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

20 DAVID OSTER, *et al.*,

21 Plaintiffs,

22 v.

23 LIGHTBOURNE, *et al.*,

24 Defendants.

Case No. CV 09-04668 CW

PLAINTIFFS' REPLY BRIEF IN SUPPORT
OF MOTION FOR PRELIMINARY
INJUNCTION

Date: January 19, 2012
Time: 2 :00 pm
Place: Courtroom 2
Judge: Hon. Claudia Wilken

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INTRODUCTION

1
2 Implicitly conceding that their officially promulgated All County Letter (“ACL”) illegally
3 denied hours restoration to IHSS recipients based on their functional ranks and failed to exempt
4 children from the budget-based hours reductions, Defendants have done an about-face: They
5 “recently decided” to exempt children from the reductions and now claim that, contrary to the plain
6 language of the ACL, social workers have “discretion” to restore hours to recipients who do not
7 meet the functional ranks eligibility criteria. It is well settled that voluntary cessation of illegal
8 activity, without some official guarantee that Defendants will not renew that activity, does not
9 moot Plaintiffs’ claims for injunctive relief. This is particularly important here, where Defendants
10 do not concede that the ACL as written bases eligibility for hours restoration on functional ranks,
11 and instead posit an entirely implausible reading of the ACL which no reasonable county official or
12 social worker charged with actually restoring hours would ever understand. Named Plaintiffs have
13 standing to challenge Defendants’ implementation of SB 73 because they do not meet the
14 functional ranks criteria set forth in the ACL (and thus are ineligible for hours restoration) and will
15 suffer irreparable harm as a result of the 20 percent reduction. Plaintiffs are likely to succeed on
16 the merits for all of the reasons set forth in the TRO brief, most of which Defendants have not even
17 attempted to rebut. Indeed, the Ninth Circuit recently held plaintiffs challenging similar home care
18 reductions were entitled to a preliminary injunction under the Americans with Disabilities Act
19 (“ADA”) and Section 504 of the Rehabilitation Act (“504”) based on their serious risk of
20 institutionalization. *M.R. v. Dreyfus*, ___ F.3d___, 2011 WL 6288173, *20 (9th Cir. Dec. 16, 2011).

21 Even if the ACL could be interpreted as Defendants urge (which it cannot), and even if
22 Defendants promulgated a new official ACL that used functional ranks as presumptive eligibility
23 criteria for hours restoration but also gave social workers discretion to restore IHSS hours for
24 recipients not meeting those criteria, Plaintiffs would still have standing, would still be subject to
25 irreparable injury, and would still be likely to succeed on the merits of their claims that SB 73 and
26 Defendants’ implementation thereof violate the Medicaid Act, the ADA, Section 504, and due
27 process. As a preliminary matter, Defendants’ ripeness argument is exactly backwards: Plaintiffs
28 are certain to receive a notice reducing their hours; the only contingency is whether they will be

1 able to reverse that reduction through the Care Supplement process. Defendants confuse ripeness
 2 with exhaustion of administrative remedies, which is not required here. And, as described in detail
 3 below, cutting benefits determined necessary to enable Medicaid recipients to remain safely at
 4 home by 20 percent across the board based solely on budgetary considerations, restoring lost hours
 5 only to those who manage to apply, basing eligibility for hours restoration on “presumptions”
 6 about functional ranks or some undefined and flawed standard of “serious risk of out-of-home
 7 placement,” and setting an arbitrary deadline for applications each independently violate the
 8 Medicaid Act and/or ADA/504. Moreover, Defendants’ planned notices of reduction violate due
 9 process, for all of the reasons set forth in Plaintiffs’ TRO brief and below.

10 ARGUMENT

11 I. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF DESPITE 12 DEFENDANTS’ POST-LITIGATION CHANGE IN DIRECTION.

13 A. Defendants Unofficially Changed Their Positions After The TRO Was Granted.

14 On November 29, 2011, Defendants issued All County Letter 11-81 (“ACL”) to implement
 15 SB 73. Carroll Decl., Ex. A (Dkt. 446-1). That ACL outlines the statutory exemptions and
 16 individuals pre-approved for Supplemental Care by the California Department of Social Services
 17 (“CDSS”), and establishes “a screening tool to be used by counties to determine if a recipient is at
 18 serious risk of out-of-home placement as a consequence of the reduction in authorized hours,” *id.*
 19 at 4-5, under which functional ranks determine eligibility for hours restoration.

20 After the filing of this action and issuance of the TRO, Defendants reversed course in two
 21 significant ways. First, according to a declaration filed in opposition to Plaintiffs’ motion for class
 22 certification, Defendants “recently decided” to pre-approve Care Supplements for children under
 23 21. Carroll Decl. (Dkt. 439-1) second ¶8. Second, this same declaration now claims that the
 24 functional ranks specified in the Care Supplement Worksheet “serve[] as a floor, not a ceiling,” in
 25 that they establish a presumption of serious risk, but that county social workers “retain the
 26 discretion to exercise their independent judgment” and may approve a Care Supplement even if the
 27 recipient’s functional ranks do not meet the minimum in the Worksheet. Carroll Decl. (Dkt. 439-
 28 1), ¶¶10-11; *see also* Carroll Decl. (Dkt. 446) ¶9 (similar). Neither of these changes in direction

1 has been set forth in an ACL or in any other official promulgation.

2 Four county IHSS officials, whose job duties include ensuring that county social workers
 3 authorize hours in accordance with state regulations and ACLs (and who would be responsible for
 4 overseeing the administration of the Care Supplement approval process in their counties), explain
 5 in detail why the ACL cannot possibly be interpreted to give social workers “discretion” to restore
 6 hours to recipients whose functional ranks do not meet the criteria set forth in the ACL. 4th
 7 Collins Decl. ¶¶1-10; 4th Kaljian Decl. ¶¶1-5; 2nd Cottrell Decl. ¶¶1-3; 2nd Elliott Decl. ¶¶3-4.
 8 The ACL instructs that the Worksheet must be completed for each Supplemental Care applicant,
 9 makes clear that whether there is a serious risk of institutionalization is determined based on an
 10 applicant’s functional ranks, and directs that if such serious risk is not shown the social worker
 11 should not move on to the next step (the more discretionary determination of whether risk can be
 12 avoided through alternative sources of care or rearrangement of hours).¹ The ACL gives no
 13 indication that social workers may exercise “discretion” rather than following the functional ranks
 14 set forth in the Worksheet. 4th Kaljian Decl. ¶4. Additionally, the ACL and Worksheet provide no
 15 alternative guidance for assessing “serious risk of out-of-home placement” (as opposed to the risk
 16 faced by every IHSS recipient, who necessarily has been deemed to need all authorized services in
 17 order to remain safely at home) other than the specified functional ranks. If the Department had
 18 intended social workers to exercise discretion in assessing “serious risk of out-of-home placement”
 19 it would have given them some guidance as to what was meant. 4th Collins Decl. ¶8; 2nd Cottrell
 20 Decl. ¶3.² Accordingly, “[a]ny reasonably trained social worker....would interpret the ACL as

21 _____
 22 ¹ Specifically, the ACL states, “[w]hen a completed application for IHSS Supplemental Care is
 23 received, the county shall complete the IHSS Supplemental Care Worksheet” Carroll Decl.,
 24 Ex. A (Dkt. 446-1) at 6. That Worksheet contains three sections: Sections A and B, under the
 25 heading “Serious Risk of Out-of-Home Placement,” and Section C, under the heading “IHSS
 26 Supplemental Care Request Disposition.” *Id.* at 20. Section A specifies minimum functional ranks
 27 for personal care tasks, and instructs that “[t]hree (3) or more ‘YES’ responses for the following
 28 items indicate serious risk in this category.” *Id.* Section B specifies a minimum combined total of
 functional ranks for certain mental functions, and similarly instructs, “[a] ‘YES’ response ...
 indicates serious risk in this category.” *Id.* The worksheet specifies that Section C, which records
 how that risk can be addressed, shall be “[c]ompleted ... *only if* recipient/applicant is determined to
 be at serious risk.” *Id.* (emphasis added). There is no space on the Worksheet for a social worker
 to indicate any other criteria, observations, or risk factors for out-of-home placement, although
 documentation is a central tenet of social work and the IHSS program. 4th Collins Decl. ¶6.

² Indeed, the association of county welfare directors responsible for running IHSS in their

1 requiring use of the Worksheet to determine serious risk of out of home placement, and would
 2 interpret the Worksheet as requiring use of functional ranks to determine serious risk of out of
 3 home placement.” 4th Collins Decl. ¶7.³

4 **B. Plaintiffs Are Entitled to a Preliminary Injunction for the Same Reasons that this**
 5 **Court Granted the TRO Application.**

6 Defendants implicitly concede that their planned implementation of SB 73 was illegal,
 7 when they argue that SB 73 is “the *antithesis* of an across-the-board benefits slashing based on
 8 inflexible and arbitrary eligibility criteria.” Def. Opp. Pl. Mot. Prelim. Inj. (Dkt. 445) (“Opp.”)
 9 1:2-4 (emphasis in original). As described in Plaintiffs’ TRO Application (Dkt. 329) (“TRO Br.”),
 10 SB 73 is precisely such an across-the-board benefits cut based on arbitrary and unreasonable
 11 eligibility criteria: SB 73 mandates a 20 percent reduction in IHSS hours, and allows hours
 12 restoration only for those who manage to apply for Supplemental Care and are at “serious risk of
 13 out-of-home placement.” Defendants’ official ACL restricts eligibility for hours restoration only to
 14 those who apply within two months and have specified functional ranks, and does not exempt
 15 children. Defendants’ implementation of SB 73 likely violates the Medicaid Act and ADA/504 for
 16 all of the reasons set forth in Plaintiffs’ TRO brief, none of which has been rebutted by Defendants.

17 Similarly, Named Plaintiffs L.C., Sheppard, Thurman, Stern, and Hylton all have standing,
 18 and ripe claims: They are all subject to the 20 percent reduction, and none meets the functional
 19 ranks eligibility criteria for Supplemental Care. Stern Decl. (Dkt. 401) ¶25, Ex. A (Dkt. 401-1) at
 20 3; Thurman Decl. (Dkt. 404) ¶30, Ex. A (Dkt. 404-1) at 2; 2nd Hylton Decl., Ex. A (Dkt. 371-1) at
 21 2; Carroll Decl. Ex. B (Dkt. 446-2) at 3; M.G. Decl. re: L.C., Ex. A (Dkt. 352-1) at 2. *See Jones v.*
 22 *Blinziner*, 536 F.Supp. 1181, 1192 (N.D. Ind. 1982) (challenge to benefits termination ripe despite

23 _____
 24 respective counties specifically asked for such a definition, but received no response from CDSS.
 25 4th Collins Decl. ¶9; 3rd Collins Decl. Ex. A (Dkt. 344-1) at 4 (Q14); *see also id.* at 3 (Q5
 “Screening Tool”) (making clear counties understood functional ranks to be “criteria for being
 considered for restoration of hours”).

26 ³ CDSS also held meetings with county IHSS program staff to discuss implementation of SB
 27 73, presenting materials that instructed counties that the Worksheet must be completed “to make a
 28 determination as to whether [a recipient who applies] is at serious risk of out-of-home placement.”
 Schmeding Decl., Ex. B at 12. CDSS never indicated that social workers had discretion to restore
 hours for recipients who did not meet the functional ranks criteria, despite specific questions about
 that issue. 2nd Elliott Decl. ¶3; 2nd Cottrell Decl. ¶4.

1 appeal and interim benefits, where policy dictated they would eventually lose appeal).

2 This Court should reject Defendants' attempt to escape liability through two post-litigation
3 declarations signed by a mid-level CDSS official, that were not officially promulgated, were not
4 communicated to the relevant county authorities responsible for implementing SB 73, and do not
5 officially bind Defendants. Voluntary cessation of illegal activity in response to pending litigation
6 does not moot a claim, unless the party alleging mootness can show that "it is absolutely clear the
7 allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.*
8 *v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 190 (2000) (citation omitted). Without such a rule,
9 "the courts would be compelled to leave [t]he defendant . . . free to return to his old ways." *Porter*
10 *v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007) (alterations in original) (citation omitted). Here,
11 there is absolutely no guarantee that the wrongful behavior will not recur. Indeed, the opposite is
12 true. Although Defendants admit that they "recently decided" to exempt children from the cuts
13 (because to do otherwise would violate Medicaid's EPSDT requirement), they do not even
14 acknowledge that the ACL mandates use of functional ranks to determine eligibility, and pretend
15 that it gives social workers "discretion" to restore hours based only on the undefined term "serious
16 risk of out-of-home placement," when no reasonable person could so interpret it. *See Carroll Decl.*
17 (Dkt. 439-1) ¶¶8, 11. Accordingly, Defendants must be enjoined from implementing SB 73 for all
18 of the reasons set forth in Plaintiffs' request for a TRO, as this Court already found in granting that
19 request.

20 Much of the remainder of this brief is relevant only if this Court determines that the Carroll
21 Declarations, and Defendants' post-litigation change in position, should be credited.

22 **II. PRELIMINARY INJUNCTIVE RELIEF IS WARRANTED EVEN IF**
23 **DEFENDANTS' CREATIVE REINTERPRETATION OF THE ACL IS**
24 **ACCEPTED.**

25 Even if the Court were to accept Defendants' post-litigation, post-TRO reinterpretation of
26 the ACL to give social workers discretion to restore hours based on something other than
27 functional ranks, Plaintiffs would still have standing to challenge SB 73, as discussed *infra* at 6-10,
28 and are still likely to succeed on the merits of their claims, *see infra* at 19-34. The Carroll
Declarations do not make SB 73 lawful, for a number of reasons:

1 *First*, the post-litigation declarations do not address many of the legal problems Plaintiffs
 2 identified, including placing the burden on elderly and disabled recipients to apply for restoration
 3 of hours they have already been found to need and imposing unreasonable timelines on the
 4 application process. *Second*, use of functional ranks as a “presumption” for eligibility means that
 5 many recipients who do not meet the functional ranks criteria, but who would otherwise be at
 6 serious risk, may be passed over for hours restoration by social workers. 4th Collins Decl. ¶13.
 7 *Third*, giving social workers discretion to determine which of their clients are at “serious risk of
 8 out-of-home placement” but failing to provide them with any guidance or criteria for exercising
 9 this discretion will “create a completely unmanageable situation” in which different counties and
 10 social workers use different criteria, and hours will be awarded in an “inequitable” manner. 2nd
 11 Elliott Decl. ¶7; 4th Collins Decl. ¶11; 4th Kaljian Decl. ¶5; 2nd Cottrell Decl. ¶5. *Fourth*, because
 12 the term “serious risk of out-of-home placement” must mean something other than the current
 13 standard for authorization of IHSS hours—the minimum necessary to keep recipients safe at
 14 home—it will leave many recipients ineligible for hours restoration, even if they will suffer
 15 declining health or injury as a result of the 20 percent reduction. 4th Kaljian Decl. ¶7; 4th Collins
 16 Decl. ¶12. *Fifth*, if “serious risk of out-of-home placement” is construed to mean imminent risk,
 17 many IHSS recipients will not qualify, even though they are in grave danger of health deterioration
 18 that may lead to institutionalization at some time in the future. 3rd LaPlante Decl. ¶¶2-5; 2nd
 19 Cottrell Decl. ¶6; 4th Kaljian Decl. ¶7. Accordingly, as discussed below, Named Plaintiffs’ claims
 20 are ripe for decision, and Named Plaintiffs are likely to succeed on the merits of their claims, even
 21 if the ACL could be interpreted in accordance with Carroll’s post-litigation declarations.

22 **III. PLAINTIFFS HAVE STANDING TO PURSUE THEIR CLAIMS.**

23 **A. The Potential Availability of the Care Supplement Process Does Not Render** 24 **Named Plaintiffs’ Claims Unripe.**

25 While Defendants argue “standing,” most of their argument focuses on cases addressing
 26 prudential ripeness.⁴ Article III ripeness “coincides squarely with standing’s injury in fact prong
 27

28 ⁴ This Court need only find one plaintiff, either an individual or association, with standing. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

1 and can be characterized as standing on a timeline.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109,
 2 1122 (9th Cir. 2009). Of course, courts have long recognized that one “does not have to await the
 3 consummation of threatened injury to obtain preventive relief.” *Ariz. Right to Life Political Action*
 4 *Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003). The harm at issue need not be “actual” so
 5 long as it is “imminent.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). A claim is
 6 only unripe for Article III purposes “if it rests upon contingent future events that may not occur.”
 7 *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009). Prudential ripeness examines “both
 8 the fitness of the issues for judicial decision and the hardship to the parties of withholding court
 9 consideration.” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Its purpose is “to
 10 prevent the courts, through avoidance of premature adjudication, from entangling themselves in
 11 abstract disagreements over administrative policies, and also to protect the agencies from judicial
 12 interference until an administrative decision has been formalized and its effects felt in a concrete
 13 way...” *Id.* at 148. Named Plaintiffs’ claims here satisfy both ripeness inquiries.

14 Named Plaintiffs Stern, Thurman, Hylton, and Sheppard have standing, because they will
 15 receive notices reducing their IHSS hours by 20 percent.⁵ In arguing that Named Plaintiffs’ claims
 16 are unripe because they can allegedly seek and receive hours restoration through the Care
 17 Supplement process (Opp. 13:16-14:22 (citing *Bova*, 564 F.3d at 1096)), Defendants have the
 18 argument precisely backwards. What is contingent on potential future events is not the hours
 19 *reduction*, but the hours *restoration*. In *Bova*, by contrast, plaintiff employees challenged a policy
 20 that would discontinue health insurance for retirees. Their claim was not ripe, because they had not
 21 yet retired or been denied insurance, and it was possible that they would neither retire nor be

22
 23 ⁵ CDSS has reprogrammed the software that manages its IHSS database known as “CMIPS,” to
 24 implement the 20 percent reduction. Carroll Decl. (Dkt. 439-1) ¶4; Carroll Decl., Ex. A (Dkt. 446-
 25 1) at 3. CDSS had planned to implement the programming changes through a system update on
 26 December 1, 2011, which would have automatically modified hundreds of thousands of recipient
 27 and provider files to reflect the hours reduction, but implementation was enjoined by this Court.
 28 5th Bird Decl. (Dkt. 331) ¶10; TRO (Dkt. 417). The CMIPS system update generates written
 notices of action; by the time they are sent, the reductions have been implemented and will occur
 automatically. Carroll Decl., Ex. A (Dkt. 446-1) at 9-10; G. Brown Decl. (Dkt. 170) ¶3.
 Recipients’ hours will thus automatically be reduced unless they submit a timely Supplemental
 Care application and a county IHSS worker calls up the recipient’s and provider’s CMIPS
 computer files and manually reverses the reductions. Petty Decl. (Dkt. 171) ¶13; Carroll Decl.
 (Dkt. 446-1), Ex. A at 7, 9-10.

1 denied insurance (they might die, or switch jobs, or the retirement policy could change, before they
2 retired). *Id.* at 1096-97. Here, if Defendants planned to first review all IHSS recipients to
3 determine which ones would be at serious risk of out-of-home placement, and then send a notice
4 reducing the hours of only those recipients found not at serious risk, Named Plaintiffs' claims
5 might not be ripe until such a review was completed. But Defendants are instead reducing hours
6 for everyone who is not exempt, and placing the burden on recipients to apply for restoration later.
7 The contingency here is thus not whether hours will be reduced—they will be—but whether
8 Named Plaintiffs will manage to timely apply for Supplemental Care and have their hours restored.
9 This does not make Plaintiffs' claims unripe.⁶

10 Courts faced with ripeness arguments under similar circumstances have not hesitated to
11 reject them, even when plaintiffs had actually applied for and were receiving aid paid pending.
12 *See, e.g., Elkins v. Dreyfus*, 2011 WL 3438666 at *6 (W.D. Wash. Aug. 5, 2011) (“Defendant
13 argues that [plaintiff’s] claim is not ripe because he never lost his benefits because he appealed the
14 termination decision. This argument rings hollow. It remains a fact that he was terminated from
15 the program, even if he received interim benefits.”); *Pashby v. Cansler*, ___ F.Supp.2d ___, 2011 WL
16 6130819 at *4 (E.D. N.C. Dec. 8, 2011) (challenge to policy terminating eligibility for Medicaid
17 services ripe despite pending administrative appeals); *Kerr v. Holsinger*, 2004 WL 882203 at *6
18 (E.D. Ky. March 25, 2004) (“reasonable standards” challenge to termination of Medicaid services
19 ripe despite failure to exhaust administrative remedies); *Mayer v. Wing*, 922 F.Supp. 902, 906
20 (S.D.N.Y. 1996) (plaintiffs had standing to appeal reduction in benefits even though none were
21 experiencing reduction at moment complaint was filed because interim benefits were paid pending
22 appeal). Even in the single non-binding case to the contrary cited by Defendants, the court found
23 ripe the claim of a recipient whose benefits had been reduced following an informal review of his
24

25 ⁶ *See, e.g. Ashley County Medical Center v. Thompson*, 205 F.Supp. 2nd 1026, 1046 n. 25 (E.D.
26 Ark. 2002) (action ripe where rule had “a direct impact on Plaintiffs, without any intervening acts
27 required”; fact that defendants “could take steps to ameliorate” rule’s effect not relevant) (italics
28 omitted). *Central Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002) (“It
would be inequitable in the extreme for us to permit one party to create a significantly increased
risk of harm to another, and then avoid the aggrieved party from trying to prevent the potential
harm because the party that created the risk promises that it will ensure that the harm is avoided,
yet offers no specific or concrete plan of action for doing so”).

1 case, despite the fact that he could seek formal administrative review during which his benefits
2 would not be reduced. *Sumner v. Fukono*, 2009 WL 1249306, *7 (D. Hi. May 6, 2009).

3 Defendants' standing argument confuses ripeness with failure to exhaust administrative
4 remedies, although Defendants have not argued (nor could they) that Plaintiffs are required to
5 exhaust administrative remedies.⁷ Named Plaintiffs' claims are ripe because Defendants will send
6 them notices reducing their IHSS benefits; the only "contingency" is not the reduction, but
7 Plaintiffs' presumed opportunity to *later* seek redress by requesting restoration of hours from the
8 county or an Administrative Law Judge ("ALJ")—*i.e.*, exhaust administrative remedies. Failure to
9 exhaust administrative remedies does not make a claim unripe:

10 While the policies underlying the two concepts often overlap, the finality requirement is
11 concerned with whether the initial decisionmaker has arrived at a definitive position on the
12 issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to
13 administrative and judicial procedures by which an injured party may seek review of an
adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise
inappropriate.

14 *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172,
15 193 (1985). So it is here. The initial decision—to reduce hours by 20 percent—is made by CDSS
16 pursuant to SB 73. Although Named Plaintiffs might later seek a remedy for this reduction by
17 requesting that the county "restore" hours already reduced, or that an ALJ reverse the county's
18 decision not to restore those hours, the existence of these administrative remedies does not render
19 their initial claims unripe or deprive them of standing.

20 Turning to prudential ripeness, Plaintiffs' claims are plainly fit for review now, as there is
21 no need for "further factual development." *Stormans*, 586 F.3d at 1126. Plaintiffs bring a facial
22 challenge to Defendants' implementation of SB 73, and no further facts are needed for this Court to
23 decide whether Defendants' notices violate due process,⁸ and whether a 20 percent budget-driven

24
25 ⁷ It is well settled that such exhaustion is not required for claims brought pursuant to Section
26 1983, including in the Medicaid context. *Patsy v. Bd. Of Regents*, 457 U.S. 496, 500-501 (1982);
Talbot v. Lucy Corr. Nursing Home, 118 F.3d 215, 219 (4th Cir. 1997); *Alcare, Inc.-North v.*
Baggiano, 785 F.2d 963, 965-69 (11th Cir. 1986).

27 ⁸ Plaintiffs receiving a notice that they allege to be constitutionally defective have standing to
28 challenge such notices, regardless of whether they file an administrative appeal. *See, e.g.,*
McCartney v. Cansler, 608 F.Supp.2d 694, 701-02 (E.D.N.C. 2009) (rejecting argument that
challenge to defective notice terminating or reducing Medicaid benefits is unripe because plaintiffs

1 reduction in IHSS hours violates the Medicaid Act or ADA/504 despite the potential for recipients
 2 to apply for hours restoration, when Defendants have placed the burden on recipients to apply for
 3 restoration (rather than conducting a pre-reduction assessment),⁹ are improperly using functional
 4 ranks as at least a presumptive criteria for restoration, and have failed to give social workers any
 5 guidance as to what constitutes “serious risk of out-of-home placement.”

6 Named Plaintiffs also meet the hardship requirement—that is, “withholding review would
 7 result in direct and immediate hardship and would entail more than possible financial loss.”
 8 *Stormans*, 586 F.3d at 1126. Named Plaintiffs describe *infra* at 15-19 the irreparable injury they
 9 will suffer if their hours are reduced, and their potential inability to timely apply for a Care
 10 Supplement. This Court should not withhold review until Named Plaintiffs (or an unnamed class
 11 member, who could be added as a named plaintiff) miss the deadline for applying for Supplemental
 12 Care, or their application is denied, as the injury that would occur in the interim until this Court
 13 could order hours restoration would certainly be irreparable. CDSS has estimated that some
 14 250,000 recipients will not have their hours restored. 2nd Keeslar Decl. (Dkt. 376) ¶16 & Ex. A at
 15 3 (Dkt. 376-1). This Court should act now to protect them.

16 **B. Union Plaintiffs Have Established Both Article III and Prudential Standing.**

17 Union Plaintiffs have both associational and organizational standing. This Court has held
 18 in related litigation that the same Union Plaintiffs have associational standing to bring an ADA
 19 claim challenging IHSS cuts based on the impact on recipients. *Dominguez v. Schwarzenegger*,

20
 21 had not yet appealed the terminations or reductions); *Unthaksinkun v. Porter*, 2011 WL 4502050,
 22 *10 (W.D. Wash. Sept. 28, 2011) (claim ripened when class members “were terminated from Basic
 23 Health, allegedly without due process” despite failure to appeal the disenrollment notices); *Pashby*,
 24 2011 WL 6130819 at *4 (Medicaid recipients had standing to challenge notice of termination on
 due process grounds, even though, with assistance, they had managed to file timely administrative
 appeals); *Jones*, 536 F. Supp. at 1192 (standing for due process claim because receipt of defective
 notices injury per se); *Elkins*, 2011 WL 3438666, *6 (claim for inadequate notice ripe even though
 plaintiff appealed and received interim benefits).

25 ⁹ This is much like Defendants’ case, *New York State Ophthalmological Society v. Bowen*, 854
 26 F.2d 1379 (D.C. Cir. 1988), in which plaintiffs brought a pre-enforcement challenge to a law
 27 prohibiting doctors from billing Medicaid patients for certain services unless those services were
 preapproved by an insurance carrier. The court held that plaintiffs’ challenge to the existence of a
 28 preapproval requirement was ripe. *Id.* at 1386. Plaintiffs did not have to participate in the
 preapproval process for the court to decide whether or not the very requirement that they
 participate in such a process violated their privacy rights. *Id.* at 1387.

1 2010 WL 3447691, at *3 (N.D. Cal. Aug. 30, 2010). That holding is equally applicable here.

2 Union Plaintiffs have demonstrated Article III injury because Union Plaintiffs' members
 3 have standing to sue in their own right, both as IHSS providers who will lose hours of work (and
 4 resultant wages and health benefits),¹⁰ and as IHSS recipients (because Union Plaintiffs' members
 5 include both the legal guardians of IHSS recipients and retirees who receive IHSS).¹¹ Defendants
 6 argue that Union Plaintiffs must pinpoint a particular provider whose recipient's hours will not be
 7 restored.¹² But Union Plaintiffs need only demonstrate a "substantial probability" that at least one
 8 member has standing to sue.¹³ Defendants' own calculation that over 200,000 IHSS recipients will
 9 not have any hours restored establishes a mathematical certainty that many of Union Plaintiffs'
 10 hundreds of thousands of members will suffer injury.¹⁴

11 ¹⁰ See Jiminez Decl. (Dkt. 373) ¶9; Guerra Decl. (Dkt. 362) ¶¶25-26; Vargas Decl. ¶17;
 12 Carpenter Decl. (Dkt. 342) ¶¶2,19; Guerin Decl. (Dkt. 361) ¶¶3, 9-10; Gonzalez Decl. (Dkt. 357)
 13 ¶2 (provider is Sofia Moreno); Armendariz Decl. ¶14; Cunningham Decl. (Dkt. 348) ¶¶1,12;
 14 Hutchens Decl. (Dkt. 370) ¶2 (provider is Gloria Reyes); 2nd Voice Decl. ¶19; Miereles Decl.
 15 (Dkt. 384) ¶12; Phillips Decl. (Dkt. 393) ¶16; Woods Decl. (Dkt. 414) ¶¶7-8; Soto Decl. ¶¶1, 12;
 16 Anderson Decl. ¶¶3, 10; T. Brown Decl. ¶19; Mills Decl. (Dkt. 386) ¶¶2,12 (provider is Zolia
 17 Alanz); Stern Decl. (Dkt. 401) ¶¶3, 18 (provider is Michelina Duke); Goulet Decl. (Dkt. 359) ¶¶21-
 18 22; Peterson Decl. (Dkt. 392) ¶¶8-11; Warner Decl. (Dkt. 410) ¶¶17-18; 2nd Baker Decl. ¶¶3, 7;
 19 Wong Decl. ¶¶2, 6; Castro Decl. ¶¶2,6; Bailey Decl. ¶¶2, 11; Aguirre Decl. ¶¶2, 5; Clifton Decl.
 20 ¶¶1, 8-9; W. Wallace Decl. ¶¶2, 10-11; Calavan Decl. (Dkt. 341) ¶8. That redressable injury
 21 establishes Article III standing. See *Independent Living Ctr. v. Shewry*, 543 F.3d 1050, 1065 (9th
 22 Cir. 2008), cert. denied, 129 S.Ct. 2828 (2009) (Medi-Cal providers have standing to challenge
 23 statute where they will suffer economic harm as result); *Singleton v. Wulff*, 428 U.S. 106, 112-13
 24 (1976) (physicians who will lose revenue from abortions have standing to challenge Medicaid
 25 funding restriction).

19 ¹¹ Legal guardians/conservators/powers of attorney: Bailey Decl. ¶3; Clifton Decl. ¶1; Aguirre
 20 Decl. ¶3; 2nd Baker Decl. ¶4; Anderson Decl. ¶3; Wong Decl. ¶3; Castro Decl. ¶4; W. Wallace
 21 Decl. ¶4. Retirees: MacDonald Decl. ¶¶2-4; Macias Decl. ¶¶2-3; Rogers Decl. ¶¶2-3; R. Brown
 22 Decl. ¶¶2-3. Thus, Union Plaintiffs, directly through their members, represent the rights and
 23 interests of IHSS recipients under the Medicaid Act, ADA, Section 504, and Due Process Clause.
 24 See *Dominguez*, 2010 WL 3447691, at *3 (so holding in relation to ADA claim).

22 ¹² Defendants further argue the injured union member must also show she would be unable to
 23 pick up additional hours from another IHSS recipient. If that were required, it would lead to the
 24 absurd result that plaintiffs in economic injury cases able to recoup their losses through other
 25 means would thereby be completely deprived of their ability to challenge defendants' unlawful
 26 conduct. Unsurprisingly, Defendants cite no authority for these propositions.

25 ¹³ *American Library Ass'n v. FCC*, 406 F.3d 689, 696 (D.C. Cir. 2005) (quotation marks
 26 omitted); see also *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*,
 27 517 U.S. 544, 555 (1996) (*Hunt* "requir[es] an organization suing as representative to include at
 28 least one member with standing to present, in his or her own right, the claim (or the type of claim)
 29 pleaded by the association").

28 ¹⁴ See 2nd Keeslar Decl. (Dkt. 376) ¶16; 4th RJN Ex. 9. Cf. *Sandusky County Democratic
 Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (appellees had standing to assert rights of

1 Union Plaintiffs' also satisfy "germaneness." Preventing reductions in IHSS hours protects
 2 Union Plaintiffs members' employment interests and avoids adverse impact on collective
 3 bargaining efforts (*see infra* at 12-13 & nn.17-18), both core to Union Plaintiffs' purposes. And
 4 this Court has held in related litigation that protecting recipients against IHSS cuts is germane to
 5 Unions Plaintiffs' purposes. *See Dominguez*, 2010 WL 3447691, at *3 (so holding, in relation to
 6 ADA claims); Pl. Opp. Mot. Dismiss (Dkt. 292) 14 n.19 (collecting relevant record evidence).

7 Finally, the participation of individual members is not necessary in suits that seek only
 8 injunctive relief, not damages. *United Food & Commercial Workers Union Local 751 v. Brown*
 9 *Group, Inc.*, 517 U.S. 544, 554 (1996); *Int'l Union, United Auto., Aerospace & Agr. Implement*
 10 *Workers of America v. Brock*, 477 U.S. 274, 286-88 (1986).¹⁵

11 Union Plaintiffs also have organizational standing, because they can "substantiate[] by
 12 affidavit or other specific evidence that a challenged statute or policy frustrates the organization's
 13 goals and requires the organization to expend resources in representing clients they otherwise
 14 would spend in other ways." *Comite De Jornaleros De Redondo Beach v. City of Redondo Beach*,
 15 657 F.3d 936, 943 (9th Cir. 2011) (*en banc*) (internal quotation marks omitted).¹⁶ The threatened
 16 implementation of SB 73 has caused such injury to Union Plaintiffs, which have had to devote
 17 considerable resources to educating staff, members, and recipients about the cuts, bargaining about
 18 their effects, and otherwise preparing for them; these efforts have required Union Plaintiffs to
 19 spend tens of thousands of dollars and many hours of staff time (independent of their support for
 20 this litigation), and have thwarted them from addressing other union issues, pursuing other union
 21 organizing and similar campaigns, and accomplishing other collective bargaining objectives central

22
 23 members where had "not identified specific voters who will seek to vote at a polling place that will
 24 be deemed wrong by election workers," but it was "inevitable . . . that there will be such
 25 mistakes"); *Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999) (*Hunt* does not require that "the
 26 association name the members on whose behalf suit is brought").

27 ¹⁵ Defendants are incorrect that requirements for class-wide injunctions have a bearing on an
 28 association's standing or entitlement to an injunction covering its members. *Cf.* Opp. 17:20-24.

¹⁶ To the extent the Court believes that organizational standing is not adequately pled in the
 Third Amended Complaint, Plaintiffs respectfully request leave to amend again in order to add
 additional allegations. *But see Comite De Jornaleros*, 657 F.3d at 944 (rejecting argument that
 organizational standing was not alleged in complaint; conforming complaint to evidence).

1 to their mission.¹⁷ Such efforts would certainly continue if the cuts are implemented.¹⁸

2 Defendants' conclusory arguments regarding prudential standing (Opp. 17:25-18:9)
3 similarly fail, for reasons explained here and in greater detail in other briefing filed in this case.
4 *See generally* Pl. Opp. Mot. Dismiss (Dkt. 292); Pl. Surreply Opp. Mot. Dismiss (Dkt. 295-1).

5 Prudential limitations are not jurisdictional, and the merits may be addressed, where the
6 underlying justifications for the limitations are absent.¹⁹ And they do not apply at all to Plaintiffs'
7 ADA/Section 504 or Supremacy Clause Medicaid preemption claims.²⁰

8 In any event, Union Plaintiffs are not seeking to assert the legal rights of unrelated third
9 parties. Rather, Union Plaintiffs represent members who receive IHSS or are the legal
10 representatives of IHSS recipients. And IHSS providers are within the zone of interests of the
11 Medicaid Act, ADA, and Section 504, because their services are a critical component of the
12 mandates and benefits established by those laws.²¹ Moreover, in this context providers are also
13 within the zone of interests of the Due Process Clause, because the intelligibility and accuracy of
14 notices reducing IHSS services directly affect providers' livelihood. Defendants' argument

15
16
17 ¹⁷ Such activities have included, but were not limited to, holding trainings and informational
18 meetings, sending special mailings, updating websites, translating information, participating on
19 informational conference calls, fielding calls related to the cuts, other outreach and lobbying
20 efforts, and bargaining with counties to prevent providers from losing health benefits. Armendariz
21 Decl. ¶¶5-11; T. Brown Decl. ¶¶7-16; Tracey Decl. ¶¶4-10; Vargas Decl. ¶¶7-9; 2nd Voice Decl.
22 ¶¶6-15; Werlin Decl. ¶¶4-9.

23 ¹⁸ *See* Armendariz Decl. ¶¶12-13; T. Brown Decl. ¶¶17-18; Tracey Decl. ¶¶11-13; Vargas Decl.
24 ¶¶10-15; 2nd Voice Decl. ¶¶15-17.

25 ¹⁹ *See Hilton v. Hallmark Cards*, 580 F.3d 874, 885 n.6 (9th Cir. 2009); *LaDuke v. Nelson*, 762
26 F.2d 1318, 1323 n.4 (9th Cir. 1985) (citing *Singleton*, 428 U.S. at 114 (Blackmun, J.)); *Frank*
27 *Rosenberg, Inc. v. Tazewell County*, 882 F.2d 1165, 1169 (7th Cir. 1989).

28 ²⁰ *See Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 46-48 (2nd Cir. 1997)
(prudential standing under ADA/504 extends as broadly as Article III standing; drug rehabilitation
center has standing); *California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 851 (9th Cir.
2009) (Supremacy Clause claim does not rely on third-party rights but "enforce[s] the proper
constitutional structural relationship between the state and federal governments"); *Pharmaceutical*
Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 73 (1st Cir. 2001) (third-party standing and
zone of interests analyses do not apply to Supremacy Clause claim).

²¹ *See California Ass'n of Bioanalysts v. Rank*, 577 F.Supp. 1342, 1347 n.6 (C.D. Cal. 1983)
(many cases hold providers within zone of interests of Medicaid Act); *Bethany Med. Ctr. v.*
Harder, 1987 WL 47845, at *6 n.3 (D. Kan. Mar. 12, 1987) (similar); *Granville House, Inc. v.*
Department of Health & Human Servs., 715 F.2d 1292, 1299 (8th Cir. 1983) (similar).

1 otherwise is premised on an overly restrictive view of the relevant test.²²

2 **IV. PLAINTIFFS HAVE DEMONSTRATED THAT THEY ARE LIKELY TO SUFFER**
3 **IRREPARABLE HARM.**

4 **A. IHSS Authorized Hours Reflect the Minimum Necessary to Maintain Recipients**
5 **Safely in Their Homes.**

6 Although Plaintiffs' showing of irreparable harm or likely merits success does not depend on
7 proving that all authorized IHSS hours are necessary to keep recipients safe at home,²³ Defendants'
8 own regulations establish this to be true. TRO Br. 6:10-17. Defendants erroneously assert that,
9 because the hourly guidelines for each task are "relatively broad," social workers have "a degree of
10 latitude in authorizing hours." Opp. 19:7-8. But social workers do not have discretion to authorize
11 hours anywhere within the range set by the hourly guidelines. 4th Collins Decl. ¶14. Rather,
12 social workers must individually assess each recipient to determine the minimum amount of time to
13 perform each service necessary to allow the recipient to remain safely at home. They then must
14 confirm that this time is within the guidelines, and if it is not, document why the recipient is out of
15 range: that is, the guidelines serve as a tool to guide review of their hours authorizations, not as an
16 open-ended range of hours that may be allocated. Crockett Decl. (Dkt. 67) ¶¶4-7, 12-13; Collins
17 Decl. (Dkt. 65) ¶¶11, 15; 4th Collins Decl. ¶14; CDSS, Manual of Policies and Procedures ("MPP"
18 or "Manual") §30-757. (The MPP is Exhibit H to RJN (Dkt. 18-8)). The Manual sets forth
19 specific criteria for social workers to consider in relation to each specified task, in order to
20 determine the precise number of minutes needed. MPP §30-757. This is exemplified in the IHSS
21 records of Named Plaintiffs. Mr. Thurman receives less time than the guidelines range for
22 ambulation because he is able to manage inside his home by holding onto counters and furniture.
23 Carroll Decl., Ex. F (Dkt. 446-6) at 4. Ms. Hylton receives less time than recommended by the
24 guidelines for meal preparation, because she does not eat breakfast. Carroll Decl., Ex. C (Dkt. 446-
25 3) at 4.

26 Nor are Defendants correct that social workers may authorize more hours than needed

27 ²² See *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987); *Nat'l Credit Union*
28 *Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 192 (1998); *Stormans*, 586 F.3d at 1122.

²³ See *M.R. v. Dreyfus*, 2011 WL 6288173, *14 n.2.

1 because they may take living environment and daily fluctuation in ability into account. Opp. 19:9-
2 17. These are simply factors that must be considered in determining the minimum number of hours
3 necessary to remain safely at home. 4th Collins Decl. ¶15; 2nd Elliott Decl. ¶11. For example, a
4 client with a roll-in shower and shower chair may need less assistance bathing than a client who
5 needs assistance in and out of a claw-foot tub. 4th Collins Decl. ¶15. Most clients' functional
6 abilities do not fluctuate dramatically from day to day; for those whose abilities do, social workers
7 do not "assum[e] the worst case scenario," Opp. 19:13, but must authorize hours based on average
8 functionality. 4th Collins Decl. ¶15; 2nd Elliott Decl. ¶11. In short, these factors do not provide
9 any support for Defendants' erroneous contention that "some IHSS recipients could absorb a 20%
10 reduction in IHSS hours without being placed at serious risk of out-of-home placement," Opp. at
11 19:16-17, and certainly do not demonstrate that Defendants' proposed methodology for actually
12 identifying those "some recipients" is reasonable: *i.e.*, cutting hours across the board, forcing
13 recipients to apply for restoration of hours on very short timelines, and restoring hours based on a
14 functional ranks presumption.

15 **B. The Named Plaintiffs Will Be Irreparably Harmed by the Hours Reduction.**

16 There is no merit to Defendants' argument that Named Plaintiffs Stern, Hylton, and
17 Thurman have failed to show they are likely to suffer irreparable harm. As in *Brantley v. Maxwell-*
18 *Jolly*, 656 F. Supp.2d 1161, 1177 (N.D. Cal. 2009), "Defendants ignore the case law holding that
19 the reduction in public medical benefits standing alone is sufficient to demonstrate irreparable
20 harm." TRO Br. 27:2-20 (citing cases). Defendants concede that these Plaintiffs are "not exempt
21 from the reduction in hours," Opp. 20:3, so they will certainly receive a notice that their IHSS
22 hours have been automatically reduced by 20 percent, which alone establishes irreparable harm.

23 Moreover, Defendants err when they focus only on Plaintiffs' "showing that they are *likely*
24 to be institutionalized." Opp. 20:3-4 (emphasis in original). Plaintiffs have made this showing, but
25 the palpable risk of deteriorating health and injury also constitutes irreparable harm. *See, e.g.*, 2nd
26 Hylton Decl. (Dkt. 371) ¶¶17-20; Stern Decl. (Dkt. 401) ¶¶18-24; Thurman Decl. (Dkt. 404) ¶¶24-
27 28. Named Plaintiffs base their description of the risk they face upon personal knowledge of their
28 own physical and mental limitations, their observations of the time that it takes their providers to

1 perform specified tasks that they cannot perform themselves, and prior experience trying to
 2 perform the tasks themselves and/or living without assistance.²⁴ Plaintiffs also submitted expert
 3 evidence about the adverse health consequences and risk of institutionalization that arise from
 4 inadequate home care services. S. Wallace Decl. (Dkt. 409) ¶¶18-21, 23-25, 27; 2nd LaPlante
 5 Decl. (Dkt. 377) ¶¶7-17. The Ninth Circuit recently held that plaintiffs demonstrated irreparable
 6 harm from a reduction in Medicaid home care services based on similar plaintiff declarations and
 7 expert evidence. *M.R.*, 2011 WL 6288173, at *7-14.²⁵

8 Nonetheless, Defendants contend that Ms. Hylton failed to describe the “causal link ...
 9 between the loss of nine hours and losing her home” and will lose only 1.2 hours of domestic
 10 assistance. Opp. 20: 12-13, 15-17. Defendants must have overlooked the portions of Ms. Hylton’s
 11 declaration in which she describes how each authorized hour is used, that she already cut out two
 12 hours of food preparation with the 3.6 percent cuts in early 2011, that she will have no choice but
 13 to eliminate all of her domestic assistance (six hours per month) and still has “an additional three
 14 hours to cut,” that she cannot eliminate bathing or food shopping, that “the stress of trying to think
 15 about” how to manage is “aggravating” her underlying mental illness, and that if the cuts are
 16 implemented, she “would probably give up and stop eating and bathing.” 2nd Hylton Decl. (Dkt.
 17 371) ¶¶17-20.²⁶ Supplemental declarations from Ms. Hylton, her psychiatrist and her IHSS
 18 provider confirm these facts.²⁷ Already, she receives fewer than the IHSS hourly guidelines for

19 _____
 20 ²⁴ Defendants are thus incorrect when they argue that Named Plaintiffs’ declarations are
 21 speculative. Opp. 20:9. *See generally* Plaintiffs’ Response to Defendants’ Objections to Evidence,
 22 filed concurrently herewith.

23 ²⁵ Defendants erroneously seek to distinguish *M.R.*, claiming that “Plaintiffs in that case were []
 24 all on waivers” and so eligible for nursing or intermediate care facilities. Opp. 1 n.1. This is
 25 incorrect. Fully one-third of the Plaintiff Class in *M.R.* were not on any waiver (2011 WL
 26 6288173, *2), and the Ninth Circuit’s reasoning did not rely on this factor in any respect. *See also*
 27 3rd LaPlante Decl. ¶6 (many IHSS recipients meet skilled nursing facility level of care).

28 ²⁶ Ms. Hylton cannot undertake even mild physical exertion because of her emphysema, uses a
 walker and wheelchair, and has already fallen and broken bones. 2nd Hylton Decl. (Dkt. 371) ¶¶3-
 7. She also has bi-polar disorder and panic attacks. *Id.* ¶¶3-4, 7. Her provider comes for two
 hours per day, five days a week, to help her in and out of the shower, apply topical anti-pain
 medication, prepare meals, and clean house, in addition to taking her to doctor’s appointments,
 doing laundry, and going shopping. *Id.* ¶¶7-16. When Ms. Hylton had a gap in providers for only
 two weeks, her new provider found the apartment extremely dirty already, because she was
 absolutely incapable of performing these cleaning tasks herself. Soto Decl. ¶6.

²⁷ Dr. Benson Decl. ¶7 (“Reducing Ms. Hylton’s hours with her IHSS worker would be

1 meal preparation, cleanup, and bathing. Carroll Decl., Ex. C (Dkt. 446-3) at 4, 6. She cannot cut
 2 her “already bare-bone hours” any further. 2nd Hylton Decl. (Dkt. 371) ¶18. Nor are Defendants
 3 correct that Ms. Hylton “offers no explanation as to why she would be evicted for a dirty
 4 apartment.” Opp. 20:15. She lives in Section 8 housing, which means that her apartment is subject
 5 to multiple inspections each year, and that she may be evicted if her apartment is not clean. 2nd
 6 Hylton Decl. (Dkt. 371) ¶10; 3rd Hylton Decl. ¶6 & Ex. A at 12, no. 25; Soto Decl. ¶6.²⁸ The risk
 7 of losing her eligibility to stay in her home is very clear.

8 Ms. Stern’s declaration also describes specific facts that put her at risk of irreparable
 9 harm.²⁹ Defendants object that Ms. Stern’s statement that with fewer IHSS hours the open lesions
 10 on her legs may become infected, leading to hospitalization, is “highly speculative.”³⁰ Opp. 20:19-
 11 21. Again, Defendants must have overlooked Ms. Stern’s description of how her IHSS provider

12
 13 extremely detrimental to her mental and physical health. Also, it might well result in placement
 14 outside her home, which neither the state nor anyone else would desire.”); 3rd Hylton Decl. ¶¶2-8
 15 (fell and broke toes last weekend); Soto Decl. ¶¶4-16 (without sufficient provider services Hylton
 will either overexert herself and break more bones or enter depressive state and not do anything,
 even eat).

16 ²⁸ Other IHSS recipients face the same eviction risk. Aho Decl. (Dkt. 337), ¶¶8-9 & Ex. B
 17 (notice of failed inspection). *See also* 24 C.F.R. §§982.401(m)(1), 982.404(b)(3), 982.405
 18 (requiring at least annual inspections of Section 8 housing to determine whether unit is “in sanitary
 19 condition” and “prompt and vigorous action to enforce the family obligations” regarding housing
 20 quality standards, including terminating assistance); *cf., e.g., Douglas v. Kriegsfeld Corp.*, 884
 A.2d 1109, 1115 (D.C. 2005) (Section 8 tenant with disabilities evicted “for violation of her lease
 covenant to ‘maintain the apartment in clean and sanitary condition’”); *Whitfield v. Public Housing*
 21 *Agency of City of St. Paul*, 2004 WL 1212082, *1-2 (D. Minn. 2004) (similar); *Community*
 22 *Development Agency v. Smallwood*, 379 N.W.2d 554, 556 (Minn. App. 1985) (similar); *Housing*
 23 *Authority of City of Milwaukee v. Mosby*, 192 N.W.2d 913, 914 (Wis. 1972) (similar).

24 ²⁹ The 86-year-old plaintiff cannot walk without help, bend or lift, and has compromised vision,
 25 high blood pressure, congestive heart failure, chronic urinary tract infections and incontinence, and
 26 poor circulation that causes open leg wounds. Stern Decl. (Dkt. 401) ¶¶4-6. Although the 20
 27 percent reduction will technically reduce Ms. Stern’s hours by approximately 24 hours per month,
 28 she will actually lose far more (almost 50 hours), because her provider currently works many hours
 for free but will stop doing so because she will be forced to get another job. *Id.* ¶¶2, 9, 10, 12, 15,
 17, 18. The Ninth Circuit took loss of unpaid hours into account in determining that plaintiffs in
M.R. faced irreparable injury. *M.R.*, 2011 WL 6288173, *8-9.

³⁰ Defendants are wrong to fault Plaintiffs for failing to submit doctors’ declarations. Opp.
 20:21. Individuals may testify about their own medical conditions, including making predictions
 based on past experiences. *See Jones, Rosen, Wegner & Jones, Rutter Group Practice Guide*
Federal Civil Trials and Evidence 8F-15 (citation omitted) (“A lay witness may give opinion
 testimony regarding his or her own health or physical condition.”); *M.R.*, 2011 WL 6288173, at
 *12 (crediting evidence from plaintiff and home care provider that plaintiff would develop sores,
 risking infection, without provider assistance to remove compression stockings).

1 must reposition her legs and rub them with a medicated ointment twice per day to control the
 2 edema and infection risk, tasks that she cannot do herself, and how these oozing sores already have
 3 required skin grafts in the past. Stern Decl. (Dkt. 401) ¶¶6, 11, 22. Even the county IHSS public
 4 health nurse noted her recurrent leg wound. Carroll Decl. Ex. E (Dkt. 446-5). Ms. Stern's medical
 5 records confirm that she was hospitalized in 2010 when she became malnourished and developed a
 6 staph-resistant infection (MRSA) in her leg wound, which led to a three week stay in a nursing
 7 facility. Branch Decl., Ex. B (Discharge Summary). Defendants ignore the obvious when they
 8 contend that Ms. Stern has not demonstrated how inability to maintain personal hygiene, keep her
 9 house clean, get to the doctor, and comply with her medically indicated diet might lead to nursing
 10 home admission. Opp. 20:22-26.³¹ The Ninth Circuit specifically found that insufficient assistance
 11 with meal preparation, bathing, house cleaning, and accompaniment to doctor's visits placed a
 12 plaintiff at risk of institutionalization. *M.R.*, 2011 WL 6288173, *11 (reduction of 13.5 percent).

13 As to Mr. Thurman, Defendants concede that he "would be left alone longer" if his IHSS is
 14 cut, but contend that he does not explain "why he would be less safe at home" if this occurs. Opp.
 15 21:6-8. Again, Defendants overlook Mr. Thurman's detailed explanation of the care he and his
 16 wife require, all of which will be reduced, whether the provider reduces days or simply works less
 17 hours on the days she does come. Thurman Decl. (Dkt. 404) ¶¶7-8, 10-23; 2nd Thurman Decl.
 18 ¶2.³² For example, it takes Mr. Thurman an hour to put on his shoes and socks himself. Thurman
 19 Decl. (Dkt. 404) ¶14. Managing this alone is so exhausting that he often is forced to go barefoot on

20
 21 ³¹ For example, Ms. Stern needs help with incontinence care, walking, bathing, and dressing;
 22 assistance with medically indicated diet; and travel to doctor's appointment. Stern Decl. (Dkt. 401)
 23 ¶¶5, 8, 11, 14, 20. Defendants similarly fail to acknowledge that Ms. Stern needs a provider twice
 per day to help dress and undress and change adult pull-ups, and that this will be impossible with
 the hours reduction. *Id.* ¶¶10, 20.

24 ³² Mr. Thurman is completely blind in one eye and has cataracts in the other. Branch Decl., Ex.
 25 A (medical records). He has diabetes, diabetic neuropathy (numbness) in his hands and feet such
 26 that he can't hold or grasp anything, COPD which causes shortness of breath, inability to walk
 27 without a cane in the house or wheelchair for longer distances, heart disease, chronic back pain,
 28 and is a constant fall risk. Thurman Decl. (Dkt. 404) ¶¶7-8, 10. Thus, he needs assistance bathing,
 shaving, dressing, cooking, cleaning, going to the doctor, and shopping, and faces health risks if
 these tasks are either not done or performed by him. *Id.* ¶¶11-23. Mr. Thurman's hours are so low
 that he has already forgone assistance with less essential tasks such as making breakfast and has no
 non-essential hours left to cut. 2nd Thurman Decl. ¶5-6. See also, TRO Br. at 20: 10-23, 22:14-20
 (experts describe risk from additional hours and days without assistance).

1 the days his provider is absent, despite warnings of the danger this creates for someone with
 2 diabetic neuropathy. 2nd Thurman Decl. ¶4.³³ Similarly, Mr. Thurman can only shower when his
 3 provider is present because of his history of falls; his disabled wife who also receives IHSS burned
 4 herself when she tried to cook for them. Thurman Decl. (Dkt. 404) ¶¶11-27. Already, Mr.
 5 Thurman receives fewer than the hourly guidelines in three areas (dressing, ambulation, and
 6 bathing), so there is no room to reduce his hours. Carroll Decl., Ex. F (Dkt. 446-6) at 4. As with
 7 the plaintiffs in *M.R.*, a reduction in his home care creates a serious risk to his health, and could
 8 easily lead to out-of-home placement.

9 Finally, there is no merit to Defendants' contention that these three Named Plaintiffs can
 10 have their hours restored through application for a Care Supplement, given that their functional
 11 ranks do not meet the ACL's criteria. 2nd Hylton Decl. (Dkt. 371-1) Ex. A; Stern Decl. (Dkt. 401)
 12 ¶¶25-26; Thurman Decl. (Dkt. 404) ¶30. Even if Thurman and Hylton were eligible, it is doubtful
 13 that they could fill out and timely return the application in time to avoid a reduction in hours, given
 14 Thurman's vision impairment and Hylton's mental illness.³⁴

15 **V. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR** 16 **CLAIMS.**

17 **A. SB 73 LIKELY VIOLATES THE MEDICAID ACT.**

18 **1. SB 73 Likely Violates Medicaid's Comparability Requirement.**

19 *Use of functional ranks.* Defendants argue that the "nuanced and individualized" use of
 20 functional ranks does not violate comparability because all recipients will have "the opportunity for
 21 an individualized review to determine whether [their] hours should be restored." Opp. 27:9-12,
 22

23 ³³ Mr. Thurman already has a persistent foot ulcer, which is a common complication of
 24 diabetes that can lead to gangrene and even amputation. 2nd Thurman Decl. ¶3. *See, e.g.*, Mayo
 25 www.mayoclinic.com/health/amputation-and-diabetes/DA00140 at 2 ("Don't go barefoot, even
 around the house.").

26 ³⁴ *See* Thurman Decl. (Dkt. 404) ¶33 (due to partial blindness, may "misunderstand any notice
 27 [...] or have trouble reading the fine print" so he "will miss the opportunity" to appeal); 2nd
 28 Thurman Decl. ¶3 (needs a large print copy of the notice "so that I would be better able to decide
 what to do."); 2nd Hylton Decl. (Dkt. 371) ¶23 (stress of receiving a reduction notice may make it
 impossible Hylton to respond); Soto Decl. ¶15 (same).

1 28:1-2.³⁵ But even under the approach posited by the Carroll Declarations, Defendants concede
 2 functional ranks will determine whether recipients are presumed at serious risk of out-of-home
 3 placement. This in turn will determine whether hours must be restored if reallocation or alternative
 4 resources cannot ameliorate that risk. Opp. 9:24-10:4. Courts have deemed similar presumptions,
 5 even if rebuttable, to violate comparability when not based on need. *See, e.g., Beltran v. Myers*,
 6 701 F.2d 91, 92-94 (9th Cir. 1983) (rebuttable presumption that certain assets transfers by
 7 medically needy recipients were in order to qualify for benefits violated comparability rule),
 8 *disapproved of on other grounds by Green v. Mansour*, 474 U.S. 64 (1985). This Court previously
 9 determined that functional ranks “were not designed as a measure of eligibility *or need for IHSS*
 10 *services* and cannot reasonably be used for this purpose” without violating comparability. PI Order
 11 (Dkt. 198) 18:6-8 (emphasis added); *see also id.* at 12:24-27, 12:28-13:1 (“particularly inaccurate
 12 measures of the needs of individuals with mental impairments”).³⁶ Additionally, if functional
 13 ranks are not determinative, Defendants have provided no meaningful guidance regarding the
 14 criteria for adjudicating Care Supplement applications. Such an undefined process would
 15 inevitably lead to arbitrary variations between and within counties, and would violate the
 16 comparability requirements for this reason as well. *See supra* at 6.

17 *Date of application.* Defendants point out that the March 1 Care Supplement application
 18 deadline applies to everyone. Opp. 28:2-8. However, if one assumes that “serious risk of out-of-
 19 home placement” is a legitimate, needs-based standard, it is undisputed that two individuals with
 20 the exact same serious risk/need will face different results – one’s hours will be restored and the
 21 other not – based on date of application. For example, someone whose serious risk/need arises
 22 after March 1, 2012 (because their health deteriorated, their hours were reassessed and reduced, or
 23 they only began receiving IHSS after that date) will be ineligible for hours restoration even though

24 ³⁵ *M.R. v. Dreyfus*, 767 F.Supp.2d 1149, 1173 (W.D. Wash. 2011), *rev’d on other grounds*,
 25 2011 WL 6288173 (9th Cir. 2011), is not on point because the plaintiffs there “d[id] not contend ...
 26 that the 2011 reduction treats similarly situated beneficiaries differently,” and because whether
 Washington’s acuity group system reasonably approximates recipient need sheds no light on
 whether California’s use of functional ranks does so. Opp. 27:21-25.

27 ³⁶ Defendants also argue that the waivers and pre-approval criteria are based on need. Opp.
 28 27:9-10, 27:27-28. Plaintiffs do not challenge these except insofar as they rely on functional ranks
 or exclude similarly situated individuals on waiver waitlists. TRO Br. 41:19-23 & n. 76.

1 someone with the *exact same risk* prior to March 1 will have hours restored. *See* TRO Br. 41:10-
 2 18. This will allocate different levels of benefits to similarly needy individuals whose need
 3 happens to arise at different points in time, violating the comparability mandate. *Compare Randall*
 4 *v. Lukhard*, 709 F.2d 257, 268 & n.18 (4th Cir. 1983) (grandfathering in Medicaid recipients who
 5 applied prior to certain date by exempting from eligibility rule would violate comparability).

6 *Waiver participants.* Defendants defend their failure to exempt recipients who are eligible
 7 for DHCS waiver programs but on waitlists, claiming that “the waiver of the comparability
 8 requirement under DHCS waiver programs allows Defendants to provide a greater level of services
 9 for those on waivers than those receiving services only under the State Plan.” *Opp.* 28:14-17.
 10 Defendants would be correct if IHSS services were being provided under the waivers themselves.
 11 However, the terms of the comparability waivers clearly apply to the *specific services provided*
 12 *under the waiver*, not to *all* Medicaid services provided to waiver participants. In other words,
 13 they allow the State to provide the waiver services to a target group (*e.g.*, case management support
 14 to individuals over a particular age); they are not a blanket grant of authority to provide *non*-waiver
 15 services to the target group in a manner not available to the general Medicaid population.³⁷ The
 16 IHSS services at issue are provided under the Medicaid State Plan, not the various DHCS waivers.
 17 Carroll Decl. (Dkt. 113) ¶7; Leyton Reply Decl., Ex. A at 30:23-31:16 (personal care services
 18 provided under IHO waiver are hours in addition to IHSS provided under State Plan). Because
 19 comparability has not been waived as to these services, and because Defendants acknowledge there
 20 is no difference between those receiving waiver services and those on the waitlists for such waiver
 21 services, provision of different IHSS hours to the two groups violates comparability.

22 **2. SB 73 Likely Violates Medicaid’s Reasonable Standards Requirement.**

23 Defendants urge this Court to defer resolution of this Supremacy Clause preemption claim,
 24 because the Supreme Court may this term resolve the question whether Plaintiffs may pursue such
 25

26 ³⁷ *See, e.g.*, 4th RJN, Ex. 12 at §4(A) (p. 4 of 284) (DHCS IHO Waiver; permits state to
 27 provide services specified in App. C not otherwise available under state plan); *id.* at App. C (listing
 28 services provided under waiver); *accord* 4th RJN, Ex. 13 at §4(A) (p. 4 of 138) & App. C (pp. 38-
 83 of 138) (DHCS MSSP Waiver); 4th RJN, Ex. 11 at §4(A) (p. 7) & App. C (NF/AH Waiver); Ex.
 10 at #3, #4, #10, #11 (pp. 13-18 of excerpt) (HCBS/DD Waiver).

1 claims. Opp. 29:14-27.³⁸ But Defendants do not deny that unless and until the Supreme Court
 2 reverses them, Ninth Circuit decisions authorizing such claims are the applicable governing
 3 precedent. TRO Br. 35-36 n.71. Resolution of the reasonable standards issue will serve judicial
 4 efficiency, by permitting all merits issues to be considered on appeal together and preventing
 5 multiple remands to consider alternative grounds. Further, if a subsequent Supreme Court decision
 6 calls into question a preliminary injunction based on this claim, Defendants will have the
 7 opportunity to move to modify or vacate the injunction at that time.

8 Defendants also argue that the exemptions to the hours reductions make implementation of
 9 SB 73 consistent with the reasonable standards mandate. Opp. 30:1-9. But Plaintiffs' reasonable
 10 standards claim is based on the reduction of hours for recipients who will *not* be automatically
 11 exempted. Defendants do not deny that SB 73 will reduce many such recipients' hours based
 12 *solely* on an arbitrary budgetary objective, and not based on any reasonable determination that 20
 13 percent fewer hours are needed.³⁹ And even assuming that Defendants are correct in their post-
 14 litigation about-face, functional ranks will at the very least be used to establish a presumption,
 15 despite this Court's prior determinations that they are not reasonable measures of need and that
 16 their use has a disparate impact on recipients with mental impairments, in violation of the
 17 reasonable standards mandate and the accompanying regulation prohibiting limitation of services
 18 based on diagnosis, type of illness, or condition. TRO Br. 39:27-40:2 & n.75.⁴⁰ Additionally, if

19 _____
 20 ³⁸ Defendants mistakenly look to the Ninth Circuit's deferral of resolution of the prior appeal in
 21 this action to support their argument that no injunction should issue. But the Ninth Circuit's
 22 deferral *left the current injunction in place*. If this Court deems Plaintiffs unlikely to succeed on
 23 the other merits claims, then it will *need* to address this claim to decide whether Plaintiffs are
 24 entitled to a preliminary injunction.

25 ³⁹ *Cf. Independent Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 655-56 (9th Cir.
 26 2009), *cert. granted on other issue*, 131 S.Ct. 992 (2011) (Medicaid rates may not be reduced
 27 "based solely on state budgetary concerns"); *Arkansas Med. Soc., Inc. v. Reynolds*, 6 F.3d 519, 531
 28 (8th Cir. 1993) (Medicaid rate case; "Abundant persuasive precedent supports the proposition that
 budgetary considerations cannot be the conclusive factor in decisions regarding Medicaid."); *Kerr*,
 2004 WL 882203 at *9 ("Focusing solely on budgetary concerns [in changing eligibility rules]
 simply does not rise to the level of a reasonable standard for determining eligibility for long-term
 care services and is inconsistent with Medicaid objectives").

⁴⁰ Thus, states' "broad discretion...to adopt standards for determining the extent of medical
 assistance," Opp. 2:1-11 (quoting *Beal v. Doe*, 432 U.S. 438, 444 (1977)), is limited by the
 requirement "that such standards be 'reasonable' and 'consistent with the objectives' of the Act,"
id. Moreover, *Beal* made clear that a state may not refuse to pay for covered, necessary services.
Id. at 444-45. As explained elsewhere, the services at issue here have been deemed necessary. *See*

1 functional ranks are not determinative, then the only remaining standard for processing Care
 2 Supplements—serious risk of out-of-home placement—is far too ill-defined to be reasonable. *See*
 3 *supra* at 6. Moreover, Plaintiffs explain elsewhere why requiring IHSS recipients to apply for
 4 hours restoration by a specified date, basing eligibility solely on the severity of the threat of
 5 institutionalization and not other potential adverse health consequences, and failing to provide a
 6 standard to guide counties’ exercise of discretion does not adequately ensure that the extent of
 7 IHSS hours will be determined based on need. *See supra* at 6, 20; *infra* at 23-24, 25-26.

8 **3. SB 73 Likely Violates Medicaid’s Sufficiency Requirement.**

9 Defendants erroneously suggest that Plaintiffs’ sufficiency argument is based on an agency
 10 regulation not tied to statutory authority creating a privately enforceable right, and thus cannot be
 11 the basis for a claim. This Court has already rejected that argument and held “federal regulations
 12 may carry preemptive force, *see, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 884-86
 13 (2000), and, as such, they may provide a cause of action for injunctive relief under the Supremacy
 14 Clause.” PI Order (Dkt. 198) 20 n.9.⁴¹

15 With respect to the merits, this Court has recognized that the purpose of the IHSS program
 16 is to “enable disabled and elderly people to remain in their homes safely.” PI Order (Dkt. 198)
 17 20:4-5. Defendants contend the Care Supplement process ensures that purpose is achieved,
 18 because remaining safely at home and being at serious risk of out-of-home placement (the
 19 purported Care Supplement criterion) are “two sides of the same coin.” Opp. 31:19-20. Not so. If
 20 the State intended to adopt a standard consistent with ensuring that the program’s purposes are met,
 21 it would have mandated restoration of hours whenever the reduction would leave a recipient with
 22 fewer hours than necessary to remain safely at home. But that would be nonsensical, since
 23 recipients *already* receive only those services that “have already been determined by social
 24 workers to be ‘necessary’ to permit [them] to remain safely in their homes.” PI Order (Dkt. 198)
 25 *also Lankford v. Sherman*, 451 F.3d 496, 504 (8th Cir. 2006) (“Once the state offers an optional
 26 service, it must comply with all federal statutory and regulatory mandates.”).

27 ⁴¹ In addition, the statutory authority for the sufficiency regulation is the Medicaid
 28 comparability provision, which is enforceable via Section 1983. *See* 42 C.F.R. §440.200(a)(1);
Gaines v. Hadi, 2006 WL 6035742, at *24 (S.D. Fla. Jan. 30, 2006). Thus this claim is not
 dependent on the Supremacy Clause cause of action.

20:16-19 (quoting MPP §30-761.1); *see also* 4th Kaljian Decl. ¶¶5-6; 2nd Elliott Decl. ¶7. In other words, adopting a standard that is consistent with the purposes of the program would mandate that no one's hours be reduced (and that the State would save no money).

Thus, the entire premise of the serious-risk-of-out-of-home-placement standard is that, whatever it means exactly, it must mean something different than the current standard for hours authorization, and will leave many recipients "at home in a compromised position without adequate care."⁴² 4th Kaljian Decl. ¶6; *supra* at 6; *infra* at 26 (noting other reasons that undefined "serious risk of out-of-home placement" standard will preclude hours restoration for recipients whose health may deteriorate as a result of the cuts). As such, the Care Supplement process will not ensure that recipients receive services in an amount sufficient to meet the purposes of the program.

Additionally, Defendants brush off the record evidence that placing the burden to apply (and then, potentially, to appeal) on IHSS recipients will invariably mean that many vulnerable recipients will not manage to seek hours restorations or will not do so in a timely manner that allows them to maintain current hours during the process. TRO Br. 37:14-38:10 & nn.72-74. Defendants do not deny that Defendants' cost savings estimates were expressly premised on their understanding that tens of thousands of recipients eligible for a Care Supplement – *i.e.*, recipients who admittedly need a restoration of hours in order to maintain a level of services consistent with the purposes of the program and avoid a serious institutionalization risk – will not complete the process. 2nd Keeslar Decl. (Dkt. 376) ¶17, Ex. A (Dkt. 376-1).⁴³ In such circumstances, it can hardly be said that SB 73 ensures the level of services necessary to fulfill the purposes of IHSS (even if the Care Supplement process achieved that purpose, which it does not).

Finally, Defendants ignore entirely the fact that, after March 1 (or 60 days after the ultimate date of implementation), no one will be able to use the Care Supplement process to try to maintain

⁴² In that event, the two-sided coin will operate only in the one direction that Defendants mention: those at serious risk of out-of-home placement will be also deemed at serious risk of being unlikely to remain safely at home without full IHSS hours, but not vice versa.

⁴³ While the Carroll Declaration protests that these were only "high level fiscal estimates" and that the number of eligible recipients who will apply cannot be "predict[ed] with any level of certainty" (Dkt. 446 ¶14), neither this declaration nor Defendants' brief denies that many eligible recipients will not apply for hours restorations and the State will save money as a result.

1 a sufficient number of hours. TRO Br. 37:16-18. Thus, Defendants’ only argument against
 2 Plaintiffs’ sufficiency claim does not even exist as to the impact of SB 73 after that date.

3 **B. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR ADA AND**
 4 **SECTION 504 CLAIMS.**

5 **1. Plaintiffs Have Article III Standing to Assert ADA/504 Claims.**

6 Defendants are not correct that the injury required for Article III standing purposes must be
 7 institutionalization. Article III standing may be established based on any cognizable injury,
 8 including the loss of IHSS hours, regardless of whether it is the specific type of injury that the
 9 statute seeks to prevent or remedy. *See Lujan*, 504 U.S. at 560-61 (1992) (“injury-in-fact”
 10 requirement); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 n.5 (2006) (litigant with standing
 11 to challenge agency action may assert all legal grounds for challenge); *Covington v. Jefferson Cty.*,
 12 358 F.3d 626, 638-39 (9th Cir. 2004) (warning against conflating injury and merits inquiry).

13 In any event, record evidence establishes the likelihood that Named Plaintiffs and numerous
 14 other IHSS recipients face a serious risk of institutionalization. *See supra* at 16-19; TRO Br.
 15 23:17-26:28. When the injury asserted is a *risk* of future harm, a “credible” or “reasonable
 16 probability” or “reasonable concern” that the harm will result suffices to establish Article III
 17 standing. *See Covington*, 358 F.3d at 638 & n.15; *Harris v. Board of Supervisors*, 366 F.3d 754,
 18 761-62 (9th Cir. 2004) (chronically ill plaintiffs had standing based on “threat of delayed
 19 treatment” shown by likelihood they would need future medical services and risk that reduction of
 20 hospital beds would exacerbate delays). In fact, the Ninth Circuit has held that precisely the type
 21 of showing made here – that reduced hours will “exacerbate” or increase the risk of
 22 institutionalization – demonstrates “cognizable irreparable injury” sufficient to support preliminary
 23 injunctive relief. *M.R.*, 2011 WL 6288173 at *10. Certainly a “cognizable irreparable injury”
 24 sufficient to establish standing for injunctive relief is also adequate for Article III purposes.

25 **2. SB 73 Places Plaintiffs At Risk of Institutionalization.**

26 Defendants apparently concede that “serious risk” of institutionalization is the applicable
 27 ADA standard, *see M.R.*, 2011 WL 6288173 at *16-17, 19, and rely on the Supplemental Care
 28 application process to argue that Plaintiffs cannot establish it. *Opp.* 35:10.⁴⁴ However, Defendants

⁴⁴ Defendants also misconstrue the integration mandate (*Opp.* 35:9-20), which applies not only

1 fail to contest Plaintiffs’ showing that many eligible recipients will fail to timely apply for Care
 2 Supplements, because they will be unable to open or read their mail without assistance, mental
 3 health or cognitive issues will prevent them from applying, their risk will not become apparent
 4 until after their condition has deteriorated which will be beyond the application deadline, or other
 5 factors. TRO Br. 38:1-10 & nn. 73-74; Preis Decl. (Dkt. 394) ¶11; 4th Collins Decl. ¶16; 2nd
 6 Cottrell Decl. ¶7; 2nd Elliott Decl. ¶13; 4th Kaljian Decl. ¶10; 2nd S. Wallace Decl. ¶¶8-9. For
 7 example, Yolo County Public Authority Director Frances Smith describes a paralyzed and blind
 8 recipient who is unlikely to understand the importance of the Care Supplement application and may
 9 well miss the deadlines for applying. Smith Decl. (Dkt. 400) ¶¶15-16.⁴⁵

10 Moreover, many recipients who manage to timely apply but who do not benefit from the
 11 functional ranks “presumption” will have their applications denied. 4th Collins Decl. ¶13.
 12 Because CDSS has failed to define “serious risk of out-of-home placement,” Supplemental Care
 13 will be denied to many for whom the hours reduction will “cause them to decline in health over
 14 time and eventually enter an institution.” *M.R.*, 2011 WL 6288173, *16; *see also supra* at 23-24.
 15 Even those who manage to timely apply may be incapable of pursuing appeals if their applications
 16 are denied. 4th Collins Decl. ¶17; 2nd Elliott Decl. ¶14; 3rd Hylton Decl. ¶9.

17 In fact, while Defendants have backed away from their estimate that tens of thousands of
 18 eligible recipients will not apply, 2nd Keeslar Decl. (Dkt. 376) ¶16, they concede that “[t]here is no
 19 way to predict how many recipients will submit a Supplemental Care application, or who will
 20 ultimately not have their hours restored, modified partially or reduced” Carroll Decl. (Dkt. 446)
 21 ¶14. Defendants’ concession establishes their failure to fulfill their affirmative obligation under the

22
 23 to unnecessary placement in nursing facilities but also to placement in entities like board-and-care
 homes. *See* PI Order (Dkt. 198) 21:25-22:4; U.S. Statement of Interest (Dkt. 449) 4 n.4.

24 ⁴⁵ *See also, e.g.*, 3rd Collins Decl. (Dkt. 344) ¶20 (expressing concern that even recipients with
 25 ranks of 5 for mental functioning categories will be required to timely complete and return
 application); Carlson Decl. ¶16 & Ex. A (recipient who should qualify for Care Supplement
 26 because her scores for mental functioning are 5 (judgment), 2 (memory), 2 (orientation) is unlikely
 to have capacity to timely return Care Supplement application); Soto Decl. ¶17 (Carlson likely
 27 unable to return application); Mills Decl. (Dkt. 386) ¶¶4, 6-11 (disabilities of recipient with
 bipolarity, dyslexia, and arthritis render her unable to keep track of, complete, and return important
 28 documents, and create difficulty accessing mail regularly); Guerin Decl. (Dkt. 361) ¶¶7, 17-24
 (recipient with developmental disability often hides important mail including IHSS notices).

1 ADA and Section 504 to avoid actions that place individuals with disabilities at serious risk of
 2 unnecessary institutionalization. “Defendants bear the ultimate responsibility for ensuring the
 3 State’s compliance with federal disability law,” and so cannot rely on alternative services to
 4 prevent institutionalization if it is uncertain whether those services will actually be provided. PI
 5 Order (Dkt. 198) 23:13-23 (state cannot rely on the potential existence of alternative services such
 6 as unpaid family care to defeat ADA claim); *Brantley*, 656 F.Supp.2d at 1174 (although existence
 7 of alternative services was undisputed, Defendants violated ADA by failing to ensure that they
 8 would be provided contemporaneously with elimination of adult day health services); *cf. Frederick*
 9 *L. v. Department of Pub. Welfare of Pa.*, 364 F.3d 487, 500 (3d Cir. 2004) (ADA and Section 504
 10 impose upon state obligation to protect individuals with disabilities; “[The State] must be prepared
 11 to make a commitment to action in a manner for which it can be held accountable by the courts.”);
 12 *Ball v. Rodgers*, 2009 WL 1395423, at *5 (D. Ariz. April 24, 2009) (defendants violated ADA by
 13 “fail[ing] to provide adequate services to avoid unnecessary gaps in service” caused by home care
 14 provider unavailability).

15 **3. Defendants Discriminate Against Individuals with Psychiatric and Cognitive** 16 **Disabilities.**

17 Defendants’ only response to Plaintiffs’ showing that implementation of SB 73 would
 18 discriminate against people with cognitive or psychiatric disabilities is that such individuals’
 19 “unique needs ... are sufficiently addressed” by waivers, preapprovals, and the Supplemental Care
 20 process. Opp. 35:25-36:7. But Defendants fail to dispute Plaintiffs’ showing that (1) psychiatric
 21 disabilities are in no way addressed by the waiver and preapproval categories, (2) the use of
 22 functional ranks – whether that use be dispositive or simply influential – discriminates against
 23 individuals with cognitive or psychiatric disabilities in violation of the ADA; and (3) those with
 24 cognitive or psychiatric disabilities are particularly unlikely to be able to avail themselves of the
 25 Supplemental Care process. TRO Br. 46:9-25 & nn. 80-81; *supra* at 6, 19 n.34, 24, 25-26 & n.45;
 26 *see also Hargrave v. Vermont*, 340 F.3d 27, 36-37 (2d Cir. 2004).

27 **4. Defendants Are Using Discriminatory Methods of Administration.**

28 Defendants do not even attempt to rebut Plaintiffs’ showing that substantial impairment of

1 the IHSS program’s objective (which is to enable recipients to remain safely at home) would
 2 violate the ADA’s methods of administration regulation. TRO Br. 47:3-9 (citing federal regulation
 3 and cases). Plaintiffs have demonstrated that requiring recipients to apply for Care Supplements,
 4 imposing application deadlines, and using functional ranks to screen out recipients will
 5 substantially impair this purpose. *Id.* at 47:9-17; *supra* at 20-21, 22, 23-26.

6 **5. Plaintiffs’ ADA/504 Claims Do Not Violate The Tenth Amendment.**

7 In arguing that applying the protections of the ADA/Section 504 to the State’s
 8 implementation of the IHSS program amounts to commandeering in violation of the Tenth
 9 Amendment, Opp. 33-34, Defendants ignore that Section 504 is itself Spending Clause legislation.
 10 The Tenth Amendment does not prohibit Congress from using its spending powers to create
 11 financial incentives for conduct that serves the general welfare. *See New York v. U.S.*, 505 United
 12 States 144, 166-68, 171-73 (1992); *South Dakota v. Dole*, 483 U.S. 203, 208-10 (1987). And the
 13 Ninth Circuit has held that Section 504 is valid Spending Clause legislation. *Lovell v. Chandler*,
 14 303 F.3d 1039, 1051 (9th Cir. 2002). With respect to Section 504, the State voluntarily agreed not
 15 to discriminate against individuals with disabilities in any program or activity receiving federal
 16 financial assistance, in exchange for federal funds. *See* 29 U.S.C. §794. Since Medi-Cal
 17 (including IHSS) is a program or activity receiving federal financial assistance, the State has
 18 agreed to comply with Section 504 in its implementation, including in the IHSS program. Rather
 19 than creating an impermissible mandate, requiring the State to comply with Section 504 is part of a
 20 *quid pro quo* that is permissible under the Tenth Amendment. *See New York*, 505 U.S. at 166-68.

21 Because Section 504 and Title II of the ADA are co-extensive, there is no need to consider
 22 whether requiring compliance with the ADA would violate the Tenth Amendment. *See, e.g.*,
 23 *Olmstead v. L.C.*, 527 U.S. 581, 591-92 (1999) (noting ADA regulations were required to be
 24 consistent with Section 504 regulations, quoting 504 integration regulation, 28 C.F.R. §41.5(d));
 25 *M.R.*, 2011 WL 6288173, *15 (citation omitted) (“Because the applicable [integration mandate]
 26 provisions of the ADA and the Rehabilitation Act are ‘co-extensive,’ we discuss both claims
 27 together”); *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) (“There is
 28 no significant difference in analysis of the rights and obligations created by the ADA and the

1 Rehabilitation Act.”).⁴⁶

2 **C. PLAINTIFFS ARE LIKELY TO SUCCEED ON DUE PROCESS CLAIMS.**

3 As this Court has explained, Defendants must issue “timely and adequate notice detailing
4 the reasons” for their action “tailored to the capacities and circumstances of the recipients who
5 must decide whether to request a hearing.” PI Order (Dkt. 198) 24:2-7 (punctuation omitted).
6 Plaintiffs’ TRO brief discusses more than a dozen cases relying on these principles to show that
7 Defendants’ notices are inadequate. TRO Br. 28-35. Defendants’ notices create a serious risk that
8 many otherwise eligible IHSS recipients will not seek their much-vaunted “administrative review,”
9 and violate due process, as measured by the *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976),
10 three-pronged balancing test: (1) the interest at stake for the individual, (2) the risk of an erroneous
11 deprivation of the interest through the procedures used as well as the probable value of additional
12 or different procedural safeguards, and (3) the interest of the government in using the current
13 procedures rather than additional or different procedures.

14 **1. Interest of the Individual**

15 Plaintiffs’ interest in adequate notice is substantial, since without IHSS, “they may be
16 unable to do things as basic as bathing, preparing a meal, or using the toilet.” *Baker v. State Dept.*
17 *of Health Soc. Servc.*, 191 P.3d 1005, 1010 (Alaska 2008). The importance of these services makes
18 them at least equivalent to the “brutal need” of the welfare recipients in *Goldberg v. Kelly*, 397
19 U.S. 254, 261 (1970). *See Baker*, 191 P.3d at 1010 (equating these interests, and holding they
20 require extra efforts to provide adequate notice); *Pashby*, 2011 WL 6130819, at *8 (same);
21 *compare M.R.*, 2011 WL 6288173, at *14, 19.

22 **2. Risk of Erroneous Deprivation**

23 Unlike the typical due process case, in which a defendant has decided to reduce or
24 terminate someone’s benefits and the only question is whether that termination was erroneous
25 because of a mistake or failure to give adequate consideration, *e.g. Goldberg*, 397 U.S. at 267,
26

27 ⁴⁶ *See also Dare v. California*, 191 F.3d 1167, 1176 (9th Cir. 1999) (“Because Title II [of the
28 ADA] falls within Congress’s Fourteenth Amendment powers, it does not conflict with powers reserved to the states under the Tenth Amendment.”).

1 here, Defendants *concede* that hundreds of thousands of recipients *should not have hours reduced*
2 because they will qualify for Care Supplements if they apply. Keeslar Decl. (Dkt. 376) ¶16, Ex. A.
3 (Dkt. 376-1) at 2. In defending the lawfulness of SB 73, Defendants place great emphasis on the
4 purported “highly individualized review process for *all affected* recipients,” which will result in
5 hours restorations. Opp. 4:5 (emphasis in original); *see also* 1:14-17, 2:8-10, 12:21-23, 13:27-28,
6 14:24-25, 15:20, 18:17, 21:13-15, 27:12, 29:5-6, 30:9-12, 31:8-15, 32:12, 35:9-20, 36:6-7. Thus,
7 Defendants effectively concede that tens of thousands of recipients will have their hours
8 erroneously reduced, and Defendants depend on the adequacy of the notice, Supplemental Care
9 process, and state hearing process to reverse those erroneous deprivations.

10 Defendants’ proposed notices do not adequately protect against that erroneous deprivation.
11 Defendants *also* have effectively conceded that many eligible recipients will not apply for Care
12 Supplements, so tens of thousands of recipients who are eligible for restoration will have hours
13 erroneously reduced. Keeslar Decl. (Dkt. 376-1), Ex. A; *see also* Carroll Decl. (Dkt. 446) ¶14.
14 And Plaintiffs have submitted evidence that the proposed notices are confusing and difficult for
15 many IHSS recipients to understand, do not include all necessary information, and are not available
16 in alternative formats for recipients who are blind or vision-impaired, or in translation for speakers
17 of Vietnamese, Russian, and other languages. TRO Br. 29-31.⁴⁷

18 *Understandability.* Defendants do not dispute that their notices to the IHSS population
19 require a college reading level. In contrast, Defendant requires contractors serving the same Medi-
20 Cal population to provide materials at no more than a fifth or sixth grade reading level to ensure
21 recipients understand managed care plan materials. Huntley-Fenner Decl. (Dkt. 369) ¶12; *see also*
22 4th RJN, Ex. 1, 2. IHSS recipients are entitled to the same minimum level of comprehensibility.
23 *See David v. Heckler*, 591 F.Supp. 1033, 1037 (E.D.N.Y. 1984) (elderly Medicare recipients would
24 not understand notices “written at the 12th and 14th grade levels”).

25
26 ⁴⁷ Defendants contend that they need not make their notices comprehensible and functional
27 because *Jones v. Flowers*, 547 U.S. 220 (2006) and *Covey v. Town of Somers*, 351 U.S. 141 (1956)
28 concern only the manner in which notice is provided. Opp. 23:7-17. But these cases simply apply
a core due process principle: that notices must be “reasonably calculated” to inform. *Mullane v.*
Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

1 *Mistaken Reductions.* Defendants now concede that exempt or preapproved recipients may
 2 appeal mistaken reductions, Opp. 26:19-20, but ignore that such recipients will have no basis to
 3 know a mistake has been made because the notice does not set forth the exemption and preapproval
 4 categories. Moreover, despite Defendants’ protestation that the reduction notice “neither expressly
 5 nor implicitly purports to bar any recipient from challenging a mistaken application of the
 6 reduction” (Opp. 27:2-3), the explanation sheet states: “If you disagree with the county’s decision
 7 [to deny Supplemental Care], you can request a hearing...However, requests for a state hearing
 8 *only to dispute the new state law requiring the 20-percent reduction* in authorized hours will be
 9 dismissed.” Carroll Decl. (Dkt. 446-1), Ex. A at 13 (emphasis added). A recipient sent a reduction
 10 notice by mistake may believe that requesting a hearing *is* “disput[ing] the new state law,” as
 11 opposed to the mistaken application of the law to her case. This distinction may be “plain[]” to
 12 Defendants (Opp. 26:20) but is unlikely to be understood by an aged or disabled IHSS recipient.
 13 The first sentence quoted above also suggests that the only permissible hearing is to dispute a Care
 14 Supplement denial, which will further discourage appeals based on a mistaken notice.

15 *Other Necessary Information.* None of the proposed notices explains the eligibility criteria
 16 for the new Care Supplement, other than a statement that a showing of “serious risk of out-of-home
 17 placement” is required.⁴⁸ TRO Br. 32-33. Defendants concede this point, arguing that “due
 18 process does not require that the notice itself apprise recipients of the underlying bases of the
 19 county’s Supplemental Care determination” and that recipients can call their social worker or
 20 request a fair hearing. Opp. 25:25-26:9. But courts have repeatedly held that due process requires
 21 the explanation of the basis for an adverse action to be in the notice itself, and that inadequate
 22 notice is not cured by instructions to contact a case worker. *See, e.g., Vargas v. Trainor*, 508 F.2d
 23 485, 489-90 (7th Cir. 1974) (written notice that needs supplementation through recipient action by
 24 recipient does not satisfy due process); *Schroeder v. Hegstrom*, 590 F.Supp. 121, 128 (D. Or. 1984)

25
 26 ⁴⁸ In addition, the template denial notices for county use in ACL-11-81 do not include the
 27 effective date of the denial, which recipients need in order to file a timely appeal. TRO Br. 33.
 28 Though Defendants contend the counties must provide this information, Opp. 26:12-16, the cited
 regulation makes no reference to effective date. MPP §22-001(a)(1) (county must identify “if
 appropriate, the circumstances under which aid will be continued if a hearing is requested”).

1 (ability to ask case worker for help “does not remedy the shortcomings of an inadequate notice.”).
 2 Fair hearings are also an impermissible substitute for inadequate notice, since a recipient will not
 3 know what to appeal without knowing the basis for the denial. *Goldberg*, 397 U.S. at 267-68.
 4 Moreover, IHSS recipients frequently do not request fair hearings because they are elderly,
 5 confused, or in poor health.⁴⁹

6 Defendants also argue that the notices are adequate because Care Supplement eligibility is
 7 not “determined exclusively or primarily on recipients’ functional ranks.” Opp. 25:11. But if
 8 functional ranks create a “presumption” of eligibility, this is how eligibility is “primarily”
 9 determined, and must be disclosed. Further, whatever weight the presumption is given,
 10 information about the eligibility criteria and their functional ranks is critical to recipients.
 11 Defendants have already identified the 112,000 recipients who meet the presumptive eligibility
 12 criteria based on their functional ranks. 2nd Keeslar Decl. (Dkt. 376) ¶16. Informing these
 13 recipients of their presumptive eligibility is necessary for them to decide whether to apply for a
 14 Care Supplement. And recipients whose ranks are too low to presumptively qualify need to know
 15 this so they can decide whether to contest their ranks in order to meet the eligibility criteria. TRO
 16 Br. 32 n. 62; *see, e.g.*, Thurman Decl. (Dkt. 404) ¶32; Stern Decl. (Dkt. 401) ¶26; M.G. Decl. (Dkt.
 17 352) ¶17; 2nd Hylton Decl. (Dkt. 371) ¶21.⁵⁰

18 *Alternate Formats.* Defendants disclaim any obligation to provide effective notice to IHSS
 19 recipients who are blind or have vision impairments. Opp. 24:27-25:7. To the contrary, due

20 ⁴⁹ *See, e.g.*, 2nd Elliott Decl. ¶14 (“many recipients whose applications for Supplemental Care
 21 are denied by counties are likely simply to give up, rather than appealing to the state”); 4th Collins
 22 Decl. ¶17 (“only a small percentage of public benefits clients appeal notices of termination or
 23 reduction” and “percentage of IHSS clients who appeal is even smaller”); 2nd S. Wallace Decl.
 ¶¶2-8 (administrative hurdles such as Supplemental Care application make it less likely that
 eligible applicants will successfully receive benefits); 3rd Hylton Decl. ¶9 (“I have never appealed
 a public benefit decision, nor have I ever gone to a hearing.”).

24 ⁵⁰ As in 2009, the proposed notices also fail to mention to the right to a home hearing. The
 25 cases Defendants cite to justify this omission (Opp. 26 n.13) are inapplicable. *Childress v. Small*
 26 *Business Admin*, 825 F.2d 1550 (11th Cir. 1987), concerns qualified immunity in a damages action,
 27 where federal officials violated regulatory procedures in denying a farm loan. In the other cases,
 28 courts dismissed lawsuits to review an adverse administrative decision (rendered after full notice
 and hearing) by plaintiffs who had missed the statute of limitations; both argued unsuccessfully
 that the administrative law judge had a duty to inform them of limitations periods. *Bennett v. Dir.,*
Off. of Workers’ Comp., 717 F.2d 1167, 1169 (7th Cir. 1983); *Vialez v. New York Cty. Hous. Auth.*,
 783 F.Supp. 118, 122 (S.D.N.Y. 1991).

1 process, the ADA and Section 504⁵¹ all require Defendants to ensure notice is effective by offering
 2 it in alternative formats such as computer disks, email, or large print. In *American Council of the*
 3 *Blind v. Astrue*, the court held the Social Security Administration violated Section 504 even though
 4 it provided blind and vision-impaired recipients with both written notice and a follow-up telephone
 5 call in which the notice was read verbatim – more than Defendants offer here. 2009 WL 3400686,
 6 *3-4, 16-25 (N.D. Cal. Oct. 20, 2009). (The court’s holding that defendant there did not violate
 7 due process was premised on the telephone notice, which Defendants here do not provide. *Id.* at
 8 *25-26.) Defendants claim they delegate this duty to counties, but the regulations are inadequate
 9 and evidence shows current practices are ineffective and alternate formats largely unavailable.⁵²

10 *Translation.* Defendants contend that due process does not require translation, but rely on
 11 three decades-old cases in which there was no easy alternative or the aid recipients did not have
 12 disabilities that would prevent them from seeking their own translations. Opp. 24:14-23.⁵³
 13 Defendants also argue that state regulations require counties to fill the gap. But Defendants do not
 14

15 ⁵¹ The ADA requires public entities to take appropriate steps to ensure communications with
 16 individuals with disabilities are as effective as communications with others. 28 C.F.R.
 17 §§35.160(a)-(b), 35.164 . Section 504 requires a service provider to “ensure that qualified
 18 handicapped persons, including those with impaired sensory or speaking skills, are not denied
 19 effective notice because of their handicap.” 45 C.F.R. §84.52(b). See TRO Br. 31 n. 61.

18 ⁵² Defendants point to CDSS regulations that require counties to be prepared as a general
 19 matter to provide alternative formats and equal access. Opp. at 24:27-25:6, citing MPP §§10-110.3,
 20 21-111.14, 21-115.41 (4th RJN, Exs. 7-8). These regulations do not ensure effective notice, since
 21 they do not require proactive efforts in the absence of a recipient request or ensure that every
 22 request is answered. Defendants also ignore record evidence that current practices are inadequate.
 23 Gunn-Cushman Decl. (Dkt. 363) ¶6; 2nd Good Decl. (Dkt. 358 ¶¶10-11; Smith Decl. (Dkt. 400)
 24 ¶16; G. Thompson Decl. (Dkt. 403) ¶14. Reading a notice to a recipient is insufficient. See 2nd
 25 Thurman Decl. ¶3 (“[I]t is hard to remember [...] exactly what she said. I forget the details and
 26 have no way to go back over the notice when she is not around.”); Gunn-Cushman Decl. (Dkt. 363)
 27 ¶6 (similar). Moreover, counties are generally unaware of this responsibility and ill-equipped and
 28 unprepared to assume it. Gutierrez Decl. ¶¶7-23 (telephone survey of every county IHSS office);
 Daitsman Decl. ¶¶7-15 (same); 4th Collins Decl. ¶21; 2nd Cottrell Decl. ¶7 (may not be able to
 respond to all requests in timely manner); 4th Kaljian Decl. ¶10 (similar).

⁵³ See *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (absence of “relatively easy
 means of providing a more adequate form of notice”); *Soberal-Perez v. Heckler*, 717 F.2d 36, 43
 (2d Cir. 1983) (“No plaintiff in this litigation alleges that he is under a disability which would
 prevent him from understanding the need for further inquiry. Plaintiffs’ only non-physical
 disability is that they are unable to understand English.”); *Guerrero v. Carleson*, 9 Cal. 3d 808, 812
 (1973) (“the plaintiffs in the case at bar are in full possession of their mental faculties”). IHSS
 recipients, in contrast, have physical and cognitive impairments that make recognizing the need for
 translation and acquiring assistance difficult.

1 show that counties are required to or are providing written translation of IHSS notices; they are
 2 not.⁵⁴ Gutierrez Decl. ¶25; Daitsman Decl. ¶17; 4th Kaljian Decl. ¶9. Further, “language line” oral
 3 translation does not suffice for a complicated form like the Care Supplement application, and such
 4 interpretation assistance may not be immediately available. *See* 4th Collins Decl. ¶¶18, 20.⁵⁵

5 **3. Interest of the Government**

6 Not surprisingly, Defendants do not mention the possible burden on the State to make the
 7 changes in the content of the notice requested by Plaintiffs, since it is minimal. *See David*, 591 F.
 8 Supp. at 1043 (in challenge to readability of Medicare notices, “the burden on the government of
 9 writing letters in a manner designed to communicate rather than obfuscate is not substantial”). The
 10 burden of informing recipients of their functional ranks would also be minimal, since Defendants
 11 have this information. *See Baker*, 191 P.3d at 1013 (administrative burden of including copy of
 12 assessment form with notice not unreasonable); *Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992)
 13 (“minimal” burden in providing more detailed notice). Under *Mathews*, the scales weigh heavily in
 14 favor of more detailed notices. In addition, Defendants are aware of which recipients are blind or
 15 have visual impairments, and so could provide notices in alternate formats to those recipients. 4th
 16 Collins Decl. ¶22; *compare American Council of Blind*, 2009 WL 3400686, at *22-25 (rejecting
 17 Section 504 undue burden defense for alternate formats). And since Defendants already translate
 18 into three languages and know which languages recipients speak, additional translations will not
 19 impose a significant cost or burden when weighed against the benefit of providing understandable
 20 notice to tens of thousands of IHSS recipients with critical benefits at stake.⁵⁶

21
 22 ⁵⁴ Defendants cite Cal. Gov’t Code §7295.2, which requires translations and interpretation
 23 services for non-English speaking populations that exceed 5% of the recipient population. Opp.
 24 24:27. For language groups below this threshold such as Russian (4%) and Vietnamese (3.7%),
 25 counties are required to provide bilingual services but not written translations. MPP §§21-115.1,
 115.2 (4th RJN Ex. 7). Consequently, an IHSS recipient can obtain an oral interpretation of the
 reduction notices if he is able to reach his IHSS social worker, but not a written translation. *See*,
e.g. Nguyen Decl. ¶¶5-6; 2nd Nguyen Decl.

26 ⁵⁵ 2nd Cottrell Decl. ¶7 (“We will have to suspend all other operations just to respond to the
 27 anticipated volume of calls and requests for assistance, and still may not be able to keep up with
 demand.”); 4th Kaljian Decl. ¶10 (similar). A centralized state written translation would make far
 more sense than requiring 58 counties to spend scarce staff time to respond to non-English
 speaking IHSS recipients and to separately secure translations. 4th Collins Decl. ¶19.

28 ⁵⁶ *See* Pl.’ App. Attorneys’ Fees and Expenses (Dkt. 273-74), Exs. F-G (costs approximately

1 **VI. THE BALANCE OF EQUITIES AND PUBLIC INTEREST TILT IN PLAINTIFFS'**
 2 **FAVOR.**

3 Defendants assert that the balance of harms and public interest weigh in their favor, by
 4 suggesting that budget cuts enjoined in this litigation will fall necessarily on other vulnerable
 5 populations.⁵⁷ Of course, this is not at all certain; the State has many alternatives to resolve budget
 6 shortfalls, including revenue increases, reductions in other programs, and cuts to institutional
 7 placements such as nursing facilities.⁵⁸ See *M.R.*, 2011 WL 6288173, at *19 (holding these factors
 8 favor enjoining cuts to home care hours; if other programs will be cut instead, state has not made
 9 clear “precisely what those other programs are and the extent to which they would be cut”). In any
 10 event, Defendants simply cannot escape the fact that, where access to critical care is concerned,
 11 “repeatedly recognized” and controlling Ninth Circuit law holds that threats regarding potential
 12 fiscal impact are insufficient. See *Dominguez v. Schwarzenegger*, 596 F.3d 1087, 1098 (9th Cir.
 13 2010); *Independent Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 659 (9th Cir. 2009);
 14 *California Pharmacists Ass’n v. Maxwell-Jolly*, 596 F.3d 1098, 1114-15 (9th Cir. 2011); PI Order
 15 (Dkt. 198) at 28:9-12. Moreover, Defendants do not deny Plaintiffs’ showing that, as in *M.R.*,
 16 2011 WL 6288173 at *19, the increased demands on public services and risk of institutionalization
 17 presented by the hours cuts will undermine any purported cost savings.

18 **CONCLUSION**

19 For the reasons discussed, this Court should preliminarily enjoin implementation of SB 73.

20 \$100 to translate a notice into a foreign language). The potential value of these additional notices
 21 is great, even if these languages do not meet CDSS’s “five percent statewide IHSS recipient
 22 population threshold.” Carroll Decl., Ex. A (Dkt. 446-1) at 5. For example, if the State translated
 23 notices into languages spoken by two percent or more of IHSS recipients, it would provide
 24 accessible notices to more than 50,000 additional recipients who speak Russian, Vietnamese,
 25 Tagalog, and Farsi. Supp. Rich Decl. (Dkt. 148), Ex. A.

26 ⁵⁷ Recipients who depend on other health and welfare programs may be protected by court
 27 orders, such as the Medi-Cal participants in Adult Day Health Care (“ADHC”). Although
 28 Defendants are correct that the Legislature eliminated funding for ADHC, Opp. 1 n.1, the proposed
 reductions were twice enjoined. *Brantley*, 656 F.Supp.2d at 1178; *Cota v. Maxwell-Jolly*, 688 F.
 Supp. 2d 980, 1000-01 (N.D. Cal. 2010). DHCS recently agreed to a settlement that continues
 ADHC-like services to ADHC participants who meet heightened eligibility requirements and
 enhanced case management to arrange alternative services (which could include increased IHSS)
 for the remaining participants. 4th RJN, Exs. 3, 14.

⁵⁸ Instead, the Governor has proposed restoring a 10 percent rate reduction for nursing facilities
 next year, while continuing the 20 percent cut in IHSS hours. 4th RJN, Exs. 4, 9.

1 Dated: January 9, 2012

Respectfully Submitted,

2
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