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14 ATTORNEYS FOR UNITED STATES

15 IN THE UNITED STATES DISTRICT COURT
 16 FOR THE NORTHERN DISTRICT OF CALIFORNIA

17 DAVID OSTER, *et al.*,
 18 Plaintiffs,
 19 v.

20 WILL LIGHTBOURNE, Director of the
 California Department of Social Services;
 21 TOBY DOUGLAS, Director of the
 Department of Health Care Services, State
 22 of California, DEPARTMENT OF
 HEALTH CARE SERVICES; and
 23 CALIFORNIA DEPARTMENT OF
 24 SOCIAL SERVICES,
 25 Defendants.

Case No.: CV 09-04668 CW

CLASS ACTION

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

Hearing Date: January 19, 2012

Time: 2:00 p.m.

Judge: The Hon. Claudia Wilken

1 **I. INTRODUCTION**

2 The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C.
3 § 517,¹ because this litigation implicates the proper interpretation and application of title II of the
4 Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* (“ADA”), and in particular, its
5 integration mandate. *See* 28 C.F.R. § 35.130(d); *Olmstead v. L.C.*, 527 U.S. 581 (1999). The
6 Department of Justice has authority to enforce title II and to issue regulations implementing the
7 statute. 42 U.S.C. §§ 12133-34. The United States thus has a strong interest in the resolution of
8 this matter.

9 This lawsuit alleges that Will Lightbourne, the Director of the California Department of
10 Social Services (“DSS”), Toby Douglas, the Director of the California Department of Health
11 Care Services (“DHCS”), and their respective agencies (collectively, “Defendants”), will place
12 hundreds of thousands of individuals with disabilities at risk of unnecessary institutionalization,
13 in violation of the ADA, if they are not enjoined from implementing a twenty percent reduction
14 in In-Home Support Services (“IHSS”) hours to Medi-Cal beneficiaries. (*See* Third Am. Class
15 Action Compl. (“Compl.”), ECF No. 431, Dec. 6, 2011, ¶ 6.) On December 1, 2011, this Court
16 granted Plaintiffs’ *ex parte* Application for a Temporary Restraining Order, enjoining
17 Defendants from implementing the reduction in hours, finding that Senate Bill 73 (“SB 73”) –
18 the Statute mandating the reduction – raises serious questions of violations of the Medicaid Act,
19 the ADA, and the Rehabilitation Act, and that unless enjoined, the reduction in IHSS hours
20 would “cause immediate and irreparable harm by placing members of the plaintiff class at
21 imminent and serious risk of harm to their health and safety, as well as unnecessary and
22 unwanted out-of-home placement including institutionalization.” (Order Granting Application
23 for TRO, ECF No. 417, Dec. 1, 2011, at 1-2.)

24 _____
25 ¹ 28 U.S.C. § 517 permits the Attorney General to send any officer of the Department of Justice
26 “to any State or district in the United States to attend to the interests of the United States in a suit
pending in a court of the United States.”

1 Defendants' legal arguments regarding Plaintiffs' standing, the ripeness of Plaintiffs'
 2 ADA and Rehabilitation Act claims, and the Tenth Amendment are without merit.² Plaintiffs
 3 have standing to bring these claims because they have alleged the threat of concrete,
 4 particularized injuries that Defendants' actions will cause, and which relief from this Court will
 5 address. And contrary to Defendants' contentions, ensuring that the State's programs comply
 6 with the requirements of the ADA neither conflicts with the Medicaid Act nor violates the Tenth
 7 Amendment.

8 **II. BACKGROUND**

9 **A. In Home Support Services**

10 IHSS is an optional Medi-Cal benefit that provides in-home assistance with basic tasks of
 11 daily living, including domestic services, personal care services, accompaniment during travel to
 12 health-related appointments or to alternative resource sites, protective supervision, teaching and
 13 demonstration directed at reducing the need for other supportive services, and paramedical
 14 services to assist individuals in maintaining an independent living arrangement. Cal. Welf. &
 15 Inst. Code §§ 12300(b). The IHSS program is designed to make these services available to those
 16 who are "unable to perform the services themselves and who cannot safely remain in their homes
 17 or abodes of their own choosing unless these services are provided." *Id.* §12300(a).
 18 Approximately 440,000 individuals in California receive IHSS, which is funded through a
 19 combination of state, county, and federal dollars. *See* Cal. Welf. & Inst. Code §12306; (Decl. of
 20 Eileen Carroll ("Carroll Decl."), ECF No. 446, Dec. 23, 2011, ¶ 4.)

21 SB 73 was signed into law on June 30, 2011 and required the hours of most IHSS
 22 recipients to be reduced by 20 percent, effective January 1, 2012. *See* Cal. Welf. & Inst. Code
 23 §12301.07(a); (*see also* Pls.' Third Request for Judicial Notice ("3rd RJN"), ECF No. 335, Dec.

24 _____
 25 ² Plaintiffs also allege that Defendants' plan to implement the reduction in IHSS hours violates
 26 the Due Process Clause of the Constitution and the Medicaid Act. In this Statement of Interest,
 27 the United States addresses solely the merits of Defendants' legal arguments regarding standing,
 28 ripeness, and the Tenth Amendment as it relates to the ADA and Rehabilitation Act.

1 1, 2011, Ex. 1.) The statute established a number of exemptions from the reductions for certain
 2 IHSS recipients and required DSS to establish a process to pre-approve supplemental hours for
 3 certain recipients. *See* Cal Welf. & Inst. Code §12301.07(a)(5), (b); (Carroll Decl. ¶ 7). All
 4 individuals who do not fall into the exemptions (over 300,000 people) will have their IHSS hours
 5 reduced, but will have the opportunity to apply for supplemental hours to fully or partially
 6 restore the reduced hours. (*See* Carroll Decl. ¶ 8; Ex. A to Carroll Decl. at 13.) Plaintiffs have
 7 presented evidence that Defendants assume that approximately 164,458 IHSS recipients will not
 8 be eligible for restoration of hours, and that approximately 61,672 IHSS recipients will be
 9 eligible for restoration but will not return the application for IHSS Care Supplements. (*See*
 10 Second Decl. of Karen Keeslar, ECF No. 376, Dec. 1, 2011, Ex. A.)

11 **III. Statutory and Regulatory Background**

12 Congress enacted the ADA in 1990 “to provide a clear and comprehensive national
 13 mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C.
 14 § 12101(b)(1). Congress found that “historically, society has tended to isolate and segregate
 15 individuals with disabilities, and, despite some improvements, such forms of discrimination
 16 against individuals with disabilities continue to be a serious and pervasive social problem.”
 17 42 U.S.C. § 12101(a)(2). For those reasons, Congress prohibited discrimination against
 18 individuals with disabilities by public entities:

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

22 42 U.S.C. § 12132.

23 As directed by Congress, the Attorney General issued regulations implementing title II,
 24 which are based on regulations issued under section 504 of the Rehabilitation Act.³ *See* 42

25 ³ In all ways relevant to this discussion, the ADA and Section 504 of the Rehabilitation Act are
 26 generally construed to impose similar 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.

1 U.S.C. § 12134(a); 28 C.F.R. § 35.190(a); Executive Order 12250, 45 Fed. Reg. 72995 (1980),
2 *reprinted in* 42 U.S.C. § 2000d-1. The title II regulations require public entities to “administer
3 services, programs, and activities in the most integrated setting appropriate to the needs of
4 qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). The preamble discussion of the
5 “integration regulation” explains that “the most integrated setting” is one that “enables
6 individuals with disabilities to interact with nondisabled persons to the fullest extent possible....”
7 28 C.F.R. Pt. 35, App. B at 673 (2011) (addressing § 35.130).

8 Twelve years ago, the Supreme Court applied these authorities and held that title II
9 prohibits the unjustified segregation of individuals with disabilities. *Olmstead*, 527 U.S. at 596.
10 There, the Court held that public entities are required to provide community-based services to
11 persons with disabilities when (a) such services are appropriate; (b) the affected persons do not
12 oppose community-based treatment; and (c) community-based services can be reasonably
13 accommodated, taking into account the resources available to the entity and the needs of others
14 who are receiving disability services from the entity. *Id.* at 607.

15 The ADA’s protections are not limited to those individuals who are currently
16 institutionalized. The integration mandate also prohibits public entities from pursuing policies
17 that place individuals at serious risk of unnecessary institutionalization.⁴ *See M.R. v. Dreyfus*,

18 1999). This principle follows from the similar language employed in the two acts. It also derives
19 from the Congressional directive that implementation and interpretation of the two acts “be
20 coordinated to prevent[] imposition of inconsistent or conflicting standards for the same
21 requirements under the two statutes.” *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468-9 (4th Cir.
1999) (citing 42 U.S.C. § 12117(b)) (alteration in original).

22 ⁴ Defendants incorrectly presume that the ADA would not prohibit policies placing individuals at
23 risk of placement from their own home into “residential care-type facilities [that] do not maintain
24 24-hour nursing care.” (*See Defs.’ Opposition to Pls.’ Mot. for a Prelim. Inj.* (“*Defs.’ Opp.*”),
25 ECF No. 445, Dec. 23, 2011, at 35). The ADA requires public entities to provide services in the
26 most integrated setting appropriate, which affords individuals with disabilities the opportunity to
27 interact with nondisabled individuals to the fullest extent possible. 28 C.F.R. § 35.130(d); 28
28 C.F.R. Pt. 35, App. B at 673 (2011). *See also, e.g., DAI v. Paterson*, 653 F.Supp. 2d 184, 224
(E.D.N.Y. 2009) (recognizing Adult Homes as “settings [that do] not enable interactions with
nondisabled people to the fullest extent possible.”)

1 ____ F.3d ____, 2011 WL 6288173, *16 (9th Cir. 2011); *see also Fisher v. Oklahoma Health*
 2 *Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003) (noting that “nothing in the *Olmstead* decision
 3 supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA’s
 4 integration requirements”).

5 To comply with the ADA’s integration requirement, a state must reasonably modify its
 6 policies, procedures, or practices when necessary to avoid discrimination. 28 C.F.R.
 7 § 35.130(b)(7). The obligation to make reasonable modifications may be excused only where a
 8 state demonstrates that the requested modifications would “fundamentally alter” the programs or
 9 services at issue. *Id.*; *see also Olmstead*, 527 U.S. at 604-07.⁵

10 **IV. ARGUMENT**

11 **A. Plaintiffs have Article III Standing to Assert a Violation of the ADA’s Integration** 12 **Mandate**

13 Defendants argue that Plaintiffs lack Article III standing for a preliminary injunction
 14 because “none of the [named plaintiffs] face[s] an imminent risk of institutionalization.” (Def.’
 15 Opp. at 32-33.) This argument is without merit and conflates the requirements of standing with
 16 the merits of Plaintiffs’ ADA claims. It is well settled that to establish standing, a litigant must
 17 show (1) that he suffered actual or threatened injury; (2) that the condition complained of caused
 18 the injury or threatened injury, and (3) that the requested relief will redress the alleged
 19 injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). When examining

20 _____
 21 ⁵ Budgetary concerns alone do not sustain a fundamental alteration defense. *M.R.*, 2011 WL
 22 6288173, *18; *see also Fisher*, 335 F.3d at 1183 (“that [a state] has a fiscal problem, by itself,
 23 does not lead to an automatic conclusion” that providing the community services that plaintiffs
 24 seek would be a fundamental alteration). Further, “[i]f every alteration in a program or service
 25 that required the outlay of funds were tantamount to a fundamental alteration, the ADA’s
 26 integration mandate would be hollow indeed.” *Fisher*, 335 F.3d at 1183; *see also Pennsylvania*
Protection and Advocacy, Inc. v. Pennsylvania Dept. of Pub. Welfare, 402 F.3d 374, 380 (3d Cir.
 2005). Congress was aware that integration “will sometimes involve substantial short-term
 27 burdens, both financial and administrative,” but the long-term effects of integration “will benefit
 28 society as a whole.” *Fisher*, 335 F.3d at 1183 (*citing* H.R. Rep. No. 101-485, pt.3, at 50,
reprinted in 1990 U.S.C.C.A.N. 445,773).

1 whether plaintiffs suffered actual or threatened injury, the inquiry focuses on whether the injury-
2 in-fact is (1) “concrete and particularized,” and (2) actual or imminent, not ‘conjectural’ or
3 ‘hypothetical.’” *Id.* at 560.

4 Plaintiffs have standing because the reduction of their IHSS services is concrete, actual
5 and not hypothetical and thus this injury alone is sufficient to establish standing. *See Cal. Pro-*
6 *Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003); *United States v. Antelope*,
7 395 F.3d 1128, 1132 (9th Cir. 2005). Plaintiffs seek to represent a class of individuals who
8 “have received or will receive notices of action that include a reduction of IHSS hours based on
9 SB 73 or Defendants’ implementation of SB 73...” (Compl. ¶ 225.) Receipt of this notice means
10 that a recipient’s IHSS hours are due to be or have already been administratively reduced, and
11 recipients must then affirmatively apply for IHSS Care Supplements to even attempt to have
12 their hours partially or fully restored. (*See* Pls.’ Reply in Support of Motion for Class
13 Certification, ECF No. 442, Dec. 22, 2011, at 3; Carroll Decl., Ex. A, at 7 (instructing county
14 departments of social services to “reinstat[e] the reduced hours” if recipient returns IHSS
15 Supplemental Care application within 15 days of postmark or by January 3, 2012.)) Plaintiffs,
16 and hundreds of thousands of others similarly situated individuals, thus face the imminent threat
17 of a twenty percent reduction of services. It is the partial or full *restoration* of these hours – not
18 their reduction – that rests on contingent, future events. That these Plaintiffs may ultimately
19 have some or all of their current amount of IHSS hours restored, either through county-level
20 determinations of eligibility for Care Supplement hours or by pursuing state administrative
21 appeals, does not render their injuries non-imminent, hypothetical, or speculative. *See Pashby v.*
22 *Cansler*, ___ F.Supp. 2d ___, 2011 WL 6130819, *3 (E.D.N.C. 2011) (“because each Plaintiff
23 faced, at the time this lawsuit commenced, the termination of his or her [personal care services]
24 due to the change in requirements that was to be implemented ... each Plaintiff had standing to

1 challenge the implementation of [the official policy changing eligibility requirements].”) *appeal*
2 *docketed*, No. 11-2363, (4th Cir. Dec. 14, 2011).⁶

3 Further, even the threat of future harm is sufficient to confer standing. *Cent. Delta Water*
4 *Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002) (“[T]he possibility of future injury
5 may be sufficient to confer standing.”); *see also Friends of the Earth, Inc. v. Laidlaw Envtl.*
6 *Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). By receiving notices of an impending
7 reduction in their IHSS hours, there can be no question that Plaintiffs face a threat of harm.
8 “[A] credible threat of harm is sufficient to constitute actual injury for standing purposes.” *Cent.*
9 *Delta Agency*, 306 F.3d at 950. Indeed, the threat of injuries to plaintiffs resulting from the
10 reduction in IHSS hours is “credible” and is not “speculative or imaginary.” *See Lopez v.*
11 *Candaele*, 630 F.3d 775, 786 (9th Cir. 2010) (citing *Babbitt v. United Farm Workers*, 442 U.S.
12 289, 298 (1979); *see also Mental Disability Law Clinic v. Hogan*, No. 06-cv-6320, 2008 WL
13 4104460, at *8 (E.D.N.Y. Aug. 26, 2008) (“the likely harm of another hospitalization and the
14 fact that this harm could be avoided if [Plaintiff were to continue to receive existing services] is
15 not too speculative or conjectural to preclude standing.”). Thus, Plaintiffs have standing to
16 pursue their title II and Rehabilitation Act claims.

17 For the same reasons, Plaintiffs’ claims are ripe. A court considers two factors in
18 determining whether a case is ripe: (1) the fitness of the issues for judicial decision; and (2) the
19 hardship to the parties of withholding court consideration. *Yahoo! Inc. v. La Ligue Contre Le*
20 *Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1211 (9th Cir. 2006) (citing *Abbot Labs. v.*
21 *Gardner*, 387 U.S. 136, 149 (1967) *overruled on other grounds by Califano v. Sanders*, 430 U.S.
22 99 (1977)). Fitness for review means that a question “can be decided without considering
23 contingent future events that may or may not occur as anticipated, or that may not occur at all.”

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25 ⁶ Defendants’ comparison of this case to *Summer H. v. Fukino*, No. 09-cv-00047, 2009 WL
26 1249306 (D. Haw. 2009), is inapt. There, the Court specifically declined to dismiss plaintiffs’
ADA and Section 504 claims for lack of standing or ripeness. *See id.* at *8.

1 *Addington v. U.S. Airline Pilots Ass'n.*, 606 F.3d 1174, 1179 (9th Cir. 2010). A number of the
2 Plaintiffs, and by definition, members of the proposed class, will receive notices indicating that
3 their IHSS hours have been reduced. (*See* Compl. ¶ 225.) That any individual plaintiff or
4 member of the proposed class may avail themselves of the application process to have their IHSS
5 hours partially or fully restored does not render their claims unfit for judicial review. *See*
6 *Pashby*, 2011 WL 6130819, *4 (holding that plaintiffs' claims were ripe and that they "need not
7 wait until the resolution of their administrative appeals under [a new policy altering eligibility for
8 personal care services] to challenge the legality of it."). And the hardship to the Plaintiffs from
9 withholding judicial consideration is considerable here: Plaintiffs have submitted substantial
10 evidence from their care providers, experts, county officials and individual IHSS recipients that
11 recipients face a serious risk of institutionalization if their hours are in fact reduced.

12 **B. ADA Compliance Does Not Conflict With the Medicaid Act and Does Not Violate**
13 **the Tenth Amendment**

14 Defendants argue that plaintiffs' ADA and Rehabilitation Act claims run afoul of the
15 Tenth Amendment because remedying Plaintiffs' claims may require the continuation of the
16 current level of IHSS services to prevent individuals' unnecessary institutionalization. (*See*
17 *Defs.' Opp.* at 33-34.) Defendants appear to argue that because IHSS is an optional, rather than
18 mandatory, program under the federal Medicaid Act, this Court is without power to enjoin
19 Defendants from operating the program in a manner that discriminates against individuals with
20 disabilities. This contention lacks merit.

21 A determination that Defendants should refrain from implementing policies that present a
22 serious risk of institutionalization does not require a finding that the State must provide IHSS
23 services as a mandatory (as opposed to optional) Medicaid service. Rather, once a state has
24 elected to provide services (whether mandatory or optional under the Medicaid Act), the state
25 must administer those services in accordance with the ADA and Rehabilitation Act. *See Doe v.*
26 *Chiles*, 136 F.3d 709, 714 (11th Cir. 1998) (when a state chooses to provide an optional

1 Medicaid service, it must do so in accordance with the requirements of federal law); *Fisher v.*
2 *Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003) (even though a waiver program
3 is optional, a state may not, under title II of the ADA, amend optional programs in such a way as
4 to violate the integration mandate).

5 Indeed, another district court recently rejected a similar argument. In *Haddad v. Arnold*,
6 784 F. Supp. 2d 1284, 1302 (M.D. Fla. 2010), defendants argued that plaintiff's integration claim
7 would abrogate or amend Medicaid Act provisions allowing states to limit the number of
8 participants in its waiver programs. The district court rejected this argument, finding defendants'
9 attempt to characterize ADA compliance "as an invalidation of the Medicaid Act [was] without
10 merit." *Id.* at 1303. The court reasoned that "[a] state that chooses to provide optional services,
11 cannot defend against the discriminatory administration of those services simply because the
12 state was not initially required to provide them." *Id.* at 28. Thus, here, as in *Haddad*, requiring
13 Defendants' to administer their Medicaid program in a nondiscriminatory manner does not
14 conflict with the Medicaid Act.

15 Further, contrary to Defendants' assertions, compliance with the ADA's integration
16 mandate does not violate the Tenth Amendment principles of *New York v. United States*, 505
17 U.S. 144 (1992) or *Printz v. United States*, 521 U.S. 898 (1997). See *Reno v. Condon*, 528 U.S.
18 141, 150-51 (2000) ("That a state wishing to engage in certain activity must take administrative
19 and sometimes legislative action to comply with federal standards regulating that activity is a
20 commonplace that presents no constitutional defect.") (quoting *South Carolina v. Baker*, 485
21 U.S. 505, 514-15 (1988)).

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1 DATED: January 9, 2012

2 Respectfully submitted,

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