No. 14-1082

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROSEMARY SCIARRILLO, by and through her Guardians**, JOANNE ST. AMAND AND ANTHONY SCIARRILLO**, et al.,
Appellants/Plaintiffs,

v.

CHRISTOPHER CHRISTIE, as Governor of the State of New Jersey, et al.

Appellees/Defendants.

On Appeal from the Order dated January 29, 2014, by the United States District Court for District of New Jersey, Civil Action No. 2:13-cv-03478 (SRC-CLW)

BRIEF *AMICI CURIAE* OF VOR, Inc. (Formerly, "Voice of the Retarded, Inc.") IN SUPPORT OF APPELLANTS' ARGUMENT FOR REVERSAL
(Filed by Consent Pursuant to Fed. R. App. P. 29(a))

LIST OF AMICI:

Woodbridge Developmental Center Parents Association;
Save New Jersey Developmental Centers, Inc. (d/b/a Save Residents' Homes at Developmental Centers);
Association for Hunterdon Developmental Center;
Green Brook Regional Center Family and Friends Association;
Vito Coletti, Family Advocacy Representative of Vineland Developmental Center;
North Jersey Developmental Center Parents' Council (d/b/a North Jersey Developmental Center Families & Friends).

LESLI C. ESPOSITO, ESQUIRE
MICHAEL E. BUSHEY, ESQUIRE
MARK A. KASTEN, ESQUIRE
DLA PIPER LLP (US)
1650 MARKET STREET, SUITE 4900
PHILADELPHIA, PA 19103
TELEPHONE: (215) 656-3300
ATTORNEYS FOR AMICUS CURIAE

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 14-1082

ROSEMARY SCIARRILLO, by and through her guardians, JOANNE ST. AMAND and ANTHONY SCIARRILLO, et al.

V.

CHRISTOPHER CHRISTIE, as Governor of the State of New Jersey, et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. An original and three copies must be filed. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, VOR, inc. (Name of Party) makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

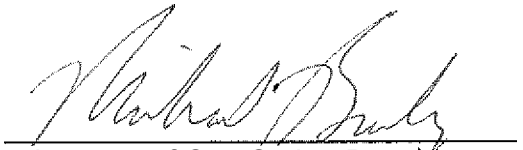
None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

None



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Dated: March 25, 2014

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES/RULES

OTHER AUTHORITIES

I. Interest of Amicus Curiae[1]

VOR, Inc.[2] is a nationwide, non-profit advocacy organization dedicated to ensuring that individuals with intellectual and developmental disabilities receive the care and support they need in settings appropriate to fulfill those needs. A corollary objective is to advance family participation in the choice of treatment options, with the decisions of the disabled person and his or her family recognized as primary. VOR has previously appeared before courts as *amicus curiae* in cases, like this one, that have direct and significant impact upon the rights, care and treatment of the mentally retarded. *See*, *e.g., Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) (on behalf of 141 *amici*); *Heller v. Doe*, 509 U.S. 312 (1993); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (on behalf of 93 *amici*); *Ricci v. Patrick*, 544 F.3d 8 (1st Cir. 2008), *cert. denied,* 129 S. Ct. 1907 (2009); *Martin v. Taft*, 222 F.Supp.2d 940 (S.D.Ohio 2002); *Cramer v. Chiles*, 33 F.Supp.2d 1342, 1351 (S.D. Fla. 1999); and *Benjamin v. Department of Public Welfare of Pennsylvania*, 807 F.Supp.2d 201 (M.D.Pa. 2011).

The Plaintiffs/Appellants, thirty-five developmentally disabled individuals, who are residents of Woodbridge Developmental Center ("WDC") and North Jersey Developmental Center ("NJDC"), brought this action against officials of the

[1] This *Amicus* Brief is filed with the consent of all participating parties.
[2] Formerly "Voice of the Retarded," VOR officially changed its name in 2011.

State of New Jersey, who either decided to close WDC and NJDC, or who are carrying out the closure of those facilities. The case was brought as a putative class action seeking declaratory or injunctive relief requiring the Defendants/Appellees to allow treating professionals to make independent and reliable judgments as to the least restrictive environment that can meet the needs of Plaintiffs/Appellants. Additionally, Plaintiffs/Appellants seek injunctive relief allowing the proper weight to be given to their consent or refusal to any proposed transfers from their homes at WDC and NJDC, and to recognize their right to an Intermediate Care Facility for Individuals with Intellectual Disabilities (ICF's/IID) (formerly ICF's/MR).

The District Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), dismissed Plaintiffs/Appellants' Complaint with prejudice. The Order is the subject of this appeal.

VOR has an interest in this matter because it will directly affect the right of approximately thirty-five residents of either WDC or NJDC in New Jersey to choose their own care and receive the care necessary to meet their individual needs. VOR supports the Plaintiffs/Appellants' request to seek injunctive relief in this matter because, absent such relief, the rights of those individuals who do not wish to leave ICFs/IID and be placed in community settings will not be protected. The mass relocation of individuals from ICFs/IID to community settings can have

a devastating effect on the health, well-being and mortality of those individuals. *See, e.g.*, Robert Shavelle, et. al, *Deinstitutionalization in California: Mortality of Persons with Developmental Disabilities after Transfer into Community Care, 1997-1999*, Journal of Data Science 3:371-380, 376 (2005) (finding a 47% increase in mortality in community placement setting over that expected in ICFs/IID). For the reasons stated below, this Court should reverse the decision dismissing Plaintiffs/Appellants' Complaint.

II. Argument

The Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), establishes the right of mentally disabled residents to treatment for their disabilities in "the setting that is least restrictive of the person's personal liberty." *Olmstead v. Zimring*, 527 U.S. 581, 599 (1999) (quoting The Developmentally Disabled Assistance and Bill or Rights Act, 89 Stat. 502, 42 U.S.C. § 6010(2) (1976 ed.)). The Court in *Olmstead* was very clear that the least restrictive environment may, in fact, be in an ICF/IID such as the Woodbridge Developmental Center or the North Jersey Developmental Center. The issue in this case is whether plaintiffs have the right to have state treatment professionals make an independent and reliable assessment in order to determine the least restrictive treatment environment appropriate for their needs. This amicus brief seeks to assist the Court in applying the precedential *Olmstead* opinion to that

question. As such, VOR urges this Court to hold that the Americans with Disabilities Act (ADA) and *Olmstead* requires a state agency to make individualized assessments of the needs of disabled individuals as to the least restrictive environment that can meet their needs, which may be a developmental center, before individuals are transferred to community-based care.

A. The *Olmstead* Decision.

In *Olmstead*, two Plaintiffs who had been treated in institutions sought placement in a "less restrictive" community setting. *Olmstead*, 527 U.S. at 593. One woman filed suit, and the second intervened, alleging that the State's failure to place them in community-based programs, once their treating professionals determined that community placement was appropriate, violated Title II of the ADA. *Id.* at 594. The Supreme Court considered the question of whether the ADA's discrimination provision *could* require placement of individuals with mental disabilities in community settings rather than in institutions, and determined the answer to that question was a "qualified yes." *Id.* at 587. The Court held that qualified individuals must be moved to community settings only (1) when a state treatment professional has determined that the community placement is appropriate; (2) the affected individual does not oppose the transfer; (3) and the placement can be accommodated in light of the resources of the state and the needs of others mentally disabled individuals. *See id.* If these factors are not met, the

State is not in violation of the ADA in requiring an individual to remain in a developmental center rather that in a community-based setting.

However, *Olmstead* does not merely hold that intellectually disabled individuals have the qualified right to choose to live in community settings; it holds that intellectually disabled individuals have a right to the least restrictive environment that can meet their needs, which, in many instances, is an institutional care facility. The central question faced by the *Olmstead* court was whether the failure to transfer a resident from a developmental institution to community-based care constitutes discrimination under the ADA. *See* 527 U.S. at 587. The lead plaintiff in that case, L.C., had been admitted to a Georgia psychiatric institution in 1992. *Id.* at 593. A year after her voluntary admission, her condition had stabilized and her treatment team had determined that her needs could be appropriately met in a community-based state program. *Id.* The plaintiff remained institutionalized until 1996, when the State finally moved her to community-based treatment. L.C. filed suit in May 1995, before her eventual transfer, challenging her continued institutionalization and alleging that the State's failure to place her in a community-based program after her treating physicians had determined that such a placement was appropriate, was in violation of, *inter alia*, Title II of the ADA. *Id.* Stating an identical claim, E.W. intervened in L.C.'s suit. *Id.* at 594. E.W. was voluntarily admitted to an institutional psychiatric facility in February 1995

and, like L.W., her treating physicians determined that her needs could be met through community-based treatment. *Id.* at 593. However, she was confined to institutional treatment until the District Court released its decision in that case. [3] *Id.* at 593.

Setting out the statutory framework, the Court reiterated the Title II requirement 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." *Id.* at 590 (citing 42 U.S.C. §12132). The Court also noted the Attorney General's regulation issued pursuant to Title II, which states "[a] public entity shall administer services, programs, and activities in the *most integrated setting appropriate* to the needs of qualified individuals with disabilities." *Id.* at 592 (quoting 28 CFR § 35.130(d) (1998)). Based on these provisions, the Court found that the State of Georgia's failure to transfer the plaintiffs after their respective treating physicians had recommended it constituted discrimination within the meaning of Title II.

Thus, the core holding of *Olmstead* is that state treatment agencies *must* consider the opinions of treating professionals, the wishes of the individual, and

[3] Although L.C. and E.W. were receiving treatment in community-based programs while the case was before the Supreme Court, the Court resolved that the case was not moot because the controversy before it was "capable of repetition, yet evading review." *Id.* at 594 n.6.

the resources of the state before the transfer of an individual to community-treatment is required. *Id.* If, however, a transfer is undertaken without an individualized assessment using the three factors, that constitutes discrimination in violation of the ADA.

B. The *Olmstead* Decision Stands For the Proposition That All Individuals in a State ICF/IID Have a Legal Right to Choose Their Own Care.

At first glance, *Olmstead*, which addressed the request of two plaintiffs to be transferred from a developmental center to a community-based setting seems inverse to the facts of the present case. Here, in contrast, members of the putative class seek the right to have their voices heard and their needs evaluated *before being transferred* to community-based treatment. The Supreme Court's reasoning is equally as applicable in this case as it was in *Olmstead* itself. Indeed, the language of the opinion demands a broad application. The Court clearly intended to require the State when determining the least restrictive treatment option appropriate for the needs of a disabled individual to take into account and make an individualized assessment of (1) the opinions of treatment professionals; (2) the wishes of the individual; (3) and the resources of the State, relative to the needs of others with mental disabilities. *Olmstead*, 527 U.S. at 587.

Although the facts at issue in *Olmstead* address the continued institutionalization of two individuals against their wishes, Section III-A of the

opinion makes clear that the core holding of the case would apply equally to a situation where, as here, residents wish to remain institutionalized. The Court went out of its way to clarify the scope of this holding. Highlighting the requirement for an individualized assessment before an individual is transferred out of an institution, the Court clarified that a finding that such a transfer was medically appropriate is a necessary precondition to such a transfer. Specifically, the Court said that a State may generally rely on its treating professionals to determine whether an individual meets the eligibility requirements for treatment in a community-based program, but "[a]bsent such qualification it would be inappropriate to remove a patient from the more restrictive setting." *Id.* at 602 (citing 28 CFR § 35.130) ("public entity shall administer services and programs in 'the most integrated setting *appropriate* to the needs of qualified individuals with disabilities'") (emphasis added by Supreme Court)). It cautioned that "nothing in the ADA or its implementing regulations condones termination of institutional settings for persons *unable to handle or benefit from* community settings." *Olmstead*, 527 U.S. at 601-02 (emphasis added). The Court's clear mandate that a purportedly less restrictive setting must nonetheless be appropriate for the treatment of an individual's needs underscores its core holding that an individualized assessment which takes into account the opinions of treatment professionals, the wishes of the individual, and the resources of the State must be

made before an individual can be transferred out of institutionalized care. Moreover, the Court stressed the general applicability of its holding to all persons with disabilities who desire a certain level of care. It specifically cited language from 28 CFR § 35.130(e)(1), which says "[n]othing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept," and 28 CFR § pt. 35, App. A, p. 450, which states directly that "[p]ersons with disabilities must be provided the option of declining to accept a particular accommodation." *Olmstead*, 527 U.S. at 602-03 (citations omitted).

Quite simply, the Court found that L.C. and E.W. were qualified for non-institutional care because the State's professionals determined such treatment would be appropriate and neither individual objected to community-based treatment. *Olmstead*, 527 U.S. at 603. In other words, the Court held that if a transfer occurs absent the individualized process set forth, the result is discrimination in violation of the ADA. As such, *Olmstead* teaches that this individualized process is equally applicable when a resident seeks to avoid transfer *out of an institution*, as in the present case. In other words, *Olmstead*'s command of an individualized determination—one which must take into account assessments of treatment professionals and the views of the resident—has equal force here.

The Court's ruling in *Olmstead* was not mere dicta, rather, it was a guide to the lower Federal Courts in their application and interpretation of the ADA. As noted above, the Supreme Court unequivocally stated that "[c]onsistent with [the ADA], the State generally may rely on the . . . assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program. *Absent such qualification it would be inappropriate to remove a patient from the more restrictive setting*.'" *Olmstead*, 527 U.S. at 602 (citations omitted) (emphasis added). This constitutes a clear statement that the individualized process required by the ADA and set out in the core holding of *Olmstead* applies with equal force to residents who are better served by continued institutionalization.

Here, the members of the putative class are such individuals. VOR believes strongly that Appellants are entitled to an assessment by their treating professionals to determine whether their needs can properly be met in alternate ICFs/IID far from family or in community-based treatment. Instead, Appellants are being forced into less comprehensive and potentially more restrictive environments without the proper assessment of their needs, by their treating professionals. VOR urges this Court to remedy this situation by applying the holding that the individualized assessment called for in the Supreme Court's *Olmstead* decision

applies equally to individuals who, like Appellants, seek to prevent a transfer from institutionalized to community-based care.

C. *Olmstead*'s Relevant Progeny.

Since the *Olmstead* decision, a number of courts have held that *Olmstead* supports an individual's right to choose to remain in institutional care. In *Capitol People First v. Department of Developmental Services*, 155 Cal.App.4th 676, 66 Cal.Rptr.3d 300 (Cal.App. 1 Dist., 2007) *further review denied* (January 3, 2008), an action was brought, as in O*lmstead*, concerning the rights of individuals to enter into community-based care. Intervenors in the suit, as Appellants do in this case, sought the right to remain in institutional facilities. The California Appellate Court found that there was no tension between the positions of plaintiffs and intervenors. Rather, the Court held that intervenors' interests were adequately represented because the issue in the case was "whether respondents' policies and practices violate legal mandates calling for placement options and support services in the least restrictive environment commensurate with personal needs," *regardless* of whether one argued for the right to stay in institutionalized care or enter into community-based treatment. 155 Cal.App.4th at 700.

The Seventh Circuit reached a similar decision in the same scenario in *Ligas v. Maram* where individuals, pursuant to *Olmstead*, were seeking treatment in community-based care. 478 F.3d 771 (7th Cir. 2007). The Circuit Court denied a

motion to intervene, holding that the rights of the proposed intervenors who sought to remain ICF/IID care were adequately represented by the plaintiff, whose complaint was "replete with language on choice." *Id.* at 774. The Court cited *Olmstead* as holding that "[f]or some, institutionalized care is the best plan, while others are best served by integration into the community." 478 F.3d 773.

Subsequently, the district court refused to approve a proposed consent decree in *Ligas* and the class was decertified. *See Ligas v. Maram*, No. 05 C 4331, 2010 WL 1418583, at *1 (N.D. Ill. Apr. 7, 2010). The plaintiffs then, with a new class definition, requested certification and preliminary approval of a consent decree. *Id.* The district court instead granted intervention, based on *Olmstead*, of "approximately 2,000 previous objectors who lived in [institutional settings]" and wished to defend their right to remain in the place they considered home. *Id.* The court held that "the Proposed Intervenors have a right under *Olmstead* to have their needs considered before the Amended Proposed Consent Decree is approved." *Id.* at *2.

In *Omega Healthcare Investors, Inc. v. Res-Care, Inc.*, a company that managed an institutional care facility emptied the facility by forcing residents into community settings. 475 F.3d 853 (7th Cir. 2007). Plaintiff brought a breach of contract suit based on the management company's termination of the lease, and the company, on appeal, argued that enforcement of the lease agreement would violate

Olmstead by preventing the movement of individuals into community-based treatment settings. The Court rejected this argument and held that "*Olmstead* requires only that particular individuals be given the choice of community placement or institutional care." *Id.* at 864.

More recently, an Eastern District of Virginia court, in granting a motion to intervene as of right by families seeking to be able to choose to have their loved ones continue the receive institutional care, adopted Amici's interpretation of *Olmstead*. Memorandum Order in *United States v. Virginia*, No. 3:12-CV-00059 (E.D. Va. 2012) at pp. 3-4. The court stated expressly: "In short, the petitioners have a federally protected right, under *Olmstead* and the ADA, to receive the appropriate care *of their choice*." *Id.* at 4 (emphasis added). In support of its holding, the court quoted *Olmstead*'s statement, "[n]or is there any federal requirement that community-based treatment be imposed on patients who do not desire it." *Id.* at 3 (citing O*lmstead* 527 U.S. at 602). The Eastern District Court's order reflects the correct interpretation of the *Olmstead* decision: that intellectually disabled individuals and their family members have a right to have their voices heard before individuals are transferred out of a less restrictive institutionalized setting. *See Olmstead* 527 U.S. at 601-02 ("We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings.").

Most importantly the Third Circuit has considered the rights of individuals who wish to continue to receive treatment in institutionalized settings in the context of motions to intervene in a case in which plaintiff's sought the right to be treated in community settings. *See Benjamin v. Department of Public Welfare of Pennsylvania*, 701 F.3d 938 (3d. Cir. 2012). Proposed intervenors sought intervention at the remedy stage of the suit after plaintiff and the Department of Public Welfare came to a settlement. The Third Circuit vacated the District Court's order denying intervention. *Id.* at 958. In examining the extent to which the rights of proposed intervenors were protected, the Court noted that the settlement agreement "Says nothing about any possible disadvantages or risks of community placement or about the possible advantages of ICF/MR care." *Id.* at 953. The Court also took issue with the settlement's default rule that stated that if an ICF/MR [herein ICF/IID] resident did not express opposition, that resident would be placed on a "Planning List," which could result in transfer to community-based care. *Id.* at 954. The Court stated that this default rule affected the interests of proposed intervenors. *Id.* Importantly, the Court, in a footnote, cited approvingly the Northern District of Illinois' decision in *Ligas* to permit intervention, as well as its reliance on *Olmstead*. *Id.* at 957 n.3 ("Relying on *Olmstead*, the Illinois district court determined that these objectors were entitled to intervene[.]"). Although this Court's opinion vacating the denial of the

intervention motion in *Benjamin* does not, of course, stand for the proposition that the Third Circuit has accepted the application of *Olmstead* to individuals who wish to remain in institutional care, it does signal this Court's recognition of the protected rights of such individuals and their families.

Accordingly, VOR urges this Court to join in the interpretation of *Olmstead* set forth by the opinions above and consistent with the principles of its previous decision in *Benjamin*. Those courts held that the *Olmstead* decision was not merely applicable to individuals seeking a right to community-based treatment. Rather, these decisions stand for the proposition that intellectually disabled individuals retain the right, in conjunction with treatment professionals, to have a voice in their habilative, therapeutic, and medical care.

D. For Appellants, Institutionalized Care May Be the Least Restrictive Treatment Available.

In applying the *Olmstead* factors to a case such as this one, the Court must take into account that in many instances, institutionalized care in a developmental center may be the least restrictive treatment available to intellectually disabled individuals. *Olmstead* holds that the State is to put an intellectually disabled person in a more integrated setting if (1) the State treatment professionals have determined community placement is appropriate; (2) the individual consents to the transfer to a *less restrictive setting*; and (3) the State has the resources to reasonably accommodate the transfer in light of the needs of others with mental

disabilities. *Olmstead*, 527 U.S. at 587. Even if one construes *Olmstead* narrowly to mean that the factors merely set out when a transfer to a less restrictive environment is *required*, that interpretation still may mandate placement of Appellants and similarly situated individuals in institutionalized care. Because community-based care may, in fact, be *more* restrictive for Appellants than community-based care, the *Olmstead* factors could require that, upon transfer to a community setting, Appellants be immediately transferred back into the less-restrictive institutionalized environment.

For some Appellees, many of whom are profoundly disabled, community-based care will effectively be a *more* restrictive setting. Many Appellees and similarly situated individuals are in need of high level medical care and supervision that simply cannot be provided in community-based settings. The nationwide forced expulsion of the intellectually disabled from institutional care has provided ample evidence of the failings of community-based care relative to institutional treatment. Such evidence exists in over half the states in the United States. A summary of over 100 newspaper articles and reports detailing the very real increased risks and dangers involved in relocating individuals from institutional to community-based care can be found on VOR's website: http:/vor.net/images/AbuseandNeglect.pdf. This summary details systematic abuse, neglect, and death in community systems of care, affecting thousands of

vulnerable people across the country. The lessons learned from these stories illustrate that in many instances community care is, in fact, more restrictive than institutional treatment, especially when individuals face the possibility of neglect, abuse, and even death.

VOR has also gathered, over the course of several years, reliable statistics and information that support the fact that the habilative, therapeutic, and medical care required for profoundly disabled individuals is largely deficient in community settings. Perhaps the most thorough and recent peer-reviewed study relating to the risks of abuse and neglect of people with intellectual disabilities upon their transfer from institutional to community placement was performed by Robert Shavelle, David Strauss, and Steven Day. *See Deinstitutionalization in California: Mortality of Persons with Developmental Disabilities after Transfer into Community Care, 1997-1999*, Journal of Data Science 3:371-380 (2005). Using information that the authors gathered on 1,878 children and adults who were moved from ICFs/IID to community placement between April 1, 1993 and December 31, 1999, they analyzed the increased mortality rate of those who moved into community-based treatment as compared to those who remained in an ICF/IID setting. *Id.* at 371.[4]

[4] The authors studied mortality rates because it is a simple, unambiguous measure of quality of health care in community-based care. *Id.* at 372. In performing their study, the authors compared the California Development Evaluation Report database (1997-1999) with information from the California Department of Health Services (1999). *Id.* They also took into consideration factors such as age, sex, and feeding and mobility skills to predict the probability of death for each of the individuals involved. *Id.* at 373.

Based on the data collected and analyzed, the authors found a 47% increase in mortality in community-based settings over that expected in ICFs/IID. *Id.* at 376. The authors reasoned that the higher mortality rates for community placement individuals were due to lack of centralized record keeping, continuity of care, intensive supervision, and access to immediate medical care. *Id.* Once again, a treatment environment that results in a much higher risk of death cannot be said to be "less" restrictive.

Although the Shavelle, Strauss, and Day study focused on California, there is no reason to believe the failings of community-based treatment for the intellectually disabled are confined to that state. Indeed, in a recent New Jersey study, Rutgers University found that a lack of oversight of facilities run by third-party contractors, such as treatment facilities for the intellectually disabled, is prevalent. *See* Janice Fine, et. al, *Overlooking Oversight: A Lack of Oversight in the Garden State is Placing New Jersey Residents and Assets at Risk* (March 2014), *available at* http://smlr.rutgers.edu/rutgers-study-overlooking-oversight. In a press release announcing the report's publication, one author of the study referenced "weaknesses in the state's capacity to oversee third-party contracts," some of which are for services to New Jersey's disabled residents. Press Release, Rutgers School of Management and Labor Relations, Rutgers Study Finds Systemic Lack of Effective Oversight of Contractors with the State, Recommends

Improvements to the Process (Mar. 6, 2014), *available at* http://smlr.rutgers.edu/news-events/new-study-review-of-njs-oversight-of-third-party-contractors. The Rutgers University study suggests that the State of New Jersey has difficulty overseeing third party-contractors, creating an even greater risk of harm for Appellants who may be forced into community-based care. *See also*, Letter from Chris Murphy, U.S. Senator, to Daniel R. Levinson, Inspector General, U.S. Department of Health and Human Services (March 4, 2013), *available at* http://www.vor.net/images/SenChrisMurphyIGLtr.pdf ("I write to you today to request that you undertake an immediate investigation into the alarming number of deaths and cases of abuse of developmentally disabled individuals in group homes. In particular, I would like you to focus on the prevalence of preventable deaths at privately run group homes across this nation and the widespread privatization of our delivery system."); *In State Care, 1,200 Deaths and Few Answers*, New York Times (November 5, 2011) (investigation finding "more than 1,200 [deaths] in the past decade, have been attributed to either unnatural or unknown causes," in state-run group homes); Georgia Department of Behavioral Health & Developmental Disabilities Office of Quality Management, Annual Quality Management Report, January 2013 - December 2013, 20-21 (February 2014) (finding that, following aggressive deinstitutionalization since an October 2010 federal settlement agreement, there have been 82 unexpected deaths

of mentally ill and developmentally disabled individuals in 2013, 1,200 hospitalizations, 318 incidents requiring law enforcement services, 305 individuals who were expectantly absent from a community residential or day program, and 210 alleged instances physical abuse of an individual); and Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 Cardoza L. Rev. 1, 21 (2012) ("It should not be surprising that the coalition of deinstitutionalization advocates and fiscal conservatives largely achieved their goal of closing and downsizing institutions and that deinstitutionalization advocates were less successful in achieving their goal of developing community services."). These and many other tragic references to abuse, neglect and death of developmentally disabled victims are chronicled in *Widespread Abuse, Neglect and Death in Small Settings Serving People with Intellectual Disabilities*, VOR (rev. February 2014), *available at* http://vor.net/images/AbuseandNeglect.pdf.

Due to the relative lack of supervision and medical attention, community-based care will inherently be more dangerous for those Appellants who are profoundly disabled. It cannot be credibly argued, then, that a community-based facility is always less restrictive than institutional care.

1. The State may not transfer individuals to potentially more restrictive community-based treatment absent the consultation of their treatment professionals.

The State has failed to consult Appellants' treating professionals to assess what the least restrictive setting is that can meet the needs of their individuals. Without consulting treatment professionals before transferring, wholesale, individuals who are intellectually disabled (some profoundly so), to a whole new setting, the State of New Jersey not only violates the holding of *Olmstead*, it completely disregards it.[5] Indeed, based on the Appellants' conditions, it is likely that their respective treatment professionals would endorse a move back to effectively less restrictive institutional care if Appellants were, in fact, forced out of their developmental center homes. Even the narrow interpretation of *Olmstead*, which *Amici* does not here argue, *requires* an individual to transfer to the less restrictive environment if the treating professional deems it appropriate, the individual consents, and the State has the resources to accommodate the transfer. *Olmstead*, 526 U.S. at 587.

[5] A few residents have been offered placements in distant developmental centers, but this is still inappropriate without professional judgments by treating professionals as to the least restrictive environment that is available to meet the needs of each individual resident. All developmental centers are not equal in their environment. Even within a particular developmental center, the living areas can vary from one home setting to another. The Defendants have not even identified the specific living area for each resident at a distant center, let alone determined if that specific living area can meet each individual's needs. Also, the distant placement of residents away from their loved ones may make a particular developmental center inappropriate for the needs of a particular resident, and that determination requires professional review.

2. Appellants must be given the opportunity to decline transfer to community-based treatment that may be more restrictive.

In this case, their developmental center homes may provide a less restrictive environment for many Appellants. As such, their consent must be obtained before a transfer to more restrictive community-based care or alternate ICFs/IID far from family. A number of affected individuals will be forced to leave institutions where they are afforded constant and consistent care and protection from themselves and others into a community where they will be given (due, in part, to the politically motivated cost-saving tactic of closing institutions) far less supervision by and attention from treating professionals. There is a grave danger that such inferior care will lead to increased risk of injury or death from reduced levels of supervision and/or treatment. It cannot be said that such a situation is a transfer to a "less restrictive" environment. When intellectually disabled individuals are given less of the assistance they need to carry out basic tasks in their daily lives, their abilities are significantly more restricted. Therefore, in keeping with the *Olmstead* mandate that an individual be able to choose (in conjunction with treating professionals) a less restrictive treatment environment this court should hold that individuals may not be transferred to alternate settings, including more restrictive community-based care, without their consent and the consultation of their treating professionals. *See Olmstead*, 527 U.S. at 587.

3. The financial benefit to the State in closing institutional facilities is exaggerated.

New Jersey's assessment of the financial impact of the closing of the institutions at issue is misguided. On the surface, it may be arguable that the closures of WDC and NJDC are cost-effective to the State. While the statement that the cost per-person to the State is lower when an individual is treated in the community rather than an institutional setting may or may not be accurate,[6] the underlying facts paint a more complicated picture. First, and most importantly, that cost savings is largely created because of the less encompassing treatment in the community-based programs. Many intellectually disabled individuals require durable medical goods and near constant supervision, neither of which are generally available outside an institutional setting. While depriving Appellants and similarly situated individuals of necessary medical care may positively affect the State's bottom line, it, as noted above, makes the community setting a more restrictive treatment environment. Moreover, the State's stated mission of moving individuals out of institutionalized care has artificially inflated the per-person cost of institutionalized care. As more individuals are moved out of developmental institutions and the number of patients in such facilities continues to drop,

[6] All the cost comparisons used by the State seem to not include the costs of certain services in the community, while the costs of all services are included in the total for the institutional settings. Also, those still residing in institutional settings have much higher needs and expenses than those in the community. In short, the comparison studies are of two unequal service environments for two different populations.

overhead costs on a per-person basis are calculated using dramatically smaller numbers. Additionally, as the number of individuals being treated goes down, the cost of treating each goes up as the State loses the purchasing power it enjoyed when it was procuring supplies and medical goods for a much larger number of individuals. Thus, the higher cost of treatment in a developmental institution compared to that of community-based care is at least partially a result of the transfer of individuals to treatment in the community. Such a calculation serves the State's political goal of shuttering publicly-run institutions.

As the foregoing paragraphs describe, *Olmstead*, for some of these individuals, would likely mandate transfer from what is, in effect, a less restrictive institutional environment, should this Court permit their expulsion from WDC and NJDC. First, the State's treating professionals, if they were allowed to assess Appellants, would recommend treatment in the effectively less restrictive institutional environment. Second, the Appellants and their families would not object to a transfer back to the institution. And third, the State's financial concerns, in the context of the treatment of other individuals with intellectual disabilities, are largely of its own making.

III. Conclusion

VOR, on behalf of those for whom it speaks, simply asks that the voices of those intellectually disabled individuals currently residing in institutional settings

throughout the Third Circuit be heard. We request that, before individuals can be forcibly transferred from institutional care to more restrictive community-based settings the State take into account their needs and the assessments of the treatment professionals on an individualized basis, in addition to its own finances. The Supreme Court, however, demands it. It is difficult to speak with more clarity than the Court did when it said that the State may rely on its treating professionals to determine if community-based care is appropriate for the intellectually disabled, but that "[a]bsent such qualification, it would be inappropriate to remove a patient from the [institutional] setting." *Olmstead*, 527 U.S. at 602. Those statements clearly and definitively set forth parameters for the application of the opinion's core holding. VOR urges this Court to heed the pronouncements of the Supreme Court and hold that the *Olmstead* factors must be weighed any time a State seeks the transfer of any individual from institutionalized care.

For the reasons stated above, this Court should reverse the District Court's order dismissing Plaintiffs' Complaint.

Respectfully submitted,

/s/ Lesli C. Esposito
Lesli C. Esposito, Esquire, Pa. I.D. No. 201916
Michael E. Bushey, Esquire, Pa. I.D. No. 92108
Mark A. Kasten, Esquire, Pa. I.D. No. 316387
DLA Piper LLP (US)
1650 Market Street, Suite 4900
Philadelphia, PA 19103
Telephone: (215) 656-3300
Attorneys for *Amici Curiae*

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the *Amici Curiae* Brief, has been filed electronically with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the appellant CM/ECF system. Participants who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: March 25, 2014

/s/ Lesli C. Esposito
Lesli C. Esposito

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, I certify that, according to the word-count feature of the Microsoft Word word processing program, the foregoing Brief contains 6,110 words.

Date: March 25, 2014

/s/ Lesli C. Esposito
Lesli C. Esposito

CERTIFICATE OF TEXT

I, Lesli C. Esposito, hereby certify that the text of the electronically filed Brief and the text of the hard copies of the Brief are identical.

Date: March 25, 2014

/s/ Lesli C. Esposito____
Lesli C. Esposito

CERTIFICATE OF A VIRUS CHECK

I, Lesli C. Esposito, hereby certify that a virus check has been performed on the PDF file containing the Brief. The virus check was completed using McAfee VirusScan Enterprise-Antispyware Enterprise 9.7i.

Date: March 25, 2014

/s/ Lesli C. Esposito____
Lesli C. Esposito

CERTIFICATE OF ADMISSION TO BAR

1. I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Date: March 25, 2014

/s/ Lesli C. Esposito
Lesli C. Esposito