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

V.L., et al.,

Plaintiffs

v.

WAGNER, et al.,

Defendants

) Case No.: CV 09-04668 JSW

) **NOTICE OF MOTION AND MOTION**
) **FOR TEMPORARY RESTRAINING**
) **ORDER AND/OR PRELIMINARY**
) **INJUNCTION; MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **SUPPORT THEREOF**

) DATE: October 16, 2009

) TIME: 9:00 a.m.

) PLACE: Courtroom 11, 19th Floor

1 **NOTICE OF MOTION AND MOTION FOR TEMPORARY RESTRAINING ORDER**
2 **AND/OR PRELIMINARY INJUNCTION**

3 TO DEFENDANTS DIRECTOR JOHN WAGNER, THE CALIFORNIA DEPARTMENT
4 OF SOCIAL SERVICES, DIRECTOR DAVID MAXWELL-JOLLY, THE CALIFORNIA
5 DEPARTMENT OF HEALTHCARE SERVICES AND THEIR ATTORNEYS OF RECORD:

6 PLEASE TAKE NOTICE that on October 16, 2009 at 9:00 a.m. or as soon thereafter as counsel
7 may be heard in Courtroom 11, 19th Floor, United States District Court, Northern District of
8 California, located at 450 Golden Gate Avenue, San Francisco, CA, Plaintiffs individually and on
9 behalf of class members will move the Court pursuant to Rule 65 of the Federal Rules of Civil
10 Procedure and Rule 65-1 of the Civil Local Rules for a temporary restraining order and/or
11 preliminary injunction enjoining Defendants and their successors, agents, officers, servants,
12 employees, attorneys and representatives and all persons acting in concert or participating with
13 them, from implementing the provisions of ABX4 4 that amended Sections 12309(e) and 12309.2
14 of the California Welfare and Institutions Code to terminate from eligibility for IHSS services
15 those recipients with Functional Index Scores of less than 2.0 and to eliminate domestic and related
16 services for recipients with functional ranks of less than 4 for those services.

17 The Motion will be made on the ground that Plaintiffs and class members will suffer
18 irreparable injury unless the activities described above are enjoined, and that the activities
19 described above violate the Medicaid Act, the Americans with Disabilities Act, Section 504 of the
20 Rehabilitation Act, and the Due Process Clause of the United States Constitution. Plaintiffs are
21 concurrently filing a motion for class certification, and further move that the injunction issue on a
22 class-wide basis.

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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

This suit challenges the legality of two provisions in ABX4 4, which, for purely budgetary reasons, terminate and reduce services to more than 130,000 elderly, blind, or disabled individuals who rely on the In-Home Supportive Services (“IHSS”) program to remain safely in their homes. Each of these over 135,000 IHSS recipients has been determined by county social workers to need the services he or she currently receives in order to avoid the risk of injury or other harm. Yet ABX4 4 terminates or reduces IHSS services to these elderly or disabled recipients based on measures called functional ranks and composite Functional Index (“FI”) Scores – numbers that do not measure such risk of harm, were not intended to determine eligibility, and have never previously been sent to IHSS recipients. As county officials attest, FI Scores were not designed to measure need or eligibility and should not be used for such purposes. Collins Decl. ¶27 (counties “do not use the composite FI scores for any reason.”); Crockett Decl. ¶¶8, 14 (“never intended to be used as an eligibility criterion”); Kaljian Decl. ¶5 (“[p]roblems” with using FI Score as eligibility standard); Calame Decl. ¶6 (“completely arbitrary”) Golledge Decl. ¶6 (use of FI Score and functional ranks for eligibility determinations “misguided”); Figueroa Decl. ¶8 (does nto use to determine services needed).

Defendants have announced plans to send notices of termination and reduction of IHSS services under ABX4 4 to class members on or before October 19, 2009, with an effective date of November 1, 2009. Plaintiffs seek a TRO and/or preliminary injunction of the planned IHSS terminations and reductions which, unless enjoined, will cause immediate and irreparable harm by placing members of the plaintiff class at imminent and serious risk of harm to their health and safety, as well as of unnecessary and unwanted out-of-home placement including institutionalization. The balance of equities strongly favors Plaintiffs because Defendants’ only interest is fiscal, whereas the plaintiff class faces life or death consequences.

Plaintiffs are highly likely to prevail on their legal claims. Defendants’ failure to provide adequate notice of the terminations and reductions violates the federal Due Process Clause. ABX4

1 4 also contravenes federal law by terminating necessary health care services based on arbitrary
 2 numbers that do not meaningfully distinguish among individuals on the basis of need, and that
 3 discriminate against recipients with mental disabilities. Thus, ABX4 4 violates the requirements of
 4 Title XIX of the Social Security Act, 42 U.S.C. § 1396a (“the Medicaid Act”) that States provide
 5 (1) comparable Medicaid services to individuals with similar needs; (2) services according to
 6 reasonable standards; and (3) services that are sufficient in amount, duration, and scope to
 7 reasonably achieve their purposes. And it violates the Americans with Disabilities Act of 1990, 42
 8 U.S.C. § 12312 (“ADA”), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794
 9 (“Section 504”), by placing IHSS recipients at imminent risk of unnecessary and unwanted out-of-
 10 home placement, including in institutions such as nursing homes and psychiatric facilities; by
 11 discriminating on the basis of type of disability; and by using methods of administration that will
 12 exclude individuals with disabilities from IHSS.

13 **BACKGROUND**

14 **I. The IHSS Program Provides Necessary Services To Keep Elderly and Disabled 15 People Safely At Home.**

16 **A. IHSS provides Core Services that Recipients Need to Remain Safely at Home.**

17 IHSS is a program provided through California’s Medicaid program (“Medi-Cal”) and is
 18 funded with a combination of state, county and federal Medicaid funds. Welf. & Inst. Code §
 19 12306. The purpose of the program is “to enable [the] aged, blind or disabled poor to avoid
 20 institutionalization by remaining in their homes with proper supportive services.” *Miller v. Woods*,
 21 148 Cal.App.3d 862, 867 (1983); *see also* Welf. & Inst. Code § 12300(a) (IHSS provides services
 22 to those who “cannot safely remain in their homes . . . unless these services are provided”); *id.* §
 23 14132.95(a) (similar); Cal. Dep’t Soc. Servs. (“CDSS”), Manual of Policies and Procedures
 (“MPP”) § 30-700.1 (similar).¹

24 The IHSS program has been remarkably successful in stabilizing elderly and disabled Medi-
 25
 26

27 ¹ For the Court’s convenience, that portion of the CDSS Manual containing the regulations
 28 applicable to IHSS is attached to Plaintiffs’ Request for Judicial Notice (“RJN”) as Exhibit H.

1 Cal recipients at home.² For example, 81-year-old Plaintiff Beatrice Sheppard struggles with the
 2 effects of a stroke that left her unable to walk, cook, shop, clean house, go to the doctor, or bathe
 3 without assistance. Sheppard Decl., *passim*. She “want[s] to do things for [her]self but ... know[s]
 4 there is a chance that [she] will lose [her] balance and fall” and so is “very cautious about what
 5 [she] tr[ies] to do.” *Id.* ¶3. She is able to remain in the small apartment where she has lived for 11
 6 years only because her IHSS provider assists her with shopping, meal preparation and clean-up,
 7 housecleaning, accompaniment to medical appointments, and bathing. She receives just 41.7 hours
 8 of IHSS per month, but these services are critical to enabling her to remain safely at home. *Id.* ¶5.

9 Of the more than 425,000 people who depend on the IHSS program, 60% are seniors such as
 10 Plaintiff Sheppard.³ Experts and county IHSS officials confirm that these seniors are healthier and
 11 happier living at home. *See, e.g.*, Altman Decl. ¶4; Castro Decl. ¶8; Gardner Decl. ¶39; Hathaway
 12 Decl. ¶14; LaPlante Decl. ¶7; Navarro Decl. ¶13; Schnelle ¶¶ 5,6. Similarly, people under 65 with
 13 disabilities have better outcomes and experience more independence and well-being living
 14 independently.⁴

15 Assistance with personal care tasks such as bathing, dressing, and using the toilet are core
 16 IHSS tasks. For example, Plaintiff V.L. is a 14-year-old boy with muscular dystrophy who cannot
 17 stand for more than a few minutes and needs assistance using the toilet, showering and dressing.
 18 Lagahid Decl. ¶2. IHSS is crucial for this family, since V.L.’s mother has the same neuromuscular

19 ² IHSS services include (1) domestic services (house cleaning); (2) related services - meal
 20 preparation and clean-up, restaurant meal allowance, laundry, grocery shopping and other
 21 shopping; (3) personal care services - bowel and bladder care, respiration, feeding, routine bed
 22 baths, bathing, oral hygiene and grooming, dressing, repositioning and rubbing skin including
 23 range of motion exercises, transfers, care and assistance with prosthetic devices and self-
 24 administration of medication, routine menstrual care, skin care, ambulation; (4) travel to medical
 appointments; (5) yard hazard abatement; (6) protective supervision; (7) teaching and
 demonstration services, and (9) paramedical services. Welf. & Inst. Code § 12300(b) & (c); *Id.* §
 14132.95(d)(1) & (2).

25 ³ IHSS Background and Caseload Components, Kline Decl., Ex. C at 8. *See also* Goldberg
 26 Decl. ¶¶ 2, 8; Hoffacker Decl. ¶3; Guerra Decl. ¶¶12, 14; Crockett Decl. ¶ 3 (many recipients over
 80 being terminated); Collins Decl. ¶ 30 (91-year old woman losing domestic and related services).

27 ⁴ *See, e.g.*, Oster ¶7 (“healthiest” in his own home); Hathaway Decl. ¶14 (director of county
 28 IHSS program; “people will live longer, be happier and . . . their quality of life will be increased” if
 they remain at home); Leiva Decl. ¶7; Rivera Decl. ¶¶ 16, 36.

1 disorder that has disabled V.L. *Id.* ¶11. Like many recipients with arthritis or the symptoms of a
2 stroke, Plaintiff Sheppard depends on her IHSS provider for assistance taking a bath; without this
3 help she would not be able to bathe at all. Sheppard Decl. ¶10. Other IHSS recipients need
4 personal care assistance because, for example, they are paralyzed, Bean Decl. ¶¶2, 7, 9, have
5 traumatic brain injury, F.H. Decl. ¶2, or have seizure disorders, Crockett Decl. ¶17.

6 Many IHSS recipients need assistance with simple domestic chores such as cooking.
7 Addison Decl. ¶2; Campbell Decl. ¶6; F.H. Decl. ¶11; Jones Decl. ¶8; Mandell Decl. ¶9; Oster
8 Decl. ¶2; Wilson Decl. ¶13; Worden Decl. ¶6. When balance is poor, help with cooking and meal
9 clean-up ensures that individuals do not risk a fall, which can trigger a “downward spiral” that ends
10 in a nursing home. Kaljian Decl. ¶16. Other IHSS recipients need assistance with meal
11 preparation because they have dementia or cognitive impairments. Aho Decl. ¶11; Baran Decl.
12 ¶25; Crockett Decl. ¶16; Jansen Decl. ¶¶2, 5; Oster Decl. ¶2. Whatever the reason, IHSS services
13 ensure their safety, continued health, and nutrition. *See., e.g.* Baran Decl. ¶25 (regular, nutritious
14 meals slow dementia process and make individuals more alert); Gardner Decl. ¶31; Nicco Decl.
15 ¶35. Other recipients need help with special diets because of suppressed immune systems,
16 Campbell Decl. ¶5; Jones Decl. ¶ 8, or because they are dialysis patients, Collins Decl. ¶23.

17 Many elders and people with disabilities can no longer go out into the community on their
18 own. Sheppard Decl. ¶6; Anderson Decl. ¶7; Guerra Decl. ¶13; Hoffacker Decl. ¶4. They rely on
19 another core IHSS service, which is assistance with shopping, errands, and accompaniment to
20 medical appointments. Addison Decl. ¶5; Anderson Decl. ¶4; Bean Decl. ¶7; Good Decl. ¶4;
21 Hoffacker Decl. ¶4; Hylton Decl. ¶ 5; Mandell Decl. ¶6; Oeland Decl. ¶5; Reeder Decl. ¶5; Wilson
22 Decl. ¶13. Even IHSS recipients like Plaintiffs Sheppard and Oster who can warm up their own
23 food still need someone to buy food for them or prepare meals to eat later. Sheppard Decl. ¶9;
24 Oster Decl. ¶2. Plaintiffs and others like them also need IHSS assistance to visit their doctors.
25 Sheppard Decl. ¶6; Anderson Decl. ¶7; Canann Decl. ¶4; Brent Decl. ¶4. The amount of time that
26 IHSS allows for these tasks is small – no more than 90 minutes per week – but critical to recipients.

27 IHSS recipients may also need help with cleaning and laundry. Those with poor balance
28 and weakness often cannot manage a broom or mop and risk falls if they attempt to clean house

1 themselves. Sheppard Decl. ¶7; Anderson Decl. ¶5; Bean Decl. ¶¶9, 10; Collins Decl. ¶29; Good
 2 Decl. ¶5; F.H. Decl. ¶10; Hylton Decl. ¶5; Mandell Decl. ¶7; Oeland Decl. ¶6. Blind people need
 3 similar assistance. Kaljian Decl. ¶12; Anderson Decl. ¶5. Others have mental disabilities and need
 4 direction and reminders to clean because of their level of confusion, disorientation, or self-neglect.
 5 Aho Decl. ¶16; Oster Decl. ¶¶8, 9. Cleaning services are vital to allow individuals to stay safely in
 6 their home, particularly those with suppressed immune systems, Jones Decl. ¶14; Campbell Decl.
 7 ¶4, respiratory ailments, Collins Decl. ¶29, or obsessive compulsive disorders, Nicco Decl. ¶26.
 8 As with shopping, the allowable hours and cost to the IHSS program are small—only six hours per
 9 month—in relation to the benefit to recipients. MPP § 30-757.135.

10 IHSS providers also offer support and prompting to remind recipients to take prescription
 11 medication at the right time and in the right amounts. McHenry Decl. ¶4 (recipient took either too
 12 much or too little medication in absence of provider); Leon Decl. ¶4; Medina Decl. ¶6; Nicco Decl.
 13 ¶33; Oster Decl. ¶4; Reeder Decl. ¶4; Baran Decl. ¶21. Often this crucial service does not require
 14 much extra time because providers give these prompts while performing other tasks such as
 15 laundry and cooking. Baran Decl. ¶23; Castro Decl. ¶10; Medina Decl. ¶6; Nicco Decl. ¶23.

16 For frail seniors and people with mental disabilities who lack family supports and may
 17 otherwise be very isolated, the presence of an IHSS provider monitors deterioration or changes in
 18 condition that may otherwise go unnoticed until it is too late. Castro Decl. ¶9; Nicco Decl. ¶23;
 19 Kaljian Decl. ¶16. IHSS providers who see a problem developing can intervene or obtain help.

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

21 IHSS is administered by counties under the supervision of Defendant CDSS and pursuant to
 22 an interagency agreement between Defendant Department of Health Care Services (“DHCS”) and
 23 CDSS. County social workers conduct an individualized, in person assessment of applicants’
 24 eligibility for IHSS services and the amount of services that they need to remain safely in their own
 25 home. Welf. & Inst. Code §§ 12300(g), 12302.1, 14132.95(f), 14132.951(b) & (e); MPP §§ 30-
 26 761.11-.13, §30-761.24; *Miller*, 148 Cal.App.3d at 868; Figueroa Decl. ¶4. Regulations dictate that
 27 “[s]ervices shall be authorized only [where] Social services staff . . . has determined that the
 28

1 recipient would not be able to remain safely in his/her own home without IHSS [and]
 2 [p]erformance of the service by the recipient would constitute such a threat to his/her health/safety
 3 that he/she would be unable to remain in his/her own home.” MPP § 30-761.1.

4 California statutes require that counties determine a person’s eligibility (need) for any
 5 services by assessing “the recipient’s living environment, alternate resources, and their functional
 6 abilities.” Welf. & Inst. Code § 12309 (a)-(b). While the State has promulgated “hourly task
 7 guidelines” as an aid in the assessment process, counties are required to authorize hours outside the
 8 guidelines ranges when necessary to meet individual need. Welf. & Inst. Code § 12301.2(a)-(c);
 9 Figueroa Decl. ¶6. It is “very necessary to conduct individualized assessment.” Crockett Decl.
 10 ¶¶4-6; *accord* Collins Decl. ¶11; Nicco Decl. ¶12.

11 C. IHSS is Cost Effective.

12 IHSS is extremely cost effective, given the comparative costs of out-of-home care. Nursing
 13 homes, for example, cost five times as much as services received by a typical IHSS recipient.⁵
 14 Most IHSS recipients need only a few hours of assistance per day or week.⁶ However, this
 15 assistance makes all the difference in a recipient’s ability to live safely at home. Kaljian Decl. ¶10;
 16 Nicco Decl. ¶41; Oster Decl. ¶2; Sheppard Decl. ¶12. Without IHSS, many recipients would end
 17 up needing to seek more expensive services in emergency rooms and other settings. Gardner Decl.
 18 ¶ 38; Kaljian Decl. ¶16-17; Collins Decl. ¶32, 34-35; Nicco Decl. ¶36, 40.⁷

19 Because of its many benefits, Defendants have described IHSS as “an essential component

20 _____
 21 ⁵ “California’s IHSS Program: Who is Served?” Kline Decl., Ex. G at 7. This report
 22 compares the average daily rate for hospitals (\$1230), ICF/DD facility (\$142), nursing home
 (\$118) and IHSS (\$24). *See also* Jimenez Decl. ¶¶3, 6; Polit Decl. ¶¶4, 5.

23 ⁶ IHSS: Background and Caseload Components, Kline Decl., Ex. C at 7: Half of all IHSS
 24 recipients receive fewer than 80 hours per month. The maximum number of IHSS hours is 283 per
 25 month, but only 6% of recipients receive services in this hourly range. *Id.*

26 ⁷ This cost effectiveness is well illustrated by Plaintiffs. Plaintiff Sheppard’s IHSS provider
 27 works 41.7 hours per month (Sheppard Decl. ¶5) and at \$11.50 per hour her wages are less than
 28 \$500 per month. In contrast, a nursing home costs over \$4000 per month. *See supra* n. 5. David
 Oster is able to live safely in the community with only 63.2 monthly IHSS hours (Oster Decl. ¶1),
 for which his provider earns \$568. When the threat to his IHSS precipitated a mental breakdown
 and he ended up in a psychiatric hospital for two weeks at over \$1000 per day, the total cost
 exceeded \$15,000.

1 of the State's effort to provide services to maintain individuals [with disabilities] in their homes
2 and communities."⁸ One year ago, Governor Schwarzenegger declared:

3 [C]ommunity-based care and services can be more cost-effective than institutional
4 care and result in a higher quality of life that promotes the values of community
5 participation, inclusiveness, and respect for diversity. . . . California has a
6 demonstrated record of success in providing services that support the full integration
7 of persons with disabilities in community life through such programs as In-Home
8 Supportive Services.

9 Gov. Schwarzenegger's Executive Order 5-19-08, Kline Decl., Ex. H.

10 **II. New State Budget Act Provisions Will Cut IHSS Services Based on Functional
11 Index Rankings and Scores That Do Not Reflect Recipients' Ability to Live Safely
12 at Home.**

13 **A. ABX4 4 Eliminates IHSS Services For Tens of Thousands of Recipients.**

14 Governor Schwarzenegger signed ABX4 4 on July 28, 2009. ABX4 4 amended California
15 Welfare and Institutions Code Section 12309(e) and added Section 12309.2, to terminate from
16 IHSS all recipients with overall composite FI Scores below 2.0 and to eliminate domestic and
17 related services for IHSS recipients with functional ranks below 4. Stats. 2009, c. 4, §§ 29, 30
18 (Part II). There are four functional ranks in the domestic and related services categories: 1)
19 Housekeeping; 2) Laundry; 3) Meal Preparation and Clean-up; and 4) Shopping and Errands.
20 CDSS estimates that 36,000 Californians will lose all IHSS services, and 97,000 will lose domestic
21 and related services, as a result of ABX4 4. CDSS Press Release, Kline Decl., Ex. F. These cuts
22 will affect 133,000 people – almost one in every three IHSS recipients.

23 State officials claim that ABX4 4 limits IHSS eligibility to the "most severely disabled" and
24 cuts services to the "least disabled." LAO's CA July 2009 Budget Package, Kline Decl., Ex. J at 7.
25 This is not true. As described by the most senior social services director in the State of California:⁹

26 [T]o the extent that the Legislature intended to cut IHSS services in accordance with
27 need, ABX4 4 does not do that. First, all IHSS recipients by definition need the
28 services that they are authorized to receive in order to remain safely in their homes;
they would not have been authorized to receive those services if they did not need

⁸ CA Health and Human Services Agency, CA Olmstead Plan, Kline Decl., Ex. I at 32, 52 (commitment to increase service capacity for "in-home care").

⁹ Leland Collins is Director of the Social Services Department for San Luis Obispo County. He has over 25 years of experience as a director of county social services. Collins Decl. ¶1.

1 them. Moreover, because of the way the functional rank and composite FI score are
 2 calculated, they are not an accurate indicator of need, and these cuts do not
 3 necessarily reduce or eliminate IHSS services for the least needy. Instead, many
 comparably needy individuals are being treated differently because of the vagaries
 of the scoring system.

4 Collins Decl., ¶ 10; *see also* Nicco Decl. ¶11 (FI Scores and functional ranks “not good
 5 measures”); Golledge Decl. ¶¶7, 9; *supra* at 1. As described below, ABX4 4 terminates and
 6 reduces IHSS services on the basis of these arbitrary numbers that have never previously been
 7 considered a proxy for IHSS eligibility, the amount of services needed, or the risk of injury without
 8 services.

9 **B. The Functional Ranks Are Not An Accurate Predictor of Severity of**
 10 **Disability or Whether Recipients Will be Safe without Assistance.**

11 The functional ranks that are used to eliminate eligibility for domestic and related services
 12 for some individuals, and to calculate the composite FI Score used to terminate services for others,
 13 were never designed for such a purpose. The functional ranks correspond to five levels for each
 14 activity of daily living (“ADL”):

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

19 Welf. & Inst. Code § 12309(d).

20 A recipient must rank at least 2 in any activity to need the corresponding IHSS service
 21 (MPP § 30-763.1), but otherwise, until now, functional rank has had no direct correlation to
 22 eligibility for IHSS or the number of IHSS hours authorized. *See, e.g.*, MPP § 30-757.1(a)(1)
 23 (functional ranks cannot be “sole factor” to determine eligibility or hours); Figueroa Decl. ¶8. The
 24 functional ranks were not intended to signify that a recipient with a 2 or 3 for a given task had less
 25 need for assistance than someone with a 4. By definition, any recipient with a rank of 2 or above
 26 cannot perform the function safely without assistance. Welf & Inst. Code § 12309(d); MPP § 30-
 27 761.1; Crockett Decl. ¶9. Indeed, for every service with hourly task guidelines, the standard time
 28

1 range is so broad that it overlaps for functional ranks 2 through 5. Collins Decl. ¶15.¹⁰ Until now,
2 social workers have used the functional ranks and hourly task guidelines only as a form of
3 documentation, and authorized hours based on a careful, individualized assessment of need.
4 Crockett Decl. ¶7, 12-13; Collins Decl. ¶11, 15. Under ABX4 4, however, these functional ranks
5 mean the difference between receiving or not receiving services.

6 There are “many grey areas [s] and it is impossible to place someone in a given functional
7 rank with mathematical precision.” Collins Decl. ¶12. Researchers note that “whether provider
8 assistance is verbal (rank 2) or physical (3) their presence during task performance is necessary and
9 therefore the practical distinction between the two ranks is elusive.” Kline Decl., Ex. D at 14.
10 Similarly, “[I]t is very difficult to discern the difference between” ranks 3 (“some assistance”) and
11 4 (“substantial assistance”). Collins Decl. ¶13 (highlighting similarity in CDSS descriptions of
12 ranks 3 and 4 for domestic services); Nicco Decl. ¶ 17. For example, recipients are to be ranked 3
13 in meal preparation if they need assistance on a less than daily basis (because they can reheat
14 leftover food in a microwave) and 4 if they need assistance on a daily basis. All County Letter
15 (“ACL”) No. 06-34, RJN Ex. C, Ex. B at 7. Under ABX4 4, however, a person with a rank of 3
16 will get *no* assistance, and will not have any leftover food to heat up. Crockett Decl. ¶11.

17 The functional ranks are a particularly poor measure of eligibility for individuals with
18 mental impairments. National expert Dr. William Gardner explains that individuals with cognitive
19 and psychiatric disabilities frequently require verbal rather than physical assistance, and so may
20 receive a functional rank of 2 rather than 3 or 4 for some activities. Gardner Decl. ¶¶20-24; *accord*
21 Nicco Decl. ¶¶21-22; Hathaway Decl. ¶15; Foss Decl. ¶6; Collins Decl. ¶19; Crockett Decl. ¶9-10.
22 Prior to the adoption of ABX4 4, CDSS trained social workers to give equal recognition to the
23 needs of IHSS recipients with cognitive and psychological disabilities, instructing: “If a depressed
24 client, for example, sits passively in the dark living room all day, his need is as real and measurable
25

26 ¹⁰ For example, a recipient may rank either 2, 3, or 4 in meal preparation and receive 3-7
27 hours per week for this service under the standard hourly task guideline. MPP § 30-757.131(a).
28 Thus, a recipient with a rank of 2 could receive seven hours while a recipient with a rank of 4
receives only five hours, depending on the social worker’s individual assessment of need.

1 as the client whose immobility is caused by a spinal cord injury. If the client will perform the
 2 given activity when reminded or encouraged, the appropriate ranking is a 2.” ACL 88-118, RJN,
 3 Ex. G at 6; *see also* Kline Decl., Ex. A at 49-85. Assigning a functional rank of 2 to recipients with
 4 mental disabilities reflects the nature of the assistance needed, not the severity of need or whether
 5 IHSS would be authorized.

6 Treating the functional ranks as a hierarchal order, with a 2 signifying less need for services
 7 than a 3, 4, or 5, incorrectly presumes that verbal assistance, cueing or encouragement to help a
 8 person perform an activity of daily living is less essential to health and safety than the provision of
 9 physical assistance for an individual with a physical impairment. This ignores the fact that if a
 10 person with a mental or cognitive disability does not have the verbal assistance of his or her IHSS
 11 provider, the risk to his or her health and safety can be the same as for a person who needs physical
 12 assistance to do these same activities. Gardner Decl. ¶21; Nicco Decl. ¶24. People with mental
 13 disabilities may need verbal cueing or other nonphysical assistance for a variety of reasons that are
 14 critical. For example, many people need reminders to eat on a regular basis or to eat appropriate
 15 foods, assistance to avoid eating excessive amounts of food, or reminders not to eat food that is
 16 contraindicated because of their medical conditions. Gardner Decl. ¶¶30-33. An IHSS Program
 17 manager explains:

18 Often all that someone with a cognitive or psychiatric disability needs in order to
 19 maintain a safe and independent living situation is someone who can come by every
 20 morning to encourage or remind them to get out of bed, bathe, get dressed, take
 21 medication, and have breakfast. . . . with no IHSS provider visiting regularly . . .
 [a]person’s environment and ability to live safely in the community can fall apart in
 a matter of days, potentially leading to an exacerbated medical condition,
 hospitalization, institutionalization, homelessness and/or death.

22 Nicco Decl. ¶23.

23 **C. The Composite Functional Index Score Is Calculated By A Weighted**
 24 **Formula That Does Not Reflect the Critical Nature of Certain Services and**
 25 **Results in Low Scores for Certain Groups of Recipients, Including Children**
and People with Mental Disabilities.

26 The composite FI Score is even more disconnected from the actual IHSS assessment
 27 process than are the functional ranks. When the FI Score was first initiated as a method of quality
 28 assurance the State recognized that neither the individual functional ranks nor the overall FI Score

1 “predict hours” that are “appropriate.” ACL 88-118 Q13, RJN, Ex. G at 4. CDSS itself has tested
2 the FI Score and determined that it is “not meaningful.” Kline Decl., Ex. E. But under ABX4 4,
3 anyone with an FI Score below 2.0 will be terminated from all IHSS services.

4 The FI Score is a number between 1.00 and 5.00 that is calculated by the state’s computer
5 system according to a complex mathematical formula that factors in the weighted average of the
6 functional ranks for each of the 11 physical task ADL’s. ACL 88-118 Qs 9-10, RJN, Ex. G at 3-4;
7 ACL 09-56 RJN, Ex. A at 2. It was originally designed in the 1980s as part of a “uniformity
8 system” for quality control purposes. ACIN No. E-61-89, RJN, Ex. F. Until ABX4 4, the counties
9 administering the IHSS program did not use the FI Score for any purpose, including quality
10 control. Collins Decl. ¶27; Nicco Decl. ¶20; Crockett Decl. ¶14. Thus, neither state nor county
11 staff has had any incentive to review FI Scores for accuracy, or alignment with actual need.
12 Collins Decl. ¶27. Notices of action to IHSS recipients have never included the FI Score or its
13 component functional ranks, and so recipients have never had the opportunity to challenge the
14 accuracy of these measures.¹¹ ACL 09-56, RJN, Ex. A at 7. The very first time that most
15 recipients hear about their functional ranks and FI Scores will be the new notice of action that
16 CDSS plans to send out ten days before IHSS benefits are cut.¹²

17
18 ¹¹ See Baran Decl. ¶10 (“Although our clients would appeal or ask for a reassessment if
19 they were not getting enough IHSS hours, they would not know to appeal or ask for a reassessment
20 of their functional index ranks and scores.”); Bean Decl. ¶6 (after requesting functional ranks,
21 found that FI Score listed by county was different from that listed on state system). Once they
22 have learned their FI Scores, some IHSS recipients have found that their county social workers
23 rapidly acknowledged that the component functional ranks were incorrect and increased them.
24 Hylton Decl. ¶7; Brown Decl. ¶¶4-6. This informal reassessment process might have resolved
25 many problems with functional ranks if CDSS had notified recipients of their functional ranks and
26 FI Scores earlier, but it takes time. Sending the functional ranks and FI scores out on the eve of the
27 termination and reductions, as CDSS plans to do, will not allow enough time for informal
28 reassessment to avert an interruption in IHSS.

¹² Most IHSS recipients have not heard of their FI Scores and are unsure how to obtain this
information. *E.g.*, F.H. Decl. ¶3 (“I don’t know my functional index score because it doesn’t say it
on my notice”); Sheppard Decl. ¶13 (“I have never heard of a functional index or functional
rankings and I have no idea what these mean...I don’t even know who my county IHSS social
worker is, so I don’t have an easy way to find out whether I will be cut or not”). Recipients have
encountered tremendous difficulty in contacting their social workers to find out their FI Scores and
whether they are at risk of having their services cut or reduced. *See e.g.*, Marshall Decl. ¶4

1 There are numerous reasons why the FI Score does not accurately reflect whether an
2 individual can safely perform activities without IHSS assistance: First, as described above, the
3 functional ranks themselves do not signify that someone with a rank of 2 or 3 can perform the task
4 safely without assistance, any more than someone with a higher rank.

5 Importantly, the FI Score reflects the *average* of 11 different functions. “Looking at the
6 average functional ranking across a wide spectrum of tasks fails to take into account criticality.”
7 Collins Decl. ¶17. That is, if a recipient needs assistance with only some activities, that recipient
8 will tend to have a low FI Score, and will be cut off from all services, including those that may be
9 critical in allowing that recipient to live safely and independently at home. Crockett Decl. ¶¶15-17
10 (clients with seizure disorders only need assistance with bathing and cooking which would be
11 dangerous for them to perform themselves); Kaljian Decl. ¶ 12 (blind recipient needs assistance
12 traveling to medical appointments and cleaning dishes and apartment); Golledge Decl. ¶ 8 (“does
13 not make any sense” to terminate recipients who need assistance bathing and using the toilet
14 “because their ability to perform other tasks lowers their” FI Score). Moreover, the FI Score does
15 not factor in at all some tasks that are crucial for certain recipients, such as medication reminders
16 and travel to medical appointments. MPP § 30-757.14(g)(i); Kaljian Decl. ¶ 8; Nicco Decl. ¶25.

17 Additionally, the weights used have no external validity. They were determined based on
18 the average hours assigned for those tasks by counties in 1988. ACL 88-118, Q11, RJN, Ex. G.
19 The weights have not changed since, despite changes in the IHSS population and corresponding
20 changes in need. Collins Decl. ¶16. Moreover, in 1988 counties varied widely in their
21 authorization of IHSS hours, so that the weights derived from those hours “may already reflect
22 inconsistent assignment of hours.” ACL 06-34E2, Kline Decl., Ex. D at 8; Collins Decl. ¶16.

23 The FI Score is especially not correlated to the needs of children, who will be terminated at
24 high rates. Collins Decl. ¶7 (36% of children in county will be terminated compared to 25% of

25 _____
26 (“[M]ost consumers I spoke with were unable to get their scores...several have reached their
27 service workers but been unable to get their scores, and several more have been unable to reach
28 their service worker at all, despite repeated attempts”). Even law firms representing plaintiffs have
29 been unable to obtain FI Scores and functional ranks for many of their clients. *See e.g.* Kline Decl.
30 ¶4; Marshall Decl. ¶8; Taggares Decl. ¶8.

1 adults); Nicco Decl. ¶¶8-9 (23% of children in county will be terminated compared to 8% of
2 adults). The problem is the way functional ranks are averaged into the score:

3 Because children are not expected to perform domestic or related functions (disabled or
4 not) or even certain personal care activities (depending on age), they receive a “1” for all of
5 these activities. . . . Because the FI [Score] is an average number that includes services that
6 children do not receive, the children all receive disproportionately low scores.

7 Collins Decl. ¶21; *see also* ACL 88-118, RJN, Ex. G at 6. Consequently, children such as V.L.
8 who have high needs and high scores for bathing, dressing, and toileting still receive a relatively
9 low composite FI Score, and will be terminated from the IHSS program. Lagahid Decl. ¶6; *see*
10 *also* Collins Decl. ¶25 (9 year old with multiple severe disabilities and FI Score of 1.82); Nicco
11 Decl. ¶¶21, 31 (child with brain tumor and FI Score below 2).

12 The FI Score is also a particularly inaccurate measure for individuals with mental
13 impairments, who are disproportionately likely to have an FI Score below 2.0 and lose eligibility
14 for all IHSS. Baran Decl. ¶13-16; Collins Decl. ¶19; Nicco Decl. ¶21. As described earlier,
15 individuals with mental impairments tend to receive lower functional ranks than those with
16 physical disabilities, which drives down their FI Scores. *See supra* at 9-10. Moreover, the FI
17 Score does not include the functional ranks assigned by social workers for memory, judgment, and
18 orientation. MPP 30-756.372. This may artificially depress FI Scores for recipients with mental
19 disabilities. Gardner Decl. ¶24; Nicco Decl. ¶¶22, 33; Collins Decl. ¶19; Kaljian Decl. ¶9.
20 Similarly, many individuals with mental disabilities will need only a few critical services, such as
21 medication management and assistance with domestic and related tasks, and will not need help
22 with personal care functions as bowel/bladder, ambulation, or respiration. Because the FI Score is
23 a weighted average, persons who need only a few services receive disproportionately low scores.¹³

24 ¹³ For example, many IHSS recipients have psychiatric disabilities relating to hoarding and
25 cluttering. Because they do not need personal care services, and often receive only one-time heavy
26 cleaning and ongoing domestic assistance, they tend to have low FI Scores, and may lose their
27 IHSS, be evicted and become homeless. Nicco Decl. ¶26; Syropiatko Decl. ¶6; Guerra Decl. ¶12;
28 Baran decl. ¶14. Plaintiff Oster has a FI Score of below 2.0 even though he has a rank of 5 for
housework, laundry, and shopping errands, and a rank of 3 in meal preparation. This is because he
does not have high functional ranks in other areas, such as eating or bowel and bladder care. Oster
Decl. ¶11.

LEGAL STANDARD

1
2 “A plaintiff seeking a preliminary injunction must establish that he is [1] likely to succeed
3 on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3]
4 that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.”
5 *Am. Trucking Ass’ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v.*
6 *Natural Res. Def. Council Inc.*, 129 U.S. 365, 374 (2008)); *Stormans, Inc. v. Selecky*, 571 F.3d 960,
7 978 (9th Cir. 2009). Requests for preliminary injunctive relief are evaluated on a sliding scale –
8 where plaintiffs have made a strong showing of irreparable harm, they need not make as great a
9 showing with respect to likelihood of success on the merits, and vice versa. *See, e.g., Martinez v.*
10 *Schwarzenegger*, 2009 WL 1844989, at *3, *5-*6 (N.D. Cal. June 26, 2009); *Habeas Corpus Res.*
11 *Ctr. v. United States Dep’t. of Justice*, 2009 WL 185423, at *5, *9 (N.D. Cal. Jan. 20, 2009).
12 Plaintiffs meet this test, as here there is both severe irreparable harm and a strong likelihood of
13 success on the merits.¹⁴

ARGUMENT

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

14
15 The loss of IHSS services will put Plaintiffs at imminent risk of illness, injury,
16 institutionalization, and even death, as well as harm to their family ties, independence and dignity.
17 An injunction should issue to preserve the status quo while the merits of the legal challenge are
18 adjudicated.
19
20

21 ¹⁴ Although plaintiffs are concurrently filing a motion for class certification in an
22 abundance of caution, “[d]istrict courts are empowered to grant preliminary injunctions regardless
23 of whether the class has been certified.” *Brantley v. Maxwell-Jolly*, ___ F.Supp.2d ___, 2009 WL
24 2941519, at *14 n.14 (N.D. Cal. Sept. 10, 2009) (quotation marks omitted). Class certification is
25 unnecessary when, as here, granting relief to any class member will effectively grant relief to the
26 entire class. *See* 2 Newberg on Class Actions, § 9:45, at 411 n.3 & 413-14 (4th ed. 2002) (interim
27 injunctive relief should be awarded on class-wide basis where “activities . . . are directed generally
28 against a class of persons”; collecting cases ordering class-wide preliminary injunctive relief
pending class certification); *cf. Joyce v. City & County of San Francisco*, 846 F.Supp.2d 843, 853-
54 (N.D. Cal. 1994) (considering injuries to all individuals within class when class determination
not yet made). However, if this Court disagrees, it should certify the classes for the reasons set
forth in Plaintiffs’ Motion for Class Certification.

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A. The Termination of IHSS Services Will Place Recipients at Great Risk of Injury at Home, Homelessness and Institutionalization.

1. Risk of Injury and Effect on Health and Safety

The irreparable injury resulting from the loss of IHSS services will be severe. Counselors who work with IHSS recipients predict a “humanitarian crisis,” Baran Decl. ¶19, and premature deaths, Goldberg Decl. ¶¶6-7. Some who lose their IHSS may neglect to take their medications or take them improperly, compromising their health. Baran Decl. ¶¶20-21; Crockett Decl. ¶¶16-17; Reeder Decl. ¶6; Kaljian Decl. ¶7; Medina Decl. ¶6; Leon Decl. ¶4; Castro Decl. ¶10; Nicco Decl. ¶24; Hoffacker Decl. ¶6; McHenry Decl. ¶4. Others will be unable to leave the house to obtain food, medication, and other necessities. Guerra Decl. ¶13; Collins Decl. ¶28; Hathaway Decl. ¶13; Mandell Decl. ¶6; Oeland Decl. ¶10; Canann Decl. ¶7. Recipients who cannot move independently may develop decubitus ulcers and be unable to clean and dress themselves. Bean Decl. ¶7; Collins Decl. ¶32; Hoffacker Decl. ¶5.

Some recipients will try to clean or cook food and injure themselves as a result. Good Decl. ¶8; Vescovo Decl. ¶13-16; Canann Decl. ¶5. Without assistance preparing meals, some individuals will not know when their food is fully cooked and safe to eat, Anderson Decl. ¶4, or will burn themselves or start fires, Brown Decl. ¶4; Good ¶8 (concerned that vision impaired recipient will burn down the building if she tries to cook for herself). Others will be unable to maintain a diet that avoids exacerbating their medical conditions, Crockett Decl. ¶¶12, 16; Campbell Decl. ¶5; Collins Decl. ¶30; Medina Decl. ¶5; Oster Decl. ¶2; Jones Decl. ¶8; Sheppard Decl. ¶9; Goldberg Decl. ¶7; Castro Decl. ¶¶7, 10. Others need assistance in order to eat at all, because of mental illness or lack of appetite, Baran Decl. ¶23; Jones Decl. ¶9, or because they risk choking, Hoffacker Decl. ¶8; Canann Decl. ¶5.

Without an IHSS provider to transport them to doctor’s appointments, many will go without essential care. Brent Decl. ¶4; Canann Decl. ¶¶5-6; Baran Decl. ¶22; Hathaway Decl. ¶11.

Recipients who are unable to clean their houses adequately, particularly those with impaired immune function due to HIV/AIDS, may become sick due to unsanitary conditions. Campbell Decl.¶4; Good Decl. ¶8; F.H. Decl. ¶13; Jones Decl. ¶14; Hylton Decl. ¶4; Collins Decl.

1 ¶29. Some may try to clean their homes even though they lack the requisite strength or balance,
 2 and may injure themselves. Crockett Decl. ¶15; F.H. Decl. ¶10; Collins Decl. ¶29; Vescovo Decl.
 3 ¶18. County officials and other professionals who serve the IHSS community state unequivocally
 4 that they believe individuals will die as a result of neglect and injuries. Nicco Decl. ¶36; Goldberg
 5 Decl. ¶7; Vescovo Decl. ¶¶ 5, 21.

6 “[E]ntire families will be destabilized” when a child or family member is cut off IHSS,
 7 since caregiver relatives will be forced to seek other jobs without a way to care for their loved
 8 ones. Hathaway Decl. ¶5; Crockett Decl. ¶¶19-20; Kaljian Decl. ¶18; Nicco Decl. ¶27; Leiva Decl.
 9 ¶¶7-8. Without IHSS, some families may have no choice but to leave their dependent family
 10 member (including some children) unattended while they work, leading to the possibility of tragic
 11 accidents or mental and medical decline. Collins Decl. ¶33.

12 Even a temporary interruption in services may “result in damaging setbacks,” as it may take
 13 years to find the right provider and set of services for a recipient. Baran Decl. ¶20

14 Each one of the IHSS recipient affected by the cuts represents a person with a
 15 disability who has been stabilized at home, often through a painstaking process
 16 that takes months of even years, to find the right attendant, the right home or
 17 apartment, the right combination of services. All of this will be lost. And even if
 the cuts are restored later, it will be virtually impossible to rebuild the safe living
 situations people have now.

18 *see also* Gardner Decl. ¶¶ 39- 45 (describing difficulties in returning to community after
 hospitalization or other institutional placement).

19 For individuals with psychiatric disabilities, the stress of losing services may trigger
 20 symptomatic behaviors such as hurting themselves or damaging property. Gardner Decl. ¶¶36-37.
 21 Several years ago, an IHSS recipient with muscular dystrophy committed suicide after receiving a
 22 notice that her services would be cut and left a recording to explain that she did not know how it
 23 would be possible for her to continue living without that support. Vescovo Decl. ¶¶5-6.

24 **2. Risk of Homelessness**

25 There is also a serious risk that many individuals, particularly those with mental or
 26 cognitive disabilities, will become homeless if they lose IHSS services. Nicco Decl. ¶¶23, 35;
 27 Kaljian Decl. ¶18; Aho Decl. ¶¶13-20; Oster Decl. ¶9; Syropiatko Decl. ¶7; Calame Decl. ¶7.
 28

1 Once homeless, people with mental illness decline rapidly, and may end up under a
 2 conservatorship, in a psychiatric hospital, a board-and-care facility, or even jail. Hill Decl. ¶4.¹⁵
 3 For example, individuals with hoarding disorders who lack IHSS are likely to lose their housing
 4 because without IHSS their homes will become unsanitary and hazardous. Syropiatko Decl. ¶7;
 5 Castro Decl. ¶7; Navarro Decl. ¶¶ 9, 15-17; Aho Dec. ¶ 16-23; Calame Decl. ¶7.¹⁶

6 **3. Risk of Institutionalization**

7 If ABX4 4 is implemented, class members also risk unnecessary institutionalization. Dr.
 8 Gardner warns of the particular risk facing individuals with mental disabilities who lose IHSS
 9 assistance to remind them to take medication, attend medical appointments, and perform tasks
 10 essential to their continued mental health. Gardner Decl. ¶¶ 30-33; *see also* Crockett Decl. ¶16;
 11 Baran Decl. ¶¶12, 24; Castro Decl. ¶10; Nicco Decl. ¶¶33-34; Navarro Decl. ¶¶15-16. Other
 12 experts have found that elderly and disabled individuals with unmet in-home care needs are at
 13 increased risk of institutionalization, LaPlante Decl. ¶7, and that the lack of affordable home care
 14 services is “a primary factor driving the need for nursing home placement,” Schnelle Decl. ¶5.

15 County IHSS officials express further concerns that recipients who lose IHSS services as a
 16 result of ABX4 4 will suffer falls that lead to hospitalization and further institutionalization,
 17 Crockett Decl. ¶15, and that family providers forced to seek outside employment will have no
 18 choice but to place relatives in institutional settings, Nicco Decl. ¶31, Kaljian Decl. ¶15; Hathaway
 19 Decl. ¶¶5, 6. Similarly, they warn that elderly individuals who lose meal preparation services may
 20 face health declines that land them in nursing homes. Guerra Decl. ¶¶12, 14. *See also* Collins

22 ¹⁵ The mental health system already gone through waves of funding cutbacks so very few
 23 resources are available; “IHSS is one of the few support services left” to people with mental
 illness. Hill Decl. ¶ 7.

24 ¹⁶ Class member Gerald Aho, who lives in a Section 8-funded apartment and receives IHSS
 25 based on his bipolar disorder, faces this risk. During periods of extreme depression Mr. Aho is
 unable to take the trash out, clean dishes or do his laundry. Aho Decl. ¶16. On several occasions,
 26 his apartment has become so unsanitary that he did not pass his Section 8 inspection. *Id.* ¶18.
 After receiving IHSS heavy cleaning and other domestic and related services, he was able to pass
 27 inspection and remain at home, rather than be forced to live in his car as in the past. *Id.* ¶¶20-23.
 Without IHSS Mr. Aho is in danger of becoming homeless again.

1 Decl. ¶26; Dillard-Foss Decl. ¶¶7-8.¹⁷

2 Institutionalization will be detrimental to IHSS recipients' quality of life and care.
 3 Placement in an institution can destabilize already compromised mental or physical functioning,
 4 and it is extremely difficult for individuals to move out of institutions and back into the
 5 community. Gardner Decl. ¶¶ 39, 45; Navarro Decl. ¶ 13. Institutionalized individuals may
 6 become habituated to institutional structures, and lose or fail to develop the skills necessary to live
 7 in a community-based setting. Gardner Decl. ¶ 40. They also may be subjected to inadequate care
 8 due to chronic understaffing. *See* Schnelle Decl. ¶6 (noting that citations for noncompliance are
 9 common); Navarro Decl. ¶13. IHSS recipients fear institutionalization because they value the
 10 independence of community living, Golledge Decl. ¶5; Oster Decl. ¶7; Wilson Decl. ¶9, and are
 11 aware that care in institutions is sometimes inadequate, Sheppard Decl. ¶12.

12 4. Plaintiffs Will Suffer Irreparable Injury.

13 *Martinez v. Schwarzenegger*, 2009 WL 1844989, at *5 (N.D. Cal. June 26, 2009), recently
 14 concluded that recipients would suffer irreparable harm if they were to lose IHSS assistance:

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

21 ¹⁷ The individual circumstances of class members support these predictions of risk.
 22 Plaintiff Oster needs IHSS assistance to remember to take his medications, shop, cook, or clean up.
 23 Oster Decl. ¶¶2-4. Before receiving IHSS services, his apartment was unsanitary and in disarray,
 24 with piles of trash, dishes and paper. *Id.* ¶8. He was under threat of eviction because of the
 25 condition of his apartment. *Id.* And fear when he learned he might lose IHSS has already caused a
 26 breakdown that required two weeks of psychiatric hospitalization. *Id.* ¶¶2, 6, 9. F.H., a woman
 27 with a traumatic brain injury due to domestic violence, may be unable to continue living
 28 independently because she falls constantly if she tries to do housework and often becomes too
 confused to handle domestic tasks. F.H. Decl. ¶¶5, 8-12; Leon Decl. ¶¶3-5. Plaintiff Sheppard
 may need to enter a nursing home because of her inability to bathe, clean house, or prepare meals.
 Sheppard Decl. ¶¶7-12; *see also* Worden Decl. ¶11; Wilson Decl. ¶¶ 9, 18; Hylton Decl. ¶ 9;
 Jansen Decl. ¶6; Anderson Decl. ¶8; Good Decl. ¶9; Canann Decl. ¶7; Leiva Decl. ¶¶7-10.

1 This “reduc[tion] or terminati[on of] home care services . . . would result in the deprivation
2 of life-sustaining medical services. This certainly constitutes irreparable harm.” *Mayer v. Wing*,
3 922 F.Supp. 902, 905, 909 (S.D.N.Y. 1996) (issuing preliminary injunction prohibiting reduction
4 of personal home care services including “assistance with personal hygiene, dressing, feeding and
5 housekeeping”); *see also Crabtree*, 2008 WL 5330506, at *30 (home care services cuts will cause
6 irreparable injury because “institutionalization will cause Plaintiffs to suffer injury to their mental
7 and physical health, including a shortened life, and even death for some Plaintiffs”); *Long v.*
8 *Benson*, 2008 WL 4571903, at *2 (N.D. Fla. Oct. 14, 2008) (similar); *cf. Independent Living Ctr. of*
9 *S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009) (denial of needed medical care
10 constitutes irreparable harm); *LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48, 55-56 (2nd
11 Cir. 2004) (same, regarding reduction of retiree health benefits including increased cost of
12 prescription medications); *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) (same, regarding
13 deprivation of social security benefits); *Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir. 1982)
14 (same, regarding “needed medical care”).

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

16 Defendants’ purely fiscal interest, by contrast, is not as weighty as the risk of illness and
17 injury to low-income public assistance recipients. *See Lopez*, 713 F.2d at 1437; *Daniels v. Wadley*,
18 926 F. Supp. 1305, 1313 (M.D. Tenn. 1996); *Kansas Hosp. Ass’n v. Whiteman*, 835 F. Supp. 1548,
19 1552-53 (D. Kan. 1993). Just this year, the Ninth Circuit held that the current California fiscal
20 crisis does not outweigh the harm that might befall Medi-Cal beneficiaries if unlawful cuts are
21 implemented. *See Independent Living Ctr.*, 572 F.3d at 659 (“A budget crisis does not excuse
22 ongoing violations of federal law, particularly when there are no adequate remedies available other
23 than an injunction.”); *Martinez*, 2009 WL 1844989, at *6; *see also California Pharmacists Ass’n v.*
24 *Maxwell-Jolly*, 563 F.3d 847, 853 (9th Cir. 2009).¹⁸

25 Further, in addition to the harm experienced by IHSS recipients, the IHSS eligibility

26 _____
27 ¹⁸ Moreover, the likely increased demand upon public services and threat of institutional
28 placement means that the IHSS eligibility restrictions are unlikely to save as much money as
Defendants might argue.

1 restrictions will cause increased demand upon other public services which are ill-positioned to bear
 2 these burdens. County emergency rooms will see seniors and people with disabilities who have
 3 experienced “dramatic declines” in their health, including falls and other injuries. Kaljian Decl.
 4 ¶12; *see also* Altman Decl. ¶5 (UCSF researcher predicts that loss of home care services will result
 5 in greater emergency room use); Nicco Decl. ¶¶23, 25, 31; Collins Decl. ¶32; Kaljian Decl. ¶17;
 6 Leon Decl. ¶5; Mandel Decl. ¶¶4, 7-9; Bailey Decl. ¶¶ 13-14; Oster Decl. ¶6; Hill Decl. ¶4.
 7 Seniors who lose assistance with food shopping and meal preparation and consequently stop eating
 8 will end up in local hospitals. Collins Decl. ¶29. County adult protective services divisions will
 9 face increased demand and no longer be able to rely upon IHSS for referrals. Collins Decl. ¶31;
 10 Nicco Decl. ¶25; Kaljian Decl. ¶20; Crockett Decl. ¶20; Baran Decl. ¶19.

11 An injunction is also in the public interest. *See Lopez*, 713 F.2d at 1437 (deprivation of
 12 essential benefits harms public interest even if benefits are costly to government); *Martinez*, 2009
 13 WL 1844989 at *6. The termination of IHSS services is likely to devastate tens of thousands of
 14 families who will have no way to care for their loved ones, and place increased and untenable
 15 demands upon local government services and emergency rooms. Moreover, an injunction will also
 16 preserve the status quo *pendente lite*, which is one of the purposes of a preliminary injunction
 17 under Rule 65. *See Chalk v. U.S. Dist. Court Cent. Dist. Cal.*, 840 F.2d 701, 704 (9th Cir. 1988).

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

20 **A. The Termination and Reduction Notices Violate Due Process Because They Are Not** 21 **Reasonably Calculated to Apprise IHSS Recipients of Their Rights.**

22 Prior to an action that will affect an interest in life, liberty, or property protected by the Due
 23 Process Clause, a State must provide “notice reasonably calculated, under all circumstances, to
 24 apprise interested parties of the pendency of the action and afford them an opportunity to present
 25 their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Thus,
 26 recipients of social services must receive a “timely and adequate notice detailing the reasons for
 27 termination and an effective opportunity to defend” against it at a pre-termination, administrative
 28 hearing. *Goldberg v. Kelly*, 397 U.S. 254, 262-63, 269 (1970); *O’Bannon v. Town Court Nursing*
Ctr., 447 U.S. 773, 787 (1980). That notice must provide recipients with information they can use

1 to decide whether the agency has made mistakes in terminating their benefits and, if so, how they
2 can contest those mistakes at a hearing. *Goldberg*, 397 U.S. at 266, 268; *see also Gray Panthers v.*
3 *Schweiker*, 652 F.2d 146, 168 (D.C. Cir. 1981) (without adequate notice of reasons for denial
4 “hearing serves no purpose”); *Vargas v. Trainor*, 508 F.2d 485, 490 (7th Cir. 1974) (notice is
5 especially important because of “human tendency, even among those more experienced and
6 knowledgeable in the ways of bureaucracies than the aged, blind and disabled persons . . . to
7 assume that an action taken by a government agency in a pecuniary transaction is correct”).¹⁹

8 Whether notice comports with constitutional requirements depends upon whether it is
9 “tailored to the circumstances” of the recipients who must decide whether to request a hearing.
10 *Goldberg*, 397 U.S. at 268. Thus, when the government is on notice of an individual’s impairment,
11 “even notice that complied fully with the statutory requirements [may] nonetheless not [be]
12 reasonably calculated to provide her adequate notice.” *Covey v. Town of Somers*, 351 U.S. 141,
13 146-47 (1956); *see also Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13-15 (1978)
14 (“[P]articularly extensive efforts to provide notice may often be required when the State is aware of
15 a party’s inexperience or incompetence.”); *Jones v. Flowers*, 547 U.S. 220, 221 (2006) (due
16 process violated when government has reason to know notice is ineffective because of “unique
17 information about an intended recipient”); *Evans v. Chater*, 110 F.3d 1480, 1483 (9th Cir. 1997)
18 (where disability benefits applicant was incompetent at the time he received notice of denial or
19 termination of benefits, due process right to meaningful opportunity to be heard was implicated);
20 *Steiberger v. Apfel*, 134 F.3d 37, 40-41 (2nd Cir. 1997) (due process violated where disability
21 benefits claimant served with notice of termination of benefits that he was unable to understand
22 and act upon due to mental impairment); *David v. Heckler*, 591 F.Supp. 1033, 1042 (E.D.N.Y.
23 1984) (when notice was technical and confusing it was not comprehensible to class of disability
24 recipients); *accord Doston v. Duffy*, 732 F.Supp. 857, 872-73 (N.D. Ill. 1988).

25
26 ¹⁹ The risk of such mistakes is extremely high here. Because functional ranks and FI scores
27 have never before been used to determine eligibility, errors in these scores and rankings may have
28 gone unnoticed. Since ABX4 4 was enacted, recipients have sought reevaluation of their FI scores
and been reassessed with higher scores. *See supra* note 11.

1 Defendants' termination and reduction notices – a notice of action message and 22 pages of
2 agency procedures lifted verbatim from official policies that are given to counties and county social
3 workers for determining functional rank (ACL 9-56, RJN, Ex. A) – are not written so that IHSS
4 recipients can understand and act upon them, and so are not “reasonably calculated” to provide
5 IHSS recipients with the meaningful and comprehensible information that due process requires.
6 Social workers, the intended audience for these 22 pages, have undergone extensive training in the
7 use of functional ranks they discuss. ACIN I-61-89; ACL 88-118, RJN, Ex. F at 14-21.
8 Recipients, by contrast, have never even seen functional ranks or an FI Score before now. *See*
9 *supra* at 11-12 & nn. 11-12. The 22 pages also outline the complex mathematical formula for
10 computing FI Scores, which recipients (and, for that matter, most social workers) have never
11 before seen. ACL 9-56, RJN, Ex. A. Defendant CDSS itself terms the description of this formula
12 “difficult to conceptualize” even for trained social workers. ACIN I-61-89, RJN, Ex. F at 10. To
13 expect disabled recipients to understand this notice, without training and explanation, is a cruel
14 hoax. To be meaningful, the notice would need to put the recipient on notice that in order to retain
15 IHSS eligibility he or she would need to present evidence to increase one or more functional ranks
16 which, when multiplied by the weight for each function and added together, would produce a score
17 of 2.0 or more. Because of its confusing, technical content, the planned notice will not convey this
18 key information to IHSS recipients.

19 The notice is defective in other ways as well. It is misleading, in that the 22 pages include
20 descriptions of the three mental functions of memory, orientation and judgment, even though these
21 functional ranks are completely irrelevant to determining either the FI Score or any functional rank
22 used in computing it, or to eligibility for domestic and related services. The notice fails to inform
23 recipients that they may contest the ranks for all 11 functions, even those ranked “1” for which they
24 are not authorized any hours, in order to raise their composite FI Score.

25 The language, format, and timing of these notices will not allow recipients to ascertain
26 whether counties made errors in their FI Scores or functional ranks--figures they have never seen
27 before--and whether, if they contest them, they can raise their FI Scores to 2.0 or raise their
28 functional ranks for domestic or related services to 4. This makeshift termination notice is plainly

1 not tailored to the capacity of IHSS recipients and does not satisfy procedural due process
2 standards.²⁰

3 **B. ABX4 4 Violates the Medicaid Act’s Comparability, Reasonable Standards, And**
4 **Sufficiency Requirements.**

5 The Medicaid program was established by Title XIX of the Social Security Act in 1965 to
6 enable states to provide medical services to individuals with limited ability to pay for health care.
7 42 U.S.C. § 1396-1396v. Medicaid is a cooperative program between federal and state
8 governments that allows states to receive federal financial assistance for the provision of medical
9 assistance to low-income individuals. 42 U.S.C. § 1396. Participation is voluntary, but when a
10 state chooses to participate, it must comply with the Medicaid Act and its implementing
11 regulations. 42 U.S.C. § 1396; *Alexander v. Choate*, 469 U.S. 287, 289 n.1 (1985).²¹

12 **1. By Providing Differing Levels of Medical Assistance to Individuals With**
13 **Similar Needs, ABX4 4 Violates the Comparability Requirement of the**
14 **Medicaid Act.**

15 The “comparability” requirement of the Medicaid Act, 42 U.S.C. § 1396a(a)(10)(B), provides
16 “that medical assistance made available to any individual described in subparagraph (A)
17 [describing categorically needy recipients] — (i) shall not be less in amount, duration, or scope
18 than the medical assistance made available to any other such individual, and (ii) shall not be less in
19 amount, duration, or scope than the medical assistance made available to individuals not described
20 in subparagraph (A).”²² In effect, the comparability requirement mandates “comparable services

21 ²⁰ In addition to violating procedural due process, the planned notice of action also violates
22 the ADA and Section 504 because it is not reasonably accessible to people with disabilities. *See*
23 *Alexander v. Choate*, 469 U.S. 287, 301 (1985); *see also Henrietta D. v. Gulliani*, 119 F. Supp. 2d
24 181 (E.D.N.Y. 2000), *aff’d*, 331 F.3d 261 (2nd Cir. 2003) (state must make process to obtain
25 benefits meaningfully accessible to individuals with disabilities).

26 ²¹ As set forth in the Complaint, many of plaintiffs’ Medicaid claims are brought pursuant
27 to 42 U.S.C. § 1983. As the Ninth Circuit held in *Independent Living Center of Southern*
28 *California, Inc. v. Shewry*, 543 F.3d 1050 (9th Cir. 2008), *cert. denied sub nom. Maxwell-Jolly v.*
Independent Living Center of S. California, 129 S.Ct. 2828 (2009), all of the Medicaid provisions
at issue are also enforceable directly under the Supremacy Clause.

²² *See* 42 C.F.R. § 440.240 (“(a) The state must provide that the services available to any
categorically needy recipient under the plan are not less in amount, duration, and scope than those
services available to a medically needy recipient; and (b) The plan must provide that the services

1 when individuals have comparable needs,” and it is violated “when some recipients are treated
2 differently from other recipients where each has the same level of need.” *Jenkins v. Washington*
3 *State Dep’t Social & Health Servs.*, 157 P.3d 388, 392 (Wash. 2007); *see also Sobky v. Smoley*, 855
4 F. Supp. 1123, 1139 (E.D. Cal. 1994) (comparability requirement “creates an equality principle by
5 which all categorically needy individuals must receive medical assistance which is no less than that
6 provided to any other categorically or medically needy individual”); *Hodgson v. Bd. of County*
7 *Comm’rs, Hennepin County*, 614 F.2d 601, 608 (8th Cir. 1980) (“Once a state designates services it
8 will subsidize, it may distinguish between eligible and ineligible recipients only on the basis of
9 their degree of medical need.”).

10 Courts have thus found that states violate the Medicaid Act when they fail to offer the same
11 service to all with the same need. *See, e.g., Conlan v. Bonta*, 102 Cal.App.4th 745, 753-54 (2002)
12 (comparability violated where state policy resulted in some Medi-Cal recipients incurring
13 unreimbursed expenses); *Parry v. Crawford*, 990 F.Supp. 1250, 1257 (D. Nev. 1998)
14 (comparability violated where state provides Intermediate Care Facility for the Mentally Retarded
15 only to those with mental retardation, not those with “related conditions” and no basis on which to
16 infer difference in medical need); *Charpentier v. Belshe*, 1994 WL 792591, at *5 (E.D. Cal. Dec.
17 21, 1994) (limiting reimbursement for those eligible for both Medi-Cal and Medicare to no more
18 than 20% of Medicare’s reasonable charge while placing no such limitation on Medi-Cal-only
19 recipients violates comparability requirement).

20 *Jenkins* is directly on point. There, the state had previously determined the number of hours
21 of home health care services needed by recipients, based on assessment of their ability to perform
22 daily living activities. The state then reduced the number of hours that would be provided to
23 recipients whose caregiver lived with them, on the theory that the caregiver would, for example,
24 need to clean their own houses and should not be paid for this effort. The reduction was applied
25 without any individual assessment of need; rather, it operated as an “irrebuttable presumption.”

26
27 _____
28 available to any individual in the following groups are equal in amount, duration, and scope for all
recipients within the group: (1) The categorically needy. (2) A covered medically needy group.”)

1 157 P.3d at 390. The Washington Supreme Court held that the state violated the comparability
2 requirement because it “reduce[d] a recipient’s benefits based on a consideration other than the
3 recipient’s actual need.” *Id.* at 393; *see also White v. Beal*, 555 F.2d 1146, 1151 (3rd Cir. 1977)
4 (optional state Medicaid services must be “distributed in a manner which bears a rational
5 relationship” to underlying federal purpose of helping those in greatest need; provision of glasses
6 only to recipients with eye diseases, but not refractive error, violated comparability requirement);
7 *Jeneski v. Myers*, 163 Cal.App.3d 18 (1984) (across-the-board restrictions violated Medicaid
8 comparability requirement by failing to account for individual needs).

9 By definition, *all* individuals currently receiving IHSS services have been found to need such
10 services (in some amount) in order to remain safely in their home. Thus, they have already been
11 determined to meet the same threshold level of need through an individualized assessment. An
12 across-the-board termination of all recipients with an FI Score below 2.0, and an across-the-board
13 elimination of domestic and related services for all recipients with a functional rank below 4,
14 without any examination of their individual circumstances, will deprive tens of thousands of IHSS
15 recipients of services that they need just as critically as the remaining IHSS recipients whose FI
16 Scores are above 2.0 or whose functional ranks for domestic or related services are 4 or 5. This is
17 because, as previously discussed, neither the composite FI Score nor the functional ranks are
18 meaningful measures of need, and need is the only basis upon which distinctions can be made
19 without violating the comparability requirement. Thus, using the fundamentally flawed FI Scores
20 and functional ranks to distinguish between those who receive IHSS services and those who do not
21 violates the comparability requirement.

22 Moreover, because of the way FI Scores are calculated, individuals with cognitive or mental
23 disabilities, children, and those who do not need the full range of services (but for whom the
24 needed services are critical to remain safely at home) may receive FI Scores lower than warranted
25 by their actual need. These individuals will be entirely cut off from IHSS services despite the fact
26 that they desperately need these services in order to remain safely in their homes.

27 Because neither the functional ranks nor the FI Score reflect the criticality of the service and
28 whether a recipient is safe at home without the service, and because the State has previously

1 determined recipients' actual need and allocated IHSS services accordingly, the State's use of the
 2 false and arbitrary proxies of FI Scores and functional ranks to determine eligibility for services
 3 violates Medicaid's comparability requirement by treating similarly situated recipients differently.
 4 *See Jenkins*, 157 P.2d at 393.

5 **2. By Authorizing IHSS Services Based On Functional Index Score and**
 6 **Functional Ranks, ABX4 4 Violates the Reasonable Standards Requirement.**

7 The Medicaid Act further requires that all participating states employ "reasonable standards
 8 ... for determining ... the extent of medical assistance under the plan which ... are consistent with
 9 the objectives of this subchapter." 42 U.S.C. § 1396a(a)(17); *see also Wisconsin Dep't of Health &*
 10 *Fam. Serv. v. Blumer*, 534 U.S. 473, 479 (2002); *Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37
 11 (1981). The primary objectives of the Medicaid program are to provide medical assistance to
 12 individuals whose income and resources are insufficient to meet the costs of necessary medical
 13 services and to furnish "rehabilitation and other services to help such ... individuals attain and
 14 retain capability for independence or self care." 42 U.S.C. § 1396-1.

15 When state Medicaid rules deny coverage of services on an arbitrary or irrational basis,
 16 courts have invalidated those state rules as contrary to the reasonable standards requirement. *See*
 17 *Lankford v. Sherman*, 451 F.3d 496, 511-13 (8th Cir. 2006) (plaintiffs likely to succeed on
 18 reasonable standards claim where state unreasonably restricted optional medical equipment
 19 benefit); *Hern v. Beye*, 57 F.3d 906, 910-11 (10th Cir. 1995) (state law restricting medically
 20 necessary treatment to those whose lives were at risk not reasonable standard); *Preterm, Inc., v.*
 21 *Dukakis*, 591 F.2d 121, 131 (1st Cir. 1979) (state could not restrict medically necessary services
 22 solely on basis of diagnosis); *White*, 555 F.2d at 1151 (enjoining policy for glasses coverage
 23 because it "discriminated based upon etiology rather than the need for services"); *Allen v.*
 24 *Mansour*, 681 F.Supp. 1232, 1238 (E.D. Mich. 1986) (state medical necessity criteria arbitrary
 25 when unsupported by expert opinion or scientific data).

26 Defendants' termination of IHSS services based on FI Scores and functional ranks is even
 27 more arbitrary and capricious than state actions found elsewhere to violate Medicaid's reasonable
 28 standards requirement. As Plaintiffs have amply demonstrated, FI Scores and functional ranks

1 were never intended to measure “need” for IHSS services, and cannot reasonably be used for this
 2 purpose. *See supra* at 8-13. FI Scores and functional ranks have not been scientifically designed
 3 or validated, and CDSS has acknowledged that the FI Score is not a meaningful measure. Kline
 4 Decl. Ex. E. Defendants have not even offered, nor does ABX4 4 provide, an exceptions process
 5 through which individuals with FI Scores below 2.0 or ranks below 4 for domestic and related
 6 services could demonstrate their actual level of need for services. By arbitrarily denying and
 7 reducing access to IHSS based solely on FI Score and functional ranks, Defendants employ an
 8 unreasonable standard to determine the extent of medical assistance in violation of §
 9 1396a(a)(17).²³

10 **3. By Failing to Provide Adequate Domestic and Related Services, ABX4 4**
 11 **Violates the Sufficiency Requirement.**

12 Medicaid’s related “sufficiency” requirement mandates that “[e]ach service must be
 13 sufficient in amount, duration, and scope to reasonably achieve its purpose.” 42 C.F.R. §
 14 440.230(b). Thus, when a state has committed to provide a Medicaid service, the sufficiency
 15 requirement ensures that it adequately fulfills that obligation. To determine whether the service is
 16 sufficient, a court considers whether the level of service achieves the specific program’s purposes.
 17 *Curtis v. Taylor*, 625 F.2d 645, 651 (5th Cir. 1980).

18 For example, reductions in a children’s dental health program violate the sufficiency
 19 requirement where the resulting program fails to achieve its preventative, maintenance and
 20 restorative purposes. *Mitchell v. Johnson*, 701 F.2d 337, 347-51 (5th Cir. 1983); *see also Weaver*
 21 *v. Reagen*, 886 F.2d 194, 197-200 (8th Cir. 1989) (where state elects to provide prescription drugs,
 22 program’s failure to cover prescription of AIDS drug to certain individuals for whom that drug is
 23 medically necessary violates sufficiency requirement); *Charpentier*, 1994 WL 792591, at *5

24 _____
 25 ²³ Additionally, because ABX4 4 uses FI Scores and functional ranks which have a
 26 disparate impact on recipients with mental, as opposed to physical, impairments, it is inconsistent
 27 with the related regulation that prohibits arbitrary limitations on required services “based solely on
 28 diagnosis, type of illness, or condition.” 42 C.F.R. § 440.230(c); *see White*, 555 F.2d at 1152
 (applying §440.230(c) to determine whether state used reasonable standards to limit provision of
 optional benefit).

1 (limiting reimbursement for those eligible for both Medi-Cal and Medicare to no more than 20% of
 2 Medicare's reasonable charge, such that affected individuals are denied supplies and equipment,
 3 violates sufficiency requirement).

4 Here, the elimination of domestic and related services to individuals eligible for IHSS
 5 would result in the insufficient provision of IHSS services. Without domestic and related services,
 6 the IHSS services that remain cannot reasonably achieve the purpose of the IHSS program, as
 7 defined by statute, to provide services to those "who cannot safely remain in their homes or abodes
 8 of their own choosing unless these services are provided." Welf. & Inst. Code § 12300(a). The
 9 services currently authorized for IHSS recipients are, by definition, necessary to permit these
 10 individuals to remain safely in their home. MPP § 30-761.1; *see supra* at 2-7.

11 For example, as a result of the cuts, Plaintiff Doty Jones would remain eligible for some
 12 IHSS but lose all help with cleaning and meal preparation. Jones Decl. ¶3. Jones has AIDS and
 13 related medical complications, including neuropathy, pervasive weakness, mouth sores and
 14 breathing difficulties. Since she cannot cook or clean for herself, she is likely to stop eating or be
 15 unable to keep her apartment free of dust and infection, putting her at risk of a medical crisis and
 16 hospitalization. Without adequate nutrition and a healthy environment, Ms. Jones' remaining IHSS
 17 hours will do little to keep her safely at home. This provision of ABX4 4 thus violates the
 18 sufficiency requirement by failing provide services adequate to achieve the purpose of the IHSS
 19 program.²⁴

20 **C. ABX4 4 Violates Title II of the ADA and Section 504 of The Rehabilitation Act.**

21 Title II of the ADA states that "no qualified individual with a disability shall, by reason of
 22 such disability, be excluded from participation in or be denied the benefits of the services,
 23 programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42
 24 U.S.C. § 12132. To establish a violation of the ADA, a plaintiff must show: "(1) he is a 'qualified

25 ²⁴ As Medi-Cal recipients under age 21, Plaintiffs V.L. and C.R. have an additional claim:
 26 ABX4 4 violates federal mandates for Early and Periodic Screening, Diagnosis and Treatment
 27 (EPSDT). Amended Complaint ¶¶220-231. The Court need not reach this issue at present,
 28 however, because the requested TRO and preliminary injunction, if granted, will protect EPDST-
 eligible plaintiffs from injury.

1 individual with a disability'; (2) he was either excluded from participation in or denied benefits of a
 2 public entity's services, programs or activities, or was otherwise discriminated against by the
 3 public entity; and (3) such exclusion, denial of benefits or discrimination was by reason of his
 4 disability."²⁵ See *Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th
 5 Cir. 1997). Here, Plaintiffs are qualified individuals with disabilities in that they are capable of
 6 living independently in their own homes with assistance and meet the Medicaid income eligibility
 7 requirements.

8 Plaintiffs are likely to prevail in showing that ABX4 4 violates the ADA in myriad ways:
 9 (1) violating the "integration mandate" of the ADA by placing people at serious risk of having to
 10 move out of their homes to less integrated settings and institutionalization, *Olmstead v. Zimring*,
 11 527 U.S. 581 (1999); (2) discriminating against IHSS recipients with cognitive and psychiatric
 12 disabilities; and (3) utilizing methods of administration that discriminate against people with
 13 disabilities, which is prohibited by 28 C.F.R. § 35.130(b)(3).

14 **1. ABX4 4 Violates the ADA's Integration Mandate by Placing People with**
 15 **Disabilities at Risk of Unnecessary Institutionalization.**

16 Implementation of ABX4 4 will place class members at risk of unnecessary confinement in
 17 institutional settings such as nursing homes and psychiatric facilities in violation of the ADA's
 18 integration mandate. In adopting the ADA, Congress recognized that "historically, society has
 19 tended to isolate and segregate individuals with disabilities, and, despite some improvements, such
 20 forms of discrimination against individuals with disabilities continue to be a serious and pervasive
 21 social problem," and that "individuals with disabilities continually encounter various forms of
 22 discrimination, including outright intentional exclusion, ... failure to make modifications to existing
 23

24 ²⁵ The ADA and Section 504 apply to "all facets of state government." *Bay Area Addiction*
 25 *Research, Inc. v. City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999). Because of the absence of any
 26 significant difference between the substantive standards of the ADA and Section 504, see 29
 27 U.S.C. §794(a), the claims may be analyzed together. See, e.g., *Giebeler v. M & B Assocs.*, 343
 28 F.3d 1143, 1149 (9th Cir. 2003) (internal quotation marks omitted). The only difference is that
 Section 504 also requires the plaintiff to demonstrate that the relevant program receives federal
 funding. *Henrietta D.*, 331 F.3d at 272.

1 facilities and practices, ... [and] segregation.” 42 U.S.C. § 12101(a)(2), (5).

2 To this end, ADA regulations require provision of services in the most integrated setting
3 possible: “A public entity shall administer services, programs, and activities in the most integrated
4 setting appropriate to the needs of qualified persons with disabilities.” 28 C.F.R. § 35.130(d).

5 “The ‘most integrated setting’ is defined as ‘a setting that enables individuals with disabilities to
6 interact with non-disabled persons to the fullest extent possible.’” *Brantley v. Maxwell-Jolly*, 2009
7 WL 2941519, at *6 (N.D.Cal. Sept. 10, 2009) (citing 28 C.F.R. pt. 35 app. A; *Olmstead*, 527 U.S.
8 at 592). This mandate “serves one of the principal purposes of Title II of the ADA: ending the
9 isolation and segregation of disabled persons.” *Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615,
10 618 (9th Cir. 2005); *see also Brantley*, 2009 WL 2941519 at *6.

11 In *Olmstead*, the Court applied these integration and anti-isolation principles, holding that
12 the ADA prohibits “[u]njustified isolation of the disabled.” *Olmstead*, 527 U.S. at 597. The Court
13 reasoned that unnecessary institutional placement “perpetuates unwarranted assumptions that
14 persons so isolated are incapable or unworthy of participating in community life,” and “severely
15 diminishes the everyday life activities of individuals, including family relations, social contacts,
16 work options, economic independence, educational advancement, and cultural enrichment.” *Id.* at
17 600-01 (citations omitted). To establish an *Olmstead* claim, a plaintiff must show (1) the state’s
18 treatment professionals have determined that community-based services are appropriate, (2) the
19 disabled individual does not oppose such community-based treatment, and (3) the provision of
20 community-based services can be reasonably accommodated, taking into account the resources
21 available to the state and the needs of other individuals with disabilities.²⁶ 527 U.S. at 587.

22 Although *Olmstead* addressed ongoing institutionalization, plaintiffs who currently reside
23 in community settings may assert ADA integration claims to challenge state actions that give rise
24 to a risk of unnecessary institutionalization. *See Fisher v. Oklahoma Health Care Auth.*, 335 F.3d
25

26 ²⁶ The Ninth Circuit has also analyzed the integration mandate claim under the more
27 general test applicable to ADA claims brought under Title II. *See Townsend v. Quasim*, 328 F.3d
28 511 (9th Cir. 2003) (citing *Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001));
Brantley, 2009 WL 2941519 at *7. Plaintiffs prevail under either formulation.

1 1175, 1181-82 (10th Cir.2003) (imposition of cap on prescription medications placed participants
2 in community-based program at high risk for premature entry into nursing homes in violation of
3 ADA); *Ball v. Rodgers*, 2009 WL 1395423 at *5 (D. Ariz. Apr. 24, 2009) (defendants' failure to
4 provide plaintiffs with needed services "threatened Plaintiffs with institutionalization, prevented
5 them from leaving institutions, and in some instances forced them into institutions in order to
6 receive their necessary care in violation of the ADA and Rehab Act"); *Mental Disability Law
7 Clinic v. Hogan*, 2008 WL 4104460 at * 15 (E.D.N.Y. Aug.28, 2008) ("[E]ven the risk of
8 unjustified segregation may be sufficient under *Olmstead*"); *M.A.C. v. Betit*, 284 F.Supp.2d 1298,
9 1309 (D. Utah 2003) (integration mandate applies to those at risk of institutionalization); *Makin ex
10 rel. Russell v. Hawaii*, 114 F.Supp.2d 1017 (D. Haw. 1999) (denying summary judgment because
11 statute at issue "could potentially force Plaintiffs into institutions in violation of the ADA's non-
12 discrimination policy since the State's Medicaid statute fails to offer all qualified disabled people
13 services in the 'most integrated setting possible'").

14 Here, the statutes and regulations that govern the IHSS program themselves establish that
15 the elimination of services for members of the plaintiff class will place them at risk of unnecessary
16 institutionalization. *See supra* at 2, 5-6. Also, the evidence submitted herewith demonstrates a
17 dramatic risk of institutionalization for many class members. *See supra* at 17-18.

18 In similar circumstances, courts have found violations of the ADA's integration mandate.
19 For example, in *Fisher*, the Tenth Circuit held that recipients of community-based Medicaid
20 services could challenge a state-imposed limitation (enacted for budgetary reasons) of five
21 prescriptions per month, which did not apply to residents of nursing homes, because they "st[oo]d
22 imperiled with segregation" under the new policy. 335 F.3d at 1178-79, 1181-82; *see also*
23 *Crabtree*, 2008 WL 5330506, at *25 (M.D. Tenn. Dec. 19, 2008) (enjoining state from reducing
24 maximum allowable hours of home health care services because it would "eliminate services that
25 enable Plaintiffs to remain in their community placement" and thereby "cause their
26 institutionalization into nursing homes").

27 Finally, maintenance of current IHSS eligibility standards constitutes a reasonable
28 modification that would not require fundamental alteration of the program. Even assuming that

1 requiring Defendants to maintain current standards *could* constitute a fundamental alteration, it is
2 well-established that “budgetary constraints alone are insufficient to establish a fundamental
3 alteration defense.” *Penn. Protection & Advocacy, Inc. v. Penn. Dept. of Public Welfare*, 402 F.3d
4 374, 380 (3rd Cir. 2005); *see also Frederick L. v. Dept. of Public Welfare of Com. Of Penn.*, 364
5 F.3d 487, 495-96 (3rd Cir. 2004); *Fisher*, 335 F.3d at 1182-83. ABX4 4’s exclusive purpose was
6 such budget savings. Moreover, if even a small proportion of the 133,000 IHSS recipients at risk
7 here end up in hospitals, emergency rooms or nursing homes, the cost to taxpayers may actually be
8 far greater than the entire cost of the IHSS program. *See supra* at 6-7, 19-20.

9
10 **2. ABX4 4 Discriminates Against People with Psychiatric and Cognitive Disabilities.**

11 Implementation of ABX4 4 would also violate the ADA because the use of the composite
12 FI Scores and functional ranks as criteria to determine IHSS eligibility criteria will have a uniquely
13 detrimental effect upon people with psychiatric and cognitive disabilities and tend to exclude them
14 from IHSS.

15 Actionable discrimination under the ADA may be established through a showing that a
16 facially neutral rule has a uniquely detrimental impact upon persons with disabilities; for example,
17 that its effect would be to deny individuals with disabilities meaningful access to government-
18 provided services due to their unique needs. *See Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir.
19 1996) (facially neutral 30-day quarantine on animals); *Rodde v. Bonta*, 357 F.3d at 998 (9th Cir.
20 2004) (closure of county hospital). Similarly, the use of “eligibility criteria that screen out or tend
21 to screen out an individual with a disability or any class of individuals with disabilities from fully
22 and equally enjoying any service, program, or activity” violates the ADA “unless such criteria can
23 be shown to be necessary for the provision of the service, program, or activity being offered.” 28
24 C.F.R. §35.130(b)(8); *see also Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 122-23, 135, 139-
25 40 (D.Mass. 1997) (imposition of requirements that may discourage students with learning
26 disabilities from seeking accommodations); *Coleman v. Zatechka*, 824 F.Supp. 1360, 1368 (D.
27 Neb. 1993) (eligibility requirements imposed upon students with disabilities seeking to participate
28 in roommate assignment program).

1 Here, ABX4 4 has a uniquely detrimental and disproportionate impact upon persons with
2 cognitive and psychiatric disabilities, in two primary ways. First, individuals with cognitive and
3 psychiatric disabilities, many of whom may require verbal encouragement or cueing rather than
4 physical assistance, are likely to receive lower functional ranks than individuals with physical
5 disabilities, which will render them ineligible for domestic and related services – even though their
6 need for assistance is just as critical. *See supra* at 9-10. Second, the way in which the FI Score is
7 calculated tends to result in lower FI Scores for recipients with mental disabilities, such that their
8 IHSS benefits will be terminated while services authorized for recipients with physical disabilities
9 will not be terminated. *See supra* at 13. The use of these measures to determine IHSS eligibility
10 cannot be characterized as necessary to the program when neither is currently in place; rather, they
11 have been adopted purely as cost-cutting measures.

12 In *Olmstead*, the Court clarified that the ADA does not limit its protections to situations
13 involving discrimination that disfavors members of a protected class in comparison to individuals
14 outside of that class; rather, the ADA also forbids discrimination *among* members of the same
15 protected class. *See Olmstead*, 527 U.S. at 598 (concluding that the latter is within the scope of the
16 “comprehensive view of the concept of discrimination advanced in the ADA”); *id.* at 598 n. 10
17 (rejecting dissent’s assertion that the “Court has never endorsed an interpretation of the term
18 ‘discrimination’ that encompassed disparate treatment among members of the same protected
19 class”) (citing *O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996)).²⁷ This
20 proposition that the ADA requires even-handed treatment among the disabled derives logically
21 from the fact that the ADA affords “individualized protection against illegal conduct,” not group
22 protection. *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 151 (2nd Cir. 2000) (citing *Olmstead*,
23 527 U.S. at 598 n. 10). Thus, the key question is whether an entity covered by the ADA has
24 discriminated against an individual because of that individual’s disability – here, against members
25

26 ²⁷ In *O’Connor*, the Court held that a plaintiff asserting age discrimination need not show
27 that he was replaced by a younger employee outside of the protected category in order to establish
28 a *prima facie* case. 517 U.S. at 312. Rather, the plaintiff needed show only that he “ha[d] lost out
because of his age,” even if it was to another member of the protected class. *Id.*

1 of the plaintiff class with cognitive or psychiatric disabilities. *See Olmstead*, 527 U.S. at 598.

2 Accordingly, courts have held actionable under the ADA discrimination based on type or
 3 degree of disability in cases involving programs that are available only to the disabled. *See, e.g.,*
 4 *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1010 (3rd Cir. 1995) (refusal to admit
 5 Alzheimer's patient who suffered from particularly severe disturbances violated Rehabilitation
 6 Act); *Hamlyn v. Rock Island County Metro. Mass Transit Dist.*, 986 F. Supp. 1126, 1131 (C.D. Ill.
 7 1997) (exclusion of individuals with AIDS from reduced transit fare program available to other
 8 individuals with disabilities violated Rehabilitation Act and ADA); *Winkler v. Interim Svcs., Inc.*,
 9 36 F.Supp.2d 1026, 1029 (M.D. Tenn. 1999) (exclusion of severely disabled individuals from
 10 program providing home health services to individuals with disabilities would violate
 11 Rehabilitation Act). Here, the implementation of ABX4 4 will have a uniquely detrimental effect
 12 upon individuals with cognitive and/or psychiatric impairments in that it will tend to exclude them
 13 from IHSS services. Moreover, the basis on which these individuals will be excluded bears no
 14 relation to their actual need for the services because the functional ranks and FI Score were not
 15 designed to measure criticality of need. Relying on an unreasonable and arbitrary basis for
 16 excluding these disabled individuals denies them meaningful access and violates the ADA and
 17 Section 504.

18 **3. ABX4 4 Uses Methods of Administration that Discriminate Against People 19 with Disabilities.**

20 The ADA prohibits methods of administration that have a discriminatory effect on people
 21 with disabilities. *See Alexander*, 469 U.S. at 296-97; *Helen L. v. DiDario*, 46 F.3d 325, 335 (3rd
 22 Cir. 1995); *Crowder*, 81 F.3d at 1484. The ADA's implementing regulations state:

23 A public entity may not, directly or through contractual or other arrangements,
 24 utilize criteria or methods of administration: ¶ (i) That have the *effect of* subjecting
 25 qualified individuals with disabilities to discrimination on the basis of disability; ¶
 (ii) That have the purpose or *effect of* defeating or *substantially impairing*
accomplishment of the objectives of the public entity's program with respect to
 individuals with disabilities. . . .

26 28 C.F.R. § 35.130(b)(3) (emphasis added); *see also* 28 C.F.R. § 41.51(b)(3)(i); 45 C.F.R. §

1 84.4(b)(4) (Section 504).²⁸

2 The purpose of the IHSS program is “to enable the aged, blind or disabled poor to avoid
3 institutionalization by remaining in their homes with proper supportive services.” *Miller*, 148
4 Cal.App.3d at 867; *see also* Welf. & Inst. Code § 12300(a) (IHSS provides services to those who
5 “cannot safely remain in their homes . . . unless these services are provided”). Defendants’ new
6 criteria for deciding IHSS eligibility will significantly impair the purpose of the IHSS program
7 because, among other things, they will cause thousands of individuals to lose IHSS they have
8 already been found to need based on calculations that were not developed to measure the need for
9 IHSS, do not in fact measure that need, and, when applied, cause arbitrary reductions and
10 terminations of supportive services among people with disabilities. *See supra* at 8-13.

11 Defendants’ new methods of administration will also subject individuals to disability
12 discrimination. The scoring criteria will screen out many individuals with cognitive and
13 psychiatric disabilities. *See supra* at 9-10, 13. They will also exclude from domestic and related
14 services individuals who have been found to need these services to remain safely in their homes.
15 The methods of administration regulations are also violated by, *inter alia*, terminating eligibility
16 and services without providing for an individualized exception process for individuals whose
17 scores may be technically accurate but who need IHSS in order to remain safely in their own
18 homes and to avoid institutionalization, without proper notice and a hearing, and without adequate
19 time to arrange for any alternative services that are in fact available.

20 Terminating services based on inaccurate assessments, or based on accurate rankings and
21 scores that do not reflect who may remain safely in their homes without IHSS, impair the purpose
22 of the IHSS program and so violate the ADA. *See Brantley*, 2009 WL 2941519 at *11 (plaintiffs
23 likely to succeed on claim that defendants’ failure to provide sufficient notice and information
24 regarding reduction in Medi-Cal services violated methods of administration regulation); *Kathleen*

25
26 ²⁸ Because Congress explicitly authorized the Attorney General to promulgate regulations
27 to implement Title II of the ADA, these regulations must be given controlling weight unless they
28 are arbitrary, capricious, or plainly contrary to the statute. *See* 42 U.S.C. § 12134; *Parker v.*
Universidad de Puerto Rico, 225 F.3d 1, 5 n.5 (1st Cir. 2000).

1 *S. v. Pennsylvania Dep't of Publ. Welfare*, 10 F.Supp.2d 460, 471 (E.D.Pa. 1998) (state's "failure
2 to adequately plan for the community placements" it had already determined appropriate by
3 shifting needed funds within a reasonable time constituted discriminatory methods of
4 administration).

5 **CONCLUSION**

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

8
9 Dated: October 5, 2009

Respectfully Submitted,

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