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Attorneys for Plaintiffs

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

MIKESHA MARTINEZ, by and through her husband and next friend Carlos Martinez, LYDIA DOMINGUEZ, ALEX BROWN, by and through his mother and next friend Lisa Brown, DONNA BROWN, CHLOE LIPTON, by and through her conservator and next friend Julie Weissman-Steinbaugh, HERBERT M. MEYER, LESLIE GORDON, CHARLENE AYERS, WILLIE BEATRICE SHEPPARD, and ANDY MARTINEZ, on behalf of themselves and a class of those similarly situated; SERVICE EMPLOYEES INTERNATIONAL UNION UNITED HEALTHCARE WORKERS WEST; SERVICE EMPLOYEES INTERNATIONAL UNION UNITED LONG-TERM CARE WORKERS; SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 521; and SERVICE EMPLOYEES INTERNATIONAL UNION CALIFORNIA STATE COUNCIL,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, Governor of the State of California; JOHN A. WAGNER, Director of the California Department of Social Services; DAVID MAXWELL-JOLLY, Director of the California Department of Health Care Services; JOHN CHIANG, California State Controller; FRESNO COUNTY; and FRESNO COUNTY IN-HOME SUPPORTIVE SERVICES PUBLIC AUTHORITY,

Defendants.

Case No. C 09-02306 CW

CLASS ACTION

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR A PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: TBD
Time: TBD
Place: Courtroom 2, 4th floor,
Oakland Federal Courthouse
1301 Clay Street
Oakland, CA 94612

NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

Please take notice that at a date and time to be set by the Court, in Courtroom 2, Oakland Federal Courthouse, 1301 Clay Street, Oakland CA 94612, before the Honorable Claudia Wilken, Plaintiffs will move the Court for entry of a preliminary injunction, pending a final decision on the merits, that prohibits Defendants Schwarzenegger, Wagner, Maxwell-Jolly and Chiang from implementing California Welfare and Institutions Code §12306.1(d)(6), including by approving or implementing any county In Home Supportive Services ("IHSS") rate decreases adopted pursuant to Section 12306.1(d)(6), and that prohibits Defendants Fresno County and Fresno County IHSS Public Authority from implementing the rate reduction for IHSS providers that is scheduled to become effective on July 1, 2009. Because the challenged actions will take effect on July 1, 2009, a motion to shorten the time in which to hear this motion is being filed under separate cover.

This motion is made pursuant to FRCP 65 on the ground that Plaintiffs meet the requirements for a preliminary injunction because they have demonstrated a likelihood of success on the merits, a likelihood of irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest. *See American Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities in Support of Preliminary Injunction, the Declarations in Support of Motion for Preliminary Injunction, the Complaint For Injunctive And Declaratory Relief, the Plaintiffs' Request for Judicial Notice, the [Proposed] Order Granting Plaintiffs' Motion for a Preliminary Injunction, the complete files and records of this action, and such other and further matters as the Court may properly consider.

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Dated: June 4, 2009

Respectfully submitted

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

SUMMARY OF ARGUMENT

On July 1, 2009, unless this Court enters a preliminary injunction, dramatic cuts to the wages paid to In-Home Supportive Services ("IHSS") providers, who provide in-home assistance to low-income elderly and disabled individuals through California's Medi-Cal program, will take effect. These wage cuts will have a devastating effect on some of California's most vulnerable populations. Many IHSS providers will be forced to reduce their hours or quit their jobs altogether, and many IHSS consumers will be forced into institutional facilities or, if they remain in their homes, will go without much-needed care, at serious risk to their health and safety.

The wage cuts must be enjoined because they contravene federal law in a variety of ways. Most obviously, they violate procedural requirements of the Medicaid Act. *See* 42 U.S.C. §1396a(a)(30)(A). In April of this year, the Ninth Circuit re-affirmed that, when the State seeks to change payment rates under the Medi-Cal program, the Medicaid Act requires that it first conduct a reasoned analysis of the impact of those cuts to ensure that they are consistent with the level of care required under the Act. *See California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847 (9th Cir. 2009). Cuts enacted for purely budgetary reasons, without such consideration, violate the Act. Because the Defendants failed to conduct the required analysis of the impact of the cuts at issue prior to their enactment, they must be enjoined.

Further, by leaving recipients without adequate access to quality in-home assistance, the cuts violate the Medicaid Act's substantive guarantees of access to services and quality of care. *See* 42 U.S.C. §1396a(a)(30)(A). The cuts also constitute unlawful discrimination under the Americans with Disabilities Act ("ADA") and Rehabilitation Act, because they will force disabled individuals who are otherwise capable of living in their own homes and their own communities into institutional facilities. *See* 42 U.S.C. §12132; 29 U.S.C. §794(a); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

Plaintiffs have submitted dozens of declarations from IHSS providers, IHSS consumers, and experts in public health and economics that demonstrate the profound impact of the cuts at issue, and

made the requisite showing to support entry of a preliminary injunction prohibiting Defendants from implementing the wage cuts on July 1, 2009, pending a trial on the merits.

BACKGROUND

A. California's IHSS Program

California established the In-Home Supportive Services ("IHSS") program to provide assistance with the tasks of daily living to low-income elderly and/or disabled persons "who cannot safely remain in their homes or abodes of their own choosing unless these services are provided." Cal. Welf. & Inst. Code §12300(a). The types of services provided through the program include assistance with bathing, dressing, cooking, feeding, bowel and bladder care, self-administration of medication, and cleaning. *Id.* §12300(b), (c). The program also authorizes, under some circumstances, protective supervision for mentally impaired individuals and educational and paramedical services such as the administration of medication and injections. *Id.*, §12300(b), 12300.1.

By preventing the unnecessary institutionalization of individuals who can, with assistance, remain in their homes and in the community, the IHSS program conserves state resources. In the affected counties, the average annual cost to the State of maintaining someone in a nursing home is $65,339, as opposed to an average annual IHSS cost of $12,374. Howes Decl. ¶¶ 72-73. In addition, elderly and disabled individuals who remain in community-based settings are able to maintain the autonomy and quality of life that such settings offer. Schnelle Decl. ¶¶5-6; Jimenez Decl. ¶¶12-15.

For example, Plaintiff Lydia Dominguez, who is 81 years old, suffers from osteoperosis and serious problems with her eye and right arm and is mostly unable to walk, fears she would die if forced into a nursing home but is able to live in her own home because she receives IHSS assistance with bathing, cooking, laundry and cleaning. Dominguez Decl. ¶¶2-4, 7; Armas Decl. ¶¶2-3, 7. Similarly, Plaintiff Donna Brown, whose multiple sclerosis has caused her paralysis from the neck down, maintains an active life in her church and community with IHSS assistance with meal preparation, eating, getting out of bed, basic hygiene, bathing, dressing, emptying her catheter, self administration of medication, and transportation to medical appointments. D. Brown Decl. ¶¶1-3, 5, 7-9.

The IHSS program is administered by counties, which may establish public authorities to provide for the delivery of IHSS services. Cal. Welf. & Inst. Code §12301.6(a). These public authorities are considered employers of IHSS providers for some purposes, including bargaining about providers' wages and benefits. *Id.*, §12301.6(c)(1). However, individual consumers hire, fire, and supervise their own IHSS providers. *Id.* Consumers may find IHSS providers through personal connections, registries maintained by county public authorities, or any other method. *Id.* §12301.6(e)(1), (h). The State, county and public authorities are not responsible for finding an IHSS provider for a consumer unable to hire one. *See* Pls. Request for Judicial Notice (hereinafter "Pl. RJN"), Ex. Q at 3.[1]

Some IHSS providers are related to their clients, and became providers only because a loved one needed care. L. Brown Decl. ¶7; Cerqua Decl. ¶3; Meyer Decl. ¶8. But many consumers employ unrelated providers. Weissman-Steinbaugh Decl. ¶5; Sheppard Decl. ¶7; Tiedt Decl. ¶7. Consumers can have difficulty finding IHSS providers, in part because of the nature of the work. C. Martinez Decl. ¶5; Weissman-Steinbaugh Decl. ¶6; Ayers Decl. ¶5; Tiedt Decl. ¶6; Marzette Decl. ¶6; *see also* Pl. RJN Exs. R, S. The actual work performed by an IHSS provider depends on the needs of the individual consumer,[2] but is often difficult and can be unpleasant. Some IHSS consumers are incontinent or unable to reach the bathroom when necessary. Billops Decl. ¶2; Marzette Decl. ¶4. Others have mobility impairments and must be lifted by their providers. Armas Decl. ¶6; Calhoun Decl. ¶8; Wilson Decl. ¶4. Still others have behavioral or mental health issues that make providing even basic services extremely challenging. Weissman-Steinbaugh Decl. ¶6; Y. Lee Decl. ¶3; Lam Decl. ¶5.

The IHSS rates (i.e., wages and benefits) affect the difficulty of finding providers. Because the vast majority of IHSS consumers receive services as part of California's Medicaid program ("Medi-Cal"), the federal government pays a certain percentage of these costs. *See* 42 U.S.C. §1396d(b).[3] Of the remaining cost, often referred to as the "non-federal share," the county pays 35 percent and the state

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[1] Plaintiffs' RJN cites refer to the page numbers assigned by the electronic filing system.

[2] The counties, using state-established guidelines, regularly assess each consumer's needs to determine how many hours of assistance per month the consumer needs. *Id.* §§12301.1(b), 12301.2. A consumer may be authorized up to a maximum of 283 hours. *Id.* §12300(h)(3).

[3] Pursuant to Section 5001(b)-(c) of the American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115, states are eligible for a temporary increase in the federal share of provider rates from October 1, 2008 through December 31, 2010.

pays 65 percent of wages up to the current statutory cap of $12.10 per hour, above which the State will not share the costs. Cal. Welf. & Inst. Code §§12306, 12306.1(c)-(d).

The rates paid to IHSS providers vary by county. The California Department of Health Care Services ("DHCS") is required by state law to "establish a provider reimbursement rate methodology to determine payment rates." *Id.* §14132.95(j)(2)(A). Consistent with that mandate, California's Medicaid State Plan provides that wages and benefits established through collective bargaining at the county level are the "rates recommended by the Department." Pl. RJN, Ex. P at 7-9. But these rates are subject to, and do not take effect without, DHCS approval. Cal. Welf. & Inst. Code §12306.1(a)-(b); Pl. RJN, Ex. N. DHCS may grant conditional approval subject to available state funding. Cal. Welf. & Inst. Code §12306.1(b).

At present, IHSS providers in many counties are paid wages that exceed $9.50 per hour and/or a combination of wages and benefits that exceed $10.10 per hour. Golubock Decl., Ex. B.[4]

B. Enactment Of Section 12306.1(d)(6) to Cut IHSS

In early 2009, the California Legislature held the Third Extraordinary Legislative Session to adopt emergency budget measures. As part of this session, the Legislature enacted Senate Bill No. 6 ("SBX3 6"), §9, which amended Cal. Welf. & Inst. Code §12306.1(d) to add the following provision ("Section 12306.1(d)(6)"):

> (6) Notwithstanding [other provisions of §12306.1(d)], the state shall participate as provided in subdivision (c) in a total cost of wages up to nine dollars and fifty cents ($9.50) per hour and in individual health benefits up to sixty cents ($0.60) per hour. This paragraph shall become operative on July 1, 2009.

This provision reduces the maximum IHSS provider rate in which the State will participate from $12.10 per hour to $10.10 per hour ($9.50 in wages; $0.60 in benefits), effective July 1, 2009. The Legislature estimated this would reduce state IHSS payments by $74 million (Pl. RJN, Ex. K at 3), but

[4] Plaintiff Service Employees International Union ("SEIU") local unions United Healthcare Workers West, United Long Term Care Workers, and Local 521 represent IHSS providers in a number of counties with wages above $9.50 (Alameda, Calaveras, Contra Costa, Fresno, Marin, Mendocino, Monterey, Napa, Sacramento, San Benito, San Mateo, Santa Cruz, Solano, Sonoma, and Yolo) and/or benefits above $0.60 (Alameda, Contra Costa, Fresno, Marin, Sacramento, San Francisco, and Santa Clara). Rasberry Decl. ¶11; Golubock Decl., Ex. B.

that number is inflated because it does not reflect a subsequent increase in federal funds. *See* Pl. RJN, Ex. U at 15 (row 344); *infra* n.9.

SBX3 6 was pushed through in haste to close a budget gap. As originally introduced on January 5, 2009, the bill contained no substantive terms, but stated its intention to "address[] the fiscal emergency declared by the Governor by proclamation on December 19, 2008." Pl. RJN, Exs. A, B. On February 14, 2009, SBX3 6 was amended to include the IHSS cap. *Id.*, Ex. D. The bill passed the Assembly the very same day, and passed the Senate five days later. *Id.*, Ex. A. Governor Schwarzenegger signed SBX3 6 into law on February 20, 2009. *Id.*

C. Implementation of Section 12306.1(d)(6)

The IHSS cuts in SBX3 6 were not automatic. The Legislature provided that they would not be implemented if the Treasurer and Department of Finance certified, by April 1, 2009, that California would receive at least $10 billion is federal ARRA funds that could be used to offset General Fund expenditures. *See* Cal. Gov. Code §99030; Budget Act of 2009, Senate Bill X3 No. 1, §8.30. On March 27, 2009, the Treasurer and Department of Finance agreed that California would receive less than $10 billion in such funds (*see* Pl. RJN, Exs. L, M), and therefore, that Section 12306.1(d)(6) would go into effect on July 1, 2009. The Treasurer expressed his view that the IHSS cuts "target[] people who most need our help," predicted that "the suffering that would be caused by these particular cuts [will] be both severe and compelling," and urged the Legislature to reconsider them. Pl. RJN, Ex. L at 3.

On April 2, 2009, the California Department of Social Services ("CDSS"), which administers the IHSS program, issued an All-County Letter informing counties that the Section 12306.1(d)(6) cuts would be implemented. Pl. RJN, Ex. N. CDSS directed counties to "submit a PA Rate Request to reduce the wages and health benefits to the $10.10 level" ($9.50 per hour in wages and $.60 per hour in benefits) by May 1, 2009, in order for the new rate to take effect on July 1, 2009. *Id.* The letter also stated that if the county wage remained above $9.50 the State would no longer share in the cost above $9.50. *Id.* On May 1, 2009, CDSS issued an All-County Information Notice directing all counties paying above $9.50 per hour in wages to submit a rate change request, and moved the applicable deadline to June 1, 2009. Pl. RJN, Ex. O.

On May 5, 2009, an official at the U.S. Department of Health and Human Services ("HHS") issued a letter concluding that, if California implemented Section 12306.1(d)(6), the State would violate a provision of the federal ARRA. Golubock Decl., Ex. D. On May 20, 2009, another HHS official overruled this determination, clearing the way for Section 12306.1(d)(6) to take effect. *Id.*, Ex. E.

At least 12 counties that currently pay wages greater than $9.50 per hour have submitted Rate Change Requests to CDSS to reduce wages. McDevitt Decl. ¶¶2-4 & Ex. A; Nam Decl. ¶¶2, 4-6, 9; Roth Decl. ¶¶4(b), 5(a), (b), (e), 6. For example, Defendant Fresno County IHSS Public Authority has submitted a Rate Change Request that hourly wages be reduced from $10.25 to $9.50 and benefits from $.85 to $.60.[5] *See* Pl. RJN, Ex. T. These reduced rates will be effective July 1, 2009. Four additional counties currently paying more than $9.50 per hour are likely to submit similar Rate Change Requests in the imminent future.[6] Nam Decl. ¶10; Roth Decl. ¶¶4(a), (c); 5(c), (d).

D. Effect Of Section 12306.1(d)(6)

1. On IHSS Providers

If Section 12306.1(d)(6) is implemented, the wages of tens of thousands of IHSS providers will be reduced on July 1, 2009. The vast majority of providers are already living on extremely limited incomes. The wage reduction will have a substantial financial impact and, in some situations, will lead providers to leave the IHSS program to seek other employment. Howes Decl. ¶¶9, 58; Calhoun Decl. ¶¶6-7; Dominguez Decl. ¶¶6-7; Armas Decl. ¶¶5-7; C. Martinez Decl. ¶¶5-8; Peppars Decl. ¶¶5-7; D. Brown Decl. ¶¶6-9; L. Brown Decl. ¶¶10-13; Billops Decl. ¶¶5-7; Marzette Decl. ¶¶9-13; Schwartz Decl. ¶4; Hamry Decl. ¶6-7; Hunter Decl. ¶¶5-6; Wilson Decl. ¶5.

For those IHSS providers who remain in their jobs, the wage cuts will be devastating, and may result in providers' inability to pay for basic needs like food, health care, or housing. Sanchez Decl. ¶5;

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[5] These rate change requests also include the following: Alameda ($11.50 to $10.20), Calaveras ($9.75 to $9.50), Contra Costa ($11.50 to $10.32), Mendocino ($9.90 to $9.64), Napa ($11.50 to $10.20), Placer ($10.00 to $9.68), Riverside ($10.25 to $9.50), San Benito ($10.50 to $9.85), San Mateo ($11.50 to $10.50), Solano ($11.50 to $10.50), and Yolo ($10.50 to $9.50). McDevitt Decl. ¶¶2-4; Nam Decl. ¶¶2, 4-6, 9; Roth Decl. ¶¶4(b), 5(a), (b), (e).

[6] These counties include Monterey (proposing a phased reduction down to $9.50, from current wage of $11.50); Sacramento (proposing a wage reduction from $10.40 to $9.50 and benefit reduction from $.70 to $.60); Santa Cruz (proposing a wage reduction from $11.50 to $9.50) and Sonoma (proposing a reduction from $11.50 to $10.20). Roth Decl. ¶¶4(a), (c), 5(c), (d).

Schwartz Decl. ¶4; Blannon Decl. ¶4; L. Brown Decl. ¶¶9, 11; Rae Decl. ¶5; Cerqua Decl. ¶5; Chen Decl. ¶6; Madanat Decl. ¶5. The reduction of an $11.50 hourly wage to $9.50 per hour, for example, will represent a more than 17% wage cut. Many of these providers are family members of their IHSS consumers and responsible for providing housing, food, medication, and other necessities for their elderly or disabled relative, and so both the providers and IHSS consumers are likely to suffer serious deprivations.[7] *See* Blannon Decl. ¶4 (provider and brother/consumer "would not be able to purchase basic things, like three meal[s] a day and it would be difficult to pay rent" or for provider's diabetes medication); L. Brown Decl. ¶¶11-12 (provider and son/consumer "could end up losing [our] home"); Cerqua Decl. ¶5 (provider and daughter/consumer could "lose our housing" and provider "would lose the ability to pay for health care"); Madanat Decl. ¶5 ("it would become extremely difficult to pay for food, clothing, utilities, and rent"); A. Martinez Decl. ¶6 (provider and husband/consumer would have to leave current apartment); Rae Decl. ¶5 (provider and consumer/son "would not be able to afford to stay in our home"); Sanchez Decl. ¶5 (provider could no longer afford consumer/daughter's medication or food required by consumer's food allergies).

The reduction in IHSS rates will lead other providers to reduce their IHSS hours or to cease to provide IHSS services altogether and seek other jobs. Howes Decl. ¶¶9, 56-63; *see also, e.g.*, Marzette Decl. ¶¶2, 10 (currently earns $16 per hour in second job as nursing assistant and could earn overtime rate of $24 per hour or $20 per hour performing private care); Billops Decl. ¶5 (could look for property maintenance work); Hamry Decl. ¶7 (currently earns $12 per hour for private home care agency and could increase those hours); Hunter Decl. ¶5 (currently earns $13 per hour for private homecare agency and could work more hours); Schwartz Decl. ¶4; Armas Decl. ¶5; Huamani Decl. ¶6; Peppars Decl. ¶5; Figueroa Decl. ¶4. For example, IHSS providers could seek home care work at private agencies, which typically pay between $12 and $15 per hour. Traum Decl. ¶¶3-8. Many such agencies are currently hiring home care providers. *Id.* ¶9.

[7] Providers who are related to their clients will be understandably reluctant to stop providing IHSS services to their loved ones, particularly when it is uncertain whether it would be possible to find a replacement for the lower wage rate. *See, e.g.*, Y. Lee Decl. ¶6.

Plaintiffs' expert, Economics Professor Candace Howes, has conducted a preliminary analysis of data from CDSS, the California Employment Development Department, and an IHSS retention study of five California counties. Howes Decl. ¶¶ 3-23. Professor Howes estimates the wage reductions currently contemplated are likely to cause approximately 4,000 additional providers to leave IHSS employment. *Id.* ¶56. This conclusion is based upon her quantitative analysis of the responsiveness of the relevant IHSS labor markets to changes in wages, based on prior data and taking into account the independent variables (including the unemployment rate) that affect fluctuations in that responsiveness. *Id.* ¶¶ 29-63.

2. On IHSS Consumers

IHSS consumers who lose their providers will face three options: find another provider, go without IHSS services but attempt to remain in their homes, or enter institutional care.

Even those fortunate individuals who are able to find other providers at lower wages will be harmed by a loss of continuity of care and disruption of relationships that have taken months or years to build. Dominguez Decl. ¶5 ("I did not know [my provider] before she began working for me as my IHSS provider. But she treats me like a member of her family. She invites me to her family gatherings and take me on her family vacations."); Wilson Decl. ¶6 (consumer and provider "are very close and have developed a mother-daughter-like relationship"); Billops Decl. ¶6 (consumer "is a private person" and "[i]t took time for her to develop trust in me, [even though] I was referred to her by her daughter"); Figueroa Decl. ¶5 ("Because of [consumer's] paranoia issues, it is very difficult for her to find someone that she will trust. Before I became her IHSS provider, she had been without a provider for many months because she had so much trouble finding a provider she trusted.").

For many, the consequences will be even more severe, threatening to undermine if not destroy their health and independence. Finding a new IHSS provider, which has been difficult in the past for many IHSS consumers, will be impossible for some given the reduced wages. For example, it is very difficult to provide care for Teresa Armas' client, who is mostly unable to walk and must be physically lifted into the shower. Armas Decl. ¶6. It would be difficult to find a new provider at lower wages because providers could find easier jobs for equal or more pay. *Id.* Shawna Marzette's client went

through 15 or 16 providers before she found Ms. Marzette. Marzette Decl. ¶6. These providers were either unreliable – failing to show up when expected or walking off of the job – or would quit because of the difficulty of providing care. *Id.* Charlene Ayers, who is legally blind, has had difficulty finding honest IHSS providers who will not take advantage of her disability. Ayers Decl. ¶5; *see also* D. Brown Decl. ¶7; Tiedt Decl. ¶6; Gordon Decl. ¶6.

Plaintiffs' expert, Professor Howes, estimates that approximately 2,700 current IHSS consumers whose providers will leave their jobs as a result of the rate cut may be unable to find providers to replace them. Howes Decl. ¶66.. Based on past studies, Professor Howes estimates that over one-fifth of these IHSS consumers will try to remain at home without assistance from an IHSS provider. *Id.* This would be at best difficult and at worst quite dangerous. Ayers Decl. ¶9 ("would be unable to clean my apartment or cook for myself" or "to go out into the community"); Figueroa Decl. ¶5 ("would go crazy, have extreme anxiety and panic episodes"); Tiedt Decl. ¶8 (could not go to doctors' appointments, leave apartment, go shopping or get food); Hamry Decl. ¶9. As Professor Mitchell LaPlante, an expert in community-based care, explains, the adverse consequences of such consumers going without care include "going hungry, weight loss, dehydration, falls, injuries due to falls, burns, and dissatisfaction." LaPlante Decl. ¶7; *see also* Howe Decl. ¶65.

Some of these consumers will be forced to enter nursing facilities or other residential institutions because of their inability to remain in their homes without the help of an IHSS provider. Armas Decl. ¶¶6-7; Billops Decl. ¶5, 7; D. Brown Decl. ¶¶7-9; L. Brown Decl. ¶12; Calhoun Decl. ¶9; Dominguez Decl. ¶7; Figueroa Decl. ¶4; Gordon Decl. ¶¶6-7; Huamani Decl. ¶8; Hunter Decl. ¶8; C. Martinez Decl. ¶8; Marzette Decl. ¶¶12-13; Schwartz Decl. ¶4; Sheppard Decl. ¶8; Tiedt Decl. ¶8; Weissman-Steinbaugh Decl. ¶7; Wilson Decl. ¶9. Based on past studies, Professor Howes estimates that 1,400 consumers will be forced into such institutional care by the rate cut. Howes Decl. ¶67.

The consequences of institutionalization – among others, loss of independence and reduced quality of care due to high patient-staff ratios, Schnelle Decl. ¶¶5-6 – would be devastating for individuals who are currently able to live relatively independent and autonomous lives in their homes and, in many cases, to participate actively in their communities. D. Brown Decl. ¶¶8-9

(institutionalization would preclude her from engaging in current activities like teaching Sunday school or planning community conference for disaster awareness); Gordon Decl. ¶¶2, 7 (would prevent work as co-director of organization providing emergency services to elderly and disabled persons); Sheppard Decl. ¶9 (does not want to enter nursing home because used to work in one and witnessed poor quality of care including residents who "ha[d] to sit in their own urine all day long" or who "would not get enough to eat"); Billops Decl. ¶7; L. Brown Decl. ¶13; Calhoun Decl. ¶9; Huamani Decl. ¶8; Marzette Decl. ¶13; Weissman-Steinbaugh Decl. ¶8; Wilson Decl. ¶9.

Moreover, the movement of even a portion of IHSS consumers into institutional care settings will cost the State tens of millions of dollars. The average total cost per consumer of providing IHSS services in the counties affected by SBX3 6 is $12,400 per year; the State's share of this is $2,700. Howes Decl. ¶¶73, 75. The average total cost to house a patient in a California nursing home for a year in the affected counties is $65,339, and the State's share of this cost is $25,110. Howes Decl. ¶¶72, 75.[8] Accordingly, Professor Howes estimates that the cost of approximately 1,400 IHSS consumers entering nursing homes as a result of Section 12306.1(d)(6) would be approximately $31 million. *Id.* ¶76. This significantly offsets the savings that the State claims will result from Section 12306.1(d)(6).[9]

ARGUMENT

To obtain a preliminary injunction, a plaintiff must establish that "'he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Natural Res. Def. Council, Inc.*, __ U.S. __, 129 S.Ct. 365, 374 (2008)). Plaintiffs easily satisfy each requirement.[10]

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[8] Because, with very limited exceptions, the State contracts with private facilities to administer nursing home care and pays on a per-patient basis, this average cost is a reasonably accurate assessment of the actual cost to the State for each patient. Jimenez Decl. ¶¶4-6.

[9] These savings on IHSS payments would be less than the $74 million that the State predicted would result from the lower wages; when the ARRA's temporary increase in the federal share of provider rates is taken into account, the number drops to $60 million. Howes Decl. at 25 n. 6, ¶77; RJN, Ex. U at 15 (row 344).

[10] Class certification is not necessary at this stage because granting relief to any members of the consumer class (*i.e.*, invalidating the statute) will effectively grant relief to the entire class. *See* Newberg on Class Actions, §9:45 at 413-14 (4th Ed. 2002) (interim injunctive relief should be awarded on a class-wide basis where "activities . . . are directed generally against a class of persons"); *cf. Joyce v. City &*

I. PLAINTIFFS HAVE AN OVERWHELMING LIKELIHOOD OF SUCCESS ON THE MERITS

A. Section 12306.1(d)(6) Violates Procedural And Substantive Medicaid Requirements.

Title XIX of the Social Security Act, 42 U.S.C. §§ 1396a-1396v (the "Medicaid Act"), authorizes federal grants to states for medical assistance to low income persons who are aged, blind, disabled, or members of families with dependent children. *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1493 (9th Cir. 1997). The program is jointly financed by the federal and state governments and administered by the states. *Id.* To receive matching federal financial participation for such services, states must agree to comply with the applicable federal Medicaid law. *Id.*

The Medicaid Act requires a participating state to develop a state plan which describes the policy and methods to be used to set payment rates for each type of service included in the program. *Id.* at 1494. A provision of the Medicaid Act, 42 U.S.C. §1396a(a)(30)(A) (hereinafter "Section 30(A)") requires, in relevant part, that a state's Medicaid plan:

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary . . . to assure that payments are consistent with efficiency, economy, *and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area . . . .*

(Emphasis added).

The italicized language sets forth what are known as Section 30(A)'s "quality of care" and "access to care" or "equal access" provisions. *See Independent Living Ctr. of S. Cal. v. Shewry*, 543 F.3d 1050, 1053 (9th Cir. 2008); *Ball v. Rodgers*, 492 F.3d 1094, 1097 (9th Cir. 2007). They require that the state Medicaid plan "establish reimbursement rates for health care providers that are both consistent with high-quality medical care . . . and sufficient to enlist enough providers to ensure that medical services are generally available to Medicaid recipients . . . ." *Independent Living Ctr.*, 543 F.3d

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County of San Francisco, 846 F. Supp. 843, 853-54 (N.D. Cal.1994) ("Since a determination has not yet been made whether plaintiffs can proceed as a class, it is appropriate at this stage that the Court consider the injuries alleged to individuals within the entire, proposed class."). However, if the Court disagrees, it should certify the class of consumers preliminarily for purposes of interim relief. *Cf.* Newberg, §9:45 at 413-14 ("Preliminary injunctive relief on behalf of a class is freely awarded on a classwide basis. The court may conditionally certify the class or otherwise award a broad preliminary injunction, without a formal class ruling, under its general equity powers.").

at 1053; *Orthopaedic Hosp.*, 103 F.3d at 1497 ("[P]ayments should be . . . high enough to provide for quality care and to ensure access to services").

"Section (30)(A) imposes both procedural and substantive requirements on states when they set reimbursement rates for [care and services] provided to Medicaid beneficiaries." *Mission Hosp. Regional Med. Ctr. v. Shewry*, 168 Cal.App.4th 460, 473 (2008). The wages and benefit payments to IHSS providers are Medicaid "reimbursement rates" within the meaning of §30(A). *See supra* at 4.[11] Section 12306.1(d)(6) violates both the procedural and substantive requirements.

1. Defendants Failed To Comply With Section 30(A)'s Procedural Requirements.

In *Orthopaedic Hospital v. Belshe*, the Ninth Circuit held that Section 30(A) "requires the state to consider efficiency, economy, quality of care, and access before setting Medi-Cal reimbursement rates." *California Pharmacists*, 563 F.3d at 850 (citing *Orthopaedic Hosp.*, 103 F.3d at 1496); *accord Independent Living Ctr. of S. Cal. v. Shewry*, 2008 WL 3891211, at *4 (C.D. Cal. Aug. 18, 2008); *see also Mission Hosp.*, 168 Cal.App.4th at 473-74 ("As a result of section (30)(A), when the state seeks to modify its reimbursement rates, it must consider efficiency, economy, quality of care, and equality of access, and it must rely on responsible cost studies as a basis.").

When the state fails to conduct a Section 30(A) analysis regarding the impact of a rate cut, that cut must be enjoined. *See California Pharmacists*, 563 F.3d at 849-50 (upholding preliminary injunction: where Section 30(A) factors not considered prior to enactment of rate cut; plaintiffs made "strong showing" of likelihood of success on merits); *see also Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 364 F.3d 925, 929-31 (8th Cir. 2004) (enjoining cuts: plaintiffs established procedural due process violation where state agency failed to consider effect of proposed change on

[11] SBX3 6 was a rate cut for purposes of Section 30(A). According to communications that DHCS sent to the federal government to explain why SBX3 6 did not violate the ARRA, the State's prior IHSS rate approvals had been provisional and subject to the availability of State funding. Golubock Decl., Exs. A, C. After the adoption of SBX3 6, the State informed counties that existing rates above $9.50/$0.60 were no longer approved and directed them to submit new rates to become effective on July 1, 2009. Pl. RJN, Exs. N, O. SBX3 6 also left the State with no choice but to approve requested rate reductions down to $9.50/$0.60, regardless of the 30(A) factors, because the ARRA precludes the State from requiring counties to bear a greater percentage share of IHSS rates to make up for a State funding reduction. Thus, the State's decision to approve all requested rate reductions down to $9.50/$0.60 was already made by SBX3 6.

equal access and quality of care); *Independent Living Ctr.*, 2008 WL 3891211, at *11 (enjoining cuts: "Because respondent has failed to demonstrate that the State of California considered whether the ten percent rate reduction would be consistent with efficiency, economy, quality of care, and equality of access, or the effect of providers' costs on Medi-Cal beneficiaries' access to medical providers and services, the Court finds that petitioners have demonstrated a likelihood of succeeding on the merits of their Supremacy Clause claim."); *Affiliates, Inc. v. Armstrong*, 2009 WL 1197341, at *4-*7 (D. Idaho Apr. 30, 2009) (enjoining cuts for failure to consider §30(A) factors); *Washington State Pharm. Ass'n v. Gregoire*, 2009 WL 1259632, at *1 (W.D. Wash. Mar. 31, 2009) (same).

The Legislature's enactment of Medi-Cal cuts can be sustained only if there is evidence "the legislature actually considered" an analysis regarding the impact of the cuts prior to enacting the statute. *California Pharmacists*, 563 F.3d at 850 (not enough that an analysis existed, where there was no evidence it was actually considered). Analyses performed after enactment cannot satisfy the procedural requirements of Section 30(A) because the statute mandates that rates be "based on" consideration of the relevant factors. *Id.* ("post-hoc rationalization for a legislative decision that had already been made" does not satisfy §30(A)'s procedural requirements). Finally, it is not permissible to set a particular rate "for purely budgetary reasons." *Orthopaedic Hosp.*, 103 F.3d at 1499 n.3; *see also Arkansas Med. Soc., Inc. v. Reynolds*, 6 F.3d 519, 531 (8th Cir. 1993) ("Abundant persuasive precedent supports the proposition that budgetary considerations cannot be the conclusive factor in decisions regarding Medicaid." (collecting cases)); *Clayworth v. Bonta*, 295 F.Supp.2d 1110, 1129 (E.D. Cal. 2003), *vacated on other grounds*, 140 Fed.Appx. 677 (9th Cir. 2005) ("Budget constraints are not alone a valid justification for rate setting.").

In this case, the California Legislature never considered the Section 30(A) factors when it adopted Section 12301(d)(6). SBX3 6, which include the IHSS cap, states only that it "addresses the fiscal emergency declared by the Governor by proclamation on December 19, 2008." Pl. RJN, Ex. F at 17. *Cf. Clayworth*, 295 F.Supp.2d at 1128 (statutory language supports conclusion that statute was enacted for budgetary reasons). No analyses in Section 12306.1(d)(6)'s legislative history mention the impact of the provision on access to care or the quality of care. Instead, they focus solely on the

purported cost savings to the State. *See* Pl. RJN, Exs. A-J. And the Legislature conducted no hearings prior to the passage of SBX3 6 to determine the impact on IHSS services. *See* Rasberry Dec. ¶4.

Indeed, on April 1, 2009 – well after the enactment of Section 12306.1(d)(6) – Eva Lopez, the Deputy Director of the Adult Programs Division of CDSS testified at a hearing before Assembly Budget Subcommittee No. 1 that no such analysis of the impact of Section 12306.1(d)(6) on access and quality had been performed. *Id.* ¶¶5-6 & Ex. A. The following exchange occurred between Ms. Lopez and Assemblymember Jim Beall, Jr.:

> Assemblymember Beall: Have you determined if the wages go down and people withdraw from the IHSS program what the impact on increased levels of nursing home referrals for IHSS individuals would be in those areas that are high cost?
>
> Lopez: No analysis has been conducted.
>
> ***
>
> Beall: I believe that if we really wanted to know what the real impact of this is, we would probably have to analyze whether or not this would basically cause a reduction in IHSS numbers in the County and whether or not it would have an impact on increasing the number of people that would go to nursing homes. Wouldn't you agree with that?
>
> Lopez: I think the discussions that occurred through this last budget process was a very difficult process and this is what the Legislature and the Administration moved forward with. And it's very difficult. And we would need to do – pursue additional information in order to even attempt to do such an analysis.
>
> Beall: OK. So you're saying you don't want to do the analysis? Is that what you're saying?
>
> Lopez: No, I'm not saying that we don't *want* to do the analysis. I guess what I'm suggesting is that an analysis of that nature would need to – it would not be something that would be as easily done. It would need to be really looked at – looked at, work with Department of Health Care Services, look at how many folks have gone into the nursing homes - I mean, it's a variety of issues that we would have to look at.

Rasberry Decl. ¶6 & Ex. A.

Further, on April 21, 2009, the SEIU State Council sent public records requests seeking "[a]ll documents discussing, analyzing, reflecting, or otherwise regarding the impact that the wage and health benefits cap set forth in California Welfare & Institutions Code §12306.1(d)(6) will or might have on any aspect of California's Medi-Cal program" to the Legislative Analyst's Office ("LAO"), CDSS, and DHCS. Rasberry Decl. ¶7 & Exs. B-D. In response, the LAO informed the State Council it had no responsive documents. *Id.* ¶8 & Ex. E. Similarly, CDSS has provided no documents in response to the request, and the documents produced by DHCS included no analysis of Section 12306.1(d)(6)'s impact on the Section 30(A) factors. *Id.* ¶¶9-10 & Exs. F-H.

Because Defendants did not adequately consider the impact of Section 12306.1(d)(6) on the various Section 30(A) factors, Plaintiffs have made a "strong showing" of likelihood of success on the merits. *California Pharmacists*, 563 F.3d at 850. Because the Ninth Circuit has held that such a violation of Section 30(A) by itself requires enjoining a Medicaid cut (*see California Pharmacists*), the Court should enjoin the implementation of Section 12306.1(d)(6) on this ground alone and need not reach the remaining claims for preliminary injunctive relief.

2. Section 12306.1(d)(6) Will Violate Substantive Rights Guaranteed By Section 30(A).

Section 12306.1(d)(6) must be enjoined for the additional reason that it will violate the substantive guarantees of Section 30(A)'s quality of care and equal access provisions. *See Alaska Dep't of Health & Soc. Servs. v. Centers for Medicare & Medicaid Servs.*, 424 F.3d 931, 937 (9th Cir. 2005) (affirming disapproval of state plan amendment because proposed rates were not "consistent with efficiency, economy, and quality of care under §30(A)" (quotation marks omitted)). After conducting responsible studies to obtain data, the State must set rates that bear a reasonable relationship to the data on the cost of providing access to quality services. *See Orthopaedic Hospital*, 103 F.3d at 1500 ("Upon remand, the Department should undertake responsible cost studies that will provide reliable data as to the hospitals' costs in providing outpatient services to the end that it determine the cost to an efficient hospital economically providing quality care. The state must then set rates that have some reasonable relation to such costs, the state bearing the burden of justifying any rate that substantially deviates from such determined costs.").

a. Equal Access. Section 12306.1(d)(6) will prevent Medi-Cal recipients from receiving in-home care "at least to the extent that such care [is] available to the general population in the geographic area." Section 30(A); 42 C.F.R. §447.204 ("agency's payments must be sufficient to enlist enough providers so that services under the plan are available to recipients at least to the extent that those services are available to the general population"); *Moody Emergency Med. Serv., Inc. v. City of Millbrook*, 967 F.Supp. 488, 493 (M.D. Ala. 1997) ("A state plan breaches its obligation under the equal access provision if the state reimbursement rate is so inadequate that the number of participating

Medicare health care providers is substantially lower than the number of health care providers available to the general population . . . .").

Plaintiffs' evidentiary burden in this regard must take into account the preliminary stage of the case, the State's failure to provide an analysis, and the recognition that gathering precise data regarding the utilization of home care services by the insured population would present a "high, if not insurmountable, hurdle[]." *Clark v. Richman*, 339 F.Supp.2d 631, 645 (M.D. Penn. 2004). Plaintiffs can meet their burden by relying on various indicia of equal access, including evidence regarding the level of provider participation in the Medi-Cal program and whether consumers are having difficulty obtaining care. *See Clark*, 339 F.Supp.2d at 644 (citing *Clark v. Kizer*, 758 F.Supp. 572, 576 (E.D. Cal. 1990), *aff'd in relevant part sub nom*, *Clark v. Cove*, 967 F.2d 585 (9th Cir. 1992)).

Here, the evidence demonstrates that Section 12306.1(d)(6) will increase provider turnover and decrease the total pool of individuals willing to provide IHSS services. Plaintiffs have produced evidence that IHSS providers will leave their employment based on the wage cuts at issue, and that Plaintiff consumers and others will be unable to find providers to replace them. *See supra* at 8-9. Plaintiffs' expert has reached a preliminary estimate that the cap will cause approximately 4,000 IHSS providers to leave their jobs and that 2,700 consumers may be unable to find providers to replace them. *See supra* at 9. Private home care agencies in the affected counties pay higher wages than $9.50 per hour (*see* Traum Decl. ¶¶3-8; Hamry Decl. ¶7; Hunter Decl. ¶5), giving IHSS providers affected by the wage cuts a strong incentive to turn to the private market and bolstering the conclusion that consumers will be unable to access services for this rate. *See, e.g.*, Marzette Dec. ¶10. As a result, many current IHSS recipients will be forced to go without care altogether, and certainly without the level of home care available to the insured population that does not rely on Medi-Cal.

Because these facts indicate that Section 12306.1(d)(6) will result in a significant disparity between the availability of services available under the plan to Medicaid patients and its availability to those who can afford to pay privately, Plaintiffs have demonstrated a strong likelihood that they will prevail on their claim that Section 12306.1(d)(6) violates Section 30(A)'s equal access guarantee. *See DeGregorio v. O'Bannon*, 500 F.Supp. 541, 551 (E.D. Pa. 1980) ("If providers . . . do not, in fact,

readily offer their services to medicaid recipients, with the result that medicaid recipients are denied access to services comparable to that afforded the general population, the 'equal access' regulation requires, at a minimum, that the Commonwealth set rates with a view toward enlarging the base of provider participation.").

b. Quality of Care. The Ninth Circuit construes Section 30(A) to require "high-quality medical care." *Independent Living Ctr.*, 543 F.3d at 1053; *see also* 42 C.F.R. §440.260 (state plan must include "description of methods and standards to assure that services of are high quality"). Yet the evidence submitted in support of this motion demonstrates that Section 12306.1(d)(6)'s implementation will cause many current IHSS consumers to go without in-home care altogether or to suffer significant gaps or deterioration in in-home assistance. *See* Howes Decl. ¶¶64-67; *see also, e.g.*, Figueroa Decl. ¶¶4-6; Armas Decl. ¶¶5-6; Ayers Decl. ¶¶5, 8; D. Brown Decl. ¶¶6-7; Huamani Decl. ¶7; Rae Decl. ¶5. The absence of care that will thus result is inconsistent with Section 30(A)'s mandate that the Medi-Cal program provide high quality care to recipients. *See* LaPlante Decl. ¶7 (individuals eligible for home care but who go without services "are much more likely to experience adverse consequences, including discomfort, going hungry, weight loss, dehydration, falls, injuries due to falls, burns, and dissatisfaction. These are serious problems that compromise the safety, comfort, and hygiene of such individuals."); Altman Decl. ¶¶5-8 (provider cuts of the type contemplated by Section 12306.1(d)(6) will result in "poorer care, more expensive care, and poorer quality of life for these individuals who are among our most vulnerable").[12]

For all of these reasons, Plaintiffs have also established a substantial likelihood of success in demonstrating that Section 12306.1(d)(6) will violate Section 30(A)'s substantive guarantees.

B. Implementation of Section 12306.1(d)(6) And The Fresno County Wage Reductions Will Violate The Integration Mandates Of The ADA And The Rehabilitation Act

By reducing IHSS provider wages and creating a shortage of IHSS providers, Section 12306.1(d)(6) will force some IHSS consumers – unable to remain safely at home without critical IHSS

[12] Even those who go into nursing homes will suffer a significant deterioration in quality of care. *See* Schnelle Decl. ¶6 (many nursing homes in California offer poor quality care); *see also* Sheppard Decl. ¶9; Weissman-Steinbaugh Decl. ¶8; Meyer Decl. ¶9; Andy Martinez Decl. ¶7; Billops Decl. ¶7.

services – to enter nursing homes or other residential institutions, thereby violating the integration mandates of the ADA, 42 U.S.C. §12132, and the Rehabilitation Act, 29 U.S.C. §794(a). A preliminary injunction should be granted for this reason as well.

1. The Integration Mandates Of The ADA And Rehabilitation Act Prohibit Unjustified Institutionalization Of Disabled Persons

The ADA and the Rehabilitation Act both prohibit discrimination on the basis of disability; the ADA prohibits such discrimination by public entities, and the Rehabilitation Act prohibits it in programs receiving federal financial assistance. 42 U.S.C. §12132; 29 U.S.C. §794(a).

In *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), the Supreme Court held that the "[u]njustified isolation [of disabled persons] . . . is properly regarded as discrimination based on disability." *Id.* at 597.[13] The Court explained the judgments underlying this recognition:

> First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.

Id. at 600-01 (citations omitted); *see also* 42 U.S.C. §12101(a)(2) (Congressional finding that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem"). As *Olmstead* noted, this interpretation is also embodied in the statutes' implementing regulations, which require that covered services be "administer[ed] . . . in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. §35.130(d) (ADA regulation); *see also id.* §41.51(d) (Rehabilitation Act regulation).

Accordingly, *Olmstead* concluded that persons with disabilities must be placed "in community settings rather than in institutions when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not

[13] Subsequent decisions have concluded that the Rehabilitation Act's anti-discrimination provision imposes the same requirements. *See, e.g., Penn. Protection & Advocacy v. Penn. Dep't of Public Welfare*, 402 F.3d 374, 379 n.3 (3d Cir. 2005); *Radaszewski ex rel. Radaszewksi v. Maram*, 383 F.3d 599, 607 (7th Cir. 2004).

opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with . . . disabilities." 527 U.S. at 587. As the Third Circuit subsequently noted, "[i]t is a gross injustice to keep . . . disabled persons in an institution notwithstanding the agreement of all relevant parties that they no longer require institutionalization. We must reflect on that more than a passing moment." *Frederick L. v. Department of Public Welfare of Comm. of Penn.*, 364 F.3d 487, 500 (3d Cir. 2004).

2. The Implementation Of Section 12306.1(d)(6) And The Proposed Wage Reduction In Fresno County Will Cause Unjustified Institutionalization In Violation Of The ADA And The Rehabilitation Act

The implementation of Section 12306.1(d)(6) and the proposed wage reduction in Fresno County threatens to force Plaintiffs who wish to remain in their homes and are able to do so with the help of IHSS services instead to enter nursing homes or other residential institutions.

For example, Plaintiff Sheppard's provider will have to look for other work if her IHSS wage is reduced, and she does not believe that Ms. Sheppard will be able to find another provider for that lower wage given her past difficulty finding providers. Huamani Decl. ¶¶5-8. Plaintiff Sheppard expects that she will be forced into a nursing home. Sheppard Decl. ¶¶6-9. Other Plaintiffs are in a similar situations. *See supra* at 9.

In addition, Professor Howes' analysis shows that reducing wages will cause many IHSS providers to leave their jobs, and that a substantial number of IHSS consumers will be unable to find replacements. Howes Decl. ¶¶56, 64-67. Many of those consumers will end up in nursing homes, when they could have remained in their homes with IHSS services. *Id.* ¶67; LaPlante Decl. ¶7; Schnelle Decl. ¶5.[14] This threatened institutionalization is a violation of the integration mandates of the ADA and the Rehabilitation Act. *Olmstead*, 527 U.S. at 597 ("Unjustified isolation . . . is properly regarded as discrimination based on disability.").[15]

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[14] Howes' analysis shows that this is true in Fresno County as well. Howes Decl. ¶78.

[15] Plaintiffs are qualified individuals with disabilities, *see* 42 U.S.C. §§12131(2), 12102(2); 29 U.S.C. §705(20)(B), and Defendants are regulated entities under the ADA and the Rehabilitation Act, *see* 42 U.S.C. §12131(1); 29 U.S.C. §794(b)(1). In addition, as Plaintiffs are currently receiving IHSS services in their homes, *Olmstead*'s qualifications that community placement is only required if "the State's treatment professionals have determined that community placement is appropriate [and] the transfer from institutional care to a less restrictive setting is not opposed by the affected individual," 527

In a very similar case, the District of Arizona recently found that Arizona violated the integration mandates of the ADA and Rehabilitation Act by, among other things, failing to compensate home care workers adequately and thereby creating "a shortage of attendant care workers, which prevented Plaintiffs from receiving all of the needed and authorized services in their care plans." *Ball v. Rodgers*, No. 00-cv-67, 2009 WL 1395423, at **5-6 (D. Ariz. Apr. 24, 2009) (appeal pending). The court found that the state's "failure to provide Plaintiffs with the necessary services threatened Plaintiffs with institutionalization, prevented them from leaving institutions, and in some instances forced them into institutions in order to receive their necessary care." *Id.* Just as in *Ball*, Plaintiffs here have demonstrated a likelihood that the reduced provider wages resulting from Section 12306.1(d)(6) will "threaten[] Plaintiffs with institutionalization" and thus violate the ADA and Rehabilitation Act.

Similarly, in *Fisher v. Oklahoma Health Care Authority*, the Tenth Circuit considered a state program limiting recipients of Oklahoma's community-based Medicaid services to five prescriptions per month, regardless of medical necessity; residents of nursing homes were not subject to the restriction. 335 F.3d 1175, 1178 (10th Cir. 2003). The program was implemented purely for budgetary reasons. *Id.* at 1178-79. The plaintiffs – recipients of community-based services subject to the new policy – presented evidence that this policy "will force them out of their communities and into nursing homes in order to obtain the care that is medically necessary." *Id.* at 1179 (footnote omitted). Because the *Fisher* plaintiffs, like Plaintiffs here, "st[oo]d imperiled with segregation" as a result of the state's new policy, the Tenth Circuit held that they had an ADA claim. *Id.* at 1181-82; *see also Crabtree v. Goetz*, No. 3:08-cv-939, 2008 WL 5330506, at *25 (M.D. Tenn. Dec. 19, 2008) (granting plaintiffs' motion for preliminary injunction preventing state from reducing maximum allowable hours of home health care services because state's new policy "will eliminate services that enable Plaintiffs to remain in their community placement" and thereby "cause their institutionalization into nursing homes").

Moreover, the requested relief does not constitute a "fundamental alteration" of the IHSS program. *See Olmstead*, 527 U.S. at 604 (plurality opinion). It is well-established that "budgetary constraints alone are insufficient to establish a fundamental alteration defense." *Penn. Protection &*

U.S. at 587, are satisfied here.

Advocacy, 402 F.3d at 380; *see also Frederick L.*, 364 F.3d at 495-96; *Fisher*, 335 F.3d at 1182-83. And in any event, as discussed above, Plaintiffs have demonstrated that the increased nursing home admissions caused by implementation of Section 12306.1(d)(6) are likely to cost the State tens of millions of dollars, reducing if not completely offsetting any anticipated savings from cutting the IHSS wage. Howes Decl. ¶76-77. And any savings are a small portion of the State's $14 billion in annual Medi-Cal spending (including almost $2 billion on IHSS alone). Pl. RJN, Exs. W at 2, X at 3.

In sum, Plaintiffs are likely to succeed on their claim that the implementation of Section 12306.1(d)(6) and the wage and benefit reductions of Fresno County threaten them with unjustified institutionalization and thereby violate the integration mandates of the ADA and Rehabilitation Act.

II. THE REMAINING PRELIMINARY INJUNCTION FACTORS OVERWHELMINGLY WEIGH IN FAVOR OF MAINTAINING THE STATUS QUO PENDING A HEARING ON THE MERITS

A. The Failure To Enjoin Section 12306.1(d)(6) And The Wage Cuts Would Result In Immediate, Irreparable Harm To IHSS Consumers And Providers

Unless the Court issues a preliminary injunction before July 1, 2009, Defendants will proceed to implement Section 12306.1(d)(6), and Fresno County and several other counties will implement reductions in the wages and benefits of IHSS providers. This will cause severe and irreparable harm to both IHSS consumers and providers.

Consumer Plaintiffs: The wage reductions are likely to cause many IHSS providers to reduce their hours of IHSS service or leave IHSS employment altogether. *See supra* at 7-8 (relying on declarations and expert analysis of Professor Howes). Many consumer Plaintiffs and class members will be unable to find a satisfactory replacement provider and will either go without IHSS assistance or will be forced to enter a nursing home or other institutional facility. *See supra* at 8-9.

In either case, these consumers' quality of life and the quality of their health care will be greatly diminished, causing them irreparable harm. Going without needed home care services has been documented to cause severe harm to disabled individuals. LaPlante Decl. ¶7 (consumers eligible for community care who go without such care suffer from "going hungry, weight loss, dehydration, falls, injuries due to falls, burns, and dissatisfaction"); Schnelle Decl. ¶¶5-6 (consumers eligible for community care who enter nursing homes suffer from "a loss of independence and autonomy" as well as

"poor quality care"). Declarations filed in this case establish that similar harm may befall Plaintiffs and other IHSS consumers. *See, e.g.*, Ayers Decl. ¶9 ("I would be unable to clean my apartment or cook for myself" and would "not be able to go out into the community the way that I am able to now"); Tiedt Decl. ¶8 (couldn't go to doctors' appointments, leave apartment, go shopping or get food); Figueroa Decl. ¶5 ("would go crazy, have extreme anxiety and panic episodes").

Unwanted entry into a nursing home will cause different but equally irreparable injuries. Individuals who prefer to remain in their homes but are forced into institutional care suffer greatly from the loss of independence and autonomy. Schnelle Decl. ¶5. And regardless of whether nursing home admission is a choice, California nursing homes are often maintained below staffing levels considered to be minimally safe. *Id.* ¶6. Indeed, citations for noncompliance with legal requirements are common. *Id.* Such deficient staffing can lead to problems such as ulcer development, pneumonia, undernutrition, urinary incontinence, infections, and mortality. *Id.*

Plaintiffs and other declarants have established the specific injuries that they personally will suffer upon entry into a nursing home. *See* D. Brown Decl. ¶¶8-9 (consumer paralyzed from the neck down who is currently active member of her community; would "take away all of my freedom"); Weissman-Steinbaugh Decl. ¶8 (mentally retarded consumer; would risk escalating behavioral problems such as "screaming," "run[ning] her wheelchair into things," and "pinching staff"); Gordon Decl. ¶7 (consumer with cerebral palsy who is currently active member of her community; could no longer "maintain[] the quality and independence of the life I currently enjoy"); L. Brown Decl. ¶13 (consumer with Down Syndrome; "would lose control over his activities, schedule, and opportunity to make choices"); Sheppard Decl. ¶9 (consumer's prior experience working in a nursing home makes her fearful of having to enter one; she witnessed poor quality of care including residents who "ha[d] to sit in their own urine all day long" or who did "not get enough to eat").

This "reduc[tion] or terminati[on of] home care services . . . would result in the deprivation of life-sustaining medical services. This certainly constitutes irreparable harm." *Mayer v. Wing*, 922 F.Supp. 902, 905, 909 (S.D.N.Y. 1996) (issuing preliminary injunction prohibiting the reduction of "personal care" home care services such as "assistance with personal hygiene, dressing, feeding and

housekeeping"); *see also Crabtree*, 2008 WL 5330506, at *30 (finding irreparable injury would result from cuts in home care services because "institutionalization will cause Plaintiffs to suffer injury to their mental and physical health, including a shortened life, and even death for some Plaintiffs"); *Long v. Benson*, 2008 WL 4571903, at *2 (N.D. Fla. Oct. 14, 2008) (finding irreparable harm would result if plaintiff were forced out of home-based care and into nursing home because would "inflict an enormous psychological blow" and "because of the very substantial difference in Mr. Griffin's perceived quality of life in the apartment as compared to the nursing home"); *cf. LaForest v. Former Clean Air Holding Co., Inc.*, 376 F.3d 48, 55-56 (2d Cir. 2004) (affirming preliminary injunction prohibiting reduction of retiree health benefits, including increased cost of prescription medications, because would pose "substantial risk to plaintiffs' health"); *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) ("[B]ecause the members of plaintiffs' class are largely infirm and disabled, their resources and life spans are by definition extremely limited. Deprivation of [Social Security disability] benefits pending trial might cause economic hardship, suffering or even death."); *Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir. 1982) (finding sufficient risk of irreparable injury when plaintiffs showed that absent injunction would be denied "needed medical care").

Provider Plaintiffs: IHSS providers, including many of the members of the SEIU Plaintiffs, are also likely to suffer irreparable harm in the absence of an injunction. First, their wages will be reduced. Where, as here, monetary damages would be unavailable to remedy a plaintiff's injury because of the defendants' Eleventh Amendment immunity, the plaintiff will suffer irreparable harm from a monetary loss. *California Pharmacists*, 563 F.3d at 849-52.

Second, the reduction of wages will force many providers – already barely living within their means – to choose among equally important life necessities such as food, health care, and housing. Blannon Decl. ¶4 (if wages reduced, family "would not be able to purchase basic things, like three meal[s] a day and it would be difficult to pay rent"; also, affording provider's diabetes medication "would be much harder if the wages were lowered"); Figueroa Decl. ¶4 (provider would no longer be able to pay for her own health care or make mortgage payments); L. Brown Decl. ¶11 (provider and consumer/son "could end up losing . . . home" and she "will be forced to live in my car because I have

no alternative housing"); Cerqua Decl. ¶5 (provider and daughter/consumer could "lose our housing" and provider "would lose the ability to pay for health care"); Madanat Decl. ¶5 ("[I]t would become extremely difficult to pay for food, clothing, utilities, and rent"); A. Martinez Decl. ¶6 (provider and husband/consumer would have to leave current apartment); Rae Decl. ¶5 (family "would not be able to afford to stay in our home"); Robinson Decl. ¶5 (family "could lose the house that we live in" and provider "do[es] not know how I would be able to afford health care, which I currently pay for myself"); Durham Decl. at 2 (provider would be unable to afford necessary arthritis prescriptions).

This type of harm is plainly irreparable. *See LaForest*, 376 F.3d at 55 (finding irreparable injury where challenged action would cause "(1) substantial risk to plaintiffs' health; (2) severe financial hardship; (3) the inability to purchase life's necessities; and (4) anxiety associated with uncertainty"); *Beltran*, 677 F.2d at 1322 (same, when plaintiffs showed that absent injunction would be denied "needed medical care"); *United Steelworkers of Am. v. Textron, Inc.*, 836 F.2d 6, 8 (1st Cir. 1987) (affirming district court's finding of irreparable harm because plaintiffs "would likely suffer emotional distress, concern about potential financial disaster, and possibly deprivation of life's necessities"); *Garrett v. City of Escondido*, 465 F.Supp.2d 1043, 1052 (S.D.Cal. 2006) (threat of lost housing is irreparable harm).

B. The Balance Of Hardships Tips Strongly In Plaintiffs' Favor

In contrast to the harm likely to befall Plaintiffs and class members – decreased medical care, loss of housing, severe emotional distress – Defendants' sole injury will be the financial costs associated with continuing to participate in current IHSS provider wages for the modest period of time until this case can be heard on the merits.

As an initial matter, Plaintiffs have demonstrated that the wage cuts are likely to cost the State tens of millions of additional dollars, calling into question the existence or extent of any purported financial injury. *See supra* at 10.[16] In any event, even assuming that Defendants will incur some financial loss, this loss does not outweigh the hardship that Plaintiffs would suffer absent an injunction:

[16] Moreover, the federal ARRA included significant funds for California's Medi-Cal program: The state Director of Finance has estimated that the State will receive $6.6 billion in federal stimulus money for Medi-Cal. Pl. RJN, Ex. M at 23.

> [T]he physical and emotional suffering shown by plaintiffs in the record . . . is far more compelling than the possibility of some administrative inconvenience or monetary loss to the government. . . . Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor.

Lopez, 713 F.2d at 1437; *see also Golden Gate Restaurant Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008) ("While the City's and Association's injuries are entirely economic, the Intervenors' injuries include preventable human suffering. Therefore, the balance of hardships tips sharply in favor of the parties seeking relief.").

C. The Public Interest Sharply Favors Granting Relief

Finally, the public interest weighs heavily in favor of granting relief to Plaintiffs and the class. The public interest analysis requires "[t]he government [to] be concerned not just with the public fisc but also with the public weal." *Lopez*, 713 F.2d at 1437. "Our society as a whole suffers when we neglect the poor, the hungry, the disabled . . . ." *Id.* Accordingly, it is beyond dispute that the public interest weighs heavily in favor of granting relief:

> It would be tragic, not only from the standpoint of the individuals involved but also from the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential benefits for any period of time. It would be unfortunate, but far less harmful to society, were the government to succeed in overturning the preliminary injunction but be unable to recoup all or a portion of the funds.

Id. at 1437-38.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be granted.

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Respectfully submitted

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