

**DEPARTMENT OF HEALTH CARE AND HUMAN SERVICES
CENTERS FOR MEDICAID AND MEDICARE SERVICES**

**IN RE RECONSIDERATION OF
DISAPPROVAL OF CALIFORNIA STATE
PLAN AMENDMENTS (“SPAS”) 08-009A,
08-009B1, 08-009B2, 08-009D, AND 08-019**

**AARP’S APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
AND PROPOSED *AMICUS CURIAE* BRIEF URGING AFFIRMANCE OF
CMS’ DECISION DISAPPROVING PROPOSED CALIFORNIA
STATE PLAN AMENDMENTS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
APPLICATION OF AARP FOR LEAVE TO FILE <i>AMICUS CURIAE</i> BRIEF AND PROPOSED BRIEF URGING AFFIRMANCE OF CMS’ DECISION DISAPPROVING PROPOSED CALIFORNIA STATE PLAN AMENDMENTS	1
STATEMENT OF INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. CUTS IN PROVIDER REIMBURSEMENT RATES WILL RESULT IN A MASS EXODUS OF PHYSICIANS FROM THE MEDI-CAL PROGRAM.....	3
A. Fewer Providers Mean Delayed Access And Lack Of Access To Health Care For California’s Most Vulnerable Populations	6
B. Low-Income Older People Disproportionately Suffer Grave Consequences As A Result Of Reduced Access To Medical Services.....	8
CONCLUSION.....	12
CERTIFICATE OF SERVICE.....	13

TABLE OF AUTHORITIES
CASES

Beltran v. Myers
677 F.2d 1317 (9th Cir. 1982)7

Beno v. Shalala
30 F.3d 1057 (9th Cir. 1994)7

Edmonds v. Levine
417 F. Supp.2d 1323 (S.D. Fla. 2006).....7

Independent Living Center of Southern California v. Shewry
543 F.3d 1050 (9th Cir. 2008), *cert. granted, Maxwell-Jolly v. Independent Living Center of Southern California*, 78 USLW 3500 (U.S. Jan. 18, 2011) (No. 09-958).....1

REGULATIONS

42 C.F.R § 447.20412

OTHER AUTHORITIES

AARP, Home and Community Based Care: Expanding Options for Long-Term Care, Statement for the Record Submitted to the Senate Finance Committee (Sept. 25, 2007)6

AARP, Beyond 50.02: *A Report to the Nation on Trends in Health Security* (2002), available at http://assets.aarp.org/rgcenter/health/beyond_50_health.pdf9

AARP, Beyond 50.03: *A Report to the Nation on Independent Living and Disability* (2003), available at http://assets.aarp.org/rgcenter/il/beyond_50_il_2.pdf..... 10, 11

AARP, Testimony Before the Subcommittee on Health, Exploring Options for Improving the Medicare Physician Payment System (March 6, 2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:39511.pdf9

Steve Berman et al., <i>Factors that Influence the Willingness of Private Primary Care Pediatricians to Accept More Medicaid Patients</i> , 110 Pediatrics 239 (2002)	3
Andrew B. Bindman et. al, California HealthCare Found., <i>Physician Participation in Medi-Cal 2008</i> (2010).....	4
Andrew B. Bindman et al., Medi-Cal Policy Institute, <i>Physician Participation in Medi-Cal. 2001</i> (2003).....	4
Cal. Budget Project, <i>Legislature Approves Midyear Cuts</i> , Feb. 15, 2008, available at http://www.cbp.org/pdfs/2008/080214_Midyearcuts.pdf	5
Cal. Dept. of Aging, Adult Day Health Care, http://www.aging.ca.gov/programs/adhc/adhc.asp (last visited Jan. 26, 2011).....	6
Cal. HealthCare Found., <i>Medi-Cal Facts and Figures</i> (2009), available at http://www.chcf.org/~media/Files/PDF/M/PDF%20MediCalFactsAndFigures2009.pdf	4, 9
Centers for Medicare and Medicaid Services, Dual Eligibility: Overview, http://www.cms.gov/dualeligible/ (last visited Jan. 26, 2011).....	10
Karen Davis, Testimony given to U.S. Senate, Special Comm. on Aging The Commonwealth Fund, <i>Time for Change: The Hidden Cost of a Fragmented Health Insurance System</i> (2003), available at http://www.commonwealthfund.org/publications/publications_show.htm?doc_id=221616	8
Sandra L. Decker, <i>Changes in Medicaid Physician Fees and Patterns of Ambulatory Care</i> , 46 Inquiry 291 (2009).....	3
Stan Dorn, Urban Inst., <i>Uninsured and Dying Because of It: Updating the Institute of Medicine Analysis on the Impact of Uninsurance on Mortality</i> (2008), available at http://www.urban.org/UploadedPDF/411588_uninsured_dying.pdf	8

Duane W. Gang, <i>Riverside County Threatens to Pull Out of Medi-Cal Mental Health Program</i> , Press Enter., Apr. 1, 2008, available at http://www.pe.com/localnews/healthcare/stories/PE_News_Local_H_board02.430192d.html	5, 6, 10
Evan George, <i>Pharmacists Fight Pending Medi-Cal Cuts</i> , Los Angeles Daily J., April 30, 2008	6
Jack Hadley, Kaiser Comm'n on Medicaid and the Uninsured, <i>Sicker and Poorer: The Consequences of Being Uninsured</i> (2002), available at http://www.kff.org/uninsured/upload/Full-Report.pdf	7
Jack Hadley & John Holahan, Kaiser Comm'n on Medicaid and the Uninsured, <i>The Cost of Not Covering the Uninsured</i> (2003), available at http://www.kff.org/uninsured/upload/Cost-of-Not-Covering-the-Uninsured-Project-Highlights.pdf	7
Evan Halper, <i>Further Fee Cuts Force a Medi-Cal Exodus: Doctors are Rejecting New Patients</i> , L.A. Times, Mar. 24, 2008, available at 2008 WLNR 5628983	5, 10
Wan He et. al, Nat'l Inst. on Aging & U.S. Census, <i>65+ in the United States: 2005</i> (2005), available at http://www.census.gov/prod/2006pubs/p23-209.pdf	9
Andrew H. Hwang et al., <i>Access to Urologic Care for Children in California: Medicaid Versus Private Insurance</i> , 66 Urology 170 (2005).....	4
The Henry J. Kaiser Family Found., <i>California - Kaiser State Health Facts</i> (2010), available at http://pdf.kff.org/mfs/CAUS.pdf	11
The Henry J. Kaiser Family Found., <i>California: Medicaid Enrollment</i> (2007), available at http://www.statehealthfacts.org/profileind.jsp?cat=4&sub=52&rgn=6	8
The Henry J. Kaiser Family Found., <i>Medicaid Payments Per Enrollee</i> (2007), http://www.statehealthfacts.org/comparetable.jsp?ind=183&cat=4	4
The Henry J. Kaiser Family Found., <i>Medicaid Physician Fee Index</i> (2008),	

http://www.statehealthfacts.org/comparetable.jsp?cat=4&ind= 195	4
Kaiser Network, <i>Lawsuit Filed to Stop 10% Medicaid Provider Payment Rate Reduction in California</i> , May 6, 2008	5
Joanne Lynn & David M. Adamson, RAND Health, <i>Living Well at the End of Life: Adapting Health Care to Serious Chronic Illness in Old Age</i> (2003), available at http://www.medicaring.org/educate/download/wp137.pdf	9
Nina Nolcox, Op-Ed, <i>Sick Seniors to Take Big Hit from State Budget Cuts</i> , Los Angeles Bus. J., Mar. 10, 2008, available at http://labusinessjournal.com/news/2008/mar/10/sick-seniors-to-take-big-hit-fromstatebudget/	6
Stephen Norton, <i>Recent Trends in Medicaid Physician Fees, 1993-1998</i> , Urban Inst. (1999), http://www.urban.org/publications/409113.html	3
Julia C. Prentice & Steven D. Pizer, <i>Delayed Access to Health Care and Mortality</i> , 42 Health Services Research 644 (2007)	8
David L. Skaggs, et al., <i>Access to Orthopedic Care for Children With Medicaid Versus Private Insurance: Results of a National Survey</i> , 26 J. Pediatric Orthopaedics 400 (2006)	3
David L. Skaggs, et al., <i>Insurance Status and Delay in Orthotic Treatment in Children</i> , 27 J. Pediatric Orthopaedics 94 (2007)	3
David L. Skaggs et al., <i>Access to Orthopedic Care for Children With Medicaid Versus Private Insurance In California</i> , 107 Pediatrics 1405 (2001).....	4

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BRIEF AND PROPOSED BRIEF URGING AFFIRMANCE OF CMS'
DECISION DISAPPROVING PROPOSED CALIFORNIA
STATE PLAN AMENDMENTS**

**To Presiding Officer Benjamin Cohen, Department of Health and
Human Services, Centers for Medicare & Medicaid Services**

AARP requests leave to file an *amicus curiae* brief in this case in support of the Centers for Medicare & Medicaid Services (CMS) decision disapproving California's proposed State Plan Amendments (SPAs) to reduce the reimbursement rates for services under the approved State plan. AARP was an *amicus curiae* in both the District Court and U.S. Court of Appeals in *ILCSC v Shewry*, 543 F.3d 1050 (9th Cir. 2008), *cert. granted*, *Maxwell-Jolly v. Independent Living Center of Southern California*, 78 USLW 3500 (U.S. Jan. 18, 2011) (No. 09-958), which rejected proposed provider cuts in California. That case is currently pending in the U.S. Supreme Court. Access to health care is a top priority for AARP since many people 50 and over will be directly affected by the decision in this hearing.

STATEMENT OF INTEREST OF *AMICI CURIAE*

AARP is a nonpartisan, nonprofit organization for people 50 and over. Access to health care is a top priority for AARP. During 2007, AARP California spent much of the year working for passage of health care reform in California and throughout the nation. AARP supports access to affordable health care, including prescription drugs, for everyone. Thus, AARP advocates for health and economic

security for everyone and in particular for vulnerable people of all ages, including low-income persons and persons with disabilities. To that end, AARP supports legislative efforts at the state and national level to ensure that these individuals have continuous access to quality health care through publicly administered health insurance programs, including Medicaid. AARP encourages states to exercise available options for expanding Medicaid eligibility and services and to ensure the highest level of Medicaid participation among all health care providers. AARP has participated as amicus curiae in a variety of Medicaid cases nationwide supporting access to health care.

SUMMARY OF ARGUMENT

The California Medicaid program, Medi-Cal, has the lowest Medicaid spending per enrollee in the nation and one of the lowest physician reimbursement rates. Due to these low rates, the ratio of primary care physicians to Medi-Cal beneficiaries is significantly below the federal minimum standard. Numerous studies focused on California, reflect that even before the cuts, few physicians were willing to take Medicaid payments due to the low provider rates. In 2008 California approved a 10 percent cut in provider reimbursement, which if allowed would further decrease doctor participation in the program and force some health facilities to close completely, making health care even more inaccessible to low-income California residents. Delayed care and lack of access to care will result in

increased morbidity and mortality for California's most vulnerable citizens, particularly older individuals and the disabled. The Centers for Medicare & Medicaid Services (CMS) was correct in disapproving the proposed California State Plan Amendments 08-009A, 08009B1; 08-009B2; 08-009D; and 08-019 which were submitted on December 31, 2008 and disapproved on November 18, 2010 because the State did not provide information indicating how the reductions would impact beneficiary access to services.

ARGUMENT

I. CUTS IN PROVIDER REIMBURSEMENT RATES WILL RESULT IN A MASS EXODUS OF PHYSICIANS FROM THE MEDICAL PROGRAM.

Numerous studies have shown a strong relationship between low provider payment rates and the unwillingness of primary care physicians to accept Medicaid patients.¹ Some studies show that physician fee levels affect not only access but the outcomes for Medicaid patients.² Studies focused on California, reflect that

¹ See e.g., Steve Berman et al., *Factors that Influence the Willingness of Private Primary Care Pediatricians to Accept More Medicaid Patients*, 110 *Pediatrics* 239 (2002); David L. Skaggs, et al., *Access to Orthopedic Care for Children With Medicaid Versus Private Insurance: Results of a National Survey*, 26 *J. Pediatric Orthopaedics* 400 (2006); David L. Skaggs, et al., *Insurance Status and Delay in Orthotic Treatment in Children*, 27 *J. Pediatric Orthopaedics* 94 (2007).

² Stephen Norton, *Recent Trends in Medicaid Physician Fees, 1993-1998*, Urban Inst. (1999), <http://www.urban.org/publications/409113.html>; Sandra L. Decker, *Changes in Medicaid Physician Fees and Patterns of Ambulatory Care*, 46 *Inquiry*

even before the cuts, few physicians were willing to take Medi-Cal payments due to the low payment rates. A 2001 study focused on children concluded that “on average, the overhead cost to an orthopedic surgeon to treat a patient with Medi-Cal is more than the reimbursement”.³ Other reports have “documented the inequality of access to subspecialty healthcare” for patients with Medicaid and other government health care.⁴

California already has by far the lowest Medicaid spending per enrollee⁵ and one of the lowest physician reimbursement rates in the nation⁶ and as a result there are only 46 primary care physicians per 100,000 beneficiaries, well below the federal minimum standard of 60 to 80 providers per 100,000.⁷ Participation among

291 (2009).

³ David L. Skaggs et al., *Access to Orthopedic Care for Children With Medicaid Versus Private Insurance In California*, 107 *Pediatrics* 1405, 1406 (2001).

⁴ See e.g., Andrew H. Hwang et al., *Access to Urologic Care for Children in California: Medicaid Versus Private Insurance*, 66 *Urology* 170 (2005) citing Andrew B. Bindman et al., Medi-Cal Policy Institute, *Physician Participation in Medi-Cal, 2001* (2003); Andrew B. Bindman et. al, California HealthCare Found., *Physician Participation in Medi-Cal 2008* (2010).

⁵ The Henry J. Kaiser Family Found., *Medicaid Payments Per Enrollee* (2007), <http://www.statehealthfacts.org/comparetable.jsp?ind=183&cat=4>.

⁶ The Henry J. Kaiser Family Found., *Medicaid Physician Fee Index* (2008), <http://www.statehealthfacts.org/comparetable.jsp?cat=4&ind=195>.

⁷ Cal. HealthCare Found., *Medi-Cal Facts and Figures 52* (2009), available at

medical and surgical specialists is even lower.⁸ The access to office-based physicians is already so limited some recipients languish months before getting an appointment.⁹ Many physicians who are continuing to see their current Medi-Cal patients will be forced to not accept any new patients once the rates are cut.¹⁰ Such a trend, if allowed to continue, would erode, and possibly destroy, the future of the Medi-Cal program.

In addition to physicians, the ten percent cuts will also apply to dentists, pharmacies, mental health facilities, Adult Day Health Care programs and health clinics.¹¹ Many of these providers will eliminate services because they operate on tight budgets and rely almost entirely on Medi-Cal reimbursement to cover their

<http://www.chcf.org/~media/Files/PDF/M/PDF%20MediCalFactsAndFigures2009.pdf>.

8 *Id.*

9 *See e.g.,* Evan Halper, *Further Fee Cuts Force a Medi-Cal Exodus: Doctors are Rejecting New Patients*, L.A. Times, Mar. 24, 2008, available at 2008 WLNR 5628983; Duane W. Gang, *Riverside County Threatens to Pull Out of Medi-Cal Mental Health Program*, Press Enter., Apr. 1, 2008, available at http://www.pe.com/localnews/healthcare/stories/PE_News_Local_H_board02.430192d.html.

10 *See* Halper, *supra* note 9.

11 Cal. Budget Project, *Legislature Approves Midyear Cuts*, Feb. 15, 2008, available at http://www.cbpp.org/pdfs/2008/080214_Midyearcuts.pdf; Kaiser Network, *Lawsuit Filed to Stop 10% Medicaid Provider Payment Rate Reduction in California*, May 6, 2008.

operating expenses.¹² The consequences of Adult Day Health Care (ADHC) closings will be devastating to many of California's Medi-Cal older and disabled recipients who rely upon ADHCs in order to live independently.¹³ Adult Day Health Care is a licensed community-based day care program providing a variety of health, therapeutic, and social services to those at risk of being placed in a nursing home. Currently, over 300 centers exist in many urban and rural areas of the state.¹⁴ ADHCs help aging and disabled Medi-Cal patients live in the community instead of in nursing homes, which preserves these patients quality of life by avoiding undesirable institutionalization.¹⁵

A. Fewer Providers Mean Delayed Access And Lack Of Access To Health Care For California's Most Vulnerable Populations.

Recipients of government benefits frequently constitute the most vulnerable sector of the population. Numerous courts have held that reductions in either

¹² See Gang, *supra* note 9; Evan George, *Pharmacists Fight Pending Medi-Cal Cuts*, Los Angeles Daily J., April 30, 2008 (noting that if the cuts go into effect pharmacists could actually lose money on some prescriptions.).

¹³ Nina Nolcox, Op-Ed, *Sick Seniors to Take Big Hit from State Budget Cuts*, Los Angeles Bus. J., Mar. 10, 2008, available at <http://labusinessjournal.com/news/2008/mar/10/sick-seniors-to-take-big-hit-from-state-budget/>.

¹⁴ Cal. Dept. of Aging, Adult Day Health Care, <http://www.aging.ca.gov/programs/adhc/adhc.asp> (last visited Jan. 26, 2011).

¹⁵ *Id.*; AARP, Home and Community Based Care: Expanding Options for Long-Term Care, Statement for the Record Submitted to the Senate Finance Committee, 2 (Sept. 25, 2007) [hereinafter Home and Community Based Care].

government benefits or medical care cause irreparable harm even when the cuts are of a relatively small magnitude.¹⁶ When doctors pull out of Medi-Cal due to inadequate provider rates, the ability of Medi-Cal patients to find another Medi-Cal provider willing and able to treat them becomes even more limited. Consequently, Medi-Cal recipients without access to a Medi-Cal doctor may be in even poorer health than the uninsured.¹⁷ Individuals without access to medical care, particularly older and disabled patients, are more likely to die from diseases and conditions that could be prevented or cured if they had adequate health care coverage.¹⁸ The lack of preventive care or treatment due to lack of access to healthcare is the third leading cause of death for adults age 55-64, behind heart

¹⁶ See e.g., *Beno v. Shalala*, 30 F.3d 1057, 1063-64 n.10 (9th Cir. 1994) (noting harm to beneficiaries from government benefit and medical care cuts); *Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982) (finding irreparable harm to Medicaid recipients where enforcement of a state rule “may deny [plaintiffs] needed medical care”); *Edmonds v. Levine*, 417 F. Supp.2d 1323, 1342 (S.D. Fla. 2006) (summarizing eight different Medicaid cases finding irreparable harm or imminent risk of irreparable harm due to a variety of Medicaid cuts).

¹⁷ Although uninsured persons are in worse health than persons with private health insurance, national studies have shown that people covered by Medicaid are in significantly poorer health than those without any health insurance. Jack Hadley, Kaiser Comm’n on Medicaid and the Uninsured, *Sicker and Poorer: The Consequences of Being Uninsured* 46 (2002), available at <http://www.kff.org/uninsured/upload/Full-Report.pdf>.

¹⁸ *Id.* at 16-34; Jack Hadley & John Holahan, Kaiser Comm’n on Medicaid and the Uninsured, *The Cost of Not Covering the Uninsured* 3- 4 (2003), available at <http://www.kff.org/uninsured/upload/Cost-of-Not-Covering-the-Uninsured-Project-Highlights.pdf>.

disease and cancer¹⁹ and the sixth-leading cause of death among adults ages 25 to 64, ahead of HIV/AIDS and diabetes.²⁰

Delayed access to health care also causes severe negative health outcomes. Patients of facilities with average wait times of 31 days or more had significantly higher odds of mortality than patients who attended medical facilities with wait times under 31 days.²¹ Medi-Cal patients, whose medical problems will continue while they cannot get an appointment with a doctor, will suffer due to delayed and inaccessible care.

B. Low-Income Older People Disproportionately Suffer Grave Consequences As A Result Of Reduced Access To Medical Services.

While the ten percent provider reimbursement rate cuts will have devastating consequences for low-income Californians of all ages, older people will suffer exceptional harm.²² Older individuals have an increased likelihood of developing

19 Stan Dorn, Urban Inst., *Uninsured and Dying Because of It: Updating the Institute of Medicine Analysis on the Impact of Uninsurance on Mortality* 4 (2008), available at http://www.urban.org/UploadedPDF/411588_uninsured_dying.pdf.

20 Karen Davis, Testimony given to U.S. Senate, Special Comm. On Aging, The Commonwealth Fund, *Time for Change: The Hidden Cost of a Fragmented Health Insurance System* 2 (2003), available at http://www.commonwealthfund.org/publications/publications_show.htm?doc_id=221616.

21 Julia C. Prentice & Steven D. Pizer, *Delayed Access to Health Care and Mortality*, 42 *Health Services Research* 644 (2007).

22 There are 952,500 Medi-Cal enrollees who are age 65 or older. The Henry J. Kaiser Family Found., *California: Medicaid Enrollment* (2007), available at

multiple chronic illnesses and disabilities, and a greater need for extensive medical care than their younger counterparts.²³ The number of health care visits among the older population increases with age²⁴ and they are more likely to require health care attention from medical specialists, who are increasingly unwilling to accept Medicaid reimbursement for services.²⁵ Moreover, coordination of care, which is an essential element of the quality of care, especially for older patients with numerous chronic problems, becomes more difficult as increasing numbers of physicians providing primary and specialist care refuse to treat Medi-Cal patients.²⁶

<http://www.statehealthfacts.org/profileind.jsp?cat=4&sub=52&rgn=6>.

23 Joanne Lynn & David M. Adamson, RAND Health, *Living Well at the End of Life: Adapting Health Care to Serious Chronic Illness in Old Age* 4-5 (2003), available at <http://www.medicaring.org/educate/download/wp137.pdf>; Wan He et. al, Nat'l Inst. on Aging & U.S. Census, *65+ in the United States: 2005* 1 (2005), available at <http://www.census.gov/prod/2006pubs/p23-209.pdf> (detailing the prevalence of selected chronic conditions and disabilities in people aged 65 and older) [hereinafter Nat'l Inst. on Aging Report].

24 Nat'l Inst. on Aging Report, *supra* note 22, at 64.

25 AARP, *Beyond 50.02: A Report to the Nation on Trends in Health Security* 62-63 (2002), available at http://assets.aarp.org/rgcenter/health/beyond_50_health.pdf; Cal. HealthCare Found., *Medi-Cal Facts and Figures* 51- 53 (2009), available at <http://www.chcf.org/~media/Files/PDF/M/PDF%20MediCalFactsAndFigures2009.pdf>.

26 AARP, Testimony Before the Subcommittee on Health, Exploring Options for Improving the Medicare Physician Payment System 17 (March 6, 2007), available

Further cuts in Medi-Cal reimbursement rates will especially impact the demographic of aging, low-income individuals aged 50 to 64 that has increasing health care needs but cannot afford private insurance and are not yet eligible for Medicare. Among older persons, “those in the lowest income quartile are almost three times as likely to experience a disability as those in the highest income quartile.”²⁷ These patients are the ones who need more medical attention, not less. Older Californians whose health depends on primary care doctors and specialists accepting Medi-Cal will be left without medical care if rate cuts cause a mass exodus of physicians from the program.²⁸

Another group of low-income older people, known as dual eligibles because they qualify for both Medicare and Medi-Cal,²⁹ will also be adversely impacted by the ten percent reimbursement cuts. One-fourth of California’s 4.6 million

at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:39511.pdf.

²⁷ AARP, *Beyond 50.03: A Report to the Nation on Independent Living and Disability* 44-45 (2003), available at http://assets.aarp.org/rgcenter/il/beyond_50_il_2.pdf [hereinafter *Beyond 50.03*].

²⁸ Physicians’ rates are so low that some doctors lose money serving Medi-Cal recipients. See e.g., Halper, *supra* note 9; Gang, *supra* note 9.

²⁹ Centers for Medicare and Medicaid Services, *Dual Eligibility: Overview*, <http://www.cms.gov/dualeligible/> (last visited Jan.26, 2011).

Medicare beneficiaries are dual-eligibles.³⁰ This impoverished older population will suffer harm as a result of the cuts because they rely on Medi-Cal for several medically necessary services that the Medicare program does not provide. These services include Adult Day Health Centers, eyeglasses, hearing aids, medical equipment needed for functioning outside the home, and rehabilitative services.³¹ Individuals losing any of these services will face significant obstacles to living independently and accessing quality health care.

Older people will suffer irreparable harm if additional medical providers drop out of Medi-cal. Medi-cal is a critical safety net for low-income people ages 50 and 64 who are not yet eligible for Medicare. The percentage of uninsured Americans age 50-64 has increased from about 13 percent to nearly 15 percent from 1994 to 2004. In certain areas of the state there are already too few Medicaid providers due to the state's chronic underfunding of the program. There are not Adult Day Health Centers as it stands now in over 20 counties due to the current under funding of the program.

Federal regulation requires that Medicaid payments be sufficient to enlist enough providers so that services under the state Medicaid plan are available to

³⁰ The Henry J. Kaiser Family Found., *California – Kaiser State Health Facts* (2010), available at <http://pdf.kff.org/mfs/CAUS.pdf>.

³¹ Beyond 50.03, *supra* at 26.

recipients at least to the extent that those services are available to the general public. 42 C.F.R § 447.204. The state of California has not provided any analysis to support this.

CONCLUSION

For the reasons stated above, *Amicus Curiae* AARP respectfully request that California's request for reconsideration be denied.

Dated: February 3, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2011, I served by FedEx a true and correct copy of AARP'S Application for Leave to File *Amicus Curiae* Brief and Proposed Brief Urging Affirmance of CMS' Decision Disapproving Proposed California State Plan Amendments was served on the interested parties as follows:

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