

RECORD NO. 10-1005

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

THE ARC OF VIRGINIA, INC.,
A not-for-profit Corporation,

Plaintiff-Appellant,

v.

ROBERT F. MCDONNELL, In His Official Capacity as Governor
of the COMMONWEALTH OF VIRGINIA, et al.,

Defendants-Appellees,

UNITED STATES OF AMERICA,

Movant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT RICHMOND

**BRIEF OF *AMICUS CURIAE* "ASSOCIATION FOR PUBLIC AND
PRIVATE DEVELOPMENTAL DISABILITIES
ADMINISTRATORS"
SUPPORTING APPELLEES**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 10-1005 Caption: The Arc of Virginia, Inc., a not for profit corporation v. Timothy M. Kane, in his official capacity as Governor of the Commonwealth of Virginia et al.,

Pursuant to FRAP 26.1 and Local Rule 26.1,

APPDDA who is Amicus, makes the following disclosure:

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2. Does party/amicus have any parent corporations? YES NO

If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO

If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? YES NO

If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)

YES NO

If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims

the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

I certify that on June 3, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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TABLE OF CONTENTS

Corporate Disclosure form.....i

Table of Contents.....iii

Table of Authorities.....iv

Statement of the Identity, Interest and Authority of the Amicus
Brief..... 1

Summary of Argument3

Argument.....5

 I. Standard of Review.....5

 II. Appellant’s Claims are not Ripe for Adjudication.....5

 III. Appellant failed to allege any violation of Constitutional
Rights.....6

 IV. Appellant failed to allege any violation of the ADA.....9

Conclusion.....15

Certificate of Compliance with Rule 32.....16

Certificate of Service.....17

TABLE OF AUTHORITIES

Cases

Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149 (1967).....5

ARC of Washington State, Inc. v. Braddock, 427 F.3d 615, 618 (9th Cir. 2005)
.....13

Arizonans for Official English v. Arizona, 520 U.S. 43, 67 1997)..... 6

Armstead v. Pingree, 629 F. Supp. 273, 276 (M.D. Fla. 1986).....8

Bryson v. Shumway, 308 F.3d 79, 86 (1st Cir. 2002)..... 14

Buchanan, et al. v. Maine, 469 F. 3d 158, 174 (1st Cir. 2006)11

Burger v. Bloomberg, 418 F. 3d 882 (8th Cir. 2005).....11

Canupp v. Sheldon, 2009 U.S. Dist. LEXIS 113488, at *30(M.D. Fla. Nov. 23,
2009).....7

Conner v. Branstad, 839 F. Supp. 1346, 1357 (S.D. Iowa 1993).....10, 14

Dees v. Austin Travis County Mental Health & Mental Retardation, 860 F. Supp.
1186, 1190 n.7 (W.D. Tex. 1994).13

Easley ex rel. Easley v. Snider, 36 F.3d 297, 305 (3d Cir. 1994)13

Fitzgerald v. Corr. Corp. of Amer., 403 F. 3d 1134, 1144 (10th Cir. 2005).....12

Hanson v. Clarke County, 867 F.2d 1115, (8th Cir. 1989)7

Hargett v. Adams, 2005 U.S. Dist. LEXIS 6240, at *35, 50, 53-55(N.D. Ill. Jan.
13, 2005).....7

Lelsz v. Kavanagh, 807 F.2d 1243, 1251 (5th Cir. 1987)7

Messier v. Southbury Training Sch., 1999 U.S. Dist. LEXIS 1479 , at *36 (D. Conn. Jan. 5, 1999);13

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 587, 603, 603-606, 603-604, 604, 605-606, 609 (1999)..... 4, 6, 9, 10, 11, 12, 13, 14

P.C. v. McLaughlin, 913 F.2d 1033, 1041, 1043 (2nd Cir. 1990))8

Phillips v. Thompson, 715 F.2d 365, 368(7th Cir. 1983).....9

Schiavo v. Schiavo, 403 F. 3d 1289, 1294 (11th Cirt. 2005)11

Society for Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d. 1239, 1248, 1250(2d Cir. 1984)7, 11

Texas v. United States, 528 U.S. 296, 300-301 (1998)5

United States v. Oregon, 782 F. Supp. 502, 514 (D. Or. 1991)10, 14

United States ex rel Vuyyuru v. Jadhav, et al., 555 F.3d, 348 (4th Cir. 2009)5

Velasco v. The Gov't of Indonesia, 370 F.3d 392, 398 (4th Cir. 2004)).....5

White Tail Park, Inc. v. Stroube, 413 F.3d 451, 457 (4th Cir. 2005).....6

Williams v. Wasserman, 937 F. Supp. 524, (D. Md. 1996);13

Youngberg v. Romeo, 457 U.S. 307, 317, 322, 321, 323, 324 (1982).....6, 7, 8, 9

Statutes

42 U.S.C. § 1396 n (c)14
42 U.S.C.A. §§ 12131-121344

Regulations

28 C.F.R. § 35.130(b)(7).....12, 14

**STATEMENT OF THE IDENTITY, INTEREST AND AUTHORITY OF
THE AMICUS CURIAE**

The Association of Public and Private Developmental Disabilities Administrators (“APDDA”) is a not-for-profit professional organization founded in 1970. The APDDA is devoted to the support of administrators of public and private residential programs for persons with developmental disabilities. The APPDA supports the continuous improvement of a comprehensive array of individual and accessible services designed to enhance the quality of life for persons with developmental disabilities. The primary purpose of APDDA is to address the needs of people with intellectual disabilities and other developmental disabilities. The focus of APDDA includes, but is not limited to, the promotion of excellence in service management and delivery for the developmentally disabled, the promotion of research in intellectual disabilities and other developmental disabilities, and the advancement of public education and awareness in the area of developmental disabilities. The members of the APDDA believe that individuals with developmental disabilities are best served by the availability of a comprehensive array of services that includes larger public-operated Intermediate Care Facilities for Persons with Mental Retardation (“ICF/MR’s”) as well as community-based facilities.

Many of the individuals served in these larger ICF/MR’s require personal assistance in all areas of their lives, have associated multiple disabling medical

conditions, are quite medically fragile, and need constant and pervasive services and supports. The facts, including comparative mortality studies, significantly support the superior care that is available in these ICF/MR's for this population as compared to other settings in the "community". Individuals placed in the "community" may run an increased risk of death, abuse, mental health crisis, inappropriate placement, and lack of needed services. The individuals in these larger ICF/MR's with severe and profound disabilities benefit from and require this high level of services in these settings. The APDDA fears that the ideological viewpoint of the Appellant will deprive these developmentally disabled, who most often cannot speak for themselves, of the necessary, efficacious, and superior options available in larger ICF/MR's. The APDDA seeks to promote the well-being of people with developmental disabilities by maintaining the options of high-quality care in larger ICF/MR's.

The APDDA and its members have the privilege of working with and serving the parents and guardians of individuals with developmental disabilities. These parents and guardians with loved ones in larger ICF/MR's often support the delivery of needed services in these ICF/MR's. These parents and guardians similarly seek to preserve the superior service options available in larger ICF/MR's for their loved ones. The APDDA wants the voice of these parents and guardians

to not be drowned out by the allegedly “politically correct” arguments of the Appellant.

The APDDA and its members will obviously be significantly impacted by this litigation that seeks to limit the development of larger ICF/MR’s or, as is more common, by any litigation to close larger ICF/MR’s. With a membership that includes administrators of such ICF/MR’s, the APDDA has a direct and compelling interest in preserving the availability of the outstanding services offered at these facilities. In fact, the biased and unsubstantiated claim of the Appellant that placement in the “community” is always superior is not only inaccurate, but is an unfair insult to the high quality of work performed by APDDA members and their employees. The viewpoint of the APDDA is desirable so that the ideologically-biased views of the ARC do not go unopposed.

SUMMARY OF ARGUMENT

The claims of the Appellant are not ripe for adjudication as not even a single individual with developmental disabilities has been placed in the unfinished ICF/MR. The appropriateness of any such future placements cannot be determined until treating professionals exercise professional judgment to decide to place a developmentally disabled person in the new ICF/MR. The Appellant seeks to avoid any legal standards to be applied to specific facts and, instead, asks the Court

to accept its biased and unsubstantiated viewpoint that all such placements should be barred.

Similarly, the Appellant has not and cannot allege any violations of constitutional rights because there are no individuals with developmental disabilities who have even been placed at the ICF/MR that is under construction. The Court must consider whether reasonable care is being provided based upon professional judgment, but there are no specific facts on any individual cases for the Court to review. Again, the Appellant would have this Court ignore the applicable legal standards and blindly accept its political opinions against all larger ICF/MR's.

Furthermore, the Appellant has failed to allege and cannot allege any violation of the Americans with Disabilities Act, 42 U.S.C.A. §§ 12131-12134 (“ADA”). There must be consideration of professional judgment, the consent of guardians, and the resources of the State, but the Appellant has no facts on which the Court can render a fair determination. Instead of seeking reasonable application of the law, the Appellant asks this Court to ignore the clear language of Olmstead to incorrectly find that all developmentally disabled persons must be “deinstitutionalized.”

ARGUMENT

I. STANDARD OF REVIEW

This Court should review “a district court’s jurisdictional findings of fact on any issues that are not intertwined with the facts central to the merits of the plaintiff’s claims under the clearly erroneous standard and any legal conclusions flowing therefrom *de novo*.” United States ex rel Vuyyuru v. Jadhav, et al., 555 F.3d, 348 (4th Cir. 2009) (citing Velasco v. The Gov’t of Indonesia, 370 F.3d 392, 398 (4th Cir. 2004)).

II. APPELLANT’S CLAIMS ARE NOT RIPE FOR ADJUDICATION

A claim is not ripe for adjudication if it depends on contingent future circumstances that may not occur as anticipated, or may not occur at all. Texas v. United States, 528 U.S. 296, 300 (1998). A ripeness challenge requires a court to assess both the fitness of the issues for consideration and the hardship to the parties of withholding the court’s consideration. Id. at 300-01. The purpose of the ripeness doctrine, among other things, is to prevent judicial interference before a proceeding has been formalized and its effects felt in a concrete way by the parties. Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967). “To qualify as a case fit for federal court adjudication, an actual controversy must be extant at all stages of

review, not merely at the time the complaint is filed.” White Tail Park, Inc. v. Stroube, 413 F.3d 451, 457 (4th Cir. 2005) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997)). The Olmstead Court held that States must “provide community-based treatment for persons with mental disabilities” when three conditions are met: (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. Olmstead, 527 U.S. at 609 (1999).

The mere construction of a facility does not by itself create harm or the threat of harm to any individual. Because Appellant cannot show any facts establishing an unconstitutional placement, it cannot substantiate any violation of constitutional rights.

III. APPELLANT FAILED TO ALLEGE ANY VIOLATION OF CONSTITUTIONAL RIGHTS

States are not constitutionally obligated to provide social services to their citizens. Youngberg v. Romeo, 457 U.S. 307, 317 (1982). The Commonwealth of Virginia has opted to provide such service to its citizens who have been diagnosed with a mental illness or developmental disability. Because the Commonwealth has chosen to provide those services, the U.S. Supreme Court has held that the Due

Process Clause of the U.S. Constitution's Fourteenth Amendment imposes an affirmative duty on the Commonwealth to protect certain rights of the individuals that it serves. Specifically, the U.S. Supreme Court has held that persons in state custody have "constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." Youngberg, 457 U.S. at 324. Courts have consistently held that "reasonable care" does not impose a constitutional standard of optimal treatment and that minimal levels of care are sufficient. Id. at 323; Hanson v. Clarke County, 867 F.2d 1115, 1120 (8th Cir. 1989) (finding no constitutional right to optimal placement); Canupp v. Sheldon, 2009 U.S. Dist. LEXIS 113488, at *30 (M.D. Fla. Nov. 23, 2009) (noting that the U.S. Constitution does not require institutionalized persons to receive optimal treatment and mental health services); Hargett v. Adams, 2005 U.S. Dist. LEXIS 6240, at *36, 50, 53-55 (N.D. Ill. Jan. 13, 2005) (finding that Illinois' treatment program was not "optimal," but did not violate constitutional standards).

The Commonwealth is required only to provide such treatment as an appropriate professional would consider "reasonable in light of [a person's] liberty interests in safety and freedom from unreasonable restraints." Youngberg, 457 U.S. at 322; Lelsz v. Kavanagh, 807 F.2d 1243, 1251 (5th Cir. 1987); Society for Good

Will to Retarded Children, Inc. v. Cuomo, 737 F.2d.1239, 1250 (2d Cir. 1984);
Armstead v. Pingree, 629 F. Supp. 273, 276 (M.D. Fla. 1986).

In determining what constitutes “reasonable care,” the Supreme Court in Youngberg emphasized that the State “has considerable discretion in determining the nature and scope of its responsibilities.” Youngberg, 457 U.S. at 317. Judicial deference must be afforded to the judgment that a qualified professional exercises: “It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.” Id. at 321. In fact, decisions made by such professionals are presumptively valid. Id. at 323; P.C. v. McLaughlin, 913 F.2d 1033, 1043 (2d Cir. 1990) (stating that courts should not “ascertain whether in fact the best course of action was taken”). In the instant matter, Appellant would have the Court substitute its judgment for qualified, treating professionals before those professionals are even given an opportunity to exercise their judgment.

Appellant has made no allegation that treatment decisions in the Commonwealth are arbitrary or capricious, nor does it claim that such treatment decisions are based on stereotypes of the disabled rather than an individualized inquiry into the needs of each disabled individuals in the Commonwealth. See P.C. v. McLaughlin, 913 F.2d 1033, 1041 (2nd Cir. 1990)) (holding that the Rehab Act “does not require all handicapped persons to be provided with identical benefits,” and that the Act “did not clearly establish an obligation to meet [an

individual's] particular needs *vis a vis* the needs of other handicapped individuals...."; See also Phillips v. Thompson, 715 F.2d 365, 368 (7th Cir. 1983) (rejecting appellants' argument that the state had the affirmative duty under the Rehab Act "to create less restrictive community residential settings for them," and holding that because "there is no contention that these class members, because of their handicap, are being denied access to community residential living that Illinois is affording to others," the Rehab Act "simply has no application to appellants' claim") (emphasis added). "Liability may be imposed only when [a] decision by [a] professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." Youngberg, 457 U.S. at 323. In this matter, no such professional judgment has been rendered and Appellant's preemptive abuse of judicial process makes it impossible for Appellant to even make such an allegation.

IV. APPELLANT FAILED TO ALLEGE ANY VIOLATION OF THE ADA.

Olmstead does not require deinstitutionalization or a state to close its institutions. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999). In Olmstead, the U.S. Supreme Court held that "unjustified isolation" can constitute discrimination under the ADA only "when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional

care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.” Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 587. Appellant ignores this language in Olmstead and argues that the input of an affected individual and his or her treating professionals is not required. This contention cannot be reconciled with the plain language of Olmstead and further demonstrates the Appellant’s attempt to mislead the Court with its erroneous representations of the ADA.

As the Court in Conner v. Branstad held, “if Congress had actually intended to require states to provide community based programs for mentally disabled individuals currently residing in institutional settings, it surely would have found a less oblique way of doing so.” Conner v. Branstad, 839 F. Supp. 1346, 1357 (S.D. Iowa 1993); See also U.S. v. Oregon, 782 F. Supp. at 514 (“[P]remature or inappropriate community placements would result in a much higher risk of potential harm than residents are exposed to at [the facility].”). “[L]iability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.” Id. Appellant has not alleged any such deviation from professional judgment. “[P]rofessional judgment has nothing to do with what course of action would make

patients safer, happier, and more productive.” Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1248 (2nd Cir. 1984). The issue is “not whether the optimal course of treatment, as determined by some experts, is being followed.” Id.

The relief requested by Appellant necessarily involves a determination of the appropriateness of professional services, including medical care, psychology services, social services, and a vast number of related services. No treating professional has concluded that any particular citizen of the Commonwealth would be better served in any particular location. The facility has not even been built yet, so there is no way for any treating professional to determine whether it is the most integrated setting for any particular individual.

On this issue, Circuit courts have consistently been guided by Justice Kennedy’s concurring opinion in Olmstead. In his opinion, Justice Kennedy noted that “[I]t is undisputed that the State’s own treating professionals determined that community-based care was medically appropriate for respondents.” Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 609, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999). See e.g. Buchanan, et al. v. Maine, 469 F. 3d 158, 174 (1st Cir. 2006) (“[t]here [was] no evidence that Buchanan was either discriminated against or not provided the additional services [he sought] ‘by reason of his disability.’”); Burger v. Bloomberg, 418 F. 3d 882 (8th Cir. 2005) (citing Schiavo v. Schiavo, 403 F. 3d

1289, 1294 (11th Cir. 2005) (“[t]he Rehabilitation Act, like the ADA, was never intended to apply to decisions involving ... medical treatment.”); Fitzgerald v. Corr. Corp. of Amer., 403 F. 3d 1134, 1144 (10th Cir. 2005) (inmate’s claims under Rehab Act and ADA were properly dismissed for failure to state claim as they were based on medical treatment decisions)).

Appellant has failed to plead any discrimination by the Commonwealth, but even if it had, the Commonwealth could only be required to make reasonable modifications to resolve the discrimination. Its responsibility to provide community-based treatment options “is not boundless.” Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 603. A modification is not reasonable (and thus not required) if it will impair a state’s ability to (1) maintain a range of facilities for the care and treatment of persons with diverse disabilities and (2) administer services and apportion resources equitably across a broad spectrum of need. Id. at 603-06.

Moreover, the ADA does not require a state to implement modifications that entail a “fundamental alteration” of the state’s overall program for administering mental health services. Id. at 603-04; 28 C.F.R. § 35.130(b)(7) (“A public entity shall 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 services, program, or activity.”). “[T]he

fundamental-alteration component ... allow[s] the State to show that, in the allocation of available resources, immediate relief for the plaintiffs 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.”

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 604.

In the instant matter, Appellees will likely be able to show that the Commonwealth has a “comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that move[s] at a reasonable pace not controlled by the State’s endeavors to keep its institutions fully populated.” Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 605-06. The relief sought by Appellant would constitute a “fundamental alteration” of its program. Id. at 603-04; See also Easley ex rel. Easley v. Snider, 36 F.3d 297, 305 (3d Cir. 1994); ARC of Washington State, Inc. v. Braddock, 427 F.3d 615, 618 (9th Cir. 2005); Messier v. Southbury Training Sch., 1999 U.S. Dist. LEXIS 1479, at *36 (D. Conn. Jan. 5, 1999); Williams v. Wasserman, 937 F. Supp. 524, 531 (D. Md. 1996); Dees v. Austin Travis County Mental Health & Mental Retardation, 860 F. Supp. 1186, 1190 n.7 (W.D. Tex. 1994).

Although the integration mandate requires states “to make ‘reasonable modification in policies, practices, or procedures’ that are ‘necessary to avoid discrimination on the basis of disability...’”, ARC of Washington State, Inc. v.

Braddock, 427 F.3d 615, 618 (9th Cir. 2005) (citing 28 C.F.R. § 35.130(b)(7)), such compliance does not include an obligation to make “modifications [that] would fundamentally alter the nature of the service, program, or activity.” Id.; Olmstead v. L. C. by Zimring, 527 U.S. at 605; Bryson v. Shumway, 308 F.3d 79, 86 (1st Cir. 2002) (acknowledging that § 1396n(c) contemplates state waiver plans with definite limits on the number of individuals served, and the right of states to include a limit on the number of waiver slots they request.).

Olmstead does not require, as Appellant argues, deinstitutionalization of all eligible disabled persons. Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 604. See also Conner v. Branstad, 839 F. Supp. 1346, 1357 (S.D. Iowa 1993) (“[I]f Congress had actually intended to require states to provide community based programs for mentally disabled individuals currently residing in institutional settings, it surely would have found a less oblique way of doing so.”); United States v. Oregon, 782 F. Supp. 502, 514 (D. Or. 1991) (“[P]remature or inappropriate community placements would result in a much higher risk of potential harm than residents are exposed to at [the facility].”).

CONCLUSION

Nothing alleged by Appellant in its Complaint or through its evidentiary filings was ripe for adjudication. The ruling of the District Court was correct and should be affirmed.

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United States Court of Appeals
For the Fourth Circuit

No. 10-1005 Caption: The Arc of Virginia, Inc., a not-for-profit corporation
v. Robert F. McDonnell, in his official capacity as Governor of
the Commonwealth of Virginia et al.

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COUNSEL FOR: Assoc. of Public and Private Developmental Disabilities Administrators as the
(party name)

appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s)

/s/ Donald B. Zaycosky
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APPELLATE COUNSEL IS: _____
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Case Name: Arc of Virginia Incorporated v. Timothy M. Kaine
Case Number: 10-1005
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AMICUS CURIAE/INTERVENOR BRIEF filed by Thomas B. York Counsel for Amicus in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 06/03/2010. [998352282] [10-1005] (TBY)

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Document Description: Amicus Curiae/Intervenor Brief filed (with appearance of counsel form)

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