No. 14-1082

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ROSEMARY SCIARRILLO, *et al.*,

Plaintiffs-Appellants

v.

CHRISTOPHER CHRISTIE, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING THE DEFENDANTS-APPELLEES AND URGING AFFIRMANCE IN PART

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LEGISLATIVE HISTORY:

MISCELLANEOUS:

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INTEREST OF THE UNITED STATES

This case raises an important issue regarding the interpretation and application of Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.* (Title II or the ADA), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (Section 504), and the Supreme Court's decision in *Olmstead* v. *L.C.*, 527 U.S. 581 (1999), which interpreted the United States Department of Justice's regulations promulgated under Title II of the ADA. The Department of Justice has

substantial enforcement responsibilities under Section 504 and Title II of the ADA. The Department of Justice issued regulations implementing Section 504 and Title II, is authorized to bring civil actions to enforce these statutes, 29 U.S.C. 794, 794a; 42 U.S.C. 12133-12134; 28 C.F.R. Pts. 35, 41, and coordinates the implementation and enforcement of Section 504 by all federal agencies, 29 U.S.C. 794a; 28 C.F.R. Pt. 41 & App. A (Exec. Order 12,250), including the United States Department of Health and Human Services, whose Medicaid Act funds are used for individuals both in institutions and in community placements.

The appellants and their amici argue that the appellants have a right under *Olmstead* to remain in a state institution of their choosing. Opening Br. 8-18; Amicus Br. 4, 7-11, 21-22.[1] In several recent cases, the United States, as a party or *amicus curiae*, argued that *Olmstead* held only that unnecessary institutionalization and segregation violates Title II, and that the integration mandates of Title II, Section 504, and the implementing regulations do not create a right to an institutional placement. See, *e.g.*, *Illinois League of Advocates for the Developmentally Disabled* v. *Quinn*, 13-CV-1300 (N.D. Ill.); *United States* v. *Virginia*, 12-CV-59 (E.D. Va.); *Carey* v. *Christie*, 12-CV-2522 (D.N.J.); *Disability*

[1] "Opening Br. __" refers to pages of the plaintiffs-appellants' opening brief filed in this Court on March 18, 2014. "Amicus Br. __" refers to pages of the *amicus curiae* brief filed by VOR, Inc. (formerly Voice of the Retarded, Inc.) in this Court on March 25, 2014.

Rights N.J., Inc. v. *Velez*, 05-CV-4723 (D.N.J.). As the Department enforcing Title II and Section 504 and issuing and overseeing the implementing regulations, the United States has a strong interest in the proper interpretation of these statutes and their integration mandates, as interpreted in *Olmstead*.

STATEMENT OF THE ISSUE

The United States' brief is limited to the following issue:

Whether the integration mandate of Section 504, Title II, and their implementing regulations, as interpreted in *Olmstead*, provide a right to receive services in an institution.[2]

STATEMENT OF THE CASE

1. Facts And Procedural History

The appellants (plaintiffs in the district court) are residents of the Woodbridge Developmental Center and the North Jersey Developmental Center. J.A. 8 (Dec. 13, 2013, Opinion); J.A. 39-45, 50 (Complaint).[3] These are intermediate care facilities for individuals with intellectual disabilities (ICF/IID), operated by the State of New Jersey, that provide housing, habilitation, behavioral,

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[2] The United States takes no position on any other issue presented in this appeal.

[3] "J.A. __" refers to pages of the consecutively paginated Joint Appendix and Addendum filed in this Court on March 18, 2014. "R. __ at __" refers to pages of documents filed in the district court, identified by docket number.

and medical services and support for people with intellectual and developmental disabilities. J.A. 8 (Dec. 13, 2013, Opinion); J.A. 47-48, 50-51 (Complaint). New Jersey decided to close these two institutions and offered the appellants the option of a community placement or placement at another state institution. J.A. 8-9 (Dec. 13, 2013, Opinion).

In their complaint, the appellants alleged that, once New Jersey decided to close these institutions, treating professionals in the institutions have concluded that each of the appellants would be best served in an alternative placement. J.A. 58. The appellants claimed that the assessments supporting alternative placements were politically-motivated and were based on the State's desire to close the two institutions rather than the plaintiffs' actual medical needs, and that the treating medical staff fabricated fitness for community placement. J.A. 58-59, 64-65, 68-69 (Complaint). The appellants asserted that they have not consented to be transferred to community placements because they have not had the benefit of their treating professionals' independent judgment as to what placement would be most appropriate for each plaintiff. J.A. 66-69 (Complaint). The appellants contend that they would be "most appropriately" served at the institutions in which they currently reside (J.A. 65-66 (Complaint)), and also question the basis on which New Jersey decided to close these two institutions (J.A. 67-68, 71-72 (Complaint)). The appellants acknowledge, however, that the State has offered them placements

in other institutions. J.A. 66, 70 (Complaint); see also J.A. 9 (Dec. 13, 2013, Opinion); but see Opening Br. 7 n.1.

On June 5, 2013, the appellants filed a putative class action on behalf of themselves and all other residents of these two institutions, asserting violations of Title II, Section 504, the Medicaid Act, and the Due Process Clause of the Fourteenth Amendment. J.A. 8-10 (Dec. 13, 2013, Opinion); J.A. 48, 75-87 (Complaint).

On September 9, 2013, the state appellees (defendants in the district court) moved to dismiss the complaint. R. 4. They argued, in pertinent part, that the appellants' Title II and Section 504 claims should be dismissed because these statutes require that "States * * * serve individuals with disabilities in the least-restrictive environment appropriate to their needs," and "do not compel a State to serve individuals in their chosen institutions." R. 4-1 at 8 (Motion to Dismiss). The state appellees argued that the appellants had failed to state a claim under Title II or Section 504 because while both statutes "forbid 'unjustified institutionalization,'" neither statute establishes that transferring an individual out of a particular institution is discrimination. R. 4-1 at 13 (Motion to Dismiss) (quoting *Olmstead* v. *L.C.*, 527 U.S. 581, 600-601 (1999)).

On September 13, 2013, the Department of Justice filed a statement of interest in support of dismissal of the appellants' Title II and Section 504 claims.

R. 7. The Department of Justice argued that the appellants do not have a right under Section 504, Title II, or their implementing regulations to prevent their transfer and thereby to remain in a particular institution. R. 7 at 5, 7-10 (Statement of Interest). The Department of Justice argued that there is no right under Section 504 or Title II to placement in a particular institution. R. 7 at 5, 8-9 (Statement of Interest).

2. The District Court's Decision

On December 13, 2013, the district court granted the state appellees' motion to dismiss. J.A. 6-7 (December 13, 2013, Order); J.A. 8-22 (Dec. 13, 2013, Opinion). The district court rejected appellants' argument that, under *Olmstead*, providing a community placement can be a form of disability-based discrimination prohibited by Section 504 and Title II. J.A. 14 (Dec. 13, 2013, Opinion). To the contrary, the district court found that *Olmstead* established only that it is a violation of Section 504, Title II, and their implementing regulations "'to force developmentally disabled patients to reside in institutions when they are able and willing to live' in more integrated community settings." J.A. 13 (Dec. 13, 2013, Opinion) (quoting this Court's decision in *Benjamin* v. *Department of Pub. Welfare*, 701 F.3d 938, 942 (3d Cir. 2012)). Accordingly, the district court held that the appellants' relocation out of the two institutions slated for closure was not

"discrimination on the basis of disability in violation of federal law" and dismissed the appellants' Title II and Section 504 claims. J.A. 15 (Dec. 13, 2013, Opinion).

SUMMARY OF THE ARGUMENT

The appellants do not have a right enforceable under Title II, Section 504, or *Olmstead* v. *L.C.*, 527 U.S. 581 (1999), to remain in institutions that the State has determined should be closed. The appellants argue that *Olmstead* requires the State to permit them to remain in these two institutions unless they consent to transfer, and therefore transferring them against their preference out of the two state institutions slated for closure is actionable discrimination under Title II and Section 504. The appellants and their amici misconstrue the integration mandates of Title II, Section 504, and their implementing regulations, distort the holding of *Olmstead*, and attempt to define a new form of discrimination not contemplated by these statutes. The district court properly rejected these arguments, and this Court should affirm dismissal of the appellants' Title II and Section 504 claims.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THERE IS NO ENFORCEABLE RIGHT TO REMAIN IN AN INSTITUTION UNDER TITLE II, SECTION 504, OR *OLMSTEAD*

A. Congress Enacted Section 504 And The ADA To Eliminate Discrimination Against Individuals With Disabilities, Including Isolation, Segregation, And Unnecessary Institutionalization

Section 504 and the ADA redress discrimination against individuals with disabilities, which includes isolation, segregation, and unnecessary institutionalization. Nothing in the statutory text, legislative histories, or implementing regulations supports the appellants' argument that transferring individuals from a facility slated for closure is actionable discrimination under Section 504, Title II, or their implementing regulations, as interpreted in *Olmstead* v. *L.C.*, 527 U.S. 581 (1999).

1. Section 504 "was the first broad federal statute aimed at eradicating discrimination against individuals with disabilities." *Helen L.* v. *DiDario*, 46 F.3d 325, 330 (3d Cir.), cert. denied, 516 U.S. 813 (1995). Section 504 provides that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a).

With this law, Congress sought to rectify "the country's 'shameful oversights,' which caused the handicapped to live among society 'shunted aside, hidden, and ignored'" and to be "invisibl[e] * * * in America." *Alexander* v. *Choate*, 469 U.S. 287, 295-296 (1985) (quoting 117 Cong. Rec. 45,974 (1971); 118 Cong. Rec. 525-526 (1972)). Accordingly, as part of its anti-discrimination precepts, Section 504 regulations have an "integration mandate" that requires recipients of federal funds to "administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons." 28 C.F.R. 41.51(d). In this manner, "Section 504 of the Rehabilitation Act has served not only to open up public services and programs to people with disabilities but has also been used to end segregation." H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 49 (1990) (House Report (Part III)).

2. In the late 1980s, Congress acknowledged that "then current laws were 'inadequate' to combat 'the pervasive problems of discrimination that people with disabilities are facing.'" *Helen L.*, 46 F.3d at 330 (quoting S. Rep. No. 116, 101st Cong., 1st Sess. 18 (1989) (Senate Report)); H.R. Rep. No. 485(II), 101st Cong., 2d Sess. 47 (1990) (House Report (Part II)). Some of the forms of discrimination that concerned Congress were segregation of individuals with disabilities in institutions and their concomitant exclusion from the community and society at large. Senate Report 6 ("One of the most debilitating forms of discrimination is

segregation imposed by others."); House Report (Part II) 29 ("Discrimination against people with disabilities includes segregation[] [and] exclusion."). "Both branches of Congress concluded: '[T]here is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities *and for the integration of persons with disabilities into the economic and social mainstream* of American life.'" *Helen L.*, 46 F.3d at 331 (quoting Senate Report 20; House Report (Part II) 50); see also H.R. Rep. No. 485(IV), 101st Cong., 2d Sess. 23 (1990).

To this end, Congress enacted the ADA in 1990. "The ADA is a comprehensive piece of civil rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation." House Report (Part III) 26. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. Title II "incorporates the 'non-discrimination principles' of [S]ection 504 * * * and extends them to state and local governments." *Helen L.*, 46 F.3d at 331 (quoting *Easley* v. *Snider*, 36 F.3d 297, 300 (3d Cir. 1994)). The ADA specifies that discrimination against individuals with disabilities includes "segregation" and "institutionalization." 42 U.S.C. 12101(a)(3) and (5).

As part of the ADA, Congress set forth findings that indicate the legislation was intended to, among other things, remedy the unnecessary isolation and segregation of persons with disabilities, including institutionalization. Congress specifically found that "historically, society has tended to isolate and segregate individuals with disabilities, and * * * such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem"; that "discrimination against individuals with disabilities persists in such critical areas as * * * institutionalization"; and that "the Nation's proper goals regarding individuals with disabilities are to assure * * * full participation[] [and] independent living." 42 U.S.C. 12101(a)(2)-(3) and (7); see also House Report (Part III) 49-50 ("The purpose of [T]itle II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life."). These findings reveal Congress's judgment that the impermissible discrimination the ADA was intended to redress includes unnecessary institutionalization.

3. The ADA directs the Department of Justice to promulgate implementing regulations. 42 U.S.C. 12134. Congress specified that such regulations "shall be consistent" with the ADA and with the "coordination regulations" issued under Section 504. 42 U.S.C. 12134(b). The specified "coordination regulations" include Section 504's integration mandate regulation, 28 C.F.R. 41.51(d).

Therefore, in enacting the ADA, Congress specifically ratified the integration mandate previously promulgated under Section 504.

Consistent with congressional directive, the Department of Justice promulgated regulations that include an integration mandate identical to that found in Section 504's regulations: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d); see also 28 C.F.R. 41.51(d). The preamble to the Department's Title II regulations explains that "[i]ntegration is fundamental to the purposes of the [ADA]." 28 C.F.R. Pt. 35, App. B at 682; Final Rule, Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 35,694, 35,703 (July 26, 1991). The Department further explained that the "most integrated setting appropriate to the needs of qualified individuals with disabilities" means "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. Pt. 35, App. B at 685; 56 Fed. Reg. at 35,705.

The statutory language, purpose, history, and implementing regulations reveal that Section 504 and the ADA seek to integrate individuals with disabilities into the social mainstream. These authorities do not create a right to institutional placement.

B. Olmstead *Held Only That Unnecessary Segregation Of Individuals With Disabilities In Institutions Is Discrimination Under Title II And Its Implementing Regulations*

The appellants and their amici incorrectly claim that because the appellants do not consent to their transfer, they have a right under *Olmstead* to remain in a state institution slated for closure. Opening Br. 12-13; Amicus Br. 6-11. This argument misstates the issue presented in *Olmstead* and the Court's holding.

In the *Olmstead* plurality decision, the Supreme Court interpreted Title II's anti-discrimination provision and its integration mandate. After examining congressional findings, statutory language, implementing regulations, and the views of the government, the majority of the Court held that "[u]njustified isolation * * * is properly regarded as discrimination based on disability" under Title II of the ADA. *Olmstead*, 527 U.S. at 597. Therefore, Title II "require[s] placement of persons with mental disabilities in community settings rather than in institutions * * * when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated." *Id.* at 587.

Because the two *Olmstead* plaintiffs were qualified for and desired a community placement, the Court did not decide any issue related to individuals with disabilities who prefer to receive services only in an institution. See 527 U.S.

at 593, 602-603. In fact, the majority of the Court specifically noted that there was "no genuine dispute" that the two plaintiffs were qualified for and desired a community placement. *Id.* at 602-603. Thus, the only issue the majority of the Court decided in *Olmstead* was whether the State had impermissibly discriminated against the two plaintiffs in that case by unnecessarily continuing to keep them in an institution.[4]

In the course of the opinion, the majority held that, consistent with the ADA and its regulations, a State must provide services in the most integrated setting appropriate to a person's needs. *Olmstead*, 527 U.S. at 587, 597. The Court also explained that there was no "federal requirement that community-based treatment be imposed on patients who do not desire it." *Id.* at 602 (citing 42 U.S.C. 12132; 28 C.F.R. 35.130(d) and (e)(1)). This observation that federal law does not require a community placement when it is not desired does not, however, create a right for any individuals with a disability to remain in an institution or to choose a particular institution in which they will receive services. This is evident from the majority's statement that "[w]e do not in this opinion hold that the ADA imposes on the States a 'standard of care' for whatever medical services they render, or that the

[4] The *Olmstead* decision also discussed a State's fundamental alteration defense; however, this portion of the opinion was joined by only four Justices. 527 U.S. at 587.

ADA requires States to provide a certain level of benefits to individuals with disabilities." *Id.* at 603 n.14 (citation and internal quotation marks omitted).

The appellants' and their amici's claim that *Olmstead* confers a right to institutional services (see Opening Br. 8-13; Amicus Br. 7-11) is in direct conflict with this statement from the *Olmstead* majority, see 527 U.S. at 603 n.14. As the text of the majority's decision makes clear, States are not required to offer a certain level of benefits or type of care. Rather, the *Olmstead* majority held "that States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide." *Ibid.*

In *Olmstead*, the Supreme Court decided that unnecessary segregation in an institution was a form of discrimination on the basis of disability. 527 U.S. at 597 ("Unjustified isolation, we hold, is properly regarded as discrimination based on disability."); see also *id.* at 600 ("Congress explicitly identified unjustified 'segregation' of persons with disabilities as a 'for[m] of discrimination.'") (brackets in original; citation omitted). *Olmstead* did not review the appropriateness of the medical care either of the two plaintiffs was receiving, nor did it create a right for individuals to use the ADA to challenge the care they are receiving by alleging that the treatment is discrimination on the basis of disability. See *id.* at 603 n.14. The fact that Title II and *Olmstead* require a State to place people in community-based settings when the individuals do not oppose and are

appropriately suited for such placements does not establish, as a matter of anti-discrimination law, that there is a legally enforceable *prohibition* on such placements absent consent under the nondiscrimination language of Section 504 or the ADA.

C. The Department Of Justice's Views On The Proper Interpretation Of Title II Warrant Respect And Substantial Deference

The Supreme Court recognized in *Olmstead* that as the federal agency charged with issuing Title II's implementing regulations, the Department of Justice's views on the proper interpretation of Title II "warrant respect." 527 U.S. at 597-598; see also *Helen L.*, 46 F.3d at 331-332 (noting that the Department of Justice's regulations, interpretation of Title II, and construction of the statutory scheme should be given "substantial deference" and "[c]onsiderable weight") (citation omitted). The Department of Justice has consistently taken the position that the discrimination Title II prohibits includes unnecessary institutionalization of individuals with disabilities. *Olmstead*, 527 U.S. at 597-598. The Department of Justice's consistent position has been that nothing in the ADA, its implementing regulations, or the *Olmstead* decision supports the appellants' charge that transferring individuals with disabilities to an integrated setting, or if they prefer, another institution, constitutes discrimination.

To be sure, the ADA provides that it shall not "be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity,

or benefit which such individual chooses not to accept." 42 U.S.C. 12201(d); see also 28 C.F.R. Pt. 35, App. B at 685 (providing that "persons with disabilities must be provided the option of declining to accept a particular accommodation"). The Department of Justice has explained that this provision and corresponding regulation were added to make clear that the ADA does not require individuals with disabilities to accept special accommodations and services aimed at individuals with disabilities where those accommodations or services actually may segregate those individuals. 56 Fed. Reg. at 35,705. Instead, those individuals may choose to participate in the regular services already offered to individuals without disabilities. *Ibid.* For example, "a blind individual may choose to decline to participate in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibits at his or her own pace with the museum's recorded tour." *Ibid.* The right this language establishes to refuse an offered modification or accommodation does not create a right to institutionalized care. As explained previously, the ADA prohibits discrimination, one form of which is unnecessary isolation, segregation, and institutionalization. See pp. 12-15, 17-18, *supra*. It would be incongruous to interpret statutory language and an implementing regulation, as the appellants do here, to defeat that Congressional goal.

D. The Appellants May Not Contest Their Transfer From Institutions The State Has Selected For Closure Under Title II, Section 504, Or Olmstead

Nothing in Title II or *Olmstead* forbids a State from closing an institution. See *Baccus* v. *Parrish*, 45 F.3d 958, 961 (5th Cir. 1995) (rejecting plaintiffs' challenge to a state task force's recommendation to close two schools for people with intellectual disabilities because "the state reserves the right to unilaterally close a state school for administrative or financial reasons, even if it means that certain residents will have to relocate as a result"); *Rolland* v. *Patrick*, 562 F. Supp. 2d 176, 185 (D. Mass. 2008), aff'd, 592 F.3d 242 (1st Cir. 2010); *Lelsz* v. *Kavanagh*, 783 F. Supp. 286, 298 (N.D. Tex. 1991), aff'd, 983 F.2d 1061 (5th Cir.), cert. denied, 510 U.S. 906 (1993); cf. *Ricci* v. *Patrick*, 544 F.3d 8, 16-20 (1st Cir. 2008), cert. denied, 556 U.S. 1166 (2009) (reversing the district court's reopening of the case because the Commonwealth had fully complied with the consent decree in closing a state-run institution and transferring its residents to other facilities). There is no legal requirement under Section 504 or the ADA that any State create or maintain such an institution.[5]

[5] As of 2011, Alaska, Michigan, and Oregon had no institutions for individuals with developmental disabilities, and eight additional States had no individuals in large, state-operated institutions like the Woodbridge Developmental Center and the North Jersey Developmental Center. See University of Minnesota, Research & Training Center on Community Living, Institute on Community Integration (UCEDD), *Residential Services for Persons with Intellectual and*

(continued…)

Any alleged right to remain in a specific state institution would directly contradict the statutory language of Section 504 and the ADA, their legislative histories, and implementing regulations, all of which focus on deinstitutionalization as a part of eliminating discrimination against individuals with disabilities. See pp. 8-12, *supra*. Consistent with this, *Olmstead*'s only holding was that "unjustified isolation" – *i.e.*, continued institutionalization when a community placement is appropriate, not objected to, and can be reasonably accommodated – constitutes impermissible discrimination under Title II. *Id.* at 587, 597. There is no basis in the language or purpose of the ADA, Section 504, or *Olmstead* to support a claim that placing an individual with disabilities in an integrated setting is similarly discriminatory.

The appellants therefore do not have a right under Title II, Section 504, or *Olmstead* to remain in institutions that the State has determined should be closed. This is precisely the holding of every identifiable decision that has directly examined this issue. See, *e.g.*, *Illinois League of Advocates for Developmentally Disabled* v. *Quinn*, No. 13-C-1300, 2013 WL 3168758, at *5 (N.D. Ill. June 20, 2013) ("Unjustified isolation constitutes discrimination under the ADA, but * * * it does not follow from *Olmstead* that the converse is true.") (citation and internal

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(…continued)
Developmental Disabilities: Status and Trends Through Fiscal Year 2011, Table 3.1, http://rtc.umn.edu/risp/docs/risp2011.pdf.

quotation marks omitted); *Richard C.* v. *Houstoun*, 196 F.R.D. 288, 292 (W.D. Pa. 1999) ("[I]t does not logically follow that institutionalization is required if any one of the three *Olmstead* criteria is not met.").

The authorities the appellants and their amici cite do not hold to the contrary. See Opening Br. 13-15; Amicus Br. 11-15. The cases on which they rely primarily are decisions deciding motions to intervene that obliquely reference *Olmstead* and address other legal issues. See, *e.g.*, *Ligas* v. *Maram*, 478 F.3d 771 (7th Cir. 2007). Indeed, in *Ligas*, the Seventh Circuit recognized that "*Olmstead* established that it is a violation of the ADA to force developmentally disabled patients to reside in institutionalized settings when they are able to live more fully integrated into society at large and do not oppose doing so." *Id.* at 773. Not a single decision cited in the appellants' or amici's briefs directly supports the proposition that *Olmstead* creates a right to continued institutionalization.

Nor does this Court's decision in *Benjamin* v. *Department of Public Welfare*, 701 F.3d 938, 942 (3d Cir. 2012), support the appellants' Title II or Section 504 claims. In *Benjamin*, individuals who lived in an institution who were eligible for and desired community placements filed a class action under *Olmstead* to force the State to establish a plan to transfer them into the community. 701 F.3d at 941. After settlement was entered, this Court held that the district court should have allowed the proposed intervenors, a group of residents who opposed community

placements for themselves, to intervene at the remedy stage in order to challenge the settlement agreement and class certification. *Id.* at 941-942, 947-948. This Court found that the settlement agreement between the class plaintiffs (the residents who wanted community placements) and Pennsylvania could affect the interests of the proposed intervenors (the residents who did not want community placements). *Id.* at 952.

Benjamin has little impact on the present case. *Benjamin* addressed only a motion to intervene under Federal Rule of Civil Procedure 24(a)(2); it did not address whether Section 504, the ADA, or their implementing regulations, as interpreted in *Olmstead*, create a right to institutionalization. See 701 F.3d at 957. The appellants here acknowledge that, in *Benjamin*, this Court did not reach the question whether the proposed intervenors opposing community placement had a legally enforceable right to remain in the institution where they resided. Opening Br. 13-14.

The appellants, however, incorrectly argue that this Court's introductory comment in *Benjamin* that "*Olmstead* and the regulations make clear that 'community based treatment [cannot] be imposed on patients who do not desire it,'" 701 F.3d at 942 – which the appellants acknowledge is merely dictum – somehow constitutes an "acknowledge[ment] that the residents and guardians may have ADA or other rights" to remain in an institution (Opening Br. 13-14). The

appellants ascribe far too much weight to this Court's passing remark and also overlook the fact that *Olmstead* stated only that there is no "federal requirement that community-based treatment be imposed on patients who do not desire it." 527 U.S. at 602. The fact that there is no federal requirement for community placements for individuals who do not consent to such a placement does not give rise to a claim for discrimination when a State chooses to close an institution and transfer individuals with disabilities from an institutional setting. See pp. 15-16, *supra*. Neither *Olmstead* nor *Benjamin* holds that the ADA creates an independent right for an individual with disabilities to remain in an institution, or that transferring an individual from an institution slated for closure violates Section 504 or the ADA.

What is more, the appellants in this case stand in significantly different shoes from those of the proposed intervenors in *Benjamin* and other cited cases. The factual background and issue presented in this case are distinct from those presented in *Benjamin*. Here, the appellants are not opposing or attempting to intervene in a class action by institutionalized individuals who consent to and who can be appropriately and reasonably accommodated in community placements. Therefore, unlike in *Benjamin*, in this case, there is no need to evaluate the effects on the appellants here of a settlement agreement or future relief to a class.

In this case, the State has decided to close two institutions and has offered appellants the option of moving to either a community placement or, while not required under Section 504 or Title II, another institution. J.A. 9 (Dec. 13, 2013, Opinion); J.A. 66, 70 (Complaint); but see Opening Br. 7 n.1. This Court's concern in *Benjamin* about the possibility of the proposed intervenors being placed into the community without their consent is simply not presented in this case. See 701 F.3d at 952, 954-956. Although not required by Section 504 or Title II, there is no current or future impediment to the appellants in this case receiving services in a state institution, as they request; indeed, the appellants admit that the State has offered them an alternate institutional placement. J.A. 66, 70 (Complaint); see also J.A. 9 (Dec. 13, 2013, Opinion); but see Opening Br. 7 n.1. The appellants do not, however, have the right they seek under Section 504, Title II, or *Olmstead* to select which particular institution that will be.[6] See *Baccus*, 45 F.3d at 961; *Rolland*, 562

[6] The United States does not take a position on the appellants' Medicaid Act claims. The United States notes, however, that the administrative appeals process available within the State provides an avenue for the appellants to raise their concerns with the State's assessments and placement decisions. See N.J. Admin. Code 10:48-1.1 *et seq.* (2014). In addition, the Medicaid Act places certain obligations on States. For example, to be eligible for the waiver program for community-based services, a State must take necessary safeguards to protect the health and welfare of individuals receiving waiver services, 42 U.S.C. 1396n(c)(2)(A), and must provide evaluations of the level of need, 42 U.S.C. 1396n(c)(2)(B). Individuals must be given the choice of feasible alternatives available under the waiver program, or institutional level services otherwise available, which are not required to be provided in a particular facility. 42 U.S.C.

(continued…)

F. Supp. 2d at 185; *Lelsz*, 783 F. Supp. at 298; cf. *Ricci*, 544 F.3d at 16-20. Indeed, the appellants cite nothing to support that argument.

CONCLUSION

For the reasons stated herein, this Court should affirm dismissal of the appellants' Title II and Section 504 claims.

Respectfully submitted,

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(…continued)
1396n(c)(2)(C). Implementing regulations require that community-based services be provided in accordance with a person-centered plan of care developed with the individual and the individual's representative(s) based on an assessment of functional needs and consideration of personal preferences. 42 C.F.R. 441.301(c). For individuals in the institutional placements, there will be institutionally-developed evaluations, assessments and individual program plans (identifying needs and designing programs to address those needs) which can be a resource in developing or reviewing these person-centered care plans. 42 C.F.R. 483.440(c)(1) and (3). All of these provisions work to the same goals; they provide protections to guard against medically-improper placements.

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING THE DEFENDANTS-APPELLEES AND URGING AFFIRMANCE IN PART complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 5379 words, and it complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally-spaced typeface using Word 2007, 14-point Times New Roman font.

I also certify that the paper copies of this brief tendered to the Clerk of the Court are identical to the brief electronically-filed via the CM/ECF system. I further certify that the electronically-filed brief was scanned using Trend Micro Office Scan Edition (8.0) and is virus-free.

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Date: May 12, 2014

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Rules 28.3(d) and 46.1(a), I hereby certify that I am exempt from the Third Circuit's bar admission requirement as counsel to the United States.

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Date: May 12, 2014

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2014, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING THE DEFENDANTS-APPELLEES AND URGING AFFIRMANCE IN PART with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system, and that seven (7) paper copies, identical to the electronically-filed brief were sent to the Clerk of the Court by First Class U.S. mail.

I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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