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11 **UNITED STATES DISTRICT COURT**
 12 **NORTHERN DISTRICT OF CALIFORNIA**
 13 **OAKLAND DIVISION**

15 BRUCE ANDERSON, JOHN WILSON,
 16 ROBERT AUSTIN, individuals; and
 CALIFORNIA ADVOCATES FOR NURSING
 17 HOME REFORM, a California non-profit
 corporation,

18 Plaintiffs,

19 v.

20 MARK GHALY, in his official capacity as
 21 Secretary of the CALIFORNIA DEPARTMENT
 OF HEALTH AND HUMAN SERVICES,
 22

23 Defendant.

Case No.: 4:15-cv-05120-HSG

**PLAINTIFFS' MOTION FOR
 PRELIMINARY INJUNCTION**

Date: May 14, 2020
Time: 2:00 p.m.
Ctrm.: 2, 4th Floor
Judge: Hon. Haywood S. Gilliam, Jr.

1 **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION**

2 PLEASE TAKE NOTICE that on May 14, 2020 at 2:00 p.m., or as soon thereafter as the
3 matter may be heard before the Honorable Judge Haywood S. Gilliam, Jr., in the United States
4 District Court for the Northern District of California, located in the Ronald V. Dellums Federal
5 Building and United States Courthouse, Courtroom 2, 4th Floor, 1301 Clay Street, Oakland, CA
6 94162, Plaintiffs will and hereby do move the Court for a preliminary injunction ordering Secretary
7 Mark Ghaly to begin enforcing readmission orders.

8 This motion will be based on this notice of motion and motion, the memorandum of points
9 and authorities below, and the declarations and proposed order filed concurrently.

10
11 Dated: April 3, 2020

Respectfully submitted,

BRAUNHAGEY & BORDEN LLP

12
13
14 By: /s/ Matthew Borden

Matthew Borden

15 Attorneys for Plaintiffs Bruce Anderson,
16 John Wilson, Robert Austin, and California
17 Advocates for Nursing Home Reform
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TABLE OF CONTENTS

1

2 INTRODUCTION 1

3 STATEMENT OF ISSUES TO BE DECIDED 3

4 FACTUAL BACKGROUND..... 3

5 A. The Novel Coronavirus Crisis and its Devastating Impact on the Elderly 3

6 B. The Dumping Epidemic in California 4

7 C. Plaintiffs’ Claims 5

8 D. Defendant’s Discovery Responses Admit that California Has No Effective Judicial
9 Mechanism to Enforce DHCS Readmission Orders..... 7

10 1. The State Has Never Enforced a DHCS Readmission Order 8

11 2. The State Has No Evidence to Support Its Argument that Private Individuals
12 Can Gain Readmission by Bringing Private Litigation 9

13 3. The State Is Capable of Enforcing Its Own Readmission Orders 11

14 ARGUMENT 12

15 I. PLAINTIFFS SATISFY ALL FOUR FACTORS OF THE TEST FOR PRELIMINARY
16 INJUNCTIVE RELIEF 12

17 A. Plaintiffs are Likely to Succeed on the Merits..... 12

18 1. Plaintiffs Have a Right to a Meaningful Readmission Hearing 12

19 2. The State Does Not Enforce DHCS Readmission Orders 13

20 3. Residents Cannot Enforce DHCS Readmission Orders on Their Own.... 14

21 B. Plaintiffs Will Suffer Irreparable Harm if the State Does Not Enforce Readmission
22 Orders During the Coronavirus Crisis 16

23 C. The Balance of Hardships Tips Sharply in Favor of Plaintiffs..... 20

24 D. The Public Interest Favors Granting an Injunction..... 22

25 II. PLAINTIFFS’ PROPOSED INJUNCTION SEEKS REASONABLE ENFORCEMENT
26 MEASURES THAT ARE WITHIN THE STATE’S POWER..... 23

27 CONCLUSION..... 24

28

TABLE OF AUTHORITIES

Page(s)

Cases

1

2

3

4 *Adriana Int’l Corp. v. Thoeren,*
913 F.2d 1406 (9th Cir. 1990) 18

5 *Anderson v. Ghaly,*
930 F.3d 1066 (9th Cir. 2019) passim

6 *Andreiu v. Ashcroft,*
253 F.3d 477 (9th Cir. 2001) (en banc)..... 20

7 *Bernhardt v. Los Angeles Cty.,*
339 F.3d 920 (9th Cir. 2003) 22

8 *Brede v. Dir. for Dep’t of Health,*
616 F.2d 407 (9th Cir. 1980) 18

9 *Byington v. Superior Court,*
14 Cal. 2d 68 (1939) 10

10 *Canavarrro v. Theatre and Amusement Janitors Union Local No. 9,*
15 Cal. 2d 495 (1940) 10, 15

11 *Catanzano ex rel. Catanzano v. Wing,*
103 F.3d 223 (2d Cir. 1996) 12

12 *Commc’ns Ctr., Inc. v. Hewitt,*
2005 WL 3277983 (E.D. Cal. Apr. 5, 2005) 17

13 *Easyriders Freedom F.I.G.H.T. v. Hannigan,*
92 F.3d 1486 (9th Cir. 1996) 19, 20

14 *Goldman, Sachs & Co. v. City of Reno,*
747 F.3d 733 (9th Cir. 2014) 12

15 *Hammond Packing Co. v. State of Ark.,*
212 U.S. 322 (1909)..... 18

16 *Harris v. Bd. of Supervisors,*
366 F.3d 754 (9th Cir. 2004) 18

17 *In re Phenylpropanolamine (PPA) Prod. Liab. Litig.,*
460 F.3d 1217 (9th Cir. 2006) 18

18 *John E. Andrus Mem’l, Inc. v. Daines,*
600 F. Supp. 2d 563 (S.D.N.Y. 2009) 19

19 *Kettenhofen v. Superior Court,*
55 Cal. 2d 189 (1961) 10

20 *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton,*
752 F.3d 755 (9th Cir. 2014) 22

21 *Leiva-Perez v. Holder,*
640 F.3d 962 (9th Cir. 2011) 20

22 *M.R. v. Dreyfus,*
697 F.3d 706 (9th Cir. 2012) 16, 18, 20

23 *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.,*
886 F.3d 803 (9th Cir. 2018) 19, 20

24 *Oregon Advocacy Center v. Mink,*
322 F.3d 1101 (9th Cir. 2003) 19

25

26

27

28

1 *Rodde v. Bonta*,
 357 F.3d 988 (9th Cir. 2004) 18

2 *Rodriguez v. Robbins*,
 715 F.3d 1127 (9th Cir. 2013) 21, 22

3 *Sajous v. Decker*,
 2018 WL 2357266 (S.D.N.Y. May 23, 2018) 21

4 *Shell Offshore, Inc. v. Greenpeace, Inc.*,
 709 F.3d 1281 (9th Cir. 2013) 18

5 *Sierra Forest Legacy v. Rey*,
 577 F.3d 1015 (9th Cir. 2009) 21

6 *The Wild Rockies v. Cottrell*,
 632 F.3d 1127 (9th Cir. 2011) 12, 19

7 *URS Corp. v. Atkinson/Walsh Joint Venture*,
 15 Cal. App. 5th 872 (2017) 15

8 *Valdivia v. Schwarzenegger*,
 2008 WL 1990800 (E.D. Cal. May 6, 2008) 21

9 *Weinberger v. Romero-Barcelo*,
 456 U.S. 305 (1982)..... 22

10 *Winter v. Nat. Res. Def. Council*,
 555 U.S. 7 (2008)..... 16, 17, 20, 21

11 *Zepeda v. I.N.S.*,
 753 F.2d 719 (9th Cir. 1983) 21

12
 13
 14 **Statutes**

15 42 U.S.C. § 1395i-3(c)(2)(A) 5

16 42 U.S.C. § 1983..... 7

17 42 U.S.C. §§ 1395i-3(c), (e)(3)..... 5

18 42 U.S.C. §§ 1395i-3(e)(3), 1396r(e)(3)..... 8, 9

19 Cal. Code Civ. P. § 1094.5 11, 15

20 Cal. Health & Saf. Code § 1424(c)..... 24

21 Cal. Health & Saf. Code § 1424(d)..... 11, 23

22 Cal. Health & Saf. Code § 1425 11, 23

23 Cal. Health & Saf. Code § 1428(g)..... 24

24 Cal. Health & Safety Code § 1430(b)..... 11, 14, 15

25 Cal. Health & Safety Code § 1599.1 11, 15

26 Cal. Welf. & Inst. Code § 14133.3 11, 23

27 **Regulations**

28 42 C.F.R. § 43 8

42 C.F.R. § 431.246(a) 8, 9

Other Authorities

H.R. Rep. No. 100-391 19

1 Plaintiffs Bruce Anderson, Robert Austin, John Wilson, and California Advocates for
2 Nursing Home Reform (“CANHR”) respectfully submit this memorandum in support of their
3 motion for a preliminary injunction.

4 **INTRODUCTION**

5 By the time this motion is heard, we will be in the throes of an unprecedented hospital-bed
6 crisis. But as a result of the unlawful conduct at issue in this lawsuit, many desperately needed
7 hospital beds will be filled with people who are not sick—nursing-home residents who have been
8 dumped there by nursing homes. In ordinary times, hospital dumping causes grave trauma to
9 residents. But now, it also exposes them to risk of contracting Covid-19, which is often deadly in
10 that population, and steals hospital beds from victims of the pandemic.

11 The reason this problem exists is that the State of California refuses to enforce readmission
12 orders issued by the Department of Health Care Services (“DHCS”). Federal law entitles nursing-
13 home residents to a fair hearing when a facility refuses to readmit them after hospitalization, so that
14 they can be quickly readmitted. The State provides a hearing, but then refuses to enforce its own
15 decisions. This policy violates federal law, and only benefits nursing homes, which use hospitals
16 as dumping grounds to get rid of their poorest and neediest residents so they can replace them with
17 more lucrative clients.

18 Plaintiffs seek a preliminary injunction to put an immediate end to the State’s illegal
19 practice in this time of danger. Plaintiffs are overwhelmingly likely to prevail on the merits. Both
20 the Ninth Circuit and this Court have held that the State must provide a meaningful hearing. The
21 State, however, has admitted in discovery that it has never enforced DHCS readmission orders, and
22 that it is unaware of anyone successfully doing so through private litigation.¹ And Governor Gavin
23 Newsom has engaged in a Trump-like refusal to respond to a lawful federal subpoena seeking to
24 uncover his communications with the nursing-home industry—which has contributed mightily to
25 his campaign.

26 ¹ Given the State’s admissions, Plaintiffs have concurrently moved for summary judgment on
27 liability. The only open question in this case is what the ultimate remedy should look like, which is
28 naturally a more complex issue that Plaintiffs have sought to mediate with the State since the outset
of this litigation. In this motion, however, Plaintiffs seek immediate preliminary relief to protect
vulnerable nursing-home residents and to secure hospital beds for Covid-19 victims.

1 The harm from allowing nursing facilities to dump residents into hospitals is devastating.
2 At this point, it is jeopardizing public health and safety. Preventing even one resident from being
3 dumped could save multiple lives. For example, Plaintiff Bruce Anderson was forced to live in a
4 hospital for over a year. During that time, his bed could have been used to treat more than 36 acute
5 sufferers from Covid-19 or up to a hundred people needing acute hospital care for other reasons.
6 Nor should vulnerable residents themselves unnecessarily be exposed to a deadly disease. There is
7 no legitimate countervailing state interest in violating federal law. Indeed, the public interest
8 mandates that the State’s illegal conduct immediately cease.

9 Accordingly, Defendant should be enjoined as follows:

10 1. Upon any known failure of a facility to obey an order from DHCS that a resident be
11 readmitted from a hospital, the State shall:

- 12 a. assert an offset or recoupment against the nursing facility’s Medi-Cal payments
13 for medically unnecessary care provided at a hospital as a result of the refusal to
14 readmit;
- 15 b. issue an immediate Class A citation and plan of correction requiring the facility
16 to readmit the resident;
- 17 c. impose daily penalties for each day the facility refuses readmission; and
- 18 d. after 10 days of non-compliance, deny Medi-Cal payments for new admissions
19 and recommend to the Centers for Medicare and Medicaid Services (“CMS”)
20 that it deny Medicare payments for new admissions.

21 2. In addition, if a resident refused readmission dies as a result of Covid-19 contracted
22 while in the hospital, the State shall issue a Class AA citation to the facility for causing the death of
23 a patient or resident.

24 3. The State shall provide immediate notice to all facilities in the State that the State
25 will take all the measures above should they disobey a readmission Order from DHCS.

26 4. The State shall track repeat offenders for the imposition of additional penalties, and
27 provide notice to Plaintiffs of who they are.

28

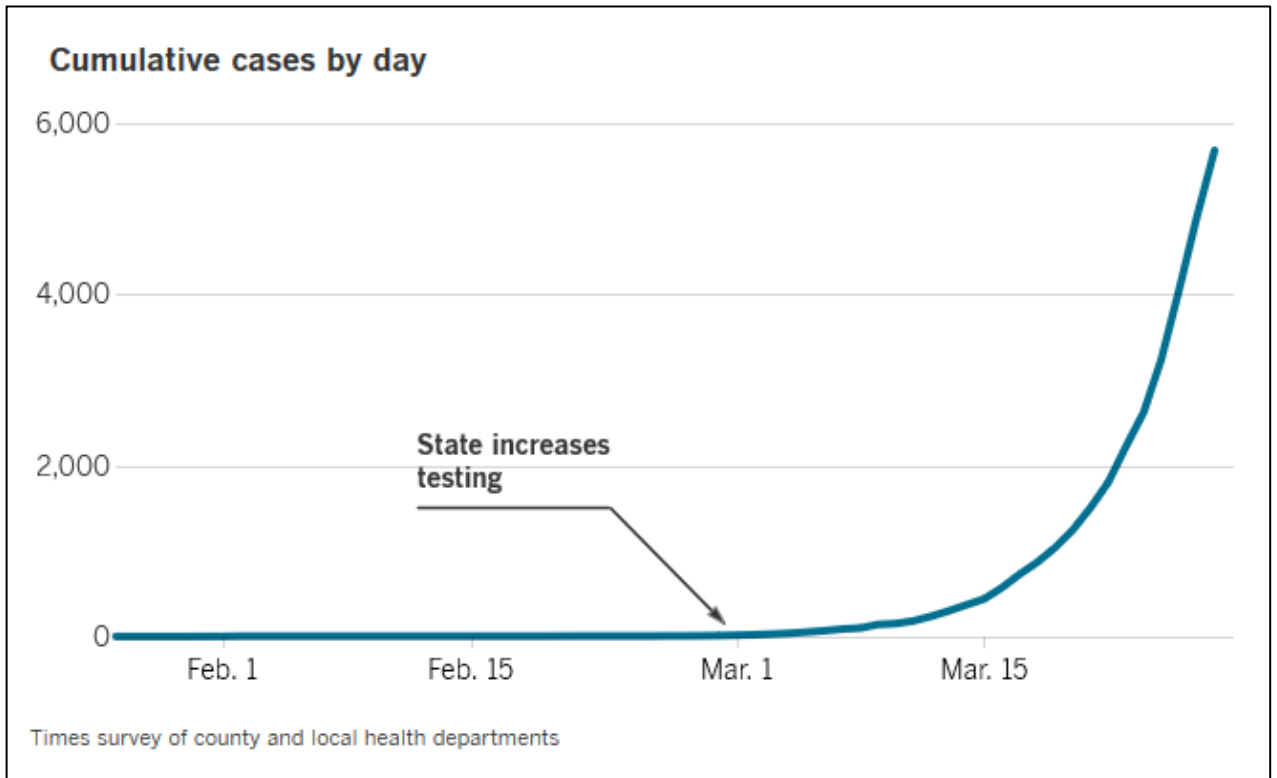
STATEMENT OF ISSUES TO BE DECIDED

Should the Court order the State to enforce DHCS readmission orders when the State’s failure to do so violates federal law and is causing irreparable harm to residents and citizens in need of hospital beds?

FACTUAL BACKGROUND

A. The Novel Coronavirus Crisis and its Devastating Impact on the Elderly

California saw its first confirmed case of novel coronavirus towards the end of January. *Tracking coronavirus in California*, L.A. Times (updated Apr. 2, 12:32 A.M.).² Since then, the virus has spread at an exponential pace:



Id. In the 30 minutes it takes to read this motion, some 470 people in the United States will be diagnosed with Covid-19, and perhaps nine people will die.³ Defendant Mark Ghaly, California

² <https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/>.

³ Yesterday, 22,559 people in the United States were newly diagnosed with Covid-19, and 452 died. *See* World Health Organization, Coronavirus Disease 2019 (COVID-19) Situation Report - 72, World Health Organization (Apr. 1, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200401-sitrep-72-covid-19.pdf?sfvrsn=3dd8971b_2.

1 Secretary of Health and Human Services, stated in a press conference on March 25, 2020, that
 2 California’s cases were doubling every three to four days. Anita Chabria, *California coronavirus*
 3 *cases continue to grow, reaching rate on par with New York*, L.A. Times (Mar. 25, 2020).⁴

4 Covid-19, the disease caused by this coronavirus, is a respiratory disease. Graham
 5 Readfearn, *What happens to people’s lungs when they get coronavirus?*, The Guardian (Mar. 28,
 6 2020);⁵ (Declaration of Jonathan Evans (“Evans Decl.”) ¶ 20). When it presents in its acute
 7 form—when the infection traverses from the upper to the lower respiratory tract—it can cause lung
 8 damage, requiring that its victim be hospitalized, intubated, and connected to a ventilator. Daniela
 9 J. Lamas, M.D., *What if I Need to Go on a Ventilator?*, N.Y. Times (Mar. 27, 2020).⁶ Based on
 10 statistical modeling and events around the world, it is highly likely that the number of California
 11 citizens needing hospital care due to Covid-19 will greatly exceed the number of available hospital
 12 beds within the next several weeks. (Evans Decl. ¶ 17.) In a very short amount of time, virtually
 13 all hospitals in the State will be overrun with Covid-19 patients. (*Id.* ¶ 23.)

14 Covid-19 is especially deadly to the elderly. It kills around 5% of people aged 70-79 and
 15 nearly 10% of people aged 80 and above, and is especially deadly to nursing-home residents due to
 16 their preexisting conditions. (*Id.*) As of this filing, 215 people in California had died of Covid-19.
 17 *Tracking coronavirus in California, supra*. Not all the victims’ families have disclosed the age of
 18 the victim, but of those that are known, the overwhelming majority are over 60 years old. *Id.*

19 **B. The Dumping Epidemic in California**

20 Outside of coronavirus, dumping is one of the biggest issues facing nursing-home residents.
 21 (Evans Decl. ¶ 25; Declaration of Anthony Chicotel (“Chicotel Decl.”) ¶¶ 2, 5-10.) When a
 22 resident’s ability to pay comes exclusively from Medi-Cal, a facility has a strong financial
 23 motivation to replace the resident with someone who is either a private-pay resident or who
 24 receives money from Medicare in addition to Medi-Cal. (Chicotel Decl. ¶ 6.) Facilities have

25
 26 ⁴ <https://www.latimes.com/california/story/2020-03-25/california-coronavirus-cases-doubling-rate-newsom>.

27 ⁵ <https://www.theguardian.com/world/2020/mar/28/what-happens-to-peoples-lungs-when-they-get-coronavirus>.

28 ⁶ <https://www.nytimes.com/article/ventilator-coronavirus.html>.

1 similar incentives for residents who require substantial amounts of care. If they can replace such
2 residents with ones who require less staff time, their bottom line increases. (*Id.*)

3 Federal law prohibits facilities from discharging residents, except under very limited
4 circumstances. 42 U.S.C. § 1395i-3(c)(2)(A). Hospital dumping is a way facilities circumvent this
5 law. (Evans Decl. ¶¶ 8-9.) The facility sends the resident to a hospital, purportedly for medical or
6 mental-health treatment, but when the hospital discharges the resident, the facility refuses to take
7 him or her back. (*Id.*) The result is that residents are forcibly removed from their homes, their
8 familiar surroundings, friends, and caregivers. (Evans Decl. ¶ 25; Chicotel Decl. ¶¶ 8, 10.) In
9 hospitals, residents have no social activities. (*Ibid.*) They are often isolated from their families.
10 (*Ibid.*) They are subjected to a higher risk that they will be given psychotropic drugs to keep them
11 docile—which has a profound impact on their health and will to live. (*Ibid.*) Residents who can
12 walk often lose the ability to ambulate as a result of muscle atrophy from living in a hospital bed.
13 (Evans Decl. ¶ 25) In sum, they are stuck in a setting wholly inappropriate for long-term
14 residential care. (Chicotel Decl. ¶ 10.) This practice has a devastating impact on residents,
15 including Plaintiffs, and has cost California residents tens of millions of dollars. (*Id.* ¶¶ 8, 10-11.)

16 Dumping in ordinary times is bad enough, but in the time of coronavirus, it is deadly.
17 Hospitals are filling with Covid-19 patients and the air is thick with coronavirus. (Evans Decl.
18 ¶ 23.) Each day illegally discharged nursing-home residents remain in such a hospital, their
19 chances of contracting Covid-19 increase. (*Id.*) Each day, they are subjected to the risk of
20 contracting a disease that will leave more than one out of ten of them gasping for air on a ventilator
21 until they expire. (*Id.*)

22 C. Plaintiffs' Claims

23 Federal law protects against dumping by requiring states to provide residents with a “fair
24 hearing” whenever they have been refused readmission from a hospital. *See* 42 U.S.C. §§ 1395i-
25 3(c), (e)(3); 1396r(c), (e)(3).⁷ The Ninth Circuit has held that the right to a “hearing” includes the
26 right to a meaningful result. *Anderson v. Ghaly*, 930 F.3d 1066, 1076 (9th Cir. 2019).

27 ⁷ Section 1395i-3 applies to any facility that accepts Medicare reimbursement, while § 1396r
28 applies to any facility that accepts Medicaid reimbursement. The provisions at issue here are not
substantively different in the two statutes.

1 CMS, the federal agency tasked with enforcing the Medicaid Act, has told the State of
2 California at least three times that it must enforce DHCS hearing decisions. (Chicotel Decl., Ex. 3
3 at 3-4; *id.*, Exs. 6-7.) But no California agency will do so. DHCS conducts the fair hearing.
4 (Evans Decl. ¶¶ 11-12.) Once it issues its order, however, DHCS’s position is that it lacks
5 jurisdiction to act further. (Chicotel Decl., Ex. 2 (Letter from DHCS (Aug. 6, 2015)); *id.*, Ex. 4 at 2
6 (Letter from DHCS (Aug. 21, 2015)).) The California Department of Public Health (“CDPH”) has
7 taken the position that it will not enforce DHCS orders since CDPH was not a party to the hearing.
8 (Chicotel Decl., Ex. 5 at 2 (CDPH Memorandum at 2 (Oct. 23, 2008)).) DHCS and CDPH report
9 directly to Defendant Ghaly.

10 Each of the individual Plaintiffs in this case won his fair hearing. (Declaration of Sara
11 Anderson (“Anderson Decl.”), Dkt. 13-1 ¶ 7; Declaration of Vera Washington (“Washington
12 Decl.”), Dkt. 13-3 ¶ 10; Declaration of Jeremy Wilson (“Wilson Decl.”), Dkt. 15 ¶ 6.) Each of the
13 individual Plaintiffs obtained an order from DHCS requiring the facility to admit him to the first
14 available bed. (*Ibid.*) None of the individual Plaintiffs was able to return home because the State
15 of California refuses to enforce its own hearing decisions. (Anderson Decl. ¶¶ 8-10; Washington
16 Decl. ¶¶ 11, 13; Wilson Decl. ¶¶ 7-9.) Plaintiffs repeatedly petitioned the State to enforce its own
17 decisions, but it refused to do so. (*Ibid.*)

18 Plaintiffs suffered cruelly as a result of the State’s inaction. Plaintiff Bruce Anderson was
19 forcibly drugged and restrained in a hospital bed for over a year. (Anderson Decl. ¶ 12; Chicotel
20 Decl. ¶ 21.) Plaintiff Wilson, who suffered from ALS, could only communicate through eye
21 movements. (Wilson Decl. ¶ 2.) He was removed from his familiar caregivers, who had learned
22 how to communicate with him. (*Id.* ¶¶ 2-3.) He passed away while this case was on appeal.
23 (Chicotel Decl. ¶ 21.) Plaintiff Austin suffered a stroke and began to lose all the therapeutic gains
24 he made at his nursing facility because he did not receive therapy at the hospital. (Washington
25 Decl. ¶¶ 7-8, 12.) Because Mr. Austin was deteriorating rapidly at the hospital, his sister began
26 looking for other facilities to accept him, but could only find a facility in Crenshaw, which is over
27 400 miles from her house. (Washington Decl. ¶ 14.) As a result, Mr. Austin’s sister can rarely
28

1 visit with him, he spends the holidays alone, and he often goes long periods of time where he does
2 not see his family. (*Id.* ¶¶ 14-15; Chicotel Decl. ¶ 21.)

3 When the State refused to help Plaintiffs, they enlisted the help of Plaintiff CANHR, a
4 public-interest organization dedicated to protecting nursing-home residents that has been trying to
5 stem the tide of resident dumping for years. (Chicotel Decl. ¶¶ 2-5; Washington Decl. ¶ 13; Wilson
6 Decl. ¶ 8.) Thereafter, CANHR petitioned the State to act. (Washington Decl. ¶ 13; Wilson Decl.
7 ¶ 8.) When it again refused to do so, Plaintiffs filed this case seeking to enforce their federal rights
8 under 42 U.S.C. § 1983.

9 After the Ninth Circuit issued its opinion in this case, Plaintiffs wrote Governor Gavin
10 Newsom a letter imploring him to “do the right thing and enforce meaningful remedies” for
11 Plaintiffs. (Declaration of Matthew Borden (“Borden Decl.”), Ex. 2.) The State did not respond,
12 and instead filed a motion to dismiss the First Amended Complaint (“FAC”).

13 On January 15, 2020, the Court denied Defendant’s motion to dismiss. (Dkt. 43 at 12.) The
14 Court held that if it is true that the State does not enforce DHCS hearing decisions and that citizens
15 have no feasible means to privately enforce such decisions, then Plaintiffs have stated a claim. (*Id.*
16 at 10-11.) Thereafter, Plaintiffs propounded discovery on the State and the Governor to determine
17 (1) if the State has ever done anything to enforce a DHCS readmission order, (2) if it had any
18 evidence to support its position that any resident had ever obtained readmission to a nursing home
19 by filing a private lawsuit to enforce a DHCS hearing decision, and (3) why the Governor had done
20 nothing in response to Plaintiffs’ repeated pleas. (Borden Decl., Exs. 3-5; Dkt. 51-1, Ex. A.)
21 Defendant responded to Plaintiffs’ discovery on March 3, and Governor Newsom refused to
22 respond. (Borden Decl., Exs. 3-5; Dkt. 51.)

23 **D. Defendant’s Discovery Responses Admit that California Has No Effective**
24 **Judicial Mechanism to Enforce DHCS Readmission Orders**

25 Given the two principal factual issues remaining in this case—whether the State itself
26 enforces DHCS readmission orders and whether residents can obtain private enforcement of
27 readmission orders on their own—Plaintiffs asked the State whether it had any evidence that either
28 predicate was true. (Borden Decl., Exs. 3-5.) Defendant answered with a litany of evasions that

1 ultimately boiled down to a single answer—*no*—and the Governor refused to answer entirely.
2 (*Ibid.*; Motion to Quash, Dkt. 51.)

3 **1. The State Has Never Enforced a DHCS Readmission Order**

4 Plaintiffs’ Interrogatory No. 5 asks: “Identify all actions you have taken to ensure that
5 orders by DHCS requiring skilled-nursing facilities to readmit a resident after the resident
6 exercised his or her federal right to a meaningful hearing on readmission, as required by 42 U.S.C.
7 §§ 1395i-3(e)(3), 1396r(e)(3), *Anderson v. Ghaly*, 930 F.3d 1066, 1077 (9th Cir. 2019), and 42
8 C.F.R. § 431.246(a) are enforced.” (Borden Decl., Ex. 3 at 5-6.) Defendant answered that “it is
9 not required to take any ‘actions’ and thus, there are no non-privileged ‘actions’ to identify in
10 response to this request.” (*Id.*)

11 Defendant’s responses to Plaintiffs’ Requests for Admission similarly reflect that the State
12 does not enforce DHCS orders. For example, Plaintiffs’ Request for Admission No. 7 inquires:
13 “Admit that the California Department of Public Health has never issued a citation, fine, or penalty
14 to a skilled-nursing facility for refusal to obey an order requiring it to readmit a resident that was
15 issued by the California Department of Health Care Services after the resident exercised his or her
16 federal right to a meaningful hearing on readmission, as required by 42 U.S.C. §§ 1395i-3(e)(3),
17 1396r(e)(3), *Anderson v. Ghaly*, 930 F.3d 1066, 1077 (9th Cir. 2019), and 42 C.F.R. § 43 1.246(a).”
18 (Borden Decl., Ex. 5 at 7.) Defendant was unable to identify any such instance, and instead
19 asserted that in three cases, CDPH had issued citations to facilities based on its own
20 “investigation.” (*Id.*) In other words, Defendant reprised the argument from his motion to dismiss,
21 rejected by this Court, that any sanctions CDPH might levy after its own independent investigation
22 suffice to “enforce” a DHCS order. (*Cf.* Reply in Support of MTD, Dkt. 42 at 4-5; Order Denying
23 MTD, Dkt. 43 at 9-10.) Of course, none of the three cases Defendant identified resulted in the
24 resident being readmitted. (Borden Decl. ¶ 2.)⁸

25
26 ⁸ RFA No. 8 similarly inquires: “Admit that since the time this case was filed, you have done
27 nothing to ensure that orders by DHCS requiring skilled-nursing facilities to readmit a resident
28 after the resident exercised his or her federal right to a meaningful hearing on readmission.”
(Borden Decl., Ex. 5 at 7-8.) Again, Defendant was unable to identify anything that it had done to
enforce a DHCS readmission order, and instead claimed that CDPH does its own “investigations”
regarding illegal discharges. (*Id.*)

1 Finally, Request for Admission No. 11 asks: “Admit that you have done nothing to change
 2 your practices regarding enforcement of orders requiring facilities to readmit a resident that were
 3 issued by the California Department of Health Care Services after the resident exercised his or her
 4 federal right to a meaningful hearing on readmission, as required by 42 U.S.C. §§ 1395i-3(e)(3),
 5 1396r(e)(3), *Anderson v. Ghaly*, 930 F.3d 1066, 1077 (9th Cir. 2019), and 42 C.F.R. § 431.246(a),
 6 in response to Judge Gilliam’s order denying your motion to dismiss in *Anderson v. Ghaly*, No.
 7 4:15-cv-5120-HSG (Jan. 15, 2020), Dkt. No. 43.” (Borden Decl., Ex. 5 at 10-11.) Defendant
 8 claimed not to understand this question and refused to respond altogether. (*Id.*)

9 In addition to these admissions, the State has admitted that it has no documents to show that
 10 it had ever enforced a DHCS order or changed its practices to do so since the outset of this
 11 litigation. (Borden Decl., Ex. 4 at 6.) When Plaintiffs subpoenaed Governor Newsom to see what
 12 he had done to fix this problem, he refused to respond. (Subpoena to Gavin Newsom, Dkt. 51-1,
 13 Ex. A at 4; Motion to Quash, Dkt. 51.)

14 **2. The State Has No Evidence to Support Its Argument that Private** 15 **Individuals Can Gain Readmission by Bringing Private Litigation**

16 In both the Ninth Circuit and in this Court, the State has argued that its hearing results are
 17 meaningful because it has created a private cause of action that allows residents to enforce the
 18 DHCS readmission orders themselves. (Motion to Dismiss, Dkt. 37 at 18-20.) *See also Anderson*,
 19 930 F.3d at 1080-81. In denying Defendant’s motion to dismiss, this Court explained that creating
 20 such a cause of action does not alleviate the State’s obligation to provide a meaningful hearing, if
 21 in reality, indigent residents are unable to successfully use the private right of action to enforce the
 22 orders. (Dkt. 43 at 10.) In particular, the Court held that the following allegations, if proven true,
 23 sufficed to state a claim for relief:

24 The FAC alleges that there are “no reported instances of any resident
 25 successfully filing” a § 1430(b) suit because of the following: (1)
 26 residents who would pursue § 1430(b) are indigent and cannot afford
 27 to find and retain counsel (given they are typically MediCal
 28 recipients); (2) state courts “do not ... uniformly treat DHCS
 readmission orders as *res judicata*”; and (3) even if state courts did
 treat DHCS readmission orders as *res judicata*, any appeal from a
 mandatory injunction “automatically stays the injunction, and such
 appeals take roughly two years to resolve.”

1 (*Id.*) Here, Plaintiffs have provided evidence that all of the above facts are true. (Chicotel Decl.
2 ¶¶ 2-5, 15, 29; Borden Decl. ¶¶ 7-9.)

3 In particular, CANHR operates a hotline for people to call when they or their loved ones
4 have been mistreated. (Chicotel Decl. ¶ 2.) CANHR also runs an attorney-referral service, where
5 it attempts to find counsel for people who call with legal problems. (*Id.* ¶ 12.) In over a decade of
6 dealing with California’s dumping epidemic, CANHR has almost never been able to find counsel
7 to bring suits to enforce DHCS readmission orders because these types of suits are not perceived to
8 be lucrative. (*Id.*)

9 In over a decade of dealing with the dumping epidemic, CANHR is likewise unaware of
10 any resident ever successfully enforcing a DHCS readmission order on his or her own. (*Id.* ¶ 29;
11 *see also* Borden Decl. ¶ 8.) Even in the few cases where a resident was able to find pro bono
12 counsel to take the case, the resident did not end up getting readmitted. (Chicotel Decl. ¶ 13.)
13 Plaintiffs are unaware of any case where a state court has found that a DHCS readmission order has
14 given rise to issue or claim preclusion, and in the one state court case known to counsel, the court
15 held that the DHCS order was non-binding. (Borden Decl. ¶ 7.)

16 Finally, under California law, it has been long established that “[a] mandatory injunction is
17 automatically stayed by an appeal.” *Canavarro v. Theatre and Amusement Janitors Union Local*
18 *No. 9*, 15 Cal. 2d 495, 498 (1940); *see also, e.g., Byington v. Superior Court*, 14 Cal. 2d 68, 70
19 (1939) (“an injunction mandatory in character is automatically stayed by appeal”); *Kettenhofen v.*
20 *Superior Court*, 55 Cal. 2d 189, 191 (1961) (“An appeal stays a mandatory but not a prohibitory
21 injunction.”). In the California Courts of Appeal, it usually takes at least a year and a half to obtain
22 a decision. (Borden Decl. ¶ 9.) *See also 2016 Court Statistics Reports—Statewide Caseload*
23 *Trends 28*, Judicial Council of California (2016) (reporting that in 2016, 90% of civil appeals in
24 California took up to 22 months to resolve).⁹ Thus, any indigent resident who was fortunate
25 enough to find counsel, and who succeeded in obtaining an order from a state trial court enforcing a
26 DHCS readmission order, would still face an insurmountable 18-to-22-month delay.

27
28 ⁹ <https://www.courts.ca.gov/documents/2016-Court-Statistics-Report.pdf>.

1 In discovery, the State has admitted that it has no evidence to contradict Plaintiffs or to
2 substantiate its argument that providing a private right of action does anything to meaningfully
3 enforce DHCS readmission orders. The State admitted that it has no evidence of any case in which
4 “a resident successfully obtained readmission to a skilled nursing facility as a result of filing suit
5 under Cal. Health & Safety Code § 1430(b) to enforce [a DHCS readmission] order.” (Borden
6 Decl., Ex. 5 at 3.) It also admitted that it was unaware of any such case under Cal. Health & Safety
7 Code § 1599.1, Cal. Code Civ. P. § 1094.5, or “any other provision of state or federal law.” (*Id.* at
8 3-6.) It admitted it was unaware of “any case in which a resident successfully enforced an order
9 requiring a skilled-nursing facility to readmit the resident that was issued by [DHCS].” (*Id.* at 6-7.)
10 In short, it admitted that it had no evidence to support its primary contention both on appeal and in
11 this Court that despite state non-enforcement, residents can privately enforce a DHCS readmission
12 order.

13 3. The State Is Capable of Enforcing Its Own Readmission Orders

14 The State has also represented to this Court, and confirmed in its admissions to Plaintiffs,
15 that it has a variety of powers with which to enforce DHCS readmission orders. In its original
16 motion to dismiss, the State explained that it has the power under Cal. Welf. & Inst. Code
17 § 14133.3 to assert an offset or recoupment against nursing facilities’ Medi-Cal payments for
18 medically unnecessary care provided at a hospital as a result of a refusal to readmit. (Dkt. 11 at 7.)
19 The State has further explained that it has the power to issue citations to facilities that refuse to
20 obey a DHCS readmission order. (Dkt. 37 at 8-9.) In discovery, the State and the California
21 Attorney General have verified that all of their representations to this Court about the nature and
22 extent of the State’s remedial powers are true. (Borden Decl., Ex. 5 at 7.)

23 The State also has the power to issue a Class A citation to a facility for actions that pose a
24 “substantial probability that death or serious physical harm to patients or residents of the long-term
25 health care facility would result.” Cal. Health & Saf. Code § 1424(d). In the coronavirus crisis,
26 refusing to obey a DHCS readmission order does pose a substantial possibility of death or serious
27 physical harm, both to the resident and to others. (Evans Decl. ¶¶ 23, 18.) The State also has the
28 power to impose daily penalties for each day the facility refuses readmission under Cal. Health &

1 Saf. Code § 1425. (Dkt. 37 at 9.) Finally, it has the power to deny Medi-Cal payments for new
 2 admissions and recommend to CMS that it deny Medicare payments for new admissions. The State
 3 represented that it had the former power in its first motion to dismiss and the latter power in both
 4 motions to dismiss. (Dkt. 11 at 7; Dkt. 37 at 9.)

5 ARGUMENT

6 Under the traditional four-factor test, plaintiffs may obtain a preliminary injunction if they
 7 show that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm
 8 in the absence of preliminary relief; (3) the balance of equities tip in their favor; and (4) an
 9 injunction is in the public interest. *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 738 (9th
 10 Cir. 2014). Alternately, in the Ninth Circuit, plaintiffs who show that the balance of hardships tips
 11 “sharply” in their favor may obtain an injunction even if, rather than a “likelihood of success,” they
 12 merely raise “serious questions” going to the merits. *All. for the Wild Rockies v. Cottrell*, 632 F.3d
 13 1127, 1135 (9th Cir. 2011). In this case, Plaintiffs easily meet either bar.

14 **I. PLAINTIFFS SATISFY ALL FOUR FACTORS OF THE TEST FOR 15 PRELIMINARY INJUNCTIVE RELIEF**

16 **A. Plaintiffs are Likely to Succeed on the Merits**

17 In light of the State’s admissions in discovery and the prior rulings in this case by the Ninth
 18 Circuit and this Court, Plaintiffs have an overwhelming likelihood of success.

19 **1. Plaintiffs Have a Right to a Meaningful Readmission Hearing**

20 Nursing-home residents discharged or transferred in violation of federal law have a right to
 21 an enforceable readmission order. *Anderson*, 930 F.3d at 1077; *see also Catanzano ex rel.*
 22 *Catanzano v. Wing*, 103 F.3d 223, 229 (2d Cir. 1996) (“[T]he statutory right to a fair hearing must
 23 include within it the right to effective redress.” (quotation marks omitted)). Congress did not pass
 24 the FNHRA to “create meaningless show trials that allow nursing homes to persist in improper
 25 transfers and discharges.” *Anderson*, 930 F.3d at 1076.

26 Both the Ninth Circuit and this Court have held that the State fails to satisfy its obligation to
 27 provide a fair hearing if the process it offers ultimately proves meaningless. The Ninth Circuit held
 28 that if “that state *agencies*—namely, DHCS and CDPH—refuse to enforce favorable hearing

1 decisions,” and state *courts* also do not “enforce DHCS hearing decisions through [a] private cause
2 of action” provided by state or federal law, then the State is violating Plaintiffs’ federal rights. *Id.*
3 at 1080-81. This Court held much the same in denying the State’s motion to dismiss: If no state
4 instrumentality enforces DHCS hearing decisions, then California violates federal law and its
5 liability is established. (Order Denying MTD, Dkt. 43 at 10-11.)

6 The State concedes that it has never enforced a DHCS readmission order. It also admits
7 that it is unaware of any nursing-home resident successfully doing so on his or her own. In other
8 words, DHCS hearings are “meaningless show trial[s],” from which orders issue that neither the
9 State’s executive branch nor its judicial branch will enforce. *See id.* at 1076; (Chicotel Decl. ¶¶ 15-
10 20, 22, 29). Accordingly, the State is undisputedly in violation of federal law.

11 2. The State Does Not Enforce DHCS Readmission Orders

12 In various briefing, the State has argued that its executive agencies engage in enforcement
13 activities regarding residents’ transfer and discharge rights. (*See, e.g.*, Motion to Dismiss, Dkt. 37
14 at 8-9.) However, none of these activities involve enforcing the results of the federally mandated
15 hearing at issue in this action.

16 DHCS claims that it lacks jurisdiction to enforce its own hearing decisions after issuing
17 them. (Chicotel Decl., Ex. 2 (Letter from DHCS (Aug. 21, 2015)).) And the State has candidly
18 admitted in this proceeding that CDPH does not enforce DHCS readmission orders, and instead,
19 makes its own independent determination about whether the resident should be readmitted,
20 regardless of whether the resident won his or her hearing. (*See, e.g.*, Reply in Support of MTD,
21 Dkt. 42 at 4 (explaining that even though Plaintiff Austin won his DHCS hearing and DHCS had
22 issued an order requiring that the facility admit him to the first available bed, “CDPH investigated
23 the facility that refused to readmit Plaintiff Austin, but determined that the refusal was allowable
24 under the federal regulations, and so did not impose a penalty”).) CDPH itself has issued a
25 memorandum expressly explaining that it does not enforce DHCS’s hearing decisions: It conducts
26 its own investigation, and if the facility convinces CDPH that DHCS got things wrong, CDPH
27 “will not require the facility to re-admit the resident.” (Chicotel Decl., Ex. 5 at 2 (CDPH
28

1 Memorandum at 2 (Oct. 23, 2008)).) The State points to no other agency that might enforce a
2 readmission order.

3 The State’s discovery responses confirm that none of its agencies enforce readmission
4 orders. In its interrogatory responses, the State could not identify a single “action[] [it had] taken
5 to ensure that [readmission orders] are enforced.” (Borden Decl., Ex. 3 at 5-6; *see also id.* at 6-7
6 (identifying no actions the State has taken “to ensure that skilled-nursing-facility residents who
7 obtain a [readmission order] are actually readmitted to their skilled-nursing facilities”).) Instead, it
8 simply asserted that “it is not required to take any ‘actions’ and thus, there are no non-privileged
9 ‘actions’ to identify in response to this request.” (*Id.* at 5-7.) Nor does the State have any
10 documentation of how often, if ever, “readmission orders result in readmission of the resident,” or
11 whether readmission hearing orders were effective at all. (Borden Decl., Ex. 4 at 3.)

12 That CDPH sometimes conducts its *own* investigation of refusals to readmit does not render
13 the results of Plaintiffs’ (or anyone’s) federally mandated hearings meaningful. (Order Denying
14 MTD, Dkt. 43 at 9-10.) To the contrary, Plaintiffs all won their hearings, and none of them was
15 readmitted. (Anderson Decl. ¶¶ 8-10; Washington Decl. ¶¶ 11, 13; Wilson Decl. ¶¶ 7-9.) When
16 Plaintiffs asked the State to admit that CDPH does not enforce DHCS readmission orders, the State
17 was unable to identify any instance in which it had. (Borden Decl., Ex. 5 at 7.) Instead, the State
18 simply argued that CDPH had *independently* investigated refusals to readmit two out of three
19 individual plaintiffs in this case, as well as the facility’s refusal to readmit an individual named
20 Gloria Single, and had levied penalties in those cases. (*Id.*) Leaving aside that none of these three
21 cases resulted in the resident’s readmission as ordered by DHCS (Borden Decl. ¶ 2), investigating
22 the same refusal-to-readmit complaint as DHCS is not the same as enforcing DHCS’s readmission
23 order. (Order Denying MTD, Dkt. 43 at 9-10.) No state agency does the latter.

24 3. Residents Cannot Enforce DHCS Readmission Orders on Their Own

25 The State also argues that DHCS hearing orders are meaningful because indigent residents
26 can simply find counsel, bring suit under Cal. Health & Safety Code § 1430(b), and thereby force
27 facilities to comply with DHCS’s orders to readmit them. (Motion to Dismiss, Dkt. 37 at 18-20.)
28 As the Court held in denying Defendant’s motion to dismiss the FAC, private litigation is an

1 enforcement mechanism only if it works. (Dkt. 43 at 10.) Discovery has proven that private
2 enforcement of DHCS readmission orders has never resulted in any resident being readmitted.

3 As a threshold matter, there are no reported instances of any resident successfully filing
4 such a suit. Plaintiff CANHR, whose mission it is to advocate for nursing-home residents and
5 which often represents them in their hearings before DHCS, is aware of no such case. (Chicotel
6 Decl. ¶ 29.) Neither is Jonathan Evans, the erstwhile president of the American Medical Director’s
7 Association and an expert in skilled-nursing care in the United States. (Evans Decl. ¶ 14.)

8 Neither is the State. Plaintiffs asked the State whether it was aware “of any case in which
9 “a resident successfully obtained readmission to a skilled nursing facility as a result of filing suit
10 under Cal. Health & Safety Code § 1430(b) to enforce [a DHCS readmission] order.” (Borden
11 Decl., Ex. 5 at 3.) It was not. (*Id.*) Plaintiffs asked if it was aware of any such case under Cal.
12 Health & Safety Code § 1599.1, Cal. Code Civ. P. § 1094.5, or “any other provision of state or
13 federal law.” (*Id.* at 3-6.) It was not. (*Id.*) Finally, Plaintiffs asked if it was aware of “any case in
14 which a resident successfully enforced an order requiring a skilled-nursing facility to readmit the
15 resident that was issued by [DHCS].” (*Id.* at 6-7.) It was not. (*Id.*)

16 The reason there is no such case is that the population targeted for dumping is generally
17 indigent, and lawyers are not interested in taking on such cases in the hopes that they might be able
18 to recoup legal fees. (Chicotel Decl. ¶ 12.) CANHR runs an attorney-referral service, where it
19 attempts to find counsel for people who call with legal problems. (*Id.*) In over 10 years of dealing
20 with California’s dumping epidemic, CANHR has almost never been able to find counsel to bring
21 suits to enforce DHCS readmission orders because these types of suits are not perceived to be
22 lucrative. (*Id.*)

23 Even if a dumped resident were to find a lawyer to take their case, state courts do not
24 uniformly enforce the decisions as *res judicata*. (*Id.* ¶ 13; Borden Decl. ¶ 7.) And even if a trial
25 court were to enter an injunction enforcing a readmission order, state appellate procedure makes
26 enforcement impossible in any event. (Chicotel Decl. ¶ 14; Borden Decl. ¶ 9.) Under California
27 law, an appeal from a mandatory injunction automatically stays the trial court’s injunction.
28 *Canavarro*, 15 Cal. 2d at 498; *URS Corp. v. Atkinson/Walsh Joint Venture*, 15 Cal. App. 5th 872,

1 884 (2017). In the California Courts of Appeal, it usually takes at least a year and a half to obtain a
 2 decision, and up to 22 months in 90% of cases. (Borden Decl. ¶ 9.) *See also 2016 Court Statistics*
 3 *Reports—Statewide Caseload Trends* 28, *supra*. Thus, even if an indigent resident manages to find
 4 counsel, and even if counsel successfully obtains an order from a state trial court enforcing a
 5 DHCS readmission order, the resident would still have to languish in a hospital bed for another 18
 6 to 22 months. As a practical matter, the order is unenforceable. (Chicotel Decl. ¶ 14.) With
 7 neither executive nor judicial enforcement, California’s federally mandated readmission hearings
 8 are just the sort of “arid ritual[s] of meaningless form” that the Ninth Circuit has held is not
 9 permitted by federal law. *Anderson*, 930 F.3d at 1076.

10 **B. Plaintiffs Will Suffer Irreparable Harm if the State Does Not Enforce**
 11 **Readmission Orders During the Coronavirus Crisis**

12 “A plaintiff who seeks preliminary injunctive relief must show ‘that irreparable injury is
 13 likely in the absence of an injunction.’” *M.R. v. Dreyfus*, 697 F.3d 706, 728 (9th Cir. 2012)
 14 (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008)). Here, irreparable harm will
 15 occur for at least three reasons: (1) each day a resident is unnecessarily kept in a hospital increases
 16 his or her chance of contracting a deadly disease and at the same time deprives all Californians of a
 17 critically necessary hospital bed; (2) residents suffer other irreparable dangers from dumping,
 18 including transfer trauma, social isolation, and the risk of being subjected to dangerous
 19 psychotropic drugs used as chemical restraints; and (3) unlawful eviction is itself an irreparable
 20 injury that the statute is designed to prevent.

21 Coronavirus is wreaking havoc on the State’s medical system. (Evans Decl. ¶¶ 17, 23.)
 22 The State’s hospitals are already filling up, and by the time this motion is heard, they will be
 23 overflowing. (*Id.* ¶ 17.) Italy, which is some weeks ahead of the United States on the infection
 24 curve, offers a glimpse of what is coming: By March 12, its hospitals were at “complete
 25 saturation,” with new patients arriving every five minutes. Bill Hutchison & Maggie Rulli,
 26 ‘Complete saturation’: Italian hospital is receiving a new coronavirus patient every 5 minutes,
 27 ABC News (Mar. 12, 2020).¹⁰ And its peak was still two weeks away. *Id.*; Jason Horowitz &

28 ¹⁰ <https://abcnews.go.com/Health/coronavirus-lockdown-italy-weeks-virus-peak-expert/story?id=69557068>.

1 David D. Kirkpatrick, *Dip in Italy's Cases Does Not Come Fast Enough for Swamped Hospitals*,
2 N.Y. Times (Mar. 23, 2020).¹¹ Under such circumstances, every hospital bed is a scarce and
3 valuable resource that should be used *only* for patients who need it—not for medically cleared
4 nursing-home residents with a right to return to their homes.

5 Enforcing even one DHCS readmission order would likely save many lives and would free
6 hospitals to treat Covid-19 victims and others in need of hospital care, such as a person suffering a
7 heart attack or appendicitis. (Evans Decl. ¶¶ 3(b), 18-20.) Requiring the State to follow federal
8 law would prevent many instances of hospital dumping. In 2012, the State provided CANHR with
9 data that showed that 69 DHCS hearings took place in 2011, and that 95% of those resulted in an
10 order that the resident should be readmitted. (Chicotel Decl. ¶ 28.) The number of hearings was on
11 a sharply upward trajectory, but even if it had stayed perfectly flat since 2011, at least five residents
12 per month are entitled to return to their nursing homes but must instead continue to languish in a
13 hospital bed for months or even years. (*Id.* ¶¶ 28-30.) And that number is likely a floor—it does
14 not account for residents who never even seek a hearing because the process is futile. (*Id.*) If
15 readmission orders were actually enforced, discharge planners and state long-term-care
16 ombudsmen would advise more hospitalized residents to seek a hearing. (*Id.* ¶¶ 24-30.) If these
17 hearings were meaningful, residents would not remain hospitalized for months longer than
18 necessary. (*Id.* ¶¶ 24, 30.) Ultimately, the State's conduct usurps thousands of hospital bed-days
19 every year. This can deprive thousands of patients of urgently needed care. (Evans Decl. ¶ 20.)

20 These facts are undisputed. In discovery, the State claimed that it does not know how many
21 readmission hearings DHCS has performed in the last 10 years, how many readmission orders it
22 has issued, or how many it has denied. (Borden Decl., Ex. 3 at 4.) Nor did the State have any
23 statistical data regarding readmission hearings. (Borden Decl., Ex. 4 at 3-4.) Nor did it have the
24 decisions themselves. (*Id.* at 4.) Nor would it answer questions about when it issued a document
25 hold. (Borden Decl., Ex. 5 at 11-12.) This action has been pending since 2015. The State's
26 admission that it does not have these materials means that it has been spoliating them for at least
27 three years. *See, e.g., Commc 'ns Ctr., Inc. v. Hewitt*, 2005 WL 3277983, at *2 (E.D. Cal. Apr. 5,

28 ¹¹ <https://www.nytimes.com/2020/03/23/world/europe/italy-coronavirus-hospitals.html>.

1 2005) (“[T]he court will presume that the evidence that is now ‘gone forever’ demonstrated the
2 merit of plaintiff’s other claims.”).¹²

3 As long as hospitals remain full of coronavirus patients, every day a nursing-home resident
4 is forced to remain in a hospital increases his or her risk of contracting Covid-19. (Evans Decl.
5 ¶¶ 22-23.) Covid-19 is especially deadly to that population, killing at least 5 percent of people
6 aged 70-79, nearly 10 percent of people aged 80 and above, and an even higher percentage of
7 nursing-home residents given their preexisting health conditions. (*Id.* ¶ 23.) Under these
8 circumstances, forcing a nursing-home resident to stay in hospital despite being medically cleared
9 to return home and despite winning an order to be readmitted poses an “unacceptable risk[] to
10 human life.” *See Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1290 (9th Cir. 2013).
11 Such a “serious risk of harm to human life . . . could find no adequate remedy at law.” *Id.* at 1291.
12 Although the coronavirus crisis is very nearly *sui generis* in American life, the Ninth Circuit has
13 often found that such risk to life and limb suffices to show a likelihood of irreparable injury. *See*,
14 *e.g.*, *M.R.*, 697 F.3d at 727 (risk that institutionalization would exacerbate mental and physical
15 disabilities sufficed); *Harris v. Bd. of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004) (risk of “pain,
16 infection, amputation, medical complications, and death due to delayed treatment” from closure of
17 hospital sufficed); *Rodde v. Bonta*, 357 F.3d 988, 999 (9th Cir. 2004) (same).

18 What is more, even outside of the coronavirus crisis, dumping is exceptionally harmful.
19 (Evans Decl. ¶ 25; Chicotel Decl. ¶¶ 8-10.) Many residents, especially those with dementia, suffer
20 “transfer trauma” as a result of dumping. (*Ibid.*) As the Ninth Circuit has recognized, “the transfer
21 of geriatric patients to any unfamiliar surroundings produces an increased rate of morbidity and
22 mortality.” *Brede v. Dir. for Dep’t of Health*, 616 F.2d 407, 412 (9th Cir. 1980) (quotation marks
23 omitted). Residents suffer “cognitive and functional decline—including behavioral disturbances,
24 weight loss, an increased risk of falls and injury, and potentially increased morbidity and
25

26 ¹² Even without an adverse inference from spoliation, the State’s refusal to produce material
27 evidence is “but an admission of the want of merit” in any defense it might seek to raise now.
28 *Hammond Packing Co. v. State of Ark.*, 212 U.S. 322, 351 (1909); *In re Phenylpropanolamine*
(*PPA*) *Prod. Liab. Litig.*, 460 F.3d 1217, 1236 (9th Cir. 2006) (“[R]efusal to produce evidence
presumptively shows that an asserted claim or defense is meritless.” (citing *Adriana Int’l Corp. v.*
Thoeren, 913 F.2d 1406, 1413 n.6 (9th Cir. 1990))).

1 mortality.” *John E. Andrus Mem’l, Inc. v. Daines*, 600 F. Supp. 2d 563, 573 (S.D.N.Y. 2009).
2 Moreover, in hospitals, residents have no social activities. (Evans Decl. ¶ 25.) They are often
3 isolated from their families. (*Id.*) They are subjected to a higher risk of dangerous chemical
4 restraints. (*Id.*) When Plaintiff Anderson was dumped into Sutter Health Hospital, for instance,
5 doctors injected him with antipsychotic drugs without his consent and without any psychotic
6 diagnosis solely to restrain him. (Anderson Decl., Dkt. 13-1 ¶ 12.) Dumping subjects residents to
7 such conditions at the best of times—and these are decidedly not the best of times.

8 Finally, irreparable harm in the context of injunctions is defined by “the purposes of the
9 statute being enforced.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803, 818
10 (9th Cir. 2018). The statute at issue here is the Federal Nursing Home Reform Act (“FNHRA”),
11 which Congress passed “to improve the quality of care for Medicaid-eligible nursing home
12 residents.” *Anderson*, 930 F.3d at 1070 (quoting H.R. Rep. No. 100-391, pt. 1, at 452). In
13 particular, in directing states to provide fair hearings and enforceable readmission orders, Congress
14 intended to prevent nursing homes from “persist[ing] in improper transfers and discharges”—*i.e.*,
15 dumping. *See id.* at 1076. Thus, unlawful eviction is itself a harm that the statute seeks to prevent.

16 California’s nursing-home residents are CANHR’s constituency and functional members.
17 (Chicotel Decl. ¶¶ 2-5.) Each of them is at risk of being dumped, and each of them is at risk of
18 contracting Covid-19 because the State refuses to enforce readmission orders. (Chicotel Decl. ¶¶ 6-
19 7, 28; Evans Decl. ¶ 23.) Many are living in nursing homes, who would return if the State enforced
20 DHCS hearing decisions. (Chicotel Decl. ¶¶ 24-28, 30.) CANHR can seek a preliminary
21 injunction on their behalf. *See, e.g., Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1109-11
22 (9th Cir. 2003) (organization whose “constituency” was mentally ill inmates could seek injunction
23 on their behalf); *All. for the Wild Rockies*, 632 F.3d at 1135 (analyzing irreparable harm to
24 association’s “members’ ability to ‘view, experience, and utilize’” natural areas); *Easyriders*
25 *Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1502 (9th Cir. 1996) (affirming broad injunction
26 because of injury to an “unknown number of members” of organization). In addition, Plaintiff
27 Austin remains in a nursing home 400 miles away from his sister because the State will not enforce
28 his readmission order. (Washington Decl. ¶¶ 14-16.) He would very much like to return home.

1 (*Id.*) He, too, suffers irreparable injury because of this “separation from [his] family members.”
 2 *Leiva-Perez v. Holder*, 640 F.3d 962, 969-70 (9th Cir. 2011) (quoting *Andreiu v. Ashcroft*, 253
 3 F.3d 477, 484 (9th Cir. 2001) (en banc)).

4 The State may argue, as it did in its motion to dismiss, that it is not the cause of such
 5 injuries. (*See, e.g.*, Dkt. 37 at 22-23.) But Plaintiffs need not show that “the action sought to be
 6 enjoined is the exclusive cause of the injury.” *M.R.*, 697 F.3d at 728. Nor need they show that the
 7 injunction they seek would “completely prevent the irreparable harm that [they] identif[y].” *Nat’l*
 8 *Wildlife Fed’n*, 886 F.3d at 823. They need only show that they are likely to suffer irreparable
 9 harm “in the absence of an injunction.” *M.R.*, 697 F.3d at 728 (quoting *Winter*, 555 U.S. at 22).
 10 That much they have done: In the absence of an injunction ordering the State to begin enforcing its
 11 readmission orders, at least some residents will be dumped to a hospital, cleared to leave, obtain a
 12 readmission order, and nevertheless be forced to remain in a hospital thick with coronavirus.
 13 (Evans Decl. ¶¶ 15, 23.)

14 C. The Balance of Hardships Tips Sharply in Favor of Plaintiffs

15 The balance of hardships tips sharply in favor of Plaintiffs for three reasons: (1) preventing
 16 even one instance of hospital dumping could save several lives, including that of the resident who
 17 was dumped, whereas the administrative burden of enforcing readmission orders is minimal; (2) the
 18 State can suffer no cognizable burden in simply doing what the law requires; and (3) the injunction
 19 Plaintiffs seek—and thus any burden it places on the State—is narrowly tailored to the scope of the
 20 harm Plaintiffs face.

21 First, as detailed above, dumping nursing-home residents in a hospital in the middle of the
 22 coronavirus crisis is nearly certain to infect them with coronavirus and thus highly likely to kill
 23 them. (Evans Decl. ¶ 23.) It also robs Covid-19 patients of desperately needed hospital beds. (*Id.*
 24 ¶ 17.) Preventing even one instance of hospital dumping will likely save many lives. (*Id.* ¶¶ 3(b),
 25 18.)

26 The State, meanwhile, faces no hardship at all. The incremental administrative burden
 27 associated with enforcing DHCS readmission orders is minimal: DHCS already does the
 28 investigations, it already holds the hearings, and it already issues the decisions. All the State need

1 do is penalize recalcitrant facilities. Indeed, it has explained in this litigation that it has a variety of
2 ways to do just that. (Motion to Dismiss, Dkt. 37 at 8-9.) Many of the remedies in the State’s
3 arsenal—such as offsetting unnecessary hospital costs caused by a nursing facility’s refusal to obey
4 a readmission order against that facility’s Medi-Cal payments, issuing class B citations, and
5 recommending that CMS terminate Medicare payments—impose little expense or burden on the
6 state. Indeed, once the State announces that there will be severe consequences for disobeying its
7 readmission orders, it is overwhelmingly likely facilities will simply begin to comply, just as when
8 a judge issues an order. And even if there were some burden on the State, “[w]here human welfare
9 and the potential for suffering are concerned, the state’s expenditures of money, time, and
10 administrative resources are rarely so overwhelming so as to permit a court to conclude that
11 balance of hardships sharply favors the latter.” *Valdivia v. Schwarzenegger*, 2008 WL 1990800, at
12 *8 (E.D. Cal. May 6, 2008). Certainly they are not so overwhelming here. *Cf. id.* at *7 (burden of
13 performing “Constitutionally adequate [parole] revocation hearings” not so overwhelming); *Sajous*
14 *v. Decker*, 2018 WL 2357266, at *13 (S.D.N.Y. May 23, 2018) (burden of conducting bond
15 hearing for detained alien not so overwhelming).

16 Second, the injunction Plaintiffs seek would simply require the State to follow its
17 obligations under federal law. The Ninth Circuit has held the federal government “cannot
18 reasonably assert that it is harmed in any legally cognizable sense by being enjoined from
19 constitutional violations.” *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (quoting
20 *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983)). By the same logic, the State cannot
21 reasonably assert that it is harmed in any legally cognizable sense by being enjoined from federal
22 statutory violations. Even if it faced some difficulty, that would merely represent “the burdens of
23 complying with the applicable statutes.” *Id.* at 1146.

24 Finally, “[w]hen deciding whether to issue a narrowly tailored injunction, district courts
25 must assess the harms pertaining to injunctive relief in the context of that narrow injunction.”
26 *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1022 (9th Cir. 2009). Plaintiffs seek an injunction that
27 is no broader than necessary to ensure that DHCS hearing orders are meaningful. Thus, the balance
28 of hardships tips sharply in favor of Plaintiffs.

D. The Public Interest Favors Granting an Injunction

1 Finally, the public interest overwhelmingly favors granting an injunction. “The public
2 interest inquiry primarily addresses impact on non-parties rather than parties.” *League of*
3 *Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir.
4 2014) (quotation marks omitted). The Supreme Court has instructed courts that in exercising their
5 equitable discretion, they should “pay particular regard for the public consequences in employing
6 the extraordinary remedy of injunction.” *Bernhardt v. Los Angeles Cty.*, 339 F.3d 920, 931-32 (9th
7 Cir. 2003) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

8 Even in ordinary times, the public interest benefits from an injunction that ensures that
9 federal law is followed. *Rodriguez*, 715 F.3d at 1145-46. But now, the public consequences of *not*
10 granting the injunction are dire. Within weeks, California will run out of hospital beds to treat
11 Covid-19 patients. (Evans Decl. ¶ 17); Executive Department of the State of California,
12 *Proclamation of a State of Emergency 2* (Mar. 4, 2020) (“[T]he number of persons requiring
13 medical care may exceed locally available resources[.]”). At that point, “forcing residents to live in
14 hospital beds that could be used for patients needing acute hospital care will reduce hospital access
15 for Covid-19 patients and others needing acute care, and may well result in multiple fatalities.”
16 (Evans Decl. ¶ 18.) For example, Plaintiff Anderson was forced to live in a hospital bed for over a
17 year. (*Id.* ¶ 20.) Given that Covid-19 patients who are hospitalized typically remain in the hospital
18 for 10 days, his bed could have been used to treat roughly 36 people needing acute respiratory care.
19 (*Id.* ¶¶ 19-20.) Or the bed could be used to treat other people in need of hospital care, who are in
20 danger of not receiving care due to the pandemic. (*Id.* ¶ 20.) Each hospital bed given to a dumped
21 nursing-home resident is taking a critical resource in our time of greatest need, and nursing homes
22 are only more likely to dump residents as the coronavirus crisis worsens. (*Id.* ¶ 21.) Preventing
23 even one instance of hospital dumping will likely save many lives. (*Id.* ¶ 3(b).)

24 Nor does returning residents to their homes detract in any way from the public interest. A
25 resident must be medically cleared before he or she can obtain a readmission order. (*Id.* ¶ 24.)
26 Accordingly, “[e]nforcing DHCS readmission orders would not pose a significant risk to the
27 population of the nursing home.” (*Id.*)
28

1 * * *

2 In sum, an injunction ordering the State to enforce its readmission orders would save
3 residents from the irreparable harm of extended exposure to coronavirus. It would be a boon to the
4 public interest by freeing up hospital beds. It would impose little to no burden on the State. And
5 ultimately, Plaintiffs are likely to win a permanent injunction on the merits. Every factor for
6 analyzing whether to grant preliminary injunctive relief favors Plaintiffs.

7 **II. PLAINTIFFS' PROPOSED INJUNCTION SEEKS REASONABLE**
8 **ENFORCEMENT MEASURES THAT ARE WITHIN THE STATE'S POWER**

9 Plaintiffs ask the Court to order the State to take concrete, reasonable enforcement actions
10 that are within its statutory powers. Indeed, several of them are actions the State itself has asserted
11 in this proceeding that it has the power to take. Plaintiffs ask that the State be ordered to:

- 12 • Assert an offset or recoupment against nursing facilities' Medi-Cal payments for
13 medically unnecessary care provided at a hospital as a result of the refusal to readmit.
14 In its original motion to dismiss, the State asserted that it had this power under Cal.
15 Welf. & Inst. Code § 14133.3. (Dkt. 11 at 7.) And in discovery, it admitted that all
16 representations it had made to this Court were true. (Borden Decl., Ex. 5 at 7.) Such
17 relief is reasonable because such expenses would not be incurred but for the facility's
18 refusal to readmit.
 - 19 • Issue an immediate Class A citation and plan of correction requiring the facility to
20 readmit the resident. A Class A citation is justified because, as explained above,
21 refusing to readmit a resident while hospitals are overflowing with coronavirus patients
22 poses a "substantial probability that death or serious physical harm to patients or
23 residents of the long-term health care facility would result." Cal. Health & Saf. Code
24 § 1424(d).
 - 25 • Impose daily penalties for each day the facility refuses readmission. As the State told
26 the Court in its second motion to dismiss, it has this authority under Cal. Health & Saf.
27 Code § 1425. (Dkt. 37 at 9.)
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1 Dated: April 3, 2020

Respectfully submitted,

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