IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BARBARA HARRISON, by her next friend and guardian, Marguerite Harrison, Plaintiff, v. CECILE ERWIN YOUNG, in her official capacity as the Executive Commissioner, Texas Health and Human Services Commission, Defendant.	Civil Action No. 3:19-cv-01116-B

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

The United States of America respectfully submits this Statement of Interest in accordance with 28 U.S.C. § 517[1] to provide its views regarding the proper interpretation of Title II of the Americans with Disabilities Act (ADA) as interpreted by the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999).[2] The plaintiff in this case, an individual with a disability, alleges that the Executive Commissioner of the Texas Health and Human Services Commission (HHSC) violated the ADA and Section 504 of the Rehabilitation Act by denying her the services she alleges she needs to avoid institutionalization and death.

Defendant's motion for summary judgment misstates the standards for assessing an *Olmstead* claim. First, Defendant argues that the passage of the ADA Amendments Act (ADAAA or "the Act") abrogated the ADA's integration mandate. This argument has no merit—the Act only altered the definition of "disability" and not the statutory basis for the integration obligation on which the *Olmstead* decision relied. *Olmstead*

[1] Congress has authorized the Attorney General to send "any officer of the Department of Justice . . . to any . . . 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." 28 U.S.C. § 517.

[2] Courts interpret the integration mandate of Title II and Section 504 coextensively. *See Harrison v. Young*, 48 F.4th 331, 341-42 (5th Cir. 2022) (applying *Olmstead* to an integration mandate claim under Section 504); *M.R. v. Dreyfus*, 663 F.3d 1100, 1115 (9th Cir. 2011), *amended by* 697 F.3d 706 (9th Cir. 2012) (same); *see also Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013) (holding that Title II and Section 504 "impose the same integration requirements").

remains good law, as evidenced by the unanimous body of case law from courts around the country relying on *Olmstead* since the Act's passage.[3]

Second, Defendant misinterprets the term "qualified" in the context of an *Olmstead* claim. In this context, courts consider individuals qualified if they are eligible to receive Medicaid or other state-funded services, are appropriate for community-based services, and do not oppose receiving the services in the community. Defendant's argument that an individual is not qualified if their proposed plan of care exceeds the State's Medicaid cost cap fails because that is not an essential eligibility requirement for receipt of community-based services.

Third, Defendant's argument that the level of nursing services Plaintiff seeks is not a reasonable modification suffers from the same shortcoming. The fact that the nursing services required by Plaintiff might exceed a Medicaid cost cap is not determinative under the ADA. A State's obligations under the ADA are independent of, and distinct from, Medicaid requirements. States may be required to make reasonable modifications to their long-term care service systems despite limitations established in the context of existing Medicaid waivers. In fact, Texas has an existing system through which the State provides services to individuals who need services above the cost cap, undermining the argument that all services beyond its self-identified cap fundamentally alter its service system.[4]

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[3] Section 504's integration mandate also remains in force and unchanged by the ADAAA.

[4] The United States expresses no view on any issues other than those set forth in this brief and takes no position on the merits of Plaintiff's ADA and Section 504 claims.

As the federal agency charged with enforcement and implementation of the ADA, the Department of Justice has an interest in supporting the proper and uniform application of the ADA, in furthering Congress's intent to create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," and in furthering Congress's intent to reserve a "central role" for the federal government in enforcing the standards established in the ADA.[5] 42 U.S.C. §§ 12133-12134, 12101(b)(2), 12101(b)(3).

II. FACTUAL BACKGROUND

Texas's Home and Community-Based Services (HCS) program, administered by HHSC, provides Medicaid-funded services to people with intellectual or developmental disabilities in their homes and communities. Compl., ECF No. 1, ¶ 30; Def.'s Mot. for Summ. J. (DMSJ), ECF No. 65, at 6. HCS is a federally approved program that allows Texas to use Medicaid funds to provide services in the community to people who would otherwise need Medicaid-funded institutional care. *See* Compl. ¶¶ 26-30; DMSJ at 9-10; 42 U.S.C. § 1396n(c)(1). Texas has set cost limits for each participant's service plan as part of the HCS program. *See* Compl. ¶ 32; Pl.'s Resp. to Def.'s Mot. for Summ. J. (PRDMSJ), ECF No. 69, at 16-17; DMSJ at 25. Under State law, Texas may use general revenue funds to provide services beyond such cost limits in certain circumstances.

[5] The Department of Justice also coordinates federal agencies' implementation and enforcement of Section 504 and has the authority to enforce Section 504. *See* 28 C.F.R. pt. 41; Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980); 29 U.S.C. § 794(a); *see also* 28 C.F.R. § 0.51(b)(3).

Compl. ¶ 35; DMSJ at 12; 40 Tex. Admin. Code § 40.1.

Plaintiff is an individual with intellectual and other disabilities who, since 2017, has received HCS services in a group home. Compl. ¶ 31; DMSJ at 10. In 2018, Plaintiff's HCS service provider sought an increased level of nursing services for her. Compl. ¶¶ 31-34; DMSJ at 10-11. Such services exceeded the HCS program's cost limits,[6] so Plaintiff sought supplementation through general revenue funds. Compl. ¶¶ 32-35; DMSJ at 12-13. HHSC denied Plaintiff's request for general revenue funds after State staff determined that Plaintiff could be served in a State facility such as a State Supported Living Center. Compl. ¶¶ 44-46; DMSJ at 13.[7] HHSC then terminated Plaintiff from the HCS program because the services in Plaintiff's individual plan of care exceeded the HCS program's cost limit. Compl. ¶¶ 39, 47-48; DMSJ at 11-12; Pl.'s Mot. for Summ. J. (PMSJ), ECF No. 60, at 10-11. In 2022, HHSC reinstated Plaintiff in the HSC program with reduced nursing services. DMSJ at 15-16; PRDMSJ at 5-6.

Plaintiff maintains that, without the nursing services she has requested, she will be forced into an institutional setting, and that the cost of institutional care will exceed the cost of the community-based services Plaintiff requested. Compl. ¶¶ 8, 13; *see also* PMSJ at 8.

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[6] Defendant acknowledges that, for the 2017-2018 fiscal year, Defendant nevertheless provided the requested services. DMSJ at 11; *see also* Compl. ¶ 31 (alleging that Defendant provided Plaintiff with general revenue funding above the HCS cost limit for over nine months).

[7] A second reason for HHSC's denial of general revenue funds—asserted by Defendant but disputed by Plaintiff—is that the services requested by Plaintiff are not medically necessary. Compl. ¶¶ 44-46; DMSJ at 13; PMSJ at 10.

III. ARGUMENT

A. The ADA Amendments Act Does Not Alter the Integration Mandate

The ADAAA has the stated purpose of "reinstating a broad scope of protection to be available under the ADA." Pub. L. No. 110-325, § 2(b)(1), 122 Stat. 3553 (2008). In particular, it broadened the definition of what constitutes a disability. Pub. L. No. 110-325, § 2(a)(3)-(7) and (b)(2)-(5), 122 Stat. 3553 (2008); *see Nyrop v. Indep. Sch. Dist. No. 11*, 616 F.3d 728, 734 n.4 (8th Cir. 2010). Congress explicitly sought to reject the heightened standard for proving disability that was established in cases including *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) and *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).[8] Though the ADAAA made important changes to the definition of the term "disability," the ADAAA did not alter the core nondiscrimination obligations that were interpreted by the Court in the *Olmstead* majority's decision. The *Olmstead* majority cited Title II's prohibition against discrimination, 42 U.S.C. § 12132, and the Title II regulations that require public entities to provide services in the most integrated setting appropriate, 28 C.F.R. § 35.130(d), and require reasonable modifications, 28 C.F.R. § 35.130(b)(7), as well as the Department's regulatory guidance that defines "most integrated setting," 28 C.F.R. pt. 35, app. B at

[8] Specifically, Congress sought to reject the reasoning in *Sutton* and *Toyota*, "that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.'" Pub. L. No. 110-325, § 2(b), 122 Stat. 3553 (2008).

703. *Olmstead*, 527 U.S. at 589-90. Neither Title II's statutory prohibition on discrimination nor those regulatory provisions have changed since 1999.

Defendant's argument misreads *Olmstead*. The Court did not borrow the definition of discrimination from Title I to find that unnecessary segregation is a form of discrimination under Title II. *See* DMSJ at 21-22. Instead, the Court relied upon the ADA's express Congressional findings that segregation is a form of discrimination. *Olmstead*, 527 U.S. at 599-600.[9] These findings include that, "historically, society has tended to isolate and segregate individuals with disabilities" and that "individuals with disabilities continually encounter various forms of discrimination, including . . . segregation." 42 U.S.C. §§ 12101(a)(2) and (5). Congress determined 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." *Id.* § 12101(a)(7). Describing the consequence of unnecessary institutionalization, the Court reasoned that "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 [and] . . . severely diminishes the everyday life activities of individuals." *Olmstead*, 527 U.S. at 600-01. The Court found that segregation is in fact a form of differential treatment. *Id.* at 601 ("Dissimilar treatment correspondingly exists in this key respect: In order to

[9] The Court also observed that the Justice Department, the agency directed by Congress to issue regulations implementing Title II, had consistently taken the position that undue institutionalization is discrimination based on disability and "its views warrant respect." 527 U.S. at 597-98.

receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.").[10] The premise underlying Defendant's novel argument is wrong.

Defendant's claim that the ADAAA nullifies *Olmstead* similarly lacks merit. Had Congress wanted to reject the Supreme Court's decision in *Olmstead*, it could easily have modified Title II in response to *Olmstead*, or directed the Department of Justice to revise the integration provisions of its Title II regulations to do so. Congress did neither. The ADAAA explicitly identifies the Supreme Court decisions that Congress was rejecting, and *Olmstead* is not among them. Indeed, all of the cases rejected by the ADAAA concern the ADA's definition of disability, which *Olmstead* did not address. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553 (2008). Nothing about the ADAAA alters the analysis of whether discrimination has occurred under Title II, which is the crucial question *Olmstead* decided. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(a)(2), 122 Stat. 3553 (2008); 42 U.S.C. § 12112.

The Fifth Circuit and circuits across the country have consistently applied the integration mandate in post-ADAAA decisions. *See, e.g.*, *Harrison v. Young*, 48 F.4th 331, 341-42 (5th Cir. 2022) (*Harrison II*) ("Unjustified isolation of disabled individuals

[10] The Court in *Olmstead* specifically disavowed the Defendant's argument, noting that both "precedent and logic" support the proposition that discrimination includes disparate treatment within a protected group. *Olmstead*, 527 U.S. at 598 n.10.

in institutions rather than community placement is unlawful discrimination under the ADA and the Rehabilitation Act.") (quotation marks omitted); *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 459 (6th Cir. 2020); *Brown v. District of Columbia*, 928 F.3d 1070, 1077 (D.C. Cir. 2019); *Steimel v. Wernert*, 823 F.3d 902, 910 (7th Cir. 2016); *Davis v. Shah*, 821 F.3d 231, 260-61 (2d Cir. 2016); *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013); *M.R. v. Dreyfus*, 663 F.3d 1100, 1116 (9th Cir. 2011), *amended by* 697 F.3d 706 (9th Cir. 2012).[11]

For these reasons, the Court should reject Defendant's argument that the ADAAA undermines the *Olmstead* decision.

B. Defendant Incorrectly Defines "Qualified" Individuals

Defendant's assertion that Plaintiff is not a qualified person with a disability is based on an incorrect application of the standard for showing that an individual is "qualified." A qualified individual with a disability is one "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

[11] *Silva* does not, as Defendant contends, support the proposition that the ADA and the Rehabilitation Act only prohibit disparate treatment. In fact, the effective communication claim examined in *Silva* would be impermissible if Defendant's argument were correct because such claims do not require a showing that people with disabilities have been treated differently from people without disabilities. Instead, the ADA's effective communication provision requires public entities to provide auxiliary aids and services to individuals with disabilities where necessary to afford them an equal opportunity to participate in and enjoy the benefits of covered programs. *See Silva v. Baptist Health S. Fla., Inc*., 856 F.3d 824, 833-34 (11th Cir. 2017); 28 C.F.R. § 35.160. Yet the Eleventh Circuit reversed summary judgment for the defendants because the district court had wrongly required the plaintiffs, deaf hospital patients, to show they had suffered adverse medical consequences as a result of the hospitals' alleged failure to provide effective communication. *Silva*, 856 F.3d at 833-34.

in programs or activities provided by a public entity." 42 U.S.C. § 12131(2); 28 C.F.R. § 35.104. Title II distinguishes between "essential eligibility requirements," which need not be compromised, and "rules, policies, or practices," which—like architectural, communication, and transportation barriers—are subject to a reasonable-modification requirement to the extent that they needlessly preclude individuals with disabilities from accessing public programs and services. *See Mary Jo C. v. N.Y. State & Loc. Ret. Sys.*, 707 F.3d 144, 155-56, 160 (2d Cir. 2013). Thus, one may be "qualified" even if modifications to policies and practices are needed to access the service, program, or activity.

Defendant concedes that Plaintiff is currently enrolled in the State's HCS program. *See* DMSJ at 16. However, Defendant mistakenly identifies the Medicaid waiver cost cap as an essential eligibility requirement for services. *See id.* at 19-20. Contrary to the State's position, a plaintiff may be qualified for services even where the plaintiff seeks services exceeding a Medicaid cost limit. *See Radaszewski ex rel. Radaszewski v. Maram*, 383 F.3d 599, 612-13 (7th Cir. 2004) (rejecting the argument that the plaintiff was not a qualified individual because the amount of in-home nursing services sought by the plaintiff exceeded the cost limit set by the state for such services).

Not every aspect of an existing program is an essential eligibility requirement; rather, "essential eligibility requirements are those requirements without which the nature of the program would be fundamentally altered." *Mary Jo C.*, 707 F.3d at 158 (internal brackets and quotation marks omitted). To demonstrate that something is an essential

eligibility requirement, a public entity must provide evidence that the requirement is necessary to the substantive purpose undergirding the program. *People First of Ala. v. Merrill*, 467 F. Supp. 3d 1179, 1216 (N.D. Ala. 2020), *appeal dismissed*, No. 20-12184-GG, 2020 WL 5543717 (11th Cir. July 17, 2020) (citing *Schaw v. Habitat for Humanity*, 938 F.3d 1259, 1266-67 (11th Cir. 2019)).[12] Courts must independently analyze whether an eligibility requirement is essential. *Mary Jo C.*, 707 F.3d at 159 (observing that "[the ADA] require[s] us to analyze the importance of an eligibility requirement for a public program or benefit, rather than to defer automatically to whatever 'formal legal eligibility requirements' may exist, no matter how unimportant for the program in question they may be").

Texas maintains a program that enables it to pay for services above the cost limit in appropriate cases. Compl. ¶ 35; DMSJ at 12; 40 Tex. Admin. Code § 40.1. The availability of this State funding to support services in excess of the cost cap demonstrates that the cost cap is not an essential eligibility requirement. *See Mary Jo C.*,

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[12] Defendant refers to *Easley* as an example of a court rejecting a proposed expansion of a community-based service program to individuals who did not meet a necessary eligibility requirement. DMSJ at 19. In *Easley*, the court found that the requested modification would undermine the core purpose of the program. Plaintiffs, whose disabilities prevented them from hiring and supervising personal attendants, sought to participate in a program of self-directed care by using surrogates. *Easley v. Snider*, 36 F.3d 297, 299-300 (3d Cir. 1994). The court found that mental alertness was a necessary requirement for a program whose purpose was to "foster independence through consumer control" of services. *Id.* at 304. Unlike the facts in *Easley*, Plaintiff's requested modification does not contradict the stated purpose of the HCS program—to maximize functional independence among its beneficiaries within the community. *See* DMSJ at 20.

Two other cases that Defendant cites where courts found that program requirements were essential eligibility requirements are inapposite and did not involve *Olmstead* claims. *See Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 929-30 (8th Cir. 1994) (finding age limit for children's school sports program an essential eligibility requirement, the waiving of which would be a fundamental alteration); *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 407-08 (1979) (noting that nursing student's ability to communicate with patients was a necessary physical requirement to ensure patient safety).

707 F.3d at 160 (observing that "the fact that the State itself waives the [requirement] in the enumerated circumstances strongly suggests that the [requirement] is not essential"). Plaintiff herself apparently received such an exception from the cost cap in the 2017-2018 fiscal year. DMSJ at 11.

Rather than confining their analysis to cost caps and service definitions, courts considering whether individuals are qualified for services under *Olmstead* ask a simpler question: whether they are appropriate for and do not oppose receiving services in the community. *Olmstead*, 527 U.S. at 601-03; *see also Townsend v. Quasim*, 328 F.3d 511, 516 (9th Cir. 2003) (plaintiff was qualified because he was eligible to receive long-term care through the state's Medicaid program, he preferred to receive such services in a community-based setting, and community-based services were appropriate for his needs); *Radaszewski*, 383 F.3d at 612-13. Here, not only is Plaintiff currently enrolled in and approved by the State to receive community-based services through the HCS program, but the parties also agree that Plaintiff prefers and has for years been living in the community receiving such services.[13] DMSJ at 10-11, 15-16; PRDMSJ at 5-6; Compl. ¶¶ 31-34.

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[13] It appears that the State now concedes community-based services, albeit fewer hours of nursing services than what was sought by Plaintiff, are appropriate. *See* DMSJ at 15-16; PRDMSJ at 5-6. However, whether the State's treatment professionals find an individual appropriate for community-based services is not determinative. *See, e.g., Harrison v. Phillips*, 395 F. Supp. 3d 800, 812 (N.D. Tex. 2019) (*Harrison I*), *vacated on other grounds sub nom. Harrison v. Young*, 48 F.4th 331, 341-42 (5th Cir. 2022); *see also Day v. District of Columbia*, 894 F. Supp. 2d 1, 23-24 (D.D.C. 2012) (stating that "lower courts have universally rejected the absolutist interpretation" that plaintiffs must provide determinations from a public entity's treatment professionals); *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 258-59 (E.D.N.Y. 2009) (reasoning that requiring determinations from state treatment professionals would "eviscerate the integration mandate"), *vacated on other grounds sub nom. Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 162-63 (2d Cir. 2012); *Long v. Benson*, No.

C. Providing Access to Services to Prevent Unnecessary Institutionalization May Be a Reasonable Modification of a State's Service System Even If the Cost of Those Services Exceeds a Cost Cap for a Medicaid Waiver Program

Under the ADA, it may be a reasonable modification to provide community-based services to a person at serious risk of institutionalization even if those services would exceed a Medicaid waiver program's financial cap. *See* DMSJ at 21-26; Def.'s Opp'n to Pl.'s Mot. for Summ. J. (DOPMSJ), ECF No. 71, at 21. States must make such modifications unless they can prove that the modifications would fundamentally alter the services they provide. 28 C.F.R. § 35.130(b)(7)(i); *see Brown v. District of Columbia*, 928 F.3d 1070, 1078 (D.C. Cir. 2019) (citing *Steimel v. Wernert*, 823 F.3d 902, 914-16 (7th Cir. 2016); *Townsend v. Quasim*, 328 F.3d 511, 517 (9th Cir. 2003); *Frederick L. v. Dep't of Pub. Welfare of Pa.*, 422 F.3d 151, 156-57 (3d Cir. 2005)). A plaintiff's burden of identifying a reasonable modification to remedy or avoid discrimination is "not a heavy one." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 280 (2d Cir. 2003) (citing *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995)). The defendant must then demonstrate that the modification is in fact a fundamental alternation in order to prevail.[14] *See Olmstead*, 527 U.S. at 604-07; *Brown*, 928 F.3d at 1077-78; *Steimel*, 823 F.3d at 914-16; *Townsend*, 328 F.3d at 517; 28 C.F.R. § 35.130(b)(7)(i).

4:08cv26-RH/WCS, 2008 WL 4571904, at *2 (N.D. Fla. Oct. 14, 2008) (noting that the protections of the integration mandate would become illusory if the state could refuse to acknowledge the appropriateness of community placement); *Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp. 2d 509, 540 (E.D. Pa. 2001) (finding that states cannot avoid the integration mandate by failing to make recommendations for community placement).

[14] One way to make out the affirmative defense is for a jurisdiction to demonstrate that it has an effectively working *Olmstead* plan in place and that the requested modification would disturb that plan. *See Olmstead*, 527 U.S. at 605-06; *Frederick L. v. Dep't of Pub. Welfare of Pa.*, 422 F.3d 151, 155-59 (3d Cir. 2005).

An expansion of existing community-based services to prevent needless institutionalization can be a reasonable modification. *Pashby v. Delia*, 709 F.3d 307, 322-24 (4th Cir. 2013); *see also Radaszewski*, 383 F.3d at 609 ("[A] State may violate Title II when it refuses to provide an existing benefit [in this case, an in-home nursing program that was not available to the plaintiff] to a disabled person that would enable that individual to live in a more community-integrated setting."). This is the case even in the context of capped or restricted Medicaid waivers.[15] When limitations on waiver services place individuals at serious risk of unnecessary institutionalization, the state must make reasonable modifications to those limitations. *Cota v. Maxwell-Jolly*, 688 F. Supp. 2d 980, 994-95 (N.D. Cal. 2010) (new law limiting availability of adult day care services provided under Medicaid likely violated ADA because plaintiffs needed services to avoid

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The cases that Defendant cites to support the position that providing services beyond what is required by a Medicaid waiver program is a fundamental alteration are all inapposite. All were decided on the grounds that the state had an effectively working *Olmstead* plan. *See Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615, 621-22 (9th Cir. 2005); *Sanchez v. Johnson*, 416 F.3d 1051, 1068 (9th Cir. 2005) ("Sanchez's and the Providers' requested relief would require us to disrupt this working plan and to restrict impermissibly the leeway that California is permitted in its operation of developmentally disabled services under *Olmstead*."). Moreover, in *Braddock*, the court specifically stated that it "[did] not hold that the forced expansion of a state's Medicaid waiver program can *never* be a reasonable modification required by the ADA." *Braddock*, 427 F.3d at 621. Rather, doing so was not required in the context where the state had an effectively working *Olmstead* plan. *Id.* at 621-22. It does not appear that Defendant has put forth evidence of such a plan. The mere assertion that a state has an *Olmstead* plan does not entitle it to a fundamental-alteration defense. *See id.*; *Sanchez*, 416 F.3d at 1066-67.

[15] As Defendant acknowledges, a state's obligations under the ADA are not limited by Medicaid's requirements, since Title II of the ADA creates an independent legal obligation on states. *See, e.g.*, *Davis v. Shah*, 821 F.3d 231, 264 (2d Cir. 2016) ("A state's duties under the ADA are wholly distinct from its obligations under the Medicaid Act."); *Townsend*, 328 F.3d at 518 n.1 (stating that Medicaid Act conditions are not relevant to whether plaintiffs can demonstrate a *prima facie* violation of the integration mandate); *Haddad v. Arnold*, 784 F. Supp. 2d 1284, 1302-03 (M.D. Fla. 2010) (rejecting defendant's argument that plaintiff's ADA challenge requesting waiver services to avoid serious risk of institutionalization failed because of Medicaid rules). It is routine for courts to find that a state is violating the ADA even while administering CMS-approved services, including waiver programs. *See, e.g.*, *Radaszewski*, 383 F.3d at 602, 614-15 (plaintiff's claims allowed to proceed despite HHS's approval of state's Medicaid plan and waiver programs); *Crabtree v. Goetz*, No. Civ. A. 3:08-0939, 2008 WL 5330506, at *2, *30-31 (M.D. Tenn. Dec. 19, 2008) (same); *Haddad*, 784 F. Supp. 2d at 1302-03, 1302 n.14 (same); *Grooms v. Maram*, 563 F. Supp. 2d 840, 844, 863 (N.D. Ill. 2008) (same).

unnecessary institutionalization and the state has an obligation to make reasonable modifications to prevent this); *Radaszewski*, 383 F.3d at 609-10.

These modifications can be targeted to people who are at serious risk of institutionalization. For example, one court observed that certain statewide reductions in adult day care services likely violated the ADA because the state had not "implement[ed] any means of ensuring that, if and when the cuts take effect, the necessary alternative services will be identified and in place for Plaintiffs." *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1174 (N.D. Cal. 2009); *see also V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1122 (N.D. Cal. 2009) (noting that the state could establish "individualized measures" to reduce In-Home Supportive Services where those services were provided for "convenience or improved quality of life rather than need").[16]

Though some reasonable modifications may come with a cost, that is not determinative. The Supreme Court explained that courts should review requested modifications recognizing that spending on modifications for some may impact the state's ability to provide for others. *Olmstead*, 527 U.S. at 604. But *Olmstead* does not preclude expenditures. For example, the Tenth Circuit rejected Oklahoma's

[16] *See also B.N. v. Murphy*, No. 09-cv-199, 2011 WL 5838976, at *10 (N.D. Ind. Nov. 16, 2011) (cap on respite care services discriminated against 13 individuals who were unable to secure alternative services and were at risk of institutionalization without additional respite care); *Cruz v. Dudek*, No. 10-cv-23048, 2010 WL 4284955, at *13-15 (S.D. Fla. Oct. 12, 2010) (placing waitlisted plaintiffs on waiver to prevent unnecessary institutionalization was reasonable modification of Florida's spinal cord injury waiver); *Crabtree v. Goetz*, No. Civ. A. 3:08-0939, 2008 WL 5330506, at *25, (M.D. Tenn. Dec. 19, 2008) (noting plaintiffs' evidence that the state was "forcing Plaintiffs into nursing homes without any mechanism to determine whether their medical needs can be met in the community or the nursing home"); *see also* Centers for Medicare and Medicaid Services (CMS), Olmstead Update No. 4, at 4 (Jan. 10, 2001), https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/smd011001a.pdf [https://perma.cc/7LC7-7FFC].

fundamental-alteration defense in a case in which plaintiffs were seeking an expansion of medication benefits in the community. The court explained that Oklahoma's fiscal problems did not establish a per se fundamental-alteration defense because "[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." *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1183 (10th Cir. 2003). Similarly, the Third Circuit held that "states cannot sustain a fundamental-alteration defense based solely upon the conclusory invocation of vaguely-defined fiscal constraints." *Frederick L. v. Dep't of Pub. Welfare*, 364 F.3d 487, 496 (3d Cir. 2004) (citing *Makin ex rel. Russell v. Hawaii*, 114 F. Supp. 2d 1017, 1034 (D. Haw. 1999)).

Nor is the requirement to make reasonable modifications to state services to prevent institutionalization undermined by the decision in *Harrison II*. The context for that decision was the appeal of a preliminary injunction and the court concluded that the matter should be remanded "for the district court to make additional findings." *Harrison II*, 48 F.4th at 336. As the Fifth Circuit explained, a "preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion." *Id.* at 342-43 (citing *PCI Transp., Inc. v. Fort Worth & W.R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005) (quotation omitted)). Furthermore, the decision was made on the basis of the limited evidence provided at the preliminary injunction phase comparing the potential cost of community-based and institutional services for the individual plaintiff without the benefit of a developed record with evidence on the cost implications of modifications for the broader population of people

with disabilities. *Id.* at 342-343; *see Olmstead*, 527 U.S. at 604. The decision also did not address the cases cited above that found modifications to services, even those offered through Medicaid waivers, to be reasonable. Instead, it cites only to *Arc of Washington State Inc. v. Braddock*, 427 F.3d 615 (9th Cir. 2005), but *Braddock* turned on whether the state had an effectively working *Olmstead* plan. *Id*. at 621-212. The *Braddock* court specifically stated that it "[did] not hold that the forced expansion of a state's Medicaid waiver program can *never* be a reasonable modification required by the ADA." *Id.* at 621. The decision in *Harrison II* does not preclude the possibility that a reasonable modification may be necessary in the context of a Medicaid waiver.

IV. CONCLUSION

For the foregoing reasons, the United States submits that: (1) unnecessary institutionalization remains a form of discrimination prohibited by the ADA and the Rehabilitation Act; (2) a state's Medicaid waiver program cost cap is not necessarily an essential eligibility requirement; and (3) providing services above such a cap to avoid unnecessary institutionalization may be a reasonable modification of a state's service system.

Respectfully submitted this 23nd day of December, 2022,

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Certificate of Service

On December 23, 2022, I electronically submitted the foregoing document with the Clerk of Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

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