Hon. Thomas S. Zilly

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

M.R., et. al, Plaintiffs, v. SUSAN DREYFUS, et al., Defendants.	Case No. 2:10-cv-02052-TSZ **STATEMENT OF INTEREST OF THE UNITED STATES** PARTICIPATION IN ORAL ARGUMENT REQUESTED

I INTRODUCTION

The United States files this Statement of Interest, pursuant to 28 U.S.C. § 517, because this litigation implicates the proper interpretation and application of title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, ("ADA"). In particular, this case involves title II's integration mandate. *See Olmstead v. L.C.*, 527 U.S. 581, 607 (1999). The Department of Justice has authority to enforce title II, and to issue regulations implementing the statute. § 42 U.S.C. § 12133-34. The United States has a strong interest in the resolution of this matter and

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION
950 Pennsylvania Avenue, N.W. – NYA
Washington, D.C. 20530
Telephone: (202) 307-0663

respectfully requests this Court grant Plaintiffs' Motion for Preliminary Injunction.

This suit alleges that the State of Washington's planned reduction in personal care hours to individuals with disabilities who receive these services in the community places them at risk of institutionalization in violation of the ADA. Plaintiffs all live in community settings, primarily in their own homes, and are able to enjoy community life such as attending church, volunteering, going to movies and visiting with family. However, the independence and stability that Plaintiffs enjoy is threatened by the sudden reduction in personal care hours on which they depend.

Plaintiffs produce substantial evidence regarding the anticipated devastating effects of the service reductions including institutionalization, deteriorating health and even death. The State's swift implementation of the reduction without advanced analysis, individual assessments, plans for alternative services or other implementation plans to ensure that individuals are not placed at risk of institutionalization, undermines the State's contention that the reductions are harmless. The State asserts that the reduction is necessary in light of budget shortfalls; however, it admits that institutional care is more costly than providing the same care in the community.

II SUMMARY OF FACTS

A. Washington Provides Personal Care Hours Through Several Medicaid Programs

Approximately 45,000 elderly and disabled Washington residents receive Medicaid in-home personal care services (Susan Dreyfus Decl., DKT 124, ¶ 5, Jan. 25, 2011) that enable them to live independently and in community-based settings. In-home personal care attendants assist Plaintiffs with essential daily tasks including eating, bathing, cooking, cleaning, bowel care (e.g. changing a ileostomy bag and incontinence briefs), shopping, transferring to and from the

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toilet and changing body positions to avoid ulcers.[1]

Of the 45,000 individuals who receive Medicaid in-home personal care services (Dreyfus Decl. ¶ 5), over 60% receive the services through one of Washington's Medicaid waiver programs (Charles Reed Decl., DKT 18, ¶¶ 19-20, Dec. 20, 2010). The Medicaid waiver[2] program allows states to provide home and community-based services to the elderly and individuals with disabilities for whom "there has been a determination that but for the provision of such services the individuals would require the level of care provided in an hospital or a nursing facility or intermediate care facility for [individuals with intellectual disabilities[3]]." 42 U.S.C. § 1396n(c)(1); 42 U.S.C. § 1396(d)(1). States are required to perform an initial evaluation and at least annual evaluations to determine that "but for the provision of waiver services" the individual would be institutionalized. 42 C.F.R. § 441.302(c). Thus, for the approximately 30,000 class members who receive personal care services through one of Washington's waiver programs, the State has already made the determination that these services are necessary to prevent their institutionalization. The State must further provide assurances to the Centers for Medicare and Medicaid Services ("CMS") of the same. *Id*.

The remaining class members receive personal care services through Washington's Medicaid state plan. (Reed Decl. ¶¶ 19-20.) The Medicaid Personal Care program ("MPC") is

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[1] (Vickie Partridge Decl., DKT 35, ¶¶ 2, 5, 9, Dec. 22, 2010; Donna Albott Decl., DKT 37, ¶¶ 9-10, Dec. 14, 2010; Donna Hays Decl., DKT 39, ¶ 15, Dec. 19, 2010; Lucille Frederick Decl., DKT 40, ¶ 11, Dec. 15, 2010; Debra Dockstader Decl., DKT 42, ¶ 10, Dec. 15, 2010; Karen Paolino Decl., DKT 45, ¶ 14, Dec. 16, 2010; Maria Allington Decl., DKT 52, ¶ 13, Dec. 18, 2010.)

[2] The "waiver" authority permits the Secretary of Health and Human Services to waive certain Medicaid requirements in order for the State to offer the services. *See* 42 U.S.C. § 1396n(c)(3); 42 U.S.C. § 1396n(d)(3).

[3] The term "mental retardation" is replaced by "intellectual disability" throughout this brief as is consistent with current usage. *See* Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010).

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"designed to help [individuals] remain in the community" and "offers an alternative to nursing home care." [4] Wash. Admin. Code § 388-106-0015 (2010). In order to qualify for the MPC program, the individual must have unmet or partially unmet needs in Activities of Daily Living ("ADL") including, for example, eating, toileting, bathing, dressing, transferring, medication management, and personal hygiene. Wash. Admin. Code § 388-106-0210 (2010). The vast majority of individuals receiving personal care services through the MPC program also meet the eligibility criteria for institutional care. (Reed Decl. ¶ 19a.)

Finally, the State must also determine that the personal care services are medically necessary. Wash. Admin. Code 388-501-0050 (4). A medically necessary service is one that is "reasonably calculated to prevent, diagnose, correct, cure, alleviate or prevent worsening of conditions in the client that endanger life, or cause suffering or pain, or result in an illness or infirmity, or threaten to cause or aggravate a handicap, or cause physical deformity or malfunction." Wash. Admin. Code 388-500-0005.

Since approximately 2003 (Bea-Alise Rector Decl., DKT 125, ¶ 12, Jan. 12, 2011), the Department of Social and Health Services (DSHS) has utilized the Comprehensive Reporting Evaluation (CARE) system in order to assess individual needs and determine the number of in-home personal care hours that beneficiaries will receive. (Penny Black Decl., DKT 19, ¶¶ 6-9, Dec. 22, 2010; Reed Decl. ¶¶ 26-28, 32.) The CARE assessment relies upon in-person evaluations and is based upon standardized screening tools that have been proven to increase the

[4] The State asserts that the "essential purpose" of personal care services is to assist individuals with ADLs, and not to allow them to remain in a community-based setting. (Defs.' Resp. to Pls.' Mot. for TRO, DKT 66, 14-15.) This argument is misguided because it ignores the entire purpose of the Medicaid Waiver program, discussed above, and the express purpose of the MPC program under the Washington Medicaid state plan.

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assessments' reliability and accuracy. (Black Decl. ¶¶ 8-12, 18, 20-21, 25.) The CARE assessment occurs each year, or when there is a significant change to the individual's ability to care for his/her self. Wash. Admin. Code § 388-106-0050 (2010). The CARE tool is used to determine the number of personal care hours that individuals will receive, and whether they receive services through a Medicaid waiver program or the Medicaid state plan. Wash. Admin. Code § 388-106-0070 (2010).

B. Plaintiffs Reside in the Community and Depend upon Personal Care Services for Their Essential Needs

Plaintiffs currently reside in the community. They all have severe disabilities and rely heavily on their personal care attendants for their basic needs. For example, Z.J., who has quadriplegia, lives at home and is "able to be there as a parent for his children." (Glenda Faatoafe Decl., DKT 56, ¶ 15, Dec. 17, 2010.) Along with emptying his catheter bag three times per day, Z.J.'s caretaker prepares and places formula into Z.J.'s feeding machine. (*Id*. ¶ 12a-b.)

A.R. "values independent living," and, at 63, "is so young compared to the other people in facilities, so she really enjoys being able to spend more time with her family and people her own age." (Frederick Decl. ¶ 14.) A.R., however, is paralyzed on her right side, is blind in her right eye (*id.* ¶ 9) and must use an ileostomy bag to relieve herself (*id.* ¶ 11c). She requires extensive assistance eating, with bathing and hygiene, being repositioned in bed, and dressing herself. (Dockstader Decl. ¶ 10b-f.) Additionally, A.R.'s ileostomy bag requires cleaning every two hours, including during the nighttime. (Frederick Decl. ¶ 11c.)

A.H., who has grey matter disease, glaucoma and neuropathy, enjoys living with family. (Donna Kay Guin Decl., DKT 55, ¶ 11, Dec. 18, 2010.) She receives assistance with her oxygen machine, getting in and out of bed, bathing, toilet use, food preparation, mobility, and medication

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management. (*Id.* ¶ 13a-e; A.H. Decl. ¶¶ 5-6.) Moreover, she has "never stayed in a nursing home and . . . would never want to go to one." (A.H. Decl. ¶ 8.)

M.R., who has severe mental retardation, daily seizures, and cerebral palsy (Dorcas Maxson Decl., DKT 26, ¶ 3, Dec. 19, 2010), "loves the independence she is afforded by living at home to set her own schedule, do puzzles, color or trace letters, and spend time with [her personal care service provider] playing with beads or sorting coins" (*id.* ¶ 10). In addition to assisting M.R. with normal ADLs (*id.* ¶ 8), M.R.'s caretaker assists M.R. with her feeding tube, which "requires extensive maintenance . . . and has a tendency to ooze and become infected, and because she has a tendency to grab and pull on it" (*id.* ¶ 8b).

D.V.S., who is missing a portion of his skull as a result of brain surgery (D.V.S. Decl., DKT 59, ¶ 9, Dec. 18, 2010), receives assistance repositioning himself to avoid damage to the back of his head, and also receives assistance showering. (*Id.* ¶ 7.)

C. State of Washington's Reduction of Personal Care Hours

On September 14, 2010, Governor Christine O. Gregoire issued Executive Order 10-04, which ordered the reduction of general funds appropriations by 6.287% to offset the State budget shortfall in the current fiscal period and directed each agency to submit a plan to implement the reductions. (Andrea Brenneke Decl., DKT 12, Exs. 2, 3, Dec. 23, 2010.) In response, Defendants submitted a plan that called for, *inter alia*, the reduction of in-home beneficiaries' personal care hours by an average of 10%. (*Id.* Ex. 4.) In order to realize the anticipated budget savings from reducing the personal care hours, the Plaintiffs must remain in the community because of the high cost of institutional care. (Reed Decl. ¶ 20; Defs.' Resp. to Pls.' Mot. for TRO 27.) Defendants issued emergency regulations on November 17, 2010 and implementation

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Telephone: (202) 307-0663

instructions to their staff on December 2, 2010. Wash. Reg. 242113 (Dec. 30, 2010) (attached as Exhibit A); (Brenneke Decl. Ex. 1). However, the Defendants did not complete or plan new assessments of Plaintiffs' needs in order to determine if the reduced hours are sufficient to safely maintain Plaintiffs in their respective communities. (Reed Decl. ¶ 42.) Further, these cuts were on top of an average 4% decrease that went into effect in FY 2010. (Black Decl. ¶ 29.) Named Plaintiffs, along with approximately 45,000 other beneficiaries of personal care hours in Washington State, were notified via U.S. Mail at the beginning of December, 2010 that their personal care hours were being reduced and that no appeals would be granted. (C.B. Decl., DKT 29, Ex.4 at 1, Dec. 16, 2010.) Defendants were scheduled to implement the reductions on January 1, 2011. (Jane B. Decl., DKT 33, ¶¶ 4-5., Dec. 22, 2010)[5]

III. ARGUMENT

A. *Olmstead* and the Integration Mandate

Congress enacted the ADA in 1990 "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 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). For those reasons, Congress prohibited discrimination against individuals with disabilities by public entities.

[5] At the time of this filing, the State's implementation of these reductions is unknown given the injunction ordered by the Ninth Circuit Court of Appeals on January 14, 2011 and the State's representation to the Ninth Circuit that it was not possible to reverse the implementation before the first week of February. (Order, DKT 92, filed Jan. 20, 2011; Defs.' Mot. for Recons., 9th Cir. DKT 30-1 (No. 11-35026).)

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> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

As directed by Congress, the Attorney General issued regulations implementing title II, which are based on regulations issued under section 504 of the Rehabilitation Act.[6] *See* 42 U.S.C. § 12134(a); 28 C.F.R. § 35.190(a); Executive Order 12250, 45 Fed. Reg. 72995 (1980), *reprinted in* 42 U.S.C. § 2000d-1. The title II regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). The preamble discussion of the "integration regulation" explains that "the most integrated setting" is one that "enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible . . . ." 28 C.F.R. Pt. 35, App. A (2010) (addressing § 35.130). This mandate advances one of the

[6] Title II was modeled closely on section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination on the basis of disability in federally conducted programs and in all of the operations of certain entities, including public entities, that receive federal financial assistance. Title II provides that "[t]he remedies, procedures, and rights" applicable to section 504 shall be available to any person alleging discrimination in violation of title II. 42 U.S.C. § 12133; *see also* 42 U.S.C. § 12201(a) (ADA must not be construed more narrowly than Rehabilitation Act). The ADA directs the Attorney General to promulgate regulations to implement title II, and requires those regulations to be consistent with preexisting federal regulations that coordinated federal agencies' application of section 504 to recipients of federal financial assistance, and interpreted certain aspects of section 504 as applied to the federal government itself. 42 U.S.C. § 12134(a)-(b). Title II thus extended section 504's pre-existing prohibition against disability-based discrimination in programs and activities (including state and local programs and activities) receiving federal financial assistance or conducted by the federal government itself to all operations of state and local governments, whether or not they receive federal assistance. The ADA and the Rehabilitation Act are generally construed to impose the same requirements. *See Sanchez v. Johnson*, 416 F.3d 1051, 1062 (9th Cir. 2005); *Zukle v. Regents of Univ. of California*, 166 F.3d 1041, 1045 n. 11 (9th Cir. 1999). This principle follows from the similar language employed in the two acts. It also derives from the Congressional directive that implementation and interpretation of the two acts "be coordinated to prevent[ ] imposition of inconsistent or conflicting standards for the same requirements under the two statutes." *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468-69 (4th Cir. 1999) (citing 42 U.S.C. § 12117(b)). *See also Yeskey v. Com. of Pa. Dep't of Corr.*, 118 F.3d 168, 170 (3d Cir. 1997) ("[A]ll the leading cases take up the statutes together, as we will."), *aff'd*, 524 U.S. 206 (1998).

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principal purposes of title II of the ADA—ending the isolation and segregation of people with disabilities. *See Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005).

Twelve years ago, the Supreme Court applied these authorities and held that title II prohibits the unjustified segregation of individuals with disabilities. *Olmstead*, 527 U.S. at 596. *Olmstead* held that public entities are required to provide community-based services for persons with disabilities who would otherwise be entitled to institutional services when (1) individuals are appropriate for community placement; (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 entity and the needs of others who are receiving disability services from the entity. *Olmstead*, 527 U.S. at 607.

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." *Id*. "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. A state's obligation to provide services in the most integrated setting may be excused only where a state can prove that the relief sought would result in a "fundamental alteration" of the state's service system. *Id.* at 603-04.

B. <u>A Budget Crisis does not Automatically Relieve the State of its Duty Under the ADA</u>

A public entity cannot simply point to a budgetary shortfall as an excuse for failure to

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comply with *Olmstead.* "[T]hat [a state] has a fiscal problem, by itself, does not lead to an automatic conclusion" that providing the community services that Plaintiffs seek would be a fundamental alteration. *Fisher v. Oklahoma*, 335 F.3d 1175, 1181 (10th Cir. 2003). Indeed, "[i]f every alteration in a program or service that required the outlay of funds were tantamount to a fundamental alteration, the ADA's integration mandate would be hollow indeed." *Id.* at 1183. Congress was aware that integration "will sometimes involve substantial short-term burdens, both financial and administrative," but the long-term effects of integration "will benefit society as a whole." *Id.* Similarly, the Third Circuit Court of Appeals held that a fundamental alteration defense based solely on a budgetary shortfall analysis is insufficient. *Pa. Prot. & Advocacy, Inc. v. Pa. Dep't of Pub. Welfare*, 402 F.3d 374, 380 (3d Cir. 2005). In *Radaszewski v. Maram*, 383 F.3d 599, 614 (7th Cir. 2004), the Court similarly held that increased costs necessary to prevent institutionalization does not alone defeat a title II claim.

C. Plaintiffs Need Not Be Institutionalized To Pursue an ADA Claim

The integration mandate prohibits public entities from pursing policies that place individuals at risk of unnecessary institutionalization. *Fisher*, 335 F.3d at 1181. Plaintiffs need not wait until they are institutionalized to pursue a claim for violation of the ADA because the goal of the integration mandate is to eliminate unnecessary institutionalization, and requiring Plaintiffs to enter an institution before they may bring a title II claim would defeat this fundamental purpose. In *Fisher*, the Tenth Circuit Court of Appeals rejected defendants' argument that plaintiffs could not make an integration mandate challenge until they were placed in institutions. *Id.* The court reasoned that the protections of the integration mandate "would be meaningless if plaintiffs were required to segregate themselves by entering an institution before

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they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation." *Id*.[7]

D. Plaintiffs Satisfy the Requirements for a Preliminary Injunction.

To obtain a preliminary injunction, plaintiffs must show (1) likelihood of success on the merits of their ADA Title II claim; (2) likelihood that the disruption in services will cause irreparable harm; (3) that the balance of hardships weighs in favor of plaintiffs; and (4) that granting an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 29 S. Ct. 365, 374-76 (2008).

1. Plaintiffs Are Likely To Prevail on Their ADA Claim

Plaintiffs can establish the three key elements of an *Olmstead* claim. The first two elements—that Plaintiffs are appropriate for and do not oppose community placement—do not appear to be in dispute. This case turns on whether the Defendants' reduction in personal care services places the Plaintiffs at risk of institutionalization. Both parties agree that if the

[7] *See also Marlo M. v. Cansler*, 679 F. Supp. 2d 635, 637 (E.D.N.C. 2010); *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 985 (N.D. Cal. 2010) *appeal docketed*, No. 10-15635 (9th Cir. Mar. 24, 2010); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1164 (N.D. Cal. 2009); and *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1109 (N.D. Cal. 2009), *appeal docketed* No. 09-17581 (9th Cir. Nov. 18, 2009) (all granting preliminary injunctions where plaintiffs were at risk of institutionalization due to cuts in community-based services); *M.A.C. v. Betit*, 284 F. Supp. 2d 1298, 1309 (D. Utah 2003) (ADA's integration mandate applies equally to those individuals already institutionalized and to those at risk of institutionalization); *Makin v. Hawaii*, 114 F. Supp. 2d 1017, 1034 (D. Haw. 1999) (individuals in the community 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"); *Ball v. Rogers*, 2009 WL 1395423, at *5 (D. Ariz. April 24, 2009) (holding that defendants' failure to provide adequate services to avoid unnecessary institutionalization was discriminatory); *Cruz v. Dudek*, No. 10-23048, 2010 WL 4284955, at *3-7 (S.D. Fla. Oct 12, 2010) (Magistrate's Report and Recommendation Adopted by Court Nov. 24, 2010, attached as Exhibit B) (granting preliminary injunction where state's denial of community-based services placed plaintiffs at risk of institutionalization); *Crabtree v. Goetz*, 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 State even argues that informing recipients of the ETR process in the State's notice creates a substantial burden on the State. (Defs.' Resp. to Pls.' Mot. for Prelim. Inj., DKT 123, ¶ 14, Jan. 25, 2011.)

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Plaintiffs' prediction that the reduction in personal care hours will place them at risk of institutionalization comes true, then the State will not realize its anticipated budget savings from the reductions. (Defs.' Resp. to Pls.' Mot. for TRO at 27; Reed Decl. ¶ 20.) Thus, while the State's budgetary shortfall drove the Defendants' decision to reduce the services in the first place, this not a case where the State's compliance with *Olmstead* is at odds with the State's financial interests. The Plaintiffs have established that the sudden reductions in personal care services places them at risk of institutionalization.

a) Imminent Risk of Institutionalization Is Not Required Under the ADA Integration Mandate

The elimination of services that have enabled Plaintiffs to remain in the community violates the ADA, regardless of whether it causes them to enter an institution immediately, or whether it causes them to decline in health over time and eventually enter an institution to seek necessary care. In *Fisher*, there was no allegation that the defendants' actions threatened any of the plaintiffs with immediate institutionalization. 335 F.3d at 1185. 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." *Id.* (emphasis added). Indeed, in *Brantley v. Maxwell-Jolly*, the court explicitly rejected the defendants' assertion that "in order to state a Title II violation, Plaintiffs must show that the [State's reduction in community-based services] leaves no choice other than to be institutionalized . . ." but rather concluded that "the *risk* of institutionalization is sufficient[,]" and thus granted the plaintiffs' motion for a preliminary injunction. 656 F. Supp. 2d at 1170. (quotation marks omitted); *see also V.L.*, 669 F. Supp. 2d at 1120 (concluding that plaintiffs may establish a violation of the integration mandate by showing that the denial of services could lead to an eventual "decline in health" that puts

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them at "risk [of] being placed in a nursing home.").

Recently, a district court considered whether the state of Missouri violated the integration mandate of the ADA when it refused, as a matter of statewide policy, to provide incontinence briefs under its Medicaid state plan to adults residing in the community. *Hiltibran v. Levy*, No. 10-4185 (D. Mo. Dec. 24, 2010) (attached as Exhibit C). The court held that despite the plaintiffs' ability thus far to pay for the briefs themselves to avoid institutional placement, the plaintiffs were nonetheless likely at risk of institutionalization because the cost of the briefs strained the plaintiffs' already precarious financial situations. *Id.* at 11, 14. The district court recognized that the risk of institutionalization does not need to be imminent; indeed, many individuals go to great lengths to stave off institutionalization. *Id*. at 11. Similarly, in *Cruz v. Dudek*, No. 10-23048 (S.D. Fla. filed Aug. 18, 2010), the district court found that although the plaintiffs resided in the community for multiple years without the services they sought, they were likely at risk of institutionalization due to the lack of sufficient community services. *Cruz v. Dudek*, No. 10-23048, 2010 WL 4284955, at *3-7, 13 (S.D. Fla. 2010 Oct. 12, 2010) (See Exhibit B, Court's Order Adopting Magistrate Judge's Report and Recommendation).

b) Plaintiffs Demonstrate That They Are At Risk of Institutionalization as a Result of the Reduction in Personal Care Services

The Plaintiffs here are similarly at risk of institutionalization (some are at immediate risk while others face a risk that increases over time) due to the State's reduction of their personal care hours. Jennifer Wujick, a certified nursing assistant who works with new admissions at a nursing facility in Spokane, Washington, observed that two individuals were admitted to her facility in the first two weeks of January, 2011 because of deteriorating health due to reduced personal care hours. (Jennifer Wujick Decl., DKT 119, ¶¶ 3-6, Jan. 21, 2011.) Sean Walsh, a

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community service provider, estimates that 5% of his clients will require immediate "hospitalization, emergency room visits, and imminent institutionalization" as a result of the reductions in services. (Sean Walsh Decl., DKT 25, ¶ 13, Dec. 20, 2010.)

For other Plaintiffs, like the plaintiffs in *Fisher, Hiltibran*, *V.L.*, *Brantley* and *Cruz*, the reduction in hours places them at risk of institutionalization, but not necessarily imminently. For example, the State's reduction of J.P.'s hours resulting in 30 minutes less personal care provider per day means that her provider no longer always has enough time to clean adequately between J.P.'s legs and clean and replace her catheter daily, which is causing skin breakdowns and infections necessitating hospitalization. (Val Anderson-Webb Decl., DKT 105, ¶ 25b-c, Jan. 21, 2011.) Z.J., who has quadriplegia and requires total assistance for bathing, toileting and eating through a feeding tube (Faatoafe Decl. ¶ 9), will not be able to take a shower as a result of his reduction in hours (Faatoafe Decl. ¶ 19). Instead, he will likely have to resort to the inferior "bed bath," which creates a high risk of infection. (*Id.*) Further, Z.J.'s bowel program (inducing his bowels with a suppository, then cleansing Z.J. following the bowel movement) will be delayed every morning because the personal care attendants cannot arrive as early due to the reductions. (*Id.* ¶¶ 12b, 20.) This change in his care routine places Z.J. at risk of infection, hospitalization and even death. (*Id.* ¶ 20.) Z.J.'s personal care attendant, Glenda Faatoafe, has been providing Z.J.'s care for five years (*id.* ¶ 2), and she believes the reduced hours will result in a "concerning gap of care" and a "serious risk of deteriorating [health]" (*id.* ¶ 16). Victoria Partridge, who has provided personal care assistance for A.B., An.B., J.B. and M.B. over the past eight years, will have to make impossible choices between tasks such as taking A.B., M.B. and J.B. to medical appointments, doing laundry after toileting incidents, cooking and bathing.

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(Partridge Decl. ¶ 13.) Ms. Partridge fears that the reduced hours will force A.B., An.B., J.B. and M.B. into nursing homes. (*Id.* ¶¶ 5, 27.)

For those receiving additional hours through the Exception to the Rule (ETR) process, the harm associated with reducing their services is undeniable. The State has already made a specific determination that they require more hours than those generated by CARE for "the client's welfare" and were thus approved for additional hours. Wash. Admin. Code § 388-440-0001. Irrespective of the determination that the additional hours were needed for the individuals' welfare, the State has nevertheless reduced the total hours of in-home personal care to individuals with ETRs.[8] (HCS Management Bulletin, DKT 66, Ex. 10, at 2, Dec. 2, 2010 ("Clients who have ETRs in place for personal care will have the reduction applied to their CARE generated hours, but not the additional hours approved by ETR.").) As a result, the reduction will push the individuals' total personal care hours well below what the ETR process determined to be necessary to maintain their welfare.[9]

c) Experts Agree that Cuts in Services Place Plaintiffs At Risk of Institutionalization

The risk of institutionalization associated with going unbathed, remaining in the same

[8] Defendants point out that the additional hours authorized through the ETR process are not subject to the January 1, 2011 reductions, presumably to preserve the "health and safety" of individuals. (Bill Moss Decl., DKT 68, ¶ 9, Dec. 28, 2010.) Taken alone, this can be misleading because it inaccurately suggests that individuals who receive additional hours through the ETR process will not experience any change in overall hours.

[9] As a hypothetical example, an individual who is classified through CARE as D High (279 base hours pre-cut), and who pursuant to the ETR process was determined to need 300 hours to maintain health and safety in the community, the total hours will *automatically* be cut to 280 hours per month after Defendants' cuts take effect (reflecting a decrease of his or her "base" hours to 260), well below what had previously been determined to meet "safely" the person's needs in the community. Wash. Reg. 242113 (Dec. 30, 2010) (attached as Exhibit A). Indeed, this is exactly how the cuts have played out in the cases of at least two putative Plaintiffs: L.T. (cut of 22 hours from ETR-enhanced level of 561 hours per month) and R.B. (cut of 27 hours from ETR-enhanced level of 420 hours per month). (Walsh Decl. ¶¶ 14-15.)

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950 Pennsylvania Avenue, N.W. – NYA
Washington, D.C. 20530
Telephone: (202) 307-0663

clothing, being left in a bed or chair longer than is acceptable, or being unassisted when needing to go to the bathroom or eat is not mere conjecture or unfounded fear, but is the subject of an academic study that links unmet or partially met ADL needs with institutionalization. Mitchell LaPlante is a professor at the University of California. (Mitchell LaPlante Decl., DKT 68, ¶ 1, Dec. 14, 2010.) He recently published a study on the unmet needs of individuals who receive personal assistant services. (*Id.* ¶¶ 7-9.) He found that "[b]ecause [ADLs] involve satisfying primary biological functions unmet[sic] need cannot be tolerated for long and has immediate and serious consequences leading to death, institutionalization, injury or worsening health . . . ." (*Id.* ¶ 10.) Further, persons with two or more unmet or partially met ADL needs are 1.8 times more likely to enter a nursing home than those with met needs. (*Id.* ¶ 12.) Even temporary unmet needs can threaten individuals' ability to live safely in their own homes, but the risk increases as the needs go unmet over time. (*Id.* ¶ 17.)

Those intimately familiar with Washington's personal care system agree that the current reduction in services places individuals at risk of institutionalization. Charles Reed, who has been dubbed the "architect of the long-term care system in Washington state," served for ten years as the Director of the Washington State Bureau of Aging and Adult Services and was appointed by the Governor to serve as a Chair on the Washington State Home Care Quality Authority, states that "based on my professional opinion [and] based upon my education, training and experience, the magnitude of these cuts will place many people receiving in-home personal care services at immediate risk of serious health deterioration and even death, and will force many individuals into institutional care." (Reed Decl. ¶ 44.) Similarly, Penny Black, the Director of the Washington Home and Community Services Administration until 2005, states

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Telephone: (202) 307-0663

that "it is reasonably likely that many consumers will experience immediate and substantial harm from these hour cuts, are likely to have more medical emergencies and hospitalizations, and will experience serious and irreparable harm to their physical and mental health condition." (Black Decl. ¶ 33.) Sean Walsh, the director of a community provider agency, opines that the reduction in personal care hours "will result in hundreds or thousands of cases of additional Skilled Nursing Home placements and hospitalizations, as well as increases in preventable injury and death for low income, older and disabled adults." (Walsh Decl. ¶ 12.) Nancy Dapper, former Centers for Medicare and Medicaid Services (CMS) administrator states that the reductions "put lives at risk" and are "likely to cause increased danger to [individuals with dementia] and medical emergencies." (Nancy Dapper Decl., DKT 20, ¶¶ 8, 17, Dec. 22, 2010.)

d) The State Cannot Defend the Cuts Based on Vague Promises of Its Compliance with the Integration Mandate

The State contends that the reductions in services will not place individuals at risk of institutionalization. (Defs.' Resp. to Pls.' Mot. for TRO 22-23.) In support, the State argues that the CARE assessment is not a measure of minimum need (*id.* 25-26) thus reducing services below that level is unproblematic, that the significantly smaller 2009 cuts did not cause widespread institutionalization (Moss Decl. ¶ 8), and that the ETR process functions as a safety net to ensure individuals are not institutionalized (*id.*; Defs.' Resp. to Pls.' Mot. for TRO 3, n. 1). Plaintiffs rebut each of these arguments in detail and in total (Pls.' Mot. for Prelim. Inj. 16-24, DKT 95, Jan. 21, 2011), and thus the United States will not respond to them point-for-point, but will address the overall implication of the State's arguments.

Assuming, *arguendo*, the CARE assessment is not a measure of minimum need, then the State must admit, which it does, that it does not know what level of services Plaintiffs need to

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950 Pennsylvania Avenue, N.W. – NYA
Washington, D.C. 20530
Telephone: (202) 307-0663

remain safe in the community. (Defs.' Resp. to Pls.' Mot. for TRO 25-26.) Thus the State is embarking upon an experiment whereupon it hopes that it will not cross an unknown (and according to the State, unidentifiable threshold that places individuals at risk of institutionalization. However, the State has an affirmative obligation to ensure its compliance with title II of the ADA and the integration mandate and take necessary steps to ensure its policies do not place individuals at risk of institutionalization. *See e.g.*, *Fisher,* 335 F.3d at 1181-84; *Frederick L. v. Dep't of Pub. Welfare of Pa.*, 364 F.3d 487, 500 (3d Cir. 2004) ("[The State] must be prepared to make a commitment to action in a manner for which it can be held accountable by the courts."); *Brantley,* 656 F. Supp. 2d at 1174.

Instead of identifying the precise steps that it will undertake to ensure its compliance with *Olmstead*, the State relies (Defs.' Resp. to Pls.' Mot. for TRO 11) on vague assurances and references to unidentified "mitigation efforts" and ill-defined "appropriate steps" by department officials that its actions do not place individuals at risk of institutionalization: "I believe the department's mitigation efforts will readily avoid this worst case scenario . . . ." (Moss Decl. ¶ 8; *see also* Kathy Leitch Decl., DKT 67, ¶ 4 ("In [cases of health and safety and where the out of home placement is jeopardized,] clients are *encouraged* to contact their case manager to communicate concerns and look for ways to address them.")[10] (emphasis added).) Defendants'

[10] The State has discouraged individuals from calling their case managers for help, even if the reductions pose a serious threat to the individuals' health and safety. The State sent notices to all 45,000 recipients informing them the State "knows that these changes may be difficult to you," but that the reductions are program-wide and were directed by the Governor. (Brenneke Decl. Ex. 1A.) The State further failed to inform recipients of the ETR process. (*Id.*) The logical inference from the notice is that calling a case manager is futile, as some plaintiffs have already discovered. (Patricia Bergstrom Decl., DKT 109, ¶ 8, Jan. 14, 2011 (T.W.'s care provider's declaration states that caseworker did not mention ETR process during conversations regarding T.W.'s needs in light of service cuts, but caseworker did suggest placing T.W. in group home); Galen Ages Decl., DKT 107, ¶ 4, Jan. 14, 2011 (Andy Chen, caseworker for M.F., allegedly stated that he will not file any ETR requests for clients in relation to January 1st cuts

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vague assurances in this case are similar to those unsuccessfully proffered by the State of California in *Brantley*, where the State failed to rebut the plaintiffs' evidence that a reduction in adult day services would place individuals at risk of institutionalization:

> [T]he Court is persuaded by Plaintiffs' concern that Defendants have failed to implement any means of ensuring that, if and when the cuts take effect, the necessary alternative services will be identified and in place . . . .
> . . .
> [Defendants] have taken an arguably cavalier approach to ensuring their continuing compliance with the ADA . . . . Defendants refuse to specify how they will ensure their continuing compliance with the ADA . . . in the event that the ADHC programs fail to comply with their "expectation" to secure alternative services for their participants. . . . Defendants certainly bear the burden of ensuring more than a "theoretical" availability of services.

656 F. Supp. 2d at 1174; *see also, Ball v. Rodgers*, No. 00-cv-67, 2009 WL 1395423, at *5 (D. Ariz. April 24, 2009) (holding that defendants violated title II's integration mandate by "fail[ing] to provide adequate services to avoid unnecessary gaps in service and [because the] institutionalization was discriminatory.").

The State half-heartedly raises an affirmative defense that even if Plaintiffs establish that the reductions in personal care services places them at risk of institutionalization, a modification of the State's programs to prevent that risk would affect a fundamental alteration of the State's program. (Defs.' Resp. to Pls.' Mot. for Prelim. Inj. 19, DKT 123, Jan. 25, 2011.) The

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"because his understanding is that the Department will not approve such requests"); Rosa Perkins Decl., DKT 111, ¶ , Jan. 14, 2011 (J.W.'s care provider wanted to file ETR in December 2010 in light of pending cuts, but J.W.'s caseworker "said that the State had passed a law and [clients] just had to live with the reductions"); Anderson-Webb Decl. ¶ 29 (J.P.'s care provider had not heard of ETR until Plaintiffs' firm informed her of it)). When M.A.B.'s care provider called M.A.B.'s caseworker upon receiving notice of the pending cuts, the caseworker did not inform her of the availability of an ETR and stated that "there was nothing she could do." (Sandra Josephsen Decl., DKT 112, ¶ 8, Jan. 21, 2011; *accord* C.B. 2d Decl., DKT 114, ¶ 5, Jan. 21, 2011 (At C.B.'s annual assessment on January 14, 2011, she asked her caseworker about obtaining an ETR in light of pending cuts, but caseworker responded that ETR "did not apply" to C.B.'s case).)

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Defendants have the burden of proving their fundamental alteration defense. *Olmstead v. L.C.*, 527 U.S. 581, 603-04 (1999). The State's argument lacks merit.

The State, up until December 31, 2010, provided personal care services at a sufficient level to maintain individuals in the community. Further, the entire purpose of the Medicaid Waiver programs and Medicaid State plan service is to provide an alternative to institutionalization. Thus, the State cannot now argue that a modification to prevent individuals from being at risk of institutionalization is a fundamental alteration of the State's programs. *See Radaszewski v. Maram*, 383 F.3d 599, 612 (7th Cir. 2004); *Fisher*, 335 F.3d 1175, 1183.

Plaintiffs offer substantial evidence from experts, individual Plaintiffs, doctors, personal care providers and Defendants'policies and regulations that these reductions in services will place Plaintiffs at risk of institutionalization. Defendants attempt to rebut Plaintiffs' evidence with nothing more than vague assurances and non-specific plans to ensure that Plaintiffs are not placed at risk of institutionalization as a result of the reductions. Thus, Plaintiffs have demonstrated the third element of *Olmstead*—that community placement can be reasonably accommodated—and have proved a substantial likelihood of success on their ADA and Rehabilitation Act claims.

2. The Defendants' Reduction in Services Will Result in Irreparable Harm

Deteriorating health and institutionalization is an irreparable harm. *Rodde v. Bonta*, 357 F.3d 988, 999 (9th Cir. 2004); *V.L.*, 669 F. Supp. 2d at 1122. Several Plaintiffs referred to the loss of unfettered socialization, privacy, and pursuit of hobbies and interests and freedoms that they would lose upon admission to a nursing home as reasons for refusing an assisted living placement. (S.J. Decl. ¶ 34; C.B. Decl. ¶ 12; D.W. Decl. ¶ 28b.) For D.V.S., who sustained

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Telephone: (202) 307-0663

severe burns from a gasoline explosion when he was a child (D.V.S. Decl. ¶ 2), several of his wounds "are in private areas" and "[he is] unwilling to expose [him]self to strangers" (*id.* ¶ 21). For C.B., who has increasing difficulties with mental health, nursing home care is likely to cause "her depression and anxiety [to] spiral out of control." (Tia Davis Decl., DKT 30, ¶ 35, Dec. 16, 2010.) For the two individuals who were recently admitted to the nursing facility, M.J. is already "severely depressed" because he cannot return to his home, and C.E. cried upon his arrival to the nursing facility. (Wujick Decl. ¶¶ 5-6.)

Furthermore, several Plaintiffs harbor painful memories from past instances of institutional confinement and abhor the thought of being subjected to it again. Z.J. was recently admitted to a nursing home for a short period with an infection requiring intravenous antibiotics, as his providers were not qualified to administer that medication. (Faatoafe Decl. ¶ 26.) During a previous hospital stay, Z.J. suffered bed sores. (*Id.*) D.V.S. has "been hospitalized for half of [his] life" and does "not want to spend any more time in a facility." (D.V.S. Decl. ¶ 9.) The mere thought of doing so makes him physically ill. (Guin Decl. ¶ 23.)

The Court in *Olmstead*, recognized the adverse effects that occur with unnecessary institutional placements. *Olmstead*, 527 U.S. at 600-01. Other Courts have routinely recognized that the harm associated with institutionalization—even on a short term basis—is severe. In *Long v. Benson*, No. 08cv26, 2008 WL 4571903, at *2 (N.D. Fla. Oct. 14, 2008), a Florida court granted a preliminary injunction in an *Olmstead* case and explained that forcing the individual to leave his community placement and enter a nursing home "will inflict an enormous psychological blow." The court further explained that "because of the very substantial difference in [plaintiff's] perceived quality of life in the apartment as compared to the nursing home, each

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Telephone: (202) 307-0663

day he is required to live in the nursing home will be an irreparable harm." *Id.* *See also, Marlo M.*, 679 F. Supp. 2d at 638)(granting a preliminary injunction because the plaintiffs had "lived successfully in their community based apartments," and, if they lost community services they would "suffer regressive consequences if moved [to a nursing home], even temporarily."); *Crabtree v. Goetz*, No. 08-0939, 2008 WL 5330506, at *25 (M.D. Tenn. Dec. 19, 2008) (unpublished)(granting a preliminary injunction enjoining defendants from cutting home health care services because institutionalization "would be detrimental to [plaintiffs'] care, causing, *inter alia*, mental depression, and for some Plaintiffs, a shorter life expectancy or death.")[11]

3. Balancing the Hardships Weighs in Favor of the Plaintiffs

The hardships that Plaintiffs will endure absent an injunction—including the risk of institutionalization, deteriorating health and even death—far outweigh any potential hardship to the State.

The State argues that the hardship weighs in its favor due to budgetary considerations and the effect an injunction would have on other social services, yet "agrees with Plaintiffs that institutionalization is more costly than serving people in their homes . . . ." (Defs.' Resp. to Pls.' Mot. for TRO 27.) Former State official Charles Reed opines that "[w]ith these cuts, the State of Washington will lose prior budget savings, experience increased costs due to migration of nursing home eligible long term care customers from their homes to residential and institutional facilities, and reverse well-considered, long-standing policy of reducing reliance on nursing homes." (Reed Decl. ¶ 20.) Penny Black, another former State official, agrees that the reduction

[11] *See also Haddad v. Arnold*, No. 3:10-00414 (M.D. Fla. July 9, 2010) (Opinion granting preliminary injunction in *Olmstead* case after finding that the plaintiff would suffer irreparable injury if forced to enter a nursing home) (Attached as Exhibit D).

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in personal care services will have the opposite effect on the State's budget. (Black Decl. ¶ 34.) Laurel Lucia, who holds a master's degree in public policy from the University of California at Berkley, notes that with the reductions in services, the State will lose $26.1 million in Federal Medicaid matching dollars, with a corresponding decline of local state and tax revenue. (Laurel Lucia Decl., DKT 23, ¶¶ 10-11, Dec. 17, 2010.) Contrary to the State's assertion, the injunction will not force it to cut other social services.

When faced with similar reductions in social services, other courts have determined that the harm to the plaintiffs outweigh the defendants' budget considerations. In *Indep. Living Ctr. v. Maxwell-Jolly*, the Ninth Circuit Court of Appeals found that California's fiscal crisis was outweighed by the "robust public interest in safeguarding access to healthcare for those eligible for Medicaid, whom Congress has recognized as the most needy in the country." 572 F.3d 644, 659 (9th Cir. 2009), *cert. granted* No. 09-958 (Jan. 18, 2011). The district court in *V.L.* similarly found that the risk of institutionalization and inability to access necessary medical care as a result of reductions to personal care services outweighed the financial burden of the state during a fiscal crisis. *V.L.*, 669 F. Supp. 2d at 1122; *see also*, 656 F. Supp. 2d at 1177. Congress was aware that integration "will sometimes involve substantial short-term burdens, both financial and administrative," but the long-term effects of integration "will benefit society as a whole." *Fisher*, 335 F.3d at 1183.

4. Granting the Injunction Is in the Public Interest

The public interest weighs heavily in favor of granting relief. "It would be tragic, not only from the standpoint of the individuals involved but also from the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential benefits for any period of

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CIVIL RIGHTS DIVISION
950 Pennsylvania Avenue, N.W. – NYA
Washington, D.C. 20530
Telephone: (202) 307-0663

time." *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983).

There is a strong public interest in granting a preliminary injunction to allow Plaintiffs to remain in community settings. There is also a public interest in eliminating the discriminatory effects that arise from segregating persons with disabilities in institutions when they can be appropriately placed in community settings. As *Olmstead* explained, the unjustified segregation of persons with disabilities can stigmatize them as incapable or unworthy of participating in community life.[12] *Olmstead*, 527 U.S. at 600. In *Long*, the court relied on this reasoning to hold that the public interest favored allowing the plaintiff to "remain in the community rather than be isolated in the nursing home":

> If, as it ultimately turns out, treating individuals like [plaintiff] in the community would require a fundamental alteration of the Medicaid program, so that the Secretary prevails in this litigation, little harm will have been done. To the contrary, [plaintiff's] life will have been better, at least for a time . . . .

Long, 2008 WL 4571903, at *3.

IV. CONCLUSION

For the reasons stated above, the United States respectfully submits that this Court should grant Plaintiffs' Motion for Preliminary Injunction. Should it be helpful to the Court, counsel for the United States will be present and prepared to argue the present Statement at any upcoming hearings.

[12] *See also* U.S. Amicus Brief in *Olmstead* at 16-17, citing to 136 Cong. Rec. H2603 (daily ed. May 22, 1990) (statement of Rep. Collins) ("To be segregated is to be misunderstood, even feared," and "only by breaking down barriers between people can we dispel the negative attitudes and myths that are the main currency of oppression.").

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION
950 Pennsylvania Avenue, N.W. – NYA
Washington, D.C. 20530
Telephone: (202) 307-0663

Respectfully submitted,

ERIC H. HOLDER, JR.
Attorney General of the United States

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
Principal Deputy Assistant Attorney General
Civil Rights Division

/s/ Regan Rush
RENEE M. WOHLENHAUS, Acting Chief
PHILIP L. BREEN, Special Legal Counsel
ALISON N. BARKOFF, Special Counsel
REGAN RUSH, Trial Attorney*
D.C. Bar No. 980252
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W. - NYA
Washington, D.C. 20530
Telephone: (202) 307-0663
Facsimile: (202) 307-1197
regan.rush@usdoj.gov

* Conditionally admitted to W.D. Wash.

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2011, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Regan Rush
REGAN RUSH
Trial Attorney*
D.C. Bar No. 980252
Disability Rights Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W. - NYA
Washington, D.C. 20530
Telephone: (202) 616-2726
Facsimile: (202) 307-1197
regan.rush@usdoj.gov

Counsel for United States

* Conditionally admitted to W.D. Wash.