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12 IN THE UNITED STATES DISTRICT COURT  
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

14 LILLIE BRANTLEY, by her guardian ad ) litem Chauncey Mc Lorin; GILDA GARCIA; ) 15 ALLIE JO WOODARD, by her guardian ad ) litem Linda Gaspard-Berry, individually and ) 16 on behalf of all others similarly situated, ) ) ) 17 Plaintiffs, ) ) ) 18 vs. ) ) ) 19 DAVID MAXWELL-JOLLY, Director of the ) 20 Department of Health Care Services, State of ) California, DEPARTMENT OF HEALTH ) 21 CARE SERVICES, ) ) ) 22 Defendant. ) ) ) 23 ) 24 ) 25 ) 26 ) 27 ) 28 )	<b>Case No.: C09-03798 MEJ</b>  <b>CLASS ACTION</b>  <b>NOTICE OF MOTION AND MOTION</b> <b>FOR TEMPORARY RESTRAINING</b> <b>ORDER AND ORDER TO SHOW CAUSE;</b> <b>MEMORANDUM OF POINTS AND</b> <b>AUTHORITIES IN SUPPORT</b>  Date: TBD Time: TBD Courtroom: TBD
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1 **NOTICE OF MOTION AND MOTION FOR TEMPORARY RESTRAINING ORDER AND**  
2 **ORDER TO SHOW CAUSE**

3 TO DIRECTOR DAVID MAXWELL-JOLLY, THE DEPARTMENT OF HEALTH CARE  
4 SERVICES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE that on August  
5 \_\_\_\_\_, 2009 or soon thereafter as counsel may be heard in Courtroom \_\_\_\_\_, United States  
6 District Court, Northern District of California, located at 450 Golden Gate Avenue, San Francisco,  
7 CA, Plaintiffs individually and on behalf of class members, will move the Court pursuant to Rule 65  
8 of the FRCP and Rule 65-1 of the Local Civil Rules for an order issuing a Temporary Restraining  
9 Order immediately enjoining Defendants and their successors, agents, officers, servants, employees,  
10 attorneys and representatives and all persons acting in concert or participating with them, from  
11 violating Plaintiffs' rights by:

12 (a) Enjoining and prohibiting Defendants Director David Maxwell-Jolly and the Dept. of  
13 Health Care Services, and successors, agents, officers, servants, employees, attorneys and  
14 representatives and all persons acting in concert or participating with Defendants, from engaging in  
15 the following actions until this Court rules on Plaintiffs' Motion for a Preliminary Injunction:

16 Reducing, terminating or modifying Medi-Cal Adult Day Health Care (ADHC) program  
17 benefits to the Plaintiffs and Class Members, pursuant to ABX4 5, in violation of their rights  
18 under the ADA, Section 504, the Due Process clause of the Constitution, and the Medicaid  
Act.

19 (b) Granting a Temporary Restraining Order, compelling Defendants, their officers,  
20 agents, employees, attorneys, and all persons who are in active concert or participation with them, to  
21 take all actions necessary within the scope of their authority to implement the above injunctions; and  
22 ordering Defendants to maintain this Temporary Restraining Order, until such time as this Court  
23 rules on Plaintiffs' Motion for a Preliminary Injunction herein.

24 Plaintiffs further request that the Court waive the requirement for the posting of a bond as  
25 security for the entry of preliminary relief, on the grounds of Plaintiffs' indigency, and that this court  
26 issue an Order to Show Cause fixing the time for a hearing on Plaintiffs' motion for a Preliminary  
27 Injunction and Motion for Class Certification.

1 This Motion for a Temporary Restraining Order is based upon this Notice of Motion and  
 2 Motion, a copy of the Complaint, the Memorandum of Points and Authorities, the Proposed  
 3 Temporary Restraining Order, and declarations and exhibits filed concurrently herewith and upon  
 4 such oral and written argument as be presented at the hearing on the Motion.

5 The Motion will be made on the ground that Plaintiffs and Class Members will suffer  
 6 irreparable injury unless the activities described above are enjoined pending the hearing on  
 7 Plaintiffs' Motion for Preliminary Injunction.

## 8 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

### 9 I. SUMMARY OF ARGUMENT

10 On August 27, 2009, unless this Court issues a Temporary Restraining Order, illegal and  
 11 devastating cuts to the Adult Day Health Care (ADHC) benefit under the State Medi-Cal program  
 12 will take place, causing irreparable harm to thousands of elderly and disabled individuals.

13 On that date, A.B. 5, 4<sup>th</sup> Ex. Sess. (Cal. 2009) (Chapter 5, Statutes of 2009) (ABX4 5) is  
 14 scheduled to go into effect. The ADHC program provides cost-effective community based services  
 15 to thousands of Californians, enabling them to avoid unnecessary hospitalization and  
 16 institutionalization, maintain community and family ties, and improve health outcomes. ABX4 5  
 17 cuts ADHC benefits based solely on economic considerations. The most immediate cut is from a  
 18 maximum of 5 to 3 days per week for all Medi-Cal beneficiaries, with no exceptions, and regardless  
 19 of existing treatment authorizations and the health condition of the individual. These two days per  
 20 week cuts mean the difference between being at home and being institutionalized for the Plaintiffs  
 21 and others similarly situated.

22 As Plaintiff Lillie Brantley's niece attests, "If my aunt is not able to attend the ADHC 5 times  
 23 a week I will not be able to keep her at home, and will have to look for a nursing home for her. I  
 24 would hate to do it, because she raised me, and I love her very much, and want to keep her with us,  
 25 but I can't afford to quit my job, which is what I would have to do." (McLorin Decl. ¶¶16, 17.)

26 Additional cuts, terminating many people completely, will also take place upon a declaration  
 27 from Defendant Maxwell-Jolly. Without these services, Plaintiffs will experience immediate and  
 28 irreparable harm. Plaintiffs and other Class Members will be at risk of deterioration in health and



1 functioning, and will be forced into hospitals and nursing facilities due to Defendants' violation of  
 2 the Americans with Disabilities Act of 1990 (ADA ), 42 U.S.C. §§ 12101-12213 (West 2008), and  
 3 Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §§ 794-794a (West 2007).

4 Defendants have not even issued statutorily required written notice to Plaintiffs informing  
 5 them that their benefits are being terminated and of their right to a hearing, in violation of federal  
 6 Medicaid law and the Fourteenth Amendments of the U.S. Constitution.

7 Plaintiffs request that a temporary restraining order be issued prohibiting any cuts until  
 8 preliminary injunction motion can be heard. Plaintiffs further request that a preliminary injunction  
 9 be issued prohibiting Defendants from implementing across-the-board cuts from 5 to 3 days per  
 10 week of ADHC services prior to giving required notices and determining whether replacement  
 11 services under the Medi-Cal program can meet their needs.

## 12 **II. STATEMENT OF FACTS**

### 13 **A. Background of the ADHC Program**

14 Adult Day Health Care (ADHC) is a Medi-Cal funded community-based program for low  
 15 income seniors and younger disabled adults. Cal. Welf. & Inst. Code ¶14521 (West 2009). ADHC  
 16 services are generally provided at centers located in communities throughout California. Individuals  
 17 who live at home or in licensed residential care participate in ADHC from 1 to 5 days per week,  
 18 depending on their assessed needs.

19 In enacting the ADHC program, the California legislature found that:  
 20 [T]here exists a pattern of overutilization of long-term institutional care for elderly  
 21 persons or adults with disabilities, and that there is an urgent need to establish and to  
 22 continue a community-based system of quality adult day health care which will  
 23 enable elderly persons or adults with disabilities to maintain maximum independence.  
 . . . [O]verreliance on [nursing facility care] has proven to be a costly panacea in both  
 financial and human terms, often traumatic, and destructive of continuing family  
 relationships and the capacity for independent living.<sup>1</sup>

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24  
 25 <sup>1</sup> The legislature went on to say:

26 It is, therefore, the intent of the Legislature in enacting this chapter and related provisions to  
 27 provide for the development of policies and programs that will accomplish the following:

- 28 (a) Ensure that elderly persons and adults with disabilities are not institutionalized  
 inappropriately or prematurely.

1 Cal. Health & Safety Code § 1570.2 (West 2009).

2 ADHC serves these purposes by providing participants with a bundle of medical and other  
3 therapeutic services. Under Medi-Cal, ADHC centers must provide:

- 4 1) Rehabilitation services, including physical therapy, occupational therapy, and speech  
5 therapy;
- 6 2) Medical services supervised by either the participant's personal physician or a staff  
7 physician or both;
- 8 3) Nursing services, including skilled nursing care and self-care training and services  
9 oriented toward activities of daily living and personal hygiene, such as toileting, bathing  
10 and grooming;
- 11 4) Nutrition services, including one meal per day and dietary counseling and nutrition  
12 education for participants and their families;
- 13 5) Psychiatric and psychological services including consultation, individual assessment, and  
14 supervision of treatment by a psychiatrist, psychologist, psychiatric social worker or  
15 psychiatric nurse, when indicated;
- 16 6) Medical social services to participants and their families to help with personal, family and  
17 adjustment problems that interfere with the effectiveness of treatment;
- 18 7) Recreational and social activities designed to encourage physical exercise to prevent  
19 deterioration and to stimulate social interaction; and
- 20 8) Non-medical and medical transportation service for participants.

21 Cal. Code Regs. tit. 22 § 54309(a) (2009); Cal. Welf. & Inst. Code § 14550 (West 2009); Cal. Health  
22 & Safety Code § 1570, *et seq.* (West 2006). ADHC centers provide services for a daily all-inclusive  
23 Medi-Cal reimbursement rate of \$76.22. (Missaelides Decl. ¶21.)

24 Individuals wishing to receive ADHC services must have a physician submit history and  
25 physical information and participate in a 3 day assessment performed by a multidisciplinary team  
26 of clinicians including a physician, registered nurse, social worker, physical therapist and  
27

- 28 (b) Provide a viable alternative to institutionalization for those elderly persons and adults with  
disabilities who are capable of living at home with the aid of appropriate health care or  
rehabilitative and social services.
- (c) Establish adult day health centers in the community for this purpose, that will be easily  
accessible to all participants, including economically disadvantaged elderly persons and  
adults with disabilities, and that will provide outpatient health, rehabilitative, and social  
services necessary to permit the participants to maintain personal independence and lead  
meaningful lives.
- (d) Include the services of adult day health centers as a benefit under the Medi-Cal Act, that shall  
be an initial and integral part in the development of an overall plan for a coordinated,  
comprehensive continuum of optional long-term care services based upon appropriate need.  
Cal. Health & Safety Code § 1570.7 (West 2009).

1 occupational therapist, at minimum. Cal. Code Regs. tit. 22 (2009) § 54211. The  
 2 multidisciplinary team designs an Individual Plan of Care (IPC) that includes recommended days  
 3 of attendance, which is then submitted to the Medi-Cal Field Office along with the Treatment  
 4 Authorization Request (TAR) for approval by Medi-Cal. (Missaelides Decl. ¶ 22.)

5 Defendants have certified through the IPC process that all participants in the ADHC program  
 6 meet the criteria for services, including that a “a high potential exists for the deterioration of the  
 7 participant's medical, cognitive, or mental health condition or conditions in a manner likely to result  
 8 in emergency department visits, hospitalization, or other institutionalization if adult day health care  
 9 services are not provided.” Cal. Welf. & Inst. Code § 14526.1(d)(4); (Davis Decl. ¶ 18); (McCloud  
 10 Decl. ¶ 17; (Toth Decl. ¶ 13); (Puckett Decl. ¶ 12); (Myers Purkey Decl. ¶ 17.)

11 **B. Medi-Cal State Plan Services**

12 Many of these same services that are part of the ADHC package are also included as  
 13 community-based Medicaid state plan services and would be otherwise available to Plaintiffs and  
 14 Class Members as an alternative to ADHC. These include but are not limited to:

- 15 1. Personal care services through the In-Home Supportive Services program;<sup>2</sup>
- 16 2. Home Health services, including part-time or intermittent skilled nursing services by  
 17 licensed nursing personnel and home health aide services;<sup>3</sup>
- 18 3. Specialty mental health services, including rehabilitation services and medication  
 19 management;<sup>4</sup>
- 20 4. Targeted Case Management (TCM) services to assist Medi-Cal recipients in gaining  
 21 access to needed medical, social, educational and other services;<sup>5</sup>
- 22 5. Home and community-based waiver services, which provide case management,

20 <sup>2</sup> Including meal preparation and cleanup, assistance with ambulation, bowel and bladder care,  
 21 paramedical services, and others. Cal. Welf. & Inst. Code §§ 12300, 14132.95, 14132.95.1.

22 <sup>3</sup> Including in-home medical care services as defined in California Welfare and Institutions Code  
 23 section 14132(s); physical, occupational or speech therapy; medical social services; home health  
 24 aide services, which include assisting with personal care, bathroom needs and ambulation, and  
 25 performing medically necessary household services to facilitate self-care such as changing the bed  
 and light cleaning; medical supplies other than drugs and biologicals; and the use of medical  
 appliances, provided for under an approved treatment plan. Cal. Health & Safety Code §§ 1725 *et*

26 <sup>4</sup> Cal. Welf. & Inst. Code §§ 14021(a), 14021.4, 14681, 14683, 14684; Cal. Code Regs. tit. 9  
 §§ 1810.100; 1810.247.

27 <sup>5</sup> Including assistance in obtaining Medi-Cal services, assessments, service/support planning, and  
 28 monitoring to ensure services and supports are meeting a beneficiary's needs. Cal. Welf. & Inst.  
 Code § 14132.44.

1 community transition services, private duty nursing, family training, home health  
2 aides, life-sustaining utility reimbursement, habilitation services, and respite care;<sup>6</sup>  
3 and

4 **6. Medical and non-medical transportation.**<sup>7</sup>

5 In addition to the above community-based services, Medi-Cal also funds skilled nursing  
6 facility services which provide skilled nursing care and supportive care to individuals, and hospitals.  
7 Cal. Health & Safety Code § 1250(a),(c) (West 2009).

8 **C. ABX4 5 Makes Devastating Cuts to Program**

9 ABX4 5 is scheduled to go into effect on August 27, 2009. The new law reduces the ADHC  
10 benefit to 3 days per week for all Medi-Cal beneficiaries, with no exceptions. Cal. Welf. & Inst. §  
11 14132(p)(2) effective August 27, 2009.<sup>8</sup> These cuts are based on financial considerations. No  
12 reevaluations have been done of individuals to determine whether they still need services or qualify  
13 for other available services. (Missaelides Decl. ¶¶ 32, Exh. D.)

14 **D. Plaintiffs**

15 **1. Lillie Brantley**

16 Plaintiff Lillie Brantley is an 84-year-old woman who has severe Alzheimer's disease,  
17 hyperlipidemia, a seizure disorder, atrial fibrillation, has had a stroke, and is very frail. (Davis Decl.  
18 ¶¶ 28.) Ms. Brantley lives with her niece Chauncey McLorin<sup>9</sup> and Ms. McLorin's 15-year old

19 <sup>6</sup> Cal. Welf. & Inst. Code § 14000 *et. seq.*

20 <sup>7</sup> 42 C.F.R. § 431.53 (2009); Cal. Welf. & Inst. Code §§ 14132(i), 14133.6, 14133.65, 14136 *et.*  
21 *seq.*; Cal. Code Regs tit. 22 §§ 51151.7, 51151 *et seq.*

22 <sup>8</sup> In addition to this cut, new restrictions limiting who is eligible to receive ADHC services will go  
23 into effect if and when the Director of DHCS provides a written declaration that new restrictions are  
24 ready to be implemented. Cal. Welf. & Inst. Code § 14521.1, effective August 27, 2009. These new  
25 restrictions will terminate or deny ADHC services to individuals based on degree of functional  
26 limitation and need for a certain level of care. The statute provides that at the time of the declaration  
27 of new restrictions by the Director, the ADHC benefit will revert back to a maximum of 5 days per  
28 week for the individuals who remain eligible. Plaintiffs have alleged that these new restrictions  
violate the law, however, as they are not yet in place, Plaintiffs do not seek a TRO or PI regarding  
this component of ABx4 5. Cal. Welf. & Inst. Code §§ 14525.1, 14522.4(a)(10), effective August  
27, 2009.

<sup>9</sup> An application to appoint Ms. McLorin to act as a Guardian Ad Litem for Ms. Brantley in this  
action has been filed with this Court.

1 daughter. Because of her cognitive impairments, Ms. Brantley can never be left alone. (McLorin  
2 Decl. ¶ 6.) Ms. Brantley and her family want her to remain in the community, and in her family  
3 home, where she can be part of the household, and among people and places she knows and loves.  
4 According to Ms. McLorin, putting Ms. Brantley into a nursing home would be devastating: “It is so  
5 painful to consider this, and even though she is deteriorating, she is not in a vegetative state, and still  
6 knows me and my family, and our neighborhood. We go to church together, and out to eat. I think  
7 it would be terrible for her to have to leave us.” (*Id.* at ¶¶ 17-18.) However, Ms. Brantley’s family  
8 will be forced to institutionalize her if she is not able to go to the ADHC program 5 days a week, as  
9 Ms. McLorin cannot afford to quit her job. (*Id.* at ¶¶ 8, 16).

10 Ms. Brantley has been attending the Bayview Hunter’s Point ADHC program in San  
11 Francisco California for 3 years. (*Id.* at ¶ 4.) Ms. Brantley is authorized under Medi-Cal to receive  
12 ADHC services 5 days per week, and these services including professional nursing services every  
13 day to monitor her hypertension, monitor and control her seizures, and monitor her for weight loss;  
14 personal care services every day to help her with feeding, toileting, and ambulation, as well as  
15 monitoring her whereabouts; physical therapy maintenance program twice per week to reduce her  
16 risk for falls and maintain current functioning; occupational therapy services for maintaining her  
17 functional strength; and nutritional monitoring because of her diagnosis of hypertension and her  
18 recent weight loss. (Davis Decl. ¶¶ 26, 30.)

19 Ms. Brantley’s most recent IPC, which is approved by Medi-Cal and current through August  
20 31, 2009, documents that she is at high risk of institutionalization if she does not receive ADHC  
21 services 5 days per week, due to her inappropriate behavior and affect, two or more chronic medical  
22 conditions, poor judgment, medication mismanagement, frailty, isolation, risk for falls, including  
23 forgetting to use her cane and being unsafe in transfers, self neglect, and dementia-related behavioral  
24 problems. (*Id.* at ¶ 31.)

25 As of August 21, 2009, Ms. Brantley has not received written notice from Medi-Cal  
26 informing her that her ADHC services will be cut. (McLorin Decl. ¶ 15.)

27 **2. Allie Jo Woodard**

1 Plaintiff Allie Jo Woodard is a 79-year-old woman who is diagnosed with bipolar affective  
2 disorder, depression, glaucoma, hypertension, osteoarthritis, and is pre-diabetic. (Davis Decl. ¶ 21.)  
3 Ms. Woodard receives Medi-Cal, and is authorized to receive ADHC service 5 days per week at the  
4 Bayview Hunter's Point ADHC program in San Francisco California. (*Id.* at ¶ 20.) She has been  
5 attending the program for nine years. (Gaspard-Berry Decl. ¶ 4.) Ms. Woodard's disability causes  
6 her to be very fragile emotionally, and she has had frequent psychiatric hospitalizations as a result.  
7 (*Id.* at ¶ 9.) Her daughter, Linda Gaspard-Berry, believes that Ms. Woodard's attendance and  
8 services at the ADHC 5 days per week are essential to support her, and that without the program's  
9 services, Ms. Woodard would have been hospitalized more frequently than she has been. *Id.*

10 Although Ms. Woodard lives alone, after a two-day disappearance a few years ago, her  
11 family ensures that she is never alone. (*Id.* at ¶ 6.) Her daughter and son taking turns spending the  
12 nights with her, as they juggle full time jobs and their own families. (*Id.* at ¶ 7.) On the weekends,  
13 her daughter takes Ms. Woodard to Ms. Gaspard-Berry's home in Fremont, California. (*Id.* at ¶ 8.)

14 Ms. Woodard's family goes to great lengths to keep her in her home and depend on her  
15 attending ADHC 5 days per week. Her daughter says, "My brother and I are working very hard, and  
16 are sacrificing a lot already to try to keep our mother in the community. It would be terrible for her  
17 to be in a facility, but we cannot afford to quit our jobs and put our families at risk." (*Id.* at ¶ 17.)

18 Ms. Woodard's most recent Medi-Cal approved Individual Plan of Care authorizes her to  
19 receive the following ADHC services 5 days per week: professional nursing services every day to  
20 monitor her for fall risk, for her hypertension, and for her pain and mobility related to her arthritis;  
21 personal care services daily to monitor her exertion level to prevent cardiac compromise; social  
22 services intended to prevent psychiatric hospitalization in the form of group activities, weekly  
23 psychological counseling, and daily check in with the program social worker to reorient her to  
24 reality; therapeutic activities to decrease her feelings of isolation, and improve her interactions with  
25 peers; occupational therapy services for maintaining functional strength two days per week. (Davis  
26 Decl. ¶ 23.) Ms. Woodard's current IPC, authorized by Medi-Cal through December 31, 2009,  
27 states that she is at a high risk of institutionalization if she does not receive ADHC services 5 days  
28

1 per week, based on her chronic medical conditions, poor judgment, medication mismanagement,  
2 frailty, isolation, risk for falls, and dementia-related behavioral problems. (*Id.* at ¶ 31.)

3 As of August 21, 2009, Ms. Woodard has not received written notice from Medi-Cal  
4 informing her that her ADHC services will be cut. (Gaspard-Berry Decl. ¶ 14.)

### 5 **3. Gilda Garcia**

6 Plaintiff Gilda Garcia is a 77-year-old woman with unstable diabetes, hypertension, Bells'  
7 Palsy, and kidney problems. (McCloud Decl. ¶ 21.) She is Medi-Cal eligible and currently receives  
8 5 days a week of ADHC through the Institute on ADHC program in San Francisco, California. (*Id.*  
9 at ¶¶ 19.) Ms. Garcia lives alone, and receives limited IHSS services. (Garcia Decl. ¶¶ 4, 14.)

10 Ms. Garcia is highly dependent on the ADHC program for medical stability and preventing  
11 isolation and depression. She says, "I love going to the center. It gives me a place to go everyday,  
12 and things to do. . . I also go to the center because they help me with my diabetes there. On the  
13 weekends, I just pray not to have problems with my diabetes. I am afraid I will have to go to the  
14 hospital if I don't have a nurse 5 days a week who can help me." (*Id.* at ¶¶ 7, 8, 9, 16, 18.)

15 In the professional opinion of the nurse at her program, ". . . based on the 4.5 years I have  
16 known Gilda, it's crucial for her to be at the Center Monday through Friday to prevent Emergency  
17 Room visits and hospitalizations. I am very concerned for her health and safety if she does not have  
18 the daily monitoring we provide here at our program. I don't know how else she will get this  
19 monitoring on the two days she would not attend our program." (Perelman Decl. ¶¶ 14, 15.)

20 Ms. Garcia's most recent Medi-Cal approved Individual Plan of Care authorizes her to  
21 receive the following ADHC services 5 days per week: professional nursing services 5 times a week  
22 to monitor her for hypoglycemic reactions, and monitoring for joint and back pain; personal care  
23 services 5 times a week to supervise her ambulation and prevent falls due to her poor vision and  
24 impulse control; social services 5 times a week to increase her opportunities for socialization and on  
25 an as needed basis help her coordinate her IHSS and other social services; physical therapy  
26 maintenance program 3 days per week to maintain her endurance and physical strength; occupational  
27 therapy maintenance program two days per week to maintain her current levels of functioning; and  
28 registered dietician services. (McCloud Decl. ¶ 24.)

1 Ms. Garcia's most recent IPC states that she is at a high risk of institutionalization if she does  
 2 not receive ADHC services 5 days per week, based on her two or more chronic medical conditions,  
 3 frailty, hyper/hypoglycemia, inappropriate affect/appearance or behavior, poor judgment, risk for  
 4 falls, and medication mismanagement. (*Id.* at ¶ 25.)

5 As of August 20, Ms. Garcia has not received written notice from Medi-Cal that her services  
 6 will be cut. (Garcia Decl. ¶ 17.)

#### 7 **E. Failure to Provide Individual Notice**

8 Medicaid program recipients have rights to written notice and a predetermination fair hearing  
 9 if the benefits they are receiving are reduced, suspended or terminated. 42 C.F.R. § 431.200 *et seq.*  
 10 (2009); Cal. Code Regs. tit. 22 § 51014.1.(a).

11 On July 30, 2009, Defendants informed providers of the ADHC program that Medi-Cal  
 12 would no longer approve or pay for a beneficiary to attend an ADHC center for more than 3 days per  
 13 week as of August 27, 2009. (Puckett Decl. ¶ 15, Exh. A.) Defendants also posted a notice on the  
 14 DHCS website that the "ADHC benefit is reduced to a maximum of 3 days of ADHC per week" and  
 15 that: "Effective August 27, 2009, Medi-Cal will only authorize and pay for a maximum of 3 days  
 16 per week of Adult Day Health Care." (*Id.* at ¶ 15, Exh. B.)

17 Plaintiffs Lillie Brantley, Gilda Garcia, and Allie Jo Woodard have not received  
 18 individualized notice of the cuts to their services providing them with statutorily required hearing  
 19 rights. (McLorin Decl. ¶ 15; Garcia Decl. ¶ 17; Gaspard-Berry Decl. ¶ 14.) Upon information and  
 20 belief, no class members have received individualized notice of the cuts to their services providing  
 21 them with statutorily required hearing rights. (Puckett Decl. ¶ 18.)

### 22 **III. PLAINTIFFS MEET THE REQUIREMENT FOR GRANTING A TEMPORARY 23 RESTRAINING ORDER**

#### 24 **A. Standards for TRO and Preliminary Injunction**

25 "A plaintiff seeking a preliminary injunction must establish that he is (1) likely to succeed on  
 26 the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that  
 27 the balance of equities tips in his favor, and (4) that an injunction is in the public interest." *Am.*  
 28 *Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009); *Winter v. Natural Res.*



1 *Def. Council*, 129 S. Ct. 365, 374 (2008); *Stormans, Inc. v. Selecky*, 571 F.3d 960, 977-98 (9th Cir.  
2 2009). Standards for a temporary restraining order are the same. The purpose of a temporary  
3 restraining order is to preserve the status quo and prevent irreparable harm just so long as necessary  
4 to hold a preliminary injunction hearing. It is governed by the same general standards as a  
5 preliminary injunction, but in any event applications for a temporary restraining order cannot be  
6 more rigorous than those for a preliminary injunction. *Granny Goose Foods, Inc. v. Brotherhood of*  
7 *Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (94 S. Ct. 1113, 1124). *Hoechst Diafoil Co. v.*  
8 *Nan Ya Plastics Corp.*, 174 F.3d 411, 422 (4<sup>th</sup> Cir. 1999); *Los Angeles Unified Sch. Dist. v. United*  
9 *States Dist. Court*, 650 F.2d 1004, 1008 (9<sup>th</sup> Cir. 1981) (Ferguson, J. dissenting). Plaintiffs meet all  
10 four criteria.

11 **1. Plaintiffs will Suffer Irreparable Harm in the Absence of an Injunction**

12 Recipients of government benefits frequently constitute the most vulnerable sector of the  
13 population. Numerous courts have held that reductions in either government benefits or medical  
14 care cause irreparable harm even when the cuts are of a relatively small magnitude. *See e.g.*,  
15 *Beno v. Shalala*, 30 F. 3d 1057, 1063-64, fn. 10 (9<sup>th</sup> Cir. 1994) (noting harm to beneficiaries  
16 from government benefit and medical care cuts); *Beltran v. Myers*, 677 F. 2d 1317, 1322 (9<sup>th</sup>  
17 Cir.1982). In *Beltran*, the Plaintiffs were a class of aged, blind, and disabled individuals who  
18 were denied Medi-Cal benefits by application of a transfer of assets rule in California. The Court  
19 held that by showing loss of the Medi-Cal benefits to the class, the Plaintiffs had demonstrated  
20 irreparable injury. *See also Edmonds v. Levine*, 417 F. Supp 2d 1323, 1342 (S.D. Fla. 2006)  
21 (summarizing eight different Medicaid cases finding irreparable harm or imminent risk of  
22 irreparable harm due to a variety of Medicaid cuts.

23 In addition, a violation of civil rights under the ADA and Section 504 because of a state's  
24 failure to provide services "in the most integrated setting appropriate," and being placed at "high  
25 risk for premature entry into a nursing home," satisfy the standard for granting injunctive relief.  
26 *See Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1184-1185 (10th Cir. 2003). In  
27 this case, the named Plaintiffs and class members are elderly and/or disabled individuals who  
28 face both Medicaid benefits cuts and ADA violations.

1                                   **a.       Lillie Brantley**

2           Ms. Brantley would be irreparable harmed by a reduction in ADHC services to 3 days per  
3 week. (Steinke Decl. ¶ 22.) Although Ms. Brantley is severely impaired by Alzheimer’s disease,  
4 ADHC services 5 days per week enable her to live in a familiar environment with family members  
5 who care for her and whom she recognizes and can interact with. She can go out to eat with family,  
6 and attend church. (McLorin Decl. ¶¶ 17, 18.) However, because she is unable to be left alone for  
7 any period of time, she would be at risk of serious injury if she were home alone during the time that  
8 ADHC is no longer available. (*Id.* at ¶ 6.) Given her family’s inability to stay at home with her for  
9 the days she would no longer be able to go to ADHC, she would need to be placed in a nursing  
10 facility and would likely deteriorate rapidly in an unfamiliar environment such as a nursing facility.  
11 (Steinke Decl. ¶ 22.) Placement in an institution would be devastating to her and to her family. (*Id.*  
12 at ¶ 22; McLorin Decl. ¶ 17.)

13                                   **b.       Allie Jo Woodard**

14           Allie Jo Woodard would be irreparably harmed by a reduction in ADHC to 3 days per week.  
15 Ms. Woodward lives in her own home with family alternating caring for her. Given her complex  
16 medical and mental health conditions, Ms. Woodard cannot be left alone safely. Ms. Woodward  
17 relies on ADHC services for pain and medication management, and socialization to assist her mental  
18 health condition. Without 5 days per week of ADHC, Ms. Woodward would need to be placed in a  
19 nursing facility; where she would deteriorate physically and mentally. (Steinke Decl. ¶ 24; Davis  
20 Decl. ¶ 25; Gaspard-Berry Decl. ¶ 16-17.)

21                                   **c.       Gilda Garcia**

22           Ms. Garcia would be irreparably harmed by a reduction in ADHC to 3 days per week. Ms.  
23 Garcia has unstable diabetes such that the frequent medical monitoring by ADHC nursing cannot be  
24 replicated by primary care. Ms. Garcia relies on ADHC for medical stabilization. In addition, Ms.  
25 Garcia is protected from isolation and depression by attending ADHC 5 days per week. If she had to  
26 remain at home for part of the week, she would likely see a rapid decrease in her mental and physical  
27 states, which would likely result in acute hospitalization and institutionalization. (Steinke Decl. ¶  
28 23; McCloud Decl. ¶¶ 26-27; Garcia Decl. ¶ 18; Perelman Decl. ¶ 14-15.)

1 **d. Class Members**

2 Plaintiffs' situations are typical of thousands of individuals who receive ADHC services, all  
3 of whom face imminent harm if the ADHC cuts are enacted. There are approximately 36,860  
4 recipients of ADHC services; approximately 8,121 of them currently receive services 4 and 5 day a  
5 week and will be affected by these cuts. (Missaelides Decl. ¶¶ 27, 33.) The following examples  
6 show the severe harm similarly situated individuals will suffer:

7 Chuck Peterson, 61, of Woodland, who has Chronic Obstructive Pulmonary Disease  
8 (COPD), emphysema, depression, anxiety, a hearing impairment, and is legally blind, among other  
9 disabilities. Mr. Peterson is oxygen dependent. He has coughing episodes due to COPD, which  
10 cause him to black out and fall to the ground. As a result, he uses a wheelchair. He lives alone in an  
11 SRO and requires assistance with taking his medication and is dependent upon others for meals,  
12 transportation, personal assistance, chores, and shopping. (Peterson Decl. ¶ 3.) He attends the Yolo  
13 Adult Day Health Center 5 days a week, and fears institutionalization if he is only able to attend the  
14 program 3 days per week. (Peterson Decl. ¶ 9; *see also*, Myers Purkey Decl. ¶ 23 (stating that Mr.  
15 Peterson is a "high risk" for institutionalization).)

16 Wilrene LaMar, 57, of Oroville, who has multiple disabilities as a result of a cerebral  
17 vascular accident (CVA), and attends the Peg Taylor Center in Chico California 5 days per week.  
18 Ms Lamar receives daily nursing services to monitor her and to assess for signs of stroke, medication  
19 side effects, stomach problems and other serious health concerns. She fears she will be  
20 institutionalized in a nursing facility if ADHC services are cut. (LaMar Decl. ¶ 9.)

21 Ilene McKray, 70, of Orland, has schizoaffective disorder and diabetes. She had her left leg  
22 amputated. She lives in an assisted living facility, and is dependent on ADHC 5 days a week to  
23 avoid nursing facility institutionalization. She receives daily physical therapy services to assist her  
24 with using her prosthetic leg. Ms. McKray's sister believes she will suffer both physical and  
25 emotional harm if her ADHC services are cut to only 3 days per week. (Simmons Decl. ¶¶ 8, 10.)

26 In addition to these individual participants, ADHC program providers have identified  
27 participants who they believe will be harmed by these cuts:  
28

1 Catherine Davis, Program Director of the Bayview Hunter's Point Adult Day Health Care  
2 program: Of the participants in her Program, Ms. Davis and her staff have identified 22 individuals  
3 who they believe are most at risk of institutionalization and/or physical harm should their ADHC  
4 services be cut and they not receive replacement services. These individuals have been determined  
5 to have a high potential for the deterioration of their medical, cognitive, or mental health condition  
6 or conditions in a manner likely to result in emergency department visits, hospitalization, or other  
7 institutionalization if ADHC services are not provided. (Davis Decl., ¶¶ 18, 33-36, Exh. A.)

8 Marina Krupnik, Executive Director of the Circle of Friends Adult Day Health Care Center  
9 in San Francisco, CA.: Ms. Krupnik has identified 160 participants who receive ADHC services  
10 four and 5 days a week. Based on her knowledge and experience, Ms. Krupnik believes that  
11 reductions to ADHC services from 5 to 3 days per week will cause individuals in her programs to be  
12 institutionalized, hospitalized, or otherwise harmed. (Krupnik Decl. ¶ 18.)

13 Diane Puckett, Executive Director of Innovative Health Care Services and Administrator of  
14 the Peg Taylor Center for Adult Day Health Care, Chico: Ms. Puckett has identified twenty-eight  
15 participants in her program who receive services four and 5 days per week, who face the risk of  
16 institutionalization, hospitalization or even death as a result of the reduction to their services.  
17 (Puckett Decl. ¶¶ 14, 20, 23.)

18 Debbie Toth, Executive Director of the Mt. Diablo Center for Adult Day Health Care in  
19 Pleasant Hill: Ms. Toth has identified 28 participants in her program who receive services four and  
20 5 days per week, who face the risk of institutionalization as a result of the reduction to their services.  
21 (Toth Decl. ¶ 17.)

22 **2. Plaintiffs are Likely to Succeed on the Merits of their Claims that**  
23 **Defendants are Violating the ADA and Section 504.**

24 **a. The ADA and Section 504 Prohibit Discrimination Against**  
25 **Individuals with Disabilities.**

26 In 1990, Congress enacted the Americans with Disabilities Act, as amended by the ADA of  
27 2008 (ADA) in 1990, to prohibit discrimination by all public entities. 42 U.S.C. §§ 12101(2008);  
H.R. Rep. No. 101-485, pt. 3, at 49 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 472.

28 Title II of the ADA, which governs public programs such as Medi-Cal, provides:

1 [N]o qualified individual with a disability shall, by reason of such  
 2 disability, be excluded from participation in or be denied the benefits  
 3 of the services, programs, or activities of a public entity, or be  
 4 subjected to discrimination by any such entity.

4 42 U.S.C. § 12132. This built upon the bar on disability discrimination by federal fund recipients  
 5 embodied in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (“Section 504”).

6 Under the ADA, a “qualified individual with a disability” is a person who “with or without  
 7 reasonable modifications to rules, polices or practices” meets the “essential eligibility requirements  
 8 for the receipt of services or the participation in programs or activities provided by a public entity.”

9 42 U.S.C. § 12131. Section 504’s definition is substantially similar. *See* 29 U.S.C. § 705(20).

10 Plaintiffs are eligible for Medicaid and are qualified persons with disabilities within the meaning of  
 11 the ADA and Section 504.<sup>10</sup> (McCloud Dec. ¶¶ 19 – 21 (regarding Plaintiff Garcia); Garcia Dec.  
 12 ¶ 3; Davis Dec. ¶¶ 21-22 (regarding Plaintiff Woodard)); ¶¶ 26-28 (regarding Plaintiff Brantley).)

13 Public entities must make reasonable modifications in “policies, practices, or procedures”  
 14 when the modifications are necessary to avoid discrimination, unless the accommodation would  
 15 fundamentally alter the nature of the program. 28 C.F.R. § 35.130(b)(7) (1991).

16 **b. The Cuts will Violate ADA and Section 504 Prohibitions Against**  
 17 **Unjustified and Unnecessary Institutionalization.**

18 In enacting the ADA, Congress specifically found that segregation of persons with  
 19 disabilities, especially in institutions, is a form of discrimination prohibited under the Act. 42 U.S.C.  
 20 §§ 12101(a)(2), (3), (5). The ADA and Section 504 specifically mandate that individuals with  
 21 disabilities be integrated into the community to the greatest extent possible. The ADA requires  
 22 public entities to “administer services, programs and activities in the most integrated setting  
 23 appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). Similarly,  
 24 under Section 504, agencies receiving federal financial assistance must administer their programs

25  
 26  
 27 <sup>10</sup> ADA regulations define disabilities, with respect to an individual, to include “a physical or mental  
 28 impairment that substantially limits one or more of the major life activities of such individual... such  
 as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing,

1 and activities “in the most integrated setting appropriate to the needs of qualified handicapped  
2 persons.” 28 C.F.R. §41.51(d). These obligations, known as the “integration mandate,” are  
3 construed and applied in the same manner. *Fisher v. Oklahoma Health Care Authority*, 335 F.3d  
4 1175, 1179 n.3 (10th Cir. 2003).

5 The integration mandate was analyzed and interpreted by the United States Supreme Court in  
6 the landmark decision *Olmstead v. L.C.*, 527 U.S. 581 (1999). The *Olmstead* plaintiffs were  
7 individuals with mental disabilities who were confined in Georgia’s state psychiatric institutions but  
8 who wanted to live in the community. Plaintiffs asserted that the state’s refusal to pay for services  
9 that would enable them to live in community settings violated the integration mandate of Title II of  
10 the ADA and its implementing regulations. The Court agreed, and held that “unjustified isolation is  
11 properly regarded as discrimination based on disability.” *Id.* at 597.

12 The high Court interpreted the ADA’s “integration mandate” as requiring persons with  
13 disabilities to be served in the community when: 1) the state’s treatment professionals have  
14 determined that community placement is appropriate; 2) community placement is not opposed by the  
15 affected individual; and 3) the placement can be reasonably accommodated, taking into account the  
16 resources available to the state and the needs of others with disabilities. *Id.* at 587.

17 Plaintiffs do not need to wait until they are institutionalized to bring a claim under the  
18 integration mandate. Individuals at risk of placement in nursing homes are also protected. *See*  
19 *Fisher*, 335 F.3d at 1181 (“...*Olmstead* does not imply that disabled persons who, by reason of a  
20 change in state policy, stand imperiled with segregation, may not bring a challenge to that state  
21 policy under the ADA’s integration regulation without first submitting to institutionalization.”)

22 Defendants are violating Plaintiffs’ rights to receive Medi-Cal services in the most integrated  
23 setting appropriate. Each Plaintiff meets all of the criteria necessary to show that the community  
24 integration mandate has been violated.

25  
26 **1) The State’s Treatment Professionals Have Determined  
That Community Placement is Appropriate.**

27  
28 learning, and working.” 28 C.F.R. § 35.104 (1991). The Section 504 requirements are essentially  
the same. 28 C.F.R. § 41.32 (1981).

1 Defendants have determined that receiving Medi-Cal services in the community is  
 2 appropriate to meet Plaintiffs' needs. All Plaintiffs currently live in the community where they have  
 3 been receiving Medi-Cal services, many for years. (McCloud Decl. ¶¶ 19-20 (regarding Plaintiff  
 4 Garcia); Davis Decl. ¶¶ 20-21 (regarding Plaintiff Woodard); and ¶¶ 26-27 (regarding Plaintiff  
 5 Brantley).) They all have Individual Plans of Care (IPC), developed by a multi-disciplinary team  
 6 which sets forth services needed for them to remain safely in the community. These IPCs have been  
 7 submitted and approved by Medi-Cal. (McCloud Decl. ¶ 19; Davis Decl. ¶¶ 20 and 26.) As a  
 8 requirement of the program, Plaintiffs have been determined to have a "high potential for the  
 9 deterioration of their medical, cognitive, or mental health condition or conditions in a manner likely  
 10 to result in emergency department visits, hospitalization, or other institutionalization if ADHC  
 11 services are not provided." (McCloud Decl. ¶¶ 17, 19, and 29; Exh. B; Davis Decl. ¶¶ 18, 20 and 26,  
 12 Exh. B, C.) Moreover, Plaintiffs' treating providers and Plaintiffs' medical expert have specifically  
 13 opined that community-based ADHC is the appropriate option, and institutionalizing them in nursing  
 14 homes will be dangerous to their health and lives. (Steinke Decl. ¶¶ 21-24; McCloud Decl. ¶¶ 20-  
 15 26; Davis Decl. ¶¶ 24-25, 27-32.)

16 **2) Plaintiffs Want to Stay in the Community.**

17 Far from opposing community placement, these Plaintiffs are fighting to remain in their  
 18 homes. (Garcia Decl. ¶¶ 4, 7, 16-17; McLorin Decl. ¶¶ 8-9, 16-17 (regarding Plaintiff Brantley);  
 19 Gaspard-Berry Decl. ¶ 17 (regarding Plaintiff Woodard).) As a result of Defendants' cuts, however,  
 20 the only way Plaintiffs can receive the services they need is to move to a nursing home or risk  
 21 hospitalization. (Steinke Decl. ¶¶ 21-24; McCloud Decl. ¶ 29; Davis Decl. ¶¶ 24-25, 31-32.)

22 **3) Defendants can Reasonably Accommodate Plaintiffs'  
 23 Desire to Receive Services in the Community.**

24 Under *Olmstead*, the integration mandate requires that Plaintiffs receive Medi-Cal services in  
 25 the community when this desire can be reasonably accommodated, taking into account the resources  
 26 available to the state and the needs of others with disabilities. *Olmstead*, 527. Defendants can  
 27 accommodate Plaintiffs' needs because the necessary services are available not only through the  
 28 ADHC program, but also are covered separately by Medi-Cal. ADHC allowed Plaintiffs to be

1 supported in the community by providing cost-effective community-based services.<sup>11</sup> However,  
 2 under California’s Medi-Cal program, there are a range of alternative community services that could  
 3 be used to replace the ADHC services that are being cut, including nursing, personal care, therapy,  
 4 case management, medication, meals, and transportation.<sup>12</sup>

5 Plaintiffs need information, assistance and time to secure those services prior to termination  
 6 of ADHC services. Defendants have failed to take any steps to identify and ensure provision of  
 7 these services to Plaintiffs and Class Members. Cuts should be stopped until Defendants meet their  
 8 obligations, under *Olmstead*, to ensure access to alternative services, available under the Medi-Cal  
 9 program, which are needed to avoid institutionalization in hospitals and nursing facilities.

10 Moreover, for those Plaintiffs for whom replacement services cannot be located, and  
 11 continuance of ADHC for 4 or 5 days is necessary to prevent institutionalization, ADHC services  
 12 should be available 4 or 5 days as a reasonable modification to the Medi-Cal program. In fact, under  
 13 ABX4 5, once Defendant Maxwell-Jolly issues a declaration implementing new eligibility  
 14 restrictions, the temporary ban on 4 or 5 days of ADHC will be lifted altogether. It is not only  
 15 reasonable, but prudent, to permit up to 5 days per week in the interim when necessary.

16 Defendants’ rush to cut ADHC services, paired with the complete failure to provide notice,  
 17 give participants information on or arrange for replacement services, or take any steps to prevent the  
 18 unnecessary institutionalization of Plaintiffs is culpable, and violates both the ADA and Section 504.

19 Case law is instructive here. In *Fisher*, the state imposed a rule limiting Medicaid coverage  
 20 of prescription drugs to only 5 prescriptions per month for individuals in the community. 335 F.3d  
 21 at 1178. If Medicaid beneficiaries required more than 5 prescriptions, they had to move into nursing  
 22 homes, where prescriptions were unlimited. *Id.* Plaintiffs requested an accommodation that would  
 23 enable them to obtain prescriptions in excess of the cap while still in their homes. The Tenth Circuit

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24  
 25  
 26 <sup>11</sup> ADHC services were specifically designed to “ensure that elderly persons and adults with  
 27 disabilities are not institutionalized inappropriately or prematurely,” recognizing that overreliance on  
 28 nursing facilities and institutions has proven to be a “costly panacea in both financial and human  
 terms, often traumatic, and destructive of continuing family relationships and the capacity for  
 independent living.” Cal. Health & Safety Code § 1570.2.

<sup>12</sup> For a more complete list and description of services see Section II. B. above.



1 reversed a grant of summary judgment in defendants' favor and held that the cap on prescriptions  
2 could violate the ADA's integration mandate. *Id.* The circuit court rejected the district court's  
3 holding that fiscal burdens associated with reasonable accommodations would necessarily require a  
4 fundamental alteration, stating:

5 [It is not] clear why the preservation of a program as it has existed for  
6 years . . . would fundamentally alter the nature of the program. . . .  
7 Plaintiffs are simply asking that a service for which they would be  
8 eligible under an existing state program . . . be provided in a  
9 community-based setting rather than a nursing home. . . .

10 *Id.* at 1183. The court observed that "Congress was clearly aware that 'while the integration of  
11 people with disabilities will sometimes involve substantial short term burdens, financial and  
12 administrative, the long range effects will benefit society as a whole.'" *Id.*, quoting H.R. Rep. No.  
13 101-485, pt. 3, at 50, reprinted in 1990 U.S.C.C.A.N. 445, 473. Moreover, the court questioned  
14 whether the required accommodation would constitute a fiscal burden at all. In response to the  
15 lower court's suggestion that having to provide prescriptions in excess of the cap would force them  
16 to eliminate the home based program all together, the court observed that:

17 [g]iven that the cost of institutional care is nearly twice that of  
18 community based care, it seems unlikely that . . . elimination of the  
19 waiver program, would have solved Oklahoma's fiscal crisis, because  
20 it could have served only to drive participants into nursing homes.

21 *Id.* at 1183.

22 The situation in California is similar. Plaintiffs request only that Defendants ensure that  
23 Plaintiffs have coverage for Medi-Cal replacement services, or, in cases where that is not possible,  
24 continue to provide a cost-effective community alternative to institutional care -- ADHC services.  
25 Missaelides Decl. ¶¶ 28, 38.

26 In *Townsend v. Quasim*, 328 F.3d 511 (9<sup>th</sup> Cir. 2003) the plaintiff was a "categorically  
27 needy" Medicaid recipient who lived in a community setting with Home and Community-Based  
28 Services (HCBS) Waiver services. When his income increased slightly, he became ineligible for  
29 HCBS Waiver services; thus, Mr. Townsend and those similarly situated would be forced to receive  
30 long-term care services in nursing homes. The district court granted summary judgment in favor of  
31 the State on the basis that the plaintiffs were requesting "new" services which were not required by  
32 *Olmstead*. The Ninth Circuit reversed, concluding that the services sought by plaintiffs were not

1 new, as they were already provided in a nursing home setting and requiring the State to demonstrate  
2 that providing Waiver services to medically needy individuals would compel cutbacks in services to  
3 other Medicaid recipients. As the Court pointed out:

4 [W]here the issue is the location of services, not *whether* services will  
5 be provided, *Olmstead* controls.

6 Here, the precise issue is not whether the state must provide the long  
7 term care services sought by Mr. Townsend and the class members –  
8 the state is already providing these services – but in what location  
9 these services will be provided. Mr. Townsend simply requests that  
10 the services he is already eligible to receive under an existing state  
11 program (assistance in dressing, bathing, preparing meals, taking  
12 medications, and so on) be provided in the community-based adult  
13 home where he lives, rather than the nursing home setting the state  
14 requires.

15 *Townsend*, 328 F.3d at 517. *See also Radaszewski v. Maram*, No. 01-C 9551, 2008 WL 2097382  
16 (N.D. Ill. 2008) (on remand, the Court ordered the state to provide community-based, in-home  
17 nursing care above the state cap on services); *Crabtree v. Goetz*, 3:08-939, 2008 WL 5330506 (M.D.  
18 Tenn. Dec. 19, 2008) (Memorandum); (enjoining state agency from reducing plaintiffs' home health  
19 aide and nursing services, which would place them at risk of institutionalization, until individualized  
20 assessments could be made of their specific needs for services).

21 As in *Townsend*, Plaintiffs have already been determined to need the bundle of services  
22 available under the ADHC program. Plaintiffs' Individual Plans of Care, and the services set forth  
23 therein, have been authorized by Defendants as “medically necessary” to avoid a “high potential” for  
24 health risks and deterioration “likely to result in emergency department visits, hospitalization, or  
25 other institutionalization” without ADHC services. (Davis Decl. ¶¶ 24 and 31; McCloud Decl. ¶ 25.)  
26 Their care needs and health require services that could be provided in their homes, or, although  
27 undesirable, at an institution. (Davis Decl. ¶¶ 23, 30.) There is no dispute about eligibility or need  
28 for services, just where these services must be provided. The ADA answers that question. Plaintiffs  
should receive services at home, in the community with their families, where they desire to be.

As in *Fisher*, *Radaszewski*, *Townsend*, and *Crabtree*, Plaintiffs are not asking that a new  
program be created, nor do they ask Defendants to fund a service that it otherwise would not fund in  
an institutional setting. They simply ask that they continue to receive services in the community

1 instead of in a nursing home. There are numerous ways that Defendants can deliver these services.  
2 Accordingly, Plaintiffs are likely to succeed on the merits of this claim.

3 **c. Defendants are Violating the Prohibition on Employing Methods of**  
4 **Administration that Result in Discrimination.**

5 The ADA prohibits methods of administration or contractual arrangements which, though  
6 neutral on their face, have a discriminatory effect. A public entity may not:

7 directly or through contractual or other arrangements, utilize ...  
8 methods of administration (i) [t]hat have the effect of subjecting  
9 qualified individuals with a disability to discrimination on the basis of  
10 disability; [and](ii) [t]hat have the purpose or effect of defeating or  
substantially impairing accomplishment of the objectives of the public  
entity's program with respect to individuals with disability.

11 28 C.F.R. § 35.130 (b)(3). Section 504 contains similar requirements. *See* 28 C.F.R.  
12 § 41.51(b)(3)(i); 45 C.F.R. § 84.4(b)(4) (2005).

13 Defendants' actions violate the methods of administration provision of the ADA and Section  
14 504 by denying Plaintiffs access to community-based Medi-Cal services and by subjecting them to  
15 unnecessary institutionalization in hospitals and nursing facilities, as follows:

- 16 1. by cutting Medi-Cal ADHC services before providing notice, which would  
enable Plaintiffs and other beneficiaries to seek secure community-based replacement services;
- 17 2. by failing to provide information about alternative community-based services  
18 under the Medi-Cal program, which are available to Plaintiffs and other beneficiaries in order to  
avoid hospitalization or placement in an institution;
- 19 3. by failing to provide enough time for Plaintiffs and other beneficiaries to  
actually secure replacement community services prior to termination of current ADHC services;
- 20 4. by forcing Plaintiffs and other beneficiaries to be institutionalized pending the  
issuance of the Director's declaration reinstating ADHC services to up to 5 days per week;
- 21 5. by imposing ADHC cuts without regard to the individual needs of Plaintiffs  
and other beneficiaries;
- 22 6. by providing no system by which Plaintiffs and beneficiaries may obtain  
23 exceptions to the caps on services;
- 24 7. by failing to provide reasonable modification exceptions, including the  
provision of ADHC services four – 5 days per week, as required to avoid unnecessary  
institutionalization of Plaintiffs and other beneficiaries; and,
- 25 8. by forcing doctors and other providers into reducing levels of services  
26 contrary to the documented medical needs of Plaintiffs and other beneficiaries, placing them at risk  
of institutionalization, physical harm or death.

1 Defendants' actions and inactions defeat or substantially impair the purpose of the ADHC  
 2 Medi-Cal program which is to "provide a viable alternative" and "ensure that elderly persons and  
 3 adults with disabilities are not institutionalized . . . prematurely." Cal. Health & Safety Code §§  
 4 1570.7(a), (b) (West 2009). Defendants' methods of administration undermine these goals.

5 **3. Plaintiffs are Likely to Succeed on the Merits of their Claims that**  
 6 **Defendants are Violating the Due Process Clause of the Fourteenth**  
 7 **Amendment and Medicaid Law by Failing to Provide Adequate Pre-**  
 8 **termination Notice.**

8 Defendants have failed to provide adequate pre-termination notice and opportunity for a  
 9 hearing, in violation of the Due Process Clause of the Fourteenth Amendment and the federal  
 10 Medicaid statute and regulations. The Fourteenth Amendment to the U.S. Constitution prohibits a  
 11 state from depriving any person of property without due process of law. U.S. Const. amend XIV,  
 12 § 1. Moreover, it is well established that Medicaid recipients have a statutory entitlement to benefits  
 13 that is protected by the Due Process Clause of the Fourteenth Amendment. *See, e.g., O'Bannon v.*  
 14 *Town Court Nursing Center*, 447 U.S. 773, 787 (1980) (Medicaid recipient has right protected by  
 15 due process to continued Medicaid benefits to pay for services from the qualified provider of his  
 16 choice). In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court noted that termination of public  
 17 benefits "pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the  
 18 very means by which to live while he waits." *Goldberg v. Kelly*, 397 U.S. at 264 (emphasis in  
 19 original). Thus, the Court held that such individuals (which include Plaintiffs in this case) are  
 20 entitled, under due process, to an evidentiary hearing *before* benefits can be discontinued.  
 21 According to the Court, such recipients must also be given an "opportunity to be heard . . . at a  
 22 meaningful time and in a meaningful manner." *Goldberg*, 397 at 267.

23 Further, the federal Medicaid statute and regulations require that a state provide notice and an  
 24 opportunity for an administrative hearing before it terminates eligibility or authorization for services.  
 25 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.220. The regulations require that, at the time of any  
 26 action affecting an individual's claim to services, an individual must receive written notice of: (1)  
 27 the right to a hearing; (2) the method by which she may obtain a hearing; and (3) that she may  
 28 represent herself or be represented by another. 42 C.F.R. § 431.210. The notice must contain:

- 1 (a) a statement of what action the State . . . intends to take;  
 2 (b) the reasons for the intended action;  
 3 (c) the specific regulations that support, or the change in Federal or State law that  
 requires, the action;  
 4 (d) an explanation of –  
 (1) the individual’s right to request an evidentiary hearing if one is available,  
 or a state agency hearing; or  
 5 (2) In cases of an action based on a change in law, the circumstances under  
 which a hearing will be granted; and  
 6 (e) An explanation of the circumstances under which Medicaid is continued if a  
 hearing is requested.  
 7

8 *Id.* This notice must be mailed at least 10 days before the date of the action. 42 C.F.R. § 431.211:  
 9 Cal. Code of Regs. Tit. 22 §§ 50179(d), 51014.1(c). In addition, if a hearing is requested within 10  
 10 days, benefits must continue until the agency reaches a final decision. 42 C.F.R. § 431.230 (a).

11 Defendants have failed to provide Plaintiffs and other affected ADHC recipients with direct  
 12 or individualized notice of the imminent reduction in their benefits. The only notices to date have  
 13 been a web posting and mailing to providers. To date, the named Plaintiffs and other affected  
 14 ADHC recipients have not received any direct, individualized notice or personal copy of the web  
 15 notice. (McLorin Decl., ¶ 15; Gaspard-Berry Decl., ¶ 14; Garcia Decl. ¶ 17; Puckett Decl. ¶ 18.)  
 16 Nowhere in the web notice does it state that ADHC recipients may be entitled to services under other  
 17 Medi-Cal benefit programs, nor does the notice advise Plaintiffs of their right to a fair hearing, the  
 18 manner for requesting a hearing, their right to a continuation of benefits pending a hearing, or  
 19 whether components of their existing services or other similar other services may be available to  
 20 meet Plaintiffs’ needs which are established in their currently-authorized TARs. (Puckett Decl. ¶ 17,  
 21 Exh. B.)

22 Defendants may claim that Plaintiffs are not entitled to an opportunity for a hearing because  
 23 the change in ADHC benefits is based upon a change in law. *See* 42 C.F.R. § 431.220(b) (2002) (a  
 24 state agency “need not grant a hearing if the *sole* issue is a Federal or State law requiring an  
 25 automatic change adversely affecting some or all recipients” (emphasis added)). Even if this were  
 26 true, nothing exempts Defendants from the obligation to provide individual written notice ten days  
 27 before cutting Plaintiffs’ services, which Defendants have not done. 42 C.F.R. §§ 431.211, 431.213,  
 28 431.214; Cal. Code Regs. tit. 22, §§ 50179(d), 51014.1(c).

1 Furthermore, Plaintiffs are entitled to a hearing. Other issues that could be addressed at a  
2 hearing include whether they continue to be entitled to skilled nursing services, personal care  
3 services, and other Medi-Cal services independent of the ADHC benefit. At the very least, Plaintiffs  
4 should be granted hearings to determine whether there are other contested issues other than the  
5 change in law reducing the ADHC benefit. 42 C.F.R. § 431.230(a)(1) (1980) (providing that, if a  
6 hearing is requested within 10 days, benefits must continue pending a determination of whether the  
7 sole contested issue is one of federal or state law.) Defendants have not even attempted to meet their  
8 procedural due process obligations under the Medicaid law, or the Constitution's due process clause.

9 **4. The Balance of Equities is in Plaintiffs' Favor**

10 The balance of hardships tips sharply towards Plaintiffs. They stand to lose vital services at  
11 risk to their health and lives. They are also at risk of institutionalization and its attendant loss of  
12 independence and separation from family and community. In contrast, Defendants will suffer no  
13 harm because the injunction will only require them to continue providing services in exactly the  
14 same manner that it has done for years. Moreover, if the injunction is *not* granted, they would be  
15 required to provide the same services in costly nursing homes, which is likely to be more expensive.

16 In any case, the expense incurred by providing benefits does not outweigh harm to plaintiffs.  
17 *See Daniels v. Wadley*, 926 F. Supp. 1305 at 1313 (M.D. Tenn. 1996); *Kansas Hosp. Ass'n v.*  
18 *Whiteman*, 835 F. Supp. 1548, 1552-1553 (D. Kan. 1993) (concluding that the threatened injuries to  
19 the plaintiffs outweighed any harm to the defendant because changing Medicaid coverage  
20 "significantly alters the status quo to the detriment of the individual plaintiffs, while its positive  
21 budgetary impact on state coffers is negligible in a relative sense").

22 In this case, it is extremely unlikely the state will realize any significant savings. Without  
23 ADHC services, Plaintiffs and class members will face deteriorating, and ultimately acute, medical  
24 conditions. They will be forced into expensive nursing homes where most of them are at risk of  
25 deterioration and likely to require even more costly hospital admissions.

26 Finally, the Defendant cannot be harmed by complying with what the federal law requires.  
27 *Haskins v. Stanton*, 794 F.2d 1273, 1277 (7th Cir. 1986) (granting preliminary injunction requiring  
28 defendant's compliance with federal Food Stamp law).

1                   **5.     An Injunction is in the Public's Interest**

2             The public interest will be served by granting an injunction. The ADA and Section 504 are  
3 based on strong public policy concerns. Congress enacted the ADA to build upon the guarantees of  
4 Section 504 and to address the “serious and pervasive” social problem caused by discrimination  
5 against people with disabilities and to provide a clear and comprehensive national mandate for  
6 elimination of discrimination against individuals with disabilities. 42 U.S.C. § 12101. It serves the  
7 public interest to carry out the mandates of these laws. *See also Heather K. v. Mallard*, 887 F. Supp.  
8 1249, 1263, 1266 (N.D. Iowa 1995) (issuing temporary restraining order, holding that Americans  
9 with Disabilities Act embodied the public interest in enforcement of anti-discrimination provisions  
10 against public officials.

11 **IV.    CLASSWIDE RELIEF IS APPROPRIATE**

12             Plaintiffs have also moved for certification of a class of ADHC beneficiaries, and a subclass  
13 of ADHC beneficiaries immediately affected by the 5 to 3 day reduction. Classwide relief for the  
14 class and subclass is appropriate at the TRO stage. A TRO will preserve the status quo until the  
15 hearing on the preliminary injunction and class certification.

16 **V.     PLAINTIFFS SHOULD NOT BE REQUIRED TO POST BOND**

17             This Court has the discretion to issue a preliminary injunction without requiring plaintiffs to  
18 post bond. *People of State of Cal. ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766  
19 F.2d 1319 *modified on other grounds*, 775 F.2d 998 (9<sup>th</sup> Cir. 1985). Exercise of that discretion is  
20 particularly appropriate where an action is brought by a class of indigent plaintiffs. *Orantes-*  
21 *Hernandez v. Smith*, 541 F.Supp. 351 (C.D. Cal. 1982). Plaintiffs, who are all Medicaid recipients,  
22 seek a waiver of the security requirements in Fed. R. Civ. P. 65(c) where requiring security would  
23 effectively deny access to judicial review. *Van De Kamp*, 766 F.2d at 1325. The Court also has  
24 discretion to waive the bond in a case where issues of overriding public concern or important federal  
25 rights are involved. *See, e.g., Cont'l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 782 (10<sup>th</sup> cir. 1964).

26 **VI.    CONCLUSION**

27             Therefore, Plaintiffs request that this Court issue a Temporary Restraining Order.  
28

1 Date: August 24, 2009

Respectfully submitted,

2 DISABILITY RIGHTS CALIFORNIA

3  
4 By: /s/  
Elizabeth Zirker  
Attorneys for Plaintiffs

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