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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO/OAKLAND DIVISION

MIKESHA MARTINEZ, by and through her
 husband and next friend Carlos Martinez, LYDIA
 DOMINGUEZ, ALEX BROWN, by and through
 his mother and next friend Lisa Brown, DONNA
 BROWN, CHLOE LIPTON, by and through her
 conservator and next friend Julie Weissman-
 Steinbaugh, HERBERT M. MEYER, LESLIE
 GORDON, CHARLENE AYERS, WILLIE
 BEATRICE SHEPPARD, and ANDY
 MARTINEZ, on behalf of themselves and a class
 of those similarly situated; SERVICE
 EMPLOYEES INTERNATIONAL UNION
 UNITED HEALTHCARE WORKERS WEST;
 SERVICE EMPLOYEES INTERNATIONAL
 UNION UNITED LONG-TERM CARE
 WORKERS; SERVICE EMPLOYEES
 INTERNATIONAL UNION LOCAL 521; and
 SERVICE EMPLOYEES INTERNATIONAL
 UNION CALIFORNIA STATE COUNCIL,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, Governor of
 the State of California; JOHN A. WAGNER,
 Director of the California Department of Social
 Services; DAVID MAXWELL-JOLLY, Director
 of the California Department of Health Care
 Services; JOHN CHIANG, California State
 Controller; FRESNO COUNTY; and FRESNO
 COUNTY IN-HOME SUPPORTIVE SERVICES
 PUBLIC AUTHORITY,

Defendants.

Case No. C 09-02306 CW

CLASS ACTION

**PLAINTIFFS' OPPOSITION TO
 FRESNO DEFENDANTS' MOTIONS TO
 DISMISS PLAINTIFFS' CLASS ACTION
 COMPLAINT PURSUANT TO FRCP
 12(b)(1), (6) AND TO SEVER CLAIMS**

Date: August 27, 2009

Time: 2:00 p.m.

Place: Courtroom 2, 4th floor,
 Oakland Federal Courthouse
 1301 Clay Street
 Oakland, CA 94612

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1 Plaintiffs, In-Home Supportive Services (“IHSS”) consumers and unions representing IHSS
 2 providers, filed suit against various state officials (“State Defendants”) and against Fresno County and
 3 Fresno County In-Home Supportive Services Public Authority (collectively, “Fresno Defendants”),
 4 seeking to enjoin reductions in providers’ wages and benefits. Fresno Defendants now move to dismiss
 5 the claims against them, arguing that Plaintiffs lack standing and fail to state a claim for relief.
 6 Plaintiffs’ allegations are more than sufficient to satisfy the requisite standards at this phase of the
 7 litigation. Moreover, even though Plaintiffs need not rely on extrinsic evidence to rebut Fresno
 8 Defendants’ challenges, Plaintiffs have already submitted ample evidence supporting the relevant
 9 allegations in connection with their preliminary injunction motion. There is no basis to dismiss the
 10 claims against Fresno Defendants.

11 Fresno Defendants further move to sever the claims asserted against them, even though Plaintiffs
 12 assert the identical legal claims against State Defendants. Severance would needlessly waste judicial
 13 resources by requiring two courts to consider and decide the same questions of law and fact. It would
 14 also severely burden Plaintiffs, who would be forced to litigate these questions in two forums. Any
 15 inconvenience to Fresno Defendants from maintaining a single lawsuit does not outweigh these
 16 countervailing factors. Fresno Defendants’ motions should be denied.

17 **BACKGROUND¹**

18 On May 26, 2009, Plaintiffs filed a complaint challenging the reduction of wages and benefits for
 19 IHSS providers. Dkt. #1. The complaint asserts four claims for relief. The first and second claims
 20 challenge a state law – Welfare and Institutions Code §12306.1(d)(6) (“Section 12306.1(d)(6)”) – as
 21 violative of the federal Medicaid Act. Cpt. (Dkt. #1) ¶¶80-91. These claims are asserted only against
 22 State Defendants. The third and fourth claims (collectively, the “*Olmstead* claims”) assert challenges
 23 under, respectively, the Americans with Disabilities Act (“ADA”), 42 U.S.C. §12132, and the
 24 Rehabilitation Act, 29 U.S.C. §794(a), to both Section 12306.1(d)(6) and the conduct of Fresno
 25 Defendants in seeking to reduce the wages and benefits of IHSS providers in Fresno County. *Id.* ¶¶92-
 26 109. The *Olmstead* claims are asserted by the IHSS consumer plaintiffs against both State Defendants

27
 28 ¹ As the Court is already familiar with many of the pertinent facts, Plaintiffs set forth only those facts relevant to the instant motions.

1 and Fresno Defendants. The essence of the *Olmstead* claims is that reducing the wages and benefits of
 2 IHSS providers will create a shortage of providers, and that the resulting inability to find providers will
 3 force some IHSS consumers – unable to safely remain at home without critical IHSS services – to enter
 4 nursing homes or other residential institutions. This will violate the anti-discrimination provisions of the
 5 ADA and the Rehabilitation Act, because the “[u]njustified isolation [of people with disabilities] . . . is
 6 properly regarded as discrimination based on disability.” *Olmstead v. L.C. ex rel. Zimring*, 527 U.S.
 7 581, 597 (1999).

8 The complaint alleges that, after the enactment and implementation of Section 12306.1(d)(6),
 9 Fresno Defendants approved a notice to the California Department of Social Services (“CDSS”) “that
 10 Fresno County will reduce the wages and benefits of IHSS providers by \$1.00 per hour – wages will be
 11 reduced from \$10.25 per hour to \$9.50 per hour, and benefits will be reduced from \$.85 per hour to \$.60
 12 per hour – effective July 1, 2009.” *Id.* ¶51. The complaint further alleges the harm that would befall
 13 IHSS consumers were the wage and benefit reductions to take effect: Providers would leave IHSS
 14 employment to seek higher paying jobs, many consumers would be unable to fill the resulting vacancies,
 15 and some consumers would be forced to enter nursing homes as a result. *Id.* ¶¶58-59, 61. The
 16 complaint seeks to bring the claims against Fresno Defendants on behalf of a class consisting of all IHSS
 17 consumers residing in Fresno County. *Id.* ¶¶71-79.

18 On June 4, 2009, Plaintiffs filed a motion for a preliminary injunction based on all four claims
 19 for relief. Dkt. #5. In support of this motion, Plaintiffs submitted evidence that providers – including
 20 providers in Fresno County – would leave IHSS employment if their wages were reduced,² and that
 21 consumers – including consumers in Fresno County – face a significant threat of being unable to replace
 22 these providers and, as a result, being forced into nursing homes or other residential institutions. *See* C.
 23 Martinez Decl (Dkt. #33) ¶¶5-8 (if IHSS wages are reduced, providers will look for other work; given
 24 consumer’s difficulty finding providers at current rate, consumer will likely be forced into institutional
 25 care as a result); Peppars Decl. (Dkt. #38) ¶¶1, 5 (provider would look for other work if wages reduced);

26
 27 ² Fresno Defendants’ assertion that the providers for the named Plaintiffs residing in Fresno
 28 County are all related to the consumer they serve (Fr. Mot. to Dismiss 2:13-14) is incorrect: Mikesha
 Martinez’s three providers are not related to her. C. Martinez Decl. (Dkt. #33) ¶4; C. Martinez Reply
 Decl. (Dkt. #116) ¶2.

1 Austin Reply Decl. (Dkt. #111) ¶¶6-8 (consumer may be forced into nursing facility if wages reduced);
 2 L. Brown Decl. (Dkt. #13) ¶¶11-12 (if provider's wages cut, provider and consumer/son will lose
 3 housing and consumer will be forced to enter residential facility); Howes Decl. (Dkt. #22) ¶78 (expert
 4 analysis estimating that Fresno County wage reduction would result in 431 new provider vacancies that
 5 will not be filled and 151 additional IHSS consumers placed in nursing facilities).³

6 Plaintiffs also submitted evidence that the existence of a provider registry maintained by Fresno
 7 Defendants listing 450 active names does not mean that consumers will be able to find replacement
 8 providers. Specifically, Plaintiffs submitted declarations demonstrating the inability of some consumers
 9 to find registry providers, even at the current wage rate. *See* Austin Reply Decl. (Dkt. #111) ¶5 (registry
 10 providers did not have the characteristics of car ownership and English language skills that they were
 11 listed as having on the registry; many of the providers' listed phone numbers were disconnected); C.
 12 Martinez Reply Decl. (Dkt. #116) ¶¶3-5 (registry providers did not have characteristics of car ownership,
 13 non-smoking status, or willingness to work nights that they were listed as having on the registry; for the
 14 past two years consumer has been unable to find registry provider willing to work nights); Mesaris Reply
 15 Decl. (Dkt. #117) ¶5 (registry providers did not return phone calls or were not interested in job after
 16 hearing about physical requirements needed to care for consumer); *see also* Carroll Decl., Ex. G (Dkt.
 17 #97-7) at 24 (2008 CDSS report documenting public authorities' report of a "critical shortage" in
 18 providers willing to serve consumers with difficult health conditions – including consumers "who
 19 require multiple providers willing to work all shifts and weekends," such as Plaintiff Mikesha Martinez
 20 – despite the existence of registries). Plaintiffs also submitted evidence that Fresno County's high
 21 unemployment rate would not prevent provider vacancies. Howes Decl. (Dkt. #22) ¶78 (expert analysis,
 22 taking Fresno County's unemployment rate into account, estimated that Fresno County's proposed wage
 23 reduction would result in 431 new vacancies that would not be filled).

24 On June 26, this Court issued a written preliminary injunction enjoining Section 12306.1(d)(6),
 25 holding that Plaintiffs demonstrated a likelihood of success on their first claim for relief, that the statute
 26

27
 28 ³ Plaintiffs incorporate by reference all cited declarations filed in support of Plaintiffs' preliminary injunction motion.

1 violated the procedural requirements of the federal Medicaid Act. Dkt. #130. In an accompanying
2 order, this Court found that irreparable harm would result absent preliminary injunctive relief:

3 IHSS consumers will suffer immediate and irreparable harm unless the Court issues a
4 preliminary injunction. The wage reductions will cause many IHSS providers to leave
5 employment, which in turn will leave consumers without IHSS assistance. The
6 consumers' quality of life and health-care will be greatly diminished, which will likely
7 cause great harm to disabled individuals. For instance, the declarations submitted by
8 Plaintiffs describe harms ranging from going hungry and dehydration, to falls and burns,
9 to an inability ever to leave the home. Institutionalizing individuals that can comfortably
10 survive in their home with the help of IHSS providers will cause Plaintiffs to suffer injury
11 to their mental and physical health, including a shortened life, and even death for some
12 Plaintiffs.

13 Order Granting Prelim. Inj. (Dkt. #131) 10:25-11:10 (citation and quotation marks omitted). The Court
14 declined to rule on whether Plaintiffs had established a likelihood of success on their second, third, or
15 fourth claims for relief. *Id.* 10:18-23.

16 In subsequent Orders clarifying the Preliminary Injunction, the Court explained that the
17 Preliminary Injunction obligated State Defendants to "rescind the State's approval of all county rate
18 reduction requests which were submitted after February 20, 2009, to be effective July 1, 2009."
19 Amended Prelim. Inj. (Dkt. #172) 6:1-3. Although Fresno Defendants had submitted a letter to CDSS
20 stating an additional reason for their requested rate reduction after their submission of a rate reduction
21 request based on Section 12306.1(d)(6), this Court held that the letter "merely expresses a second reason
22 for [Fresno's] initial rate change request submitted on April 30, 2009," and accordingly "does not
23 constitute a second rate change request." Order Further Clarifying Inj. (Dkt. #203) 6:14-18. Thus, under
24 the terms of the injunction, "[b]efore the State may approve a rate reduction for . . . Fresno County, it
25 must receive from the County a new and separate written request conforming to all the requirements of
26 law and regulation, based on a reason other than § 12306.1(d)(6)." *Id.* 7:14-18. No such request has
27 been submitted to date.

28 Fresno Defendants now move to dismiss Plaintiffs' claims for lack of standing and for failure to
state a claim. Dkt. #101. Fresno Defendants further move to sever the claims against Fresno
Defendants. Dkt. #106-1. Plaintiffs oppose both motions.

ARGUMENT

I. Plaintiffs Have Standing To Bring Claims Against Fresno Defendants

A. Standard

To establish Article III standing, a plaintiff must establish injury in fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). “[E]ach element [of the standing inquiry] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.” *Id.* at 561. Thus, “[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.” *Id.* (internal quotations marks and citation omitted); *accord Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003) (at the pleading stage of litigation, a plaintiff “need only show that the facts alleged, if proved, would confer standing upon him”).

Fresno Defendants cite *San Diego Gun Rights Committee v. Reno*, 98 F.3d 1121 (9th Cir. 1996), to support their assertion that Plaintiffs must meet “a higher, more stringent burden” for standing purposes because they seek declaratory and injunctive relief. Fr. Mot. to Dismiss 9:17-19. But *San Diego Gun Rights* merely states the obvious proposition that a plaintiff seeking such relief cannot rely solely upon a past injury; instead, she must demonstrate a likelihood of future injury to warrant the requested relief. *Id.* at 1126; *see also Bras v. Cal. Public Utils. Comm’n*, 59 F.3d 869, 873 (9th Cir. 1995) (“Because Bras seeks declaratory and injunctive relief only, it is insufficient for him to demonstrate that he was injured in the past . . .”).

Accordingly, although the requested relief may impact the *type* of injury the plaintiff must demonstrate, it does not alter the requisite burden to establish standing. Any plaintiff must establish an injury that is “concrete and particularized” and “actual or imminent.” *Lujan*, 504 U.S. at 560. To establish a likelihood of future injury, “a credible threat of harm is sufficient.” *Central Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002). As noted above, Plaintiffs here need only show that the allegations in the complaint, if true, establish this credible threat. *Warren*, 328 F.3d at 1140.

B. Plaintiffs' allegations establish injury and causation

Fresno Defendants first argue that Plaintiffs' allegations on their face fail to establish injury and causation. Fr. Mot. to Dismiss 8:3-10:6. They begin by noting that the complaint lacks any allegations that a consumer Plaintiff "ha[s] suffered an actual injury at this point in time." Fr. Mot. to Dismiss 9:1-3. Of course, there are no such allegations because the challenged action has not yet taken place. Indeed, Plaintiffs sought – and the Court granted – a preliminary injunction to prevent the injury before it took place. Article III standing requirements do not require plaintiffs to wait until they have been injured before bringing suit. *See Raich v. Gonzales*, 500 F.3d 850, 857 (9th Cir. 2007) (holding plaintiff satisfied standing requirements by demonstrating threatened injury, even though she "has not suffered any past injury"); *Central Delta Water Agency*, 306 F.3d at 950 ("a credible threat of harm is sufficient to constitute actual injury for standing purposes, whether or not a statutory violation has occurred").

Nor are Plaintiffs' allegations of future injury simply "wild prognostications," as Fresno Defendants contend. Fr. Mot. to Dismiss 9:3-5. To the contrary, the complaint specifically alleges how the consumer Plaintiffs will be injured if wages are reduced:

In the counties in which wages will be reduced [including Fresno County], many IHSS providers will be forced to leave IHSS employment to seek higher paying jobs. Not all the vacancies created by IHSS providers leaving their employment will be filled with new IHSS providers.

As a result of these vacancies, many IHSS consumers in these counties will be unable to find providers for any or all of their authorized IHSS hours. These consumers will either have to make do with reduced or eliminated IHSS services, or be forced to enter nursing homes or other residential institutions.

Cpt. (Dkt. #1) ¶¶58-59.

Because Fresno Defendants here make a facial challenge to Plaintiffs' standing, Plaintiffs "need only show that the facts alleged, if proved, would confer standing upon [them]." *Warren*, 328 F.3d at 1140. Accepting the allegations as true, Plaintiffs have clearly demonstrated that they face an imminent threat of injury – namely, unjustified institutionalization – that would be caused by Fresno Defendants' reduction of IHSS provider wages and benefits.

Moreover, even though the allegations of the complaint alone are sufficient to establish standing at this stage of the litigation, Plaintiffs have in fact provided ample evidence, in the context of the preliminary injunction motion, to support these allegations. *See supra* at 2:19-3:5. Plaintiffs submitted

1 declarations from providers in Fresno County stating that they would look for other work if their wages
 2 were reduced. Peppers Decl. (Dkt. #38) ¶5; *see also* C. Martinez Decl (Dkt. #33) ¶6. Given the
 3 difficulty that consumers have had finding providers at the current wage rate, their concerns about
 4 finding providers at a reduced rate are hardly speculative. C. Martinez Decl (Dkt. #33) ¶¶5, 7. And
 5 there can be no question that some consumers' level of need is so high that they would be forced to enter
 6 institutional settings if they were unable to replace their current providers. C. Martinez Decl. (Dkt. #33)
 7 ¶¶2, 8 (consumer with severe brain injuries requires round-the-clock care); Austin Reply Decl. (Dkt.
 8 #111) ¶¶2, 5, 8 (consumer with severe muscular dystrophy needs assistance getting out of bed; when a
 9 provider failed to show up one morning he "was stuck in bed all day"). Plaintiffs' expert's analysis
 10 provides further support for the allegations. Howes Decl. (Dkt. #22) ¶78.

11 Fresno Defendants argue that Plaintiffs' evidence is insufficient because Fresno County
 12 maintains a provider registry and currently has a higher unemployment rate than many counties. Fr.
 13 Mot. to Dismiss 9 n.2. But Plaintiffs' evidence shows that the IHSS provider registry – even at the
 14 current wage rate – has not ensured a consistent source of consumers, particularly for consumers with
 15 difficult medical needs who are often at the greatest risk of institutionalization if unable to find suitable
 16 providers. *See supra* at 3:6-20. Moreover, according to Fresno Defendants' own evidence, over 40% of
 17 Fresno County's registry providers are already working 30 hours or more per week. S. Sanchez Decl.
 18 (Dkt. #91) ¶5. Finally, Professor Howes' analysis of the impact of the wage reduction in Fresno County
 19 specifically took the county's unemployment rate and wage ratio into account. Howes Decl. (Dkt. #22)
 20 ¶78.

21 In sum, Plaintiffs have easily established a concrete, imminent threat of injury that would be
 22 caused by the challenged conduct. Indeed, this Court has already rejected the argument that Plaintiffs'
 23 allegations of injury are too speculative, finding that Plaintiffs demonstrated that "IHSS consumers will
 24 suffer immediate and irreparable harm" if IHSS providers wages and benefits were reduced because
 25 "wage reductions will cause many IHSS providers to leave employment, which in turn will leave
 26 consumers without IHSS assistance. The consumers' quality of life and health-care will be greatly
 27 diminished, which will likely cause great harm to disabled individuals," including institutionalization.
 28 Order Granting Prelim. Inj. (Dkt. #131) 10:25-11:10.

1 **C. Fresno Defendants’ redressability argument should be rejected**

2 Fresno Defendants’ final standing challenge is that the terms of Fresno Defendants’
3 memorandum of understanding (“MOU”) with the union representing IHSS providers permit Fresno
4 Defendants to reduce wages for reasons other than Section 12306.1(d)(6), and therefore Plaintiffs’ injury
5 cannot be redressed by the requested relief. This argument should be rejected.

6 As an initial matter, although a court may consider extrinsic evidence on a motion to dismiss for
7 lack of subject matter jurisdiction, *Colwell v. Dep’t of Health & Human Servs.*, 558 F.3d 1112, 1121
8 (9th Cir. 2009), the only evidence relied upon by Fresno Defendants is the MOU. As discussed below,
9 the MOU is entirely irrelevant to Plaintiffs’ standing. And where, as here, “jurisdiction is intertwined
10 with the merits, [the court] must ‘assume the truth of the allegations in a complaint unless controverted
11 by undisputed facts in the record.’” *Warren*, 328 F.3d 1139 (quoting *Roberts v. Corrothers*, 812 F.2d
12 1173, 1177 (9th Cir. 1987)).

13 The MOU has no bearing on Plaintiffs’ standing because the reason for Fresno Defendants’
14 attempt to reduce IHSS wages is entirely irrelevant to Plaintiffs’ *Olmstead* claims. Plaintiffs’ claims
15 against Fresno Defendants do not hinge on the *motive* for Fresno Defendants’ wage reduction, but focus
16 instead on the *impact*. Cpt. (Dkt. #1) ¶96 (“[T]he reduction of wages and benefits for IHSS providers,
17 including in Fresno County, would violate 42 U.S.C. §12132 by creating a substantial risk that Plaintiffs
18 . . . will be unable to find IHSS providers and will, as a result, be forced to enter nursing homes or other
19 institutional facilities, despite their desire and ability to remain in their homes.”); *see also id.* ¶105. Any
20 rate reduction of sufficient magnitude would injure Plaintiffs as discussed above, and this injury would
21 be redressed by the relief sought by Plaintiffs: an order “enjoin[ing] the Fresno County Defendants from
22 taking any action to implement a wage and benefit reduction for Fresno County IHSS providers.” Cpt.
23 (Dkt. #1) at 22-23.⁴

24 Fresno Defendants’ citation to *Pritkin v. Department of Energy*, 254 F.3d 791 (9th Cir. 2001),
25 and *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121 (9th Cir. 1996), Fr. Mot. to Dismiss
26 10:28-11:16, are inapposite. In both cases, specific conduct by an entity who was *not* a party to the

27 _____
28 ⁴ If the Court disagrees that Plaintiffs’ complaint states such a claim, Plaintiffs respectfully
request leave to amend their complaint accordingly.

litigation would have been required to avoid the complained-of injury. Because the court lacked authority to issue an order to the relevant entity, the plaintiffs' claims could not be redressed by those lawsuits. *Pritkin*, 254 F.3d at 801 ("Pritkin has failed to show how ordering [defendant] DOE to request funding would lead to the tangible result of a Hanford medical monitoring program when only [non-party] ATSDR has the power to actually initiate the program."); *San Diego Cty. Gun Rights*, 98 F.3d at 1130 ("[I]t is third-party weapons dealers and manufacturers – not the government defendants – who have raised the prices of assault weapons [thereby injuring plaintiffs]."). Here, Fresno Defendants do not dispute that the relevant actors – State Defendants and Fresno Defendants – are parties to this lawsuit.

Moreover, counsel's reference to the theoretical possibility of a rate reduction for reasons other than Section 12306.1(d)(6) cannot defeat standing. At the commencement of this lawsuit – when standing is measured, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) – Fresno Defendants had submitted a single rate change request, based on Section 12306.1(d)(6). Fresno Defendants have not submitted a separate rate change request based on any other reasons to date. *See* Order Further Clarifying Inj. (Dkt. #203) 6:14-18 (Fresno's "June 24, 2009 letter merely expresses a second reason for [Fresno's] initial rate change request submitted on April 30, 2009," and accordingly "does not constitute a second rate change request."). The State's approval of Fresno Defendants' single existing rate change request has been rescinded by this Court's Preliminary Injunction and subsequent Orders, thereby preventing the proposed wage reductions and, preliminarily, redressing Plaintiffs' injuries. That Fresno Defendants *might* submit a rate change request for other reasons, which might be approved by the State, is entirely irrelevant.⁵

Finally, Fresno Defendants' discussion of California law regarding "home rule" (Fr. Mot. to Dismiss 13:4-14:15) is entirely irrelevant. State law "home rule" principles cannot abrogate a public entity's responsibility to comply with the federal requirements of the ADA and Rehabilitation Act.

⁵ In addition, Fresno Defendants' authority to implement a rate change under the terms of the MOU based on a reduction in Realignment funding – an issue not before this Court – is contested. *See* Leyton Reply Decl. (Dkt. #201) ¶2 (describing state court case in which Plaintiff SEIU-UHW West United Healthcare Workers Union takes the position that Fresno's implementation of a wage and benefits cut purportedly based on a shortfall in realignment funds violates the parties' MOU in a number of different ways). Indeed, a state court temporarily enjoined an attempt by Fresno to do so. *Id.* ¶4.

Accordingly, Plaintiffs' threatened injuries will be redressed by the requested relief. Indeed, they have already been temporarily redressed by this Court's Preliminary Injunction.

II. Plaintiffs Have Stated A Cognizable Claim Against Fresno Defendants

A. Standard

On a motion to dismiss for lack of subject matter jurisdiction or for failure to state a claim, "a court must accept as true all of the [factual] allegations contained in a complaint." *Ashcroft v. Iqbal*, — U.S. —, 129 S.Ct. 1937, 1949 (2009). The complaint need allege "only enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the alleged facts "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. at 1949. The pleading standard, even after *Twombly* and *Iqbal*, "is not an onerous burden." *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1122 (9th Cir. 2008); *see also Twombly*, 550 U.S. at 556 ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.") (internal quotation marks omitted). Here, as discussed below, the allegations in Plaintiffs' complaint easily satisfy and exceed the requisite pleading standard.

B. Plaintiffs have stated cognizable *Olmstead* claims against Fresno Defendants

Fresno Defendants first argue that Plaintiffs' *Olmstead* claims are employment actions because Plaintiffs seek to prevent Fresno Defendants from reducing provider wages, and that such employment claims must be brought under Title I of the ADA. Fr. Mot. to Dismiss 16:8-14. However, these claims are not asserted by the wage-earners, but rather by people with disabilities – IHSS consumers – to challenge discrimination in the provision of services by a public entity or recipient of federal funds. The mere fact that the cause of the discrimination at issue involves wages paid to IHSS providers does not convert Plaintiffs' *Olmstead* claims into employment disputes. *See, e.g., Nelson v. Milwaukee County*, No. 04-CV-193, 2006 WL 290510, at *1, *6-*7 (E.D. Wisc. Feb. 7, 2006) (complaint alleging that state and county were "inadequately compensating [home care] service providers" properly stated *Olmstead* claim).

Fresno Defendants then suggest that Plaintiffs are simply effecting a "ploy" to "circumvent" the true employment nature of the claims. Fr. Mot. to Dismiss 16:15-17. Their proof? That none of the

1 consumers have alleged that they have been denied IHSS services. *Id.* 16:17-21, 17:7-9. But of course
 2 there are no such allegations. Plaintiffs brought this suit *before* the provider wages were reduced and
 3 sought a preliminary injunction to prevent the reduction and the injury that would subsequently result.
 4 Plaintiffs’ allegations that *if* wages are reduced they will be discriminated against because their providers
 5 will leave for higher-paying employment and they will likely be forced into institutions as a result, Cpt.
 6 (Dkt. #1) ¶¶58-59, are more than sufficient to state an *Olmstead* claim. *See Fisher v. Okla. Health Care*
 7 *Auth.*, 335 F.3d 1175, 1181-82 (10th Cir. 2003) (plaintiffs who “st[oo]d imperiled with segregation” as a
 8 result of state’s new policy stated *Olmstead* claim); *Crabtree v. Goetz*, No. 3:08-CV-939, 2008 WL
 9 5330506, at *25 (M.D. Tenn. Dec. 19, 2008) (where new state policy “will eliminate services that enable
 10 Plaintiffs to remain in their community placement” and thereby “cause their institutionalization,”
 11 plaintiffs demonstrated likelihood of success on *Olmstead* claim).

12 Fresno Defendants’ argument that their wage reduction proposal “is not directed to the
 13 institutionalization of individuals who qualify for the IHSS program” (Fr. Mot. to Dismiss 17:14-15)
 14 fundamentally miscomprehends the nature of an *Olmstead* claim. *Olmstead* itself is extremely clear:
 15 “Unjustified isolation [of people with disabilities] . . . is properly regarded as discrimination based on
 16 disability.” *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999). The institutionalization need
 17 not be intentional, it need only be unjustified. If it is unjustified – because the individual is able to and
 18 wishes to live in a more integrated setting – the institutionalization itself constitutes discrimination on
 19 the basis of disability.

20 Accordingly, *Weinreich v. Los Angeles County Metropolitan Transportation Authority*, 114 F.3d
 21 976 (9th Cir. 1997), relied upon by Fresno Defendants (Fr. Mot. to Dismiss 16:22-17:25), is inapposite.
 22 In *Weinreich*, the plaintiff was unable to meet one of the program’s eligibility requirements – updated
 23 medical information certifying his disability – because of his financial inability to afford a doctor’s
 24 appointment. *Id.* at 978. The Ninth Circuit held that the Transportation Authority’s duty to provide
 25 “reasonable accommodations” did not apply where the barrier to plaintiff’s participation was not his
 26 disability, but rather his financial constraints. *Id.*

27 But IHSS consumers have already been held eligible for participation in Medi-Cal’s IHSS
 28 program. It is Fresno Defendants that would place a barrier to this participation by refusing to pay the

1 wages and benefits necessary to ensure that consumers will be able to obtain IHSS providers. Fresno
 2 Defendants' suggestion that the real cause of institutionalization would be the consumers' financial
 3 constraints (Fr. Mot. to Dismiss 17:20-22) is absurd given the fact that Medicaid is a program for
 4 individuals "whose income and resources are insufficient to meet the costs of necessary medical
 5 services." 42 U.S.C. §1396. Fresno Defendants apparently seek to blame consumers' inability to find
 6 service providers for a program for poor people on the consumers' lack of resources to pay for those
 7 providers themselves.

8 Moreover, in *Olmstead* "the Supreme Court interpreted the failure to provide Medicaid services
 9 in a community-based setting as a form of discrimination on the basis of disability." *Townsend v.*
 10 *Quasim*, 328 F.3d 511, 516-17 (9th Cir. 2003). Thus, as long as the *Olmstead* factors are satisfied – "the
 11 State's treatment professionals have determined that community placement is appropriate, the transfer
 12 from institutional care to a less restrictive setting is not opposed by the affected individual, and the
 13 placement can be reasonably accommodated, taking into account the resources available to the State and
 14 the needs of others with mental disabilities," *Olmstead*, 527 U.S. at 587 – the failure to provide services
 15 to a disabled person in a community setting constitutes discrimination based on disability. *See, e.g., Ball*
 16 *v. Rodgers*, No. 00-CV-67, 2009 WL 1395423, at *4-*5 (D. Ariz. Apr. 24, 2009) (state's "failure to
 17 prevent unnecessary gaps in service and properly monitor the [Medicaid home care] program improperly
 18 discriminated against persons with disabilities by limiting their ability to maintain their social and
 19 economic independence and depriving them of a real choice between home and institutional care"); *see*
 20 *also Fisher*, 335 F.3d at 1181-82, 1184 (plaintiffs stated viable *Olmstead* claim in alleging that state's
 21 imposition of a five prescriptions per month limit on Medicaid recipients receiving home care services,
 22 even though the additional cost for some plaintiffs would be as little as \$25-60 per month).

23 Fresno Defendants close by reprising their earlier argument that it is too speculative to conclude
 24 that wage reductions will cause institutionalization. Fr. Mot. to Dismiss 17:26-18:12. Of course, on a
 25 motion to dismiss for failure to state a claim, Plaintiffs' factual allegations must be taken as true.
 26 *Ashcroft v. Iqbal*, 129 S.Ct. at 1949 ("[A] court must accept as true all of the [factual] allegations
 27 contained in a complaint."). Moreover, as demonstrated *supra* at 2:19-3:23, Plaintiffs have submitted
 28 ample evidence to support their allegations.

1 **III. The Claims Against Fresno Defendants Should Not Be Severed**

2 Fresno Defendants next ask the Court to sever the claims against them from the remainder of the
3 case. In other words, they want to force Plaintiffs to litigate two separate cases: one asserting *Olmstead*
4 claims against Fresno Defendants, and a second asserting *Olmstead* claims and additional Medicaid
5 claims against State Defendants.

6 Federal Rule of Civil Procedure 21 permits a court to sever claims if the likelihood of prejudice
7 to the defendant and confusion from the joinder of claims outweighs the judicial economy gained by
8 maintaining a single lawsuit and any prejudice to the plaintiff that would result from severance.⁶
9 *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296 (9th Cir. 2000). Here, the balance plainly weighs
10 against severance.

11 Judicial economy will be greatly served by keeping the claims in the same case. The *Olmstead*
12 claims against State Defendants and Fresno Defendants involve numerous overlapping questions of law
13 and fact. The legal claims are identical, as Plaintiffs bring the same *Olmstead* claims against State
14 Defendants and Fresno Defendants – that the reduction of IHSS provider wages will result in the
15 unjustified institutionalization of IHSS consumers. Severing the claims would require two courts to
16 conduct identical analyses of the *Olmstead* standard as applied to the reduction of wages of IHSS
17 providers. For example, almost every single argument raised in Fresno Defendants’ motion to dismiss
18 applies also to Plaintiffs’ *Olmstead* claims against State Defendants. Indeed, State Defendants already
19 raised some of these arguments in their opposition to Plaintiffs’ preliminary injunction motion. State
20 Prelim. Inj. Opp. (Dkt. #95) 18:1-27 (arguing that Plaintiffs failed to state an *Olmstead* claim because
21 allegations and supporting evidence are too speculative). Many other overlapping issues are likely to
22 arise as the litigation proceeds; for example, both State Defendants and Fresno Defendants challenged
23 the analysis of Plaintiffs’ expert, Professor Candace Howes, in their oppositions to Plaintiffs’
24 preliminary injunction motion. *Id.* 17:2-5; Fr. Prelim. Inj. Opp. (Dkt. #72) 21:12-17. Requiring two
25 separate courts to conduct identical analyses of these and other issues would be a needless waste of
26

27 ⁶ Fresno Defendants do not contend that any confusion will result from maintaining the claims in
28 a single suit. Nor do they identify any prejudice that will result if they are not severed, other than
inconvenience.

1 judicial resources. Moreover, it would create a risk of inconsistent results, as the two courts could reach
2 different conclusions on any of these common questions.

3 Fresno Defendants' argument that severance is warranted because of facts specific to Fresno
4 County (Fr. Mot. to Sever 8:19-10:24) is unavailing. Any relevant facts specific to Fresno County are
5 also relevant to Plaintiffs' *Olmstead* claims against State Defendants, because Fresno is one of several
6 counties affected by the challenged state law. Thus, even if some Fresno-specific analysis is required,
7 severing the claims will require two courts to examine identical facts. Plainly, severance will *cause*, not
8 avoid, wasted judicial resources and delay. *See Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd.*, Nos.
9 04-CV-2000, 06-CV-2929, 2006 WL 2846436, at *4 (N.D. Cal. Oct. 3, 2006) ("[L]ogic dictates that
10 holding two trials, as opposed to one, will inevitably cause delay in resolution of the parties' disputes.")
11 (denying motion to sever). Fresno Defendants point to no reason why Fresno-specific evidence cannot
12 be presented in the instant case.

13 Moreover, severing the claims against Fresno Defendants would create a tremendous burden on
14 the Fresno Plaintiffs, who are low-income, disabled individuals. They would be forced to litigate the
15 same claims, issues, and facts in two separate forums.

16 In contrast, Fresno Defendants have failed to establish that they will incur significant prejudice,
17 delay, or expense absent severance. Although they claim that the Eastern District would be a more
18 convenient forum (Fr. Mot. to Sever 12:10-12), they provide no explanation for why the short distance
19 between Fresno County and this Court would be a significant inconvenience. And they have utterly
20 failed to make the "strong showing of inconvenience [required] to warrant upsetting the plaintiff's
21 choice of forum." *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986)
22 (discussing defendant's motion to transfer venue).

23 Nor have Fresno Defendants provided any basis for their assertion that denying severance would
24 cause a huge drain on their resources. Fr. Mot. to Sever 12:19-25. Plainly, they need only participate in
25 litigating those claims and issues relevant to them. Their desire to be severed from Plaintiffs' claims
26 against State Defendants indicates that they do not believe they have any stake in those claims. Thus,
27 there is no need for them to expend resources on any matter solely related to those claims.
28

1 Finally, Fresno Defendants' contention that severance is warranted because of provisions in its
 2 MOU (Fr. Mot. to Sever 10:25-12:4) is unavailing. As discussed above, the relevant analysis for
 3 Plaintiffs' *Olmstead* claims is the *impact* of the wage reductions, not the cause. The common factual
 4 and legal questions – whether the reduction of provider wages will result in the unjustified
 5 institutionalization of people with disabilities – remain the same. Moreover, the only existing rate
 6 reduction request submitted by Fresno Defendants was based on Section 12306.1(d)(6). Speculation
 7 about what Fresno Defendants may or may not do in the future cannot be the basis for severance.⁷

8 In sum, severance would needlessly burden the courts and Plaintiffs, forcing duplicative litigation
 9 of identical legal claims against two parties. Fresno Defendants have failed to demonstrate that any
 10 minor inconvenience to them warrants severance.

11 CONCLUSION

12 For the foregoing reasons, Fresno Defendants' motions to dismiss and to sever claims should be
 13 denied.

14
 15 Dated: August 6, 2009

Respectfully submitted,

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 28 ⁷ Contrary to Fresno Defendants' assertion (Fr. Mot. to Sever 12:3-4), the legality of the MOU
 provisions – although contested – are not before this Court, so any separate litigation over the MOU will
 not inconvenience any party to this case. *See supra* at 9 n.5.