ORAL ARGUMENT NOT YET SCHEDULED

No. 17-7152

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IVY BROWN, in Her Individual Capacity and as Representative of the Certified Class,
Plaintiff-Appellant,

LARRY MCDONALD, *et al.*,
Plaintiffs-Appellees,

v.

DISTRICT OF COLUMBIA,
Defendant-Appellee

On Appeal from the United States District Court for the District of Columbia

APPELLANT'S REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

The problem with the District Court's ruling is simple: Although purporting to resolve Plaintiffs' claims on the merits after trial, it did not make the necessary findings. It did not determine whether, as Plaintiffs contend, D.C. falls short of its obligation to provide effective assistance to people with physical disabilities who seek to leave nursing facilities and resume life in the community. Nor did it properly decide the subsidiary questions relevant to that ultimate question or to the appropriate scope of relief. It did not rule, for example, on whether D.C. had an effective transition system; whether D.C. reasonably could do more to transition class members from nursing facilities; or whether D.C.'s practices for the first 6 years of this lawsuit were legal or, if unlawful, were durably changed by the time of trial. Instead, it found Plaintiffs "failed" to prove things not properly part of their burden of proof on the merits or necessary to satisfy class requirements for this type of claim.

To claim that these inadequate factual findings are enough, D.C. advances a greatly restricted version of its affirmative obligation to assist class members to receive the public services in the community to which they are entitled under *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). D.C. suggests that *Olmstead* requires only that it offer public services in the community as a possible alternative to receiving them in institutional settings such as nursing facilities,

disclaiming the obligation to effectively help class members access those community-based services or assist them to overcome obstacles they face that are not of D.C.'s own making. This view of the law would drain *Olmstead* of practical meaning for class members and others requiring assistance to return to the community. It cannot be reconciled with caselaw from other circuits, with *Olmstead* itself, or with Title II and its implementing regulations.

D.C. also defends the District Court's insistence that Plaintiffs prove that D.C.'s failures cause class members' continued institutionalization. But *Olmstead*—and, more broadly, Title II of the ADA—require D.C. to make reasonable efforts to assist people with disabilities in accessing services, regardless of whether other barriers stand in the way. D.C. also asks this Court to uphold the District Court's importing into the merits inquiry the very same class-action commonality requirements this Court specifically rejected in *D.L. v. District of Columbia*, 860 F.3d 713 (D.C. Cir. 2017). Its attempts to distinguish that precedent are unsuccessful. And D.C. fails to justify the District Court's dismissal of a suit brought in 2010 without deciding whether conduct prior to 2016 was unlawful or whether any earlier violations had become moot.

D.C. suggests, through out-of-context quotations, that the District Court made the relevant factual findings such that this Court can affirm on the facts rather than reaching these legal issues. But the District Court did not do so. This

Court should clarify the proper standards to be applied and then should remand, so the District Court can build a full record and apply those standards in the first instance.

ARGUMENT

I.

THE DISTRICT COURT ERRONEOUSLY REQUIRED PLAINTIFFS TO PROVE THAT SPECIFIED DEFICIENCIES IN D.C.'S TRANSITION SERVICES CAUSED CONTINUED INSTITUTIONALIZATION

A. D.C.'s Arguments On Plaintiffs' Burden of Proof Stem From An Erroneously Restrictive Conception of Its Affirmative Obligation to Help Class Members Transition.

As Plaintiffs explained in their opening brief, D.C. has an affirmative duty to provide people with disabilities public services in the community rather than in institutions—an obligation that includes facilitating class members' transitions from nursing facilities if they require such assistance. That some class members face barriers to transitioning does not excuse D.C. from providing services that give them the fullest opportunity to succeed nonetheless. Rather than *ending* the inquiry, as the District Court mistakenly believed, evidence that class members face such challenges should *begin* the relevant inquiry: whether D.C. makes reasonable efforts, including modifying policies and practices as appropriate, to help class members overcome such obstacles. Once Plaintiffs demonstrate that D.C. has not operated an effective system for transitioning class members, the

burden should shift to D.C. to prove it cannot reasonably improve its performance. But the District Court failed to answer *either* question, instead erroneously requiring Plaintiffs to *disprove* D.C.'s assertion that barriers beyond its control prevented it from doing better. *See* Appellant Br. 29-32, 36-38.

D.C. attempts to evade review of these purely legal errors by arguing that the District Court made the factual finding that D.C. provides "'an effective, functioning transition system to all class members regardless of what other barriers class members may face.'" D.C. Br. at 28 (quoting Appellant Br. at 25). No such finding exists. What the District Court found, instead, was that no injunction could remedy the alleged class-wide injury—a finding it made prematurely and on an incomplete record, since evidence as to remedy was to be introduced at the second step of a bifurcated trial. D.C. invites this Court to likewise conflate the merits inquiry that the District Court never undertook with this premature remedy determination. *See* D.C. Br. at 19 (stating that trial was "on whether the class could establish *Olmstead* liability—that is, whether the District's transition services were systemically deficient such that a single injunction could remedy the resulting institutionalization"). But whether D.C. satisfies its *Olmstead* obligations and whether any single practice systemically causes unnecessary institutionalization (which the District Court erroneously believed was a prerequisite for effective class-wide relief) are different questions.

D.C. does not otherwise claim it has an effectively working *Olmstead* plan or that the District Court found it does. Instead, it disclaims any obligation to have an effectively working plan, as measured by the number of people transitioned, *see* D.C. Br. 29 n.17, or with respect to its policies and practices, *id.* at 50 n.30. D.C. suggests it only violates *Olmstead* upon proof that specific policies, by themselves, cause unnecessary segregation, *see id.* at 48 ("the class failed to prove *disability discrimination:* It did not connect alleged systemic deficiencies in transition assistance to alleged segregation").

This cramped view of *Olmstead* would eviscerate D.C.'s affirmative obligation to deliver results, and it finds no purchase in precedent. *Olmstead* settles any doubt that "the 'unjustified institutional isolation' of a disabled individual receiving medical care from a State amounts to an actionable form of discrimination under Title II" of the ADA. *Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 607 (7th Cir. 2004) (quoting *Olmstead*, 527 U.S. at 597-603); *accord Davis v. Shah*, 821 F.3d 231, 260 (2d Cir. 2016). The discriminatory act is the unjustified provision of state services in an institutional setting. Thus, an *Olmstead* claim does not require proof of *further* discrimination; there is no need, for example, for "traditional proof that the disabled person is being treated differently from a nondisabled person who is otherwise similarly situated." *Id.* at 608 (citing *Olmstead*, 527 U.S. at 598). Rather, the public entity must prove it

cannot reasonably serve individuals with disabilities in the community. This is consistent with the general principle that Title II and its authorizing regulations require public entities to actively assist people with disabilities to fully participate in society, not just avoid specific discriminatory actions. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 275 (2d Cir. 2003) ("It is not enough to open the door for the handicapped ...; a ramp must be built so the door can be reached.") (citation and emphasis omitted).

Accordingly, public entities administering Medicaid services must take affirmative steps to ensure that individuals with disabilities who want to and can receive such services in the community can access them. D.C. must "provide care in integrated environments for as many disabled persons as is reasonably feasible." *Arc of Washington State Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005). That does not mean it must achieve deinstitutionalization for each class member, but it must have a comprehensive *Olmstead* plan that is "'effectively working'" to accomplish a "reasonable rate of deinstitutionalization." *Sanchez v. Johnson*, 416 F.3d 1051, 1068 (9th Cir. 2005) (quoting *Olmstead*, 527 U.S. at 605); *see also Frederick L. v. Dep't of Pub. Welfare of Pa.*, 422 F.3d 151, 155 (3d Cir. 2005) (state must have "plan for future deinstitutionalization of qualified disabled persons that commits it to action in a manner for which it can be held accountable by the courts").

That is, D.C.'s compliance with *Olmstead* is based on *acceptable results* and/or *concrete plans to reach acceptable results*, not complaints that it would be hard to achieve such results. *See Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 305 (E.D.N.Y. 2009), *vacated on other grounds sub nom. Disability Advocates, Inc. v. New York Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012) ("It is clear that Defendants have no comprehensive or effective plan to enable Adult Home residents to receive services in more integrated settings."). Such excuses properly are, instead, the subject of an affirmative defense that D.C. must prove, such as that it would have to fundamentally alter its programs to deliver better results. *See, e.g.*, *Frederick L.*, 422 F.3d at 157.

Relatedly, D.C. incorrectly argues that it need not help class members bypass obstacles to transitioning that are "outside its control." *See* D.C. Br. at 19. But the question is not whether D.C. controls various barriers to integration (such as practical difficulties in securing affordable and accessible housing), but whether it makes reasonable efforts to overcome them. Appellant Br. at 36-38. D.C. cannot treat obstacles such as lack of affordable, accessible housing or bureaucratic issues at the D.C. Housing Authority as an absolute defense; rather, to the extent these issues impede class members' transitions, D.C. must demonstrate good-faith attempts to overcome them.[1] Nor can D.C. rely on vague findings that insufficient

[1] While Plaintiffs have not sought relief requiring D.C. to provide housing units for

affordable, accessible housing exists to transition *everyone* in the class as a reason not to transition *more* class members. *See* D.C. Br. at 15-18. "Nowhere does Section 504 require that there be enough housing for all before its anti-discrimination protections begin." *Indep. Living Ctr. of S. California v. City of Los Angeles*, 2012 WL 13036779, at *7 (C.D. Cal. Nov. 29, 2012).

D.C. points to the District Court's recitation of potential barriers, D.C. Br. at 34-38, but it does not, and cannot, point to any finding that D.C. cannot help at least some class members overcome them. Indeed, the District Court did not even assess the significance of these barriers. It did not, for example, assess *how often* landlords reject class members' housing applications or *how often* class members' desired housing costs more than a voucher's value, *see id.* at 36, leaving it unclear the extent to which these obstacles prevent D.C. from fulfilling its *Olmstead* obligation. D.C. assures this Court that any further services it provides would be "uselessly duplicative," D.C. Br. at 44, but it was never put to the burden of proving that is so. And even assuming the obstacles the District Court identified

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class members (their view is that D.C. should, instead, make greater efforts to place class members in existing housing), providing such housing can be an appropriate component of *Olmstead* compliance. *See, e.g., Disability Advocates v. Paterson*, 598 F. Supp. 2d 289, 340-41 (E.D.N.Y. 2009) (describing New York's *Olmstead* plan, including creation of thousands of beds of housing for people with mental illness); Amicus Br. for Am. Ass'n of People with Disabilities, *et al.* at 28-30 (describing various states' actions to overcome housing obstacles). D.C. errs in dismissing out of hand the idea that it could "provid[e] housing" as a remedy. D.C. Brief at 44.

are relevant to what constitutes a "reasonable rate of deinstitutionalization," *Sanchez v. Johnson*, 416 F.3d at 1068, the District Court did not find that D.C. had achieved that rate, nor does D.C. make such a claim.

The bottom line is that the District Court did not make any larger finding that D.C. systemically satisfied its obligations to class members, nor did it make the underlying findings that would support one. Misreading *Olmstead*, D.C. contends that whether it has an effectively working *Olmstead* plan is irrelevant until Plaintiffs prove an *Olmstead* violation through other (unspecified) means. D.C. Br. at 50 n.30. Once again, this misunderstands the fundamental holding of *Olmstead*, pursuant to which unjustified and unwanted institutionalization—without more—is disability discrimination, without regard to cause. Thus, once a plaintiff demonstrates her exclusion because of disability from public services available in the community (as the class unquestionably did here), the burden shifts to the defendant to prove an affirmative defense justifying that exclusion, such as that it has an effectively working *Olmstead* plan or that modifications to existing practices would be unreasonable. *See Olmstead*, 527 U.S. at 597-603; *Radaszewski*, 383 F.3d at 608. Neither *Olmstead* nor its progeny supports D.C.'s position that *plaintiffs* bear the initial burden of proving that *specific* deficiencies in D.C.'s transition practices prevent it from transitioning class members.

Finally, D.C. suggests that, so long as it offers Medicaid-funded services outside nursing institutions to those few who can access them, it has no obligation—or very limited obligation—to affirmatively facilitate class members' access to those community-based services. Instead, it says, the entire subject of this lawsuit is "attenuated" from *Olmstead*. *See* D.C. Br. at 21. D.C. does not explicitly argue that its *Olmstead* obligation does not include effective transition services, nor would such an argument pass muster. Title II's implementing regulations provide that a public entity "*shall* 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). Thus, the regulation requires public entities to actually administer services in the most integrated appropriate setting, not just promise to do so if a currently institutionalized person manages to obtain them without assistance.

That is for good reason. As Plaintiffs explained, *see* Appellant Br. at 16-18, many class members—particularly those institutionalized for a long time—require substantial assistance to transition. They reside in institutions with restricted ability to identify and visit potential homes, have few resources, and have limited access to the Internet, phone service, or agents. They are isolated from other community resources and often find the prospect of managing a transition from an institution daunting and overwhelming. D.C.'s theoretical willingness to provide community-

based Medicaid services does little to fulfill the integration mandate without effective services to help class members to transition. *See* AAPD Br. at 10-12. Accordingly, state after state has been required to improve transition services to make *Olmstead* compliance more than an empty promise. *Id.* at 20-29.

B. The District Court Improperly Required Plaintiffs to Demonstrate That A Particular Inadequacy in D.C.'s Transition System Causes Their Continued Institutionalization.

Instead of deciding whether D.C. has an overall transition system that effectively assists class members in accessing existing community services, the District Court fixated on whether any single systemic inadequacy in that system caused Plaintiffs' continued institutionalization. But that is beside the point, given the affirmative duty D.C. owes the class to offer effective transition services. Appellant Br. at 28-40. The causation that Plaintiffs must show, consistent with Title II's text, is that their institutionalization stems in substantial part from their *disabilities*, not from specific actions that D.C. has taken or has failed to take. *See Henrietta D.*, 331 F.3d at 276. That institutionalization because of disability is what triggers D.C.'s obligation to make reasonable modifications to its services to facilitate transitions. Yet the District Court never ruled on the adequacy of D.C.'s overall transition system, nor did it make D.C. prove it cannot make reasonable modifications to provide better access to public services in the community.

1. The District Court Imposed Improper Causation Requirements.

D.C. observes that the District Court did not explicitly reject Plaintiffs' argument regarding the correct causation requirements. D.C. Br. at 42, citing Mem. Op. 77 n.29. But the District Court's decision nonetheless finds that Plaintiffs failed to prove exactly the stringent causal link that Plaintiffs argued was unnecessary, *see, e.g.*, Mem. Op. at 24 (Plaintiffs "have the burden to demonstrate that any injunction would solve class members' institutionalization"), and D.C. relies on that finding repeatedly.[2] Moreover, D.C. urges this Court, too, to find that Plaintiffs had to show that improving any particular deficient practice necessarily would lead to class members' deinstitutionalization. *See, e.g.*, D.C. Br. at 34 (calling it "dispositive" that "remedying a *deficiency* in transition assistance would not remedy the alleged class-wide *injury* of unnecessary segregation"). This purely legal question thus is squarely presented.

In defending the District Court's stringent causation requirement, D.C. mischaracterizes the alleged injury and the relief sought. The premise of D.C.'s argument is that Plaintiffs allege that D.C.'s existing practices are the predominant cause of class members' injury, which D.C. characterizes as continued institutionalization. Based on that premise, D.C. argues that Plaintiffs fail to prove "a uniform deprivation—unnecessary segregation through a common policy or

[2] *See, e.g.*, D.C. Br. at 16 (calling causation question "one of the central issues in the case"); *id.* at 41 (stating that district court found Plaintiffs failed to connect alleged systemic deficiencies in transition assistance to class's institutionalization).

practice—that a single injunction would redress." D.C. Br. at 40 n.23. Its arguments presume that the District Court had to find it was *either* D.C.'s practices *or* external factors such as the housing market that were *the* predominant cause of the class's segregation. *See id.* at 16-17, 34-38.

In fact, Plaintiffs seek effective transition services that provide each class member with a better *chance* of transitioning, not a guarantee that D.C. will successfully transition each class member. Appellant Br. at 31; *cf. Ramirez v. U.S. Immigration & Customs Enf't*, 2018 WL 4178176, *15 (D.D.C. Aug. 30, 2018) (plaintiffs required to demonstrate that defendants' unlawful conduct "denied them an *opportunity* to be considered for less restrictive placements"). The injury class members allege as a result of D.C.'s failures is a diminished or lost opportunity to transition, not the continued institutionalization itself, which Plaintiffs need not tie solely or even predominantly to D.C.'s existing practices. Injunctive relief can remedy their injury by giving each class member access to better transition services, and thus an improved chance of transitioning, without respect to which or how many class members would transition as a result. *See, e.g.*, *Murphy v. Piper*, 2017 WL 4355970, at *10-*11 (D. Minn. Sept. 29, 2017) (no need to show that "all class members would ultimately move out" of an institutionalized setting with injunctive relief; citing cases rejecting application of *Wal-Mart* for such claims); Legal Aid Amicus Br. at 4-5.

D.C. offers no contrary caselaw, and its attempts to distinguish cases Plaintiffs cited are unavailing. It offers a narrow reading of *Henrietta D.* as "concerned" only with whether a Title II plaintiff must offer a comparator group of similarly situated people without disabilities. D.C. Br. at 45-46 & n.27. But *Henrietta D.* more broadly holds—correctly—that Title II requires a public entity to make reasonable accommodations to its policies and practices that contribute to discriminatory results regardless of whether other barriers *also* contribute. *See* F.3d at 279-80. That is because a reasonable accommodation case is *not* a disparate impact case (like *Wal-Mart*) where a plaintiff must prove a specific unlawful practice causes concrete harm; a public entity's failure to make its benefits meaningfully accessible is cognizable harm regardless of whether people with disabilities otherwise could attain them. *Id.* at 277-278.

D.C. concedes that this case is "somewhat analogous" to *Kenneth R. ex rel. Tri-Cty. CAP, Inc./GS v. Hassan*, 293 F.R.D 254 (D.N.H. 2013), which required a plaintiff to prove only that the challenged practices led to the "serious risk of continued unnecessary institutionalization," *see* D.C. Br. at 40. It does not, however, reconcile that standard with the District Court's requirement that Plaintiffs prove a much more certain causal link between D.C.'s practices and their continued institutionalization. D.C. argues that *M.R. v. Dreyfus*, 697 F.3d 706 (9th Cir. 2011), which specifically rejected such a causation requirement, is

inapplicable simply because "[t]his case does not involve preliminary injunctive relief." D.C. Br. at 46. But *M.R.* required the plaintiff to prove the same causal link—that defendant's policies contribute to a *risk* of segregation, not that they are *the* cause—to prove a likelihood of success on the *merits* as well as to prove irreparable harm. 697 F.3d at 734.

2. The District Court Imposed Improper Common Injury Requirements.

D.C. fares no better in defending the District Court's holding that Plaintiffs must prove that a *particular* deficiency in D.C.'s transition services—as opposed to a systemically deficient provision of transition services overall—impedes class members from rejoining the community. Once again, D.C. claims, erroneously, that the District Court's legal error is irrelevant. D.C. says, as a matter of "common sense," a transition system cannot be holistically systemically deficient (*i.e.*, deficient in a way that does class-wide harm) unless one or more of its components is. D.C. Br. at 22. Accordingly, D.C. asserts, the District Court's finding that *particular aspects* of D.C.'s transition system do not harm the class sufficiently to merit class-wide relief means there is no deficiency in D.C.'s transition system *as a whole*. *Id.* at 29-30. D.C. cites nothing for this proposition, instead claiming it must be true as a matter of logic. It is mistaken.

This is not a challenge to discrete bad practices within D.C.'s transition system (though many have been identified during this litigation). It is a challenge

to D.C.'s overarching refusal to allocate necessary resources, set transition goals keyed to actual need, demand the necessary accountability, and otherwise take reasonable measures to carry out its affirmative obligation to aid class members' transitions. The District Court's findings are fully consistent with such a failure manifesting in multiple ways, none individually constituting a systemic deficiency, but collectively making transitions needlessly difficult. Each class member is exposed to each deficiency, and collectively they make the system itself systemically deficient for each class member. That should be enough. *See Brown v. Plata*, 563 U.S. 493, 531 (2011) (because of State's inadequate health care, "all prisoners in California are at risk," regardless of current health); *Parsons v. Ryan*, 754 F.3d 657, 679-82 (9th Cir. 2014) (class-wide relief requires showing of "systemic and centralized policies or practices in a prison system that allegedly expose all inmates in that system to a substantial risk of serious future harm").

D.C. improperly persists in arguing for application of the proof-of-common-injury standards announced in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), for class claims seeking damages for practices causing a disparate impact to class members. D.C. Br. at 6, 23. But this Court squarely rejected the same arguments for claims such as this one in *D.L. v. District of Columbia*, 860 F.3d 713 (D.C. Cir. 2017) (*D.L. II*). *See* Appellant Br. at 41-49. D.C. purports to distinguish *D.L. II*, but its arguments really attempt to relitigate this Court's binding precedent.

D.L. II establishes that a class certified under Rule 23(b)(2), seeking only injunctive relief to remedy systemic violations of an affirmative obligation, need not show that the same *specific deficiencies* contributed to each class member's inability to transition. Instead, the class need only show its members were subjected to the same *systemically deficient transition system*. Appellant Br. 40-46; Legal Aid Br. at 17-22. D.C. asserts that class members must prove "unnecessary segregation through a common policy or practice" at a more granular level, D.C. Br. at 40 n.23, but *D.L. II* rejected that argument.

D.C. attempts to distinguish *D.L. II* by arguing that the transition obligation here is not an "express legal mandate" or as tightly defined as the one in *D.L. II*. D.C. Br. at 31-32, 40. But nothing in *D.L. II* supports such distinctions. Rather, what matters is that the class alleges violation of an affirmative duty at a more granular level than just a generalized failure to follow Title II, or even a failure to comply with *Olmstead* more broadly. The class asserts a violation of the specific affirmative obligation to provide meaningful access to community services, a violation at the same level of generality as the violations alleged by the subclasses in *D.L. II*. *See* 860 F.3d at 724, 727 (whereas "shared allegation of IDEA liability" is insufficiently specific to unite class, the failure to provide "smooth and effective transitions" is sufficiently specific). Like the class in *D.L. II*, this class seeks only injunctive relief to improve the system's performance and thus give each class

member a better chance of transitioning. *See* 860 F.3d at 724-25. *D.L. II* holds that, under such circumstances, it is immaterial that D.C. failed to meet the same affirmative obligation to class members for different reasons, *id.* at 725. Accordingly, D.C.'s argument that it fails to transition class members for different reasons, D.C. Br. at 39, is squarely foreclosed by *D.L. II* rather than a basis for distinguishing that case. *See Garnett v. Zeilinger*, 301 F. Supp. 3d 199, 208 (D.D.C. 2018) (applying *D.L. II*); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 332-33 (D.D.C. 2018) (same).

To find support, D.C. turns to pre-*D.L. II* denials of interlocutory appeals that did not resolve the question and are, at any rate, superseded by *D.L. II*. *See, e.g.*, D.C. Br. at 23, 30, 32. Contrary to D.C.'s argument, *In re District of Columbia*, 792 F.3d 96 (D.C. Cir. 2015), did *not* hold that the class here must prove systemic deficiencies "that 'affect[] all members of the class in the manner *Wal-Mart* requires for certification.'" D.C. Br. at 23. The full sentence from which D.C. selectively quotes is: "It was not manifest error to conclude, at this procedural juncture, that those two alleged deficiencies could represent the sort of systemic failure that might constitute a policy or practice affecting all members of the class in the manner *Wal–Mart* requires for certification." 792 F.3d at 100. That is, this Court found it possible that *Wal-Mart*'s requirements could be satisfied, making it

unnecessary to decide whether they *had* to be for this type of class; two years later, *D.L. II* answered that question in the negative.

D.C. also argues that the District Court had *discretion* to require what it did of the class, even if not required to do so. D.C. Br. at 32-33. But the District Court's ruling reflects no exercise of discretion; instead, it mistakenly reasoned it was bound to rule as it did. Mem. Op. 77-78, 90-91. D.C.'s reading of *Parsons* as providing discretion to certify subclasses instead of bigger classes, *see* D.C. Br. at 32-33 & n.19, similarly is irrelevant, because the District Court did *not* split the class into sub-classes—though it required granular proof of injury as though it had. And D.C.'s repeated suggestions that the District Court had discretion to decertify the class or otherwise alter the class certification order that this Court previously found not clearly erroneous, *see, e.g.*, *id.* at 7-8, 20-21, is irrelevant because the District Court took no such action.

D.C. also argues, wrongly, that granting class-wide relief "would merely initiate a process whereby" the court would "have to enter separate, mini-injunctions for each class member to remedy any unjust institutionalization." D.C. Br. at 39. But Plaintiffs do not seek such individualized relief. They merely ask that D.C. address systemic deficiencies that collectively make transitioning harder and slower (and, too frequently, entirely impossible) for each class member.

As Plaintiffs explained, a variety of injunctive options could address their common injury. Appellant Br. at 46-47. Without citing any such evidence, D.C. asserts that the trial evidence "made clear that no single transition-assistance injunction would remedy the class-wide alleged injury," D.C. Br. at 22; *id.* at 38. No such evidence regarding the effectiveness of potential remedies is in the record, because the District Court never reached the half of the bifurcated trial in which it would be introduced.

II.

A REMAND IS WARRANTED FOR THE DISTRICT COURT TO MAKE A FULL RECORD AND FINDINGS BASED ON THE PROPER STANDARDS

A. The District Court Improperly Limited Its Focus to D.C.'s Performance At the Time of Trial Without Finding Alleged Earlier Violations Moot.

Although this lawsuit was filed in 2010, the District Court confined its analysis to D.C.'s performance in 2016, without regard to whether D.C. met its *Olmstead* obligations when the suit was filed or throughout this long-running litigation. It erred in doing so without assessing whether D.C. made durable changes to its policies such as to moot any earlier violations. *See* Appellant Br. 48-50; Legal Aid Br. at 7 & n.3; *True the Vote, Inc. v. IRS*, 831 F.3d 551, 561-62 (D.C. Cir. 2016) (government failed to meet "heavy burden" of showing "interim relief or events have completely and irrevocably eradicated the effects" of past misconduct); *see, e.g.*, *Benjamin v. Dep't of Pub. Welfare of Pa.*, 768 F. Supp. 2d

747, 756 (M.D. Pa. 2011) (in *Olmstead* case, defendant had to demonstrate not just cessation of illegal practices but that it "has sufficiently demonstrated an affirmative commitment to integration").

D.C. does not offer any relevant rebuttal. It quibbles over whether the District Court *found* its earlier practices to violate *Olmstead* or simply *strongly suggested* as much, D.C. Br. at 49,[3] but nothing turns on that point. What is relevant is that the District Court never ruled for D.C. as to Plaintiffs' allegations that D.C. acted unlawfully when this lawsuit was filed and for years thereafter; D.C. asserts that "no earlier *Olmstead* violation exists," *Id.* at 23, but cites no such finding by the District Court, which failed to resolve those allegations. That D.C. never claimed the allegations were moot, *id.* at 50, proves Plaintiffs' point rather

[3] For example, in 2012, the District Court found that D.C.'s "actual success in transitioning [class members] has been minimal," *Day v. D.C.*, 894 F. Supp. 2d 1, 28 (D.D.C. 2012), with "the undisputed [low] numbers of transitions clearly undercut[ing]" D.C.'s "claim to have a plan that demonstrates a measurable commitment to deinstitutionalization." *Id.* at 28. It found that "the evidence suggests potential systemic problems such as not knowing how many nursing facility residents would prefer to live in the community." *Id.* at 30. In its post-trial opinion, the District Court found "[t]he District has little to be proud of regarding its historic inability to comply with Olmstead's mandate." Mem. Op. at 91. Further, it found "there is no question that plaintiffs have presented compelling evidence that many class members are stuck in nursing facilities and that the number of class members who have transitioned over the last five years is far from satisfactory." *Id.* at 77. It explicitly stated that its ruling in favor of D.C. was based on the (mistaken) premise that it was required to examine the District's "current transition services—not its past failures." *Id.* Indeed, it used that reasoning to discount the relevance of D.C.'s conduct with respect to several of the named plaintiffs. *Id.* at 77 n.28.

than refuting it. D.C. failed to *either* establish that its earlier conduct was not unlawful *or* claim (let alone prove) it had made durable changes that rendered earlier violations moot. The District Court erroneously dismissed this suit without requiring either.

In a footnote, D.C. invites this Court to perform the mootness analysis in the first instance despite an incomplete record. It argues that the transition services it provided through the federal Money Follows the Person (MFP) program will continue, notwithstanding that MFP funding is disappearing, because "the District has already added services previously provided under MFP to its EPD waiver" and "legislation is pending in Congress that would reauthorize the MFP program." D.C. Br. at 50 n.31. But neither point remotely resembles an assurance that funding and services will continue at 2016 levels. In any event, this Court cannot resolve the question without a focused inquiry and complete record. D.C.'s response simply confirms the need for a remand.

B. The Evidence Already Before The District Court Demonstrates the Need For a Remand for the District Court to Compile a Complete Record and Rule on the Proper Questions.

As Plaintiffs described already, substantial evidence in the record supports their prima facie case that D.C. fails to satisfy its obligation under *Olmstead* to have an effectively working transition system. Evidence in the record supports a finding that D.C. has never achieved anything resembling a "reasonable rate of

deinstitutionalization," *Sanchez*, 416 F.3d at 1068, nor have D.C.'s policies amounted to "a reasonably specific and measurable commitment to deinstitutionalization for which [D.C.] may be held accountable," *Frederick L.*, 422 F.3d at 157. The District Court never ruled on whether D.C. met these standards, and so this Court should remand for the District Court to rule on them, as well as whether D.C. can satisfy any affirmative defense justifying its failures. This Court reviews *de novo* the District Court's legal determinations as to what standards to apply, and it cannot give deference to factual findings that Plaintiffs failed to meet proof burdens that were wrong as a matter of law. *See, e.g.*, *U.S. ex rel. Modern Elec., Inc. v. Ideal Elec. Sec. Co., Inc.*, 81 F.3d 240, 244-45 (D.C. Cir. 1996) (district court's finding that no contract existed between parties was based on requiring party to prove wrong standard; case remanded for district court to apply proper standard); *Hous. Expl. Co. v. Halliburton Energy Servs.*, 359 F.3d 777, 779 (5th Cir. 2004) ("factual findings made under an erroneous view of controlling legal principles are reviewed *de novo*").

In order to attach undue significance to Plaintiffs' acceptance for purposes of this appeal of the District Court's factual findings, *see, e.g.*, D.C. Br. at 1, 22, 29, 38, D.C. erroneously presents those findings as conclusive of the proper inquiry that Plaintiffs describe above. They are not. The District Court—because it asked the wrong questions—did not resolve any of the most relevant factual disputes.

D.C. presents snippets of the District Court's findings out of context and then asks this Court to defer to findings the District Court never made.[4]

For example, D.C. portrays the District Court as having found that D.C. does everything possible to assist class members in identifying and applying for housing, such that "there is no more that *transition assistance* can do." D.C. Br. at 44 (emphasis in original). In fact, the District Court merely pointed to certain steps that D.C. took and concluded they were inconsistent with a claim that "the District has failed to assist class members," Mem. Op. at 88, apparently believing (wrongly) that Plaintiffs asserted D.C. did nothing at all. The District Court did *not* find that there is no more D.C. reasonably can do, nor would the record support such a finding.[5]

Similarly, contrary to D.C.'s suggestion through out-of-context quotation, the District Court did *not* find that D.C. has "the infrastructure to help individuals identify and then to move to existing and available housing options." D.C. Br. at 14 (quoting Mem. Op. at 87-88); *id.* at 37. Rather, the District Court rejected the

[4] D.C. suggests that Plaintiffs' factual recitation is suspect because Plaintiffs include undisputed record evidence in addition to the District Court's findings, *see* D.C. Br. at 8 n.3. It does not argue that Plaintiffs mischaracterize any finding the District Court made or dispute Plaintiffs' characterization of the record beyond cryptically comparing passages of Plaintiffs' brief and the District Court's opinion.

[5] In a footnote, D.C. Br. at 11 n.7, D.C. takes issue with Plaintiffs' statement that D.C., to avoid spending its own money, has restricted itself to offering services that the federal Money Follows the Person program pays for. Appellant Br. at 12. But it simply cites to the MFP requirements, which follows (and indeed confirms) Plaintiffs' point.

assumption that D.C. *must not* have such infrastructure. *Id.* at 87-88. Nowhere did it find that D.C.'s transition services *did* have adequate capability to help class members identify and move to available housing.

To cite just one more example, D.C. states that the District Court found that class members are transferred to the inactive list "only when 'transition support at that time would be futile.'" D.C. Br. at 43 (quoting Mem. Op. at 82). In fact, the District Court found that people were relegated to the inactive list "only after [D.C.'s] transition coordinator has determined that transition support at that time would be futile." Mem. Op. at 82. That is, the District Court never found that transition support *would* be futile, just that a D.C. employee said so.

That distinction is critical. As the District Court found here, a person with a disability has the right to live in the community if *actually* possible without regard to a public entity's determination. *Day v. D.C.*, 894 F. Supp. 2d 1, 23–24 (D.D.C. 2012); *see, e.g.*, *Disability Advocates, Inc.*, 653 F. Supp. 2d at 258–59 (application of integration mandate not left "to the virtually unreviewable discretion" of State and its contractors); *Long v. Benson*, 2008 WL 4571904, at *2 (N.D. Fla. Oct. 14, 2008) (public entity "cannot deny the right simply by refusing to acknowledge that the individual could receive appropriate care in the community."). The same principles apply readily here. D.C. must *prove* that it would be futile to attempt to transition class members on the inactive list, not just *assert* it. Otherwise, exactly

as D.C. does here, a public entity can spin into a *defense* what should be an admission of *liability*—that, with respect to many people who want to transition to the community, it has nothing "that can fairly be considered a plan for the future" and "remains silent as to when, if ever," it will deinstitutionalize them. *Frederick L.*, 422 F.3d at 158. Instead of proving the supposed futility of doing more for people on the inactive list (*i.e.*, meeting its burden of proof for an affirmative defense for its failure to transition class members), D.C. blames Plaintiffs for failing to *disprove* it. *See* D.C. Br. at 43.

Much of the rest of D.C.'s factual recitation consists of either putting a different spin on the facts Plaintiffs recited or citing to facts that are not dispositive (or, indeed, relevant) to whether D.C. satisfies its *Olmstead* obligation under the correct legal framework. For example, D.C. describes at length the evidence the District Court marshalled to find that no one aspect of D.C.'s transition service was deficient enough alone to merit class-wide injunctive relief, D.C. Br. at 24-28, and that (in the absence of additional assistance) finding appropriate housing can be difficult for class members, *id.* at 34-36. But the District Court did not find that these aspects of D.C.'s service were not deficient *at all*, that they could not contribute to a larger systemically deficient system, or that D.C. could not reasonably do more to help class members overcome obstacles to transitioning, and so the relevant questions remain unanswered. To the extent there are any relevant

factual disputes regarding application of the proper standards, the District Court should resolve them in the first instance.[6]

C. Plaintiffs' Individual Claims Should Be Remanded For the District Court to Consider in the First Instance.

The District Court dismissed Plaintiffs' individual claims without analysis, based solely on the incorrect premise that no such claims existed distinct from the class-wide claims. Accordingly, this Court at least should remand the individual claims for consideration under the very different standard that the District Court articulated for individual *Olmstead* claims. Appellant Br. at 22-24, 50 & n.12.

D.C. offers no rejoinder on the merits. Instead, it argues, first, that Plaintiffs failed to properly raise this argument on appeal. D.C. Br. at 41 n.24. But Plaintiffs were not "obscure on th[e] issue in their opening brief," *id.* (quoting *Bd. of Regents of Univ. of Washington v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996). They clearly explained the reason for remand. The argument was short because it was simple. Second, D.C. argues that Plaintiffs waived individual claims in the District Court by stating they would not pursue "individualized relief." *Id.* (quoting *Thorpe v. D.C.*, 303 F.R.D. 120, 152 (D.D.C. 2014)). But that was with respect to individualized relief as a remedy *for a class*, not relief for individuals should class

[6] In a footnote, D.C. suggests that other states have had comparable difficulty in transitioning people. D.C. Br. at 12 n.9. This was not part of the District Court's reasoning, nor is there any obvious reason why it would excuse D.C.'s failures (given that other States also have faced *Olmstead* litigation).

relief be unavailable. Finally, D.C. points to the notice of appeal taken by Ivy Brown, both as an individual and as a class representative. *Id.* It is unclear why D.C. believes that to constitute waiver of the individual claims of other class members whom Ivy Brown still is charged with representing; in any event, D.C.'s argument provides no reason why Ivy Brown's claim, at least, should not be remanded.

CONCLUSION

For the above reasons, and those stated in Plaintiff-Appellant's initial brief, this Court should vacate the District Court's entry of judgment for D.C. and remand this case for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font. I further certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because its total word count, including headings, footnotes, and quotations but excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), is 6314.

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I certify that on November 7, 2018 electronic copies of the foregoing were served through the Court's ECF system, to:

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