MELINDA BIRD (SBN 102236)
MARILYN HOLLE (SBN 61530)
DEBORAH DORFMAN (CRLSA No. 801060)
DISABILITY RIGHTS CALIFORNIA
3580 Wilshire Blvd., Ste. 902
Los Angeles, CA 90010
Telephone: (213) 427-8747
Facsimile: (213) 427-8767
Melinda.bird@disabilityrightsca.org
Debbie.dorfman@disabilityrightsca.org
Marilyn.holle@disabilityrightsca.org

Attorneys for Named Plaintiffs and the Proposed Class
Additional Attorneys for Named Plaintiffs and the Proposed Class on Signature Page

STEPHEN P. BERZON (SBN 46540)
EVE H. CERVANTEZ (SBN 164709)
STACEY M. LEYTON (SBN 203827)
PEDER J. THOREEN (SBN 217081)
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, California 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
sberzon@altshulerberzon.com
ecervantez@altshulerberzon.com
sleyton@altshulerberzon.com
pthoreen@altshulerberzon.com

Attorneys for Plaintiffs SEIU-UHW, SEIU-ULTCW, SEIU Local 521, SEIU California State Council, UDW, and CUHW

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

V.L., *et al.*, Plaintiffs v. WAGNER, *et al.*, Defendants	Case No.: CV 09-04668 CW **REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** DATE: October 19, 2009 TIME: 10:00 a.m. PLACE: Courtroom 2, 4th Floor

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INTRODUCTION

In response to Plaintiffs' Motion for a Preliminary Injunction, Defendants' central contention is that the functional ranks and composite Functional Index ("FI") Score are reasonable measures of need. Defendants never squarely address the objections raised by the county officials who administer the IHSS program – that use of the functional index to determine eligibility is arbitrary and defeats the purpose of the program, which is to keep recipients safely at home. They also never acknowledge the absence of a relationship between functional ranks and scores and criticality or need. Nor do Defendants address the way in which the FI Scores of children and individuals with psychiatric and cognitive disabilities are artificially low, which result in disproportionate terminations. Ignoring these defects does not make them go away. They are evidence of the profound irrationality of the use of the functional index as an eligibility standard.

Plaintiffs' opening brief demonstrated convincingly the irreparable harm that will befall 130,000 Californians if ABX4 4 is implemented. Defendants quibble over whether some of the named Plaintiffs will be able to find alternative services, but cannot counter Plaintiffs' showing of this enormous harm. Before turning to irreparable harm, however, Plaintiffs discuss why functional ranks and FI Scores are not reasonable proxies for need (which is relevant to both harm and the merits), and demonstrate that Plaintiffs have a likelihood of success on the merits.

I. Functional Ranks and Functional Index Scores Were Not Intended to, and Do Not, Measure Recipients' Need for IHSS in Order to Remain Safely at Home.

Defendants' arguments, with respect to both Plaintiffs' likelihood of success on the merits and irreparable harm, are premised on one central claim, which is belied by the evidence: that ABX4 4 eliminates and reduces IHSS services on the basis of recipients' need. *See, e.g.,* Opp. 1-2 (arguing comparability, sufficiency, reasonable standards, ADA, and irreparable harm claims fail because functional ranks and FI Scores measure need). If Defendants are wrong about this central point (and they are), their opposition to a preliminary injunction entirely collapses.

The extensive record evidence shows that county social workers conduct individualized assessments of applicants' eligibility for IHSS services, that they may not authorize services unless

"the recipient would not be able to remain safely in his/her own home without IHSS," and that they are required to go beyond functional ranks to determine the level of assistance needed by IHSS recipients. Pl. Br. 5-6.

A. The FI Score Does Not Bear a Reasonable Relationship to an Individual's Need for Any Particular IHSS Service.

Defendants fail to refute Plaintiffs' showing that the FI Score, upon which Plaintiffs' continued eligibility for IHSS now depends, is not a reasonable measure of any particular recipient's need for any specific IHSS service, because, as the declarations establish, it does not measure criticality of services, and cannot serve as a reasonable proxy for what would happen to a recipient if services were eliminated. Pl. Br. at pp. 8-13; *see also, e.g.,* Gardner Supp. Decl. ¶8, Kessler Decl. ¶ 6.

- The FI Score is a weighted average of functional ranks for 11 IHSS tasks. It does not take into account whether any one or several of those tasks are critical to an IHSS recipient's ability to live safely at home; it looks only at ***how many*** services the recipient needs, ***and the statewide average number of hours needed to perform those tasks.*** Individuals who need fewer discrete services, or services that require fewer hours, will necessarily have lower FI Scores. Pl. Br. 12.[1]
- The FI Score does not include some IHSS tasks such as medication management and accompaniment to medical appointments that are medically necessary for many IHSS recipients. Pl. Br. 12.
- The functional ranks that are summed and averaged to arrive at the FI Score are themselves not reliable indicators of need. Pl. Br. 8-10, *infra* at 5-7.
- The weights used have no external validity. Pl. Br. 12; *see also* Benjamin Decl. ¶12.
- The FI Scores of children are particularly meaningless because children automatically

[1] It is as if the state is treating a person who has appendicitis *and* symptoms of a heart attack as "more needy" than a person who only has appendicitis, because one person needs two services (appendectomy and heart stent) while the other person needs only one service (appendectomy) to live. If you take the "average" number of surgeries needed, you might determine (as the state has with respect to the FI Score) that the person with appendicitis but no heart trouble is "less needy" than the person with both. But the person with appendicitis needs the appendectomy to live just as surely as the person who needs two separate surgeries.

receive a rank of 1 for many services. Pl. Br. 12-13.[2]

- Individuals with mental impairments are disproportionately likely to have FI Scores below 2.0 and thus be terminated from all services. Pl. Br. 13.

For example, Plaintiff David Oster has functional ranks of 5 for housework, laundry, and shopping; that is, his social worker has determined he is incapable of performing these tasks, even with substantial assistance. Oster Decl. ¶11. He also has a functional rank of 3 for meal preparation, which means that he needs some human assistance to safely prepare meals. *Id.* But because he does not need other services not typically needed by person with mental disabilities (such as assistance with mobility, toileting and eating) he will be denied services that he cannot safely perform by himself, and without which he cannot live independently. *See* Medina Decl. ¶¶ 3-4 (Oster's apartment was full of trash and rotten food before he started receiving IHSS). Thus it is not true that "[p]eople who demonstrate the same level of need will receive the same services." Opp. 14. Plaintiff Oster, with a rank of 5 for housework, laundry, and shopping, will no longer receive IHSS whereas another individual who has similar ranks for those tasks will continue to receive those services if that person also needs assistance with, for example, mobility and toileting. *See also* Supp. Gardner Decl. ¶ 10 (noting "arbitrary nature" of Oster's FI Score).[3]

Defendants' assertion that "[t]he FI Score provides a reasonable measure of each recipient's individual need for service," Opp. at p. 4,[4] falsely equates "relative dependence on human assistance for IHSS tasks" (i.e. the number of services or hours needed) with need, without taking

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[2] Defendants' declarant Janet Nicholson incorrectly contends that children above age 3 may receive a score above 1 for certain domestic and related services, such as meal preparation and clean up. Nicholson Decl. ¶9. However, CDSS training materials state that children up to the age of 17 should be assessed with a functional rank of 1 for meal preparation and clean up. Nicco Supp. Decl. Ex. A at 1.

[3] After a recent psychiatric hospitalization, Mr. Oster's social worker authorized six additional hours per month for accompaniment to medical appointments because his psychiatric condition had worsened. However, his FI Score did not change (because accompaniment to medical appointments is not included in the FI Score), and remains below 2.0. Supp. Gardner Decl. ¶10.

[4] *See, e.g.* Carroll Decl. Ex. A at 13 ("Since the FI Score is a measurement of the client's relative dependence on human assistance for selected IHSS tasks, there should be a correlation between each client's FI Score and his FI Hours.").

into account the fact that even one or two or three services can be critical to maintaining an individual safely in his or her own home. *See* Supp. Gardner Decl. ¶8.

Defendants – who have access to all the data on IHSS recipients whose services will be eliminated – have also failed to rebut Plaintiffs' evidence that the use of the FI score has a particularly detrimental effect upon people with psychiatric and cognitive disabilities. *See* Opp. 26. Defendants have presented no answer to Plaintiffs' declarations from both experts and county officials that individuals with mental impairments are disproportionately likely to have FI Scores below the eligibility threshold. Pl. Br. 13.[5]

Defendants' reliance on the declaration of Ernest Cowles to support the proposition that the FI Score is a reasonable measure of individual need is misplaced.[6] Not only does Dr. Cowles provide no support for his opinion, but the opinion is based on a non-sequitur. Benjamin Decl. ¶12. He states that he recalculated the county weights (originally calculated in 1988) in June 2009, and "found that the number of individuals that were ranked less than 2.0 did not change substantially from 1988. Therefore, the FI Score is a reasonable measure because it has been consistent over time." Cowles Decl. ¶3. But consistency over time has no bearing on accuracy: The FI Score could be consistently wrong. Benjamin Decl. ¶12. Nor is the Cowles declaration correct that the FI Score takes criticality into account. *See supra* at 2-4; Benjamin Decl. ¶14 (noting that fact that FI Score includes services that are critical to certain people, such as

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[5] For example, Joyce McHenry's severe depression and anxiety disorder mean that she requires verbal assistance in order to dress, bathe and groom, and prepare meals, and has functional ranks of 2 for those services. McHenry Decl. ¶ 2; Kline Supp. Decl., Ex. B. She has been assessed a 3 for housework and shopping—she can do some of this work herself, but often forgets, or cannot muster the energy. *Id.* ¶ 5. These relatively "low" functional ranks, combined with her ability to move, toilet, and eat independently, have resulted in an FI Score of 1.64. Medication management and accompaniment to medical appointments are extremely important for Ms. McHenry. *Id.* at ¶4, 6. But these IHSS service are not included in the FI Score. Furthermore, Ms. McHenry is not a regional center client and does not qualify for protective supervision. McHenry Supp. Decl. ¶¶2-4; Kline Supp. Decl., Ex. B. Ms. McHenry has been hospitalized before due to her depression and suicide attempt, and is likely to require such services again in the absence of IHSS. McHenry Decl. ¶ 7. Other individuals with mental disabilities similarly are not authorized for protective supervision and do not receive regional center services. *See* Supp. Aho Decl. ¶ 2; Love Decl. ¶ 7.

[6] Although Dr. Cowles has a Ph.D., it is in criminology. Cowles Decl. Ex. A; *see also* Pl. Obj. Def. Evid.

respiration, does not make use of an ***average*** any less problematic for people who have critical need for some, but not a great number, of services); *see also* Gardner Supp. Decl. ¶¶8-9.

Indeed, the final paragraph of the Cowles Declaration and the attached "Summary Statistics" illustrate that the FI Score is not a reasonable measure of need. *See* Benjamin Decl. ¶16. According to the Declaration, if the 2009 weighted average (rather than the 1988 weighted average) were used to determine FI Scores, an additional 1,500 individuals would lose IHSS eligibility due to ABX4 4. Cowles Decl. ¶6. In other words, a change to the complex formula, based on the average hours assigned by 58 counties throughout the state to over 400,000 recipients for 11 tasks, changes the eligibility of specific individuals for those services. Benjamin Decl. ¶16. But a change in mathematical formula does not change those individuals' specific needs. *Id.*

Independent researchers have concluded that the FI Score is not a rational measure of need. A recent study by the UCLA Center for Health Policy Research found that "[t]he assumption made by the state budget cuts that an FIS score below 2 represents someone who needs fewer services is inaccurate." Benjamin Decl., Ex. B at 24.[7] Report co-author Dr. A.E. Benjamin, a professor of Social Welfare at UCLA and expert in home care services, explains that, because the FI Score is an average of 11 different tasks, those who need a larger number of services will generally receive higher FI Scores. "The FI Score does not measure, and says nothing about, the nature or intensity of an individual's need for any particular service, or the risk associated with withdrawing that assistance." Benjamin Decl. ¶24. Dr. Benjamin concludes, "the Functional Index Score and functional rankings are not reasonable measures of need for IHSS services." Benjamin Decl. ¶22.

B. The Functional Ranks Do Not Indicate Degree of Need for Services.

Plaintiffs' opening brief explained that functional ranks 2-5 do not measure whether a recipient needs a particular service, but simply characterize the type or degree of assistance needed. Defendants' own statutes and regulations show that any recipient with a functional rank of 2 or higher cannot perform the function safely without assistance. Welf. & Inst. Code § 12309(d); MPP

[7] *See also* Barnes, *et al*., Kline Decl. Ex. D at 68 (inclusion of household help in functional index "probably contributes to the inconsistency with which the scale is applied").

§ 30-763.1. It is not true that some individuals are authorized for IHSS services only to "improve their quality of life." Opp. 4; Nicco Supp. Decl. ¶9. Moreover, Plaintiffs showed that the differences among functional ranks of 2, 3, and 4 are difficult to discern and cannot be determined with precision, and that recipients with cognitive or psychiatric disabilities may correctly be assessed with a functional rank of "2" even though assistance is critical to them. Pl. Br. 8-9.

Defendants have not refuted this showing. Their argument that social workers have received training in how to conduct assessments (Opp. 4) is to no avail, as Plaintiffs' argument does not rest on inaccuracy of assessments, but rests instead on the use of the rankings for inappropriate purposes. Moreover, Defendants fail to note that this training is focused almost entirely on the hourly task guidelines and on the need for accurate and uniform hours authorization, rather than accurate and uniform assessment of functional ranks, which have heretofore never been used to determine eligibility for services. *See* Collins Supp. Decl. ¶3; Kaljian Supp. Decl. ¶2; Kessler Decl. ¶ 5-10. Notably, social workers are required to document exceptions to the hourly task guidelines, but these exceptions are nowhere captured in the functional ranks the State will use to determine eligibility absent a preliminary injunction. Benjamin Decl. ¶28.

Defendants also argue that the ranks have been evaluated and validated by state and county review teams, but provide no competent evidence of this. Opp. 4. The only support they cite is Paragraph 13 of the Carroll Declaration. *See* Pl. Obj. Def. Evid. None of the studies supposedly validating the functional ranks is attached to her declaration; instead, she includes only studies from 1988 and 1989 when the system was first enacted. Dr. Benjamin is unaware of any such recent study. Benjamin Decl. ¶29.[8]

[8] There are many reasons to distrust statements in the Carroll Declaration not supported by accompanying evidence. For example, she blatantly misstates the statutory definition for the functional rank of 3, stating that an individual can be ranked a 3 if that individual "requires ***minimal*** human assistance with the tasks," when the statute, and the documents she attaches to her declaration, describe rank 3 as indicating a need for "some" human assistance. Welf. & Inst. Code § 12309(d)(3); Carroll Decl. Ex. A & B. Ms. Carroll also states that "ABX4 4 mandates that Domestic and Related Services will be authorized only to those individuals with a substantial need for that specific service based on a Rank of at least 4 in that functional area." A rank of 4 does not mean that a person has "substantial need" for that service, but, rather, that a person needs "substantial assistance" to perform that task. Welf. & Inst. Code § 12309(d)(4). As Plaintiffs have

Moreover, the recent UCLA Center for Health Policy Research study indicates that there are unexplained differences between the functional rankings in different counties: In San Diego County, an estimated one-third of all elderly IHSS recipients will lose one or more domestic service because of a functional rank below 4, whereas in Santa Clara County, only one-tenth of elderly recipients will lose eligibility. Benjamin Decl., Ex. B at 12, ¶26. The only other published study of which Plaintiffs are aware analyzing the reliability of the functional ranks, which was authored by the Institute for Social Research (with which Dr. Cowles is affiliated), found the following:

- Mental functioning is weakly related to functional level. Kline Decl., Ex. D at 8, 16.
- Use of time-task guidelines, especially for domestic or related services, lessens the importance to social workers of making precise distinctions in functional ranks. *Id.* at 9, 17.
- Distinctions among functional ranks on household tasks are difficult to draw. *Id.* at 10, 18.
- Demands of particular home environments (a required factor in assessments) vary independently of client functioning. *Id.* at 17.

II. Defendants' Notices Are Not Reasonably Calculated to Inform Plaintiffs of Their Appeal Rights.

The notices Defendants plan to mail to IHSS recipients do not comport with due process and will not prevent irreparable harm by giving recipients sufficient notice to request a fair hearing within ten days of receipt so that they can continue to receive IHSS services ("aid paid pending"). It is well settled that where recipients lack the capacity to understand and act upon a notice of benefits termination and corresponding appeal rights, and state officials are or should be aware that recipients lack such capacity, the notices are defective and violate due process. *See* Pl. Br. 21. As Defendants acknowledge, the notice must be drafted "in terms comprehensible to the client." Opp. 9. Many class members, because of their disabilities and/or limited English, will be unable to understand and act upon the highly technical and complicated English-only, single-spaced, notice

described, a person may need only "some" human assistance to perform a task, but still have a "substantial need" for that service. *See* Pl. Obj. Def. Evid.

and "stuffer" that explain how the functional index score is calculated. *See* Carroll Decl., Ex. B.[9]

Both the notice and "stuffer" will be incomprehensible to most IHSS recipients. Thomson Decl. ¶ 12; *see also* Padilla Decl., ¶ 8. Each is esoteric and highly technical, and they are not readable or accessible to IHSS recipients. *Id*. The complicated description of the formula used to calculate the FI Score requires the recipient to have "knowledge or aptitude beyond that possessed by the average high school graduate." *Id*. It is replete with perplexing abbreviations. And before now, IHSS recipients have never been told what their FI Score or rankings are, Pl. Br. 11, n. 11, 12, making the notice all the more confusing. And without understanding the stuffer, IHSS recipients will be unable to make an informed decision whether to appeal.

Further, elderly or disabled individuals may be assumed to "be unable or disinclined, because of physical handicaps and, in the case of the aged, mental handicaps as well, to take the necessary affirmative action" on the notice. *Vargas v. Trainor,* 508 F.2d 485, 489-90 (7th Cir. 1974) (notice that required elderly and disabled individuals to meet with case managers or appeal without knowing basis of termination violated due process). *See also* Thomson Decl., ¶ 12; Ackel Decl. ¶¶ 5(a), (b), 7; Williams Decl. ¶10; K. Good Decl.¶¶7-8; Kaljian Supp. Decl. ¶9. Many members of the Plaintiff Class will be unable to comply with the 10-day appeal deadlines in order to receive aid paid pending the outcome of their appeals. Ackel Decl., ¶ 7; Williams Decl. ¶18; S. Good Decl.¶6; Kaljian Supp. Decl. ¶9.

Other individuals may not appeal because they will not understand that they could have a "home hearing," and mistakenly believe they cannot challenge the loss of services because they cannot leave their homes due to their disabilities. Ackel Decl. ¶ 5(c). Some will not appeal because they are afraid that they will lose further services if they request a hearing to challenge the cuts. *Id*. ¶5(d). Some will not appeal simply because they do not or cannot open and read their

[9] The exact contours of the Notice to be sent have been a moving target. The Notice attached to ACL 09-56 (Oct. 1, 2009), RJN Ex. A, is different than the apparently final notice attached to the Carroll Declaration, in that the draft contains a 22-page stuffer while the final contains a one-page stuffer. (And both differ from the draft notice attached to the draft ACL issued on Sept. 17-18, 2009; *see* RJN, Ex. B.)

mail until someone is there to assist them. *Id.* ¶5(e); Williams Decl. ¶12-14; S. Good Decl ¶9.[10]

Elderly or disabled IHSS recipients who do not speak English will certainly not understand the notice, which is exclusively in English except for one line in Spanish that states, "If you do not understand the information or notice, contact the social worker in your county. The county should provide you with an interpretation service free of charge." Carroll Decl., Ex. B; Taggares Supp. Decl. ¶4. This does not even warn Spanish-speaking recipients that this is an important notice regarding termination or reduction of benefits. Moreover, there are ***no*** advisements for other non-English speakers informing them of their right to a free translation of the notice and stuffer. Carroll Decl., Ex. B. Yet IHSS data indicate that 15% of IHSS recipients are monolingual Spanish speakers and 34% of IHSS recipients are monolingual in a language other than English or Spanish. Rich Supp. Decl., Ex. A. Consequently, an extra burden is placed on non-English speaking IHSS recipients (almost half of all IHSS recipients) to (1) realize the importance of the notice; and (2) find someone to translate it. It is not reasonable to expect these individuals to obtain translation of the notice in sufficient time to act upon it within the 10-day aid paid pending timeframe.

Finally, the notice and stuffer are not available in alternate formats (*i.e.* large print, Braille, tape), or in more simple language that might be needed by some recipients with disabilities. The notice and stuffer thus violate the ADA and Section 504. *See* Pl. Br. 23, n. 20.

III. Defendants Have Failed to Undermine Plaintiffs' Showing of Likelihood of Success on Their Medicaid Claims.

A. Defendants Violate the Comparability Requirement.

The parties are in agreement regarding the basic requirements of the Medicaid Act's comparability requirement, 42 U.S.C. § 1396a(a)(10)(B). In Defendants' words, comparability is violated "when some recipients are treated differently from other recipients where each has the

[10] There is no merit to Defendants' contention that IHSS recipients who are incompetent to understand and act upon the notices will have their due process rights protected because notices will be mailed to authorized representatives of these individuals. Opp. 10. There is no evidence that all, or even most, incompetent IHSS recipients have authorized representatives. And non-legal representatives or family members have no legal duty to act on behalf of the IHSS recipient receiving the notice. *See Cultbertson v. Sec'y Health & Human Servs*., 859 F. 2d 319, 324 (4th Cir. 1988).

same level of need." Opp. 12:19-21.[11] In this case, the use of the flawed FI Scores and functional ranks to distinguish between those who receive IHSS services and those who do not violates the comparability requirement, because neither is a reasonable measure of the criticality of any particular service, or a proxy for the effects of eliminating that service. As previously discussed, an individual with a cognitive or psychiatric disability may need the assistance of an IHSS provider just as much as one with a physical disability, but because of the way that the functional ranks and FI scores are calculated, will lose services. *See* Pl. Br. 9-10, 12-13. Similarly, a child with severe disabilities requiring substantial physical assistance may be cut off while an adult requiring similar assistance will not be, simply based on automatic low ranks for children. *See*, *e.g.*, Collins Decl. ¶¶ 21, 25; Nicco Decl. ¶ 32; *supra* at 2-3.[12] As in *Sobky v. Smoley*, 855 F.Supp. 1123, 1139-40 (E.D. Cal. 1994), where the availability of methadone treatment varied by county in an arbitrary way and thus violated the comparability requirement, here the availability of IHSS is limited by a similarly irrelevant standard – recipients' FI scores and rankings – which do not measure the criticality of services or the individual's ability to live safely at home without the services.

Defendants fundamentally misapprehend the nature of Plaintiffs' comparability claim when they argue that "plaintiffs are essentially contending that because recipients qualified for a certain level of services at one point, a state may never amend the eligibility requirements as this would somehow violate the comparability requirement." Opp. 13.[13] Not so. Plaintiffs do not contest that

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[11] Defendants note that comparability "may be waived" as to the State Plan Option (Opp. 12 n.3), but do not, and cannot, contend that comparability was in fact waived here.

[12] Defendants cite 42 C.F.R. § 440.230(c), suggesting that the comparability requirement applies only to distinctions based on "diagnosis, type of illness, or condition." The cited regulation does not address comparability, but rather prohibits states from "arbitrarily deny[ing] or reduc[ing] the amount, duration, or scope" of certain mandatory Medicaid programs. As defendants elsewhere correct concede, the comparability provision requires, more generally, that individuals with like needs receive like services. *See*, *e.g.*, Opp. 13:18-19.

[13] Further, Defendants point out that a different Medicaid regulation (*not* the comparability regulation set forth in 42 C.F.R. § 440.240), permits states to "place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures." 42 C.F.R. § 440.230(d). This has no relevance here, both because the regulation is not part of the comparability law, and because FI Scores and ranks do not differentiate between recipients on the basis of medical necessity.

Defendants could impose limitations on services without violating comparability. But where, as here, the limitations at issue *result in individuals with similar needs receiving critically different levels of services*, comparability is violated.

Defendants' attempt to distinguish *Jenkins v. Washington State Dep't Soc. & Health Servs.*, 157 P.3d 388 (Wash. 2007), is unpersuasive. As in *Jenkins*, here IHSS recipients have been assessed through an individualized process to determine their needs. As in *Jenkins*, the State has subsequently imposed a categorical formula to eliminate services, regardless of how or whether that formula adequately reflects individuals' need for services. And as in *Jenkins*, the State's introduction of an across-the-board standard that "presumes certain needs of the recipient are met without an individualized determination" (*id.* at 393-94), violates the comparability requirement.

B. Defendants Violate the Reasonable Standards and Sufficiency Requirements.

1. Plaintiffs May Enforce the Reasonable Standards and Sufficiency Requirements Directly Under the Supremacy Clause.

Defendants assert that Plaintiffs' claims under the Medicaid Act's reasonable standards (42 U.S.C. § 1396a(a)(17)) and sufficiency (42 C.F.R. § 440.230(b)) requirements must fail because these provisions are not privately enforceable. But Plaintiffs assert these claims directly under the Supremacy Clause, not under 42 U.S.C. §1983. First Amended Compl. ¶¶ 212-19. *Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006), relied on by Defendants, is therefore irrelevant. In that case, the court held that Section 1396a(a)(17) does not create a Section 1983 private right of action. But in *Independent Living Ctr. S. Cal. v. Shewry*, 543 F.3d 1050, 1056-57 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2828 (2009), the Ninth Circuit held that such conclusion does not bar a request for injunctive relief under the Supremacy Clause for violations of the Medicaid Act.

Defendants assert that *Independent Living Center* is distinguishable because it involved a different provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A). Opp. 16-17. In fact, the cases are directly analogous. In *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005), the Ninth Circuit had held that the Medicaid Act provision at issue in *Independent Living Center* did not create a right enforceable under Section 1983. But that was irrelevant to *Independent Living Center*'s conclusion regarding the availability of injunctive relief under the Supremacy Clause.

Instead, "[t]he Supreme Court has repeatedly entertained claims for injunctive relief based on federal preemption, without requiring that the standards for bringing suit under § 1983 be met . . ."; "a plaintiff seeking injunctive relief under the Supremacy Clause on the basis of federal preemption need not assert a federally created 'right,' in the sense that term has been recently used in suits brought under § 1983." 543 F.3d at 1055 & 1058.

The conclusion in *Watson* regarding Section 1983 is just as irrelevant with respect to the Supremacy Clause enforceability of Section 1396a(a)(17) as was *Sanchez* with respect to Supremacy Clause enforcement of Section 1396a(a)(30)(A).[14] Although the Ninth Circuit has not yet considered Section 1396a(a)(17) in the context of a Supremacy Clause challenge (*Independent Living Center* would dictate the outcome), the Eighth Circuit in *Lankford v. Sherman*, 451 F.3d 496, 509-13 (8th Cir. 2006), addressed this precise issue, holding Section 1396a(a)(17) was not enforceable under Section 1983 but that the claim may be brought under the Supremacy Clause.[15]

Defendants are also wrong, and miss the point, with respect to Plaintiffs' sufficiency claim, when they argue that private rights of action to enforce federal law can only be created by federal statute, not regulations. *See Independent Living Ctr. of S. Cal.*, 543 F.3d at 1059 ("A party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." (quotation marks omitted)). Defendants cannot dispute the *preemptive force* of the regulation under the Supremacy Clause. *See*, *e.g.*, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 884-86 (2000) (state law preempted where it poses obstacle to objective of federal regulation); *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) (Supremacy Clause "encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authority."); *cf. Bank of Am. v. City & County of San*

[14] Just as *Watson* opined that the statute at issue was "too vague and amorphous for judicial enforcement" (436 F.3d at 1162), the Court in *Sanchez* held that the "'broad and diffuse' language of the statute [was not] amenable to judicial remedy" (416 F.3d at 1060). This did not prevent the court in *Independent Living Center* from holding that such claims are enforceable under the Supremacy Clause.

[15] As Defendants' footnote 6 indicates, their real issue is with the Ninth Circuit's holding in *Independent Living Center*. But the Supreme Court has already declined to review that decision, 129 S.Ct. 2828, and Defendants have no grounds to ask the Court to disregard binding circuit law.

Francisco, 309 F.3d 551, 560-61 (9th Cir. 2002) (field preemption by regulation).

2. ABX4 4 Does Not Meet the Medicaid Act's Reasonableness Requirement.

As with the comparability analysis, the parties do not differ regarding the applicable law, but merely in how that law applies to the facts of this case. Defendants repeatedly claim that restricting or eliminating IHSS based on FI Scores or functional ranks allows for distinctions based on "need," but, as discussed extensively above and in our opening brief, this is not true: A functional rank of 2 or above for any particular task indicates that the recipient cannot live safely in his or her home without assistance for that task, and signals the nature of that assistance (*i.e.* verbal or physical), but not the number of hours needed or the criticality of the assistance; the FI Score indicates only the number of services/hours needed (if that), and not whether or not a particular service is critical, or whether a person can survive at home without that assistance.

As in *Lankford*, here the State has used unreasonable standards for determining eligibility for IHSS services in order to limit access to those services, with nonsensical results. *See supra* at 1-7.[16] And as in *Allen v. Mansour*, 681 F. Supp. 1232, 1234 (E.D. Mich. 1986), the State relies on a measurement that is not supported by expert opinion or scientific data. *See* Benjamin Decl. ¶¶15, 21-22; Gardner Decl. ¶¶8-9. Further, as in *White v. Beal*, 555 F.2d 1146, 1151-52 (3d Cir. 1977), *Hern v. Beye*, 57 F.3d 906, 910 (10th Cir. 1995), and *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 126 (1st Cir. 1979), the terminations and reductions based on the FI Score and functional ranks discriminate against people who have different types of diagnosis or conditions (here, mental v. physical disabilities) yet the same need for services. *See supra* at 1-7, Pl. Br. at 10-13, 32-34.

While Defendants point to various mechanisms such as carve-out exceptions that supposedly ameliorate the arbitrary nature of the FI scoring system, they do not cure the violation of the reasonable standards requirement. For example, Defendants have presented no evidence that

[16] For example, two blind women in Sonoma County are both authorized to receive domestic and related services as well as accompaniment to medical services. Kaljian Supp. Decl. ¶ 10. Social workers authorized these services because they were necessary for recipients to live safely in their homes. But because of the vagaries of the FI Scoring system, one of these women has an FI Score of 1.75 and will be terminated from IHSS, while the other (with very similar needs) has an FI Score of 2.18, and will not be terminated.

all of the IHSS recipients fall within an exempted category. Nor does the existence of the federally required fair hearing process, or theoretically available alternative services, cure the legal violation caused by the denial of IHSS based on unreasonable standards.

3. Defendants Do Not Address Plaintiffs' Sufficiency Argument.

Defendants entirely fail to address Plaintiffs' claim that reducing domestic and related services for 97,000 IHSS recipients, while leaving other IHSS services in place for these recipients, will violate federal requirements that the remaining services "be sufficient in amount, duration, and scope to reasonably achieve its purpose." 42 C.F.R. § 440.230(b). Plaintiffs' sufficiency argument is directed ***only*** at the reductions to domestic and related services – a critical point Defendants completely ignore. *See* Pl. Br. 28:4-19; First Amended Compl. at 37 & ¶¶ 212-15 (asserted on behalf of the "Loss of Domestic and Related Services Subclass Only").

As a team of UCLA researchers recently noted, "domestic services are in some respects the 'glue' that permits older people to stay in their homes. Shopping and meal preparation are especially essential, since they influence how much and how well older people eat." Benjamin Decl. Ex. B at 13. "Weight loss in elders is often the reason that they end up being placed into nursing homes. These domestic and related services are vital." *Id.* ¶ 30.

Defendants fail to explain how, with the elimination of domestic and related services, the remaining IHSS services will still fulfill the purpose of the program: to enable recipients to safely remain in their homes. Welf. & Inst. Code § 12300(a). Because currently authorized services have already been deemed *necessary* to permit recipients to remain safely in their homes, MPP § 30-761.1; Crockett Decl. ¶ 9, the elimination of these services cannot possibly leave affected individuals with a level of service sufficient to achieve the purpose of the program. As named plaintiff Dottie Jones explains, without these services "I will not be able to eat regular nutritious meals as I am presently, and my house will quickly become inhabitable for me since I cannot clean it." Supp. Jones Decl. ¶ 7; *see also* Collins Decl. ¶¶ 28-30, Guerra Decl. ¶¶ 12-15 (providing additional examples of individuals who, with the loss of domestic and related services, will suffer substantial harm and potentially be forced their homes).

Defendants' characterization notwithstanding, this case is directly analogous to *Mitchell v.*

Johnston, 701 F.2d 337 (5th Cir. 1983). *Mitchell* involved Texas' elimination of several previously available services (such as topical fluoride treatments and porcelain crowns) from its preventive dental program for children. The court analyzed the impact of these reductions on the ability of the program to fulfill its goal of preventive dental care and concluded that they undermined that goal. Here the sufficiency violation is even clearer, since the eliminated services at issue are, *by Defendants' own definition*, necessary components to achieve the purpose of the program.

IV. Defendants Have Failed to Refute Plaintiffs' Likelihood of Prevailing on Their ADA and Section 504 Claims.

A. Defendants Cannot Defeat Plaintiffs' *Olmstead* Claim.

Defendants argue that Plaintiffs' *Olmstead* claim fails because Plaintiffs have allegedly not shown that "any named plaintiff (or any other recipient) is likely to be significantly harmed by the reduction in IHSS, much less end up being admitted to a skilled nursing facility or other institution as a result of ABX4 4." Opp 23:20-21, 26:20-23. However, as recently reaffirmed by this Court in *Brantley*, "the *risk* of institutionalization is sufficient to demonstrate a violation of Title II [of the ADA]." *Brantley v. Maxwell-Jolly*, __ F.Supp.2d __, 2009 WL 2941519, at *7 (N.D. Cal. Sept. 10, 2009) (emphasis in original); *see also* Pl. Br. 30:24-31:13, 31:18-26. And Plaintiffs have submitted substantial evidence – unrefuted by Defendants – from experts, county officials, service providers, and individual recipients and providers showing that class members do face precisely such a risk of institutional placement in a hospital or care facility. Pl. Br. 2:18-23, 5:26-6:3, 17:7-18:11 & n. 17, 31:14-17; *see also* Jones Decl. ¶¶ 15-17; Love Decl. ¶14; Nicco Supp. Decl. ¶¶9-10; Brent Decl., ¶ 9; Brandt Decl., ¶ 9; Gardner Supp. Decl. ¶10.[17] That risk is especially heightened for individuals with cognitive or psychiatric disabilities, who comprise a large portion of the class. *See* Gardner Decl., Docket No. 70, ¶¶ 30-33; Castro Decl. ¶10; Crockett Decl. ¶16; Baran Decl. ¶¶12, 24; Nicco Decl. ¶¶33-34; Navarro Decl. ¶¶15-16.

[17] To the extent Defendants mean to suggest that this Court should consider only the risk of institutionalization faced by the named Plaintiffs, and not by other class members, they are mistaken. Because Defendants have conceded that class certification is not necessary, this case must be analyzed as if the Court has a certified class in front of it.

Next, Defendants blithely assert that Plaintiffs are not at risk of institutionalization because they are eligible for regional center services, have family members who theoretically could fill the void left by loss of IHSS, or could secure unspecified community services to meet their needs. Opp. 24:4-6; 24:10-12; 24:22-23; 25:12; 25:27-26:3, 26:13-19. Similar arguments were recently rejected in *Brantley*:

> Defendants concede that they bear the ultimate responsibility for ensuring compliance with federal disability laws. Nevertheless, they have taken an arguably cavalier approach to ensuring their continuing compliance with the ADA and Rehabilitation Act . . . . Thus, to the extent that Defendants are claiming that alternative services satisfy their obligations under the integration mandate, Defendants certainly bear the burden of ensuring more than a 'theoretical' availability of such services.

2009 WL 2941519, at *10 (internal cites omitted). In any event, the record establishes that alternative services are not available for a substantial portion of the Plaintiffs who face the risk of institutionalization. *See infra* 19-21; *see also* Goldblatt Decl. ¶21; Rosene Decl.¶7-9; Nicco Decl. ¶36, 38-41; Nicco Supp. Decl. ¶ 3.

Finally, the assertion that Plaintiffs are not being denied benefits by reason of their disabilities ignores *Olmstead*, which held that undue institutionalization *is* discrimination on the basis of disability. 527 U.S. at 598-601.

B. ABX4 4 Discriminates Based on Type of Disability.

Defendants fail to address Plaintiffs' authority that, if ABX4 4 has a uniquely detrimental impact against people with cognitive and psychiatric disabilities, it violates the ADA. Pl. Br. 32:11-34:17. Instead, they argue that any disparate treatment or impact is based on varying levels of need, not disability (Opp. at 23:14-19), but that is directly refuted by Plaintiffs' showing that FI Scores and functional rankings are not reasonable proxies for criticality of need, particularly for individuals with cognitive and psychiatric disabilities. Pl. Br. at 32; see also *supra* at 3-4; see also Supp. Gardner Decl. ¶ 9. Further, in arguing that social workers are trained to measure need and that anyone with a "genuine need" will continue to receive services (Opp. 26:8-10) Defendants misunderstand the nature of Plaintiffs' criticism of the use of FI Scores and functional ranks. Plaintiffs' claims rest not on the notion that social workers are giving recipients the wrong functional rankings, but on the showing that the *design* of the functional ranks and FI Score will

screen people with cognitive and psychiatric disabilities out of the IHSS program. Pl. Br. at 32; see also *supra* at 3-4.

Defendants also contend that the functional ranks and FI Score do not discriminate against individuals with cognitive or psychiatric disabilities because their needs will be met in other ways: they will receive alternative services through regional centers (a point addressed *infra* at 19-20), and those "with serious cognitive or psychiatric disabilities will almost certainly be authorized to receive protective supervision" and therefore be exempt from ABX4 4. Opp. 26:13-19; *see also id.* at 4, 28. In fact, many individuals with cognitive or psychiatric disabilities serious enough to require IHSS services do not qualify for protective supervision, either because they do not meet the particular requirements for that service or because they fall into one of a number of exclusions.[18] *See* Kaljian Supp. Decl. ¶3 ("Protective supervision is authorized very sparingly" to only 4% of IHSS recipients, while "number of [IHSS] clients with cognitive or psychiatric disabilities who receive IHSS far exceeds" this percentage); Ackel Decl. ¶¶9-10; *see also, e.g.,* Aho Supp. Decl. ¶¶13-14 (no protective supervision). Quite simply, most IHSS recipients with mental disabilities will not be exempt from the terminations and reductions, and the use of functional rankings and an FI Score that exclude them from IHSS violates the ADA.

C. Defendants Concede Plaintiffs' Methods of Administration Claim.

Defendants do not address, and appear to concede, Plaintiffs' claim that ABX4 4 violates the ADA's methods of administration regulation by thwarting the purpose of the IHSS program

[18] Protective supervision is available only if "a need exists for twenty four-hours-a-day of supervision in order for the recipient to remain at home safely," MPP § 30-757.173, and the recipient must be mobile enough to move around the house and be injured, *Calderon v. Anderson*, 45 Cal.App.4th 607, 616-18 (1996); *see also Marshall v. McMahon,* 17 Cal.App.4th 1841, 1852-53 (1993). Moreover, those who meet this standard may fall into one of a number of excluded categories. MPP § 30-757.172(e) (excluding, e.g., need to control anti-social behavior or guard against deliberate self-destructive behavior from protective supervision). Defendants' contention that "there is no evidence that anyone with significant cognitive or psychological difficulties will lose any IHSS services" is belied by substantial evidence in the record. *See* Pl. Br. 13:10-22 & n.13; Aho Decl. ¶4; Aho Supp. Decl. ¶14; Oster Decl. ¶¶4-5; Love Decl. ¶¶2, 12-13; Campbell Decl. ¶¶2, 8; McHenry Decl. ¶¶2, 10; Syropiatos Decl. ¶¶5-6; Williams Decl. ¶¶10, 21.

and screening out individuals with certain types of disabilities. *See* Pl. Br. 34:19-36:4.[19]

V. Because Defendants Have Failed to Rebut the Risk of Irreparable Harm to Plaintiffs and Others Similarly Situated, the Balance of Equities Strongly Favors an Injunction.

Although Defendants raise claims of fiscal emergency, they ignore settled Ninth Circuit authority and this Court's preliminary injunction decision in *Martinez* that fiscal problems cannot outweigh the needs of the sick and poor. Pl. Br. at 19. Defendants have not and cannot rebut Plaintiffs' strong showing of irreparable injury.

A. The Loss of IHSS Benefits is Irreparable Injury Per Se.

Defendants have failed to rebut Plaintiffs' showing that the loss of Medicaid services such as IHSS constitutes irreparable harm. Pl. Br. 18:13-19:14; *see also Brantley*, 2009 WL 2941519 at *12-*13 (reduction in Medi-Cal-funded Adult Day Health Care services); *Angotti v. Rexam, Inc.*, 2006 WL 1646135 *14 (N.D. Cal. June 14, 2006) (Medicaid recipients so poor that by definition could not otherwise afford medical care, so irreparable harm could be reasonably inferred without particularized showing by class members).

Moreover, Plaintiffs have pointed out – and Defendants do not dispute – that the IHSS statutes and regulations themselves establish the likelihood of irreparable injury, because all IHSS recipients have been assessed by trained county personnel to need the services they receive in order to remain safely in their homes. Pl. Br. 9-10, 25. Indeed, Defendants have specifically stated that "without regular contact with a personal care service worker, individuals will experience isolation and deterioration of chronic conditions that will result in more frequent emergency room visits and higher utilization of acute hospital and nursing facilities . . . ." IHSS Plus Demonstration Waiver at 10, Brzovic Decl. Ex. A. Plaintiffs also have provided ample specific evidence of irreparable

[19] Defendants fail to raise any fundamental alteration defense, and therefore have waived it. In any event, Plaintiffs have explained why no such defense would have merit. Pl. Br. 31:27-32:8. *Rosen v. Goetz*, 410 F.3d 919 (6th Cir. 2005), cited by Defendants, does not involve an ADA claim and so its discussion of when federal courts may enjoin the elimination of Medicaid programs is not applicable here. And to the extent Defendants mean to argue that individuals who qualify for IHSS are not "disabled" under the ADA, they are mistaken. *Compare* Welf. & Inst. Code § 12300(a), MPP § 30-700.1, *with* 42 U.S.C. § 12101(2)(A).

harm, in the form of declarations from county IHSS officials, and service providers who describe in great detail the impact the IHSS terminations and reductions will have on thousands of needy IHSS recipients, as well as numerous declarations from the named Plaintiffs and class members. Pl. Br. at 14-19; *see also* Shneider Decl. ¶¶4, 9; Brown Decl. ¶3; Love Decl. ¶10.[20]

B. Plaintiffs and Others Similarly Situated Do Not Have Access to Alternative Services that Will Replace the IHSS They Will Lose.

Defendants' assertion that other reasonable alternatives to IHSS services exist and that therefore there is no risk of imminent harm is without basis. Defendants make no showing that these services will be available without interruption following the loss of IHSS services, and as in *Brantley*, "even temporary gaps in services would present serious consequences for plaintiffs and place them at great risk of being institutionalized." 2009 WL 2941519 at *10**.**

For example, Defendants suggest (without support) that plaintiffs with developmental disabilities "need only contact the regional center" and their lost IHSS services will be replaced.[21] Carroll Decl, ¶ 18; Pl. Obj. Def. Evid. However, named Plaintiffs, other class members, advocates, and IHSS county officials have already tried contacting regional centers and been told such replacement services will not be provided. Supp. Oster Decl. ¶¶10-13; Rivera Supp. Decl. ¶ 2;

[20] Defendants fail to rebut this showing, but instead complain that some of the declarations discuss recipients whose benefits will not be reduced or terminated on November 1, because they fall into a category that the State has tentatively exempted or because their scores or ranks appear to be above the minimum. Opp. Br. 28:8-20. But this fact does nothing to negate Plaintiffs' extensive showing that thousands of individuals who *will* face service reductions or terminations will suffer irreparable injury. Love Decl. ¶¶7, 12 (score of 1.9, not client of regional center or eligible for protective supervision); Baran Decl. ¶¶13-16 (discussing two women who will lose all IHSS services); Brent Decl. ¶11 (score of 1.27, will lose all services); Campbell Decl. ¶8 (score of 1.97, will lose all services); Hylton Decl. ¶7 (score of 2.0, will lose some domestic services hours); Collins Decl. ¶¶7-8 (387 will lose all services because FI score below 2.0 and not covered by exemption); Crockett Decl. ¶3 (approximately 900 will lose all services and 2500 will lose some); Guerra Decl. ¶¶6-8 (195 people will lose all services); Hathaway Decl. ¶ 10 (dozen people will lose all services); Kaljian ¶4 (778 will lose all services because FI score below 2.0 and not covered by exemption); Nicco Decl. ¶¶8, 10 (1,078 will lose all services, and 6,863 will lose certain domestic and related services, numbers exclude those covered by exemptions); Wilson Decl. ¶17 (score of 1.75, will lose all services).

[21] Ironically, Defendants' argument that terminated IHSS services will be replaced by regional centers, if true, would show that the individual IHSS recipients must need those services.

Schneider Decl. ¶10; Drass Decl. ¶¶4-5; Collins Decl. ¶9; Supp. Nicco Decl. ¶5; Kaljian Supp. Decl. ¶6. And regional centers are unlikely to provide replacement services in a timely manner. Goldblatt Decl. ¶¶8-19, 21; Rosene Decl. ¶¶8, 9.[22] Finally, even assuming that regional centers could be persuaded to fund replacement services for IHSS, this at most would protect but a few thousand of the more than 130,000 IHSS recipients who face service reductions and terminations.[23]

Similarly, Defendants argue that IHSS recipients can turn to other programs and services, ignoring Plaintiffs' showing that these resources were already overburdened even before recent budget cuts, and cannot accommodate the needs of tens of thousands of disabled or elderly individuals who will lose IHSS services. Pl. Br. at 20; Guerra Supp. Decl. ¶¶4, 6-9; Nicco Supp. Decl. ¶¶3, 5; Baran Decl. ¶26; Kaljian ¶¶20-21; Nicco Decl. ¶¶38-39; Rosene Supp. Decl. ¶7; Kaljian Supp. Decl. ¶4; Collins Supp. Decl. ¶¶4, 7.[24]

Defendants also argue that family members should provide personal care services to Plaintiffs such as V.L. for free. Opp. at p. 24. In fact, family members are not available to care for V.L. (Lagahid Supp. Decl. ¶3), and Defendants' suggestion is illegal under CDSS regulations:

> Social services staff shall explore with the recipient the willingness of relatives, housemates, friends or other appropriate persons to provide voluntarily some or all of the services required by the recipient, . . . [they] *shall not compel* any such volunteer to provide services.

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[22] Regional centers themselves have recently sustained deep funding cuts, suggesting that already existing difficulties in obtaining services will only be exacerbated. Rosene Decl. ¶7; Kaljian Decl. ¶6; Goldblatt Decl. ¶¶9, 10, 20.

[23] Kline Supp. Decl., Ex. A at 12 (only 10,909 regional center consumers (less than 3% of all IHSS recipients) receive IHSS); *see also, e.g.,* Aho Decl. ¶2.

[24] For example, Defendants suggest that Meals on Wheels could replace Dottie Jones' meal preparation services. However, that program in Nevada County is not available to recipients under aged 60. Rossow Decl., Ex. A (Jones Supp. Decl.) ¶8; Guerra Supp. Decl. ¶6. In other counties, if IHSS recipients are added, the waiting period will be months if not years. Nicco Supp. Decl. ¶7. Also, because Medi-Cal funding for adult mental health services was eliminated, there is no "extra" Proposition 63 funding available to replace services to IHSS recipients with mental illness. *Compare* Opp. at pp. 26, 28 with Hill Decl. ¶7. The UCLA report co-authored by Dr. Benjamin shows the elimination of or serious cuts to other programs that serve elderly or disabled individuals, including the elimination of 36 Alzheimer's program centers, a case management program targeted to long-term care recipients, a respite program to assist caregivers facing burn-out, and a surplus food and feeding program. Benjamin Decl., Ex. B at 32.

MPP 30-763.62 - .622 (emphasis added). Free care from family members is also not an option for the many IHSS recipients who live alone and do not have family member providers. Rossow Decl., Ex. A (Jones Supp. Decl.) ¶10; Guerra Decl. ¶10; Oster Decl. ¶7. UCLA researchers concluded that as many as 40 to 50% of the seniors facing service reductions or terminations are in this situation. Benjamin Decl., Ex. B at 10.[25]

Similarly, Defendants suggest that overburdened county social workers will somehow be able to find nonexistent services to replace the IHSS hours that tens of thousands of individuals across the State will lose. Opp. at 5. Even if such services were available, which they are not, social workers do not have caseloads that permit such intensive case management and assistance. Nicco Supp. Decl. ¶6; Guerra Supp. Decl. ¶11. Nor will IHSS social workers likely assist someone who has already been terminated and is no longer their responsibility. Nicco Supp. Decl. ¶ 6.

Defendants have made no effort to identify those recipients who do have alternative resources; Defendants did not make their eligibility decisions on this basis; and Defendants do not plan to exempt those *without* alternative resources from the devastating impact of the cutbacks.

C. The Class of Thousands of Recipients Will Suffer Severe Irreparable Harm.

Defendants fail to address the overwhelming majority of Plaintiffs' evidentiary showing, and instead focus almost exclusively on attempts to rebut the showing by the named plaintiffs. However, Plaintiffs' declarations amply establish irreparable injury to both the named Plaintiffs and members of the plaintiff class. *See* Pl. Br. 15-18 and declarations cited therein; *see also* Rose Brown Decl. ¶¶2-7; Love Decl. ¶¶8-11.

Moreover, to the extent Defendants mean to suggest that only injury to the named plaintiffs is relevant, or that irreparable injury to class members is irrelevant in the absence of injury to the named plaintiffs, they are mistaken. Neither the case cited by Defendants, or the decision on which

[25] The researchers also found "no evidence that family and friends will automatically step in and fill gaps in care" as a result of the IHSS reductions and terminations. *Id.* at 13. Instead, the cuts will attenuate "'the fragile individualized safety net' cobbled together by families with (up to now) significant assistance from the state." *Id.* (also noting that "[l]egally-responsible adults like spouses are already stretched very thin in terms of the physical and economic resources they devote to care giving").

it relies, addressed the question whether a specific showing of harm to class members was adequate without a showing of injury to the named plaintiffs. *Mandrigues v. World Savings, Inc.*, 2009 WL 160213 (N.D. Cal. Jan. 20, 2009), *citing Angotti v. Rexam, Inc.*, 2006 WL 1646135. In fact, *Angotti* demanded a particularized showing of harm by "prospective class members," not the named plaintiffs. *Id.* at 14-15. S*ee also LaForest v. Former Clean Air Holding Co., Inc.*, 376 F.3d 48, 57 (3d Cir. 2004) ("That the six affidavits relied upon by the district court [to support showing of irreparable harm] were submitted by unnamed plaintiffs gives us little pause, given that these persons are now members of the certified class."). Although the named plaintiffs here will clearly suffer irreparable harm, additional IHSS recipients who face termination and will also suffer irreparable harm are willing to act as named plaintiffs, should the Court deem this necessary. McHenry Supp. Decl.¶ 5; Aho Supp. Decl. ¶ 3.

Whether the named plaintiffs will suffer irreparable injury, as Plaintiffs have shown, would be relevant to their adequacy as class representatives, not to whether this Court should issue a preliminary injunction. Defendants did not file an opposition to plaintiffs' motion for class certification, and concede that class certification is not necessary for the Court to grant class-wide injunctive relief. Opp. Br. 31:5-7.

CONCLUSION

For all the foregoing reasons, Plaintiffs request that this Court issue a preliminary injunction.

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Respectfully Submitted,

By: /s/ *Melinda Bird*

MELINDA BIRD (SBN 102236)
MARILYN HOLLE (SBN 61530)
DEBORAH DORFMAN (CRLSA No. 801060)
DISABILITY RIGHTS CALIFORNIA
LOS ANGELES REGIONAL OFFICE
3580 Wilshire Blvd., Ste. 902
Los Angeles, CA 90010
Telephone: (213) 427-8747
Facsimile: (213) 427-8767
Melinda.bird@disabilityrightsca.org
Debbie.dorfman@disabilityrightsca.org
Marilyn.holle@disabilityrightsca.org

SUJATHA JAGADEESH BRANCH (SBN 166259)
DISABILITY RIGHTS CALIFORNIA
SACRAMENTO REGIONAL OFFICE
100 Howe Ave., Suite 235N
Sacramento, CA 95825
Telephone: (916) 488-9950
Facsimile: (916) 488-9960
Sujatha.branch@disabilityrightsca.org

DARA L. SCHUR (SBN 98638)
FREDERICK P. NISEN (SBN 184089)
JUNG PHAM (SBN 251232)
DISABILITY RIGHTS CALIFORNIA
BAY AREA REGIONAL OFFICE
1330 Broadway, Suite 500
Oakland, CA 94612
Telephone: (510) 267-1200
Facsimile: (510) 267-1201
Dara.schur@disabilityrightsca.org
Fred.nisen@disabilityrightsca.org
Jung.pham@disabilityrightsca.org

ANN MENASCHE (SBN 74774)
DISABILITY RIGHTS CALIFORNIA
SAN DIEGO REGIONAL OFFICE
111 Sixth Avenue, Suite 200
San Diego, CA 92101
Telephone: (619) 239-7861
Facsimile: (619) 239-7906
Ann.menasche@disabilityrightsca.org

PAULA PEARLMAN (SBN 109038)
SHAWNA PARKS (SBN 208301)
DISABILITY RIGHTS LEGAL CENTER
919 Albany Street
Los Angeles, CA 90015
Telephone: (213) 736-1031
Facsimile: (213) 736-1428
Paula.pearlman@lls.edu
Shawna.parks@lls.edu

CHARLES WOLFINGER (SBN 63467)
LAW OFFICE OF CHARLES WOLFINGER
4655 Cass Street #314
San Diego, Ca 92109
Telephone: (858) 272-8115
Facsimile: (858) 270-3960
Cw@charleswolfinger.com

JANE PERKINS (SBN 104784)
NATIONAL HEALTH LAW PROGRAM
211 N. Columbia Street
Chapel Hill, NC 27514

Telephone: (919) 968-6308
Facsimile: (919) 968-8855
perkins@healthlaw.org

ANNA RICH (SBN 230195)
NATIONAL SENIOR CITIZEN LAW CENTER
1330 Broadway, Suite 525
Oakland, CA 94612
Telephone: (510) 663-1055
Facsimile: (510) 663-1051

Attorneys for Individual Named Plaintiffs V.L., David Oster, Willie Beatrice Sheppard, C.R., Dotty Jones, and the Plaintiff Class

By: /s/ *Stacey M. Leyton*
STEPHEN P. BERZON (SBN 46540)
EVE H. CERVANTEZ (SBN 164709)
STACEY M. LEYTON (SBN 203827)
PEDER J. THOREEN (SBN 217081)
CASEY A. ROBERTS (SBN 253474)
(*Admission Pending*)
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, California 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
sberzon@altshulerberzon.com
ecervantez@altshulerberzon.com
sleyton@altshulerberzon.com
pthoreen@altshulerberzon.com

Attorneys for Plaintiffs SEIU-UHW, SEIU-ULTCW, SEIU Local 521, SEIU California State Council, UDW, and CUHW