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9  
 10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 12 OAKLAND DIVISION

13  
 14 **DAVID OSTER, et. al.,**

15 Plaintiffs,

16 v.

17 **WILL LIGHTBOURNE, Director of the**  
 18 **California Department of Social Services;**  
**TOBY DOUGLAS, Director of the**  
 19 **California Department of Health Care**  
 20 **Services; CALIFORNIA DEPARTMENT**  
 21 **OF HEALTH CARE SERVICES; and**  
**CALIFORNIA DEPARTMENT OF**  
**SOCIAL SERVICES,**

22 Defendants.

CV 09-4668 CW

**DEFENDANTS' OPPOSITION TO  
 PLAINTIFFS' MOTION FOR A  
 PRELIMINARY INJUNCTION**

Date: January 19, 2012  
 Time: 2:00 p.m.  
 Dept: Courtroom 2, 4th Floor  
 Judge: Honorable Claudia Wilken  
 Date Filed: October 1, 2009

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## INTRODUCTION

Plaintiffs ask this Court to preliminarily enjoin a state statute reducing In-Home Support Services (IHSS) benefits which is the *antithesis* of an across-the-board benefits slashing based on inflexible and arbitrary eligibility criteria. Deeply cognizant of its obligation to keep IHSS recipients safely in their homes, the California Legislature adopted SB 73, which employs thoughtful, nuanced, and highly individualized methods of identifying and exempting (or restoring hours to) IHSS recipients who would be at risk of out-of-home placement if their hours were reduced by 20%. Among other things, SB 73:

- Expressly exempts all IHSS recipients who also receive services under one of the State’s Home and Community Based Services Waivers<sup>1</sup> (and thus have a higher level of medical need) from any reduction in hours;
- Allows counties to pre-approve additional groups of IHSS recipients as exempt from the reduction in hours when they meet certain criteria;
- Provides all IHSS recipients who are neither exempt nor pre-approved with a highly individualized review process—including two independent levels of review—to seek restoration of their full hours (and to maintain currently authorized hours in the interim); and
- Does not use functional ranks or any other criteria which the Court previously determined to be problematic as a bar to having hours restored.<sup>2</sup>

<sup>1</sup> This fact alone is an important distinguishing factor from the recent Ninth Circuit decision in *M.R. v. Dreyfus*, No. 11-35026,--F.3d--, 2011 WL 6288173. Plaintiffs in that case were on all on waivers, which means that by definition, they needed the level of care provided in nursing or intermediate care facility. *Id.* at \*3. By contrast, SB 73 exempts all IHSS recipients on waivers, so no IHSS recipient needing that heightened level of care would be subject to a reduction in hours.

<sup>2</sup> Plaintiffs insist that functional ranks did limit eligibility for IHSS Supplemental Care (the individualized process for restoration of hours, which is discussed below) and that Defendants’ position to the contrary is a “litigation-inspired change.” See Docket 442 at 1. Plaintiffs are wrong; the language on pages 7-8 of the Defendants’ All County Letter (ACL) 11-81 implicitly gave county social workers discretion to look beyond the functional ranks to determine whether or not there is a serious risk of out-of-home placement. See Carroll Declaration (Carroll Decl.) ISO Opposition to Motion for a Preliminary Injunction, Ex. A, at 7-8. Nevertheless, to clear up any ambiguity in the ACL, Defendants are willing to provide clarifying guidance to the counties once the TRO is lifted and they are permitted to do so. Carroll Decl. at ¶ 9.

1 As Defendants will demonstrate below, because of this individualized administrative  
2 review process (called IHSS Supplemental Care), whether or not any individual plaintiff will  
3 suffer any injury cannot be determined at present. That question depends on innumerable  
4 contingencies, including whether and when IHSS recipients seek Supplemental Care and/or a fair  
5 hearing from the state, and what the outcomes of those processes are. Not only does the IHSS  
6 Supplemental Care process make this litigation unripe, but it also fatally undercuts both the  
7 likelihood of Plaintiffs suffering irreparable harm, and the likelihood of Plaintiffs succeeding on  
8 the merits of their claims. California has established a robust (yet flexible) process to  
9 determine—on a case-by-case basis—whether or not any IHSS recipient affected by the reduction  
10 in hours would be placed “at serious risk of out-of-home placement.” Plaintiffs must first seek  
11 relief in that administrative forum.

12 Accordingly, Defendants respectfully request that the Court deny Plaintiffs’ Motion for a  
13 Preliminary Injunction.

#### 14 **STATEMENT OF FACTS**

##### 15 **A. California’s Enduring Fiscal Crisis and the Mid-Year Budget Cuts**

16 California’s devastating and enduring fiscal crisis is well known. The 2011 Budget Act  
17 reduced expenditures by \$15 billion in order to address a \$26.6 billion budget gap. *See*  
18 Defendants’ Request for Judicial Notice (RJN), Ex. A (California 2011-12 State Budget  
19 Summary (2011 Budget)) at 3-4. To reduce expenditures by such a large amount, the State was  
20 forced to heavily cut spending on health and human services programs and education, which  
21 comprise the bulk of the State’s spending. *Id.* For example, the Legislature eliminated the Adult  
22 Day Health Care program and greatly reduced CalWorks grants. *Id.* The University of California  
23 and California State University systems absorbed cuts of 22% and 25%, respectively. *Id.* The  
24 State also laid off thousands of employees; reduced its inmate population by 25%; and eliminated  
25 twenty boards, commissions, task forces, and similar entities. *Id.* at 4.

26 California would have been forced to cut even deeper but for improved revenue forecasts.  
27 *Id.* The 2011-2012 budget projected revenue increases of \$4 billion, and avoided deeper cuts in  
28 light of that projection. *Id.* However, the budget also provided for mid-year cuts if the projected

1 revenue increases failed to materialize. *Id.* Thus, if mid-year revenues projections fell short by  
2 more than \$1 billion, an additional \$600 million in cuts to higher education, health and human  
3 services, and public safety would be implemented in January 2012. *Id.* The 20% reduction in  
4 IHSS authorized service hours are among these “tier 1” mid-year budget cuts. *Id.* at 5. If revenue  
5 projections were more than \$2 billion shy of the initial projections, then “tier 2” cuts, consisting  
6 of \$1.9 billion in education reductions, would be instituted. *Id.* These include shortening the  
7 school year by seven days; eliminating the home-to-school transportation program; and reducing  
8 community college apportionments. *Id.*

9 On December 13, 2011, the California Department of Finance forecast that revenue would  
10 fall short of the 2011-2012 budget forecast by approximately \$2.2 billion. *See* RJN, Ex. B (Dec.  
11 13, 2011 letter from the Department of Finance re 2011-12 Revenue Forecast/Determination  
12 (DOF Letter)), at 3. Given this revenue shortfall, the tier 1 cuts to higher education, health and  
13 human services, and public safety were implemented, including the 20% reduction in authorized  
14 IHSS service hours. *Id.* at 2. Most of the tier 2 spending reductions also were instituted,  
15 including the elimination of the home-to-school transportation program and reduction of  
16 community college apportionments. *Id.* The final tier 2 cut—shortening the school year by seven  
17 days—was triggered, but the full magnitude of that cut was averted because the revenue shortfall  
18 was only marginally above \$2 billion. *See* California Education Code § 46201.3(c). In short,  
19 California is now implementing nearly \$1 billion in mid-year budget cuts to a wide array of  
20 programs and services. *Id.*

21 Given the enormity of the spending reductions required by California’s fiscal emergency,  
22 cuts to health and human services were inevitable. Medi-Cal is the second largest general fund  
23 expenditure after K-12 education. Declaration of Toby Douglas ISO Defendants’ Opposition to  
24 TRO (Douglas Decl.), Docket No. 115, at ¶ 4. Currently, there are two only ways to reduce  
25 Medi-Cal expenditures: (1) the State can reduce payments to providers; or (2) the State can  
26 eliminate Medi-Cal coverage of optional services that California currently provides, but that  
27 federal law does not require. *Id.* at ¶ 5. Because IHSS is an optional service, California could  
28 eliminate it entirely consistent with the Medicaid Act, as it is in the process of doing with respect

1 to the Adult Day Health Care program. *Id.* at ¶ 8; 2011 Budget Act Summary, at 3-4. The  
2 California Legislature, however, chose a more focused approach to reducing IHSS expenditures:  
3 as discussed in greater depth below, the legislation challenged in this litigation (SB 73) exempts  
4 the most vulnerable IHSS recipients from *any* reduction in their IHSS hours, and provides a  
5 highly individualized review process for *all affected* recipients to partially or fully avoid  
6 reductions to their authorized hours.

### 7 **B. The IHSS Program**

8 Because the Court is already familiar with the basics of the IHSS program, only the most  
9 salient facts are summarized below. As the Court’s preliminary injunction Order explained,  
10 county social workers use a 5-point scale for individually ranking the functional abilities of each  
11 IHSS recipient in fourteen discrete areas. *See* Docket No. 198, at 3-4. There is a close  
12 relationship between an IHSS recipient’s functional ranks and the number of authorized hours for  
13 any particular service that he or she receives. This is because, by statute, most IHSS authorized  
14 services have “time guidelines” for each functional rank, and “the services shall be subject to the  
15 specified time guideline unless the recipient’s needs require an exception to the guideline.”  
16 CDSS Manual of Policies and Procedures (MPP) § 30-757.1(a); *see also* Cal. Welf. & Inst. Code  
17 § 12301.2 (requiring the establishment and creation of “hourly task guidelines and instructions to  
18 provide counties with a standard tool for consistently and accurately assessing service needs and  
19 authorizing service hours to meet those needs”). Moreover, counties must “use the statewide  
20 hourly task guidelines when conducting an individual assessment or reassessment of an  
21 individual’s need for supportive services.” Cal. Welf. & Inst. Code § 12301.2(b). As this Court  
22 previously noted, the very “purpose of the [functional] ranks was to help social workers  
23 determine with uniformity the number of hours of a particular service elderly and disabled  
24 individuals needed.” PI Order, Docket No. 198 at 5.

25 Though important, an IHSS recipient’s functional rank for a given task is not the “sole  
26 factor” in determining the amount of time a recipient needs for that task. MPP § 30-757.1(a)(1).  
27 Social workers may also consider: (1) the recipient’s living environment; and (2) the recipient’s  
28 fluctuation in needs due to daily variances in functional capacity (*i.e.*, that the recipient has “good

1 days” and “bad days”). *Id.* Although county social workers may authorize hours outside of the  
2 statewide guidelines based on a recipient’s individual level of need, approximately 70% of all  
3 authorized hours fall within the guidelines. Carroll Decl. at ¶ 6.

#### 4 **C. ABX4 4 Reductions to IHSS and Prior Litigation**

5 In July 2009, the California Legislature passed ABX4 4. *See* Docket No. 198 at 7. That  
6 legislation required IHSS recipients to have a functional rank of at least four in any given  
7 category of domestic and related services to continue to receive services in that category, and to  
8 have a Functional Index (FI) score of at least 2.0 to continue receiving any IHSS services.<sup>3</sup> *Id.*  
9 Individuals who were authorized for either protective supervision or paramedical services were  
10 exempt from the cuts. *Id.* On October 23, 2009, this Court issued a Preliminary Injunction  
11 enjoining Defendants from implementing any changes to the IHSS program pursuant to ABX4 4.  
12 *Id.* at 29-31. In its Preliminary Injunction Order, the Court ruled on the likelihood of success of  
13 Plaintiffs’ challenges to that prior legislation under the Medicaid Act, Americans with Disabilities  
14 Act (ADA), Rehabilitation Act (RA), and federal Due Process Clause. *Id.*

15 Defendants appealed that Order. *See* Ninth Circuit Case No. 09-17581, Docket No.  
16 7178639 (Dec. 29, 2009). The Ninth Circuit then requested supplemental briefing on whether the  
17 named plaintiffs and the association plaintiffs have standing to pursue their Due Process,  
18 Medicaid Act, ADA and RA claims. *See* Appellate Docket Nos. 68, 73-1, 75-1, 76. The appeal  
19 has been fully briefed and argued before the Ninth Circuit. However, the Ninth Circuit withdrew  
20 submission and deferred decision pending the United States Supreme Court’s decision in the  
21 consolidated appeals *Douglas v. Indep. Living Ctr. of S. Cal., et al.*, No. 09-958 *et al.*, which  
22 address whether Medicaid recipients and providers may maintain a cause of action under the  
23 Supremacy Clause to enforce sections of the Medicaid Act that do not reflect unambiguous  
24 Congressional intent to provide for private enforcement. *See* Docket No. 311. The Supreme  
25 Court is expected to rule within the next few months.

26 In light of the injunctions issued by this Court, the California Legislature suspended the

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27 <sup>3</sup> The Functional Index is not utilized in any way under SB 73’s hours reduction.  
28

1 ABX4 4 IHSS reductions until July 1, 2012, to allow the litigation to reach a final result. Cal.  
2 Welf. & Inst. Code §§ 12309(i) & 12309.2(e). ABX4 4 will be implemented after July 1, 2012  
3 only if the courts have upheld its validity. *Id.*

#### 4 **D. SB 73**

5 As discussed above, California passed a FY 2011-2012 budget which reduced expenditures  
6 by \$15 billion, but which avoided making even deeper cuts to education and social services with  
7 the hope that increased revenue projections would cover the State's multi-billion dollar budget  
8 gap. 2011 Budget Act Summary at 3-4. However, if revenue projections fell short by mid-year,  
9 under SB 73, the California Department of Social Services (the Department) would be required to  
10 "implement a 20-percent reduction in authorized hours of service" for IHSS recipients, which  
11 would become effective on January 1, 2012. Cal. Welf. & Inst. Code § 12301.07(a)(1).

12 This new, 20% reduction, is not an across-the-board cut. To the contrary, the statute  
13 exempts, outright, certain IHSS recipients from the hours reduction who would be at "at serious  
14 risk of out-of-home placement unless all or part of the reduction is restored." Cal. Welf. & Inst.  
15 Code §§ 12301.07(a)(5), (b)(1), (e), (f). And, the statute allows additional groups of recipients,  
16 and any recipient to avoid having their hours reduced if it would place them at serious risk of out-  
17 of-home placement.

#### 18 **1. SB 73 Exempts the Most Vulnerable IHSS Recipients from Any** 19 **Reduction in Hours**

20 There are several statutory carve-outs to protect the most vulnerable IHSS recipients from a  
21 reduction in their authorized service hours. First, the statute expressly exempts all IHSS  
22 recipients who also receive services under one of the State's Home and Community Based  
23 Services Waivers, which includes the: (1) AIDS waiver; (2) Home and Community Based  
24 Services for the Developmentally Disabled waiver; (3) In-Home Operations waiver; (4)  
25 Multipurpose Senior Services Program waiver; and (5) and the Nursing Facility/Acute Hospital  
26 waiver. Cal. Welf. & Inst. Code § 12301.07(a)(5). Over 42,000 IHSS recipients are on one of  
27 these waivers and therefore are statutorily exempt from this reduction in IHSS service hours.  
28 Carroll Decl. at ¶ 7.

1 Second, the statute provides for the Department to develop a process by which county  
2 workers may pre-approve "IHSS Care Supplements" that partially or fully restore IHSS hours to  
3 certain recipients who otherwise would be at serious risk of out-of-home placement (e.g.,  
4 institutionalization). Cal. Welf. & Inst. Code § 12301.07(b); Carroll Decl., Ex. A at 7 of 20.<sup>4</sup>  
5 Eligible recipients include those whom the Department and the counties determine "would be  
6 categorically at serious risk of out-of-home placement as a result of the reduction and who  
7 otherwise would be granted full restoration of their reduced hours." Carroll Decl., Ex. A at 5.  
8 Similar to IHSS recipients on waivers, the pre-approval process exempts IHSS recipients from  
9 any reduction in hours without any action being required on the part of qualifying recipients. *Id.*

10 After consultation with the counties and with stakeholders, the Department initially agreed  
11 to pre-approve for exemption all IHSS recipients who are either: (1) assessed for the statutory  
12 maximum number of hours; (2) assessed for protective supervision; or (3) assessed with a  
13 functional rank of 5 in any one of four categories involving essential daily functions.<sup>5</sup> Carroll  
14 Decl., Ex. A, at 5. The Department has subsequently added a fourth pre-approval category: all  
15 IHSS recipients who also receive Early and Periodic Screening, Diagnostic, and Treatment  
16 (EPSDT) services. Carroll Decl. at ¶ 8. These are IHSS recipients under the age of 21. *Id.*  
17 Therefore, approximately 66,000 IHSS recipients—roughly 15%—are completely exempt from  
18 the hours reduction because they are on a waiver or they meet one of the pre-approval criteria. *Id.*  
19 These IHSS recipients will receive a letter saying "you are exempt from this reduction" and  
20 "[y]our authorized hours will NOT be reduced." *Id.* at Ex. A at 19. They will not receive a  
21 notice of action that their hours will be reduced. *Id.* at Ex. A at 6.

## 22 2. Notices of Action for IHSS Recipients Potentially Affected by the 23 Hours Reduction

24 All remaining IHSS recipients (i.e., those not on a waiver or pre-approved) are required by  
25 statute to be mailed a notice informing them of the hours reduction at least fifteen days prior to

26 <sup>4</sup> For ease of reference, the page numbers to this exhibit (ACL 11-81) follow the page  
numbers in the ECF header at the top right hand corner of the document (e.g. Page 7 of 20).

27 <sup>5</sup> These categories are: (1) Inside Mobility; (2) Bowel, Bladder and Menstrual or having  
28 authorized Paramedical Services for catheter or colostomy care; (3) Transfer or authorized  
Paramedical Services for bed sore care; and (5) Eating.

1 the reduction going into effect. Cal. Welf. & Inst. Code § 12301.07(c). Fifteen days notice is  
2 five days longer than the minimum amount of notice required by federal law. 42 C.F.R.  
3 § 431.211. The Department must translate the notice of action into all languages spoken by a  
4 substantial number (currently considered 5%) of IHSS recipients statewide, pursuant to  
5 Government Code section 7295.2. *Id.*; *see also* Carroll Decl., Ex. A at 5. In accordance with this  
6 requirement, the Department translated the notice of action into Spanish, Chinese, and Armenian.  
7 *See* Carroll Decl., Ex. A, at 15-17. Counties are required by state law to provide  
8 bilingual/interpretive services and written translations to other non-English or limited-English  
9 speaking populations. Carroll Decl., Ex. A at 5.

10 The notice of action explains that: “[i] you believe that the 20-percent reduction in your  
11 authorized service hours puts you at serious risk of out-of-home placement, you can ask for IHSS  
12 Supplemental Care.” Carroll Decl., Ex. A at 13. “If the county determines that you are at serious  
13 risk of out-of-home placement, your service hours may be partially or fully restored.” *Id.*

14 Recipients may avoid any loss of hours while their request for Supplemental Care, and any  
15 review of their Supplemental Care determination, are pending. As the notice explains: “If you  
16 ask for Supplemental Care within 15 days of receiving this notice or mail it to the county  
17 postmarked no later than January 3, 2012,<sup>6</sup> the reduction in your service hours will not go into  
18 effect and you will continue to get the same number of authorized service hours you have been  
19 getting until the county determines if you are at serious risk of out-of-home placement.” *Id.* It  
20 also informed the recipients generally that they must return the IHSS Supplemental Care form by  
21 March 1, 2012. *Id.* (emphasis original). The notice informs the recipient that the “county will  
22 send you a notice telling you if your application for IHSS Supplemental Care has been approved  
23 or denied” and that if the recipient disagrees with the county’s decision, “you can request a state  
24 hearing on that decision.” *Id.* The back of the notice includes an information sheet titled  
25 “RIGHT TO REQUEST A STATE HEARING” and explains the recipient’s state hearing rights.

26 \_\_\_\_\_  
27 <sup>6</sup> The January 3, 2012 and March 1, 2012 dates for seeking supplemental care (while  
28 maintaining current authorized hours under the former date) would of course be moved if the  
notices are mailed at a later date.

1 *Id.* at 14.

2 **3. IHSS Supplemental Care Applications**

3 All IHSS recipients who receive a notice that their hours will be reduced by 20% may  
4 complete an IHSS Supplemental Care application seeking restoration of their hours. Cal. Welf. &  
5 Inst. Code § 12301.07(c); Carroll Decl., Ex. A at 13. The one-page “Application for  
6 Supplemental Care” is included with the notice of action of the hours reduction. Carroll Decl., Ex.  
7 A, at 18. The application form re-states (**in bold**) the January 3, 2012 application deadline for  
8 preventing the reduction in hours from going into effect until after the county’s determination. *Id.*  
9 After that deadline, recipients would have nearly two more months to apply for Supplemental  
10 Care, but their reduction in hours would go into effect pending that determination. *Id.* Applicants  
11 are given space on the form to explain, in their own words, “how the 20-percent reduction in your  
12 authorized hours would put you at serious risk of out-of-home placement.” *Id.* They may attach  
13 another page if they need additional space for their explanation. *Id.*

14 Counties assess Supplemental Care applications in the first instance using a Supplemental  
15 Care worksheet provided by the Department. Carroll Decl., Ex. A at 20. The worksheet is based  
16 on a previously-used screening tool which has been specifically modified to “address individually  
17 both physical or cognitive impairments in determining whether an individual would be at serious  
18 risk of out-of-home placement.” *Id.* at Ex. A at 4. The worksheet utilizes objective indicia from  
19 a recipient’s case file, including functional ranks in certain categories, to assist the county social  
20 worker in determining whether the recipient has physical or cognitive impairments that put him or  
21 her at serious risk of out-of-home placement with reduced hours. *Id.* at 20.

22 Although the Supplemental Care worksheet uses functional ranks to guide the assessment,  
23 those ranks are not dispositive for determining whether an applicant is at serious risk of out-of-  
24 home placement. Carroll Decl. at ¶ 9. If the functional rank criteria are met, the social worker  
25 should presume that the candidate is at serious risk of out-of-home placement and restore some or  
26 all of the authorized hours unless the social worker is satisfied that either: (1) re-arranging the  
27 applicant’s existing hours, or (2) finding an alternative resource to provide the necessary service,  
28 will eliminate the serious risk. *Id.*; *see also id.*, Ex. A at 20. Conversely, if the functional rank

1 criteria are not met, the county social worker still retains the discretion to restore some or all the  
2 hours if the worker believes that a reduction in hours would cause a serious risk of out-of-home  
3 placement. *Id.* at ¶ 9. After completing the worksheet, the county social worker’s mandate is to  
4 take “steps to alleviate any serious risk of out-of-home placement.” *Id.*, Ex. A at 8.

5 After making a final determination on a Supplemental Care application, the county social  
6 worker will send the applicant a revised notice of action (NOA) explaining whether or not some  
7 or all of the applicant’s IHSS hours will be restored. *Id.*; *see also* Cal. Welf. & Inst. Code  
8 § 12301.07(e). The revised NOA will also explain when the county action will go into effect,  
9 which under federal law is ten days after the notice is mailed. Carroll Decl. at ¶ 12; 42 C.F.R. §  
10 431.211. Finally, the county’s revised NOA will reiterate the applicant’s right to request a state  
11 fair hearing before the county action goes into effect, or within 10 days of receiving the notice of  
12 action, in order to prevent any reduction in hours pending the State’s final determination  
13 (assuming the recipient timely applied for Supplemental Care in the first place). Carroll Decl. at  
14 ¶ 12.

#### 15 4. State Fair Hearing

16 Any recipient who disagrees with the county’s determination regarding his or her need for  
17 IHSS supplemental care may request a fair hearing from the State “on that determination.” Cal.  
18 Welf. & Inst. Code § 12301.07(f). At a recipient’s fair hearing, the administrative law judge in  
19 the Department’s Hearings Division will consider all relevant factors pertaining to whether or not  
20 a recipient will be at serious risk of out-of-home placement if his or her IHSS hours are reduced.  
21 *See* Cal. Gov’t Code §§ 11425.10(a)(1), 11513; Carroll Decl. at ¶ 13; MPP § 22-045.5 (issues for  
22 consideration at the hearing are those “reasonably related to the request for hearing”). The Judge  
23 may consider the totality of the circumstances and is not constrained in any manner by a  
24 recipient’s functional ranks. *Id.*

#### 25 LEGAL STANDARD

26 “A plaintiff seeking a preliminary injunction must establish that he is *likely* to succeed on  
27 the merits, that he is *likely* to suffer irreparable harm in the absence of preliminary relief, that the  
28 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*

1 *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (emphasis added). “[A] preliminary  
2 injunction will not be issued simply to prevent the possibility of some remote future injury.” *Id.*  
3 at 22. Injunctive relief is an “extraordinary remedy” that may only be awarded upon a clear  
4 showing that the plaintiff is entitled to such relief. *Id.*

## 5 ARGUMENT

### 6 I. PLAINTIFFS LACK STANDING TO PURSUE ANY OF THEIR CLAIMS

7 Plaintiffs are seeking to enjoin SB 73 before it is determined whether or not they are  
8 categorically exempt from any hours reduction; before they have had the opportunity, if  
9 necessary, to submit a Supplemental Care application; before any such application has been  
10 accepted or denied; and before they have had an opportunity to request a fair hearing, if  
11 necessary. For these and related reasons described below, Plaintiffs lack standing to pursue their  
12 claims, and their claims are unripe. Because these are threshold issues, Defendants address them  
13 first.

#### 14 A. Named Plaintiffs Oster, Jones, C.R. and L.C. Lack Standing for Any of 15 Their Claims Because They are Exempt from SB 73’s Reduction in Hours

16 Named Plaintiffs Oster, Jones, C.R., and L.C. are exempt from SB 73’s reduction in hours.  
17 They will not suffer any injury in fact, and therefore lack standing to bring any claims in this  
18 litigation.

19 The Supreme Court has outlined three standing requirements which form the “irreducible  
20 constitutional minimum of standing”: (1) the plaintiff must have suffered an injury in fact, which  
21 is an invasion of a legally protected interest which is (a) concrete and particularized, and (b)  
22 actual or imminent; (2) there must be a causal connection between the injury and the conduct  
23 complained of such that the alleged injury is fairly traceable to the challenged conduct; and (3) it  
24 must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of*  
25 *Wildlife*, 504 U.S. 555, 560-61 (1992). Imminence requires the injury to be “*certainly*  
26 *impending*” in order to “reduce the possibility of deciding a case in which no injury would have  
27 occurred at all.” *Id.* at 564 n.2; *see also Addington v. U.S. Airline Pilots Ass’n*, 606 F.3d 1174,  
28 1179 (9th Cir. 2010) (“[A] litigant need not await the consummation of threatened injury to

1 obtain preventive relief. If the injury is *certainly* impending, that is enough.” (internal citations  
2 omitted)).

3 Named plaintiffs Oster, Jones, C.R., and L.C. are on waivers or fall within one of the pre-  
4 approval categories, and therefore are not be subject to any reduction of IHSS hours. Carroll  
5 Decl. at ¶ 15. Plaintiffs Oster and Jones are on developmental disability and AIDS waivers,  
6 respectively. *See id.* at ¶ . Plaintiffs L.C. and C.R. are minors who fall within the EPSDT pre-  
7 approval category. *Id.* These IHSS recipients will not only be completely exempt from any  
8 reduction in their IHSS authorized hours, but they will also receive a letter explicitly telling them  
9 that “you are exempt from this reduction” and “[y]our authorized hours will NOT be reduced.”  
10 *Id.*, Ex. A at 19. Thus, these four named plaintiffs cannot demonstrate injury-in-fact. *See Lujan*,  
11 504 U.S. at 560.

12 Plaintiff Oster acknowledges being exempt from SB 73’s hours reduction, but nevertheless  
13 asserts standing on account of his purported fear of *mistakenly* receiving a Notice of Action  
14 stating that he will be subject to a 20% IHSS hours reduction. *See Oster Decl.* at ¶ 7. Subjective  
15 fear that a bureaucratic error might occur—and that this hypothetical bureaucratic error would  
16 cause injury—is far too speculative to confer Article III standing. Such an unbounded view of  
17 Article III simply cannot be squared with *Lujan* and its progeny. These four named plaintiffs lack  
18 standing as to any of their causes of action.

19 **B. Because the Supplemental Care Application Provides for a Highly**  
20 **Individualized Review Process Which May Result in Hours Being Restored,**  
21 **the Remaining Individual Plaintiffs Do Not Have a Ripe Claim**

22 As detailed above, California is providing each IHSS recipient who would be adversely  
23 affected by SB 73’s reduction in authorized hours with a highly individualized review process—  
24 with two independent levels of review—to seek restoration of his or her full hours (and to  
25 maintain currently authorized hours in the interim). Cal. Welf. & Inst. Code § 12301.07(e), (f).  
26 Because any injury is contingent upon whether or not plaintiffs apply for IHSS Supplemental  
27 Care – and what the outcome of those applications are – plaintiffs currently do not have a ripe  
28 claim that this Court can consider.

“The ripeness doctrine rests, in part, on the Article III requirement that federal courts decide

1 only cases and controversies and in part on prudential concerns.” *Addington*, 606 F.3d at 1179.  
2 Constitutional ripeness often “coincides squarely with standing's injury in fact prong” and “can be  
3 characterized as standing on a timeline.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1122 (9th Cir.  
4 2009). The “basic rationale” of the doctrine is “to prevent the courts, through avoidance of  
5 premature adjudication, from entangling themselves in abstract disagreements over administrative  
6 policies, and also to protect the agencies from judicial interference until an administrative  
7 decision has been formalized and its effects felt in a concrete way by the challenging parties.”  
8 *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds by Califano v.*  
9 *Sanders*, 430 U.S. 99 (1977).

10 Two factors are considered in determining whether a case is ripe: (1) the fitness of the  
11 issues for judicial decision; and (2) the hardship to the parties of withholding court consideration.  
12 *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1211 (9th Cir.  
13 2006). Under the first prong, a question “is fit for decision when it can be decided without  
14 considering contingent future events that may or may not occur as anticipated, or indeed may not  
15 occur at all.” *Addington*, 606 F.3d at 1179; *see also Bova v. City of Medford*, 564 F.3d 1093,  
16 1096 (9th Cir. 2009). A claim that is contingent upon future events cannot be ripe because “if the  
17 contingent events do not occur, the plaintiff likely will not have suffered an injury that is concrete  
18 and particularized enough to establish the first element of standing.” *Bova*, 564 F.3d at 1096  
19 (citing *Lujan*, 504 U.S. at 560). A threatened injury must be “*certainly impending*.” *Addington*,  
20 606 F.3d at 1179. (emphasis original). Under the second prong, “a litigant must show that  
21 withholding review would result in direct and immediate hardship and would entail more than  
22 possible financial loss.” *Id.* at 1180; *see also Winter v. California Med. Review, Inc.*, 900 F.2d  
23 1322, 1325 (9th Cir. 1989).

24 The first ripeness factor strongly militates against this case being ripe. This is not a case  
25 where the existence of plaintiffs' claims turns solely on a pure issue of law; to the contrary,  
26 whether any individual plaintiff will suffer injury cannot be determined at present. The  
27 individualized IHSS Supplemental Care application process creates innumerable contingencies  
28 and individualized decisions affecting whether, and to what degree, any plaintiff might suffer

1 harm.

2 As an initial matter, plaintiffs who receive a notice that their hours will be reduced may or  
3 may not seek to have their IHSS hours restored through the Supplemental Care application  
4 process. Those IHSS recipients who seek Supplemental Care may or may not be presumptively  
5 at risk of out-of-home placement, depending on their functional ranks. *See* Carroll Decl., Ex. A,  
6 at 20. Applicants whose functional ranks indicate a serious risk of out-of-home placement are  
7 likely to have their hours restored, but it depends on whether the social worker can (1) re-arrange  
8 the IHSS recipient's hours to eliminate the serious risk of out-of-home placement; or (2) arrange  
9 for the recipient to receive services from an informal alternative resource. *Id.*

10 Supplemental Care applicants whose functional ranks alone do not indicate a serious risk of  
11 out-of-home placement may still present other risk factors to their county social worker, which  
12 may or may not convince the county social worker to restore their hours. Carroll Decl. at ¶ 9.  
13 Any IHSS applicant who is not satisfied with the county's initial determination on their  
14 Supplemental Care application may seek a fair hearing from the State on that determination. Cal.  
15 Welf. & Inst. Code § 12301.07(f). In all likelihood some—but not all—IHSS Supplemental Care  
16 applicants will exercise this right. Of the IHSS recipients who seek a fair hearing, they may or  
17 may not succeed in having their IHSS hours restored at that stage. But these are all contingencies  
18 which make the individual claims of every Plaintiff speculative at this stage, because it is unclear  
19 who will suffer an actual injury in the form of reduced IHSS hours and any accompanying harm.  
20 *See Addington*, 606 F.3d at 1180 (alleged breach of duty of fair representation not ripe because  
21 the union's collective bargaining agreement had not been ratified, so any potential injury to  
22 allegedly disadvantaged group of pilots was speculative).

23 The courts have regularly applied ripeness to bar plaintiffs' claims where potential injuries  
24 are purely conjectural because they turn on issues of fact that are subject to an individualized  
25 administrative review process. *See, e.g., N.Y.S. Ophthalmological Soc'y v. Bowen*, 854 F.3d 1379,  
26 1388 (D.C. Cir. 1988) (claim that prohibition on Medicare patients' employment of assistant  
27 cataract surgeon infringed on "liberty" rights was unripe where "it is not possible to glean from  
28 the face of the guidelines how each patient will fare," and where at least some patients would be

1 able to "appeal for an individualized review"); *Sumner H. v. Fukino*, No. 09-00047 SOM/BMK,  
2 2009 WL 1249306, at \*6-7 (D. Haw. 2009); *see also Valerie G. v. Wilson*, 12 F. Supp. 2d 1007,  
3 1016 (N.D. Cal. 1998) ("[A]n issue is not ripe for federal adjudication if a plaintiff has not  
4 applied for benefits sought through available administrative channels."), *aff'd*, 307 F.3d 1036 (9th  
5 Cir. 2002).

6 Thus, the Hawaii federal district court recently held that several Medicaid beneficiaries'  
7 challenges to a 15 percent cut in Home and Community-Based Services (HCBS) and Early  
8 Periodic Screening, Diagnosis, and Treatment (EPSDT) services were unripe precisely because  
9 those beneficiaries had not yet completed the individualized review and appeals process created  
10 by that State. *Sumner H.*, 2009 WL 1249306, at \*6-7.<sup>7</sup> By adhering to these requirements, the  
11 court may avoid "preempt[ing] and prejudg[ing] issues that are committed for initial decision to  
12 an administrative body." *CalPERS v. Marzion*, No. C 08-04806 CW, 2009 WL 513742, at \*6  
13 (Mar. 2, 2009) (Wilken, J.) (quoting *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 246  
14 (1952)).

15 Plaintiffs also cannot satisfy the second ripeness prong, that withholding judicial  
16 consideration will "result in direct and immediate hardship" on the Plaintiffs. *Winter*, 900 F.2d at  
17 1325. Every IHSS recipient who may lose hours under SB 73 is given an opportunity to preserve  
18 his or her currently authorized hours while seeking Supplemental Care to have those hours  
19 partially or fully restored on a permanent basis. This availability of unreduced benefits pending  
20 the processing of IHSS recipients' individualized administrative appeals supports that this case is  
21 not ripe for this Court's intervention. *N.Y.S. Ophthalmological Soc'y*, 854 F.3d at 1388 (claims  
22 were not ripe in light of individualized administrative review process where "proceeding through  
23 this approval application stage does not present patients with the dilemma of foregoing a benefit  
24 or risking sanctions"); *see also Valerie G.*, 12 F. Supp. 2d at 1016 (claims were unripe where

25 \_\_\_\_\_  
26 <sup>7</sup> The court specifically distinguished *Independent Living Center v. Shewry*, 543 F.3d 1050  
27 (9th Cir. 2008) on the basis that "[t]here was no question that the reduction [a 10% reduction in  
28 payments to providers] would be implemented, and [there was] no flexibility in its application,"  
whereas the 15% cut in Medicaid benefits "being applied to individuals in fact-specific ways"  
such that "Medicaid recipients were not all facing guaranteed cuts." *Id.* at \*5-6.

1 "plaintiffs have not yet applied for the available waivers from the requirements of [the challenged  
2 statute], which could eliminate their alleged harm").

### 3 **C. The Union Plaintiffs Lack Article III and Prudential Standing**

4 The Union Plaintiffs lack Article III standing as to all claims raised because they are  
5 pursuing their claims on behalf of their members who are IHSS *providers*, and not on behalf of  
6 any IHSS *recipients*. See TAC, ¶¶ 21-26 (all Union Plaintiffs<sup>8</sup> bring suit “on behalf of its  
7 members who will be injured if IHSS recipients (including minor children of members) lose  
8 eligibility and services”). Union Plaintiffs’ members are at most indirect and incidental  
9 beneficiaries of the IHSS program (by earning incomes as IHSS providers), which is insufficient  
10 to meet their burden of establishing the Article III requirements for associational standing.

11 “[A]n association has standing to bring suit on behalf of its members when: (a) its members  
12 would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are  
13 germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested  
14 requires the participation of individual members in the lawsuit.” *Hunt v. Wash. State Apple*  
15 *Adver. Comm’n*, 432 U.S. 333, 343 (1977). “The association must allege that its members, or any  
16 one of them, are suffering immediate or threatened injury as a result of the challenged action of  
17 the sort that would make out a justiciable case had the members themselves brought suit.” *Id.* at  
18 342.

19 First, the Union Plaintiffs have not met their burden of establishing that any of their  
20 members would otherwise have standing to sue in their own right. None of the Union Plaintiffs  
21 have identified any members who would experience “an immediate or threatened injury.” *Id.*  
22 They simply recite – without providing any evidentiary support<sup>9</sup> – the boilerplate that their

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23  
24 <sup>8</sup> The sole exception is Union Plaintiff SEIU State Council, who brings suit “on behalf of  
25 its affiliate local unions and the members of its affiliates.” TAC at ¶24. Presumably those local  
26 affiliates are then bringing suit on behalf of their members who are IHSS providers, creating an  
even more attenuated connection to any IHSS recipient who may lose hours under SB 73. SEIU  
State Council – like the other Union Plaintiffs – cannot establish Article III associational  
standing.

27 <sup>9</sup> Out of eighty or so declarations submitted by Plaintiffs, it does not appear that any were  
28 submitted by IHSS providers who are union members and who provide IHSS services for their  
minor children.

1 members “would have standing to sue in their own right.” TAC ¶¶ 21-26. But to even  
2 theoretically demonstrate that any particular IHSS *provider* will suffer an immediate injury, the  
3 Union Plaintiffs would need to show – at a minimum – that: (1) the IHSS recipient for whom the  
4 provider works is not exempt from SB 73’s hours reduction; (2) the IHSS recipient would not be  
5 able to have his or her hours restored through the Supplemental Care application process; (3) the  
6 IHSS provider would be unable to pick up additional hours of work from another IHSS recipient;  
7 and (4) the IHSS provider would be injured on account of the reduced hours authorized for the  
8 IHSS recipient(s) whom he or she works for. Union Plaintiffs have not met, and cannot meet, the  
9 first prong of the associational standing test.

10 Second, the interests Union Plaintiffs are seeking to protect in this case are not germane to  
11 the purpose of the unions. Unions advocate for better working conditions for their members by  
12 seeking better wages and benefits through the collective bargaining process. In this case, Union  
13 Plaintiffs represent third parties (IHSS providers) who are litigating to prevent the contraction of  
14 work in an industry they happen to work in. The State’s decision to reduce benefits under a  
15 health and human services program (IHSS) cannot reasonably be considered “germane” to the  
16 unions’ collective bargaining mandate on behalf of their members. *See, e.g., Local 186, Int’l*  
17 *Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Brock*, 812 F.2d 1235, 1239  
18 (9th Cir. 1987) (asserted right of a convicted felon to serve in union employment is not an interest  
19 germane to the union’s purpose).

20 Finally, the Union Plaintiffs lack standing because the claims asserted and relief requested  
21 require the participation of the individual union members in the lawsuit (at a minimum, at least  
22 one named plaintiff who has standing and is similarly situated to the rest of the purported class).  
23 *See Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999) (en banc) (injunctive  
24 relief requires demonstration of an injury to a named plaintiff).

25 In addition, two separate prudential standing doctrines also bar the claims of the Union  
26 Plaintiffs. First, they are impermissibly attempting to rest their claims entirely on the alleged  
27 rights or interests of third parties—IHSS recipients. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct.  
28 2197, 2205, 45 L. Ed. 2d 343 (1975) (“the plaintiff generally must assert his own legal rights and

1 interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”); *see*  
2 *also Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*,  
3 454 U.S. 464, 474 (1982) (same). Second, the Union Plaintiffs’ interest in maximizing the hours  
4 available to IHSS providers is not within “the zone of interests to be protected or regulated by the  
5 statute or constitutional guarantee in question.” *Valley Forge*, 454 U.S. at 475. The *raison d’etre*  
6 of IHSS is to help the aged, poor, and disabled avoid out-of-home placement by remaining longer  
7 in their homes with supportive services. The creation and preservation of IHSS provider jobs is  
8 nowhere near that “zone of interests” that are regulated and protected by the ADA, RA, or any of  
9 the other federal authorities at issue.

10 Under both Article III and prudential standing precedents, the Union Plaintiffs lack  
11 standing as to any cause of action.

## 12 **II. PLAINTIFFS CANNOT SHOW THAT THEY ARE LIKELY TO SUFFER IRREPARABLE** 13 **HARM**

14 For at least three reasons, Plaintiffs cannot show that they are “*likely* to suffer irreparable  
15 harm in the absence of preliminary relief.” *Winter*, 555 U.S. at 20. First, as detailed above, if SB  
16 73’s hours reduction places a recipient at serious risk of out-of-home placement, those hours can  
17 be restored through the individualized Supplemental Care application process. Second, there is  
18 some flexibility in the manner in which IHSS hours are authorized such that some IHSS  
19 recipients can absorb a 20% reduction in their authorized hours without being placed at risk of  
20 institutionalization. Third, the four named plaintiffs who are potentially subject to a reduction in  
21 their authorized IHSS hours under SB 73 fail to meet their burden of showing that they would be  
22 at risk of institutionalization if forced to absorb a 20% reduction in their hours, and therefore  
23 injunctive relief may not issue.

### 24 **A. IHSS Authorized Hours Do Not Reflect the Bare Minimum Number of** 25 **Hours Needed to Avoid Institutionalization**

26 Plaintiffs’ core irreparable harm argument is that “there is no room to cut” IHSS hours  
27 because “[e]ach authorized hour is necessary to keep vulnerable recipients safe at home.”  
28 Plaintiffs’ MPA ISO Application for a TRO (TRO App.), at 20; *see also* TRO App. at 16 (“In

1 most cases, there is no appropriate choice because every authorized hour is needed.”).

2 Plaintiffs’ contention that every authorized hour is needed to prevent institutionalization is  
 3 overstated.<sup>10</sup> In considering how many hours a recipient needs for any given task, county social  
 4 workers first use the hourly guidelines set by the recipient’s functional rank. *See* MPP § 30-  
 5 757.13 et seq. For example, the hourly guidelines for bathing, oral hygiene, and grooming are as  
 6 follows: 0.5-1.92 (Rank 2), 1.27-3.15 (Rank 3), 2.35-4.08 (Rank 4), 3.00-5.10 (Rank 5). *Id.*  
 7 These hourly guidelines are often relatively broad, which provides the social worker with a  
 8 degree of latitude in authorizing hours.

9 Further, in determining how many service hours to authorize, county social workers may  
 10 depart from these guidelines giving consideration to: (1) the recipient’s living environment, and  
 11 (2) the recipient’s fluctuation in needs due to daily variances in functional capacity (*i.e.*, that the  
 12 recipient has “good days” and “bad days”). MPP § 30-757.1(a)(1). Thus, a social worker may  
 13 authorize more hours to a recipient by assuming the worst case scenario (a “bad day”), and by  
 14 considering the circumstances of a recipient’s living environment. Given the flexibility and  
 15 discretion inherent in the hourly guideline range and consideration of these additional factors,  
 16 some IHSS recipients could absorb a 20% reduction in IHSS hours without being placed at  
 17 serious risk of out-of-home placement.

18 **B. The Named Plaintiffs Have Not Met Their Burden of Showing That They**  
 19 **are Likely to Be Irreparably Harmed Because of a Reduction in Hours**

20 Plaintiffs cannot obtain injunctive relief without a clear showing that a named plaintiff is  
 21 likely to suffer irreparable harm. *Hodgers-Durgin*, 199 F.3d at 1045 (“system-wide injunctive  
 22 relief is not available based on alleged injuries to unnamed members of a proposed class.”) The  
 23 four named plaintiffs who are exempt from the 20% reduction (Oster, Jones, C.F. and L.C.) will

24 \_\_\_\_\_  
 25 <sup>10</sup> As an aside, this argument undercuts Plaintiffs’ contention that functional ranks do not  
 26 reasonably measure need because most services have “time guidelines” for each functional rank,  
 27 and 70% of authorized hours fall within the specified time guideline. MPP § 30-757.1(a); Carroll  
 28 Decl. at ¶ 6. It is logically inconsistent to assert that all hours authorized for a service are  
 necessary to prevent out-of-home placement, but that the functional rank which provided the  
 guideline for those same authorized hours does not reflect a recipient’s need or relative risk of  
 out-of-home placement.

1 suffer no reduction in their IHSS hours as result of SB 73, and therefore have no viable claim  
2 under the ADA, Medicaid Act or Due Process Clause. Moreover, the four named plaintiffs who  
3 are not exempt from the reduction in hours fail to meet their burden of showing that they are  
4 *likely* to be institutionalized by a 20% reduction in their IHSS hours.

5 First, plaintiffs have submitted no evidence with regard to Ms. Sheppard, and therefore  
6 there is no basis to determine that she is likely to suffer irreparable harm from a 20% reduction in  
7 her IHSS hours. The other three named plaintiffs, Ms. Stern, Ms. Hylton and Mr. Thurman, have  
8 failed to make any credible showing that they are at risk of irreparable harm. Their purported  
9 evidence consists of declarations replete with conjecture and speculation.<sup>11</sup> For example,  
10 Ms. Hylton, who receives 45.3 hours per month, asserts that if her hours are reduced by 20%, that  
11 nine hour reduction “can mean losing my own home and independence and going into a nursing  
12 home or a board and care facility.” Hylton Decl. ¶ 8. She offers no causal link—not even a  
13 highly attenuated one—between the loss of nine hours and losing her home. Ms. Hylton also  
14 claims that she “will definitely be evicted” if her apartment is not kept clean. *Id.* at ¶ 10. But she  
15 offers no explanation as to why she would be evicted for a dirty apartment, nor does she explain  
16 how the 1.2 hours per month in domestic services that she would lose with a 20% cut would  
17 prevent her from keeping her apartment clean enough.

18 Ms. Stern claims that a 20% cut could force her into a nursing home because she could  
19 develop open lesions on her legs, which could become infected, and then she could end up in a  
20 hospital. Stern Decl. ¶ 22. Not only is this chain of events highly speculative, but Ms. Stern does  
21 not offer a declaration from her physician to corroborate this risk or its likelihood of occurring.  
22 Ms. Stern also states that if she cannot “reliably stay clean, have a hygienic home, get to my  
23 medical appointments, eat a balanced diet, and receive necessary personal care to manage my  
24 health concerns, I may have no choice but to go to a nursing home.” *Id.* She does not offer any  
25 explanation as to how a 20% cut in hours will cause all of these events to occur, or specify how  
26 they would force her into a nursing home.

27 <sup>11</sup> See generally Defendants’ Objections To Evidence Filed By Plaintiffs in Support of  
28 Their Motion for a Preliminary Injunction, filed concurrently herein.

1 Finally, plaintiffs have failed to establish that Mr. Thurman is at risk of institutionalization  
2 if his hours are reduced. Mr. Thurman receives 31.7 hours a month and lives with his wife who  
3 receives 39.81 hours per month. (The average recipient currently receives 85 hours per month.)  
4 Mr. Thurman claims that if their hours are reduced by 20% their provider will only come four, not  
5 five days a week, and they will not be “safe at home, and are likely to end up in a hospital or  
6 nursing home.” Thurman Decl. ¶ 6. There is no explanation as to why he would be less safe at  
7 home other than the fact that he would be left alone longer, but this reason does not appear to  
8 relate to any IHSS services which he receives. *Id.* Also, Mr. Thurman has not submitted a  
9 declaration from his provider confirming that she would only come four days per week, nor has  
10 he submitted any evidence from a medical provider that they would be at serious risk of  
11 hospitalization or admission to a skilled nursing facility if his provider showed up one fewer day  
12 per week.

13 In any event, so long as plaintiffs timely apply for Supplemental Care, they can avoid any  
14 reduction in hours that would place them at serious risk of out-of-home placement, as determined  
15 on an individual basis by social workers specifically trained to conduct IHSS needs assessments.

16 For these reasons, none of the named plaintiffs have demonstrated or can demonstrate that  
17 he or she is “likely” to suffer irreparable harm absent a preliminary injunction.

### 18 **III. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS**

#### 19 **A. Plaintiffs are Not Likely to Succeed on Their Due Process Claim**

20 CDSS’ notices meet the requirements of due process because they will advise recipients in  
21 plain, non-technical language: (1) about AB 73’s 20% reduction in benefits and Supplemental  
22 Care determinations; (2) the reasons for and the law supporting the reduction and Supplemental  
23 Care determinations; and (3) the right to request a hearing and the circumstances under which aid  
24 will be continued if Supplemental Care or further review is requested. Plaintiffs’ concern that the  
25 notices fail to provide essential information is based on a misunderstanding of the Supplemental  
26 Care process and of the content of county-issued notices regarding Supplemental Care  
27 determinations. Plaintiffs’ other claims regarding the clarity of the notices, foreign language  
28 translations, and alternative formats are unfounded and do not, in any event, give rise to a due

1 process violation. Thus, Plaintiffs are not likely to succeed on the merits of their due process  
2 claims.

### 3 **1. CDSS Notices Meet the Requirements of Due Process**

4 Due process requires that recipients receive “timely and adequate notice” of a reduction or  
5 termination of their benefits and the reasons therefore, and be given a reasonable opportunity to  
6 challenge the reduction or termination if factual determinations are at issue. *Goldberg v. Kelly*,  
7 397 U.S. 254, 262-69 (1970); *see also Garrett v. Pruet*, 707 F.2d 930, 931-32 (6th Cir. 1983).

8 Consistent with these requirements, CDSS regulations define “adequate notice” as:

9 A written notice informing the claimant of the action the county intends to take, the  
10 reasons for the intended action, the specific regulations supporting such action, an  
11 explanation of the claimant’s right to request a state hearing, and if appropriate, the  
12 circumstances under which aid will be continued if a hearing is requested.

13 MPP § 22-001(a)(1)(a); *see also* 45 C.F.R. § 205.10(a)(3) & (a)(4)(i)(B) (virtually identical  
14 requirements).

15 CDSS’s notices here meet each of these requirements. The notices regarding the SB 73  
16 reductions advise IHSS recipients in concise, non-technical language about the 20% reduction  
17 and the statute on which the reduction is based. The accompanying notice of action will advise  
18 each recipient of the number of hours they are authorized for presently and how many they will  
19 have if the reduction is applied. The notices advise recipients of the right to apply for  
20 Supplemental Care, and the right to request a hearing to challenge county Supplemental Care  
21 determinations. Finally, the notices advise recipients that as long as they submit a Supplemental  
22 Care application within fifteen days of receiving the notice, and that if a state hearing is requested  
23 before the effective date of the action their currently authorized hours may continue until the  
24 hearing. Carroll Decl., Ex. A at 11-12.

25 Notices issued by the counties regarding Supplemental Care decisions will identify in plain  
26 language the basis of the county’s determination, the right to request a hearing, and that recipients  
27 may continue to receive IHSS at the same level if they request a hearing before the effective date  
28 of the change in hours. Carroll Decl., ¶ 12 [notices will identify effective date] and Ex. A at 10-  
11. Accordingly, CDSS’s notice meet the fundamental requirements of due process.

1                   **2. Sufficient Measures are in Place to Ensure That Recipients Can**  
2                   **Understand and Act on the Notices, and Plaintiffs' Critique does not**  
3                   **Demonstrate Any Due Process Violation**

4                   Plaintiffs' challenges to the comprehensibility and format of the notices lack merit and fail  
5                   to demonstrate any due process violation. Moreover, CDSS has issued regulations requiring the  
6                   counties to ensure effective communication of notices with all recipients or their authorized  
7                   representatives.

8                   Plaintiffs, misapplying the context and holdings of *Jones v. Flowers*, 547 U.S. 200, 221  
9                   (2006) and *Covey v. Town of Somers*, 351 U.S. 141 (1956) contend that the notices must be  
10                  tailored to be understood by recipients with "mental illnesses, cognitive impairments or  
11                  dementia." TRO App. at 27. However, it would be nonsensical to construe due process as  
12                  requiring notices to be understandable by individuals who are incompetent, and no law supports  
13                  such a contention. *Flowers* and *Covey* are inapposite. These opinions deal with the *manner* in  
14                  which notice is given, not its content.<sup>12</sup> While the Supreme Court has stated that the "opportunity  
15                  to be heard" must be tailored to the "capacities and circumstances" of recipients, it did not hold  
16                  that the *content* of any notice must be so tailored. *Goldberg*, 369 U.S. at 269-70 (holding that  
17                  welfare recipients must be allowed to present oral argument and cross-examine witnesses in  
18                  contesting adverse action). CDSS has, in any event, ensured that recipients who cannot  
19                  responsibly manage their own affairs can designate a representative or have one designated for  
20                  them to receive notices regarding their benefits and take action on their behalf. See MPP § 22-

21                  Plaintiffs also contend that the notices violate due process because they are not written  
22                  sufficiently clearly, and will be confusing to recipients. But due process does not require perfect  
23                  notice. Rather, notice need only be sufficient to apprise the recipients of the action being taken,  
24                  the reasons or basis for it, and their right to challenge that action. See *Goldberg*, 397 U.S. at 262-

25                  <sup>12</sup> The Supreme Court in *Jones* held simply that the government failed to provide adequate  
26                  notice before selling a property owner's real property in a tax sale when it was aware that the  
27                  notice mailed to the property owner had been returned unclaimed and it made no further attempts  
28                  to contact him. 547 U.S. at 223-39. Similarly, the Court held in *Covey* that provisions regarding  
                    the manner of providing notice of a tax foreclosure did not provide due process where the  
                    property owner was known to be incompetent and lacked a guardian. 351 U.S. at 146-47.

1 69. A fair reading of the notices demonstrates that they are written plainly and without technical  
2 or bureaucratic jargon, and sufficiently advise recipients of those matters that due process  
3 requires. That some recipients allege that they are confused about some aspects of the novel  
4 Supplemental Care process and their subsequent appeal rights does not establish that the notices  
5 are deficient, much less that they violate recipients' due process rights.

6 Contrary to Plaintiffs' assertion, neither state guidance nor regulation, much less due  
7 process, impose any "reading level" requirements with respect to Defendants' notices.  
8 Accordingly, CDSS has not "ignored" any such requirements. Plaintiffs fail to identify any  
9 constitutional violation based on the alleged reading level of the notices.

10 While Plaintiffs complain that the notices are not being translated into any foreign  
11 languages beyond Spanish, Armenian, and Chinese, or provided in alternative formats for  
12 recipients who are blind or vision impaired, they fail to identify any authority imposing these  
13 translation or alternative format requirements as a matter of due process or under the ADA. None  
14 exists. To the contrary, the Ninth Circuit and other courts have rejected the argument that notices  
15 regarding government benefits must be translated into foreign languages. *See Carmona v.*  
16 *Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (holding that due process did not require notices  
17 regarding unemployment benefits to be sent in Spanish); *see also Soberal-Perez v. Heckler*, 717  
18 F.2d 36, 43 (2d Cir. 1983) ("Notice in the English language to social security claimants residing  
19 in the United States is "reasonably calculated" to apprise individuals of the proceedings.");  
20 *Guerrero v. Carleson*, 9 Cal.3d 808, 810-14 (1973) *cert. denied sub nom. Guerrero v. Swoap*, 414  
21 U.S. 1137 (1974) (holding that issuance of welfare termination notices only in English did not  
22 violate due process). The same principles underlying these decisions apply equally to Plaintiffs'  
23 claims that notices must be provided in alternative formats for the vision impaired.

24 CDSS has translated the notice of the SB 73 reductions in those languages required by state  
25 law, and each county is required to provide interpreter assistance, and written translations of  
26 notices issued by the county, in additional languages to the extent required by state law. Carroll  
27 Decl., Ex. A, at 5; Cal. Gov't Code § 7295.2. Further, CDSS has enacted regulations to ensure  
28 that persons with disabilities, including recipients who are blind or vision impaired, may receive

1 assistance from the counties in understanding communications with applicants and recipients.  
2 *See, e.g.*, MPP §§ 10-110.3 (requiring counties to designate staff member to assist the blind); §  
3 21-111.14 (requiring adoption of procedures to ensure equally effective communication with  
4 persons with disabilities as with general public) and 21-115.41 (requiring provision of “auxiliary  
5 aids and services to persons who are deaf or hearing impaired, or persons with impaired speech,  
6 vision or manual skills”). Accordingly, due process does not require that CDSS or county-issued  
7 notices be translated into additional languages or provided in alternative formats.

### 8 **3. The Notices Include All Relevant and Required Information**

9 Plaintiffs’ contention that the notices omit essential information necessary for recipients to  
10 exercise their due process rights is based on the misunderstanding that eligibility for  
11 Supplemental Care is determined exclusively or primarily on recipients’ functional ranks in the  
12 categories identified on the Supplemental Care worksheet. Based on this false assumption,  
13 Plaintiffs wrongly contend that the notices violate due process because they fail to explain the use  
14 of functional ranks or to provide recipients’ own ranks. However, as discussed above, functional  
15 ranks are merely one piece of information that social workers will consider in determining  
16 whether the reductions in hours would place a recipient at serious risk of out-of-home placement.  
17 Social workers maintain discretion to determine that a recipient qualifies for supplemental care  
18 regardless of whether their functional rank scores, standing alone, indicate a potentially serious  
19 risk of out-of-home placement. The exclusive determination that social workers, and  
20 administrative law judges on review, must make is whether the reductions would place a recipient  
21 at serious risk of out-of-home placement. Since the reduction notice and NOA messages identify  
22 this standard as the basis for Supplemental Care determinations, the notices do not omit any  
23 information necessary for Plaintiffs to apply for Supplemental Care or to appeal Supplemental  
24 Care determinations.

25 Indeed, the notices of any adverse Supplemental Care determination will advise recipients  
26 that they may request a conference with a representative of the county welfare department to “talk  
27 about the intended action,” at which time recipients may learn the underlying basis of the  
28 county’s determination. Carroll Decl., Ex. A at 14. Further, on requesting a hearing, IHSS

1 recipients are entitled to review or obtain the case file and all “nonprivileged information which  
 2 the county has used in making its decision to take the action which is being appealed,” and to  
 3 have witnesses subpoenaed on their behalf. MPP § 22-045. The information regarding the right  
 4 to request a state hearing specifically advises recipients that they may obtain relevant regulations  
 5 governing the hearing. See Carroll Decl., Ex. A (Right to Request a State Hearing, § 6 (“State  
 6 regulations governing State Hearings for social services are available at the office of [sic] County  
 7 Welfare Department.”)).

8 Particularly under these circumstances, due process does not require that the notice itself  
 9 apprise recipients of the underlying bases of the county’s Supplemental Care determination. *See*  
 10 *Garrett*, 707 F.2d at 930-32 (rejecting argument that due process required notices identify  
 11 calculations used by the Department to determine AFDC benefits).<sup>13</sup>

12 Plaintiffs’ contention that county notices of denials of Supplemental Care applications will  
 13 not identify the effective date of the reductions is simply incorrect. Counties must identify the  
 14 “circumstances under which aid will be continued if a hearing is requested,” which information  
 15 necessarily includes, and will include, the effective date of the reduction. MPP § 22-001(a)(1);  
 16 Carroll Decl., ¶ 11.

#### 17 **4. The Notices Do Not Preclude Plaintiffs From Challenging a Mistaken** 18 **Reduction Notice**

19 Plaintiffs mistakenly contend that the reduction notice violates due process because it fails  
 20 to make clear that recipients may request a hearing if they believe they are exempt from the  
 21 reductions and have mistakenly been issued a reduction notice. However, the notice plainly states  
 22 only that “requests for a state hearing *only to dispute the law* requiring the 20-percent reduction in

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23 <sup>13</sup> For the same reason, due process does not require that the notice advise recipients of the  
 24 right to seek a home hearing. Department regulations make clear that a recipient may request that  
 25 a hearing take place at the home or other location, and permit hearings by telephone or video.  
 26 MPP § 22-045.1 to 22-045.132. Moreover, circuit courts of appeal and other courts have  
 27 routinely rejected that due process requires notice of the right to appeal itself. *See, e.g., Bennett v.*  
 28 *Director, Office of Workers’ Comp. Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983)  
 (administrative decision denying benefits under Black Lung Benefits Act); *Childress v. Small*  
*Bus. Admin.*, 825 F.2d 1550, 1553 (11th Cir. 1987) (cancellation of Farmers Home  
 Administration loan); *Vialez v. New York City Hous. Auth.*, 783 F. Supp. 109, 116-22 (S.D.N.Y.  
 1991) (termination of tenancy by city housing authority) (citing cases).

1 authorized services hours will be dismissed.” Carroll Decl., Ex. A (reduction notice) (emphasis  
2 added). Accordingly, the notice neither expressly nor implicitly purports to bar any recipient  
3 from challenging a mistaken application of the reduction. As Plaintiffs believe Defendants “must  
4 intend,” only appeals that raise “a general challenge to the 20 percent reduction would be  
5 dismissed.” TRO App. at 35. No clarification is needed, or required by due process.

6 For the reasons above, Plaintiffs have no likelihood of success on their due process claims.

## 7 **B. SB 73 Does Not Violate the Medicaid Act**

### 8 **1. SB 73 Does Not Violate Medicaid’s Comparability Requirement**

9 SB 73 does not violate comparability because: (1) the waivers and pre-approval criteria are  
10 based on indisputably objective, need-based criteria; and (2) the statute eschews any rigid use of  
11 numerical ranks or indices in favor of providing all affected recipients the opportunity for an  
12 individualized review to determine whether a recipient’s hours should be restored.

13 Medicaid’s “comparability” requirement “mandates comparable services for individuals  
14 with comparable needs and is violated when some recipients are treated differently than others  
15 where each has the same level of need.” PI Order, Docket No. 198, at 12:7-10. However, a state  
16 may “place appropriate limits on a service based on such criteria as medical necessity or on  
17 utilization control procedures.” 42 C.F.R. § 440.230(c)(2). It just may not do so solely because  
18 of “diagnosis, type of illness, or condition.” *Id.* § 440.230(c)(1). “Once a state designates  
19 services it will subsidize, it may distinguish between eligible and ineligible recipients only on the  
20 basis of their degree of medical need.” *Hodgson v. Board of County Commissioners*, 614 F.2d  
21 601, 608 (8th Cir. 1980). Applying this principle in cases where benefit reductions have been  
22 challenged, such as this one, the comparability requirement is not violated so long as individuals  
23 within the same acuity group are treated similarly. *M.R. v. Dreyfus*, 767 F. Supp.2d 1149, 1160  
24 (W.D. Wash. 2011), *reversed on other grounds*, *M.R. v. Dreyfus*, --F.3d--, 2011 WL 6288173,  
25 (9th Cir. 2011).

26 Plaintiffs have not demonstrated that SB 73 treats individuals with similar medical needs  
27 differently. SB 73’s waivers and pre-approval criteria are based on indisputably objective, need-  
28 based criteria (such as being on an AIDS waiver or being pre-approved as an EPSDT recipient).

1 And unlike ABX4 4, SB 73 does not utilize functional ranks to automatically subject recipients to  
2 the 20% hours reduction, but is far more nuanced and individualized. Plaintiffs' assertion that the  
3 March 1, 2012 Supplemental Care application deadline violates comparability is similarly  
4 misguided. Providing a uniform deadline (of two and a half months after the mailing date) for all  
5 IHSS recipients to seek a restoration of their hours does not treat equally situated recipients  
6 differently. Defendants are not aware of any case—and Plaintiffs have not provided one—  
7 holding that comparability is violated when a state establishes a universally applicable deadline  
8 for seeking the restoration of a reduced benefit.

9 Finally, Plaintiffs contend that comparability is violated because SB 73 exempts IHSS  
10 recipients on waivers, but not recipients on the waiting lists for waivers. This argument also fails  
11 for at least two reasons. First, none of the named plaintiffs assert that they are on the waiting list  
12 for a waiver, and plaintiffs cannot succeed on the merits of a purported comparability violation  
13 that did not injure any named plaintiff. *See Hodgers-Durgin*, 199 F.3d at 1045.

14 Second, Plaintiffs misconstrue the waiver of comparability under these programs. Contrary  
15 to plaintiffs' suggestion, the waiver of the comparability requirement under DHCS waiver  
16 programs allows Defendants to provide a greater level of services for those on waivers than those  
17 receiving services only under the State Plan.<sup>14</sup> Plaintiffs' suggestion that those on the waiver  
18 waiting lists should be exempted from the reduction in hours would *create*—rather than  
19 eliminate—a comparability violation, as it would require a different level of state plan services  
20 between individuals who may have the same level of need, based on whether they elected to  
21 apply for and were deemed eligible for a waiver program.

22 Plaintiffs fail to show any likelihood of success on the merits of their comparability claim.  
23  
24

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25 <sup>14</sup> *See, e.g.*, DHCS IHO Waiver, § 4(A), at p. 4 of 284 (requesting waiver of comparability  
26 requirements "in order to provide the services specified in Appendix C that are not otherwise  
27 available under the approved Medicaid State plan" to individuals who: (a) require the level(s) of  
28 care specified in Item I.F. and (b) meet the target group criteria specified in Appendix  
B") (available at <http://www.dhcs.ca.gov/formsandpubs/publications/Pages/HCBSWaivers.aspx>,  
accessed Dec. 22, 2011).

1                   **2. SB 73 Does Not Violate Medicaid’s Reasonable Standards**  
2                   **Requirement**

3                   Even assuming that the “reasonable standards” requirement is privately enforceable under  
4 the Supremacy Clause, SB 73 employed reasonable standards by exempting the most vulnerable  
5 IHSS recipients from any reduction in hours and by creating an individualized Supplemental Care  
6 application process for all other recipients to seek restoration of their hours if they would be  
7 placed at serious risk of out-of-home placement.

8                   The Medicaid Act requires that all participating states use reasonable standards which are  
9 consistent with the objectives of the Act for determining both eligibility and the extent of medical  
10 assistance under the state plan. 42 U.S.C. § 1396a(a)(17). Section (a)(17) “confers broad  
11 discretion on the States to adopt standards for determining the extent of medical assistance,  
12 requiring only that such standards be ‘reasonable’ and ‘consistent with the objectives’ of the Act.”  
13 *Beal v. Doe*, 432 U.S. 438, 444 (1977).

14                   As a preliminary matter, the Court should decline to address the merits of Plaintiffs’  
15 reasonable standards and sufficiency Medicaid claims at this time. As the Court’s preliminary  
16 injunction Order recognized, the Supremacy Clause is the sole vehicle through which Plaintiffs  
17 can bring both a reasonable standards and a sufficiency claim. PI Order at 19:1-20; 20 n.9  
18 (Docket No. 198). And Plaintiffs explicitly rely on the Supremacy Clause for both causes of  
19 action. *See* TAC ¶¶ 319, 323, 373, 332.

20                   The United States Supreme Court is currently considering precisely this question: whether  
21 Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to  
22 enforce sections of the Medicaid Act that do not reflect unambiguous Congressional intent to  
23 provide for private enforcement. *See Douglas v. Indep. Living Ctr. of S. Cal., et al.*, No. 09-958  
24 *et al.* Indeed, the Ninth Circuit withdrew submission of the appeal in this matter and deferred a  
25 decision pending the forthcoming guidance from the U.S. Supreme Court. Similarly, this Court  
26 should refrain from ruling on these claims, especially given the likelihood of Supreme Court  
27 guidance in the next month or two.

1           Should the Court reach the merits, California’s “broad discretion” to adopt reasonable  
2 standards was not exceeded in this instance. First, SB 73 reasonably created multiple carve-outs  
3 to protect the most vulnerable IHSS recipients from a reduction in their authorized service hours.  
4 The statute exempts tens-of-thousands of IHSS recipients who are also on one of the seven  
5 community based waivers (which means that they qualify for intermediate or skilled nursing care  
6 unlike most other IHSS recipients) from any reduction to their authorized hours. Second, the  
7 statute formalized a collaborative process between CDSS and the counties to pre-approve  
8 exemptions from the hours reduction, which led to four additional categories of IHSS recipients  
9 (including all children) becoming totally exempt from the cuts. And finally, the State will  
10 provide all remaining IHSS recipients with the opportunity to participate in a highly  
11 individualized review process—with two independent levels of review—to seek restoration of his  
12 or her full hours (and to maintain currently authorized hours in the interim).

13           Far from employing an unreasonable standard, California’s approach to carrying out this  
14 reduction in IHSS hours is nuanced, thoughtful, and eminently reasonable. Plaintiffs cite no  
15 case—nor are Defendants aware of one—which permitted a reasonable standards claim when the  
16 benefit reduction was accompanied by a detailed process to consider each affected individual’s  
17 unique circumstances. Plaintiffs are highly unlikely to succeed on the merits of this claim.

### 18           **3. SB 73 Does Not Violate Medicaid’s Sufficiency Requirement**

19           Even assuming that the Medicaid regulation imposing the “sufficiency” requirement is  
20 privately enforceable, there is no sufficiency violation because SB 73 provides a Supplemental  
21 Care application process *precisely* for the purpose of considering whether the reduced hours  
22 would cause any IHSS recipient to be at risk of out-of-home placement.

23           First of all, Plaintiffs’ “sufficiency” claim under 42 C.F.R. § 440.230(b) fails as a matter of  
24 law because a federal regulation cannot, by itself, serve as the basis for a private lawsuit, but  
25 instead must be tied to a privately enforceable right created by a Congressional statutory  
26 enactment. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87, 291 (2001); *Lonberg v. City of*  
27 *Riverside*, 571 F.3d 846, 850-51 (9th Cir. 2009) (“[R]egulations that do not encapsulate [a]  
28 statutory right and corresponding remedy are not privately enforceable.”); *Save Our Valley v.*

1 *Sound Transit*, 335 F.3d 932, 941 (9th Cir. 2003) (a regulation creates a valid right only to the  
2 extent that it “merely further defines or fleshes out the content of that [statutory] right.”) This is  
3 because, “[l]ike substantive federal law itself, private rights of action to enforce federal law must  
4 be created by Congress.” *Sandoval*, 532 U.S. at 287.

5 Here, plaintiffs have not tied 42 C.F.R. § 440.230(b) to *any* statute, much less demonstrated  
6 that it “encapsulate[s]” a statutory right. *See* TAC, ¶¶ 316-323. On this basis alone, Plaintiffs  
7 have no likelihood of success on the merits.

8 In any event, SB 73 readily meets the sufficiency requirement. For IHSS recipients who  
9 are subject to a reduction in their hours, the Supplemental Care application process guarantees  
10 that each recipient who applies will have an individualized determination before the county and  
11 (if requested) before a State hearing officer to ensure that their reduced hours are *sufficient* to  
12 prevent any serious risk of an out-of-home placement. Every sufficiency case cited by Plaintiffs  
13 eliminated services for certain individuals without providing any sort of individualized review to  
14 determine if the services in place after the reduction were still sufficient. These cases are  
15 inapposite to the statutory scheme at issue here.

16 Plaintiffs nevertheless challenge the adequacy of the Supplemental Care application process  
17 on two grounds.<sup>15</sup> First, they aver that the Supplemental Care process only evaluates the risk of  
18 out-of-home placement, and not whether recipients will suffer injury or harm in their homes.  
19 TRO App. at 37. This argument lacks merit. These considerations are two sides of the same  
20 coin. If a social worker determines that the reduction would place a recipient at serious risk of  
21 out-of-home placement, it is tantamount to a determination that the recipient faces a serious risk  
22 of being unable to remain safely in their own home. There is no merit to Plaintiffs’ assertion that  
23 the IHSS Supplemental Care process considers the risk of out-of-home placement divorced from  
24 any consideration of harm or safety.

25  
26 \_\_\_\_\_  
27 <sup>15</sup> Plaintiffs also assert a third basis, that the Supplemental care application process  
28 excludes individuals if their functional ranks fall below certain levels. TRO App. at 38.  
However, as discussed above, this contention is inaccurate and apparently based on Plaintiffs’  
misunderstanding of the process.

1 Second, Plaintiffs contend that the Supplemental Care application process improperly  
2 places the burden on elderly and disabled recipients to seek a restoration of their hours. TRO  
3 App. at 37. It is true that IHSS recipients who are not exempt or pre-approved must affirmatively  
4 apply for IHSS Supplemental Care. It is equally true that there are many resources available to  
5 assist IHSS recipients, from the county, their providers, and others. But the fact that IHSS  
6 Supplemental Care applicants will need to take the affirmative step of completing a one-page  
7 application form does not mean that SB 73 fails the sufficiency requirement. All IHSS recipients  
8 will maintain a sufficient level of hours if they utilize the Supplemental Care process, and  
9 therefore Plaintiffs cannot show a likelihood of success on the merits of their sufficiency claim.

### 10 **C. Plaintiffs are Not Likely to Succeed on Their ADA/RA Claims**

11 As discussed previously, no Plaintiff is likely to be institutionalized because the  
12 individualized Supplemental Care application process is designed to evaluate any individual's  
13 risk of out-of-home placement and restore hours if necessary. Further, Plaintiffs are unlikely to  
14 succeed on their Title II American with Disabilities Act (ADA) and Section 504 Rehabilitation  
15 Act (RA) because: (1) they lack Article III standing; (2) construing their ADA/RA claims to  
16 require the continuation of IHSS services at their current level as to specific individuals violates  
17 the Tenth Amendment; and (3) SB 73 does not place Plaintiffs at serious risk of  
18 institutionalization.

#### 19 **1. Plaintiffs Lack Article III Standing to Assert ADA/RA Claims**

20 The individual Plaintiffs lack Article III standing to bring their ADA and RA claims  
21 because none of them face an imminent risk of institutionalization. No named plaintiff meets the  
22 “irreducible constitutional minimum of standing” which requires that the alleged injury in fact—  
23 unnecessary institutionalization and segregation—be “actual or imminent, ‘not conjectural or  
24 hypothetical.’” *Lujan*, 504 U.S. at 560. Imminence requires the injury to be “certainly  
25 impending” in order to “reduce the possibility of deciding a case in which no injury would have  
26 occurred at all.” *Id.* at 564 n.2; *see also Addington*, 606 F.3d at 1179 (a threatened injury must be  
27 “*certainly* impending.”) (emphasis original).

28 For example, Ms. Stern claims that a 20% cut could force her into a nursing home

1 because: (1) she could develop open lesions on her legs, which (2) could become infected, and  
2 then (3) she could permanently end up in the hospital because of the infection. Stern Decl. ¶ 22.  
3 This highly speculative chain of events is too conjectural to establish standing. As discussed  
4 above, the remaining named plaintiffs rely on similar chains of contingencies.

5 Plaintiffs seek to do an end-run around Article III by relying on the United States  
6 Department of Justice interpretation that imminent institutionalization is not required to violate  
7 the ADA's integration mandate. TRO App. at 44. The Ninth Circuit has also afforded deference  
8 to DOJ's interpretation of this regulation. See *M.R. v. Dreyfus*, --F.3d--, 2011 WL 6288173, at  
9 \*16 (9th Cir. 2011) (affording deference to DOJ's view that the ADA is violated even when "it  
10 causes [plaintiffs] to decline in health over time and eventually enter an institution in order to  
11 seek necessary care.").

12 But whatever the level of risk required by the *statute*, no agency interpretation can re-define  
13 what the U.S. Supreme Court has held *Article III* to require. Neither Congress, nor a federal  
14 agency, nor any lower court, can bestow standing unto a plaintiff claiming a non-imminent injury.  
15 It is elementary that no statute could lower Article III's threshold for presenting a case or  
16 controversy. The Ninth Circuit's decision in *M.R.* *did not* address Article III standing, nor could  
17 it have squared the bedrock principles of Article III with its statutory interpretation of the ADA's  
18 integration mandate.

## 19 **2. The Breadth of Plaintiffs' ADA/RA Claims Violates the Tenth** 20 **Amendment**

21 Construing the ADA and Rehabilitation Act to require the continuation of the IHSS  
22 program as to specific persons would run afoul of the Tenth Amendment. Congress enacted the  
23 Medicaid Act not as a mandate, but as a type of entirely voluntary agreement to which the States  
24 may subscribe in order to receive federal funds. See *Pennhurst State Sch. & Hosp. v.*  
25 *Halderman*, 451 U.S. 1, 11 (1981) ("Like other federal-state cooperative programs, the Act is  
26 voluntary and the States are given the choice of complying with the conditions set forth in the Act  
27 or forgoing the benefits of federal funding."). Indeed, the very "legitimacy of Congress' power to  
28 legislate under the spending power . . . rests on whether the State voluntarily and knowingly

1 accepts the terms of the 'contract.'" *Id.* at 17. Not only is participation in Medicaid entirely  
2 voluntary, but IHSS itself is an "optional" benefit within the Medicaid Act, meaning that States  
3 that participate in Medicaid are not required by Medicaid law to provide this particular benefit.  
4 M.R., 2011 WL 6288173, at \*2. Thus, the State could eliminate the IHSS benefit entirely without  
5 running afoul of the Medicaid Act -- it would simply lose the federal matching funds for the  
6 program.

7 To construe a different federal act, such as the ADA and the Rehabilitation Act, to mandate  
8 what Medicaid does not require, however, is to change a condition for federal funding into a  
9 mandate. But such a statutory mandate would run afoul of the anti-commandeering component of  
10 the 10th Amendment. *New York v. U.S.*, 505 U.S. 144, 176 (1992) (provision of Low-Level  
11 Radioactive Waste Policy Act held unconstitutional where "Congress has not held out the threat  
12 of exercising its spending power or its commerce power; it has instead held out the threat, should  
13 the States not regulate according to one federal instruction, of simply forcing the States to submit  
14 to another federal instruction"); *see also Printz v. U.S.*, 521 U.S. 898 (1997). While Congress  
15 may induce the States to provide the services at issue to its residents through the promise of  
16 federal money, it may not mandate that they do so.

### 17 **3. SB 73 Does Not Place Plaintiffs at Serious Risk of Institutionalization**

18 SB 73 not only does not place Plaintiffs at serious risk of institutionalization, but the  
19 Supplemental Care process actually protects against any form of "out-of-home placement" which  
20 is a more protective standard than institutionalization.

21 Title II of the ADA provides that "no qualified individual with a disability shall, by reason  
22 of such disability, be excluded from participation in or be denied the benefits of services,  
23 programs, or activities of a public entity, or be subjected to discrimination by any such entity."  
24 42 U.S.C. § 12132 In other words, "[t]he ADA guarantees individuals the right to be free from  
25 discrimination. Thus, the threshold for an ADA claim is that there must be some discrimination  
26 based upon an individual's disability." *Community House, Inc. v. City of Boise*, 2007 U.S. Dist.  
27 LEXIS 12443 at \*7 (D. Idaho 2007). The Supreme Court has held that unnecessary  
28 institutionalization is a form of discrimination. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581,

1 587 (1999). However, “[t]he State’s responsibility, once it provides community-based treatment  
2 to qualified persons with disabilities, is not boundless.” *Olmstead*, 527 U.S. at 603. “We do not  
3 in this opinion hold that the ADA imposes on the States a ‘standard of care’ for whatever medical  
4 services they render, *or that the ADA requires States to ‘provide a certain level of benefits to*  
5 *individuals with disabilities.* . . . We do hold, however, that States must adhere to the ADA’s  
6 nondiscrimination requirement with regard to the services they in fact provide.” *Id.* (emphasis  
7 added).

8 Thus, on its face, *Olmstead* does not require states to adhere to a certain level of benefits.  
9 The focus is on preventing unnecessary institutionalization. In this regard, the Supplemental Care  
10 process actually establishes a *more protective standard*, because it protects against any form of  
11 out-of-home placement, whereas institutionalization requires a specified level of medical need.  
12 An institutionalized individual must meet specific criteria, including the need for 24-hour nursing  
13 care. Cal. Code Regs., tit. 22 §§51124, 51335. By contrast, there are many forms of out-of-home  
14 placement for individuals who do not need 24-hour nursing care, but who need enough assistance  
15 that that cannot live independently. For example, person may live in a board and care home  
16 which would provide IHSS-type services around the clock. There are many residential care-type  
17 facilities which do not maintain 24-hour nursing care (thereby qualifying as institutions), but  
18 which indisputably qualify as out-of-home placement. By evaluating whether a reduction in  
19 hours would cause a serious risk of any out-of-home placement, the Supplemental Care  
20 application process actually employs a more protective standard than the ADA.

21 For the reasons discussed above, the named Plaintiffs failed to show a likelihood of  
22 irreparable harm that they would be forced from their homes, much less institutionalized. There  
23 is simply no credible and corroborated evidence that any named Plaintiff faces a serious risk of  
24 institutionalization from a 20% reduction in authorized IHSS hours.

25 Finally, Plaintiffs’ contention that SB 73 discriminates against individuals with cognitive  
26 and psychiatric disabilities is specious. Between the waivers, pre-approval categories, and the  
27 nature of the Supplemental Care application process, the unique needs of individuals with  
28 cognitive and psychiatric disabilities are sufficiently addressed. First, many individuals with

1 cognitive disabilities are on the developmentally disabled and senior services waivers, and  
2 therefore will be exempt from the reduction in hours. Second, all individuals who have been  
3 assessed for protective supervision are preapproved as exempt from the reduction in hours.  
4 Carroll Decl., Ex. A at 5. Protective supervision is provided for individuals who are “nonself-  
5 directing, confused, mentally impaired, or mentally ill” and who need 24-hours a day supervision.  
6 MPP § 30-757.171-173. And finally, IHSS recipients with cognitive disabilities will have those  
7 disabilities considered if they seek Supplemental Care.

8 In sum, Plaintiffs are not likely to succeed on the merits of their ADA/RA claims.

9 **IV. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR DENYING PLAINTIFFS’**  
10 **REQUEST TO ENJOIN A STATE STATUTE**

11 The balance of equities and the public interest favor deferring to the California  
12 Legislature’s considered judgment in allocating scarce and limited public resources during a state  
13 of fiscal emergency. In considering the public interest, Plaintiffs set up a false dichotomy—that  
14 of concrete injury to “individuals” (IHSS recipients) versus the abstract injury to the State’s “fisc”  
15 (presumably a bank account). The reality, however, is that should the Court enjoin this statute,  
16 injury to different “individuals” will occur – both within and without the Medicaid program. For  
17 example, reductions to the K-12 school year were narrowly averted this month because the budget  
18 shortfall only marginally crossed into the tier 2 threshold. Should other budget cuts be enjoined –  
19 and those savings not realized – additional reductions in health, education, and other areas will  
20 become more likely. The extensive balancing of state-wide policy concerns and aggregate public  
21 welfare reflected in SB 73 are exactly the type of functions allocated to the legislative, rather  
22 than to the judicial, branch under our tripartite system of government.

23 The reductions highlight the sobering reality that “individuals” are affected either way  
24 when budget cuts are litigated. More money for IHSS means less money for other Californians.  
25 And as a general matter, the public interest is best served when the California Legislature, as the  
26 elected representatives of the people of California, makes the enormously difficult decisions of  
27 allocating available public monies. When considered holistically, the public interest tilts in favor  
28 of Defendants.

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**CONCLUSION**

For the foregoing reasons, the Court should deny Plaintiffs’ Motion for a Preliminary Injunction. To avoid precisely the concerns Plaintiffs articulate, SB 73 exempts tens-of-thousands of the most vulnerable IHSS recipients from any reduction in their hours, and employs a thoughtful, nuanced, and highly individualized administrative process through which all remaining IHSS recipients can have their authorized hours partially or fully restored. With this process in place, Plaintiffs have not—and cannot—meet their burden of showing that they are *likely* to suffer irreparable harm and *likely* to succeed on the merits, nor should they be allowed to circumvent the administrative forum California has created for them. The “extraordinary remedy” of a preliminary injunction should not issue.

Dated: December 23, 2011

Respectfully Submitted,  
  
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