14-543

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HARRY DAVIS; RITA-MARIE GEARY; PATTY POOLE;
AND ROBERTA WALLACH, ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees

v.

NIRAV SHAH, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS
COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF HEALTH,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF THE UNITED STATES

This case concerns individuals with disabilities whose doctors have prescribed them orthopedic footwear or compression stockings to treat their medical conditions. The State of New York excluded their conditions from Medicaid coverage for footwear and stockings but continued to provide people with other conditions footwear and stockings through Medicaid. The individuals

sued the State Department of Health alleging, among other things, that the coverage limitation placed them at risk of institutionalization in violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*

This case involves the proper interpretation of the prohibition against unnecessary segregation of individuals with disabilities under Title II and its implementing regulations. Title II prohibits discrimination against individuals with disabilities in the provision of public services. 42 U.S.C. 12132. The Attorney General has authority to enforce Title II, 42 U.S.C. 12133, and to promulgate regulations implementing its broad prohibition against discrimination, 42 U.S.C. 12134. Pursuant to this authority, the Attorney General issued the integration mandate regulation: "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).

The United States enforces Title II and its regulations, including the integration mandate, across the country. The Department of Justice (Department) has issued guidance on the proper legal standard under the mandate. U.S. Department of Justice, *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.* (June 22, 2011), http://www.ada.gov/olmstead/q&a_olmstead.htm (DOJ *Olmstead* Statement). The

Department also has filed similar briefs on the legal standard under the integration mandate in *Oster* v. *Wagner*, No. 09-17581 (9th Cir.) (filed Dec. 9, 2013); *Cota* v. *Maxwell-Jolly*, No. 10-15635 (9th Cir.) (filed July 1, 2010); and *M.H.* v. *Cook*, No. 13-14950-B (11th Cir.) (filed Apr. 23, 2014). The United States thus has a substantial interest in this appeal. The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether a currently non-institutionalized individual with a disability can bring a claim under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.*, that a State or local government's actions create for that individual a serious risk of institutionalization.[1]

STATEMENT OF THE CASE

1. Statutory And Regulatory Background

Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities" and that

[1] The United States takes no position on the issues in this appeal involving plaintiffs' private right of action under Medicaid and challenge under Medicaid to State decisions on services provided.

"individuals with disabilities continually encounter various forms of discrimination, including * * * segregation." 42 U.S.C. 12101(a)(2) and (5). Congress determined that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, *independent living*, and economic self-sufficiency for such individuals." 42 U.S.C. 12101(a)(7) (emphasis added).

Title II of the ADA prohibits disability discrimination in public services: "[N]o 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. Congress directed the Attorney General to promulgate regulations to implement Title II. 42 U.S.C. 12134.

Pursuant to this authority, the Attorney General issued the integration mandate: "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). The most integrated setting is "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. The Attorney General also required that a public entity "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid

discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7).

In *Olmstead*, the Supreme Court held that, under the ADA and its regulations, "unjustified institutional isolation of persons with disabilities is a form of discrimination." *Olmstead* v. *L.C.*, 527 U.S. 581, 600 (1999). The Court reasoned that "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Ibid.* The Court also reasoned that "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id.* at 601. The Court concluded that individuals with disabilities are entitled to community-based services "when 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, taking into account the resources available to the State and the needs of others with * * * disabilities." *Id.* at 607 (plurality opinion).

The question of resources recognizes that "[t]he State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not

boundless. The reasonable-modifications regulation speaks of 'reasonable modifications' to avoid discrimination, and allows States to resist modifications that entail a 'fundamental alteration' of the States' services and programs." *Olmstead*, 527 U.S. at 603 (plurality opinion) (quoting 28 C.F.R. 35.130(b)(7)). This is commonly referred to as a fundamental alteration defense.

Since *Olmstead*, the Department has issued guidance regarding Title II's integration mandate. See DOJ *Olmstead* Statement. In that guidance, the Department stated that "the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings. Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent." *Id.* at Question & Answer 6. The Department provided as an example "a public entity's failure to provide community services" that "will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution." *Ibid.*

2. Statement Of The Facts

a. Plaintiffs are adult Medicaid recipients with a variety of conditions—including multiple sclerosis, paraplegia, and transmetatarsal amputation (*i.e.*, loss of the front part of the foot)—for which their doctors prescribed orthopedic footwear or compression stockings. J.A. 425. In 2011, the State of New York

eliminated most coverage under its state Medicaid program for adult orthopedic footwear and compression stockings. J.A. 424. New York limited coverage to (1) footwear prescribed as part of a diabetic treatment plan or orthotic brace and (2) stockings prescribed to treat pregnancy or venous stasis ulcers. J.A. 423. This excluded plaintiffs' conditions from coverage for footwear and stockings. J.A. 420.

Plaintiffs sued the Commissioner of the State Department of Health over the coverage limitation, arguing that, "[w]ithout these medically necessary treatments, Plaintiffs face a high likelihood of hospitalizations to address life-threatening infections and other preventable conditions" and "are likely to be institutionalized in nursing homes and rehabilitation centers in order to be treated for the very conditions the eliminated items would have prevented at much lower cost." J.A. 378-379, 381. They alleged violations of the Medicaid Act, 42 U.S.C. 1396 *et seq.*; Title II of the ADA, 42 U.S.C. 12131 *et seq.*; and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. J.A. 401-405. Specifically, they alleged that the coverage limitation violated the Medicaid Act's home health services provision, 42 U.S.C. 1396a(a)(10)(D), reasonable standards provision, 42 U.S.C. 1396a(a)(17), comparability provision, 42 U.S.C. 1396a(a)(10)(B), and due process provision, 42 U.S.C. 1396a(a)(3). J.A. 401-403. They also alleged that the

limitation violated Title II of the ADA, Section 504, and their implementing regulations. J.A. 403-405.

b. The district court granted plaintiffs declaratory and permanent injunctive relief under the Medicaid Act, ADA, and Rehabilitation Act. J.A. 427. The court denied their claim under the home health services provision but awarded them summary judgment on every other claim.

In particular, the court held that the limitation violated the ADA and Rehabilitation Act.[2] J.A. 454-461. The court quoted the Fourth Circuit for being "especially swayed by the DOJ's determination that the ADA and the *Olmstead* decision extend to persons *at serious risk of institutionalization or segregation* and are not limited to individuals currently in institutional or other segregated settings." J.A. 457 n.38 (quoting *Pashby* v. *Delia*, 709 F.3d 307, 322 (4th Cir. 2013)). The court reasoned that the State provided footwear and stocking coverage to Medicaid recipients other than plaintiffs and "that a State may commit discrimination by treating one type of disabled person worse than another type of disabled person." J.A. 461. The court found that defendant never disputed the plaintiffs' assertion "that the elimination of coverage for orthopedic shoes and compression stockings for Plaintiffs may result in them being institutionalized." J.A. 457. The court also

[2] The Second Circuit considers Title II and Section 504 claims "in tandem," as they "impose identical requirements." *Rodriguez* v. *City of New York*, 197 F.3d 611, 618 (1999).

found that defendant did not argue "that modifying the Medicaid program, to include coverage of orthopedic shoes and compression stockings for Plaintiffs, would fundamentally alter the program." J.A. at 458.

SUMMARY OF THE ARGUMENT

The district court correctly held that an individual need not wait to be institutionalized to raise a claim under Title II of the ADA and its integration mandate concerning unnecessary institutionalization. This Court should join the Fourth, Ninth, and Tenth Circuits in so holding; no circuit has held to the contrary. A non-institutionalized individual with a disability has standing to claim, under Title II and the integration mandate, that a State or local government's actions create a serious risk of institutionalization for that individual. This standard is dictated by the plain text and intent of the ADA and its regulations; by the Supreme Court's reasoning in *Olmstead* v. *L.C.*, 527 U.S. 581 (1999); and by the Department's explicit guidance on the issue, which warrants deference.

ARGUMENT

I

A SERIOUS RISK OF INSTITUTIONALIZATION STATES A CLAIM UNDER THE ADA

This Court "review[s] *de novo* a district court's decision resolving a question of statutory interpretation." *United States* v. *Robles*, 709 F.3d 98, 99 (2d Cir. 2013).

Individuals with disabilities need not wait until they are institutionalized to assert an integration claim under Title II of the ADA, 42 U.S.C. 12132, and its integration mandate, 28 C.F.R. 35.130(d). Neither the statute nor the integration mandate regulation by its own terms applies only to institutionalized individuals. Instead, the plain text of each protects the rights of all "qualified individuals with disabilities." 28 C.F.R. 35.130(d); accord 42 U.S.C. 12132. Indeed, protecting individuals with disabilities from the harm of unnecessary institutionalization was one of Congress's intents in passing the ADA. Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities." 42 U.S.C. 12101(a)(2). Congress further found that such discriminatory segregation continues. 42 U.S.C. 12101(a)(5). Congress thus stated that one of "the Nation's proper goals" is to ensure "independent living" for individuals with disabilities. 42 U.S.C. 12101(a)(7). In turn, Congress "provide[d] a clear and comprehensive national mandate for elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1).

In Title II of the ADA, Congress prohibited discrimination against individuals with disabilities in the provision of public services, 42 U.S.C. 12132, and directed the Attorney General to promulgate regulations implementing that prohibition, 42 U.S.C. 12134(a). To carry out that directive, the Attorney General issued the integration mandate regulation, 28 C.F.R. 35.130. The integration

mandate requires that "[a] public entity * * * 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), which is the "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. The Attorney General further required that public entities "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination" unless the "modifications would fundamentally alter" an entity's service system. 28 C.F.R. 35.130(b)(7).

In *Olmstead* v. *L.C.*, 527 U.S. 581 (1999), the Supreme Court recognized that unnecessary institutionalization for an individual with a disability is discrimination prohibited by Title II and the integration mandate. The Court held that "[u]njustified isolation * * * is properly regarded as discrimination based on disability" because it "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and because "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id*. at 597, 600-601. These concerns and the potential for harm exist both where individuals unnecessarily institutionalized seek to return to their communities and where those

with disabilities seek to avoid unnecessary, discriminatory institutionalization in the first place.

The Department issued regulatory guidance that further removes any doubt that suing to *prevent* the harm of unnecessary institutionalization is a cognizable claim under Title II, the integration mandate, and *Olmstead*. See DOJ *Olmstead* Statement. In that guidance, the Department answered the very question presented by this appeal: "Do the ADA and *Olmstead* apply to persons at serious risk of institutionalization or segregation?" *Id.* at Question & Answer 6. The answer, unequivocally, is "[y]es, the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation." *Ibid.* The protection against the harm of unnecessary institutionalization is "not limited to individuals currently in institutional or other segregated settings. Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent." *Ibid.*

The Department's interpretation of Title II and its integration mandate warrants deference. Specifically, the Department's views on Title II "warrant respect," *Olmstead*, 527 U.S. at 597-598, and its interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation," *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation and internal quotation marks omitted). The DOJ *Olmstead* Statement guidance is a consistent implementation of Title II's prohibition on unnecessary institutionalization and

segregation of individuals with disabilities, the integration mandate, and *Olmstead*. Indeed, the prohibition on unnecessary institutionalization would be hollow, if not totally countermanded, if individuals with disabilities were forced to suffer the significant harm of unnecessary institutionalization merely in order to seek relief from it. The law does not demand that an individual suffer this unnecessary and avoidable harm. Cf. *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 238 (2009) ("[H]aving mandated that participating States provide a [free appropriate public education] for every student [with a disability], Congress could not have intended to require parents to either accept an inadequate public-school education pending adjudication of their claim or bear the cost of a private education if the court ultimately determined that the private placement was proper under the Act.").

The Department's interpretation also aligns with routine Article III standing requirements. To have Article III standing, a plaintiff must allege (1) an injury that is concrete and particularized, (2) caused by the defendant, (3) that would be redressed by a favorable court decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). At-risk ADA claims, such as the claim alleged here, by their nature satisfy these standing requirements because they involve threats to health, safety, and welfare, as exemplified in the guidance: a plaintiff typically alleges (1) an injury either from an existing denial of or failure to provide services, or from a threatened cut to services, (2) caused by the defendant, (3) that would be redressed

if the defendant's actions were enjoined. See DOJ *Olmstead* Statement at Question & Answer 6.

Moreover, the Department's interpretation is consistent with the decision of every Court of Appeals to squarely address the issue. In *Fisher* v. *Oklahoma Health Care Authority*, 335 F.3d 1175 (2003), the Tenth Circuit held that "disabled persons who * * * stand imperiled with segregation" have standing to bring a claim "under the ADA's integration regulation without first submitting to institutionalization." *Id.* at 1182. The court reasoned that "there is nothing in the plain language of the regulations that limits protection to persons who are currently institutionalized." *Id.* at 1181. The court concluded that the integration mandate "would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation." *Ibid.* The plaintiffs in *Fisher* moreover "face[d] a substantial risk of harm" because they were "at high risk for premature entry" to an institution due to the state policy at issue in the case. *Id.* at 1184 (internal quotation marks omitted).

In *M.R.* v. *Dreyfus*, 663 F.3d 1100 (2011), amended by 697 F.3d 706 (2012), the Ninth Circuit held that "[a]n ADA plaintiff need not show that institutionalization is 'inevitable' or that she has 'no choice' but to submit to institutional care in order to state a violation of the integration mandate. Rather, a

plaintiff need only show that the challenged state action creates a serious risk of institutionalization." *Id.* at 1116. The court held that "[i]nstitutionalization … creates an unnecessary clinical risk that the individual will become so habituated to, and so reliant upon, the programmatic and treatment structures that are found in an inpatient setting that his or her ability to function in less structured, less restrictive, environments may become severely compromised." *Id.* at 1118 (internal quotation marks omitted). The *M.R.* court also afforded "considerable respect" to the Department's view on the integration mandate, as expressed in a statement of interest in the district court. *Id.* at 1117 (citing *Olmstead*, 527 U.S. at 597-598). The court deferred to the Department's "reasonable interpretation of its own statutorily authorized regulation" as "controlling unless plainly erroneous or inconsistent with the regulation." *Ibid.* (quoting *Auer*, 519 U.S. at 461). The court concluded that the Department's standard that a plaintiff may file a serious-risk-of-institutionalization complaint "is not only reasonable; it also better effectuates the purpose of the ADA." *Id.* at 1117-1118.

In *Pashby* v. *Delia*, 709 F.3d 307 (2013), the Fourth Circuit held that individuals who "face a risk of institutionalization" and "must enter institutions to obtain * * * services for which they qualify" have standing to bring an ADA claim. *Id.* at 322. The court reasoned that "nothing in the plain language of the regulations * * * limits protection to persons who are currently

institutionalized." *Ibid.* (quoting *Fisher*, 335 F.3d at 1181). The court also was "especially swayed by the DOJ's determination that 'the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings.'" *Ibid.* (quoting the DOJ *Olmstead* Statement).

In short, appellees here may sue for relief under the ADA if the State's actions place them at a serious risk of institutionalization. This standard best effectuates the broad prohibition of discrimination against individuals with disabilities in public services under Title II, the integration mandate, and *Olmstead*. The standard also implements the Department's reasonable interpretation of its own regulation and comports with every court of appeals decision that has squarely addressed the issue.

II

DEFENDANT-APPELLANT'S ARGUMENTS TO NARROW THE INTEGRATION MANDATE ARE MERITLESS

Defendant's proffered interpretation of the integration mandate conflicts with decisions of the Fourth, Ninth, and Tenth Circuits and with the Department's *Olmstead* guidance.

a. First, defendant argues that the integration mandate does not govern "optional" Medicaid services. Appellant Br. 56-57. Defendant is mistaken. "When a state elects to provide an optional service, that service becomes part of

the state Medicaid plan and is subject to the requirements of federal law." *Doe* v. *Chiles*, 136 F.3d 709, 714 (11th Cir. 1998); see also *Bryson* v. *Shumway*, 308 F.3d 79, 89 (1st Cir. 2002) ("Once the waiver plan is created and approved, it becomes part of the state plan and therefore subject to federal law."). The fact that Medicaid does not require a State to offer a particular service does not determine whether the ADA's integration mandate applies to that service once it is offered. See DOJ *Olmstead* Statement at Question & Answer 7 ("A state's obligations under the ADA are independent from the requirements of the Medicaid program."). Rather, the ADA and its integration mandate apply to all state programs, services, and activities, regardless of whether they are federally mandated, federally funded, or even entirely voluntary on the part of the State.

Thus, whether a listed service is "mandatory" or "optional" in Medicaid parlance is immaterial to the State's obligation under the ADA. See *Chiles*, 136 F.3d at 714; see also 42 U.S.C. 12132 (prohibiting discrimination in all "services, programs, or activities of a public entity"). "[W]here a public entity operates a program or provides a service, it cannot discriminate against individuals with disabilities in the provision of those services." DOJ *Olmstead* Statement at Question & Answer 8. Whether "mandatory" or "optional," the State must administer the service "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d). The options

contained in the Medicaid program do not limit state obligations under the ADA, but provide an opportunity for States to obtain federal funding to meet their obligations to provide services in the most integrated setting. The State's argument is particularly troubling because many "optional" services are necessary to ensure that the vulnerable populations at the heart of *Olmstead* are not unnecessarily institutionalized. For example, community supported living arrangements, case management, and personal care services are critical for many individuals with disabilities to live in their communities. See 42 U.S.C. 1396d(a)(23)-(25).

b. Defendant argues that, under Seventh Circuit precedent, the integration mandate first requires institutionalization in order to state a claim. Appellant Br. 57. As discussed above, actual placement in an institution is not a prerequisite to suing under Title II to prevent institutionalization. See *Pashby* v. *Delia*, 709 F.3d 307, 322 (4th Cir. 2013); *M.R.* v. *Dreyfus*, 663 F.3d 1100, 1116 (9th Cir. 2011), amended by 694 F.3d 706 (2012); *Fisher* v. *Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003); see also DOJ *Olmstead* Statement at Question & Answer 6.

Defendant misconstrues Seventh Circuit precedent in arguing otherwise. In *Amundson* v. *Wisconsin Department of Health Services*, 721 F.3d 871 (2013), the Seventh Circuit never reached the question of the proper legal standard under the integration mandate because the integration claim in that case was "unripe." *Id.* at

874. Plaintiffs had challenged the State's Medicaid service rates regarding community placements but never alleged that community providers would not accept the rates. *Id.* at 873-874. The court thus credited the State's assertion that the rates could operate "without landing any * * * disabled person in an institution," essentially finding that the complaint did not allege facts sufficient to demonstrate a serious risk of institutionalization. *Id.* at 874. Here, to the contrary, plaintiffs not only alleged a risk of institutionalization due to the State's coverage limitation, but the State never challenged that allegation.

c. Defendant argues that, under Fourth Circuit precedent, the integration mandate requires a service differential between institutional and community placements in order to state a claim. Appellant Br. 58-59. This argument misapprehends the nature of the integration mandate and misreads the Fourth Circuit's decision in *Pashby*. The mandate requires that a State administer its service system in a way that serves qualified individuals with disabilities in the most integrated setting appropriate to their needs, which includes not placing individuals with disabilities at serious risk of institutionalization. To be sure, one form of serious risk is when a State offers a service only in an institutional setting. See DOJ *Olmstead* Statement at Question & Answer 8 ("Do the ADA and *Olmstead* require a public entity to provide services in the community to persons with disabilities when it would otherwise provide such services in institutions?

Yes."). This was the exact situation before the Fourth Circuit in *Pashby*, where individuals had to "enter institutions to obtain Medicaid services for which they qualif[ied]." *Pashby*, 709 F.3d at 322.

A service differential, however, is not the only cognizable risk-of-institutionalization claim, and the Fourth Circuit never held otherwise. To the contrary, that court deferred to the Department's *Olmstead* guidance in holding that the factual scenario before it violated the integration mandate. See *Pashby*, 709 F.3d at 322 ("we are especially swayed by the DOJ's determination"). That guidance includes as another example of cognizable risk "a public entity's failure to provide community services or its cut to such services [that] will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution." DOJ *Olmstead* Statement at Question & Answer 6. This was the situation before the Ninth Circuit in *M.R.*, where plaintiffs alleged that a proposed reduction in community services would "exacerbate Plaintiffs' already severe mental and physical difficulties" and "put Plaintiffs at serious risk of institutionalization." *M.R.*, 663 F.3d at 1115. The Ninth Circuit held that this situation stated a claim under the integration mandate, deferring to the Department's statement to that effect as a reasonable interpretation of its own regulation and as a position that "better effectuates the purpose of the ADA." *Id.* at 1116-1118.

The United States does not argue here that the integration mandate requires a State to provide a certain level of benefits. Rather, the benefits a State provides cannot discriminate by creating a serious risk of institutionalization for people with disabilities. In *Olmstead*, the Court stated:

> We 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 ADA requires States to provide a certain level of benefits to individuals with disabilities. We do hold, however, that States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide.

Olmstead v. *L.C.*, 527 U.S. 581, 603 n.14 (1999) (internal quotation marks omitted).

As the Department's guidance indicates, a State's service system can create a serious risk by requiring entry into an institution in order to receive services or by causing decline of health requiring placement into an institutional setting. See DOJ *Olmstead* Statement at Question & Answer 6 and 8. In its defense, a State can dispute whether the services at issue actually create a serious risk of institutionalization and can argue that the proposed relief would constitute a fundamental alteration of the State's service system. See *Olmstead*, 527 U.S. at 603 (plurality opinion); DOJ *Olmstead* Statement at Question & Answer 10. Here, the State asserted neither. See J.A. 457 ("Plaintiffs maintain, and Defendant does not dispute, that the elimination of coverage for orthopedic shoes and compression stockings for Plaintiffs may result in them being institutionalized."); J.A. 458

("Defendant references the financial reasons that prompted the challenged changes in coverage, but does not specifically argue that modifying the Medicaid program, to include coverage of orthopedic shoes and compression stockings for Plaintiffs, would fundamentally alter the program."); see also Appellant Br. 54-60 (failing to raise either argument).

CONCLUSION

This Court should hold that a non-institutionalized individual with a disability can bring a claim under Title II, its integration mandate, and *Olmstead* for a State or local government's actions that create for that individual a serious risk of institutionalization.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation imposed by Rules 29(d) and 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains 4639 words of proportionally-spaced text. The type face is Times New Roman, 14-point font.

s/ Robert A. Koch
ROBERT A. KOCH
Attorney

Dated: September 15, 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2014, I electronically filed the foregoing Brief For The United States As Amicus Curiae In Support Of Plaintiffs-Appellees with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. 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. Finally, I certify that 6 (six) hard copies of the foregoing were sent via certified mail to the Clerk of the Court.

s/ Robert A. Koch
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Attorney