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FILED
Superior Court of California
County of Los Angeles
05/13/2019
Sherri R. Carter, Executive Officer / Clerk of Court
By: Jennifer De Luna Deputy

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Attorneys for Petitioners/Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES – CENTRAL DISTRICT

PATRICK KELLEY and MATTHEW
REED, by and through his guardian ad
litem, VICKI REED,

Petitioners/Plaintiffs,

v.

JENNIFER KENT, in her official capacity
as Director of the California Department of
Health Care Services and the
CALIFORNIA DEPARTMENT OF
HEALTH CARE SERVICES,

Respondents/Defendants.

CASE NO. BS170173

(Assigned to Hon. James C. Chalfant)

**JOINT STIPULATION AND [PROPOSED]
ORDER RE: FILING OF VERIFIED
FOURTH AMENDED PETITION FOR
WRIT OF MANDATE (CODE CIV. PROC.
§ 1085); ADMINISTRATIVE MANDAMUS
(CODE CIV. PROC. § 1094.5);
COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

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1 Petitioners Patrick Kelley and Matthew Reed (collectively “Petitioners”) and respondents
2 California Department of Health Care Services (“DHCS”) and DHCS Director Jennifer Kent,
3 acting through their respective attorneys, have agreed and request that the Court enter an Order, on
4 the terms provided for below, regarding the filing of Petitioners’ proposed Verified Fourth
5 Amended Petition for Writ of Mandate, Administrative Mandamus and Complaint for Declaratory
6 and Injunctive Relief as follows:

7 1. On December 21, 2018, Petitioners filed their Verified Third Amended Petition for
8 Writ of Mandate, Administrative Mandamus and Complaint for Declaratory and Injunctive Relief
9 (“Third Amended Petition”).

10 2. On March 12, 2019, Respondents DHCS and Kent filed their answer to the Third
11 Amended Petition asserting the affirmative defense of failure to join indispensable parties to
12 Petitioner Reed’s First Cause of Action brought under a Civil Procedure Code section 1094.5.

13 3. Petitioners have provided Respondents a proposed Verified Fourth Amended
14 Petition for Writ of Mandate, Administrative Mandamus, and Complaint for Declaratory and
15 Injunctive Relief (“Fourth Amended Petition”) that California Department of Social Services
16 (“CDSS”) and CDSS Acting Director Pat Leary as respondents to the First Cause of Action. The
17 parties agree that the Fourth Amended Petition, attached hereto as Exhibit A, should be filed in lieu
18 of proceeding with a motion to amend to add a necessary party.

19 THEREFORE, Petitioners and Respondents, by and through their undersigned counsel of
20 record, hereby stipulate and agree that:

21 1. Petitioners may file the Verified Fourth Amended Petition in the form attached as
22 Exhibit A to this Stipulation.

23 2. Petitioners may join as respondents CDSS and CDSS Acting Director Pat Leary.

24 3. Respondents DHCS and Director Jennifer Kent reserve all defenses to the proposed
25 Verified Fourth Amended Petition and does not waive any defenses by executing this stipulation.


26 4. CDSS and CDSS Acting Director Pat Leary reserve all defenses to the proposed
27 Verified Fourth Amended Petition.

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Dated: May 10, 2019

McDERMOTT WILL & EMERY LLP

By: 

GREGORY R. JONES
Attorneys for Petitioners/Plaintiffs

Dated: May 10, 2019

XAVIER BECERRA
Attorney General of California
Richard T. Waldow
Supervising Deputy Attorney General

By: */s/ Michael Byerts*

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Deputy Attorney General
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~~PROPOSED~~ ORDER

Pursuant to the foregoing Stipulation, and good cause appearing, it is hereby ORDERED that:

1. Petitioners can file the Fourth Amended Petition.
2. Petitioners can join as Respondents CDSS and Director Leary.
3. The parties reserve all rights as stated in the stipulation above.

IT IS SO ORDERED.

Dated: 05/13/2019



James C. Chalfant / Judge

The Honorable James C. Chalfant
Judge of the Superior Court

McDERMOTT WILL & EMERY LLP
ATTORNEYS AT LAW
LOS ANGELES

EXHIBIT A

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12 PATRICK KELLEY and MATTHEW
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litem, VICKI REED,

14 Petitioners/Plaintiffs,

15 v.

16 JENNIFER KENT, in her official capacity
17 as Director of the California Department of
Health Care Services; the CALIFORNIA
18 DEPARTMENT OF HEALTH CARE
SERVICES; PAT LEARY, in her official
19 capacity as the Acting Director of the
California Department of Social Services;
20 and the CALIFORNIA DEPARTMENT
OF SOCIAL SERVICES,

21 Respondents/Defendants.
22

CASE NO. BS170173

(Assigned to Hon. James C. Chalfant)

**FOURTH AMENDED VERIFIED
PETITION FOR WRIT OF MANDATE
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ADMINISTRATIVE MANDAMUS (CODE
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INTRODUCTION

1
2 1. Through this lawsuit, Petitioners seek to compel the California Department of
3 Health Care Services (“DHCS”) and its Director, Jennifer Kent (collectively, “DHCS
4 Respondents”) to fulfill their ministerial duty to ensure prompt, consistent, and correct application
5 of the expanded spousal impoverishment protection to Medi-Cal eligibility determinations
6 statewide.

7 2. The expanded spousal impoverishment protection, a special Medi-Cal income and
8 asset counting methodology, enables individuals with disabilities who are married to qualify for
9 Medi-Cal. Medi-Cal eligibility enables beneficiaries with disabilities to receive the home and
10 community-based services they need to continue living in the community and with their spouse.
11 Prior to this change in the law, the choice for the spouse requiring home and community-based
12 services was institutionalization or impoverishment.

13 3. Effective January 1, 2014, the federal Patient Protection and Affordable Care Act
14 (“ACA”) requires all states to expand the definition of “institutional spouse” to include spouses
15 who are eligible for a variety of Medi-Cal home and community-based programs. The practical
16 effect of this definitional change is to increase the number of individuals who qualify for Medi-Cal
17 using the spousal impoverishment protection methodology.

18 4. For more than five years, DHCS Respondents have failed to ensure all “potentially
19 eligible individuals”¹ have received a correct Medi-Cal eligibility determination or to ensure that
20 the harms caused by an incorrect Medi-Cal eligibility determination have been cured. As a result,
21 since January 1, 2014, thousands of individuals with significant disabilities have been erroneously
22 denied Medi-Cal or wrongly assessed a Medi-Cal share of cost, and as a consequence were either
23 denied access to needed home and community-based services or forced to pay out of pocket for
24 those services, often at a prohibitive cost. The cascading effect of DHCS Respondents’ failures

25 _____
26 ¹ “Potentially eligible individuals” refer to individuals who meet all of the non-financial eligibility
27 requirements for Medi-Cal—(i.e., they are residents of California, are married or in a registered
28 domestic partnership, have satisfactory immigration status, and require a nursing home level of
care)—and would qualify for Medi-Cal if the expanded spousal impoverishment protections were
utilized to assess their financial eligibility.

1 placed Petitioners and other potentially eligible individuals at unnecessary risk of
2 institutionalization and impoverishment.

3 5. Petitioners are each married older adults who have limited income and resources
4 and who have disabilities caused by significant medical conditions. DHCS Respondents failed to
5 properly and promptly determine Petitioners' Medi-Cal eligibility using the expanded spousal
6 impoverishment protections.

7 6. Petitioners bring this Petition for Writ of Mandate and Complaint for Injunctive and
8 Declaratory Relief to compel DHCS Respondents to fulfill their ministerial duties: (1) to identify
9 all potentially eligible individuals statewide; (2) to notify all potentially eligible individuals
10 statewide of the expanded spousal impoverishment protection so that they have a reasonable
11 opportunity to apply or seek a correct eligibility determination; (3) to supervise the counties and to
12 enforce the expanded spousal impoverishment protection to ensure all potentially eligible
13 individuals statewide receive correct and prompt Medi-Cal eligibility determinations; (4) to create
14 a process to determine retroactive eligibility for In-Home Supportive Services ("IHSS"), a Medi-
15 Cal covered home and community-based services benefit that requires Medi-Cal eligibility as a
16 pre-requisite; and (5) to provide retroactive reimbursement or payment for Medi-Cal covered
17 expenses that would have been covered if Medi-Cal had been properly assessed initially.

18 7. Petitioner Matthew Reed seeks an administrative writ under Code of Civil Procedure
19 § 1094.5 against Respondents California Department of Social Services ("CDSS") and its Acting
20 Director, Pat Leary (collectively, "CDSS Respondents"), and DHCS Respondents vacating his final
21 hearing decision and granting him: (1) eligibility for IHSS services retroactive to the earliest date
22 Petitioner Reed would have been eligible for Medi-Cal, if the expanded spousal impoverishment
23 protection had been applied, and (2) payment to his in-home caregivers for work performed during
24 the period of retroactive eligibility.

25 **PARTIES**

26 8. Petitioner Patrick Kelley is a married 68-year-old veteran with multiple sclerosis,
27 residing in Los Angeles, California. Because of the severity of his disabilities and medical
28 conditions, Petitioner Kelley is eligible for home and community-based services at a nursing home

1 level of care. As of January 1, 2014, Petitioner Kelley would have been eligible for Medi-Cal had
2 the expanded spousal impoverishment protection been applied. Instead, Petitioner Kelley's
3 application for Medi-Cal was denied for exceeding the Medi-Cal asset limit.

4 9. Although Petitioner Kelley was eventually able to obtain Medi-Cal coverage after
5 an administrative fair hearing, he continues to have a beneficial interest in the consistent statewide
6 administration and supervision of the expanded spousal impoverishment protection because, like
7 all Medi-Cal beneficiaries, he will need to renew his Medi-Cal eligibility annually and is at risk of
8 losing eligibility at the time of redetermination. Because DHCS Respondents have failed to ensure
9 consistent statewide administration and supervision of the counties' application of the expanded
10 spousal impoverishment protection there is a danger that the county will not apply the correct
11 eligibility rules to his case during his annual redetermination.

12 10. Petitioner Matthew Reed participates in this action through his wife, Vicki Reed, as
13 his guardian ad litem. Petitioner Reed resides in Los Angeles, California. Petitioner Reed is a 63-
14 year-old man with multiple sclerosis, Bell's Palsy, and vascular dementia following a stroke.
15 Because of the severity of his disabilities and medical conditions, Petitioner Reed is eligible for
16 Medi-Cal home and community-based services at a nursing home level of care. At least as early
17 as July 1, 2016, Petitioner Reed would have been eligible for Medi-Cal without a share of cost had
18 expanded spousal impoverishment protections been applied. Instead, he was erroneously required
19 to pay a share of cost of more than \$1,500 a month. Because Petitioner Reed was not able to afford
20 this share of cost, he was not able to access Medi-Cal benefits, including IHSS and other home and
21 community-based services programs.

22 11. Petitioner Reed has still not received all of the Medi-Cal benefits to which he is
23 entitled had the expanded spousal impoverishment protection been properly administered.
24 Specifically, Petitioner Reed has been denied an IHSS assessment retroactive to the date of his
25 Medi-Cal eligibility under the expanded spousal impoverishment protection. Petitioner Reed has a
26 beneficial interest in the correct application of the expanded spousal impoverishment protection in
27 his case. He also has a beneficial interest in the consistent statewide administration and supervision
28 of the expanded spousal impoverishment protection because, like all Medi-Cal beneficiaries, he

1 will need to renew his Medi-Cal eligibility annually and is at risk of losing eligibility at the time of
2 redetermination because DHCS Respondents have failed to ensure consistent statewide
3 administration and supervision of the counties' application of the expanded spousal
4 impoverishment protection.

5 12. Respondent DHCS is the single state Medicaid agency and administers the Medi-
6 Cal program, as Medicaid is known in California. As the single state Medicaid agency, DHCS has
7 a mandatory ministerial duty to implement all federal Medicaid eligibility provisions and to
8 administer all Medi-Cal home and community-based services programs in accordance with all
9 applicable federal and state laws and regulations.

10 13. Respondent Jennifer Kent is the current Director of DHCS. As such, Director Kent
11 has a mandatory ministerial duty to ensure DHCS's compliance with all applicable state and federal
12 laws governing the Medi-Cal program. Welf. & Inst. Code § 10721. Director Kent is sued only in
13 her official capacity.

14 14. Respondent CDSS is the agency delegated by Respondent DHCS to administer the
15 IHSS program. On August 20, 2018, Respondent CDSS adopted the Administrative Law Judge's
16 decision that upheld the Los Angeles County Department of Social Services' denial of IHSS
17 eligibility retroactive to the date of Petitioner Reed's Medi-Cal application and denied his request
18 for equitable relief.

19 15. Respondent Pat Leary is the current Acting Director of CDSS. As such, Director
20 Leary has a mandatory ministerial duty to ensure Respondent CDSS's compliance with all
21 applicable state and federal laws governing the IHSS program. Welf. & Inst. Code §§ 10600;
22 10553; 12301; 12302. Director Leary is sued only in her official capacity.

23 **STATUTORY AND REGULATORY FRAMEWORK**

24 **The Medi-Cal Program**

25 16. The Medicaid program is a cooperative, federal and state-funded program that
26 provides medical assistance to low-income elderly persons and persons with disabilities, among
27 others. *See* 42 U.S.C. §§ 1396 *et seq.* The purpose of the Medicaid program is to furnish, "medical
28 assistance on behalf of ... aged, blind or disabled individuals, whose income and resources are

1 insufficient to meet the costs of necessary medical services” and “to help such families and
2 individuals to attain or retain capability for independence or self-care....” *Id.* at § 1396-1.

3 17. The goal of California’s Medicaid program, Medi-Cal, is to provide comprehensive
4 health care to low-income Californians who cannot afford the cost of health care. Welf & Inst.
5 Code § 14012(a).

6 18. On the federal level, Medicaid is administered by the Centers for Medicare and
7 Medicaid Services (“CMS”), an agency within the United States Department of Health and Human
8 Services.

9 19. All states that elect to participate in the Medicaid program must comply with the
10 requirements of Title 19 of the Social Security Act (hereinafter “Medicaid Act”) and its
11 implementing regulations. 42 U.S.C. §§ 1396-1396v. California has elected to participate in the
12 Medicaid program. Welf. & Inst. Code § 14000 *et. seq.*

13 **Duties and Obligations of the Single State Agency**

14 20. As the designated single state agency for Medi-Cal, Respondent DHCS has a
15 mandatory ministerial duty to administer the Medi-Cal program according to state and federal law.
16 Welf. & Inst. Code § 14100.1; 22 C.C.R. § 50004. As such, Respondent DHCS is solely
17 responsible for administering and supervising the state’s Medicaid plan. 42 U.S.C. § 1396a(a)(5);
18 42 C.F.R. § 431.10.

19 21. Respondent DHCS must utilize methods of administration necessary for the proper
20 and effective operation of the Medi-Cal program. 42 U.S.C. § 1396a(a)(4).

21 22. Respondent DHCS must ensure that “all individuals wishing to make application for
22 [Medi-Cal] have opportunity to do so” and that Medi-Cal benefits be furnished to all eligible
23 individuals with reasonable promptness. 42 U.S.C. § 1396a(a)(8); 22 C.C.R. § 50177.

24 23. Respondent DHCS “is responsible for determining eligibility for all individuals
25 applying for or receiving benefits.” 42 C.F.R. § 431.10(b)(3). Although Respondent DHCS is
26 permitted to delegate certain eligibility processing functions to other governmental agencies, it
27 must ensure that the delegated agency “complies with all relevant Federal and State law, regulations
28

1 and policies, including, but not limited to, those related to the eligibility criteria.” 42 C.F.R.
2 §§ 431.10(c)(3)(i)(A).

3 24. This limited delegation does not relieve Respondent DHCS of its duty to ensure that
4 eligibility determinations comply with all applicable laws. Specifically, Respondent DHCS “must
5 exercise appropriate oversight over the eligibility determinations” made by the delegated agency
6 and institute “corrective action” as needed. 42 C.F.R. § 431.10(c)(3)(ii).

7 25. Respondent DHCS has chosen to delegate the task of making individual eligibility
8 determinations to the county welfare departments in each of the 58 California counties. 22 C.C.R.
9 § 50004(c).

10 26. Additionally, Respondent DHCS has delegated responsibility for the IHSS program,
11 a Medi-Cal covered benefit, to Respondent CDSS. California Medicaid State Plan Amendment No.
12 13-0024-MM4 (Effective Date: October 1, 2013).

13 27. Respondent DHCS retains the ultimate authority to supervise the Medi-Cal program
14 to ensure compliance with state and federal law or to develop or issue policies, rules, and
15 regulations on program matters. 42 C.F.R. §§ 431.10(c)(3)(i)(A), 431.10(e). Respondent DHCS
16 must ensure that the Medi-Cal program is continuously in operation in all local offices and agencies
17 through issuing policies and instructions, systematic planned examination and evaluation of
18 operations in local offices by state staff who make regular visits, and other reports and controls. 42
19 C.F.R. § 431.50(b)(3).

20 28. Under state law, DHCS Respondents must administer the Medi-Cal program
21 promptly and humanely. Welf. & Inst. Code § 10000. They must also secure all aid to which an
22 individual is entitled without discrimination on account of any characteristic listed or defined by
23 law. *Id.* § 10500.

24 **Medi-Cal & Constitutional Due Process Requirements**

25 29. Medi-Cal applicants and beneficiaries, including IHSS program applicants, are
26 entitled to due process. U.S. Const. amend. XIV; Cal. Const., Art. I, §§ 7, 15.

27 30. Recipients and applicants for public benefits, including the Medi-Cal program and
28 Medi-Cal services like IHSS, have rights to written notice and an opportunity for a hearing before

1 coverage of services can be denied, suspended, reduced, or terminated. 42 U.S.C. § 1396a(a)(3);
2 *Goldberg v. Kelly*, 397 U.S. 254 (1970); 42 C.F.R. §§ 431.200-250.

3 31. Likewise, state law mandates that “[Medi-Cal] applicants or beneficiaries shall have
4 the right to a state hearing if dissatisfied with any action or inaction of ... the Department of Health
5 [Care] Services ... relating to Medi-Cal eligibility or benefits.” 22 C.C.R. § 50951(a); Welf. & Inst.
6 Code § 10950; 42 C.F.R. § 431.220(b).

7 32. Medi-Cal and IHSS applicants and beneficiaries are entitled to written notice of their
8 right to a fair hearing to contest any action or inaction by DHCS Respondents to approve, deny,
9 discontinue, or change the eligibility status for Medi-Cal or a share of cost. *Id.* at § 50179(a), (c)(4).

10 33. At least ten days before termination, suspension, or reduction of Medi-Cal eligibility
11 or covered services, written notice must be mailed to Medi-Cal beneficiaries. 22 C.C.R.
12 § 50179(d). Such notice must include a statement of the action the State intends to take; the reasons
13 and legal authorities that support the intended action; and an explanation of the individual’s right
14 and the procedures to request an administrative hearing. 22 C.C.R. § 50179(c).

15 **Medi-Cal Eligibility Determinations**

16 34. Respondent DHCS shall furnish Medi-Cal benefits with reasonable promptness to
17 all eligible individuals. 42 U.S.C. § 1396a(a)(8).

18 35. An application for Medi-Cal under any program is an application for Medi-Cal
19 under all programs for which the person may be eligible. 22 C.C.R. § 50153(a). A person may
20 choose to have their application processed under any program for which they are eligible even if it
21 is not the most advantageous. 22 C.C.R. § 50153(c).

22 36. Erroneously denied applications, whether determined a county welfare department
23 or by a fair hearing decision, must be rescinded. 22 C.C.R. § 50182. This is known as a corrective
24 action. “Medi-Cal eligibility that results from corrective action taken on a denied application shall
25 be approved based on the date of the application that was denied.” *Id.*

26 37. Individuals who have their Medi-Cal eligibility discontinued must be evaluated by
27 the county department to determine if Medi-Cal eligibility exists under any other program. 22
28 C.C.R. § 50183. The county department must transfer the person to the appropriate Medi-Cal

1 program and determine his eligibility under that program. *Id.* A new application is not required.
2 *Id.*

3 38. Individuals who have their Medi-Cal eligibility wrongly determined may require
4 other corrective actions to make them whole. For example, Medi-Cal eligibility is a prerequisite
5 for IHSS eligibility, and the IHSS program requires a separate application process and eligibility
6 determination. Therefore, correcting Medi-Cal eligibility is the necessary antecedent to addressing
7 an erroneous IHSS eligibility determination.

8 39. Individuals whose Medi-Cal eligibility was wrongly determined may have incurred
9 medical expenses for services that should have been covered by the Medi-Cal program. The Medi-
10 Cal program is required to reimburse these individuals for Medi-Cal covered services that were
11 incurred as a result of an erroneous Medi-Cal determination. Welf. & Inst.Code § 14019.3; *Conlan*
12 *v. Bonta*, 102 Cal. App. 4th 745 (2002); 42 C.F.R. § 431.246.

13 40. Individuals may be financially eligible for Medi-Cal if they qualify as “categorically
14 needy” or “medically needy.” People who are “categorically needy” are generally persons who
15 receive cash assistance to meet basic needs or who qualify under other categories set forth in federal
16 and state law. “Categorically needy” people receive “free Medi-Cal,” meaning that they do not
17 generally need to financially contribute to the cost of their care for covered services.

18 41. “Medically needy” recipients are otherwise eligible for Medi-Cal, but are required
19 to pay a “share of the cost” toward their medical treatment if their income exceeds the allowed
20 amount. Welf. & Inst. Code §§ 14005.7, 14005.9; 22 C.C.R. §§ 50651-50660. This “share of cost”
21 is the amount that they must spend out-of-pocket on medical care before Medi-Cal will pay for any
22 covered service.

23 42. In 2018, married Medi-Cal beneficiaries in California with more than \$1,664 of net
24 monthly income are subject to payment of a share of the cost for their care. The State’s calculation
25 requires that married couples with net monthly income above \$1,664 pay all income above \$934
26 each month toward their health care costs before Medi-Cal will pay for any covered services.

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Medi-Cal Eligibility & the Institutional Alternatives:

Home & Community-Based Services

43. For Medi-Cal eligible beneficiaries, the Medi-Cal program is required to cover certain medical services. 42 U.S.C. § 1396d(a)(4)(A); Welf. & Inst. Code §§ 14132.20, 14133.12, 14132.99, 14132.97, 14132.92, 14132.925, 14132.93. Certain covered services included in California’s Medicaid State Plan must be offered statewide, without any limits on the number of qualified people receiving those services. Services made available to beneficiaries may not be less in amount, duration, or scope than those services made available to any other individuals. 42 U.S.C. § 1396a(a)(10)(B)(i); 42 C.F.R. § 440.240(a), (b). In addition, services made available to any individuals in a categorically needy or medically needy group must be equal in amount, duration, and scope for all individuals within the group. 42 U.S.C. § 1306a(a)(10)(B)(ii); 42 C.F.R. § 440.240(b). Respondent DHCS must provide Medi-Cal services statewide, including in every county. 42 U.S.C. § 1396a(a)(1); 42 C.F.R. § 431.50(b).

44. The Medi-Cal program covers a number of home and community-based services programs as an alternative to institutional long-term care. Some of the home and community-based services programs are offered to any Medi-Cal recipient who is eligible to receive the service as described above. Other home and community-based programs are offered through more restricted “waiver” programs, which can be limited in scope, enrollment, and geography.

45. The purpose of these Medi-Cal home and community-based services programs is to enable low-income seniors and people with disabilities to receive the medical and personal care they need while living in their homes rather than in more expensive and less desirable institutional settings.

46. Respondent DHCS delivers home and community-based services programs as a Medi-Cal benefit through the state’s Medi-Cal State Plan, Medicaid Act section 1915(c) waivers, section 1915(i) or (k) state plan benefits, and section 1115 waivers.

47. The IHSS program is the largest Medi-Cal home and community-based services program in California. Established in 1973, IHSS ensures that eligible individuals who are elderly,

1 blind or disabled receive the home care services they need to remain safely in their homes. *See*
2 *Welf. & Inst. Code §§ 12300, 14132.95, 14132.951.*

3 48. The IHSS program provides attendant care services to Medi-Cal beneficiaries,
4 which may not be less in amount, duration, or scope than those services made available to any other
5 individuals. In other words, IHSS must be made available to any qualifying person, without an
6 enrollment cap or a waiting list. At present, the IHSS program enables more than 550,000 people
7 with disabilities in California to live at home and in their community. It is a critical piece of Medi-
8 Cal’s continuum of services for those who need long-term care.

9 49. California covers 41% of people in the IHSS program through the Community First
10 Choice Option (“IHSS-Community First Choice Option”) which is a section 1915(k) state plan
11 option. Medi-Cal beneficiaries who are enrolled in IHSS-Community First Choice Option are
12 entitled to receive a wide variety of needed services in their own homes. Such services include
13 meal preparation and cleanup, transportation to and from medical appointments, domestic and
14 related services, paramedical services, protective supervision, and personal care services.

15 50. A married individual who is eligible for the IHSS-Community First Choice Option
16 program is considered an “institutional spouse” under the Affordable Care Act’s definitional
17 change and is entitled to have the spousal impoverishment protection methodology applied to his
18 or her Medi-Cal eligibility determination.

19 51. In addition to IHSS, there are several other Medi-Cal home and community-based
20 services programs for which potentially eligible individuals could qualify. These include benefits
21 delivered through a federal Medicaid waiver under the authority of sections 1915(c) and 1115 of
22 the Medicaid Act. All waivers limit the number of enrollees. These programs include the Home
23 and Community-Based Alternatives Waiver, the Multi-purpose Senior Services Program, the
24 Assisted Living Waiver, and Community Based Adult Services program. Waivers have a cap on
25 enrollment, which has created significant waiting lists for some people who need home and
26 community-based services. For example, on information and belief, the Home and Community-
27 Based Alternatives Waiver has a waitlist of approximately 2,700 people.

1 52. A married individual who is eligible for, but not enrolled in, a qualifying home and
2 community-based services program (*i.e.*, a waitlisted individual) is considered an “institutional
3 spouse” under the Affordable Care Act’s definitional change and is entitled to have the spousal
4 impoverishment protection methodology applied to their Medi-Cal eligibility determination. A
5 waitlisted individual approved for Medi-Cal pursuant to the expanded spousal impoverishment
6 protection is entitled to all covered Medi-Cal benefits, including IHSS, even as they wait for
7 acceptance into a limited waiver slot.

8 **Federal and State Anti-Discrimination Laws**

9 53. Section 1557 of the ACA also expressly incorporated existing anti-discrimination
10 laws and applied them to federally funded health programs, such as Medi-Cal. 42 U.S.C. § 18116.
11 Thus, Respondents are prohibited from excluding from participation in, denying the benefits of, or
12 subjecting any applicant or beneficiary to discrimination on the basis of race, color, national origin,
13 sex, age, or disability. *Id.*

14 54. The ACA anti-discrimination provisions supplement existing protections such as the
15 Americans with Disabilities Act (ADA). In enacting the ADA, Congress found that “[i]ndividuals
16 with disabilities continually encounter various forms of discrimination, including...segregation...”
17 42 U.S.C. § 12101(a)(5). Title II of the ADA provides that “no qualified individual with a disability
18 shall, by reason of disability, be excluded from participation in or be denied the benefits of services,
19 programs, or activities of a public entity or be subjected to discrimination by such entity.” *Id.* at §
20 12132.

21 55. The United States Supreme Court in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581
22 (1999), held that the unnecessary institutionalization of individuals with disabilities is a form of
23 discrimination under Title II of the ADA. In doing so, the Court interpreted the ADA’s “integration
24 mandate” as requiring persons with disabilities to be served in the community when: (1) the state
25 determines that community-based treatment is appropriate; (2) the individual does not oppose
26 community placement; and, (3) community placement can be reasonably accommodated.
27 *Olmstead*, 527 U.S. at 607.

1 56. Regulations implementing Title II of the ADA provide: “A public entity shall
2 administer services, programs, and activities in the most integrated setting appropriate to the needs
3 of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d) (1991).

4 57. Section 504 of the Rehabilitation Act of 1973, on which the ADA is modeled, sets
5 forth similar protections against discrimination by recipients of federal funds, such as Respondents
6 herein. 29 U.S.C. §§ 794-794a. These protections include the prohibition against unnecessary
7 segregation. Regulations implementing Section 504 require that a public entity administer its
8 services, programs and activities in “the most integrated setting appropriate” to the needs of
9 qualified individuals with disabilities. 28 C.F.R. § 41.51(d).

10 58. Regulations implementing Title II of the ADA and Section 504 also provide: “a
11 public entity may not, directly or through contractual or other arrangements, utilize criteria or other
12 methods of administration: (i) that have the effect of subjecting qualified individuals with
13 disabilities to discrimination on the basis of disability; [or] (ii) that have the purpose or effect of
14 defeating or substantially impairing accomplishment of the objectives of the entity’s program with
15 respect to individuals with disabilities. . . .” 28 C.F.R. § 35.130(b)(3); 28 C.F.R. § 41.51(b)(3)(i);
16 45 C.F.R. § 84.4(b)(4).

17 59. ADA regulations further provide: “A public entity shall not impose or apply
18 eligibility criteria that screen out or tend to screen out an individual with a disability or any class
19 of individuals with disabilities from fully and equally enjoying any service, program, or activity,
20 unless such criteria can be shown to be necessary for the provision of the service, program, or
21 activity being offered.” 28 C.F.R. § 35.130(b)(8).

22 60. Similar to the ADA, California’s anti-discrimination statute prohibits discriminatory
23 actions by the state and state-funded agencies or departments, and provides civil enforcement rights
24 for violations. Gov’t. Code §§ 11135 – 11139.

25 **Spousal Impoverishment Protections**

26 *History of the Spousal Impoverishment Protections*

27 61. Prior to 1988, when a state determined the Medicaid eligibility of a married person
28 for purposes of obtaining Medicaid benefits, a state generally considered the income and assets of

1 either spouse as being available to the Medicaid applicant. This is known as “spousal deeming.”
2 When one spouse became disabled and required institutional care in a nursing home or other
3 Medicaid-funded facility, assets held jointly by the spouse receiving care in an institution (the
4 “institutionalized spouse”) and the spouse living in the community (the “community spouse”) were
5 deemed fully available to the applicant in determining Medicaid eligibility.

6 62. This practice of spousal deeming impoverished many community spouses who spent
7 all of the married couple’s income and assets paying for the institutionalized spouse’s care until
8 their assets were exhausted and the institutionalized spouse qualified for Medicaid.

9 63. In 1988, Congress sought to remedy this “pauperization” problem with regard to
10 nursing facility and institutional settings by enacting the Medicaid Catastrophic Coverage Act. 102
11 Stat. 754, 42 U.S.C. § 1396r-5(b)(1). The Medicaid Catastrophic Coverage Act imposed a
12 protection against spousal impoverishment by ensuring that the community spouse would be able
13 to keep a sufficient – but not excessive – amount of income and resources without disqualifying
14 the institutionalized spouse from Medicaid.

15 64. This change helped many couples, but it also created a strong financial incentive for
16 people to seek care in a nursing facility. Even if an individual could remain safely in their home
17 with home and community-based services, the Medicaid Catastrophic Coverage Act’s protections
18 were limited only to the spouses of people receiving care in a hospital or nursing facility (*i.e.*, an
19 institutional setting), but not those receiving long-term care while living at home.²

20 ***Affordable Care Act Expansion of Spousal Impoverishment Protection***

21 65. In 2010, Congress addressed this problem by requiring all states, including
22 California, to evaluate Medicaid eligibility using the spousal impoverishment protection
23 methodology for people who meet the nursing facility level of care standard, but were eligible for
24 home and community-based services. Pub. L. No. 111-148. The Affordable Care Act amended
25 the statutory definition of an “institutionalized spouse.” *See* 42 U.S.C. § 1396r-5(h)(1)(A)

26 _____
27 ² The Medicaid Catastrophic Coverage Act permitted states to offer spousal impoverishment
28 protections to eligible individuals enrolled in a 1915(c) waiver. 42 U.S.C § 1396r-5(h)(1)(A).
Prior to the ACA’s expansion, California’s 1915(c) waivers used spousal impoverishment rules
for enrolled, but not waitlisted, individuals.

1 (referring to services described in 42 U.S.C. § 1396a(a)(10)(A)(ii)(VI)). Under the expanded
2 protection, a spouse with a disability no longer must submit to institutionalization or obtain a scarce
3 waiver slot to receive the care he or she needs. Rather, if the spouse with a disability meets the
4 criteria for a broad range of home and community-based service programs, the couple may avail
5 themselves of the expanded protection, thereby allowing the disabled spouse to remain at home
6 while receiving needed medical care and services.

7 66. The expanded spousal impoverishment protection is not itself a Medi-Cal program
8 or service. Rather it is an income- and asset-counting methodology used to determine Medi-Cal
9 eligibility for married individuals eligible who need home and community-based services.

10 67. The definitional change expanding the spousal impoverishment protection became
11 effective on January 1, 2014. *See* Pub. L. No. 111-148, § 2404.

12 **FACTUAL ALLEGATIONS**

13 **DHCS Respondents' Actions and Inactions Regarding the Expanded Spousal**

14 **Impoverishment Protection from January 1, 2014 through Present**

15 68. On May 7, 2015, CMS issued guidance on the spousal impoverishment protection
16 detailing “how states would apply the statute in making Medicaid eligibility determinations.”
17 CMS, SMD #15-001 ACA #32, Affordable Care Act’s Amendments to the Spousal
18 Impoverishment Statute (D.H.H.S. 2015) (“CMS Guidance”).

19 69. The CMS Guidance explained that states are required to apply the spousal
20 impoverishment rule when determining Medicaid eligibility for married Medicaid applicants who
21 meet an institutional level of care. This includes applicants who are “medically needy” and must
22 pay a share of cost in order to receive services. CMS made clear that the spousal impoverishment
23 protection also applies to applicants who are on waiting lists for home and community-based
24 service waivers.

25 70. The CMS Guidance clarified that states must determine need for home and
26 community-based services when a married applicant requests such services. States are directed to
27 establish a method (or methods) for applicants to request home and community-based services that
28 will trigger an eligibility determination based on the spousal impoverishment methodology.

1 According to the CMS Guidance, it is the responsibility of the state, not the applicant, to determine
2 which Medicaid home and community-based service program the applicant is eligible for, based
3 on the eligibility criteria for each program.

4 71. Finally, the CMS Guidance reminded states that the expanded definition of
5 “institutionalized spouse” went into effect on January 1, 2014, and it expressly directed the states
6 to “begin work on conforming their eligibility practices for married individuals potentially in need
7 of HCBS as soon as possible” and that this change “affects initial eligibility determinations and *in*
8 *some circumstances redeterminations* of eligibility.” (Emphasis added).

9 72. From January 1, 2014, the effective date of the expanded spousal impoverishment
10 protection until after the filing of the instant lawsuit on July 6, 2017, DHCS Respondents failed to
11 even inform the county welfare departments that a new group of individuals were potentially
12 eligible for Medi-Cal based on the expanded spousal impoverishment protection by either issuing
13 guidance to them, or otherwise directing them to process Medi-Cal applications in accordance
14 with the expanded spousal impoverishment protections. Despite the fact that the ACA was
15 enacted in 2010, the definitional change did not become effective until 2014, and the CMS
16 Guidance was issued in 2015. Moreover, DHCS Respondents began to draft statewide guidance
17 to regarding the expanded spousal protection in 2015, but it did not issue the guidance until after
18 this lawsuit was filed in July 2017.

19 73. On July 19, 2017, DHCS Respondents released statewide guidance in the form of
20 All County Welfare Directors Letter (“ACWDL”) 17-25, which announced the expanded definition
21 of “institutionalized spouse” as required by the ACA.

22 74. The release of ACWDL 17-25, however, did not result in all or even most potentially
23 eligible individuals receiving eligibility determinations based on the expanded spousal
24 impoverishment protection. It also failed to cure a number of problems created as a result of DHCS
25 Respondents’ delayed actions and continued inactions regarding the expanded spousal
26 impoverishment protection.

27 75. After releasing ACWDL 17-25, DHCS Respondents did not disseminate any
28 additional statewide guidance from late July 2017 to early August 2018.

1 76. DHCS Respondents convened an “SI Work Group” of county policy staff to respond
2 to counties’ questions and concerns regarding the application of the expanded spousal
3 impoverishment protection in eligibility determinations. However, the SI Work Group included
4 representatives from less than 10 California counties, and DHCS Respondents did not officially or
5 systematically release information to the other counties about the issues discussed and developed
6 in the SI Work Group meetings.

7 77. For more than a year, from late July 2017 to mid-August 2018, DHCS Respondents
8 did not disseminate any additional statewide guidance. This meant that counties were not able to
9 consistently ensure that potentially eligible individuals received proper Medi-Cal eligibility
10 determinations.

11 78. On August 21, 2018, more than a year after ACWDL 17-25 and four and a half years
12 after the expanded spousal impoverishment went into effect, DHCS Respondents issued ACWDL
13 18-19, which provided supplemental guidance to the counties regarding the expanded spousal
14 impoverishment protection.

15 79. Even with the issuance of ACWDLs 17-25 and 18-19, DHCS Respondents’ belated
16 efforts are still inadequate to satisfy their ministerial duties as the single state agency to provide
17 Medi-Cal benefits and services to eligible beneficiaries and applicants with reasonable promptness
18 and in a comparable and consistent way statewide.

19 80. Specifically, the policy guidance issued by DHCS Respondents to date is silent or
20 insufficient in five key aspects of implementation: (1) the identification of all potentially eligible
21 individuals statewide; (2) the notification of all potentially eligible individuals statewide of the
22 expanded spousal impoverishment protection so that they have a reasonable opportunity to apply
23 or seek a correct eligibility determination; (3) the supervision of the counties and the enforcement
24 of the expanded spousal impoverishment protection to ensure all potentially eligible individuals
25 statewide receive correct and prompt Medi-Cal eligibility determinations; (4) the creation of a
26 process to determine retroactive eligibility for IHSS; and (5) the provision of retroactive
27 reimbursement or payment for Medi-Cal covered expenses that would have been covered if Medi-
28 Cal eligibility had been properly determined initially.

1 **DHCS Respondents’ Failure to *Identify* Potentially Eligible Individuals**

2 81. DHCS Respondents have failed to identify all potentially eligible individuals
3 entitled to Medi-Cal eligibility determinations based on the expanded spousal impoverishment
4 protection.

5 82. Specifically, Respondent DHCS has breached its ministerial duty to identify all
6 potentially eligible individuals, such as those who:

- 7 a) Are currently enrolled in IHSS-Community First Choice Option and have a Medi-
8 Cal share of cost;
- 9 b) Are currently enrolled in Medi-Cal with a share of cost who are in need or have a
10 pending request for IHSS or another home and community-based services program;
- 11 c) Were enrolled in Medi-Cal, but whose Medi-Cal was discontinued;
- 12 d) Were denied Medi-Cal eligibility due to excess property;
- 13 e) Are institutionalized, but could live in the community with the provision of Medi-
14 Cal home and community-based services.

15 83. In early 2018, DHCS Respondents did attempt to identify individuals who were
16 currently on a Medi-Cal waiver waiting list who might be potentially impacted by the definitional
17 change. Based on this attempt, DHCS Respondents provided counties with an estimated number of
18 individuals on the waiver waiting lists in their county. However, DHCS Respondents did not
19 provide a list of individual names of waiver waitlisted individuals. Without the names, counties
20 were unable to ensure all potentially eligible individuals received a correct eligibility determination.

21 84. To date, DHCS Respondents have not compiled or provided a complete list of
22 potentially impacted individuals to counties. To the extent DHCS Respondents believe the counties
23 can compile their own lists, they have not provided the counties with deadlines for identifying
24 potentially eligible individuals and have not taken any steps to supervise the counties in these
25 efforts.

26 **DHCS Respondents’ Failure to *Notify* Potentially Eligible Individuals**

27 85. Despite direction in the 2015 CMS Guidance that States must establish methods for
28 applicants to request home and community-based services that will trigger application of expanded

1 spousal impoverishment protections, DHCS Respondents have failed to notify all potentially
2 impacted individuals of the definitional change. This includes a failure to notify individuals
3 erroneously denied or discontinued from Medi-Cal and those assessed an incorrect share of cost for
4 their Medi-Cal. Instead, ACWDLs 17-25 and 18-19 put the onus on applicants or beneficiaries to
5 ask for an eligibility determination using a methodology that they were never informed exists.

6 86. Although DHCS Respondents developed one informational letter about the
7 expanded spousal impoverishment protection, DHCS Respondents only sent that letter to
8 individuals on the Medi-Cal waiver waitlists at that particular point in time. Medi-Cal Eligibility
9 Division Information Letter (“MEDIL”) No. 18-03. On information and belief, DHCS
10 Respondents have not notified all individuals who were on a waiver waitlist at any time between
11 January 1, 2014 and the present.

12 87. DHCS Respondents did not send the informational letter to potentially eligible
13 individuals who never appeared on a waiver waitlist such as those who:

- 14 a) Are currently enrolled in IHSS-Community First Choice Option and have a Medi-
15 Cal share of cost;
- 16 b) Are currently enrolled in Medi-Cal with a share of cost who are in need or have a
17 pending request for IHSS or another home and community-based services program;
- 18 c) Were enrolled in Medi-Cal, but whose Medi-Cal was discontinued;
- 19 d) Were denied Medi-Cal eligibility due to excess property;
- 20 e) Are institutionalized, but could live in the community with the provision of Medi-
21 Cal home and community-based services.

22 88. Without notification, it is impossible for DHCS Respondents to comply with the
23 CMS Guidance to ensure that all potentially eligible individuals have a method of triggering the
24 application of these rules. For this reason, ACWDLs 17-25 and 18-19 and MEDIL 18-03 fall short
25 of the requirements laid out by the CMS Guidance for administration of the expanded spousal
26 impoverishment protection.

27 89. Additionally, DHCS Respondents’ actions fall short of the promptness requirements
28 in both 42 U.S.C. § 1396a(a)(8) and Welf. & Inst. § 10000.

1 90. Furthermore, DHCS Respondents’ informational letter to waiver waitlisted
2 individuals is a constitutionally deficient notice because it does not explain that a potentially
3 eligible individual has hearing rights and the right to retroactive coverage.

4 **DHCS Respondents’ Failure to Supervise and Enforce the Expanded Spousal**

5 **Impoverishment Protection**

6 91. Respondent DHCS’s duties as the single state agency extend beyond issuing two
7 policy letters and sending an informational notice to a small portion of potentially eligible
8 individuals. DHCS Respondents must ensure that the Medi-Cal program is continuously in
9 operation in all local offices and agencies by issuing policies and instructions, conducting
10 systematic planned examination and evaluation of operations in local offices by state staff who
11 make regular visits, and implementing other reports and controls. 42 C.F.R. § 431.50(b)(3).

12 92. DHCS Respondents have abrogated their duty to ensure that the expanded spousal
13 impoverishment protection is being applied consistently and comparably across the state. DHCS
14 Respondents have not taken the requisite steps to ensure that Medi-Cal eligibility determinations
15 based on the expanded spousal impoverishment protection are in operation in all local offices. Nor
16 have they supervised the counties to ensure that eligibility determinations are being made correctly
17 and promptly.

18 93. At all times material herein, DHCS Respondents have admittedly failed to monitor
19 whether any county is following ACWDLs 17-25 or 18-19. DHCS Respondents also did not
20 impose deadlines for implementation of the policy guidance related to the expanded spousal
21 impoverishment protection. Nor did they systematically track issues as counties raised them.
22 DHCS Respondents did not even require counties to acknowledge whether they received ACWDLs
23 17-25 and 18-19.

24 94. Instead, DHCS Respondents passively waited for counties to raise questions, despite
25 the fact that not hearing from a county does not mean that the policy was implemented properly.
26 DHCS Respondents do not review a county’s internal guidance interpreting Respondent DHCS’s
27 policy guidance unless a county specifically requests it.

28

1 95. While DHCS Respondents conduct reviews of a sample of each county’s Medi-Cal
2 cases as part of a general case review process, DHCS Respondents have not conducted and will not
3 conduct a case review specific to the expanded spousal impoverishment protection. Likewise,
4 DHCS Respondents have not conducted and will not conduct any quality control review of county
5 cases involving the spousal impoverishment protection.

6 96. Furthermore, although DHCS Respondents stated in ACWDL 18-19 that the county
7 computer systems should be updated to process cases using the expanded spousal impoverishment
8 protection, they did not explain when or how that should happen. As a result, none of the county
9 computer eligibility and case management systems have programmed the necessary eligibility rules
10 or criteria.

11 97. On information and belief, the counties do not know when such programming will
12 occur. As a result, a county currently must determine the Medi-Cal budget manually and enter a
13 separate case comment to indicate that the spousal impoverishment methodology was applied in a
14 particular case. In a system where Medi-Cal eligibility determinations are otherwise automated and
15 processed through a computer, these manual calculations for expanded spousal impoverishment are
16 burdensome and non-routine for county staff processing them.

17 98. Starting in August 2018, DHCS Respondents provided a handful of optional
18 regional training on the expanded spousal impoverishment protection. Counties were not required
19 to attend. DHCS Respondents took attendance at the trainings, but did not verify that all 58 counties
20 attended a training. The spousal impoverishment portion of the training was less than two hours
21 long.

22 99. DHCS Respondents’ issuance of written policy guidance and presenting optional
23 regional trainings does not satisfy DHCS Respondents’ duty to conduct systematic planned
24 examination and evaluation of operations in local offices.

25 100. Further, DHCS Respondents’ laissez faire approach to “implementation” has led to
26 dramatically different outcomes based on geography. For example, representatives of the Los
27 Angeles County Department of Public Social Services, which manages the largest population of
28 individuals potentially impacted by the expanded spousal impoverishment protection in the State,

1 have regularly interacted with DHCS Respondents concerning the expanded spousal
2 impoverishment protection. Los Angeles County participated in the SI Work Group, was proactive
3 in raising questions to Respondent DHCS, and was among the first counties to issue their own
4 internal guidance and conduct internal trainings. Despite this, Los Angeles County reports a
5 number of areas where DHCS Respondents' guidance is still insufficient, such as: (i) failure to
6 direct when and how the county's computer eligibility systems would be programmed with the
7 expanded spousal impoverishment protection rules; (ii) the need for DHCS to provide lists of
8 potentially eligible individuals; and (iii) instructions on how to deal with verification of eligibility
9 going back for many years, among others. On information and belief, Los Angeles County has
10 more than 3.9 million Medi-Cal beneficiaries, of whom more than 200,000 also receive IHSS. Los
11 Angeles County is unable to identify how many cases were processed using the expanded spousal
12 impoverishment methodology.

13 101. In contrast, representatives of the San Mateo County Human Services Agency did
14 not engage in the SI Work Group, had limited interactions with DHCS Respondents regarding the
15 expanded spousal impoverishment protection, and only released its internal expanded spousal
16 impoverishment protection policy in November 2018. Yet, working in tandem with and responsive
17 to local legal aid advocates, San Mateo County staff used the spousal impoverishment methodology
18 on a few cases before DHCS Respondents issued their statewide guidance in July 2017. Thus, a
19 small, select group of San Mateo County residents, who had representation from legal aid
20 advocates, could access the expanded spousal impoverishment protection using only the 2015 CMS
21 Guidance. On information and belief, San Mateo County has 145,000 enrolled Medi-Cal
22 beneficiaries, of whom more than 4,600 also receive IHSS. However, in San Mateo County only
23 approximately 10 individuals have been determined eligible for Medi-Cal using the expanded
24 spousal impoverishment protection since January 1, 2014.

25 102. As yet another disparate example, representatives of the Tulare County Human
26 Services Agency staff did not participate in the SI Work Group and did not reach out to DHCS
27 Respondents with requests for clarification or assistance in implementing the expanded spousal
28 impoverishment protection. On information and belief, Tulare County has 245,000 enrolled Medi-

1 Cal beneficiaries, approximately 4,100 receiving IHSS, and 506 waiver waitlist participants, but
2 only *six* cases have been assessed and approved using the expanded spousal impoverishment
3 protection since 2014.

4 103. Counties report that DHCS Respondents never told them to prioritize the expanded
5 spousal impoverishment protection or ACWDLs 17-25 and 18-19 over other policy matters or
6 workload issues.

7 104. None of the county case management systems have the expanded spousal
8 impoverishment protection budgeting rules programmed into their system.

9 105. Some counties report having an insufficient understanding and guidance as to how
10 to assess retroactive IHSS eligibility.

11 106. Several counties also report having an insufficient understanding and guidance as to
12 how to calculate and verify reimbursements owed for Medi-Cal covered services, particularly
13 IHSS.

14 107. DHCS Respondents' utter failure of its ministerial duty to supervise the counties
15 in applying the complicated expanded spousal impoverishment protection has led to a predictable
16 result: the amount, duration, and scope of Medi-Cal benefits and services furnished to potentially
17 eligible individuals is not comparable from county to county.

18 108. Furthermore, DHCS Respondents' lack of supervision and oversight has resulted in
19 dramatically different access to the expanded spousal impoverishment protection based on a
20 potentially eligible individual's geographic location. This is the opposite of the statewide
21 consistency required by the Medicaid Act.

22 109. An estimated 5,000 individuals are on Medi-Cal waiver waitlists and 12,000 IHSS
23 recipients have a share of cost. Thousands of other married individuals qualify for home and
24 community-based services and are entitled to receive these services under Medi-Cal but have been
25 wrongfully denied or discontinued from Medi-Cal because of DHCS Respondents' actions and
26 omissions in administering the expanded spousal impoverishment protection in California. These
27 individuals are placed at risk of unnecessary institutionalization and impoverishment, as a result of
28 DHCS Respondents' failure to properly determine their Medi-Cal eligibility under the mandatory

1 expanded spousal impoverishment protection and have no plain, speedy, or adequate remedy at
2 law.

3 **DHCS Respondents' Failure to Provide Retroactive IHSS Eligibility, and**
4 **Provider Payment & Reimbursement**

5 110. ACWDLs 17-25 and 18-19 provide no guidance on how counties should process
6 retroactive IHSS eligibility determinations and incomplete and conflicting guidance on
7 reimbursement of attendant care for individuals who can show retroactive eligibility for IHSS.
8 ACWDLs 17-25 and 18-19 require retroactive assessments of Medi-Cal eligibility, and retroactive
9 reimbursement of Medi-Cal covered expenses (through a statewide process, known as the *Conlan*
10 process) for individuals who would have been eligible for Medi-Cal had the expanded spousal
11 impoverishment protection been implemented in 2014. However, these ACWDLs fail to provide
12 procedures to determine retroactive IHSS hours, retroactive IHSS eligibility dates and retroactive
13 payments to IHSS providers who were unpaid for their work.

14 111. Although a substantial number of individuals have not had their Medi-Cal eligibility
15 re-determined based on the expanded spousal impoverishment provision, DHCS Respondents at
16 least have a process in place to determine Medi-Cal eligibility retroactively. This means that the
17 counties also have to the ability to determine retroactive Medi-Cal eligibility.

18 112. In contrast, all Respondents have failed to establish a procedure for retroactively
19 determining IHSS eligibility in the context of the expanded spousal impoverishment provision.
20 Many people eligible for Medi-Cal under the expanded spousal impoverishment protection may
21 have been eligible for IHSS because it is a statewide Medi-Cal covered benefit for individuals with
22 disabilities who require in-home attendant care.

23 113. However, Petitioners and other potentially eligible individuals were unable to access
24 the IHSS program because Medi-Cal eligibility is a condition precedent to IHSS eligibility.

25 114. County welfare departments do not have a process for determining IHSS
26 retroactively in the context of the expanded spousal impoverishment protection because DHCS
27 Respondents have not created that process despite acknowledging in their guidance that many
28

1 potentially eligible individuals assessed retroactively for Medi-Cal may also have been entitled to
2 IHSS as a covered Medi-Cal benefit for individuals with disabilities.

3 115. Relatedly, individuals eligible for IHSS who paid out of pocket for home and
4 community-based care are entitled to reimbursement through the *Conlan* process, but AWCDL 18-
5 19 states that only services “provided by an IHSS enrolled provider” are reimbursable retroactively
6 to January 1, 2014. However, IHSS providers cannot be enrolled into the program retroactively
7 and most people providing attendant care services do not enroll as IHSS providers unless and until
8 they are working for an IHSS-eligible recipient.

9 116. DHCS Respondents have effectively created an illusory benefit. A potentially
10 eligible individual could be eligible retroactively for Medi-Cal and IHSS, have unpaid wages or
11 out of pocket expenses for attendant care, which should be a covered Medi-Cal expense, but cannot
12 be made whole because DHCS Respondents have erected an insuperable barrier to reimbursement.

13 **DHCS Respondents’ Unlawful Denial of Petitioners’ Access To Medi-Cal Benefits**

14 ***Petitioner Patrick Kelley***

15 117. Patrick Kelley is a 69-year-old veteran who lives with his wife, Melody Rogers, in
16 Los Angeles, California.

17 118. Petitioner Kelley has primary progressive multiple sclerosis. First diagnosed almost
18 15 years ago, the disease has progressed, and Petitioner Kelley now has spastic quadriplegia and
19 can only use his left hand for simple, limited motor tasks.

20 119. Because of his condition, Petitioner Kelley is eligible for home and community-
21 based services at a nursing home level of care.

22 120. Although Petitioner Kelley’s condition is severe enough to require a nursing home
23 level of care, Petitioner Kelley and Ms. Rogers do not want Petitioner Kelley to be institutionalized;
24 they want to remain together in their home and community.

25 121. In May 2014, Petitioner Kelley applied for the Nursing Facility/Acute Hospital
26 Waiver, now called the Home and Community Based Alternatives Waiver, to obtain long-term
27 services available to eligible Medi-Cal beneficiaries. In January 2019, Mr. Kelley was approved
28 for the HCBA waiver.

1 122. Petitioner Kelley and his wife, Ms. Rogers, live primarily on a fixed income of
2 pensions and Social Security retirement income. Ms. Rogers works as a licensed real estate agent,
3 which provides her with an irregular source of income. Ms. Rogers's ability to work is severely
4 limited by her caregiving responsibilities to Petitioner Kelley.

5 123. In September 2016, Petitioner Kelley applied for Medi-Cal.

6 124. On February 27, 2017, the Los Angeles County Department of Public Social
7 Services denied Petitioner Kelley's Medi-Cal application on the grounds that he and his wife
8 together had savings that exceeded the Medi-Cal property limit of \$3,000.

9 125. The Los Angeles County Department of Public Social Services did not apply the
10 expanded spousal impoverishment protection to Petitioner Kelley's Medi-Cal eligibility
11 determination because DHCS Respondents had not instructed counties to do so. Had the expanded
12 spousal impoverishment protection been timely implemented, Petitioner Kelley would have
13 qualified for Medi-Cal as of the date of his application.

14 126. As a direct result of DHCS Respondents' failure to implement expanded spousal
15 impoverishment protections, Petitioner Kelley was wrongly denied Medi-Cal and he could not be
16 assessed for IHSS-Community First Choice Option program.

17 127. Had Petitioner Kelley been assessed for IHSS-Community First Choice Option
18 program in September 2016, he would have been found eligible for it.

19 128. Instead, starting in September 2016, Petitioner Kelley and Ms. Rogers paid
20 approximately \$4,000 per month for caregivers to stay with Petitioner Kelley so that he could live
21 safely at home in the community, and with his wife. Ms. Rogers also provided a significant amount
22 of in-home care for Petitioner Kelley.

23 129. On March 16, 2017, an advocate from Bet Tzedek Legal Services, contacted DHCS
24 Respondents regarding Petitioner Kelley. Bet Tzedek Legal Services requested that DHCS
25 Respondents require the Los Angeles County Department of Public Social Services to process
26 Petitioner Kelley's Medi-Cal application using the expanded spousal impoverishment protection
27 because Petitioner Kelley was depleting his resources by paying for private in-home care. DHCS
28 Respondents failed to respond.

1 138. Petitioner Reed has been diagnosed with multiple sclerosis. Approximately 17 years
2 ago, Petitioner Reed was diagnosed with Bell’s Palsy and also had a stroke. Following his stroke,
3 Petitioner Reed experienced paralysis in his left hand as well as vascular dementia, which has
4 resulted in impaired memory, confusion, and trouble with judgment, concentrating, reasoning, and
5 planning. Petitioner Reed also has mood swings, as well as physical impairments, including trouble
6 with walking and balance.

7 139. Because of his conditions, Petitioner Reed is eligible for home and community-
8 based services at a nursing home level of care.

9 140. Although Petitioner Reed’s conditions are severe enough to require a nursing home
10 level of care, Petitioner Reed and his family do not want Petitioner Reed to be institutionalized;
11 they want to remain together at home in their community.

12 141. In 2014, Petitioner Reed was eligible for Medi-Cal with a share of cost and for the
13 IHSS program. However, due to Petitioner Reed’s high monthly share of cost, he was unable to
14 utilize IHSS because it was prohibitively expensive. He voluntarily discontinued his IHSS in late
15 2014.

16 142. Petitioner Reed, through his wife, applied for the Home and Community Based
17 Alternative Waiver program on July 22, 2016. He was placed on the waiting list. As of this filing,
18 Petitioner Reed is still on the waiting list.

19 143. On her husband’s behalf, Mrs. Reed submitted a Medi-Cal redetermination form on
20 October 27, 2016. Los Angeles County Department of Public Social Services, following DHCS
21 Respondents’ rules determined that Petitioner Reed was eligible for Medi-Cal, but with an
22 unaffordable share of cost of \$1,509 per month effective January 1, 2017. Petitioner Reed receives
23 Social Security Disability benefits, and Mrs. Reed is employed as a security guard. Petitioner
24 Reed’s monthly share of cost amounted to nearly 30% of their monthly income.

25 144. The Los Angeles County Department of Public Social Services did not apply the
26 expanded spousal impoverishment rules to Petitioner Reed’s Medi-Cal case because DHCS
27 Respondents had not yet instructed counties to do so. Had expanded spousal impoverishment been
28

1 timely implemented, Petitioner Reed would have qualified for Medi-Cal with a reduced or
2 eliminated share of cost as far back as January 1, 2014.

3 145. Additionally, if Petitioner Reed had been determined eligible for Medi-Cal with a
4 reduced or eliminated share of cost using the expanded spousal impoverishment protection, he
5 would have had access to the IHSS program for free or at a reduced cost. Instead, because Petitioner
6 Reed's high share of cost, Petitioner's wife and son provided in-home care to Petitioner Reed
7 without compensation.

8 146. On May 5, 2017, an advocate from Bet Tzedek Legal Services requested that the
9 Los Angeles County Department of Public Social Services re-determine Petitioner Reed's Medi-
10 Cal eligibility using the expanded spousal impoverishment protection because Petitioner Reed's
11 incorrect share of cost was preventing him from accessing IHSS. The Los Angeles County
12 Department of Public Social Services Respondents failed to respond.

13 147. On May 11, 2017, Petitioner Reed applied for IHSS.

14 148. On June 15, 2017, Petitioner Reed appealed his Medi-Cal share of cost
15 determination and sought retroactive Medi-Cal and IHSS benefits.

16 149. On July 20, 2017, Petitioner Reed received an IHSS notice approving him for 241
17 hours and 11 minutes monthly IHSS hours retroactive to May 11, 2017, the date of his most recent
18 application for IHSS.

19 150. On or about August 8, 2017, Petitioner Reed and the Los Angeles County
20 Department of Public Social Services entered into a Conditional Withdrawal for the Los Angeles
21 County Department of Public Social Services to evaluate his eligibility for Medi-Cal utilizing
22 expanded spousal impoverishment protections from August 2016 through April 2017. The
23 Department of Public Social Services also agreed to reimburse Petitioner Reed for retroactive IHSS
24 payments for August 2016 through April 2017, contingent upon its determination that Petitioner
25 Reed was eligible for Medi-Cal benefits during this period.

26 151. On August 1, 2017, Petitioner Reed received a Notice of Action informing him that
27 he was eligible for Medi-Cal without a share of cost effective July 1, 2016. The elimination of the
28

1 share of cost was based on the application of the expanded spousal impoverishment protection to
2 his Medi-Cal eligibility determination.

3 152. On September 21, 2017, the Los Angeles County Department of Public Social
4 Services informed Petitioner Reed that it was unable to process retroactive IHSS payments for
5 August 2016 through April 2017 because there was no IHSS application made between the
6 termination of IHSS in 2014 and his application on May 11, 2017.

7 153. Petitioner Reed appealed, arguing that his IHSS application and eligibility for IHSS
8 benefits should be retroactive to the date of his Medi-Cal application in accordance with the
9 California Department of Social Services' ACL 07-11 (Feb. 20, 2007).

10 154. Petitioner Reed further argued that it was DHCS Respondents' error that led to
11 Petitioner Reed's incorrect Medi-Cal eligibility determination that assigned him a prohibitively
12 high share of cost, which materially affected his decision not to apply for IHSS in 2016. DHCS
13 Respondents should be equitably estopped from denying Petitioner Reed retroactive eligibility for
14 IHSS without a share of cost. DHCS Respondents were aware in 2014 and 2016 that they were
15 required to apply the expanded spousal impoverishment protection to married individuals requiring
16 a nursing home level of care, like Petitioner Reed. However, they failed to implement any part of
17 expanded spousal impoverishment before July 2017.

18 155. Petitioner Reed did not know that he was eligible for Medi-Cal without a share of
19 cost in either 2014 or 2016 because he reasonably relied on the Los Angeles County Department
20 of Public Social Services' determinations that assigned him a share of cost. Petitioner Reed relied
21 on those determinations to his detriment to make medical decisions, including voluntarily
22 discontinuing his IHSS and foregoing other medical care that would have been covered had his
23 eligibility been correctly determined using the expanded spousal impoverishment protection.

24 156. The Administrative Law Judge's decision, adopted by Respondent CDSS on August
25 20, 2018, upheld the Department of Public Social Services' denial of IHSS eligibility retroactive to
26 the date of his Medi-Cal application and denied Petitioner Reed's request for equitable relief. This
27 denial and the Administrative Law Judge's ruling are a direct result of DHCS Respondents' failure
28 to create a process to award retroactive IHSS services back to the date of Medi-Cal application

DECLARATORY AND INJUNCTIVE RELIEF AND RIGHT OF ACTION

157. Due to their failure to fully and effectively implement the expanded spousal impoverishment protection, DHCS Respondents have caused thousands of potentially eligible individuals to be improperly denied Medi-Cal coverage or assessed an incorrect share of cost. DHCS Respondents' piecemeal efforts to belatedly implement the expanded spousal impoverishment protection have resulted in five major breaches of their ministerial duties: (1) failure to identify all potentially eligible individuals statewide; (2) failure to notify all potentially eligible individuals statewide of the expanded spousal impoverishment protection so that they have a reasonable opportunity to apply or seek a correct eligibility determination; (3) failure to supervise the counties and to enforce the expanded spousal impoverishment protection to ensure all potentially eligible individuals statewide receive correct and prompt Medi-Cal eligibility determinations; (4) failure to create a process to determine retroactive eligibility for IHSS; and (5) failure to provide retroactive reimbursement for Medi-Cal covered expenses that would have been covered if Medi-Cal eligibility had been properly assessed initially.

158. Absent intervention by this Court, Petitioners and other potentially eligible individuals have suffered and will continue to suffer irreparable harm in that they will not receive a correct Medi-Cal eligibility determination and therefore, will not have access to the Medi-Cal services that they are eligible for, causing these individuals either to submit to institutionalization or become impoverished. Money damages cannot compensate for this harm. Petitioners request a judicial determination that DHCS Respondents must immediately implement the expanded spousal impoverishment protection pursuant to their responsibilities to administer the federal Medicaid program in California.

159. Petitioners contend that DHCS Respondents' abovementioned actions violate federal law requiring implementation of the spousal impoverishment protection, state and federal anti-discrimination statutes, and Welfare and Institutions Code §§ 10000 and 10500. DHCS Respondents contend otherwise. Declaratory relief is therefore necessary and appropriate to resolve this controversy. Accordingly, Petitioners seek a judicial declaration of the rights and duties of the respective parties.

1 160. Code of Civil Procedure § 1085 confers a right of action to enforce the state and
2 federal statutes cited in this petition.

3 **FIRST CAUSE OF ACTION**

4 **(Against All Respondents)**

5 **(Code of Civil Procedure § 1094.5 –**

6 **Abuse of Discretion - Error of Law as to Petitioner Matthew Reed)**

7 161. Petitioner Matthew Reed re-alleges and incorporates by reference each and every
8 allegation contained in the above paragraphs as though fully set forth herein.

9 162. DHCS Respondents have a legal duty to make correct Medi-Cal eligibility
10 determinations and to provide retroactive benefits to eligible beneficiaries.

11 163. CDSS Respondents have a legal duty to make correct IHSS eligibility
12 determinations and to provide retroactive benefits to eligible beneficiaries.

13 164. The administrative decision challenged herein substantially affects a fundamental
14 vested right of Petitioner Reed in the lawful administration of his Medi-Cal eligibility and related
15 Medi-Cal covered services, such as IHSS; therefore, this Court should exercise independent
16 judgment in reviewing the evidence.

17 165. CDSS Respondents' final hearing decision constitutes a prejudicial abuse of
18 discretion pursuant to Civ. Proc. Code Section 1094.5(b) because CDSS Respondents did not
19 proceed in the manner required by law in that the administrative law judge misapplied the
20 standard for equitable estoppel, despite Petitioner Reed having presented evidence sufficient to
21 meet the elements required by *Canfield v. Prod*, 67 Cal. App. 3d 722, 730-32 (1977).

22 166. Under California law, a party asserting estoppel against a government actor must
23 demonstrate that (1) the party to be estopped was apprised of the facts and (2) intended that his
24 conduct be acted upon; (3) the party asserting estoppel was ignorant of the true state of facts, and
25 (4) relied upon the conduct of the other party to his injury; and (5) the estoppel will not frustrate
26 public policy and is required by justice and right. *Canfield v. Prod*, 67 Cal. App. 3d 722, 730-32
27 (1977).

28 167. Petitioner meets the first element because evidence was presented that all

1 Respondents were aware of the fact that effective January 1, 2014, spousal impoverishment
2 provisions must be applied to individuals, like Petitioner Reed, who will likely participate in
3 IHSS-Community First Choice Option.

4 168. Petitioner meets the second and third elements because:

- 5 a) Evidence was presented that despite having three separate opportunities to
6 correctly apply the expanded spousal impoverishment protection to Petitioner
7 Reed’s Medi-Cal eligibility determination—one in 2014 and two in 2016, the
8 expanded spousal impoverishment protection was never actually correctly applied.
9 All Respondents and the Los Angeles County Department of Public Social
10 Services expected Petitioner Reed to rely on these assessments and continue to pay
11 a share of cost for services.
- 12 b) Evidence was presented that Petitioner Reed was ignorant of the expanded spousal
13 impoverishment protection until May of 2017, when he obtained representation
14 from Bet Tzedek Legal Services. Prior to that, he was not aware that he was
15 eligible for Medi-Cal with a reduced or eliminated share of cost, allowing him to
16 access Medi-Cal covered benefits like IHSS;

17 169. Petitioner Reed meets the fourth element because evidence was presented that
18 Petitioner Reed relied on the county’s determination of his prohibitive share of cost in making his
19 decision to forego valuable and necessary IHSS care.

20 170. Petitioner also meets the fifth element of equitable estoppel, which the
21 Administrative Law Judge erroneously failed to consider or address in his ruling. Applying
22 equitable estoppel to the IHSS application date in this case would not frustrate public policy. To
23 the contrary, it would effectuate the retroactive assessments that DHCS Respondents’ guidance in
24 ACWDLs 17-25 and 18-19 purport to implement. Further, equitable estoppel is necessary to
25 reach a just and right result for Petitioner Reed. It is undisputed that Respondents did not even
26 begin to implement the expanded spousal impoverishment protection until July 2017. If the
27 expanded spousal impoverishment protection had been applied to Petitioner Reed’s applications
28 for Medi-Cal since January 1, 2014, he would have qualified for Medi-Cal with a reduced or

1 eliminated share of cost, and would have had the ability to access Medi-Cal covered services like
2 IHSS without a share of cost.

3 171. This is a problem of Respondents' own making. None of the Respondents gave
4 the county sufficient information in 2014 or 2016 to correctly determine Petitioner Reed's Medi-
5 Cal or IHSS eligibility. It would be unjust for individuals who qualify retroactively for Medi-Cal
6 to be prevented from likewise retroactively being able to apply for services for which Medi-Cal
7 eligibility is a prerequisite, such as IHSS. Now that Petitioner Reed has been determined eligible
8 for Medi-Cal without a share of cost, consistent with justice and public policy, he should be
9 afforded the opportunity to likewise apply for IHSS, retroactive to the same date.

10 172. In addition to failing to consider the fifth element of equitable estoppel, the
11 Administrative Law Judge mistakenly found that equitable estoppel was inapplicable because of a
12 lack of authority requiring counties to inform the claimant of his rights to receive IHSS benefits.
13 Whether or not this statement is factually accurate, the Administrative Law Judge misunderstands
14 that it is the county's failure to timely assess Petitioner Reed for Medi-Cal eligibility using the
15 expanded spousal impoverishment protection, not the failure to inform Petitioner Reed of the
16 protection, that creates the basis for equitable estoppel here.

17 173. It was also error for the Administrative Law Judge to find that the onus was on
18 Petitioner Reed to affirmatively preserve his IHSS application date despite acknowledging that
19 "[c]ounties are responsible for informing IHSS recipients of their rights and responsibilities in
20 relation to eligibility" and despite finding that "the timing of ACWDL 17-25 may be a crucial
21 reason why the claimant did not submit his IHSS application at an earlier date."

22 174. Respondent Kent, as the Director of the Medicaid single state agency, and
23 Respondent DHCS, as the Medicaid single state agency, are ultimately responsible for
24 administration of the Medi-Cal program, including responsibilities they delegate to other agencies
25 like state fair hearings and administration of the IHSS program.

26 175. Under Code of Civil Procedure section 1094.5, Petitioner Reed is entitled to a writ
27 of administrative mandamus ordering Respondents to set aside the final hearing decision; and to
28 issue a new and different decision granting Petitioner Reed retroactive IHSS eligibility

1 concurrently with the Medi-Cal eligibility date and ordering Los Angeles County to pay
2 Petitioner Reed retroactive IHSS.

3 **SECOND CAUSE OF ACTION**

4 **(Against Respondents Department of Health Care Services and Kent)**

5 **(Code of Civil Procedure § 1085 –**

6 **Violation of the Medicaid Act’s Reasonable Promptness, Comparability, and Statewide
7 Provisions)**

8 176. Petitioners re-allege and incorporate herein by reference each and every allegation
9 and paragraph set forth previously.

10 177. Effective January 1, 2014, federal law required states participating in Medicaid to
11 adopt the definitional change of an “institutional spouse” to include all people who required a
12 nursing facility level of care, but could receive home and community-based services. The effect of
13 this definitional change is to require states to apply the spousal impoverishment protection
14 methodology when calculating Medi-Cal eligibility.

15 178. DHCS Respondents have a ministerial duty: (1) to identify all potentially eligible
16 individuals statewide; (2) to notify all potentially eligible individuals statewide of the expanded
17 spousal impoverishment protection so that they have a reasonable opportunity to apply or seek a
18 correct eligibility determination; (3) to supervise the counties and to enforce the expanded spousal
19 impoverishment protection to ensure all potentially eligible individuals statewide receive correct
20 and prompt Medi-Cal eligibility determinations; (4) to create a process to determine retroactive
21 eligibility for In-Home Supportive Services (“IHSS”), a Medi-Cal covered home and community-
22 based services benefit that requires Medi-Cal eligibility as a pre-requisite; and (5) to provide
23 retroactive reimbursement for Medi-Cal covered expenses that would have been covered if Medi-
24 Cal had been properly assessed initially. DHCS Respondents have breached these duties by:

- 25 a) Failing to identify all potentially eligible individuals;
- 26 b) Failing to notify all potentially eligible individuals of their right to a Medi-Cal
27 eligibility redetermination under the expanded spousal impoverishment protection
28 including: (i) individuals currently enrolled in IHSS-Community First Choice

1 Option who have a Medi-Cal share of cost; (ii) individuals currently enrolled in
2 Medi-Cal with a share of cost who are in need or have a pending request for IHSS
3 or another home and community-based services program; (iii) individuals enrolled
4 in Medi-Cal on or after January 1, 2014, but whose Medi-Cal was discontinued; (iv)
5 individuals denied Medi-Cal eligibility due to excess property on or after January 1,
6 2014; (v) individuals who are institutionalized, but could live in the community with
7 the provision of Medi-Cal home and community-based services;

- 8 c) Failing to set a timeline for county compliance and to monitor counties to ensure
9 that notices are sent promptly, or at all.
- 10 d) Failing to require prompt retroactive eligibility determinations for persons
11 potentially wrongfully denied Medi-Cal applications retroactive to January 1, 2014.
- 12 e) Failing to ensure county compliance with DHCS Respondent’s directive that
13 counties “complete retroactive eligibility determinations” promptly, if at all;
- 14 f) Failing to ensure that individuals retroactively eligible for Medi-Cal after
15 reassessment under expanded spousal impoverishment are receiving reimbursement
16 of all Medi-Cal covered benefits promptly, if at all;
- 17 g) Improperly delegating authority to CDSS Respondents to make its own
18 determinations about what IHSS benefits are retroactively reimbursable following a
19 reassessment under expanded spousal impoverishment;
- 20 h) To the extent DHCS Respondent’s delegation to CDSS Respondents is proper,
21 failing to ensure that CDSS Respondents are making prompt lawful determinations
22 as to what IHSS benefits are retroactively reimbursable following a reassessment
23 under expanded spousal impoverishment; and
- 24 i) Failing to conduct systematic examination and evaluation of county application of
25 the expanded spousal impoverishment protection such that access to the Medi-Cal
26 program and to Medi-Cal covered home and community-based services programs
27 impermissibly varies throughout the state.
- 28

1 179. DHCS Respondents have failed to enforce the federally-required expanded spousal
2 impoverishment protection in their administration of Medi-Cal eligibility. As a result, Medi-Cal
3 benefits are not being provided with the comparable amount, duration and scope to all potentially
4 eligible individuals across the state. Thus, Petitioners and others similarly situated individuals have
5 paid out-of-pocket for care and services that should have been free, thereby impoverishing their
6 families and risking unnecessary institutionalization.

7 180. DHCS Respondents have a clear, present, and ministerial duty to administer the
8 Medi-Cal program in conformity with federal and state law and regulations to ensure all individuals
9 who apply are properly determined eligible or ineligible. Eligible individuals are entitled to home
10 and community-based services as a covered Medi-Cal service.

11 181. Petitioners have a beneficial interest in the issuance of a writ of mandate because
12 without financial assistance under Medi-Cal, they will be forced to choose between leaving their
13 homes and families and unnecessary institutionalization or impoverishing their spouses. Petitioners
14 are also interested as citizens in the enforcement of the public duty at issue in this case.

15 182. In all of the above mentioned-actions, DHCS Respondents have, acting under color
16 of state law, deprived Petitioners of rights, privileges, or immunities secured to Petitioners by the
17 federal Medicaid Act.

18 183. Petitioners lack a plain, speedy, and adequate remedy at law except by way of
19 issuance of this writ of mandate.

20 **THIRD CAUSE OF ACTION**

21 **(Against Respondents Department of Health Care Services and Director Kent)**

22 **(Code of Civil Procedure § 1085 –**

23 **Violation of Anti-Discrimination Laws)**

24 184. Petitioners re-allege and incorporate herein by reference each and every allegation
25 and paragraph set forth previously.

26 185. DHCS Respondents' failure to ensure that Medi-Cal eligibility determinations
27 utilize the spousal impoverishment protection methodology mandated by the federal Medicaid Act
28 places Petitioners and others similarly situated at risk of unnecessary institutionalization in

1 violation of the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. § 12101 *et seq.*, as
2 interpreted by the United States Supreme Court in *Olmstead v. L.C. by Zimring*, 527 U.S. 581
3 (1999), and Section 504 of the Rehabilitation Act.

4 186. Government Code § 11135 prohibits DHCS Respondents from discriminating or
5 “unlawfully den[ying] full and equal access to the benefits of” Medi-Cal on the basis of disability,
6 whether mental or physical. *See* 22 C.C.R. § 98100. Section 11135(b) expressly incorporates the
7 ADA and its implementing regulations. Gov’t Code § 11135(b).

8 187. Under the ADA and Section 504 of the Rehabilitation Act, DHCS Respondents have
9 a duty to provide services to people with disabilities in the “most integrated setting appropriate to
10 their needs” and to prevent unnecessary institutionalization. 28 C.F.R. §§ 35.130(d), § 41.51(d).
11 The most integrated setting for Petitioners is continued living in their homes and communities with
12 appropriate home and community-based services, not placement in a nursing facility. Denying
13 integrated services to individuals with disabilities, such as Petitioners, places them at risk of
14 unnecessary institutionalization in order to receive the care they need and violates the ADA, Section
15 504, and § 11135.

16 188. Under the ADA, DHCS Respondents also have an obligation to use methods of
17 administration that do not discriminate against individuals with disabilities such as Petitioners.
18 DHCS Respondents administration of the Medi-Cal program fails to implement the expanded
19 spousal impoverishment protection required by the federal Medicaid Act and thereby wrongfully
20 bars qualified individuals with disabilities from accessing the home and community-based services
21 they need to continue living in their homes and avoid unnecessary institutionalization.

22 189. DHCS Respondents have a clear, present and ministerial duty to implement Medi-
23 Cal in a manner that complies with state and federal anti-discrimination laws, and Petitioners have
24 a beneficial interest in the performance of that duty. Petitioners are entitled to a writ of mandate to
25 enforce that duty.

26 **FOURTH CAUSE OF ACTION**

27 **(Against Respondents Department of Health Care Services and Director Kent)**

1 (Code of Civil Procedure § 1085 –

2 Violation of Welfare & Institutions Code §§ 10000 & 10500)

3 190. Petitioners re-allege and incorporate herein by reference each and every allegation
4 and paragraph set forth previously.

5 191. Welfare & Institutions Code § 10000 requires California public assistance, including
6 Medi-Cal, to be administered “promptly and humanely.” Section 10500 requires DHCS
7 Respondents to administer the Medi-Cal program in a way that secures for every person “the
8 amount of aid to which he is entitled.”

9 192. Petitioners and other potentially eligible individuals have gone without care, paid
10 enormous costs out of pocket, or been institutionalized while waiting for DHCS Respondents to
11 provide them with the federally-required expanded spousal impoverishment protections.

12 193. By belatedly issuing the expanded spousal impoverishment protection policies,
13 failing to notify potentially eligible individuals, and abrogating their mandatory duty under the
14 Medicaid Act to enforce those provisions consistently across the state, DHCS Respondents have
15 impermissibly delayed and deprived Petitioners and similarly situated beneficiaries of the aid to
16 which they are entitled and have thus violated sections 10000 and 10500 of the Welfare &
17 Institutions Code. Petitioners are entitled to a writ of mandate to compel enforcement of the
18 ministerial duty to comply with these statutes.

19 194. DHCS Respondents have a clear, present and ministerial duty to promptly and
20 humanely administer the Med-Cal program according to state and federal law and furnish Medi-
21 Cal benefits and services with reasonable promptness. Petitioners have a beneficial interest in the
22 performance of that duty. Petitioners are entitled to a writ of mandate to enforce that duty.

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FIFTH CAUSE OF ACTION

(Against Respondents Department of Health Care Services and Director Kent)

(Code of Civil Procedure § 1085 –

Violation of California Procedural Due Process,

Cal. Const. Art. I, §§ 7, 15)

195. Petitioners re-allege and incorporate herein by reference each and every allegation and paragraph set forth previously.

196. Respondent Kent, as the Director of the Medicaid single state agency, and Respondent DHCS, as the Medicaid single state agency, are ultimately responsible for administration of the Medi-Cal program, including ensuring the provision of adequate notice and hearing rights.

197. Petitioners have a private, dignitary and statutory interest in receiving notice of their right to a hearing regarding DHCS Respondents' action or inaction with respect to their Medi-Cal eligibility. DHCS Respondents failed to provide adequate notice informing Petitioners and other potentially eligible individuals of their right to Medi-Cal eligibility under the expanded spousal impoverishment protection and their right to a hearing by:

- a) Failing to notify individuals currently enrolled in IHSS-Community First Choice Option who have a Medi-Cal share of cost;
- b) Failing to notify individuals currently enrolled in Medi-Cal with a share of cost who are in need or have a pending request for IHSS or another home and community-based services program;
- c) Failing to notify individuals who were enrolled in Medi-Cal on or after January 1, 2014, but whose Medi-Cal was discontinued;
- d) Failing to notify individuals who were denied Medi-Cal eligibility due to excess property on or after January 1, 2014; and
- e) Failing to notify individual who are institutionalized, but could live in the community with the provision of Medi-Cal home and community-based services.

1 198. DHCS Respondents' practices and procedures alleged herein violate the due process
2 guarantee of the California Constitution by, among other things, denying Petitioners adequate
3 notice and the opportunity for a fair hearing to dispute a denial of Medi-Cal eligibility or incorrect
4 share of cost.

5 199. In all of this, DHCS Respondents have deprived Petitioners of rights, privileges or
6 immunities secured to them by the Constitution of the State of California. Petitioners have a
7 beneficial interest in the performance of that duty. Petitioners are entitled to a writ of mandate to
8 enforce that duty.

9 **SIXTH CAUSE OF ACTION**

10 **(Against Respondents Department of Health Care Services and Director Kent)**

11 **(Code of Civil Procedure § 1085 –**

12 **Violation of Medicaid Act,**

13 **Failure to provide Notice and Opportunity for Hearing)**

14 200. Petitioners re-allege and incorporate herein by reference each and every allegation
15 and paragraph set forth previously.

16 201. Respondent Kent, as the Director of the Medicaid single state agency, and
17 Respondent DHCS, as the Medicaid single state agency, are ultimately responsible for
18 administration of the Medi-Cal program, including ensuring the provision of adequate notice and
19 hearing rights.

20 202. Pursuant to the Medicaid Act, the State of California has established a procedure to
21 provide notice and a fair hearing to any Medi-Cal applicant and beneficiary to contest any action
22 or inaction by the Department to approve, deny, discontinue, or change the eligibility status for
23 Medi-Cal or a share of cost. 22 C.C.R. § 50179(a), (c)(4). By failing to grant an opportunity for a
24 fair hearing to an individual whose Medi-Cal was denied or not acted upon with reasonable
25 promptness as set forth above, DHCS Respondents are in violation of 42 U.S.C. § 1396a(a)(3).

26 203. DHCS Respondents failed to provide adequate notice informing Petitioners of their
27 right to Medi-Cal eligibility under the expanded spousal impoverishment protection and their right
28 to a hearing by:

- 1 a) Failing to notify individuals currently enrolled in IHSS-Community First Choice
2 Option who have a Medi-Cal share of cost;
- 3 b) Failing to notify individuals currently enrolled in Medi-Cal with a share of cost who
4 are in need or have a pending request for IHSS or another home and community-
5 based services program;
- 6 c) Failing to notify individuals who were enrolled in Medi-Cal on or after January 1,
7 2014, but whose Medi-Cal was discontinued;
- 8 d) Failing to notify individuals who were denied Medi-Cal eligibility due to excess
9 property on or after January 1, 2014; and
- 10 e) Failing to notify individual who are institutionalized, but could live in the
11 community with the provision of Medi-Cal home and community-based services.

12 204. DHCS Respondents' practices and procedures alleged herein violate 42 U.S.C §
13 1396a(a)(3) by among other things, failing to ensure that Petitioners have access to a fair hearing
14 to dispute a denial of Medi-Cal eligibility or incorrect share of cost. Petitioners have a beneficial
15 interest in the performance of that duty. Petitioners are entitled to a writ of mandate to enforce that
16 duty.

17 **SEVENTH CAUSE OF ACTION**

18 **(Against Respondents Department of Health Care Services and Director Kent)**

19 **(Code of Civil Procedure § 526A –**

20 **Taxpayer Action to Prevent Illegal Expenditure of Funds)**

21 205. Petitioners re-allege and incorporate herein by reference each and every allegation
22 and paragraph set forth previously.

23 206. DHCS Respondents have expended public funds in the promulgation and
24 implementation of unlawful policies as described above, including using public funds in part
25 through Medi-Cal to pay for the unnecessary institutionalization of individuals who would have
26 qualified for less costly home care had the expanded spousal impoverishment protection been
27 correctly and promptly applied.

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1 207. Petitioners, who, within one year before the commencement of this suit, have been
2 assessed and paid a tax within and to the State of California, have been substantially affected by
3 these illegal expenditures.

4 208. DHCS Respondents' unlawful conduct, unless and until enjoined by order of this
5 Court, will cause great and irreparable injury to Petitioners in that DHCS Respondents will continue
6 to make illegal expenditures.

7 **PRAYER FOR RELIEF**

8 WHEREFORE, Petitioners pray that the Court order the following relief and remedies:

9 A. That the Court exercise its independent judgment and issue a Peremptory Writ of
10 Administrative Mandamus pursuant to Cal. Civ. Proc. Code § 1094.5 commanding Respondents
11 CDSS and Respondents DHCS to:

- 12 i. Set aside Hearing No. 2017318248-467;
13 ii. Issue a new and different decision establishing Petitioner Reed's IHSS
14 effective application date as concurrent with his retroactive Medi-Cal
15 eligibility date and ordering IHSS services retroactive to that date; and
16 iii. Order Los Angeles County to pay Petitioner Reed retroactive IHSS wages
17 with prejudgment interest from the earliest date of his Medi-Cal and IHSS
18 eligibility to the present.

19 B. Issue a writ of mandate and preliminary and permanent injunctive relief prohibiting
20 DHCS Respondents from continuing to violate Section 1396r-5(h)(1)(A) of the federal Medicaid
21 Act, state and federal anti-discrimination laws, Medi-Cal and California Constitutional Due Process
22 rights, and sections 10000 and 10500 of the Welfare & Institutions Code.

23 C. Declare that DHCS Respondents are required to fully and effectively implement the
24 expanded spousal impoverishment protection pursuant the federal Medicaid Act as amended by the
25 Affordable Care Act and should have done so since January 1, 2014.

26 D. Issue a writ of mandate pursuant to Code of Civil Procedure § 1085 commanding
27 DHCS Respondents to take all steps necessary to promptly and completely implement the expanded
28 spousal impoverishment protection within 90 days of issuance of the writ including:

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- i. Identify and provide notice, which includes the right to a fair hearing to all potentially eligible individuals whose Medi-Cal eligibility was wrongly determined because of DHCS Respondents’ failure to apply the spousal impoverishment methodology on or after January 1, 2014;
 - ii. Identify and re-determine Medi-Cal eligibility for all potentially eligible individuals using the expanded spousal impoverishment protection methodology to the date of application for home and community-based services or for Medi-Cal, whichever came first;
 - iii. Create a process for determining retroactive IHSS eligibility for all Medi-Cal beneficiaries redetermined under the expanded spousal impoverishment protection;
 - iv. Provide for retroactive reimbursement for or payment of expenses that Medi-Cal would have covered if DHCS Respondents had timely implemented the expanded spousal impoverishment protection;
 - v. Reverse the guidance in ACDWL 18-19 that limits claims for IHSS reimbursement or payment to services provided by an IHSS enrolled provider.
 - vi. Supervise counties in eligibility determinations and redeterminations for all impacted applicants and beneficiaries to ensure implementation within 90 days; and
 - vii. Monitor the application of the expanded spousal impoverishment protection and report data to Petitioners’ counsel on Medi-Cal and home and community-based services program enrollment quarterly for two years.
- E. Award Petitioners the costs of this action and reasonable attorneys’ fees; and
- F. Such other and further relief as the Court deems just and proper.

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Dated: May XX, 2019

McDERMOTT WILL & EMERY LLP

By: _____
GREGORY R. JONES
Attorneys for Petitioners/Plaintiffs

VERIFICATION OF PATRICK KELLEY

I, PATRICK KELLEY, hereby state as follows:

1. I have read the foregoing Petition for Writ of Mandate and know its contents.
2. I certify that the factual allegations contained in the Petition related to Petitioner Patrick Kelley are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May _____, 2019 in Los Angeles County, California.

Patrick Kelley

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VERIFICATION OF MATTHEW REED

I, Vicky Reed, Guardian Ad Litem for Petitioner MATTHEW REED, hereby state as follows:

1. I have read the foregoing Petition for Writ of Mandate and know its contents.
2. I certify that the factual allegations contained in the Petition related to Petitioner Matthew Reed are true of my own personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May _____, 2019 in Los Angeles County, California.

Matthew Reed, by and through
his guardian ad litem, VICKI REED

MCDERMOTT WILL & EMERY LLP
ATTORNEYS AT LAW
LOS ANGELES

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PROOF OF SERVICE FEDEX

I, Regina N. Hunter, declare:

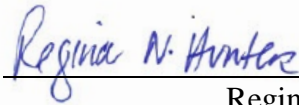
I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 2049 Century Park East, Suite 3800, Los Angeles, California 90067-3218. On May 10, 2019, I served a true and correct copy of STIPULATION & ORDER TO FILE FOURTH AMENDED PETITION:

- by email via PDF FILE, by transmitting on this date via email, a true and correct copy scanned into an electronic file in Adobe "pdf" format. The transmission was reported as complete and without error.
- by placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FedEx agent for delivery.

Michael Byerts Deputy Attorney General Health, Education and Welfare Section Los Angeles 300 S. Spring Street, Suite 1702 Los Angeles, California 90013 Tel: 213.269.6266 eMail: Michael.Byerts@doj.ca.gov	<i>Counsel for Respondents</i>
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Following ordinary business practices, the envelope was sealed and placed for collection by FedEx on this date, and would, in the ordinary course of business, be retrieved by FedEx for overnight delivery on this date.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 10, 2019, at Los Angeles, California.



Regina N. Hunter