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17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 OAKLAND DIVISION

20 ROSA MARTINEZ, JIMMY HOWARD,
ROBERTA DOBBS, BRENT
21 RODERICK, SHARON ROZIER, and
JOSEPH SUTRYNOWICZ, on behalf of
22 themselves and all others similarly situated,

23 Plaintiffs,

24 vs.

25 MICHAEL J. ASTRUE, Commissioner of
Social Security, in his official capacity,

26 Defendant.
27
28

CASE NO. 08-CV-4735 CW

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR A PRELIMINARY
INJUNCTION;**

**MEMORANDUM OF LAW IN SUPPORT
THEREOF**

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17 SUTRYNOWICZ, and all others similarly situated
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NOTICE OF MOTION AND MOTION

TO THE COURT, ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 19, 2009, at 2:00 p.m., before the Honorable Claudia Wilken, at the United States Courthouse at 1301 Clay Street, Oakland, California 94612, Plaintiffs will and hereby do move the Court for an order (1) preliminarily enjoining Defendant from suspending or denying benefits under 42 U.S.C. §§ 402(x)(1)(A)(iv), 1004(a)(2), 1382(e)(4)(A) in the absence of a finding that the individual had the intent to flee for the specific purpose of avoiding prosecution, custody, or confinement for a felony; and (2) requiring Defendant to vacate all suspensions or denials of benefits made since August 11, 2008 without such a finding.

This Motion is made pursuant to the Federal Rule of Civil Procedure 65(a) and Civil Local Rule 65-2. The Motion is based upon this Notice of Motion, the attached Memorandum of Points and Authorities, and the declarations of Rosa Martinez, Joseph Sutrynowicz, Tannitte Shufford, Sharon Rozier, Roberta Dobbs, and Jeremy S. Kroger, filed herewith.

DATED: January 12, 2009

Respectfully submitted,

By: 

DAVID H. FRY

Attorneys for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

The Social Security Administration (“SSA”) has unlawfully denied benefits to, or suspended the benefits of, thousands of otherwise eligible beneficiaries of Old Age, Survivors, and Disability Insurance (“OASDI”), Supplemental Security Income (“SSI”), and Special Veterans Benefits (“SVB”) (collectively, the “Benefit Programs”). These individuals are overwhelmingly either elderly or disabled. For most, the Benefit Programs are their sole or primary source of income, without which they would be unable to pay for the necessities of life, including food, clothing, and shelter. Denial and suspension of benefits have caused and continue to cause significant, irreparable harm to those who have been improperly deprived of their monthly payments. A preliminary injunction should issue requiring the SSA to cease applying its unlawful policies described herein and vacate the terminations or suspensions that have been based on the unlawful policy.

Under several substantially identical statutes and regulations, the law renders ineligible for the Benefit Programs those persons who are “fleeing to avoid prosecution, or custody or confinement after conviction” for a felony. 42 U.S.C. §§ 402(x)(1)(A)(iv), 1004(a)(2), 1382(e)(4)(A). As numerous courts have held, the plain language of these statutes sets forth an intent requirement: The “statute’s use of the words ‘to avoid prosecution’ confirms that for ‘flight’ to result in a suspension of benefits, it must be undertaken with a specific intent, i.e., to avoid prosecution.” *Fowlkes v. Adamec*, 432 F.3d 90, 96-97 (2d Cir. 2005); *see also Garnes v. Barnhart*, 352 F. Supp. 2d 1059, 1066 (N.D. Cal. 2004) (“[T]he concept of ‘fleeing’ contain[s] an intent requirement.”). This interpretation is supported by the relevant regulations, which require a court “finding that the individual . . . [i]s fleeing, or has fled, to avoid” prosecution or confinement. 20 C.F.R. §§ 416.1339(b)(i)(A)-(B), 408.810(b).

Despite the clear language of the statute and its own regulations, and despite the consistent judicial interpretations thereof, the SSA has adopted a policy of suspending benefits to every person who it concludes has a felony warrant outstanding against him or her — without regard to whether the court issuing the warrant made any finding that the person was fleeing prosecution

1 and, indeed, without regard to whether, in fact, the person ever intended to flee prosecution, or
2 even has the necessary mental capacity and/or mental state to form such an intent. *Garnes*, 352 F.
3 Supp. 2d at 1066. The SSA even contends that a person can be “fleeing to avoid prosecution”
4 without knowing it, *i.e.*, even if he or she does not know that criminal charges are pending or
5 likely. Courts have repeatedly found this internal policy to be contrary to the plain language of
6 the statute and regulations and, therefore, not entitled to deference and unlawful. *Fowlkes*, 432
7 F.3d at 96-97; *Garnes*, 352 F. Supp. 2d at 1065-66.

8 With this motion, Plaintiffs do not ask the Court to determine whether even a single class
9 member is eligible for benefits under the relevant statutes and regulations. Rather, Plaintiffs seek
10 only an injunction compelling the SSA to (1) apply the flight-with-intent provisions in a manner
11 consistent with the plain language of the statutes and their accompanying regulations, and (2)
12 vacate suspensions and denials previously made under the SSA’s unlawful standard. Because the
13 SSA’s policy contradicts the plain language of the statute and regulations (as courts have
14 consistently held), Plaintiffs have an overwhelming likelihood of success on the merits. Plaintiffs
15 will also suffer grave and irreparable harm in the absence of the requested relief because most
16 class members will be deprived of their sole, or at least primary, source of income. *See, e.g.*,
17 *Johnson v. Shalala*, 2 F.3d 918, 922 (9th Cir. 1993) (“[E]conomic hardship does constitute
18 irreparable harm. Back payments cannot erase the experience or the entire effect of several
19 months without food, shelter or other necessities.”) (internal quotation marks omitted).
20 Accordingly, a preliminary injunction should issue requiring the SSA to conform its conduct to
21 the law.

22 **II. STATEMENT OF FACTS**

23 **A. The Relevant Statutes and Regulations.**

24 Effective August 22, 1996, the Personal Responsibility and Work Opportunity
25 Reconciliation Act (“PRWORA”), Pub. L. No. 104-193, amended the Social Security Act by
26 adding a provision authorizing the SSA to suspend or deny SSI benefits to individuals fleeing to
27 avoid prosecution, custody or confinement for a felony.
28

1 The PRWORA provides, in relevant part:

2 (4)(A) No person shall be considered an eligible individual or
3 eligible spouse for purposes of this subchapter with respect to any
month if during such month the person is —

4 (i) fleeing to avoid prosecution, or custody or confinement after
5 conviction, under the law of the place from which the person flees,
6 for a crime, or an attempt to commit a crime, which is a felony
under the laws of the place from which the person flees

7 42 U.S.C. § 1382(e).

8 In 1999, after authorizing the SVB program to provide an SSI-like benefit for certain
9 World War II veterans residing outside of the United States, Congress extended the flight-with-
10 intent restrictions of 42 U.S.C. § 1382(e)(4)(A)(i) to the SVB program. 42 U.S.C. § 1004(a)(2).
11 Six years later, in 2005, Congress also extended the restrictions to the OASDI Program. 42
12 U.S.C. § 402(x)(1)(A)(iv).

13 Interpreting these flight-with-intent restrictions with respect to the SSI and SVB
14 programs, the SSA has issued two sets of implementing regulations relevant to this action. In
15 2000, the SSA issued regulations regarding the SSI program. These regulations provide in
16 relevant part that:

17 (1) Suspension of benefit payments because an individual is a
18 fugitive . . . is effective with the first day of whichever of the
following months is earlier —

19 (i) The month in which a warrant or order for the
20 individual's arrest or apprehension, an order requiring the
21 individual's appearance before a court or other appropriate
tribunal (e.g., a parole board), or similar order is issued by a
court or other duly authorized tribunal *on the basis of an
appropriate finding that the individual* —

22 (A) Is fleeing, or has fled, to avoid prosecution as
23 described in paragraph (a)(1) of this section;

24 (B) Is fleeing, or has fled, to avoid custody or
25 confinement after conviction as described in
26 paragraph (a)(2) of this section;

27 20 C.F.R. § 416.1339(b) (emphasis added). In 2003, the SSA issued largely identical regulations
28 applicable to the SVB program. 20 C.F.R. § 408.810(b). Thus, taken together, the plain language
of the statutory and regulatory framework clearly allows suspension or denial of benefits only

1 after a finding that an individual is fleeing with the specific intent to avoid prosecution, custody,
2 or confinement for a felony.

3 **B. The SSA's Published Internal Policy Guidelines Contradict the Plain**
4 **Language of the Statutes and Regulations.**

5 Despite promulgating regulations consistent with the governing statutes, the SSA has
6 issued internal policy guidelines that allow for sweeping suspensions and denials that are plainly
7 unlawful. For example, the SSA's guidelines instructing its employees on the SSI program's
8 "ineligibility criteria" under the PRWORA state that,

9 An individual is ineligible to receive SSI benefits for any month
10 during which he/she

11 Has an unsatisfied warrant for his/her arrest for a crime, or
12 attempt to commit a crime, that is a felony . . . ; [or]

13 Has an unsatisfied warrant for avoiding custody or
14 confinement after conviction for a crime, or attempt to commit a
15 crime, which is a felony . . . ;

16 Kroger Decl. Ex. A at 1 (SSA Program Operations Manual System ("POMS") Section SI
17 00530.001); *see also* Kroger Decl. Ex B (POMS Section GN 02613.001, setting forth the
18 guidelines in the context of OASDI benefits). These criteria do not require that the person be
19 "fleeing" prosecution — indeed, the word "fleeing" is entirely absent. Nor do the criteria require
20 a judicial finding as mandated by the governing regulations. Rather, the agency has issued an
21 additional policy guideline concerning the timing of when applicants become ineligible, which
22 specifically provides that "[t]he warrant does not have to state that the individual is 'fleeing' for
23 the suspension to apply." Kroger Decl. Ex. C (POMS Section SI 00530.010).

24 Even more remarkably, in a position that contradicts not only the law but also common
25 sense, the SSA has expressly taken the view that a person is "fleeing" prosecution even when they
26 are unaware that they are being sought by authorities: "We interpret . . . the Act to mean that a
27 person is 'fleeing to avoid prosecution, custody, or confinement' when a person has an
28 outstanding warrant for his or her arrest, *even if that person is unaware of that warrant.*" Kroger
Decl. Ex. D (SSA Acquiescence Ruling acknowledging that the "Second Circuit Court of Appeals
rejected this interpretation") (emphasis added).

1 **C. The SSA's Illegal Policy Has a Devastating Impact on Our Nation's Most**
2 **Vulnerable Citizens.**

3 The injustice of the SSA's unlawful policy is compounded by the fact that it targets
4 precisely those individuals who are most economically vulnerable — the poor, the elderly, and
5 the disabled. The impact of this policy is evident in the effect that it has had on several of the
6 named plaintiffs. Plaintiff Joseph Sutrynowicz, for example, has been receiving Social Security
7 Disability Insurance ("SSDI") benefits since 2004 because of his disability. Declaration of
8 Joseph Sutrynowicz ("Sutrynowicz Decl.") ¶ 3. In 2008, his payments were \$997 per month. *Id.*
9 Together with the \$14 he received each month in food-stamp assistance, these payments were his
10 only income, which he used to pay for life's necessities, including food, clothing, and his monthly
11 rent payment of \$650. *Id.* In September 2008, Mr. Sutrynowicz received notice that the SSA
12 intended to suspend his benefits because of an outstanding arrest warrant issued in his name on
13 November 20, 1996. *Id.* ¶ 4. On October 30, 2008, the SSA informed Mr. Sutrynowicz that his
14 benefits would be suspended immediately and demanded that he repay a supposed overpayment
15 of \$42,876.70 within thirty days. *Id.* ¶ 5. As a result of this suspension, he did not receive his
16 benefits in November and December of 2008. *Id.* Without his benefits, Mr. Sutrynowicz was
17 unable to pay rent during those months and struggled even to make it through each month without
18 going hungry. *Id.* ¶ 6. He managed to avoid homelessness only through the generosity of his
19 landlord, who allowed him to stay on rent-free. *Id.* Mr. Sutrynowicz received a single month's
20 check in January, which he assumes is part of the 90-day continuation of benefits that he is
21 entitled to under the law. *Id.* ¶ 8. That 90-day period will expire at the end of the month,
22 however, and the SSA has not rescinded the suspension. Thus, if Mr. Sutrynowicz does not
23 receive immediate relief, he will be unable to pay rent and buy food in February. Mr.
24 Sutrynowicz is not sure whether his landlord will allow him to stay in his apartment in February if
25 he is unable to pay rent. *Id.* ¶ 6.

26 Plaintiff Sharon Rozier similarly faces imminent and irreparable harm if she does not
27 receive relief. In March 2006, in a catastrophic car accident, Ms. Rozier suffered brain damage
28 and severe injuries to her spinal cord. Declaration of Sharon Rozier ("Rozier Decl.") ¶ 2;

1 Declaration of Tannitte Shufford (“Shufford Decl.”) ¶ 2. Due to these injuries, Ms. Rozier is
2 paraplegic, she has significant short-term and long-term memory loss, and she has difficulty
3 speaking. *Id.* Because her disabilities prevent her from working, Ms. Rozier began receiving
4 SSDI benefits around September 2006. But the SSA unlawfully terminated these payments in
5 2007 based on an outstanding arrest warrant. Rozier Decl. ¶ 4. Without any income, Ms. Rozier
6 is entirely dependent on her family to take care of her, which has put significant strain on her and
7 her loved ones. *Id.* ¶ 7; Shufford Decl. ¶ 7. She currently lives with her sister, Tannitte Shufford,
8 but because Ms. Shufford’s home is too small to accommodate Ms. Rozier’s two youngest
9 children, the children are forced to live with other relatives hundreds of miles from their mother.
10 Rozier Decl. ¶ 9; Shufford Decl. ¶ 6. Without any income, Ms. Rozier has also been unable to
11 purchase basic equipment to cope with her disability, such as a wheel chair more appropriate for
12 someone in her condition, or a shower chair that might enable her to bathe without assistance.
13 Rozier Decl. ¶ 8.

14 Although the SSA reinstated the benefits of Plaintiff Rosa Martinez immediately after she
15 sought emergency injunctive relief from this Court, her story likewise demonstrates the
16 irreparable harm faced by Plaintiffs in this case. Ms. Martinez suffers from Sharp’s syndrome,
17 fibromyalgia, hepatitis, depression and sleep apnea — disabilities which the SSA has determined
18 render her unable to work. Declaration of Rosa Martinez (“Martinez Decl.”) ¶ 2.¹ Her only
19 source of income is her SSI benefit check of \$870 per month. *Id.* ¶ 3. Unsurprisingly given her
20 income level, Ms. Martinez has no savings. *Id.* When the SSA suspended her benefits in October
21 2008, she was able to pay rent and buy food only through the help of a \$400 loan that she was
22 fortunate to secure with the assistance of her Legal Aid attorney. *Id.* ¶ 17. But had the SSA not
23 responded to her application for emergency injunctive relief by immediately restoring her
24 benefits, she would have soon been destitute, without anywhere to turn for even the most basic of
25 life’s necessities. *Id.*

26
27 ¹ In support of this Motion, Plaintiffs respectfully resubmit the Declaration of Rosa Martinez
28 previously filed with the Court in support of Ms. Martinez’s motion for a temporary restraining
order.

1 Finally, Plaintiff Roberta Dobbs has suffered significant and irreparable harm as a result
2 of the SSA's unlawful policy. The 74-year-old Ms. Dobbs is terminally ill, having been
3 diagnosed with end-stage lung disease. *Id.* ¶ 2. She also suffers from diabetes and has a history
4 of heart trouble. *Id.* Because of her disabilities, she must use supplemental oxygen 24 hours a
5 day and has trouble even moving around her own home without the aid of a wheel chair. *Id.* ¶¶ 2,
6 6. Applying its unlawful policy, the SSA suspended Ms. Dobbs's benefits in January 2006
7 because of a 2001 California arrest warrant of which she had no knowledge. *Id.* ¶ 3. After losing
8 her benefits, Ms. Dobbs was unable to pay for her most basic needs. *Id.* ¶ 4. When the heating in
9 her home broke down, she did not have the money to have it repaired, requiring her to live her life
10 around a single space heater provided to her by her church. *Id.* ¶ 5. When her wheel chair was
11 stolen, she was unable to replace it, making it impossible for her to leave her home. *Id.* ¶ 6.
12 Fortunately, shortly after she was named as a plaintiff in this case, the SSA sent Ms. Dobbs a
13 check for \$37,970 for the benefits that it improperly had withheld from her since 2006. *Id.* ¶ 4.
14 But while this money will allow her to address the many needs that she was forced to neglect
15 since her benefits were suspended, *id.* ¶ 7, it cannot make Ms. Dobbs whole for the hardship,
16 stress and depression that the SSA's policy caused her in these final years of her life. *Id.* ¶¶ 8, 9.

17 These individual stories of economic hardship are not outliers, but rather are squarely
18 representative of the class. By definition, beneficiaries of the SSI and SVB programs are
19 individuals who cannot afford the loss of even a single month's benefit payment. To qualify for
20 these programs, an individual recipient can have no more than \$2000 in total assets and cannot
21 exceed certain strict income thresholds. *See* 42 U.S.C. §§ 1002(3), 1382(a)(3)(B). With very
22 limited exceptions, if beneficiaries of these programs somehow manage to obtain an additional
23 source of income, their payments are correspondingly reduced. *See* 42 U.S.C. § 1382(b). And
24 the benefit payments themselves are not large. Although some states, such as California, provide
25 a modest supplement, in most states the maximum monthly payment under the SSI program for
26 2009 is \$674, 73 Fed. Reg. 64651 (Oct. 30, 2008), hardly enough to meet most individuals'
27 monthly expenses and certainly not enough to put aside any significant savings. *See* Social
28 Security Administration, Office of Retirement and Disability Policy, Office of Research,

1 Evaluation and Statistics, “Fast Facts and Figures About Social Security, 2008,” p. 23 (SSA Pub.
2 No. 13-11785), attached as Kroger Decl. Ex. E. SVB payments are even smaller, as they are
3 restricted to 75 percent of the monthly SSI Federal Benefit Rate, or about \$506 for 2009. *See* 42
4 U.S.C. § 1005.

5 Although the OASDI program does not contain the same indigency requirements as the
6 SSI and SVB programs, the SSA’s own data show that the significant majority of OASDI
7 beneficiaries cannot afford to have their benefits denied or suspended. As of December 2007, the
8 average monthly benefit payment to OASDI beneficiaries was \$987. Kroger Decl., Ex. E at 7.
9 Moreover, in 2006, 64 percent of all OASDI recipients over age 65 relied on these benefits for at
10 least half their total income, and a third relied on the payments for 90 percent of their income. *Id.*
11 In the case of elderly OASDI recipients who are not living with a spouse, their reliance on their
12 benefits is even more complete. Of this group, 72 percent rely on OASDI benefits for at least half
13 of their income and 41 percent rely on those benefits for at least 90% of their income. *Id.*

14 The Benefit Programs are the core of our nation’s safety net for those who are elderly or
15 disabled. The SSA’s unlawful suspension or denial of benefits effectively denies that safety net
16 to members of the class, allowing the bulk of them to fall into the very destitution that the
17 programs were intended to prevent, thereby depriving them of the means to obtain the necessities
18 of life.

19 **III. ANALYSIS**

20 **A. Standard for Injunctive Relief**

21 In the Ninth Circuit, preliminary injunctive relief is appropriate when a plaintiff satisfies
22 either a four-part test or a two-part test. *Rodde v. Bonta*, 357 F.3d 988, 994 (9th Cir. 2004).
23 Under the four-part test, a preliminary injunction should issue when a plaintiff demonstrates:
24 “(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to
25 plaintiff[s] if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff[s],
26 and (4) advancement of the public interest (in certain cases).” *Id.* Under the alternative, two-part
27 test, injunctive relief is proper if the plaintiff demonstrates “*either* a combination of probable
28 success on the merits and the possibility of irreparable injury *or* that serious questions are raised

1 and the balance of hardships tips sharply in [their] favor.” *Id.* (emphases in original). Under this
2 second test, the two prongs operate on a sliding scale, such that “‘the greater the relative hardship
3 to the party seeking the preliminary injunction, the less probability of success’ must be
4 established by the party.” *Id.* While courts in the Ninth Circuit apply both tests, they “‘primarily
5 employ[] the . . . two-prong test.” 13 Moore’s Fed. Practice § 65.22[5][i] (3d ed.).

6 As set forth below, Plaintiffs here satisfy the requirements of either test, and the Court
7 should therefore issue the requested preliminary relief.

8 **B. There is a Strong Likelihood that Plaintiffs Will Succeed on the Merits.**

9 Plaintiffs have a strong likelihood of success on the merits because the SSA’s policy is
10 contrary to the plain language of the governing statute and regulations, as courts have repeatedly
11 determined.

12 **1. The SSA’s Policy is Unlawful.**

13 **a. The SSA’s Policy Is Contradicted by Statute and by the**
14 **Implementing Regulations and Has Been Repeatedly Found to**
15 **Be Unlawful.**

16 The SSA’s policy of finding otherwise-qualified SSI beneficiaries ineligible based on the
17 mere existence of a warrant, without a finding that the person is fleeing prosecution or custody or
18 confinement after conviction for a felony, contradicts the clear language of the statutes and the
19 relevant implementing regulations. Prior to the suspension or denial of benefits, the plain
20 language of each of the relevant flight-with-intent statutes requires a finding that an individual is
21 “fleeing” with the specific intent “to avoid prosecution, or custody or confinement.” 42 U.S.C.
22 §§ 402(x)(1)(A)(iv), 1004(a)(2), 1382(e)(4)(A). The relevant implementing regulations require,
23 furthermore, that that finding be made “by a court or other duly authorized tribunal.” 20 C.F.R.
24 §§ 408.810(b), 416.1339(b)(i)(A)-(B).

25 Unsurprisingly, therefore, the courts have repeatedly rejected the SSA’s attempts to
26 suspend benefits based on its internal guidelines, which do not require any finding (by a court or
27 anyone else) that the beneficiary is “fleeing.” *E.g.*, *Fowlkes v. Adamec*, 432 F.3d 90, 96-97 (2d
28 Cir. 2005); *Reff v. Astrue*, 2008 WL 4277713 at *7 (D. Minn. Sept. 15, 2008); *Caldwell v. Astrue*,

1 2008 WL 2713714 (E.D. Tenn. July 10, 2008); *Blakely v. Comm’r of Soc. Sec.*, 330 F. Supp. 2d
2 910 (W.D. Mich. 2004); *Hull v. Barnhart*, 336 F. Supp. 2d 1113 (D. Or. 2004); *Thomas v.*
3 *Barnhart*, 2004 WL 1529280 (D. Me. June 24, 2004), *aff’d*, 2004 WL 1770151 (D. Me. Aug. 4,
4 2004); *Garnes v. Barnhart*, 352 F. Supp. 2d 1059 (N.D. Cal. 2004). In *Fowlkes*, for example, the
5 Second Circuit expressly held that the SSI “statute does not permit the Commissioner to conclude
6 simply from the fact that there is an outstanding warrant for a person’s arrest that he is ‘fleeing to
7 avoid prosecution.’” 432 F.3d at 96-97. The *Fowlkes* court held, moreover, that the regulations
8 permit the agency to suspend benefits only after a court or other authorized tribunal has made the
9 required finding: “[T]he regulation does not permit the *agency* to make a finding of flight; rather,
10 it demands a court or other appropriate tribunal to have issued a warrant or order based on a
11 finding of flight.” *Id.* at 97 (emphasis in original). The Second Circuit based these rulings on the
12 plain language of the SSI statute and accompanying regulations, noting that the court “need not
13 afford any deference to the [SSA’s construction] here, because the plain language of the statute
14 and its implementing regulation do not permit th[at] construction” *Id.* at 96.²

15 The court in *Hull* reached a similar ruling. There, the plaintiff moved from Nevada to
16 Oregon several months before the criminal charges were filed against her. 336 F. Supp. 2d at
17 1115. She was unaware of the charges until the SSA sought to suspend her SSI benefits. *Id.* She
18 was not in hiding — she had obtained an Oregon driver’s license when she moved and had lived
19 at the same address for four years, then had moved once and remained at the second address for
20 another three years. *Id.* She had not changed her name or done anything else to avoid law
21 enforcement. *Id.* She was eventually arrested at her home and she waived extradition, but
22 Nevada did not bother to take her into custody and the Oregon authorities subsequently released

23
24 ² See also *Garnes*, 352 F. Supp. 2d at 1067 (“The court agrees that the plain language of [the
25 regulation] requires more than the existence of a warrant. It requires a finding by a court or other
26 duly authorized tribunal . . . ‘that the individual is fleeing, or has fled, to avoid prosecution.’”);
27 *Hull*, 336 F. Supp. 2d at 1116-17 (“The Commissioner argues that if a warrant is issued, the
28 person is a fleeing felon under the statute and remains so until the warrant is resolved. This is not
what the regulation provides. It requires a court finding that the person is fleeing. . . . This is the
only way to give meaning to all parts of the regulation.” (emphasis added)); *Thomas*, 2004 WL
1529280, at *4 (“[T]he commissioner’s interpretation of the statute . . . is unreasonable to the
extent that it presumes that the statute applies merely from the existence of an arrest warrant.”).

1 her. *Id.* The court found that the absence of any evidence that the court issuing the warrant made
2 a finding that the plaintiff was fleeing prosecution precluded the agency from suspending the
3 plaintiff's benefits and, in any event, the evidence was insufficient to find that the plaintiff was, in
4 fact, fleeing. *Id.* at 1117.

5 These uniform judicial decisions holding that the agency's policies are unlawful are well-
6 founded. The statutes use the term "fleeing," which necessarily implies action combined with a
7 particular mental state — *i.e.*, "the conscious evasion of arrest or prosecution." *Fowlkes*, 432
8 F.3d at 96-97. In the context of 18 U.S.C. § 3290, the provision tolling the statute of limitations
9 in criminal proceedings, the Ninth Circuit has adopted a similar interpretation of "fleeing," saying
10 that the defendant must have "concealed himself or herself with an intent to avoid prosecution."
11 *United State v. Murguia-Oliveros*, 421 F.3d 951, 954 (9th Cir. 2005). The statutes, moreover,
12 require not only that the individual be "fleeing," but that the specific purpose of that "flight" be
13 the avoidance of "prosecution, or custody or confinement after conviction" for a felony. 42
14 U.S.C. §§ 402(x)(1)(A)(iv), 1004(a)(2), 1382(e)(4)(A) Yet the SSA's policy requires *neither*
15 action nor any particular mental state. It thus contradicts the plain language of the governing
16 statute and regulations and cannot lawfully be applied.

17 Given the unambiguous statutory and regulatory language and the uniformity of the
18 caselaw interpreting it — all of which strongly support a ruling in favor of Plaintiffs — there
19 exists a strong likelihood that Plaintiffs will succeed on the merits. This aspect of both
20 preliminary injunction tests is therefore satisfied.

21 **2. Defendant Cannot Avoid this Result by Claiming that Some Class**
22 **Members Have Failed to Exhaust Their Administrative Remedies.**

23 The SSA has a set policy concerning the application of the flight-with-intent provisions —
24 written into its employee manual — and the law does not require Plaintiffs to delay seeking
25 judicial review in order to permit the SSA to apply this unlawful policy to every class member at
26 every level of review. Although judicial review of SSA decisions under 42 U.S.C. § 405(g)
27 typically requires a plaintiff to "exhaust his administrative remedies by proceeding through all . . .
28 stages of the administrative appeals process" prior to bringing an action in federal district court,

1 *Bowen v. City of New York*, 476 U.S. 476, 482 (1986), this requirement is waived where a
2 plaintiff satisfies a three-part test: “The claim must be (1) collateral to a substantive claim of
3 entitlement (collaterality), (2) colorable in its showing that denial of relief will cause irreparable
4 harm (irreparability), and (3) one whose resolution would not serve the purposes of exhaustion
5 (futility).” *Johnson v. Shalala*, 2 F.3d 918, 921 (9th Cir. 1993); *accord Cares, Inc. v. Leavitt*,
6 2007 WL 2023543, at *2 (E.D. Cal. July 11, 2007) (applying the test to the claims of an
7 individual disabled Medicare beneficiary). Each element of this test is satisfied here.

8 **Collaterality.** “A plaintiff’s claim is collateral if it is not essentially a claim for benefits,”
9 *Johnson*, 2 F.3d at 921, but rather a claim that a “systemwide . . . policy . . . [is] inconsistent in
10 critically important ways with established regulations,” *City of New York*, 476 U.S. at 485.
11 Applying this rule, the Ninth Circuit repeatedly has held that claims are collateral where plaintiffs
12 “neither sought nor were awarded benefits . . . but rather challenged the Secretary’s failure to
13 follow the applicable regulations.” *Johnson*, 2 F.3d at 921 (quotations omitted); *see also Kildare*
14 *v. Saenz*, 325 F.3d 1078, 1082-83 (9th Cir. 2003) (holding that claims are collateral where they
15 “challenge[] specific . . . policies that conflict[] with established law” but denying plaintiffs’
16 claims of exhaustion because “they cannot point to any specific policy, directive, or order
17 requiring the State Defendants to disregard the regulations, and that is what is lacking in this case:
18 a policy.”).

19 Here, Plaintiffs unquestionably challenge a “systemwide policy” — namely, the SSA’s
20 official, published policy of denying benefits solely on the basis of an outstanding warrant
21 without the findings of intent required by the relevant statutes and regulations. As in *Johnson*,
22 Plaintiffs’ claims explicitly do *not* concern individual benefit determinations; rather, Plaintiffs
23 seek to compel Defendants to (1) apply the flight-with-intent provisions in a manner consistent
24 with the plain language of the statutes and their accompanying regulations (*see, e.g., Am. Compl.*
25 ¶¶ 111c, 111d), and (2) to vacate suspensions and denials previously made under the SSA’s
26 unlawful standard. Granting the relief sought here will not prevent the SSA from denying or
27 suspending benefits to individuals who do not meet the *statutory* requirements — it will simply
28 force the SSA to make those determinations in accordance with the applicable statutes. As the

1 *Johnson* court put it, “[s]ome claimants will receive benefits they were once denied. For others,
2 the readjudication will make no difference. They would not be entitled to benefits under either
3 policy.” 2 F.3d at 921. Because with this action Plaintiffs do not challenge the SSA’s factual
4 adjudications, but instead challenge the legality of its policies, the action is collateral to a
5 substantive claim of entitlement.

6 **Irreparable Harm.** To satisfy the irreparable harm prong of this test, a plaintiff need
7 only raise a “colorable claim” of irreparability, which the Ninth Circuit interprets as a claim that
8 is “not wholly insubstantial, immaterial, or frivolous.” *Briggs v. Sullivan*, 886 F.2d 1132, 1140
9 (9th Cir. 1989) (quotations omitted); *accord Johnson*, 2 F.3d at 922. As set forth in detail in Part
10 III.C below, if the SSA is allowed to continue its policy of unlawfully suspending and denying
11 benefits, many Plaintiffs face the immediate threat severe economic hardship, including in some
12 cases the possibility “months without food, shelter or other necessities.” *Johnson*, 2 F.3d at 922.
13 This is sufficient to state a colorable claim of irreparable harm in the Ninth Circuit. *Id.* (“We hold
14 that the economic hardship suffered by the plaintiffs while awaiting administrative review
15 constitutes irreparable injury.”).

16 **Futility.** Finally, it would not serve the purposes of exhaustion for class members to
17 complete their administrative remedies because such an endeavor plainly would be futile. With
18 this action, Plaintiffs do not ask the Court to resolve a factual dispute; rather, Plaintiffs raise a
19 challenge to the SSA’s official policy with respect to the flight-with-intent restrictions to the
20 Benefit Programs. Plaintiffs’ objection is not that the SSA has wrongly determined that the class
21 members are fleeing with the specific intent to avoid prosecution, but that the SSA unlawfully has
22 decided that such a determination is unnecessary. This action therefore presents a straightforward
23 statutory challenge to the SSA’s policies. *See Johnson*, 2 F.3d at 922 (“We do not need a detailed
24 factual record for each claimant to decide such a straightforward statutory challenge. Nor do we
25 require the benefit of agency expertise because the issue posed by class members is one purely of
26 statutory construction.” (quotations and citations omitted)).

27 Under such circumstances, courts have held that “there [i]s nothing to be gained from
28 permitting the compilation of a detailed factual record, or from agency expertise,” and that,

1 therefore, exhaustion is futile. *Briggs*, 886 F.2d at 1140. Specifically, courts find futility where,
2 as here, an “agency applies a systemwide policy that is inconsistent in critically important ways
3 with established regulations.” *Johnson*, 2 F.3d at 922 (internal quotations omitted). In *Cares*,
4 *Inc. v. Leavitt*, for example, a disabled Medicare beneficiary brought a claim challenging the
5 constitutionality of a specific policy of the Department of Health and Human Services. The
6 defendant moved to dismiss on the grounds that the plaintiff had not exhausted her administrative
7 remedies under Section 405(g) of the Social Security Act (a provision that also applies to the
8 Medicare Act). The *Cares* court rejected this claim, holding that “because plaintiff’s
9 constitutional claim *challenges fundamental agency policies and practices* that broadly impact
10 similarly situated medicare beneficiaries, administrative exhaustion would be futile.” *Cares*,
11 *Inc.*, 2007 WL 2023543, at *4 (emphasis added). Under such circumstances, the court held,
12 “[t]he policies underlying the exhaustion requirement — deference to agency expertise,
13 development of a detailed factual record, and conservation of judicial resources — are not
14 furthered by foregoing immediate judicial consideration of this issue.” *Id.* This reasoning applies
15 with equal force here, and the Court should therefore determine that Plaintiffs have satisfied the
16 futility prong of the test for waiver of exhaustion.

17 The futility of the administrative process is further illustrated by the case of *Garnes v.*
18 *Barnhart*, in which the plaintiff successfully pursued an appeal before an administrative law
19 judge (“ALJ”) on the ground that he was not and had never been “fleeing,” only to have
20 Defendant issue a final decision reversing the ALJ’s opinion as contrary to SSA policy.
21 Moreover, the agency has steadfastly clung to that unlawful policy, despite more than a half-
22 dozen federal court decisions finding it unlawful. *See, e.g.*, note 2, *supra*. The agency’s
23 recalcitrance in the face of plain statutory and regulatory language and unambiguous judicial
24 rulings further supports a finding of futility. Rather than continuing a potentially endless series of
25 cases adjudicating the same issue in the district courts, with no authority to bind the agency
26 beyond an individual plaintiff’s case, the Court should hold that such actions are futile and should
27 resolve the issue in this class action for all persons affected by the unlawful policy.
28

1 **C. Plaintiffs Face Irreparable Harm if Their Benefits Are Suspended and the**
2 **Balance of Hardships Tips Decidedly in Plaintiffs' Favor.**

3 “When a family is living at subsistence level, the subtraction of any benefit can make a
4 significant difference to its budget and to its ability to survive.” *Paxton v. Sec’y of Health &*
5 *Human Servs.*, 856 F.2d 1352, 1354 (9th Cir. 1988). For this reason, courts in the Ninth Circuit
6 regularly find that a class meets the irreparable-harm requirement where financially vulnerable
7 class members face the possibility of economic harm. *See, e.g., Roe v. Anderson*, 134 F.3d 1400,
8 1404-05 (9th Cir. 1998); *Beno v. Shalala*, 30 F.3d 1057, 1063-64; *Johnson*, 2 F.3d at 922
9 (holding, in the context of SSI benefits, that “economic hardship does constitute irreparable harm.
10 Back payments cannot ‘erase the experience or the entire effect of several months without food,
11 shelter or other necessities.’” (quoting *Briggs*, 886 F.2d at 1140)).

12 In *Anderson*, for example, the Ninth Circuit held that a class of California welfare
13 recipients had established irreparable harm even though they faced only the reduction — rather
14 than the complete suspension or denial — of their welfare benefits. 134 F.3d 1400 at 1404-05.
15 As the *Anderson* court noted, “[n]umerous cases have held that reductions in [welfare] benefits,
16 even reductions of a relatively small magnitude, impose irreparable harm on recipient families.”
17 *Id.* at 1404; *see also Miller v. Carlson*, 768 F. Supp. 1331, 1339 (N.D. Cal. 1991) (finding
18 irreparable harm where plaintiffs, who received educational aid as recipients of a benefit program
19 for families with dependent children, faced the threat of having to “choose between dropping out
20 of school and foregoing basic necessities in order to pay for child care.”).

21 Similarly, in *Newton-Nations v. Rogers*, 316 F. Supp. 2d 883 (D. Ariz. 2004), the court
22 held that a class of Medicaid recipients had established irreparable harm where their copayments
23 for medical services were increased. There, the mere possibility that some class members might
24 be denied medical care as a result of the challenged policy was sufficient. *See id.* at 888
25 (“Because Plaintiffs *may* be denied medical care, Plaintiffs have demonstrated irreparable injury.”
26 (emphasis added)); *see also Beltran v. Meyers*, 677 F.2d 1317, 1322 (9th Cir. 1982) (“Plaintiffs
27 have shown a risk of irreparable injury, since enforcement of the California rule may deny them
28 needed medical care. That is a sufficient showing.”).

1 This Court has likewise recognized Ninth Circuit caselaw holding that, where a class, “by
2 definition,” consists of particularly vulnerable individuals, a “finding that [it faces] irreparable
3 harm [can be] a reasonable inference even without any particularized showings by individual
4 class members.” *Angotti v. Rexam, Inc.*, 2006 WL 1646135, at *14 (N.D. Cal. June 14, 2006).
5 That rule is applicable here, as the proposed class is by definition economically distressed. Its
6 members are almost all elderly or disabled, and the overwhelming majority of them are of
7 extremely limited economic means. In the case of the SSI and SVB programs, this is so by
8 statute, as beneficiaries must meet strict indigency requirements. And in the case of the OASDI
9 program, the SSA’s own data establish that OASDI recipients receive subsistence-level benefits
10 and that aged beneficiaries overwhelmingly rely on those benefits for a significant portion of their
11 income.

12 Moreover, although not necessary to establish irreparable harm where the class, by
13 definition, consists of particularly vulnerable individuals, Plaintiffs have also shown
14 particularized harm through the declarations submitted in conjunction with this Motion. The
15 statements of class members Joseph Sutrynowicz, Rosa Martinez, Roberta Dobbs, and Sharon
16 Rozier demonstrate that even a single month of lost benefits can threaten Plaintiffs’ ability to pay
17 rent, buy food, and pay for life’s other necessities. Mr. Sutrynowicz, for example, was unable to
18 pay rent when his benefits were suspended in November. Sutrynowicz Decl. ¶ 6. Ms. Martinez
19 managed to avoid homelessness only with the help of an emergency loan. Martinez Decl. ¶ 17.
20 The terminally ill Ms. Dobbs lost her independence and was confined to her home when she was
21 without the resources to replace a stolen wheelchair. Dobbs Decl. ¶ 6. And Ms. Rozier has been
22 unable to buy needed equipment for her disability and has been forced to live apart from her five-
23 year-old son and nine-year-old daughter. Rozier Decl. ¶¶ 8-9; Shufford Decl. ¶ 6. It is
24 reasonable, moreover, to infer that these harms are representative of the injuries faced by the class
25 generally, as it can hardly be disputed that the class is made up of individuals facing similar
26 economic hardships while at the same time dealing with the difficulties of old age and disability.
27 *See Part II.C, supra.*
28

1 Finally, where, as here, the harm to a government defendant is merely economic and the
2 harm to the plaintiffs consists of the deprivation of living necessities, the Ninth Circuit has held
3 that the balance of hardships tips decidedly in favor of the plaintiffs:

4 [T]he physical and emotional suffering shown by plaintiffs in the
5 record before us is far more compelling than the possibility of some
6 administrative inconvenience or monetary loss to the government.
7 . . . Faced with such a conflict between financial concerns and
8 preventable human suffering, we have little difficulty concluding
9 that the balance of hardships tips decidedly in plaintiffs' favor.

10

11 We also consider it crucial that, because the members of plaintiffs'
12 class are largely infirm and disabled, their resources and life spans
13 are by definition extremely limited. Deprivation of benefits
14 pending trial might cause economic hardship, suffering or even
15 death. Retroactive restoration of benefits would be inadequate to
16 remedy these hardships. Following his thorough review of the
17 record, Judge Gray reached a similar conclusion: "Retroactive
18 relief [for plaintiffs] would be inadequate, and perhaps too late, to
19 ensure that the purpose of Social Security disability benefits, i.e.,
20 provision of a minimum standard of living for the poor and
21 disabled, will be served."

22 *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983); *see also Miller*, 768 F. Supp. at 1339-40
23 ("Where the government only faces a financial harm, the balance of hardships strongly favors
24 plaintiffs who will be deprived of essential benefits.").

25 In short, Plaintiffs face irreparable harm if the Court does not issue a preliminary
26 injunction and that the balance of hardships tips decidedly in their favor.

27 * * *

28 Plaintiffs have thus satisfied the relevant parts of both the two-part and four-part tests
applied in the Ninth Circuit for determining the propriety of preliminary injunctive relief. They
have established a strong likelihood of success on the merits, the possibility of irreparable injury,
and a balance of hardships decidedly in their favor. This is sufficient to grant a preliminary
injunction under the four-part test. Moreover, because the probability of success is so great —
supported by both the unambiguous text of the statutes and regulations and the uniform caselaw
establishing the illegality of the SSA's policy — and because the balance of hardships tips so
decisively in their favor, Plaintiffs have satisfied either combination of factors applied in the two-

1 part, sliding-scale test. The Court should therefore grant the requested injunctive relief and issue
2 the injunction set forth in the accompanying Proposed Order.

3 **D. The Court Should Not Require Plaintiffs to Post a Bond.**

4 Although in some circumstances Federal Rule of Civil Procedure 65(c) requires a plaintiff
5 to give security in order to compensate a defendant who may later be found to have been
6 wrongfully enjoined, the Ninth Circuit has held that district courts have broad discretion to limit
7 or waive this bond requirement. *See Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir.
8 1999) (“Our sister circuits have construed Fed. R. Civ. P. 65(c) as investing the district court with
9 discretion as to the amount of security required, *if any*. We agree with this rationale.”) (emphasis
10 added; citations omitted). Applying this flexible standard, courts regularly waive the bond
11 requirement where, as here, the plaintiffs have limited resources or where public policy
12 considerations otherwise support a waiver. *See, e.g., Westlands Water Dist. v. U.S. Dept. of*
13 *Interior*, 2001 WL 34094077, at *19 (E.D. Cal. 2001) (“Some courts . . . permit indigent or poor
14 parties either to not post or to post nominal bond amounts.”); *Miller v. Carlson*, 768 F. Supp.
15 1331, 1340 (N.D. Cal. 1991) (“[A bond] is not required where plaintiffs are indigent or where
16 considerations of public policy make waiver of a bond appropriate.”); *Governing Council v.*
17 *Mendocino County*, 684 F. Supp. 1042, 1047 (N.D. Cal. 1988) (“[C]ourts have discretion to
18 excuse the bond requirement under appropriate circumstances, such as . . . where suit is brought
19 on behalf of a group of mostly indigent persons.”).

20 In *Miller*, the plaintiffs were a putative class of recipients of Aid to Families with
21 Dependent Children (“AFDC”), “who need[ed] child care in order to participate in educational or
22 training activities” 768 F. Supp. at 1333. Plaintiffs sought preliminary injunctive relief,
23 contending that defendants were unlawfully restricting the child-care guarantee under the Family
24 Support Act. After granting the injunctive relief, the *Miller* court held that the plaintiffs need not
25 post a bond because strict application of the bond requirement “would effectively deny access to
26 judicial review for indigent people.” *Id.* at 1340. The court noted that plaintiffs were “indigent
27 people who rely upon AFDC for the necessities of life,” *id.*, and that, as such, “considerations of
28 equity dictate[d] that the requested preliminary injunction issue without bond.” *Id.* at 1341.

1 As set forth above, Plaintiffs are largely indigent. Most would not have the resources to
2 post a bond; nor would it be possible to collect one from each class member. Most rely upon the
3 Benefit Programs “for the necessities of life.” Plaintiffs thus find themselves in a predicament
4 similar to that faced by the plaintiffs in *Miller*. They do not have the means to post a bond, and if
5 they are required to do so, the result will be the effective denial of the requested injunctive relief
6 — preventing access to the sought-after judicial review solely on the basis of indigence. Under
7 these circumstances, the Court should waive the bond requirement.

8 **IV. CONCLUSION**

9 For the foregoing reasons, Plaintiffs respectfully request that the Court enjoin the
10 Commissioner from applying the flight-with-intent provisions inconsistent with the plain
11 language of the relevant statutes and regulations by entering the Proposed Order filed herewith.

12 DATED: January 12, 2009

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Lechwar, Maureen

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Roberta Dobbs
Brent A. Roderick
Sharon D. Rozier
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