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10 Attorney for Plaintiffs
Gray Panthers of San Francisco; Mark Beckwith;
11 California Foundation for Independent Living
Centers; Independent Living Centers of Southern
12 California; LifeLong Medical Care; and
Margaret Dowling

13
14 IN THE UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

16 THE GRAY PANTHERS OF SAN
FRANCISCO, a nonprofit corporation; MARK
17 BECKWITH; CALIFORNIA FOUNDATION
FOR INDEPENDENT LIVING CENTERS,
18 INC., a nonprofit corporation; INDEPENDENT
LIVING CENTER OF SOUTHERN
19 CALIFORNIA, INC., a nonprofit corporation;
20 LIFELONG MEDICAL CARE, a nonprofit
corporation; and MARGARET DOWLING,
21 Plaintiffs,

No. C-09-02307 EMC

Date: August 5, 2009
Time: 10:30 a.m.
Courtroom: C
Judge; Hon. Edward M.
Chen

22 -vs.-

23 ARNOLD SCHWARZENEGGER, Governor of
State of California; KIM BELSHE, Secretary of
24 Health and Human Services Agency of the State of
California; DAVID MAXWELL-JOLLY, Director
25 of Department of Health Care Services of the
State of California; JOHN CHIANG, Controller of
26 State of California; BILL LOCKYER, Treasurer
of State of California; and MICHAEL E. GENEST,
Director of Finance of the State of California,

Defendants. /

**PLAINTIFFS' NOTICE OF
MOTION, AND MOTION FOR
PRELIMINARY INJUNCTION;
AND MEMORANDUM IN
SUPPORT OF PRELIMINARY
INJUNCTION**

1 **NOTICE OF MOTION and MOTION FOR PRELIMINARY INJUNCTION**

2 PLEASE TAKE NOTICE that at 10:30 a.m. of August 5, 2009, in Courtroom C, 15th
3 Floor, San Francisco Federal Courthouse, 450 Golden Gate Ave., San Francisco, California 94102,
4 before the Honorable Edward M. Chen, each of the Plaintiffs:

- 5 - Gray Panthers of San Francisco,
6 - Mark Beckwith,
7 - California Foundation for Independent Living Centers,
8 - Independent Living Center of Southern California, Inc.,
9 - LifeLong Medical Care,
10 - Margaret Dowling,

11 will move, – and each of the Plaintiffs do hereby move, – for a preliminary injunction, pending a
12 final determination on the merits, that prohibits each of the Defendants:

- 13 - Arnold Schwarzenegger, Governor of State of California
14 - Kim Belshe, Secretary of Health and Human Services Agency of State of California,
15 - John Chiang, Controller of State of California
16 - Bill Lockyer, Treasurer of State of California
17 - Michael E. Genest, Director of Finance of State of California
18 - David Maxwell-Jolly, Director of Department of Health Care Services of State
19 of California

20 from **(1)** implementing California Welfare and Institutions (“Welf. & Inst.”) § 14131.10, including
21 **(2)** refraining from eliminating:

- 22 1. Adult dental services, 21 years or older, (except medical and surgical services
23 which, if provided by a physician, would be considered physician services),
24 2. Acupuncture services,
25 3. Audiology services,
26 4. Speech therapy services,
 5. Chiropractic services,
 6. Optometric and optician services,
 7. Podiatric services,
 8. Psychology services, and,

1 9. Incontinence creams and washes,¹
2 (herein, “the 9 Medicaid services”), furnished on or after July 1, 2009 in California's Medicaid
3 program; **(3)** refraining from refusing to pay established Medicaid rates to providers of these 9
4 Medicaid services which are furnished on and after July 1, 2009; and which affirmatively
5 commands each of them **(4)** to do all things necessary to use the savings to the State of California
6 from the temporary increase of Federal Medical Assistance Percentage (FMAP) payments to the
7 State of California under §§ 5000 - 5008, Title V, Division B, of the American Recovery and
8 Reinvestment Act of 2009, (Public Law 111-5, Page 123, Stat. 115) to protect and maintain the
9 State's Medicaid program under the Medicaid Act, 42 U.S.C. § 1396 et seq., including but not
10 limited to paying providers the established rates for furnishing the 9 Medicaid services to
11 Medicaid beneficiaries in California on or after July 1, 2009, and **(5)** to do all things necessary to
12 continue and to reinstate, as the case may be, the 9 Medicaid services in California's state
13 Medicaid plan and program, and to furnish and pay for the 9 Medicaid services to Medicaid
14 beneficiaries in California, for the duration of the remainder of the recession adjustment period of
15 July 1, 2009 to December 31, 2010; **or else, in the event the defendants do not reinstate the**
16 **9 Medicaid services within and by a date specified by the Court,** that (5) each of the defendant
17 state officials, and all State employees, attorneys, and those working in concert with the defendant
18 officials or any of them, be commanded by the Court (A) to not accept any further enhanced
19

20
21 ¹ An exception is that Welf. & Inst. Code § 14131.10(b)(3) and (c) provide that the 9
22 Medicaid services will continue to be furnished to Medicaid recipients who are:
23 - in the Early and Periodic Screening Diagnosis and Treatment Program,
24 - receive long-term care in a skilled nursing facility or intermediate care facility, or,
25 - are pregnant.
26

1 FMAP payments from the federal government in respect to the State's Medicaid program, (namely,
2 no federal FMAP payments in excess of 50% of all California expenditures for services in the
3 State's Medicaid program); and (B) do all acts necessary to cause the State (1) to cease accepting
4 any more enhanced FMAP funds from the federal government in respect to the State's Medicaid
5 program, and (2) to refund to the federal government all FMAP payments in excess of 50% of the
6 State's expenditures on the Medicaid program in California, received since the enactment of the
7 Stimulus Act, (namely, the ARRA).

8 *See, Rosado v. Wyman*, 397 U.S. 397 (1970).

9 This motion is made pursuant to FRCP 65 on the ground that Plaintiffs meet the
10 requirements for a preliminary injunction because they have documented a likelihood of success
11 on the merits, a likelihood of irreparable harm in the absence of preliminary relief, that the balance
12 of equities tips in their favor, and that an injunction is in the public interest. *See American*
13 *Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

14 This motion is made and based upon on this Notice of Motion and Motion, the
15 accompanying Memorandum in Support of Preliminary Injunction, the Declarations in Support of
16 Preliminary Injunction, the First Amended Complaint for Injunctive and Declaratory Relief, the
17 Plaintiffs' Request for Judicial Notice, the [Proposed] Order Granting Plaintiffs' Motion for a
18 Preliminary Injunction, the complete files and records in this action, and such other and further
19 matters as the Court may properly consider.

20 Dated: June 30, 2009

21

22 Respectfully submitted,

23

24 LYNN S. CARMAN
25 JESSIE M. SANDOVAL

26

By: /s/ Lynn S. Carman
Attorneys for Plaintiffs

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13 1. The above context and express purposes clause of the Enhanced FMAP Measure
 14 compel the conclusion that a State in accepting enhanced FMAP amounts under the
 15 Act may not allow the savings therefrom to sink into the State's fungible assets and,
 16 at the same time, eliminate services in its Medicaid program; but must, rather,
 employ the savings resulting from the enhanced FMAP funds to avert cuts in its
 Medicaid services, during this period of economic downturn..... 12

17 2. Also, the express purposes clause, § 5000(a), and the “no-reserve--or-rainy-day-fund”
 18 clause of § 5001(f)(3) of the Enhanced FMAP Measure , – when read together , --
 19 compel the conclusion that defendants have a mandatory ministerial duty, arising
 20 from §§ 5000 and 5001(f)(3), not to accept enhanced FMAP funds on the one hand,
 21 cut 9 Medicaid services on the other hand, and let the savings therefrom sink into the
 fungible assets of the State so as to become a *de facto* sinking fund, reserve, or rainy
 day fund, for non-Medicaid expenditures by the State..... 12

22 3. Also, the express purposes clause, § 5000(a), and the provisions of subs. (f)(1)(A) of
 23 § 5001 of the Enhanced FMAP Measure which prohibit restricting “procedures,”
 24 (i.e., services), in the State's Medicaid program to less than were in effect on July 1,
 25 2008, – when read together, – compel the conclusion that defendants have a mandatory
 26 ministerial duty, arising from §§ 5000 and 5001(f)(1)(A) not to accept enhanced
 FMAP funds on the one hand and, on the other hand, cut 9 Medicaid services which
 were in effect on July 1, 2008. 14

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5 (1) Marty Lynch. 17

6 (2) Plaintiff Margaret Dowling. 17

7 (3) Plaintiff Mark Beckwith.. 18

8 (4) The executive directors of the three plaintiffs:

9 - Independent Living Center of Southern California, Inc. 19

10 - California Foundation for Independent Living Centers.. . . . 19

11 - SF Gray Panthers 19

12 Summary and conclusion of this sub-point, 20

13 4. The plaintiffs LifeLong Care, ILC, CFILC, and SF Gray Panthers also suffer

14 irreparable injury on their own account, in that (1) LifeLong Care suffers permanent

15 loss of income and is forced to cut its services to its needy clientele and (2) the

16 member/service organizations (ILC, CFILC, and SF Gray Panthers) are impeded

17 and injured in their ability to carry out the functions for which they are organized to

18 provide, namely, to enable the blind, elderly, and disabled of our population to

19 obtain, among other things, adequate medical care.. 2

20 Conclusion on this sub-point21

21 2. There is no defense that no appropriations have been enacted by the Legislature,

22 or that the courts may not, under Separation of Powers, compel the Legislature to

23 enact any appropriations in this case... 21

24 3. There is also, to boot, a continuing State appropriation of \$2 billion to pay Medicaid

25 providers, when there are no other state appropriations to pay Medicaid providers,

26 out of which the defendants can easily comply with the court order which is

 requested in the case at bar.. 22

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4. Also, DHCS has not yet obtained approval by HHS of any amendment to the state Medicaid plan to eliminate the 9 optional Medicaid services. Hence there is no defense available to the defendants, to claim that the state Medicaid plan has already been amended to delete the 9 optional Medicaid services in question, from the state Medicaid plan..... 22

5. There is no valid defense that HHS is exclusively empowered by Congress to take such action which may be required to enforce the Stimulus Act. 23

6. Also, *Rosado v. Wyman*, 397 U.S. 397 (1970), established that in cooperative state-federal programs to which the federal government contributes under the Social Security Act, that participation by a State is purely voluntary; so that it is appropriate to order that the State officials perform the court's order to comply with the Social Security Act provision in question or, within a date specified by the court, or cease accepting enhanced FMAP funds under the Enhanced FMAP Measure. 23

 C. The balance of hardships tips strongly in Plaintiffs' favor..... 24

 D. The public interest strongly favors granting relief..... 25

Summary and relief requested. 25

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 8 How. 113, 122, 12 L.Ed. 1009 (1894). 11

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1 **MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION**

2 The plaintiffs Gray Panthers of San Francisco (“SF Gray Panthers”); Mark Beckwith;
3 California Foundation for Independent Living Centers, Inc. (“CFILC”); Independent Living Center
4 of Southern California, Inc. (“ILC”); LifeLong Medical Care (“LifeLong Care”), and Margaret
5 Dowling file the below memorandum in support of motion for preliminary injunction.

6 **PRELIMINARY**

7 **Jurisdiction and venue**

8 This is a Supremacy Clause case.² The Court has jurisdiction under 28 U.S.C. § 1331. *Shaw*
9 *v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983). The first named plaintiff in the complaint is the SF
10 Gray Panthers, whose principal office is in San Francisco, California.

11 **Parties**

12 The plaintiffs are:

- 13 - a member organization which advocates for and assists its members to obtain
14 healthcare rights including Medicaid benefits whose headquarters is in San Francisco,³
15 - a designated center for independent living under California Rehabilitation Act,
16 § 19800 California Welfare and Institutions (Welf. & Inst.) Code) in the Los Angeles area,⁴
17 - the state association for independent living centers, whose members are independent
18 living centers;⁵
19 - a community health center organization with clinics in Berkeley, Oakland, and

20 _____
21 ² U.S. Constitution, Article VI, cl. 2.

22 ³ The SF Gray Panthers, a nonprofit corporation.

23 ⁴ Independent Living Center of Southern California, Inc., (“ILC”), a nonprofit corporation
24 which serves more than 7,500 disabled Medicaid beneficiaries annually in Van Nuys, Santa
Clarita, and Lancaster.

25 ⁵ California Foundation for Independent Living Centers (“CFILC”), a nonprofit
26 corporation, whose members are 25 independent living centers in California who serve 330,000
blind, elderly or disabled persons, most of whom are Medicaid beneficiaries.

1 Novato;⁶

2 - two individual beneficiaries of California's Medicaid program (which is often called
3 "Medi-Cal").⁷

4 The defendants are all the relevant executive officers of the State of California: the
5 Governor, Controller, Treasurer, Finance Director, Secretary of the California Health and Human
6 Agency, and the Director of the California Department of Health Care Services, – the latter
7 department being the single California agency which is authorized, under the Medicaid Act, 42
8 U.S.C. § 1396a(a)(5) and Section 1 of the State's Medicaid plan (herein, "state Medicaid plan"), to
9 exclusively administer the state Medicaid plan (which plan must be approved by the Secretary of
10 the U.S. Department of Health and Human Services ("HHS")).⁸

11 Also, the Director of the California Department of Health Care Services ("DHCS") is
12 authorized by California Welfare and Institutions ("Welf. & Inst.") Code, §§ 14000.1 and 14105,
13 to exclusively set all policies, rules, and regulations for DHCS and the state Medicaid program.⁹

14 _____
15 ⁶ LifeLong Care, a nonprofit corporation whose 9 community services sites in the Bay
16 Area receive 5,300 adult dental visits, 4,000 podiatry visits, 700 optometry visits from Medicaid
recipients, and also many mental health visits, annually. (¶ 5 Lynch Decl.)

17 ⁷ Mark Beckwith, a quadriplegic who resides in Berkeley, California; and Margaret
18 Dowling, a paraplegic who resides in Pittsburg, California.

19 ⁸ A copy of Section 1 of the state Medicaid plan is set forth in **Exhibit D** of Plaintiffs'
20 Request for Judicial Notice ("RJN").

21 ⁹ The Governor's duties are to supervise all executive and administrative officers of the
22 State and see that their official duties are performed. (Cal. Government ("Govt.") Code §§ 12010,
12011).

23 The California Department of Health Care Services ("DHCS") is within and subordinate
24 to the California Health and Human Services Agency; and the Agency in turn is, by § 12801
Govt. Code, under the supervision of Secretary Kim Belshe.

25 The Controller, by § 12410 Govt. Code, superintends the fiscal concerns of the State of
26 California. Under California Constitution, article XVI, section 7, money may be drawn from the
Treasury of the State only upon the Controller's duly drawn warrant.

The Treasurer, under §§ 12320 and 12324 Govt. Code, receives and keeps all moneys of

1 **Standing**

2 The plaintiffs have standing to sue to obtain injunctive and declaratory relief because they:

3 - are Medicaid beneficiaries, or,

4 - have patients, clients, or members who are Medi-Cal beneficiaries,

5 who are threatened with injury from enactment of Welf. & Inst. Code 14130.10 and its

6 implementation by the defendant State officials, which State actions are contrary to, – hence

7 preempted under the Supremacy Clause by – Title V, (§§ 5000-5008), of Division B of the

8 American Recovery and Reinvestment Act of 2009.¹⁰ *See*:

9 - *Independent Living Center of Southern California, Inc. (“ILC”) v. Shewry*, 543 F.3d 1050
10 (9th Cir. 2008), *cert. den.* June 22, 2009,

11 - *ILC v. Shewry*, 2008 WL3891211 (C.D.Cal. Aug. 18, 2008),

12 - *California Pharmacists Assn. (“CPhA”) v. Maxwell-Jolly*, 563 F.3d 847 (9th Cir.
2009), *pet reh'g en banc filed*,¹¹

13 in which injunctive relief was granted to prevent injury from State action preempted, under the

14 Supremacy Clause, by federal law (there, the Medicaid Act).

15 Also, *CPhA*, 563 F.3d at 851-852, held that Medicaid providers, – such as the plaintiff

16
17 _____

17 the State, and may only pay out State monies upon warrants drawn by the Controller.

18 The Director of Finance is authorized by § 13300 Govt. Code to supervise the accounts of
19 each department of the State, and may, by certain statutes made and provided therefore, veto
20 certain expenditures of the State.

21 ¹⁰ Public Law 111-5; Page 123, Stat. 115.

22 ¹¹ Generally, a person or organization who seeks third party standing to assert or represent
23 the interests of another: (1) must have suffered an injury-in-fact, (2) must have a close
24 relationship with the third party, and (3) there must be "some hindrance" or a "genuine obstacle"
25 to the third party's ability to assert its own interests. *Powers v. Ohio*, 499 U.S. 400, 410-411
26 (1991); *Singleton v. Wulff*, 428 U.S. 106, 112-116 (1976). All of these criteria are satisfied in this
27 case.

28 *See, Schweiker v. Gray Panthers*, 453 U.S. 34, fn. 8 at 40 (1981): Gray Panthers have
29 prudential standing; *Clayworth v. Bonta*, 295 F.Supp.2d 1110 (E.D.Cal. 2003), *vacated on other*
30 *grounds*, 140 Fed.Appx. 677 (9th Cir. 2005): Medicaid providers have prudential standing.

1 LifeLong Care in case at bar, – are entitled to preliminary injunctive relief because the Eleventh
2 Amendment bars them from recovery of damages even if they are successful on the merits of their
3 case.

4 **STATEMENT OF FACTS AND CLAIMS OF PLAINTIFFS**
5 **For injunction against State action, preempted under the Supremacy Clause**
6 **by the Stimulus Act, which threatens injury.**

7 As of July 1, 2008 California's Medicaid program under Social Security Act Title XIX, (42
8 U.S.C. § 1396 et seq.), furnished the following services which are optional, and are not mandatory
9 to be provided in a state Medicaid program,¹² as a minimum condition for the State to receive
10 federal funds under the Medicaid Act, (called the “federal medical assistance percentage,” or
11 “FMAP”)¹³ for participating in the Medicaid program:

- 12 1. Adult dental services, 21 years or older (except medical and surgical services which,
13 if provided by a physician, would be considered physician services),
 - 14 2. Acupuncture services,
 - 15 3. Audiology services,
 - 16 4. Speech therapy services,
 - 17 5. Chiropractic services,
 - 18 6. Optometric and optician services,
 - 19 7. Podiatric services,
 - 20 8. Psychology services, and,
 - 21 9. Incontinence creams and washes,
- 22 (herein, “the 9 Medicaid services”).

23 On February 17, 2009, Congress enacted the American Recovery and Reinvestment Act of
24 2009, (the “Stimulus Act”),¹⁴ in which the following provisions of Title V, Division B, provide:

25 _____
26 ¹² 42 U.S.C. §§ 1396a(a)(10)(A) and 1396d.

¹³ Social Security Act § 1903(a)(1), (42 U.S.C. § 1396b(a)(1) , and Social Security Act
§ 1905(b), (42 U.S.C. § 1396d(b), – defining the FMAP which is to paid to States).

¹⁴ **NOTE:** All statutory references shall be to Title V, of Division B of the Stimulus Act,
unless otherwise specified.

A copy of Title V, (§§ 5000-5008), of Division B, of the Stimulus Act, (Public Law
111-5; Page 123, Stat. 115), is set forth in **Exhibit F** of Plaintiffs' RJN.

1
2 “ SEC. 5000. PURPOSES; . . .

(a) Purposes.--The purposes of this title are as follows:

3 (1) To provide fiscal relief to States in a period of economic downturn.

4 (2) To protect and maintain State Medicaid programs during a period of
5 economic downturn, including by helping to avert cuts to provider payment rates and
benefits or services . . . ”

6 **Note:** § 5001, subs. (a), (b), (c) provide that the FMAP for a State shall be temporarily increased
7 during the recession adjustment period of October 1, 2008 through December 31, 2010, by at least
8 6.2%, – with an additional increase for a State of up to 17.7% depending upon the increase in
9 unemployment in a State during this period.

10 –§ 5001, subs. (f)(3) provides:

11 “State's application toward rainy day fund.--A State is not eligible for an increase in its
12 FMAP under subsection (b) or (c) . . . if any amounts attributable (directly or indirectly) to
13 such increase are deposited or credited into any reserve or rainy day fund of the State.”

14 § 5001, subs. (f)(1)(A) provides:

15 “[A] State is not eligible for an increase in its FMAP under subsection (a), (b), or (c), . . . if
16 eligibility standards, methodologies, or **procedures** under its State plan under title XIX of
17 the Social Security Act (including any waiver under such title or under section 1115 of such
18 Act (42 U.S.C. 1315) are more restrictive than the eligibility standards, methodologies, or
procedures, respectively under such plan (or waiver) as in effect on July 1, 2008.”

(Boldface emphasis supplied.

19 **NOTE:** §§ 5000 - 5008 of Title V, Division B, of the Stimulus Act shall hereinafter
20 sometimes be referred to in this Memorandum as the “Enhanced FMAP Measure.”¹⁵

21 The extra federal FMAP amounts paid to states, including California, under the foregoing
22 §§ 5000-5001 are referred to in this Memorandum as “enhanced FMAP funds.”

23 However, notwithstanding the Enhanced FMAP Measure , California Welfare & Institutions
24 (“WI”) Code § 14131.10, which was enacted on March 3, 2009, as Stats. 2009, ch . 20, eliminated

25
26 _____
¹⁵ A copy of §§ 5000 - 5008 is set forth in **Exhibit F** of Plaintiffs' RJN.

1 the 9 Medicaid benefits, effective for services furnished on and after July 1, 2009.¹⁶

2 (A copy of Welf. & Inst. Code § 14131.10 is set forth as **Exhibit A** of Plaintiffs' Request for
3 Judicial Notice (“RJN”).

4 **The defendant Director of DHCS, and DHCS, have adopted a policy and have**
5 **issued a bulletin and notice to implement Welf. & Inst. Code §14131.10.**

6 The defendant David Maxwell-Jolly, Director of DHCS, and the DHCS, have adopted a
7 policy to implement Welf. & Inst. Code § 14131.10, as evidenced by the June 2008 Bulletin on
8 DHCS's official website which is entitled:

9 “Notice of Reduction of Medi-Cal Benefits,”

10 which the DHCS website states has been sent to all Medicaid beneficiaries in California.¹⁷

11 A copy of this June 2008 bulletin and notice is set forth as **Exhibit B** of Plaintiffs' RJN).

12 The Director of DHCS has admitted in a Bulletin on the DHCS website that under the
13 Enhanced FMAP Measure of the Stimulus Act that the enhanced FMAP funds for the State for the

14
15
16 _____
17 ¹⁶ An exception is that Welf. & Inst. Code § 14131.10(b)(3) and (c) provide that the 9
18 Medicaid services will continue to be furnished to Medi-Cal recipients who are:

- 19 - in the Early and Periodic Screening Diagnosis and Treatment Program
20 - receive long-term care in a skilled nursing facility or intermediate care facility, or,
21 - are pregnant.

22 ¹⁷ An exception stated in the DHCS notice is that the 9 Medicaid services will continue to
23 be furnished to Medi-Cal recipients who are:

- 24 - in the Early and Periodic Screening Diagnosis and Treatment Program
25 - living in a skilled nursing facility (Level A or B), including subacute facilities, or,
26 - are pregnant.

The notice also specifies that those in the state-funded part of the Medi-Cal program (i.e., not, the federal-state Medicaid program) will continue to receive these services if the Medi-Cal beneficiary receives benefits from the California Children's Services program, a Program of All-Inclusive Care for the Elderly, the Genetically Handicapped Persons Program, a county mental health program, Medicare Part B, or from a physician. These, however, are not Medicaid programs.

1 recession adjustment period October 1, 2008 through December 31, 2010, is 61.59%.¹⁸ This is an
 2 11.59% increase over the former 50% FMAP which the State formerly received under the Medicaid
 3 Act.¹⁹

4 The defendant Director of Finance has estimated that the State will receive \$6.6 billion in
 5 enhanced FMAP funds during the two fiscal years 2008-09 and 2009-2010, combined,²⁰ which – by
 6 simple arithmetic, – is an average of \$0.94 billion per calendar quarter (for the seven quarters from
 7 October 1, 2008 through December 31, 2009 for which enhanced FMAP funds are estimated by the
 8 Director of Finance), or an average of **\$3.76 billion** per year being received by the State.

9 This saves the State **\$3.76 billion annually** in State funds which the State would otherwise
 10 have to expend for services in the Medicaid program in California, were it not for this \$3.76 billion
 11 in enhanced FMAP funds from the Enhanced FMAP Measure of the Stimulus Act.

12 In comparison, it only costs the State **\$129.4 million** in State funds per year to continue the
 13 9 Medicaid services in question.²¹

14 However, despite the above purposes of Congress expressed in § 5000(a), the State
 15 (1) has enacted and has not rescinded Welf. & Inst. Code § 14131.10, and (2) each of the
 16 defendant State officials has adopted a policy and will, unless restrained by the Court,
 17 _____

18 ¹⁸ See, DHCS Bulletin, (copy set forth in **Exhibit C** of Plaintiffs RJN), which states:

19 “ The FMAP is the share of Medicaid expenditures paid by the federal government.
 20 ARRA increased California's FMAP from 50 percent to 61.59 percent meaning that the
 21 federal government now pays about 62 cents for every dollar of Medi-Cal services used.
 The FMAP increase is effective from October 12, 2008 through December 31, 2010.”

22 This Bulletin is available at <http://www.dhcs.ca.gov/ARRA>. (last visited June 28, 2009).

23 ¹⁹ 42 U.S.C. § 1396d(b) provides that the standard FMAP shall be not less than 50%. See,
 24 also, prior Footnote 18.

25 ²⁰ **Exhibit G**, Page 22 of Plaintiffs' RJN.

26 ²¹ Assembly Bill Analysis, page 3, of Assembly Bill X3 5, which enacted Welf. & Inst.
 Code § 14131.10. (**Exhibit J** of Plaintiffs' RJN).

1 implement Welf. & Inst. Code § 14131.10 by eliminating and refusing to pay for any of the
 2 9 Medicaid services, for services rendered on or after July 1, 2009; – which state statute and
 3 the policies and actions of the defendant State officers constitute State action which is in
 4 violation of, hence preempted, under the Supremacy Clause, by the purposes clause of
 5 § 5000(a), – which purposes clause expressly imposes upon the State and its officers the
 6 obligation to protect and maintain the State's Medicaid program by averting cuts to services
 7 of the program; **especially** when in case at bar, the State is enjoying billions of dollars in
 8 savings (of at least **\$3 billion per year**) from the enhanced FMAP funds, (which vastly
 9 exceed the State's costs, of only **\$129.4 million per year**, to continue the 9 Medicaid
 10 services in question).

11 Also, the implementation of Welf. & Inst. Code § 14131.10 by elimination of the 9
 12 Medicaid services, plus, the refusal of the State and the defendant officials **to use any of the \$3.76**
 13 **billion annual savings to the State**, from the increased FMAP payments, to pay for the
 14 continuation of the 9 Medicaid services during the remainder of the recession adjustment period,
 15 violates the Stimulus Act in **two additional ways**; because this:

16 - (1) violates the express prohibition of subs. (f)(3) of § 5001 of the Enhanced FMAP
 17 Measure not to indirectly deposit or credit into any reserve or rainy day fund any amount
 18 attributable to the extra FMAP payments, (here, the savings from the enhanced FMAP funds which
 19 sink unidentified into the fungible assets of the State of California, for use by the Legislature as a
 20 real but unidentified source of funds for non-Medicaid purposes); and,

21 - (2) violates the express prohibition of subs. (f)(1)(A) of § 5001 of the Enhanced FMAP
 22 Measure against restricting “procedures,” (i.e., Medicaid services) in the State's Medicaid program
 23 to less than were in effect on July 1, 2008.

24 Thereby, Welf. & Inst. Code § 14131.10 and the above policies and actions of each of the
 25 defendant State officials to implement Welf. & Inst. Code § 14131.10 manifestly comprise state
 26 action which is in violation of , – and defeats the purposes of Congress in enacting, – § 5000(a) and

1 subds. (a),(b) and (c), and subs (f)(3) of § 5001 of the Enhanced FMAP Measure, – so as to be
 2 hence preempted, under the Supremacy Clause.

3 Further, millions of poor Medicaid beneficiaries, including the:

- 4 - plaintiffs Mark Beckwith and Margaret Dowling,
- 5 - thousands of Medicaid adult dental, podiatry, optometric, and mental health patients of
 6 the plaintiff LifeLong Care,
- 7 - 7,500 blind, elderly, and disabled clients of the plaintiff Independent Living Center of
 8 Southern California, Inc., (“ILC”) who are Medicaid beneficiaries,
- 9 - several hundred thousand blind, elderly, and disabled Medicaid beneficiaries who are the
 10 clients of the 25 independent living centers who are members of the plaintiff California
 Foundation for Independent Living Centers (“CFILC”), and,
- 11 - the 15 members of the plaintiff SF Gray Panthers who are Medicaid beneficiaries,

12 will manifestly suffer irreparable injury as shall be set forth on pages 16 - 20 of this Memorandum.

13 Also, the plaintiffs LifeLong Care, ILC, CFILC, and SF Gray Panthers will also be
 14 irreparably injured by this preempted State action, as shall be set forth on pages __ of this
 15 Memorandum.

16 Accordingly, under the case law in the Ninth Circuit relating to the Supremacy Clause and
 17 irreparable injury, (*ILC v. Shewry*, 453 F.3d 1047, *cert . den.*; *ILC v. Shewry*, 2008 WL3891211
 18 (C.D.Cal. 2008); *CPhA v. Maxwell-Jolly*; 563 F.3d at 851-852; and *Clayworth v. Bonta*, 295
 19 F.Supp.2d at 1128 (E.D.Cal. 2003), *vacated on other grounds*, 140 Fed.Appx. 677 (9th Cir. 2005),
 20 the plaintiffs are clearly entitled to a permanent injunction or in the alternative, a preliminary
 21 injunction, which enjoins the defendant officials from (1) implementing Welf. & Inst. Code
 22 § 14131.10, (2) eliminating the 9 Medicaid services, and (3) refusing to pay established rates for
 23 these 9 Medicaid services which are furnished on or after July 1, 2009; and, **affirmatively** (4)
 24 commands them to use the savings to the State from the temporary increase of FMAP federal
 25
 26

1 payments to California, under the Enhanced FMAP Measure,²² to preserve, continue, and pay
 2 providers for furnishing the 9 Medicaid services to Medi-Cal beneficiaries on and after July 1,
 3 2009, using savings to the State from the enhanced FMAP payments to do so.

4 **History of §§ 5000 - 5001, Title V, Division B of the Stimulus Act**

5 This emergency remedial statute was enacted in the greatest economic crisis this country has
 6 faced since the Great Depression, to solve, – insofar as this part of the Stimulus Act is concerned, –
 7 the collapse of funding sources for states to carry out the Medicaid program of 42 U.S.C. § 1396, et
 8 seq., by flooding States with billions of dollars of additional federal funding to enable States to
 9 preserve and maintain their existing Medicaid programs, by averting cuts to provider rates, benefits,
 10 and services.²³ The purpose was not to give extra funds to States to save their Medicaid programs,
 11 only to have the States pocket the \$\$\$\$ billions and cut their Medicaid services, anyway, in
 12 unlawful defiance of the express purpose for which they accepted the additional federal funding to
 13 accomplish.

14 **The basic rules of statutory construction.**

15 The basic rules of statutory construction which apply to this case are as follows:

16 **First.** A court must first ascertain the purpose of Congress in enacting a statute, and then
 17 construe all parts of the statute consistent with, and to effect and not defeat, the purposes for which
 18 the statute was enacted. (*Philbrook v. Glodtgett*, 421 U.S. 707, 713 (1975) (our objective “is to
 19 **ascertain the congressional intent and give effect to the legislative will**”); *Weinberger v. Hynson*,
 20 *Westcott and Dunning, Inc.*, 412 U.S. 609, 631-632 (1973), (we “give the Act the most harmonious,
 21 comprehensive meaning possible **in light of the legislative policy and purpose**”); *Kelly v.*
 22 *Robinson*, 479 U.S. 36, 43 (1986) (in expounding a statute we “look to the provisions of the whole
 23 law, and to its object and policy,” quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221,
 24

25 ²² Title V, Division B of the Stimulus Act.

26 ²³ *See*, express purposes clause of § 5000(a). (Copy , in **Exhibit FL** of Plaintiffs' RJN.)

1 quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956), quoting *United States v. Heirs of*
 2 *Boisdore*, 8 How. 113, 122, 12 L.Ed. 1009 (1894).

3 **Second.** The starting point for determining legislative purpose is “plainly an appreciation of
 4 the “mischief” that Congress was seeking to alleviate.” *Liberation News Service v. Eastland*, 426
 5 F.2d 1379, 1383 (2d Cir. 1970).

6 **Third.** The provisions of an act must not be construed so as render any part of the act
 7 superfluous, without meaning or effect. *Weinberger, supra*, 421 U.S. at 634.

8 **Fourth.** A provision of an act may not be construed so as to defeat or frustrate Congress'
 9 purpose in enacting the act. *Lange v. United States*, 443 F.2d 720, 723 (D.C. 1971); *Holloway v.*
 10 *U.S.*, 526 U.S. 1 (1999); *Shulte v. Louisiana Trailer Sales, Inc.* 428 F.2d 61, 65 (1970).

11 **Fifth.** Where a provision of an act is susceptible to two opposed interpretations, the
 12 provision must be construed in the manner “which effects rather than frustrates the major purpose”
 13 of the act. *Shapiro v. U.S.*, 335 U.S. 1, 31 (1948).

14 **ARGUMENT**

15 The emergency context and terms of the enactment of the Enhanced FMAP Measure,²⁴
 16 including the express purposes clause of this measure, which is set forth in § 5000(a) of the
 17 Enhanced FMAP Measure , – to wit:

18 “SEC. 5000. PURPOSES; . . .

19 (a) Purposes.--The purposes of this title are as follows: . . . (2) To protect and
 20 maintain State Medicaid programs during a period of economic downturn, including by
 helping to avert cuts to provider payment rates and benefits or services . . . ”

21 compel the conclusions that are set forth below in this Memorandum.

22 //

23 //

24 //

25 _____

26 ²⁴ § 5000 - 5008 of Title V, Division B of the Stimulus Act. (Copy set forth in **Exhibit F**
 of Plaintiffs' RJN.)

1 **1. The above context and express purposes clause of the Enhanced FMAP Measure**
2 **compel the conclusion that a State in accepting enhanced FMAP amounts under the**
3 **Act may not allow the savings therefrom to sink into the State's fungible assets and,**
4 **at the same time, eliminate services in its Medicaid program; but must, rather,**
5 **employ the savings resulting from the enhanced FMAP funds to avert cuts in its**
6 **Medicaid services, during this period of economic downturn.**

7 I.e., what purpose is achieved for Congress to have awarded the enhanced FMAP funds to a
8 State, only to have the State let the savings accruing to the State from the enhanced FMAP funds
9 sink into its fungible assets, without using the savings to preserve to the extent possible the State's
10 Medicaid program which Congress is manifestly attempting to save and preserve by awarding, in
11 the first instance, the enhanced FMAP funds to the State, expressly, in § 5000(a), to “protect and
12 maintain State Medicaid programs during a period of economic downtown, including by helping to
13 avert cuts to . . . services and benefits”?

14 To the contrary, such action of the State, in the case at bar, clearly violates the Enhanced
15 FMAP Measure as well as destroys the Congressional purposes – (which are expressly stated in
16 § 5000(a) of the Enhanced FMAP Measure) – for which Congress enacted the Enhanced FMAP
17 Measure in the first instance; so as to be therein preempted, under the Supremacy Clause, the
18 express purposes clause of the Enhanced FMAP Measure.

19 **2. Also, the express purposes clause, § 5000(a), and the “no-reserve--or-rainy-day-**
20 **fund” clause of § 5001(f)(3) of the Enhanced FMAP Measure , – when read**
21 **together, – compel the conclusion that defendants have a mandatory ministerial**
22 **duty, arising from §§ 5000(a) and 5001(f)(3), not to accept enhanced FMAP funds**
23 **on the one hand, cut 9 Medicaid services on the other hand, and let the savings**
24 **therefrom sink into the fungible assets of the State so as to become a *de facto* sinking**
25 **fund, reserve, or rainy day fund, for non-Medicaid expenditures by the State.**

26 The no-reserve-no-rainy-day-fund provision of § 5001(f)(3) of the Enhanced FMAP
Measure prohibits eligibility of a State to receive increased FMAP payments:

//

//

1 “ . . . if any amounts attributable (directly or indirectly) to such increase are
2 deposited or credited into any reserve or rainy day fund of the State.”²⁵

3 **Note:** The failure of the State to formally call the savings accruing to the State from the receipt of
4 these enhanced FMAP funds a “reserve for non-Medicaid purposes” does not prevent such *de facto*
5 reserve from arising in fact in the fungible assets of the State, all, in violation of the purposes and
6 no-reserve clauses of §§ 5000(a) and 5001(f)(3) of the Enhanced FMAP Measure.

7 Indeed, the fact that the State is reserving the \$3.76 billion in savings to the State to its
8 General Fund to be used for purposes other than preserving the state Medicaid program, is brazenly
9 openly stated in a white paper of the California Legislative Analyst to the Legislature:

10 “**Federal Medicaid Funds Free Up State General Fund.** . . . [T]he additional FMAP funds
11 that the state would receive for Medi-Cal could be used to reduce state General Fund
12 support for the program. In effect, this would permit a temporary shift of General Fund
13 resources currently used by Medi-Cal to support other state programs and achieve at least a
14 short-term state budget solution for a couple of years.”²⁶

14 Accordingly, Welf. & Inst. Code § 14131.10 and the actions of the State officials which are
15 complained of to implement § 14131.10 are (1) contrary to both the provisions of the express
16 purposes clause of § 5000(a) of the Enhanced FMAP Measure;²⁷ and the no-reserve-no-rainy-day-
17 fund provision of § 5001(3)(f) of the Enhanced FMAP Measure; and (2) will destroy and prevent
18 these purposes for which Congress enacted the enhanced FMAP provision of the Stimulus Act, – so
19 as to be hence preempted under the Supremacy Clause, by §§ 5000(a) and 5001(3)(f) of the
20 Enhanced FMAP Measure.

21 ²⁵ § 5001(f)(3) of Title V, Division D, of the Stimulus Act provides:

22 “(f)(3) State's application toward rainy day fund.—A State is not eligible for an increase in
23 its FMAP under subsection (b)) or (c), . . . if any amounts attributable (directly or
24 indirectly) to such increase are deposited or credited into any reserve or rainy day fund of
25 the State.”

26 ²⁶ A copy of this shocking LAO document is set forth as **Exhibit E** of Plaintiffs' RJN.

²⁷ Title V, Division B, of the Stimulus Act.

1 3. **Also, the express purposes clause, § 5000(a), and subs. (f)(1)(A) of § 5001 of the**
 2 **Enhanced FMAP Measure which prohibits restricting “procedures,”(i.e., services),**
 3 **in the Medicaid program to less than were in effect on July 1, 2008; – when**
 4 **read together, – compel the conclusion that defendants have a mandatory ministerial**
 5 **duty, arising from §§ 5000(a) and 5001(f)(1)(A) not to accept enhanced FMAP funds**
 6 **on the one hand and, on the other hand, cut 9 Medicaid services which were in effect**
 7 **on July 1, 2008.**

8 A cardinal rule of statutory construction is that all words in part of an act must be read
 9 together to give effect to every word and part, if at all possible. *Weinberger, supra*, 412 U.S. at 634.

10 However, in respect to the provisions of §§ 5000(a) and 5001(f)(1)(A), construing the word
 11 “**procedures**” as used in § 5001(f)(1)(A) to mean one of its several meanings, namely, “an
 12 established or official way of doing something,” (*Oxford University Press*), would result in
 13 the purposes clause of § 5000(a), – (“to protect and maintain State Medicaid programs” by “helping
 14 to avert cuts to “provider rates and benefits or services”), – **being without any force or effect**, –
 15 due to the fact that restricting eligibility standards, methodologies, or **way of doing something**, as
 16 such, in a state Medicaid program **has no effect and does not avert cuts to provider payments**
 17 **rates, benefits or services**, (which is the express purpose of § 5000(a) of the Enhanced FMAP
 18 Measure for increased FMAP funds to States), -- hence, rendering the express purposes clause of
 19 § 5000(a) meaningless and without any purpose or effect whatsoever.

20 On the other hand, if the word “**procedures**” in § 5001(f)(1)(A) is construed by the
 21 customary **professional usage** of the word “procedures” as referring to and meaning “**services**,”
 22 then, the no-restriction-of-procedures provision of § 5001(f)(1)(A) and the avert-cuts-to-services
 23 provision of § 5000(a) are both given effect and are consistent with each other; but, not otherwise.

24 This is in accordance with the established rule of statutory construction: that a provision
 25 which is susceptible to two opposed interpretations, must be construed in the manner “which effects
 26 rather than frustrates the major purpose” of the act. *Shapiro v. U.S.*, 335 U.S. 1, 31 (1948).

1 **Discussion**

2 Such construction of “procedures” as referring to professional “services” for which a
3 professional bills and is paid, is the customary professional usage of the word, “procedures.”

4 This is evidenced by the fact that the services of doctors, dentists, etc., are frequently and
5 customarily spoken of or described as being “procedures;” with billings for services by
6 professionals customarily being listed and paid for as “procedures,” under a “procedure code.”

7 For example, payment for physician services is authorized for “each procedure performed by
8 a physician.” 22 California Code of Regulations (“CCR”) § 51503.²⁸ And payment for each of the
9 9 Medicaid services in question are respectively authorized for “procedures” performed by licensed
10 professionals, which services are listed by “procedure code” or “procedure number.” 22 CCR
11 §§ 51506, 51505.1, 51507.2, 51514, 51514.5, and 51505.3.²⁹

12 And it should be noted that in one's discussion with another of what services a professional
13 performed, the question normally asked is not, “What services did your (doctor) (dentist) perform?”
14 but, instead, is “What procedures did your (doctor) (dentist) (podiatrist) perform?”

15 **Conclusion in respect to violation of §§5000(a) and 5001(f)(1)(A).**

16 As prior shown, the express purposes clause, (§ 5000(a) and the provisions of subs. (f)(1)(A)
17 of § 5001 of the Enhanced FMAP Measure which prohibits restricting “procedures,” (properly
18 construed to mean “**services**”), in the State's Medicaid program to less than were in effect on July 1,
19 2008; – when read together as comprising one single provision, – **compel the conclusion** that
20 “procedures” as used in § 5001(f)(1)(A) of the Enhanced FMAP Measure means and includes,
21 “**services**,” so that defendant officials have a mandatory ministerial duty, arising from §§ 5000(a)
22 and 5001(f)(1)(A) not to receive enhanced FMAP funds on the one hand and, on the other hand, cut
23 the 9 Medicaid services which were in effect on July 1, 2008.

25 ²⁸ Copy set forth in **Exhibit H** of Plaintiffs' RJN.

26 ²⁹ Copies of these regulations are set forth in **Exhibit H** of Plaintiffs' RJN.

1 Accordingly, Welf. & Inst. Code § 14131.10 and the actions of the State officials which are
 2 complained of which implement § 14131.10 , are (1) clearly contrary to the express provisions of
 3 the express purposes clause of § 5000(a) and the no-restrictions-in-procedures clause of
 4 § 5001(f)(1)(A), and (2) will destroy and prevent the purposes for which Congress enacted these
 5 statutes to achieve, (namely, to protect and maintain California's Medicaid program during a period
 6 of economic downturn, including averting cuts in Medicaid services), – so as to be hence preempted
 7 under the Supremacy Clause, by §§ 5000(a) and § 5001(f)(1)(A) of the Enhanced FMAP Measure.³⁰

8 **PLAINTIFFS HAVE MET THE FACTORS FOR PRELIMINARY INJUNCTION**

9 To obtain a preliminary injunction, a plaintiff must establish “he is likely to succeed on the
 10 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
 11 balance of equities tips in his favor, and that an injunction is in the public interest.” *American*
 12 *Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). Plaintiffs satisfy
 13 each of these requirements.

14 **A. Likelihood of success on the merits.**

15 Plaintiffs have demonstrated prior in this Memorandum, that they have a high likelihood of
 16 success on the merits.

17 **B. Likelihood of irreparable injury.**

18 In this case there is a certainty, not a mere likelihood, that the (1) two individual Medicaid
 19 beneficiary plaintiffs, (2) the thousands of Medicaid beneficiaries who are dental, podiatry,
 20 optometric, and psychology patients of the plaintiff LifeLong Care, (3) the 7,500 Medicaid
 21 beneficiaries who are annually served by the ILC plaintiff, (4) the 330,000 disabled persons, many
 22 of whom are Medicaid beneficiaries, who are served by the 25 independent living centers who are
 23 members of the plaintiff CFILC, and (5) the 15 Medicaid beneficiaries of the plaintiff SF Gray
 24 Panthers, will be denied and be unable to obtain these needed services.

25
 26 ³⁰ Title V, Division B, of the Stimulus Act.

1 In this respect:

2 (1) **Marty Lynch**, Ph.D., MPA, – the Executive Director of the **plaintiff LifeLong**
3 **Care**, – states that this will cause great harm especially to the elderly and disabled patients of
4 LifeLong Care, – including the:

- 5 - 1,300 adult Medi-Cal beneficiaries who are dental patients,
6 - 1,600 Medi-Cal beneficiaries who are podiatry patients,
7 - 700 Medi-Cal beneficiaries who are optometry patients,
8 - Med-Cal beneficiaries who are mental health patients,

9 of the nine health clinics of LifeLong Care in Berkeley, Oakland, and Novato, for the following
10 reasons:

11 - In view of the fact that poor oral health is linked with heart disease, stroke,
12 respiratory disease, diabetes, and low birth weight, the elderly and disabled Medi-Cal beneficiaries
13 who LifeLong Care serves will be unable to manage or care for their diabetes, cardio vascular
14 problems, and other chronic problems without adequate dental care.³¹

15 - In view of the fact that medically necessary podiatry services are critical in
16 managing chronic diseases like diabetes patients, elimination of this service will adversely implicate
17 diabetes patients who have circulatory problems;³² and,

18 - LifeLong Care patients will no longer be able to receive optometry care.³³

19 (2) **Plaintiff Margaret Dowling**, age 69, a paraplegic Medicaid beneficiary who receives
20 536 hours monthly of personal care from 5 attendants under Medicaid, has low vision from head
21 injury, deaf left ear, and is incontinent from recovering from bowel cancer in 2009;³⁴ from skin
22 infection in 2007-2008 which caused open boils (each opening, discharging, then drying and

23 ³¹ ¶ 8 Lynch Decl.

24 ³² ¶ 9 Lynch Decl.

25 ³³ ¶ 9 Lynch Decl.

26 ³⁴ ¶ 3 Dowling Decl.

1 healing), and from hospitalization in 2008 for urinary tract infection with consequent constant need
 2 for incontinence wipes and washes.³⁵ She has tooth decay and teeth misalignment,³⁶ and may need
 3 acupuncture, chiropractic, and podiatry services due to her conditions.³⁷

4 Accordingly, she will be denied **dental** services, **incontinence creams and washes**,
 5 **optometry** for her low-vision, **audiology** for her deafness, and **acupuncture, chiropractic, and**
 6 **podiatry** services, which is medically necessary for her permanent conditions if the 9 Medicaid
 7 services cease; -- which will inevitably cause great suffering (as for just one example out of many, a
 8 mass of raw, bleeding, bloody and painful skin for which there is little or no relief if not prevented
 9 by incontinence creams and washes).³⁸

10 - (3) **Plaintiff Mark Beckwith**, age 52, a Medicaid beneficiary, who is a quadriplegic due
 11 to spinal muscular atrophy, type 2 (SMA11), with wasted muscles with very little ability to move,³⁹
 12 (who receives 655 hours monthly of personal care from 8 attendants under Medicaid),⁴⁰ and
 13 requires oxygen 24 hours a day to survive⁴¹ – the result of which he is permanently bedridden most
 14 of the hours of each day,⁴² – states that for this and other afflictions he is permanently incontinent
 15 with constant need for incontinent creams and washes.⁴³ He is very near sighted so as to require
 16 two pairs of glasses because he cannot move his head enough to use bifocals, and without glasses

17 ³⁵ ¶¶ 8, 12, 20 Dowling Decl.

18 ³⁶ ¶ 14 Dowling Decl.

19 ³⁷ ¶ 11 Dowling Decl.

20 ³⁸ ¶ 13, Dowling Decl.

21 ³⁹ ¶ 3 Beckwith Decl.

22 ⁴⁰ ¶ 7 Beckwith Decl.

23 ⁴¹ ¶ 4 Beckwith Decl.

24 ⁴² ¶ 15 Beckwith Decl.

25 ⁴³ ¶ 15 Beckwith Decl.

1 his eyesight is inadequate for his daily activities.⁴⁴

2 Further, because of his age and these conditions, plaintiff Beckwith may need at any time
3 **acupuncture, chiropractic, podiatric, and psychology** services.⁴⁵

4 From the above, plaintiff Beckwith will manifestly be subjected to immediate insufferable
5 pain and suffering, if the 9 optional services cease to be furnished on July 1, 2009; – which will be
6 magnified due to his quadriplegia and inability to breathe without the oxygen he needs to survive).⁴⁶

7 (5) The executive directors of the three plaintiffs:

8 - **Independent Living Center of Southern California, Inc.**, which assists 7,500 disabled
9 Medi-Cal beneficiaries to obtain medical services to enable them to live independently in
10 the community,

11 - **California Foundation for Independent Living Centers**, whose 25 independent living
12 center members assist 350,000 disabled Medi-Cal beneficiaries to obtain medical services to
13 enable them to live independently in the community, and,

14 - **SF Gray Panthers**, which assists its 15 members who are Medi-Cal beneficiaries, and
15 the elderly to obtain needed medical care,

16 each state essentially the same, namely, that in their experience it is already difficult for Medi-Cal
17 beneficiaries to obtain the 9 Medicaid services from providers, so that when these 9 Medicaid
18 services are eliminated, that their Medi-Cal clients will be denied these services, which will
19 cause them attendant pain and suffering from untreated conditions.⁴⁷

20 Also, the elimination of the 9 Medicaid services will manifestly impede and injure the
21 ability of these organizations to carry out their function of enabling and assisting individuals,
22

23 ⁴⁴ ¶ 16 Beckwith Decl.

24 ⁴⁵ ¶ 18, Beckwith Decl.

25 ⁴⁶ ¶ 19 Beckwith Decl.

26 ⁴⁷ ¶ 10 Vescovo Decl.; ¶ 6 Favuzzi Decl.; ¶ 8 Lyon Decl.

1 including Medi-Cal beneficiaries, to live independently in the community (in the case of the
2 plaintiffs ILC and the CFILC) and to aid the elderly needy (in the case of SF Gray Panthers).⁴⁸

3 **Summary and conclusion of this sub-point**

4 The plaintiffs have established overwhelming evidence that millions of Medicaid
5 beneficiaries, including:

- 6 - the two individual Medicaid beneficiaries who are plaintiffs,
7 - the Medi-Cal beneficiaries who are patients of the LifeLong Care clinics;
8 - the thousands of Medi-Cal beneficiaries who are served by the plaintiffs ILC, CFILC, and
SF Gray Panthers,

9 will be denied the 9 Medicaid services in question, causing them pain and suffering: which facially
10 constitutes irreparable injury.

11 4. **The plaintiffs LifeLong Care, ILC, CFILC, and SF Gray Panthers also suffer**
12 **irreparable injury on their own account, in that (1) LifeLong Care suffers permanent**
13 **loss of income and is forced to cut its services to its needy clientele and (2) the**
14 **member/service organizations (ILC, CFILC, and SF Gray Panthers) are impeded**
15 **and injured in their ability to carry out the functions for which they are organized to**
provide, namely, to enable the blind, elderly, and disabled of our population to
obtain, among other things, adequate medical care.

16 **First:** The *CPhA* decision, 563 F.3d at 851-852, *supra*, establishes that, by virtue of the
17 Eleventh Amendment, that providers of Medicaid services are irreparably injured when their
18 reimbursement for Medicaid services is unlawfully reduced.

19 **Second:** In addition to the immediate health impacts on LifeLong Care patients, the loss of
20 Medi-Cal revenue for adult dental care, podiatry, optometry, and psychology services will lessen
21 LifeLong Care's ability to provide care to uninsured members of its community as well.⁴⁹ LifeLong
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25 ⁴⁸ See, ¶ 11 Favuzzi Decl.

26 ⁴⁹ ¶ 11 Lynch Decl.

1 Care already does not have adequate care to serve all needy patients and must place many patients
2 on waiting lists.⁵⁰

3 **Third:** Similarly, the elimination of the 9 Medicaid services will impede and impair the
4 ability of the plaintiffs ILC and the statewide CFILC to carry out their purposes of enabling the
5 thousands of persons with disabilities who are the clients of the ILC or the clients of members of
6 the statewide CFILC to be able to achieve and continue independence, including equal access to
7 society and to all activities of society, outside of institutions; and, similarly, will also impede and
8 impair the ability of the plaintiff SF Gray Panthers to carry out its purposes of aiding the elderly
9 needy to obtain adequate medical care.⁵¹

10 **Conclusion on this sub-point**

11 It is facially manifest, and the evidence is overwhelming, that the elimination of the 9
12 Medicaid services will cause irreparable injury to millions of Medi-Cal recipients, – including the
13 two individual plaintiffs Beckwith and Dowling and the Medi-Cal beneficiaries who are served by
14 the four plaintiff organizations, (LifeLong Care, ILC, CFILC, and SF Gray Panthers).

15 5. **There is no defense that no appropriations have been enacted by the Legislature,
16 or that the courts may not, under Separation of Powers, compel the Legislature to
17 enact any appropriations in this case.**

18 These defense objections have been fully resolved against the defendants by *Dowling v.*
19 *Davis*, 19 F.3d 445 (9th Cir. 1994); *White v. Davis*, 108 Cal.App.4th 197, 212-216 (2002)⁵² and
20 *White v. Davis*, 30 Cal.4th 528 (2003), which held that payments to Medicaid providers are required
21 by federal law, even in the absence of any appropriations therefore by the Legislature.

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23 _____
24 ⁵⁰, and ¶11 Lynch Decl.

25 ⁵¹ See, ¶ 11 Favuzzi Decl.

26 ⁵² Ordered published by the Supreme Court in *White v. Davis* 30 Cal.4th 528, fn. 14,
(2003).

1 6. **There is also, to boot, a continuing State appropriation of \$2 billion to pay Medicaid**
 2 **providers, when there are no existing other state appropriations to pay Medicaid**
 3 **providers, out of which the defendants can easily comply with the court order**
 4 **which is requested in the case at bar.**

5 I.e., *White*, 108 Cal.App.4th at 212-216, holds that enacted continuing appropriations are
 6 valid even in the absence of any State budget.

7 In this respect there is in the case at bar, in any event, an existing continuing annual
 8 appropriation under Calif. Government Code § 15331.1 of a \$2 billion annual fund,⁵³ called the
 9 Medical Providers Interim Payment (MPIP) Fund, for each of the fiscal years 2009-2010 and 2010-

10 (The actual amount of the annually renewed continuing appropriation of Govt. Code
 11 § 15331.1 is \$1 billion; but to this is added the \$1 billion matching federal funds under the regular
 12 FMAP provision under 42 U.S.C. §§ 1396b(a)(1) and 1396d(b).)

13 **Conclusion:** Accordingly, by the above, there is no valid defense claim that there are no
 14 appropriations out of which to fund payment to providers of the 9 Medicaid services in question.

15 7. **Also, DHCS has not yet obtained approval by HHS of any amendment to the state**
 16 **Medicaid plan to eliminate the 9 optional Medicaid services. Hence there is no**
 17 **defense available to the defendants, to claim that the state Medicaid plan has already**
 18 **been amended to delete the 9 optional Medicaid services in question, from the state**
 19 **Medicaid plan.**

20 The fact that none of the 9 Medicaid services in question have been deleted from the state
 21 Medicaid plan filed with HHS is due to DHCS's practice of never filing any request to HHS for
 22 approval of any amendment to the state Medicaid plan, except by an *ex post facto* filing, after the
 23 cut or reduction of Medicaid services has already been commenced by DHCS.

24 In this latter respect, *see* the defendant Director's judicial admission of this practice at 73a

25 ⁵³ The \$2 billion continuing appropriation consists of \$1 billion of State funds from the
 26 State's General Fund, (subd. (a)(1) of Govt. Code § 16531.1), and \$1 billion of federal funds
 from the Federal Trust Fund maintained by the Controller, (subd. (a)(2) of Govt. Code 16531.1)
 under the Medicaid Act.

1 of Appendix of Petition for Writ of Certiorari filed by the Director in Case No. 08-12234,
 2 *Maxwell-Jolly v. Independent Living Center of Southern California, Inc.*, (*cert. den.*), in the
 3 U.S. Supreme Court.⁵⁴

4 8. **There is no valid defense that HHS is exclusively empowered by Congress to take**
 5 **such action which may be required to enforce the Stimulus Act.**

6 Such a claim was long ago disposed of by *Rosado v. Wyman*, 397 U.S. 397 (1970)
 7 and by the prior-cited Supremacy Clause cases of *ILC v. Shewry*, 543 F.3d 1050, *cert den.*;

8 *ILC v. Shewry*, 2008 WL3891211, (C.D.Cal.); and *CPhA v. Maxwell-Jolly*, 563 F.3d at 851-852;
 9 -- which decisions reiterate that persons threatened with injury from State action which is
 10 preempted, under the Supremacy Clause, by contrary federal law, are entitled to injunctive and
 11 declaratory relief.

12 9. **Also, *Rosado v. Wyman*, 397 U.S. 397 (1970), established that in cooperative**
 13 **state-federal programs to which the federal government contributes under the**
 14 **the Social Security Act, that participation by a State is purely voluntary; so**
 15 **that it is appropriate to order that the State officials perform the court's order to**
 16 **comply with the Social Security Act provision in question or, within a date specified**
 17 **by the court, cease accepting enhanced FMAP funds under the Enhanced FMAP**
 18 **Measure.**

19 **Part One:** *Rosado* ruled that AFDC beneficiaries were entitled, in a Supremacy Clause
 20 case, to declaratory and injunctive relief against New York for reducing benefits to AFDC
 21 beneficiaries contrary to benefit-setting standards of the Social Security Act § 402(a)(23). *Rosado*
 22 then specifically ordered the District Court, – should New York choose not to comply by the date

23 ⁵⁴ A copy of Pages 73a of this Appendix of the Director's Petition for Writ of Certiorari is
 24 set forth as **Exhibit I** of Plaintiffs' RJN.

25 **Also, please note** that in any event that, as part of the interlocutory and final relief
 26 requested to be ordered in the case at bar, that the Court may always order the Director of DHCS
 to take all steps necessary to amend the state Medicaid plan back again, so as to once again
 include the 9 Medicaid services in question; – (were it to become the case that HHS, eventually,
 approves any application of DHCS to amend the state Medicaid plan to delete the 9 Medicaid
 services in question, from the state Medicaid plan).

1 set by the District Court, – to “issue its order restraining the further use of federal monies pursuant
2 to the present statute.”

3 **Part Two:** *Rosado*, in so ruling, incidentally ruled that:

4 “We have considered and rejected the argument that a federal court is without power to
5 . . . prohibit the use of federal funds by the States in view of the fact that Congress has
6 lodged in the Department of HEW the power to cut off federal funds for noncompliance
7 with statutory requirements. We are most reluctant to assume Congress has closed the
8 avenue of effective judicial review to those individuals most directly affected by the
9 administration of its program. [citations omitted].” 397 U.S. at 420.

10 Also, Justice Douglas, concurring, pointed out, **first**, that the fact that a State may choose to
11 refuse to comply with the federal requirements **at the cost of losing federal funds** is, of course, a
12 risk that any welfare plaintiff takes; and **second**, that where a suit involves an alleged conflict
13 between a state regulation and federal law, **neither the United States nor HEW is a necessary**
14 **party** to such an action, (in that the wrong alleged is the State's failure to comply with federal
15 requirements in the use of federal funds, not, HEW's).

16 Also, the above *ILC* and *CPhA* decisions implicitly rejected any State claim that HHS and
17 the United States are necessary parties to this type of Social Security Act litigation.

18 **C. The balance of hardships tips strongly in Plaintiffs' favor.**

19 The State suffers no financial loss because it is receiving \$3.76 billion extra federal funds
20 per year under the Enhanced FMAP Measure out of which to pay the small amount of \$129.4
21 million to continue the 9 Medicaid services, which is a function for which the State accepted the
22 extra \$3.76 billion annual federal subsidy to accomplish. On the other hand, millions of Medicaid
23 beneficiaries suffer. The balance of hardships is therefore all on the side of the plaintiffs.

24 **D. The public interest strongly favors granting relief.**

25 Finally, the public interest weighs heavily in favor of granting relief to plaintiffs. First, the
26 injunctive relief carries out Congress' express purposes to protect and maintain and not cut

1 Medicaid services in a state. And secondly, “Our society as a whole suffers when we neglect the
2 poor, the hungry, the disabled.” *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983).

3 **SUMMARY AND RELIEF REQUESTED**

4 For the foregoing reasons, plaintiffs' motion for preliminary injunction should be granted.

5 Dated: June 30, 2009

6 Respectfully submitted,

7 LYNN S. CARMAN
8 JESSIE M. SANDOVAL

9 By /s/ Lynn S. Carman
10 Attorneys for Plaintiffs

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