

**No. 21-60772**

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

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee*

v.

THE STATE OF MISSISSIPPI,  
*Defendant-Appellant*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
CIVIL ACTION NO. 3:16-CV-622-CWR-FKB

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**BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF PEOPLE  
WITH DISABILITIES, THE ARC, MENTAL HEALTH AMERICA, AND  
NATIONAL COUNCIL ON INDEPENDENT LIVING SUPPORTING  
PLAINTIFF-APPELLEE AND IN SUPPORT OF AFFIRMANCE**

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Richard D. Salgado  
Marina Stefanova  
JONES DAY  
2727 North Harwood Street  
Dallas, TX 72501  
Tel: (214) 969-5209  
Fax: (214) 969-5100

Ira A. Burnim  
JUDGE BAZELON CENTER FOR  
MENTAL HEALTH LAW  
1090 Vermont Ave, NW, Suite 220  
Washington, DC 20005  
Tel: (202) 467-5730

*Counsel For Amici Curiae American Association of People with  
Disabilities, The Arc, Mental Health America, and National Council on  
Independent Living*

## SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that the following persons and entities have an interest in the outcome of the case under Rule 28.2. These representations are made so judges may evaluate potential recusal.

### Amici Curiae

American Association of People with Disabilities  
The Arc  
Mental Health America  
National Council on Independent Living

### Counsel for Amici Curiae

Jones Day  
Richard D. Salgado  
Marina Stefanova

Judge Bazelon Center for Mental Health Law  
Ira A. Burnim

Dated: April 5, 2022

/s/ Richard D. Salgado  
Richard D. Salgado

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## STATEMENT OF INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici curiae* are disabilities rights organizations that are interested in this matter because the Court's decision will impact the legal rights of persons with disabilities along with the remedies available when a person or entity violates the Americans with Disabilities Act.

The American Association of People with Disabilities ("AAPD") works to increase the political and economic power of people with disabilities, and to advance their rights. A national cross-disability organization, AAPD advocates for full recognition of the rights of over 60 million Americans with disabilities, including their right to be free of unnecessary institutionalization and to be integrated into the community and the mainstream of American life.

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<sup>1</sup> Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, *Amici* state that they have conferred with Appellant and Appellee and that both parties consent to the filing of this *amicus* brief.

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *Amici* state that: (A) there is no party, or counsel for a party in the pending appeal who authored the *amicus* brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than *Amici* and their members.

The Arc of the United States (“The Arc”), founded in 1950, is the nation’s largest community-based organization of and for people with intellectual and/or developmental disabilities (“IDD”) with over 600 chapters across the country. The Arc promotes and protects the human and civil rights of people with IDD and actively supports their full inclusion and participation in the community.

Mental Health America, founded in 1909, is the nation’s leading community-based non-profit dedicated to addressing the needs of those living with mental illness and promoting the overall mental health of all Americans. Its work is driven by its commitment to promote mental health as a critical part of overall wellness, including prevention services for all, early identification and intervention for those at risk, and community-based care, services, and support for those who need it, with recovery as the goal.

The National Council on Independent Living (“NCIL”) is the longest-running national cross-disability, grassroots organization run by and for people with disabilities. NCIL works to advance independent living and the rights of people with disabilities. NCIL’s members include individuals with disabilities, Centers for Independent Living, Statewide Independent Living Councils, and other disability rights advocacy

organizations. Members of NCIL's leadership helped draft the Americans with Disabilities Act, and NCIL has advocated and will continue to advocate for courts to enforce that law's intent of providing full and equal opportunities for people with disabilities to live in and be integrated into their communities.

## SUMMARY OF THE ARGUMENT

The district court correctly applied *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), to hold that Mississippi violates Title II of the Americans With Disabilities Act (“ADA”). The Court should therefore affirm the district court for the reasons that the United States offers in its brief.

The *Amici*—organizations dedicated to protecting the rights of those with serious mental illness—however, do not submit this *amicus* brief to merely repeat the United States’ thorough arguments and analysis. Instead, *Amici* submit this brief with two purposes: First, to emphasize the extent to which the Supreme Court’s existing precedent controls this case’s outcome and requires affirmance. Second, and only in the alternative, to explain why anything less than full affirmance would necessitate remand back to the district court for further development of the factual record.

For context, the importance of holding faithfully to precedent and giving this case careful treatment cannot be overstated here. That is because ensuring the continued availability of community-based services is essential to implementing the purpose of the ADA, which recognizes that “unjustified institutional isolation of persons with disabilities is a form of discrimination.” *Id.* at 600; *see also* 42 U.S.C. § 12101(a)(2) (“historically,

society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem”). Such confinement “perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life,” and “severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.” *Olmstead*, 527 U.S. at 600–01.

This Court has echoed the importance of Title II of the ADA, stating that it “does not only benefit individuals with disabilities” but is also essential to society at large. *Frame v. City of Arlington*, 657 F.3d 215, 230 (5th Cir. 2011), *cert. denied*, 565 U.S. 1200 (2012). For instance, in *Frame*, the Court explained that “Congress recognized that isolating disabled individuals from the social and economic mainstream imposes tremendous costs on society.” *Id.* This Court further emphasized that “Congress specifically found that disability discrimination ‘costs the United States billions of dollars in unnecessary expenses resulting from dependency and

nonproductivity.’” *Id.* (quoting 42 U.S.C. § 12101(a)(8)) (other citations omitted).

This case thus indisputably implicates issues of tremendous significance to individuals with disabilities and all others in society. It demands careful treatment; not the broad stroke solution and reversal that Mississippi seeks.

First, precedent controls. The controlling law is Title II of the ADA as interpreted by the Supreme Court in *Olmstead*. That precedent remains fully intact twenty years after it was decided and this case fits comfortably within its bounds. The district court properly conducted the three-part inquiry set forth in *Olmstead* and supported its conclusion as to each subpart with evidence presented at trial, including findings made by numerous experts, showing that individuals with serious mental illness had been unnecessarily institutionalized, Mississippi does not provide the community-based services that are needed to prevent such discrimination, and providing such services would not fundamentally alter Mississippi’s mental health system. Under *Olmstead*, a state’s compliance with the ADA can be assessed on a system-wide basis and does not need to be limited to individual cases, as Mississippi incorrectly claims.

Second, the Court should affirm because the district court correctly applied the *Olmstead* precedent to the facts before it, but *Amici* also submit this brief to make absolutely clear that Mississippi's urged outcome—reversal—would not be proper on the existing record. If the Court were to harbor any lingering questions, they would necessarily flow from perceived uncertainties about the facts below— not about what *Olmstead* and the ADA demand. Therefore, at most, further development of the factual record would be proper. That is because, at most, Mississippi's arguments would—if indulged—be resolved by further factual development in the following areas: the number of people who need relief from future unnecessary institutionalization and the cost calculations related to the changes Mississippi needs to make to its mental health system. Accordingly, while such further development is *not* necessary and affirmance is the correct outcome here based on the application of controlling precedent to the existing record, the only other plausible alternative would be remand to the district court for further factual development.

## ARGUMENT

### I. The District Court Correctly Applied *Olmstead* to Find That Mississippi Violates Title II of the ADA.

#### A. A clear and well-established legal framework governs the institutionalization of individuals with disabilities.

The core legal framework governing the institutionalization of individuals with disabilities is clear and not subject to any dispute in this case.

The key parameters of that framework start with the text of Title II of the ADA, which prohibits discrimination by public entities. It provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.

To implement Title II’s prohibition on discrimination, the United States Department of Justice (“DOJ”) promulgated regulations that require public entities to “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) (emphasis added). The goal is to create “a setting that enables individuals with disabilities to interact with

nondisabled persons to the fullest extent possible.” 28 C.F.R. Pt. 35, App. B. The regulations further impose an affirmative obligation on public entities to “make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7)(i).

The Supreme Court’s ruling in *Olmstead* two decades ago largely dictates the rest of the framework. The Supreme Court interpreted Title II of the ADA to hold that “[u]njustified isolation . . . is properly regarded as discrimination based on disability.” 527 U.S. at 597. To prevent discrimination, the *Olmstead* Court explicitly “required” states “to provide community-based treatment for persons with mental disabilities when” (1) “the State’s treatment professionals determine that such placement is appropriate,” (2) “the affected persons do not oppose such treatment,” and (3) “the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.” *Id.* at 607.

Since then, this Court has relied on *Olmstead* in decisions involving the application of the ADA, without ever limiting or qualifying *Olmstead*'s clear requirement for community-based treatment in any way. *See Frame*, 657 F.3d at 223 n.18 (quoting *Olmstead*, 527 U.S. at 599 (“The ADA stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living.”)); *see also Caldwell v. KHOU-TV*, 850 F.3d 237, 243–44 (5th Cir. 2017) (recognizing that under *Olmstead*, the ADA’s prohibition on discrimination may require placing individuals with disabilities in a community setting). Mississippi likewise recognizes that *Olmstead* governs this case, and it does not identify any decision by the Supreme Court or the Fifth Circuit that calls into question *Olmstead* or imposes additional requirements or limitations on its holding. *See Appellant’s Opening Brief (“Op. Br.”)* at 18–32.

The requirements that *Olmstead* establishes—which are essential to implementing the goals of the ADA—remain undisturbed and unchallenged. This case does not raise any novel legal issues or questions as to this clear precedent.

**B. The district court correctly applied precedent to arrive at the correct conclusion.**

The district court correctly applied precedent to arrive at the correct conclusion: Mississippi's mental health system depends too heavily on institutionalization and does not provide the community-based services that Title II of the ADA requires. ROA.3945-48. The United States has briefed this in detail; *Amici* agree with that briefing and do not seek to reiterate the United States' arguments here. However, *Amici* emphasize that the district court's ruling was a correct application of precedent to the facts found by the district court.

In *Olmstead*, the Supreme Court established that unnecessary institutionalization violates the ADA because it constitutes discrimination based on disability. 527 U.S. at 597. Mississippi does not dispute this. *See* Op. Br. at 2, 6-7. It is based on this well-established precedent that the district court was asked to decide whether Mississippi engages in unnecessary institutionalization of individuals with serious mental illness.

There are neither questions as to the continued applicability of *Olmstead's* holding, nor limitations or qualifications as to the requirements that *Olmstead* imposes on public entities. *See Frame*, 657 F.3d at 223 n.18; *cf.*

*Caldwell*, 850 F.3d at 243 (declining to extend *Olmstead* to employment cases not involving “physical segregation” and isolation). Contrary to Mississippi’s position, nothing in *Olmstead* limits its application only to individual cases. Nor does anything in *Olmstead* preclude application on a system-wide basis. To the contrary, the Supreme Court’s decision, and specifically its explanation of the fundamental alteration defense, shows that a system-wide analysis is necessary and appropriate in determining whether a federal law violation exists. *Olmstead*, 527 U.S. at 597 (“In evaluating a State’s fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State providers others with mental disabilities....”). Indeed, despite urging that system-wide application is improper, Mississippi does not point to any holding in *Olmstead* or any other authority confirming its position. Op. Br. at 21–24. Instead, Mississippi merely summarizes the analysis in *Olmstead* regarding the individuals at issue in that case, and it then insists that all other cases seeking to enforce the ADA with respect to the provision of community-based services must conform to that same pattern. *Id.*

But the *Olmstead* Court did not limit all ADA enforcement actions to individual cases. Rather, it explicitly noted the problem of adjudicating these cases when the plaintiffs were only a few individuals. *Olmstead*, 527 U.S. at 606 (discussing the perverse effects of affording relief to select individuals “who commenced civil actions”). It instead held that unnecessary institutionalization is “discrimination based on disability” and that “*States are required* to provide community-based treatment for persons with mental disabilities” so long as the requirements enumerated above are met – full stop. *Id.* at 597, 607 (emphasis added).

The qualifications and limitations that Mississippi seeks to impose here exist nowhere in *Olmstead*. Rather, the *Olmstead* Court assessed Georgia’s mental health services and remanded the case for further consideration of issues related to whether those services complied with the prohibition against unnecessary hospitalization. *Id.* at 607. Here, the district court examined whether the same harm had been committed in Mississippi: whether the state had engaged in unnecessary institutionalization and whether it had provided the community-based services necessary to avoid such unnecessary hospitalization. ROA.3931–39.

Moreover, the fact that public entities can assert a fundamental alteration defense (which Mississippi did but failed to prove) itself underscores that courts can assess system-wide compliance with the ADA. Under *Olmstead*, to prove the fundamental alteration defense to liability under the ADA, a state has the burden to show that providing individuals with immediate relief from hospitalization “would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.” 527 U.S. at 604. This prioritizes system-wide compliance over ensuring that each individual receives all needed accommodations at any cost.

To this end, the *Olmstead* Court recognized that the state could show compliance with the ADA by demonstrating “that it ha[s] a comprehensive, effectively working plan of placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable place not controlled by the State’s endeavors to keep its institutions fully populated[.]” *Id.* at 605–06. The Court also emphasized the need for states “[t]o maintain a range of facilities and to administer services with an even hand[.]” *Id.* at 605. If anything, *Olmstead* discourages the person-by-person application of its requirements. *Id.* at 606. In sum, a system-wide analysis

was built into *Olmstead*. The Supreme Court has recognized that states' mental health programs can and should be assessed on a system-wide basis to ensure sufficient and equitable access to mental health services and compliance with the ADA.

Nor does Mississippi find any support for its proposed limitations in either the ADA or this Court's precedent. As the House Report on the ADA made clear, "[t]he purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role *in enforcing these standards* on behalf of individuals with disabilities." H.R. REP. 101-485, 22-23, 1990 U.S.C.C.A.N. 303, 304 (emphasis added). As noted in its preamble, the ADA is intended to achieve systemic changes and not merely improvements on a case-by-case basis. 42 U.S.C. § 12101(b)(1)-(2). In fact, the Fifth Circuit has held that the United States can bring actions to enforce the ADA *both* to obtain personal relief on behalf of private individuals *and* to remedy a pattern of discrimination on behalf of the public. *United States v.*

*Mississippi Dep't of Pub. Safety*, 321 F.3d 495, 498–99 (5th Cir. 2003) (holding that the United States has the power to determine when to assert claims on behalf of the public and when to bring claims on behalf of an individual, and that “the federal government *always* has a real and substantial federal interest in ensuring the states’ compliance with federal law”).

Here, the district court correctly concluded that Mississippi violates the ADA by engaging in unnecessary institutionalization. ROA.3945–48. The district court’s ruling was supported by the evidence presented at trial. The United States’ experts assessed a group of patients who all had been hospitalized in Mississippi at least once between October 2015 and October 2017, and they found that “nearly all, if not all, of the 154 patients would have spent less time or avoided hospitalization if they had had reasonable services in the community.” ROA.3932–33. Moreover, of the 122 individuals who were not living in an institution at the time of their interview, 103 (approximately 85%) were found to be at serious risk of re-institutionalization. ROA.3933–34; *see also* ROA.3934–37 (summarizing the United States’ experts’ findings regarding how community-based services would have benefitted the individuals and would have helped them avoid hospitalization). The evidence thus established that Mississippians

had been unnecessarily institutionalized. That violates Title II of the ADA under *Olmstead*. The district court was correct in so ruling.

The district court applied the *Olmstead* Court's three-part test to assess whether Mississippi must provide community-based services for persons with serious mental illness:

*First*, the district court considered whether "treatment professionals determine[d] that [community-based] placement is appropriate," *Olmstead*, 527 U.S. at 607; *see also* ROA.3946-47. As noted above, the district court based its decision on reliable testimony from the United States' experts showing that "nearly all, if not all, of the 154 patients" that were assessed "would have spent less time or avoided hospitalization if they had had reasonable services in the community." ROA.3933. Notably, even one of Mississippi's experts confirmed that individuals were unnecessarily institutionalized, testifying that "as many as half of the people at [the South Mississippi State Hospital] do not need to be hospitalized." RAO.3937.

Reliable evidence presented by the United States' experts also showed "exactly which community-based services would be beneficial to the patient's current and future needs." ROA.3946. In contrast, Mississippi's experts only opined on whether the individuals were appropriate for

hospitalization at the time of admission.<sup>2</sup> ROA.3938, 3947. They never evaluated community-based services, especially whether individuals could “benefit from community settings,” *Olmstead*, 527 U.S. at 600, before admission or at any point thereafter, thus making hospitalization for those individuals unnecessary. ROA.3938, 3947. In sum, the district court properly concluded, based upon evidence from qualified professionals—and the only treatment professionals who properly considered the relevant question—that the first *Olmstead* factor was met.

*Second*, the district court considered whether “the affected persons do not oppose such treatment.” *Olmstead*, 527 U.S. at 607; *see also* ROA.3946–47. The United States’ experts demonstrated that all individuals (except one) were not opposed to treatment in the community. ROA.3947. Again, Mississippi’s experts did not address this prong of the inquiry. ROA.3947.

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<sup>2</sup> Mississippi retained seven psychiatric experts, most of whom did not work at its state hospitals or provide treatment to the 154 individuals assessed by the United States’ experts. ROA.3937–39. Thus, Mississippi presented almost no evidence from the treatment professionals for persons institutionalized in its facilities. The district court weighed the competing evidence from the United States’ and Mississippi’s retained experts and made specific findings of fact concerning the weight it afforded to their clinical conclusions. Those findings are supported by the evidence, but to the extent the Court determines that the district court should have considered the views of the actual treatment professionals for these 154 individuals, which Mississippi never presented, it should remand for further findings.

*Third*, the district court considered whether “the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.” *Olmstead*, 527 U.S. at 607; *see also* ROA.3946–47. The United States’ experts established that Mississippi both had the general framework for providing community-based care, and already offered an array of needed community-based services—albeit in an insufficient amount—so that this framework easily could be expanded to make the services actually available and accessible. ROA.3947. Mississippi’s own experts, in turn, confirmed that institutional and community services cost the same amount of money. ROA.3947. Based on this evidence, the district court concluded that requiring the state to reallocate the resources to community-based services was not unreasonable. ROA.3947.

Because the United States established each of the three components under *Olmstead*, the district court concluded that Mississippi was required to provide the community-based services that had been lacking. ROA.3947–48. This ruling tracked established precedent, was supported by the evidence, and should be affirmed.

**C. Injunctive relief is appropriate to prevent future harm because Mississippi does not provide the required community-based services.**

The district court correctly ordered injunctive relief to prevent Mississippi from engaging in unnecessary institutionalization and to assure provision of the required community-based services in the future. ROA.3953-54, 4310.

Mississippi claims that this case focuses on “imposing liability in the absence of actual institutionalization.” Op. Br. at 25. Not so. The evidence in this case demonstrates that discrimination *has already occurred* and is ongoing: numerous cases of unnecessary hospitalizations have been established, and community-based services continue to be lacking. ROA.3931-39, 3945-48. Because this is discrimination that violates the ADA, injunctive relief is necessary to prevent future harm. *See Carter v. Orleans Par. Pub. Sch.*, 725 F.2d 261, 263 (5th Cir. 1984) (assessing claim under Section 504 of the Rehabilitation Act and noting that equitable remedies like injunctions are “designed to correct . . . the violation, and may be essential to prevent future harm as a result of the original violation.”).

The need to prevent future harm has even been written into ADA regulations, as they require public entities to make “reasonable

modifications in policies, practices, or procedures” as is “necessary *to avoid discrimination on the basis of disability*[.]” 28 C.F.R. § 35.130(b)(7)(i) (emphasis added). The Supreme Court in *Olmstead* relied on these regulations and likewise recognized the need to prevent future harm. *See* 527 U.S. at 597 (citing 28 C.F.R. § 35.130(b)(7) and recognizing “States’ obligation to avoid unjustified isolation of individuals with disabilities”); *see also Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005), *cert. denied*, 547 U.S. 1098 (2006) (recognizing that the ADA not only prohibits disability-based discrimination, but also imposes on “public entities an affirmative obligation to make reasonable accommodations for disabled individuals.”).

In sum, the district court’s decision was correct and should be affirmed.

**II. While Affirmance Is Proper, Alternatively, the Court Should Not Reverse the Case but Should Remand and Instruct the District Court to Make Additional Factual Findings.**

Affirmance is proper for the reasons above and as set forth in the United States’ brief. That should be the end of the analysis. *Amici* write additionally, however, to emphasize that even if the Court were not persuaded by the controlling precedent set forth above and by the United States, the outcome that Mississippi seeks – reversal – exceeds the scope of

review based on the existing record and would be improper. Instead, at most, limited remand for further factual development would be proper. Indeed, Mississippi takes advantage of the volume and complexity of the factual record to construct arguments that ultimately amount to fact questions as a basis for reversal. But such reversal would be incorrect.

Given the volume and complexity of the evidence, the district court's findings understandably may not reflect every detail or nuance established in the underlying record. But the answer is not to assume a lack of support — which is what Mississippi suggests. Instead, and in the alternative, remand for further factual development would be appropriate if the Court were to find that existing precedent is not dispositive, based on the existing factual findings. *See Morales v. State of N.Y.*, 396 U.S. 102, 105 (1969) (remanding case for further proceedings where record did not “squarely and necessarily present[] the issue and fully illuminate[] the factual context in which the question arises”); *Wilson v. Allgood*, 391 F.2d 285, 286 (5th Cir. 1968) (on appeal from the denial of *habeas corpus*, the Court “declin[ed] to reverse on the merits” due to incomplete record and held that “the ends of justice . . . require that [the Court] vacate the judgment below and remand the case with directions that a complete factual record be developed”); *see also*

*Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 386 (2008) (“When a district court’s language is ambiguous . . . it is improper for the court of appeals to presume that the lower court reached an incorrect legal conclusion” and remand is proper instead.).

**A. While affirmance is proper, reversal would be improper without further factual development regarding the number of people who need relief from future unnecessary institutionalization.**

Mississippi complains that the district court required Mississippi to improve its mental health services on a system-wide basis, not merely provide accommodations for specific individuals. Op. Br. at 21–25. This is not a basis for reversal because the district court’s ruling is consistent with *Olmstead*, as explained in Section I.B, above. But, even if the Court concludes that questions remain as to the application of the underlying facts to this precedent, reversal still would be improper because the district court made no legal errors, and its conclusions were supported by sufficient evidence that Mississippi engaged in unnecessary institutionalization. Instead, if additional questions still remain regarding the proper scope of relief for the actual number of individuals who have experienced unnecessary institutionalization in the past or who will experience such

institutionalization in the future if community services are not expanded, the case should be remanded to the district court with instructions to determine the specific number of individuals who need community mental health services to prevent their future unnecessary institutionalization.

Any such remand should also include instructions requiring that the scope of appropriate relief be based on the number of Mississippians who have been admitted – at any time – to a state hospital.

**B. While affirmance is proper, reversal would be improper without further factual development regarding the cost calculations related to Mississippi’s fundamental alteration defense.**

At trial, Mississippi attempted to invoke the fundamental alteration defense, which can excuse public entities from making reasonable modifications if they “can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7)(i). Under *Olmstead*, to prove the fundamental alteration defense, Mississippi had the burden to show that providing individuals with immediate relief from hospitalization “would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.” 527 U.S. at 604.

The issue is heavily fact-intensive because it calls for an assessment of the changes to be made to the system and how they compare to the current system. Indeed, in evaluating Georgia's fundamental alteration defense in *Olmstead*, the Supreme Court remanded the case and required the district court to "consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably." *Id.* at 597. Mississippi does not dispute that this is the inquiry for determining whether the defense applies. Op. Br. at 34. Nor does Mississippi dispute that it currently provides the types of community services that are necessary to prevent institutionalization. As a result, there is no argument that the district court's order requires Mississippi to create entirely new services, or to modify its community service system in a manner that would fundamentally alter the character of the services it already offers. ROA.3947. Accordingly, the district court correctly applied *Olmstead* and correctly rejected Mississippi's fundamental alteration defense.

In addition, the district court's ruling was based on reliable evidence that the cost of expanding community services, as required by the judgment,

would not result in a fundamental alteration of Mississippi's service system. ROA.3948-51. The United States' experts demonstrated that community-based care is less expensive than hospitalization, in significant part because community services can be funded with federal Medicaid reimbursement, whereas hospitalization is entirely paid with state revenue. ROA.3939-40. Mississippi's own experts testified that hospitalization and community-based care cost approximately the same amount of money for the State. ROA.3940, 3947. Thus, the district court's conclusion that the cost to Mississippi of expanding its community services would not fundamentally alter its mental health program was amply supported by both Mississippi's and the United States' experts.

In continuing to insist that implementing the required changes will result in a fundamental alteration, Mississippi effectively shows that, if the district court's ruling is not affirmed, remand, and not reversal, would be proper. Op. Br. at 34. Although Mississippi identifies the cost of certain services that the district court's ruling requires it to add, it does not explain how these costs would make the changes "inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities," as *Olmstead*

instructs. 527 U.S. at 604; *see also* Op. Br. at 32–34. Mississippi entirely ignores the importance of federal Medicaid reimbursement and offers no information on whether it will experience savings from fewer hospitalizations and if so, how much. *See Olmstead*, 527 U.S. at 604–05. If the Court has concerns with the district court’s application of the fundamental alteration defense, remand—not reversal—is the proper outcome. Any remand should be accompanied with instructions that the district court confirm whether the cost of relief is greater than the cost of hospitalization.

### **III. Conclusion**

The district court correctly ruled that Mississippi violates Title II of the ADA because it engages in unnecessary institutionalization of individuals with serious mental illness and fails to provide the community-based services that are needed to prevent such a form of discrimination. Because the district court correctly applied well-settled precedent and based its conclusions on the extensive evidence presented at trial, this Court should affirm the district court’s ruling. In the alternative, the Court should remand the case to the district court for further factual development. Additional factual development will address the criticisms raised by Mississippi and

will be helpful in resolving any outstanding issues, to the extent the Court finds that such exist.

Dated: April 5, 2022

Respectfully submitted,

/s/ Richard D. Salgado

Richard D. Salgado

Marina Stefanova

JONES DAY

2727 North Harwood Street

Dallas, TX 75201

Tel: (214) 969-5209

Fax: (214) 969-5100

rsalgado@jonesday.com

mstefanova@jonesday.com

Ira A. Burnim

JUDGE BAZELON CENTER FOR  
MENTAL HEALTH LAW

1090 Vermont Ave, NW, Suite 220

Washington, DC 20005

Tel: (202) 467-5730

### CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2022, I electronically filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit, using the CM/ECF system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this notice as service of this document by electronic means.

Dated: April 5, 2022

/s/ Richard D. Salgado  
Richard D. Salgado

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

I hereby certify that: (1) this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 4,713 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in a 14-point Book Antiqua font in the text.

Dated: April 5, 2022

/s/ Richard D. Salgado  
Richard D. Salgado