

No. 19-10818

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

COMMUNITY FOR PERMANENT SUPPORTED HOUSING, CYNTHIA CURTIS,
MARY HUBBARD, IRENE NIEMOTKA, MARGARET (“PEGGY”) SHADDUCK, AND
KELLY WATERMAN

Plaintiffs-Appellants,

v.

HOUSING AUTHORITY OF THE CITY OF DALLAS, TEXAS,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Texas, Dallas Division, No. 3:18-CV-2030-K
Before the Honorable Judge Kinkeade

**BRIEF FOR THE ARC OF THE UNITED STATES, ET AL. AS *AMICI
CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, which requires a “supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the *amicus* brief,” undersigned counsel of record certifies that the following parties have an interest in this brief, but no financial interest in this litigation. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Amici Curiae

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The Arc of Texas
The American Civil Liberties Union
The American Civil Liberties Union of Texas
Disability Rights Advocates
The Judge David L. Bazelon Center for Mental Health Law
National Disability Rights Network

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STATEMENT OF THE INTEREST OF *AMICI CURIAE*

The Arc of the United States, The Arc of Texas, the American Civil Liberties Union, the American Civil Liberties Union of Texas, Disability Rights Advocates, the Judge David L. Bazelon Center for Mental Health Law, and the National Disability Rights Network submit this brief as *amici curiae* in support of Plaintiffs-Appellants.

Amici curiae are organizations that advocate for the rights of individuals with disabilities. They have a wealth of knowledge regarding the affordable housing crisis facing people with disabilities, as well as best practices in the supports and services that individuals with disabilities require to live successfully in community-based settings, and they believe that the Court's consideration of Plaintiffs' appeal would be informed by a brief presenting pertinent information within their expertise.

The Arc of the United States (The Arc) is the largest national community-based organization advocating for and serving persons with intellectual and developmental disabilities (I/DD) and their families. Founded in 1950, The Arc has over 650 state and local chapters. The Arc seeks to promote and protect the civil and human rights of people with intellectual and developmental disabilities and to actively support their full inclusion and participation in the community.

The Arc of Texas is the Texas affiliate of The Arc of the United States and serves people with I/DD through 28 chapters throughout the state.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. With more than three million members, activists, and supporters, the ACLU fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction. The ACLU's Disability Rights Program envisions a society in which discrimination against people with disabilities no longer exists, and in which people understand that disability is a normal part of life. This means a country in which people with disabilities are valued, integrated members of the community, and where people with disabilities have jobs, homes, education, healthcare, and families.

The American Civil Liberties Union of Texas (ACLU of Texas) is the Texas affiliate of The American Civil Liberties Union. The ACLU of Texas is the leading civil rights organization in the Lone Star State. Since its formation in 1938, it has worked in the courts, the legislature, and through public education to secure and protect civil rights and individual liberty for Texans throughout the state.

Disability Rights Advocates (DRA) is a non-profit public interest center that specializes in high-impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, employment, technology and housing. DRA's clients, staff and board of directors include people with various types of disabilities. With offices in New York City and Berkeley, California, DRA strives to protect and advance the civil rights of people with all types of disabilities.

The Judge David L. Bazelon Center for Mental Health Law is a national nonprofit advocacy organization that provides legal and other assistance to individuals with mental disabilities. The Center was founded in 1972 as the Mental Health Law Project. Through litigation, policy advocacy, and public education, the Center advances the rights of individuals with mental disabilities to participate equally in all aspects of society, including health care, housing, employment, education, community living, parental and family rights, and other areas. The Center has extensive experience with community integration litigation and policy, including efforts to expand opportunities for individuals with disabilities to live in their own apartments and homes through the use of housing subsidies.

The National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy

(P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally-based advocacy services to people with disabilities in the United States.

ARGUMENT

In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the U.S. Supreme Court held that “unjustified institutional isolation of persons with disabilities is a form of discrimination” under the Americans with Disabilities Act (hereafter ADA). Title II of the ADA requires public entities to administer programs in the “most integrated setting appropriate to the needs of qualified individuals with disabilities,”¹ and *Olmstead* is noteworthy for its broad recognition of the rights of people with disabilities to live and receive needed services and supports in the community—as opposed to institutional settings—which has become known as the “integration mandate” of the ADA.² But this mandate—which also protects those who are “at risk” of institutionalization—cannot be fully realized without affordable housing opportunities in the community that are accessible to people with intellectual and developmental disabilities (hereafter I/DD) and enable them to live outside their family homes. For many adults with I/DD currently living in their family homes, opportunities that allow them to live in the community separate from their families are often preferable because these opportunities provide greater independence and autonomy. Additionally, living in the community separate from

¹ 28 C.F.R. § 35.130(d) (2019).

² Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101–336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C. and 47 U.S.C. § 225 (2018)).

their families can be critical for adults with I/DD to avoid homelessness or institutionalization when a supporting family member inevitably ages and reaches a point where she or he can no longer provide shelter or support. Thus, the refusal by Defendant Housing Authority of the City of Dallas (hereafter DHA) to provide reasonable accommodations to people with I/DD to enable access to the Section 8 Project Based Voucher (hereafter PBV) program harms Plaintiffs. DHA's actions limit the ability of Plaintiffs' loved ones to live in the most integrated setting appropriate to their needs—community-based housing separate from their families—in violation of the ADA's integration mandate. DHA's actions not only unduly restrict opportunities for community-based housing that offers more independence and autonomy, but also puts Plaintiffs' adult children with I/DD at risk of homelessness and institutionalization.

It is well-established that people with I/DD thrive best when they are able to live in small homes in the community with needed supports rather than in congregate, segregated, and isolated institutional placements far from their communities. The advantages of community living for people with I/DD—and, in turn, the harms of institutionalization—are powerfully and convincingly supported by a large body of professional literature measuring outcomes over the last several

decades.³ Specifically, professional, scholarly studies have found that individuals with I/DD frequently report feeling the greatest level of autonomy and satisfaction when living in their own homes with needed supports.⁴

However, a severe affordable housing crisis means that the sort of housing opportunities Plaintiffs seek for their adult children with I/DD are scarce, putting their adult children with I/DD at risk of institutionalization and homelessness.⁵ As Plaintiffs note, of the more than 100,000 people with I/DD living in North Texas,⁶ around 75% continue to live with at least one family member into adulthood

³ See, e.g., AAIDD/AUCD, *Community Living and Participation for People with Intellectual and Developmental Disabilities: What the Research Tells Us* (July 24, 2015) (hereafter the AAIDD/AUCD Report), at 2, available at http://www.aucd.org/docs/publications/2015_0723_aucd_aaidd_community_living_3.pdf.

⁴ *Id.* at 3 (citing Tichá, R., *et al. System and individual outcomes in services and support for people with IDD and their predictors*, 51 *Intell. and Dev. Disabilities* 5, 298–315); see also National Council on Disability, *Home and Community-Based Services: Creating Systems for Success at Home, at Work and in the Community* (2015) (hereafter NCD Report), at 26, available at <https://ncd.gov/publications/2015/02242015> (citing same).

⁵ See, e.g., Gina Schaak, *et al.*, *Priced Out: The Housing Crisis for People with Disabilities* (2017), at 11, available at <http://www.tacinc.org/media/59493/priced-out-in-2016.pdf>. (noting that since the Money Follows the Person (MFP) program—designed to help transition individuals currently in institutions into the community—began, state grantees have consistently noted that the lack of affordable and accessible housing is one of the primary barriers to helping a greater number of individuals transition back to the community).

⁶ ROA.2.

because of a shortage of affordable housing that would allow them to access community-based support services in homes apart from their families.⁷ Statewide, twenty percent of people with I/DD (nearly 60,000 individuals) are living with a family member over the age of 60.⁸ Of the nearly three quarters of people with I/DD nationwide who are living in their family home, far too many are supported by aging parents or other family members with no meaningful plan in place to address where the individual will live or who will provide supports when the family member can no longer do so.⁹ Thus, even those who may have some satisfaction with living in their family homes face an acute risk of institutionalization and homelessness, in the event that the family member inevitably reaches a point where she or he can no longer provide shelter and supports.

Defendant DHA has publicly acknowledged that two-thirds of adults with I/DD in North Texas “may be at risk of institutionalization or homelessness” due to

⁷ ROA.2.

⁸ Braddock, D., *et al.*, *The state of the states in intellectual and developmental disabilities: Texas* (2017) (hereafter Braddock Texas), at 6, available at <http://stateofthestates.org/documents/Texas.pdf>.

⁹ *See, e.g.*, Anderson, L., *et al.* *Family and Individual Needs for Disability Supports: Community Report 2017, Version 2* (2018) (hereafter FINDS Survey), at 21, available at http://thearc.org/wp-content/uploads/2019/07/FINDS_report-2017-FINAL-VERSION.pdf.

the affordable housing shortage.¹⁰ These numbers are unacceptably high and reflect a systemic problem that must be urgently addressed. Despite this, DHA has failed to provide the benefits of its subsidized housing programs and services to adults with I/DD via reasonable accommodations to the PBV program.

As described below and in Plaintiffs' Complaint, the PBV program at issue in this suit provides one critical (and highly flexible) option to people with I/DD and their families to help ameliorate this housing crisis. PBVs attach subsidies to specific properties, allowing people with limited income (including most people with I/DD) to rent suitable housing that otherwise would be beyond their means. Housing authorities, including DHA, are meant to use PBV programs to target specific populations with a significant need for affordable housing, such as people who are homeless or who have disabilities.

In DHA's Request for Proposals, it explained that it would approve a rent amount for a house, an individual with I/DD would pay 30% of his or her collective adjusted monthly income to the owners as rent, and DHA would then pay the owners the difference between those two amounts. Most of the proposals DHA received contemplated that a family member of an individual with I/DD

¹⁰ DHA, *Request for Proposals for Section 8 Project Based Voucher (PBV) Assistance- Availability of 50 PBVs for Neighborhood Housing Pilot Program of Permanent Supportive Housing for Persons with Intellectual or Developmental Disabilities* (July 31, 2016), at 2.

would own the PBV-subsidized home and then rent to that family member and others with I/DD. DHA shut down the PBV offering entirely rather than permit this arrangement, even though it is perfectly permissible as a matter of law and is often necessary to ensure that individuals with I/DD have the most appropriate living arrangement.

Though family ownership is otherwise prohibited in accessing the benefits of the PBV program, regulations promulgated by the U.S. Department of Housing and Urban Development (hereafter HUD) specifically permit families to rent PBV-subsidized properties to their adult children with disabilities as a reasonable accommodation.¹¹ In contrast to the challenges inherent in the typical landlord-tenant relationship, family ownership allows for, among other things, greater continuity and more control over housing condition and quality and also mitigates the risk of exploitation. And by eventually creating a trust to own the house, parents or other family members can ensure that the housing will be there for their children after their incapacity or death.

Despite HUD regulations specifically permitting this arrangement, DHA has unlawfully prohibited family-owned PBV-subsidized properties for adults with I/DD. DHA's ongoing failure to provide access to its program (including through

¹¹ See 24 C.F.R. § 983.251(a)(4) (2019).

reasonable accommodations where necessary) deprives adults with I/DD of a critical opportunity to live in the most integrated setting appropriate in the community and creates an acute risk of homelessness and institutionalization.

It is critical to understand the context behind Plaintiffs' request for relief so that the Court may reach a correct and just resolution here that will further compliance with the ADA's integration mandate. And realization of the ADA's integration mandate in North Texas can be realized only by increasing the stock of affordable, community-based housing accessible to people with disabilities. *Amici* support Plaintiffs' claims that they have presented a dispute ripe for judicial review because DHA's actions are worsening the ongoing and acute housing crisis facing people with I/DD in North Texas who are at risk of homelessness and institutionalization. The Court should reverse the district court's order of dismissal.

I. THE PROMISE OF THE ADA AND OTHER FEDERAL CIVIL RIGHTS LAWS CANNOT BE REALIZED WITHOUT DHA ALLOWING MEANINGFUL ACCESS TO AFFORDABLE HOUSING

The ADA is a comprehensive civil rights law that prohibits discrimination against individuals with disabilities in all areas of public life to ensure that people with disabilities are protected against discrimination, including when seeking housing. When it passed the ADA, Congress noted that forced isolation and segregation of individuals with disabilities constituted a serious form of

discrimination.¹² Title II of the ADA requires public entities to administer programs in the “most integrated setting appropriate to the needs of qualified individuals with disabilities.”¹³

In its landmark *Olmstead* decision interpreting the ADA, the Supreme Court recognized that “unjustified institutional isolation of persons with disabilities is a form of discrimination.” *Olmstead*, 527 U.S. at 596 (citations omitted). The Court explained that its holding “reflects two evident judgments.” *Id.* at 600. First, “institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable of or unworthy of participating in community life.” *Id.* at 600. Second, “confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.” *Id.* at 601.

As such, *Olmstead* interpreted the ADA as requiring integrated community settings where possible “when the State’s treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to

¹² See 42 U.S.C. §§ 12101(a)(2), (5) (2018).

¹³ 28 CFR § 35.130(d) (2019).

the State and the needs of others with mental disabilities.” *Id.* at 587. In *Olmstead*, the Court recognized the rights of people with disabilities to live and receive needed services and supports in the community. And the promise of *Olmstead* extends to and protects people with I/DD who are *at risk* of homelessness and institutionalization.¹⁴

Additional statutory provisions further amplify and buttress the “integration mandate” of the ADA. For example, section 504 of the Rehabilitation Act¹⁵ similarly provides that “[r]ecipients shall administer programs and activities in the most integrated setting appropriate” to the needs of qualified people with disabilities.¹⁶ Indeed, both Section 504 of the Rehabilitation Act, as well as the spirit and letter of the Fair Housing Act¹⁷ are consistent with and support the “integration mandate” of the ADA.

¹⁴ Courts have routinely held that, to establish standing in an *Olmstead* case, plaintiffs need not prove that they *will* be institutionalized, just that the governmental practices at issue unnecessarily place them *at risk* of institutionalization. *See, e.g., Davis v. Shah*, 821 F.3d 231, 264 (2d Cir. 2016) (collecting cases); *M.R. v. Dreyfus*, 697 F.3d 706 (9th Cir. 2011); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1184-85 (10th Cir. 2003).

¹⁵ Rehabilitation Act of 1973, Pub. L. No. 93–112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C. (2017)).

¹⁶ 28 C.F.R. § 41.51(d) (2019); *see also* 24 C.F.R. §§ 8.24(b) & 8.4(d) (2019).

¹⁷ Pub. L. No. 90–284, Title VIII, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601-3619 (2018)).

Full realization of *Olmstead*'s promise requires that individuals with I/DD and other disabilities have the ability to secure housing in the community. As HUD recognizes, the "promise of *Olmstead* is that individuals with disabilities be given meaningful opportunities to live, work, and receive services in integrated settings."¹⁸ HUD further notes in its report on discrimination in rental housing:

As a result of the U.S. Supreme Court's decision in *Olmstead* . . . an increasing number of individuals with disabilities are moving from nursing homes and other institutional and segregated settings into community-based settings. As a result, equality of access to the rental housing market has become even more of a critical policy issue."¹⁹

DHA is the governmental entity specifically tasked with ensuring meaningful access to affordable housing opportunities in the Dallas area. The ADA's integration mandate cannot be realized without DHA ensuring that people with I/DD and other disabilities get equal access to those services.

Following *Olmstead*, there have been increased efforts nationwide to assist individuals who are institutionalized or reside in other segregated settings to move to community-based settings. To do this, states are rebalancing health care delivery systems by shifting away from an overreliance on providing long-term services and

¹⁸ Joy Hammel, *et al.*, *Rental Housing Discrimination on the Basis of Mental Disabilities: Results of Pilot Testing*, U.S. Dep't of Hous. and Urban Develop. (2017), at 4, available at <https://www.huduser.gov/portal/sites/default/files/pdf/MentalDisabilities-FinalPaper.pdf>.

¹⁹ *Id.* at vi.

supports in institutional settings and moving towards a greater reliance on home and community-based services. For many states, as HUD notes in its guidance, these efforts are:

confounded by a lack of integrated housing options for individuals with disabilities. As a result, there is a great need for affordable, integrated housing opportunities where individuals with disabilities are able to live and interact with individuals without disabilities, while receiving the health care and long-term services and supports they need.²⁰

Thus, the HUD Guidance reflects the understanding, grounded in *Olmstead*, that the ADA's mandate of equal access cannot be achieved without meaningful access to affordable housing. Accordingly, the authors of the recent "Priced Out" report explicitly note: "[c]ompliance with *Olmstead* and an end to chronic homelessness can be achieved only with additional targeted federal affordable housing resources."²¹

II. PEOPLE WITH I/DD IN NORTH TEXAS FACE A HOUSING CRISIS THAT PUTS THEM AT RISK OF HOMELESSNESS AND INSTITUTIONALIZATION

Individuals with disabilities, including I/DD, have long faced a persistent housing crisis beyond those faced by those without disabilities, due to a lack of affordable and suitable housing, as well as discrimination in the provision of

²⁰ *Id.* at 1.

²¹ Schaak, *et al.*, *supra*, at 13.

housing, putting them at risk of homelessness and institutionalization,²² in contravention of the promise of *Olmstead*.

A. People with I/DD Face a Severe Affordable Housing Crisis

As summarized in the “Priced Out” report:

Approximately 4.8 million adults with disabilities who are between the ages of 18 and 64 received income from the Supplemental Security Income (SSI) program in 2016. The enormity of rental housing costs relative to monthly SSI payments affects the daily lives of millions of adults with disabilities. Unless they have rental assistance or live with other household members who have additional income, virtually everyone in this group has great difficulty finding housing that is affordable.²³

Nationally, this “unrelenting rental housing crisis” “deprives hundreds of thousands of people with disabilities” of a home in the community of their choice and puts them at risk of “homelessness, institutionalization, and incarceration.”²⁴

There are many contributing factors to this housing crisis, such as a serious lack of affordable housing that is also accessible and close to public transportation. The recognition that people with I/DD belong in the community has led to a growing demand for community-based housing, but people with I/DD are among

²² See, e.g., Schaak, *et al.*, *supra*; Paul Carling, *Community Integration of People with Psychiatric Disabilities*, in John W. Jacobson, *et al.*, eds., *Community Living for People with Developmental and Psychiatric Disabilities* 22 (1992).

²³ Schaak, *et al.*, *supra*, at 10.

²⁴ *Id.* at 8.

the nation's poorest citizens.²⁵ For many, Social Security and Supplemental Security Income (hereafter SSI) benefits, which are often far lower than typical rents, are their primary or sole source of income; beneficiaries are generally priced out of rental markets across the country.²⁶

Affordable housing programs are drastically underfunded, with long waiting lists.²⁷ In addition, Medicaid, the principal source of funding for services and

²⁵ See, e.g., Disability Statistics & Demographics Rehabilitation Research & Training Center, *2018 Annual Report on People with Disabilities in America* (2019), at 9, available at https://disabilitycompendium.org/sites/default/files/user-uploads/Annual_Report_2018_Accessible_AdobeReaderFriendly.pdf (citing a nearly 30% poverty rate for people with disabilities (including people with I/DD) in contrast to a 13.2% poverty rate for people without disabilities).

²⁶ See, e.g., Schaak, *et al.*, *supra*, at 9 (“The average annual income of a single person receiving Supplemental Security Income (SSI) payments in 2016 was \$9,156 — about 22% below the federal poverty level, and equal to only 20% of the national median income for a one-person household. Nationally, the average rent for a modest one-bedroom rental unit was \$861, equal to 113% of the national average monthly income of a one-person SSI household. This finding confirms that in 2016 it was virtually impossible for a single adult receiving SSI to obtain decent and safe housing in their community without some type of rental assistance.”); Watson, Nicole E., *et al.*, *Worst Case Housing Needs 2017 Report to Congress*, Office of Policy Development & Research, U.S. Dep’t of Hous. & Urban Develop. (2017) (available at <https://www.huduser.gov/portal/publications/Worst-Case-Housing-Needs.html>) (finding that “worst case needs” households—those that lack rental assistance, including many with I/DD—increased by 28% between 2013-2017).

²⁷ See, e.g., Schaak, *et al.*, *supra*, at 14.

supports for people with I/DD, typically does not allow funds to be used for rent or other community-based housing-related costs.²⁸

On top of this, for many people with I/DD, families are overwhelmingly the primary support system with over 70% nationwide living with family members and nearly 25% living with family members over 60 years old.²⁹ Increasingly, people with I/DD are living with aging family members with no meaningful plan in place to address where the individual will live or receive supports when the family member is no longer able to provide these things.³⁰ When this happens, some individuals can rely on other family members, while others may have the means to pay for a market rate apartment and private supports. But for many, SSI will

²⁸See, e.g., 42 U.S.C. § 1396 *et seq.* (2018); 42 CFR §441.310(a)(2) (2019); Center for Medicaid & CHIP Services, *Coverage of Housing-Related Activities and Services for Individuals with Disabilities*, (June 26, 2015) at 1, available at: <https://www.medicaid.gov/federal-policy-guidance/downloads/cib-06-26-2015.pdf> (“Consistent with statute, CMS does not provide Federal Financial Participation (FFP) for room and board in home and community based services...”). See generally *amicus* The Arc of the United States, *Position Statements: Housing*, at 1, available at https://thearc.org/wp-content/uploads/2019/08/16-117-The-Arcs-Position-Statements_C9_Housing-1.pdf.

²⁹ Braddock, D., *et al.*, *The state of the states in intellectual and developmental disabilities* (2017), at 6, available at <http://stateofthestates.org/documents/UnitedStates.pdf>.

³⁰ Over 50% of respondent to one survey noted there was no meaningful plan in place to address things like housing and supports when the family member was no longer able to provide these things. See Anderson, L., *et al.*, *supra*, at 21; see generally *amicus* The Arc of the United States, *Position Statements: Family Support*, available at <https://thearc.org/position-statements/family-support/>.

become their sole source of income and they will require affordable housing and supports in order to continue to live in the community rather than being moved to an institutional setting.³¹ The lack of affordable, accessible housing opportunities means that many people with I/DD will experience an acute crisis, such as institutionalization or homelessness, upon the aging or death of family members who own the home and provide support. It means that many are barred from seeking a greater level of independence by living separately from their families.

As such, in a recent study, family members reported their concerns about their adult offspring with I/DD ending up in an institution (63%) or not being able to live in the home of their choice (81%), should the family member no longer be able to provide them with a home or supports.³² These factors pose major barriers to community living, making it difficult for people to move from family homes into more independent community homes, and putting many people with I/DD at risk of unnecessary institutionalization or homelessness.

Data show that the affordable housing crisis is particularly acute in Texas, where more than 340,000 recipients of SSI benefits (many of whom have I/DD) do not receive enough to cover even monthly rent, let alone additional necessities.³³

³¹ Braddock, D., *et al.*, *supra* at 4.

³² FINDS survey, *supra*, at 21.

³³ Schaak, *et al.*, *supra*, at Tables 1-3.

The lack of affordable housing in the Dallas metropolitan area is even worse than Texas as a whole.³⁴ These data demonstrate that, for the Dallas metro area, basic SSI payments account for around 94 to 114% of the typical cost of an efficiency or 1-bedroom apartment, respectively, leaving very little to nothing for other costs of daily living.³⁵

B. People with I/DD Face Persistent Discrimination When Seeking Rental Housing

Discrimination is another prominent reason why the housing crisis continues to worsen for people with disabilities, as discrimination decreases options that are already severely limited, as described above.³⁶ As the National Fair Housing Alliance reported, in recent years, the majority of complaints HUD receives involve housing discrimination against people with disabilities.³⁷

³⁴ *See id.*

³⁵ *Id.* at 40. As the *Priced Out* report notes, housing is considered affordable when housing costs account for between 30-40% of household income. Households are considered “rent burdened” when housing costs account for between 40-50% of household income, and households are considered “worst case needs” when housing costs exceed 50% of household income. *Id.* at 10.

³⁶ HUD Guidance, *supra* at 1.

³⁷ National Fair Housing Alliance, *2018 Fair Housing Trends Report* (2018), at 52, available at <https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report.pdf>.

Discrimination against people with I/DD takes many forms that prevent them from obtaining adequate living arrangements or even maintaining current living arrangements.³⁸ HUD reports that people with I/DD and mental illnesses were disadvantaged in seeking rental housing when compared to their peers without disabilities in almost every respect. They were less likely to receive a response to their inquiry; less likely to be told an advertised unit was available; less likely to be invited to contact the housing provider to see the unit; less likely to be invited to inspect the available unit; more likely to be encouraged to look at a different unit than the one advertised; and treated adversely at disparate rates.³⁹ As HUD notes:

Individuals with MD [mental disabilities] often face multiple challenges when they seek housing in the rental housing market. Challenges may include both economic barriers and stigma or suspicion on the part of housing providers that limits their access to diverse housing choices. Complaints based on disability make up the largest number of housing discrimination complaints filed with federal, state, and local fair housing agencies and with private fair housing groups. . . . A significant portion of these complaints involves people with MD. For example . . . in . . . 2010, fully 40 percent of the disability complaints involved MD, which includes people with psychiatric disability or mental illness (PD/MI) and intellectual or developmental disability (I/DD).⁴⁰

³⁸ *Id.* at 47-49.

³⁹ *Id.* at vii.

⁴⁰ *Id.* at 2.

This report reflects that there are “significant levels of adverse differential treatment” toward people with I/DD when those individuals attempt to secure or maintain affordable housing.⁴¹

III. DHA’S REFUSAL TO PROVIDE THE PBVs PEOPLE WITH I/DD NEED TO ACCESS AFFORDABLE HOUSING SUBSIDIES JEOPARDIZES THEIR AUTONOMY AND PUTS THEM AT RISK OF HOMELESSNESS AND INSTITUTIONALIZATION

Findings from the National Core Indicators (NCI)⁴² indicate that those who live in their own homes “report the greatest amount of choice compared to those living in an institution, community residence, family home, or foster care.”⁴³ While the family home has many benefits, such an environment often does not offer people with I/DD the level of autonomy and community integration that many

⁴¹ *Id.* at 47.

⁴² The NCI is a voluntary effort by state developmental disability agencies to evaluate their performance using a common nationally validated set of measures. It is coordinated by the National Association of State Directors of Developmental Disabilities Services in collaboration with the Human Services Research Institute. NCI includes a set of more than 100 standard performance measures (or “indicators”) in areas such as: employment, rights, service planning, community inclusion, choice, health, and safety. NCI uses four main surveys to collect this information: an in-person Adult Consumer Survey as well as three mail-out surveys to families. *See* NCI, Featured Core Indicators, available at <https://www.nationalcoreindicators.org/>.

⁴³ AAIDD/AUCD Report, *supra*, at 3 (citing Bradley, V., *et al.*, 25 years after ADA: what story does the data tell? Impact: Feature Issue on the ADA and People with Intellectual and Developmental Disabilities (2015)).

seek.⁴⁴ An overview of studies published between 2008 and 2012 examined different types of residential settings in which people with I/DD lived and concluded that “the best outcomes occurred among individuals with I/DD living in their own homes.”⁴⁵

Though Section 504 of the Rehabilitation Act provides that “disability is a natural part of the human experience and in no way diminishes the right of individuals to live independently [and] enjoy self-determination...,”⁴⁶ historically, many people with I/DD have been prevented from realizing their self-determination.⁴⁷ They have too often lacked the opportunity or the supports to make choices and decisions about important aspects of their lives, such as where they live. Instead, they have often been overprotected and involuntarily segregated, with others making decisions about key elements of their lives. For many, this has

⁴⁴ See, e.g., Center for Medicaid & CHIP Services, *Fact Sheet: Summary of Key Provisions of the Home and Community-Based Services (HCBS) Settings Final Rule* (hereafter Center for Medicaid & CHIP Services Fact Sheet), available at <https://www.medicaid.gov/medicaid/hcbs/downloads/hcbs-setting-fact-sheet.pdf>; see also 24 C.F.R. § 983.251 (2019).

⁴⁵ AAIDD/AUCD Report, *supra*, at 3 (citing Tichá, R., *et al.*, *System and individual outcomes in services and support for people with IDD and their predictors*, 51 *Intell. and Dev. Disabilities* 5, 298–315); see also NCD report, *supra*, at 26 (citing same).

⁴⁶ 29 U.S.C. § 701(a)(3)(A-B) (2019).

⁴⁷ See, e.g., *amicus* The Arc of the United States, *Position Statements: Self-Determination*, available at <https://thearc.org/position-statements/self-determination/>.

posed a barrier to exercising their right of self-determination and has inhibited their ability to live lives of their own choosing in homes and communities of their own choosing.

DHA's ongoing failure to provide the benefits of its subsidized housing programs and services to adults with I/DD (in part because it refuses to make reasonable accommodations to the PBV program) deprives those adults of a critical opportunity to live independently in the community and is inconsistent with the ADA's integration mandate.

For many people with I/DD who are unable to find affordable housing in the community outside of their family homes, the alternative when the family home is no longer an option is all too often either homelessness or institutionalization.⁴⁸ It is critical that the Court understand the concrete harms that institutional settings impose on people with I/DD in order to fully comprehend the risks people with

⁴⁸ Unfortunately, research shows that incarceration is too often another outcome for those lacking a viable home and necessary supports in the community. *See, e.g.,* Schaak, *et al., supra*, at 7–8, 17. People with disabilities are dramatically overrepresented in prisons and jails: about 32% of prisoners and 40% of jail inmates have at least one disability in contrast to 11% of the general population. *See, e.g.,* Bronson, Jennifer, *et al.*, Bureau of Justice Statistics, *Disabilities Among Prison and Jail Inmates, 2011-2012* (2015), at 3. As many as 10% of individuals in jails have an intellectual and/or developmental disability in contrast to only 1.5% in the general population. *See, e.g.,* Scheyett, Anna, *et al., Are We There Yet? Screening Processes for Intellectual and Developmental Disabilities in Jail Settings*, 47 *Intell. & Dev. Disabilities* 13, 14 (2009).

I/DD face when community-based affordable housing opportunities outside of their family homes are unlawfully restricted in the manner DHA has done in this case. Fear of such a devastating outcome causes the Individual Plaintiffs real injury, right now; their injuries are both concrete and ripe.

In institutional settings, individuals with disabilities live only with others with disabilities in large, congregate settings separated from their communities. These settings isolate residents by discouraging typical community interaction and providing limited opportunities for autonomy over their daily lives. Decades of research have shown the numerous negative impacts of institutionalization on people with I/DD, including adverse outcomes on quality of life, health, well-being, independence, and overall happiness.⁴⁹

Indeed, one cannot fully understand the risks posed by DHA's refusal to make its affordable housing programs accessible to people with I/DD without considering our nation's dark history of institutionalization and the harm that this caused to people with I/DD both historically and continuing to the present day. Reports from the infamous Pennhurst State School and Hospital⁵⁰ document abuses

⁴⁹ *E.g.*, AAIDD/AUCD Report, *supra*, at 2.

⁵⁰ *See Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. 1295 (E.D. Penn. 1977) (summarizing the history of abuse and mistreatment of those with I/DDs in institutional settings).

such as unnecessary physical restraint, seclusion, use of psychotropic drugs for control rather than treatment, and injuries, deaths, and rape caused by inadequate supervision and sometimes intentional abuse.⁵¹ Individuals who could otherwise thrive and valuably contribute to their communities if only they had access to adequate support instead stagnated and suffered in institutional environments.⁵²

Because of the harms of institutionalization and the Supreme Court’s articulation of the ADA’s integration mandate in *Olmstead*, since the late 1950s, the trend has been to shift from institutionalization to community-based services, where people with I/DD have thrived as full members of their communities with greater autonomy over their daily lives.⁵³ While much progress has been made over the last several decades,⁵⁴ over 120,000 individuals with I/DD nationwide—and more than 6,600 in Texas—remain in congregate, institutional settings.⁵⁵

Institutionalization, thus, presents an ongoing threat to people with I/DD in North Texas.

⁵¹ *Id.* at 1302–11.

⁵² *See id.* at 1309.

⁵³ *E.g.*, Carling, *supra*, at 21; AAIDD/AUCD Report, *supra*, at 2; Center for Medicare and Medicaid Services Fact Sheet, *supra*, at 1 (“The final rule requires that all home and community-based settings meet certain qualifications. These include: • The setting is integrated in and supports full access to the greater community; • Is selected by the individual from among setting.”).

⁵⁴ *See e.g.*, AAIDD/AUCD Report, *supra*.

⁵⁵ Braddock, D., *et al.*, *supra*, at 3; Braddock Texas, *supra* at 3.

A vast body of scholarly research demonstrates that people with I/DD have benefited greatly as a result of the move from institutionalization to community-based supports and services. These benefits have been proven in a variety of community settings, and for individuals with even the most intensive needs. In addition to living among their families and peers with and without disabilities and having autonomy over their daily lives, the gains to people with I/DD from community living include improvements in adaptive skills, reductions of challenging behaviors, and an increase in independence, self-care, social interactions, and vocational skills.⁵⁶ In contrast, those residing in institutional placements often see a regression with regards to certain challenges and behaviors due to variety of restrictions imposed on residents.⁵⁷

Community living also provides people with I/DD opportunities that are not available in large institutions, including regular interactions with individuals without disabilities and greater freedom to experience day-to-day community life, such as grocery shopping, participating in religious services, going to the movies,

⁵⁶ See John W. Jacobson & Sara N. Burchard, *Overview of Clinical Services, Social Adjustment, and Work Life in Community Living*, in Jacobson, *et al.*, eds., *supra*, at 12-16; see also AAIDD/AUCD Report, *supra*, at 4-5 (noting the wide range of benefits due to community living).

⁵⁷ *E.g.*, Sheryl Larson & Charlie Larkin, *Behavioral Outcomes of Moving From Institutional to Community Living for People with Intellectual and Developmental Disabilities: U.S. Studies from 1977 to 2010*, 37 Res. & Prac. for Persons with Severe Disabilities, no. 4, 235, 244 (2012).

visiting friends, and working. Life in the community allows people with I/DD to develop richer, more meaningful, and more autonomous lives and to enjoy freedoms, benefits, and experiences that others may take for granted.

The seminal study in this field was the Pennhurst Longitudinal Study, launched in connection with the landmark *Halderman v. Pennhurst* class action lawsuit against the Pennhurst State School and Hospital in Pennsylvania⁵⁸ alleging statutory and constitutional violations imposed on Pennhurst residents. Researchers followed over 1,100 individuals as they moved into the community from an institutionalized setting. Research and analysis were conducted for five years, following the court-ordered phase-down of Pennhurst. The study found that people who moved into the community were more independent and showed significant improvements in adaptive skills, while their counterparts who remained institutionalized showed no similar growth.⁵⁹ Numerous other studies have corroborated the Pennhurst Study results, finding statistically significant gains in

⁵⁸ *Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. 1295 (E.D. Penn. 1977).

⁵⁹ See *The Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis* at 56-63 (1985) (hereafter Pennhurst Study), available at <http://aspe.hhs.gov/daltcp/reports/5yrpenn.pdf>.

adaptive behavior skills associated with community living in contrast to negative associations with institutional placements.⁶⁰

The overwhelming consensus of studies was highlighted by the National Council on Disability in a 2015 report that called for more small-scale, community residential supports for people with disabilities.⁶¹ This report explained that the “preponderance of research . . . supports the conclusion that smaller, more dispersed and individualized community settings further integration and positive outcomes for individuals with disabilities.”⁶² Most recently, the 2015

⁶⁰ See, e.g., S.A. Larson & K.C. Lakin, *Deinstitutionalization of Persons with Mental Retardation: Behavioral Outcomes*, 14 J. of the Ass’n for Persons with Severe Handicaps, 324-32 (1989); S. Kim, S.A. Larson & K.C. Lakin, *Behavioral Outcomes of Deinstitutionalization for People with Intellectual Disabilities: A Review of Studies Conducted Between 1980 and 1999* at 6 (2001), available at <https://ici.umn.edu/index.php?products/view/83>; *Behavioral Outcomes of Deinstitutionalization for People with Intellectual and/or Developmental Disabilities: Third Decennial Review of U.S. Studies, 1977-2010* at 8 (2011), available at <http://ici.umn.edu/products/prb/212/212.pdf>; E.A. Eastwood & G.A. Fisher, *Skills Acquisition Among Matched Samples of Institutionalized and Community-Based Persons with Mental Retardation*, 93 Am. J. on Mental Retardation 75, 80 (1988); J.W. Conroy, et al., *Initial Outcomes of Community Placement for the People Who Moved from Stockley Center* at 47-48 (2003), available at <http://www.dhss.delaware.gov/ddds/files/conroyrep.pdf>.

⁶¹ See NCD Report, *supra*.

⁶² *Id.* at 7.

AAIDD/AUCD report found that “smaller settings, on average, continue to produce better quality of life outcomes for people with IDD.”⁶³

In sum, “[i]t is clear from decades of studies that people with I/DD have happier, healthier, and more independent lives when they live in smaller community-based residences than in larger institutional settings.”⁶⁴ The access to DHA’s PBV program that Plaintiffs seek would require only reasonable steps by DHA, and would promote participation of people with I/DD in all aspects of community life, thereby decreasing the risk of homelessness and institutionalization, consistent with the integration mandate articulated in *Olmstead*. DHA’s ongoing failure to provide the benefits of its subsidized housing programs and services to adults with I/DD (including by offering reasonable accommodations in its PBV program as contemplated by the applicable regulation) further deprives those adults of a critical opportunity to live independently in the community outside of their family homes and increases their risk of homelessness and institutionalization.

⁶³ AAIDD/AUCD Report, *supra*, at 3; see also Nord, D., *et al.*, *Policy Research Brief: Residential Size and Individual Outcomes: An Assessment of Existing National Core Indicators Research*, Vol. 24 No. 2, Univ. of Minn. (July 2014).

⁶⁴ AAIDD/AUCD Report, *supra*, at 4.

IV. DHA’S RESTRICTION OF THE PBV PROGRAM UNDULY LIMITS THE SUPPLY OF AFFORDABLE, COMMUNITY-BASED HOUSING FOR PEOPLE WITH I/DD IN NORTH TEXAS, PLACING THEM AT RISK OF HOMELESSNESS AND INSTITUTIONALIZATION

DHA’s actions not only unduly restrict opportunities for community-based housing that offers more independence and autonomy to people with I/DD in North Texas, but also puts them at risk of homelessness and institutionalization. As Plaintiffs note in their Complaint, the need for affordable community-based living arrangements for people with I/DD is not being adequately met by DHA with the existing DHA programs. PBV programs provide an obvious solution to ameliorate this problem by increasing affordable housing opportunities that are accessible to people with I/DD.

The PBV program that DHA initially explored is the very type of program that would achieve these goals.⁶⁵ PBVs attach to a building, rather than to a tenant, and for single-family PBVs, the voucher attaches to a specific house. The owners of the house apply to the local public housing authority for a voucher and enter into a contract with the housing authority, if the application is approved. The owners of the house must find tenants who meet the eligibility requirements of the particular PBV program, such as having an income below a certain level. The voucher then

⁶⁵ See, generally, Center on Budget and Policy Priorities, *Policy Basics: Project-Based Vouchers*, available at <https://www.cbpp.org/research/housing/policy-basics-project-based-vouchers>.

pays much of the tenants' rent. If tenants leave, the owners are responsible for finding replacements. Housing authorities, including DHA, use PBV programs to target specific populations with a significant need for affordable housing that is not adequately served by tenant-based voucher offerings, such as people who are homeless or who have disabilities. In DHA's Request for Proposals, it explained that it would approve a rent amount for the house, the individual with I/DD would pay 30% of his or her collective adjusted monthly income to the owners as rent, and DHA would then pay the owners the difference between those two amounts.

Though owners of PBV-subsidized properties are otherwise prohibited from renting to family members, HUD regulations specifically permit such an arrangement where necessary as a reasonable accommodation for disability.⁶⁶ Family ownership allows more continuity for the tenant and more control over housing condition and quality and mitigates the risk of exploitation that can accompany the typical landlord-tenant relationship. By eventually creating a trust to own the house, parents or other family members can ensure that the housing will be there for their children after their incapacity or death.

Plaintiffs explain that there are very limited community housing options for people with I/DD in North Texas: "Most adults with I/DDs in North Texas who are

⁶⁶ 24 C.F.R. § 983.251(a)(4) (2019).

unable to live with their families have been housed in State-operated institutions, nursing facilities, intermediate care facilities for people with intellectual disabilities (“ICF/IDs”), group homes, and foster care homes” despite the fact that most would prefer to live independently in the community of their choice.⁶⁷ As noted above, DHA itself has acknowledged this reality.⁶⁸ A PBV program accessible to Plaintiffs and their loved ones would enable them to achieve an affordable housing solution tailored to their specific and particular needs, thereby improving outcomes and helping to avoid crisis.⁶⁹ When DHA cancelled the Neighborhood Housing request for proposal and thereby precluded family ownership through the PBV program, DHA concretely harmed Plaintiffs by continuing the risk of institutionalization or homelessness to Plaintiffs’ loved ones who have I/DD and who face a critical shortage of affordable housing options.⁷⁰

The HUD Guidance explicitly recognizes that HUD-funded programs, including PBV, are appropriate resources to implement the ADA’s integration mandate by funding affordable community-based housing for people with

⁶⁷ ROA.2.

⁶⁸ DHA, *supra*, at 2.

⁶⁹ *See Schaak, et al., supra*, at 13.

⁷⁰ ROA.31.

disabilities.⁷¹ Thus, DHA's continuing failure to administer its PBV program in a manner that would benefit people with I/DD via reasonable accommodations, or to otherwise make community-based housing programs available to people with I/DD, has caused and continues to cause significant, concrete injuries to Plaintiffs.

CONCLUSION

The failure of DHA to provide the benefits of its subsidized housing programs and services to adults with I/DD (including by offering reasonable accommodations in its PBV program) contravenes the promise of the ADA's integration mandate embodied by the Supreme Court's *Olmstead* decision and causes concrete, particularized harms to Plaintiffs. DHA's actions deprive individuals with I/DD in North Texas of a critical opportunity to live independently in the community outside of their family homes and create an acute risk of institutionalization and homelessness. Plaintiffs deserve the opportunity to prove these allegations. Accordingly, the Court should reverse the district court's dismissal of Plaintiff's claims.

⁷¹ HUD Guidance, *supra*, at 2, 8 (referencing Section 8 project-based voucher assistance under Section 8(o)(13) of the Housing Act of 1937).

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the length limitation of briefs of an *amicus curiae* under Fed. R. App. P. 29(a)(5).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 5721 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Christa Laser
CHRISTA J. LASER

October 9, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Christa Laser
CHRISTA J. LASER