
C.A. NO. 09-17649

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA ALLIANCE OF
CHILD AND FAMILY SERVICES,

Plaintiff/Appellee,

v.

JOHN WAGNER, Director of the
California Department of Social
Services, in his official capacity;
GREGORY ROSE, Deputy Director of
the Children and Family Services
Division of the California Department
of Social Services, in his official
capacity,

Defendants/Appellants.

USDC Case No. 09-4398-MHP

On Appeal From the United States District Court
for the Northern District of California
Honorable Judge Marilyn Hall Patel

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CORPORATE DISCLOSURE STATEMENT

PURSUANT TO FRAP 26.1

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, Plaintiff-Appellee California Alliance of Child and Family Services (“the Alliance”) states the following: the Alliance has no parent companies, and no publicly-held corporation owns 10% or more of its stock.

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I. STATEMENT REQUESTING ORAL ARGUMENT

Counsel for Plaintiff-Appellee California Alliance of Child and Family Services (“the Alliance”) respectfully requests twenty minutes of oral argument.

II. STATEMENT OF JURISDICTION

A. District Court’s Jurisdiction

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) because the Alliance’s Complaint against the California Department of Social Services (“the State” or “CDSS”) raised claims under Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679b (hereafter, “the Child Welfare Act” or “the Act”), and its implementing regulations.

B. Court of Appeals’ Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1292(a), which gives the Court authority to hear appeals from interlocutory orders granting, modifying or denying injunctions. (ER 16-36; CR 67, 57.)¹

¹ “ER” refers to the State’s Excerpt of Record in this matter, and “CR” refers to the Court Record followed by the relevant docket number. “ACR” refers to the Appellate Court Record in this case followed by the relevant docket number. “AICR” refers to the District Court Record in *California Alliance of Child and Family Services v. Allenby et al.*, Case No. 06-CV-04095-MHP (“*Alliance I*”).

C. Timeliness of Appeal

The district court issued its order granting the Alliance's motion for a preliminary injunction on November 18, 2009. (ER 21-36; CR 57.) The State filed its Notice of Appeal on November 19, 2009. (ER 145-165; CR 59.)

III. ISSUE PRESENTED ON APPEAL

Whether the district court abused its discretion by enjoining the State from cutting foster care maintenance payment rates for non-federally eligible foster children, which inevitably cuts federally mandated benefits to federally eligible foster children.

IV. STATEMENT OF FACTS

A. The Child Welfare Act

Congress enacted the Child Welfare Act, 42 U.S.C. Sections 670-679b, in 1980 to address the needs of foster care children. The Child Welfare Act created a cooperative program in which the federal government provides funding to assist states in providing these children with the basic necessities of life. To become eligible for federal funding, a state must submit a plan for financial assistance to the Secretary of the United States Department of Health and Human Services ("DHHS"). 42 U.S.C. § 671(a). Each participating state's plan must "provide for foster care maintenance payments in accordance with [42 U.S.C. § 672] and for adoption assistance in accordance with [42 U.S.C. § 673]." 42 U.S.C. § 671(a)(1).

The Child Welfare Act sets forth specific requirements that each participating state must follow when implementing its plan. One requirement is that “[e]ach State with a plan approved . . . shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative” 42 U.S.C. § 672(a)(1) (emphasis added). The Child Welfare Act defines “foster care maintenance payments” as:

payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, reasonable travel to the child’s home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement. In the case of institutional care, such term shall include the reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence.

42 U.S.C. § 675(4)(A) (emphasis added).

B. California’s Plan Under The Child Welfare Act

Following the enactment of the Child Welfare Act, California designated the California Department of Social Services (“CDSS”) as the state agency responsible for submitting California’s plan to the DHHS for approval. Cal. Welf. & Inst. Code §§ 11229, 11460(a), 11462(a).

Under California law, “[f]oster care providers shall be paid a per child per month rate in return for the care and supervision of the [Aid to Families with Dependant Children - Foster Care (AFDC-FC)] child placed with them.” Cal.

Welf. & Inst. Code § 11460(a). The phrase “care and supervision” is defined as “food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, and reasonable travel to the child’s home for visitation.” Cal. Welf. & Inst. Code § 11460(b).

California uses a Rate Classification Level System (“RCL”) to determine the amount of foster care maintenance payments for foster care group homes. Cal. Welf. & Inst. Code § 11462. Under the RCL, a group home is assigned to one of fourteen levels based on the group home’s number of “points.” Cal. Welf. & Inst. Code §§ 11462(b), (e). The number of points assigned to a group home is based largely on the (1) number of “paid/awake” hours worked per child, per month, and (2) qualifications of the staff. Cal. Welf. & Inst. Code § 11462(e). All of the group homes in the same RCL receive the same AFDC-FC payment rate based on the standardized schedule of rates. Cal. Welf. & Inst. Code § 11462(f). The CDSS determines the RCL and AFDC-FC payment rate for each group home using information each group home submits in its application. Cal. Welf. & Inst. Code § 11462(e).

California law further requires that “the standardized schedule of rates shall be adjusted annually by an amount equal to the [California Necessity Index (CNI)] computed pursuant to section 11453, subject to the availability of funds.” Cal. Welf. & Inst. Code § 11462(g)(2). The CNI is a weighted average of increases in

various costs of living for low-income consumers, including food, clothing, fuel, utilities, rent and transportation. *See, e.g.*, Cal. Welf. & Inst. Code § 11453.

California law also provides funding for foster care children who are not “federally eligible” under the Child Welfare Act. However, California law does not distinguish between federally eligible and non-federally eligible children at the time a child is placed with a group home provider. Federally eligible and non-federally eligible children are inextricably mixed within California’s foster care group homes because placements are made based on location and needs of each specific foster care child — not on federal eligibility status. (ER 34; CR 57, at 14.) Indeed, under California’s current system, foster care providers often do not learn of a child’s federal eligibility until *after* placement. (ER 17; CR 67.)

C. The Alliance Files Suit In *Alliance I* To Force The State To Comply With The Child Welfare Act

On June 30, 2006, the Alliance sued the State of California for violating the Child Welfare Act by failing to make payments sufficient to cover the cost of providing foster care. (*California Alliance of Child and Family Services v. Allenby*, USDC Case No. CV 06 04095 (“*Alliance I*”). In July 2007, the parties filed cross motions for summary judgment. (AICR 34, 37.) On March 11, 2008, the district court issued an order granting the State’s motion for summary judgment and denying the Alliance’s motion for summary judgment. (AICR 57.) The

district court entered judgment on March 12, 2008, and the Alliance appealed to this Court. (AICR 58, 75.)

On December 14, 2009, this Court issued its opinion reversing the district court's order. *California Alliance of Child and Family Services v. Allenby*, 589 F.3d 1017 (9th Cir. 2009) (“*Allenby*”). The Court's ruling made clear that the State was not complying with the Child Welfare Act because it did not “cover” the costs of providing foster care. *Allenby*, 589 F.3d at 1021. The Court explained:

It is undisputed that the State is no longer paying this amount -- rather, it is paying somewhere in the neighborhood of 80 percent of the amount. In other words, the [Child Welfare Act] requires California to cover the cost of certain items and California has developed a formula to determine what those items cost, but is now only partially covering the cost of those items. This runs afoul of the [Child Welfare Act's] mandate.

Id. The Court reversed the district court's order and directed the district court to enter judgment for the Alliance and to determine the proper scope of declaratory and injunctive relief. *Id.* at 1023.

On remand, the district court entered judgment in *Alliance I* on February 23, 2010. (AICR 92.) The district court's judgment permanently enjoined the State from underfunding foster care group homes and included rate increases for both federally eligible and non-federally eligible children. (*Id.*) The district court explained: “The injunction extends to non-federally eligible children for the reasons set forth in this court's order of December 18, 2009, entered in the related

California Alliance v. Wagner action.” (*Id.*) The State’s appeal from the district court’s judgment in *Alliance I* is currently pending before this Court. See *California Alliance of Child and Family Services v. Allenby et al.*, C.A. No. 10-15593.

D. The District Court Enjoins The State’s Additional 10% Cut To Foster Care Maintenance Payments

On September 18, 2009, before this Court issued its Opinion in *Allenby*, the Alliance initiated the underlying action to enjoin the State of California from cutting the already deficient RCL rates by another 10% (“*Alliance II*”). (ER 539-551; CR 1.)

On November 18, 2009, the district court issued its Order granting the Alliance’s Motion for Preliminary Injunction. (ER 21-36; CR 57.) The district court’s injunction “prohibits implementation of the reduction only with respect to payments made in connection with children subject to the [Child Welfare Act]. Execution of the injunction SHALL NOT be carried out in a manner that will reduce in any amount the full entitlement to such federally eligible children under this order.” (ER 34; CR 57 (emphasis in original).) The district court stated that “[c]ounsel for the parties agreed at oral argument that the RCL system and group homes do not distinguish between federally eligible and non-federally eligible children in the rates set or the services provided.” (*Id.*) The district court added:

“This raises the question [of] whether any funding scheme for foster care maintenance payments that discriminates among federally eligible and non-federally eligible children can be carried out under California’s system.” (*Id.*) The district court then asked the State to explain how the State planned to determine the amount of foster care maintenance payments that will satisfy the Order. (*Id.*)

In response to the district court’s request, the State merely submitted a plan with two different rate tables — one for federally eligible children, and one for non-federally eligible children. (ER 131-137; CR 63.) The federally eligible children’s rates the rates that were in effect prior to the State’s October 1, 2009 10% rate reduction. The non-federally eligible children’s rates reflected the 10% rate cut. (*Id.*) The Alliance objected to the State’s plan on the ground that “it does not specify how group homes are supposed to implement it in such a way as to ensure that federally eligible children are not subject to additional reductions in foster care maintenance payments, as mandated by the court’s preliminary injunction order.” (ER 101; CR 66.)

On December 18, 2009, the district court issued its Order enjoining the State from implementing the proposed rate cuts for both federally and non-federally eligible children. The district court explained: “At the preliminary injunction hearing, plaintiff represented to the court that group homes are required to provide the same basic level of care to all children placed with the home, regardless [of]

whether the children are federally eligible. The State did not dispute this characterization.” (ER 17; CR 67 (internal citations omitted).) The district court also found that “nothing in the State’s submission contests or even addresses the preliminary injunction order’s finding that ‘group homes do not distinguish between federally eligible and non-federally eligible children in . . . the services provided.’” (ER 17-18; CR 67.) The district court concluded:

Because group homes do not so distinguish, it is inevitable that simply reimbursing group homes differently for federally eligible and non-federally eligible children will result in the dilution of funds to federally eligible children. For instance, a group home operating at an RCL 14 level would receive \$6,694 per month for each federally eligible child and \$6,025 per month for each non-federally eligible child. According to the State, approximately 59% of children statewide are federally eligible whereas 41% are non-federally eligible. A group home whose population reflected this breakdown would receive an average of \$6,419.71 per child. For a federally eligible child, this amounts to a funding level of 95.9% of that to which the child is entitled. In other words, because group homes do not -- and likely would not, as a matter of ethics as well as policy -- give non-federally eligible children less food, clothing, shelter, or less of any of the other items enumerated in the [Child Welfare Act], *see* 42 U.S.C. § 675(A)(4), the effect of the State’s current plan is to cut the benefits to federally eligible children by 4.1%, in contravention of the court’s preliminary injunction order.

(ER 18; CR 67 (emphasis added).) Accordingly, the district court held that “[i]mplementation of such reduction is enjoined both in relation to federally eligible children and non-federally eligible children.” (*Id.*)

E. The State Unsuccessfully Attempts To Delay

Implementation Of The Injunction

On November 24, 2009, the State filed an Emergency Motion for Stay of Injunction Pending Appeal. (ACR 4.) On December 10, 2009, this Court denied the State's motion. (ACR 9.)

When this Court decided the State's first motion for a stay of injunction, *California State Foster Parent Association v. Wagner*, 620 F.3d 1115 (9th Cir. 2010) ("Wagner"), *reh'g denied* 2010 U.S. App. LEXIS 22400 (9th Cir. Oct. 27, 2010), was pending. In *Wagner*, foster parents sued the State under the Child Welfare Act for failure to cover the expenses foster parents incur in caring for their foster children. *Id.* at 1116. At issue was whether the Child Welfare Act provided a private right of action under 42 U.S.C. Section 1983. *Id.* at 1117. This Court gave the State leave to renew its motion for a stay in this case once *Wagner* was decided. (ACR 9.)

On August 30, 2010, this Court issued its decision in *Wagner*. It held "that §§ 672(a) and 675(4)(A) of the Act establish a presumptively enforceable right under § 1983 to foster care maintenance payments from the State that cover the cost of the expenses enumerated in § 675(4)(A)." *Id.* at 1122. The district court's decision in favor of the plaintiff foster parents was affirmed. *Id.*

The State then attempted to convert its loss in *Wagner* into a win by using the decision as a basis to move for a second stay of the district court's injunction in this case. (ACR 16.) Although *Wagner* affirmed the Alliance's right to seek relief under the Child Welfare Act, the State argued that *Wagner* created a "new" basis for imposing a stay. (*Id.*) This Court rejected that argument and denied the State's second stay request. (ACR 19.)

V. SUMMARY OF THE ARGUMENT

This Court's Order in *Allenby* made it clear that the Child Welfare Act requires California to make foster care payments that "meet[] all the costs of food, clothing, shelter, etc." *Allenby*, 589 F.3d at 1021. Despite this unambiguous mandate, the State has gone to great lengths to underfund (or at least delay fully funding) foster care group homes. In this latest appeal, the State attempts to continue to underfund foster care by making an end-run around the *Allenby* ruling. Specifically, the State asks this Court to sanction substantial funding cuts for non-federally eligible children on the ground that they are not entitled to funding under the Child Welfare Act. (Opening Brief at 20.) The district court correctly found that, under the State's current system, any funding cuts for non-federally eligible children will cut funding to federally eligible children. (ER 18; CR 67, at 3.)

The State does not dispute the district court's finding that California's system does not distinguish between federally eligible and non-federally eligible

children. Nor does the State dispute that group homes are often unaware of a child's federal eligibility status at the time of placement. (Opening Brief at 19-31.) The State also does not disagree with the district court's finding that cutting funds for non-federally eligible children will cause reduced funding for non-federally eligible children. (Opening Brief at 19-31.)

In response to the district court's finding, the state has not submitted a new plan or devised a new system that both complies with *Allenby* and ensures that reducing funding for non-federally eligible children will not simultaneously reduce funding for the federally eligible children. Instead, the State has devoted its scarce resources to challenging the district court's injunction as it relates to non-federally eligible children. But the State never addresses the district court's reasoning for enjoining cuts for both federally and non-federally eligible children.

The State's arguments are predicated on the incorrect assertion that the district court found that non-federally eligible children are entitled to a certain level of funding under the federal Child Welfare Act. But the district court found no such thing. Rather, the district court concluded that under California's current RCL system, the State must maintain rates for federally eligible *and* non-federally eligible children to insure that federally eligible children receive the funding that the Child Welfare Act mandates.

The State argues that the district court exceeded its jurisdiction because the Child Welfare Act only applies to federally eligible children. But the district court did not provide relief under state law, and it did not expand its own jurisdiction. The district court simply tailored the relief consistent with this Court's decision in *Allenby* to ensure that California's system *covers* the costs for the federally eligible children. The district court found that the proposed funding cuts to *non*-federally eligible children would necessarily result in payments that would not cover the costs of providing care for *federally* eligible children.

Further, the State does not dispute that the preliminary injunction does not violate the Eleventh Amendment as it relates to federally eligible children. Instead, it argues that the inclusion of non-federally eligible children pushes the injunction over the threshold into impermissibility. (Opening Brief at 26.) But again, the district court's preliminary injunction order *does not* require the State to fund foster care group homes beyond the amount the Child Welfare Act requires. It only enjoins cuts that would have resulted in inadequate funding for federally eligible children vis-à-vis reducing funding to non-federally eligible children. (ER 16-36; CR 67, 57.)

Accordingly, for the foregoing reasons, the Alliance respectfully requests that this Court affirm the district court's Order granting the preliminary injunction.

VI. ARGUMENT

A. The District Court Did Not Abuse Its Discretion In Granting The Alliance’s Preliminary Injunction Request And Tailoring The Injunctive Relief

1. Standard of Review

This Court reviews an order granting an injunction for “an abuse of discretion or an erroneous application of legal principles.” *United States v. AMC Entm’t, Inc.*, 549 F.3d 760, 768 (9th Cir. 2008). This Court has emphasized that “[t]he district court has substantial discretion in defining the terms of an injunction and appellate review is correspondingly narrow.” *Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1256 n.16 (9th Cir. 1982) (citing *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) (“In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow”)); *see also Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) (“Once plaintiffs establish they are entitled to injunctive relief, the district court has broad discretion in fashioning a remedy.”); *United States v. AMC Entertainment, Inc.*, 549 F.3d at 768 (“A district court has considerable discretion in granting injunctive relief and in tailoring its injunctive relief.”).

As explained below, the district court did not abuse its discretion in (1) granting the Alliance's Motion for Preliminary Injunction and (2) fashioning the appropriate injunctive relief in response to this Court's Order in *Allenby*.

2. The District Court Did Not Abuse Its Discretion In Enjoining The State From Cutting Funding To Federally Eligible And Non-Federally Eligible Children

The State does not dispute that the district court properly enjoined it from cutting funding to federally eligible children. (Opening Brief at 19.) It argues instead that the district court exceeded its jurisdiction and the scope of the pleadings by enjoining cuts to non-federally eligible children. (Opening Brief at 19.) To support these arguments, the State relies entirely on the fundamentally false premise that the district court found that non-federally eligible children are entitled to full funding under the Child Welfare Act. But the district court merely held that the State cannot decrease funding for federally *or* non-federally eligible children because under the structure of California's current system cuts to non-federally eligible children would result in a funding scheme that does not "cover the cost" of caring for federally eligible children in violation of the Child Welfare Act.

The district court correctly concluded that merely providing different rates for federally eligible and non-federally eligible children is insufficient to protect the federally eligible children. (ER 16-20; CR 67.) The district court explained: “At the preliminary injunction hearing, plaintiff represented to the court that group homes are required to provide the same basic level of care to all children placed with the home, regardless of whether the children are federally eligible. The State did not dispute this characterization.” (ER 17; CR 67) (internal citations omitted). The district court also found that “nothing in the State’s submission contests or even addresses the preliminary injunction order’s finding that ‘group homes do not distinguish between federally eligible and non-federally eligible children in . . . the services provided.’” (ER 17-18; CR 67.) The district court concluded:

Because group homes do not so distinguish, it is inevitable that simply reimbursing group homes differently for federally eligible and non-federally eligible children will result in the dilution of funds to federally eligible children. . . . In other words, because group homes do not -- and likely would not, as a matter of ethics as well as policy -- give non-federally eligible children less food, clothing, shelter, or less of any of the other items enumerated in the [Child Welfare Act], *see* 42 U.S.C. § 675(A)(4), the effect of the State’s current plan is to cut the benefits to federally eligible children by 4.1%, in contravention of the court’s preliminary injunction order.

(ER 18; CR 67 (emphasis added).) The district court then ordered that

“[i]mplementation of such reduction is enjoined both in relation to federally eligible and non-federally eligible children.” (*Id.*) In other words, because California does not distinguish between federally eligible and non-federally

eligible children, cutting rates for only non-federally eligible children will render the funding to federally eligible children insufficient to “cover” the costs of providing the enumerated items.

The State does not dispute any of the district court’s findings. The State does not dispute that California’s RCL system does not distinguish between children on the basis of federal eligibility. Nor does it dispute that group homes often do not know the eligibility status of children the State is placing in their home at the time of placement. Most importantly, the State does not dispute the district court’s conclusion that to be in compliance with the Child Welfare Act and “cover” the costs enumerated therein under the State’s current system, the State must pay adequate rates to federally eligible and non-federally eligible children. Instead, the State asserts two arguments based on the fundamentally false premise that the district court concluded that non-federally eligible children are entitled to full funding under the Child Welfare Act. The State’s arguments are meritless.

First, the State argues that the district court exceeded its jurisdiction by enjoining the rate cuts to non-federally eligible children. (Opening Brief at 19-26.) The Alliance agrees that it sought relief under only federal law, and that the Ninth Circuit’s Opinion in *Allenby* did not expand the district court’s jurisdiction. But contrary to the State’s characterization of the injunction, the district court did not provide relief under state law, and it did not expand its own jurisdiction. Instead, it

tailored the injunction to ensure that California's system *covers* the costs for the federally eligible children, as the Child Welfare Act mandates.

Specifically, under California's current system, federally eligible children and non-federally eligible children are placed together, housed together and fed together. Even if the State maintains rate levels for the federally eligible children, unless rate levels are also maintained for the non-federally eligible children, the result is that the average rate per federally eligible child will fall below the amount necessary to "cover" the costs required by the Child Welfare Act. Consequently, California will continue to deprive federally eligible children of funds sufficient to cover the costs of care that the Child Welfare Act mandates. To be sure, the district court found that the 10% rate cut to non-federally eligible children would result in a 4.1% cut in benefits to federally eligible children. (ER 18; CR 67.) If the State is permitted to cut rates by 10%, there is nothing to stop it from reducing the rate to 50%, or even cutting funding completely for non-federally eligible children, thereby reducing the benefits to federally eligible children even further. Thus, the district court did not find that non-federally eligible children were entitled to anything under the Child Welfare Act, but only that cutting funding to non-federally eligible children would deprive federally eligible children of the mandated funds.

The State's reliance on *Harris v. McRae*, 448 U.S. 297 (1980) in support of its jurisdiction argument is misplaced because *Harris* did not involve the situation presented here. In *Harris*, the Supreme Court held that states receiving Medicare funding were not required to fund abortions for which federal reimbursement was unavailable under the Hyde Amendment. *Harris*, 448 U.S. 309-10. Because Medicare funding is provided on a procedure by procedure basis, a state's refusal to pay for an abortion did not have any effect on funding for covered procedures. *Id.* at 308-09. Thus, *Harris* is inapplicable here because California has chosen to establish a foster care system where any cuts to funding for non-federally eligible children would result in inadequate rates being paid on behalf of federally eligible children.

The holding of *Allenby* also does not support the State's jurisdictional argument. (Opening Brief at 23.) To the contrary, *Allenby* makes clear that the State is required to cover *all* of the costs required by the Child Welfare Act, and not just some portion of those costs as the State now attempts to do. *Allenby*, 589 F.3d at 1021. The district court was correct in holding that California does not distinguish between federally eligible and non-federally eligible children, therefore, cutting rates for non-federally eligible children will result in a *de facto* rate cut for federally eligible children. This is precisely the outcome *Allenby* prohibits.

Second, the State's argument that the relief is outside the scope of the pleadings is also meritless. The district court did *not* base its decision on California law. Rather, the district court found that under the current California system, any cuts to funding for non-federally eligible children would bring funding for federally eligible children out of compliance with the Child Welfare Act. The State created the RCL system and the State treats federally eligible and non-federally eligible children the same. The State has had nearly a year since the injunction was issued to develop a new system that separates federally eligible and non-eligible children, but has chosen not to do so. It cannot rely on its own failure to justify depriving federally eligible children of the full funding required by the Child Welfare Act.

B. The District Court Did Not Violate The Eleventh Amendment

The State asserts that “[t]o the extent that [the preliminary injunction] purports to require the State to increase spending on foster care group homes beyond the amount supported by the [Child Welfare Act] . . . , the preliminary injunction violates principles of sovereign immunity reflected in the Eleventh Amendment.” (Opening Brief at 26.) In other words, the State does not argue that the preliminary injunction as it relates to federally eligible children violates the Eleventh Amendment, but merely suggests that the inclusion of non-federally

eligible children pushes it into impermissibility. That is incorrect. The preliminary injunction does not require the State to increase spending on foster care group homes beyond the amount the Child Welfare Act supports. Rather, the district court held that under the State's current RCL system, rates must be maintained for both federally eligible *and* non-federally eligible children so that the rates for the *federally eligible children* comply with the Child Welfare Act and the Ninth Circuit's decision in *Allenby*. This is entirely consistent with the *Ex Parte Young* exception to the Eleventh Amendment.

The *Ex Parte Young* doctrine is an exception to the general principle of Eleventh Amendment sovereign immunity. *Western Mohegan Tribe and Nation v. Orange County*, 395 F.3d 18, 22 (2d Cir. 2004) (citing *Ex Parte Young*, 209 U.S. 123, 155-56 (1908)). It allows a suit for injunctive or declaratory relief challenging the constitutionality of a state official's actions where the complaint alleges an ongoing violation of federal law and, like here, seeks only prospective relief. *Id.* Such prospective relief is allowed, even if it would require the State to make additional expenditures. *Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (holding that the *Ex Parte Young* exception "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury"); *Cardenas v. Anzai*, 311 F.3d 929, 937 (9th Cir. 2002) (finding that under the *Ex Parte Young* doctrine the court

could require state to disburse higher percentage of future settlement payments it received on behalf of injured parties). Because the district court's injunction seeks only to ensure compliance with the Child Welfare Act by preventing dilution of funding to federally eligible children that inevitably occurs when funding is cut to non-federally eligible children, it falls within the *Ex Parte Young* exception and therefore does not violate the Eleventh Amendment.

In sum, while the State makes several arguments in its Opening Brief, it never addresses the district court's reasoning for enjoining the State from cutting rates for both federally eligible and non-federally eligible children. The district court did not base its decision in state law, but rather determined that under the State's current system rates cannot be cut for non-federally eligible children in foster care group homes to ensure that the federally eligible children receive the full amount of funds that the Child Welfare Act requires. This was not an abuse of discretion.

VII. CONCLUSION

Based on the foregoing, the Alliance respectfully requests that the Court affirm the district court's order granting the preliminary injunction.

DATED: November 19, 2010 Bingham McCutchen LLP

By: s/ William F. Abrams

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CALIFORNIA ALLIANCE OF CHILD AND
FAMILY SERVICES

STATEMENT OF RELATED CASES

To the knowledge of counsel, the following cases are related to this case:

(1) *California Alliance of Child and Family Services v. Allenby et al.*, Case No. 08-16267, 589 F.3d 1017 (9th Cir. 2009) (*Allenby*), wherein this Court reversed the district court order granting summary judgment in favor of defendants and directed the district court to enter an order granting summary judgment in favor of plaintiff.

(2) *California Alliance of Child and Family Services v. Allenby et al.*, Case No. 10-15593, which involves an appeal of the judgment and permanent injunction that was entered following this Court's decision in *Allenby*.

(3) *California Alliance of Child and Family Services v. Wagner et al.*, Case No. 09-17649 (*Alliance II*), wherein this Court denied the State's first request for a stay of the district court's preliminary injunction order in this case.

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