

1 STEPHEN P. BERZON (SBN 46540)
SCOTT A. KRONLAND (SBN 171693)
2 STACEY M. LEYTON (SBN 203827)
PEDER J. THOREEN (SBN 217081)
3 ANNE N. ARKUSH (SBN 254985)
EMILY B. WHITE (SBN 254294)
4 CAROLINE P. CINCOTTA (SBN 261056)
Altshuler Berzon LLP
5 177 Post Street, Suite 300
San Francisco, California 94108
6 Telephone: (415) 421-7151
Facsimile: (415) 362-8064
7 sberzon@altshulerberzon.com
skronland@altshulerberzon.com
8 sleyton@altshulerberzon.com
pthoreen@altshulerberzon.com
9 ccincotta@altshulerberzon.com
Attorneys for Plaintiffs

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

13 LYDIA DOMINGUEZ, PATSY MILLER, ALEX
BROWN, by and through his mother and next friend
14 Lisa Brown, DONNA BROWN, CHLOE LIPTON, by
and through her conservator and next friend Julie
Weissman-Steinbaugh, HERBERT M. MEYER,
15 LESLIE GORDON, CHARLENE AYERS, WILLIE
BEATRICE SHEPPARD, and ANDY MARTINEZ, on
16 behalf of themselves and a class of those similarly
situated; SERVICE EMPLOYEES INTERNATIONAL
17 UNION UNITED HEALTHCARE WORKERS WEST;
SERVICE EMPLOYEES INTERNATIONAL UNION
18 UNITED LONG-TERM CARE WORKERS; SERVICE
EMPLOYEES INTERNATIONAL UNION LOCAL
19 521; and SERVICE EMPLOYEES INTERNATIONAL
UNION CALIFORNIA STATE COUNCIL,

20 Plaintiffs,

21 v.

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

27 Defendants.
28

) Case No. C 09-02306 CW

) **CLASS ACTION**

) ***PLAINTIFFS' EX PARTE***
) **APPLICATION FOR A TEMPORARY**
) **RESTRAINING ORDER AND**
) **ORDER TO SHOW CAUSE WHY**
) **PRELIMINARY INJUNCTION**
) **SHOULD NOT ISSUE;**
) **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

) **RELIEF REQUESTED BY**
) **JUNE 30, 2010**

TABLE OF CONTENTS

1

2 TABLE OF AUTHORITIES. iii

3 GROUNDS FOR MOTION. 2

4 NEED FOR PROMPT ACTION. 3

5 RELIEF SOUGHT. 3

6 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION
7 FOR A TEMPORARY RESTRAINING ORDER. 4

8 BACKGROUND. 5

9 A. California’s IHSS Program. 5

10 B. Plaintiffs Obtain Preliminary Injunction and Ninth Circuit Affirms. 8

11 C. State Defendants’ Approval Of Fresno County’s Request to Reduce IHSS Provider
12 Rates To Minimum Wage. 9

13 D. Effect Of Fresno County’s Wage Cut. 10

14 1. On IHSS Providers. 10

15 2. On IHSS Consumers. 11

16 LEGAL STANDARD. 12

17 ARGUMENT. 13

18 I. Plaintiffs Have An Overwhelming Likelihood Of Success On The Merits. 13

19 A. State Defendants’ Approval Of The Rate Change Request Violates The Requirements
20 Of The Medicaid Act. 13

21 1. State Defendants Failed To Comply With Section 30(A)’s Procedural
22 Requirements. 14

23 2. Approval Of The Rate Change Request Violates Substantive Rights Guaranteed
24 By Section 30(A). 16

25 a. Equal Access. 17

26 b. Quality of Care. 18

27 B. Approval Of The Rate Change Request Violates The Integration Mandates Of The ADA
28 And The Rehabilitation Act. 19

1. The Integration Mandates Of The ADA And Rehabilitation Act Prohibit
Unjustified Institutionalization Of Disabled Persons. 19

2. The Approval And Implementation Of The Fresno County Wage Reduction Will
Cause Unjustified Institutionalization In Violation Of The ADA And The
Rehabilitation Act. 20

1

2 II. The Remaining TRO Factors Overwhelmingly Weigh In Favor Of Maintaining The Status Quo
Pending A Hearing On The Merits. 22

3 A. The Failure To Enjoin Approval Of The Wage Cuts Would Result In Immediate,
Irreparable Harm To IHSS Consumers And Providers in Fresno County..... 22

4 B. The Balance Of Hardships Tips Strongly In Plaintiffs’ Favor..... 24

5 C. The Public Interest Sharply Favors Granting Relief. 25

6 CONCLUSION. 25

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

TABLE OF AUTHORITIES

FEDERAL CASES

1

2

3 *Affiliates, Inc. v. Armstrong,*
2009 WL 1197341 (D. Idaho Apr. 30, 2009)..... 14

4

5 *Alaska Department of Health & Social Services v. Centers for Medicare &*
Medicaid Services,
424 F.3d 931 (9th Cir. 2005). 16

6

7 *Arkansas Medical Social, Inc. v. Reynolds,*
6 F.3d 519 (8th Cir. 1993) 15

8 *Ball v. Rodgers,*
492 F.3d 1094 (D. Ariz. 2009)..... 13, 20, 21

9

10 *Beltran v. Meyers,*
677 F.2d 1317 (9th Cir. 1982) 23

11 *Beno v. Shalala,*
30 F.3d 1057 (9th Cir. 1994) 24

12

13 *California Pharmacists Association v. Maxwell-Jolly,*
563 F.3d 847 (9th Cir. 2009) *passim*

14 *California Pharmacists Association v. Maxwell-Jolly,*
596 F.3d 1098 (9th Cir. 2010)..... 17, 18, 22

15

16 *Clark v. Coye,*
967 F.2d 585 (M.D. Pa. 2004) 17

17 *Clark v. Kizer,*
758 F. Supp. 572 (E.D. Cal. 1990). 17

18

19 *Clark v. Richman,*
339 F. Supp. 2d 631 (9th Cir. 1992). 17

20 *Crabtree v. Goetz,*
2008 WL 5330506 (M.D. Tenn. Dec. 19, 2008) 21

21

22 *DeGregorio v. O'Bannon,*
500 F. Supp. 541 (E.D. Pa. 1980) 18

23 *Dominguez v. Schwarzenegger,*
596 F.3d 1087 (9th Cir. 2010). *passim*

24

25 *Fisher v. Oklahoma Health Care Authority,*
335 F.3d 1175 (10th Cir. 2003). 20, 21

26 *Frederick L. v. Department of Public Welfare of Committee of Penn.,*
364 F.3d 487 (3d Cir. 2004)..... 20

27

28 *Garrett v. City of Escondido,*
465 F. Supp. 2d 1043 (S.D. Cal. 2006) 24

1	<i>Independent Living Ctr. of S. Cal. v. Shewry</i> ,	
	2008 WL 3891211 (C.D. Cal. Aug. 18, 2008)	14
2		
3	<i>Independent Living Ctr. of S. Cal. v. Shewry</i> ,	
	543 F.3d 1050 (9th Cir. 2008)	13, 18
4	<i>Independent Living Ctr. of S. Cal. v. Shewry</i> ,	
	572 F.3d 644 (9th Cir. 2009)	14, 23, 25
5		
6	<i>LaForest v. Former Clean Air Holding Co., Inc.</i> ,	
	376 F.3d 48 (2d Cir. 2004)	24
7	<i>Long v. Benson</i> ,	
	2008 WL 4571903 (N.D. Fla. Oct. 14, 2008)	23
8		
9	<i>Lopez v. Heckler</i> ,	
	713 F.2d 1432 (9th Cir. 1983)	24, 25
10	<i>Managed Pharm. Care v. Maxwell-Jolly</i> ,	
	603 F. Supp. 2d 1230 (C.D. Cal. 2009)	14
11		
12	<i>Martinez v. Schwarzenegger</i> ,	
	2009 WL 1844989 (N.D. Cal. June 26, 2009)	12
13	<i>Mayer v. Wing</i> ,	
	922 F. Supp. 902 (S.D.N.Y. 1996)	23
14		
15	<i>Mental Disability Law Clinic v. Hogan</i> ,	
	2008 WL 4104460 (E.D.N.Y. 2008)	20
16	<i>Moody Emergency Medical Serv., Inc. v. City of Millbrook</i> ,	
	967 F. Supp. 488 (M.D. Ala. 1997)	17
17		
18	<i>Olmstead v. L.C. ex rel. Zimring</i> ,	
	527 U.S. 581 (1999)	<i>passim</i>
19	<i>Orthopaedic Hospital v. Belshe</i> ,	
	103 F.3d 1491 (9th Cir. 1997)	13, 15, 17
20		
21	<i>Penn. Protection & Advocacy v. Penn. Department of Public Welfare</i> ,	
	402 F.3d 374 (3d Cir. 2005)	19
22	<i>Radaszewski ex rel. Radaszewski v. Maram</i> ,	
	383 F.3d 599 (7th Cir. 2004)	19, 20
23		
24	<i>United Steelworkers of America v. Textron, Inc.</i> ,	
	836 F.2d 6 (1st Cir. 1987)	24
25	<i>V.L. v. Wagner</i> ,	
	669 F. Supp. 2d 1106 (N.D. Cal. 2009)	20, 21
26		
27	<i>Washington State Pharm. Ass'n v. Gregoire</i> ,	
	2009 WL 1259632 (W.D. Wash. Mar. 31, 2009)	14
28	<i>Winter v. Natural Resources Defense Council, Inc.</i> ,	
	555 U.S. ___, 129 S.Ct. 365 (2008)	12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATE CASES

Bunny's Waffle Shop v. California Employment Commission,
24 Cal.2d 735 (1944)..... 11

FEDERAL STATUTES

28 C.F.R. § 35.130..... 20, 22
28 C.F.R. § 41.51..... 20
42 C.F.R. § 431.10..... 15, 13
42 C.F.R. § 440.260..... 18
42 C.F.R. § 447.204..... 17
29 U.S.C. § 705. 21
29 U.S.C. § 794. 5, 19, 21
42 U.S.C. §12101..... 20
42 U.S.C. § 12102. 21
42 U.S.C. § 12131. 21
42 U.S.C. § 12132. 5
42 U.S.C. § 1396. *passim*
ARRA §5001(h)(3), Pub.L. No. 111-5, 123 Stat. 115..... 7

STATE STATUTES

Cal. Labor Code § 1182.12. 9
Cal. Welf. & Inst. Code § 12300. 6
Cal. Welf. & Inst. Code § 12300.1..... 6
Cal. Welf. & Inst. Code § 12301.6 6
Cal. Welf. & Inst. Code § 12303. 6
Cal. Welf. & Inst. Code § 12306. 7
Cal. Welf. & Inst. Code § 12306.1..... *passim*

FEDERAL RULES

Fed. Rule of Civ. Proc. 65. 2

FEDERAL LEGISLATIVE MATERIALS

H.R. Rep. No. 101-247, reprinted in 1989 U.S.C.C.A.N. 1906..... 17

EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER

1
2 Plaintiffs hereby apply for a temporary restraining order (“TRO”), and an order to show cause
3 why a preliminary injunction should not issue, to maintain the status quo by prohibiting Defendants
4 from implementing an In Home Supportive Services (“IHSS”) rate reduction in Fresno County from
5 \$10.25 to \$8.00 in hourly wages, and from \$0.85 to \$0.60 in hourly benefit contributions. Plaintiffs
6 request that the Court set a hearing on the request for a TRO in time for relief to be granted before the
7 challenged rate reduction takes effect on July 1, 2010, and in time for Defendants to reverse the
8 challenged rate reduction in their payment systems before reduced paychecks for the first July pay
9 period begin to issue. The challenged rate reduction either was recently approved by the State
10 Defendants or will be approved before July 1, 2010 absent injunctive relief.

11 Plaintiffs seek to enjoin implementation of the Fresno County rate reduction on three legal
12 grounds. First, as the recent Ninth Circuit decision affirming the preliminary injunction in this case
13 makes clear, State Defendants’ approval of Fresno County’s rate change request without undertaking
14 the analysis required by 42 U.S.C. §1396a(a)(30)(A) (hereinafter “Section 30(A)”) is preempted by the
15 procedural mandates of the Medicaid Act. *See Dominguez v. Schwarzenegger*, 596 F.3d 1087, 1094-95
16 (9th Cir. 2010), *petition for cert. filed* (U.S. Mar. 24, 2010) (No. 09-1158). Second, the dramatic
17 reduction in provider payments in Fresno County will deprive many IHSS recipients of access to home
18 care services that would be available in the private market, and will cause a serious reduction in the
19 quality of IHSS services, in violation of the substantive mandates of Section 30(A). Third, the
20 reduction of IHSS provider payments to the California minimum wage will result in the unnecessary
21 institutionalization of a significant number of Fresno County IHSS recipients who will be unable to
22 find providers willing to work for that amount, in violation of the integration mandate of the
23 Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act.

24 Implementation of the rate change reduction would cause irreparable injury to IHSS providers
25 as well as to the health and welfare of hundreds of low income elderly, blind, or disabled Californians
26 who reside in Fresno County and rely on crucial IHSS services in order to remain safely in their homes.

1
2 **3** **4** **5** **6** **7** **8** **9** **10** **11** **12** **13** **14** **15** **16** **17** **18** **19** **20** **21** **22** **23** **24** **25** **26** **27** **28**
29 **30** **31** **32** **33** **34** **35** **36** **37** **38** **39** **40** **41** **42** **43** **44** **45** **46** **47** **48** **49** **50**
51 **52** **53** **54** **55** **56** **57** **58** **59** **60**
61 **62** **63** **64** **65** **66** **67** **68** **69** **70**
71 **72** **73** **74** **75** **76** **77** **78** **79** **80**
81 **82** **83** **84** **85** **86** **87** **88** **89** **90**
91 **92** **93** **94** **95** **96** **97** **98** **99** **100**
101 **102** **103** **104** **105** **106** **107** **108** **109** **110**
111 **112** **113** **114** **115** **116** **117** **118** **119** **120**
121 **122** **123** **124** **125** **126** **127** **128** **129** **130**
131 **132** **133** **134** **135** **136** **137** **138** **139** **140**
141 **142** **143** **144** **145** **146** **147** **148** **149** **150**
151 **152** **153** **154** **155** **156** **157** **158** **159** **160**
161 **162** **163** **164** **165** **166** **167** **168** **169** **170**
171 **172** **173** **174** **175** **176** **177** **178** **179** **180**
181 **182** **183** **184** **185** **186** **187** **188** **189** **190**
191 **192** **193** **194** **195** **196** **197** **198** **199** **200**
201 **202** **203** **204** **205** **206** **207** **208** **209** **210**
211 **212** **213** **214** **215** **216** **217** **218** **219** **220**
221 **222** **223** **224** **225** **226** **227** **228** **229** **230**
231 **232** **233** **234** **235** **236** **237** **238** **239** **240**
241 **242** **243** **244** **245** **246** **247** **248** **249** **250**
251 **252** **253** **254** **255** **256** **257** **258** **259** **260**
261 **262** **263** **264** **265** **266** **267** **268** **269** **270**
271 **272** **273** **274** **275** **276** **277** **278** **279** **280**
281 **282** **283** **284** **285** **286** **287** **288** **289** **290**
291 **292** **293** **294** **295** **296** **297** **298** **299** **300**
301 **302** **303** **304** **305** **306** **307** **308** **309** **310**
311 **312** **313** **314** **315** **316** **317** **318** **319** **320**
321 **322** **323** **324** **325** **326** **327** **328** **329** **330**
331 **332** **333** **334** **335** **336** **337** **338** **339** **340**
341 **342** **343** **344** **345** **346** **347** **348** **349** **350**
351 **352** **353** **354** **355** **356** **357** **358** **359** **360**
361 **362** **363** **364** **365** **366** **367** **368** **369** **370**
371 **372** **373** **374** **375** **376** **377** **378** **379** **380**
381 **382** **383** **384** **385** **386** **387** **388** **389** **390**
391 **392** **393** **394** **395** **396** **397** **398** **399** **400**
401 **402** **403** **404** **405** **406** **407** **408** **409** **410**
411 **412** **413** **414** **415** **416** **417** **418** **419** **420**
421 **422** **423** **424** **425** **426** **427** **428** **429** **430**
431 **432** **433** **434** **435** **436** **437** **438** **439** **440**
441 **442** **443** **444** **445** **446** **447** **448** **449** **450**
451 **452** **453** **454** **455** **456** **457** **458** **459** **460**
461 **462** **463** **464** **465** **466** **467** **468** **469** **470**
471 **472** **473** **474** **475** **476** **477** **478** **479** **480**
481 **482** **483** **484** **485** **486** **487** **488** **489** **490**
491 **492** **493** **494** **495** **496** **497** **498** **499** **500**
501 **502** **503** **504** **505** **506** **507** **508** **509** **510**
511 **512** **513** **514** **515** **516** **517** **518** **519** **520**
521 **522** **523** **524** **525** **526** **527** **528** **529** **530**
531 **532** **533** **534** **535** **536** **537** **538** **539** **540**
541 **542** **543** **544** **545** **546** **547** **548** **549** **550**
551 **552** **553** **554** **555** **556** **557** **558** **559** **560**
561 **562** **563** **564** **565** **566** **567** **568** **569** **570**
571 **572** **573** **574** **575** **576** **577** **578** **579** **580**
581 **582** **583** **584** **585** **586** **587** **588** **589** **590**
591 **592** **593** **594** **595** **596** **597** **598** **599** **600**
601 **602** **603** **604** **605** **606** **607** **608** **609** **610**
611 **612** **613** **614** **615** **616** **617** **618** **619** **620**
621 **622** **623** **624** **625** **626** **627** **628** **629** **630**
631 **632** **633** **634** **635** **636** **637** **638** **639** **640**
641 **642** **643** **644** **645** **646** **647** **648** **649** **650**
651 **652** **653** **654** **655** **656** **657** **658** **659** **660**
661 **662** **663** **664** **665** **666** **667** **668** **669** **670**
671 **672** **673** **674** **675** **676** **677** **678** **679** **680**
681 **682** **683** **684** **685** **686** **687** **688** **689** **690**
691 **692** **693** **694** **695** **696** **697** **698** **699** **700**
701 **702** **703** **704** **705** **706** **707** **708** **709** **710**
711 **712** **713** **714** **715** **716** **717** **718** **719** **720**
721 **722** **723** **724** **725** **726** **727** **728** **729** **730**
731 **732** **733** **734** **735** **736** **737** **738** **739** **740**
741 **742** **743** **744** **745** **746** **747** **748** **749** **750**
751 **752** **753** **754** **755** **756** **757** **758** **759** **760**
761 **762** **763** **764** **765** **766** **767** **768** **769** **770**
771 **772** **773** **774** **775** **776** **777** **778** **779** **780**
781 **782** **783** **784** **785** **786** **787** **788** **789** **790**
791 **792** **793** **794** **795** **796** **797** **798** **799** **800**
801 **802** **803** **804** **805** **806** **807** **808** **809** **810**
811 **812** **813** **814** **815** **816** **817** **818** **819** **820**
821 **822** **823** **824** **825** **826** **827** **828** **829** **830**
831 **832** **833** **834** **835** **836** **837** **838** **839** **840**
841 **842** **843** **844** **845** **846** **847** **848** **849** **850**
851 **852** **853** **854** **855** **856** **857** **858** **859** **860**
861 **862** **863** **864** **865** **866** **867** **868** **869** **870**
871 **872** **873** **874** **875** **876** **877** **878** **879** **880**
881 **882** **883** **884** **885** **886** **887** **888** **889** **890**
891 **892** **893** **894** **895** **896** **897** **898** **899** **900**
901 **902** **903** **904** **905** **906** **907** **908** **909** **910**
911 **912** **913** **914** **915** **916** **917** **918** **919** **920**
921 **922** **923** **924** **925** **926** **927** **928** **929** **930**
931 **932** **933** **934** **935** **936** **937** **938** **939** **940**
941 **942** **943** **944** **945** **946** **947** **948** **949** **950**
951 **952** **953** **954** **955** **956** **957** **958** **959** **960**
961 **962** **963** **964** **965** **966** **967** **968** **969** **970**
971 **972** **973** **974** **975** **976** **977** **978** **979** **980**
981 **982** **983** **984** **985** **986** **987** **988** **989** **990**
991 **992** **993** **994** **995** **996** **997** **998** **999** **1000**

This motion is made, pursuant to Federal Rules of Civil Procedure 65 and Civil Local Rules 7-10 and 65-1, on the ground that Plaintiffs have demonstrated that they meet the requirements for a preliminary injunction or TRO: (1) a likelihood of success on the merits, (2) the probability of irreparable injury absent interim injunctive relief, (3) a balance of hardships that tips in Plaintiffs' favor, and (4) an injunction that is in the public interest.

A TRO is necessary to preserve the status quo until this Court can decide whether a preliminary injunction should issue to prevent Defendants from paying IHSS providers in Fresno County at the sharply reduced rate of \$8.00 per hour, thereby threatening the IHSS services on which thousands of low-income elderly, blind, or disabled recipients rely. Fresno County Defendants have requested approval of the rate reduction so it will be effective on July 1, 2010; State Defendants either have recently approved the rate reduction or intend to approve the rate reduction prior to July 1, 2010, and Fresno Defendants have stated their intent to implement the new hourly wage beginning July 1, 2010.

As demonstrated in Plaintiffs' Memorandum in Support of a TRO, Plaintiffs have a strong likelihood of success on the merits of their claims that approval of the rate change request is preempted by Section 30(A) and also violates the integration mandates of the ADA and Rehabilitation Act. Plaintiffs have also shown that this reduction in wages will cause irreparable harm to Fresno County IHSS providers, who will be unable to recover any lost wages from State Defendants, and to Fresno County IHSS consumers, who will be unable to find reliable providers at the reduced wage and who cannot safely remain in their homes without IHSS services. Finally, Plaintiffs have shown that the balance of equities and public interest weigh in favor of granting temporary relief to preserve the status quo while the merits of the case are litigated.

Plaintiffs further seek an order to show cause why a preliminary injunction should not issue to extend the provisions of the TRO which prohibit the implementation of the Fresno County rate decrease and to further enjoin State Defendants from approving any material IHSS rate decreases without consideration of the Section 30(A) factors.¹

¹ With this motion, Plaintiffs also submit a Motion to Amend the First Amended Complaint that seeks to, among other things, add one IHSS recipient and additional provider unions as plaintiffs; add

1 **NEED FOR PROMPT ACTION**

2 On June 26, 2009, this Court preliminarily enjoined State Defendants from implementing cuts
3 to IHSS provider rates that were provided for by Welfare and Institutions Code Section 12306.1(d)(6).
4 Prelim. Inj. (Dkt. 130). The Court held Plaintiffs had demonstrated a likelihood of success on their
5 claim that the State of California had not satisfied the procedural mandates of Section 30(A) before
6 enacting the statute. On March 3, 2010, the United States Court of Appeals for the Ninth Circuit
7 affirmed the preliminary injunction on the same grounds. *Dominguez*, 596 F.3d at 1098.

8 In April 2010, Fresno County notified Plaintiff Service Employees International Union United
9 Healthcare Workers (“UHW”), with which it was engaged in collective bargaining regarding a new
10 memorandum of understanding, that Fresno County contemplated a unilateral reduction in the hourly
11 wages of IHSS providers from \$10.25 to the state minimum wage of \$8.00, and a unilateral reduction
12 in the hourly benefits contribution from \$0.85 to \$0.60. Malberg Decl. ¶¶5-6. On May 25, 2010, the
13 Fresno County Board of Supervisors approved this proposed rate decrease, to become effective on July
14 1, 2010, and thereafter submitted it to the California Department of Social Services (“DSS”) and the
15 Department of Health Care Services (“DHCS”). See Dkt. #282, 283. As of the filing date of this TRO
16 motion (June 21, 2010), Plaintiffs have been unable to confirm whether State Defendants have granted
17 approval to the rate change request but understand that it either has been approved or will be approved
18 before July 1, 2010 so it can become effective on July 1, 2010. Malberg Decl. ¶¶9-10; Thoreen Decl.
19 ¶¶2-5, 10-11. State Defendants already have represented to this Court that they do not analyze the
20 Section 30(A) factors before approving rate change requests. Prompt action from the Court is
21 necessary because, absent injunctive relief, the rate change request will go into effect on July 1, 2010.

22 **RELIEF SOUGHT**

23 Plaintiffs respectfully request that the Court issue a TRO and an order to show cause why a
24 preliminary injunction should not issue, to prohibit Defendants from implementing the Fresno rate
25

26
27
28
factual allegations that relate to the recent Fresno County rate change request; and add new causes of
action that specifically address the State’s failure to analyze the Section 30(A) factors before approving
material county rate change requests and the conflict with the substantive requirements of the Medicaid
Act violation that resulted from the State’s approval of the Fresno rate reduction submitted on May 26,
2010. The amendment of the pleadings will allow the Court to grant complete relief in this case.

1 reduction, and to prohibit State Defendants from approving material rate reductions without analysis of
2 the Section 30(A) factors. Plaintiffs request that a hearing on their application for a TRO be set at a
3 time that will permit this Court to rule on whether a TRO should issue to preserve the status quo before
4 the rate reduction takes effect on July 1, 2010, and to permit adequate time to reverse that reduction in
5 payroll systems before paychecks issue.

6
7 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE**
8 **APPLICATION FOR A TEMPORARY RESTRAINING ORDER**

9 On July 1, 2010, unless this Court enters a TRO, dramatic cuts will be made to the wages paid
10 to IHSS providers in Fresno County, who provide in-home assistance to low-income elderly and
11 disabled individuals through California's Medi-Cal program. DHCS and DSS either have just
12 approved or will be approving within days a Fresno County request to reduce IHSS provider wages
13 from \$10.25 to a mere \$8.00 per hour – the California minimum wage – and the hourly benefits
14 contribution from \$0.85 to \$0.60. These rate cuts will have a devastating effect on some of Fresno
15 County's most vulnerable populations. Many IHSS providers will be forced to reduce their hours or to
16 quit their jobs altogether, and many IHSS consumers will be forced into institutional facilities or, if
17 they remain in their homes, will go without much-needed care, at serious risk to their health and safety.

18 Defendants' implementation of the Fresno rate reduction must be enjoined because it
19 contravenes federal law in a variety of ways. Most obviously, DSS and DHCS approved the rate
20 change request without considering the impact it would have upon access to or the quality of IHSS
21 services, and so the approval is preempted by the procedural requirements of the Medicaid Act. 42
22 U.S.C. §1396a(a)(30)(A) ("Section 30(A)"). This Court has already granted Plaintiffs' motion for a
23 preliminary injunction on a similar claim, enjoining implementation of Welfare and Institutions Code
24 Section 12306.1(d)(6), which would have reduced the maximum hourly provider rate (wages and
25 benefits) to which the State would contribute from \$12.10 to \$10.10, on the ground that although the
26 statute would directly influence provider wages the State had not considered the Section 30(A) factors
27 prior to enactment. Prelim. Inj. Order (Dkt. 131) 9:17-10:23. That ruling has been affirmed by the
28 Ninth Circuit, which held that the State must analyze the Section 30(A) factors "before enacting
legislation that has the effect of lowering payments to providers" or, as more relevant here, "prior to

1 approving reimbursement rates.” *Dominguez*, 596 F.3d at 1093, 1094-95. By approving the drastic
 2 wage reduction proposed by Fresno County without any analysis of the Section 30(A) factors, State
 3 Defendants have violated their obligations under the Medicaid Act under clear Ninth Circuit precedent.

4 Further, this Court already has recognized the relationship between provider payments and
 5 access to IHSS services. Prelim. Inj. Order (Dkt. 131) at 10:26-28 (holding that wage reductions would
 6 “cause many IHSS providers to leave employment, which in turn will leave consumers without IHSS
 7 assistance”); *see also Dominguez*, 596 F.3d at 1094 (“The Department itself has acknowledged the
 8 relationship between reimbursement rates and access to in-home supportive services.”); *id.* at 1098
 9 (crediting “evidence in the record that suggests that reductions in providers’ wages and benefits may
 10 have an adverse, rather than beneficial, effect on the State’s budget, such that it would actually save the
 11 State money if it maintained its current level of funding of the IHSS program”). The Fresno County
 12 rate reduction would leave recipients without adequate access to quality in-home assistance, and so
 13 would also violate the Medicaid Act’s substantive guarantees of access to services and quality of care.
 14 42 U.S.C. §1396a(a)(30)(A). The rate reduction would additionally violate the ADA and
 15 Rehabilitation Act, because it would force disabled individuals who are otherwise capable of living in
 16 their own homes and their own communities into institutional facilities. *See* 42 U.S.C. §12132; 29
 17 U.S.C. §794(a); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

18 With this application, Plaintiffs submit declarations from IHSS providers and consumers in
 19 Fresno County, as well as declarations from experts and others that demonstrate the profound impact of
 20 the cuts at issue, and make the requisite showing to support entry of a TRO enjoining Defendants’
 21 implementation of the Fresno County rate reduction, thereby preserving the status quo, pending
 22 determination of whether Plaintiffs are entitled to a preliminary injunction.²

23 BACKGROUND

24 A. California’s IHSS Program

25 California established the IHSS program to provide assistance with tasks of daily living to
 26 low-income elderly and/or disabled persons “who cannot safely remain in their homes or abodes of
 27

28 ² Plaintiffs’ application is accompanied by a Motion to Amend the First Amended Complaint.
 A description of the content of Plaintiffs’ proposed amended pleading is set forth in note 1 *supra*.

1 their own choosing unless these services are provided.” Cal. Welf. & Inst. Code §12300(a). The types
2 of services provided include assistance with bathing, dressing, cooking, feeding, bowel and bladder
3 care, self-administration of medication, and cleaning. *Id.* §§12300(b), (c). The program also
4 authorizes, under some circumstances, protective supervision for mentally impaired individuals and
5 educational and paramedical services such as the administration of medication and injections. *Id.*
6 §§12300(b), 12300.1. Thus, for example, Plaintiff Carolyn Stewart, who suffers from pain and limited
7 mobility as a result of a stroke and also has diabetes, relies on her provider for all household tasks, such
8 as cooking and cleaning, as well as for personal care such as bathing, dressing, and going to the
9 bathroom. Stewart Decl. ¶¶3-4; Ward Decl. ¶¶2-3. Stewart’s provider also assists her with getting her
10 medications and taking the insulin she needs to maintain her health, allowing her to remain safely in
11 her own home. Ward Decl. ¶3.

12 By preventing institutionalization of individuals who can, with assistance, remain in their
13 homes and in the community, the IHSS program conserves state resources. In Fresno County, the
14 average annual cost of maintaining someone in a nursing home is nearly \$55,000, as opposed to an
15 average annual cost of \$19,400 to maintain someone on IHSS. Howes Decl. ¶85(a) & (b). In addition,
16 elderly and disabled individuals who remain in community-based settings are able to enjoy the
17 autonomy and quality of life that such settings offer. Prelim. Inj. Order (Dkt. 131) at 10:28-11:10.

18 The IHSS program is administered by counties, which may establish public authorities to
19 provide for the delivery of IHSS services. Cal. Welf. & Inst. Code §§12301.6(a), 12303. In those
20 counties that have established them, such as Fresno, public authorities are considered employers of
21 IHSS providers for purposes of bargaining about providers’ wages, benefits, and other terms and
22 conditions of employment. *Id.* §12301.6(c). However, individual consumers retain the right to hire,
23 fire, and supervise their own IHSS providers. *Id.*

24 Consumers may find IHSS providers through personal connections, registries maintained by
25 county public authorities, or any other method. Cal. Welf. & Inst. Code §§12301.6(e)(1), (h). Some
26 IHSS providers are related to their clients, and became providers only because a loved one needed care.
27 L. Brown Supp. Decl. ¶1; Carolyn Buckley Decl. ¶2; Cendejeas Decl. ¶2; Everhardt Decl. ¶2; M.
28 Garcia Decl. ¶1; Leon Decl. ¶2; Perez Decl. ¶2; Singh Decl. ¶2; Valdez Decl. ¶2; Cerqua Decl. ¶3 (Dkt.

1 15); Meyer Decl. ¶8 (Dkt. 35). But many consumers employ unrelated providers. Candy Buckley
2 Decl. ¶4; R. Garcia Decl. ¶2; Gilchrist Decl. ¶3; Hanlon Decl. ¶3; Hopkins Decl. ¶4; Lee Decl. ¶4;
3 Miller Supp. Decl. ¶2; Moore Decl. ¶4; Stewart Decl. ¶2; Vang Decl. ¶4; Weissman-Steinbaugh Decl.
4 ¶5 (Dkt 51); Sheppard Decl. ¶7 (Dkt. 47); Tiedt Decl. ¶7 (Dkt. 48).

5 Finding IHSS providers can be difficult for a consumer, in part because of the nature of the
6 work. R. Garcia Decl. ¶5; Stewart Decl. ¶6; Wilkins Decl. ¶5; Weissman-Steinbaugh Decl. ¶6 (Dkt.
7 51); Ayers Decl. ¶5 (Dkt. 8); Tiedt Decl. ¶6 (Dkt. 48); Marzette Decl. ¶6 (Dkt. 34). The actual work
8 performed by an IHSS provider depends on the needs of the individual consumer, but is often difficult
9 and can be unpleasant. Some IHSS consumers are incontinent or unable to reach the bathroom when
10 necessary. Carolyn Buckley Decl. ¶3; Everhardt Decl. ¶3; Jones Decl. ¶4; Wilkins Decl. ¶4; Lee Decl.
11 ¶4; Leon Decl. ¶4; Martinez Supp. Decl. ¶5; Moreno Decl. ¶6; Muniz Decl. ¶3; Perez Decl. ¶4; Wright
12 Decl. ¶4; Billops Decl. ¶2 (Dkt. 9); Marzette Decl. ¶4 (Dkt. 34). Others have mobility impairments
13 and must be lifted by their providers. Cendejas Decl. ¶3; Everhardt Decl. ¶5; Gilchrist Decl. ¶5;
14 Hopkins Decl. ¶5; Jones Decl. ¶4; Wilkins Decl. ¶5; Armas Decl. ¶6 (Dkt. 7); Calhoun Decl. ¶8 (Dkt.
15 14); Wilson Decl. ¶4. Still others have behavioral or mental health issues that make providing even
16 basic services extremely challenging. Candy Buckley Decl. ¶3; Cendejas Decl. ¶3; Moore Decl. ¶3;
17 Moreno Decl. ¶¶3-5; Perez Decl. ¶3; Wright Decl. ¶4; Weissman-Steinbaugh Decl. ¶6 (Dkt. 51); Y.
18 Lee Decl. ¶3 (Dkt. 30); Lam Decl. ¶5 (Dkt. 26).

19 The costs of delivering IHSS services administered as part of California's Medicaid program
20 ("Medi-Cal") are shared by the federal, state, and county governments. 42 U.S.C. §1396d(b).
21 Currently the federal government contributes 62% of this cost, but that figure is set to drop to 50% at
22 the end of 2010. ARRA §5001(h)(3), Pub. L. No. 111-5, 123 Stat. 115. Of the remaining cost, often
23 referred to as the "non-federal share," the county pays 35% and the state pays 65% of wages up to the
24 current statutory cap of \$12.10 per hour, above which the State will not share the costs. Cal. Welf. &
25 Inst. Code §§12306, 12306.1(c)-(d).

26 Rates paid to IHSS providers vary by county. Counties must submit proposed rate changes to
27 DSS and DHCS. Carroll Decl.¶¶6-7 (Dkt. 163-2). Counties with public authorities may establish
28 these proposed rates through collective bargaining. Welf. & Inst. Code §12306.1. The proposed rates

1 are subject to, and do not take effect without, DSS and DHCS approval. *Id.*, §12306.1(a)-(b).

2 Although the agencies ostensibly review those requests to ensure that the rates comply “with all
3 applicable state and federal laws,” State Defendants concede that, in practice, they will approve any
4 rate at or above the minimum wage. *See* State Opp. to Prelim. Inj. (Dkt. 95) at 3:19-24, 12 n.3; Carroll
5 Decl. ¶13 (Dkt. 97).

6 **B. Plaintiffs Obtain Preliminary Injunction and Ninth Circuit Affirms**

7 On June 26, 2009, this Court issued an injunction prohibiting State Defendants from
8 implementing Section 12306.1(d)(6). Prelim. Inj. (Dkt. 130), Prelim. Inj. Order (Dkt. 131). The Court
9 found Plaintiffs had demonstrated a “strong likelihood of success” on the claim that State Defendants
10 failed to consider the factors set forth in Section 30(A) before enacting Section 12306.1(d)(6), in
11 violation of the federal Medicaid Act; that, absent injunctive relief, IHSS consumers and providers
12 would suffer irreparable harm; and that the statute would likely cost the State more money than it
13 would save. Prelim. Inj. Order (Dkt. 131) at 2:2-12, 10:14-17, 10:25-26, 11:11-12, 11:26-12:5.

14 In concluding that Plaintiffs would likely succeed on the merits, this Court reasoned that the
15 Ninth Circuit has held that the Section 30(A) factors, including access and quality of care, must be
16 considered when taking action that directly influences IHSS provider rates. Prelim. Inj. Order (Dkt.
17 131) 7:5-10:17. The Court rejected the argument that the counties’ role in setting rates through
18 collective bargaining obviated the need for the State to consider the Section 30(A) factors, because the
19 state law “ha[d] a direct influence on the wages for each county” and the “county[] role does not
20 preclude the State from analyzing the impact of Section 12306.1(d)(6) on the Section 30(A) factors
21 prior to enactment.” *Id.* at 10:1-14.

22 State Defendants filed an appeal from the preliminary injunction as well as the Court’s
23 subsequent orders clarifying the preliminary injunction. Dkt. 138. This Court and the Ninth Circuit
24 denied requests that the preliminary injunction be stayed pending appeal. Dkts. 137, 178.

25 On March 3, 2010, the Ninth Circuit issued a unanimous decision affirming the preliminary
26 injunction. It held that, “before enacting legislation that has the effect of lowering payments to
27 providers – here, § 12306.1(d)(6) – the State must study the impact of that decision on the statutory
28 factors set forth in § 30(A).” *Dominguez*, 596 F.3d at 1093. The court rejected State Defendants’

1 argument that the Section 30(A) obligation did not apply because Section 12306.1(d)(6) did not
 2 directly set provider reimbursement rates and because of the role played by collective bargaining in
 3 setting those rates. *Id.* at 1093-94. The court also rejected State Defendants' related argument that
 4 collective bargaining fulfilled the requirements imposed by Section 30(A) to ensure rates are consistent
 5 with access and quality, noting that Plaintiffs were "not challenging those collectively bargained rates,
 6 nor . . . the collective bargaining process as a method of establishing rates," but rather "the procedural
 7 adequacy of the legislature's decision to decrease its funding of those rates." *Id.* at 1094.

8 In addition, and as particularly relevant here, the Ninth Circuit affirmed DHCS's specific
 9 obligation to consider the Section 30(A) factors when approving county rate change requests. The
 10 court initially noted that "[t]he Department itself has acknowledged the relationship between
 11 reimbursement rates and access to in-home supportive services" by providing, in the State Medicaid
 12 Plan, that "'reimbursement rates for Personal Care Services shall not be less than levels necessary to
 13 achieve adequate access to these services, but shall not exceed the lesser of specified limits, consistent
 14 with the requirements of [§ 30(A)],'" and that, "'[t]o the extent that the Department finds that
 15 sufficient access to services is available, any rate *increases* granted under this program shall be no
 16 greater than the funds appropriated by the Legislature for such purpose.'" (emphasis added)."
 17 *Dominguez*, 596 F.3d at 1094. From these provisions, the court concluded:

18 The Department has thus recognized that rate increases are subject to the availability of
 19 State funds and has expressly conditioned its approval over such increases on a finding
 20 that sufficient access to services is otherwise available. The corollary must also be true.
 21 That is, the same oversight exists for any decrease in rates brought about by the
 22 availability of State funds. The Department is thus well aware that *prior to approving*
reimbursement rates established through collective bargaining, it must determine
whether sufficient access to services is available.

22 *Id.* (emphasis added).

23
 24 **C. State Defendants' Approval Of Fresno County's Request to Reduce IHSS Provider Rates To Minimum Wage**

25 IHSS providers in Fresno County currently receive wages of \$10.25 per hour, and the county
 26 makes a benefits contribution of \$0.85 per hour. Malberg Decl. ¶3. In mid-April 2010, Fresno County
 27 informed UHW that it intended unilaterally to implement a rate reduction that would decrease wages to
 28 \$8.00 per hour (the state minimum wage, Cal. Labor Code §1182.12) and benefits to \$0.60 per hour,

1 effective July 1, 2010. Malberg Decl. ¶¶5-6. On May 25, 2010, the Fresno County Board of
2 Supervisors voted to approve such a rate reduction. *Id.* at ¶7.

3 On May 26, Fresno County submitted its rate change request to DSS and DHCS requesting that
4 it take effect July 1, 2010. Dkt. 283. As of the filing of this TRO motion, the State Defendants either
5 have approved the rate change request or will grant such approval within days. The State Defendants
6 have already acknowledged to the Court that they do not consider the Section 30(A) factors when
7 approving rate change requests. *See supra* at 8.

8 Without prompt action, Fresno County's rate reduction will go into effect, and provider
9 payments will fall to the minimum wage, on July 1, 2010.

10 **D. Effect Of Fresno County's Wage Cut**

11 **1. On IHSS Providers**

12 The vast majority of providers are already living on extremely limited incomes. The reduction
13 of the hourly wage from \$10.25 to \$8.00 constitutes a 20% cut, to wages that will put providers below
14 the poverty level for a family of three. Request for Judicial Notice ("RJN"), Exs. A-C.

15 The wage reduction will have a substantial financial impact and, in some situations, will lead
16 providers to leave the IHSS program to seek other employment. Howes Decl. ¶88; Aguilar Decl. ¶4;
17 Bailey Decl. ¶6; Boushele Decl. ¶6; M. Garcia Decl. ¶5; Jones Decl. ¶6; Moreno Decl. ¶7; Thao Decl.
18 ¶9; Muniz Decl. ¶4; Ward Decl. ¶5; Wright Decl. ¶5. For those IHSS providers who remain in their
19 jobs, the wage and health benefit contribution cuts will be devastating, and may result in providers'
20 inability to pay for basic needs like food, health care, or housing. Bailey Decl. ¶6; Boushele Decl. ¶6;
21 Maiden Decl. ¶4; Singh Decl. ¶4; Ward Decl. ¶4. Some of these providers are family members of their
22 IHSS consumers and responsible for providing housing, food, medication, and other necessities for
23 their elderly or disabled relative, and so both the providers and IHSS consumers are likely to suffer
24 serious deprivations. Brown Supp. Decl. ¶9; Cendejas Decl. ¶4; Everhardt Decl. ¶4; Leon Decl. ¶5;
25 Martinez Decl. ¶6; Perez Decl. ¶5; Valdez Decl. ¶4. In addition, some providers themselves suffer
26 from illnesses for which they need consistent medical care, and the likely reduction or elimination
27 medical benefits or increase in provider's contribution premiums as a result of the reduced health care
28 contributions will leave them in danger of serious medical problems. Winsten Decl. ¶¶3-5; Boushele

1 Supp. Decl. ¶2; Everhardt Supp. Decl. ¶2; Carolyn Buckley Supp. Decl. ¶2; Moreno Supp. Decl. ¶2.

2 The reduction in IHSS wages will lead other providers to reduce their IHSS hours or cease to
3 provide IHSS services altogether and seek other jobs. Aguilar Decl. ¶4; Bailey Decl. ¶6; Boushele
4 Decl. ¶6; M. Garcia Decl. ¶5; Jones Decl. ¶6; Moreno Decl. ¶7; Thao Decl. ¶9; Muniz Decl. ¶4; Ward
5 Decl. ¶5; Wright Decl. ¶5. For example, IHSS providers could seek home care work at private
6 agencies, which typically pay more than \$8.00 per hour. Traum Decl. ¶2; Ages Decl. ¶1, Ex. A. Many
7 such agencies are currently hiring. *Id.* ¶3-8. Many other jobs are available in Fresno County that
8 require minimal training or skills and pay minimum wage or greater. *Id.* ¶9-18.³

9 2. On IHSS Consumers

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

12 Even those individuals who are able to find other providers at lower wages will be harmed by a
13 loss of continuity of care and disruption of relationships that have taken months or years to build. Lee
14 Decl. ¶5 (has come to trust provider over time due to relationship they initially developed at adult day
15 care she attends); *see also* Hanlon Decl. ¶6; Hopkins Decl. ¶6; Moore Decl. ¶6; Stewart Decl. ¶7.

16 For many, the consequences will be even more severe, threatening to undermine if not destroy
17 their health and independence. Finding a new IHSS provider, difficult in the past for many IHSS
18 consumers, will be impossible for some given the reduced wages. For example, Christal Hopkins once
19 had so much difficulty finding a provider that she was forced to spend several weeks in a nursing
20 home, Hopkins Decl. ¶6, and Patsy Miller has had trouble finding reliable providers, in one case having
21 a provider who stole from her, Boushele Decl. ¶5. Other IHSS consumers report similar difficulty
22 finding reliable providers willing to meet all their needs. Aguilar Decl. ¶5; Austin Decl. ¶¶ 4-5 (Dkt.
23
24
25

26 ³ As noted in a recent report by the Legislative Analyst's Office, the majority of IHSS providers
27 are eligible for unemployment insurance. RJN, Ex. D at 4; *see also Bunny's Waffle Shop v. California*
28 *Employment Comm'n*, 24 Cal.2d 735, 743 (1944) ("A substantial reduction in earnings is generally
regarded as good cause for leaving employment" such that employee is entitled to unemployment
insurance). This makes leaving IHSS employment less costly for providers even if they are unable to
find other jobs quickly.

1 111)⁴; R. Garcia Decl. ¶5; Wilkins Decl. ¶5. Some IHSS consumers unable to find providers may try
 2 to remain in their own homes, but doing so will be at best difficult, and at worst dangerous. Bailey
 3 Decl. ¶8 (consumer has severe asthma and needs assistance cleaning asthma equipment on regular
 4 basis); Gilchrist Decl. ¶7 (has burned himself in past trying to cook on his own); LaPlante Decl. ¶7
 5 (Dkt. 28).

6 Some consumers will be forced to enter nursing facilities or other residential institutions
 7 because of their inability to remain in their homes without the help of an IHSS provider. Howes Decl.
 8 ¶¶4, 76-84; Candy Buckley Decl. ¶6; Jones Decl. ¶8; R. Garcia Decl. ¶5; Hopkins Decl. ¶¶6-7; Moreno
 9 Decl. ¶8; Bailey Decl. ¶8; Miller Supp. Decl. ¶6; Moore Decl. ¶6; Gilchrist Decl. ¶6; Schnelle Decl.
 10 (Dkt. 45) ¶5; Altman Decl. (Dkt. 6) ¶5. The consequences of institutionalization – among others, loss
 11 of independence and reduced quality of care – would be devastating for individuals who are currently
 12 able to live relatively independent and autonomous lives in their homes. Miller Supp. Decl. ¶5;
 13 Wilkins Supp. Decl. ¶6; R. Garcia Decl. ¶5; Gilchrist Decl. ¶7; Hanlon Decl. ¶7; Hopkins Decl. ¶7;
 14 Vang Decl. ¶7; Lee Decl. ¶7; Moore Decl. ¶7. The wage decrease will also cause the State to incur
 15 millions of dollars in increased institutionalization costs, as well as to lose significant tax revenues and
 16 incur other Medi-Cal expenses. Howes Decl. ¶¶9-10, 88-89 & nn. 2-3; *see also* LaPlante Decl. (Dkt.
 17 28) ¶8; Altman Decl. (Dkt. 6) ¶6.

18 LEGAL STANDARD

19 The standard for obtaining a TRO is the same as for obtaining a preliminary injunction:
 20 Plaintiffs must demonstrate (1) a likelihood of success on the merits, (2) the probability of irreparable
 21 injury absent interim injunctive relief, (3) that the balance of hardships tips in Plaintiffs' favor, and (4)
 22 that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. ___, 129
 23 S.Ct. 365, 374 (2008); *Dominguez*, 596 F.3d at 1092; *Martinez v. Schwarzenegger*, 2009 WL 1844989,
 24 at *3 (N.D. Cal. June 26, 2009) (standard is sliding scale; stronger showing of irreparable harm
 25 decreases showing needed on the merits, and vice versa). Plaintiffs easily satisfy each requirement.
 26

27
 28 ⁴ Sadly, Curtis Austin passed away on June 11, 2010. While his declaration is no longer relevant to demonstrate likely future harm to him, his past difficulty finding providers remains relevant to the question whether IHSS consumers will face difficulty replacing their providers.

ARGUMENT

I. Plaintiffs Have An Overwhelming Likelihood Of Success On The Merits

A. State Defendants' Approval Of The Rate Change Request Violates The Requirements Of The Medicaid Act

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.* In California, DHCS is designated as the "single State agency established or designated to administer or supervise the administration of the [State] plan." 42 C.F.R. §431.10(b)(1).

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 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*

42 U.S.C. §1396a(a)(30)(A) ("Section 30(A)") (emphasis added).

The italicized language above 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), *cert. denied*, 129 S.Ct. 2828 (2009) (*Independent Living I*); *Ball v. Rodgers*, 492 F.3d 1094, 1097 (9th Cir. 2007). As the Ninth Circuit has recognized, "providers' wages and benefits . . . are directly correlated to ensuring that services are consistent with efficiency, economy, and equality of care, and sufficient to ensure access to services under the IHSS program." *Dominguez*, 596 F.3d at 1093; *see also Orthopaedic Hosp.*, 103 F.3d at 1496 ("payments for [Medi-Cal] services must be consistent with efficiency, economy, and quality of care, and . . . those payments must be sufficient to enlist enough providers to provide access to Medicaid recipients).

1 Because State Defendants' approval of the Fresno rate reduction "directly affects what Medi-Cal
2 providers are *paid* for providing services," *Dominguez*, 596 F.3d at 1093 (emphasis in original), such
3 action requires compliance with the procedural and substantive requirements of Section 30(A).

4
5 **1. State Defendants Failed To Comply With Section 30(A)'s Procedural Requirements**

6 In *Orthopaedic Hospital v. Belshe*, the Ninth Circuit held that Section 30(A) "requires the state
7 to consider efficiency, economy, quality of care, and access before setting Medi-Cal reimbursement
8 rates." *California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 850 (9th Cir. 2009) (*California
9 Pharmacists I*) (citing *Orthopaedic Hosp.*, 103 F.3d at 1496); *see also Dominguez*, 596 F.3d at 1093
10 ("[B]efore enacting legislation that has the effect of lowering payments to providers . . . the State must
11 study the impact of that decision on the statutory factors set forth in § 30(A)"). Thus, when the State
12 fails to perform a Section 30(A) analysis regarding the impact of a proposed cut to IHSS provider rates,
13 the cut is preempted and must be enjoined. *See Prelim. Inj. Order* (Dkt. 131) at 12:13-17, *aff'd*,
14 *Dominguez*, 596 F.3d 1087; *California Pharmacists I*, 563 F.3d at 849-50 (holding preliminary
15 injunction proper where Section 30(A) factors were not considered prior to enactment of rate cut and
16 plaintiffs made "strong showing" of likelihood of success on merits).⁵

17 The Ninth Circuit has made clear that the State's obligation to consider the Section 30(A)
18 factors applies not only to statewide enactments, but also to its approval of county rate change requests.
19 *Dominguez*, 596 F.3d at 1094 ("The Department is thus well aware that prior to approving
20 reimbursement rates established through collective bargaining, it must determine whether sufficient
21 access to services is available."). And budget constraints alone are not permissible reasons to justify a

22
23 ⁵ *See also Independent Living Ctr. of S. Cal. v. Shewry*, 2008 WL 3891211, at *11 (C.D. Cal.
24 Aug. 18, 2008), *aff'd*, 572 F.3d 644 (9th Cir. 2009), *petition for cert. pending*, 78 U.S.L.W. 3500 (U.S.
25 Feb. 16, 2010) (No. 09-958) (*Independent Living Ctr. II*) ("Because respondent has failed to
26 demonstrate that the State of California considered whether the ten percent rate reduction would be
27 consistent with efficiency, economy, quality of care, and equality of access, or the effect of providers'
28 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."); *Managed Pharm. Care v. Maxwell-Jolly*, 603 F. Supp. 2d 1230, 1235-38, 1242 (C.D. Cal.
2009) (enjoining cuts based on failure to consider Section 30(A) factors); *Affiliates, Inc. v. Armstrong*,
2009 WL 1197341, at *4-*7 (D. Idaho Apr. 30, 2009) (same); *Washington State Pharm. Ass'n v.
Gregoire*, 2009 WL 1259632, at *1 (W.D. Wash. Mar. 31, 2009) (same).

1 rate cut. *Orthopaedic Hosp.*, 103 F.3d at 1499 n.3; *see also Arkansas Med. Soc., Inc. v. Reynolds*, 6
2 F.3d 519, 531 (8th Cir. 1993) (collecting cases).

3 Thus, State Defendants' approval of the Fresno County rate change request can be sustained
4 only if there is evidence that State Defendants "actually considered" an analysis regarding the impact of
5 the requested cut upon access and quality prior to approving the request. *California Pharmacists I*, 563
6 F.3d at 850 (existence of analysis is not enough, where no evidence analysis was actually considered in
7 connection with rate cut). Analyses performed after enactment cannot satisfy Section 30(A) because
8 the statute mandates that rates be "based on" consideration of the relevant factors. *Id.* ("post-hoc
9 rationalization" for decision already made does not satisfy Section 30(A)'s procedural requirements).

10 Finally, "a county's role in determining IHSS wages and benefits does not preclude the State
11 from analyzing the impact of [a wage reduction] on the Section 30(A) factors prior to enactment."
12 Prelim. Inj. Order (Dkt. 131) at 10:11-14. Under the Medicaid Act, the State – not the individual
13 counties – is bound by Section 30(A) as a condition of Medicaid participation to ensure that rates are
14 consistent with quality care and are sufficient to enlist enough providers so that care and services are
15 available. *See* 42 C.F.R. §431.10 (requiring that single state agency be responsible for administration
16 of State's Medicaid program); *id.*, §431.10(e)(3) (single state agency "must not delegate . . . authority
17 to . . . [e]xercise administrative discretion in the administration or supervision of the plan"). A
18 collectively bargained rate at the county level does not become the set rate until the State approves it.
19 *See supra* at 7-8. Thus, "the State's obligation to consider whether providers' 'payments are consistent
20 with efficiency, economy, and quality of care,' § 30(A), is independent of whatever wages and benefits
21 are set pursuant to collective bargaining." *Dominguez*, 596 F.3d at 1094-95.⁶

22 This case illustrates the serious problems that would arise if the State were permitted to
23 abdicate its responsibility under the Medicaid Act by simply deferring to any action taken on wages at
24 the county level. State Defendants cannot fulfill their obligations to administer the Medicaid program
25 if they are permitted merely to rubber-stamp a drastic 20% wage reduction, down to minimum wage,
26

27 ⁶ Indeed, in a May 20, 2009 letter to the State, the federal Centers for Medicare & Medicaid
28 Services emphasized the State's obligation to ensure that wages paid to IHSS providers will not lower
"the amount, duration, scope or quality of care and services available under the plan." Golublock Decl.
(Dkt. 19-6), Ex. E at 2 (citing Section 1902(a)(2) of the Medicaid Act).

1 without engaging in any of the analysis required by Section 30(A). Nothing in the Medicaid Act, the
 2 State Plan, or case law permits the State simply to elect not to comply with its Section 30(A)
 3 obligations when evaluating a rate reduction of this magnitude.

4 Here, there is no evidence that DSS and DHCS ever considered the Section 30(A) factors
 5 before approving the rate change request submitted by Fresno County on May 26, 2010.⁷ Plaintiffs are
 6 not aware of any reports, analyses, or hearings that were conducted to determine the impact of Fresno
 7 County's rate change request on IHSS services. Malberg Decl. ¶11. Indeed, State Defendants have
 8 represented throughout these proceedings that the only substantive review of counties' rate change
 9 requests is to confirm that the resultant wage will be at or above the state minimum wage. *See supra* at
 10 8. And, State Defendants cannot be "*ipso facto* immunized" from a challenge to their actions simply
 11 because they "had no system in place to make such an assessment." *Dominguez*, 596 F.3d at 1096.

12 Because State Defendants did not adequately consider the impact of their approval of Fresno
 13 County's rate change request on the various Section 30(A) factors, Plaintiffs have made a "strong
 14 showing" of likelihood of success on the merits. *California Pharmacists I*, 563 F.3d at 850. This
 15 Court may enjoin State Defendants' approval of the rate change request on this ground alone and need
 16 not reach the remaining grounds for temporary relief.

17 **2. Approval Of The Rate Change Request Violates Substantive Rights** 18 **Guaranteed By Section 30(A)**

19 State Defendants' implementation of the Fresno County rate decrease must be enjoined for the
 20 additional reason that it will violate the substantive guarantees of Section 30(A)'s quality of care and
 21 equal access provisions. *See Alaska Dep't of Health & Soc. Servs. v. Centers for Medicare & Medicaid*
 22 *Servs.*, 424 F.3d 931, 937 (9th Cir. 2005) (affirming disapproval of state plan amendment because
 23 proposed rates not "consistent with efficiency, economy, and quality of care under §30(A)") (quotation
 24 marks omitted). After conducting responsible studies to obtain data, the State should only approve
 25 rates that bear a reasonable relationship to the cost of providing access to quality services. *See*

26
 27 ⁷ In notifying UHW that it intended to reduce wages and benefits from \$10.25/\$0.85 to
 28 \$8.00/\$0.60, Fresno County stated that the reason was the shortfall in realignment funding. Malberg
 Decl. ¶6. As discussed, budgetary concerns are not sufficient grounds to justify approval of action that
 affects Medicaid funding. *See supra* at 14.

1 *Orthopaedic Hospital*, 103 F.3d at 1500 (requiring State to study cost of providing quality care and
 2 then to “set rates that have some reasonable relation to such costs, the state bearing the burden of
 3 justifying any rate that substantially deviates from such determined costs”). A showing that provider
 4 rates will cause “*at least some* providers [to] stop treating Medi-Cal beneficiaries” establishes a
 5 substantive violation of Section 30(A). *California Pharmacists Ass’n v. Maxwell-Jolly*, 596 F.3d 1098,
 6 1114 (9th Cir. 2010), *petition for cert. filed*, (U.S. Mar. 24, 2010) (No. 09-1158) (*California*
 7 *Pharmacists II*) (emphasis in original).

8 a. **Equal Access.** State Defendants’ approval of a rate change request that pays only minimum
 9 wage to IHSS providers will prevent Medi-Cal recipients from receiving in-home care “at least to the
 10 extent that such care [is] available to the general population in the geographic area.” Section 30(A); 42
 11 C.F.R. §447.204 (“agency’s payments must be sufficient to enlist enough providers so that services
 12 under the plan are available to recipients at least to the extent that those services are available to the
 13 general population”); *Moody Emergency Med. Serv., Inc. v. City of Millbrook*, 967 F. Supp. 488, 493
 14 (M.D. Ala. 1997) (equal access provision violated if “state reimbursement rate is so inadequate that the
 15 number of participating Medicare health care providers is substantially lower than the number of health
 16 care providers available to the general population”).⁸

17 Whether State Defendants’ conduct would result in unequal access to Medi-Cal services rests
 18 on a number of factors, including whether consumers would have difficulty obtaining care. *See Clark*
 19 *v. Richman*, 339 F. Supp. 2d 631, 644 (M.D. Pa. 2004) (citing *Clark v. Kizer*, 758 F. Supp. 572, 576
 20 (E.D. Cal. 1990), *aff’d in relevant part sub nom, Clark v. Coye*, 967 F.2d 585 (9th Cir. 1992)).

21 Here, the reduction of the IHSS wage in Fresno County to the state minimum wage will
 22 increase provider turnover and decrease the pool of individuals willing to provide IHSS services.
 23 Plaintiffs have produced evidence that IHSS providers will leave their employment based on the wage
 24

25 ⁸ The relevant population for purposes of comparison are individuals in the same area “with
 26 private or public insurance coverage,” not those without insurance. H.R. Rep. No. 101-247, at 390-91,
 27 *reprinted in* 1989 U.S.C.C.A.N. 1906, 2116-17. IHSS-type services are available through some private
 28 insurance. *See Burns Reply Decl.* (Dkt. 112) ¶¶2-4 (similar services paid for by long-term care
 insurance and private payments); *Jimenez Supp. Decl.* (Dkt. 114) ¶¶8-9. And Plaintiffs have
 demonstrated that home care services are available in Fresno County through private agencies which
 pay providers more than \$8 per hour and have job vacancies. *Traum Decl.* ¶¶2-8

1 cuts at issue, and that Plaintiff consumers and others will be unable to find providers to replace them.
 2 *See supra* at 10-12; Howes Decl. ¶¶71, 76-84; Aguilar Decl. ¶¶4-5; Bailey Decl. ¶6; Boushele Decl.
 3 ¶¶5-6; M. Garcia Decl. ¶5; Jones Decl. ¶6; Moreno Decl. ¶7; Thao Decl. ¶9; Muniz Decl. ¶4; Ward
 4 Decl. ¶5; Wright Decl. ¶5; R. Garcia Decl. ¶5; Wilkins Decl. ¶5; *see also* Traum Decl ¶¶2-18 (jobs
 5 requiring minimum training or skills and pay more than \$8 per hour are available in Fresno County,
 6 including positions at private home care agencies). As a result, many current IHSS recipients in Fresno
 7 County will be forced to go without care altogether, and certainly without the level of home care
 8 available to the insured population that does not rely on Medi-Cal.

9 Because these facts show that reducing the IHSS hourly wage from \$10.25 to \$8.00 will likely
 10 result in a significant disparity in the availability of services between Medicaid patients and those who
 11 can afford to pay privately, Plaintiffs have demonstrated a strong likelihood that they will prevail on
 12 their claim that State Defendants' approval of the rate is preempted by Section 30(A)'s equal access
 13 guarantee. *See California Pharmacists II*, 596 F.3d at 1114; *DeGregorio v. O'Bannon*, 500 F. Supp.
 14 541, 551 (E.D. Pa. 1980) ("If providers . . . do not, in fact, readily offer their services to medicaid
 15 recipients, with the result that medicaid recipients are denied access to services comparable to that
 16 afforded the general population, the 'equal access' regulation requires, at a minimum, that the
 17 Commonwealth set rates with a view toward enlarging the base of provider participation.").

18 **b. Quality of Care.** Section 30(A) requires "high-quality medical care." *Independent Living*
 19 *Ctr. I*, 543 F.3d at 1053; *see also* 42 C.F.R. §440.260 (state plan must include "description of methods
 20 and standards to assure that services of are high quality"). Yet the evidence demonstrates that State
 21 Defendants' approval of the rate change request will cause many IHSS consumers in Fresno County to
 22 go without in-home care altogether or to suffer significant gaps or deterioration in in-home assistance.
 23 Howes Decl. ¶¶76-84; Candy Buckley Decl. ¶6; Jones Decl. ¶8; R. Garcia Decl. ¶5; Hopkins Decl.
 24 ¶¶6-7; Moreno Decl. ¶8; Bailey Decl. ¶8; Miller Supp. Decl. ¶6; Moore Decl. ¶6; Gilchrist Decl. ¶6.

25 The reduced quality of care that will result is inconsistent with Section 30(A)'s mandate that the
 26 Medi-Cal program provide high quality care to recipients. *See LaPlante Decl. (Dkt. 28) ¶7* (individuals
 27 who go without home care services "are much more likely to experience adverse consequences,
 28 including discomfort, going hungry, weight loss, dehydration, falls, injuries due to falls, burns, and

1 dissatisfaction. These are serious problems that compromise the safety, comfort, and hygiene of such
 2 individuals.”); Altman Decl. (Dkt. 6) ¶¶5-8 (provider wage cuts will result in “poorer care, more
 3 expensive care, and poorer quality of life for these individuals who are among our most vulnerable”).⁹

4 For all of these reasons, Plaintiffs have also established a substantial likelihood of success in
 5 demonstrating that implementation of the IHSS rate decrease in Fresno County would violate Section
 6 30(A)’s substantive guarantees.

7
 8 **B. Approval Of The Rate Change Request Violates The Integration Mandates Of The
 ADA And The Rehabilitation Act**

9 By reducing IHSS provider wages and creating a shortage of providers, the Fresno rate decrease
 10 will force many consumers – unable to remain safely at home without critical IHSS services – to enter
 11 nursing homes or other residential institutions, thereby violating the integration mandates of the ADA
 12 and Rehabilitation Act. A preliminary injunction should be granted for this reason as well.

13
 14 **1. The Integration Mandates Of The ADA And Rehabilitation Act Prohibit
 Unjustified Institutionalization Of Disabled Persons**

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

18 In *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999), the Supreme Court held that the
 19 “[u]njustified isolation [of disabled persons] . . . is properly regarded as discrimination based on
 20 disability.”¹⁰ The Court explained the judgments underlying this recognition:

21 First, institutional placement of persons who can handle and benefit from community
 22 settings perpetuates unwarranted assumptions that persons so isolated are incapable or
 23 unworthy of participating in community life. Second, confinement in an institution

24 ⁹ Even those who go into nursing homes may suffer a significant deterioration in quality of care.
 25 See Schnelle Decl. (Dkt. 45) ¶6 (many nursing homes in California offer poor quality care); Leon Decl.
 ¶9 (wife received poor care in nursing home and was dropped by staff).

26 ¹⁰ Subsequent decisions have concluded that the Rehabilitation Act’s anti-discrimination
 27 provision imposes the same requirements. See, e.g., *Penn. Protection & Advocacy v. Penn. Dep’t of*
 28 *Public Welfare*, 402 F.3d 374, 379 n.3 (3d Cir. 2005); *Radaszewski ex rel. Radaszewski v. Maram*, 383
 F.3d 599, 607 (7th Cir. 2004). Hereinafter, the ADA and Rehabilitation Act will be collectively
 referred to as the “ADA.”

1 severely diminishes the everyday life activities of individuals, including family
 2 relations, social contacts, work options, economic independence, educational
 advancement, and cultural enrichment.

3 *Id.* at 600-01 (citations omitted); *see also* 42 U.S.C. §12101(a)(2) (Congressional findings regarding
 4 historic and persistent isolation and segregation of people with disabilities). As *Olmstead* noted, this
 5 interpretation is also embodied in the statutes' implementing regulations, which require that covered
 6 services be "administer[ed] . . . in the most integrated setting appropriate" 28 C.F.R. §35.130(d)
 7 (ADA regulation); *see also id.* §41.51(d) (Rehabilitation Act regulation).

8 Accordingly, *Olmstead* concluded that persons with disabilities must be placed "in community
 9 settings rather than in institutions when the State's treatment professionals have determined that
 10 community placement is appropriate, the . . . less restrictive setting is not opposed by the affected
 11 individual, and the placement can be reasonably accommodated, taking into account the resources
 12 available to the State and the needs of others with . . . disabilities." 527 U.S. at 587. As the Third
 13 Circuit subsequently noted, "[i]t is a gross injustice to keep . . . disabled persons in an institution
 14 notwithstanding the agreement of all relevant parties that they no longer require institutionalization."
 15 *Frederick L. v. Dep't of Public Welfare of Comm. of Penn.*, 364 F.3d 487, 500 (3d Cir. 2004).

16 "Although *Olmstead* addressed ongoing institutionalization, plaintiffs who currently reside in
 17 community settings may assert ADA integration claims to challenge state actions that give rise to a risk
 18 of unnecessary institutionalization." *V.L. v. Wagner*, 669 F.Supp.2d 1106, 1119 (N.D. Cal. 2009)
 19 (citing *Fisher v. Oklahoma Health Care Auth.*, 335 F.3d 1175, 1181-82 (10th Cir.2003); *Ball v.*
 20 *Rodgers*, 2009 WL 1395423, at *5 (D.Ariz.2009); *Mental Disability Law Clinic v. Hogan*, 2008 WL
 21 4104460, at *15 (E.D.N.Y.2008)).

22 **2. The Approval And Implementation Of The Fresno County Wage Reduction**
 23 **Will Cause Unjustified Institutionalization In Violation Of The ADA And**
The Rehabilitation Act

24 The implementation of the Fresno County rate reduction threatens to force many IHSS
 25 recipients who wish to remain in their homes, and are able to do so with the help of IHSS services,
 26 instead to enter nursing homes or other residential institutions. Howes Decl. ¶¶76-84; Candy Buckley
 27 Decl. ¶6; Jones Decl. ¶8; R. Garcia Decl. ¶5; Hopkins Decl. ¶¶6-7; Moreno Decl. ¶8; Bailey Decl. ¶8;
 28 Miller Supp. Decl. ¶6; Moore Decl. ¶6; Gilchrist Decl. ¶6. This threatened institutionalization violates

1 the ADA’s integration mandate. *See Olmstead*, 527 U.S. at 597 (“Unjustified isolation . . . is properly
2 regarded as discrimination based on disability.”); *Fisher*, 335 F.3d at 1182.¹¹

3 In a very similar case, a federal district court held that Arizona violated the ADA by, among
4 other things, failing to compensate home care workers adequately and thereby creating “a shortage of
5 attendant care workers, which prevented Plaintiffs from receiving all of the needed and authorized
6 services in their care plans.” *Ball v. Rodgers*, No. 00-cv-67, 2009 WL 1395423, at **5-6 (D. Ariz.
7 Apr. 24, 2009). The court found that the state’s “failure to provide Plaintiffs with the necessary
8 services threatened Plaintiffs with institutionalization, prevented them from leaving institutions, and in
9 some instances forced them into institutions in order to receive their necessary care.” *Id.*

10 Similarly, in *Fisher v. Oklahoma Health Care Authority*, the Tenth Circuit considered a state
11 program limiting recipients of Oklahoma’s community-based Medicaid services (but not nursing home
12 residents) to five prescriptions per month, regardless of medical necessity. 335 F.3d 1175, 1178 (10th
13 Cir. 2003). The program was implemented purely for budgetary reasons. *Id.* at 1178-79. The
14 plaintiffs – recipients of community-based services subject to the new policy – presented evidence that
15 this policy would “force them out of their communities and into nursing homes in order to obtain the
16 care that is medically necessary.” *Id.* at 1179 (footnote omitted). Because the *Fisher* plaintiffs, like
17 Fresno County IHSS recipients, “st[oo]d imperiled with segregation” as a result of the state’s conduct,
18 the Tenth Circuit held that their ADA claim withstood Defendants’ motion for summary judgment. *Id.*
19 at 1181-82; *see also Crabtree v. Goetz*, No. 3:08-cv-939, 2008 WL 5330506, at *25 (M.D. Tenn. Dec.
20 19, 2008) (preliminarily enjoining reduction of maximum home health care hours because would
21 “eliminate services that enable Plaintiffs to remain in their community placement” and thereby “cause
22 their institutionalization into nursing homes”); *V.L.*, 669 F.Supp.2d at 1119-20 (granting preliminary
23 injunctions based on threat of institutionalization presented by loss of IHSS services).

24 In sum, Plaintiffs are likely to succeed on their claim that the implementation of the Fresno rate

25
26 ¹¹ Plaintiffs are qualified individuals with disabilities, see 42 U.S.C. §§12131(2), 12102(2); 29
27 U.S.C. §705(20)(B), and Defendants are regulated entities under the ADA and the Rehabilitation Act,
28 see 42 U.S.C. §12131(1); 29 U.S.C. §794(b)(1). In addition, as Fresno County Plaintiffs are currently
receiving IHSS services in their homes, *Olmstead*’s qualifications that community placement is only
required if “treatment professionals have determined that community placement is appropriate” and
“not opposed by the affected individual,” 527 U.S. at 587, are satisfied here.

1 reduction would threaten IHSS recipients with unjustified institutionalization and thereby violates the
2 integration mandates of the ADA and Rehabilitation Act.¹²

3 **II. The Remaining TRO Factors Overwhelmingly Weigh In Favor Of Maintaining The**
4 **Status Quo Pending A Hearing On The Merits**

5 **A. The Failure To Enjoin Approval Of The Wage Cuts Would Result In Immediate,**
6 **Irreparable Harm To IHSS Consumers And Providers in Fresno County**

7 Unless the Court issues a TRO before July 1, 2010, State Defendants and Fresno Defendants
8 will implement the rate reduction to \$8.00 per hour. This will cause severe and irreparable harm to
9 both IHSS consumers and providers in Fresno County. *See California Pharmacists II*, 596 F.3d at 1114
10 (“[P]laintiffs need only show harm to Medi-Cal service providers or their members in order to obtain
11 injunctive relief”); *see also California Pharmacists I*, 563 F.3d at 850.

12 **Consumer Plaintiffs:** As this Court has previously recognized:

13 [W]age reductions will cause many IHSS providers to leave employment, which in turn
14 will leave consumers without IHSS assistance. The consumers’ quality of life and
15 health-care will be greatly diminished, which will likely cause great harm to disabled
16 individuals. For instance, the declarations submitted by Plaintiffs describe harms
ranging from going hungry and dehydration, to falls and burns, to an inability ever to
leave the home. Institutionalizing individuals that can comfortably survive in their
home with the help of IHSS providers will “cause Plaintiffs to suffer injury to their
mental and physical health, including a shortened life, and even death for some
Plaintiffs.”

17 Prelim. Inj. Order (Dkt. 131) at 10:26-11:10 (quoting *Crabtree*, 2008 WL 5330506, at *30).

18 Similarly, the wage reductions at issue here are likely to cause many providers to reduce their
19 hours or leave IHSS employment altogether. Howes Decl. ¶¶71-75; Aguilar Decl. ¶4; Bailey Decl. ¶6;
20 Boushele Decl. ¶6; M. Garcia Decl. ¶5; Jones Decl. ¶6; Moreno Decl. ¶7; Thao Decl. ¶9; Muniz Decl.
21 ¶4; Ward Decl. ¶5; Wright Decl. ¶5; Altman Decl. (Dkt. 6) ¶4. Many Fresno County class members
22 will be unable to find a satisfactory replacement provider and will either go without IHSS assistance or
23 will be forced to enter a nursing home or other institutional facility. *See supra* at 10-12.

24 In either case, the quality of these consumers’ lives and health care will be greatly diminished,

25
26 ¹² The “fundamental alteration” exception to the ADA and Rehabilitation Act integration
27 mandate is not relevant to this motion. *See* 28 C.F.R. §35.130(b)(7); *Olmstead*, 527 U.S. at 604
28 (plurality opinion). Under that exception, a public entity need not make modifications in its policies,
practices, or procedures if the entity can demonstrate they “would fundamentally alter the nature of the
service, program, or activity.” 28 C.F.R. §35.130(b)(7). Here, a TRO that preserves the status quo
would not “fundamentally alter” the nature of the Medi-Cal services provided to IHSS consumers.

1 causing them irreparable injury. Going without needed home care services has been documented to
2 cause severe harm to disabled individuals. LaPlante Decl. (Dkt. 28) ¶7 (eligible consumers who go
3 without home care suffer from “going hungry, weight loss, dehydration, falls, injuries due to falls,
4 burns, and dissatisfaction”); Schnelle Decl. (Dkt.45) ¶¶5-6 (consumers eligible for community care
5 who enter nursing homes suffer from “a loss of independence and autonomy” as well as “poor quality
6 care”). Declarations establish that similar harm is likely to befall IHSS consumers in Fresno County.
7 *See, e.g.*, Bailey Decl. ¶8; Gilchrist Decl. ¶7.

8 Unwanted entry into a nursing home will cause different but equally irreparable injuries.
9 Individuals forced into institutional care suffer greatly from the loss of independence and autonomy.
10 Schnelle Decl. (Dkt.45) ¶5. And regardless of whether nursing home admission is a choice, California
11 nursing homes are often maintained below minimally safe staffing levels. *Id.* ¶6. Indeed, citations for
12 noncompliance with legal requirements are common. *Id.* Such deficient staffing can lead to problems
13 such as ulcer development, pneumonia, undernutrition, urinary incontinence, infections, and mortality.
14 *Id.* Plaintiffs have submitted specific evidence regarding injuries that Fresno IHSS recipients will
15 suffer upon entry into a nursing home. Miller Supp. Decl. ¶5; Wilkins Decl. ¶6; R. Garcia Decl. ¶5;
16 Gilchrist Decl. ¶7; Hanlon Decl. ¶7; Hopkins Decl. ¶7; Vang Decl. ¶7; Lee Decl. ¶7; Moore Decl. ¶7.

17 This “reduc[tion] or terminati[on of] home care services . . . would result in the deprivation of
18 life-sustaining medical services. This certainly constitutes irreparable harm.” *Mayer v. Wing*, 922 F.
19 Supp. 902, 905, 909 (S.D.N.Y. 1996) (preliminarily enjoining reduction of personal home care services
20 such as “assistance with personal hygiene, dressing, feeding and housekeeping”); *see also Independent*
21 *Living Ctr. II*, 572 F.3d at 658 (“Medi-Cal recipients may demonstrate a risk of irreparable injury by
22 showing that enforcement of a proposed rule may deny them needed medical care.”) (quotation marks
23 omitted); *Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir. 1982) (same); *Crabtree*, 2008 WL
24 5330506, at *30 (irreparable injury would result from home care cuts because “institutionalization will
25 cause Plaintiffs to suffer injury to their mental and physical health, including a shortened life, and even
26 death for some Plaintiffs”); *Long v. Benson*, 2008 WL 4571903, at *2 (N.D. Fla. Oct. 14, 2008)
27 (irreparable harm would result if plaintiff were forced into nursing home because would “inflict an
28 enormous psychological blow” and “because of the very substantial difference in [plaintiff’s] perceived

1 quality of life in the apartment as compared to the nursing home”).¹³

2 **Provider Plaintiffs:** In addition to the harm that will be suffered by IHSS consumers, IHSS
3 providers in Fresno County are likely to suffer irreparable harm unless an injunction issues, for the
4 planned wage reduction “would impact many providers’ ability to afford such basic necessities as food,
5 clothing, utilities, and rent.” *Dominguez*, 596 F.3d at 1098. Bailey Decl. ¶6; Boushele Decl. ¶6;
6 Maiden Decl. ¶4; Singh Decl. ¶4; Ward Decl. ¶4; Brown Supp. Decl. ¶9; Cendejas Decl. ¶4; Everhardt
7 Decl. ¶4; Leon Decl. ¶5; Martinez Decl. ¶6; Perez Decl. ¶5; Valdez Decl. ¶4.¹⁴

8 This type of harm is plainly irreparable. *See Dominguez*, 596 F.3d at 1098 (affirming
9 irreparable harm finding based on reduction in State’s contribution to IHSS provider wages); *LaForest*,
10 376 F.3d at 55 (irreparable injury where challenged action would cause “(1) substantial risk to
11 plaintiffs’ health; (2) severe financial hardship; (3) the inability to purchase life’s necessities; and (4)
12 anxiety associated with uncertainty”); *United Steelworkers of Am. v. Textron, Inc.*, 836 F.2d 6, 8 (1st
13 Cir. 1987) (irreparable harm when plaintiffs “would likely suffer emotional distress, concern about
14 potential financial disaster, and possibly deprivation of life’s necessities”); *Garrett v. City of*
15 *Escondido*, 465 F. Supp. 2d 1043, 1052 (S.D.Cal. 2006) (threat of lost housing is irreparable harm).

16 Moreover, if an injunction does not issue, “financial harm to the IHSS providers is irreparable
17 because retrospective monetary damages are unavailable due to the State Defendants’ Eleventh
18 Amendment immunity.” Prelim. Inj. Order (Dkt, 131) at 11:14-21 (citing *California Pharmacists I*,
19 563 F.3d at 851-52).

20 **B. The Balance Of Hardships Tips Strongly In Plaintiffs’ Favor**

21 In contrast to the harm likely to befall Plaintiffs and Fresno class members – decreased medical
22

23 ¹³ *Cf. LaForest v. Former Clean Air Holding Co., Inc.*, 376 F.3d 48, 55-56 (2d Cir. 2004)
24 (affirming preliminary injunction prohibiting reduction of retiree health benefits, including increased
25 cost of prescription medications, because would pose “substantial risk to plaintiffs’ health”); *Beno v.*
26 *Shalala*, 30 F.3d 1057, 1064 & n.10 (9th Cir. 1994) (even small reductions of cash benefits for poor
27 families constitute irreparable injury); *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)
28 (“[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.”).

¹⁴ As noted *supra*, the reduced wage will put families of three below the poverty level, and that
is assuming that the provider is employed full-time, year round. *See* RJN, Exs. A-C.

1 care, loss of housing, severe emotional distress – Defendants’ sole injury will be the financial costs of
2 continuing the current IHSS provider wages for Fresno County for the modest period of time until this
3 case can be heard on the merits. The Ninth Circuit has “repeatedly recognized that individuals’
4 interests in sufficient access to health care trump” the government’s financial concerns. *Dominguez*,
5 596 F.3d at 1098; see also *Independent Living II*, 572 F.3d at 659; *California Pharmacists II*, 596 F.3d
6 at 1098 (recognizing important public interest in social welfare cases of safeguarding access to health
7 care for Medicaid-eligible individuals); Prelim. Inj. Order (Dkt. 131) at 11:22-12:5 (harm caused by
8 IHSS wage cut would outweigh injury to State’s fisc). Thus, any potential financial loss to Defendants
9 is insufficient to outweigh the serious hardship Plaintiffs would suffer absent an injunction. In any
10 event, the wage cut will cost the State far more than it will save. Howes Decl. ¶¶9, 89.

11 **C. The Public Interest Sharply Favors Granting Relief**

12 Finally, the Ninth Circuit has continually affirmed that individual access to health care,
13 including IHSS, is of greater public interest than budgetary concerns. See *Dominguez*, 596 F.3d at
14 1098 (individual access to health care more important than budgetary concerns). Thus:

15 [T]he public interest weighs heavily in favor of granting relief. “It would be tragic, not
16 only from the standpoint of the individuals involved but also from the standpoint of
17 society, were poor, elderly, disabled people to be wrongfully deprived of essential
benefits for any period of time.”

18 *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir.1983).” Prelim. Inj. Order (Dkt. 131) at 12:5-10; see
19 also *California Pharmacists I*, 563 F.3d at 852-53 (“[I]t would not be equitable or in the public’s
20 interest to allow the state to continue to violate the requirements of federal law, especially when there
21 are no adequate remedies available to compensate the Hospital Plaintiffs for the irreparable harm that
22 would be caused by the continuing violation”).

23 **CONCLUSION**

24 For the foregoing reasons, the Court should grant a TRO to maintain the status quo by
25 prohibiting Defendants from implementing the Fresno County wage reduction on July 1, 2010. The
26 Court should also issue an order requiring Defendants to show cause why a preliminary injunction
27 should not issue to enjoin both the Fresno County rate reduction and any further rate reduction
28 approvals by State Defendants without the required consideration of the Section 30(A) factors.

1 Dated: June 21, 2010

Respectfully submitted,

2 STEPHEN P. BERZON
3 SCOTT A. KRONLAND
4 STACEY M. LEYTON
5 PEDER J. THOREEN
6 ANNE N. ARKUSH
7 EMILY B. WHITE
8 CAROLINE P. CINCOTTA

9 By: /s/ Stacey M. Leyton
10 Stacey M. Leyton

11 Attorneys for Plaintiffs
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28