

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

UNITED STATES OF AMERICA

PLAINTIFF

V.

CIVIL ACTION NO.: 3:16-CV-00622-CWR-FKB

THE STATE OF MISSISSIPPI

DEFENDANT

THE STATE OF MISSISSIPPI'S RESPONSE TO THE COURT'S ORDER (ECF 253)

Introduction

The State of Mississippi submits the Report attached as Exhibit 1 in accordance with the Court's Order (ECF 253). This response covers three core points that bear on Mississippi's submission of that Report.

First, in submitting the Report, Mississippi respectfully maintains and preserves the arguments that it has made in this case, does not waive or forfeit any of its arguments, and maintains that it is not liable for (among other reasons) the reasons summarized on pages 89-90 of Mississippi's Proposed Findings of Fact and Conclusions of Law (ECF 232).

Second, even if the Court remains of its prior view on liability based on the evidence at trial, the Court still should order no relief because Mississippi is now in substantial compliance with Title II of the Americans With Disabilities Act, 42 U.S.C. §§ 12131-12134 (ADA), and has addressed or will imminently address the violations the Court believed to exist. The Report describes Mississippi's current compliance actions and commitments. The Court should not order any relief, given these actions and commitments, which are summarized in the Report and explained below, but instead enter a final judgment of dismissal with prejudice.

Third, if the Court does decide to order relief despite those first two points, the Court should order relief in light of certain important considerations. To start, judicial oversight of a State's systems is problematic and needs to be limited – in time and in qualitative extent – to what is

absolutely necessary. The Court recognized that this sort of oversight is subject to serious limitations on page 59 of its Memorandum Opinion and Order (Opinion) (ECF 234). Any remedy order must account for the problems inherent in the sort of oversight presented in this case. Next, any prospective injunctive relief must account for the current state of affairs in Mississippi's mental health system. As shown in the Report and as explained below, Mississippi achieved and implemented a great deal of change since the close of evidence and since the Court issued its Opinion (ECF 234) in September 2019. Any relief ordered must account for that change – as the Court recognized on page 60 of its Opinion (ECF 234). Further, in ordering a remedy under the ADA, the Court should not read or apply the ADA (including issuing a remedy under it) in a way that would create serious and ongoing federalism problems. The Court should therefore not issue sweeping relief that invades the inner, day-to-day workings of State government. Last, any relief ordered must be consistent with Mississippi's fundamental-alteration defense.

Discussion

I. Mississippi Maintains And Preserves All Of Its Arguments And Submits Its Report As Ordered Without Forfeiture or Waiver.

Mississippi submits its Report in accordance with this Court's Order (ECF 253). Mississippi does not forfeit or waive, and instead expressly preserves, all rights, defenses, and factual and legal issues in this Court and for appeal, including, respectfully, all rights and issues regarding this Court's liability finding. Mississippi maintains it is not liable at all for (among other reasons) the reasons summarized in Mississippi's Proposed Findings of Fact and Conclusions of Law (ECF 232).

Those reasons include, but are not limited to, that Mississippi did not engage in discrimination (ECF 232, pp. 65-66), that serious risk of institutionalization is not applicable here (ECF 232, pp. 65-70), that the United States did not satisfy its burden of proof (ECF 232, pp. 70-71), that the United States' 154-person sample is flawed and entitled to no weight (ECF 232, pp.

7-14 and 71-72), that the United States has not shown any unnecessary institutionalization (ECF 232, pp. 15-16), that *Olmstead v. Zimring*, 527 U.S. 581 (1999), recognizes the vital role of state hospitals in the continuum of care (ECF 232, pp. 27-32 and 72), that deinstitutionalization must be undertaken responsibly and Mississippi is doing so (ECF 232, pp. 32-33 and 73-74), that Mississippi is in compliance with the ADA because it has a reasonable continuum of mental health service that it has expanded at a reasonable pace (ECF 232, pp. 22-27, 33-48, 57-63 and 42-48), that Mississippi established a fundamental-alteration defense based on the trial record (ECF 232, pp. 48-57 and 79-86), that the relief sought by the United States violates principles of federalism (ECF 232, pp. 14-15 and 86-88), and that federal deficiencies inhibit Mississippi's ability to deliver services (ECF 232, pp. 16-22 and 88-89).

II. No Relief Is Warranted Because Mississippi Is In Substantial Compliance With The ADA.

Even if the Court remains of its view on liability based on the evidence at trial, the Court still should order no relief because Mississippi is now in substantial compliance with Title II of the ADA and has addressed or will imminently address the violations the United States alleged and the Court believed to exist. The Court's Opinion discusses both the Core Services (defined below) and "other management concerns" (ECF 234, pp. 19-29). The Report describes the State's current compliance actions and commitments regarding those matters. Those compliance actions and commitments are also explained below.

A. Core Services.

Mississippi has now implemented the community-based services that satisfy the standard and evidence that the United States presented at trial. There is accordingly no basis for ordering relief on the claims concerning those services.

Mississippi stated the following at trial: “DOJ says that if Mississippi only adds more and more community-based services, then at some point, Mississippi will have enough services to satisfy *Olmstead*. That begs this question. How much is enough? DOJ won’t say.” (Tr. 59).

The United States did not attempt to say how much is enough until it called its very last witness at trial, Melodie Peet. Ms. Peet testified as an expert in the field of mental health administration. (Tr. 1320). Ms. Peet testified the Core Services that prevent hospitalization are: Mobile Crisis, Crisis Stabilization, PACT and/or Intensive Case Management, Peer Support, Supported Employment, and Supported Housing. (Tr. 1322-23; PDX-32).¹

Ms. Peet testified that Mississippi should have the following capacity of Core Services:

- One PACT Team and/or Intensive Case Management in each Region.²
- One Crisis Stabilization Unit in each Region.³
- One Mobile Crisis Response Team in each Region.⁴
- Supported Employment in each Region.⁵
- Peer Support in each Region.⁶

Supported Housing is not a service that is offered by Region, as it is not administered by the Community Mental Health Centers (CMHCs).⁷ (DX-7; JX-51 at 1; Tr. at 684, 674, and 690). Ms. Peet thus testified that Mississippi should have “sufficient” CHOICE housing slots. (Tr. 1390-91).

¹ Mississippi does not concede Ms. Peet’s testimony regarding Core Services establishes any applicable or controlling standard for purposes of ADA compliance.

² Tr. 1385, 1434-35.

³ Tr. 1389, 1453.

⁴ Tr. 1389-90, 1453.

⁵ Tr. 1390.

⁶ Tr. 1392.

⁷ The board of supervisors in each of the counties that comprise a CMHC’s catchment area appoints a mental health commissioner. (Tr at 1579). The mental health commissioners make up the board of that CMHC, and they appoint the CMHC’s Executive Director. (Tr. at 1579, 2224, and 2317). The Executive Directors of the CMHCs report to their respective board of commissioners. (Tr. at 2318). The CMHCs are the providers of community-based services in Mississippi. (Tr. at 1579-80) [ECF 232], p. 2.

According to Ms. Peet, this capacity of Core Services is “baseline.” (Tr. 1382-83). Ms. Peet testified: “[O]nce you establish the core services for your service system, you want to make sure they’re available in each region so that access isn’t dependent on where you live.” (Tr. 1450).

As explained below and as shown in the Report, Mississippi is now in substantial compliance with the ADA, as it has addressed or will imminently address the violations the Court believed to exist. Therefore, there is no basis for ordering relief on those claims. This Court recognized already that “[i]f the State has made improvements to the adult mental health system since the trial, then by the time Final Judgment issues, it will that much closer to complying with the ADA.”⁸ Consistent with that observation, the Court should account for the points below and should not enter judgment or order relief based on capacity numbers that (given the evidentiary cutoff date at trial of December 31, 2018) are more than two years old.

Mobile Crisis Response Teams. The Court found that Mobile Crisis Services are illusory.⁹ As of December 31, 2018, Mississippi had fourteen Mobile Crisis Response Teams in all of its Regions. It has sustained fourteen teams. In FY21, DMH provided an additional \$600,000 for Mobile Crisis Response Teams. This will continue in FY22.¹⁰ Because Mississippi has Mobile Crisis Response Teams in all of its Regions, it meets Peet’s “baseline” standard.

Crisis Stabilization Units. The Court found that Crisis Stabilization Units (CSU) are not available.¹¹ As of December 31, 2018, Mississippi had CSUs in eight Regions. Mississippi now has CSUs available for every Region, except Region 11. In FY22, Mississippi will make funds available for a twelve-bed CSU in Region 11.¹² Once Mississippi adds that CSU in Region 11, it will meet Peet’s “baseline” standard.

⁸ ECF 241, Order Appointing Special Master, n. 2.

⁹ ECF 234, Memorandum Opinion and Order, pp. 23-24.

¹⁰ Exhibit 2, Declaration of Wendy Bailey, ¶.

¹¹ ECF 234, Memorandum Opinion and Order, pp. 24-25.

¹² Exhibit 2, Declaration of Wendy Bailey, ¶.

Intensive Community Services – PACT/ICORT/ICSS. The Court found that PACT is unavailable and under-enrolled.¹³ Mississippi provides Intensive Community Services through three programs: (i) Program of Assertive Community Treatment (PACT), (ii) Intensive Community Outreach and Recovery Team (ICORT), and (iii) Intensive Community Support Specialists (ICSS).¹⁴

As of December 31, 2018, Mississippi had eight PACT teams. It now has ten PACT teams. Mississippi's PACT teams are located in the Regions shown on Exhibit 2A.¹⁵

As of December 31, 2018, Mississippi had no ICORTs. Mississippi developed and implemented ICORT to deliver Intensive Community Services to less densely populated or rural areas that are difficult to serve with PACT teams.¹⁶ In FY19, Mississippi piloted ICORT in Region 2. As shown on Exhibit 2A, Mississippi now has sixteen ICORTs.¹⁷

ICORT is a modification of the PACT model. Although Mississippi did not have ICORT as of December 31, 2018, the record includes robust evidence supporting Mississippi's decision to expand its Intensive Community Services by modifying the PACT model through the development and implementation of ICORT. Ms. Peet testified that Mississippi can provide Intensive Community Services through PACT "and/or" Intensive Case Management. (Tr. 1433-34). Ms. Peet admitted that Intensive Case Management is a viable alternative to PACT teams in rural areas of Mississippi. (Tr. 1468). ICSS and Intensive Case Management are the same service. ICORT is a more intensive service than ICSS/Intensive Case Management.

Dr. Robert Drake testified as an expert witness for the United States. Dr. Drake testified that the PACT model has indeed been modified for rural areas: "The original model was designed

¹³ ECF 234, Memorandum Opinion and Order, pp. 19-23.

¹⁴ Exhibit 2, Declaration of Wendy Bailey, ¶ 9.

¹⁵ Exhibit 2, Declaration of Wendy Bailey, ¶ 10.

¹⁶ Exhibit 2, Declaration of Wendy Bailey, ¶ 11.

¹⁷ Exhibit 2, Declaration of Wendy Bailey, ¶ 12.

in an urban area in Wisconsin, and it assumed that a team of about ten clinicians would be responsible for a group of about 100 patients with serious mental illness. In rural areas, we don't have 100 patients with serious mental illness, and we don't have teams that are that large either. So we've needed to do a number of things to modify the model. I mean, and most of those have to do with servicing a smaller number of patients with a smaller number of clinicians." (Tr. 235-36). In Dr. Drake's opinion, PACT needs "to be modified considerably in rural areas." (Tr. 239). ICORT is one such modification of the PACT model for rural areas.

In FY21, Regions 3, 6, 9, and 10 each received grants for two additional ICSS. Region 11 received a grant for four additional ICSS. Mississippi now has funding for 35 ICSS as shown on Exhibit 2A.¹⁸

For all of these reasons, Mississippi is thus exceeding Peet's "baseline" standard for Intensive Community Services by providing funding for Intensive Community Services in *every county* through PACT, ICORT, and/or ICSS.

Peer Support Services. The Court found that Peer Support Services are not billed, but it did not find that Mississippi had insufficient Peer Support capacity.¹⁹ Nonetheless, Mississippi now provides and will sustain Peer Support Services in every Region by providing Peer Support Services at the primary CMHC office in each Region.²⁰ As of December 31, 2018, Mississippi had a Peer Bridger program at North Mississippi State Hospital. In FY21, Mississippi added a Peer Bridger program at South Mississippi State Hospital. In FY22, Mississippi will add a Peer Bridger Program at Mississippi State Hospital and East Mississippi State Hospital.²¹ By having

¹⁸ Exhibit 2, Declaration of Wendy Bailey, ¶ 13.

¹⁹ ECF 234, Memorandum Opinion and Order, 25.

²⁰ Exhibit 2, Declaration of Wendy Bailey, ¶ 16.

²¹ Exhibit 2, Declaration of Wendy Bailey, ¶ 15.

Peer Support Services available in every Region, plus imminently having the Peer Bridger program at all State Hospitals, Mississippi will exceed Peet’s “baseline” standard for Peer Support Services.

Supported Employment. The Court found that Supported Employment is miniscule.²² In 2015, Mississippi began offering Supported Employment Programs of Individual Placement and Support (IPS) at four pilot sites (Regions 2, 7, 10 and 12).²³ In February 2019, Mississippi offered grants for an Employment Specialist to all remaining CMHCs. Seven of them applied and all were awarded grants (Regions 3, 4, 8, 9, 11, 14 and 15).²⁴ In 2020, the remaining CMHCs received grants for an Employment Specialist. Mississippi now provides all Regions with a grant to provide Supported Employment through either IPS or an Employment Specialist that partners with Mississippi Department of Rehabilitation Services Office of Vocational Rehabilitation.²⁵ Although Mississippi now meets Peet’s “baseline” standard, Mississippi will offer IPS grants to three additional CMHCs (Region 4, 8 and 9) in FY22.²⁶

Supported Housing. The Court found that CHOICE is “far too small.”²⁷ In FY22, Mississippi will provide an additional \$150,000 to the two CHOICE housing providers to conduct assessments of people discharged from the State Hospitals and CSUs.²⁸ In addition, in FY22, the Mississippi Legislature appropriated an additional \$400,000 for CHOICE housing vouchers to Mississippi Home Corporation.²⁹

The Tables attached as Exhibits 3 through 6 show the expansion of the Core Services in Mississippi since 2013. A green check mark indicates that Mississippi has the Core Service in the Region. The Tables are reproduced below.

²² ECF 234, Memorandum Opinion and Order, pp. 25-26.

²³ Exhibit 2, Declaration of Wendy Bailey, ¶ 17.

²⁴ Exhibit 2, Declaration of Wendy Bailey, ¶ 18.

²⁵ Exhibit 2, Declaration of Wendy Bailey, ¶ 19.

²⁶ Exhibit 2, Declaration of Wendy Bailey, ¶ 20.

²⁷ ECF 234, Memorandum Opinion and Order, p. 26.

²⁸ Exhibit 2, Declaration of Wendy Bailey, ¶ 21.

²⁹ Exhibit 2, Declaration of Wendy Bailey, ¶ 22.

Key Community-Based Services by Region as of 12/31/13

REGION	ICM	PEER SUPPORT	CSUs	PACT	MOBILE CRISIS RESPONSE TEAMS	SUPPORTED EMPLOYMENT
1	✓	✓				
2	✓	✓	✓			
3	✓	✓				
4	✓	✓	✓			
6	✓	✓	✓	✓		
7	✓	✓				
8	✓	✓	✓			
9	✓	✓				
10	✓	✓	✓			
11	✓	✓				
12	✓	✓	✓			
13	✓	✓	✓			
14	✓	✓				
15	✓	✓		✓		

Key Community-Based Services by Region as of 12/31/2018

REGION	ICM	PEER SUPPORT	CSUs	PACT/ICM	MOBILE CRISIS RESPONSE TEAMS	SUPPORTED EMPLOYMENT
1	✓	✓	Pending		✓	
2	✓	✓	✓		✓	✓
3	✓	✓	✓	✓	✓	✓
4	✓	✓	✓	✓	✓	✓
6	✓	✓	✓	✓	✓	
7	✓	✓	Pending		✓	✓
8	✓	✓	✓	Pending	✓	✓
9	✓	✓	Pending	✓	✓	✓
10	✓	✓	✓	✓	✓	✓
11	✓	✓	Pending		✓	✓
12	✓	✓	✓	✓	✓	✓
13	✓	✓	✓	✓	✓	
14	✓	✓	Pending		✓	✓
15	✓	✓		✓	✓	✓

Key Community-Based Services by Region as of 3/1/2020

REGION	ICM	PEER SUPPORT	CSUs	PACT/ICM	MOBILE CRISIS RESPONSE TEAMS	SUPPORTED EMPLOYMENT
1	✓	✓	✓	✓ ICORT	✓	Funding Requested
2	✓	✓	✓	✓ ICORT	✓	✓
3	✓	✓	✓	✓	✓	✓
4	✓	✓	✓	✓	✓	✓
6	✓	✓	✓	✓	✓	Funding Requested
7	✓	✓	✓	✓ ICORT	✓	✓
8	✓	✓	✓	✓	✓	✓
9	✓	✓	✓	✓	✓	✓
10	✓	✓	✓	✓	✓	✓
11	✓	✓	Pending	ICORT-Pending	✓	✓
12	✓	✓	✓	✓	✓	✓
13	✓	✓	✓	✓	✓	Funding Requested
14	✓	✓	✓	✓ ICORT	✓	✓
15	✓	✓	✓ Shared	✓	✓	✓

Key Community-Based Services by Region as of 4/30/2021

REGION	ICM	PEER SUPPORT	CSUs	PACT/ICORT/ICM	MOBILE CRISIS RESPONSE TEAMS	SUPPORTED EMPLOYMENT
1	✓	✓	✓	✓	✓	✓
2	✓	✓	✓	✓	✓	✓
3	✓	✓	✓	✓	✓	✓
4	✓	✓	✓	✓	✓	✓
6	✓	✓	✓	✓	✓	✓
7	✓	✓	✓	✓	✓	✓
8	✓	✓	✓	✓	✓	✓
9	✓	✓	✓	✓	✓	✓
10	✓	✓	✓	✓	✓	✓
11	✓	✓	Pending	✓	✓	✓
12	✓	✓	✓	✓	✓	✓
14	✓	✓	✓	✓	✓	✓
15	✓	✓	✓ Shared	✓	✓	✓

Mississippi does not have a CSU in Region 11. Except for that one CSU, the Core Services are available in every Region now. The Core Services capacity identified in Mississippi's Report puts Mississippi at or above Peet's "baseline" standard.

B. Other management concerns.

Mississippi has also addressed the "other management concerns"³⁰ discussed by the Court as explained below.

Diversion from State Hospitals.³¹ The Report includes specific practices to divert individuals from hospitalization (see Exhibit 1, ¶¶ 28-29).

154-Person Sample.³² The United States Clinical Review Team (CRT) conducted a review of 154 people. The Report shows that Mississippi will provide funding for the CMHCs to screen those persons for eligibility for the Core Services, document the screening in the persons' records, and offer the Core Services for which persons are eligible and appropriate (see Exhibit 1, ¶¶ 30-31).

Discharge/Transition Planning.³³ The Report addresses the Court's concerns regarding discharge planning (see Exhibit 1, ¶¶ 32-34).

Medication Access.³⁴ As set forth in the Report, Mississippi is establishing a Medication Assistance Fund that will provide continuity of medication access to people in the community who have serious mental illness and who are receiving services through a CMHC, but who could not otherwise access prescribed medication that they need to avoid hospitalization (see Exhibit 1, ¶ 35).

³⁰ ECF 234, Memorandum Opinion and Order, pp. 27-33,

³¹ The Court discussed this issue at pages 16, 25, and 60 of its Opinion (ECF 234).

³² The Court discussed the 154-person sample at pages 39, 43, and 45 of its Opinion (ECF 234).

³³ The Court discussed this issue at pages 33, 35, and 45 of its Opinion (ECF 234).

³⁴ The Court discussed this issue at pages 18 and 41 of its Opinion (ECF 234).

Oversight of Providers.³⁵ Effective February 8, 2021, Mississippi created by statute the position of Coordinator of Mental Health Accessibility (Coordinator). MISS. CODE. ANN. § 41-20-3. The Coordinator's duties include increased oversight of the CMHCs and other providers. MISS. CODE. ANN. § 41-20-4 through -7.

Technical Assistance.³⁶ As shown by the Report, Mississippi is increasing its technical assistance to providers (see Exhibit 1, ¶¶ 36-37).

Data Collection and Review.³⁷ As explained in the Report, Mississippi will engage in data collection and review on a monthly basis (see Exhibit 1, ¶¶ 38-39).

Given all of these points, on Core Services and on “other management concerns,” the Court should not order any relief: Mississippi is in substantial compliance with the ADA even under the findings in the Court's opinion. A recent Fifth Circuit decision confirms why relief would therefore be inappropriate. In *Valentine v. Collier*, No. 20-20525, 993 F.3d 270, 2021 WL 1153097 (5th Cir. Mar. 26, 2021) (Op.), a prisoner class action challenging the defendant officials' response to COVID-19, the Fifth Circuit Court reversed a permanent injunction for the class because the defendant prison officials had eliminated any alleged constitutional violations by taking responsive measures during litigation – including during and after trial. Op. *4-10. The Fifth Circuit emphasized that “[w]hen there is a possible constitutional violation that is likely to continue over time as in a prison injunction case, we consider the evidence from the time suit is filed to the judgment.”) Op. *4. *See also* Op. *7 (evaluating developments during and after trial); Op. *9 (evaluating developments during trial). That reasoning reflects the more general rule that injunctive relief is prospective, it aims to deter or stop ongoing violations – and so it is inappropriate if violations no longer exist. *Valentine* thus makes clear that when responsive

³⁵ The Court discussed this issue at page 28 of its Opinion (ECF 234).

³⁶ The Court discussed this issue at pages 27-28 of its Opinion (ECF 234).

³⁷ The Court discussed this issue at pages 27-28 of its Opinion (ECF 234).

measures “have been implemented” then “injunctive relief is inappropriate” – even if the measures “came late.” Op. *9. *Valentine* thus affirms that this Court may order relief based only on now-existing legal violations – not violations that existed at the close of evidence or the time of trial. As in *Valentine*, there is no ongoing legal violation. So “injunctive relief” would be “inappropriate.” Op. *9.

III. If The Court Nonetheless Decides To Order Relief, It Should Be Guided By Certain Considerations.

If the Court decides to order relief despite Mississippi’s showings in Section I and II above, it should do so in light of the four considerations discussed below.

First, judicial oversight of Mississippi’s mental health system is problematic and must be limited – in time and in qualitative extent – to only what is absolutely necessary. The Court has recognized as much: “This Court is keenly aware of the judiciary’s limitations in a case such as this.”³⁸ Thus, if the Court were to believe that the Report would reflect substantial compliance with Title II of the ADA but concludes that the Report should be entered as a remedial order, the Court should make clear that the lawsuit shall be dismissed with prejudice at the end of FY22. Given what Mississippi has achieved since the close of evidence, that would be more than enough time and would respect the Court’s limited role in this context. If the Court does not put a firm end date then it should at least provide a clear termination provision, such as the following: “The United States’ lawsuit against Mississippi shall be dismissed with prejudice when Mississippi (i) fulfills the Capacity obligations in paragraphs 7-9, 12, 14-16, 18-19, 22-24, and 27, and (ii) fulfills the funding obligation in paragraph 27.”

³⁸ ECF 234, Memorandum Opinion and Order, p. 59.

Second, any prospective injunctive relief must account for the current state of affairs in Mississippi’s mental health system. “[R]emedies fashioned by federal courts to address constitutional infirmities ‘must directly address and relate to the constitutional violation itself.’” *M.D. v. Abbott*, 907 F.3d 237, 271 (5th Cir. 2018) (citation omitted). A federal court decree exceeds appropriate limits if it is “aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation.” *Id.* (citation omitted). No constitutional violation is alleged in this case, but the same rules that apply to alleged constitutional violations apply to the ADA statutory violations alleged here. As shown in Section II above and in the Report, Mississippi has done much to continue to expand and enhance its mental health system since the trial evidentiary cutoff date of December 31, 2018, and since the Court issued its Opinion in September 2019. The Court has recognized this consideration. “The Court is hesitant to enter an Order too broad in scope or too lacking in a practical assessment of the daily needs of the system. In addition, it is possible that further changes might have been made to the system in the months since the factual cutoff.”³⁹ Further changes have indeed been made to the system in the months since the factual cutoff. Any relief ordered must account for those changes.

Third, the Court should not read or apply the ADA in a way that would create serious federalism problems – as would be the case if the Court authorized sweeping relief that invades the inner workings of state government. Under the principles of federalism, “one of the most important considerations governing the exercise of equitable powers is a proper respect for the integrity and function of local government institutions.” *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990). Federalism requires deference to Mississippi’s discretion in determining how best to deliver what the Court has characterized as “a minimum bundle of community-based services that

³⁹ ECF 234, Memorandum Opinion and Order, p. 60.

can stop the cycle of hospitalization.”⁴⁰ Mississippi exercised its discretion as set forth in its Report. In a decision rendered in October 2020 regarding a state geriatric prison in Texas, the Fifth Circuit cautioned that federal judges are not policymakers. *Valentine v. Collier*, 978 F.3d 154, 165 (5th Cir. 2020). “The Constitution charges federal judges with deciding cases and controversies, not with running state prisons.” *Id.* (citation omitted). Just as the Constitution does not charge federal judges with running state prisons, the ADA does not charge federal judges with running state mental health systems. “Principles of federalism and separation of powers dictate that exclusive responsibility for administering state prisons resides with the State and its officials.” *Id.* at 166 (citation omitted). Those same principles dictate that exclusive responsibility for administering state mental health systems resides with the State and its officials. As Justice Kennedy observed in *Olmstead*, there are “federalism costs inherent in referring state decisions regarding the administration of treatment programs and the allocation of resources to the reviewing authority of the federal court.” *Olmstead*, 527 U.S. at 610 (Kennedy, J., concurring).

Fourth, any remedy must be consistent with the fundamental-alteration defense. “[A] public entity is required only to make ‘reasonable modifications in policies, practices, or procedures’ when necessary to avoid discrimination and it is not even required to make those if ‘the modifications would fundamentally alter the nature of the service, program, or activity.’” *Olmstead*, 527 U.S. at 613 (Kennedy, J., concurring) (citing the majority and quoting 28 CFR § 35.130(b)(7)). Mississippi asserted a fundamental-alteration defense at trial. It did so without seeing the United States’ proposed remedial plan, which has yet to be filed. Mississippi should be permitted to reassert a fundamental-alteration defense after the United States files its proposed remedial plan because any final relief ordered must be consistent with that defense.

⁴⁰ ECF 234, Memorandum Opinion and Order, pp. 59-60.

Conclusion

The Court should not order any remedy in this case because Mississippi is not liable under the ADA and should enter a final judgment of dismissal with prejudice. Even if the Court disagreed on liability, it still should not order any relief because Mississippi has now addressed or will imminently address the violations of the ADA alleged by the United States and that the Court found. If the Court does order a remedy, it must be sharply limited.

Dated: April 30, 2021.

Respectfully submitted,

PHELPS DUNBAR LLP

BY: /s/ James W. Shelson

Reuben V. Anderson, MB 1587
W. Thomas Siler, MB 6791
James W. Shelson, MB 9693
Nash E. Gilmore, MB 105554
4270 I-55 North
Jackson, Mississippi 39211-6391
Post Office Box 16114
Jackson, Mississippi 39236-6114
Telephone: 601-352-2300
Email: reuben.anderson@phelps.com
tommy.siler@phelps.com
jim.shelson@phelps.com
nash.gilmore@phelps.com

Douglas T. Miracle, MB 9648
Assistant Attorney General
Mississippi Attorney General's Office
550 High Street
Jackson, MS 39201
Telephone: 601-359-5654
Email: doug.miracle@ago.ms.gov

Mary Jo Woods, MB 10468
Special Assistant Attorney General
Mississippi Attorney General's Office
550 High Street
Jackson, MS 39201

Telephone: 601-359-3020
Email: Mary.Woods@ago.ms.gov

Attorneys for the State of Mississippi

CERTIFICATE OF SERVICE

I certify that on April 30, 2021, I electronically filed this document with the Clerk of the Court using the ECF system, which sent notification of such filing to all ECF counsel of record in this action.

/s/ James W. Shelton
JAMES W. SHELSON