pervasive changes are requested and broad new entitlements claimed—will rarely if ever be available. Defendants could not have produced concrete data for a hypothetically restructured system that has never been implemented. State officials are not charged with compiling data for programs that do not exist.

Moreover, defendants have good reason to proceed cautiously here, because the consequences of being wrong are potentially devastating. Once the State embarks on a radical expansion of supported housing, it cannot easily change course midway if costs exceed estimates. To develop supported housing, the State signs multiyear contracts with private providers that cannot easily be rescinded, and once individuals are in supported housing it may be harmful to try to move them elsewhere even if costs escalate. *See* PX(4)-299 ("moving is especially stressful for people with psychiatric disabilities and can contribute to problems and re-hospitalization"). And if DAI's constituents need additional high-demand services such as ACT, those services may be reduced or made unavailable to other individuals with mental illness, persons who are not involved in this litigation. To administer services and benefits on a system-wide basis, defendants must plan for all of these contingencies, and they must do so responsibly when future levels of mental-health funding remain deeply uncertain. *See, e.g.*, *Graham v. Richardson,* 403 U.S. 365, 374-75 (1971) (ensuring the fiscal integrity of government programs is a legitimate state interest); *Baker v. City of Concord*, 916 F.2d 744, 750 (1st Cir.

1990) (States may reasonably administer benefit programs for persons with disabilities "in a fiscally conservative fashion").

The district court's approach, by contrast, would require States to make multimillion-dollar bets on new benefit programs whenever a State cannot conclusively disprove a plaintiff's theory of future cost savings, even when the margin is as slim as the $146 here. Such a rule would improperly establish federal courts "as virtually continuing monitors of the wisdom and soundness of state fiscal administration," *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006) (quotation marks omitted), a task that the Supreme Court has instead left to state discretion. *See Olmstead*, 527 U.S. at 605 (plurality op.); *see also Mathews v. Diaz*, 426 U.S. 67, 86 (1976) (government benefits may appropriately be limited even if the limitation is broader "than necessary to protect the fiscal integrity" of the program as a whole); *Lyng v. Int'l Union, United Auto., Aerospace & Agricultural Implement Workers of Am.*, 485 U.S. 360, 373 (1988) (same).

Moreover, the district court's cost comparison is flawed on its own terms. If the court were correct that adult-home residents overuse Medicaid services, that fact should not require the State to move those

residents to another form of housing that will lock in the State's higher costs. The State might instead choose to step up enforcement actions against the providers that offer unnecessary services to adult-home residents. The appropriate comparison in assessing future costs for fundamental-alteration purposes is not to past Medicaid reimbursement levels that—according to DAI's own allegations—are both unnecessary and *avoidable*.

D. DAI's Request for a Preferential Entitlement Jeopardizes Services for Other Individuals with Disabilities.

The district court's order also effects a fundamental alteration of New York's services and programs to the extent it assumes that funds will be diverted from other mental-health programs, such as programs that support adult homes, to subsidize supported housing for DAI's constituents. DAI's suit covers fewer than 30 of the more than 380 adult homes statewide and only in one geographic location, New York City. SPA84-85. Reallocating resources from programs that assist homes statewide to benefit DAI's constituents in New York City will inequitably reduce services and affect living conditions for thousands of other adult-home residents.

It is undisputed that adult homes are a beneficial option for some individuals, and sometimes they are the only option—for example, some residents may be disabled but are ineligible for supported housing because they are not mentally ill. If homes close because support programs are terminated or because operating costs become too high after large numbers of residents leave all at once for supported housing, individuals with disabilities who need or desire adult-home residences would potentially be displaced from their chosen residence with no guarantee of alternate housing. And closure will adversely affect other individuals who desire adult-home residence in the future. The district court's order thus jeopardizes services for both current and future residents, placing those individuals at risk of homelessness or other inappropriate living situations. Guaranteeing DAI's constituents *preferred housing*—by reducing and potentially denying other persons with disabilities *any housing option* at all—would be "inequitable" and a fundamental alteration of existing programs and services. *Olmstead*, 527 U.S. at 604 (plurality op.).

For the same reason, reallocating resources across the entire state mental-health budget—at a time when many other services and

programs are at risk because of New York's fiscal crisis—is not a reasonable modification under Title II. See *supra* at 60; JA847:3245-47. OMH serves over 600,000 New Yorkers with mental illness through thousands of programs that it licenses, oversees, funds, or operates. JA824-26:3155-61; JA827:3164; JA850:3259). It may be impossible to undo the type of systemic changes the district court ordered if the court's cost predictions are incorrect or if underlying assumptions—for example, about available funding for maintaining essential mental-health services—prove untrue. "[T]he ADA is not reasonably read to impel States" to place other persons with disabilities "at risk" to grant DAI's constituents enhanced benefits. *Olmstead*, 527 U.S. at 604 (plurality op.).

POINT III

THE REMEDIAL ORDER IS OVERBROAD

Even if DAI had established a violation of Title II of the ADA, the scope of the court's Remedial Order would be overbroad. While the district court might in that case have been justified in entering a declaratory judgment, it would not have been justified in issuing a

Remedial Order so sweeping that it deprives state officials of authority to implement and administer the very program the court mandates.

The Order improperly requires the State to finance a program whose essential components are dictated and controlled by *other parties*. For example, it denies the State the power to draft and negotiate its own contracts with private supported-housing providers. *See* SPA238 ¶ 7 (requiring defendants to submit requests for proposals to DAI and the United States for review and approval and to "negotiate" with plaintiffs over the contracts' terms, subject to final resolution by the court). And it places critical eligibility determinations—including assessments of whether individuals will likely be an "imminent danger to themselves or others" if housed in supported housing (SPA238-39 ¶ 10)—not in the hands of treatment professionals, as *Olmstead* requires, but in the exclusive control of private supported-housing providers who do not have to rely on professional assessments. *Olmstead*, 527 U.S. at 587 (mandating community placement only "when the State's treatment professionals have determined that community placement is appropriate"); *id.* at 610 (Kennedy, J., concurring) ("[t]he opinion of a responsible treating physician in

determining" whether community placement is appropriate is of "central importance").

In addition to barring the State from determining if an individual may be unsafe in supported housing, the court also expanded eligibility to individuals without the level of need the State previously required. Although "[t]he evidence at trial demonstrate[d]" that supported housing was "expect[ed] . . . to serve individuals with *serious* mental illness" (SPA147) (emphasis added)—an eligibility requirement reaffirmed whenever the State solicited proposals from private providers to expand supported housing[9]—the court's Remedial Order extends benefits to individuals with almost any form of mental illness serious or not (SPA225, 238-39 ¶ 10).

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[9] *See, e.g.*, SX(1)-596 ("[t]he intent of Supported Housing" is to create housing opportunities for "individuals who are seriously and persistently mentally ill"); SX(2)-86 (supported housing "must be targeted to adults with serious and persistent mental illness"); SX(2)-220 (supported housing targeted at adult-home residents "who suffer from a serious and persistent mental illness"); SX(3)-142 ("announc[ing] the availability of funds for the development of Supported Housing for persons with serious mental illness"); SX(4)-194 (same); SX(4)-222 (same).

What discretion defendants retain under the Remedial Order to implement the new supported housing program is subject to two layers of review—first by a court-appointed monitor (and the monitor's staff) and then by the court itself, which retains ultimate authority to resolve continuing questions about future program implementation. SPA240 ¶ 13. Those questions will be extensive and ongoing. Despite mandating a sweeping new entitlement, the court's injunction leaves many practical questions about day-to-day implementation unresolved. For example, it is unclear what additional services must be provided to DAI's constituents. The court ordered defendants to evaluate the need for additional services continually and to report every ninety days on a wide array of similar implementation issues. SPA238, 241 ¶¶ 8, 16. All of these detailed decisions about the practical administration of the injunction remain subject to future dispute, litigation, and resolution by the court rather than by the officials charged with overseeing the State's mental health system.

The court's injunction thus imposes the very "federalism costs" that Justice Kennedy cautioned against in *Olmstead*: of referring every state decision regarding "the administration of treatment programs and

the allocation of resources to the reviewing authority of the federal courts." 527 U.S. at 610. The Supreme Court has repeatedly emphasized that state officials should be granted "the opportunity to devise their own solutions," *Missouri v. Jenkins*, 495 U.S. 33, 52 (1990), before a court issues a structural injunction that "enmeshe[s]" the court "in the minutae" of state program administration, *Lewis v. Casey*, 518 U.S. 343, 361-62 (1996) (quotation marks omitted). "The difference between the two approaches is far more than a matter of form." *Jenkins*, 495 U.S. at 51. Permitting state officials "to devise and implement [their own] remedies not only protects the function" of state agencies; it also "places the responsibility" of formulating a remedy on those with greatest familiarity and expertise in administering complex state programs. *Id.* at 51-52.

As a result, before taking the "drastic step" of "not only intrud[ing] on [state] authority but circumvent[ing] it altogether . . . the District Court was obliged to assure itself that no permissible alternative would have accomplished the required task." *Id.* at 51. Here there was a permissible and far less intrusive alternative. The district court could have issued a declaratory judgment identifying the relevant statutory

violation without prescribing the specific program the State must adopt, and without denying state officials the opportunity to administer and implement that program. There is no reason to believe the court will do a better job than defendants in expanding supported housing, a task defendants have undertaken since 1990—by all accounts successfully and well, even if not to the extent DAI would like. Neither the ADA nor basic federalism principles permit displacement of state agencies and divestiture of a State's control over its own programs when there is no reason to doubt that state officials will fully and faithfully comply with a declaratory judgment defining their obligations under Title II.[10]

Here, retaining state discretion and flexibility in expanding supported housing is especially important. The entitlement program the court ordered is new and untested. There is no model to follow: no other State offers even remotely comparable benefits on the scale the

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[10] While the district court criticized defendants for failing to submit a remedial plan it found satisfactory, that is no reason to presume bad faith in implementing the court's judgment. Had defendants failed to advocate for a more limited injunction, they risked being penalized on appeal for not "vigorously . . . oppos[ing]" the injunction's terms. *Lewis*, 518 U.S. at 363 n.8 (noting the dissent's position that the State was responsible for the scope of the challenged injunction by not contesting the injunction's terms).

court has required. And defendants are operating not with guaranteed program appropriations but during a time of debilitating program cuts. SPA188; *supra* at 60. Implementing the court's remedy in any form will require myriad day-to-day judgments with spillover effects across multiple state programs, and each program choice will affect not only the safety and stability of DAI's constituents but many other individuals with mental illness. "Broad remedial decrees" like the injunction in this case improperly "strip state administrators of . . . the flexibility necessary to make reasonable judgments on short notice under difficult circumstances." *Lewis*, 518 U.S. at 385 (Thomas, J., concurring).

That result is particularly troubling when the federal "decree has the effect of dictating state . . . budget priorities" for years into the future. *Horne v. Flores*, 129 S. Ct. 2579, 2594 (2009). The court's fundamental-alteration analysis, even if correct, is unavoidably static. It cannot account for changing circumstances, evolving budgetary constraints, or new policy insights. Defendants cannot predict, for example, what the State's mental-health budget will be in the future and what other public-welfare needs will arise. Federal courts have no

expertise in operating community-housing programs or balancing priorities across a statewide mental-health system, yet the Remedial Order places these decisions under the court's continuing control.

The Remedial Order is also overly broad because it is not tailored to remedy the violations of Title II that the court found to exist. *See Lewis*, 518 U.S. at 357; *see also Knight v. Alabama*, 476 F.3d 1219, 1229 n.19 (11th Cir. 2007) (the "request for a remedy untethered to a constitutional violation . . . misunderstands the nature of judicial power"). The court enjoined defendants against whom no ADA violations were even asserted. *See* SPA201 (declining to dismiss DOH and the Commissioner of DOH despite DAI's withdrawal of claims against both defendants). And although DAI failed to identify a *single* adult-home resident who had applied for and been denied supported housing, the court nonetheless mandated an entirely new, extensive "in-reach" protocol that requires providers to promote supported housing even to individuals "who decline" or "are ambivalent" about moving to supported housing. SPA237-38 ¶ 6. Similarly, the Remedial Order guarantees supported housing to future adult-home residents who have not been subject to any type of cognizable injury under Title II.

SPA234-35 ¶ 1. Individuals who are currently living in their own privately funded housing, for example, could voluntary elect to move into an adult home and would then be guaranteed state-funded supported housing under the Court's order.

"[H]arm from one particular inadequacy in government administration" does not authorize an injunction that redefines how an entire program should be administered. *Lewis*, 518 U.S. at 357. Because the Remedial Order improperly divests state officials of discretion to implement the supported-housing program the court found necessary and does so in the absence of actual injury to support many of the injunction's requirements, it should be vacated.

POINT IV

DAI LACKS STANDING TO ASSERT CLAIMS IN ITS OWN NAME ON BEHALF OF ADULT-HOME RESIDENTS

The district court's judgment should also be vacated for an entirely independent jurisdictional reason: DAI lacks standing. To establish standing, an organization suing in its own name must establish either a direct injury to itself or injury to its members under

the doctrine of associational standing. *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998). Because DAI does not allege any direct harm to its own organization from the state actions it challenges, it has standing only if it can assert the rights of the adult-home residents themselves.

A traditional membership organization has associational standing if, among other prerequisites, "its members would otherwise have standing to sue in their own right." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). DAI, however, is not a traditional membership organization. It is an advocacy organization established under the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"), 42 U.S.C. §§ 10801-10851. Its alleged "constituents"—persons with mental illnesses—are not actually members of DAI.

In *Hunt*, the Supreme Court held that such nontraditional organizations may nevertheless have associational standing if, among other things, their constituents "possess all of the indicia of membership in an organization," such as electing the organizations' leadership and financing the organizations' activities. 432 U.S. at 344-45. But DAI does not claim that its constituents have any active affiliation with the

organization, let alone authority to guide its actions. DAI in effect deems any person with mental illness whom it could *potentially* represent as a client as a "constituent," a class of persons defined by potential legal claims rather than organizational ties to DAI (Compl. ¶¶ 8-9).

For these reasons, courts have properly held that PAIMI organizations like DAI do not have associational standing to sue in their own name on behalf of potential clients. *See Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 810 (8th Cir. 2007); *Ass'n for Retarded Citizens v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994); *Tenn. Prot. & Advocacy, Inc. v. Bd. of Educ.*, 24 F. Supp. 2d 808, 815 (M.D. Tenn. 1998). Although two other courts have found that PAIMI organizations do have associational standing, *see Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1112 (9th Cir. 2003); *Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999), those rulings cannot be reconciled with *Hunt*.

Under *Hunt*, a nonmembership organization has associational standing only if its constituents enjoy two key indicia of membership: representation and control. It is not enough that the organization may

have an advisory board, a majority of which is made up of individuals with mental illness or their family members. *See* 42 U.S.C. § 10805(a)(6)(B). Representation means more than the mere presence of some constituents in the organization's leadership; rather, as in the voting context, it signifies a meaningful opportunity for each affected constituent to have his or her individual interests reflected in the organization's actions. Similarly, control means that constituents as a whole have some meaningful way of directing the organization's activities, whether through funding or some direct role in decision-making. The Ninth and Eleventh Circuit decisions erroneously permit PAIMI organizations to sue as plaintiffs in their own name when their leadership is not chosen by their constituents and when their activities are accordingly divorced from any meaningful control by the persons they purport to represent.

DAI's lack of standing to sue in its own name will not impair its mission. PAIMI organizations may file suit by identifying specific affected individuals and by bringing actions in their names. Indeed, DAI itself has done so in other actions seeking similar relief. *See, e.g., Joseph S.*, 561 F. Supp. 2d 280 (suit naming three nursing-home

residents as plaintiffs). The need to identify and litigate on behalf of specific plaintiffs, however, does serve a critical, threshold purpose. It ensures that an organization is actually acting as a true representative of its constituents rather than pursuing an independent policy agenda. When an association has members, "the very forces that cause individuals to band together . . . provide some guarantee that the association will work to promote their interests." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Brock*, 477 U.S. 274, 290 (1986). When that safeguard is missing, the vital interests of some constituents may go unheard and remain unprotected.

For this reason, associational standing requirements are not mere formalism. They serve a protective function similar to Federal Rule of Civil Procedure 23, which governs class actions, in preserving basic fairness and ensuring appropriate safeguards when the "collective adjudication of common rights" is at issue. *Brock*, 477 U.S. at 290. Ignoring threshold standing limitations leads to litigation like this case—where the asserted right is not "common" to all individuals with mental illness, but is rather a preferential right for some to receive state benefits before others. Unlike cases where true associational

standing is shown, it cannot "reasonably be supposed that the remedy, if granted, will inure to the benefit" of all persons with mental illness who could be deemed DAI's constituents. *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004) (quotation marks omitted). The remedy here requires the State to guarantee preferential benefits to a subset of DAI's constituents ahead of others who may also seek state services or benefits.

Requiring PAIMI organizations to file suit on behalf of named, identifiable individuals avoids this problem by making the scope and purported impact of the litigation transparent. It forces organizations to act more directly in their constituents' interests, thus promoting the purpose of PAIMI, rather than filing actions where the interests of some constituents may be advanced at the expense of others who are not named or even advised of the suit.[11]

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[11] This Court's nonprecedential order in *Bernstein v. Pataki*, 233 F. App'x 21, 24-25 (2d Cir. Apr. 3, 2007), does not compel a contrary result. That case was a putative class action, and one of the organization's constituents had been named as a plaintiff in addition to the organization's director. Although this Court declined to dismiss the complaint on standing grounds, it reserved the question of "whether the participation of individual patients may become necessary in

(*continued on next page*)

The eleventh-hour intervention of the United States at the remedial phase cannot cure the lack of standing at the time this case was brought. "Intervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action." 7C Charles A. Wright et al., *Federal Practice and Procedure* § 1917, at 581 (3d ed. 2007). For example, courts have dismissed cases when the initial lawsuit was filed prematurely, even though the intervenors' claims were timely, *see United States ex rel. Tex. Portland Cement Co. v. McCord*, 233 U.S. 157, 163-64 (1911) ("The intervention could not cure this vice in the original suit."), and when the initial lawsuit involved purely state-law claims between nondiverse parties, even when a federal agency seeks to intervene and the mere presence of the agency would normally confer federal jurisdiction, *see Vill. of Oakwood v. State Bank & Trust Co.*, 481 F.3d 364, 368-69 (6th Cir. 2007). And while courts may have the discretion to treat the complaint of an intervenor as a separate action and to continue ongoing litigation on that basis (assuming that the intervenor meets all other jurisdictional

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subsequent stages of this litigation" after the denial of motions to dismiss. *Id.* at 25 n.1.

requirements), *see Hackner v. Guar. Trust Co.*, 117 F.2d 95, 98-99 (2d Cir. 1941), there is no basis for doing so here, because the United States did not litigate the issue of liability.

Because DAI lacks standing to sue in its own name, the district court's judgment should be vacated and the complaint dismissed.

CONCLUSION

The Court should vacate the injunction and enter judgment in defendants' favor.

Dated: New York, NY
July 23, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 14,613 words, as permitted by this Court's July 15, 2010 order, and complies with the type-volume limitations of Rule 32(a)(7)(B).

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Oren L. Zeve

CERTIFICATE OF SERVICE

I, Cecelia C. Chang, do hereby certify that on the 23rd day of July, 2010, I served or caused to be served a copy of the attached Brief, Joint Appendix, and Special Appendix via the CM/ECF System as required under L.R. 25.1(h)(2) upon the following counsel of record:

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