EDMUND G. BROWN JR.
Attorney General of California
KARIN S. SCHWARTZ
SUSAN M. CARSON
Supervising Deputy Attorneys General
JOSHUA N. SONDHEIMER
GREGORY D. BROWN (State Bar No. 219209)
MICHAEL A. ZWIBELMAN
Deputy Attorneys General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5461
Fax: (415) 703-5480
E-mail: Gregory.Brown@doj.ca.gov
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

V.L., et al., Plaintiffs, **v.** **JOHN A. WAGNER, et al.,** Defendants.	CV 09-4668 CW **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PORTIONS OF PLAINTIFFS' SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: N/A Time: N/A Dept: 2, 4th Floor Judge: The Honorable Claudia Wilken Trial Date: None Set Action Filed: October 1, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that pursuant to the briefing schedule set forth in the court's December 30, 2009 order (Docket No. 279), defendants John A. Wagner, Director of the California Department of Social Services; David Maxwell-Jolly, Director of the California Department of Health Care Services; California Department of Health Care Services; and California Department of Social Services, hereby move the court to dismiss portions of the action pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Plaintiffs' opposition to this motion to dismiss is due March 2, 2010; defendants' reply is due March 16, 2010; and the matter shall be submitted on the briefs without oral argument.

Plaintiffs Service Employees International Union – United Healthcare Workers West; Service Employees International Union – United Long-Term Care Workers; Service Employees International Union Local 521; Service Employees International Union State Council; United Domestic Workers of America, AFSCME, Local 3930, AFL-CIO; and California United Healthcare Workers (collectively, the Union Plaintiffs) lack standing to bring this action and accordingly must be dismissed. In addition, plaintiffs' sixth, seventh, and ninth claims for relief fail to state a claim upon which relief may be granted because, as a matter of law, (1) the challenged statute (ABX4 4) is not preempted by 42 C.F.R. § 440.230(b); (2) ABX4 4 is not preempted by 42 U.S.C. § 1396a(a)(17); and (3) ABX4 4 is not preempted by § 5001(f)(1) of the American Recovery and Reinvestment Act (ARRA). Finally, plaintiffs' fourth claim for relief against defendants California Department of Health Care Services and California Department of Social Services is barred by the Eleventh Amendment and must be dismissed.

The motion will be and is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the accompanying Request for Judicial Notice, the pleadings and papers filed herein, and the argument of counsel.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF ISSUES TO BE DECIDED

1. Do plaintiffs Service Employees International Union – United Healthcare Workers West; Service Employees International Union – United Long-Term Care Workers; Service

Employees International Union Local 521; Service Employees International Union State Council; United Domestic Workers of America, AFSCME, Local 3930, AFL-CIO; and California United Healthcare Workers (collectively, the Union Plaintiffs) have standing to challenge ABX4 4?

2. Have plaintiffs stated a claim upon which relief can be granted based on purported preemption of ABX4 4 by 42 C.F.R. § 440.230(b)?

3. Have plaintiffs stated a claim upon which relief can be granted based on purported preemption of ABX4 4 by 42 U.S.C. § 1396a(a)(17)?

4. Have plaintiffs stated a claim upon which relief can be granted based on purported preemption of ABX4 4 by § 5001(f)(1) of the American Recovery and Reinvestment Act (ARRA)?

5. Is plaintiffs' fourth claim for relief against defendants California Department of Health Care Services and California Department of Social Services under Section 504 of the Rehabilitation Act barred by the Eleventh Amendment?

INTRODUCTION

This court should dismiss the Union Plaintiffs from this action because they lack prudential standing to challenge ABX4 4, which reduces or terminates some IHSS benefits based on assessments of recipients' level of need for those services. The Union Plaintiffs purport to represent their members who are *providers* of IHSS services. However, plaintiffs' First Amended Complaint alleges only that ABX4 4 violates IHSS *recipients'* rights to services under various federal laws, and plaintiffs have not alleged any violation of providers' rights. Under both Supreme Court and Ninth Circuit precedent, the Union Plaintiffs lack prudential standing to bring this action because (1) they may not rest their claims on the rights of third parties, and (2) they are not within the "zone of interests" protected by any of the laws on which plaintiffs base their claims.

In addition, plaintiffs' sixth, seventh, and ninth claims for relief must be dismissed in their entirety for failure to state a claim upon which relief can be granted. Plaintiffs assert each of these claims for relief on the basis of federal preemption of state law under the Supremacy Clause. However, as a matter of law plaintiffs cannot show that any of the federal laws in question evince

a Congressional intent to preempt state law; nor can they show that ABX4 4 stands as an obstacle to the accomplishment of Congress's purpose in enacting any of these laws. Plaintiffs' sixth and seventh claims for relief—for preemption under 42 U.S.C. § 1396a(a)(17) and 42 C.F.R. § 440.230(b)—fail because these are general discretion-granting provisions with vague and amorphous standards that are not suitable for judicial enforcement and are not sufficiently specific to create any conflict with state law. Plaintiffs' ninth claim for relief—for preemption under ARRA § 5001(f)(1)—fails because ABX4 4 does not implicate Medicaid "eligibility" in any way, and instead only affects recipients' level of services under the IHSS program. For each of these reasons, the court should dismiss the Union Plaintiffs from the case for lack of standing and dismiss plaintiffs' sixth, seventh, and ninth causes of action with prejudice for failure to state a claim.

STATEMENT OF RELEVANT FACTS

A. The Lawsuit

Plaintiffs are five individual recipients of In-Home Supportive Services (IHSS) (collectively, the Individual Plaintiffs) and six unions whose members include providers of IHSS (collectively, the Union Plaintiffs). *See* Second Amended Complaint (SAC), ¶¶ 12-22. They challenge the California Legislature's decision, in July 2009, to enact ABX4 4, which reduces or terminates IHSS for recipients who fail to meet minimum thresholds of need for those services. *See* Cal. Welf. & Inst. Code §§ 12309(e) & 12309.2. Plaintiffs' first and second claims for relief allege violations of IHSS recipients' rights to notice and a fair hearing before their benefits can be reduced or terminated. *See* SAC, ¶¶ 162-75. Plaintiffs' third and fourth claims for relief allege that ABX4 4 discriminates against recipients on the basis of disability and will lead to the unnecessary institutionalization of disabled recipients, in alleged violation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. *See id.*, ¶¶ 176-202. Plaintiffs' fifth claim for relief alleges that ABX4 4 violates the Medicaid Act's comparability requirement under 42 U.S.C. § 1396a(a)(10)(B) by allegedly discriminating against different classes of beneficiaries with comparable needs. *See* SAC, ¶¶ 203-11. Plaintiffs' sixth claim for relief, brought only by the Union Plaintiffs and a putative "Loss of Domestic and Related Services Subclass," alleges

that ABX4 4's reduction of IHSS domestic and related services is preempted by the Medicaid Act's "sufficiency" requirement under 42 C.F.R. § 440.230(b). *See* SAC, ¶¶ 212-15. Plaintiffs' seventh claim for relief alleges that ABX4 4 is preempted by the Medicaid Act's "reasonable standards" requirement under 42 U.S.C. § 1396a(a)(17). *See* SAC, ¶¶ 216-19. Plaintiffs' eighth claim for relief, brought only by the Union Plaintiffs and another putative "Child Subclass," alleges that ABX4 4 violates the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) requirements under 42 U.S.C. §§ 1396a(a)(10)(A), 1396a(a)(43), 1396d(a)(4)(B), and 1396d(r). *See* SAC, ¶¶ 220-31. Plaintiffs' ninth claim for relief, brought only by the Union Plaintiffs and a putative "Termination of Benefits Subclass," alleges that ABX4 4's termination of benefits for certain recipients is preempted by ARRA § 5001(f)(1). *See* SAC, ¶¶ 232-38. On the basis of these allegations, plaintiffs seek declaratory and injunctive relief barring defendants from implementing the provisions of ABX4 4 that enacted or amended Sections 12309(e) and 12309.2 of the California Welfare and Institutions Code.

The five Individual Plaintiffs bring their claims on behalf of themselves as IHSS recipients and a putative class of IHSS recipients alleged to be similarly situated. *See* SAC, ¶¶ 12-16, 108-55. Five of the six Union Plaintiffs allege that their members include "IHSS providers," and each of these five Union Plaintiffs purports to bring this lawsuit "on behalf of its members." *Id.*, ¶¶ 17-19, 21-22. The sixth Union Plaintiff, SEIU California State Council, alleges that it consists of "[m]ore than 20 local unions," and purports to bring this lawsuit "on behalf of its affiliate local unions and the members of its affiliates." *Id.*, ¶ 20.

B. The Medicaid Act

Medicaid is a cooperative federal-state program that provides federal financial assistance to participating states to reimburse certain costs of medical treatment for the poor, elderly, and disabled. 42 U.S.C. § 1396. To qualify for federal matching funds, known as the Federal Medical Assistance Percentage (FMAP), a state must establish and administer its Medicaid program through a state plan approved by the Secretary of Health and Human Services (HHS). 42 U.S.C. § 1396a. The receipt of federal funding is expressly conditioned on compliance with the Medicaid Act, and HHS is authorized to withhold funds for noncompliance. 42 U.S.C.

§ 1396c; *see also* 42 C.F.R. § 430.35. The Center for Medicare and Medicaid Services (CMS) is the federal agency that administers the Medicaid program on behalf of the Secretary of HHS. *See Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 650 n.3 (2003).

A state that participates in Medicaid must determine which services it will provide. *See* 42 U.S.C. § 1396d(a). To receive federal approval, the Medicaid Act mandates that a state plan include seven enumerated medical services. *See id.* §§ 1396a(a)(10), 1396d(a)(1)-(5), (17), (21) (including as mandatory: inpatient hospital, outpatient hospital, laboratory and x-ray, nursing facility, physician, nurse-midwife, and nurse-practitioner services). A state may also elect to provide optional medical services, such as dental services, prosthetics, and prescription drugs. *See id.* §§ 1396(a)(10)(A), 1396d(a). IHSS is an optional service. *See id.*

C. Enactment of ABX4 4

It is well known that California is facing an unprecedented fiscal crisis. RJN, Exhs. A & B. Because the Medi-Cal program is the second largest general fund expenditure in the state budget, second only to K-12 education, policymakers often must contemplate reductions in Medi-Cal spending to balance the budget as required under the law. When a state seeks to reduce Medicaid costs, it generally has three options: restrict eligibility standards, reduce provider payments, or eliminate optional services. The Legislature has considered all of these options. However, efforts to reduce provider payments have been enjoined by the courts. *See*, *e.g.*, *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly (Independent Living II)*, 572 F.3d 644 (9th Cir. 2009). Additionally, because California has agreed to receive ARRA funds, it may not currently restrict eligibility requirements. *See* ARRA § 5001(f)(1) (Pub. L. No. 111-5 (1st Sess. 2009)).

Accordingly, in order to help close the state's multi-billion dollar deficit in fiscal year 2009-2010 and beyond and to ensure the ongoing viability of IHSS, on July 28, 2009 the Legislature enacted need-based thresholds for recipients to qualify for IHSS benefits under Medi-Cal. *See* Cal. Welf. & Inst. Code §§ 12309(e) & 12309.2. Although the Legislature could have eliminated IHSS benefits entirely, it chose not to do so and instead enacted ABX4 4 to preserve the IHSS program for those recipients who need it most. Specifically, ABX4 4 amended section 12309 and added new section 12309.2 to the California Welfare and Institutions Code, to provide

that recipients must meet certain need thresholds based on their functional ranks and Functional Index (FI) Scores, *see id.*, which have been in use since 1988 and are calculated as follows.

Since 1988, Welfare and Institutions Code section 12309 has required that counties conducting IHSS assessments use a uniform needs assessment tool, requiring a five-point scale for ranking each of the recipient's functional abilities. The State developed functional ranks under which recipients' functional abilities are ranked on a scale of 1 to 5 by trained social workers in each of 14 areas: housework; laundry; shopping and errands; meal preparation and clean-up; mobility inside; bathing and grooming; dressing; bowel, bladder, and menstrual; transfer; eating; respiration; memory; orientation; and judgment. The ranks are defined as follows:

- Rank 1 means that the individual can perform the tasks in that area independently;
- Rank 2 means that the individual can perform the tasks in that area but requires verbal reminding or guidance from another;
- Rank 3 means that the individual can perform the tasks but requires some human assistance;
- Rank 4 means that the individual requires substantial human assistance with the tasks; and
- Rank 5 means that the individual cannot perform any part of the tasks, with or without human assistance.

See SAC, ¶ 46; Cal. Welf. & Inst. Code § 12309(d)(1)-(5). Each recipient is also given an overall Functional Index (FI) Score that is calculated based on a weighted average of the recipient's 11 functional ranks for the non-mental tasks (i.e., excluding the functional ranks for memory, orientation, and judgment). SAC, ¶¶ 67 & 72. These FI Scores have been in use since 1988. *Id.*, ¶ 67.

ABX4 4 amended the Welfare and Institutions Code to provide that recipients must have an FI Score of at least 2.0 to receive IHSS, and must have a functional rank of at least 4 in the appropriate category to receive domestic and related services (housework; laundry; shopping and errands; and mean preparation and clean-up). *See* Cal. Welf. & Inst. Code §§ 12309(e) &

12309.2. ABX4 4 exempts individuals authorized to receive either protective supervision or paramedical services, meaning that such individuals may continue to receive all of their IHSS services regardless of their FI Score and functional ranks for domestic and related services. *See id.*; RJN, Exh. G.

ARGUMENT

The Union Plaintiffs lack standing to bring any of the causes of action in this lawsuit, and accordingly each of the Union Plaintiffs must be dismissed. Additionally, plaintiffs' sixth, seventh, and ninth claims for relief fail to state a claim upon which relief can be granted and accordingly must be dismissed.

I. THE UNION PLAINTIFFS LACK STANDING AND MUST BE DISMISSED

The Union Plaintiffs must be dismissed because they lack standing to challenge ABX4 4. Standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *see also City of Los Angeles v. County of Kern*, 581 F.3d 841, 845 (9th Cir. 2009) (quoting *Warth*).

A. The Union Plaintiffs Lack Prudential Standing to Bring Claims on Behalf of IHSS Providers.

The Supreme Court has recognized several prudential limitations on standing, two of which are relevant here: first, "the plaintiff must assert his own rights and 'cannot rest his claim to relief on the legal rights or interests of third parties,'" *McMichael v. County of Napa*, 709 F.2d 1268, 1270 (9th Cir. 1983) (quoting *Warth*, 422 U.S. at 499); and second, "the plaintiff's interest must be 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Id.* (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). The "zone of interests" requirement "denies a right of review if the plaintiff's interests are . . . marginally related to or inconsistent with the purposes implicit in" the relevant constitutional or statutory provision. *City of Los Angeles*, 581 F.3d at 846-47

(citation omitted). "As the name implies, the zone of interests test turns on the *interest* sought to be protected, not the *harm* suffered by the plaintiff." *Id.* at 848.

The Union Plaintiffs cannot meet either of these prudential standing requirements. First, the Union Plaintiffs purport to represent only IHSS providers,[1] not recipients, *see* SAC, ¶¶ 17-22, yet their claims rest entirely on the alleged rights and interests of recipients. *See id.*, ¶¶ 101-05, 162-238. ABX4 4 implements reductions in services to IHSS recipients based on each recipient's level of need for such services. *See* Cal. Welf. & Inst. Code §§ 12309(e) & 12309.2. Plaintiffs challenge ABX4 4 based on claims that the statute violates *recipients'* rights under various federal laws. *See* SAC, ¶¶ 162-238. But plaintiffs do not allege, and cannot allege, that ABX4 4 violates any rights of IHSS *providers*. Plaintiffs allege that the provider members of the Union Plaintiffs will suffer "irreparable injury" because "they will lose employment and hours of work," *id.*, ¶ 157, but they fail to allege that ABX4 4 violates any legal rights of providers. *See generally* SAC. Instead, the Union Plaintiffs are attempting to rest their claims entirely on the alleged rights or interests of third parties—IHSS recipients—and accordingly the Union Plaintiffs lack prudential standing. *See Warth*, 422 U.S. at 499; *McMichael*, 709 F.2d at 1270.

Second, the Union Plaintiffs lack prudential standing because their interests are not within the "zone of interests" protected by any of the laws on which plaintiffs base their claims: Plaintiffs' first and second claims for relief allege violations of *recipients'* rights to notice and a fair hearing before their benefits are reduced or terminated. *See* SAC, ¶¶ 162-175. Plaintiffs' third and fourth claims for relief allege that ABX4 4 discriminates *against recipients* on the basis of disability and will lead to the unnecessary institutionalization *of recipients*, in alleged violation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. *See id.*, ¶¶ 176-202. Plaintiffs' fifth claim for relief alleges that ABX4 4 violates *recipients'* rights to benefits that are equal in "amount, duration and scope" for all categorically needy Medicaid beneficiaries. *See id.*, ¶¶ 203-11 (citing 42 U.S.C. § 1396a(a)(10)(B) and 42 C.F.R. § 440.240(a),

[1] To the extent that the Union Plaintiffs may be trying to assert claims on behalf of IHSS recipients, the Union Plaintiffs lack constitutional standing to bring those claims because they cannot meet the requirements for associational standing. *See* Section I.B, *infra*.

(b)(1)). Plaintiffs' sixth claim for relief alleges that ABX4 4 is preempted by 42 C.F.R. § 440.230(b) because it allegedly does not provide "sufficient" benefits to IHSS *recipients*. *See* SAC, ¶¶ 212-15. Plaintiffs' seventh claim for relief alleges that ABX4 4 is preempted by 42 U.S.C. § 1396a(a)(17) because it allegedly does not provide "reasonable standards" for determining the extent of medical assistance for IHSS *recipients*. *See* SAC, ¶¶ 216-19. Plaintiffs' eighth claim for relief alleges that defendants may intend to take actions in the future that plaintiffs allege would violate the rights of some IHSS *recipients* under age 21 under the Early and Periodic Screening, Diagnostic and Treatment (EPSDT) provisions of the Medicaid Act. *See id.*, ¶¶ 220-31. Finally, plaintiffs' ninth claim for relief alleges that ABX4 4 is preempted by ARRA because it allegedly would restrict eligibility standards, methodologies, or procedures for IHSS *recipients*. *See id.*, ¶¶ 232-38. The laws at issue, to the extent that they create any rights at all, protect the interests of *recipients* in receiving Medicaid services, and none of these laws is intended in any way to protect the interests of providers in continuing their current level of "employment and hours of work." *Id.*, ¶ 157. Accordingly, the interests of the Union Plaintiffs' provider members in maintaining their current level of employment and hours of work are not within the "zone of interests" protected by any of the laws at issue, and therefore the Union Plaintiffs lack standing to bring any of the claims for relief in the First Amended Complaint.

Defendants anticipate that the Union Plaintiffs will argue that this court should follow the First and Third Circuits and hold that plaintiffs do not need prudential standing to proceed under the Supremacy Clause. *See Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 73 (1st Cir. 2001); *St. Thomas-St. John Hotel & Tourism Ass'n v. Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000). However, neither *Concannon* nor *St. Thomas* is binding on this court, and these cases should not be followed for several reasons. First, both *Concannon* and *St. Thomas* were wrongly decided, as they improperly conflate the prudential standing inquiry with the separate and independent question of whether a plaintiff has a private right of action. *See Indep. Living Ctr. of S. Cal., Inc. v. Shewry (Independent Living I)*, 543 F.3d 1050, 1065 & n.17 (9th Cir. 2008) (holding that plaintiffs had a private cause of action under the Supremacy Clause, but declining to address the separate issue of the plaintiffs' prudential standing because defendants had not raised

it). The Ninth Circuit has *not* held that the Supremacy Clause obviates the need to establish prudential standing; nor should this court, as such a rule would conflict with the prudential standing requirement's purposes of, among other things, ensuring that claims are brought only by parties with a proper stake in the outcome. *See Warth*, 422 U.S. at 499-501; *McMichael*, 709 F.2d at 1270. Here, the Union Plaintiffs' interest in maximizing the number of hours their provider members can work (regardless of whether those hours are needed by the recipients), is potentially at odds with IHSS recipients' interests in ensuring that they receive necessary and appropriate services. Indeed, an order requiring the State to provide unnecessary IHSS hours would directly benefit providers, but could potentially harm many IHSS recipients by taking funds away from other, more necessary services. For example, the Union Plaintiffs' attorneys' request for exorbitant fees stemming from the contempt proceedings in this action, *see* Plaintiffs' Notice of Application and Application for Attorneys' Fees and Expenses (Docket No. 273), threatens to drain State coffers of taxpayer funds that could otherwise be used to provide benefits directly to recipients. Finally, the judicial-restraint and separation-of-powers concerns that underpin prudential standing doctrine are particularly acute in the context of Supremacy Clause challenges to validly enacted state statutes; thus, if anything, prudential standing concerns should be heightened, not abandoned, in Supremacy Clause cases.

> [R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982) (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)). Accordingly, this court should not permit the Supremacy Clause to be used as an end run around the sound principles of prudential standing limitations.

B. The Union Plaintiffs Lack Constitutional Standing to Bring Claims on Behalf of IHSS Recipients.

The Union Plaintiffs appear to be bringing this suit solely on behalf of their members who are IHSS providers, and not on behalf of IHSS recipients. *See* SAC, ¶¶ 17-22. Nonetheless, to

the extent that the Union Plaintiffs may claim that they also are bringing this suit on behalf of IHSS recipients, they lack constitutional standing to do so because they cannot meet the requirements for associational standing.

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977).

Here, although the allegations are not entirely clear, the Union Plaintiffs appear to be trying to assert that they are bringing this lawsuit on behalf of some children of union members who are IHSS recipients, as well as on behalf of some retired union members who are also IHSS recipients. Specifically, plaintiffs allege that

> [s]ome members of these organizational plaintiffs and their minor children for whom they provide services are at risk of losing their children's IHSS services and will suffer irreparable injury as a result. Additionally, the organizational plaintiffs' members include retirees who receive IHSS services themselves and are at risk of losing services under ABX4 4.

SAC, ¶ 157.

To the extent that the Union Plaintiffs purport to be bringing claims on behalf of minor children who are IHSS recipients, they lack standing to do so for several reasons. First, those minor children are not (and are not alleged to be) union members, and thus the unions have no associational basis for representing them in any capacity. *See Hunt*, 432 U.S. at 343 (prerequisite for associational standing is that the individuals whose interests the association seeks to represent must be "members" of that association). Second, the interests of those minor children in receiving IHSS benefits are not "germane" to the Union Plaintiffs' purpose of protecting their members' employment interests. *Id.*; *see also Local 186, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Brock*, 812 F.2d 1235, 1239 (9th Cir. 1987) (union lacks associational standing where interest the union seeks to represent "is not an interest germane to the union's purpose"). Third, the relief requested—an injunction blocking ABX4 4's cuts to IHSS benefits—requires the participation of those individual minor children in the lawsuit to demonstrate that the cuts under ABX4 4 would (1) impact each individual minor child, and (2) do

so in an unlawful manner. *See Hunt*, 432 U.S. at 343 (association lacks standing where participation of individual members is required for lawsuit); *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999) (en banc) (injunctive relief requires demonstration of an injury to a named plaintiff).

To the extent that the Union Plaintiffs purport to be bringing claims on behalf of their members who are retirees and receive IHSS services, the Union Plaintiffs lack standing to bring such claims for two reasons. First, the interests of those retirees in receiving IHSS benefits under Medi-Cal are not "germane" to the Union Plaintiffs' purpose of protecting their members' *employment* interests. *See Hunt*, 432 U.S. at 343; *Local 186*, 812 F.2d at 1239. Second, the relief requested requires the participation of those individual members to show that ABX4 4's cuts would (1) impact each individual member, and (2) do so in an unlawful manner. *See Hunt*, 432 U.S. at 343; *Hodgers-Durgin*, 199 F.3d at 1045.

C. The Court Must Decide the Issue of the Union Plaintiffs' Standing Because They Are Seeking Relief Separate from, and Potentially at Odds with, the Relief Sought by the Individual Plaintiffs.

While courts have occasionally declined to address the standing of other parties when one party has standing,[2] the issue of the Union Plaintiffs' standing must be addressed in this case because the Union Plaintiffs' presence in this lawsuit may affect important issues relating to damages (in the form of attorneys' fees) and equitable relief. "Although one plaintiff with standing is all that is required to vest the court with jurisdiction, we must consider the other . . . plaintiffs' claims that they have standing," since "[i]f they do have standing, their presence in the lawsuit may affect issues of damages or equitable relief." *Gonzalez v. N. Twp. of Lake County*, 4 F.3d 1412, 1416 (7th Cir. 1993).

Here, the Union Plaintiffs' presence in this lawsuit already has impacted the case, as the Union Plaintiffs' attorneys have requested attorneys' fees and expenses for their work bringing

[2] *See, e.g.*, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006) ("The Court of Appeals did not determine whether the other plaintiffs have standing because the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement. . . . Because we also agree that FAIR has standing, we similarly limit our discussion to FAIR.").

the contempt motion in this case, much of which was duplicative of the work done by the Individual Plaintiffs' attorneys. *See* Plaintiffs' Notice of Application and Application for Attorneys' Fees and Expenses (Docket No. 273); Defendants' Opposition to Plaintiffs' Application for Attorneys' Fees and Expenses (Docket No. 283). Additionally, the interests of the Individual Plaintiffs (who appear to have standing based on the face of the complaint) are not the same as—and in many instances are potentially at odds with—the interests of the Union Plaintiffs (who lack standing). For example, the Union Plaintiffs' interest is likely to be narrowly focused on maximizing the number of hours that their member providers are authorized to work (whether or not those hours are necessary), while the Individual Plaintiffs' interests—to the extent that they are mutually aligned[3]—are likely to be focused on ensuring that they receive the benefits that they need. Thus, the authorization of unnecessary hours is directly in the providers' interests, but may not be in the recipients' interests. Indeed, the authorization of unnecessary IHSS hours and services collectively may be contrary to the recipients' interests to the extent that unnecessary IHSS expenditures lead to cuts in other programs from which the recipients benefit. Accordingly, this court should dismiss the Union Plaintiffs for lack of standing.

II. PLAINTIFFS' SIXTH AND SEVENTH CLAIMS FOR RELIEF FAIL TO STATE A CLAIM

Plaintiffs' sixth and seventh claims for relief—for alleged violation of the Medicaid Act "sufficiency" requirement under 42 C.F.R. § 440.230(b) and the "reasonable standards" requirement under 42 U.S.C. § 1396a(a)(17)—fail to state a claim as a matter of law because neither § 440.230(b) nor § 1396a(a)(17) preempts ABX4 4 under the Supremacy Clause.[4]

[3] The individual interests of the five named Individual Plaintiffs are likely to vary considerably based on each recipient's respective individual circumstances.

[4] Before plaintiffs can raise the preemption issue, as a threshold matter they must first establish that they have a private right of action under § 440.230(b) and/or § 1396a(a)(17). Defendants recognize that *Independent Living I*, 543 F.3d at 1050, is binding on this court and arguably gives plaintiffs a private right of action under the Supremacy Clause regardless of whether Congress intended to allow a private right of action. Accordingly, defendants raise the following arguments to preserve them for future appellate proceedings: Plaintiffs lack a private right of action under the Supremacy Clause because Congress did not intend to create a private right of action to enforce § 1396a(a)(17), *see Watson*, 436 F.3d at 1162-63, and because § 440.230(b) is a regulation that is not tied to any privately enforceable statute. *See Lonberg v. City of Riverside*, 571 F.3d 846, 850-51 (9th Cir. 2009) ("[R]egulations that do not encapsulate [a] statutory right and corresponding remedy are not privately enforceable."). To the extent that *Independent Living I* holds that plaintiffs may maintain a private right of action under the (continued…)

Plaintiffs bear a heavy burden in sustaining a preemption claim, and they cannot meet that burden here. The Supreme Court has identified two "cornerstones" of a preemption case. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009). "First, 'the purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Id.* (citation omitted).

> Second, [i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Id. at 1194-95 (internal quotations omitted). "The Medicaid program exemplifies what is often referred to as 'cooperative federalism.' In programs of this sort, '[w]here coordinated state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one.'" *State of Wash., Dept. of Soc. & Health Servs. v. Bowen*, 815 F.2d 549, 557 (9th Cir. 1987) (citations omitted); *see also Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 715 (1985) (recognizing "the presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause"); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981) ("In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.").

Plaintiffs here are pursuing an "implied" or "conflict" preemption claim, as neither § 1396a(a)(17) nor § 440.230(b) contains any "express" preemption clause. Accordingly, plaintiffs must demonstrate either that it is "'impossible for a private party to comply with both state and federal requirements,'" or that state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Sprietsma v. Mercury Marine*,

---

(…continued)
Supremacy Clause regardless of Congressional intent, it was wrongly decided because it conflicts with both Supreme Court and Ninth Circuit precedents, including *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); and *Sanchez v. Johnson*, 416 F.3d 1051, 1057-62 (9th Cir. 2005), and because the Supremacy Clause does not itself create any substantive rights. *See Dennis v. Higgins*, 498 U.S. 439, 450 (1991); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 615 (1979).

537 U.S. 51, 64 (2002). Plaintiffs cannot make that showing with respect to either § 1396a(a)(17) or § 440.230(b).

A. Section 1396a(a)(17) Does Not Preempt ABX4 4.

Plaintiffs' preemption claim under § 1396a(a)(17) fails as a matter of law because Congress has not evinced any "clear and manifest purpose" to preempt ABX4 4. *Wyeth*, 129 S. Ct. at 1194. Section 1396a(a)(17) is a general discretion-granting statute that provides that "[a] State plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter." 42 U.S.C. § 1396a(a)(17). Congress did not provide any concrete standards under § 1396a(a)(17), nor did it provide any guidance as to how to define "reasonable standards . . . consistent with the objectives of this subchapter." *Id.* Instead, by providing only vague and amorphous statements of general purpose in a discretion-granting statute, Congress made clear its intent to give states broad discretion to determine the appropriate standards under Medicaid's system of "cooperative federalism" involving "coordinated state and federal efforts . . . within a complementary administrative framework" in which there is a strong presumption against preemption. *Bowen*, 815 F.2d at 557. Here, ABX4 4 provides reasonable need-based standards for determining the extent of IHSS services that will be provided under the Medi-Cal program. *See* Cal. Welf. & Inst. Code §§ 12309(e) & 12309.2. ABX4 4 is entirely consistent with § 1396a(a)(17)'s broad grant of discretion to the states to determine such standards, and it cannot "stand[] as an obstacle" to the accomplishment and execution a such a general, discretion-*granting* statute. *Sprietsma*, 537 U.S. at 64. There is simply no indication that Congress intended § 1396a(a)(17) to preempt such statutes based on a court's assessment of their "reasonableness." Indeed, to overcome the strong presumption against preemption of ABX4 4 Congress must make its intent to preempt "clear and manifest," and Congress has not done so here. *Wyeth*, 129 S. Ct. at 1194-95. Accordingly, as a matter of law ABX4 4 is not preempted by § 1396a(a)(17).

Moreover, the Ninth Circuit has analyzed Congress's intent behind § 1396a(a)(17) in the analogous context of determining whether § 1396a(a)(17) creates a private right of action under 42 U.S.C. § 1983. *See Watson v. Weeks*, 436 F.3d 1152, 1162-63 (9th Cir. 2006). There, the

Ninth Circuit held that "Section 1396a(a)(17) is a general discretion-granting requirement that a state adopt reasonable standards," and is "too vague and amorphous for judicial enforcement." *Id.* at 1162. Section 1396a(a)(17)

> does not provide meaningful instruction for the interpretation of "reasonable standards" in terms of medical need. It provides guidance only regarding the financial means of a potential beneficiary. . . . [T]he only guidance of section 1396a(a)(17)(A) regarding medical need eligibility is that state standards be "consistent with the objectives of this subchapter." Judicial enforcement of section 1396a(a)(17) . . . would require a court to delve into the medical necessity of particular types of care. If Congress had intended that result, it would have provided more concrete standards in the statute for determining eligibility based on medical need.

Id. at 1162-63. Because Congressional intent is the "ultimate touchstone" of any preemption claim, *see Wyeth*, 129 S. Ct. at 1194, *Watson*'s holding regarding Congress's intent behind § 1396a(a)(17) cannot be reconciled with plaintiffs' preemption claim and effectively forecloses any claim of preemption here.

Finally, plaintiffs lack prudential standing to bring a claim under § 1396a(a)(17) because they are not within the "zone of interests" protected by the statute. *See City of Los Angeles*, 581 F.3d at 846-47; *Watson*, 436 F.3d at 1162-63.

B. Section 440.230(b) Does Not Preempt ABX4 4.

Plaintiffs cannot state a claim for preemption under § 440.230(b) because they cannot show that Congress intended this regulation to have any preemptive effect.

First, 42 C.F.R. § 440.230(b) is an agency regulation, not a statute passed by Congress, and "a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority[,] . . . [for] an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *New York v. F.E.R.C.*, 535 U.S. 1, 18 (2002). An agency regulation alone cannot create a federal right, and can only create a right in conjunction with a statute that "itself confers a specific right upon the plaintiff"; the regulation creates a valid right only to the extent that it "merely further defines or fleshes out the content of that [statutory] right." *Save Our Valley v. Sound Transit*, 335 F.3d 932, 941 (9th Cir. 2003); *see also Lonberg*, 571 F.3d at 850-51 ("[R]egulations that do not encapsulate [a] statutory right and corresponding remedy are not

privately enforceable."). This is because, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 287. Here, plaintiffs have not tied § 440.230(b) to any statute that can give it preemptive effect, and accordingly they have failed to state a claim for preemption under § 440.230(b).

Second, ABX4 4 is not preempted by § 440.230(b) because there is no conflict between state and federal law. Section 440.230(b), like § 1396a(a)(17), is part of the Medicaid program's system of cooperative federalism and does not provide any concrete standards suitable for judicial enforcement. Specifically, § 440.230(b) states only that "[e]ach [Medicaid] service must be sufficient in amount, duration, and scope to reasonably achieve its purpose." 42 C.F.R. § 440.230(b). The regulation does not define what amount, duration, or scope of any service will be "sufficient" to "reasonably achieve" the purpose of that service; indeed, these are precisely the type of "vague and amorphous" standards that the Ninth Circuit held were not suitable for judicial enforcement in *Watson*, 436 F.3d at 1162-63. Moreover, this regulation specifically grants broad discretion to states, stating that a state "may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures." 42 C.F.R. § 440.230(d). Because § 440.230 grants states broad discretion and does not provide any concrete standards suitable for judicial enforcement, it cannot form the basis for a valid preemption claim. *See Watson*, 436 F.3d at 1162-63 ("If Congress had intended" to have courts "delve into the medical necessity of particular types of care," "it would have provided more concrete standards.").

Finally, plaintiffs lack prudential standing to bring a claim under § 440.230(b) because they are not within the "zone of interests" protected by the regulation. *See City of Los Angeles*, 581 F.3d at 846-47; *Watson*, 436 F.3d at 1162-63.

III. PLAINTIFFS' NINTH CLAIM FOR RELIEF FAILS TO STATE A CLAIM

A. ARRA Does Not Preempt ABX4 4

Plaintiffs allege that ABX4 4's reductions and terminations of benefits are preempted by ARRA's prohibition against adopting "eligibility standards, methodologies, or procedures under its State Plan" that are "more restrictive" than those in effect on July 1, 2008. ARRA § 5001(f)(1)(A); *see also* SAC, ¶¶ 232-38. Plaintiffs' claim fails because ABX4 4's reductions

and terminations of certain IHSS benefits do not affect recipients' *eligibility* for the Medi-Cal program. Plaintiffs have confused cuts in specific benefits—which are unquestionably permitted under ARRA, *see Gray Panthers of San Francisco v. Schwarzenegger*, 2009 WL 2880555, at *8-*10 & *12 (N.D. Cal. Sept. 1, 2009)—with restrictive changes in overall Medi-Cal eligibility, which is what ARRA contemplates.

Indeed, plaintiffs' argument fails as a matter of law under the plain text of the statute and classic canons of statutory construction. It is a "cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it." *Hibbs v. Winn,* 542 U.S. 88, 101 (2004). The ultimate purpose, of course, is to effectuate congressional intent, of which the plain text is the best evidence. Here, the specific provision on which plaintiffs rely occurs in a section entitled "Maintenance of Eligibility Requirements," *not* "Maintenance of Benefits or Services." According to its plain meaning, and within context, § 5001(f)(1)(A) restricts states from constricting "eligibility" standards, methodologies, or procedures. Because ABX4 4 does not restrict the "standards, methodologies, or procedures" by which a Medi-Cal beneficiaries "eligibility" is determined, there is no conflict between ABX4 4 and § 5001(f)(1)(A), and plaintiffs' claims fail as a matter of law. This is consistent with Congress's express purpose in enacting these provisions, and the distinction it made between "cuts to . . . benefits or services," which ARRA was only intended to "help[] to avert," and "constrictions" to "income eligibility requirements," which ARRA was intended to "prevent." ARRA § 5000(a)(2).

Given the unambiguous statement of Congressional purpose and the statutory text, there is no need to resort to extrinsic aids. However, defendant notes that this understanding of § 5001(f)(1)(A) is supported by CMS's guidance regarding the statute. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009). CMS has explained that "procedures," as utilized in § 5001(f)(1), "refers to those actions taken by the State in administration of their Medicaid eligibility or redetermination process," as distinct from medical services. RJN, Exh. C at 6. In addition, this understanding is consistent with the legislative history relating to ARRA's enactment. *See, e.g.*, 155 Cong. Rec. S1474, S1513 (Feb. 4, 2009) (statement of Sen. Grassley) ("The bill only prevents States from cutting Medicaid income eligibility. But if Congress is giving

States $87 billion and telling them not to cut Medicaid eligibility, I think it is very important we in Congress also tell the States that they can't cut benefits. But this bill doesn't do that."), attached as RJN, Exh. D.[5]

In sum, because ABX4 4 does not implicate the State's "eligibility" process, it does not conflict with, and therefore is not preempted by, § 5001(f)(1)(A). *See Gray Panthers*, 2009 WL 2880555, at *8-*10 & *12 (N.D. Cal. Sept. 1, 2009) (holding that § 5001(f)(1)(A) does not preempt cuts to optional Medicaid services).

B. ARRA Is Not Privately Enforceable

Plaintiffs' ARRA claim fails as a matter of law for a separate and independent reason: the ARRA provisions at issue are not enforceable by private parties. In *Gonzaga*, 536 U.S. at 273, the Supreme Court explained that, regardless of whether plaintiffs seek to enforce a federal statute under an "implied" rights theory or under § 1983, the court "must first determine whether Congress intended to create a federal right" with its enactment. *Id.* at 283. This is because, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S at 286.

A statute only may be found to create a private right of action where its text is "phrased in terms of the persons benefited," thus reflecting an intention to "confer[s] rights on a particular class of persons." *Gonzaga*, 536 U.S. at 284-85 (internal quotations omitted). "[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action." *Id.* at 286. And "even where a statute is phrased in such explicit rights-creating terms, a

[5] *See also* 155 Cong. Rec. S1992, S2009 (Feb. 9, 2009) (statement of Sen. Grassley) ("Does the bill prevent States from getting Medicaid Programs? It does not. The bill only prevents States from cutting Medicaid on one of three propositions, this one being income eligibility. So that is a good thing. But if Congress is giving States $87 billion and telling them not to cut Medicaid eligibility, shouldn't Congress also tell States they can't cut benefits?"), attached as RJN, Exh. E; *see also id* at 2013 ("The bill only prevents States from cutting Medicaid income eligibility."). Senator Grassley filed an amendment to prohibit States "from generally cutting eligibility and benefits and providers," but it was not voted on and therefore not incorporated. *Id.* at S2009-2010; *see also id.* at 2013 ("I had several other amendments that were never allowed to be made pending.").

plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private right but also a private remedy.'" *Id.* at 284 (quoting *Sandoval*).

The ARRA provisions at issue are not privately enforceable because they do not evince any Congressional intent to create either privately enforceable rights or a private remedy. Rather than confer "rights" on private parties, the text of ARRA imposes obligations on the parties to be regulated (i.e., the States). *See Sandoval*, 532 U.S. at 289 ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'"). Further, there is no indication in the text of an intent to create a private remedy; to the contrary, it appears that Congress intended that the obligation to enforce ARRA, and to impose remedies for noncompliance (i.e., forfeiture of FMAP), would lie with CMS. *See* § 5001(g) (providing for reporting by states to Secretary of HHS).

Plaintiffs may contend that, under *Independent Living I*, private parties may state a claim for injunctive relief under the Supremacy Clause any time there is a purported conflict between a federal and state statute. However, *Independent Living I* was wrongly decided because it conflicts with numerous Supreme Court precedents, including *Gonzaga*, and because the Supremacy Clause does not itself create any substantive rights. *See Dennis*, 498 U.S. at 450; *Golden State Transit Corp.*, 493 U.S. at 107; *Chapman*, 441 U.S. at 615. Defendants recognize, however, that *Independent Living I* is arguably controlling here, and therefore raise this argument to preserve it for later appellate proceedings.

IV. PLAINTIFFS' FOURTH CLAIM FOR RELIEF AGAINST THE AGENCY DEFENDANTS IS BARRED BY ELEVENTH AMENDMENT IMMUNITY

Plaintiffs' fourth claim for relief (under Section 504 of the Rehabilitation Act) against defendants California Department of Health Care Services and California Department of Social Services (collectively, the Agency Defendants) is barred in its entirety by the Eleventh Amendment. The Eleventh Amendment generally bars suits by private persons or entities against non-consenting States, which includes suits against an "arm of the State" such as the Agency Defendants here. *Alden v. Maine*, 527 U.S. 706, 756-57 (1999). While the courts have recognized limited exceptions permitting suits for injunctive or declaratory relief against state

officers, the Agency Defendants are not state officers and no exception to Eleventh Amendment immunity applies. *See id.*; *Ex Parte Young*, 209 U.S. 123, 155-57 (1908).

Defendants recognize that *Douglas v. California Department of Youth Authority*, 271 F.3d 812, 819 (9th Cir. 2001), arguably holds that by accepting federal Rehabilitation Act funds, the State has waived its Eleventh Amendment immunity with respect to claims under the Rehabilitation Act. Accordingly, defendants raise this issue to preserve it for future appellate proceedings.

CONCLUSION

The Union Plaintiffs must be dismissed with prejudice because they lack standing to bring this action. Plaintiffs' sixth, seventh, and ninth claims for relief must be dismissed with prejudice on the ground that as a matter of law each of these claims for relief fails to state a claim upon which relief can be granted.

Dated: February 2, 2010

Respectfully Submitted,

EDMUND G. BROWN JR.
Attorney General of California
SUSAN M. CARSON
KARIN S. SCHWARTZ
Supervising Deputy Attorneys General

/s/ Gregory D. Brown

JOSHUA N. SONDHEIMER
GREGORY D. BROWN
MICHAEL A. ZWIBELMAN
Deputy Attorneys General
Attorneys for Defendants

SF2009405031
40422860.doc