No. 09-17581

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID OSTER, *et al.*,

Plaintiffs-Appellees

v.

JOHN WAGNER, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE ON THE ISSUE ADDRESSED HEREIN

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STATEMENT OF THE ISSUE

The United States will address the following issue only:

Whether individuals with disabilities who currently receive community-placement services under a State's Medicaid program because the State has determined that such individuals need those services to remain safely in their homes may bring an integration claim under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq*., if the State is going to cut or reduce

those services, thereby placing such individuals at serious risk of being institutionalized.

INTEREST OF THE UNITED STATES

The United States has authority to submit this brief as *amicus curiae* under Federal Rule of Appellate Procedure 29(a). The United States has a direct and substantial interest in this appeal, which involves the proper interpretation and application of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq*. Title II prohibits discrimination against individuals with disabilities in the provision of public services. See 42 U.S.C. 12132. The Attorney General has authority to enforce Title II, see 42 U.S.C. 12133, and also to promulgate regulations implementing its broad prohibition of discrimination, see 42 U.S.C. 12134. One of those regulations requires that public entities "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). In *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999), the Supreme Court upheld the Attorney General's interpretation of this "integration regulation" as requiring states that offer treatment to persons with disabilities to provide such treatment in community settings rather than in institutions when it is appropriate and when such

placements can reasonably be accommodated without fundamentally altering the nature of the treatment program.

In 2009, on the tenth anniversary of the *Olmstead* decision, President Obama celebrated its anniversary by launching "the Year of Community Living," a new federal initiative to identify ways to improve access to housing, community supports, and independent living arrangements for individuals with disabilities. See Press Release, The White House, President Obama Commemorates Anniversary of *Olmstead* and Announces New Initiatives to Assist Americans with Disabilities (June 22, 2009).[1] The President said that "[t]he *Olmstead* ruling was a critical step forward for our nation, articulating one of the most fundamental rights of Americans with disabilities: Having the choice to live independently." *Ibid*. The President explained that the new initiative was intended to "reaffirm [his] Administration's commitment to vigorous enforcement of civil rights for Americans with disabilities and to ensuring the fullest inclusion of all people in the life of our nation." *Ibid*.

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[1] Available at: http://www.whitehouse.gov/the_press_office/President-Obama-Commemorates-Anniversary-of-Olmstead-and-Announces-New-Initiatives-to-Assist-Americans-with-Disabilities/.

STATEMENT OF THE CASE AND RELEVANT FACTS

Plaintiffs are five individuals with disabilities who currently receive services from California's In-Home Supportive Services program (IHSS), which is offered through the State's Medicaid program, Medi-Cal. See *V.L.* v. *Wagner*, No. 09-4668, 2009 WL 3486708, at *1 (N.D. Cal. Oct. 23, 2009). Plaintiffs brought this class action, alleging violations of the Medicaid Act, Title II of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, and the Due Process Clause of the United States Constitution. See *id*. at *5. They sought declaratory and injunctive relief, including a preliminary injunction, to prevent the State from implementing a change in the law for determining IHSS eligibility. See *ibid*.

1. Background: IHSS And FI Scores

In 1973, California established IHSS as part of its Medi-Cal program to provide assistance with the tasks of daily living to low-income elderly and disabled persons. See *V.L.*, 2009 WL 3486708, at *1. More than 440,000 California residents currently benefit from IHSS assistance. See *ibid*. Under state law, individuals qualify for IHSS assistance if they "are unable to perform the services themselves" and if they "cannot safely remain in their homes or abodes of

their own choosing unless these services are provided." *Ibid*. (quoting Cal. Welf. & Inst. Code. § 12,300(a)).

In 1988, the state legislature passed a law requiring the California Department of Social Services (CDSS) to develop a uniform needs assessment tool "to assure that in-home supportive services are delivered in all counties in a uniform manner." *V.L.*, 2009 WL 3486708, at *2 (quoting Cal. Welf. & Inst. Code § 12,309(a)). The CDSS thereafter developed and implemented the Uniformity Assessment System, which defined ranks of one to five for social workers to use in rating elderly or disabled individuals' functional abilities in each of 14 areas: housework; laundry; shopping and errands; meal preparation and clean-up; mobility inside the residence; bathing and grooming; dressing; bowel, bladder, and menstrual; transfer from one position to another; eating; respiration; memory; orientation; and judgment. See *ibid*. The ranks are defined as follows:

> Rank one. A recipient's functioning shall be classified as rank one if his or her functioning is independent, and he or she is able to perform the function without human assistance, although the recipient may have difficulty in performing the function, but the completion of the function, with or without a device or mobility aid, poses no substantial risk to his or her safety.
>
> Rank two. A recipient's functioning shall be classified as rank two if he or she is able to perform a function, but needs verbal assistance, such as reminding, guidance, or encouragement.

> Rank three. A recipient's functioning shall be classified as rank three if he or she can perform the function with some human assistance, including, but not limited to, direct physical assistance from a provider.
>
> Rank four. A recipient's functioning shall be classified as rank four if he or she can perform a function, but only with substantial human assistance.
>
> Rank five. A recipient's functioning shall be classified as rank five if he or she cannot perform the function, with or without human assistance.

Ibid. (quoting Cal. Welf. & Inst. Code § 12,309(d)). Social workers annually reassess each recipient's rank in the 14 areas on an individualized basis. See *ibid*. Under state law, anyone who receives a rank of two or higher for a particular function automatically qualifies for IHSS assistance. See *ibid*.

Under the Uniformity Assessment System, each recipient is also given a Functional Index (FI) Score between 1.00 and 5.00, which is calculated based on a weighted average of 11 of the recipient's 14 ranks of functional ability (the mental tasks – memory, orientation, and judgment – are not counted). See *V.L.*, 2009 WL 3486708, at *3. The weights, which were calculated in 1988 and have not changed since, were calculated using a complicated method of computing county-wide and state-wide averages for the number of hours per week IHSS services were provided for each task to the people who received assistance with that task.

See *ibid*. The weights used for each function were:

Function	*Weight*
Housework	.038
Laundry	.037
Shopping and Errands	.040
Meal Preparation and Clean-Up	.222
Mobility Inside	.079
Bathing and Grooming	.095
Dressing	.057
Bowel, Bladder, and Menstrual	.129
Transfer	.094
Eating	.127
Respiration	.082

Ibid. An individual's FI Score is calculated using these weights by subtracting one from the recipient's rank for each function (but not the mental functions, as noted above) and then by multiplying those numbers by the weight assigned to the respective function. See *ibid*. Those numbers are then totaled, and a one is added to the sum. See *ibid*.

The FI Scores were intended to be used by social workers and county and state administrators "to compare the FI Scores and FI Hours of clients on their caseload." *V.L.*, 2009 WL 3486708, at *3 (quoting All County Letter No. 88-118, at 5). If the number of IHSS hours approved by a social worker deviates from the FI Score, "the worker should be able to identify unique circumstances which account for the variance." *Ibid*. (quoting All County Letter No. 88-118, at 5). The

FI Score was not created to be an eligibility criterion to determine whether an individual beneficiary needed services to live safely in his or her home. See *ibid*.

2. New IHSS Eligibility Criteria Under ABX4 4

On July 28, 2009, the Governor of California signed ABX4 4, a bill passed by the state legislature in response to the State's current budget crisis that changed the way IHSS eligibility was determined. See *V.L.*, 2009 WL 3486708, at *4. Under ABX4 4, IHSS recipients must have a numerical rank of at least 4.00 in a given category of domestic and related services (*i.e.*, housework; laundry; shopping and errands; and meal preparation and clean-up) to receive any services in that category, and they must also have an FI Score of at least 2.00 to receive any IHSS services at all. See *ibid*. The new eligibility criteria do not apply, however, to individuals authorized to receive either 24-hour protective supervision or paramedical services.[2] See *ibid*.

The new eligibility standards under ABX4 4 were scheduled to go into effect on November 1, 2009. See *V.L.*, 2009 WL 3486708, at *4. According to the CDSS, 97,000 current IHSS recipients would have lost domestic and related

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[2] "Paramedical services include the administration of medications, puncturing the skin or inserting a medical device into a body orifice, activities requiring sterile procedures, or other activities requiring judgment based on training given by a licensed health care professional." *V.L.*, 2009 WL 3486708, at *15 n.4 (quoting Cal. Welf. & Inst. Code § 12,300.1).

services, and 36,000 current IHSS recipients would have lost all services. See *ibid*.

3. Prior Proceedings

On October 5, 2009, plaintiffs instituted a civil action for declaratory and injunctive relief in the Northern District of California, alleging violations of the Medicaid Act, Title II of the ADA, Section 504 of the Rehabilitation Act, and the Due Process Clause of the United States Constitution. See *V.L.*, 2009 WL 3486708, at *5. Plaintiffs also filed a motion for a preliminary injunction to enjoin the State from implementing the new IHSS eligibility standards under ABX4 4. See *ibid*. The court granted plaintiffs' motion, concluding that plaintiffs had made a strong showing that they are likely to succeed on the merits of their claims, *id*. at *6-12; that they will suffer immediate and irreparable harm unless the court issues a preliminary injunction, see *id*. at *13; that the balance of hardships weighs in their favor, see *id*. at *14; and that the public interest weighs heavily in favor of granting relief, see *ibid*.

In analyzing plaintiffs' likelihood of success on the merits under Section 504 and the ADA, the court agreed with plaintiffs that the change in IHSS eligibility violated those statutes' integration mandate because it places people at serious risk of being unnecessarily institutionalized. See *V.L.*, 2009 WL 3486708,

at *10-11. The court explained that the Supreme Court made clear in *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999), that "'[u]njustified isolation of the disabled' amounts to discrimination," and that under the ADA and Section 504, "[s]tates are required to provide care in integrated environments for as many disabled persons as is reasonably feasible so long as such an environment is appropriate to their health needs." *Id*. at *10; see also *ibid*. (explaining that the ADA integration regulation, 28 C.F.R. 35.130(d), requires that public entities provide services in "the most integrated setting appropriate"). The court concluded that "[a]lthough *Olmstead* addressed ongoing institutionalization, plaintiffs who currently reside in community settings may assert ADA integration claims to challenge state actions that give rise to a risk of unnecessary institutionalization." *Id*. at *11 (citing cases).

The district court found that plaintiffs in this case have shown that they face a serious risk of institutionalization under ABX4 4:

> Plaintiffs have submitted substantial evidence from experts, county officials, caregivers and individual recipients showing that class members face a severe risk of institutionalization as a result of losing the services that ABX4 4 would eliminate. For instance, individuals with mental disabilities who lose IHSS assistance to remind them to take medication, attend medical appointments and perform tasks essential to their continued health are at a severely increased risk for institutionalization. Elderly and disabled individuals with unmet in-home care needs will likely suffer falls which will lead to

> hospitalization and subsequent institutionalization. Elderly individuals who lose meal preparation services will decline in health and risk being placed in a nursing home.

V.L., 2009 WL 3486708, at *11; see also *id*. at *13 (finding that there is "a serious risk that individuals with mental or cognitive disabilities will become homeless if they lose IHSS service," and that "[o]nce homeless, mentally ill individuals decline rapidly and could end up anywhere from a psychiatric hospital to jail").

The court rejected defendants' argument that plaintiffs "are not at risk of institutionalization because some may have family members who may be able to take over the care once provided by IHSS and some might find care through some other community-based service." *V.L.*, 2009 WL 3486708, at *11. The court explained that "[d]efendants bear the ultimate responsibility for ensuring the State's compliance with federal disability law," and that, in any event, "the record demonstrates that alternative services are not available for a large portion of the class members who face the risk of institutionalization." *Ibid*.

The court also rejected defendants' argument that plaintiffs failed to establish that any of the named plaintiffs, as opposed to other class members, were at risk of institutionalization. See *V.L.*, 2009 WL 3486708, at *15 n.11. Defendants did not dispute that the named plaintiffs would lose IHSS assistance under ABX4 4. See *id* at *4. The court explained that "because Defendants have

conceded that the instant injunction may apply to the entire class before such a class is certified, the Court can look beyond the named Plaintiffs when analyzing this aspect of the preliminary injunction motion." *Ibid*. The court found that "even if Defendants' argument is correct, the named Plaintiffs in this case are likely to face the risk of unnecessary institutionalization." *Ibid*.; see also *id*. at *1 ("Plaintiffs provide ample evidence that they and others like them will be irreparably harmed if they lose their in-home help. They will be unable to care for themselves, suffer injuries, and be relegated to emergency rooms, hospitals, and other institutions.").

Defendants appeal from the district court order granting a preliminary injunction.

SUMMARY OF THE ARGUMENT

The district court correctly held that institutionalization is not a prerequisite to establishing a violation of the integration mandate under Title II of the ADA. Title II prohibits discrimination against qualified individuals with disabilities in the provision of public services, including the unjustified segregation of such individuals. Title II's "integration regulation," 28 C.F.R. 35.130(d), requires that states that provide services to such individuals must do so in the most integrated setting appropriate. In *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 607

(1999), the Supreme Court interpreted this mandate as requiring states that offer treatment to persons with disabilities to eliminate unnecessary institutionalization by providing treatment in community settings.

Such protection, however, is not limited to persons who are currently institutionalized. Accordingly, a state may be found liable under Title II if it adopts a policy that places individuals with disabilities who receive services from the state at serious risk of being institutionalized. Indeed, every court to consider whether recipients of community-placement services may bring an integration claim in such circumstances has agreed that they may do so. As the Tenth Circuit recognized, adopting a rule that would require individuals with disabilities to enter an institution before they could challenge an allegedly discriminatory law or policy that threatens their independence would contravene the purpose of the ADA.

Individuals with disabilities, however, need not show that they will experience "imminent" institutionalization in order to establish a violation of the ADA. Here, current IHSS recipients may establish a violation of Title II's integration mandate by showing that the change in eligibility criteria under ABX4 4 puts them at serious risk of being institutionalized. They need not show, however, that such institutionalization will occur overnight. The failure to provide

services in the most integrated setting appropriate to the needs of qualified individuals with disabilities violates the ADA, regardless of whether the failure to do so causes an individual to be immediately hospitalized, or whether it causes an individual to decline in health over time and eventually enter an institution to seek necessary care.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT INSTITUTIONALIZATION IS NOT A PREREQUISITE TO ESTABLISHING A VIOLATION OF THE INTEGRATION MANDATE UNDER TITLE II OF THE ADA

On appeal, defendants argue (Def. Br. 41-49) that the district court erred in concluding that plaintiffs demonstrated a likelihood of success on the merits with respect to their ADA and Section 504 claims because plaintiffs are not currently institutionalized and have not shown that their institutionalization is "imminent" upon losing IHSS assistance. As explained below, the district court correctly concluded that institutionalization is not a prerequisite to establishing a violation of Title II's integration mandate, and plaintiffs need not show that they face a risk of "imminent" institutionalization to prevail on their integration claims.[3]

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[3] The United States addresses only the standards for establishing a violation of Title II's integration mandate. We take no position on the other issues in the case, including whether the preliminary injunction was properly granted. The

(continued...)

A. Title II's Integration Mandate Requires That States Provide Services To Qualified Individuals With Disabilities In A Community Setting Rather Than In An Institution

Congress enacted the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq*., "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress was particularly concerned that the segregation of individuals with disabilities in institutions constituted a form of discrimination. For example, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress also found that "individuals with disabilities continually encounter various forms of discrimination, including * * * segregation." 42 U.S.C. 12101(a)(5). Finally, Congress found that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, *independent*

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[3](...continued)
latter question is governed by the standard set out in *Winter* v. *Natural Resources Defense Council*, 129 S. Ct. 365, 375 (2008), which requires that "plaintiffs seeking preliminary relief demonstrate that irreparable injury is *likely* in the absence of an injunction." We note only that even under that high standard there is no requirement that institutionalization be imminent.

living, and economic self-sufficiency for such individuals." 42 U.S.C. 12101(a)(7) (emphasis added).

Title II of the ADA, 42 U.S.C. 12131 *et seq*., broadly prohibits discrimination against individuals with disabilities in public services, including the unnecessary provision of such services in a segregated setting. Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. To address Congress's concern regarding the segregation of individuals with disabilities as a form of discrimination, the Attorney General promulgated an "integration regulation," which provides 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). The "most integrated setting" is "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. Pt. 35, App. A.

In *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 607 (1999), the Supreme Court interpreted this integration mandate as requiring states that offer treatment to persons with disabilities, where appropriate, to provide such treatment in

community settings rather than in institutions. The plaintiffs in *Olmstead* were individuals with mental disabilities who were confined to the psychiatric unit of a Georgia hospital, even though the State had determined that their needs could be met appropriately in one of its community-based programs. See 527 U.S. at 593. The plaintiffs challenged their institutionalization under Title II. See *id*. at 593-594. The Court considered the facts in light of the integration regulation and another regulation requiring that a public entity "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7). The Court concluded that Title II's proscription of discrimination requires "placement of persons with mental disabilities in community settings rather than in institutions" where (1) "the State's treatment professionals have determined that community placement is appropriate"; (2) "the transfer from institutional care to a less restrictive setting is not opposed by the affected individual"; 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 587; accord *id*. at

607.[4]

B. Institutionalization Is Not A Prerequisite To Establishing A Violation Of Title II's Integration Mandate

Defendants point out (Def. Br. 43) that this Court has yet to resolve the question "whether or to what extent disabled individuals who are *not* currently institutionalized may assert ADA integration claims to challenge state actions that give rise to a risk of unnecessary institutionalization." Although this Court has never addressed the issue directly, plaintiffs need not wait until they are institutionalized before they can assert such claims, for several reasons.

First, neither the statute nor the integration regulation applies solely to institutionalized persons. On the contrary, both protect "qualified individuals with disabilities." 28 C.F.R. 35.130(d); accord 42 U.S.C. 12132. A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a

[4] Defendants in this case do not argue that the relief requested in this case would "fundamentally alter the nature" of the IHSS program. Accordingly, applicability of the fundamental-alteration regulation, 28 C.F.R. 35.130(b)(7), is not at issue.

public entity." 42 U.S.C. 12131(2). There is no question in this case, and defendants do not contest, that plaintiffs, who already receive IHSS assistance through Medi-Cal, are "qualified individuals with disabilities" within the meaning of Title II. See also *Townsend* v. *Quasim*, 328 F.3d 511, 516 (9th Cir. 2003) (concluding that plaintiff was a "qualified individual with a disability" for purposes of Title II because he was eligible to receive services through State's Medicaid program, he preferred to receive such services in a community-based setting, and community-based services were appropriate for his needs).

Second, although *Olmstead* involved the ongoing institutionalization of persons with mental disabilities, its holding was broader than the facts of that case. The Court held that "[u]njustified isolation * * * is properly regarded as discrimination based on disability." *Olmstead*, 527 U.S. at 597. The Court explained that this holding "reflects two evident judgments." *Id*. at 600. "First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Ibid*. "Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Id*. at 601.

Olmstead therefore makes clear that the aim of the integration mandate is to eliminate unnecessary institutionalization. That purpose can be served by allowing suit by those who seek to avoid being unnecessarily institutionalized, as well as by those confined to an institution seeking to return to their communities.

Third, the only court of appeals to address directly whether non-institutionalized individuals with disabilities may assert an integration claim under Title II to challenge a state policy that puts them at risk of being institutionalized has concluded that they may bring such a claim. See *Fisher* v. *Oklahoma Health Care Auth.*, 335 F.3d 1175, 1181-1182 (10th Cir. 2003). The plaintiffs in *Fisher*, like plaintiffs in this case, were receiving Medicaid-funded medical care through the State's home and community-based services program. See *id*. at 1177. When the State decided to limit the number of prescription medications that participants could receive, plaintiffs sought a preliminary injunction, arguing that the change in policy violated the integration mandate of Title II because it would force them out of their communities and into nursing homes to obtain the care that they needed. See *id*. at 1177-1178. The district court denied the request for relief, holding that the plaintiffs could not maintain a claim under Title II because they were not institutionalized and faced no risk of institutionalization. See *id*. at 1178. The court of appeals reversed. See *ibid*.

The Tenth Circuit held that "*Olmstead* does not imply that disabled persons who, by reason of a change in state policy, stand imperiled with segregation, may not bring a challenge to that state policy under the ADA's integration regulation without first submitting to institutionalization." *Fisher*, 335 F.3d at 1182. In reaching this conclusion, the court pointed out that "there is nothing in the plain language of the regulations that limits protection to persons who are currently institutionalized," explaining that such protection "would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation." *Id*. at 1181. The court also observed that "nothing in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA's integration requirements." *Ibid*.

Fourth, many district courts, including several within this circuit, have similarly concluded that *Olmstead* applies in situations where the plaintiffs are not institutionalized. In *Brantley* v. *Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal. 2009), for example, the court considered another aspect of California's recent budget cuts, which would have reduced services provided to individuals with disabilities through the State's Adult Day Health Care (ADHC) program from a maximum of five days to three days per week. The court rejected the defendants'

argument that "in order to state a Title II violation, Plaintiffs must show that the program reduction leaves them 'no choice' other than to be institutionalized in the event their ADHC services are limited to three days." *Id*. at 1170. Relying in part on *Fisher*, the court held that "the *risk* of institutionalization is sufficient to demonstrate a violation of Title II." *Ibid*. Also, in *Makin* v. *Hawaii*, 114 F. Supp. 2d 1017, 1034 (D. Haw. 1999), the court concluded that plaintiffs, who resided at home while on the waiting list for community-based services offered through the State's Medicaid program, could challenge administration of the program as violating Title II's integration mandate because it "could potentially force Plaintiffs into institutions." And in *Ball* v. *Rodgers*, No. 00-cv-67, 2009 WL 1395423, at *5 (D. Ariz. April 24, 2009), the court concluded that state defendants violated Title II's integration mandate because their "failure to provide Plaintiffs with the necessary services threatened Plaintiffs with institutionalization."[5]

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[5] See also *Marlo M.* v. *Cansler*, No. 5:09-CV-535-BO, 2010 WL 148849, at *2 (E.D.N.C. Jan. 17, 2010) (concluding that plaintiffs have shown a likelihood of success on the merits of their ADA claims because they have shown that the State's termination of funding "will force Plaintiffs from their present living situations, in which they are well integrated into the community, into group homes or institutional settings"); *M.A.C.* v. *Betit*, 284 F. Supp. 2d 1298, 1309 (D. Utah 2003) (relying on *Fisher* to conclude that the ADA's integration mandate applies equally to those individuals already institutionalized and to those at risk of institutionalization); *Mental Disability Law Clinic* v. *Hogan*, No. 06-cv-6320, 2008 WL 4104460, at *15 (E.D.N.Y. Aug. 28, 2008) (unpublished decision)

(continued...)

Fifth, although this Court has never addressed the issue directly, it did apply *Olmstead* to an integration claim asserted by a non-institutionalized plaintiff in *Townsend*. The plaintiff in that case had diabetic peripheral vascular disease and amputations of both legs. See *Townsend*, 328 F.3d at 514. Before filing suit, his income qualified him for in-home assistance through the State's Medicaid program. See *ibid*. A small increase in his income, however, subsequently disqualified him from receiving living and medical assistance at home. See *ibid*. The State informed him that he would have to move to a nursing home or lose his Medicaid benefits. See *ibid*. This Court held that the refusal to continue to provide such benefits in a community-based setting constituted discrimination under Title II. See *id*. at 516-518.

Finally, strong policy considerations counsel against adopting a rule that would limit the protection of Title II's integration mandate to persons who are already institutionalized. The ADA was enacted to eliminate discrimination against individuals with disabilities, including their unnecessary segregation. As

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[5](...continued)
("[E]ven the risk of unjustified segregation may be sufficient under *Olmstead*."); *Crabtree* v. *Goetz*, No. 3:08-0939, 2008 WL 5330506, at *30 (M.D. Tenn. Dec. 19, 2008) (unpublished decision) ("Plaintiffs have demonstrated a strong likelihood of success on the merits of their [ADA] claims that the Defendants' drastic cuts of their home health care services will force their institutionalization in nursing homes.").

the Tenth Circuit observed in *Fisher*, such protection "would be meaningless" if it did not include protection against a discriminatory law or policy that "threatens to force [individuals with disabilities] into segregated isolation." 335 F.3d at 1181. Indeed, forcing those in community settings to enter institutions in order to raise *Olmstead* claims would require placement of those individuals in institutions and then placement again in community settings. Such continuous dislocation can come at considerable human cost, resulting in deterioration of individuals' conditions. Moreover, it would come at great financial cost, requiring expenditure of resources that could be put to better use. In short, individuals with disabilities who reside in community placements should be permitted to bring integration claims under the ADA to prevent their unnecessary institutionalization.

C. The Risk Of Institutionalization Need Not Be "Imminent"

Defendants contend (Def. Br. 43-44) that plaintiffs cannot prevail on the merits of their ADA claims because they have not shown that they will experience "imminent institutionalization," arguing that, "to have standing to bring a claim for unjustified institutionalization under the integration mandate, a plaintiff who is not already institutionalized must show that institutionalization is '*certainly* impending.'" This argument lacks merit for two reasons.

First, defendants incorrectly conflate the requirements of Article III standing with the merits of integration claims. The issue here is not whether plaintiffs have "standing." Indeed, defendants do not dispute that the named plaintiffs and other class members will lose some or all of their current IHSS assistance as a result of the new eligibility standards in ABX4 4. In fact, defendants concede that 133,000 people will lose services once the new law takes effect. See *V.L.*, 2009 WL 3486708, at *4. Plaintiffs therefore have standing because they have alleged injury – *i.e.*, the loss of services – resulting from defendants' conduct. See *Skaff* v. *Meridien North America Beverly Hills*, 506 F.3d 832, 838 (9th Cir. 2007) ("The existence of standing turns on the facts as they existed at the time the plaintiff filed the complaint," and "[a]t the pleading stage, general factual allegations of injury resulting from defendant's conduct may suffice.") (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). At issue in this case is whether defendants' conduct violates Title II of the ADA, which is a question about the merits of plaintiffs' claims, not justiciability.

Second, plaintiffs need not show that they will experience "imminent" institutionalization. As already explained, a violation of Title II's integration mandate may be established by showing that the denial of services under ABX4 4 places individuals with disabilities at serious risk of being unnecessarily

institutionalized. For some individuals, the denial of services could result in immediate institutionalization. For others, it could lead to their eventual institutionalization over time. In both cases, the unnecessary institutionalization of such individuals violates the integration mandate of the ADA. See *Olmstead*, 527 U.S. at 597. Indeed, in *Fisher*, p. 20-21, *supra*, the first circuit court case to explicitly recognize risk-of-institutionalization claims, there was no allegation that the cap on prescription medications threatened any of the plaintiffs with immediate institutionalization. Rather, the evidence showed that many of the plaintiffs would remain in their homes "until their health ha[d] deteriorated" and would "*eventually* end up in a nursing home." *Fisher*, 335 F.3d at 1185 (emphasis added). In concluding that plaintiffs need not be institutionalized to assert an integration claim, the district court in this case similarly found that the denial of IHSS assistance could lead to an eventual "decline in health" that puts individuals at "risk [of] being placed in a nursing home." *V.L.*, 2009 WL 3486708, at *11. The district court correctly held that such allegations, if proven, establish a violation of Title II's integration mandate.

CONCLUSION

This Court should affirm the district court's holding that institutionalization is not a prerequisite to establishing a violation of Title II's integration mandate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains 5549 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) 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 proportionally spaced typeface using WordPerfect X4, in 14-point Times New Roman font.

s/ Tovah R. Calderón
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Attorney

Dated: March 2, 2010

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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