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11
 12 IN THE UNITED STATES DISTRICT COURT
 13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 14 SAN FRANCISCO DIVISION

16 **I.N., a minor, by and through her mother
 and Guardian ad Litem, Zarinah F., and
 17 J.B., a minor, by and through his mother
 and Guardian ad Litem, Alisa B.,**

18
 19 Plaintiffs,

20 v.

21 **JENNIFER KENT, Director of the
 Department of Health Care Services, and
 22 STATE OF CALIFORNIA DEPARTMENT
 OF HEALTH CARE SERVICES,**

23
 24 Defendants.

3:18-CV-3099-WHA

**DEFENDANTS' MOTION TO DISMISS
 COMPLAINT FOR INJUNCTIVE AND
 DECLARATORY RELIEF & MOTION
 TO STRIKE**

F.R.C.P. 12(b)(1), 12(f)

Date: September 6, 2018

Time: 8:00 a.m.

Courtroom: 12

Judge: Hon. William H. Alsup

Action Filed: May 24, 2018

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1 **NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT & STRIKE**
2 **PORTIONS OF THE COMPLAINT**

3 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

4 PLEASE TAKE NOTICE THAT ON September 6, 2018, at 8:00 a.m., or as soon thereafter
5 as this motion may be heard in the above-entitled Court, located at 450 Golden Gate Avenue, San
6 Francisco, CA 94102, Defendants Jennifer Kent and the Department of Health Care Services
7 (DHCS) (collectively, Defendants) will move to dismiss and strike (in part) the Complaint for
8 Injunctive and Declaratory Relief (Complaint) filed by Plaintiffs I.N., a minor, by and through her
9 mother and Guardian ad Litem, Zarinah F. and J.B., a minor, by and through his mother and
10 Guardian ad Litem, Alisa B. (collectively, Plaintiffs). Defendants' Motion is made pursuant to
11 Federal Rules of Civil Procedure 12(b)(1) and 12(f) and is based on this Notice of Motion and
12 Motion, the accompanying Memorandum of Points and Authorities, and all pleadings and papers
13 on file in this matter, and upon such other matters as may be presented to the Court.

14
15
16 Dated: July 23, 2018

Respectfully submitted,

17 XAVIER BECERRA
18 Attorney General of California
19 SUSAN M. CARSON
20 Supervising Deputy Attorney General

21 */s/ Maryam Toossi Berona*

22 MARYAM TOOSSI BERONA
23 Deputy Attorney General
24 Attorneys for Defendants
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STATEMENT OF RELIEF SOUGHT

Defendants seek an order dismissing all of Plaintiffs’ claims for lack of subject matter jurisdiction, specifically Article III standing. Defendants also seek an order dismissing Plaintiffs’ Fifth Claim for Relief with prejudice for lack of subject matter jurisdiction, specifically as a result of their immunity from suit under the Eleventh Amendment. Finally, Defendants seek an order striking Plaintiffs’ prayers for relief found in paragraphs 167 and 168 of the Complaint.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether Plaintiffs’ claims should be dismissed because Plaintiffs lack subject matter jurisdiction, specifically Article III standing.
2. Whether Plaintiffs’ Fifth Claim for Relief should be dismissed where Defendants are immune from suit in federal court under the Eleventh Amendment of the U.S. Constitution for violations of Government Code Section 11135.
3. Whether Plaintiffs’ prayers for relief found in paragraphs 167 and 168 of the Complaint should be stricken where they are immaterial because Plaintiffs seek retrospective relief from a state agency and a state officer acting in her official capacity, and where such relief is barred by the Eleventh Amendment.

MEMORANDUM OF POINTS AND AUTHORITIES**INTRODUCTION**

1
2
3 Plaintiffs' Complaint suffers from a variety of fatal jurisdictional flaws. The Medicaid Act
4 requires that a state provide for arranging of services such as in-home or private duty skilled
5 nursing for Medicaid beneficiaries under the age of 21. Plaintiffs themselves admit that the
6 California Department of Health Care Services (DHCS) provides for the arranging of such
7 services, including: providing case managers, performing studies examining beneficiary access,
8 offering referral lists, performing home visits, and imposing numerous policies. DHCS and
9 Director Jennifer Kent have done what the Medicaid Act requires. The grievances in Plaintiffs'
10 Complaint are rooted in allegations that *third parties* are not meeting nursing hours that have been
11 allegedly authorized. The fatal deficiencies in Plaintiffs' Complaint do not end there—Plaintiffs
12 also seek redress that is barred by the Eleventh Amendment. Thus, Plaintiffs bring suit, on behalf
13 of a putative class, asking the Court to redress alleged injuries that have not been caused by
14 DHCS or Director Jennifer Kent, and to adjudicate claims and grant relief that are barred by the
15 Eleventh Amendment.

16 The entirety of Plaintiffs' Complaint must be dismissed because Plaintiffs lack Article III
17 standing. Here, Plaintiffs have not alleged any injury that is fairly traceable to either DHCS or
18 Director Jennifer Kent. In fact, Plaintiffs have alleged a complex system in which third parties—
19 including independent contractors—are providing the allegedly insufficient in-home or private
20 duty skilled nursing services, without ever specifying what harm DHCS or Director Jennifer Kent
21 has caused, and without specifying the type of relief that would redress their alleged harm.

22 Moreover, the Eleventh Amendment bars Plaintiffs' Fifth Claim for Relief for allegedly
23 violating California Government Code section 11135. As numerous courts within this circuit
24 have made clear, there is no private right of action against a State or individual acting in her
25 official capacity for violation of that state's law.

26 Lastly, the Eleventh Amendment also bars Plaintiffs' prayers for relief found in paragraphs
27 167 and 168 of the Complaint. Both these prayers for relief ask this Court to declare that a
28

1 State's *past* actions were in violation of federal law. Settled law establishes that the Eleventh
2 Amendment bars a federal court from granting such relief.

3 For these reasons, and others discussed below, Plaintiffs' attempts to hold DHCS and
4 Director Jennifer Kent liable for its grievances are legally deficient. Defendants' motion to
5 dismiss therefore should be granted with prejudice.

6 STATEMENT OF FACTS

7 Plaintiffs allege as follows: Plaintiffs Ivory N. and James B. are children dependent on
8 medical technology for survival. Complaint ¶ 2. They receive private duty nursing, but are
9 "unable to receive all the in-home shift nursing services they are authorized by Defendants to
10 receive." *Id.* ¶ 1-3, 22. Defendant DHCS operates Medi-Cal, California's Medicaid Act
11 program. *Id.* ¶ 3. Defendant Jennifer Kent is the Director of DHCS, and is sued in her official
12 capacity. *Id.* ¶ 20.

13 "The Medicaid Act expressly requires that Defendants 'arrange for (directly or through
14 referral to appropriate agencies, organizations, or individuals) corrective treatment' covered by
15 the Early and Periodic, Screening Diagnostic and Treatment (EPSDT) provisions of the Medicaid
16 Act, which includes in-home or 'private duty' skilled nursing for Medicaid beneficiaries under
17 the age of 21." *Id.* ¶ 4. DHCS arranges private duty nursing either (1) through third-party
18 managed care plans with whom DHCS contracts; or (2) "on a fee-for-service (FFS) basis,"
19 meaning that the "beneficiary seeks care from any provider" participating in Medi-Cal, namely
20 Home Health Agencies, or self-employed nurses known as Independent Nurse Providers. *Id.* ¶¶
21 60, 61, 68.

22 Plaintiffs file their action under Federal Rules of Civil Procedure 23(a) and (b)(2) on behalf
23 of: "All Medi-Cal beneficiaries under the age of 21 in California who have been approved for in-
24 home shift nursing or private duty nursing services by the Defendants, but are not receiving the
25 nursing services at the level approved by the Defendants." *Id.* ¶ 21.

ARGUMENT**I. DEFENDANTS' MOTION TO DISMISS SHOULD BE GRANTED BECAUSE PLAINTIFFS LACK ARTICLE III STANDING.**

A motion to dismiss is proper under Rule 12(b)(1) where the court lacks jurisdiction over the subject matter of the complaint. Fed. R. Civ. P. 12(b)(1). When a party moves to dismiss for lack of subject matter jurisdiction, “the plaintiff bears the burden of demonstrating that the court has jurisdiction.” *Boardman v. Shulman*, No. 12-00639, 2012 WL 6088309, at *2 (E.D. Cal. Dec. 6, 2012), *aff'd sub nom. Boardman v. C.I.R.*, 597 F. App'x 413 (9th Cir. 2015). If plaintiff lacks standing, the court lacks subject matter jurisdiction under Article III of the U.S. Constitution. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004).

Plaintiffs have failed to meet their burden of establishing Article III standing. *Takhar v. Kessler*, 76 F.3d 995, 1000 (9th Cir. 1996); *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010). To establish Article III standing, an injury must be “concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 140 (2010). The court presumes a lack of subject matter jurisdiction until the plaintiff meets his burden of establishing subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1); *see Silveira v. Beard*, No. 1:13-CV-0084 AWI BAM, 2013 WL 2458393, at *1 (E.D. Cal. June 6, 2013) (*citing Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994); *Vacek v. U.S. Postal Serv.*, 447 F.3d 1248, 1249-50 (9th Cir. 2006)). Here, Plaintiffs lack Article III standing to bring their claims because they fail to specifically allege harms that are fairly traceable to DHCS, and also fail to identify relief that will ameliorate the harms they allege. In other words, the Complaint fails to allege an injury that is fairly traceable to the challenged action and redressable by a favorable ruling because the alleged harm and the desired relief are based on the highly conjectural actions of third parties to this action. As a result, the Plaintiffs lack standing, the Court lacks subject matter jurisdiction, and the claims must be dismissed. *Cetacean Cmty*, 386 F.3d at 1174.

1 **A. Plaintiffs Have Failed to Allege that Defendants Have Caused Injury to**
2 **Plaintiffs.**

3 Foremost, Plaintiffs lack Article III standing to bring their claims because they fail to
4 specifically allege harms that are *fairly traceable* to Defendants. To demonstrate standing in this
5 case, Plaintiffs “must allege specific, concrete facts demonstrating that such practices harm
6 [them], and that [they] personally would benefit in a tangible way from the court's intervention.”
7 *Warth v. Seldin* 422 U.S. 490, 491 (1975). While “the fact that the harm to petitioners may have
8 resulted indirectly does not in itself preclude standing” plaintiffs that “rely on little more than the
9 remote possibility, unsubstantiated by allegations of fact, that their situation might have been
10 better had respondents acted otherwise, and might improve were the court to afford relief” fail to
11 allege standing. *Id.* “In cases where a chain of causation ‘involves numerous third parties’ whose
12 ‘independent decisions’ collectively have a ‘significant effect’ on plaintiffs’ injuries, the Supreme
13 Court and [the Ninth Circuit] have found the causal chain too weak to support standing at the
14 pleading stage.” *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (quoting *Allen v.*
15 *Wright*, 468 U.S. 737, 759 (1984)). In short, Plaintiffs here “must allege facts from which it
16 reasonably could be inferred” that “there is a *substantial probability*” that third party Home
17 Health Agencies could hire more nurses to assist Plaintiffs, or that nurses would appear for more
18 of their shifts, if the Court orders the relief sought. *Warth*, 422 U.S. at 504.

19 Here, Plaintiffs concede that the Medicaid Act requires only that Defendants “arrange for
20 (directly or through referral to appropriate agencies, organizations, or individuals) corrective
21 treatment’ covered by [EPSDT] provisions of the Medicaid Act.” Complaint ¶ 4. The Medicaid
22 Act’s EPSDT provisions require states “to furnish, as far as practicable” the medical services at
23 issue. *Id.* ¶ 33. Plaintiffs further recognize that Medi-Cal is a “vendor payment program, wherein
24 DHCS, or managed health care organizations with whom DHCS contracts, reimburse
25 participating providers . . . for the services they provide.” *Id.* ¶ 38. Thus, there is no contention
26 that Medi-Cal’s use of third-party service providers is unlawful, or that DHCS’s duty is limitless.
27 Rather, the statutes recognize “practicable” limitations. 42 U.S.C. § 1396-1.
28

1 Plaintiffs also concede that DHCS makes such arrangements for private duty nursing either
2 (1) through third-party managed care plans with whom DHCS contracts; or (2) “on a fee-for-
3 service (FFS) basis,” meaning that the “beneficiary seeks care from any provider” participating in
4 Medi-Cal, namely Home Health Agencies, or self-employed nurses known as Independent Nurse
5 Providers. Complaint ¶¶ 60, 61, 68. Importantly, Plaintiffs *do not allege* that any of the private
6 duty nurses, whose allegedly deficient hours are the source of Plaintiffs’ injuries, are employees
7 of DHCS, or in any way under the day-to-day management of DHCS. In fact, the allegations are
8 to the contrary—the Complaint concedes that an Independent Nurse Provider (INP) “is an
9 independent contractor” and that “beneficiaries or their families recruit INPs.” *Id.* ¶ 70. Plaintiffs
10 further allege that a Home Health Agency “is a private organization” that “recruits, hires and
11 trains health professionals to provide services such as private duty nursing” and “arrange[s]
12 scheduling of nurses.” *Id.* ¶ 69. Managed Care Plans are “health plans,” with which “DHCS
13 contracts,” that “provide health care to Medi-Cal beneficiaries within a managed care system.”
14 *Id.* ¶ 61. Thus, no matter what the arrangement, the nurses tending to EPSDT patients are staffed
15 by independent service providers. In short, the allegations of the Complaint make plain that the
16 alleged injury is traceable to the actions of *non-parties*.

17 Notwithstanding the fact that DHCS arranges the necessary services through Managed Care
18 Plans, Home Health Agencies, and Independent Nurse Providers, Plaintiffs sue DHCS because
19 the third parties providing these services allegedly do so insufficiently. Ivory N., who is alleged
20 to require 63 medically necessary hours per week of private duty nursing, receives 56 hours.
21 Complaint ¶ 93. This is because, “on average, nurses miss shifts six times per month due to
22 illness, vacation, or because they are assigned to multiple cases at one time.” *Id.* ¶ 93. Plaintiffs
23 also allege that “reasons she could not find nurses include: available nurses were unable to assist
24 a child with Ivory N.’s personal care and/or nursing needs, or available nurses did not accept
25 Medi-Cal.” *Id.* ¶ 95. Some nursing agencies “placed her on a waiting list.” *Id.* The other named
26 Plaintiff, James B., is alleged to require 135 medically necessary hours of private duty nursing per
27 week, but receives 50-60 hours. *Id.* ¶ 113. This is because independent nurses and nursing
28 agencies allegedly refuse the family’s solicitations—his father is alleged to have called 30 nursing

1 agencies, none of which “would accept James B. as a patient.” *Id.* ¶ 115. Thus, Plaintiffs have
2 alleged that the harms at issue are directly caused by third-party nurses and nurse employers.

3 Plaintiffs’ attempts to allege harms traceable to DHCS consist of grievances that DHCS has
4 allegedly failed to *successfully prevent* a harm, not that DHCS has *caused* one. By way of their
5 grievances, Plaintiffs acknowledge that DHCS provides case managers, performs studies
6 examining beneficiary access, offers referral lists, performs home visits and generates policies.
7 Complaint ¶¶ 71-83. DHCS’s alleged policies include, among others, one requiring home health
8 agencies to “only request nursing hours the agency is able to provide,” another “allowing two
9 nursing agencies to staff” the same patient, and yet another allowing the use of “certified nursing
10 assistants rather than licensed nurses.” *Id.* ¶¶ 71-83. To suggest that DHCS’s efforts legally
11 “fall-short” because they do not succeed in closing the alleged gap in hours, assumes that a failure
12 to succeed in controlling third-party behavior conveys standing. In fact, these efforts demonstrate
13 the very real limits on DHCS’s ability to influence the business decisions of third parties to this
14 litigation and to control the private sector nursing economy. *Id.* ¶ 84. In short, the allegations
15 that DHCS has failed to *successfully prevent* a harm caused by third-parties are not a substitute
16 for the allegation that DHCS has itself harmed Plaintiffs.

17 Thus, Plaintiffs fail to satisfy Article III’s traceability requirement because the allegations
18 entirely omit the causal connection between Defendants and the entities that schedule, hire,
19 manage and deploy the nurses who allegedly decline to provide services to Plaintiffs, or fail to
20 arrive for their shifts. It is insufficient to describe generally the nexus as “deficiencies in policies,
21 practices and procedures.” In order to meet standing requirements, Plaintiffs must identify a
22 specific failure on the part of Defendants that results in third party nursing agencies being unable
23 to fully staff Plaintiffs’ needs, or individual nurses failing to arrive for their shifts. They cannot
24 do so.

25 **B. A Favorable Decision Would Not Redress Any Alleged Injury.**

26 Importantly, the Complaint not only fails in tracing Plaintiffs’ alleged harms to
27 Defendants, but it also fails in identifying a form of relief by which Plaintiffs’ claims can be
28 redressed.

1 Like causation, redressability can be particularly difficult to demonstrate when the actions
2 of third parties are at issue, because “any pleading directed at the likely actions of third parties or
3 of parties under separate and independent statutory obligations would almost necessarily be
4 conclusory and speculative.” *Levine v. Vilsack* 587 F.3d 986, 997 (9th Cir. 2009). When the
5 injury arises “from the government's allegedly unlawful regulation (or lack of regulation) of
6 *someone else* . . . causation and redressability ordinarily hinge on the response of the regulated (or
7 regulable) third party to the government action or inaction—and perhaps on the response of
8 others as well.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (emphasis original).
9 Where “it is entirely conjectural whether the nonagency activity that affects respondents will be
10 altered or affected by the agency activity they seek to achieve,” there is no standing. *Id.* at 571.
11 Where the harm to the plaintiff requires a “speculative chain of possibilities” involving
12 independent third-parties, the alleged injury does not establish a fairly traceable harm. *Clapper v.*
13 *Amnesty International, USA*, 568 U.S. 398, 414 (2013).

14 Here, Plaintiffs seek an injunction “requiring Defendants to arrange directly or through
15 referral to appropriate agencies, organizations, or individuals, corrective treatment (in-home shift
16 nursing services) to Plaintiffs and Class members.” Complaint ¶ 169. They also seek an
17 injunction “enjoining Defendants from subjecting Plaintiffs and Class members to practices that
18 violate their rights under the Medicaid Act, Americans with Disabilities Act, Section 504 of the
19 Rehabilitation Act, and Government Code section 11135.” Complaint ¶ 168. Neither proposed
20 injunction includes any language that would allow Defendants to intervene in the day-to-day
21 operations of third-party employers. Thus, even a favorable ruling in this case would not, and
22 could not, require third-party entities that schedule, hire, manage and deploy the nurses to change
23 their operations. In short, a favorable decision would not redress the alleged injury.

24 Ultimately, Plaintiffs lack Article III standing to bring their claims because they fail to
25 specifically allege that the harm alleged is *fairly traceable* to Defendants. They also lack
26 standing because they fail to pray for relief that will ameliorate the harms they allege. Plaintiffs’
27 desired injunction merely restates the law, and it does nothing to ensure third parties will be able
28 to hire more nurses, or that nurses will show up for the shifts assigned them.

1 **II. THE ELEVENTH AMENDMENT BARS PLAINTIFFS FROM SEEKING ADJUDICATION OF**
2 **GOVERNMENT CODE SECTION 11135 IN THIS COURT.**

3 In addition, the Motion to Dismiss the Fifth Claim for Relief is properly granted under Rule
4 12(b)(1) because the claim is barred by the state’s sovereign immunity. “Absent waiver, neither a
5 State nor agencies acting under its control maybe ‘subject to suit in federal court.’” *Puerto Rico*
6 *Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 144 (1993). The Eleventh
7 Amendment to the Constitution provides that “[j]udicial power . . . shall not . . . extend to any suit
8 in law or equity . . . against one of the United States by Citizens of another State, or by Citizens or
9 Subjects of any Foreign State.” U.S. Const. amend. XI. “Absent a state’s unequivocal consent,
10 the Eleventh Amendment bars a federal court from entertaining a suit against that state, or one of
11 its agencies or departments, based on state law.” *Hall v. State of Hawaii*, 791 F.2d 759, 761 (9th
12 Cir. 1986) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99-100 (1984).
13 “This jurisdictional bar applies regardless of the nature of the relief sought.” *Pennhurst State*
14 *Sch.*, 465 U.S. at 100-01 (citing *Missouri v. Friske*, 290 U.S. 18 (1993). Immunity for state law
15 claims under the Eleventh Amendment extends to suits against state agencies and individuals
16 acting in their official capacities. *Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 144 (1993);
17 *Wasson v. Sonoma Cty. Jr. Coll. Dist.*, 4 F. Supp. 2d 893, 903 (N.D. Cal. 1997), *aff’d on other*
18 *grounds sub nom. Wasson v. Sonoma Cty. Junior Coll.*, 203 F.3d 659 (9th Cir. 2000). Although
19 “[a] State may waive its sovereign immunity by making a ‘clear declaration’ that it intends to
20 submit itself to federal court jurisdiction” there is no indication that California has waived its
21 sovereign immunity. *See Douglas v. Cal. Dep’t of Youth Auth.*, 285 F.3d 1226, 1228 (9th Cir.
22 2002) (internal quotation marks and citation omitted). “[T]he ‘test for determining whether a
23 State has waived its immunity from federal-court jurisdiction is a stringent one’ . . . [and] courts
24 must indulge in every reasonable presumption against waiver[.]” *Id.* (internal citations omitted).

25 Here, California, its agencies, and individuals acting in their official capacities have not
26 waived their sovereign immunity by enacting Government Code section 11135. *See Cal. Gov’t*
27 *Code § 11135; see also Myers v. California Dep’t of Rehab.*, No. 2:12-CV-00497-GEB, 2012 WL
28 3529784, at *3 (E.D. Cal. Aug. 14, 2012) (dismissing with prejudice section 11135 claim against

1 state agency on sovereign immunity grounds). Plaintiffs bear the burden of establishing this
2 Court’s subject-matter jurisdiction over their Fifth Claim for Relief against DHCS (a state
3 agency) and Director Jennifer Kent (an individual acting in her official capacity). Fed. R. Civ. P.
4 12(b)(1); *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994). Plaintiffs
5 have failed to establish such jurisdiction. Without successfully demonstrating that California
6 made a “clear declaration” in Government Code section 11135 of an intent to waive its sovereign
7 immunity, Plaintiffs’ Fifth Claim for Relief must be dismissed with prejudice.

8 **III. PLAINTIFFS ARE BARRED FROM SEEKING RETROSPECTIVE DECLARATORY RELIEF**
9 **AGAINST DHCS AND DIRECTOR JENNIFER KENT.**

10 Federal Rule of Civil Procedure enables the court to strike from any pleading “any
11 redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). The function of
12 Rule 12(f) is to “avoid the expenditure of time and money that must arise from litigating spurious
13 issues by dispensing with those issues prior to trial.” *SidneyVinstein v. A.H. Robins Co.*, 697 F.2d
14 880, 885 (9th Cir. 1983). A prayer for relief is immaterial where such relief is not recoverable as a
15 matter of law. *Reagan v. Am. Home Mortg. Servicing Inc.*, No. C 11-00704 WHA, 2011 WL
16 2149100 at *3 (N.D. Cal. May 31, 2011).

17 As a matter of law, a federal court may not issue “declarations that merely declare a [state
18 defendant’s] past violation of federal law.” *See Silveria v. Beard*, 2013 WL 2458393 at *2 (E.D.
19 Cal. June 6, 2013); *White v. Harris*, No. 2:13-6171-CAS MANX, 2015 WL 1250015, at *7 (C.D.
20 Cal. Mar. 16, 2015) (requests for declaratory and injunctive relief based on *past* violations of
21 federal law are not cognizable); *see also U.S. v. Cabral*, No. 1:07CV01741-OWW-DLB, 2008
22 WL 3836290 at *4 (E.D. Cal. Aug. 14, 2008) (“The Eleventh Amendment bars suits by private
23 litigants for damages or *retrospective* injunctive relief in federal court in which a state is named
24 as a defendant.” (emphasis added) (citation omitted)).

25 Here, Plaintiffs pray for two retrospective declarations. First, Plaintiffs seek a declaration
26 that “Defendants have been failing to comply with the requirements of the Medicaid Act, the
27 Americans with Disabilities Act, the Rehabilitation Act, and Government Code § 11135.”
28 Compl. ¶ 167. Second, Plaintiffs seek a declaration that “Defendants’ failure to arrange directly

1 or through referral to appropriate agencies, organizations, or individuals, corrective treatment (in-
2 home shift nursing services) to Plaintiffs and Class members” was unlawful. *Id.* ¶ 168. The
3 prayers for relief in paragraphs 167 and 168 of the Complaint ask the Court to declare
4 Defendants’ past actions violations of federal law. *See Silveria*, 2013 WL 2458393 at *2.
5 Therefore, the Court should strike Plaintiffs’ prayers for relief in paragraphs 167 and 168 of the
6 Complaint to the extent they relate to past actions because they are not permissible as a matter of
7 law.¹

8 CONCLUSION

9 For the foregoing reasons, Plaintiffs lack Article III standing to bring their claims, and their
10 claims should be dismissed for lack of subject matter jurisdiction as a result. Moreover, the
11 Eleventh Amendment bars Plaintiffs’ Fifth Claim for Relief for violation of Government Code
12 section 11135, and should be dismissed accordingly. Finally, Plaintiffs’ prayers for relief against
13 DHCS and Director Jennifer Kent in paragraphs 167 and 168 of the Complaint are barred by the
14 Eleventh Amendment because they seek retrospective injunctive relief against a state in federal
15 court.

16 Defendants respectfully request that the Court grant its motion under Federal Rule of Civil
17 Procedure 12(b)(1) and dismiss with prejudice: (1) all of Plaintiffs’ claims for lack of Article III
18 standing, and therefore lack of subject matter jurisdiction; and (2) Plaintiffs’ Fifth Claim for
19 Relief on the grounds it is barred by the Eleventh Amendment, and therefore lack of subject
20 matter jurisdiction. Furthermore, Defendants respectfully request that the Court grant its motion
21 under Federal Rule of Civil Procedure 12(f), and strike paragraphs 167 and 168 from the
22 Complaint accordingly.

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¹ In the alternative, Defendants respectfully request an order asking Plaintiffs to amend
their complaint to clarify they are solely seeking *prospective* declaratory relief.

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Dated: July 23, 2018

Respectfully Submitted,
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MARYAM TOOSI BERONA
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SF2018200610

CERTIFICATE OF SERVICE

Case Name: Ivory N., et al. v. Kent, et al.

No. C 18-03099 WHA

I hereby certify that on July 23, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **DEFENDANTS' MOTION TO DISMISS COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF & MOTION TO STRIKE**
- **[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 23, 2018, at San Francisco, California.

Moe San
Declarant



Signature