No. 10-15635

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HARRY COTA, *et al.*,

Plaintiffs-Appellees

v.

DAVID MAXWELL-JOLLY, *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 plaintiffs are likely to succeed in showing that the change in eligibility criteria for ADHC services violates Title II of the Americans with Disabilities Act.

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, 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, President Obama celebrated the tenth anniversary of the *Olmstead* decision 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*.

STATEMENT OF THE CASE AND RELEVANT FACTS

Plaintiffs are elderly persons and adults with physical and mental disabilities who depend on community-based services offered through the State's Adult Day Health Care (ADHC) program in order to remain in their homes and avoid institutionalization. See *Cota* v. *Maxwell-Jolly*, No. 09-3798, 2010 WL 693256, at *1-2 (N.D. Cal. Feb. 24, 2010). Plaintiffs filed the instant class action on behalf of themselves and those similarly situated against Defendants California Department of Health Care Services (DHCS) and its director, David Maxwell-Jolly, to enjoin a change in ADHC eligibility criteria that would result in their termination from the

[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/.

program. See *id*. at *1. They allege, among other things, that the change violates Title II of the Americans with Disabilities Act. See *ibid*.

1. Overview Of The ADHC Program And Current Eligibility Criteria

ADHC is a community-based program for low-income seniors and younger adults with disabilities that is offered through California's Medicaid program, Medi-Cal. See *Cota*, 2010 WL 693256, at *1. The ADHC program "provides organized day care that includes therapeutic, social and skilled nursing health activities for the purpose of restoring or maintaining optimal capacity for self care." *Ibid*. Services are provided through privately-run ADHC centers, which must be licensed by DHCS. See *id*. at *1-2. "Each center must obtain authorization from DHCS for each day of service provided to Medi-Cal beneficiaries." *Id*. at *2. Individuals who would like to receive ADHC services must participate in a "three-day assessment performed by a multi-disciplinary team of clinicians including physicians, registered nurses, social workers, physical therapists, recreational therapists, * * * dieticians," and others. *Ibid*. The multi-disciplinary team designs an Individual Plan of Care (IPC) specifying "the types of services the applicant requires and the amount of time each week those services are necessary." *Ibid*. The completed IPC is then sent to DHCS for approval and must be reapproved every six months. *Ibid*.

To qualify for ADHC services, the applicant must be certified in the IPC as having a "high potential for the deterioration of their medical, cognitive, or mental health condition or conditions in a manner likely to result in emergency department visits, hospitalization or other institutionalization if ADHC services are not provided." *Cota*, 2010 WL 693256, at *2 (citation omitted). In addition, "applicants must show that they require assistance or supervision with at least two of [15] qualifying daily activities, which serve as a measure of the individual's overall physical, mental, or cognitive functioning." *Ibid*. The qualifying daily activities are: ambulation, bathing, dressing, self-feeding, toileting, transferring, accessing resources, housework, hygiene, laundry, meal preparation, medication management, money management, shopping, and transportation. See *ibid*.

2. New Eligibility Criteria Under ABx4 5

The California legislature changed the eligibility criteria for ADHC services when it enacted ABx4 5, which was scheduled to take effect on March 1, 2010. See *Cota*, 2010 WL 693256, at *2. ABx4 5 continues to require that ADHC applicants demonstrate deficits in two daily activities, but it reduces the number of qualifying daily activities from 15 to eight. See *id*. at *3. The remaining eight activities are: ambulation, bathing, dressing, self-feeding, toileting, transferring, medication management, and hygiene. See *ibid*. The seven eliminated activities are:

transportation, money management, shopping, meal preparation, laundry, accessing resources, and housework. See *ibid*.

ABx4 5 also divides applicants into two categories and requires a showing of different levels of assistance for each. See *Cota*, 2010 WL 693256, at *3. The first category includes individuals with "chronic mental illness, moderate to severe Alzheimer's disease, or other cognitive impairments." *Ibid*. To qualify for ADHC services, individuals in this category must show that they need "assistance" with two of the eight qualifying daily activities. *Ibid*. The second category includes all other individuals, *i.e.*, individuals who do not have a cognitive impairment. See *ibid*. Those individuals must demonstrate a heightened level of need in order to qualify for services. See *ibid*. First, they must show that they require "substantial human assistance" to perform two of the eight specified activities. See *ibid*. (citations omitted). "Substantial human assistance" is defined as "direct, hands-on assistance provided by a qualified caregiver, which entails helping the participant perform the elements of [the qualifying activities]. It also includes the performance of the entire [activity] for participants totally dependent on human assistance." *Ibid*. (quoting Cal. Welf. & Inst. Code § 14522.4(a)(10)). Second, they must demonstrate "the need for intermediate care services, as set forth in 22 Cal. Code Regs. § 51120." *Ibid*. (citing Cal. Welf. & Inst. Code § 14525.1(b)).

Under ABx4 5, the number of persons eligible for ADHC services would be reduced by 20 to 40 percent, affecting approximately 8,000 to 15,000 individuals. See *Cota*, 2010 WL 693256, at *5. The new requirements also would affect persons who remain eligible for services because "[m]any programs will be forced to discharge dozens of their participants, which may jeopardize their ability to continue to operate, threatening access to services even for people who remain eligible." *Ibid*.

3. The Named Plaintiffs

Three named plaintiffs represent a subclass of individuals who face termination of their ADHC benefits due to the change in eligibility criteria under ABx4 5. See *Cota*, 2010 WL 693256, at *3 n.4. Plaintiff Ronald Bell is a 45-year-old man with diabetes, organic brain syndrome, a seizure disorder, arthritis, hypertension, and hyperlipidemia. See *id*. at *3. Due to his cognitive impairments, he needs assistance with accessing resources, housework, laundry, meal preparation, money management, and shopping, and is totally dependent on others for transportation and medication management. See *id*. at *4. In his most recent IPC, Bell is authorized to receive each week three days of ADHC services, which include professional nursing services, personal care services, social services, therapeutic activities, physical therapy, occupational therapy, and dietician services.

See *id*. at *3. He also receives mental health services at least twice a month to assist him with coping skills and to decrease his depression and social isolation. See *ibid*. Bell currently resides with his 78-year-old grandmother who suffers from various physical ailments and also relies on ADHC services. See *ibid*. Bell's receipt of ADHC services "has likely prevented him from suffering from a catastrophic medical incident and has helped him avoid being placed in a nursing home." *Id*. at *4. Under ABx4 5, however, Bell's ADHC benefits would be terminated because he requires assistance with only one of the eight remaining qualifying daily activities, which is medication management. See *ibid*.

Plaintiff Harry Cota is a 60-year-old man with a left-side hemiparesis (muscle weakness), hypertension, insulin-dependent diabetes, arthritis, a peptic ulcer, a seizure disorder, muscle spasms, neuropathy, myelopathy, and obstructive sleep apnea. See *Cota*, 2010 WL 693256, at *4. Due to his physical disabilities, Cota relies primarily on a wheelchair, although he sometimes uses a walker. See *ibid*. Accordingly, he needs supervision with ambulation and assistance with accessing resources, housework, meal preparation, shopping, and transportation. See *ibid*. He also depends on others for laundry. See *ibid*. In his most recent IPC, Cota is authorized to receive ADHC services on a daily, weekly, and monthly basis for professional nursing services, personal care services, social services, therapeutic

activities, physical therapy, occupational therapy, pain treatments, and dietician counseling (as needed). See *ibid*. He "depends upon ADHC services to remain living as independently as possible in the community." *Ibid*. "Without ADHC services, [he] is at risk for deterioration and injury, and faces hospitalization and nursing home placements." *Ibid*. Cota's ADHC services, however, would be terminated under ABx4 5 because he does not have a cognitive impairment, and because he does not require "substantial human assistance" with any of the qualifying daily activities. See *ibid*.

Finally, Plaintiff Sumi Konrai is an 87-year-old woman with dementia, hypertension, and a history of depression. See *Cota*, 2010 WL 693256, at *5. She needs supervision with bathing, dressing, hygiene, and assistance with housework. See *ibid*. In addition, she is dependent on others for medication and money management, accessing resources, laundry, meal preparation, shopping, and transportation. See *ibid*. She can feed herself, but she needs to have her food prepared. See *ibid*. In her most recent IPC, Konrai is authorized to receive on a daily, weekly, or monthly basis professional nursing services, personal care services, assistance with consuming appropriate and adequate nutrition, social services, therapeutic activities, physical therapy, occupational therapy, and dietician services. See *ibid*. She relies on ADHC services "to remain in her own apartment

and avoid institutionalization." *Ibid*. "Without ADHC services, [her] family [would] have to place her in a nursing home." *Ibid*. Under ABx4 5, however, Konrai would be terminated from ADHC because of the eight qualifying daily activities, she needs assistance only with medicine management. See *ibid*.

4. Prior Proceedings

On December 18, 2009, plaintiffs filed an amended complaint for injunctive and declaratory relief, alleging violations of Title II of the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, the Due Process Clause, and various provisions of the Medicaid Act. See *Cota*, 2010 WL 693256, at *6. On January 19, 2010, plaintiffs filed a motion for preliminary injunction, seeking to enjoin defendants from implementing the new ADHC eligibility requirements under ABx4 5, which were scheduled to take effect on March 1, 2010. See *ibid*. The court granted the motion, concluding that plaintiffs had satisfied the standard set forth in *Winter* v. *Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 376 (2008), by establishing that: "(1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the

public interest." *Id*. at *6 (citation omitted).[2]

In analyzing plaintiffs' likelihood of success on the merits with respect to their ADA claims, the district court concluded that the new ADHC eligibility requirements likely violate Title II's integration mandate. See *Cota*, 2010 WL 693256, at *10. The court began its analysis by recognizing that "[t]he ADA * * * requires that persons with disabilities receive services in the most integrated setting appropriate to their needs." *Id*. at *9 (citing, *inter alia*, 28 C.F.R. 35.130(d)). The court then set forth the three-prong test articulated in *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 607 (1999), for evaluating integration claims under Title II, which requires that a state provide community-based treatment for persons with disabilities when: (1) "the State's treatment professionals determine that such placement is appropriate"; (2) "the affected persons do no oppose such treatment"; and (3) "the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with * * * disabilities." *Id*. at *10 (citation omitted).

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[2] The district court previously granted plaintiffs' motion for a preliminary injunction, filed on August 18, 2009, which sought to enjoin defendants from reducing ADHC services from a maximum of five days to three days per week. See *Cota*, 2010 WL 693256, at *5 (citing *Brantley* v. *Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal. 2009)). Defendants did not appeal from that order.

Before applying this test to the facts, the court reiterated its holding from a previous order that the reduction or elimination of ADHC services violates the integration mandate because it puts participants at risk of being institutionalized. See *Cota*, 2010 WL 693256, at *10 (citing *Brantley* v. *Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1070-1075 (N.D. Cal. 2009)); see also *Brantley*, 656 F. Supp. 2d at 1070-1071 (holding that "the *risk* of institutionalization is sufficient to demonstrate a violation of Title II," and that "the proposed reduction in ADHC services will place them at serious risk of institutionalization"). The court then explained that the first two *Olmstead* prongs were easily satisfied because "there is no dispute that each of the three class representatives * * * has an IPC that documents their respective need for ADHC services to avoid unnecessary institutionalization," and because "each desires to remain in their homes, as opposed to being institutionalized." *Cota*, 2010 WL 693256, at *10. The court also found that "there is no dispute as to the third *Olmstead* prong; namely, that Defendants have an obligation to and can reasonably accommodate Plaintiffs' needs." *Id*. at *10 (citing *Olmstead*, 527 U.S. at 627).[3]

[3] The court also reaffirmed its previous holding that "the reduction or elimination of public medical benefits is sufficient to establish irreparable harm to those likely to be affected by the program cuts." *Cota*, 2010 WL 693256, at *13 (citing *Brantley*, 656 F. Supp. 2d at 1176).

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

SUMMARY OF THE ARGUMENT

Defendants incorrectly argue that, in order to establish a violation of Title II's integration mandate, plaintiffs must show that they will experience "imminent institutionalization." 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 where appropriate, unless it would fundamentally alter the nature of the state's program.

Such protection, however, is not limited to persons who are currently institutionalized. 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. Every court to consider whether recipients of community-based 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.

Moreover, individuals with disabilities need not show that they will experience "imminent" institutionalization in order to establish a violation of the ADA. Plaintiffs may establish a violation of Title II's integration mandate by showing that the change in eligibility criteria under ABx4 5 puts them at serious risk of being institutionalized. 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. Here, each of the named plaintiffs has an IPC detailing the serious risk of institutionalization each would face without ADHC services. Such showing is enough to establish a violation of Title II.

ARGUMENT

PLAINTIFFS ARE LIKELY TO SUCCEED IN SHOWING THAT THE CHANGE IN ADHC ELIGIBILITY CRITERIA VIOLATES THE INTEGRATION MANDATE UNDER TITLE II OF THE ADA

Defendants argue (Def. Br. 24-29) that plaintiffs have not demonstrated a likelihood of success on the merits with respect to their ADA claims because they are not currently institutionalized and cannot show that they will experience "imminent institutionalization" upon losing ADHC services. As explained below, defendants' argument lacks merit because institutionalization is not a prerequisite to establishing a violation of Title II's integration mandate. Rather, plaintiffs may prevail by demonstrating that they are at serious risk of being institutionalized without ADHC services. They need not prove, however, that such institutionalization is "imminent."[4]

A. Title II's Integration Mandate Requires That States Provide Services To Individuals With Disabilities In A Community Setting Where Appropriate And So Long As It Does Not Fundamentally Alter The Nature Of The Program

Congress enacted the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, "to provide a clear and comprehensive national mandate for the elimination of

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

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 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 to provide such treatment in community settings rather than in institutions. The plaintiffs in *Olmstead* were individuals with mental disabilities who the State served in a psychiatric 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.

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

Defendants point out (Def. Br. 26) 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 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 ADHC services 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 suits 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 *V.L.* v. *Wagner*, 669 F. Supp. 2d 1106, 1109 (N.D. Cal. 2009), for example, the court considered another aspect of California's recent budget cuts, which would have reduced or terminated assistance provided to individuals with

disabilities through the State's In-Home Supportive Services program by changing the program's eligibility criteria. The court agreed with plaintiffs that the change in eligibility criteria violated Title II's integration mandate "by placing people in serious risk of being forced to move out of their homes to the less integrated setting of institutions." *Id*. at 1119. Relying in part on *Fisher*, the court held that "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." *Ibid*.[5] 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

[5] *V.L.* is currently on appeal before this Court (argued on June 15, 2010). See *Oster* v. *Wagner*, No. 09-17581. The United States filed a brief as *amicus curiae* in that case arguing, as we do here, that individuals with disabilities do not need to be institutionalized and do not need to show that they will experience "imminent institutionalization" in order to establish a violation of Title II's integration mandate.

mandate because their "failure to provide Plaintiffs with the necessary services threatened Plaintiffs with institutionalization."[6]

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

[6] 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"); *Disability Advocates, Inc.* v. *Paterson*, No. 03-cv-3209, 2010 WL 786657, at *4 (E.D.N.Y. Mar. 1, 2010) (explaining that state's remedial order for complying with Title II's integration mandate "must be directed at 'individuals with mental illness residing in, or at risk of entry into, [impacted] adult homes'"); *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) ("[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.").

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 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 before they could 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 such 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. 27) 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 Title II 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 be terminated from the ADHC program as a result of the new eligibility standards in ABx4 5. Plaintiffs therefore have standing because they have alleged injury – *i.e.*, the loss of services – resulting from defendants' conduct. See *Skaff* v. *Meridien N. Am. 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)). In short, this

case asks 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 5 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*, pp. 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); see also *V.L.*, 2009 WL 3486708, at *11 (concluding that plaintiffs may establish a violation of the integration by showing that the denial of services could lead to an eventual "decline in health" that puts them at "risk [of] being placed in a nursing home").

Similarly, here, plaintiffs may establish a violation of Title II by showing that they face a serious risk of institutionalization without ADHC services, but they do not need to show that such institutionalization is "imminent."

D. The District Court Properly Concluded That Plaintiffs Are Likely To Prevail On Their Integration Claims Because They Are At Serious Risk Of Being Institutionalized

Based on the evidence submitted, the district court found that plaintiffs are at risk of being institutionalized under ABx4 5. See *Cota*, 2010 WL 693256, at *9-11. The court found that "[t]he seemingly arbitrary elimination of essentially half of the qualifying impairments * * * will result in individuals who previously could show two impairments now only being able to meet one of the requirements. Although these individuals' need for services and risk of institutionalization are the same as before * * * they will no longer be allowed access to ADHC services." *Id*. at *8. In the case of Plaintiff Bell, for example, the court found that "his only need cognizable under the new criteria is for medicine management which, standing alone, will be insufficient to qualify him for ADHC." *Ibid*. Consequently, the court found, "it is likely that Mr. Bell's existing benefits will be terminated, thereby increasing the likelihood that he will require institutionalization. * * * Other Plaintiffs and Class Members will be similarly affected." *Ibid*.; see also *id*. at *4 ("Without ADHC services, Mr. Cota is at risk for deterioration and injury, and faces

hospitalization and nursing home placements."); *id*. at *5 ("Without ADHC services, Mrs. Konrai's family will have to place her in a nursing home.").

Applying *Olmstead*'s three-prong test for evaluating integration claims, the district court thus properly concluded that plaintiffs are likely to succeed in showing that the new ADHC eligibility criteria violate Title II's integration mandate. See *Cota*, 2010 WL 693256, at *10. Each of the named plaintiffs in this case has an IPC detailing the State's determination that community placement is appropriate and necessary to avoid institutionalization, thereby satisfying *Olmstead*'s first prong. See *id.* at *3-5, 10 (citing declarations and submissions in support of plaintiffs' motion for preliminary injunction); see also *id*. at *2 (explaining that, to qualify for ADHC services, applicants must have an IPC certifying their "high potential for the deterioration of their medical, cognitive, or mental health condition or conditions in a manner likely to result in emergency department visits, hospitalization or other institutionalization if ADHC services are not provided") (citations omitted). With respect to the second prong, the court noted that it is undisputed that each of the named plaintiffs prefers to remain in the community setting as opposed to entering an institution. See *id*. at *10. The court also noted that the third prong was satisfied because "there is no dispute * * * that Defendants have an obligation to and can reasonably accommodate Plaintiffs' needs." *Ibid*. Indeed, defendants did not

argue below, and do not argue on appeal, that the requested relief would fundamentally alter the nature of the ADHC program.[7] Accordingly, plaintiffs are likely to succeed in showing that ABx4 5 violates Title II of the ADA.

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[7] Because defendants do not argue that the relief requested in this case would "fundamentally alter the nature" of the ADHC program, applicability of the fundamental-alteration regulation, 28 C.F.R. 35.130(b)(7), is not at issue. Defendants do not argue on appeal that plaintiffs' ADA claims fail in light of the State's fiscal situation. See Def. Br. 24-29 (arguing only that plaintiffs' ADA claims fail for lack standing). Before the district court, defendants "merely state[d] that 'the Legislature, faced with an unprecedented, severe budget crisis made a policy determination to limit ADHC services to those individuals who need the services most and who are at risk of admission to a skilled nursing facility.'" *Cota*, 2010 WL 693256, at *11. Defendants, however, did not assert a "fundamental alteration defense[]" in response to plaintiffs' motion for a preliminary injunction (or argue that plaintiffs were seeking an "[un]reasonable modification[]" to the ADHC program). *Ibid.*; see 28 C.F.R. 35.130(b)(7) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, *unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the services, program, or activity*.") (emphasis added). Such defense would have required defendants to establish that "in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Olmstead*, 527 U.S. at 604; see *Townsend*, 328 F.3d at 519 (discussing defense); *Sanchez* v. *Johnson*, 416 F.3d 1051, 1067-1068 (9th Cir. 2005) (same); see also *Perfect 10, Inc.* v. *Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007) (explaining that defendant bears burden of establishing affirmative defense at preliminary injunction stage); *Frederick L.* v. *Department of Pub. Welfare*, 422 F.3d 151, 160 (3d Cir. 2005) (holding that fundamental-alteration defense requires states to have a comprehensive working plan with specific and measurable goals for integration of individuals with disabilities into the community).

CONCLUSION

This Court should affirm the district court's holding that plaintiffs are likely to succeed in showing that the change in eligibility criteria for ADHC services violates Title II of the Americans with Disabilities Act, as discussed herein.

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:

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s/ Tovah R. Calderón
TOVAH R. CALDERON
Attorney

Dated: June 28, 2010

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system.

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