UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DAVID MARSTERS, ET AL., Plaintiffs, v. MAURA HEALEY, in her official capacity as Governor of the Commonwealth of Massachusetts, ET AL., Defendants.	)))))))))))	CIVIL ACTION NO. 1:22-cv-11715-PBS

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

Introduction

In this lawsuit, Plaintiffs allege that the Commonwealth of Massachusetts (the "State") administers its long-term care services system for people with disabilities in a manner that unnecessarily segregates them in nursing facilities, in violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, and the Supreme Court's opinion in *Olmstead v. L.C.*, 527 U.S. 581 (1999). Compl. ¶ 179. Each named Plaintiff is a nursing facility resident who qualifies for the State's system of home and community-based services and prefers to live in a more integrated setting. Compl. ¶¶ 1–2. Their unnecessary segregation is caused in part, according to Plaintiffs, by the State's failure to provide needed residential services and supports. Compl. ¶ 12. Accordingly, the named Plaintiffs seek to represent a class of:

> Medicaid-eligible adults in Massachusetts with mental illness and/or physical disabilities, including older adults, who, now or in the future: (1) reside in a nursing facility for at least 60 days, notwithstanding any temporary hospitalizations, and (2) have not been provided community residential services and supports in integrated settings in the community.

ECF No. 76 at 7. Plaintiffs claim that the class includes at least several hundred members. *Id.* at 3, 9.

The State opposes certification of the proposed class on several grounds, but only two are relevant for purposes of this brief. First, the State argues that class members do not share the same claims because they receive services from "different State agencies administering dozens of programs and benefits." ECF No. 108 at 16. For this same reason, the State further argues that the class does not satisfy Rule 23(b)(2)'s requirement that injunctive relief is appropriate for the class as a whole. ECF No. 108 at 29 (claiming that "the Court cannot fashion a single injunction with dozens of directives ordering at least five different agencies to take specific actions in relation to many different programs"). These arguments disregard the longstanding, commonplace, and appropriate certification of classes in similar *Olmstead* cases, both in this Circuit and across the country. As explained in this brief, such classes are regularly certified because: (1) *Olmstead* cases raise common questions concerning the defendant's systemic policies and practices and (2) single injunctive relief is eminently feasible and appropriate to remedy the unnecessary segregation of a large group of people.

As the agency charged with enforcing Title II and issuing regulations implementing the statute, 42 U.S.C. §§ 12133–34, the Department of Justice has a strong interest in ensuring that systemic violations of the ADA are remedied, including through class actions. The United States of America respectfully submits this Statement of Interest in accordance with 28 U.S.C. § 517[1] to assist the Court in addressing the pending motion for class certification.

[1] The Attorney General is authorized "to attend to the interests of the United States" in any case pending in federal court. 28 U.S.C. § 517.

Legal Standard

A court may certify a class under Rule 23(b)(2) if the moving party satisfies all requirements of Rule 23(a), and "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). Rule 23(a) requires that the class is so numerous that joinder of all members is impracticable; there is at least one question of law or fact common to the class; the claims or defenses of the representative parties are typical of the claims or defenses of the class; and the representative parties will fairly and adequately protect the interests of the class. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011).

Argument

"[C]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of appropriate class actions under Rule 23. *Wal-Mart*, 564 U.S. at 361 (quotations omitted); *see Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974). This is particularly true where a public entity's policy or practice causes unnecessary segregation of people with disabilities, in violation of the integration mandate of Title II of the ADA and the Supreme Court's decision in *Olmstead*. *See, e.g.*, *Kenneth R. v. Hassan*, 293 F.R.D. 254, 268 (D.N.H. 2013); *Lane v. Kitzhaber*, 283 F.R.D. 587, 596–97 (D. Or. 2012).

The ADA is explicitly intended to remedy "pervasive" discrimination, 42 U.S.C. § 12101(a)(2), and particularly discriminatory administration of state services and programs. In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the Supreme Court reviewed Title II of the ADA and its implementing regulation and held that states are prohibited from administering services and programs in a manner that makes them available only in segregated settings even when individuals

with disabilities can be served in more integrated settings. The Court's analysis focused on the requirement that public entities "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). The way states "administer" services and programs, practically speaking, is through policies, practices, and funding decisions that impact large numbers of individuals receiving those services. As explained below, courts have repeatedly and correctly certified class actions in *Olmstead* cases that challenge such policies and practices.

1. *Olmstead* Cases Are Typically Premised on Discriminatory Policies or Practices That Provide the Common Contention Necessary to Satisfy Rule 23's Commonality Requirement.

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." A question is common if it 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. The analysis focuses on whether the class-wide proceeding can "generate common *answers* apt to drive the resolution of the litigation." *Id.* (citation omitted). "Those common answers typically come in the form of a particular and sufficiently well-defined set of allegedly illegal policies [or] practices that work similar harm on the class plaintiffs." *Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13, 28 (1st Cir. 2019) (citation omitted). In the *Olmstead* context, the policies or practices at issue are those that cause the unnecessary segregation, or serious risk of segregation, of people with disabilities.

Given that *Olmstead* cases focus on the defendants' systemic policies and practices, courts regularly conclude that the commonality element is met. *See, e.g.*, *Kenneth R.*, 293 F.R.D. at 254, 268 (D.N.H. 2013) (class certification appropriate where "the State practices plaintiffs

challenge . . . all pertain to a discrete set of community-based services"); *Lane*, 283 F.R.D. at 596–98 (class certification was appropriate in *Olmstead* action challenging "system-wide policies, practices, and failures" which allegedly caused unnecessary segregation). For example, in *Thorpe v. District of Columbia*, plaintiffs claimed that the District of Columbia violated the ADA by unnecessarily institutionalizing people with disabilities in nursing facilities and sought to certify a class of nursing facility residents. 303 F.R.D. 120 (D.D.C. 2014). Specifically, plaintiffs alleged that they were subject to unnecessary segregation because the District maintained a practice of ineffective transition assistance. *Id.* at 146. The court found that this claim, centered on a systemic practice, raised several common questions and therefore satisfied Rule 23's requirement of commonality. *Id.* at 145–49. Similarly, a court in the Southern District of West Virginia recently certified a class in *Olmstead* litigation where plaintiffs are foster children with a range of disabilities who allege that West Virginia's failure to provide community-based treatment results in institutionalization. *Jonathan R. v. Justice*, 2023 WL 5298813, No. 3:19-cv-00710 (S.D.W.V. Aug. 17, 2023). There, the court found that the state's alleged practice of maintaining an inadequate infrastructure of therapeutic service providers generated common questions sufficient to establish commonality. *Id.* at 10–14. As exemplified by these cases, *Olmstead* actions typically call for rulings on system-wide policies and practices that generate common answers and make class treatment appropriate and efficient. Plaintiffs' claims here similarly center on common practices of the State. These alleged common practices include, for example, the State's use of eligibility criteria and methods of administration that have the effect of excluding people with disabilities from accessing needed community-based residential services, Compl. ¶¶ 38, 181, 183, 197; the State's failure to provide timely access to residential services that would allow people with disabilities to transition to the community, Compl. ¶¶ 10, 12, 38, 115, 179, 181; and the

State's failure to provide people with disabilities with sufficient information to allow them to make an informed choice of whether to enter—or remain in—a nursing facility, Compl. ¶¶ 11-12, 38, 97, 115, 181, 187-88.

Defendants suggest that class members' different factual circumstances in this case defeat the existence of such common questions. ECF No. 108 at 16–20. But courts routinely certify classes in *Olmstead* litigation even though there are inevitably differences among people's diagnoses, methods of service delivery, and need for services. *See Kenneth R.*, 293 F.R.D. at 268–70 (rejecting defendant's argument that dissimilarities in class member needs and preferences for community-based services made class certification improper); *Pashby v. Cansler*, 279 F.R.D. 347, 351, 353–54 (E.D.N.C. 2011) (same); *Rolland v. Patrick,* No. 98-30208, 2008 WL 4104488, *4 (D. Mass. 2008) (same); *see also Jonathan R.*, 2023 WL 5298813 at 3, 14 n. 9 (certifying a class of foster care children "who have physical, intellectual, cognitive, or mental health disabilities"). For instance, plaintiffs in *Steward v. Janek* alleged that Texas's nursing facility screening process failed to identify people for community-based care and divert them from unnecessary segregation. 315 F.R.D. 472 (W.D. Tex. 2016). The court found common questions related to this claim, rejecting the state's argument that "the deficiencies of their [screening] process are not capable of classwide assessment because the deficiencies will manifest as the failure to identify different medical conditions in different individuals." *Id.* at 482. In finding that commonality exists, courts have been likewise undaunted by the fact that plaintiffs in *Olmstead* cases are often receiving services across a range of programs and government offices. *Kenneth R.*, 293 F.R.D. at 268 ("[T]he commonality requirement has been held to be met where, as here, plaintiffs challenge more than a single service deficiency and seek more than one service enhancement or improvement as part of the remedy.").

2. *Olmstead* Claims Are Regularly Resolved Through a Single Injunctive Remedy.

Plaintiffs seek class certification under Rule 23(b)(2) and thus must show that "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. Proc. 23(b)(2). Civil rights actions seeking injunctive relief are quintessential Rule 23(b)(2) cases. *Nat'l Ass'n of Deaf v. Harvard Univ.*, No. 3:15-CV-30023-KAR, 2019 WL 6699449, at *2 (D. Mass. Dec. 9, 2019); *Connor B. ex rel. Vigurs v. Patrick*, 272 F.R.D. 288, 297 (D. Mass. 2011). It follows that an *Olmstead* lawsuit—brought to enforce the civil right of people with disabilities to live in an integrated setting—is precisely the type of case intended to be litigated as a class action pursuant to Rule 23(b)(2).

For example, the D.C. Circuit upheld class certification under Rule 23(b)(2) in the *Olmstead* lawsuit alleging that the District of Columbia unnecessarily segregated adults in nursing facilities. *In re District of Columbia*, 792 F.3d 96 (D.C. Cir. 2015). In doing so, the court of appeals rejected the District's argument that Rule 23(b)(2) certification was improper because the "unique totality of barriers to community transition for each individual class members makes grouping of the claims inappropriate." *Id.* at 101–02. The court reasoned simply that there is a "common civil right to non-segregation" and that "Rule 23(b)(2) was intended for civil rights cases." *Id.* When that case returned on appeal, the court reaffirmed the appropriateness of class certification and rejected the district court's post-trial denial of class certification. It held that "[b]ecause the proposed injunction would provide, at least in part, each member of the class an increased opportunity to obtain [transition to the community], Rule 23(b)(2) is satisfied on the current record." *Brown v. D.C.*, 928 F.3d 1070, 1083 (D.C. Cir. 2019).

Here, too, the State makes a perfunctory argument that class certification is improper under Rule 23(b)(2) because class members have different service needs. The State posits that the necessary injunctive relief would somehow involve too many directives among too many agencies and programs. ECF No. 108 at 26. But it is commonplace in *Olmstead* litigation for courts to envision an appropriate single injunction and certify classes under Rule 23(b)(2) despite the usual complexity in state long-term service systems. For example, plaintiffs in *Kenneth R.* named two state agency defendants, each overseeing its own service system, but the court showed no hesitation in finding the Rule 23(b)(2) requirements satisfied. 293 F.R.D. 254. The court wrote that "injunctive relief prohibiting a discriminatory lack of community service options would . . . benefit all class members." *Id.* at 271. The service system in another *Olmstead* lawsuit, *Lane v. Kitzhaber*, was also multi-faceted; the court's description noted multiple relevant offices and waiver programs. 283 F.R.D. at 592–94 (describing Oregon's employment services system). Nonetheless, the court found that the class action could be "resolved 'in one stroke' with an appropriate injunction" that would require the state to administer, fund, and operate its employment services system in a way that did not relegate people to segregated settings. *Id.* at 602.

The appropriateness of a single injunction to resolve *Olmstead* claims involving numerous programs and benefits is not theoretical. When such cases are litigated to resolution, courts impose injunctions that require program modifications that enable people to live in integrated settings and avoid unnecessary institutionalization. *See, e.g.*, *United States v. Florida*, No. 12-cv-60460, 2023 WL 4546188 (S.D. Fla. July 14, 2023). The backdrop underlying an injunction to comply with the integration mandate is inevitably a service system comprising multiple offices and programs, but that does not stymie the availability of appropriate injunctive relief. *See, e.g.*, *United States v.*

Mississippi, 400 F. Supp. 3d 546, 548 (S.D. Miss. 2019) (observing the "complexity" and "enormity" of the state's service system); *United v. Mississippi*, 3:16-cv-622, ECF No. 278 (S.D. Miss., Sept. 7, 2021) (issuing final remedial order).

Settlement agreements and consent decrees in *Olmstead* litigation also demonstrate the feasibility of a single court order to remedy the unnecessary segregation of a large group of people. *See, e.g.*, *Rolland v. Patrick*, 562 F. Supp. 2d 176 (D. Mass. 2008) (entering an agreement to increase community-based placements for class members). In *Lane v. Brown*, for example, the court approved a settlement agreement to resolve the *Olmstead* class action that challenged Oregon's use of segregated employment settings known as sheltered workshops. 166 F. Supp. 3d 1180 (D. Or. 2016). Plaintiffs, a class of people with intellectual or developmental disabilities, had alleged that the state over-relied on sheltered workshops and failed to develop and adequately fund integrated employment services. *Lane v. Brown*, 3:12-cv-138, ECF No. 43 (D. Or. May 29, 2012). To remedy the alleged unnecessary segregation, the court entered as an order the parties' settlement agreement, requiring the state to (1) create and implement policies and practices to facilitate compliance with the ADA; (2) reduce reliance on sheltered workshops; and (3) ensure that a significant portion of class members obtain jobs in integrated settings. 166 F. Supp. 3d at 1189; *Lane v. Brown*, 3:12-cv-138, ECF No. 384 (D. Or. Jan. 27, 2016) (entering the court-enforceable settlement agreement as an order).

Accordingly, it is possible for courts to issue an injunction that resolves *Olmstead* claims by requiring public entities to provide the services needed to remedy unnecessary institutionalization.

Conclusion

For the foregoing reasons, the United States requests that the Court consider this Statement of Interest in this litigation.

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CERTIFICATE OF SERVICE

I, Jennifer Robins, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

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Dated: September 20, 2023