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

DAVID OSTER, *et al.*,

Plaintiffs,

v.

LIGHTBOURNE, *et al.*,

Defendants.

Case No. CV 09-04668 JSW

**EX PARTE APPLICATION FOR  
TEMPORARY RESTRAINING ORDER  
AND ORDER TO SHOW CAUSE WHY  
PRELIMINARY INJUNCTION SHOULD  
NOT ISSUE**

**TRO REQUESTED BY 4:00 P.M. TODAY**  
**(THURSDAY, DECEMBER 1, 2011)**

1 Pursuant to Local Rule 65-1, Plaintiffs David Oster *et al.*, on behalf of themselves and  
2 members of proposed Class B, hereby apply for a temporary restraining order (“TRO”) and order  
3 to show cause why a preliminary injunction should not issue to enjoin the reduction, by 20 percent,  
4 of crucial In-Home Supportive Services (“IHSS”) hours that currently enable them to remain safely  
5 in their own homes. This reduction will cause severe, irreparable injury to hundreds of thousands  
6 of low-income, elderly and disabled individuals, unless a TRO issues.

7 Although the hours reduction does not take effect until January 1, 2012, Defendants are in  
8 the process of implementing that reduction by making programming changes to the statewide IHSS  
9 database (called the “Case Management Information Payrolling System,” or “CMIPS”) and  
10 printing Notices of Action that will be sent to IHSS recipients. Plaintiffs request that the Court rule  
11 on the TRO application **by 4:00 p.m. today (Thursday, December 1, 2011)**, because Defendants  
12 have stated that they will “pull the switch” on changes to CMIPS at the close of the business day  
13 on Thursday December 1, 2011. Fifth Declaration of Melinda Bird (“Bird Decl.”) ¶10.

14 Defendants have also stated that if no injunction issues today and the CMIPS switch is pulled, they  
15 will not be able to guarantee that the changes can be reversed by January 1, 2012 if an injunction is  
16 issued at a later date. *Id.* ¶11.

17 In the alternative, if this Court does not act on the TRO application today, Plaintiffs request  
18 a ruling on the TRO application by Tuesday, December 6, 2011, to ensure that this Court has an  
19 opportunity to rule before Defendants send Notices of Action reducing benefits, and to give  
20 Defendants as much time as possible to reverse the CMIPS programming implementing the 20  
21 percent reduction. Plaintiffs have acted diligently to file this action and motion as soon as  
22 practicable, but have been unable to do so any sooner because it has been unclear whether the cuts  
23 would take effect and how they would be implemented until after the close of business on  
24 November 29, 2011.

25 As explained in greater detail in Plaintiffs’ memorandum in support of TRO, Plaintiffs seek  
26 to enjoin Defendants from implementing California Senate Bill 73 (Stats. 2011, c. 34, §§1-3)  
27 (hereinafter (“SB 73”)), which will otherwise impose across-the-board, substantial reductions in  
28 authorized IHSS service hours for 372,000 IHSS recipients (all IHSS recipients except

1 approximately 70,000 individuals who are automatically exempted). Although SB 73 permits  
2 some IHSS recipients to apply for restoration of the reduced hours based on a showing of serious  
3 risk of out-of-home placement, that process fails to offer adequate protections for IHSS recipients  
4 because, among other things, it ignores that recipients already receive only those hours that are  
5 necessary to keep them safely at home, fails to provide for hours restoration based on a showing of  
6 likely risk to health, and imposes the burden on recipients to apply for restorations rather than  
7 requiring county social workers to review their caseload and identify individuals at risk. Moreover,  
8 Defendants have deemed two-thirds of IHSS recipients ineligible for hours restorations based on  
9 their functional ranks, which this Court has already held are not reasonable measures of need for  
10 IHSS services. Finally the notices of action Defendants intend to send violate constitutional due  
11 process requirements in much the same way as did the notices of action this Court previously  
12 enjoined.

13 Plaintiffs further seek class certification and amendment of the complaint on shortened  
14 time, and ask that relief be granted on a class-wide basis.

#### 15 **GROUND FOR MOTION**

16 This motion is made, pursuant to Federal Rules of Civil Procedure 65 and Civil Local Rules  
17 7-10 and 65-1, on the ground that Plaintiffs have demonstrated that they meet the requirements for  
18 a TRO and preliminary injunction: (1) a likelihood of success on the merits, (2) likely irreparable  
19 injury absent interim injunctive relief, (3) the balance of hardships tips in Plaintiffs' favor, and (4)  
20 an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S.  
21 7, 20 (2008); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011)  
22 (standard is sliding scale; stronger showing of irreparable harm decreases showing needed on  
23 merits, and vice versa).

24 As further explained in Plaintiffs' Memorandum in support of TRO and Order to Show  
25 Cause Why a Preliminary Injunction Should Not Issue, Plaintiffs have shown that the substantial  
26 reduction of IHSS services to 372,000 elderly, disabled, or blind individuals who cannot safely  
27 remain in their homes without such services will cause irreparable harm in the form of serious and  
28 imminent risk of injury, declining health, homelessness, unnecessary institutionalization, and even

1 death. Plaintiffs have also demonstrated a strong likelihood of success on the merits of their claims  
2 that implementation of SB 73 violates the Due Process Clause of the U.S. Constitution; the  
3 EPSDT, comparability, sufficiency, and reasonable standards provisions of the Medicaid Act; and  
4 the prohibitions on unnecessary institutionalization, discrimination based on type of disability, and  
5 discriminatory methods of administration of the Americans with Disabilities Act and Section 504  
6 the Rehabilitation Act. Finally, Plaintiffs have shown that the balance of equities and public  
7 interest weigh in favor of granting an injunction to preserve the status quo while the merits of the  
8 case are litigated.

### 9 **NEED FOR PROMPT ACTION**

10 On June 20, 2011, the Governor of California signed into law SB 73, which provides for a  
11 20 percent across-the-board reduction in authorized IHSS hours, subject to certain exceptions, if  
12 specified state revenue targets are not met. 3rd RJN, Ex. 1. The reductions are set to take effect on  
13 January 1, 2012 if, on or before December 15, 2011, the Director of Finance determines that these  
14 targets are not met. Assembly Bill No. 121 (Stats. 2011, c. 41, §§1-2). On November 16, 2011,  
15 the state Legislative Analyst issued a report stating that the specified revenue targets would not be  
16 met and that under its projections the IHSS reductions provided for in SB 73 would take effect.  
17 3rd RJN, Ex. 7. The same day, the Director of Finance stated that the budget reductions would  
18 likely take effect. 3rd RJN, Ex. 8. Plaintiffs learned yesterday that State officials are currently  
19 moving to implement the reductions by making programming changes to CMIPS and preparing to  
20 send out notices of action. Bird Decl. ¶¶10, 13.

21 On November 1, 2011, CDSS issued a draft All County Letter (“ACL”) explaining how the  
22 hours reduction would be implemented. 3rd RJN, Ex. 5. On the evening of November 29, 2011,  
23 CDSS issued the final ACL. *Id.*, Ex. 6. Much of the ACL describes how Defendants will  
24 implement the “IHSS Care Supplement” process, through which some recipients may apply for  
25 partial or full restoration of hours upon a showing of serious risk of out-of-home placement. Cal.  
26 Welf. & Inst. Code §12301.07(f). The ACL provides that eligibility for an IHSS Care Supplement  
27 is dependent on recipients’ functional ranks, which are scores assigned to a recipient’s mental  
28 functioning or certain activities of daily living. 3rd RJN, Ex. 6. This Court has already determined

1 that functional ranks are not reasonable measures of need. Order Granting Plaintiffs' Motion for a  
2 Preliminary Injunction (Dkt. 198) 12:24-14:5, 17:11-16, 18:6-8. Nor are they reasonable measures  
3 of risk of out-of-home placement.

4 Pursuant to a stipulation and order entered in 2010 staying the instant case pending the  
5 appeal of the preliminary injunction, on November 28, 2011 Plaintiffs gave written notice to  
6 Defendants of intent to lift the stay and notified Defendants of intent to seek a TRO. Dkt. 319 &  
7 Ex. A. Plaintiffs also contacted Defendants to discuss the timing of a TRO. On November 30,  
8 2011, Defendants' counsel informed Plaintiffs that CDSS had already completed the  
9 reprogramming of the CMIPS system required to implement the 20% reduction in IHSS hours and  
10 would "pull the switch" to put these changes into effect by the close of business on December 1,  
11 2011. Bird Decl. ¶10. According to Defendants' counsel, pulling the switch will also begin the  
12 process of printing the physical notices of action that are to be mailed out no later than December  
13 15, and once the re-programming is implemented, reversing any changes after December 1, 2011  
14 would need to be done manually by the counties. *Id.* Defendants' counsel stated that if the Court  
15 does not issue a TRO before the close of business on December 1, 2011, CDSS cannot guarantee  
16 that the changes can be reversed by January 1, 2012, and that the longer the period of time between  
17 December 1 and the date that a TRO or other order is issued, the more difficult it will be to reverse  
18 the process. *Id.* ¶¶11-12. Finally, Defendants' counsel stated that Notices of Action implementing  
19 the 20 percent reduction could issue before December 15, 2011, as soon as there is a formal  
20 announcement that the revenue targets have not been met, thus "triggering" SB 73. *Id.* ¶13. After  
21 learning this information, Plaintiffs informed Defendants' counsel that they would request that the  
22 Court issue a temporary restraining order today, December 1. *Id.* ¶15

23 By the terms of the stipulation and order, the stay of proceedings in this case lifted on  
24 December 1, 2011, and Plaintiffs immediately filed the instant application for a TRO, motion to  
25 amend the complaint, and associated papers. The TRO motion was filed as soon as it reasonably  
26 could have been, given that it was uncertain whether the specified revenue targets would be  
27 achieved, in which case the IHSS hours reductions would be avoided, until November 16, 2011;  
28 that Defendants did not set forth final implementation plans until the evening of November 29,

1 2011; and that Plaintiffs did not learn that the CMIPS changes would be implemented on  
 2 December 1, 2011 until the afternoon before, on November 30, 2011.

3 Plaintiffs need a TRO by 4:00 p.m. on Thursday, December 1, 2011, to ensure that the  
 4 switch is not pulled to implement the programming changes in the CMIPS system. Plaintiffs also  
 5 need a TRO to ensure that Defendants do not issue Notices of Action informing 372,000 IHSS  
 6 recipients that their IHSS hours will be substantially reduced on January 1, 2012. Those notices  
 7 will cause great stress and anxiety for individuals who depend upon IHSS services to live safely in  
 8 their homes, and if this Court were to enjoin the reductions after the Notices of Action issue that  
 9 would require a second set of corrective notices. Because Plaintiffs do not expect that notices will  
 10 be sent prior to Tuesday, December 6, 2011 (although there is no guarantee), if this Court  
 11 determines not to enter a TRO today, Plaintiffs alternatively request a TRO no later than December  
 12 6, 2011.

### 13 RELIEF SOUGHT

14 Plaintiffs respectfully request that the Court grant Plaintiffs' *ex parte* application for a TRO  
 15 and order to show cause why a preliminary injunction should not issue, by 4:00 p.m. on Thursday,  
 16 December 1, 2011. In the alternative, Plaintiffs request a TRO by Tuesday, December 6, 2011, on  
 17 the following expedited briefing schedule: Opening Brief filed December 1, 2011; Defendants'  
 18 Opposition Brief due December 5, 2011 at 5:00 p.m.; Plaintiffs' Reply Brief due December 6, 2011  
 19 at 12:00 p.m.; and hearing the afternoon of December 6, 2011.

20 Dated:

Respectfully Submitted,

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

DAVID OSTER, *et al.*,

Plaintiffs

v.

WILL LIGHTBOURNE, Director of the  
California Department of Social Services;  
TOBY DOUGLAS, Director of the California  
Department of Health Care Services;  
CALIFORNIA DEPARTMENT OF HEALTH  
CARE SERVICES; and CALIFORNIA  
DEPARTMENT OF SOCIAL SERVICES,

Defendants

) Case No.: CV 09-04668 CW

) **MEMORANDUM OF POINTS AND**  
) **AUTHORITIES IN SUPPORT OF**  
) **EX PARTE APPLICATION FOR**  
) **TEMPORARY RESTRAINING ORDER**

) **RELIEF REQUESTED BY 4:00 P.M.**  
) **TODAY (THURSDAY, DECEMBER 1)**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR**  
2 **TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

3 Plaintiffs seek a temporary restraining order (“TRO”) and order to show cause why a  
4 preliminary injunction should not issue to enjoin Defendants’ implementation of California Senate  
5 Bill 73 (“SB 73”), which is set to reduce most In Home Supportive Services (“IHSS”) recipients’  
6 service hours by 20 percent effective January 1, 2012. The reductions will take effect if the  
7 Director of Finance determines that certain specified revenue targets will not be met, which  
8 appears virtually certain at this time. Defendants plan to send notices of action to 372,000 elderly,  
9 disabled, or blind recipients informing them that their hours will be reduced by 20 percent on or  
10 before December 15, 2011. Each of these 372,000 IHSS recipients has been determined by county  
11 social workers to need the services he or she currently receives in order to avoid the risk of injury  
12 or other harm and live safely at home. Because Defendants intend to implement changes to the  
13 statewide IHSS database at the close of business on Thursday, December 1, 2011, Plaintiffs ask  
14 that a TRO issue **by 4:00 p.m. today.**

15 SB 73 provides for a process for recipients who face a serious risk of out-of-home  
16 placement to apply for the partial or full restoration of their IHSS hours. However, that process  
17 does not cure the legal violations presented by the hours reduction, for many reasons, including:

- 18 • All IHSS recipients have been previously individually assessed by county social  
19 workers to need their current hourly authorizations in order to remain safely at home,  
20 and so hours cannot be reduced without substantial risk of harm and institutionalization;
- 21 • SB 73 provides for hours restorations based only on a showing of serious risk of out-of-  
22 home placement, rather than considering risk to health;
- 23 • With a few narrow exceptions, Defendants are placing the burden on IHSS recipients to  
24 apply for hours restorations within a brief time window rather than identifying those at  
25 risk of out-of-home placement or deteriorating health without regard to whether the  
26 recipient files an application;
- 27 • Defendants are using functional rankings as mandatory eligibility screening criteria for  
28 hours restorations even though this Court has previously found these rankings are not

1 reasonable measures of need for IHSS;

- 2 • The reductions are being imposed on children under 21 without regard to medical
- 3 necessity;
- 4 • Defendants' notice of action is not reasonably calculated to inform recipients of their
- 5 right to challenge the reductions, and the notice Defendants will issue if the county
- 6 denies full hours restoration does not provide recipients sufficient information to
- 7 challenge the decision.

8 Plaintiffs seek a TRO enjoining the planned reductions which will otherwise cause  
9 immediate and irreparable harm by placing members of the plaintiff class at imminent and serious  
10 risk of harm to their health and safety, as well as of unnecessary and unwanted out-of-home  
11 placement including institutionalization. The balance of equities strongly favors Plaintiffs because  
12 Defendants' only interest is fiscal, whereas the plaintiff class faces life or death consequences.

13 Plaintiffs are highly likely to prevail on their legal claims. Defendants' failure to provide  
14 adequate notice of the reductions violates the federal Due Process Clause. SB 73 also violates the  
15 requirements of Title XIX of the Social Security Act, 42 U.S.C. § 1396a ("the Medicaid Act") that  
16 States provide (1) services that are sufficient in amount, duration, and scope to reasonably achieve  
17 their purposes; (2) services according to reasonable standards ("reasonable standards"); (3)  
18 comparable Medicaid services to individuals with similar needs ("comparability"); and (4)  
19 medically necessary services to children under 21 ("EPSDT"). And it violates the Americans with  
20 Disabilities Act of 1990, 42 U.S.C. § 12312 ("ADA"), and Section 504 of the Rehabilitation Act of  
21 1973, 29 U.S.C. § 794 ("Section 504"), by placing IHSS recipients at imminent risk of unnecessary  
22 and unwanted institutionalization; by discriminating on the basis of type of disability; and by using  
23 methods of administration that will exclude individuals with disabilities from IHSS.

24 In 2009, this Court already preliminarily enjoined Defendants from reducing domestic and  
25 related services that IHSS recipients had previously been individually assessed to need, based on  
26 functional ranks that this Court concluded were not reasonable measures of need. Order Granting  
27 Plaintiffs' Motion for a Preliminary Injunction ("PI Order") (Dkt. 198) 12:24-14:5, 17:11-16, 18:6-  
28 8. This Court also found that the notices Defendants intended to send did not comply with Due

1 Proces. *Id.* 24:12-25:24. Defendants’ implementation of SB 73 suffers from the same defects this  
 2 Court found earlier and more: IHSS recipients’ authorized hours will be reduced by 20 percent  
 3 below assessed need, unless recipients *both* have certain specified functional ranks (which this  
 4 Court has already determined do not reasonably measure need) *and* understand a defective notice  
 5 and are able to send back a paper requesting hours restoration by a specified date.

6 An immediate TRO should issue.

## 7 BACKGROUND

### 8 I. The IHSS Program Provides Necessary Services To Keep Elderly and Disabled 9 People Safely At Home.

#### 10 A. IHSS Provides Core Services that Recipients Need to Remain Safely at Home.

11 IHSS is provided through California’s Medicaid program (“Medi-Cal”) and is funded with a  
 12 combination of state, county and federal funds. Welf. & Inst. Code § 12306. Recipients are  
 13 eligible for IHSS if they meet income guidelines and “are unable to perform the services  
 14 themselves and ... cannot safely remain in their homes or abodes of their own choosing unless  
 15 these services are provided.” Welf. & Inst. Code §12300(a). The purpose of the program is “to  
 16 enable [the] aged, blind or disabled poor to avoid institutionalization by remaining in their homes  
 17 with proper supportive services.” *Miller v. Woods*, 148 Cal.App.3d 862, 867 (Cal. App. 1983); *see*  
 18 *also* Cal. Dep’t Soc. Servs. (“CDSS”), Manual of Policies and Procedures (“MPP”) § 30-700.1  
 19 (Exhibit H to RJN (Dkt. 18-8)).

20 Counties administer the IHSS program. County social workers may authorize hours only  
 21 based on a “determin[ation] that the recipient would not be able to remain safely in his/her home  
 22 without IHSS” and “performance of the service by the recipient would constitute such a threat to  
 23 his/her health/safety that he/she would be unable to remain in his/her own home.” MPP §30-  
 24 761.13-14.<sup>1</sup> Of the 440,000 people who depend on the IHSS program, 60% are seniors.<sup>2</sup> Experts

25 \_\_\_\_\_<sup>1</sup> IHSS services include (1) domestic services (house cleaning); (2) related services - meal  
 26 preparation and clean-up, restaurant meal allowance, laundry, grocery shopping and other  
 27 shopping; (3) personal care services - bowel and bladder care, respiration, feeding, routine bed  
 28 baths, bathing, oral hygiene and grooming, dressing, repositioning and rubbing skin including  
 range of motion exercises, transfers, care and assistance with prosthetic devices and self-  
 administration of medication, routine menstrual care, skin care, ambulation; (4) travel to  
 medical appointments; (5) yard hazard abatement; (6) protective supervision; (7) teaching and

1 and county IHSS officials confirm that these seniors are healthier and happier living at home. *See*,  
 2 *e.g.*, Altman Decl. (Dkt. 62) ¶4; LaPlante Decl. (Dkt. 85) ¶7; Schnelle (Dkt. 82) ¶¶5, 6; Preis Decl.  
 3 ¶9; Crain Decl. ¶5; Hathaway Decl. ¶5. People under 65 with disabilities also have better  
 4 outcomes and experience greater independence and well-being living independently. Gardner  
 5 Decl. (Dkt. 70) ¶39; 2nd Vescovo Decl. ¶29-31.

6 IHSS offers assistance with a range of activities of daily living at home, just as Medicaid-  
 7 funded nursing homes or private board and care facilities provide residents with services in  
 8 institutions.<sup>3</sup> Assistance with personal care tasks such as bathing, dressing, toileting, and  
 9 mobility/ambulation are core IHSS tasks. For example, Plaintiff Helen Stern is 86 years old and  
 10 has limited mobility. She requires assistance to bathe, dress, and walk around in her house. Stern  
 11 Decl. ¶¶4-10.<sup>4</sup> Many frail elders need similar assistance. *See, e.g.* Izsadore Decl. ¶9. IHSS  
 12 providers also remind recipients to take prescription medication at the right time and in the right  
 13 amounts. 2nd Baran Decl. ¶12.<sup>5</sup>

14 Domestic and related tasks, which include meal preparation, meal clean-up, shopping,  
 15 laundry, and housecleaning, are also vital components of IHSS that enable recipients to remain  
 16 safely at home. Wallace Decl. ¶¶22-26; 2nd Hoffacker Decl. ¶4.<sup>6</sup> When balance is poor, help with

17 demonstration services, and (9) paramedical services. Welf. & Inst. Code § 12300(b) & (c); *Id.* §  
 18 14132.95(d)(1) & (2).

<sup>2</sup> PI Order (Dkt. 198) at 2; *see also* Kline Decl. (Dkt. 31), Ex. C at 8.

<sup>3</sup> *See* Preis Decl. ¶¶4-10 for explanation of services provided by board and care facilities.

<sup>4</sup> *See also, e.g.*, 3rd Jones Decl. ¶7, 15 (needs help getting out of bed, dressing, and  
 20 bathing); Salazar Decl. ¶4 (cannot bathe without provider); Lott Decl. ¶¶5-7 (getting in and out of  
 21 bed, dressing, and bathing, including bed baths); Cunningham Decl. ¶¶4-5; Hayes Decl. ¶3; Baker  
 Decl. ¶¶5, 21.

<sup>5</sup> *See also, e.g.*, Thurman Decl. ¶18 (severely dyslexic consumer cannot read instructions on  
 22 medication bottles and risks overdose without assistance); 3rd Jones Decl. ¶23; Goff Decl. ¶7  
 23 (mentally ill consumer with history of suicide attempts cannot safely keep medications in home);  
 Phillips Decl. ¶6 (paranoid-schizophrenic consumer will refuse to take essential medication or take  
 24 more than directed unless closely monitored); Swann Decl. ¶6 (mentally disabled recipient forgets  
 medication on weekends when provider not present); Warner Decl. ¶9 (same, and forgets to test  
 25 blood sugar); Hayes Decl. ¶8 (Alzheimer's); Baker ¶¶8, 24; Salazar Decl. ¶9; 2nd McHenry Decl.  
 ¶4 (needs reminders and likely to forget whether she has taken pills and risk overdose); Wessinger  
 Decl. ¶8 (spills pills without help due to arthritis); Peterson Decl. ¶4; Hutchens Decl. ¶7; Lott Decl.  
 26 ¶10; Love ¶15; Hylton ¶7.

<sup>6</sup> *See also, e.g.*, Stern Decl. ¶¶17, 19 (cleaning presents fall risk); 3rd Jones Decl. ¶¶13-14  
 27 (AIDS patient prone to pneumonia and bronchitis if apartment not clean); Maher Decl. ¶5  
 28 (emphysema worsened if home not clean); Cooper Decl. ¶8 (low-salt and low-sugar diet due to  
 hypertension and diabetes; cannot cook due to nerve damage in hands); Swann Decl. ¶¶8 (special  
 diabetes diet); Warner ¶10; Hammers Decl. ¶10; Goulet Decl. ¶20; Carpenter Decl. ¶¶8, 11, 16.

1 cooking and meal clean-up ensures that individuals do not risk a fall, which can trigger a  
 2 downward spiral that ends in a nursing home. Wallace Decl. ¶¶23-24 (fall may lead to emergency  
 3 room, then hospital, then institutionalization); 3rd Kaljian Decl. ¶6.<sup>7</sup> Other IHSS recipients need  
 4 assistance with meal preparation because they have dementia or cognitive impairments. Crain  
 5 Decl. ¶7.<sup>8</sup> Still others cannot cook on their own due to physical impairments such as severe  
 6 arthritis, balance problems that create a fall risk, or inability to stand for any length of time.<sup>9</sup>  
 7 Whatever the reason, IHSS services ensure their safety, continued health, and nutrition. *See*,  
 8 *e.g.*, Crain Decl. ¶7 (eating well-balanced diet and staying hydrated essential to health); Gardner  
 9 Decl. (Dkt. 70) ¶31. This is of special importance when recipients must follow medical restrictions  
 10 on their diets due to conditions like diabetes, kidney failure, hypertension, or digestive or heart  
 11 problems. 3rd Kaljian Decl. ¶6; 2nd Marconi Decl. ¶9.<sup>10</sup>

12 Many elders and people with disabilities can no longer go out into the community on their  
 13 own, and so rely on IHSS for help with shopping for food, other essential errands, and  
 14 accompaniment to necessary medical appointments. Crain Decl. ¶9 (clients with chronic illnesses  
 15 require regular accompaniment to doctor); 2nd Baran Decl. ¶13 (medical appointments).<sup>11</sup> Others  
 16 depend on help with cleaning and laundry. Those with poor balance and weakness often cannot  
 17 manage a broom or mop and risk falls if they attempt to clean house themselves.<sup>12</sup> Blind people  
 18 may need similar assistance.<sup>13</sup> Some have mental disabilities and need direction and reminders to

19 <sup>7</sup> *See, e.g.*, Thurman Decl. ¶¶10, 19-20; 3rd Jones Decl. ¶9; Hammers Decl. ¶7.

20 <sup>8</sup> *See, e.g.*, Swann ¶8 (wrong diet could lead to coma; has left burner on); Warner ¶10;  
 21 Baker Decl. ¶¶4, 9 (has strict diabetes diet and Alzheimer's; caught trailer on fire when left burner  
 22 on); Hayes Decl. ¶5 (Alzheimer's, diabetes and heart disease; does not understand dietary  
 23 restrictions); 2nd McHenry Decl. ¶7; Cachero Decl. ¶8; 3rd Aho Decl. ¶6; Phillips Decl. ¶8.

24 <sup>9</sup> *See, e.g.*, 3rd Jones Decl. ¶9 (neuropathy; cannot grip cooking utensils); Thurman Decl.  
 25 ¶19; Stern Decl. ¶13; Cline Decl. ¶9; Hicks Decl. ¶9; Cooper Decl. ¶8; Carpenter Decl. ¶¶6, 8, 9,  
 26 16; Wessinger Decl. ¶5; Hayes Decl. ¶5; Baker Decl. ¶9; Salazar Decl. ¶10; Hutchens Decl. ¶8;  
 27 Lott Decl. ¶11; Cunningham Decl. ¶8.

28 <sup>10</sup> *See, e.g.*, Thurman Decl. ¶19; 3rd Jones Decl. ¶10; Hammers Decl. ¶7; Goulet Decl.  
 ¶¶12-14; Swann ¶8; Warner ¶10; Cline Decl. ¶9; Cooper Decl. ¶8; Carpenter Decl. ¶¶8, 16; Hayes  
 Decl. ¶5; Baker Decl. ¶¶4, 25; Hutchens Decl. ¶8; Lott Decl. ¶11; Cunningham ¶8.

<sup>11</sup> *See, e.g.*, 3rd Jones Decl. ¶15; Stern Decl. ¶¶13-14; Hayes Decl. ¶7; Swann Decl. ¶7;  
 Warner Decl. ¶¶14-15; Goff Decl. ¶¶11-12; Phillips Decl. ¶¶7, 9; Cooper Decl. ¶10-11; Carpenter  
 Decl. ¶¶7, 12, 18; Maher Decl. ¶¶8-9; 2nd McHenry Decl. ¶¶9-10; Baker Decl. ¶6; Salazar Decl.  
 ¶¶7-8; Wessinger Decl. ¶7; Hutchens Decl. ¶¶10-11; Lott Decl. ¶13; Cunningham Decl. ¶10.

<sup>12</sup> *See, e.g.*, Thurman Decl. ¶¶10, 23; Stern Decl. ¶19; Hayes Decl. ¶4; Baker Decl. ¶¶11,  
 26; Salazar Decl. ¶11; Hutchens Decl. ¶9; Lott Decl. ¶12; Hammers Decl. ¶10; Goulet Decl. ¶20.

<sup>13</sup> *See, e.g.*, Hammers Decl. ¶10; Goulet Decl. ¶20; Thurman Decl. ¶¶7, 10.

1 clean because of their level of confusion, disorientation, or self-neglect.<sup>14</sup> Cleaning and laundry  
 2 services are vital to allow individuals to stay safely in their home, particularly those with  
 3 suppressed immune systems, respiratory ailments, or obsessive compulsive disorders or who have  
 4 urinary, bowel, or blood issues that would create serious hazards otherwise. *See infra* at 17-18 &  
 5 n.38. The maximum time allocation for shopping is 90 minutes per week, for laundry 90 minutes  
 6 per week, and for housecleaning six hours per month, MPP §§30-757.11, 757.134, 757.135.

7 **B. Recipients are Individually Assessed To Receive IHSS Services.**

8 IHSS is administered by counties under the supervision of Defendant CDSS and pursuant to  
 9 an interagency agreement between Defendant Department of Health Care Services (“DHCS”) and  
 10 CDSS. County social workers conduct an individualized, in person assessment of applicants’  
 11 eligibility for IHSS services and the amount of services that they need to remain safely in their own  
 12 home. Welf. & Inst. Code §§ 12300(g), 12302.1, 14132.95(f), 14132.951(b) & (e); MPP §§ 30-  
 13 761.11-.13, §30-761.24; *Miller*, 148 Cal.App.3d at 868; D’Antonio Decl. ¶¶2-6. Regulations  
 14 dictate that “[s]ervices shall be authorized only [where] Social services staff . . . has determined  
 15 that the recipient would not be able to remain safely in his/her own home without IHSS [and]  
 16 [p]erformance of the service by the recipient would constitute such a threat to his/her health/safety  
 17 that he/she would be unable to remain in his/her own home.” MPP § 30-761.1.

18 California statutes require that counties determine a person’s eligibility (need) for any  
 19 services by assessing “the recipient’s living environment, alternate resources, and their functional  
 20 abilities.” Welf. & Inst. Code § 12309 (a)-(b). While the State has promulgated “hourly task  
 21 guidelines” as an aid in the assessment process, counties are required to authorize hours outside the  
 22 guidelines ranges when necessary to meet individual need. Welf. & Inst. Code § 12301.2(a)-(c);  
 23 *Figueroa* Decl. (Dkt. 69) ¶6.

24 **C. IHSS is Cost Effective.**

25 IHSS is extremely cost effective, given the comparative costs of out-of-home care. Nursing  
 26 homes, for example, cost five times as much as services received by a typical IHSS recipient.<sup>15</sup>

27 <sup>14</sup> *See, e.g.*, Aho Decl. ¶¶8-9; 2nd McHenry Decl. ¶6.

28 <sup>15</sup> Kline Decl. (Dkt. 31), Ex. G at 7. This 2004 report compared the average daily rate for hospitals (\$1230), ICF/DD facility (\$142), nursing home (\$118) and IHSS (\$24). *See also* 2nd



1 Half of all IHSS recipients receive fewer than 80 hours per month.<sup>16</sup> Without adequate IHSS  
 2 services, many recipients would end up needing to seek more expensive services in emergency  
 3 rooms and other settings. Gardner Decl. (Dkt. 31) ¶38. Because of its many benefits, Defendants  
 4 have described IHSS as “an essential component of the State’s effort to provide services to  
 5 maintain individuals [with disabilities] in their homes and communities.”<sup>17</sup>

6 **II. Defendants’ Implementation of SB 73 Will Cut IHSS Services to Hundreds of**  
 7 **Thousands of IHSS Recipients By 20 Percent.**

8 **A. SB 73**

9 On June 30, 2011, the Governor signed SB 73. Third Request for Judicial Notice (“3rd  
 10 RJN”), Ex. 1. Under SB 73, if certain revenue targets are not met (a determination that will be  
 11 made by December 15, 2011), the hours of most IHSS recipients will be cut by 20 percent,  
 12 effective January 1, 2012. Cal. Welf. & Inst. Code §12301.07(a).<sup>18</sup> This 20 percent reduction will  
 13 be in addition to a 3.6 percent reduction in hours for most IHSS recipients effective February 1,  
 14 2011. *Id.*, §12301.06. Thus, IHSS recipients’ hours will be reduced by almost 25 percent.  
 15 Recipients may “direct the manner in which the reduction of hours is applied to the recipient’s  
 16 previously authorized services.” *Id.*, §12301.07(a)(4).

17 Under SB 73, recipients who believe themselves at serious risk of out-of-home placement  
 18 may apply for restoration of the reduced hours; this restoration is called an “IHSS Care  
 19 Supplement.” Welf. & Inst. Code §12301.07(f). Certain recipients may be preapproved for IHSS  
 20 Care Supplements, and will not receive notices of action (“NOAs”). *Id.*, §12301.07(b), (c).  
 21 However, 372,000 recipients who are not preapproved will receive NOAs informing them of the  
 22 hours reduction, which will be sent on or before December 15, 2011. 2nd Keeslar Decl. ¶¶14-16;  
 23 *Id.*, §12301.07(a)(5); 3rd RJN, Ex. 6.

24 Recipients who apply for IHSS Care Supplements within 15 days of their receipt of the

25 Jimenez Decl. ¶¶3-7 (average nursing home cost is \$173.34 per day, or approximately \$5,200 per  
 26 month, whereas average monthly cost for IHSS is \$890.72 per month); Polit Decl. (Dkt. 81) ¶¶4, 5.

26 <sup>16</sup> Kline Decl. (Dkt. 31), Ex. C at 7.

27 <sup>17</sup> CA Health and Human Services Agency, CA Olmstead Plan, Kline Decl. (Dkt. 31), Ex. I  
 at 32, 52 (commitment to increase service capacity for “in-home care”).

28 <sup>18</sup> Individuals who receive IHSS services under certain specified waiver programs will not  
 be subject to the 20 percent reduction. *Id.*, §12301.07(a)(5). CDSS estimates that approximately  
 55,000 IHSS recipients will be exempt. 2nd Keeslar Decl. ¶¶14-15.



1 NOA, or before the effective date of the reduction, are eligible for aid paid pending (which means  
2 their currently authorized hours will be maintained) until the county rules on their IHSS Care  
3 Supplement application. Cal. Welf. & Inst. Code §12301.07(e), (f). If a recipient disagrees with  
4 the county's decision, the recipient may file a state appeal. *Id.*, §12301.07(f).

5 On November 16, 2011, the Legislative Analyst issued a report stating that the specified  
6 revenue targets would not be met and that, SB 73 would likely take effect. 3rd RJN, Ex. 7. The  
7 Director of Finance must make a formal determination as to revenue targets no later than  
8 December 15, 2011. Assembly Bill No. 121 (Stats. 2011, c. 41, §§1-2). Although that formal  
9 determination has not yet been made, the Director has indicated that this is a foregone conclusion.  
10 3rd RJN, Ex. 8. As soon as the determination is made, notices of action may issue.

#### 11 **B. Department of Social Services Implementation**

12 On November 2, 2011, DSS issued a draft All-County Letter ("ACL") outlining the steps  
13 for implementation of SB 73. 3rd RJN, Ex. 5. The evening of November 29, 2011, DSS issued a  
14 final ACL. 3rd RJN, Ex. 6. The draft ACL for the first time proposed (and the final ACL adopted)  
15 the use of functional ranks to determine which recipients would be preapproved for IHSS Care  
16 Supplements and which recipients would be eligible for discretionary consideration for IHSS Care  
17 Supplements. 3rd RJN, Ex. 6 at 3-4, Ex. 7 at 3-4.<sup>19</sup> Under the ACL, recipients with functional  
18 ranks below certain levels are categorically ineligible for IHSS Care Supplements – and counties  
19 may not approve them – even if they could otherwise show they will be at serious risk of out-of-  
20 home placement after the reduction in hours. *Id.* at 3-4. This Court has previously determined that  
21 functional ranks are not reasonable measures of individual need. PI Order (Dkt. 198) 12:24-27,  
22 18:6-8; *see also infra* at 10-11. Defendants' use of functional ranks as an eligibility screening  
23 mechanism may exclude more than two-thirds of IHSS recipients. Keeslar 2nd Decl. ¶¶14-16.

24 The ACL requires that, in order to be eligible for consideration for an IHSS Care  
25 Supplement, a recipient must "meet[] the criteria as specified in either A or B below:

26 <sup>19</sup> Under the ACL, individuals with functional ranks of 5 for four specified personal care  
27 services (mobility, bowel/bladder/menstrual, transfer, and eating), assessed for 283 hours, or  
28 assessed for protective supervision will be preapproved for IHSS Care Supplements. Counties do  
not have discretion to preapprove individuals who are outside these categories. 3rd RJN, Ex. 6 at  
3-4. CDSS estimates 13,000 recipients will be preapproved. 2nd Keeslar Decl. ¶¶14-15.

- 1
- 2 A. Any three or more of the following conditions are met:
- 3 1. Paramedical Services have been authorized to monitor medical condition
- 4 and/or give injections;
- 5 2. His/her functional rank for Mobility Inside is either 4 or 5;
- 6 3. His/her functional ranking for Bathing and Grooming is either 4 or 5;
- 7 4. His/her functional ranking for Dressing is either 4 or 5;
- 8 5. His/her functional ranking for Bowel, Bladder or Menstrual is 3, 4 or 5, or
- 9 Paramedical Services have been authorized for catheter or colostomy care;
- 10 6. His/her functional ranking for Transfer is either 4 or 5, or Paramedical
- 11 Services have been authorized for bed sore care;
- 12 7. His/her functional ranking for Eating is either 3, 4 or 5; or
- 13 8. His/her functional ranking for Respiration is 5.
- 14 B. The sum of his/her functional rankings for Memory, Orientation and Judgment is
- 15 equal to 7 or greater.

16 3rd RJN, Ex. 6 at 3-4. If a recipient does not meet the eligibility criteria, a county may not grant

17 full or partial restoration of hours. *Id.* at 3-4. If a recipient does meet the eligibility criteria, the

18 ACL directs that a county social worker determine whether the serious risk of out-of-home

19 placement can be eliminated by assisting the recipient in changing how authorized hours are used,

20 arranging for services from an alternative resource, or partial or full hours restoration. *Id.* at 6-7.

21 The ACL also imposes a March 1, 2012 deadline for requests for IHSS Care Supplements.

22 *Id.* at 6. Thus, recipients who attempt to make do with the hours reduction but find themselves

23 unable to do so, or whose ability to make do with reduced hours declines, will be ineligible for

24 Care Supplements if they fail to apply by March 1, 2012. County officials predict that many

25 eligible recipients will miss the deadline. 2nd Marconi Decl. ¶13; 3rd Collins Decl. ¶21; Elliott

26 Decl. ¶29; 3rd Kaljian Decl. ¶¶11, 14.

27 The ACL also includes language for a NOA message and insert to inform recipients of the

28 20 percent reduction and the IHSS Care Supplement process. 3rd RJN, Ex. 6 at 9-10 & Att. A-B.

That NOA message and insert do not outline the eligibility requirements for IHSS Care

Supplements or contain information about recipients' functional ranks. *Id.* IHSS recipients have

not previously received information about their functional ranks. PI Order (Dkt. 198) 25: 14-19;

Elliott Decl. ¶30; 3rd Guerra Decl. ¶10; Smith Decl. ¶13.<sup>20</sup> The NOA also does not specify the

<sup>20</sup> See, e.g., Thurman Decl. ¶32; Stern Decl. ¶26; M.G. Decl ¶17; 2nd Hylton Decl. ¶21.

1 groups that are exempted from the reduction or that are preapproved for IHSS Care Supplements,  
 2 or explain to recipients how to appeal if they believe they have received a notice of action  
 3 erroneously because they should be exempt or pre-approved. 3rd RJN, Ex. 6 at 9-10, Att. A-B.  
 4 The NOAs will not be translated into languages other than Spanish, Chinese, and Armenian. *Id.*

5 Also included in the ACL is language for NOAs informing recipients the county has denied  
 6 their IHSS Care Supplement application. That language does not specify an effective date of the  
 7 service reduction or inform individuals whether they will receive aid paid pending if they appeal  
 8 that county denial to the State. 3rd RJN, Ex. 6 at 10-11. Nor does it inform recipients that their  
 9 application has been denied because of their functional ranks, or set forth their functional ranks.

10 **C. Functional Ranks Above One Are Not Used To, and Could Not Reasonably**  
 11 **Be Used To, Measure Need or Risk of Out-of-Home Placement.**

12 Functional ranks for each of 14 activities of daily living (“ADLs”) are assigned to IHSS  
 13 recipients by county social workers. PI Order (Dkt. 198) 3:18-4:3 (listing activities). Some  
 14 activities, such as self-administration of medication and accompaniment to medical appointments,  
 15 do not receive functional ranks. *Id.* at 3 n.2. The ADL ranks are defined as follows:

- 16 • Rank 1 for those with independent functioning who do not need assistance;
- 17 • Rank 2 for those who “needs verbal assistance, such as reminding, guidance, or encouragement”;
- 18 • Rank 3 for those who need “some human assistance”;
- Rank 4 for those who need “substantial human assistance”; and
- Rank 5 for those who cannot physically perform the function at all.

19 Cal. Welf. & Inst. Code § 12309(d); PI Order (Dkt. 198) 4:4-18. Recipients also receive  
 20 ranks of 1, 2, or 5 for three categories of mental functioning, with 2 indicating some or  
 21 moderate impairment and 5 meaning severe impairment is observed. RJN, Ex. D (Dkt. 18-  
 22 4) at 18-22.<sup>21</sup>

23 This Court has already found that functional ranks do not “reasonably measure[] the  
 24 individual need of a disabled or elderly person for a particular service.” PI Order (Dkt. 198) 12:24-  
 25 27, 17:13-16. “[A]ll ranks, two through five, reflect a social worker’s determination that IHSS

26 <sup>21</sup> A rank of 2 for memory signifies moderate or intermittent memory loss, while a rank of 5  
 27 indicates severe memory deficit. *Id.* at 19-20. A rank of 2 for orientation means there is  
 28 occasional disorientation and confusion while 5 indicates severe disorientation that puts the  
 recipient at risk. *Id.* at 20-21. For judgment, 2 means judgment mildly impaired (including poor  
 social judgment), while 5 shows severely impaired judgment. *Id.* at 22.

1 recipients are ‘unable to perform the services themselves’ and ‘cannot remain in their homes or  
 2 abodes of their own choosing unless these services are provided.’” PI Order (Dkt. 198) 14:1-5  
 3 (citing Cal. Welf. & Inst. Code §12300(a)).<sup>22</sup> As such, “the functional ranks were not intended to,  
 4 and cannot by their very nature, capture the risk of out of home placement faced by a recipient who  
 5 receives almost twenty-five percent less hours than a trained social worker has already determined  
 6 him to need. The two have no relation.” 3rd Collins Decl. ¶27.

7 County officials and experts have identified many problems with Defendants’ decision to  
 8 limit eligibility for Care Supplements to recipients with particular combinations of functional  
 9 ranks, and explain that many recipients who do not meet this eligibility criteria are in fact at risk  
 10 for our-of-home placement and/or serious risk to health and safety. 2nd Marconi Decl. ¶14 (“State  
 11 has taken away the necessary discretion from the county and trained social workers to evaluate  
 12 clients as individuals and determine their specific degree of risk and hours needed for safety”); 3rd  
 13 Collins Decl. ¶¶22-32; 3rd Kaljian Decl. ¶15; Elliott Decl. ¶14; 2nd Guerra Decl. ¶8; Wallace Decl.  
 14 ¶¶28-33. There are “many grey areas, and it is impossible to place someone into a given functional  
 15 rank with mathematical precision.”<sup>23</sup> 3rd Collins Decl. ¶23. *See also id.* ¶¶24-26, 28; Elliott Decl.  
 16 ¶17; Wallace Decl. ¶32; Benjamin Decl. (Dkt. 133) ¶¶26-27. Care Supplement eligibility  
 17 requirements do not even consider activities for which there are no functional ranks, such as  
 18 accompaniment to medical appointments and assistance with medication, and also ignore  
 19 functional ranks for domestic and related services, even though these are all vital services that are  
 20 necessary to keep recipients safe at home. 3rd Collins Decl. ¶28; Elliott Decl. ¶15.<sup>24</sup> The  
 21 requirement that recipients have 4s rather than 3s in most tasks ignores the fact that a trained social

22 \_\_\_\_\_  
 23 <sup>22</sup> A rank of 1 indicates no need for assistance, and so would make a recipient ineligible for  
 24 assistance with that task, MPP §30-763.1, but otherwise functional rank has no relationship to  
 25 eligibility for IHSS hours. PI Order (Dkt. 198) 4:25-26; *see also* MPP § 30-757.1(a)(1) (functional  
 26 ranks cannot be “sole factor” to determine eligibility or hours); Figueroa Decl. (Dkt. 69) ¶8.

27 <sup>23</sup> For example, recipients are ranked 3 for transfer if they require “some help,” such as  
 28 “routinely requir[ing] a boost.” They are ranked 4 if they are “unable to complete most transfers  
 without physical assistance.” RJN, Ex. D (Dkt. 18-4) at 14. What is the difference between  
 someone who cannot get out of a chair without a boost and one who is unable to complete a  
 transfer without physical assistance? 3rd Collins Decl. ¶24.

<sup>24</sup> Ignoring recipients’ inability to perform domestic and related tasks such as meal  
 preparation seems to assume that the only out-of-home placement is a skilled nursing facility, and  
 ignores the fact that many recipients may end up in other settings such as board and care facilities.  
 Preis Decl. ¶¶3, 10.

1 worker has already found the recipient whose rank is 3 to require “some” assistance, and has  
 2 already authorized fewer hours. 3rd Collins Decl. ¶29; 2nd Marconi Decl. ¶18; 3rd Kaljian Decl.  
 3 ¶19-20; Calavan Decl. ¶7; Wallace Decl. ¶33. The requirement that recipients have high functional  
 4 ranks in at least three personal care tasks also fails to take into account that some recipients have  
 5 critical needs for only a few services. 3rd Collins Decl. ¶28; 2nd Marconi Decl. ¶19.

6 As this Court already found, functional ranks “are particularly inaccurate measures of the  
 7 needs of individuals with mental impairments, such as elders with Alzheimer’s disease.” PI Order  
 8 (Dkt. 198) 12:28-13:2. That is because “[i]ndividuals with cognitive and psychiatric disabilities  
 9 frequently require verbal rather than physical assistance” and so will “receive numerical ranks of  
 10 two rather than three or four.” *Id.* at 13:2-5. Those ranks “reflect the nature of the assistance  
 11 needed, not the severity of the need. Disabled and elderly individuals with numerical ranks of two  
 12 have no less need for verbal assistance than individuals with severe physical impairments have for  
 13 physical assistance.” *Id.* at 13:6-10; *see also id.* at 13:10-26 (citing, among other sources, 1996  
 14 study by Institute for Social Research at California State University).<sup>25</sup> But recipients with  
 15 cognitive or psychiatric disabilities often have scores of 2 in personal care tasks, and thus will not  
 16 be eligible for Care Supplements, no matter how serious their risk of deteriorating health or  
 17 institutionalization. 3rd Kaljian Decl. ¶16; Elliott Decl. ¶19; Izsadore Decl. ¶16; Wallace Decl.  
 18 ¶32. The State has limited Care Supplement eligibility to recipients who have a 5 for one of the  
 19 mental functions of memory, orientation, or judgment, meaning that the recipient is in such danger  
 20 that she cannot be left alone, but county officials and experts explain that recipients with mental  
 21 functioning ranks of 2, indicating moderate mental impairment, are also at serious risk of out-of-  
 22 home placement or deterioration of health if their hours are reduced by 20 percent. 2nd Marconi

23 \_\_\_\_\_  
 24 <sup>25</sup> Recipients with mental disabilities may need verbal cueing or other nonphysical  
 25 assistance for a variety of reasons that are critical. For example, many people need reminders to  
 26 eat on a regular basis or to eat appropriate foods, assistance to avoid eating excessive amounts of  
 27 food, or reminders not to eat food that is contraindicated because of their medical conditions.  
 28 Gardner Decl. (Dkt. 70) ¶¶30-33; *see also, e.g.*, 3rd Jones Decl. ¶12 (AIDS weakens appetite;  
 without encouragement will not eat enough and will risk malnourishment); Cooper Decl. ¶¶8, 14;  
 Carpenter Decl. ¶¶16, 22; Swann Decl. ¶¶8, 11; Warner Decl. ¶10; Hayes Decl. ¶5; *see also*  
 Cachero Decl. ¶¶5, 8 (without reminders to use restroom, developed permanently distended  
 bowels); Love Decl. ¶¶3, 10, 15, 16, 17 (needs reminders for medication; has been hospitalized for  
 wrong dose); 2nd McHenry Decl. ¶5, 11 (needs encouragement to brush and floss her teeth, bathe  
 and get dressed); Schemel Decl. ¶5; Lott Decl. ¶14.

1 Decl. ¶20-24; 3rd Collins Decl. ¶31-32; 3rd Kaljian Decl. ¶16-18; Elliott Decl. ¶18; Wallace Decl.  
 2 ¶29; Barsten Decl. ¶12; Izsadore Decl. ¶16. This is especially problematic because the line  
 3 between moderate and severe cognitive impairment is difficult to discern. Wallace Decl. ¶29.  
 4 Social workers do not use the rigorous assessment tools necessary to draw this distinction, and  
 5 independent research has shown unexplained variation by county in social worker evaluation of  
 6 mental functioning. Wallace Decl. ¶29. Moreover, these functional rankings are not designed to  
 7 capture mental health issues such as depression, anxiety, or obsessive-compulsive disorder, so  
 8 recipients suffering from psychiatric disabilities will be ineligible for Care Supplements despite  
 9 their serious risk of injury or institutionalization. Wallace Decl. ¶¶29-31.<sup>26</sup>

10 Moreover, children automatically receive ranks of 1 for certain tasks regardless of the  
 11 severity of their disability. PI Order (Dkt. 198) 15:24-28.<sup>27</sup> They too are less likely to be eligible  
 12 for a Care Supplement, despite their need for IHSS hours. Elliott Decl. ¶16.

### 13 LEGAL STANDARD

14 “A plaintiff seeking a preliminary injunction must establish that he is [1] likely to succeed  
 15 on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3]  
 16 that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.”  
 17 *American Trucking Ass’n v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting  
 18 *Winter v. Natural Res. Def. Council Inc.*, 555 U.S. 7, 20 (2008)); *Stormans, Inc. v. Selecky*, 571  
 19 F.3d 960, 978 (9th Cir. 2009). Requests for preliminary injunctive relief are evaluated on a sliding  
 20 scale – where plaintiffs have made a strong showing of irreparable harm, they need not make as  
 21 great a showing with respect to likelihood of success on the merits, and vice versa. *Alliance for the*  
 22 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Plaintiffs meet this test, as here  
 23 there is both severe irreparable harm and a strong likelihood of success on the merits.

24  
 25 <sup>26</sup> For examples of recipients with serious mental health issues but ranks of 1s or 2s, see,  
 26 e.g., 2nd Hylton Decl., ¶3; Swann Decl. ¶¶4, 13; Warner Decl. ¶6; Hayes Decl. ¶2; Goff Decl. ¶¶3,  
 18, 20; Meireles Decl. ¶4; Mills Decl. ¶¶3, 5, 7-8; Phillips Decl. ¶¶11-13; Cooper Decl. ¶¶14, 10-  
 11, 19.

27 <sup>27</sup> See Nicco Supp. Decl. (Dkt. 145) ¶¶11-12, Exs. A-B (children cannot be ranked higher  
 28 than 1 for eating or bathing until they turn eight); M.G. Decl. ¶11 (6-year-old named plaintiff L.C.  
 automatically ranked 1 for bathing although requires special assistance, and 3 for bowel/bladder  
 despite serious incontinence issues); J.O. Decl. ¶¶1, 20 & Ex. A.



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**ARGUMENT**

**I. The Reduction of IHSS Services Will Cause Irreparable Injury, and the Equities and Public Interest Weigh in Favor of a Status Quo Injunction.**

The loss of IHSS services will put Plaintiffs at imminent risk of illness, injury, institutionalization, and even death, as well as harm to their family ties, independence and dignity. An injunction should issue to preserve the status quo while the merits are adjudicated.

**A. The Reduction of IHSS Services Will Place Recipients at Great Risk of Injury at Home, Deterioration of Health, and Institutionalization.**

**1. Risk of Injury and Effect on Health and Safety**

The irreparable injury from the reduction of IHSS services will be severe. This Court has recognized, in relation to different reductions and eligibility terminations imposed by ABX4 4, that reductions in IHSS services cause irreparable injuries.<sup>28</sup> PI Order (Dkt. 198) 26:19-27:1.

This 20 percent reduction will cause such irreparable injury here. County social workers have been carefully trained to assess recipients for only the bare minimum number of hours needed for recipients to remain safely at home; thus, cutting 20 percent of these already minimal hours is a virtual guarantee that recipients will not be safe in their homes. Marconi Decl. ¶¶5-9; 3rd Kaljian Decl. ¶5; Cotrell Decl. ¶¶4-5; 3rd Collins Decl. ¶¶9-10; D'Antonio Decl. ¶¶3-8; Hathaway Decl. ¶12, 23; Smith Decl. ¶¶7-8; 3rd Guerra Decl. ¶8; Elliott Decl. ¶6; Izsadore Decl. ¶¶6-8.<sup>29</sup> County officials predict that the 20 percent reduction in hours will lead to deteriorating health and injury for a huge number of recipients who do not receive a Care Supplement (either because they are ineligible or because they fail to timely apply). Cotrell Decl. ¶5 (cut “is not sustainable, and will cause many [recipients] to suffer deteriorating health or injury”); 3rd Kaljian Decl. ¶6 (predicting “serious decline in both physical and mental health...there will be increased hospitalization and use

<sup>28</sup> ABX4 4 would have terminated some IHSS recipients from eligibility altogether, and would have eliminated certain domestic and related services for some recipients who would have maintained eligibility. PI Order (Dkt. 198) at 7:16-22. The loss of domestic and related services would have imposed hours reductions comparable to those involved here. *See infra* at 37 n.72.

<sup>29</sup> Indeed, many social workers' hours determinations are scrutinized by quality review staff, to make absolutely certain only the minimum hours necessary for a given task are authorized. Bargsten Decl. ¶¶3-4; Izsadore Decl. ¶7; Cotrell Decl. ¶¶8-9 (20 percent reduction in hours will hit Contra Costa particularly hard because county has already initiated stringent individualized assessment process, resulting in 8 percent reduction in hours and savings to State of \$1.8 million).

1 of emergency rooms”); Elliott Decl. ¶¶7-8 (predicting “health deterioration and increased  
2 hospitalization,” more emergency room admissions and referrals to Adult Protective Services).  
3 Independent researchers at UCLA similarly found that recipients will “eat less often, let their  
4 homes become less safe, and allow their medical conditions to worsen.” Wallace Decl. Ex. B at 7.  
5 And once physical and mental deterioration occurs, it is usually irreversible. *Id.* ¶20. Other  
6 directors of IHSS Public Authorities and social service agencies report similar dire predictions.  
7 2nd Hoffacker Decl. ¶8 (“outcomes will be severe and irreversible”); Smith Decl. ¶¶ 7-8 (“Many of  
8 these recipients will be living in fear in their own apartments. ... For many recipients, neglect of  
9 any one condition or task could send them spiraling downward, or necessitate a trip to the ER.”);  
10 Calavan Decl. ¶5 (“pose a risk to ... life, health, safety and independence”); 2nd Baran Decl. ¶14  
11 (“health and living conditions to spiral downward”); 3rd Guerra Decl. ¶8 (“devastating impact”);  
12 2nd Vescovo Decl. ¶3 (“risk of infection, illness, serious injury, or even death or suicide”); Preis  
13 Decl. ¶3 (“imminent risk of hospitalization”); Crain Decl. ¶5 (“life expectancy would be reduced”).

14       Officials responsible for county IHSS services or public authorities, social workers, and  
15 agency heads have reviewed their cases and found many examples of individuals who are not  
16 eligible for supplemental care, but for whom the 20 percent reduction imposes a serious risk to  
17 health or safety if they remain in their own homes. D’Antonio Decl. ¶¶17, 18, 19, 20; 3rd Kaljian  
18 Decl. ¶20; 2nd Baran Decl. ¶15; 3rd Guerra Decl. ¶¶11-14; Elliot Decl. ¶¶20-23; 3rd Collins Decl.  
19 ¶¶11-12. Quite simply, the deep hours reduction “puts the most vulnerable members of the public  
20 at great risk, and represents the difference between being safe or not safe for the vast majority of  
21 IHSS clients.” 3rd Collins Decl. ¶8.

22       IHSS recipients will be forced to make impossible choices: “Do I sit for a longer time in a  
23 dirty diaper, or do I sit around in my housecoat all day and not get dressed at all? Do I try to  
24 perform services that should be performed by my provider, such as cleaning, and risk falling and  
25 harming myself, or do I allow my home to gradually grow more filthy and unhygienic? Do I bathe  
26 less often, exacerbating skin conditions? Or do I instead try to shower alone and risk falling  
27 because my provider is here less frequently or for fewer hours? Do I forgo medical appointments  
28 because my provider doesn’t have time to take me to them? Should I cut down on meal



1 preparation and rely on frozen or processed food that is not compatible with my medically-  
 2 indicated diet?” Marconi Decl. ¶9; *see also* 3rd Collins Decl. ¶11-12; 3rd Kaljian Decl. ¶6; Elliott  
 3 Decl. ¶7.<sup>30</sup> In some cases, these recipients lack decision-making abilities, and may not make the  
 4 most appropriate or safe choice. 3rd Collins Decl. ¶¶11-12; Wallace Decl. ¶¶21, 27. For example,  
 5 one recipient plans to skip her evening meal. 3rd Guerra Decl. ¶11.<sup>31</sup> In most cases, there is no  
 6 appropriate choice, because every authorized hour is needed. 3rd Collins Decl. ¶12.

7 Recipients are likely to become malnourished from eating insufficient food or to suffer the  
 8 health consequences of eating packaged processed meals that are contraindicated by medically  
 9 necessary diets (to the extent prepared food is even affordable on their limited budgets) as they  
 10 struggle to get by with fewer hours allocated to shopping, meal preparation, and meal cleanup.  
 11 Crain Decl. ¶¶7-8 (“risk of dying”); D’Antonio Decl. ¶¶7, 18; Bargsten Decl. ¶7; 2nd Hoffacker  
 12 Decl. ¶¶5-6. 2nd Hathaway Decl. ¶¶19, 20; 3rd Kaljian Decl. ¶6; 2nd Vescovo Decl. ¶14; 2nd  
 13 LaPlante Decl. ¶16; Izsadore Decl. ¶13.<sup>32</sup> Experts agree that reductions in meal preparation  
 14 services “could have disastrous effects on [recipients’] health.” Wallace Decl. ¶25. For example,  
 15 Named Plaintiff Dottie Jones’ AIDS and neuropathy prevent her from using her hands or walking  
 16 more than a few steps. 3rd Jones Decl. ¶3-5. She is completely unable to prepare food for herself;  
 17 she cannot even reheat food in the microwave because of the danger of falling or burning herself  
 18 lifting out a hot plate. 3rd Jones Decl. ¶8. Dottie frequently develops mouth infections that make  
 19 eating difficult, has a poor appetite because of AIDS, and needs nutritious food due to her  
 20 compromised immune system. 3rd Jones Decl. ¶¶9-10. If she goes without sufficient shopping  
 21 and meal preparation services she is likely not to eat, to get sick, and to be rushed to the emergency  
 22

23 <sup>30</sup> For examples of declarations discussing difficult choices consumers face, *see, e.g.*,  
 Thurman Decl. ¶27; 2nd Hylton Decl. ¶18; Hammers Decl. ¶11; Moreno Decl. ¶¶15, 16.

24 <sup>31</sup> Swann Decl. ¶4; Warner Decl. ¶6; Aho Decl. ¶¶5-6; Goff Decl. ¶3; Meireles Decl. ¶4.

25 <sup>32</sup> *See also, e.g.*, Moreno Decl. ¶¶7, 12, 15 (diabetes, high blood pressure, high cholesterol  
 26 and kidney failure require special diet including minimum calories and maximum liquid intake;  
 frozen or processed foods will aggravate conditions); Milian Decl. ¶¶5, 6; Hammers Decl. ¶¶7, 11  
 27 (diabetes); Hayes Decl. ¶9; Wessinger Decl. ¶10 (cardiovascular disease); Salazar Decl. ¶16  
 28 (diabetes); Baker Decl. ¶30 (diabetes); Goulet Decl. ¶¶12-14; Uriarte Decl. ¶9 (high blood pressure  
 and high cholesterol); Ramirez Perez Decl. ¶¶13, 14; Gonzalez Decl. ¶¶4, 5, 6, 16 (special diet due  
 to intestine rupture, stomach lining problems, diabetes and high blood pressure; frozen or  
 processed foods will aggravate); Phillips Decl. ¶8; Cooper Decl. ¶14 (diabetes); Cline Decl. ¶13;  
 Woods ¶7 (diabetes).

1 room. 3rd Jones Decl. ¶¶17, 18. Other recipients risk choking if their provider is not there to  
 2 monitor their eating. 3rd Guerra Decl. ¶13. Some with developmental disabilities will make  
 3 extremely unhealthy food choices (i.e. bags of Cheetos for meals). 3rd Guerra Decl. ¶14.<sup>33</sup>

4 Many recipients are at great risk of falling and breaking bones if they attempt to perform  
 5 necessary tasks (such as cleaning or laundry) that they are not physically capable of doing safely,  
 6 because their provider no longer has time. 3rd Kaljian Decl. ¶6; D'Antonio Decl. ¶15-19; Elliott  
 7 Decl. ¶7; Wallace Decl. ¶¶23-24.<sup>34</sup> Some are at a fall risk when they attempt to bathe or dress  
 8 alone. Marconi Decl. ¶23.<sup>35</sup> Falls are among the leading causes of injuries among older adults; in  
 9 2007 alone, over 1,400 California seniors died due to injuries from falls and over 67,000 more  
 10 were hospitalized. Wallace Decl. ¶24; 3rd Guerra Decl. ¶11 (elderly recipient hospitalized and  
 11 then in nursing home after fall).<sup>36</sup> Other recipients may endanger themselves trying to cook  
 12 without help, risking a house fire, burn, or knife cut. D'Antonio Decl. ¶16, 19; Vescovo Decl. ¶10-  
 13 15 (individuals lacking coordination scalded just pulling hot dish from microwave).<sup>37</sup> Reduction in  
 14

15 <sup>33</sup> See, e.g., Love Decl. ¶¶13, 16; McHenry Decl. ¶7; Carpenter Decl. ¶22.

16 <sup>34</sup> Thurman Decl. ¶¶10-11, 27-28 (cannot clean home safely and may injure selves  
 17 attempting to bathe, cook, dress, or clean; suffer frequent falls that have caused broken bones);  
 18 Stern Decl. ¶19 (has fallen and been unable to get up when tried to clean); 2nd Hylton Decl. ¶¶6, 9  
 19 (many previous broken bones from falls; relies on walker and cannot clean herself); White Decl. ¶9  
 20 (many previous broken bones; has fallen when trying to clean home); Hammers Decl. ¶10; Goulet  
 21 Decl. ¶20; Uriarte Decl. ¶¶10, 13; Ramirez Perez Decl. ¶¶11, 14; Carpenter Decl. ¶¶5, 10, 17  
 22 (history of falls and bone fractures); Wessinger Decl. ¶10 (hospitalized due to falls); Hutchens  
 23 Decl. ¶15; Gonzalez Decl. ¶¶13, 16 (falls if provider not present; wounds heal slowly due to  
 24 diabetes); Lott Decl. ¶21.

25 <sup>35</sup> Thurman Decl. ¶11 (has fallen when attempted to shower alone); 2nd Hylton Decl. ¶14  
 26 (cannot shower without assistance; two prior falls have broken bones); Carpenter Decl. ¶¶5, 14  
 27 (immunosuppressed consumer with history of falls and bone fractures needs showers due to urinary  
 28 incontinence); Uriarte Decl. ¶5, 6 (has fallen while dressing; will not shower without assistance);  
 Hammers Decl. ¶¶6, 10; Goulet Decl. ¶¶8, 20; Hayes Decl. ¶3; Baker Decl. ¶¶5, 30; Salazar Decl.  
 ¶¶4, 15; Hutchens Decl. ¶6; Lott Decl. ¶7; Cunningham Decl. ¶5; J.O. Decl. ¶9.

29 <sup>36</sup> Declarants in this case have suffered serious consequences, including broken bones and  
 30 hospitalization, from falls. 2nd Hylton Decl. ¶¶6, 14; Baker Decl. ¶¶4, 13, 23; Hayes Decl. ¶¶2,  
 31 11; White Decl. ¶9; Hutchens Decl. ¶¶3, 15.

32 <sup>37</sup> Thurman Decl. ¶¶19, 27 (blind consumer with neuropathy could easily cut himself; wife  
 33 burned self badly while attempting to cook); 3rd Jones Decl. ¶9 (even use of microwave presents  
 34 risk of burns); Baker Decl. ¶9 (set trailer on fire cooking); Gonzalez Decl. ¶5 (burned self while  
 35 cooking because blind); 2nd McHenry Decl. ¶7 (burned herself and left burners on, risking fire);  
 36 Hammers Decl. ¶7 (blind; cannot safely use kitchen items such as knives); Phillips Decl. ¶17  
 37 (paranoid-schizophrenic; risks fires through excessive microwave time setting); Goulet Decl. ¶14  
 38 (left stove burner on); Swann Decl. ¶8 (same); Love Decl. ¶16 (similar risk); Warner Decl. ¶10  
 (similar); Wessinger Decl. ¶10 (burn or cut risk); Lott Decl. ¶21 (burn or fall risk); Milian Decl. ¶5  
 (fire risk).

1 cleaning services may also lead to homes that are unlivable health hazards, which are particularly  
 2 dangerous for those with COPD (emphysema) or weakened immune systems, pose extra risks for  
 3 individuals with incontinence, and may also result in eviction and/or out of home placement.

4 Calavan Decl. ¶6; Izsadore Decl. ¶14; 2nd Baran Decl. ¶17-18.<sup>38</sup>

5 Recipients who change clothes less often or bathe less will be at risk for pressure sores or  
 6 other infections. 2nd Vescovo Decl. ¶5; 2nd LaPlante Decl. ¶10; 2nd Hoffacker Decl. ¶7 (pressure  
 7 sores from not bathing prior to receipt of IHSS services; moved into board and care after 3.6% cuts  
 8 because of relapse); 3rd Guerra Decl. ¶12 (chronic urinary tract infections from improper  
 9 hygiene).<sup>39</sup> Being clean and well-groomed is essential to recipients' mental health, and those who  
 10 can't get their hair brushed or have assistance showering may be less likely to leave their homes,  
 11 leading to depression. 2nd Vescovo Decl. ¶16.<sup>40</sup> Recipients who need assistance toileting will  
 12 suffer adverse consequences including accidents as well as dehydration from reduction of fluid  
 13 intake to avoid having to use the restroom when their provider is not present. 3rd Guerra Decl.  
 14 ¶12.<sup>41</sup> Recipients may be changed less frequently and forced to remain in soiled pull-ups which

16 <sup>38</sup> For consumers with health conditions that would be aggravated by loss of domestic  
 17 services, see Thurman Decl. ¶¶7, 9, 23, 27 (COPD; respiratory conditions deteriorated after no  
 18 cleaning for several days); 2nd Hylton Decl. ¶9 (COPD/emphysema); 3rd Jones Decl. ¶14 (AIDS,  
 19 prone to bronchitis and pneumonia); Maher Decl. ¶¶3, 5 (emphysema); Hayes Decl. ¶¶2, 6 (asthma  
 20 and emphysema); Baker Decl. ¶¶4, 10, 22 (asthma, emphysema, and partially removed lung);  
 21 White Decl. ¶9 (asthma); Carpenter Decl. ¶11 (AIDS and asthma). For those facing eviction risk,  
 22 see 2nd Hylton Decl. ¶¶10, 15, 18; Aho Decl. ¶¶8-9, 14; Love Decl. ¶¶20, 28; *see also* Bargsten  
 23 Decl. ¶7 (urinary, bowel, or blood issues); 2nd McHenry Decl. ¶¶6, 16-17 (lack of cleaning  
 24 worsens depression); Baran Decl. ¶17 (recipients with obsessive compulsive disorders); Stern  
 25 Decl. ¶¶6, 8, 17, 19; Warner ¶¶5, 7-8, 12, 16 Salazar Decl. ¶5; Wessinger Decl. ¶10; Lott Decl. ¶9;  
 26 Cunningham Decl. ¶6; Swann Decl. ¶5; Mills Decl. ¶12.

27 <sup>39</sup> Stern Decl. ¶¶6, 8-10, 20, 22 (urinary incontinence and skin problems including open  
 28 lesions requiring skin grafts; will be unable to reliably shower and regularly change soiled clothing  
 and pull-ups); Goff Decl. ¶¶4-5, 15 (urinary incontinence and skin problems; provider will reduce  
 frequency of cleaning and laundry); Meireles Decl. ¶¶5-6, 12 (urinary incontinence, skin problems,  
 and shower phobia; less frequent washing); Warner Decl. ¶¶7-8, 18 (frequently soils clothing with  
 blood and feces and does not change clothes or bathe regularly); White Decl. ¶13 (urinary  
 incontinence and weakened immune system; less frequent showers risks urinary infection);  
 Carpenter Decl. ¶5 (urinary incontinence; decreased bathing frequency risks urinary infections);  
 Hayes Decl. ¶10 (potential rashes due to incontinence); Baker Decl. ¶¶13, 29 (same); Ramirez  
 Perez Decl. ¶¶15, 17 (risks rashes and skin irritation).

<sup>40</sup> *See also, e.g.*, Salazar Decl. ¶15; Baker Decl. ¶30; Lott Decl. ¶20.

<sup>41</sup> *See, e.g.*, M.G. Decl. ¶16 (child would risk contracting infections or ripping feeding  
 device if attempted to use toilet unassisted); Cachero Decl. ¶¶5, 8 (mentally ill consumer will not  
 go to bathroom without reminders, which has caused bowel impactions and permanent bowel  
 distention, and will lie in bed after wets it); 3rd Jones Decl. ¶22 (needs help getting to and from

1 can cause skin outbreak, Stern Decl. ¶20, repositioned or able to get out of bed less often, *id.*; 3rd  
 2 Jones Decl. ¶7, receive crucial foot care less frequently, Hicks Decl. ¶¶4, 15; Lott Decl. ¶17.  
 3 Providers rushing through personal care tasks may injure either the recipient or themselves.  
 4 Izsadore Decl. ¶9-12; Bargsten Decl. ¶¶8-9 (risk if provider rushes through bathing).<sup>42</sup> Many tasks  
 5 simply cannot be rushed. Izsadore Decl. ¶¶9-12 (assistance to and on the toilet, bathing, brushing  
 6 teeth, clipping nails, shaving, skin rubbing); M.G. Decl ¶¶7, 15 (use of feeding pump). For  
 7 example, there are no time-for-task guidelines for paramedical tasks, because these take whatever  
 8 length of time is prescribed. MPP §30-797.19.

9 It is also likely some providers will eliminate the time spent taking recipients to medical  
 10 appointments, because they are not paid for waiting during an appointment, and are unlikely to  
 11 continue to provide this free service. D’Antonio Decl. ¶10; *see also* 3rd Kaljian Decl. ¶6; Peterson  
 12 Decl. ¶¶6, 11; Carpenter Decl. ¶7. Even those providers who continue to provide the service will  
 13 likely need to reduce time in this area,<sup>43</sup> or may not be able to accommodate all scheduled  
 14 appointments because of the need to juggle other clients. G. Thompson Decl. ¶9. The  
 15 consequences of missed medical appointments can be dire. Crain Decl. ¶9 (“grave cost to their  
 16 health”); 3rd Guerra Decl. ¶11.<sup>44</sup>

17 For individuals with psychiatric disabilities, the stress of losing services may trigger  
 18 symptomatic behaviors such as hurting themselves. Gardner Decl. (Dkt. 70) ¶¶36-37. Such  
 19 individuals also have a problem with self-neglect, and must be reminded on a daily basis to get out  
 20 of bed, bathe, and eat. Without a provider to assist them daily, or sometimes twice a day, their  
 21 conditions will quickly deteriorate due to malnutrition, lack of hygiene, or lack of movement. 2nd  
 22

23  
 24 bathroom; could have accident without provider help); Lott Decl. ¶8 (some days needs to be  
 25 lowered down onto toilet).

26 <sup>42</sup> *See also, e.g.*, Ramirez Perez Decl. ¶7 (needs thorough drying after showers, or risks  
 27 developing irritation or sores due to diabetes); Gonzalez Decl. ¶8 (similar); Stern Decl. ¶9.

28 <sup>43</sup> Stern Decl. ¶¶14, 20; Swann Decl. ¶¶7, 11; Warner Decl. ¶¶15, 18; Carpenter Decl. ¶7;  
 Hammers Decl. ¶¶9, 11; Goulet Decl. ¶18.

<sup>44</sup> *E.g.*, 2nd Hylton Decl. ¶15 (possible mental relapse, has previously led to homelessness);  
 Maher Decl. ¶9 (almost daily medical appointments are keeping him alive); Milian Decl. ¶8 (risks  
 mismanagement of diabetes, kidney failure, and heart); Warner Decl. ¶18 (aggravate psoriasis,  
 diabetes and mental health issues).

1 Baran Decl. ¶14-15.<sup>45</sup>

2 Each authorized hour is necessary to keep vulnerable recipients safe at home, and there is  
 3 no realistic way to cut around the edges of a 20 percent reduction. Plaintiffs have submitted  
 4 declarations concerning over 30 recipients who are not eligible for a Care Supplement, who  
 5 describe in minute detail the time it takes for their provider to perform each task, why that task is  
 6 necessary for their health and well-being, and why they cannot safely perform that task themselves.  
 7 There is no room to cut. The effect of the cuts “may not show themselves immediately, but over  
 8 time people will be sicker and more likely to need intensive medical services because of the  
 9 reductions to their IHSS hours.” 2nd Vescovo Decl. ¶5.

10 Experts agree that insufficient in-home care hours may lead to adverse health consequences  
 11 and even death. Dr. Mitchell LaPlante, a UCSF expert on health, disability, and long term care,  
 12 explains that “A 20 percent reduction of care hours would result in actual care hours falling well  
 13 below the individually assessed level of personal care hours required to live safely and healthily  
 14 and is of sufficient magnitude that it is likely to result in unmet needs and an increase in the many  
 15 adverse consequences that are documented” in scholarly research to result from unmet need,  
 16 including death, hospitalization, and depression. 2nd LaPlante Decl. ¶21, 11-15. UCLA  
 17 researchers agree. Wallace Decl. ¶20 & Ex. B at 7-8 (deteriorating medical conditions and  
 18 increased use of emergency rooms and hospitals). UCSF researchers determined that elderly and  
 19 disabled individuals with insufficient help with personal care services experienced hunger, weight  
 20 loss, dehydration, and injuries due to falls, burns, and bedsores. 2nd LaPlante Decl. ¶7.  
 21 Researchers have also found that domestic and related services, such as meal preparation and  
 22 clean-up and general cleaning services, are absolutely necessary to keep recipients safely at home.  
 23 Wallace Decl. ¶¶22-26; 2nd LaPlante Decl. ¶16.

24 In addition, some recipients may lose their providers altogether. Many providers will quit  
 25

26 <sup>45</sup> 2nd Hylton Decl. ¶18 (would fall into deep depression, shut self in bedroom and not eat  
 27 or bathe due to stress over cuts); Meireles Decl. ¶¶4 (may increase suicidal tendencies); Goff Decl.  
 28 ¶¶3, 16 (past suicide attempts; will feel isolated, anxious and depressed); 2nd McHenry Decl. ¶12  
 (when depression is bad will stay in bed and forego hygiene or eating; regular provider prevents);  
 Lott Decl. ¶¶22 (mental health could deteriorate; history of suicidal and homicidal thoughts);  
 Phillips Decl. ¶¶ 4-5 (paranoid-schizophrenic; will not change clothes or bathe).



1 after a 20 percent reduction in income (and in some cases loss of health insurance).<sup>46</sup> In some  
 2 counties there is already a provider shortage and it may be impossible to replace a provider. 3rd  
 3 Collins Decl. ¶ 13 (San Luis Obispo); 2nd Hathaway Decl. ¶¶15-18 (Alpine, Modoc, Amador).<sup>47</sup>  
 4 Even if new providers are found, the break in continuity of care may be devastating for some.  
 5 Cotrell Decl. ¶11; 3rd Collins Decl. ¶13; G. Thompson Decl. ¶11; Smith Decl. ¶12 (predicting  
 6 “tragic results. These are not people who can go totally without vital services such as meal  
 7 preparation for one, two, or three weeks”); Elliott Decl. ¶9 (clients “completely destabilized” when  
 8 providers quit); Crain Decl. ¶6 (elder lay on floor for three days with broken hip when provider  
 9 schedule disrupted).<sup>48</sup>

10 The problem of providers quitting is particularly acute for recipients already authorized for  
 11 relatively few hours—it will not be worth a provider’s time to travel to that recipient for just a few  
 12 hours (commute is unpaid). D’Antonio Decl. ¶12; Bargsten Decl. ¶10; Lopez Decl. ¶¶4-10; Smith  
 13 Decl. ¶11; 3rd Guerra Decl. ¶25; Elliott Decl. ¶10.<sup>49</sup> This has a disproportionate effect on  
 14 recipients with mental illness because they often have lower hours. G. Thompson Decl. ¶10.  
 15 Providers are also more likely to refuse to serve clients with high personal care needs, who may  
 16 require more care than is authorized on some days due to bowel/bladder accidents and other  
 17 unpredictable occurrences. Bargsten Decl. ¶10.

18 Family members who can no longer afford to stay at home and care for a relative with the  
 19 reduced hours may resort to unsafe tactics, such as asking a neighbor to look in on a family

20 <sup>46</sup> Cotrell Decl. ¶11; 2nd Hathaway Decl. ¶15; 3d Collins Decl. ¶¶12-15; Smith Decl. ¶9-12;  
 21 3rd Guerra Decl. ¶26; Elliott Decl. ¶9; Calavan Decl. ¶8; 2nd Vescovo Decl. ¶19, 21. *See also*,  
 22 *e.g.*, 3rd Jones Decl. ¶16; Aho Decl. ¶16; Hammers Decl. ¶12, M.G. Decl. ¶12; Goulet Decl. ¶22-  
 23 23; Cachero Decl. ¶¶14-15; Love Decl. ¶¶22, 23; Cline Decl. ¶14; Woods Decl. ¶8; Guerin Decl.  
 24 ¶9; White Decl. ¶16; Carpenter Decl. ¶19; Moreno Decl. ¶17; 2nd Jimenez Decl. ¶¶8-10 & Ex. H  
 (explaining loss of health insurance); Voice Decl. ¶6 (same). Providers without health insurance  
 are more likely to have health-related absences, further harming their clients. 3rd Guerra Decl.  
 ¶26; Calavan Decl. ¶8.

25 <sup>47</sup> *See also* 3rd Jones Decl. ¶16 (small town with few IHSS providers); Moreno Decl. ¶18;  
 Hayes Decl. ¶10; Baker Decl. ¶15.

26 <sup>48</sup> *E.g.*, Phillips Decl. ¶19 (unfamiliar provider may not identify altered states of mind in  
 27 paranoid-schizophrenic consumer, preventing essential medication reassessments); Carpenter Decl.  
 ¶22 (provider has helped consumer address phobias and unhealthy eating habits, progress may be  
 lost with new caregiver, diabetic consumer has overcome anxiety and adopted healthy eating  
 habits); Cooper Decl. ¶¶8, 10, 15.

28 <sup>49</sup> *See also, e.g.*, 3rd Jones Decl. ¶16; Woods Decl. ¶8; Cline Decl. ¶14; Carpenter Decl.  
 ¶19; Moreno Decl. ¶18; Aho Decl. ¶17.

1 member with dementia who cannot be safely left at home. 2nd Vescovo Decl. ¶17. Relatives will  
 2 be forced to hire strangers to care for their loved ones. Calavan Decl. ¶8. For example, Named  
 3 Plaintiff L.C. has a very complicated paramedical regime, and her doctor has told her mother that  
 4 L.C. is in grave danger if others attempt to perform the tasks that her mother currently performs as  
 5 her provider. M.G. Decl. ¶13-14. But the 20 percent reduction in family income will force her  
 6 mother back into farm work with her father to support the family, and L.C. will likely be left with  
 7 relatives who are unable to perform all necessary tasks. ¶12-13.<sup>50</sup> “[I]ncreased pressure on  
 8 relatives to provide more unpaid care will increase stress, abuse and neglect.” Calavan Decl. ¶6.

9 Even when providers don’t quit, they will likely need to reduce the frequency of their  
 10 visits: For example, a provider who assists a recipient four days a week for three hours a day will  
 11 probably not be willing to continue to assist that recipient four days a week for just over two hours,  
 12 and is more likely to reduce the frequency of assistance to three days a week, leaving the recipient  
 13 to go without a provider for a two day stretch every week. 3d Collins Decl. ¶14; *see also*  
 14 D’Antonio Decl. ¶13; Smith Decl. ¶10; 3rd Guerra Decl. ¶24; 2nd Vescovo Decl. ¶20.<sup>51</sup> A UCLA  
 15 Public Health professor explains, “for most recipients, every additional day without care increases  
 16 the risk of falls, mismanaged medications, missed meals, or other problems.” Wallace Decl. ¶18  
 17 (describing senior forced to move into nursing home as a result of injecting himself with wrong  
 18 type of insulin on day his provider was not there). “There are clients who rely on their providers to  
 19 make sure that they take necessary medications every day, or eat every day. These clients cannot  
 20 get by on fewer days of service.” 3rd Collins Decl. ¶14; *see also* D’Antonio Decl. ¶13. For  
 21 example, the provider for Named Plaintiff Charles Thurman and his wife currently assists them  
 22 three to four hours per day, five days a week. Thurman Decl. ¶6. When their combined hours are  
 23 reduced by 3.4 hours per week, their provider will have to work fewer days, leaving the Thurmans  
 24 alone three days a week. *Id.* ¶24. They will have no choice but to attempt to cook and move about  
 25 their mobile home with less assistance, thus risking falls and burns, as has occurred in the past in

26 <sup>50</sup> *See also* Phillips Decl. ¶17-18; Guerin Decl. ¶¶11, 24; J.O. Decl. ¶¶17, 19.

27 <sup>51</sup> *See also, e.g.*, Stern Decl. ¶20 (provider will come once instead of twice per day);  
 28 Thurman Decl. ¶24 (four instead of five days per week); Uriarte Decl. ¶¶5, 6, 9, 12 (five instead of  
 six days; consumer cannot get dressed, bathe self or eat proper meals when provider not present);  
 2nd McHenry Decl. ¶13; Schemel Decl. ¶9; Baker Decl. ¶¶12, 28.

1 the absence of a provider. *Id.* ¶25.<sup>52</sup>

2 Alternate services will not make up for the loss of IHSS services. Cotrell Decl. ¶12 (Contra  
3 Costa); 2nd Hoffacker Decl. ¶6 (Los Angeles); 2nd Vescovo Decl. ¶23 (Los Angeles) Elliott Decl.  
4 ¶¶11-12 (San Francisco); Collins Decl. ¶33-35 (San Luis Obispo); Marconi Decl. ¶11 (San  
5 Joaquin); 3rd Kaljian Decl. ¶7-8 (Sonoma); 3rd Guerra Decl. ¶19 (Nevada, Plumas, Sierra); 2nd  
6 Hathaway Decl. ¶6-7 (Alpine); 2nd Rosene Decl. ¶¶11-13 (Regional Centers will not be able to fill  
7 the gap for their clients); ; Danneker Decl, ¶ 10-11 (same); Elliott Decl. ¶12 (same).<sup>53</sup> Most  
8 counties have waiting lists for meal delivery programs, and/or limit such services to seniors.  
9 Cotrell Decl. ¶12; 3rd Collins Decl. ¶35; Marconi Decl. ¶11; 3rd Guerra Decl. ¶18; Elliott Decl.  
10 ¶11; 3rd Jones Decl. ¶17; Uriarte Decl. ¶14; Love Decl. ¶25. The State has cut a variety of related  
11 programs. Wallace Decl. ¶19. And county social workers have no time to help IHSS recipients to  
12 locate alternate resources, even if they did exist. 3rd Guerra Decl. ¶21. IHSS recipients are by  
13 definition financially needy and cannot afford to replace lost IHSS services by hiring providers on  
14 their own, taking cabs to doctor’s appointments, paying for grocery delivery, or purchasing  
15 expensive pre-made meals. Calavan Decl. ¶4; Crain Decl. ¶11.<sup>54</sup> They are already choosing  
16 among covering expenses for shelter, food, medication, and/or clothing. Calavan Decl. ¶4.

## 17 2. Risk of Institutionalization

18 As this Court previously found in relation to the eligibility and services reductions that  
19 would have been imposed by ABX4 4, the loss of IHSS services will lead to “a severe risk of  
20 unnecessary institutionalization,” which itself will cause recipients ““to suffer injury to their mental  
21

22 <sup>52</sup> See also, e.g., Stern Decl. ¶20 (consumer will remain in dirty pull-up in morning or be  
23 unable to put on pull-up at night, risking complications from skin issues); 2nd McHenry Decl. ¶15  
24 (oral hygiene would deteriorate); Hayes Decl. ¶¶9-10 (rashes due to incontinence, forget to take  
25 medications); Baker Decl. ¶¶13-14, 29-30 (similar); White Decl. ¶¶12, 13 (consumer may not eat  
26 and would reduce showers, which could lead to infection); Gonzalez Decl. ¶16 (cannot bathe, get  
27 needed massages, or dress, and falls more frequently); *supra* at 17 & nn.34-37 (fall risk).

28 <sup>53</sup> See also Thurman Decl. ¶29; Stern Decl. ¶21; Aho Decl. ¶¶8-9, 18; Phillips Decl. ¶21;  
Carpenter Decl. ¶23; Maher Decl. ¶12; McHenry Decl. ¶18; Schemel Decl. ¶13; Wessinger Decl.  
¶12; Hayes Decl. ¶12; Baker Decl. ¶¶16, 33; Salazar Decl. ¶21; Hutchens Decl. ¶16; Lott Decl.  
¶24; Hicks Decl. ¶¶5, 15; Hammers Decl. ¶13; Cline Decl. ¶15; Love Decl. ¶24; Moreno Decl. ¶19;  
Guerin Decl. ¶5; Gonzalez Decl. ¶17; White Decl. ¶17; J.O. Decl. ¶19.

<sup>54</sup> See also 3rd Jones Decl. ¶17; 2nd Hylton Decl. ¶¶10, 13; Guerin Decl. ¶¶8, 11; Milian  
Decl. ¶8; Maher Decl. ¶12; Hayes Decl. ¶9; Hicks Decl. ¶12; Warner Decl. ¶14; Carpenter Decl.  
¶22.



1 and physical health, including a shortened life, and even death for some ....” PI Order (Dkt. #198)  
2 at 28:1-4 (quoting *Crabtree v. Goetz*, 2008 WL 5330506, at \*30 (M.D. Tenn.)).

3 County officials predict many IHSS recipients will be unnecessarily institutionalized due to  
4 the 20 percent reduction. For example, in Contra Costa County alone, it is estimated that 200-400  
5 recipients will go in nursing homes within the next six months to a year, with countless others  
6 being forced into board and care facilities. Cotrell Decl. ¶10. This will only grow worse over time.  
7 “[S]ome IHSS clients whose hours are reduced by twenty percent will deteriorate rapidly and end  
8 up in a nursing home or other facility within a matter of months; many more will suffer out-of-  
9 home placement in a year, and still more will be institutionalized within two years, as their  
10 conditions gradually deteriorate due to lack of adequate care.” Cotrell Decl. ¶7. Other county  
11 officials and agency heads make similar predictions. Elliott Decl. ¶7 (“Some clients will  
12 decompensate or deteriorate quickly and require near immediate institutionalization, while others  
13 will suffer a more gradual decline”); Smith Decl. ¶8 (“For these vulnerable and alone recipients, a  
14 trip to the hospital is often the end of independence, as deteriorating health or injury may lead to  
15 unwanted out-of-home placement”); 3rd Collins Decl. 10; Marconi Decl. ¶5 (“serious and  
16 immediate risk of out-of-home placement”); Calavan Decl. ¶5; 2nd Hathaway Decl. ¶¶13, 23;  
17 Gause Decl. ¶11.

18 Expert researchers also predict the reductions will inevitably lead to institutionalization.  
19 Wallace Decl. ¶20 (UCLA); 2nd LaPlante Decl. ¶21 (UCSF); *see also* Schnelle Decl. (Dkt. 82) ¶5  
20 (lack of affordable home care services is “a primary factor driving the need for nursing home  
21 placement”). County officials, social workers, and agency directors all cite specific examples of  
22 individuals on their caseload who are not eligible for Care Supplements but will require out-of-  
23 home placement as a result of the hours cut. D’Antonio Decl. ¶15; 3rd Collins Decl. ¶32 (76-year-  
24 old stroke victim needs reminders to eat, bathe, change clothes, and take medication; county will  
25 recommend that he move to board & care facility); 3rd Kaljian Decl. ¶17-18; Elliott Decl. ¶¶20-23;  
26 3rd Guerra Decl. ¶¶11-12 (75-year-old woman with neurological disability will miss evening meals  
27 and other care and face serious risk of injury, hospitalization, and nursing home entry); 2nd Baran  
28 Decl. ¶15 (recipient with need for help with medical compliance, meals, and transportation to

1 appointments and recovery groups at risk). Indeed, some IHSS recipients' health deteriorated so  
2 severely with just the 3.6% cut that they had to be institutionalized. 2nd Hoffacker Decl. ¶7.

3 For example, Named Plaintiff Helen Polly Stern will likely enter a nursing home as a result  
4 of the hours reductions. The 86-year-old's owns her home and enjoys visits from her sister. Her  
5 needs are intensive, as she cannot get in and out of bed or prepare any food without assistance and  
6 needs help with dressing and pull-ups. Stern Decl. ¶¶1, 8, 10, 13, 23. Her provider comes twice  
7 each day to assist her, but this will not be possible given the hours reduction and her provider's  
8 need to earn additional income by taking on another client. *Id.* ¶18. Helen cannot survive without  
9 assistance twice a day, and will be forced into a nursing home, to her "despair." *Id.* ¶¶2, 24; *see*  
10 *also id.* ¶22 (reduced skin care likely to cause lesions and infection, leading to hospitalization).

11 Insufficient access to nutritious food will lead to deteriorating health and placement in a  
12 nursing home or board and care facility. 2nd Hoffacker Decl. ¶6; Benjamin Decl. (Dkt. 133) ¶30  
13 ("Weight loss in elders is often the reason that they end up being placed in nursing homes"); *see*  
14 *also supra* 16-17 & n.32. Similarly, recipients who attempt unsafe activities in the absence of their  
15 provider—such as getting out of bed or showering unassisted, or attempting to clean house—may  
16 fall, break a bone, and be hospitalized. Kaljian Decl. ¶6; *see supra* 17 & nn.34-37. Hospitalization  
17 often leads to admission to a nursing home admission or other assisted living facility. Kaljian  
18 Decl. ¶6; 2nd Vescovo Decl. ¶18. Some recipients will be unable to find providers to work the  
19 reduced hourly schedule, leading to institutionalization. Smith Decl. ¶ 11; Lopez Decl. ¶10, 13.  
20 Recipients who are evicted because they cannot maintain a sanitary environment are at risk for  
21 homelessness and eventual institutionalization, including involuntary commitment. Elliott Decl.  
22 ¶24; *see also supra* 17-18 & n.38. Relative providers may institutionalize loved ones whom they  
23 can no longer afford to care for at home. G. Thompson Decl. ¶7.

24 For example, Named Plaintiff Andrea Hylton was formerly homeless. Hylton Decl. ¶10.  
25 She uses a walker or wheelchair for mobility because she is unsteady due to nerve problems and  
26 arthritis, and tires easily due to emphysema. *Id.* ¶¶3-5. Andrea also has bipolar disorder and panic  
27 attacks. *Id.* She currently lives in Section 8 housing, and will be evicted if she fails two  
28 inspections. *Id.* Because she has so few authorized hours to begin with, and already cut back

1 hours for meal preparation as a result of the 3.6% cut, she will have no choice but to reduce hours  
 2 allocated to housekeeping. But she cannot clean house while using her walker or wheelchair; if she  
 3 attempts to do so she is likely to fall and break a bone, due to her osteoporosis. *Id.* ¶¶6, 10. The  
 4 alternative is to fail her inspections, be evicted, and be forced into a facility. *Id.* ¶10.

5 Institutionalization has devastating effects. Many IHSS recipients “have fought so hard to  
 6 get out institutions. An attack on their IHSS services is a direct attack on their freedom and  
 7 independence.” 2nd Vescovo Decl. ¶31. For example, because Named Plaintiff Charles Thurman  
 8 is a veteran and eligible for a VA facility, and his wife of 36 years is not, they may be separated if  
 9 they are forced into nursing homes, as appears likely. Thurman Decl. ¶¶5, 24, 28. In some  
 10 counties, insufficient nursing home space will force recipients to move completely away from their  
 11 communities. 3rd Collins Decl. ¶8. Placement in an institution can destabilize already  
 12 compromised mental or physical functioning, and it is extremely difficult for individuals to move  
 13 back into the community. Gardner Decl. (Dkt. 70) ¶¶ 39, 45; 2nd Vescovo Decl. ¶18.

14 Institutionalized individuals may receive inadequate care due to chronic understaffing. Schnelle  
 15 Decl. (Dkt. 82) ¶6; Altman Decl. (Dkt. 62) ¶4. “Patients able to receive adequate care at home are  
 16 better off in terms of nutrition, avoidance of potentially lethal infections, and mental health,” and  
 17 even the act of moving from home to a facility can itself cause deteriorating health. Altman Decl.  
 18 (Dkt. 62) ¶4. Nursing homes generally have regimented and inflexible schedules. Schnell Decl.  
 19 (Dkt. 82) ¶6. IHSS recipients fear institutionalization because they value the independence of  
 20 community living and are aware that care in institutions is sometimes inadequate.<sup>55</sup>

21 \_\_\_\_\_  
 22 <sup>55</sup> 3rd Jones Decl. ¶19 (hospitalization was worst experience of her life; felt was just a  
 23 “body in a bed”); 2nd Hylton Decl. ¶8 (lack of privacy in nursing home would cause panic attacks;  
 24 convalescent home where she worked did not timely change diapers or turn patients to prevent  
 25 bedsores); Carpenter Decl. ¶21 (experienced abuse, stigma, and neglect in group home); Phillips  
 26 Decl. ¶20 (abuse by other patients, over-medication, and disease in psychiatric institution); 2nd  
 27 McHenry Decl. ¶17 (hospitalization for suicidal thoughts was “horrible”); Hayes Decl. ¶12 (loss of  
 28 independence would be devastating); Baker Decl. ¶¶17, 34 (would rather die than go into home);  
 Salazar Decl. ¶17 (would be depressed in nursing home); White Decl. ¶16; Stern Decl. ¶¶21, 23-24  
 (would lose touch with sister and friends; in convalescent home had no privacy, and “could not  
 bear that on a permanent basis”); 2nd Hylton Decl. ¶20 (would lose pet companionship that helps  
 prevent panic attacks); Swann ¶10 (felt “stuck and sad” when hospitalized); Salazar Decl. ¶17 (loss  
 of independence); Baker Decl. ¶34 (similar); Hayes Decl. ¶12 (similar); Lott Decl. ¶23 (dignity and  
 privacy; “couldn’t understand or believe” treatment of friends in convalescent home); Cooper Decl.  
 ¶16 (loss of autonomy); Uriarte Decl. ¶13 (loss of contact with sister and activities with other  
 seniors); Mills Decl. ¶4 (psoriasis needs not accommodated in institution).

1                                   **3. Plaintiffs Will Suffer Irreparable Injury.**

2           This Court has previously determined that the loss of IHSS services constitutes irreparable  
3 injury. PI Order (Dkt. 198) 26:2-14 (citing *Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir. 1982)  
4 (potential denial of Medicaid benefits is irreparable injury); *Newton-Nations v. Rogers*, 316  
5 F.Supp.2d 883, 888 (D. Ariz. 1994); *Edmonds v. Levine*, 417 F.Supp.2d 1323, 1342 (S.D. Fla.  
6 2006)). In *Martinez v. Schwarzenegger*, 2009 WL 1844989, at \*5 (N.D. Cal. June 26, 2009), this  
7 Court further elaborated on the irreparable harm likely to flow from the loss of IHSS assistance:

8           The consumers' quality of life and health-care will be greatly diminished, which  
9 will likely cause great harm to disabled individuals. For instance, the declarations  
10 submitted by Plaintiffs describe harms ranging from going hungry and dehydration,  
11 to falls and burns, to an inability ever to leave the home. Institutionalizing  
12 individuals that can comfortably survive in their home with the help of IHSS  
13 providers will "cause Plaintiffs to suffer injury to their mental and physical health,  
14 including a shortened life, and even death for some Plaintiffs." *Crabtree v. Goetz*,  
15 2008 WL 5330506, at \*30 (M.D. Tenn.).

16           *See also Independent Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir.  
17 2009), *cert. granted on other issue*, 131 S.Ct. 992 (2011) (denial of needed medical care irreparable  
18 injury); *LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48, 55-56 (2nd Cir. 2004) (reduction  
19 of retiree health benefits including increased cost of prescription medications); *Lopez v. Heckler*,  
20 713 F.2d 1432, 1437 (9th Cir. 1983) (deprivation of social security benefits); *Mayer v. Wing*, 922  
21 F.Supp. 902, 905, 909 (S.D.N.Y. 1996) (reduction of personal home care services); *Crabtree*, 2008  
22 WL 5330506, at \*30 (same); *Long v. Benson*, 2008 WL 4571903, at \*2 (N.D. Fla. Oct. 14, 2008)  
23 (similar). Plaintiffs' showing of harm here readily meets this standard.<sup>56</sup>

24                                   **B. The Balance of Equities and Public Interest Favor Plaintiffs.**

25           The Ninth Circuit has held that injuries from the loss of home care services outweigh the  
26 injury to the state fisc that may result from enjoining a budget reduction, because "individuals'  
27 interests in sufficient access to health care trump the State's interest in balancing its budget."  
28 *Dominguez v. Schwarzenegger*, 596 F.3d 1087, 1098 (9th Cir. 2010); *see also Independent Living*

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<sup>56</sup> The Ninth Circuit has also held that injury to providers in the form of lost wages constitutes irreparable injury. *Dominguez*, 596 F.3d at 1097-98, *cert. granted on other issue*, 131 S.Ct. 992 (2011). Here, moreover, Plaintiffs have shown that many providers will themselves lose eligibility for health insurance. 2nd Jiminez Decl. ¶ 9; Adams Decl. ¶ 6.

1 *Ctr.*, 572 F.3d at 659 (“A budget crisis does not excuse ongoing violations of federal law,  
 2 particularly when there are no adequate remedies available other than an injunction.”); *California*  
 3 *Pharm. Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 853 (9th Cir. 2009); *Martinez*, 2009 WL 1844989, at  
 4 \*6; *Lopez*, 713 F.2d at 1437; *Daniels v. Wadley*, 926 F. Supp. 1305, 1313 (M.D. Tenn. 1996);  
 5 *Kansas Hosp. Ass’n v. Whiteman*, 835 F. Supp. 1548, 1552-53 (D. Kan. 1993). This Court has  
 6 reached the same conclusion. PI Order (Dkt. 198) 28:5-23 (budget crisis does not excuse legal  
 7 violations and is outweighed by recipient hardship; in-home care cuts may increase institutional  
 8 care costs, and state could save funds through individualized measures).

9 An injunction is also in the public interest. *See Lopez*, 713 F.2d at 1437 (deprivation of  
 10 essential benefits harms public interest even if benefits are costly to government); *Martinez*, 2009  
 11 WL 1844989 at \*6. “State budgetary considerations do not . . . , in social welfare cases, constitute a  
 12 critical public interest that would be injured by the grant of preliminary relief. In contrast, there is  
 13 a robust public interest in safeguarding access to health care for those eligible for Medicaid, whom  
 14 Congress has recognized as the neediest in the country.” *ILC*, 572 F.3d at 659. The public interest  
 15 weighs in favor of enjoining unlawful reductions to IHSS. PI Order (Dkt. 198) 28:24-29:1.<sup>57</sup> An  
 16 injunction will also preserve the status quo *pendente lite*, which is one of the purposes of a  
 17 preliminary injunction under Rule 65. *See Chalk v. U.S. Dist. Court Cent. Dist. Cal.*, 840 F.2d 701,  
 18 704 (9th Cir. 1988).

19 **II. Plaintiffs Are Likely to Succeed on the Merits of their Due Process, Medicaid, and**  
 20 **Americans with Disabilities Act Claims.**

21 **A. The Reduction Notices Violate Due Process.**

22 **1. The Notices and Care Supplement Application Are Not Reasonably**  
 23 **Calculated to Inform Aged and Disabled IHSS Recipients of Their Due**  
 24 **Process Rights.**

25 In 2009, this Court outlined the applicable due process principles governing notices:

26 IHSS recipients must receive “timely and adequate notice detailing the reasons for  
 27 termination and an effective opportunity to defend” themselves. *Goldberg v. Kelly*,  
 28 397 U.S. 254, 268-69 (1970). To comport with due process, notice must be “tailored

<sup>57</sup> Moreover, the likely increased demand upon public services and threat of institutional placement means that the IHSS reductions may not save the state money. Cottrell Decl. ¶13; 2nd Jimenez Decl. ¶¶3, 7; LaPlante Decl. (Dkt. 85) ¶8.

1 to the capacities and circumstances” of the recipients who must decide whether to  
 2 request a hearing. [Citation omitted.] “The government must consider unique  
 3 information about an intended recipient regardless of whether a statutory scheme is  
 4 reasonably calculated to provide notice in the ordinary case.” *Jones v. Flowers*, 547  
 5 U.S. 220, 221 (2006).

6 PI Order (Dkt. 198) 24:1-11. Applying these principles, this Court held that the 2009 notices likely  
 7 violated due process: “Many class members, because of their disabilities or inability to read  
 8 English or both, will be unable to understand and act upon the notice within ten days of receipt so  
 9 that they can request a fair hearing and continue to receive IHSS services.” *Id.* at 24:13-17.

10 IHSS recipients will be equally unable to understand the proposed notices regarding the 20  
 11 percent cut and county denial of the Care Supplement. Many of the notice problems mirror those  
 12 presented in 2009: poor readability and technically complex language, a format that is inaccessible  
 13 to recipients with vision disabilities, a short time frame that will impair recipients’ ability to obtain  
 14 assistance in asserting their rights, and failure to provide adequate translation. Other problems are  
 15 new, such as the absence of information regarding the effective date of the reduction, whether  
 16 recipients can appeal the reduction and on what basis, and the eligibility criteria for the Care  
 17 Supplement.

18 “[W]hen notice is the person’s due . . . [t]he means employed must be such as one desirous  
 19 of actually informing the [recipient] might reasonably adopt to accomplish it.” *Jones v. Flowers*,  
 20 547 U.S. 220, 221 (2006) (citation omitted); *accord Covey v. Town of Somers*, 351 U.S. 141, 146-  
 21 47 (1956). Here, Defendants are on notice that all IHSS recipients are elderly and/or disabled, and  
 22 that many recipients have mental illnesses, cognitive impairments or dementia. 2nd Williams Decl.  
 23 ¶12; Thomson Decl. (Dkt. 154) ¶12; 2nd Good Decl. ¶¶9-11; Ackel Decl. (Dkt. 131) ¶¶5(a)-(b), 7;  
 24 *see also* Kline Decl. (Dkt. 31-3), Ex. B2 at 26, 28 (over 60 percent of recipients are elderly and  
 25 nearly 14 percent have mental disorders according to CDSS data). Yet Defendants have ignored  
 26 accepted guidance issued by state and federal agencies (including DHCS itself) that mandates a  
 27 reading level of no more than 5th or 6th grade for effective communication with Medi-Cal  
 28 recipients. Huntley-Fenner Decl. ¶12 (communications expert); 2nd Ackel Decl. ¶16.<sup>58</sup> The

<sup>58</sup> *See also, e.g.*, M.G. Decl. ¶¶3, 18 (farmworker parents with little education); Hayes Decl. ¶15 (unable to read or write); Baker Decl. ¶¶4, 18 (same re: Hayes).



1 planned notices have a 12th grade reading level, and are also formatted in such a way as to make  
2 them even more difficult to understand. *Id.* ¶¶14-17.

3 The content of the notices is also confusing. Recipients will receive a flyer describing the  
4 cuts, which states that “requests for a state hearing only to dispute the new state law requiring the  
5 20-percent reduction in authorized service hours will be dismissed.” 3rd RJN, Ex. 6 (Att. A). The  
6 mailing will also include a notice of action listing hours before and after the cuts on the front, while  
7 the reverse side describes state appeal rights without any explanation of how this relates to the  
8 hours reduction. *Id.* Ex. 6 (Att. A & B). The third document in the mailing will be an application  
9 for the new Care Supplement, which invites recipients to describe in five lines why they believe  
10 they are at risk of out-of-home placement but without explanation of the meaning of this term or  
11 what information they must submit to qualify. *Id.* Ex. 6 (Att. F); *accord* 2nd Williams Decl. ¶ 14  
12 (no explanation of terms); 2nd Ackel Decl. ¶ 15 (same).

13 Taken as a whole, the mailing fails to explain why a new application is required when the  
14 recipient already receives IHSS, or whether recipients may both appeal and apply for Care  
15 Supplements, even though confusion over these subjects could result in untimely applications  
16 and/or dismissal of an appeal. 3rd Rivera Decl., ¶ 12 (recipient cannot tell “if I can appeal or not”);  
17 Preis Decl., ¶ 11 (confusion over appeal vs. application); G. Thompson Decl. ¶13 (new application  
18 will confuse people); 2nd Ackel Decl. ¶¶15-17 (procedure to apply for supplement rather than  
19 appeal is so unusual that state “needs to be even more careful” about explaining it in the notice);  
20 2nd Williams Decl. ¶17 (unusual procedure of applying for aid paid pending from county rather  
21 than the state will confuse recipients).

22 Because of the reading level and complexity of the notices and the unanswered questions  
23 they raise, most IHSS recipients will require the assistance of a county or agency social worker  
24 before they can properly respond. Defendants implicitly acknowledge this need, as notices  
25 encourage recipients to “contact your county IHSS office.” 3rd RJN, Ex. 6 (Att. A). However,  
26 Defendants have chosen to send the notice during the holiday period, when many county offices  
27 will be closed and short-staffed. 2nd Keeslar Decl. ¶¶6-12. In addition, the number of affected  
28 recipients is likely to swamp the ability of county IHSS offices to respond within a short time  
frame to requests for assistance regarding these cuts. Elliott Decl. ¶26; 3rd Kaljian Decl. ¶13;



1 Cottrell Decl. ¶15; 3rd Collins Decl. ¶19; G. Thompson Decl. ¶16. In addition, delivery of the  
 2 notices will likely be slowed down by the holiday period, with heavy mail volume and two days  
 3 when post offices are closed. G. Thompson Decl. ¶18.

4 Defendants have no plans to provide notice in a format that is accessible to recipients who  
 5 are blind or have impaired vision. Defendants are aware of this problem from the argument and  
 6 evidence presented in 2009,<sup>59</sup> but still fail to offer notices in alternative formats (i.e. large print,  
 7 Braille, tape) that will provide recipients with vision impairments with the information they need to  
 8 assert their rights. 2nd Good Decl. ¶¶10-11; 3rd Kaljian Decl. ¶11; Smith Decl. ¶16; G. Thompson  
 9 Decl. ¶14.<sup>60</sup> This violates due process.<sup>61</sup>

10 Defendants do not plan to send notices in languages other than English, Spanish, Armenian  
 11 and Chinese. 3rd RJN, Ex. 6 (Att. C-E). However, there are other large populations of non-  
 12 English speaking IHSS recipients who will receive no translations of the reduction notices. 3rd  
 13 Collins Decl., Ex. A at 5-6; Elliott Decl. ¶28; Smith Decl. ¶15. CDSS's own data confirms that  
 14 over 34,000 recipients will be unable to comprehend the notice because they speak only  
 15 Vietnamese or Russian. Rich Decl. (Dkt. 148-1) Att. A. Defendants have made no provisions for  
 16 these recipients, who will not receive adequate notice and will also be affected by the inability to  
 17 contact their county workers and to obtain needed translation services over the winter holidays. PI  
 18 Order (Dkt. 198) 24:12-25:4 (lack of translation raises due process issues); Keeslar 2nd Decl. ¶¶6-  
 19 12 (county office closures and short staffing); Nguyen Decl. ¶¶5-6 (Vietnamese speaker cannot  
 20 read English and no regular translator; may take provider longer than 15 days to find someone).

21 <sup>59</sup> Pl. Br. (Dkt. 16) 23 n.20; Reply Br. (Dkt. 158) 7-9; Thomson Decl. (Dkt. 154) ¶12; Ackel  
 22 Decl. (Dkt. 131) ¶¶5(a)-(b), 7; Williams Decl. (Dkt. 155) ¶¶11-12; Hoffacker Decl. (Dkt. 76) ¶8.

23 <sup>60</sup> See also Thurman Decl. ¶33 (blind recipient whose wife has dyslexia needs notices in  
 24 very large print or on tape); Gunn-Cushman Decl. ¶2 (blind recipient must rely on IHSS provider  
 who is not fluent in English to read notice; requests for alternative formats ignored); Hammers  
 Decl. ¶17 (recipients will be unable to read notice due to blindness); Gonzalez Decl. ¶21 (similar).

25 <sup>61</sup> The denial of notice in alternate formats for recipients with visual impairments and  
 26 blindness also violates the ADA. Title II prohibits discrimination and the exclusion of individuals  
 27 from program services, benefits and activities on the basis of disability, and implementing  
 28 regulations require Defendants to take appropriate steps to ensure communications with recipients  
 who are blind or have vision impairments that are as effective as communications with others,  
 including furnishing appropriate auxiliary aids and services where necessary. 28 C.F.R. §§  
 35.160(a)-(b), 35.164. Here, IHSS recipients with vision impairments and blindness are excluded  
 from participation in the appeal, fair hearing and new application process by Defendants' failure to  
 accommodate them with notices in accessible formats.

1 Because notices with complex language, confusing instructions, and an inaccessible format  
2 and language are not reasonably calculated to inform recipients of their rights, Defendants will  
3 violate due process on this ground alone.

4 **2. The Notices Omit Important Information Without Which Recipients**  
5 **Cannot Exercise Their Due Process Rights.**

6 Defendants' notices also omit important information recipients need in order to exercise  
7 their hearing rights and ensure eligibility for aid paid pending. First, the planned notices fail to  
8 explain the use of functional ranks to determine eligibility for the Care Supplement, or to provide  
9 recipients with data on their own ranks. IHSS recipients have never been previously informed of  
10 their functional ranks and have had no opportunity to discuss these with their workers, much less to  
11 contest their rankings. PI Order (Dkt. 198) 25:14-19; Elliott Decl. ¶30; 3rd Guerra Decl. ¶10;  
12 Smith Decl. ¶13.<sup>62</sup> The notice that recipients have been denied the Care Supplement simply states,  
13 misleadingly, that "the proposed reduction in your authorized monthly hours does not put you at  
14 serious risk of out-of-home placement." 3rd RJN Ex. 6 at 11.<sup>63</sup>

15 "Due process requires notice that gives an agency's reason for its action in sufficient detail  
16 that the affected party can prepare a responsive defense." *Barnes v. Healy*, 980 F.2d 572, 579 (9th  
17 Cir. 1992). Thus, the Ninth Circuit held that notices telling welfare recipients who were custodial  
18 parents that the state would not "pass-through" collected child support payments because they were  
19 not "current support," with no further explanation, offered "no way of determining from the face of  
20 that notice why collected payments were not deemed current support and what information [the  
21 recipient] needs to challenge the agency's determination." *Id.* With such a notice the recipient "is  
22 reduced to guessing what evidence can or should be submitted in response and driven to  
23 responding to every possible argument against denial at the risk of missing the critical one  
24 altogether," in violation of due process. *Id.* (citation omitted).<sup>64</sup> And on facts strikingly similar to

24 <sup>62</sup> See, e.g., Thurman Decl. ¶32; Stern Decl. ¶26; M.G. Decl. ¶17; 2nd Hylton Decl. ¶21.

25 <sup>63</sup> Even where eligibility or full hours restoration is denied on grounds other than functional  
26 ranks (for example, availability of alternative resources), the notice does not explain this, so an  
27 IHSS recipient will have no idea what information he needs to challenge the denial.

28 <sup>64</sup> *Accord Kapps v. Wing*, 404 F.3d 105, 123-26 (2d Cir. 2005) (notices re: home energy  
assistance program did not include individualized budgetary information supporting state's  
decision to deny or reduce benefit); *Ortiz v. Eichler*, 794 F.2d 889, 892-94 (3d Cir.1986) (notices  
did not include calculations justifying denial of or reduction in welfare benefits); *Dilda v. Quern*,  
612 F.2d 1055, 1057 (7th Cir. 1980) (notices stated "ultimate reason" for the reduction or

1 those here, the Supreme Court of Alaska held that notices reducing hours of in-home care services,  
 2 which mentioned a new assessment tool but did not provide the numerical code that tool assigned,  
 3 violated federal due process because they failed to offer “a meaningful opportunity to understand,  
 4 review, and, where appropriate, challenge the department’s action.” *Baker v. State Dep’t of Health*  
 5 *& Soc. Serv.*, 191 P.3d 1005, 1008, 1011 (Ak. 2008).

6 Defendants’ planned notices are even more deficient than those in *Barnes* and *Baker*. The  
 7 notices fail not only to set forth recipients’ individual functional ranks, but even to explain that  
 8 functional ranks will be used at all to determine Care Supplement eligibility. Without a basic  
 9 understanding of the eligibility system, a recipient cannot decide whether Defendants made a  
 10 mistake that warrants appeal or properly contest Defendants’ determination in a state hearing by  
 11 challenging the accuracy of their functional ranks. Those functional ranks may well be inaccurate  
 12 in many cases, and recipients have never previously had the opportunity to contest them.<sup>65</sup>

13 Second, while Defendants acknowledge that recipients may appeal the county’s denial of a  
 14 Care Supplement application, the notice of action informing recipients of this denial fails to specify  
 15 the effective date of the resultant reduction. 3rd RJN, Ex. 6 at 10-11; *see also* 3rd Collins Decl., Ex.  
 16 A at 7. Because recipients must file an appeal before the effective date of the reduction in order to  
 17 receive aid paid pending, 3rd RJN (Att. B), failing to inform them of the effective date will deprive  
 18 them of the crucial information they need in order to file a timely appeal.<sup>66</sup> This omission violates

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19 termination of welfare benefits but not breakdown of income and allowable deductions); *Gray*  
 20 *Panthers v. Schweiker*, 652 F.2d 146, 168-69 (D.C. Cir. 1980) (same); *Vargas v. Trainor*, 508 F.2d  
 21 485, 490 (7th Cir. 1974) (notice that required elderly and disabled individuals to meet with case  
 22 managers or appeal without knowing basis of termination); *Vorster v. Bowen*, 709 F. Supp. 934,  
 944-47 (C.D. Cal. 1989) (Medicare recipients whose claims were denied were not provided with  
 written notice of methodology carriers used to assess claims).

23 <sup>65</sup> *See* Stern Decl. ¶¶26-27 (named plaintiff should have ranks of 4 instead of 3 in bathing  
 and dressing; might then qualify for Care Supplement); Thurman Decl. ¶¶12, 15, 31-32 (recipient  
 24 should have ranks of 4 instead of 3 in bathing and dressing; might qualify for Care Supplement);  
 3rd Jones Decl. ¶¶21-23 (ranks of 1 that should be 3’s in mobility and bladder care, and 1 in  
 25 memory that should be 2); Maher Decl. ¶14 (rank of 1 for respiration should be 5, would then be  
 eligible for supplement); Mills Decl. ¶ 5 (bipolar recipient with history of lapses in judgment and  
 26 memory surprised about mental functional ranks of 1); Phillips Decl. ¶¶ 23-24 (paranoid-  
 schizophrenic recipient has ranks of 2 for all mental functional ranks, provider unaware and unable  
 27 to challenge them) Cooper Decl. ¶¶10-11, 14, 19 (compromised judgment but mental functioning  
 ranks of 1).

28 <sup>66</sup> The absence of an effective date also violates the federal Medicaid notice requirements.  
*See* 42 C.F.R. §431.210(e) (“Content of notice” must include “[a]n explanation of the  
 circumstances under which Medicaid is continued if a hearing is requested”) and 42 C.F.R. §

1 due process, since aid paid pending is part of the constitutional guarantee of a pre-termination  
2 hearing. *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).<sup>67</sup>

3 **3. Defendants Violate Due Process by Failing to Provide an Adequate**  
4 **Opportunity for a Pre-Termination Hearing When the Reduction Is**  
5 **Applied to a Recipient By Mistake.**

6 The mandates of adequate notice, aid paid pending, and an impartial hearing protect against  
7 agency action “resting on incorrect or misleading factual premises or on misapplication of rules or  
8 policies to the facts of particular cases.” *Goldberg*, 397 U.S. at 267-68. Accordingly, due process  
9 requires that Defendants provide recipients with enough information to determine whether their  
10 services are being reduced in error and, if so, how to appeal that erroneous reduction. *See Barnes*,  
11 980 F.2d at 579. While recipients do not have the right to challenge an across-the-board reduction  
12 in benefits, they *do* have a due process right to raise individual factual disputes about whether they  
13 are subject to the reduction at all.<sup>68</sup>

14 Here, the principal factual dispute will be whether a recipient is statutorily exempt from the  
15 reduction, and has received a reduction notice in error. Already, IHSS recipients frequently receive  
16 erroneous notices, including incorrect calculations of their share of cost or of the recent 3.6 percent  
17 reduction. 2nd Ackel Decl. ¶¶7, 8. Under SB 73, tens of thousands of IHSS recipients are  
18 statutorily exempt from the cuts because they are covered by one of California’s seven Home and  
19 Community Based Services (“HCBS”) Medicaid Waivers. Cal. Welf. & Inst. Code  
20 §12301.07(a)(5). According to knowledgeable officials, it is almost inevitable that some exempt  
21 waiver recipients will nonetheless receive reduction notices by mistake, given the large number of

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22 431.230 (a) (services must be maintained if “the recipient requests a hearing before the date of  
23 action”).

24 <sup>67</sup> Defendants’ notice also fails to explain that recipients have a right to a “home hearing,”  
25 so that some may mistakenly believe they cannot challenge the loss of services because they cannot  
26 leave their homes due to their disabilities. This is an additional due process defect. PI Order (Dkt.  
27 198) 25:10-13; *see also* Ackel Decl. (Dkt. 131) ¶5(c)).

28 <sup>68</sup> *See, e.g., Budnicki v. Beal*, 450 F.Supp. 546, 553-54, 558 (E.D. Pa. 1978) (where state  
terminated optional Medicaid program, due process required “individual hearing ... so long as a  
program recipient might have individual questions to raise,” such as possibility they are “entitled to  
the service under some other element” of Medicaid program); *Viverito v. Smith*, 421 F.Supp. 1305,  
1309 (S.D.N.Y. 1976) (pre-reduction hearing required where recipients alleged that mass reduction  
in benefits pursuant to state law change created “unforeseen emergency” entitling them to  
continued aid for reasonable time); *Rosen v. Goetz*, 410 F.3d 919, 924, 929 (6th Cir. 2005) (due  
process satisfied because beneficiaries who presented “valid factual dispute” about eligibility for  
alternative Medicaid program in lieu of discontinued program were granted hearings).

1 recipients and the complexity of the data-matching between different agencies that will be required  
2 to identify them all.<sup>69</sup>

3 The automatic dismissal of an appeal based on mistaken application of the reduction would  
4 violate the clear mandate of *Goldberg v. Kelly*, 397 U.S. at 264. Consequently, Defendants must  
5 intend only that appeals raising a general challenge to the 20 percent reduction will be dismissed,  
6 and that appeals claiming mistakes will be considered, since they would surely concede that if an  
7 exempt recipient is issued a termination notice, she has a right to appeal this factual error.  
8 Unfortunately, Defendants' procedures are fatally flawed because they fail to explain this  
9 distinction to recipients, so that they will not know if they have received a notice in error and, if  
10 they have, what to do. Danneker Decl. ¶8; 2nd Rivera Decl., ¶ 11-12; 3rd Oster Decl. ¶ 7-8.  
11 Consequently, Defendants violate due process, since any recipient who relies on the information  
12 and instructions provided will lose her right to appeal and obtain aid paid pending.<sup>70</sup>

13 **B. Defendants' Implementation of SB 73 Violates the Medicaid Act's Sufficiency,  
14 Reasonable Standards, Comparability, and EPSDT Requirements.**

15 Congress established Medicaid in 1965 to enable states to provide medical services to  
16 individuals with limited ability to pay for health care. 42 U.S.C. § 1396-1396v. Medicaid is a  
17 cooperative program that allows states to receive federal financial assistance for the provision of  
18 medical assistance to low-income individuals. 42 U.S.C. § 1396. Participation is voluntary, but  
19 states that choose to participate must comply with the Medicaid Act and its implementing  
20 regulations. 42 U.S.C. § 1396; *Alexander v. Choate*, 469 U.S. 287, 289 n.1 (1985).<sup>71</sup>

21 <sup>69</sup> Danneker Decl. ¶¶4-7 (regional center official describes risk of error in attempting to  
22 match data between different state agencies); 2nd Rosene Decl. ¶¶7-9 (same). Defendants'  
23 problem with data-matching between state agencies is not limited to the DD waiver, as two  
24 additional HCBS waivers are operated by state agencies other than Defendants DHCS and CDSS,  
25 which maintain their own data systems. 3rd RJN, Ex. 10 ¶2 (DHCS operates only four of the seven  
26 HCBS waivers). The timing of the inter-agency data match will create an additional source of  
27 error, as the data matches will need to be run on a regular basis to identify newly approved waiver  
28 recipients. Danneker Decl. ¶7.

<sup>70</sup> For similar reasons, the notice's failure to explain which recipients should be  
automatically preapproved for Care Supplements and so should not receive notices of reduction  
(for example, recipients who receive protective supervision services) also violates due process.

<sup>71</sup> As set forth in the Complaint, many of plaintiffs' Medicaid claims are brought pursuant  
to 42 U.S.C. § 1983. The Medicaid provisions at issue are also enforceable directly under the  
Supremacy Clause. *Independent Living Center of Southern California, Inc. v. Shewry*, 543 F.3d  
1050, 1058-59 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2828 (2009). While the Supremacy Clause  
issue is under review by the United States Supreme Court, unless and until Ninth Circuit precedent

1                   **1. By Failing to Provide Adequate In-Home Services, Defendants Violate the**  
 2                   **Sufficiency Requirement.**

3                   Medicaid’s “sufficiency” requirement mandates that “[e]ach service ... be sufficient in  
 4 amount, duration, and scope to reasonably achieve its purpose.” 42 C.F.R. §440.230(b). Thus,  
 5 when a state has committed to provide a Medicaid service, it must adequately fulfill that obligation.  
 6 PI Order (Dkt. 198) 19:22-27. To determine whether a service is sufficient, a court considers  
 7 whether the level of service achieves the specific program’s purposes. *See Curtis v. Taylor*, 625  
 8 F.2d 645, 651 (5th Cir. 1980).

9                   For example, a state’s limitation of preventative dental checkups to every three years  
 10 (instead of annually) and elimination of certain dental services violate the sufficiency mandate  
 11 when the resulting program failed to achieve its preventative, maintenance and restorative  
 12 purposes. *Mitchell v. Johnston*, 701 F.2d 337, 347-51 (5th Cir. 1983); *see also Lankford v.*  
 13 *Sherman*, 451 F.3d 496, 511-13 (8th Cir. 2006) (providing oxygen and limited respiratory  
 14 equipment, but not other necessary breathing assistance equipment, violates sufficiency  
 15 requirement); *Weaver v. Reagen*, 886 F.2d 194, 197-200 (8th Cir. 1989) (program’s failure to cover  
 16 prescriptions for certain individuals violates sufficiency requirement); *Charpentier v. Belshe*, 1994  
 17 WL 792591, \*5 (E.D. Cal. Dec. 21, 1994) (reimbursement limits that result in denial of supplies  
 18 and equipment violate sufficiency requirement).

19                   This Court previously held that elimination of certain services authorized under IHSS  
 20 would likely violate the sufficiency mandate:

21                   The services currently provided through IHSS have already been determined by social  
 22 workers to be “necessary” to permit elderly and disabled individuals to remain safely in  
 23 their homes. MPP §30-761.1. *Thus, the elimination of these services will likely leave*  
 24 *affected individuals without a level of service sufficient to achieve the purpose of the*  
*program. Accordingly, the Court concludes that Plaintiffs are likely to succeed on their*  
*sufficiency claim.*

25                   PI Order (Dkt. 198) 20:16-23 (emphasis added). This Court’s reasoning is equally applicable to  
 26 the 20 percent cut at issue here, which will leave some recipients with even fewer hours than the  
 27  
 28 on the issue is reversed, it remains binding. *See United States v. Gamma Tech Indus., Inc.*, 265  
 F.3d 917, 930 n.12 (9th Cir. 2001).



1 2009 cuts.<sup>72</sup> Plaintiffs' evidence demonstrates that the reduction will leave the remaining hours  
 2 insufficient for numerous IHSS recipients. *See supra* at 14-21. Thus, SB 73's reduction of IHSS  
 3 services is preempted by Medicaid's sufficiency mandate.

4 Defendants may argue that the IHSS Care Supplement process ensures that service levels  
 5 will remain sufficient to accomplish the program's objectives, but that argument lacks merit for a  
 6 number of reasons. First, a Care Supplement may be granted only based on serious risk of *out-of-*  
 7 *home placement*. Cal. Welf. & Inst. Code §12301.07(f). Recipients who will remain in their  
 8 homes but suffer injuries and/or deterioration of health are statutorily ineligible. But the purpose of  
 9 the IHSS program is not just to avoid institutionalization; rather, it is to provide services that  
 10 enable recipients to remain "*safely ... in their homes.*" Cal. Welf. & Inst. Code §12300(a)  
 11 (emphasis added); *see also* MPP 30-761.1. A process for hours restoration that considers only risk  
 12 of institutionalization, and not risk of harm to health or safety, does not adequately ensure that  
 13 IHSS service levels continue to accomplish the program's purpose.

14 Second, SB 73 places the burden on elderly or disabled recipients to take the initiative to  
 15 apply for IHSS Care Supplements rather than providing for county or state identification of  
 16 recipients who need to maintain current service levels in advance of the reduction. Moreover,  
 17 Defendants have established strict deadlines by which recipients must apply in order to be eligible  
 18 (March 1, 2012) and/or in order to maintain authorized services while their application is evaluated  
 19 (January 3, 2012). *See supra* at 7-9. But as in *Vargas v. Trainor*, 508 F.2d 485, 489-90 (7th Cir.  
 20 1974), elderly or disabled individuals may "be unable or disinclined, because of physical handicaps  
 21 and, in the case of the aged, mental handicaps as well, to take the necessary affirmative action" on  
 22

23 <sup>72</sup> Many recipients will lose more hours than they would have in 2009. For example,  
 24 plaintiff Charles Thurman would have lost 3.25 monthly hours for shopping and errands under  
 25 ABX4 4, but will lose 6.23 hours under SB 73. Thurman Decl. ¶¶2, 24, 30, Ex A; *see also id.* ¶¶3,  
 26 4, 30, Ex. A (wife would lose 3.25 hours under ABX4 4 versus 7.96 under SB 73); Cooper Decl.  
 27 ¶¶2, 17, Ex. A (6.5 versus 10.09); D. Hammers Decl. ¶¶1, 14, Ex. A (3.25 versus 13.64); Hammers  
 28 Decl. ¶¶1, 2, 14, Ex. A (3.25 versus 13.97 and 6.5 versus 15.35); Hicks Decl. ¶¶1, 20, Ex. A (6.5  
 versus 10.03); Salazar Decl. ¶¶2, 18, Ex. A (4.33 versus 11.84); Swann ¶13, Ex. A (6.5 versus  
 11.68). Other declarants would have lost more under ABX4 4. Jones Decl. ¶¶2, 20, Ex. A (19.49  
 versus 9.29); Cline ¶¶1, 16, Ex. A (15.16 versus 6.93); White Decl. ¶¶2, 19, Ex. A (25.98 versus  
 8.06). Moreover, for many recipients, the reduction will be the practical equivalent of the  
 elimination of categories of domestic and related services, because they will be unable to reduce  
 hours in other categories. *E.g.*, Milian Decl. ¶12; Hutchens Decl. ¶15.



1 the notice. Many eligible recipients simply will not apply, because they cannot open or read their  
 2 mail without assistance. 3rd Kaljian Decl. ¶¶11-12; Calavan Decl. ¶9; 3rd Collins Decl. ¶¶17-20;  
 3 3rd Guerra Decl. ¶23; 2nd Marconi Decl. ¶13; Williams Decl. (Dkt. 155) ¶¶12-14; S. Good Decl  
 4 (Dkt. 139) ¶9.<sup>73</sup> Others' mental health or cognitive issues will pose serious barriers to taking the  
 5 initiative to apply.<sup>74</sup> Even individuals with ranks of 5 for memory, orientation, or judgment will  
 6 have to meet the January 3 deadline if they do not receive protective supervision. 3rd Collins Decl.  
 7 ¶20. Defendants themselves acknowledge that many eligible recipients will not submit  
 8 applications for Care Supplements. 2nd Keeslar Decl. ¶17, Ex. A. Thus, a substantial percentage  
 9 of IHSS recipients who are eligible for the Care Supplement will not receive it based on their  
 10 failure to submit a timely application.

11 Third, Defendants' implementation of SB 73 excludes from eligibility for Care  
 12 Supplements even individuals who can show risk of out-of-home placement, if their functional  
 13 ranks fall below certain levels. *See supra* at 8-9. This Court has already determined that functional  
 14 ranks are not reasonable measures of need; nor can they reasonably be used to assess risk of out-of-  
 15 home placement. *See supra* at 10-13. Thus, the Care Supplement process will not ensure that such  
 16 individuals maintain service levels sufficient to keep them safely at home.

17 **2. Reduction of Hours for Purely Budgetary Reasons, and Using Functional**  
 18 **Ranks to Determine Eligibility for Hours Restorations, Violates the**  
 19 **Reasonable Standards Requirement.**

20 <sup>73</sup> *See also* Thurman Decl ¶33 (recipients' blindness and dyslexia); M.G. Decl. ¶5 (staff at  
 21 hospital helped her apply for IHSS 5 years ago, not sure she could apply for something new on her  
 22 own); Guerin Decl. ¶¶17-24 (recipient functions at 9-year-old level, lacks judgment to appreciate  
 23 importance of documents and frequently hides mail); Hayes Decl. ¶15 (unable to read or write);  
 24 Baker Decl. ¶¶4, 18; Hammers Decl. ¶17 (recipients cannot read mail due to blindness, and may  
 25 not even know notice has arrived); Mills Decl. ¶¶7-8 (often bed-bound, and misplaces important  
 26 mail due to concentration and mobility impediments); Swann Decl. ¶¶14-15 (consumer with mental  
 27 disabilities does not understand IHSS notices); Goff Decl. ¶21 (same); Mills Decl. ¶9 (consumer  
 28 with bipolar disorder and visual dyslexia cannot fill out forms).

<sup>74</sup> Preis Decl. ¶11 (recipients with psychiatric disabilities afraid to open mail, lose track of  
 mail); Crain Decl. ¶13; 3rd Jones Decl. ¶¶18, 19 (too frightened by possible cuts to even think  
 about it, may not have concentration to follow-through correctly); 2nd Hylton Decl. ¶23 (stress,  
 anxiety and depression will prevent timely response); 3rd Jones Decl. ¶24 (would be too confused  
 and overwhelmed to correctly respond); Lott Decl. ¶28 (very confused and forgetful; depression  
 could make unable to respond); Love Decl. ¶25 (schizophrenia prevents focusing on or  
 understanding written notices, library may not be open around the holidays to help with  
 comprehension of mail); Meireles Decl. ¶4 (mentally ill consumer will be paralyzed and  
 overwhelmed); *see also* Ackel Decl. (Dkt. 131) ¶7; Williams Decl. (Dkt. 155) ¶18; S. Good Decl.  
 (Dkt. 139) ¶6; Kaljian Supp. Decl. (Dkt. 141) ¶9.

1           The Medicaid Act further requires that all participating states employ “reasonable standards  
2 ... for determining ... the extent of medical assistance under the plan which ... are consistent with  
3 the objectives of this subchapter.” 42 U.S.C. § 1396a(a)(17); *see also Wisconsin Dep't of Health &*  
4 *Fam. Serv. v. Blumer*, 534 U.S. 473, 479 (2002); *Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37  
5 (1981). The primary objectives of the Medicaid program are to provide medical assistance to  
6 individuals whose income and resources are insufficient to meet the costs of necessary medical  
7 services and to furnish “rehabilitation and other services to help such ... individuals attain and  
8 retain capability for independence or self care.” 42 U.S.C. § 1396-1.

9           Courts invalidate state Medicaid rules that deny coverage of services on an arbitrary or  
10 irrational basis as contrary to, and so preempted by, the reasonable standards requirement. *See*  
11 *Lankford*, 451 F.3d at 511-13 (reasonable standards violation likely where state unreasonably  
12 restricted optional medical equipment benefit); *Hern v. Beye*, 57 F.3d 906, 910-11 (10th Cir. 1995)  
13 (state law restricting medically necessary treatment to those whose lives were at risk not reasonable  
14 standard); *Preterm, Inc., v. Dukakis*, 591 F.2d 121, 131 (1st Cir. 1979) (state could not restrict  
15 medically necessary services solely on basis of diagnosis); *White v. Beal*, 555 F.2d 1146, 1151 (3d  
16 Cir. 1977) (enjoining policy for glasses coverage because it discriminated “based upon etiology  
17 rather than need for the service”); *Allen v. Mansour*, 681 F.Supp. 1232, 1238 (E.D. Mich. 1986)  
18 (state medical necessity criteria arbitrary when unsupported by expert opinion or scientific data).

19           Defendants’ reduction of IHSS services violates the reasonable standards mandate in a  
20 number of ways. Initially, there is no dispute that the 20 percent reduction figure was driven by  
21 budgetary needs, and not by any reasonable determination that recipients needed fewer hours. That  
22 reliance on budgetary objectives rather than reasonable or evidence-based needs assessment to  
23 determine service levels violates the reasonable standards mandate. *Cf. Cota v. Maxwell-Jolly*, 688  
24 F.Supp.2d 980, 992 (N.D. Cal. 2010) (modification of adult day services eligibility requirements,  
25 without explanation of “how these changes are linked to the individual’s circumstances, particular  
26 need for [adult day] services or their risk of institutionalization”).

27           Moreover, this Court has already determined that the use of functional ranks to allocate  
28 medical assistance violates reasonable standards. PI Order (Dkt. 198) 18:13-21. Under that ruling,

1 restricting eligibility for Care Supplements based on functional ranks employs an unreasonable  
 2 standard to determine the extent of medical assistance in violation of § 1396a(a)(17).<sup>75</sup>

3 **3. By Providing Differing Levels of Medical Assistance to Individuals With**  
 4 **Similar Needs, Defendants Violate the Comparability Requirement.**

5 The “comparability” requirement of the Medicaid Act, 42 U.S.C. § 1396a(a)(10)(B),  
 6 “mandates comparable services for individuals with comparable needs and is violated when some  
 7 recipients are treated differently than others where each has the same level of need.” PI Order  
 8 (Dkt. 198) 12:7-10; *see also Jenkins v. Washington State Dep’t Social & Health Servs.*, 157 P.3d  
 9 388, 392 (Wash. 2007); *Sobky v. Smoley*, 855 F. Supp. 1123, 1139 (E.D. Cal. 1994); *Hodgson v.*  
 10 *Board. of County Com’rs, Hennepin County*, 614 F.2d 601, 608 (8th Cir. 1980); 42 C.F.R.  
 11 §440.240. Courts have thus found that states violate the Medicaid Act when they fail to offer the  
 12 same service to all with the same need. *See, e.g., Parry v. Crawford*, 990 F.Supp. 1250, 1257 (D.  
 13 Nev. 1998) (comparability violated where state provides certain services to those with mental  
 14 retardation but not those with “related conditions”). Courts do not blindly accept states’ recitations  
 15 that they are making needs-based distinctions, but examine the evidence to determine whether it is  
 16 actual need, or some other factor like diagnosis, that determines eligibility for services. *See*  
 17 *Jenkins*, 157 P.3d at 299 (reduction of services to recipients who live with caregiver violates  
 18 comparability because “it reduce[d] a recipient’s benefits based on a consideration other than the  
 19 recipient’s *actual* need”) (emphasis in original); *White*, 555 F.2d at 1150-51 & n.3 (provision of  
 20 eyeglasses to recipients with eye diseases, but not refractive error, violated comparability).

21 Defendants’ implementation of SB 73 violates the comparability mandate in three ways.  
 22 First, the use of functional ranks to exclude recipients from eligibility for Care Supplements will  
 23 result in individuals with comparable need receiving different levels of IHSS. This Court has  
 24 already held that “[t]he use of numerical ranks ... to determine eligibility for IHSS services likely

25 \_\_\_\_\_  
 26 <sup>75</sup> Additionally, because the use of functional ranks has a disparate impact on recipients  
 27 with mental, as opposed to physical, impairments, it is inconsistent with the related regulation that  
 28 prohibits arbitrary limitations on required services “based solely on diagnosis, type of illness, or  
 condition.” 42 C.F.R. § 440.230(c); *see White*, 555 F.2d at 1152 (§440.230(c) violated by limiting  
 provision of optional eyeglass benefit based on source of vision impairment); *Jeneski v. Myers*, 163  
 Cal.App.3d 18, 33 (Cal. Ct. App. 1984) (§440.230(c) violated by across-the-board denial of drug  
 that would be merely palliative for some Medicaid recipients but medically necessary for others).

1 violates the comparability requirement” because ranks do not “reasonably measure[] the individual  
 2 need of a disabled or elderly person for a particular service.” PI Order (Dkt. 198) 12:24-27; *see*  
 3 *also id.* at 12:28-13:20 (“particularly inaccurate measures of the needs of individuals with mental  
 4 impairments”); *id.* at 13:21-14:5 (*any* rank of two or more demonstrates inability to remain safely  
 5 at home without assistance); *id.* at 15:24-28 (particularly inaccurate measure of children’s needs).  
 6 “IHSS recipients have been assessed in an individualized process to determine the services they  
 7 need to remain safely in their homes,” and the “mechanical[] application” of functional ranks “to a  
 8 use for which they were not designed” distinguishes among recipients based on a factor other than  
 9 actual need. *Id.* at 17:11-21.

10 Second, the March 1, 2012 application deadline means that California will authorize  
 11 different services for IHSS recipients based on the date of their application for a Care Supplement,  
 12 rather than based on differences in actual need. Individuals who miss the deadline inadvertently,  
 13 attempt to cope with the hours reduction and later discover they need their full hours authorization,  
 14 deteriorate after March 1 in a way that heightens their risk of out-of-home placement, or have  
 15 hours reduced through a post-March 1 reassessment such that they can no longer tolerate a 20  
 16 percent reduction, will be eligible for only 80 percent of the hours for which they would have been  
 17 eligible had they applied prior to March 1. *See supra* at 9 (many recipients will miss deadlines);  
 18 2nd Marconi Decl. ¶13; 3rd Collins Decl. ¶21. That violates the comparability mandate.

19 Third, SB 73 exempts IHSS recipients who receive services under specified waiver  
 20 programs, but not those who have identical need, including those who are on waiting lists for those  
 21 waivers. *See supra* n.18. Those waiting lists are substantial. 3rd RJN, Ex. 11 ¶30, Ex. 12 (Ex.  
 22 A).<sup>76</sup> Exempting one group from the reduction while imposing it on the other violates the  
 23 comparability mandate.

24 **4. Imposing a 20 Percent Reduction on Children and Youth Under Age 21**  
 25 **Violates the EPSDT Mandate in Federal Medicaid Law.**

26  
 27 <sup>76</sup> While Medicaid waivers may waive the comparability requirement, any such waiver  
 28 would be only with respect to services provided under those waivers, *not* with respect to IHSS  
 services which are provided not under a waiver but under the California State Medicaid Plan.  
 Carroll Decl. (Dkt. 113) ¶7.

1 States are required to provide “early and periodic screening, diagnostic, and treatment  
2 services,” known as EPSDT, for all Medicaid-eligible children under age 21. 42 U.S.C.  
3 §1396d(a)(4)(B). EPSDT services include “[s]uch other necessary health care, diagnostic services,  
4 treatment, and other measures described in subsection (a) of this section to correct or ameliorate  
5 defects and physical and mental illnesses.” 42 U.S.C. §1396d(r)(5). The Ninth Circuit has  
6 explained that “states must ‘cover every type of health care or service necessary for EPSDT  
7 corrective or ameliorative purposes that is allowable under § 1396d(a).’” *Katie A. v. Los Angeles*  
8 *County*, 481 F.3d 1150, 1154 (9th Cir. 2007) (citations omitted). “The EPSDT obligation is thus  
9 extremely broad.” *Id.* Personal care services such as IHSS are expressly subject to the EPSDT  
10 mandate. 62 Fed. Reg. 47896, 47898 (Sept. 11, 1997).

11 Under the EPSDT provisions in 42 U.S.C. § 1396a(a)(43)(C), states have an affirmative  
12 obligation to ensure that children actually receive all of the services identified as medically  
13 necessary during a screening or assessment. *Katie A.*, 481 F.3d at 1158. “States also must ensure  
14 that the EPSDT services provided are reasonably effective.” *Id.* at 1159. They may limit required  
15 EPSDT services based only on medical necessity. *Id.*; see also *Moore ex rel. Moore v. Reese*, 637  
16 F.3d 1220, 1255 (11th Cir. 2011) (state may not reduce children’s medically necessary hours of  
17 private duty nursing); *SD ex rel. Dickson v. Hood*, 391 F. 3d 581, 593-94 (5th Cir. 2004)  
18 (incontinence supplies); *Collins v. Hamilton*, 349 F. 3d 371, 376 (7th Cir. 2003) (psychiatric  
19 residential treatment); *Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Services*, 293  
20 F.3d 472, 480 (8th Cir. 2002) (early intervention day treatment).

21 Here, there can be no dispute that the 20 percent reduction is an across-the-board limitation  
22 that is not based on medical necessity, and thus violates the EPSDT mandate. Nor does the Care  
23 Supplement process legitimize the reduction, for several reasons. First, eligibility for the Care  
24 Supplement is not based on whether the services are medically necessary and will “ameliorate” the  
25 child’s condition by ensuring his or her health and safety, as required by 42 U.S.C. §1396d (r)(5).  
26 Instead, eligibility is ostensibly based upon the risk that the child will end up in a different  
27 placement. This inquiry, while relevant to the ADA, does not correlate with medical necessity. In  
28 fact, named plaintiff L.C. does not qualify for the Care Supplement, although all the hours she  
currently receives are medically necessary to manage her rare metabolic disorder at home, which

1 requires complicated tube feedings and special care to prevent infection and illness and ensure her  
2 growth and development. M.G. Decl. ¶¶4-6, 14; *see also* J.O. Decl. ¶¶3, 5, 20.

3 Second, the procedure for obtaining the Care Supplement does not ensure that all eligible  
4 children will receive it. Under the EPSDT screening and treatment provisions of 42 U.S.C.  
5 §1396a(a)(43)(C), a child’s receipt of medically necessary services cannot be left to chance, even  
6 the chance that his or her parents will not respond to a notice. The “[state’s] obligations with  
7 respect to EPSDT services require more proactive steps, such as actual provision of services.”  
8 *Katie A.*, 481 F.3d at 1158 (quoting *Clark v. Richman*, 339 F.Supp.2d 631, 646-47 (M.D.Pa. 2004);  
9 *accord Chisholm v. Hood*, 110 F.Supp.2d 499, 507 (E.D.La. 2000) (“states are further obligated to  
10 actively arrange for corrective treatment” under §1396a(a)(43)(C)); *Salazar v. Dist. of Columbia*,  
11 954 F.Supp. 278, 330 (D.D.C. 1996) (failure to ensure children receive diagnosis and treatment for  
12 health problems detected during screening violated §1396a(a)(43)(C)); *John B. v. Menke*, 176  
13 F.Supp.2d 786, 801 (M.D. Tenn.2001) (state cannot “disclaim responsibility for the ultimate  
14 provision of EPSDT-compliant services by a once-removed provider”). Once a county social  
15 worker has assessed a child and determined the IHSS hours that are necessary, Defendants cannot  
16 disclaim responsibility for whether a child’s hours are actually restored via the Care Supplement,  
17 especially given the deadlines and complications inherent in that application process.

18 Finally, reliance on the Care Supplement to redeem cuts to children’s IHSS hours cannot be  
19 reconciled with this Court’s previous finding that the functional ranks themselves are weighted  
20 against children. PI Order (Dkt. 198) 15:24-28 (particularly inaccurate measure of children’s  
21 needs). Because children’s functional ranks are likely to be lower than those of adults, children are  
22 far less likely to qualify for the Care Supplement. *See supra* at 13 & n.27.

23 **C. Defendants’ Implementation of SB 73 Violates Title II of the ADA and Section 504 of  
24 The Rehabilitation Act.**

25 **1. Reduction of IHSS Hours Under SB 73 Violates the ADA’s Integration  
26 Mandate by Placing People with Disabilities at Risk of Unnecessary  
27 Institutionalization.**

28 The ADA and Section 504 (collectively “ADA”) prohibit discrimination based on  
disability. 42 U.S.C. §12132; 29 U.S.C. §794(a). “Unnecessary isolation is a form of  
discrimination against people with disabilities” in that it perpetuates stereotypes and diminishes the



1 quality of life of people with disabilities. PI Order (Dkt. 198) 21:4-13 (citing *Olmstead v. L.C. ex*  
 2 *rel. Zimring*, 527 U.S. 581, 597, 600-601 (1999)).

3 The ADA's integration mandate requires provision of services "in the most integrated  
 4 setting appropriate to the needs of qualified persons with disabilities." 28 C.F.R. § 35.130(d).  
 5 "The 'most integrated setting' is defined as 'a setting that enables individuals with disabilities to  
 6 interact with non-disabled persons to the fullest extent possible.'" PI Order (Dkt. 198) 21:25-22:2  
 7 (quoting *Brantley v. Maxwell-Jolly*, 656 F.Supp.2d 1161, 1170 (N.D. Cal. 2009)). This  
 8 "integration mandate" "serves one of the principal purposes of Title II of the ADA: ending the  
 9 isolation and segregation of disabled persons." *Arc of Washington State v. Braddock*, 427 F.3d  
 10 615, 618 (9th Cir. 2005).<sup>77</sup>

11 "[P]laintiffs who currently reside in community settings may assert ADA integration claims  
 12 to challenge state actions that give rise to a risk of unnecessary institutionalization." PI Order (Dkt.  
 13 198) 22:9-12 (citing *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1181-82 (10th  
 14 Cir.2003)) (cap on prescription medications placed participants in community-based program at  
 15 high risk for premature entry into nursing homes in violation of ADA); *Hunter v. Cook*, 2011 WL  
 16 4500009 at \*5 (N.D. Ga. Sept. 27, 2011); *Ball v. Rodgers*, 2009 WL 1395423 at \*5 (D. Ariz. Apr.  
 17 24, 2009); *Mental Disability Law Clinic v. Hogan*, 2008 WL 4104460 at \* 15 (E.D.N.Y. Aug.28,  
 18 2008)); *see also Townsend v. Quasim*, 328 F.3d 511, 514-18 (9th Cir. 2003); 3rd RJN, Ex. 9  
 19 (Department of Justice Brief) at 14, 18-24 & n.5 (citing cases and statutory and regulatory  
 20 language). As the United States Department of Justice has explained, that risk may result from  
 21 deterioration over time and need not be imminent. 3rd RJN, Ex. 9 at 13-14, 24-26 & n.3; *see also*  
 22 *Fisher*, 335 F.3d at 1184-85 (many plaintiffs would remain in homes "until their health ha[d]  
 23 deteriorated" and would "eventually end up in a nursing home").<sup>78</sup>

24 \_\_\_\_\_  
 25 <sup>77</sup> To establish an *Olmstead* claim, a plaintiff must show (1) the state's treatment  
 26 professionals have determined that community-based services are appropriate, (2) the disabled  
 27 individual does not oppose such community-based treatment, and (3) the provision of community-  
 28 based services can be reasonably accommodated, taking into account the resources available to the  
 state and the needs of other individuals with disabilities. *Olmstead*, 527 U.S. at 587.

<sup>78</sup> The Department of Justice's interpretation of the integration regulation as violated by the  
 risk of institutionalization, even when that risk is not imminent, is entitled to deference. *See Zurich*  
*American v. Whittier Properties*, 356 F.3d 1132, 1137 & n.27 (9th Cir. 2004); *Barden v. City of*  
*Sacramento*, 292 F.3d 1073, 1077 (9th Cir. 2002); *see also Olmstead*, 527 U.S. at 597-98; *Auer v.*



1 Here, the statutes and regulations that govern the IHSS program themselves establish that  
 2 the reduction of IHSS services will place recipients at risk of unnecessary institutionalization,  
 3 because only services that are necessary to permit individuals to remain safely at home may be  
 4 authorized in the first place. *See supra* at 6. Also, the evidence submitted here demonstrates a  
 5 dramatic risk of institutionalization for many class members. *See supra* at 23-26.<sup>79</sup>

6 Defendants may argue that the opportunity to apply for IHSS Care Supplements obviates  
 7 the risk of institutionalization and so prevents an ADA violation. That is not the case. First, other  
 8 than the small number of individuals who fall into categories that will be preapproved, Defendants  
 9 place the obligation upon IHSS recipients to apply for Care Supplements. 3rd RJN , Ex. 6. For  
 10 reasons discussed, including the effects of their disabilities, many recipients simply will not apply,  
 11 or will not apply on time. *See supra* at 30-31, 37-38. Defendants acknowledge that many eligible  
 12 recipients will not apply. 2nd Keeslar Decl. ¶17, Ex. A. “Defendants bear the ultimate  
 13 responsibility for ensuring the State’s compliance with federal disability law,” PI Order (Dkt. 198)  
 14 23:13-14, and so cannot satisfy their ADA obligation by relying on recipients’ ability to understand  
 15 the notice and act quickly to protect their interests.

16 Second, Defendants have excluded from eligibility for Care Supplements hundreds of  
 17 thousands of recipients who face serious risks of out-of-home placement. 2nd Keeslar Decl. ¶¶14-  
 18 16 (state official says two-thirds of recipients won’t be eligible). Counties, acting as agents of the  
 19 State, have awarded hours to these recipients based on individualized determinations that they need  
 20 these hours to remain safely at home. *See supra* at 6. That need does not depend on the recipient’s  
 21

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22 *Robbins*, 519 U.S. 452, 462 (1997); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 397  
 (2008).

23 <sup>79</sup> Maintenance of current IHSS hourly authorizations would not require fundamental  
 24 alteration of the program, since plaintiffs are “not demanding a separate service or one not already  
 25 provided.” *Fisher*, 335 F.3d at 1183. It is well-established that “budgetary constraints alone are  
 26 insufficient to establish a fundamental alteration defense.” *Pennsylvania Protection & Advocacy,*  
 27 *Inc. v. Pennsylvania Dept. of Public Welfare*, 402 F.3d 374, 380 (3rd Cir. 2005); *see also Frederick*  
 28 *L. v. Dept. of Public Welfare of Com. of Penn.*, 364 F.3d 487, 495-96 (3rd Cir. 2004); *Fisher*, 335  
 F.3d at 1182-83; *Townsend*, 328 F.3d at 520; *Haddad v. Arnold*, 784 F.Supp.2d 1284, 1305 (M.D.  
 Fla. 2010); *Cota v. Maxwell-Jolly*, 688 F.Supp.2d 980, 995 (N.D. Cal. 2010) (appeal pending).  
 Moreover, if even a small proportion of the 372,000 IHSS recipients at risk here end up in  
 hospitals, emergency rooms or nursing homes, the cost may actually exceed the savings from the  
 20 percent reduction. *See supra* at 6-7 & n.15.

1 functional rank for specified personal care services or mental functioning. *See supra* at 10-13.  
 2 This Court has already held that individuals with functional ranks of less than 4 for domestic and  
 3 related services would likely face a risk of institutionalization if those domestic and related services  
 4 were taken away. PI Order (Dkt. 198) 22:24-23:8. Here, 20 percent of all IHSS services are being  
 5 eliminated, and high functional ranks for a limited number of functions are not a reasonable way to  
 6 distinguish individuals who are at risk from those who are not.

7 **2. Defendants' Implementation of SB 73 Discriminates Against People with**  
 8 **Psychiatric and Cognitive Disabilities.**

9 Defendants' use of functional ranks to exclude certain recipients from eligibility for IHSS  
 10 Care Supplements also violates the ADA because it will have a uniquely detrimental effect upon  
 11 people with psychiatric and cognitive disabilities, in violation of 28 C.F.R. §35.130(b)(8)  
 12 (prohibiting "eligibility criteria that screens out or tends to screen out ... *any class of individuals*  
 13 *with disabilities* from fully and equally enjoying any service, program, or activity") (emphasis  
 14 added); *see also* 45 C.F.R. §84.4(b)(4).<sup>80</sup>

15 As previously explained, the use of functional ranks as eligibility criteria will have a  
 16 uniquely detrimental and disproportionate impact upon persons with cognitive and psychiatric  
 17 disabilities. Such individuals are likely to have many functional ranks of 2, as the nature of their  
 18 disability means that they need verbal encouragement or cueing, not necessarily physical assistance  
 19 – even though their need for assistance is just as critical. *See supra* at 12-13. Defendants may  
 20 respond that they are giving adequate consideration to cognitive disabilities by providing that a  
 21 rank of 5 for any mental function will make a recipient potentially eligible for a Care  
 22 Supplement.<sup>81</sup> However, because the standard for a functional rank of 5 is so high, and because the  
 23 mental functioning ranks do not measure psychiatric illnesses such as depression, Defendants'  
 24 standards will leave individuals with moderate cognitive disability and psychiatric disabilities  
 25 ineligible. *See supra* at 10 n.21, 12-13.

26 <sup>80</sup> This discrimination is actionable even though its adverse impact is confined to  
 27 individuals with mental disabilities, rather than *all* individuals with disabilities. *See Olmstead*, 527  
 U.S. at 598 & n.10.

28 <sup>81</sup> Because mental functioning is ranked only 1, 2, or 5, a recipient would have to have at  
 least one functional rank of 5 in order to qualify for the Care Supplement. *See supra* at 9.

1                                   **3. Defendants' Implementation of SB 73 Uses Methods of Administration that**  
 2                                   **Discriminate Against People with Disabilities.**

3                   The ADA prohibits methods of administration that have a discriminatory effect on people  
 4 with disabilities, including by "substantially impairing accomplishment of the objectives of the  
 5 public entity's program with respect to individuals with disabilities." 28 C.F.R. §35.130(b)(3); *see*  
 6 *Alexander*, 469 U.S. at 296-97; *Helen L. v. DiDario*, 46 F.3d 325, 335 (3rd Cir. 1995); *Crowder v.*  
 7 *Kitigawa*, 81 F.3d 1480, 1484 (9th Cir. 1996). The purpose of the IHSS program is to permit  
 8 recipients to remain safely at home. Cal. Welf. & Inst. Code § 12300(a); *see also Miller*, 148  
 9 Cal.App.3d at 867. Defendants' requirement that IHSS recipients apply for IHSS Care  
 10 Supplements, deadlines for applying, and functional rank eligibility limitations will significantly  
 11 impair this purpose of IHSS. *See Brantley*, 656 F.Supp.2d at 1175-76 (defendants' failure to  
 12 provide sufficient notice and information regarding reduction in Medi-Cal services likely violated  
 13 methods of administration regulation); *Kathleen S. v. Pennsylvania Dep't of Publ. Welfare*, 10  
 14 F.Supp.2d 460, 473 (E.D.Pa. 1998) (state's "failure to adequately plan for the community  
 15 placements" constituted discriminatory methods of administration). Defendants' methods of  
 16 administration will also subject individuals to disability discrimination by screening out many  
 17 individuals with cognitive and psychiatric disabilities. *See supra* at 12-13.

18                                   **CONCLUSION**

19                   For all the foregoing reasons, Plaintiffs request that this Court issue an immediate  
 20 temporary restraining order.

21 Dated: December 1, 2011

Respectfully Submitted,

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 23 By: /s/ Melinda Bird

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