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

PHYLLIS BALL, by her General Guardian, PHYLLIS BURBA, et al.,

Plaintiff(s),

v.

JOHN KASICH, Governor of Ohio, in his official capacity, et al.,

Defendant(s).

Case No. 2:16-cv-282
CHIEF JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Elizabeth P. Deavers

BRIEF OF VOR, INC. IN SUPPORT OF MOTION FOR PERMISSION TO FILE BRIEF AS *AMICUS CURIAE* AND IN SUPPORT OF PROPOSED INTERVENORS' MOTION TO INTERVENE

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STATEMENT OF INTEREST OF AMICUS CURIAE

VOR, Inc. ("VOR") is a nationwide, nonprofit advocacy organization dedicated to ensuring that individuals with intellectual disabilities receive the care and support they require in environmentS appropriate to their needs. (St. Amand Decl, ¶ 2). A corollary objective is to advance family participation in the choice of treatment options, with the decisions of the disabled person and his or her family recognized as primary. *Id.* VOR has previously appeared before courts as *amicus curiae* in cases, like the instant one, that have a direct and significant impact upon the rights, care, and treatment of the developmentally disabled. *See, e.g., Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999); *Heller v. Doe*, 509 U.S. 312 (1993); *Ricci v. Patrick*, 544 F.3d 8 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 1907 (2009); *Martin v. Taft*, 222 F.Supp.2d 940 (S.D. Ohio 2002); *Cramer v. Chiles*, 33 F.Supp.2d 1342, 1351 (S.D. Fla. 1999); *Benjamin v. Dep't. of Pub. Welfare*, 807 F.Supp.2d 201 (M.D. Pa. 2011).

VOR has a substantial interest in this litigation because it will directly affect the right of developmentally disabled residents in Ohio to choose their own care and receive the services necessary to meet their individual needs. VOR supports the Proposed Intervenors' request to participate in this matter because, absent such intervention, the rights of those individuals who do not wish to leave Intermediate Care Facilities ("ICFs") and be forced into alternative settings will not be protected.

PRELIMINARY STATEMENT

This case involves the provision of care to Ohioans with developmental and intellectual disabilities. The issues involved are complicated, nuanced, and most of all, intensely personal. When it comes to providing such care, VOR agrees with the named plaintiffs that one size does not fit all and that individuals with developmental disabilities should be able to obtain the care

they need in the setting that will do them the most good. VOR disagrees, however, with the plaintiffs' policy position that the appropriate setting is always community-based care. VOR also strongly disagrees with plaintiffs' stance – made clear by their opposition to the motion to intervene, and even their denial to consent to VORs' filing of this motion – that only plaintiffs' advocates should be able to speak for all Ohioans with intellectual disabilities. It is precisely the divergence of interest between the plaintiffs' representatives and the wants and needs of many in the proposed class that require the Court to take a very close look at the relief sought. Accordingly, VOR supports the motion of the proposed intervenors here – residents of ICFs and their guardians who do not wish to be forced out of their homes – to speak for themselves.

In order to fully and equitably resolve this case, the court will be confronted with the unenviable tasks of trying to fashion relief in such a manner as to protect the constitutional rights of thousands of Ohioans with unique requirements, needs, and preferences. To do so, the court should hear from more voices – not less. More to the point, VOR respectfully submits that the history of cases virtually identical to this one have demonstrated, time and again, that due regard must be given to those who do not necessarily share the plaintiffs' advocates' ideological views.

STATEMENT OF FACTS

This case was commenced by six individual plaintiffs and the Ability Center of Greater Toledo (collectively, "Plaintiffs") purportedly on behalf of a "class of approximately 27,800 similarly-situated adults with intellectual and developmental disabilities throughout Ohio . . . who are needlessly institutionalized" in ICFs for individuals with intellectual disabilities with eight or more beds. (Complaint, ¶¶ 1-2). The named plaintiffs seek declaratory and injunctive relief pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure requiring class members

to "receive services in the most integrated setting appropriate for their needs," which plaintiffs interpret as meaning treatment outside of ICFs. (*Id.* at ¶¶ 106, 136-175).

Thereafter, Plaintiffs filed a motion for certification of a class defined as:

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

(Pl. Mot. for Class Cert. at pp. 1-2). The district court originally granted the motion for class certification as unopposed, but later vacated that order. (ECF Nos. 91, 98). The Defendants' opposition to the motion to class certification is currently due on June 16, 2017. (ECF No. 96).

On or about April 19, 2017, ten individuals, by and through their guardians, filed a motion to intervene in these proceedings (the "Intervenors"). The Intervenors are ICF residents who do not want to be forced out of their homes as a result of the relief sought by the plaintiff class. (ECF No. 107). That motion has since been joined by approximately twenty additional intervenors and their families or guardians (collectively, the "Proposed Intervenors"). (ECF Nos. 123, 125-129, 138-139, 141-144, 146-148, 152-153, 155, 160-161). The Defendants have supported the Proposed Intervenors' motion; the Plaintiffs oppose it. (ECF Nos. 130, 131).

ARGUMENT

I. VOR SHOULD BE PERMITTED TO FILE AN *AMICUS* BRIEF

The United States Court of Appeals for the Sixth Circuit characterizes leave to appear as *amici curiae* as a matter of privilege committed to the sound discretion of the Court. *United States v. Michigan*, 940 F.2d 143, 164 (6th Cir. 1991) (internal citation omitted); *United States v. City of Columbus, Ohio*, No. 2:19-cv-1097, 2000 WL 1745293, at *1 (S.D. Ohio Nov. 20, 2000). The courts within the Circuit recognize "[g]rant of leave to appeal as *amici* is appropriate where

such parties have an important interest and a valuable perspective on the issues presented . . . ." *City of Columbus, Ohio*, No. 2:19-cv-1097, 2000 WL 1745293, at *1 (quoting *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)) (internal quotation marks omitted). *Amici* may provide limited adversary support on issues through briefs and/or oral argument. *See Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982). "Factors relevant to the determination of amicus status include whether or not the proffered information is timely, useful, or otherwise necessary to the administration of justice." *City of Columbus, Ohio*, No. 2:19-cv-1097, 2000 WL 1745293, at *1 (citing *Michigan*, 940 F.2d at 146).

Here, VOR respectfully submits that it should be permitted to file an *amicus* brief in support of the *pro se* Proposed Intervenors' motion to intervene. As noted above, VOR is a, nonprofit advocacy organization dedicated to advocating for a complete continuum of care for the developmentally disabled in the settings most suitable for the individual, whether that setting is in a facility or in the community. (St. Amand Dec. ¶ 2). VOR also advocates for the primacy of the individual and the guardian in making care decisions. *Id.* As such, VOR has a unique view with respect to this litigation as it is neither forced to defend the Defendants' current state system at all costs, nor does it advocate Plaintiffs' "community-only" view of care. *Id.* at ¶ 3. Accordingly, VOR respectfully requests permission to file this brief in support of the Proposed Intervenors' motion to participate in these proceedings and be given a say in their own future care.[1]

II. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS OF RIGHT

The Proposed Intervenors seek to intervene in this action both as a matter of right and

[1] VOR sought the consent of the parties to this action before filing the present application. Counsel for Defendants Martin, Sears, and Miller consented to this request. Counsel for Defendant Kasich did not respond. Counsel for Plaintiffs did not consent to this request.

permissively pursuant to Rule 24 of the Federal Rules of Civil Procedure. Rule 24(a) allows for intervention as a matter of right. This Rule is "broadly construed in favor of potential intervenors," who must be permitted to intervene if: "1) the application was timely filed; 2) the applicant possesses a substantial legal interest in the case; 3) the applicant's ability to protect its interest will be impaired without intervention; and 4) the existing parties will not adequately represent the applicant's interest." *Blount-Hill v. Zelman*, 636 F.3d 278, 283 (6th Cir. 2011) (citing *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999)); *cf. Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-cv-524, 2016 WL 4269080, at *2 (S.D. Ohio Aug. 15, 2016) (noting that "Rule 24 should be construed in favor of intervention"). The Proposed Intervenors satisfy each of these factors and their motion should be granted.

A. The Proposed Intervenors' Application is Timely

The Proposed Intervenors' application is unequivocally timely. This action is still in the early stages of litigation, and no substantive factual or legal issues have been litigated. Nor has the Court ruled on the pending motion for class certification. Although some class discovery has occurred, no merits discovery has taken place, and the matter is not significantly close to trial. *See United States v. City of Detroit*, 712 F.3d 925, 931 (6th Cir. 2013) ("Where future progress remains and the intervenor's interests are relevant, intervention may be the most effective way to achieve a full and fair resolution of the case."). As such, the parties will not suffer any prejudice by intervention nor will intervention delay the proceedings. Indeed, judicial economy is better served having all relevant interests represented at this stage of the proceedings. *See Jansen v. City of Cincinnati*, 904 F.2d 336, 339-40 (6th Cir. 1990) (noting intervention serves judicial economy resulting from disposition of related issues in a single lawsuit).

B. The Proposed Intervenors' Substantial Interests Are Implicated by the Present Action

It should be beyond cavil that the Proposed Intervenors have a substantial interest in their own care. In addition, the Proposed Intervenors also have the same legal interest here that the plaintiff class purportedly seeks to enforce – namely, the right to make their own care and treatment decisions. The Proposed Intervenors' believe (and VOR agrees) that those treatment decisions should be made by the affected individual based upon their own beliefs, not the policy preferences of their self-styled "protectors." These interests are more than sufficient to meet Rule 24's "interest" requirement. The courts in this Circuit have adopted a "rather expansive notion of the interest sufficient to invoke intervention of right." *Mich. State AFL-CIO*, 103 F.3d at 1245; *see Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("[T]his court has acknowledged that 'interest' is to be construed liberally."). In addition, the Sixth Circuit has held that "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Mich. State AFL-CIO*, 103 F.3d at 1247.

Here, the Proposed Intervenors have a substantial and legally protectable interest in receiving appropriate care. *See e.g.*, 42 U.S.C. § 15009(a)(1) ("individuals with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities"); *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982). In particular, the Proposed Intervenors allege that ICF care is both appropriate and necessary in their particular situations, and seek to intervene to ensure that care remains accessible. *Cf. Olmstead*, 527 U.S. at 605 ("Each disabled person is entitled to treatment in the most integrated setting possible for that person—recognizing that, on a case-by-case basis, that setting may be an institution."). The uniquely personal interest in receiving appropriate care in the state and federal programs set up for that precise purpose is a sufficient interest to warrant intervention. *See Benjamin v. Dep't of Pub.*

Welfare, 701 F.3d 938 (3d Cir. 2012) (recognizing that ICF residents who did not wish to move to community placement had a significantly protectable interest in their own care to warrant intervention in class action seeking increased access to community services).

The Proposed Intervenors also have a substantial interest in making their own care choices, the same right that the named Plaintiffs seek to vindicate here, and a right that VOR wholeheartedly endorses for both groups. *See* 42 U.S.C. § 15001(c)(3) (noting that "individuals with developmental disabilities and their families are the primary decisionmakers regarding the services and supports such individuals and their families receive, including regarding choosing where the individuals live."). Indeed, the Supreme Court's decision in *Olmstead*, which is the genesis of the Plaintiffs' claims, expressly rejected the one-size-fits-all mentality, and recognized the need for an array of care options:

> Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But we recognize, as well, the States' need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities.

Olmstead, 527 U.S. at 597. The *Olmstead* Court also acknowledged the existence of the specific interest raised by the Proposed Intervenors in this action – the right to choose whether community or institutional care is appropriate for them. Indeed, the Court emphasized that "nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings. . . . Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it." 527 U.S. at 601-02; *cf.* 28 C.F.R. § 35.130(e)(1) ("Nothing in this part shall be construed to require an individual with a disability to accept an accommodation . . . which such individual chooses not to accept"); *Ligas ex rel. Foster v. Maram*, Case No. 05-cv-4331, 2010 WL 1418583, at *2 (N.D. Ill. Apr. 7, 2010) (granting intervention motion and noting that proposed

intervenors' interest in "enforcing the mandate of *Olmstead*. . . that the needs of Intervenors and other ICF-DD residents be considered in determining the State's obligation to provide the 'community-based' services required by the proposed consent decree" was "well placed" and warranted intervention).

In their opposition to the intervention motion, Plaintiffs acknowledge that "*Olmstead* does not stand for the principle that community treatment be imposed upon individuals who do not want integrated services, or who are not able to handle and benefit from community living." (Pl. Br. Opp. Mot. at p. 7, n.5). Notwithstanding that admission, Plaintiffs claim that the Proposed Intervenors have no substantial interest in this action because they allegedly could not bring an "obverse *Olmstead*" claim to vindicate that interest. (*Id.* at p. 10). Even if that were true, it is irrelevant for the purposes of intervention. *See e.g.*, *Grutter*, 188 F.3d at 398-99 (explicitly rejecting the premise that a "legally enforceable right" is necessary to demonstrate interest to intervene); *Purnell v. Akron*, 925 F.2d 941, 948 (6th Cir. 1991) ("a party seeking to intervene need not possess the standing necessary to initiate a lawsuit"); *Bd. of Educ. of the Highland Local Sch. Dist.*, No. 2:16-cv-524, 2016 WL 4269080, at *3 ("As [Rule 24's] plain text indicates, intervenors of right need only an 'interest' in the litigation—not a 'cause of action' or 'permission to sue.'") (quoting *Jones v. Prince George's Cnty., Md.*, 348 F.3d 1014, 1018 (D.C. Cir. 2003)).

In their intervention motion, the *pro se* Intervenors express their interest in continuing to receive appropriate care in their current ICF placements as the "right to be let alone." (Int. Mot. at p. 4). In their rush to prevent participation in this suit by anyone with differing views, Plaintiffs feign the misunderstanding that they believe the Intervenors are thus raising a "constitutional privacy interest" not implicated by this suit. (Pl. Br. Opp. Mot. at p. 7). This is a

strawman argument that cannot fairly be reconciled with the emotional and poignant statements submitted by the Proposed Intervenors' guardians, which lay bare their concerns about the health and well-being of their children, siblings and wards. (Int. Mot. at Ex. A). In this context, the "right to be let alone" set forth by the Proposed Intervenors does not refer to an "invasion of privacy" claim, but a concern over the care provided to the Intervenors. As noted above, this interest is both substantial and protectable, and more than sufficient to warrant the grant of intervention.

C. The Proposed Intervenors' Interests Are at Risk in the Present Action

The movants have also demonstrated (and the Defendants agree) that the Proposed Intervenors' "ability to protect [their] interest[s] may be impaired" if intervention is not permitted. *Shy v. Navistar Int'l Corp.*, 291 F.R.D. 128, 136 (S.D. Ohio 2013). The Sixth Circuit has characterized the burden of demonstrating the "impairment" element as "minimal," finding it met where the proposed intervenor can demonstrate that "impairment of their substantial legal interest is possible if intervention is denied." *Mich. AFL-CIO*, 103 F.3d at 1247.

In the present case, both the Proposed Intervenors' right to appropriate care, and their right to choose the care that is best for their unique situations, will be put at risk if this litigation is allowed to proceed without their input. Plaintiffs' contrary argument – that the interest groups representing them are "not seeking to 'impose' any particular action, outcome or remedy . . . on the Proposed Intervenors" – is both disingenuous and ignores the procedural realities of this case. (Pl. Br. Opp. Mot. at 7). While the Plaintiffs are not *explicitly* asking for Ohio to close the ICFs where the Proposed Intervenors live, they are instead requesting an order "that will specifically modify the State's systemic practices" with regard to the provision of care for the developmentally disabled, while at the same time disclaiming the need "to engage in any

individualized assessment of the class members' preferences or treatment needs." (Pl. Mot. for Class Cert. at pp. 1, 29). This backwards procedure, seeking structural changes to the State's programs *then* trying to figure out how many people want or need those changes, has been shown time and again to be a waste of judicial resources and a threat to the rights of those who do not share the Plaintiffs' advocates' "community only" philosophy.

1. The Proposed Intervenors' Interests Are Harmed By Being Part of a Plaintiff Class Antagonistic to Their Interests

Plaintiffs have purported to bring this action on behalf of "a class of approximately 27,800 similarly-situated adults with intellectual and developmental disabilities throughout Ohio . . . who are needlessly institutionalized in publicly- and privately-operated large ICFs" or at risk of such placement. (Complaint at ¶ 2). Plaintiffs arrive at the 27,800 number by adding the "5,800 people in the State's vast network of publicly- and privately-operated large ICFs" to the "22,000 Ohioans with immediate needs on waiting lists" for services. (Complaint at ¶¶ 6, 103). In other words, Plaintiffs seek declaratory and injunctive relief under Rule 23(b)(2) on behalf of all Ohioans with developmental disabilities to require the State to make the "requisite administrative and budgetary changes necessary" to provide community-care to the class. *Id.* at ¶¶ 7-11. This goal is directly antagonistic to the interests of the Proposed Intervenors, who wish to retain the ability to stay in their current ICF homes.

Plaintiffs have since sought to superficially (but not actually) reduce the scope of the proposed class in their motion for class certification by supposedly exempting from the class those who have "documented their opposition to receiving integrated, community-based services." (Pl. Br. in Opp. Mot. at 4). This safeguard, however, presupposes that there is or will be some requirement for the class members to articulate their preferences or treatment needs – a requirement that the Plaintiffs have *expressly rejected* in their class certification motion, arguing

that a class should be certified and relief granted without the need "to engage in any individualized assessment of the class members' preferences or treatment needs." (Pl. Mot. for Class Cert. at p 29). The illusory nature of this "opposition" safeguard is laid bare by the Plaintiffs' completely circular stance on the Proposed Intervenors' class membership. Plaintiffs argue that "[t]he proposed class does not include the Proposed Intervenors, as they have documented their opposition to more integrated services," *citing to the motion for intervention.* (Pl. Br. Opp. Mot. at p. 4). In other words, Plaintiffs claim that the Proposed Intervenors are not entitled to intervene here because of their motion for intervention. Of course, the reverse is also true; without attempting to intervene, those who oppose being forced out of ICFs remain in the class.

The procedural mechanics of this case also support intervention. Plaintiffs bring this class action pursuant to Rule 23(b)(2), which provides for neither notice nor the ability for class members to opt-out. *See Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 641 (6th Cir. 2015). While Plaintiffs acknowledge that "[p]eople with intellectual and developmental disabilities may have a range of medical and behavior needs which bring varying degrees of complexity to their care and treatment," they nonetheless insist that wide ranging declaratory and injunctive relief should be granted without "requiring the Court to engage in any [apparently bothersome and unnecessary] individualized assessment of the class members' preferences or treatment needs." (*Compare* Complaint at ¶ 131 *with* Pl. Br. in Supp. of Mot. for Class Cert. at p. 28-29). Without such an assessment, however, the Proposed Intervenors and those similarly situated remain members of the class by any objective standard. Accordingly, they should be permitted to defend those interests in this litigation. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1310 (1975) (explaining that public law litigation has brought

about an increased capacity for affecting the rights of those not party to the suit, and noting that at the settlement or decree stage "if the decree is to be quasi[-]negotiated and party participation is to be relied upon to ensure its viability, representation at the bargaining table assumes very great importance").

2. Other Cases Demonstrate that the Proposed Intervenors' Interests Are Likely at Risk Here

Other similar cases involving precisely these same issues (and many of the same public interest groups) underscore the propriety of allowing the Proposed Intervenors to represent themselves in this suit. For example, in *Ligas v. Maram*, the district court overseeing a similar case certified a class of Illinois' ICF residents except those who "oppose community placement." No. 1:05-cv-04331, 2006 WL 644474, at *5 (N.D. Ill. Mar. 7, 2006). The district court denied a motion to intervene filed by ICF residents who wished to stay in their homes, finding that nothing in the complaint "would require the state to force those who desire institutional care to move out." *Ligas v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007).

After four years of litigation, the district court held a fairness hearing in connection with a proposed consent decree jointly supported by the plaintiffs and the state defendants. As explained by the district court:

> Approximately 240 people attended the fairness hearing, and thirty-four individual class members or their legal guardians spoke at the hearing. Many more objectors were represented at the hearing by counsel. A common theme among the objectors was the concern that many developmentally disabled individuals, who were within the class definition, would be adversely affected by provisions of the Proposed Consent Decree even though the individual neither met the *Olmstead* criteria nor desired placement in a community-based setting.

Ligas v. Maram, No. 1:05-cv-04331, 2009 WL 9057733, at *1 (N.D. Ill. July 7, 2009) (class decertification order). Ultimately, the district court concluded that, as a practical matter, "the

class definition fail[ed] to restrict the class to . . . [those who] desire[d] community placement" and that "sufficient commonality does not exist among the highly specialized needs and desires of the class members and their legal guardians." *Id.*

Similarly, in *Benjamin v. Dep't of Public Welfare*, the district court certified a class of Pennsylvania ICF residents, excluding those who would "oppose community placement." 701 F.3d 938, 943 (3d Cir. 2012). A group of ICF residents and their families sought to intervene, and their motion was denied by the district court. Affirming that denial, the Third Circuit reasoned that "[t]he current parties have deliberately defined the class and the relief sought so that Intervenors' right to choose institutional treatment would not be affected." *Benjamin v. Dep't of Public Welfare*, 432 Fed. App'x. 94, 98 (3d Cir. 2011).

Thereafter, the litigation proceeded and the plaintiff class and state defendants entered into a proposed settlement agreement that was approved by the district court. *Benjamin*, 701 F.3d at 946-47. On appeal, the Third Circuit vacated the settlement, finding that the proposed intervenors should have been allowed to participate in the proceedings. *Id.* The court explained that "there are several components of the Settlement Agreement reached by the parties (and ultimately approved by the District Court after it denied Appellants' motions to intervene) that may affect or impair the protectable interests of Appellants themselves as well as other ICF/MR residents, guardians, and involved family members." *Id.* at 952. Accordingly the Third Circuit concluded that the proposed intervenors there "should have the opportunity to be heard insofar as the Settlement Agreement may have an impact on the available resources as well as the needs of other individuals with mental disabilities, especially other ICF/MR residents." *Id.* at 957. Cases such as *Ligas* and *Benjamin* strongly counsel allowing the participation of those, such as the Proposed Intervenors, who have substantial interests not aligned with the plaintiff class.

D. The Proposed Intervenors Are Not Adequately Represented by the Defendants

"As with impairment, the proposed intervenor must only make a minimal showing that its interests will not be adequately represented." *Shy*, 291 F.R.D. at 137 (citing *Mich. State AFL-CIO*, 103 F.3d at 1247); *see also Coalition to Defend Affirmative Action v. Granholm*, 240 F.R.D. 368, 375-76 (E.D. Mich. 2006) (quoting *United States v. Michigan*, 424 F.3d at 443-44) (explaining that movant need only show "that there is a potential for inadequate representation"); *Grutter*, 188 F.3d at 400 ("[T]his circuit has declined to endorse a higher standard for inadequacy when a governmental entity is involved.").

In the instant case, the Proposed Intervenors raise distinct interests not advocated by the existing parties. Plaintiffs challenge, and seek to alter, the fundamental nature of Ohio's existing program for services to the developmentally disabled. The "relief" they seek endangers an individual's right to choose their own care and where he or she will receive that care. Indeed, the relief sought would likely result in the closure of ICFs in Ohio, leaving residents, such as the Proposed Intervenors who oppose relocation to community centers, with no choice but to relocate to community settings. Plaintiffs discount the fact that some individuals willingly choose ICFs as an informed decision. To that end, Plaintiffs have disclaimed representation of the Proposed Intervenors and have acknowledged a disagreement amongst the proposed class members. (Pl. Br. Opp. Mot. at pp. 4, 11). As such, Plaintiffs cannot be said to represent the Proposed Intervenors' interests adequately. *See Grubbs v. Norris*, 870 F.2d 343, 347 (6th Cir. 1989) ("An interest that is not represented at all is surely not adequately represented, and intervention in that case must be allowed.").

Similarly, the Defendants, government officials and agencies, are neutral in their position and, more to the point, have disclaimed the responsibility of representing the unique and personal

interests of the Proposed Intervenors. (*See* Def. Br. in Support of Mot. for Intervention at p. 3) ("The State Defendants openly admit that they have significant policy disagreements with the Guardian Intervenor"). Consequently, it is not mere speculation that the Defendants may not advance or defend the Proposed Intervenors' interests as vigorously as the movants would. Accordingly, intervention of right is appropriate in this case.

III. IN THE ALTERNATIVE, PROPOSED INTERVENORS SHOULD BE ALLOWED TO INTERVENE WITH THE COURT'S PERMISSION

Permissive intervention is likewise appropriate here. Rule 24(b)(1) provides that, on a timely motion, a court may grant permissive intervention if the "applicant's claim or defense and the main action have a question of law or fact in common." Fed.R.Civ.P. 24(b)(2). "Once these two requirements are established, the district court must then balance undue delay and prejudice to the original parties, if any, and any other relevant factors to determine whether, in the court's discretion, intervention should be allowed." *Michigan*, 424 F.3d at 445.

As the above reasoning indicates, Proposed Intervenors also meet the less-than-stringent requirements for permissive intervention.

CONCLUSION

While there are doubtless many ICF residents desirous and capable of living successfully in community programs, such settings are not suited for all. The Supreme Court in *Olmstead* requires protection of an individual's right to choose the care appropriate to his or her specific needs, and reflects the Court's observation that a variety of care options are required to meet the varying needs of the disabled. VOR does not seek to take away an individual's right to choose community placement; rather, VOR supports the pending intervention motion to ensure that the right of other citizens who choose to remain in ICFs are protected as well. Without input and participation by the Proposed Intervenors, the rights of those individuals will be ignored.

For the reasons stated above, this Court should grant the Motion to Intervene.

Dated: Morristown, New Jersey
May 26, 2017

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