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11
 12 IN THE UNITED STATES DISTRICT COURT
 13 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 14 WESTERN DIVISION

15 INDEPENDENT LIVING CENTER OF
 SOUTHERN CALIFORNIA, a nonprofit
 16 corporation; GRAY PANTHERS OF
 SACRAMENTO, a nonprofit corporation;
 17 GRAY PANTHERS OF SAN
 FRANCISCO, a nonprofit corporation;
 18 GERALD SHAPIRO, Pharm.D. doing
 business as Uptown Pharmacy and Gift
 19 Shoppe; SHARON STEEN, doing
 business as Central Pharmacy; MARK
 20 BECKWITH; MARGARET DOWLING;
 TRAN PHARMACY, INC., a corporation,
 21 doing business as Tran Pharmacy; and
 JASON YOUNG,

22
 23 Petitioners,

24 v.

25 SANDRA SHEWRY, Director of the
 Department of Health Care Services of the
 26 State of California; DEPARTMENT OF
 HEALTH CARE SERVICES, a
 Department of the State of California; and
 27 DOES 1 through 50,

28 Respondents.

CV08-03315 CAS (MANx)

**RESPONDENT'S
 OPPOSITION TO
 PETITIONERS' MOTION FOR
 PRELIMINARY INJUNCTION**

Date: June 23, 2008
 Time: 10:00 a.m.
 Courtroom: 5
 Judge: The Honorable
 Christina A.
 Snyder

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INTRODUCTION

1
2 On February 16, 2008, the California Legislature enacted Assembly Bill 5
3 (AB 5). Section 14 of AB 5 added section 14105.19 of the California Welfare and
4 Institutions Code. Subdivisions (a), (b)(1), (b)(2), and (c) through (e) of Welfare and
5 Institutions Code section 14105.19 provide that payments shall be reduced by 10%
6 to physicians, dentists, pharmacies, skilled nursing facilities, hospitals, and other
7 providers in the Medi-Cal fee-for-service program, beginning July 1, 2008. Section
8 15 of AB 5 added Welfare and Institutions Code section 14105.245, which provides
9 that interim payments for non-contract, inpatient hospital services covered by Medi-
10 Cal, shall also be reduced by 10% beginning July 1, 2008.

11 AB 5 also included in subdivision (b)(3) of Welfare and Institutions Code section
12 14105.19, a provision requiring that Medi-Cal payments to managed care plans that
13 contract with the Department of Health Care Services (Department) shall be reduced
14 by an “actuarial equivalent amount” to the 10% payment reduction to providers in the
15 Medi-Cal fee-for-service system. Subdivision (c) of section 14105.19 exempts
16 several types of services from the 10% payment reduction.

17 Petitioners, who are health care advocates and Medi-Cal providers and
18 beneficiaries, seek to enjoin Respondent from implementing state legislation
19 requiring a 10% reduction in Medi-Cal payments to providers in the fee-for-service
20 as well as a 10% actuarially equivalent reduction in payments to managed care plans.
21 Petitioners allege that the proposed reduction, which is planned to go into effect on
22 July 1, 2008, violates the Medicaid Act, namely 42 U.S.C. § 1396a(a)(30)(A), and
23 the Americans with Disabilities Act of 1990 (ADA). The Court should deny
24 Petitioners’ Motion for Preliminary Injunction because (1) section 1396a(a)(30)(A)
25 does not create a cause of action, (2) section 1396a(a)(30)(A) does not create a “right”
26 enforceable under 42 U.S.C. § 1983, (3) the elements necessary for enforcing section
27 1396a(a)(30)(A) pursuant to California Code of Civil Procedure section 1085 do not
28 exist, and (4) Petitioners are not entitled to relief under the Supremacy Clause of the

1 United States Constitution.

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STATEMENT OF THE CASE

4 Respondent removed this case from the Superior Court of California,
5 Los Angeles County, on May 19, 2008. (CD 1.) Petitioners filed a Notice of Related
6 Case on May 28, 2008, alleging that the instant case was related to the federal class
7 action of *California Medical Association, et al. v. Sandra Shewry, et al.*, case number
8 08-03363-CAS-MAN (C.D. Cal.). (CD 7.) Petitioners filed their Notice of Motion
9 for Preliminary Injunction on May 29, 2008. (CD 9.) However, Petitioners did not
10 file their memorandum, declarations, and requests for judicial notice in support of
11 their Motion for Preliminary Injunction until May 30, 2008, June 1, 2008, and June
12 2, 2008, respectively. (CDs 10-11, 13-25.) The hearing for Petitioners' Motion for
13 Preliminary Injunction is set for June 23, 2008, at 10:00 a.m. (CD 10.) On June 1,
14 2008, Petitioners voluntarily dismissed California Department of Health Care
15 Services as a party. (CD 12.) Petitioners now seek to enjoin Respondent from
16 implementing the reimbursement rate reductions provided for in AB 5.

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ARGUMENT

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I.

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PETITIONERS DO NOT MEET THE CRITERIA FOR INJUNCTIVE RELIEF.

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The traditional equitable criteria for determining whether an injunction should issue are: (1) Have the movants established a strong likelihood of success on the merits; (2) does the balance of irreparable harm favor the movants; and (3) does the public interest favor granting the injunction? *See Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 501 (9th Cir.1980). Under an alternative test, also used by the Ninth Circuit, a preliminary injunction may issue: Upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently

1 serious questions going to their merits to make them fair ground for litigation and a
2 balance of hardships tipping decidedly toward the party requesting the preliminary
3 relief. *Benda v. Grand Lodge of Int'l Ass'n*, 584 F.2d 308, 315 (9th Cir. 1978). If,
4 however, the plaintiff shows no chance of success on the merits, the injunction should
5 not issue. *Benda*, 584 F.2d at 314 (9th Cir.1978).

6
7 **A. Petitioners Cannot Prevail On The Merits Because Section**
8 **1396a(a)(30)(A) Does Not Create A Cause Of Action And Does Not**
9 **Create A “Right” Enforceable Under The Civil Rights Act.**

10 42 U.S.C. § 1396a(a)(30)(A) is part of Title 19 of the Social Security Act.
11 The Supreme Court has held that the Social Security Act, which includes section
12 1396a(a)(30)(A), does not itself create a cause of action. *Edelman v. Jordan*, 415
13 U.S. 651, 673-674 (1974) and *Maine v. Thiboutot*, 448 U.S. 1, 7 (1980). However,
14 the court has held that 42 U.S.C. § 1983 authorizes lawsuits seeking relief for the
15 deprivation of a “right” contained in provisions of the Social Security Act.

16 In *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005), the Ninth Circuit held that
17 section 1396a(a)(30)(A) fails to create a “right” for either health care providers or
18 Medicaid recipients that is enforceable under 42 U.S.C. § 1983. *Id.* at 1059-1060.

19 **B. Section 1396a(a)(30)(A) Is Not Enforceable Under California Code**
20 **Of Civil Procedure Section 1085.**

21 To obtain relief under Code of Civil Procedure section 1085, Petitioners
22 must show: (1) a clear, present, and usually ministerial “duty” on the part of the
23 government official, and (2) a clear, present, and beneficial “right” in the petitioner
24 to the performance of that duty. *Loder v. Mun. Ct. for the San Diego Judicial Dist.*
25 *of San Diego County*, 17 Cal. 3d 859, 863, 132 Cal. Rptr. 464 (1976). Moreover, a
26 court may only issue a writ of mandate “to compel the performance of an act which
27 the law specifically enjoins. . . .” Cal. Code Civ. Proc. § 1085, subd. (a). Mandamus
28 may compel action by a governmental entity only when there is a clear, present, and

1 ministerial obligation to take such action. *Orange County Employees Ass'n. v.*
2 *County of Orange*, 234 Cal. App. 3d 833, 845, 285 Cal. Rptr. 799 (Cal. Ct. App.
3 1991).

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5 **C. Petitioners Cannot Prevail On The Merits Because Section**
6 **1396a(a)(30)(A) Does Not Create a Clear, Present, And Ministerial**
7 **Duty Concerning Provider Payments**

8 In *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005), the United States
9 Court of Appeals for the Ninth Circuit discussed section 1396a(a)(30)(A) extensively
10 and stated:

11 Far from focusing on the rights of a specific class of beneficiaries, §
12 30(A) is concerned with a number of competing interests. It requires a
13 State to ‘provide such methods and procedures relating to . . . care and
14 services . . . as may be necessary to . . . assure that payments are
15 consistent with efficiency, economy, and quality of care.’ The most
16 efficient and economical system of providing care may be one that
17 benefits taxpayers to the detriment of medical providers and recipients;
18 likewise, the provision of ‘quality’ care—whatever standard may be
19 implied by such a nebulous term—is likely to conflict with the goals of
20 efficiency and economy. The tension between these statutory objectives
21 supports the conclusion that § 30 (A) is concerned with overall
22 methodology rather than conferring individually enforceable rights on
23 individual Medicaid recipients. [¶] . . . *The language of § 30(A) is . . .*
24 *ill-suited to judicial remedy; the interpretation and balancing of the*
25 *statute’s indeterminate and competing goals would involve making*
26 *policy decisions for which this court has little expertise and even less*
27 *authority.*

19 *Sanchez v. Johnson, supra*, 416 F.3d at 1059-1060, emphasis added.

20 If the federal courts lack the “expertise” and the “authority” to interpret and
21 balance the statute’s indeterminate and competing goals, then the statute certainly
22 does not impose any “clear” duty regarding provider payments.

23 Based on the *Sanchez* decision, there is also no “ministerial” duty imposed
24 by section 1396a(a)(30)(A).

25 A ministerial act is an act that a public officer is required to perform in
26 a prescribed manner in obedience to the mandate of legal authority and
27 without regard to his own judgment or opinion concerning such act's
28 propriety or impropriety, when a given state of facts exists. Discretion,
on the other hand, is the power conferred on public functionaries to act
officially according to the dictates of their own judgment.

1 *Carrancho v. California Air Resources Bd.*, 111 Cal. App. 4th 1255, 1267, 4 Cal.
2 Rptr. 3d 536 (Cal. Ct. App. 2003).

3 Only where the law prescribes, defines, and limits the “duties to be
4 performed with such precision and certainty as to leave nothing to the exercise of
5 discretion,” can the act performed pursuant to such a duty be defined as ministerial.
6 *Glickman v. Glasner*, 230 Cal. App. 2d 120, 125, 40 Cal. Rptr. 719 (1964). *Sanchez*
7 held that section 1396a(a)(30)(A) does not provide any precision or certainty
8 concerning how rates are to be established and that interpreting the statute requires
9 “policy” decisions, not judicial intervention. States obviously have a great deal of
10 discretion in making such “policy” decisions, which require the “balancing” of
11 “competing,” “indeterminate,” “conflict[ing],” and “nebulous” criteria. *Sanchez v.*
12 *Johnson, supra*, 416 F.3d at 1059-1060. Section 1396a(a)(30)(A) authorizes states
13 to take action concerning rates “that benefits taxpayers to the detriment of medical
14 providers and recipients.” *Id.* There is no precise or certain manner specified in
15 section 1396a(a)(30)(A) as to how states are to determine rates or what the rates
16 should be.

17 Petitioners cite *Orthopaedic Hosp. v. Belshe*, 103 F. 3d 1491 (9th Cir. 1997),
18 for the proposition that section 1396a(a)(30)(A) requires states to consider provider
19 costs. That case concerned a judicial challenge to rates for hospital outpatient
20 services. The court in that case interpreted the “efficiency, economy, and quality of
21 care” provision of section 1396a(a)(30)(A) as requiring rates to “bear a reasonable
22 relationship to an efficient and economical hospital’s costs in providing quality care.”
23 *Id.* at 1500. This is the only federal court decision in the more than forty-year history
24 of section 1396a(a)(30)(A) to interpret it as requiring a state to consider costs or to
25 assure that rates “bear a reasonable relationship” or meet any other reasonableness
26 standard relative to provider costs. As discussed below, the *Sanchez* decision has
27 effectively overturned *Orthopaedic*’s interpretation of section 1396a(a)(30)(A).

28 Nothing in the legislative history of section (a)(30)(A) indicates that

1 Congress ever intended for this statute to require states to establish payments based
2 on provider costs or to assure that provider payments compensate any particular
3 portion of provider costs. When Congress has intended for states to establish
4 payment rates on a cost basis or compensate some portion of provider costs, it has
5 made that clear in the statute. *See* Sen. Report No. 92-1230, Social Security
6 Amendments of 1972, P.L. 92-603 at 287 (concerning former 42 U.S.C. §
7 1396a(a)(13)(A) which formerly required payments for skilled nursing facility and
8 intermediate care facility services to be on a “reasonable cost-related basis.”). *See*
9 *also*, H.R. Rep. No. 149, 105th Cong., 1st Sess. 590-591 (1997) (repealed a Medicaid
10 statute commonly known as the Boren Amendment, which had required payment rates
11 for hospital inpatient services and nursing facility services to be “reasonable and
12 adequate” to “meet the costs of efficiently and economically operated facilities.”).
13 Thus, if Congress intends for states to assure that payment rates to be based on or
14 compensate a portion of provider costs, it says that in the statute.

15 The United States Department of Health and Human Services (USDHHS) is
16 the federal cabinet level department responsible for administering the federal
17 Medicaid laws. The *Orthopaedic* decision is contrary to the longstanding
18 interpretation of the federal agency that section 1396a(a)(30)(A) does not impose a
19 minimum standard of reimbursement related to provider costs.

20 The Solicitor General, in an amicus brief filed on behalf of USDHHS
21 regarding the DHCS petition for certiorari to the Supreme Court in *Orthopaedic*,
22 agreed with DHCS. According to the view of USDHHS, the Ninth Circuit in
23 *Orthopaedic* erred in “reading Section 1396a(a)(30)(A) as imposing on States an
24 obligation to set payment rates for outpatient services that substantially reimburse
25 providers their costs.” (Req. Judicial Notice, Exh. E [Solicitor General’s Amicus
26 Brief] at p. 6.) In contrast to the Boren Amendment, “section 1396a(a)(30)(A) does
27 not specifically require that the State consider provider costs in setting Medicaid
28 payments, much less ‘meet’ those costs.” *Id.* at p. 13.

1 Neither the Act nor any regulation promulgated by the Secretary

2 “gives any guidance” . . . as to what portion of costs must be
3 reimbursed by States for how many of the providers, or gives more
4 specific content to the statutory criteria of “efficiency, economy, and
5 quality of care” so that those criteria could be enforced by the court.
6 Accordingly, the “right assertedly provided by the statute is . . . so
7 vague and amorphous that its enforcement would strain judicial
8 competence.” (Citations omitted.) (Id. at p. 15.)

9 This USDHHS interpretation is consistent with the longstanding regulatory
10 history of section 1396a(a)(30)(A). USDHHS has never interpreted the “efficiency,
11 economy, and quality of care” provision of the statute as requiring cost-based rates
12 or that a state conduct a study before it changes rates. The only federal regulations
13 that have ever been adopted implementing the “efficiency, economy, and quality of
14 care” provision with respect to provider payments providers are those establishing
15 upper spending limits. *See* 42 C.F.R. §§ 447.300-447.361; *see also* 42 C.F.R. §
16 447.242(a) (establishing an aggregate upper limit on payments to groups of facilities
17 such as hospitals or nursing facilities).

18 USDHHS explained in 1981 that:

19 The Medicaid law did not initially include any
20 specific requirements regarding the methods of payment to be
21 used to pay for either skilled nursing facility or intermediate care
22 facility services. As a result, individual states were permitted to
23 develop their own payment methods, subject only to the general
24 requirement . . . that payments not exceed reasonable charges
25 **consistent with efficiency, economy, and quality of care.** These
26 methods ranged from the retrospective, reasonable cost
27 Reimbursement system used by Medicare $\frac{1}{4}$ to prospective rates
28 based, in some instances, on **state budgetary considerations** and
29 other factors **not related to actual $\frac{1}{4}$ costs.**”

30 46 Fed. Reg. 47, 964 (Sept. ____, 1981). (Emphasis added.)

31 Thus, USDHHS construed section 1396a(a)(30)(A) as imposing only a
32 “general requirement” under which rates were sometimes based on budgetary
33 considerations and other factors unrelated to provider costs.

34 In adopting regulations in 1983 for implementation of the now repealed
35 Boren Amendment, USDHHS discussed the aggregate state spending limit in 42
36 C.F.R. section 447.272, stating that it was intended to meet “the separate requirement

1 . . . that payments be consistent with efficiency, economy, and quality of care.” 48
2 Fed. Reg. 56,054 (Dec. 19, 1983.) Thus, in the more than forty (40) year history of
3 section 1396a(a)(30)(A), USDHHS has never enacted any regulations or policy
4 guidelines that interpret section 1396a(a)(30)(A) as imposing a minimum standard
5 of payment based on provider costs, provider charges, or any other criteria for that
6 matter.

7 The federal agency’s longstanding interpretation of section 1396a(a)(30)(A)
8 is entitled to a high degree of deference. *Chevron U.S.A., Inc. v. Nat’l Resources*
9 *Def. Council*, 467 U.S. 837, 843. n.9 (1984).

10 The Ninth Circuit decision in *Sanchez v. Johnson* effectively overturned
11 *Orthopaedic*. First, *Sanchez* held that the “interpretation and balancing of the
12 statute’s indeterminate and competing goals would involve making policy decisions
13 for which this court has little expertise and even less authority,” thus rejecting
14 *Orthopaedic’s* attempt to interpret the statute. Second, *Sanchez* stated that the
15 statute contained nebulous and indeterminate goals that conflicted with each other,
16 thus rejecting *Orthopaedic’s* interpretation of the statute as imposing a single
17 cohesive standard of reimbursement. Third, *Sanchez* interpreted the “efficiency” and
18 “economy” criteria as being concerned with an efficient and economical “system”
19 of providing care which may benefit taxpayers to the detriment of both providers and
20 beneficiaries, thus rejecting *Orthopaedic’s* interpretation of these criteria as referring
21 to an efficient and economical hospital’s costs as an element of a minimum cost
22 based standard of reimbursement. Fourth, *Sanchez* held that section
23 1396a(a)(30)(A) was “ill-suited to judicial remedy,” thus rejecting *Orthopaedic’s*
24 grant of a judicial remedy in the form of a mandate for the state to conduct a study
25 of hospital costs and set rates in a particular manner.

26 The *Orthopaedic* interpretation of section 1396a(a)(30)(A) illustrates why the
27 *Sacnhez* court held that the statute was ill-suited to judicial remedy. There is no
28 guidance in the federal statute or regulation as to what an efficient and economical

1 provider's costs would be under the *Orthopaedic* interpretation, or as to how quality
2 care would be interpreted or applied in determining payments. As *Sanchez* held, the
3 statutory terms are "indeterminate" and "nebulous." There is also no guidance in the
4 federal statute or regulation for defining the phrase "bears a reasonable relationship"
5 as contained in the *Orthopaedic* interpretation of the statute. What the Ninth Circuit
6 attempted to do in *Orthopaedic* may be in part why the Ninth Circuit held in *Sanchez*
7 that the federal courts have "little expertise and even less authority" to interpret and
8 enforce the statute's "indeterminate and competing goals." *Sanchez, supra*, 416 F.3d
9 at 1059-1060. In summary, the *Orthopaedic* interpretation of section
10 1396a(a)(30)(A) fails itself to create a "clear, present, and ministerial duty"
11 enforceable in mandamus.

12 Because section 1396a(a)(30)(A) does not impose a clear, present, and
13 ministerial duty concerning payments, mandamus relief is unavailable, and it is
14 unnecessary to evaluate whether the other elements for such relief are met in order
15 to conclude that the petitioners are entirely unlikely to succeed on the merits of this
16 case. See *Loder v. Mun. Ct. for the San Diego Jud. Dist. of San Diego County*,
17 *supra*, 17 Cal.3d at 863 (2004); *Armando D. v. Shewry*, 124 Cal.App.4th 13, 22, 21
18 Cal. Rptr. 3d 66 (Cal. Ct. App. 2005), holding that where a federal Medicaid statute
19 did not impose a "clear, present, and ministerial duty," it was not necessary to
20 evaluate if the petitioner had a "clear, present, and beneficial right.")

21 **D. Petitioners Lack A Clear, Present, And Beneficial Right Under**
22 **Section 1396a(a)(30)(A) Concerning Reimbursement Rates.**

23 Even assuming arguendo that section 30(A) imposed a clear, present, and
24 ministerial duty on Respondent concerning payment rates, a writ of mandate would
25 not lie, as the statute does not confer a right on Petitioners to enforce it. Therefore,
26 again petitioners cannot prove a likelihood that they will prevail on the merits.

27 The Supreme Court has held that in order to obtain mandamus relief, the
28 petitioner must have a clear, present, and beneficial "right." *Loder v. Mun. Ct.*,

1 *supra*, 17 Cal.3d at 863. The Supreme Court has further stated that for the remedy
 2 of mandamus to be granted, “there must be a specific legal right . . . and the right
 3 must be perfect, not inchoate.” *People v. Olds*, 3 Cal. 167, 171 (1853). The court
 4 further emphasized that the “right” of a person to enforce an alleged duty is not
 5 provided by the mandamus remedy itself. By its terms, Code of Civil Procedure
 6 section 1085 does not create any “rights” – it is merely a procedure for enforcing
 7 rights created by substantive law. “A mandamus can give no right . . . although it
 8 may enforce one.” *People v. Olds, supra*, 3 Cal. at 175; *see also Armando D. v.*
 9 *Shewry, supra*, 124 Cal.App.4th at 22 [petitioner must have clear, present, and
 10 beneficial right to performance]; Moreover, the Court has stated that granting of a
 11 writ is discretionary. It will only be granted where there is a substantial right
 12 involved. *Parker v. Bowron*, 40 Cal.2d 344, 351, 254 P.2d 6 (1953). In summary,
 13 the California Supreme Court has made clear that there must be a “specific legal
 14 right” that the petitioner has to performance of an alleged duty, it must be a
 15 “substantial right,” and it must be derived from a source other than the mandamus
 16 remedy itself.

17 A “right” in a petitioner to the performance of a corresponding “duty,” are
 18 essential elements for mandamus relief. Mandamus is not itself a cause of action, but
 19 a remedy for someone with a cause of action.

20 “**Every judicial action** must therefore involve the following
 21 elements: a primary **right** possessed by the plaintiff, and a
 22 corresponding **duty** devolving upon the defendant: a delict or
 23 wrong done by the defendant which consisted . . . of such primary
 24 right and duty . . . Of these elements, the primary right and duty
 25 and the delict or wrong combined constitute the cause of action.”

26 (4 Witkin, Cal. Procedure (4th ed. 1997), Pleadings §24, p. 85, emphasis
 27 added.)

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1 Thus, if Congress did not confer a “right” on petitioners to compel
2 performance of section 1396a(a)(30)(A), then they simply do not have a cause of
3 action to support a remedy in mandamus, and there is no likelihood that they will
4 succeed on the merits.

5 *Santa Clara County Counsel Attorneys Ass’n. v. Woodside*, 7 Cal.4th 525,
6 28 Cal.Rptr.2d 617 (Cal. Ct. App. 1994) illustrates that the mere fact that a petitioner
7 has some financial or other special interest in how a government agency implements
8 a particular statute is not sufficient to establish a “right” to enforce the statute in
9 mandamus. The *Santa Clara County* case shows that it is necessary that the
10 legislative body enacting an alleged statutory duty must have intended that petitioner
11 have a substantive enforceable “right” to enforce the duty. In that case, the County
12 had taken the position that the county attorneys association did not have a “right” to
13 enforce the “meet and confer” provision of the State Myers-Milias Brown Act. In
14 order to determine whether the attorneys association could bring an action in
15 mandamus, the court examined whether there was evidence that the Legislature
16 intended to confer a “right” on public attorneys to enforce the MMBA in mandamus.
17 The court reviewed the language of the MMBA and held that “the Legislature
18 intended in the MMBA to . . . confer substantive, enforceable rights, on . . .
19 employees.” *Id.* at 539.

20 Had the Supreme Court in the *Santa Clara County* case instead concluded
21 that the Legislature did not intend “in the MMBA” to confer substantive, enforceable
22 rights on the county attorneys, then the court would have held that they lacked the
23 “right” necessary to enforce the MMBA in mandamus. There is no evidence that
24 Congress intended **in section 1396a(a)(30)(A)** to confer on providers or
25 beneficiaries a substantive, enforceable “right,” such as that which *Santa Clara*
26 *County* held is necessary for enforcing the statute in mandamus. As discussed
27 earlier, Congress only intended that there be a judicial remedy for providers or
28 beneficiaries with respect to federal statutory “rights.”

1 The Court of Appeals in *Sanchez* reviewed section 1396a(a)(30)(A), and
2 with respect to health care providers stated that:

3 “The text does at least refer explicitly to Medicaid providers, but
4 as a means to an administrative end rather than as individual
5 beneficiaries of the statute.... Under §30(A), providers are to be
6 ‘enlisted’ as subordinate partners in the administration of
7 Medicaid services. They may certainly benefit from their
8 relationship with the State, but they are at best indirect
9 beneficiaries and **it would strain common sense to read §30(A)
10 as creating a right enforceable by them.**” (Emphasis added.)
11 (*Sanchez, supra*, at p. 1059.)

12 With respect to Medicaid recipients, the Court of Appeals in *Sanchez*
13 reviewed section 1396a(a)(30)(A) and stated:

14 “Far from focusing on the rights of a specific class of beneficiaries,
15 § 30(A) is concerned with a number of competing interests. It
16 requires a State to ‘provide such methods and procedures relating to
17 . . . care and services . . . as may be necessary to . . . assure that
18 payments are consistent with efficiency, economy, and quality of
19 care.’ The most efficient and economical system of providing care
20 may be one that benefits taxpayers to the detriment of medical
21 providers and recipients; likewise, the provision of ‘quality’
22 care—whatever standard may be implied by such a nebulous term
23 – is likely to conflict with the goals of efficiency and economy. The
24 tension between these statutory objectives supports the conclusion
25 that § 30 (A) **is concerned with overall methodology rather than
26 conferring individually enforceable rights on individual
27 Medicaid recipients.**”

28 (Emphasis added.) (*Sanchez, supra*, at 1059-1060.)

Summarizing, the Court of Appeals in *Sanchez* held that “[t]he text and
structure of §30(A) simply **do not focus on an individual recipient’s or provider’s
right** to benefits, nor is the ‘broad and diffuse’ language of the statute amenable to
judicial remedy.” (Emphasis added.) (*Id.* at 1060.)

Thus, Petitioners have no legally protected interest at stake under section
30(A). *See Assoc’d Builders & Contractors, Inc. v. S. F. Airports Comm’n*, 21 Cal.
4th 352, 361-362, 87 Cal. Rptr. 2d 654 (1999). In order to have such a legally
protected interest, the legislative body enacting a statute must intend, in enacting the
asserted duty, to confer a substantive, enforceable right on the petitioner to enforce
the duty. *See Santa Clara County Counsel Attorneys Ass’n. v. Woodside, supra*, 7
Cal. 4th at 539, 28 Cal. Rptr. 2d 617 (1994). If the legislative body, in this case

1 Congress, did not intend to confer a substantive enforceable right, then there is no
2 legally protected interest.

3 Since Congress did not intend to confer enforceable rights on health care
4 providers or Medicaid recipients under section 30(A), then neither health care
5 providers nor Medicaid recipients have a right under that statute that is enforceable
6 by mandamus. *See Santa Clara*, 7 Cal.4th at 539. At no time in this litigation have
7 petitioners argued that Congress intended in enacting section 30(A) to confer
8 substantive enforceable rights on health care providers or Medicaid recipients.

9 *Sanchez* forecloses Petitioners' claim for relief. In holding that Congress did
10 not unambiguously create an individually enforceable right, the court left no doubt
11 that section 30(A) lacks explicit rights-creating language but that it instead has an
12 aggregate, not an individual, focus. This does not mean that California's rate-making
13 is beyond review. The adequacy of the state's rate-making may be reviewed – and
14 challenged – by the federal government under title 42 United States Code section
15 1396c. At any rate there can be no dispute that petitioners' inability to prevail on the
16 merits forecloses the granting of preliminary injunctive relief.

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II.

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PETITIONERS ARE NOT ENTITLED TO RELIEF UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

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The Supremacy Clause is not the direct source of any federal right, but
“secures federal rights by according them priority whenever they come in conflict
with state law.” *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107
(1989) quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979).
“Under the preemption doctrine, state laws that ‘interfere with, or are contrary to the
laws of congress, made in pursuance of the constitution’ are preempted.” *Lankford
v. Sherman*, 451 F.3d 496, 509-510 (2006). “A federal statute or regulation may
preempt state law in three situations, commonly referred to as (1) express preemption,

1 (2) field preemption, and (3) conflict preemption.” *Olszewski v. Scripps Health*, 30
2 Cal.4th 798, 135 Cal.Rptr. 2d 814 (2003). “First, Congress can define explicitly the
3 extent to which its enactments pre-empt state law. . . . Second, in the absence of
4 explicit statutory language, state law is pre-empted where it regulates conduct in a
5 field that Congress intended the Federal Government to occupy exclusively. . . .
6 Finally, state law is pre-empted to the extent that it actually conflicts with federal
7 law.” *Smiley v. Citibank*, 11 Cal. 4th 138, 147-148 (1995). “A state law actually
8 conflicts with federal law ‘where it is impossible for a private party to comply with
9 both state and federal requirements, or where state law “stands as an obstacle to the
10 accomplishment and execution of the full purposes and objectives of Congress.”
11 *Olszewski*, 30 Cal. 4th at 815. “Although federal law may preempt state law, ‘[c]ourts
12 are reluctant to infer preemption, and it is the burden of the party claiming that
13 Congress intended to preempt state law to prove it.” *Id.*
14 Therefore, the Supremacy Clause does not itself create any “duty” or “right”
15 enforceable in mandamus and Petitioners’ cause of action under the Supremacy
16 Clause should be dismissed.

17 18 III.

19 **INBALANCING THE HARDSHIPS, IT IS UNLIKELY THAT** 20 **PETITIONERS WILL SUFFER IRREPARABLE INJURIES** 21 **IN THE ABSENCE OF A PRELIMINARY INJUNCTION.**

22 Unless Congress provides otherwise, a preliminary injunction may only be
23 granted when the moving party has demonstrated a significant threat of irreparable
24 injury, irrespective of the magnitude of the injury. *Simula, Inc. v. Autoliv, Inc.*, 175
25 F3d 716, 725 (9th Cir. 1999). Petitioners must show that the alleged threatened
26 harms will be irreparable. At a minimum, a plaintiff seeking preliminary injunctive
27 relief must demonstrate that he or she will be exposed to irreparable harm. *L.A.*
28 *Mem’l Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1202-03 (9th Cir.
1980). Speculative injury does not constitute irreparable injury sufficient to warrant

1 granting a preliminary injunction. *Goldie's Bookstore, Inc. v. Super. Ct.*, 739 F.2d
2 466, 472 (9th Cir. 1984). A plaintiff must do more than merely allege imminent harm
3 sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened
4 injury as a prerequisite to preliminary injunctive relief. *L.A. Coliseum*, 634 F.2d at
5 1201.

6 Here, the petitioners who are Medi-Cal beneficiaries allege that the
7 implementation of state legislation (AB 5) which is planned to go into effect on July
8 1, 2008, and which requires a 10% reduction in Medi-Cal payment to Medi-Cal
9 providers, will force thousands of disabled Medi-Cal beneficiaries out of their homes
10 and into institutions. To support this contention, Petitioner Margaret Dowling states
11 in her declaration that if the 10% reduction went into effect, her primary care
12 physician would stop treating her various ailments, and she would then have to be
13 treated in a hospital or skilled nursing facility, she would then lose her Section 8
14 housing subsidy, and would eventually face institutionalization. (Decl. Dowling, ¶¶
15 16, 18-24.) Petitioner Jason Young declares that he fears that his doctors will stop
16 treating him if the rate cut goes into effect, and that he has fears he will then be
17 unable to find a replacement doctor, and he will then be forced into an institution.
18 (Decl. Young, ¶¶ 13-16, 18.) Petitioner Mark Beckwith testified to the same effect.
19 (Decl. Beckwith, ¶ 16.)

20 This chain of speculative contingencies, however, is not enough to confer an
21 entitlement to a preliminary injunction, because this threatened injury is speculative
22 and hypothetical, rather than imminent. *See L.A. Coliseum*, 634 F.2d at 1201.
23 Petitioners-Medi-Cal beneficiaries have not alleged that their Medi-Cal providers
24 have threatened to stop treating them, only that they “fear” they will do so. (Decl.
25 Dowling ¶¶ 21-22; Decl. Beckwith ¶¶ 14-16.) Petitioners have also not alleged when
26 they will definitely face institutionalization, only that they “fear” they will at
27 sometime in the future. (Decl. Beckwith ¶ 16; Decl. Dowling ¶ 24; Decl. Young ¶
28 16.) In sum, Petitioners do not know whether or when they will face

1 institutionalization. They have not suffered an injury in fact. Moreover, AB 5 cuts
2 reimbursement rates to service providers. Reimbursement is paid to the service
3 providers, not to beneficiaries. The legislation does not require service providers to
4 stop serving beneficiaries. Therefore, since Petitioners' Motion for Preliminary
5 Injunction relies on such a speculative chain of contingencies, and there is no
6 immediate, irreparable threat, then the court should deny the Motion.

7 Furthermore, the Supreme Court has stated:

8 (T)he temporary loss of income, ultimately to be recovered, does
9 not usually constitute irreparable injury. . . . "The key word in this
10 consideration is irreparable. Mere injuries, however substantial,
11 in terms of money, time and energy necessarily expended ... are
12 not enough. The possibility that adequate compensatory or other
corrective relief will be available at a later date, in the ordinary
course of litigation, weighs heavily against a claim of irreparable
harm." *Sampson v. Murray*, 415 U.S. 61, 90 (1974).

13 Here, Petitioners who are Medi-Cal providers testify that they their
14 businesses will be less profitable if the Medi-Cal rate cut goes into effect. (Decl.
15 Shapiro ¶ 23; Decl. Sheen ¶ 14; Decl. Tran ¶ 20.) The Medi-Cal providers' lost
16 revenues may be compensable by a damage award should they ultimately prevail on
17 the merits. At this point, however, the potential of lost revenue alone does not
18 constitute an immediate and irreparable threat of harm, and Petitioners, therefore, are
19 not entitled to injunctive relief. *See Sampson*, 415 U.S. at 90.

20 Moreover, the Medi-Cal rate cut, as set forth in AB 5, is intended to address
21 a budget deficit. Negotiations regarding the handling of the deficit are ongoing and
22 are in a state of flux, and as of yet no Budget Act for 2008-2009 has been enacted.
23 A. B. no. 5, Ch. 3 (2008). This particular cut is not scheduled to become effective
24 until July 1, 2008. *Id.* The situation is fluid, and this legislation is only one
25 component of the proposals to address the deficit. *Id.* But until and unless the deficit
26 is addressed by the enactment of a final state budget, it would be premature to address
27 this one component, before it has even become effective. In sum, Petitioners' Motion
28 for Preliminary Injunction is premature because it does not address an immediate and

1 irreparable threat. Therefore, Petitioners have not satisfied the second requirement
2 for preliminary injunctive relief.

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IV.

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**THE PUBLIC INTEREST IS IN FAVOR OF DENYING
6 PETITIONERS' INJUNCTION.**

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The public interest inquiry primarily addresses the impact on non-parties,
8 rather than on parties. *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959,
9 974 (9th Cir. 2002).

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Here, the Governor issued a proclamation declaring a fiscal emergency, and
called a special session of the Legislature for this purpose, on January 10, 2008. AB
5, Ch. 3 (2008). Clearly, in deciding whether, and how, to make cuts in programs, the
Legislature is faced with difficult choices. But the authority and discretion to make
such choices are reserved to the Legislature under our system of government, and AB
5, which addresses the fiscal emergency declared by the Governor, reflects the
exercise of such authority and discretion. *Id.* There can be no doubt that the public
interest would be seriously harmed if the Legislature's measures to address the multi-
billion-dollar deficit facing the State of California, which measures include AB 5,
were thwarted by the issuance of a preliminary injunction in this case. That potential
harm to the public interest weighs heavily against granting petitioners' motion for a
preliminary injunction.

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CONCLUSION

For the foregoing reasons, Petitioners' Motion for Preliminary Injunction should be denied.

Dated: June 12, 2008

Respectfully submitted,

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DECLARATION OF SERVICE

Case Name: **Independent Living Ctr. of So. Cal., et al. v. DHCS**
USDC No.: **CV08-03315 CAS (MANx)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. On June 12, 2008, I served the following document(s):

RESPONDENT'S OPPOSITION TO PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION

on the parties through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

- (A) **By First Class Mail:** I caused each such envelope to be placed in the internal mail collection system at the Office of the Attorney General with first-class postage thereon fully prepaid in a sealed envelope, for deposit in the United States Postal Service that same day in the ordinary course of business.
- (B) **By Messenger Service:** I caused each such envelope to be delivered to a courier employed by a professional messenger service, with whom we have a direct billing account, who personally delivered each such envelope to the office of the addresses listed below.
- (C) **By Overnight Mail:** I caused each such envelope to be placed in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for.
- (D) **By E-Mail:** I served the above-referenced document by transmitting a true copy in PDF format via electronic transmission from Jin.Nam@doj.ca.gov.


SEE ATTACHED SERVICE LIST

STATE - I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

FEDERAL - I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on June 12, 2008, at Los Angeles, California.

Jin S. Nam
Declarant


Signature

Case Name: **Independent Living Ctr. of So. Cal., et al. v. DHCS**
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