**IN THE UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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| **Phyllis Ball, *et al.*,** | : | |
| | : | **Case No. 2:16-cv-282** |
| **Plaintiffs,** | : | |
| | : | **Chief Judge Edmund A. Sargus, Jr.** |
| **v.** | : | |
| | : | **Magistrate Judge Elizabeth P. Deavers** |
| **John Kasich, *et al.*,** | : | |
| | : | |
| **Defendants.** | : | **ORAL ARGUMENT REQUESTED** |

**PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Plaintiffs Phyllis Ball, Antonio Butler, Caryl Mason, Richard Walters, Nathan Narowitz, and Ross Hamilton respectfully move this Court to certify the above-captioned case as a class action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2). Plaintiffs bring this action for declaratory and injunctive relief only.

In violation of Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and the Social Security Act, Defendants Kasich, Martin, McCarthy, and Miller, in their official capacities, administer, operate, plan, and fund the service system for people with intellectual and developmental disabilities in a way that causes thousands of people to be unnecessarily institutionalized or at serious risk of institutionalization. Systemic relief is needed so that members of the proposed class have sufficient access to integrated, community-based residential, employment, and day services. Plaintiffs request certification of a class defined as:

> All Medicaid-eligible adults with intellectual and developmental disabilities residing in the state of Ohio who, on or after March 31, 2016, are institutionalized, or at serious risk of institutionalization, in an Intermediate Care Facility with eight or more beds, and who

> have not documented their opposition to receiving integrated, community-based services.

In addition, Plaintiffs respectfully request that this Court appoint Disability Rights Ohio, Sidley Austin, LLP, Attorney Samuel Bagenstos, and the Center for Public Representation as co-class counsel in this action pursuant to Fed. R. Civ. P. 23(g).

Finally, Plaintiffs request oral argument because it is essential to the fair resolution of this Motion. The service system for people with intellectual and developmental disabilities provides support for tens of thousands of individuals and their families across Ohio. Class-wide relief is critical given the complex structure of this system and the multiple ways in which Defendants' administrative, planning, policy, and funding decisions limit Plaintiffs' access to integrated services in their communities and result in their unnecessary segregation. The public importance of this case, the complexities of the service system, and the need for class-wide relief all warrant oral argument pursuant to S.D. Ohio Civ. R. 7.1(b)(2).

Plaintiffs' Memorandum in Support of this Motion is attached.

Respectfully submitted,

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**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION**

**TABLE OF CONTENTS**

Under Fed. R. Civ. P. 23(a)(3), named plaintiffs' claims for relief must be typical of the claims of the class members. The typicality requirement is satisfied when the class representatives generally "possess the same interest and suffer the same injury" as class members, *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982), and the class members' claims are "fairly encompassed by the named plaintiffs' claims." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc) (quoting *In re Am. Med. Sys.*, 75 F.3d at 1082). Also, when the named plaintiffs' claims "arise from the same event or practice or course of conduct that gives rise to the claims of other class members" and are "based on the same legal theory," typicality is satisfied. *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009). Here, the Individual Plaintiffs and the proposed class members are both aggrieved by the same discriminatory segregation as a result of Defendants' service system and the same limitations on access to integrated, community-based services. They both share a common interest in expanding community-based alternatives and avoiding unnecessary institutionalization.



Fed. R. Civ. P. 23(a)(4) requires that the named plaintiffs in a class action fairly and adequately represent the interests of the class members. There are two criteria for determining adequacy of representation: "(1) the representative[s] must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Price v. Medicaid Dir.*, 310 F.R.D. 345, 380 (S.D. Ohio 2015). Here, the Individual Plaintiffs and the proposed class members have suffered a common injury and share a common interest in avoiding unnecessary institutionalization and having access to integrated, community-based services. Notably, the proposed class excludes those who have documented their opposition to such services. Furthermore, Plaintiffs' counsel is qualified, experienced, and able to prosecute the litigation vigorously.

This case concerns systemic deficiencies within Ohio's service system for people with intellectual and developmental disabilities[1] that have left thousands of Ohioans unnecessarily institutionalized, and thousands more at serious risk of unnecessary institutionalization, in violation of federal law. As a result of Defendants' administrative, planning, policy, and funding decisions, Ohio has failed to create sufficient home and community-based services to avoid class members' unnecessary institutionalization. Instead, Defendants continue to maintain and financially support segregated, facility-based residential, employment, and day services, provide inadequate transition assistance and diversion programs, and deny Plaintiffs opportunities to live, work, and spend their days in integrated settings in the community and to make an informed choice between institutionalization in its statewide network of Intermediate Care Facilities ("ICFs") and community-based alternatives. This common course of conduct by Defendants harms a large and growing group of people with intellectual and developmental disabilities who face ongoing, discriminatory segregation.

On their own behalf, and as representatives of the proposed class, the Individual Plaintiffs move for class certification under Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. Plaintiffs seek declaratory and injunctive relief that will specifically modify the State's systemic practices and therefore remedy ongoing federal-law violations on behalf of the class as a whole. In virtually every community integration case under Title II of the Americans with Disabilities Act in which the plaintiffs sought class certification since the Supreme Court's decision in

[1] As noted in Plaintiffs' Motion for Class Certification, the proposed class includes both persons with intellectual disability and those with other forms of developmental disability. Intellectual and developmental disabilities can overlap or may be distinct conditions, depending on the individual. An intellectual disability originates before the age of 18 and is characterized by limited mental capacity and difficulty with adaptive behaviors. A developmental disability is a severe, long-term disability that manifests prior to age 22, is likely to be life-long, and affects one's cognitive ability, physical functioning, or both. The term developmental disability encompasses intellectual disability, but also includes other conditions like cerebral palsy, Down syndrome, and autism. *See, e.g.*, Nat'l Inst. of Health, U.S. Dep't. of Health & Human Services, *Fact Sheet on Intellectual and Developmental Disabilities*, https://report.nih.gov/nihfactsheets/ViewFactSheet.aspx?csid=100 (last visited Aug. 16, 2016).

*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the court has granted class-action status. Pursuant to that precedent, and the established law in this Circuit, class certification is appropriate here.

## I. BACKGROUND

This case was filed on March 31, 2016 by six Individual Plaintiffs: Phyllis Ball, Antonio Butler, Caryl Mason, Richard Walters, Nathan Narowitz, and Ross Hamilton (collectively, the "Individual Plaintiffs"). [2] They are joined by the Ability Center of Greater Toledo, an organizational Plaintiff. Plaintiffs filed their class action Complaint (Doc. 1) on behalf of themselves and all other Medicaid-eligible adults with intellectual and developmental disabilities in Ohio who are institutionalized in, or at serious risk of admission to, an Intermediate Care Facility with eight or more beds ("large ICF"). Defendants in this action—Governor Kasich and Directors Martin, McCarthy and Miller—are sued in their official capacities.[3]

The Individual Plaintiffs and the Plaintiff class are entitled to receive services in the most integrated setting appropriate for their needs, yet Defendants (collectively, the "State") have failed to provide the home and community-based services class members require in order to leave ICFs and to avoid unnecessary admission to these facilities. This case aims to redress the common injury arising out of class members' discriminatory segregation, and to ensure integrated, community-based service options for those who are not opposed to community living.

[2] Since the filing of Plaintiffs' class action Complaint on March 31, 2016 (Doc. 1), several Individual Plaintiffs, and even some putative plaintiffs, have been approached by the State and offered expedited access to home and community-based waiver services due, in significant part, to their participation in this litigation. These Plaintiffs had all previously requested, or been placed on a waiting list for, community-based services. Many have been waiting ten years or longer for the opportunity to leave institutional settings and receive integrated, community-based services. Had it not been for the initiation of this action, and these Plaintiffs' role in that effort, it is likely they would continue to wait, along with thousands of other putative class members, for integrated, community-based services.

[3] Defendant John Kasich is sued in his official capacity as Governor of the State of Ohio, Defendant John Martin as Director of the Ohio Department of Developmental Disabilities, Defendant John McCarthy as Director of the Ohio Department of Medicaid, and Defendant Kevin Miller as Executive Director of Opportunities for Ohioans with Disabilities.

The Individual Plaintiffs seek declaratory and injunctive relief under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12132 *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 794 *et seq.*, and the Social Security Act, 42 U.S.C. §§ 1396n(c)(2)(B) and (C), as well as a single injunctive order requiring Defendants to remedy systemic deficiencies that deny class members their rights under federal law. In particular, the Individual Plaintiffs seek the opportunity to leave segregated ICFs, or to avoid unnecessary and unwanted admission to these facilities, through the provision of integrated residential, employment, and day services. A single injunction requiring the Defendants to develop and deliver these services in a manner sufficient to avoid class members' unnecessary institutionalization would resolve the alleged legal violations and create alternatives that benefit the class as a whole.

Defendant Miller filed his Motion to Dismiss Plaintiffs' Complaint on May 9, 2016 (Doc. 16). Defendants' additional Motions to Dismiss were filed on June 27, 2016 (Doc. 27, Doc. 28). Plaintiffs' consolidated response to these Motions was filed on July 27, 2016 (Doc. 34). Defendants' Reply is due August 22, 2016. After exchange of Plaintiffs' proposed litigation schedule, protective order and Joint Rule 26(f) Discovery Report on June 20, 2016, the parties completed their Rule 26(f)(1) "meet and confer" obligations by conference call on July 29, 2016. A Joint Rule 26(f) Discovery Report and proposed schedule was subsequently filed with the Court on August 12, 2016 (Doc. 37, Doc. 37-1).

Consistent with S.D. Ohio Civ. R. 23.3, the Individual Plaintiffs now submit their Motion for Class Certification and accompanying Memorandum, and respectfully request that this Court certify a class consisting of:

> All Medicaid-eligible adults with intellectual and developmental disabilities residing in the state of Ohio who, on or after March 31,

> 2016, are institutionalized, or at serious risk of institutionalization, in an Intermediate Care Facility with eight or more beds, and who have not documented their opposition to receiving integrated, community-based services.

Class members at serious risk of institutionalization in large ICFs include people with intellectual and developmental disabilities who now, or in the future: (1) apply for or are referred for admission to an ICF; or (2) are placed on waiting lists for Medicaid home and community-based services and have an aging caregiver or intensive needs as defined by Ohio Admin. Code 5123:2-1-08(D)(10)(c).[4]

This Memorandum and accompanying exhibits are submitted in support of the Individual Plaintiffs' Motion for Class Certification.

## II. STATEMENT OF FACTS

As described in detail below, the Individual Plaintiffs have offered sufficient evidence for this Court to conclude that the proposed class satisfies the threshold requirements of Fed. R. Civ. P. 23(a) and 23(b)(2), and that class treatment is appropriate and necessary to resolve the common claims and contentions presented by the Plaintiff class.

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[4] Defendants' waiting list regulations, Ohio Admin. Code 5123:2-1-08, specifically acknowledge the extent to which certain factors may increase individuals' risk of institutionalization and, therefore, the urgency of providing home and community-based services, including a specific priority category for individuals with aging caregivers or intensive needs. Included in this priority category is "[a]n individual who is eligible for home and community-based services and meets either of the following requirements:

> (i) The individual does not receive residential services or supported living, either needs services in the individual's current living arrangement or will need services in a new living arrangement, and has a primary caregiver who is sixty years of age or older; or
>
> (ii) The individual has at least one of the following service needs that is unusual in scope or intensity:
>
> > *(a)* Severe behavioral problems for which a behavioral support strategy is needed;
> >
> > *(b)* A mental health diagnosis for which medication has been prescribed;
> >
> > *(c)* A medical condition that leaves the individual dependent on life-support medical technology;
> >
> > *(d)* A condition affecting multiple body systems for which a combination of specialized medical, psychological, educational, or habilitation services is needed; or
> >
> > *(e)* A condition the county board determines to be comparable in severity to any condition described in paragraphs (D)(10)(c)(ii)(a) to (D)(10)(c)(ii)(d) of this rule and places the individual at significant risk of institutionalization."

Ohio Admin. Code 5123:2-1-08(D)(10)(c).

### A. Defendants Continue to Invest In and Maintain a Vast System of Segregated, Institutional Facilities.

Due to the way in which Defendants administer, plan, operate, and fund the service system for people with intellectual and developmental disabilities, thousands of adults live in ICFs across Ohio, segregated from their communities and without access to integrated, community-based services. As of July 2016, there were a total of 6,259 people institutionalized in publicly- and privately-operated ICFs in Ohio. Ohio Dep't of Developmental Disabilities, *Annual Report* at 7 (2016) (attached, "Ex. 1").[5] According to the most recent available data, as of June 30, 2013, there were a total of 421 privately-operated ICFs in Ohio and ten State-operated ICFs, also known as developmental centers. Sheryl Larson et al., Residential Information Systems Project, *In-Home and Residential Long-Term Supports and Services for Persons with Intellectual or Developmental Disabilities: Status and Trends Through 2013* at 48 (Table 2.4) (2016) (Ex. 2). These publicly- and privately-operated facilities are located in every region of Ohio. Rose Frech et al., Ctr. for Cmty. Solutions, *Ohio at a Crossroads: The Developmental Disabilities System* at 16-17 (March 2015) (Ex. 3). Most private facilities are large ICFs with eight or more beds, while all developmental centers have significantly more than eight beds. Doc. 1 ¶ 136; Ohio Dep't of Developmental Disabilities, Index to Residential Facilities Guide, May 25, 2011 (Ex. 4).[6]

ICFs have long been recognized as institutional in nature. 42 U.S.C. § 1396d(d); 42 C.F.R. § 441.301(c)(5); Frech, *Ohio at a Crossroads*, Ex. 3 at 2-3, 16; Larson, *Status and Trends*, Ex. 2 at 34-36; Doc. 1 ¶¶ 134-35, 139. Although they differ in size, ICFs share a

[5] Defendants asserted in their Motion to Dismiss that 6,367 individuals were in public and private ICFs across the state in 2015. *See* Doc. 27 at 10. The *DODD 2016 Annual Report*, Ex. 1 provides no explanation for the alleged census reduction, which could be attributable to numerous causes other than transition to integrated, community-based settings, including resident deaths, transfers to skilled nursing facilities or other long-term care facilities, and individuals moving out of state.

[6] In 2011, the most recent date for which public data is available, DODD listed 312 ICFs with 8 or more beds, just under three-quarters of the statewide total.

common service definition, design, and funding structure, and they are licensed by Defendants pursuant to a common regulatory and administrative scheme. *See* Ohio Rev. Code § 5124.01, *et seq.*; Ohio Rev. Code § 5123.03; Ohio Admin. Code 5123:2-7-01, *et seq.*; 42 C.F.R. § 483.400, *et seq.* As a result, these facilities share many of the same harmful characteristics of segregation. Defendants' reliance on facility-based settings for employment (sheltered workshops, for example) and congregate day services, particularly for residents of ICFs, compounds the discriminatory segregation those Plaintiffs experience.

Defendants concede that this segregation has negative consequences, especially when compared to home and community-based services. Numerous public statements by state agencies, and Defendant Martin himself, acknowledge that ICF residents have little control or autonomy over daily schedules or involvement in everyday choices, that they are restricted in their community outings and interactions with their non-disabled peers, and that they have limited options for daytime work and vocational activities. Ohio Dep't of Developmental Disabilities, *The Future of the ICF/IID Program* at 5 (Aug. 2012) (Ex. 5); *FY16-17 Budget Senate Testimony on H.B. 64 Before Ohio Senate Committee on Medicaid*, 131st Session at 1-3 (May 14, 2015) (statement of John L. Martin, Director, Ohio Dep't. of Developmental Disabilities) (Ex. 6).

In a 2013 presentation to the Ohio Association of County Boards of Developmental Disabilities, Defendant Martin noted that transitioning from segregated, facility-based settings to integrated, community-based settings is "based on some fundamental principles," including the principle that "part of being human is the right to make choices," and "[t]he more choices we take away from people[,] the more we dehumanize them. Think prisons, dictatorships, communism, slavery[,] and segregation." John L. Martin, Director, Ohio Dep't. of

Developmental Disabilities, *Budget Symposium* PowerPoint presentation, 35 (Aug. 21, 2013) (Ex. 7). Segregation in ICFs and sheltered workshops "sends a dehumanizing message 'they are not like us' and either 'we need to be protected from them' or 'they need to be protected from us' or 'they are so unlike us they [cannot] live like us." *Id.* at 37.

Conversely, there is an inherent value in integrated, community-based services for people with intellectual and developmental disabilities. Integrated, community-based services in the employment context, for example, "provide richer opportunities for authentic work experiences, which lead to better outcomes" for people with disabilities, and with a range of integrated, community-based services, individuals will "have an opportunity to interact with all people, enriching their own lives and the lives of people without disabilities." Governor's Office of Health Transformation, *Ohio's HCBS Transition Plan*, at 43-44 (June 2, 2016) (Ex. 8).

Defendants acknowledge the vast numbers of people in ICFs who want to live, work, and spend their time in integrated, community-based settings instead of being segregated from their families, friends, and broader communities. Defendant Martin has publicly recognized that people with intellectual and developmental disabilities "want to more fully participate in their communities—they want to engage in everyday life activities, maintain strong family relationships, make social contacts, explore work options, find cultural enrichment, and achieve economic independence." *Martin Testimony*, Ex. 6 at 1.

The size of the State's waiting lists reflects the number of people in ICFs who have expressed a preference for integrated, community-based services. According to a study commissioned by the Ohio Developmental Disabilities Council, 3,020 people, about half of the entire ICF population, had expressed a preference for community living in 2013, but were waiting for home and community-based services waiver programs to become available. Ohio

Colleges of Med. Gov't Res. Ctr., *What Are We Waiting For? Waiver Supported Services Needed by Individuals and their Caregivers* at 25 (Feb. 2014) (Ex. 9). Once class members become institutionalized in the ICF system, they tend to remain in such settings for prolonged periods of time. As of June 2013, the median wait time for community-based services for individuals living in ICFs was 13.7 years. *Id*. at 9, 25.

The Defendants have publicly cited to, and relied upon, this 2013 waiting list study, including its conclusion that "more than 22,000 people with immediate needs [are] on waiting lists" for community-based services, about "8,000 of whom [rely on] aging caregiver[s], and 1,000 of whom will lose the support of their primary caregiver" within a twelve-month period. Governor's Office of Health Transformation, *Enhance Community Developmental Disabilities Services* at 6 (Feb. 2, 2015) (Ex. 10).

Services for people with intellectual and developmental disabilities exist that would enable even those with extensive needs to live, work, and spend time integrated in their communities. Defendant Martin has stated that "even those of us with the most severe disabilities can be living, working, and receiving services as full participants in our community." *Martin Testimony*, Ex. 6 at 3. Indeed, in 2014, ICF resident assessment data showed only eight percent of people in ICFs had chronic medical conditions warranting the State's highest level of acuity.[7] Frech, *Ohio at a Crossroads*, Ex. 3 at 18. That fact suggests that the vast majority of ICF residents are qualified for, and could be safely served by, home and community-based services.

Despite these public acknowledgements and the high demand for integrated, community-based services, Defendants continue to administer, operate, and fund a service system that relies

[7] "Acuity assessments are utilized to determine the level of staffing support and other resources necessary to provide quality services to an individual." Frech, *Ohio at a Crossroads*, Ex. 3 at 18.

heavily upon a vast, statewide network of ICFs and facility-based employment and day programs. As a result, thousands of people with intellectual and developmental disabilities are segregated from their communities and denied access to integrated, community-based services.

Defendants recognize that "Ohio's ICF-IID footprint is one of the largest in the United States, particularly in regards to facilities of more than 8 beds." Ohio Dep't of Developmental Disabilities, *Request for Proposal: Targeted Options Counseling for Residents of Intermediate Care Facilities* at 2 (May 2015) (Ex. 11); *see also* Frech, *Ohio at a Crossroads*, Ex. 3 at 16 ("Currently, Ohio relies more heavily than other states on ICFs . . ."). In 2013, Ohio ranked sixth in the nation for the highest number of publicly- and privately-operated ICFs and third for the number of people served in private ICFs. Larson, *Status and Trends*, Ex. 2 at 48-49 (Tables 2.4, 2.5); Doc. 34 at 25. Despite recent increases in community-based services, and reductions in the number of people in publicly-operated ICFs, "Ohio continues to have significantly more people living in large private institutions than other states, including residents who are waiting for home and community-based services." *Enhance Community Developmental Disabilities Services*, Ex. 10 at 2; *see also* Doc. 34 at 26.

Ohio is also an outlier nationally in its reliance on segregated, facility-based settings for employment and day services. In FY 2013, Ohio ranked third highest in the nation for the percentage of residents with intellectual and developmental disabilities receiving employment services in segregated, facility-based work settings. John Butterworth et al., Inst. for Cmty. Inclusion, Univ. of Mass. Bos., *StateData: The National Report on Employment Services and Outcomes* at 21 (2014) (Ex. 12). Ohio was one of only five states to relegate at least half of its residents with intellectual and developmental disabilities to sheltered workshops. *Id.* at 21. The most recent national data confirms only 21 percent of people with intellectual and developmental

disabilities in Ohio received integrated employment services. *Id.* Even this number likely overstates the level of integration in Ohio's system, because the relevant study's definition of "integrated" includes group employment or enclaves of workers with disabilities—settings in which workers with disabilities and those without disabilities are not fully integrated. *Id.* at 17.

Unmet demand for integrated, community-based services among Ohio residents with intellectual and developmental disabilities grows by the hundreds each month. Frech, *Ohio at a Crossroads*, Ex. 3 at 28. State officials have long acknowledged the need to "rebalance" Ohio's long-term service system for people with intellectual and developmental disabilities and to reduce the State's reliance on segregated residential, employment, and day programs. *The Future of the ICF-IDD Program*, Ex. 5 at 1-2, 4-8; *Martin Testimony*, Ex. 6 at 1-2, 5-9; *Ohio's HCBS Transition Plan*, Ex. 8 at 13-14. The State has previously identified a number of systemic barriers to reducing unnecessary institutionalization very similar to the ones alleged in this case. These barriers included: the inadequacy of individual assessment forms used to evaluate the intensity of ICF residents' service needs; limited county board resources that were unable to keep pace with increased demands; and funding models that incentivize private ICF providers to continue to serve individuals whose needs could be met in home and community-based settings. *The Future of the ICF-IDD Program*, Ex. 5 at 3-4.

However, the State has failed to reduce its overreliance on ICFs, or to significantly modify its approach to funding home and community-based services. To the contrary, it has further entrenched these segregated settings in its residential service system for people with intellectual and developmental disabilities. According to one nationally-recognized study, the number of persons institutionalized in Ohio's ICF system has actually increased by twelve percent in recent years, from 5,984 in 2010 to 6,678 in 2013. Larson, *Status and Trends*, Ex. 2 at

78 (Table 3.6); *see also* Doc. 34 at 24. In 2013, Defendant Martin observed that the State's private ICF population actually had increased, contrary to national trends: "Nationally, over the past 10 years, the number of people living in private facilities larger than 16 beds has decreased by 33%. In Ohio, we have actually increased by 6%." Martin, *Budget Symposium*, Ex. 7 at 15.

Even if recent budgetary measures (announced by the State in 2015) are fully implemented, they will not substantially reduce, let alone eliminate, the unnecessary segregation of the Plaintiff class. Defendants estimate that 2,500 people in ICFs continue to wait for integrated, community-based services, yet the State has only committed to fund 800 new waiver slots for people in ICFs. *Martin Testimony*, Ex. 6 at 2; *DODD 2016 Annual Report*, Ex. 1 at 8.[8] Despite thousands of people at serious risk of institutionalization, the State has agreed to fund only 400 diversion waivers to prevent their unnecessary segregation. *DODD 2016 Annual Report*, Ex. 1 at 8. Over the past nine months, the State has made meager progress in implementing these budget initiatives. Ohio Dep't of Developmental Disabilities, *Third Quarter Scorecard* at 1 (May 2016) (Ex. 13); *see also* Rose Frech, Ctr. for Cmty. Solutions, *DODD Scorecard Suggests Progress on Budget Initiatives has been Slow* (May 5, 2016) (Ex. 14).[9]

### B. Plaintiffs' Injuries Result from Systemic Actions and Inactions of the Defendants.

Defendants' administrative, planning, policy, and funding decisions have created and maintained segregated residential, employment, and day programs. Their systemic actions and inactions perpetuate Plaintiff class members' segregation, which can be seen across Ohio's

[8] Defendants asserted in their Motion to Dismiss filed on June 27, 2016 that 736 exit waivers would be available during the SYF 2016-17 period. Doc. 27 at 10. The *2016 DODD Annual Report*, Ex. 1 provides no explanation for this inconsistency.

[9] The State just announced its most recent data on implementation of the SFY 2016-17 state budget initiatives. Ohio Dep't of Developmental Disabilities, *Year End Scorecard* (Aug. 2016) (Ex. 15). Progress continues to be inadequate, even in light of the limited nature of these initiatives. For example, even though 1,580 people in ICFs participated in options counseling and the vast majority (1,024 people) either chose to enroll in a waiver program (590) or expressed interest in moving out of the ICF in the future (434), only 242 waiver enrollments have been approved and only 11 people have actually been enrolled in waiver programs. *Id.* at 3-4.

service systems. Defendants: (1) choose to allocate State resources in a way that limits access to integrated, community-based services and incentivizes admissions to ICFs; (2) fail to evaluate individuals for integrated, community-based services and to inform people of alternatives to institutional care; and (3) fail to develop integrated, community-based residential, employment, and day services in a manner sufficient to remedy and prevent class members' discriminatory segregation.

First, the State's funding structure incentivizes institutionalization. Under the Medicaid program, the federal government partially reimburses states for the costs of long-term services (including the costs of both ICFs and waiver services) provided to eligible persons, including people with intellectual and developmental disabilities. Doc. 1 ¶ 90. The residual share for ICF services not paid by the federal government (which participants in the system call the "non-federal share"), is funded by the State from its own revenue. Frech, *Ohio at a Crossroads*, Ex. 3 at 21. But in most instances, the State requires counties to pay for the non-federal share of home and community-based services, typically through local tax levies. *Id*. at 22. This structure shifts the cost of integrated, community-based service delivery to fiscally stretched county boards—a result that exacerbates the unmet need for waiver services. *Id*. at 29.

The effect of Defendants' funding decisions can be seen in waiting lists administered by county boards across Ohio. Over 40,000 Ohioans remain on waiting lists for home and community-based services—a figure that is the highest of any state in the country. *What Are We Waiting For?* Ex. 9 at 4; Larson, *Status and Trends*, Ex. 2 at 30, 32. In 2015, the Center for Community Solutions found that 65 of Ohio's 88 counties had more individuals waiting for services than receiving services. Frech, *Ohio at a Crossroads*, Ex. 3 at 31. Of those 65 counties, sixteen had more than twice as many people waiting for services than those being served. *Id.*

Limitations on local funds constrain the number of new Medicaid waivers a county can offer, and create statewide disparities in access to integrated, community-based residential, employment, and day services. *Id.* at 29, 40-42.

Defendants' funding decisions and misallocation of resources also perpetuate Plaintiffs' unnecessary segregation in employment and day services. Defendant Martin acknowledged in 2013 that Ohio continues to fund 93 percent of the State's employment services in segregated, facility-based settings, with nearly 17,000 people in Ohio receiving services in sheltered workshops—more than in any other state in the nation. Martin, *Budget Symposium*, Ex. 7 at 17-18, 20. Of the roughly 14,000 people receiving adult day support in 2013, nearly all were spending their days in segregated, facility-based settings. Letter from Kate Haller, Chief Legal Counsel, Ohio Dep't of Developmental Disabilities at 2 (Feb. 14, 2014) (Ex. 16).

Second, for those who are at serious risk of admission to an ICF, Defendants fail to provide adequate diversionary services and appropriate information about waiver programs. Without timely and individualized information about their service options, these Plaintiffs are unlikely to receive the services they need to remain in the community and avoid unnecessary institutionalization. Similarly, Defendants fail to provide adequate transition services to those already in ICFs and to provide them the kind of individualized information that would allow them to make an informed choice regarding alternatives to institutional care. Doc. 1 ¶¶ 199-201.

Defendants recently recognized the need for a face-to-face education and outreach program to inform current and prospective ICF residents about options for home and community-based services. Ohio Dep't of Developmental Disabilities, *Pre-Admission Counseling* (Sept. 10, 2015) (Ex. 17); *Targeted Options Counseling*, Ex. 11 at 2-3. Yet this new initiative fails to reach a significant portion of the Plaintiff class because it provides options

counseling only to individuals in ICFs who already have expressed an interest in integrated, community-based services. *See* Doc. 1 ¶¶ 199-200. It does nothing to reach individuals who have never been informed about community-based options or presented with alternatives to institutionalization. *Id.* Additionally, Defendants' pre-admissions counseling occurs late in the ICF application process when people and families are often in immediate need of help and less able to explore community alternatives. *Pre-Admission Counseling*, Ex. 17 at 1-2. Thus far, Defendants' chosen counseling entity has demonstrated very little success in diverting people from institutionalization in ICFs. *Third Quarter Scorecard*, Ex. 13 at 1; *DODD Scorecard Suggests Slow Progress*, Ex. 14; *Year End Scorcard*, Ex. 15 at 3, 4.

Finally, Defendants have failed to provide the integrated, community-based residential, employment, and day services needed to remedy and prevent class members' discriminatory segregation. The State has recently adopted some measures in this area, but they do not redress the harm to the class. Most notably, the State's new initiatives largely ignore those who are not already enrolled in home and community-based waiver programs. The members of the proposed Plaintiff class, who live in large ICFs or are at serious risk of institutionalization because of reliance on aging caregivers and insufficient community-based services, thus will not benefit from those initiatives. Defendants' actions do not address the widespread segregation experienced by class members.

Defendants' "Employment First" initiative is a prime example. In 2013, Defendant Kasich issued an Executive Order stating that "individuals with developmental disabilities have the right to make informed decisions about where they work, and to have opportunities to obtain community jobs that may result in greater earnings, better benefits, improved health and increased quality of life." *Exec. Order 2012-05K*, at 1 (Mar. 19, 2012) (Ex. 18). In its

implementation of the Governor's Order, the State must presume that people with intellectual and developmental disabilities are capable of integrated, community-based employment, and that integrated employment should be the first option for each person. *See* Ohio Rev. Code § 5123.022. However, Defendant agencies' efforts to develop and operationalize this initiative have not resulted in significant changes in opportunities for integrated, community-based employment for the proposed Plaintiff class. *Ohio at a Crossroads*, Ex. 3 at 38. For example, as part of this Employment First initiative, and its transition planning obligations to the Centers for Medicaid and Medicare Services (CMS), the State is reportedly redesigning its employment and day programs. But this initiative, and the state transition planning process, is limited to waiver-funded services, thus neglecting the members of the proposed Plaintiff class for whom waiver services are not sufficiently available. *Employment First, HCBS Waiver Redesign Adult Day and Employment Services*, (Apr. 13, 2016) (Ex. 19).

Defendants' other recent employment initiatives also are insufficient to avoid Plaintiffs' unnecessary segregation in employment and day services. The State proposed its first and only integrated employment initiative for people in ICFs in August 2015. Ohio Dep't. of Developmental Disabilities, *Intermediate Care Facility Employment Pilots, Request for Proposals* (Aug. 26, 2015) (Ex. 20). On that date, the Ohio Department of Developmental Disabilities and Opportunities for Ohioans with Disabilities issued a request for proposals to fund three pilots intended to result in "[a]n increase in integrated community based employment and day services." *Id*. at 5. However, that RFP provides only $400,000 in funding to be spread among three organizations over a period of more than twenty months. *Id*. at 7. This amount is insufficient to address the needs of the thousands of residents of ICFs who are members of the

Plaintiff class, nearly all of whom attend segregated, facility-based employment and day programs. *See supra*, at 13; Doc. 1 ¶ 143.

Even if access to integrated, community-based employment services increases gradually over time, Defendants' policy will have little or no discernable impact on the Plaintiff class members, given the State's decision to provide minimal, if any, supported employment services outside of its waiver programs. Indeed, the State has chosen to provide little or no vocational rehabilitation services to people in ICFs or people on waiting lists for enrollment in waiver programs. Doc. 1 ¶¶ 166-170. This limitation on available vocational services is evident in Opportunities for Ohioans with Disabilities' vocational rehabilitation case closure guidelines, which state that a person's case can be closed if he or she "is unavailable to participate in VR [(vocational rehabilitation)] services for an indefinite or considerable period of time due to entering an institution other than a prison or jail (e.g. hospital, nursing home, treatment center)" or if he or she "would have benefitted from . . .supported employment services" through the State's waiver programs but these services were unavailable. Opportunities for Ohioans with Disabilities, *Vocational Rehabilitation Case Closure* at 4, 5 (Apr. 7, 2014) (Ex. 21); *see also* Opportunities for Ohioans with Disabilities' (OOD) case closure form, Ex. 22 (OOD's form lists among the reasons for closure of an individual's vocational rehabilitation case that the individual is "receiving primary services in an institutional setting"). *Id.* at 1.

As noted above, the State recently adopted a transition plan to comply with federal regulatory requirements established by the Centers for Medicare & Medicaid Services ("CMS") in 2014, but that plan will not directly benefit the Plaintiff class, given their limited access to Medicaid-funded home and community-based services. *See Ohio HCBS Transition Plan*, Ex. 8. New CMS regulations require all services covered by Medicaid waiver programs to be delivered

in integrated settings which "supports full access of individuals . . . to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community." 42 C.F.R. § 441.301(c)(4)(i). Ohio's federally-mandated "transition plan" recognizes that its employment and day services for people with intellectual and developmental disabilities "have a significant bias toward facility-based supports." *Ohio HCBS Transition Plan*, Ex. 8 at 13.

Ohio has proposed a lengthy process through its transition plan in which it will gradually comply with the new federal requirements to ensure people enrolled in waiver programs receive services in integrated settings. *Id.* at 12-15. However, any improvements in waiver-funded services will not meaningfully increase access to integrated employment and day programs for people currently segregated in large ICFs, or those who are at serious risk of admission to these facilities, precisely as a result of Ohio's failure to provide reasonable access to home and community-based services for these individuals.

As evidenced by the attached exhibits, and the legal analysis below, Plaintiffs' injury arises out of, and presents common questions regarding, a core of salient facts and a common course of conduct by the Defendants. These systemic actions and inactions, including Defendants' administrative, planning, policy, and funding decisions regarding the service system for people with intellectual and developmental disabilities, and their ability to be resolved by a single injunctive order, make class treatment appropriate.

## III. LEGAL STANDARDS FOR CLASS CERTIFICATION

The party moving for class certification must satisfy all of the requirements of Rule 23(a) of the Federal Rules of Civil Procedure, and the requirements of at least one of the subdivisions of Rule 23(b). Fed. R. Civ. P. 23(a) imposes four distinct criteria: (1) the class must be so numerous that joinder of all members is impracticable; (2) the members of the class must share

common questions of law or fact; (3) the claims or defenses of the named representatives must be typical of those of the class; and (4) the named plaintiffs must be able to fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a)(1)-(4). Fed. R. Civ. P. 23(b)(2), under which the Individual Plaintiffs seek certification here, allows class actions when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

"Class certification is appropriate if the court finds, after conducting a 'rigorous analysis,' that the requirements of Rule 23 have been met." *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 851 (6th Cir. 2013) (quoting *Wal-Mart*, 564 U.S. at 351). Plaintiffs satisfy their burden when the putative class provides ". . . an adequate statement of the basic facts to indicate that each requirement of the rule is fulfilled." *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618, 629 (6th Cir. 2011) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir.1996)) (quotations omitted). The evidence presented in Section II, *supra*, is sufficient to satisfy threshold criteria under Fed. R. Civ. P. 23(a), demonstrating that the Individual Plaintiffs, and thousands of similarly-situated individuals, have experienced a common injury—discriminatory segregation—as a result of Defendants' administrative, planning, policy, and funding decisions regarding the service system for people with intellectual and developmental disabilities. Their common factual contentions and legal claims are susceptible to class-wide proof and can be resolved on behalf of the class as a whole, making class treatment appropriate.

Pursuant to the Supreme Court's decision in *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013), Rule 23 "grants courts no license to engage in free-

ranging merits inquiries at the certification stage." Rather, district courts may "consider at the class certification stage only those matters relevant to deciding if the prerequisites of Rule 23 are satisfied. In other words, district courts may not 'turn the class certification proceedings into a dress rehearsal for the trial on the merits.'" *In re Whirlpool Corp.*, 722 F.3d at 851-52 (citation omitted; quoting *Messner v. Northshore Univ. Health System*, 669 F.3d 802, 811 (7th Cir. 2012)). Instead, "'[m]erits questions may be considered to the extent—*but only to the extent*—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.'" *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 505 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1493 (2016) (quoting *Amgen*, 133 S. Ct. at 1194-95).

## IV. THE PROPOSED CLASS SATISFIES FED. R. CIV. P. 23.

Since the passage of the ADA in 1990, courts have repeatedly certified class actions challenging government officials' noncompliance with Title II of the ADA. *See* List of Selected ADA Class Action Cases (Ex. 23). In particular, courts have routinely granted class certification in cases seeking to enforce the ADA's Integration Mandate on behalf of those who are unnecessarily institutionalized or facing serious risk of unnecessary institutionalization. They have done so both before and after the Supreme Court's decision in *Wal-Mart*. Indeed, class certification has been granted in virtually every post-*Wal-Mart* community integration class action case.[10] Such cases include those that are strikingly similar to this one, in which plaintiffs

[10] *See, e.g.*, *Cole v. Brad Livingston*, No. 4:14-cv-1698, 2016 WL 3258345 (S.D. Tex. June 14, 2016); *Holmes v. Godinez*, 311 F.R.D. 177 (N.D. Ill. 2015); *Hernandez v. County of Monterey*, 305 F.R.D. 132 (N.D. Cal. 2015); *Oster v. Lightbourne*, No. C09-4668 CW, 2012 WL 685808 (N.D. Cal. Mar. 2, 2012); *Pashby v. Cansler*, 279 F.R.D. 347 (E.D.N.C. 2011), *aff'd*, *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013); *cf. Steimel v. Wernert*, 823 F.3d 902, 917-918 (7th Cir. 2016) (reversing and remanding lower court ruling, and concluding that the ADA's Integration Mandate applied to plaintiffs' claim for discriminatory segregation, but affirming denial of class certification where class definition was 'too vague'); *A.R. v. Dudek*, No. 12-60460, slip op. at 2 (S.D. Fla. Feb. 29, 2016) (denying second renewed motion for class certification where plaintiffs and the Department of Justice sought both monetary damages and injunctive relief, and where the proposed class definition "offer[ed] no objective measure by which to gauge the persons included within the class."), Ex. 24. Here Plaintiffs seek only prospective injunctive relief and propose a class definition which is both sufficiently ascertainable and based on objective criteria, distinguishing both *Steimel* and *Dudek* from the instant case.

are unnecessarily institutionalized, or face a serious risk of institutionalization, and seek compliance with Title II's requirement that services be provided in the most integrated setting appropriate for their needs. *See, e.g.*, *Kenneth R. ex rel. Tri-County CAP, Inc./GS v. Hassan*, 293 F.R.D. 254 (D.N.H. 2013); *Lane v. Kitzhaber*, 283 F.R.D. 587 (D. Or. 2012); *Steward v. Janek*, No. 5:10-CV-1025-OLG, 2016 WL 3960919 (W.D. Tex. May 20, 2016). Additionally, courts have routinely certified classes challenging a failure to provide appropriate, integrated services to persons with disabilities institutionalized in privately-operated facilities.[11] This long line of decisions granting class certification where plaintiffs challenge their needless institutionalization and the denial of integrated, community-based services argues strongly for class certification here.

In keeping with this established case law, Plaintiffs propose certification of a class containing:

> All Medicaid-eligible adults with intellectual and developmental disabilities residing in the state of Ohio who, on or after March 31, 2016, are institutionalized, or at serious risk of institutionalization, in an Intermediate Care Facility with eight or more beds, and who have not documented their opposition to receiving integrated, community-based services.

Class members at serious risk of institutionalization in large ICFs include people with intellectual and developmental disabilities who now, or in the future: (1) apply for or are referred for admission to an ICF; or (2) are placed on waiting lists for Medicaid home and

[11] *See, e.g.*, *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1333 (W.D. Wash. 2015), *reconsideration denied*, No. C14-0567JLR, 2015 WL 4076789 (W.D. Wash. July 1, 2015) (certifying class of nursing facility residents with intellectual and developmental disabilities who are eligible to be screened under 42 U.S.C. § 1396r(e)(7) and the Nursing Home Reform Act and its implementing regulations); *Thorpe v. District of Columbia*, 303 F.R.D. 120 (D.D.C. 2014), *petition for appeal denied*, *In re District of Columbia*, 792 F.3d 96 (D.C. Cir. 2015); *Van Meter v. Harvey*, 272 F.R.D. 274 (D. Me. 2011); *Hampe v. Hamos*, No. 1:10-cv-3121, slip op. (N.D. Ill. Nov. 22, 2010), Ex. 25; *Colbert v. Blagojevich*, No. 07 C 4737, 2008 WL 4442597 (N.D. Ill. Sept. 29, 2008); *Bzdawka v. Milwaukee County*, 238 F.R.D. 469 (E.D. Wis. 2006); *Fields v. Maram*, No. 04 C 0174, 2004 WL 1879997 (N.D. Ill. Aug. 17, 2004); *Rolland v. Cellucci*, No. Civ. A 98-30208-KPN, 1999 WL 34815562 (D. Mass. Feb. 2, 1999).

community-based services and have an aging caregiver or intensive needs as defined by Ohio Admin. Code 5123:2-1-08 (D)(10)(c).[12]

The proposed class satisfies the requirements of Fed. R. Civ. P. 23(a), and the class, as defined, is sufficiently ascertainable for purposes of certification under Fed. R. Civ. P. 23(b)(2).[13] *See Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 387, 391 (S.D. Ohio 2008) ("Because the point of (b)(2) classes is to furnish broad injunctive or declaratory relief, and because notice is not required, courts apply the ascertainability requirement more flexibly in this context, than in the (b)(3) context.") (quoting *Finch v. N.Y. State Office of Children & Family Servs*., No. 04-1688, 2008 WL 3349561, at *5 (S.D.N.Y. Aug. 8, 2008)); s*ee also Young v. Nationwide Mut. Ins. Co*., 693 F.3d 532, 539 (6th Cir. 2012) (upholding certification of a class of Kentucky policy-holders and finding class definition sufficiently definite and administratively feasible for purposes of Rule 23(b)(3)).

By excluding ICF residents who have documented their opposition to integrated, community-based services, the proposed definition uses objective criteria to focus class

[12] It is well established that persons at risk of institutionalization have standing to state a claim under Title II of the ADA and need not wait until the harm of institutionalization or segregation occurs or is imminent before seeking relief. Doc. 34 at 24-31; *see Steimel v. Wernert*, Nos. 15-2377, 15-2389, 2016 WL 2731505 (7th Cir. May 10, 2016) (holding that "the integration mandate is implicated where the state's policies have either (1) segregated persons with disabilities within their homes, or (2) put them at serious risk of institutionalization."); *see also Steward v. Janek*, No. 5:10-CV-1025-OLG, 2016 WL 3960919 (W.D. Tex. May 20, 2016); *Davis v. Shah*, 821 F.3d 231, 263-64 (2d Cir. 2016); *M.A. v. Norwood*, No. 15 C 3116, 2015 WL 5612597, at *10-11 (N.D. Ill. Sept. 23, 2015); *Pashby v. Delia*, 709 F.3d at 321-22; *Kenneth R.*, 293 F.R.D. at 263; *Lane*, 283 F.R.D. at 598; *M.R. v. Dreyfus*, 663 F.3d 1100, 1116-17 (9th Cir. 2011), *as amended on denial of rehearing en banc*, 697 F.3d 706 (9th Cir. 2012); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003); *Makin ex rel. Russell v. Hawaii*, 114 F. Supp.2d 1017, 1033 (D. Hawaii 1999). *See also* Civil Rights Div., U.S. Dep't 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), *available at* https://www.ada.gov/olmstead/q&a_olmstead.htm (last visited Aug. 4, 2016).

[13] "[S]everal other circuit courts have held that, due to the unique characteristics of a Rule 23(b)(2) class, it is improper to require ascertainability for a Rule 23(b)(2) class." *Dunakin*, 99 F. Supp. 3d at 1326 (citing *Shelton v. Bledsoe*, 775 F.3d 554, 559-63 (3d Cir. 2015) ("[A]scertainability is not a requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief . . . .")); *see also Shook v. El Paso County*, 386 F.3d 963, 972 (10th Cir. 2004) ("[M]any courts have found Rule 23(b)(2) well suited for cases where the composition of a class is not readily ascertainable."); *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir.1972) (holding that, because "notice to the members of a(b)(2) class is not required . . . the actual membership of the class need not . . . be precisely delimited.").

membership on those individuals who have experienced a common injury and who are qualified to state a claim under *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). At the same time, the proposed class definition recognizes the fluid nature of the prospective injunctive relief sought in this case, the presence of future class members, and the possibility that individuals' interest in exploring community alternatives may change over the duration of the litigation.

The proposed class satisfies the requirements of Fed. R. Civ. P. 23(a), because its members share a common legal injury—unnecessary segregation. This injury results from a common course of conduct arising out of Defendants' administration, operation, planning, and funding of the service system for people with intellectual and developmental disabilities. This case will be decided based upon a core of salient facts that form the basis of all class members' legal claims. Class treatment is appropriate under Fed. R. Civ. P. 23(b)(2) because class members' claims, and the factual and legal contentions that underpin them, are susceptible to a common answer and can be redressed by a single injunctive order. Therefore, and as set out more fully below, this class satisfies the requirements of Fed. R. Civ. P. 23(a) and (b)(2).

**A. The Class is So Numerous That Joinder of All Members is Impractical.**

Rule 23(a)(1) requires that plaintiffs demonstrate the proposed class is so numerous that joinder of all class members is impractical. Fed. R. Civ. P. 23(a)(1). There is no strict numerical test for determining impracticability of joinder. *See, e.g.*, *In re Whirlpool Corp.*, 722 F.3d at 852; *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 523 (6th Cir. 1976). However, "[w]hen class size reaches substantial proportions . . . the impracticability requirement is usually satisfied by the numbers alone." *In re Am. Med. Sys., Inc.*, 75 F.3d at 1079 (citation omitted).

The number of individuals institutionalized in ICFs in Ohio, or at serious risk of admission to these facilities, far exceeds the requirements for class certification. The proposed class consists of at least 2,500 persons who have expressed a preference to receive integrated,

community-based services and who reside in ICFs. *See supra*, at 11. Thousands of other proposed class members are at serious risk of institutionalization. Defendants publicly acknowledge that there are approximately 8,000 people who live in the community but rely on aging caregivers and 1,000 people who are expected to lose the support of their primary caregiver within a twelve-month period. *See supra*, at 8.

"Lawsuits alleging class-wide discrimination are particularly well suited for 23(b)(2) treatment" because the cases usually involve members who are "incapable of specific enumeration." *Senter*, 532 F.2d at 525-26 (internal citation omitted) (citing Fed. R. Civ. P. 23 Advisory Committee's note to 1966 amendment). For this reason, only a "reasonable estimate or some evidence of the number of class members" is required. *Price v. Medicaid Dir.*, 310 F.R.D. 345, 375-76 (S.D. Ohio 2015) (quoting *Bentley v. Honeywell Intern., Inc.*, 223 F.R.D. 471, 480 (S.D. Ohio 2004)) (quotations omitted); s*ee also Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 645 (4th Cir. 1975) (size of class can be speculative where only injunctive or equitable relief is requested). In fact, a proposed class is "more likely to satisfy the numerosity requirement if it is difficult to identify potential class members." *In re Tyco Int'l, Ltd.*, No. MD-02-1335-PB, 2006 WL 2349338, at *1 (D.N.H. Aug. 15, 2006) (citing *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 132 (1st Cir. 1985)). Data on the State's waiting lists for home and community-based services, and Defendants' continued reliance on the analysis of that data, provide a basis upon which to reasonably estimate the number of institutionalized class members who have already expressed a preference for community living, as well as the number of individuals who face a serious risk of unnecessary institutionalization. *See supra*, at 7-8. These proposed class members are more than sufficient to satisfy the threshold criteria for numerosity—especially when the remedy sought is prospective, injunctive relief.

When examining the practicability of joinder, courts also give significant weight to factors such as judicial economy, the plaintiffs' ability to bring separate actions, and the likely presence of future class members. *Card v. City of Cleveland*, 270 F.R.D. 280, 290 (N.D. Ohio 2010) (impracticability can be shown through factors including judicial economy, '"the financial resources of class members,' ability or motivation of class members to institute individual suits, and requests for prospective and injunctive relief that could affect future class members.") (quoting *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 184 F.R.D. 583, 586 (N.D. Ohio 1998)); *see also Jordan v. County of Los Angeles*, 669 F.2d 1311, 1320 (9th Cir. 1982) ("The joinder of unknown individuals is inherently impractical."), *vacated on other grounds*, 459 U.S. 810 (1982); *Phillips v. Joint Legislative Comm. on Performance & Expenditure Review*, 637 F.2d 1014, 1022 (5th Cir. 1981) (concluding class certification was improperly denied in employment discrimination case and the requirements of Rule 23(a)(1) met where the presence of future, unknown class members makes joinder impracticable); *Van Meter*, 272 F.R.D. at 282 (class containing present and future nursing facility residents whose chronic disabilities and segregation made the maintenance of separate actions impractical); *Risinger v. Concannon*, 201 F.R.D. 16, 19 (D. Me. 2001) (difficulties associated with identifying and formally joining a geographically dispersed group of more than 391 children with disabilities and their families made joinder impractical); *Williams v. Lane*, 96 F.R.D. 383 (N.D. Ill. 1982) (the fluid nature of putative class of prisoners challenging conditions of confinement in correctional center's protective custody unit made joinder impractical).

These factors weigh strongly in favor of class certification here. The proposed class includes thousands of individuals who are institutionalized across the State's ICF system—approximately 2,500 of whom have already expressed a preference for community-based

services. *See supra*, at 11. Large ICF facilities are located throughout the State, in over 300 program settings. *See supra*, at 5. Across Ohio, other class members languish on county-based waiting lists, and will continue to find themselves at serious risk of ICF admission due to their reliance on aging caregivers or because of their intensive needs. *See supra*, at 8. The fluid nature of this class, and the presence of future "at risk" class members, makes joinder impractical.

Finally, it is highly unlikely that individual class members—people with intellectual and developmental disabilities who are eligible for Ohio's Medicaid program—would have the ability or resources to institute separate suits for declaratory and injunctive relief in the event class certification is denied. *See, e.g.*, *Price*, 310 F.R.D. at 377 (assisted living waiver applicants' advanced age, significant cognitive and/or physical limitations, and limited financial resources make filing individual lawsuits impracticable); *Raymond v. Rowland*, 220 F.R.D. 173, 179 (D. Conn. 2004) (multiple factors indicate that impoverished nursing facility residents with disabilities are unlikely to maintain individual actions for relief); *Armstead v. Pingree*, 629 F. Supp. 273, 279 (M.D. Fla. 1986) ("Considering plaintiffs' confinement, their economic resources, and their mental [disabilities], it is highly unlikely that separate actions would follow if class treatment were denied.").

Given the size, geographic diversity, and fluidity of the proposed class, as well as the personal circumstances and systemic claims of its members, joinder is impractical and the requirements of Fed. R. Civ. P. 23(a)(1) are satisfied.

**B. Members of the Class Share Common Questions of Law and Fact.**

Fed. R. Civ. P. Rule 23(a)(2) requires that there be one or more "questions of law or fact common to the class." To satisfy this requirement, Plaintiffs' claims "must depend upon a common contention," one that "is capable of classwide resolution—which means that

determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. Therefore, commonality turns on "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 132 (2009)) (internal quotation marks omitted; emphasis in original).

Both the Supreme Court and the Sixth Circuit have emphasized that the commonality requirement does not demand that *all* issues in a case be capable of resolution on a class-wide basis; "[e]ven a single [common] question will do." *Wal-Mart*, 564 U.S. at 359 (quoting Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L.Rev. 149, 176, n. 110 (2003) (internal quotation marks omitted). Nor must the plaintiff show that all class members have been injured in precisely the same way, or even injured at all. *See Rikos*, 799 F.3d at 505 ("The Supreme Court in *Dukes* did not hold that named class plaintiffs must prove at the class-certification stage that all or most class members were in fact injured to meet this requirement."). Rather, "named plaintiffs must show that there is a common question that will yield a common answer for the class (to be resolved later at the merits stage), and that that common answer relates to the actual theory of liability in the case." *Id.*

**1. This Case Presents Multiple Common Questions.**

There are multiple factual contentions that are common to the Plaintiff class, susceptible to a common answer and that, if so answered, would resolve the legal claims of the class as a whole. Plaintiffs contend, *inter alia*, that:

a) Defendants' administration, operation, planning, and funding of the service system for people with intellectual and developmental disabilities arbitrarily and impermissibly denies Plaintiffs the opportunity to receive services in the most integrated setting by: maintaining and continuing to fund an unnecessarily large

number of ICFs; failing to provide people in ICFs with sufficient access to, and options for receipt of, integrated, community-based residential, employment, and day services; and maintaining a service funding structure for people with intellectual and developmental disabilities that incentivizes institutionalization;

b) Defendants' policies, practices, and programs fail to provide integrated, community-based services as alternatives to ICF admission, placing Plaintiffs at serious risk of institutionalization and forcing them to enter ICFs in order to receive needed services and supports; and

c) Defendants' policies, practices, and programs fail to provide adequate and timely information and transitional assistance services to people already in ICFs, thereby denying Plaintiffs reasonable access to integrated, community-based service options and causing them to remain unnecessarily and impermissibly segregated in the settings where they live, work, and spend their days.

Questions of law common to the class include the following:

a) Whether Defendants unnecessarily institutionalize qualified persons with intellectual and developmental disabilities in ICFs, and fail to provide them with services in the most integrated setting in violation of the ADA and Section 504 of the Rehabilitation Act;

b) Whether Defendants administer their service system for people with intellectual and developmental disabilities in a way that discriminates against Plaintiffs in violation of the ADA and Section 504 of the Rehabilitation Act; and

c) Whether Defendants fail to evaluate Plaintiffs' eligibility for more integrated, community-based services and to adequately inform them of feasible alternatives to institutional care, in violation of 42 U.S.C. §1396n(c)(2)(B) and (C).

These contentions are central to the Plaintiffs' case and focus on a specific set of home and community-based services required to avoid class members' unnecessary institutionalization and resulting segregation. The factual and legal questions raised by these contentions can be resolved on a class-wide basis. As the evidence recounted in the Statement of Facts demonstrates, it is the State's policies, practices, and systemic deficiencies, and not simply misplaced decisions in individual cases, that have resulted in the legal violations alleged. *See supra*, Section II.

In particular, Plaintiffs intend to show that Defendants: (1) continue to maintain and invest in a vast system of segregated, institutional facilities, when thousands of qualified persons in these facilities can and want to receive services in integrated, community-based settings; (2) choose to allocate State resources in a way that limits access to integrated, community-based services and incentivizes institutional ICF placement; (3) fail to evaluate ICF residents' eligibility for integrated, community-based services and to adequately inform them of feasible alternatives; and (4) fail to develop community-based services, including integrated residential, employment, and day services, sufficient to prevent the unnecessary institutionalization and segregation of qualified individuals with intellectual and developmental disabilities.

A single injunction which requires the expansion of integrated, community-based services, paired with: 1) the presentation of feasible alternatives to institutional care to people facing or experiencing institutionalization; 2) the provision of transition assistance to people in ICFs; and 3) diversionary services to those facing admission to ICFs can resolve these systemic

violations, redress Plaintiffs' injuries, and benefit the class as a whole. This relief can be provided without requiring the Court to engage in any individualized assessment of class members' preferences or treatment needs. These types of person-centered assessments are best done though the State's existing clinical and administrative process for individualized service planning.

Plaintiffs have presented both the common questions and the possible "common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L.Rev. 97, 132 (2009) (internal quotation marks omitted; emphasis in original). Unlike *Wal-Mart*, where the plaintiffs sought to tie together the individualized exercise of discretion by managers at thousands of stores across the country, *see id.* at 355-360, the class-based issues here focus entirely at the level of the Defendants' policies, practices, and programs. They are far more concrete than the abstract assertion that the class members "have all suffered a violation of the same provision of law." *Id.* at 350. Plaintiffs' common contentions target discrete State practices that concern all Plaintiffs and raise questions that can be answered 'yes' or 'no' for the class as a whole. As a result, class treatment of these claims will "resolve . . . issue[s] that [are] central to the validity" of all Plaintiffs' claims "in one stroke." *Id.*

**2. Courts Have Repeatedly Found Commonality in Cases Like This One.**

ADA Title II cases, like this one, customarily focus on the standardized conduct of the defendants and do not depend on individualized determinations of either liability or remedy. Thus, courts commonly find class treatment appropriate in such cases—and have repeatedly done so after *Wal-Mart*.[14] Indeed, in cases just like this one—cases brought under the ADA, the

[14] *See Henderson v. Thomas*, 289 F.R.D. 506 (M.D. Ala. 2012) (certifying class of prisoners with HIV who alleged that the Alabama Department of Corrections' policy of segregating inmates with HIV from the general prison

Rehabilitation Act, and the Social Security Act to challenge state practices that lead to unnecessary segregation in residential and day services—multiple federal courts within the last three years have found commonality and granted class certification motions.

In *Kenneth R.*, the court certified a class of individuals with serious mental illness who claimed that

> the State's pattern and practice of under-funding community services and its over-reliance on institutional treatment has created a systemic deficiency in the array of available community services, which, in turn, has (1) contributed to the unnecessary institutionalization of people with serious mental illnesses; and (2) contributed to the placement of people with serious mental illnesses at serious risk of unnecessary institutionalization.

293 F.R.D. at 260 (footnote omitted). The court found that common questions of law and fact existed, making certification appropriate. Particularly relevant here, the court explained:

> [W]hether there is a systemic deficiency in the availability of community-based services, and whether that deficiency follows from the State's policies and practices, are questions central to plaintiffs' theory of the case. These questions will, necessarily, be answered similarly for every class member. And, whether the systemic conditions, if shown to exist, expose all class members to a serious risk of unnecessary institutionalization, including continued unnecessary institutionalization, is a central and common contention whose resolution will defeat or advance the claims of all class members, whether institutionalized or not.

*Id.* at 267. These are exactly the sorts of common questions Plaintiffs seek to resolve here.

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population violated Title II of the ADA); *Oster*, 2012 WL 685808, at *5 (certifying class of individuals placed at risk of institutionalization by defendants' cuts to in-home support services and rejecting defendants' assertion that class members do not meet the commonality requirement because they suffer different service reductions); *Gray v. Golden Gate Nat'l Recreation Area*, 279 F.R.D. 501 (N.D. Cal. 2011) (certifying a class of individuals with mobility and/or vision disabilities and concluding that commonality was satisfied by defendant's general policies and practices which failed to address access barriers at a national recreational area); *Pashby v. Cansler*, 279 F.R.D. at 353 (certifying class of plaintiffs placed at risk of institutionalization by a state policy limiting access to personal care assistance); *see also*, *Parsons v. Ryan*, 754 F.3d 657, 687 (9th Cir. 2014) (affirming certification of a class of inmates seeking injunctive relief from the Arizona Department of Corrections for Eighth Amendment violations where common questions existed regarding whether systemic practices and customs placed class members at substantial risk of serious harm); *Ind. Prot. & Advocacy Servs. Comm'n v. Comm'r, Ind. Dep't of Corr.*, No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517, at *18 (S.D. Ind. Dec. 31, 2012) (certifying a class of prisoners with a range of mental illnesses who have been or will be subject to segregation).

In *Lane*, the court certified a class of persons with developmental disabilities who had been referred to, or were receiving segregated employment services in, the state's sheltered workshop system. The plaintiffs claimed that the state's failure to provide them integrated supported employment services violated the ADA's Integration Mandate. *Lane*, 283 F.R.D. at 591. The court found that the case presented a common question—"whether defendants have failed to plan, administer, operate and fund a system that provides employment services that allow persons with disabilities to work in the most integrated setting." *Id.* at 598. The court recognized that not all of the class members were identical in all respects—"[f]or example, not all of the named plaintiffs work in sheltered workshops; some have worked in (or declined the opportunity to work in) integrated settings; and appropriate vocational training will differ for each individual"—but it noted that "commonality only requires a single common question of law *or* fact." *Id.* at 597-98 (footnotes omitted; emphasis in original). "As in other cases certifying class actions under the ADA and Rehabilitation Act," the court concluded, "commonality exists even where class members are not identically situated." *Id.* at 598. As in *Kenneth R.*, the common question identified in *Lane* mirrors the central factual and legal contentions raised by the Plaintiffs.

In both *Kenneth R.* and *Lane*, the federal court rejected arguments that plaintiffs must affirmatively prove that they, and all putative class members, are unnecessarily segregated and would benefit from the proposed remedial services in order for class treatment to be appropriate. *Kenneth R.*, 293 F.R.D. at 263; *Lane*, 283 F.R.D. at 598. The Court in *Lane* found that such an inquiry would, in effect, constitute "the answer to the common question," 283 F.R.D. at 598, rather than a simple demonstration that there are common contentions whose answer ". . . will

resolve an issue that is central to the validity of each one of the class members claims in one stroke." *Id.* at 595 (citing *Wal-Mart*, 564 U.S. at 350).

As recently as May 2016, the court in *Steward* certified a class of "[a]ll Medicaid-eligible persons over twenty-one years of age with intellectual or developmental disabilities or a related condition in Texas who currently or will in the future reside in nursing facilities, or who are being, will be, or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 *et seq.*" *Steward v. Janek*, No. 5:10-CV-1025-OLG, 2016 WL 3960919 (W.D. Tex. May 20, 2016) at *16. The plaintiffs alleged, *inter alia*, that the state violated the ADA and the Rehabilitation Act by unnecessarily institutionalizing class members in nursing facilities, and that it violated the Social Security Act by failing to properly evaluate class members' eligibility for community services before placing them in those nursing facilities. *Id.* at *6-7. The instant case includes very similar ADA, Rehabilitation Act, and Social Security Act claims.

The *Steward* court concluded that the plaintiffs had pointed to a number of common contentions of law and fact, including whether the state was systematically "failing to identify candidates for community-based care and divert them from unnecessary institutionalization." *Id.* at *7. The court specifically rejected the argument that the deficiencies in the state's program "will manifest as the failure to identify different medical conditions in different individuals and will therefore contribute to the denial of different specialized services to different individual class members." *Id.* The court held that "although the State's failures may be unique to each individual class member, the failures can also be quantified and remedied by the Court in ways that are common across the class." *Id.* Precisely the same could be said here.

Similarly, in *Thorpe*, the court certified a class of nursing facility residents who claimed that the District of Columbia's failure to provide effective transition assistance caused them to remain unnecessarily institutionalized in violation of the ADA. The court found that the plaintiffs had raised three common questions: "(1) are there deficiencies in the District's existing system of transition assistance? (2) if so, what are those deficiencies? and (3) are the proven deficiencies causing unnecessary segregation?" 303 F.R.D. at 146 (footnote omitted). "True or false," the court concluded, "resolution of these common contentions will generate common answers for the entire class and resolve issues that are central (and potentially dispositive) to the validity of each plaintiff's claim and the claims of the class as a whole." *Id.* at 146-47. So too here, Plaintiffs challenge systemic deficiencies in Defendants' service system—deficiencies that are causing, or creating a serious risk of, unnecessary institutionalization.

The district court's decision in *Dunakin* applies the same analysis. There, the court determined that Washington's undue reliance on segregated nursing facilities to serve individuals with developmental disabilities, and its policies concerning federally-mandated specialized services, constituted standardized conduct that justified certification of a class of nursing facility residents with intellectual and developmental disabilities. The court found multiple common questions regarding putative class members' access to appropriate and adequate services—questions very similar to those posed in the instant case—including whether defendants "properly determine whether individuals with intellectual disabilities and related conditions residing in Medicaid-certified, privately-operated nursing facilities want to live in less restrictive, community-based settings and, if so, provide for class members to access those less restrictive community-based settings?" 99 F. Supp. 3d at 1328.

The parallels between these five cases and the present class action are significant. Here, Plaintiffs challenge the Defendants' discriminatory planning, administration, operation, and funding of a system whose lack of adequate community-based services results in the unnecessary institutionalization and segregation of thousands of individuals with intellectual and developmental disabilities, while placing thousands more at serious risk of institutionalization. These are precisely the kinds of factual and legal contentions that courts routinely find to satisfy the requirement of commonality, as they arise from a core of salient facts and a course of conduct that affects all class members, can be answered "yes" or "no" for all class members, and, therefore, can be productively litigated at once. Differences among class members' preferences and community-based service needs do not change the fact that the State's practices with regard to the provision of community-based services affects all class members.[15] *See Kenneth R.*, 293 F.R.D. at 269 (". . . the existence of preference differences among class members does not change the fact that the State's practices with regard to community services have been shown, by substantial proof, to affect all class members") (citing *In re Whirlpool Corp.*, 722 F.3d at 852).

[15] *Lane*, 283 F.R.D. at 598 ("As in other cases certifying class actions under the ADA and Rehabilitation Act, commonality exists even where class members are not identically situated."); *Ault v. Walt Disney World Co.*, No. 6:07-cv-1785-Orl-31KRS, 2011 WL 1460181 (M.D. Fla, Apr. 4, 2011), *aff'd*, 692 F.3d 1212 (11th Cir. 2012) (certifying ADA Title III class for members with varying types of mobility impairments); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith*, 672 F.3d 482 (7th Cir. 2012), (reversing denial of class certification in disparate impact case where common questions exist regarding company policies and their contributory effect on alleged employment discrimination, even if individual employee decisions may also be a factor) *abrogated in part on other grounds by Phillips v. Sheriff of Cook Cty.*, No. 14-3753, 2016 WL 3615761, at *8 (7th Cir. July 6, 2016); *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 296 (D. Mass. 2011) (that specific harms suffered by unnamed class members differs from that experienced by named plaintiffs does not undermine commonality or typicality); *Brooklyn Ctr. for Independence of the Disabled v. Bloomberg*, 290 F.R.D. 409, 418-19 (S.D.N.Y. 2012) ("In other words "[a] court may find a common issue of law even though there exists some factual variation among class members' specific grievances.") (citing *Stinson v. City of New York*, 282 F.R.D. 360, 369 (S.D.N.Y. 2012) (internal quotations omitted; alteration in original); *Churchill v. Cigna Corp*., No. 10-6911, 2011 WL 3563489, at *3 (E.D. Pa. Aug. 12, 2011) (plaintiff class denied the benefit of treatment for autism spectrum disorder stated common claims as well as "common answer apt to drive the resolution of the litigation" regardless of their different conditions, treatment needs, and abilities to benefit from a particular type of therapy) (citing *Wal-Mart*, 564 U.S. at 350) (quotations omitted).

Like the many other ADA cases decided before and after *Wal-Mart*, the commonality requirement is amply satisfied here. Whether currently admitted to a large ICF, or at serious risk of institutionalization in these facilities, the Plaintiff class is suffering a single injury – unnecessary segregation – as a result of a common course of conduct by Defendants. From this conduct arises a set of common legal and factual contentions, including whether Defendants have failed to administer, fund, and operate their service system for people with intellectual and developmental disabilities in a manner which provides people in ICFs, and those at serious risk of admission to such facilities, the opportunity to receive services in integrated, community-based settings. This is the common thread or "glue" which unites class members' common factual and legal claims in this case. *Wal-Mart*, 564 U.S. at 350. The question of whether Defendants' system subjects the Plaintiff class to unnecessary institutionalization and segregation is both susceptible to a common answer and "capable of classwide resolution," since a determination of its truth or falsity will resolve an issue central to each one of the Plaintiffs' claims. *Id.*

### C. The Claims or Defenses of the Named Representatives Are Typical of the Class.

The third component of Rule 23(a) requires that the representatives' claims for relief be typical of the claims of the absent class members. Fed. R. Civ. P. 23(a)(3). Like commonality, the typicality requirement does not demand a showing of complete identity between the legal claims of a representative and each class member, but only that "a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class so that the court may properly attribute a collective nature to the challenged conduct." *Newberg on Class Actions*, § 3:29 (5th ed. Nov. 2011); *Hendricks v. Total Quality Logistics, LLC*, 292 F.R.D. 529, 542 (S.D. Ohio 2013) ("Typical does not mean identical, and the typicality requirement is

liberally construed.") (citing *Ross v. RBS Citizens, N.A.*, No. 09 CV 5695, 2010 WL 3980113, at *3 (N.D. Ill. Oct. 8, 2010) (quotations omitted).

For this reason, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982). The typicality requirement is satisfied when the class representatives generally "possess the same interest and suffer the same injury" as unnamed class members, *id.* at 156 (citing *E. Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)) (internal quotation marks omitted), and class members' claims are "fairly encompassed by the named plaintiffs' claims." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d at 1082) (quotations omitted); *In re Whirlpool Corp.*, 722 F.3d at 852-53 (typicality exists where "by pursuing their own interests, the class representatives also advocate the interests of the class members.").

Similarly, when the plaintiffs' claims "arise from the same event or practice or course of conduct that gives rise to the claims of other class members" and are "based on the same legal theory," typicality is satisfied. *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 460 (1st Cir. 2009) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d at 1082) (quotations and bracket omitted); *see also* James Wm. Moore et al., 5-23 Moore's Federal Practice - Civil § 23.24[3] (3d ed. 2016) ("[T]he critical inquiry is whether the class representative's claims have the same essential characteristics as those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, some factual differences among the claims will not defeat typicality."); *D.G. ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1199 (10th Cir. 2010) ("[T]ypicality exists where, as here, all class members are at risk of being subjected to the same harmful practices, regardless of any class member's individual circumstances.").

Here, the Individual Plaintiffs and the Plaintiff class are aggrieved by the same actions and inactions of the Defendants. They are subject to the same discriminatory segregation in Defendants' administration, operation, planning, and funding of the system for people with intellectual and developmental disabilities. They face the same limitations in accessing integrated residential, employment, and day services, and they share a common interest in expanding community-based alternatives and avoiding unnecessary institutionalization. The Individual Plaintiffs seek declaratory and injunctive relief that is reasonably related to the harm experienced by the Plaintiff class and which will inure to the benefit of all class members. Finally, the Individual Plaintiffs' legal claims arise from the same policies and practices of Defendants and are based on the same legal theory. *See Daffin v. Ford Motor Co.*, 458 F.3d 549, 553 (6th Cir. 2006) (Where named plaintiff and class members' claims arise from the same practice, are impacted by the same systemic defect, and are based on the same legal theory, typicality is satisfied despite "different factual circumstances.").

Because the Individual Plaintiffs' factual proof and legal theories arise from a common course of discriminatory conduct, and their claims and interests are aligned with that of the putative class, the requirements for typicality under Rule 23(a)(3) are satisfied.

### D. The Class Representatives Fairly and Adequately Represent the Interest of the Class.

Fed. R. Civ. P. 23(a)(4) requires that the representative plaintiffs in a class action fairly and adequately represent the interests of the entire class. "The Sixth Circuit has articulated two criteria for determining adequacy of representation: (1) the representatives must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Price*, 310 F.R.D. at 380 (citing *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir. 1996)) (internal citations,

bracket, and quotations omitted). Both elements of Rule 23(a)(4) are met in this case. *See, e.g.*, *Ross v. Abercrombie & Fitch Co.*, 257 F.R.D. 435, 447 (S.D. Ohio 2009) (Sargus).

**1. Adequacy of the Named Representatives**

For the named representatives to adequately represent the class, their interests must coincide with those of the unnamed class members. *See generally Gen. Tel. Co. of Sw.*, 457 U.S. 147. The requirement tends to overlap with commonality and typicality, acting to ensure that the representatives' interests are not antagonistic to those of the other class members. *See, e.g.*, *Day v. NLO, Inc.*, 144 F.R.D. 330, 335 (S.D. Ohio 1992). For example, this Court has previously concluded that named plaintiffs have common interests with the unnamed members of the class where the named class members were "recent juveniles that have been subject[ ] to the alleged unconstitutional and illegal practices at the [Washington County, Ohio Juvenile] Center and are at risk of return to the Center." *D.D. v. Washington County.*, No. 2:10-cv-1097, 2011 WL 830761, at *4 (S.D. Ohio Mar. 3, 2011) (Sargus); *see also Prater v. Ohio Educ. Ass'n*, No. C2 04 1077, 2008 WL 2566364, at *8 (S.D. Ohio June 26, 2008) ("Internal, minor differences in the status and alleged injuries of class members do not bar class certification. Instead, class representatives were adequate when it appear[s] that [they] will vigorously prosecute the interests of the class through qualified counsel, which usually will be the case if the representatives are part of the class and possess the same interest and suffer the same injury as the class members." (internal citations and quotations omitted; alterations in original)).

Here, the Individual Plaintiffs and the Plaintiff class have suffered a common injury and share a common interest—avoiding unnecessary institutionalization and having reasonable access to alternative, community-based services.[16] The class excludes those who have

[16] Although Defendants made affirmative offers of community-based waiver services to several Individual Plaintiffs following initiation of this litigation (*see supra* note 2, at 2), this feint toward voluntary cessation of discriminatory

documented, or in the future will document, their opposition to integrated, community-based services. Thus, to the extent there are some ICF residents who want to remain in these facilities and oppose transition to the community, they simply are not in the class. Those who do not oppose receiving more integrated, community-based services will be included in the class, and for good reason: if provided adequate information regarding feasible alternatives to institutionalization, as well as the transitional assistance necessary to identify and secure community services, it is very likely that the vast majority of class members would choose to receive services in the community and to avoid unnecessary segregation in an ICF. Even class members who do not immediately choose integrated, community-based services have an interest in having this alternative available to them in the future.

Because the Individual Plaintiffs seek to vindicate legal rights shared by all members of the putative class, the Individual Plaintiffs have interests that coincide with, and are not antagonistic to, the class, making them adequate representatives.

**2. Adequacy of Counsel**

In addition to common interests, it must appear that the representatives ". . . will vigorously prosecute the interests of the class through qualified counsel." *Senter*, 532 F.2d at 524-25, (citing *Gonzales v. Cassidy*, 474 F.2d 67, 73 (6th Cir. 1973)). Class counsel must be qualified, experienced, and generally able to conduct the litigation. *Stout v. J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000); *see also D.D.*, 2011 WL 830761, at *4 (Sargus) (certifying class and concluding that "based on the experiences of the attorneys representing the class, it appears that the class's legal representation is sufficient).

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conduct regarding those specific Plaintiffs does not undermine their adequacy as class representatives. As of the date of this filing, none of the Individual Plaintiffs have transitioned from ICFs to integrated, community-based settings. In any event, given that they remain eligible for an ICF level of care, there is a serious risk that they may be forced to return to an ICF if the home and community-based service they are ultimately provided are inadequate, or that their isolation will continue in segregated facility-based day or sheltered workshop programs.

Disability Rights Ohio (DRO) is the federally-designated protection and advocacy organization for the state of Ohio; as such, it is charged with protecting the rights of individuals with disabilities throughout Ohio. Doc. 34 at 89-93. The organization brings decades of experience litigating on behalf of individuals with disabilities, both individually and in class action cases, as well as extensive knowledge of, and experience working within, Ohio's service system for people with intellectual and developmental disabilities. DRO also is in direct contact with the Individual Plaintiffs and with numerous other class members through its ongoing outreach and intake processes.

Sidley Austin, LLP, has a national practice that includes complex trial and appellate litigation. Sidley adds expertise in the area of complex litigation and trial skills, and provides extensive litigation support capabilities. The Center for Public Representation (CPR) has been involved in complex class action litigation on behalf of institutionalized persons with disabilities for over 40 years and has been lead counsel in numerous class action lawsuits throughout the country. Samuel Bagenstos is an experienced civil rights litigator, specializing in the area of disability law. He has served as the Deputy Assistant Attorney General for Civil Rights in the United States Department of Justice, Civil Rights Division.

The Individual Plaintiffs' resources are adequate to represent the class competently. They have no other professional commitments which are antagonistic to, or which would detract from, their efforts to seek a favorable decision for the class in this case.

### E. The Defendants Have Acted or Refused to Act on Grounds Generally Applicable to the Class, Making Final Injunctive or Declaratory Relief Appropriate.

In addition to the four prerequisites set forth in Fed. R. Civ. P. 23(a), a proposed class must satisfy at least one of the three requirements set forth in Fed. R. Civ. P. 23(b). *Wal-Mart*, 564 U.S. at 345; *In re Whirlpool Corp.*, 722 F.3d at 850; *Price*, 310 F.R.D. at 375. Under Rule

23(b)(2), class certification is appropriate when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2); *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 847-48 (5th Cir. 2012) (requirements of Rule 23(b)(2) are met where plaintiffs show that the "[s]tate engages in a pattern or practice of agency action or inaction—including a failure to correct a structural deficiency within the agency . . . with respect to the class") (internal citation omitted).

Courts have long recognized that certification under subsection (b)(2) of Rule 23 of the Federal Rules of Civil Procedure is an appropriate and important vehicle for civil rights actions. *Wal-Mart*, 564 U.S. at 361 ("'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture.") (quoting *Amchem Prods., Inc., v. Windsor*, 521 U.S. 591, 614 (1997)). Lawsuits alleging class-wide discrimination "are particularly well suited for 23(b)(2) treatment since the common claim is susceptible to a single proof and subject to a single injunctive remedy." *Senter*, 532 F.2d at 525-26 (internal citation omitted).[17] Rule 23(b)(2) is satisfied here because Plaintiffs allege systemic civil rights violations (discriminatory segregation) and seek declaratory and injunctive relief (the provision of integrated, community-based alternatives) designed to benefit the class as a whole. The modifications that Plaintiffs seek to the State's service system can be achieved through a single injunction. *Wal-Mart*, 564 U.S. at 365. Class injuries can be redressed by the expansion of community-based services as feasible alternatives to institutionalization.

[17] *See also Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980) ("[A] class action may be maintained under Fed. R. Civ. P. 23(b)(2), which is an especially appropriate vehicle for civil rights actions."); *Hawkins ex rel. Hawkins v. Comm'r of N.H. Dept. of Health & Human Servs.*, No. Civ. 99-143-JD, 2004 WL 166722, at *4 (D.N.H. Jan. 23, 2004) ("Classes certified under Rule 23(b)(2) 'frequently serve as the vehicle for civil rights actions and other institutional reform cases,' including cases alleging deficiencies in government administered programs such as Medicaid.") (quoting *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 58-59 (3d Cir. 1994) (other citations omitted).

The court in *Steward* squarely addressed the appropriateness of injunctive relief for *Olmstead* claims like those presented here:

> Defendants argue that class-wide injunctive relief is not possible because such relief would require the Court to determine which services and supports were appropriate for each individual class member based on their individual needs. As above, however, the propriety of classwide injunctive relief depends upon the level of generality at which Plaintiffs seek relief. Plaintiffs are not asking the Court to order individualized relief, but seek injunctions targeted at the deficiencies that they allege exists within Defendants' Medicaid service system . . . . This relief—seeking to rectify [Defendants'] systemic failure to comply [with] specific statutory duties—is not only an appropriate structure under Rule 23(b)(2) for relief in this case, but fits the most frequent[] . . . vehicle for civil rights actions and other institutional reform cases that receive class action treatment.

No. 5:10-CV-1025-OLG, 2016 WL 3960919 (W.D. Tex. May 20, 2016) at *15.

As in *Steward*, Plaintiffs contend that, once reformed in accordance with the requested injunctive relief, Defendants' own administrative, person-centered planning process will be capable of conducting assessments of class members' medical needs, providing individualized information concerning feasible alternatives to institutionalization in an ICF, and delivering integrated service options in accordance with their expressed preference. The fact that there are differences among the class members' specific needs or disabling conditions does not render Rule 23(b)(2) treatment any less appropriate. *See, e.g.*, *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012) ("All of the class members need not be aggrieved by . . . [the] defendant's conduct in order for some of them to seek relief under Rule 23(b)(2). What is necessary is that the challenged conduct or lack of conduct be premised on a ground that is applicable to the entire class.") (quoting 7AA Wright & Miller, *supra*, § 1775) (quotations omitted; alterations in original); *Price*, 310 F.R.D. at 380-81 (Plaintiffs' request for declaratory

and injunctive relief will apply uniformly to all class members, regardless of the unique situation of any individual plaintiff, making certification appropriate under Rule 23(b)(2)).

Defendants administer, operate, fund, and plan their system of services for people with intellectual and developmental disabilities in a discriminatory manner by failing to provide the community-based services required by the Plaintiff class to avoid their unnecessary institutionalization. Class members' experience of discriminatory segregation is a product of these structural deficiencies in Defendants' service system. Defendants' decision to license, fund, and maintain an excessive number of segregated ICF placements, when coupled with their inadequate funding for and provision of home and community-based services, results in a continuing pattern of unnecessary and avoidable ICF admissions. This systemic policy and practice harms the Plaintiff class by depriving them of integrated, community-based service alternatives and causing their discriminatory segregation. As a result, Defendants are acting or refusing to act in a manner that is generally applicable to the class as a whole.

ADA Title II classes are routinely certified under Fed. R. Civ. P. 23(b)(2) precisely because they raise questions that are susceptible to a common solution, apply uniformly to the class as a whole, and seek injunctive relief designed to modify the public entity's program and offer services in the most integrated setting. For instance, in *Kenneth R.*, the Court concluded that plaintiffs had shown a pattern or practice of actions or inaction with respect to the class as a whole. 293 F.R.D. at 271. Since class members shared a strong common interest in enhanced options for community treatment, injunctive relief prohibiting a discriminatory lack of community services would benefit everyone. *Id.*

The Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring* itself suggests that class treatment is appropriate in cases seeking to enforce the ADA's Integration Mandate. *See*

527 U.S. 581, 606 (1999). Although *Olmstead* was filed by two individual plaintiffs, *id.* at 593, the Court's integration and accommodation analysis highlights the value of class actions in enforcing that case's holding. For example, the Court warned against "displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions." *Id.* at 606. And it explained that the fundamental alteration defense requires an inquiry into the needs of all persons served by the State's mental health system, "given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Id.* at 604. Applying this principle, the *Kenneth R.* court observed "[t]hat *Olmstead* claims may, as a general matter, be suited for class treatment is also suggested by the fact that the fundamental alteration defense involves an inquiry into the needs of all persons served by the state's mental health system. Class treatment would avoid 'repetitious resolution' of that inquiry." *Kenneth R.*, 293 F.R.D. at 262 n.3 (quoting *Gintis v. Bouchard Transp. Co.*, 596 F.3d 64, 67 (1st Cir. 2010)).

Defendants' continued funding and support for ICFs, their inadequate provision of home and community-based services, and the unnecessary segregation which results, constitute a policy and practice of discriminatory segregation which harms the Plaintiffs and the class they seek to represent. As a result, Defendants are acting or refusing to act in a manner that is generally applicable to the class as a whole. In response, Plaintiffs seek: (1) a declaratory judgment that would compel Defendants' compliance with federal law; and (2) injunctive relief designed to modify Ohio's service system for persons with intellectual and developmental disabilities by providing reasonable access to integrated, community-based services. The proposed relief is appropriate precisely because it will resolve the legality of the Defendants' conduct towards the class as a whole, and it can be accomplished by a single injunctive order

requiring the provision of integrated residential, employment, and day services sufficient to avoid class members' discriminatory segregation. Such relief would, in a single stroke, resolve the legal claims of the Plaintiff class and benefit class members as a whole, by providing them with alternatives to unnecessary institutionalization through a single, class-wide injunction.

## V. CLASS COUNSEL SHOULD BE APPOINTED PURSUANT TO FED. R. CIV. P. 23(G).

The Individual Plaintiffs are jointly represented by Disability Rights Ohio, Sidley Austin LLP, Attorney Samuel Bagenstos, and the Center for Public Representation. Each of Plaintiffs' counsel brings unique resources, experience, and skills to this case. The organizational qualifications of class counsel are described at Section IV, D(2), *supra*. Together, these attorneys request appointment as class co-counsel pursuant to Fed. R. Civ. P. 23(g).

Kerstin Sjoberg-Witt, the lead attorney for Disability Rights Ohio, has over twelve years of experience representing individuals in state and federal court, including seven years litigating cases exclusively on behalf of individuals with disabilities. She is supported by DRO staff attorneys Kevin Truitt and Alison McKay—both of whom are experienced in the representation of people with intellectual and developmental disabilities.

Attorney Neil Ellis is a partner in the law firm of Sidley Austin, LLP and has more than thirty years of legal experience, including complex international trade and antitrust cases. Attorney Ellis is supported in this case by Kristen Rau, Kristen Knapp, and other firm associates. Together, the team at Sidley Austin adds expertise in the area of complex litigation and trial skills, and litigation support capabilities.

Attorney Samuel Bagenstos is an experienced litigator who specializes in constitutional and civil rights litigation and formerly supervised disability rights litigation at the United States

Department of Justice. Attorney Bagenstos has more than twenty years of legal experience, which includes significant knowledge of disability law and the Americans with Disabilities Act.

Center for Public Representation (CPR) attorney Cathy Costanzo has served as lead counsel in numerous class actions, and has over thirty years of experience representing people with psychiatric, intellectual and developmental disabilities. CPR attorney Kathryn Rucker has served as co-counsel in several class action cases and has over fifteen years of experience representing individuals with disabilities. CPR attorney Anna Krieger has practiced in the field of disability law for more than five years.

There is no conflict among counsel. Pursuant to Fed. R. Civ. P. 23(g), Plaintiffs request that this Court appoint DRO, Sidley Austin, LLP, attorney Samuel Bagenstos, and CPR as co-class counsel in this action.

## VI. CONCLUSION AND REQUEST FOR RELIEF

For all the reasons set forth above, the Individual Plaintiffs respectfully request that the Court, pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2), certify a class consisting of:

> All Medicaid-eligible adults with intellectual and developmental disabilities residing in the state of Ohio who, on or after March 31, 2016, are institutionalized, or at serious risk of institutionalization, in an Intermediate Care Facility with eight or more beds, and who have not documented their opposition to receiving integrated, community-based services.

In addition, the Individual Plaintiffs respectfully request that this Court appoint DRO, Sidley Austin, LLP, Attorney Samuel Bagenstos, and the CPR as co-class counsel in this action pursuant to Fed. R. Civ. P. 23(g).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing Plaintiffs' Motion for Class Certification was filed electronically on August 22, 2016. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

s/Kerstin Sjoberg-Witt
Kerstin Sjoberg-Witt (0076405)