

No. 09-17649

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA ALLIANCE OF CHILD
AND FAMILY SERVICES,

Plaintiff,

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.

On Appeal from the United States District Court
for the District of California

No. CV 09-4398 MHP
The Honorable Marilyn H. Patel, Judge

APPELLANTS' OPENING BRIEF

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STATEMENT OF JURISDICTION

This is an appeal of a preliminary injunction entered November 18, 2009, the scope of which was modified by an order that issued on December 18, 2009¹. The District court had subject matter jurisdiction of the matter under 28 United States Code §1331.

Defendants-Appellants John Wagner and Gregory Rose (the State) filed their notice of appeal as to the preliminary injunction with the district court on November 19, 2009 (DD 59, ER 145); and filed their notice of appeal as to the order modifying the scope of the preliminary injunction with the district court on December 29, 2009 (DD 68, ER 98). This Court has jurisdiction under 28 United States Code § 1292 (a).

ISSUE PRESENTED

Did the district court err in directing the State to make foster care maintenance payments for all foster children in California at rates required under the federal Child Welfare Act² because the district court did not have

¹ The Memorandum and Order Re: Plaintiff's Motion for a Preliminary Injunction (District Court [electronic] Docket Document (DD) 57) from which this appeal was taken, is reproduced at Excerpt of Record (ER) 21-36. The modifying Order Re: Scope of Preliminary Injunction (DD 67) is reproduced at ER 16-20.

² The Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272), 42 U.S.C. §§ 670-679b (CWA).

and does not have the authority to require the State to expend its funds as to state-only program?

STATEMENT OF THE CASE

Plaintiff-appellee California Alliance of Child and Family Services (Alliance), a trade association representing operators of foster care group homes, filed this action on September 18, 2009, contending that the newly enacted budget for fiscal year 2009-2010 that was to reduce by 10 percent, effective October 1, 2009, the amount of payments under California's standardized schedule of rate payments to foster care group homes (the RCL system) was unlawful. Specifically, the Alliance contended that California Welfare and Institutions Code §11462 (g) (5), the statute enacting the budget reductions, is preempted by the federal Child Welfare Act (CWA) under the Supremacy Clause of the United States Constitution.

The September 2009 action basically re-crafted an action that the Alliance brought in 2006 -- *California Alliance of Child and Family Services v. Allenby*, No. C 06-04095 MHP (Alliance I), in which the district court found that the State's Rate Classification System (RCL) system was in substantial conformity with the CWA, notwithstanding the fact that the level of foster care maintenance payments made by the State to foster care group home operators had not kept pace with the costs index that the state statute

had conditionally pegged as the benchmark for payment increases over time.³ The primary factual difference between *Alliance I* and the case at bar is that in the instant case the Alliance assails a budget cut required under the State's Budget Act of 2009, while *Alliance I* challenged the RCL system's basic ability to track cost-of-living increases in foster care maintenance payments.⁴

Specifically, in the instant case the Alliance sought injunctive relief to prevent the State from implementing a 10 percent reduction in the RCLs as legislatively mandated by the Budget Act of 2009 -- and set forth at Welfare and Institutions Code §11462 (g) (5)⁵ -- that was scheduled to go into effect

³ Summary judgment was granted to the State defendants by the district court in *Alliance I*. The Alliance's appeal of *Alliance I* resulted in a reversal of the order granting judgment for the State and the remand of the case to the district court on December 14, 2009, in *California Alliance of Child and Family Services v. Cliff Allenby, et al.*, 589 F.3d 1017 (9th Cir. 2009) (*Allenby*), for entry of judgment. The judgment thereafter entered on February 24, 2010, by Judge Patel following remand of the action is itself the subject of a pending appeal before this Court in *California Alliance of Child and Family Services v. Allenby, et al.*, Case No. 10-15593, which has been briefed but not yet calendared for oral argument.

⁴ Although the named defendants are different in the 2009 action from the 2006 case, the parties are essentially identical: the Alliance as an entity in both actions sued the director of the California Department of Social Services (CDSS) and his deputy director of the Children and Family Services Division of CDSS, in their official capacities.

⁵ The basic RCL rate schedules are set forth in Welfare and Institutions Code §11462 (f) (1). The pre-*Allenby* payment per child per
(continued...)

on October 1, 2009. The statutory reduction stemmed from California's historic fiscal emergency, which was at the root of the Budget Act of 2009 that revised the State's budget for fiscal year 2009-10.

Following briefing and supplemental briefing by the parties, and several hearings, the district court issued a temporary restraining order on November 4, 2009, enjoining implementation of the budget reduction statute and set a briefing schedule as to the motion for a preliminary injunction. (Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction (DD 45, ER 94-97).)

On November 13, 2009, after additional briefing and another hearing, the district court granted the Alliance's motion for preliminary injunction in a ruling from the bench. The district court thereafter denied appellants' verbal request for a stay of the injunction pending appeal, but invited appellants to seek review of her decision denying the stay.

On November 18, 2009, the district court issued its Memorandum & Order, which stated:

Pending final adjudication of the merits of the instant action, ... defendants ... are HEREBY ENJOINED

(...continued)

month could be as high as \$6,694 at RCL 14; post-*Allenby*, RCL 14 is set at \$8,974 per child per month.

AND PROHIBITED from implementing the ten percent reduction in the standardized schedule of rates for each RCL provided at California Welfare and Institutions Code § 11462(g)(5), such reduction having been approved in Assembly Bill ABX 44, filed with the Secretary of State on July 28, 2009, and Senate Bill 597, filed with the Secretary of State on October 11, 2009, as part of the Budget Act of 2009.⁶

In addition to the grant of the preliminary injunction, the district court's Memorandum and Order stated: "Counsel 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. This raises the question whether any funding scheme for foster care maintenance payments that discriminates against federally eligible and non-federally eligible children can be carried out under California's system." (DD 57, at ER 34, lines 20-24.) The district court also ordered the State to submit a plan for determining the amount of foster care maintenance payments for each group home that would satisfy its order as well as additional briefing on other issues. (*Id.*, at ER 34: 24-ER 35:2.)

The State defendants filed their notice of appeal with the district court on November 19, 2009 (DD 59, ER 145). On November 24, 2009, the State

⁶ November 18, 2009 Memorandum and Order Re: Plaintiff's Motion for a Preliminary Injunction (DD 57, at ER 34, lines 5-15).

defendants filed an emergency motion for a stay of the preliminary injunction pending appeal with this Court, which denied the motion on December 10, 2009 and stayed appellate proceedings as to the preliminary injunction.⁷

On December 9, 2009, the State submitted to the district court a filing including an instructional letter to county welfare directors and other officials involved in the administration of foster care group home programs in California's 58 counties setting out two separate payment schedules for group home residents, one for federal eligible children and one for non-federally eligible children. (DD 63, ER 131.) The Alliance objected to the State's filing on December 15, 2009, and included with its objection a copy of this Court's decision in *Allenby*, which had issued the previous day (DD 66, ER 100). That opinion reversed the district court's March 12, 2008 decision that the State was in substantial compliance with the CWA, and

⁷ The motion was denied without prejudice to renewing it after a decision by the Court issued in *California State Foster Parent Association, et al. v. John Wagner, et al.*, No. 09-15051, where the issue was whether a private right of action exists to enforce the Child Welfare Act; oral argument in that action took place in this Court on December 7, 2009, in the midst of the proceedings in the instant case. This Court's opinion in that case was published on August 30, 2010, and the State filed a petition for rehearing *en banc* on September 20, 2010.

remanded the matter to the district court to determine the proper scope of declaratory and injunctive relief (*id.*, ER 116).

Following the submissions of the parties in response to the November 18, 2009 Memorandum and Order, the district court on December 18, 2009, entered an order revising the scope of the preliminary injunction. After noting that “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 other items enumerated in the CWA, see 42 U.S.C. §675(4)(A), the effect of the State’s current plan is to cut benefits to federally eligible children by 4.1%, in contravention of the court’s preliminary injunction order.” (Order Re: Scope of Preliminary Injunction, DD 67, ER 18 at lines 9-13.) The district court reiterated its order of November 18, 2009 enjoining the 10 percent reduction, and added the following language: “Implementation of such reduction is enjoined in relation to federally eligible children and non-federally eligible children.” (*Id.*, lines 15-25.) The State defendants filed their notice of appeal as to the order modifying the scope of the preliminary injunction with the district court on December 29, 2009 (DD 68, ER 98).

On September 29, 2010, this Court lifted its December 10, 2009 stay of appellate proceedings in the preliminary injunction appeal. (DD 79, ER 1.)

STATEMENT OF FACTS

A. Factual Background Regarding Foster Care Funding.

The Foster Care Rates Bureau of the California Department of Social Services (CDSS) is responsible for overseeing statewide policies related to applicable CWA and Title IV-E eligibility provisions, revisions, and maintenance of California's State Plan under Title IV-E, and providing technical assistance and oversight of eligibility and funding aspects of the foster care program administration in all 58 counties of California. (Decl. of Debra Williams in Support of Opposition to Motion for Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction (Williams Decl.), ¶ 2 (DD 25-1, at ER 509)).

The United States Department of Health and Human Services' (HHS) Administration for Children and Families provides oversight of state child welfare services and foster care programs under the CWA. HHS develops and implements national policy by issuing regulations, overseeing states' performance, and conducting compliance audits. It also allocates federal funds for child welfare and related programs to state, county, city, and tribal governments, and to public and private local agencies. (Williams Decl., ¶ 3, DD 25-1, at ER 509.)

Not all foster care children in California qualify for benefits under the CWA. Section 672 of the Act outlines the specific requirements a child must meet in order to qualify for federal funding under the CWA in a state with a plan approved by HHS, such as California. (42 U.S.C. § 672.) In fact, California receives no federal monies for approximately 41 percent of the foster care children in group homes in the state. (DD 57, ER 26:25-26, citing Decl. of Hafida Habek in Support of Opposition to Motion for Preliminary Injunction (Habek Decl.), ¶32 (DD 52, at ER 193-194).) The entirety of foster care maintenance payments for these non-federally eligible children comes from the State and its 58 individual counties, without any federal financial participation.⁸

Despite the fact that California does not receive any federal funds for more than two-fifths of the children in foster care group homes, the State has chosen to provide benefits to those children without any federal assistance, and to date has chosen to pay the same amount to foster care group home

⁸ The State's statutory authority for foster care programs is set forth at California Welfare Institutions Code §§ 11460 et seq. State and county payments to foster care providers – as distinguished from those supported by the CWA -- comes from California Welfare & Institutions Code § 11460(a), which also requires that State functions shall be performed by CDSS or by delegation of CDSS to county welfare departments. The Alliance did not bring its lawsuit under any this or any other provision of state law governing state-only funded foster care.

operators for the federally ineligible children as is paid for those who are federally eligible for financial benefits under the CWA.

CDSS is California's state agency responsible for child welfare services. CDSS supervises California's 58 counties' administration of child welfare services and foster care programs through statutes, regulations, policies, and compliance reviews. CDSS also allocates federal and state funds to all California's counties. (Williams Decl., ¶ 4, DD 25-1, at ER 509.) California's foster care group home rates are set by the State's Legislature, as set forth in Welfare and Institutions Code section 11462, and changes to those rates are made by the State Legislature by amendments to that statute. (*Id.*, ¶ 5, DD 25-1.)

The foster care group home payments rates system set by the Legislature is based on the RCL point system that measures the number of "paid awake" hours worked each month by a group home program's child care and social worker staff and their first-line supervisors. The point system also counts the number of hours of mental health treatment services received by the children in the program, although these services are funded by another state agency, the Department of Mental Health, and do not have to be paid for by the provider. These hours are then weighted to reflect the experience, formal education, and ongoing training of the child care staff

and the qualifications of the social work and mental health professionals. These weighted hours are then divided by 90 percent of the program's licensed capacity (that is, the number of foster children within a given group home) to compute the program's RCL points. The higher the points, the higher the RCL reimbursement. Consistent with their program statements, group homes can access additional funding sources such as the Early & Periodic Screening & Diagnostic Treatment (EPSDT) Program, which is a Medi-Cal program), and education funds. Group homes may also apply for grants, and conduct fundraising. (Williams Decl., ¶ 6, DD 25-1, at ER 509-510.)

Subsequent to the filing of [the first *California Alliance of Child and Family Services v. Allenby* action in 2006], Senate Bill (SB) 84, Chapter 177, Statutes of 2007, provided a five percent increase in the wages and benefits for group home providers, which became effective January 1, 2008. Thereafter, Assembly Bill (AB) 4, Chapter 4, Statutes of 2009, added section 11462 (g)(5) to the Welfare & Institutions Code (the code section that is the subject of the instant preliminary injunction), creating the 10 percent decrease in RCLs effective October 1, 2009. Thus, the Legislature's 10 percent reduction was enacted after the RCLs had been increased by the five

percent provided by SB 84 effective January 1, 2008. (See Williams Decl., generally, ¶¶ 8-9, DD 25-1 at ER 510.)

At the same time it created the 10 percent RCL reductions, AB 4 also continued an adjusted rate schedule for 2009-2010; that adjusted rate schedule is based on the same determination of points described above, but allows providers to more easily meet their RCL points by allowing them flexibility to make a proportionate adjustment to their staff expenses. For example, a group home may choose to reduce the number of hours spent by staff, or reduce the level of education and/or experience of child care, social work, and mental health workers it employs, thereby offsetting the statutory rate reduction. By such choices, a program can be funded at a higher RCL rate level than is reflected by the degree of services it provides thereby, as a practical matter, diminishing or even negating altogether the effect of the budget cutbacks. In other words, the decrease described above is offset by the extension of this rate adjustment schedule. This effectively allows the group home providers to adjust services and reduce expenses while retaining the same level of payment. (Williams Decl., ¶ 10, DD 25-1 at ER 510-511.)⁹

⁹ In addition to the rate relief described above, SB 597, which became law on October 11, 2009, allows an even greater adjustment to points necessary to meet a given paid RCL. (See Williams Decl., ¶ 11, DD 25-1 at (continued...))

Although the district court was aware, prior to the entry of the preliminary injunction on November 18, 2009, that only some 59 percent of foster care group home residents in California met the eligibility requirements under the CWA (see discussion by district court entitled “Federal Eligibility” at DD 67, ER 26:24-25:2), it did not include in its November 18th order any specific directive enjoining the 10 percent budget reduction in foster care maintenance payments as to the 41 percent of non-federally eligible children. Such a directive was explicitly incorporated into the injunction only when the November 18th order was amended and superseded by the December 18, 2009 Order Re: Scope of Permanent Injunction. (Order Re: Scope of Preliminary Injunction, DD 67, ER 16-20.)

B. Judicial Decisions Postdating the Preliminary Injunction.

Since the entry of the preliminary injunction two significant opinions have issued from this Court in cases either directly or closely related to the

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ER 511.) The district court did not exactly embrace the State’s argument that this adjustment provided palpable benefits to group operators, stating: “While SB 597’s adjustment of point ranges may reduce the group home’s overhead, it does not appear to blunt the impact of the budget reduction upon the foster children in group homes.” (November 18, 2009 Memorandum and Order Re: Plaintiff’s Motion for a Preliminary Injunction, DD 57, at ER 30, lines 12-14.)

case at bar, though aspects of each opinion still remain yet to be definitively resolved.

First, on December 12, 2009 – after the district court first issued the preliminary injunction on November 18th but prior to issue of the order amending and superseding the preliminary injunction on December 18th – this Court published its opinion in *Allenby*.¹⁰ In that decision, this Court held that California was not in conformity with the CWA because the State was not following the requirements of its own, federally approved state plan as to funding of foster care group homes. This was so because the State’s plan incorporated a cost-indexing system to provide for increases in foster care maintenance payments, but that the State’s failure to consistently adhere to that cost-indexing system resulted in the State failing to provide sufficient foster care maintenance payments to “cover the costs” expended by group home operators in providing the items set forth in the CWA.¹¹

Second, on August 30, 2010, this Court issued its opinion in *California State Foster Parent Ass’n v. Wagner* (2010 U.S. App. Lexis 18117), which

¹⁰ *California Alliance of Child and Family Services v. Cliff Allenby, et al.*, 589 F.3d 1017 (9th Cir. 2009)

¹¹ As discussed in note 3, *post*, the judgment subsequently entered by the district court on remand following the reversal of the district court’s grant of summary judgment to the State defendants is itself on appeal before this Court, with the briefing completed but oral argument yet to occur.

held that the CWA creates a private right of action enforceable under 42 U.S.C. § 1983.¹² And, pursuant to this Court's December 10, 2009 order denying the State defendants' November 24, 2009 emergency motion for a stay of the preliminary injunction, the publication of the *Wagner* decision also opened the window for the State defendants to renew their motion for a stay. That motion was renewed and subsequently denied on September 29, 2010, in an order that in addition lifted the stay on appellate proceedings and resulted in the instant appeal. (See Order, DD 79, ER 1-2.)

SUMMARY OF THE ARGUMENT

The preliminary injunction entered by the district court exceeds the scope of the pleadings, the district court's jurisdiction, the conclusions of this Court's *Allenby* opinion, and impermissibly requires the expenditure of State monies.

¹² The State defendants filed a petition on September 20, 2010, for rehearing *en banc* of *Wagner*, seeking reconsideration of the finding that the CWA creates a private right of action enforceable under 42 U.S.C. § 1983 on the ground that this Court used an incorrect standard in determining that the provisions of the CWA at issue were privately enforceable. As of the date this opening brief was filed no decision had yet issued from the Court as to that petition.

Additionally, to the extent the preliminary injunction compels the State to pay funds beyond those required under the federal CWA, it is barred by principles of sovereign immunity reflected in the Eleventh Amendment.

ARGUMENT

I. THE PRELIMINARY INJUNCTION ENTERED BY THE DISTRICT COURT EXCEEDS THE SCOPE OF THE PLEADINGS, THE DISTRICT COURT'S JURISDICTION, AND THIS COURT'S DECISION IN THE *ALLENBY* CASE.

A. Introduction

The district court granted the Alliance's motion for a preliminary injunction more than 11 months ago, the State's emergency motion for a stay of that injunction pending appeal and request for an expedited appeal was filed nearly 11 months ago, and this Court's order denying that emergency motion and request for an expedited appeal and staying appellate proceedings on the injunction was denied on December 10, 2009. This Court's order lifting the stay on appellate proceedings on the injunction issued on September 29, 2010.

Since the time the injunction was entered, two decisions of this Court have significantly altered part of the judicial landscape upon which the foundation of the State's November 9, 2009 opposition to the motion for preliminary injunction was built; *California Alliance of Child and Family*

Services v. Allenby, on December 14, 2009, and *California State Foster Parent Association, et al. v. Wagner, et al.*, on August 30, 2010. *Allenby*, in particular, has significance with respect to several findings in the injunction.

In *Allenby*, this Court ruled that while the CWA did not require the State to adopt any particular system for arriving at the amount to be reimbursed for foster care maintenance costs, under the system the State had adopted to meet the requirements of the CWA in determining the amount of foster care maintenance payments it made – the RCL system -- the State had to cover the costs as they rose over time as determined by the cost index built into the RCL. *Allenby*, 589 F.3d at 1022.

In its decision granting the motion for an injunction (DD 57, ER 21), the district court discussed and rejected several bases advanced by the State as to why the district court should not issue an injunction.

First, the State had challenged the Alliance's theory that the CWA preempted California's Welfare and Institutions Code §11462 (g) (5) under a Supremacy Clause analysis, because there is no express preemption clause in the CWA nor any component in the CWA that impliedly preempts California's power to set payment rates or make reductions to those rates. The district court rejected the State's contention, finding that the Alliance was likely to prevail on the preemption issue because 10 percent rate

reduction would frustrate Congress's "unambiguous purpose" in the CWA to "cover the costs." (DD 57, ER 28-29.)

Also dismissed was the State's argument that the district court could not determine whether the State was in conformity with the CWA because it was the role of the Secretary of the Department of Health and Human Services to so determine. The district court found that judicial review of the question of substantial compliance was not precluded. (DD 57, ER 29.)

It would seem that *Allenby* effectively validates these two findings of the district court: by holding that the California had to "cover the costs" and that the system the State had adopted to comply with the CWA had a mechanism to do so, this Court effectively sustained the district court on the preemption and judicial review of substantial conformity issues. However, these issues are tied explicitly to the federal CWA: nothing in the district court's order and nothing in *Allenby* supports any extension of these findings to group home residents who are not covered by the CWA. And, for all of the reasons set forth below, nothing in the district court's Order Re: Scope of Preliminary Injunction (DD 67, ER 16-20), which squarely addressed the matter of federally eligible and non-federally eligible children, changes that fact. Accordingly, even to the extent the district court's preliminary injunction is sustainable as to the federally eligible group home residents, it

is unsustainable as to the non-federally eligible residents. Funding for these non-federally eligible residents is provided by state and county funds alone, without federal financial participation under the CWA or otherwise, and those funding sources are subject to the budget reductions of California's 2009 Budget Act. The district court simply lacks the jurisdiction over the State as to matters beyond the CWA here, and cannot prevent the State from implementing the reductions required by the Budget Act.

B. Standard of Review

A preliminary injunction must be supported by findings of fact, reviewed for clear error. See *Independent Living Center of Southern California, Inc. v. Shewry*, 543 F.3d 1050, 1055 (9th Cir. 2008); *Hawkins v. Comporet-Cassani*, 251 F.3d 1230, 1239 (9th Cir. 2001). The district court's conclusions of law are reviewed de novo. See *Shewry*, 543 F.3d at 1055; *Brown v. California Department of Transportation*, 321 F.3d 1217, 1221 (9th Cir. 2003).

C. The District Court Lacks Jurisdiction to Enjoin the Budget Reductions Required by the Budget Act of 2009

Implicit in the preliminary injunction is the district court's assertion of a valid legal basis to support the injunction's directives. However, neither

the pleadings nor *Allenby* supports extending the scope of the injunction beyond foster care maintenance payments directly linked to the CWA.

1. The Alliance's Original Pleading

The Alliance's September 18, 2009 complaint (DD 1-1, ER 539) framed this action, as does any complaint. "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

Nowhere in the complaint did the Alliance seek to have this matter adjudicated under California's state laws. The Alliance's complaint was based entirely on federal law – the provisions of the Child Welfare Act -- "under 42 U.S.C. § 1983." The Alliance sought relief "pursuant to 28 U.S.C. § 2201" on the sole theory that the RCL system implemented by the State defendants "violates Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679b . . . and its implementing regulations[,]'" and averred that the district court had jurisdiction pursuant to 28 U.S.C. § 1343(a)(3)." (ER 543:2-13.)

Further, in its specific allegations against the State defendants, the Alliance sought relief only under federal law: First, in Count I, the Alliance

alleged that the State defendants failure to “substantially comply with the CWA’s “mandated factors in setting rates for foster care maintenance payments deprives the Alliance’s member group homes of their federal rights, privileges and immunities under color of state law in violation of 42 U.S.C. § 1983.” (ER 548:26-549:2.) Second, in Count II, the Alliance alleged that the State defendants would continue to violate the CWA if the district court did not enjoin the State defendants. (ER 549:13-20.)

Moreover, in its prayers for relief, the Alliance sought relief only under federal law, the CWA. (ER 549:26-551:2.)

These federal-only claims were made notwithstanding the Alliance’s unambiguous averment that State defendant “Wagner is responsible for implementing the policies contained in the approved state plans and assuring DSS’ compliance with state and federal law.” (ER 542:12-13.) In that the Alliance is an association, incorporated in California, that represents and advocates for foster care group home operators in a variety of ways, including matters relating to the State of California (ER 541:11-14), it can hardly be gainsaid that it was unaware of the independent significance of California law to the foster care group home industry, or unaware of the fact that not all foster care group home residents in California are eligible for benefits as set forth under the federal CWA. Nonetheless, the Alliance’s

complaint did not state a cause of action for the violation of any state law, and thus did not need to ask the district court to exercise supplemental jurisdiction under 28 U.S.C. § 1367 or by any other means.

2. The Pleadings Dictate District Court Jurisdiction

The district court's jurisdiction necessarily depends on the pleadings of a party. See Rule 8, Federal Rules of Civil Procedure. The Alliance's complaint, as detailed above, was based on federal law with references to the State's Budget Act of 2009, with no state law as a basis for relief. First, the Alliance sought relief pursuant to 28 U.S.C. § 2201, which by its own terms restricts remedies as to which a federal court can issue declaratory relief to those "within its jurisdiction" (*id.*) Second, the Alliance based its claim of subject matter jurisdiction in the district court on 28 U.S.C. § 1343(a)(3), which states -- in concert with 28 U.S.C. § 1343(a) recitation that "district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person" -- that it applies to "any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress" (*Id.*) The CWA is undeniably an "Act of Congress." 28 U.S.C. § 1343 itself does not extend a district court's jurisdiction beyond federal law.

Thus, on the face of the pleadings before it, the district court's jurisdiction was limited to provisions of the federal CWA, and the district court's power to issue relief was likewise limited to that it could issue on the basis of the provisions of the CWA.

3. *Allenby* Does Not Expand the District Court's Jurisdiction

Even though this Court's decision in *Allenby* did not issue until after the preliminary injunction first issued in November 2009, there is nothing in that case that would lend support to the overly broad injunctive relief ordered by the district court. To the contrary, *Allenby* supports a curtailment of the injunction.

Allenby had as its foundation the district court's Memorandum and Order of March 12, 2008, which necessarily stemmed from the pleadings in the Alliance's original complaint. As with the 2009 complaint, there was nothing in the 2006 complaint stating any cause of action under state law and, as follows, there was no state law cause of action for the district court to rule upon. Consequently, there was no state law cause of action before this Court in *Allenby*, and nothing in that opinion increased or expanded the jurisdiction of the district court as to the complaint or provided a basis for

the district court to extend its *Allenby*-based judgment to matters outside the purview of the CWA upon which the complaint was based.

As Judge Rymer, speaking for the Court, wrote in *Allenby*, “The CWA, codified as 42 U.S.C. §§ 670-679b, was enacted in 1980 and creates an opt-in scheme whereby states can receive federal funding to assist in the costs associated with raising children who are dependents or wards of the state.” *Allenby*, 589 F.3d at 1018. She further explained that a state must first submit a plan to the Secretary of DHHS that, among other things, “must ‘provide[] for foster care maintenance payments in accordance with’ other provisions of the CWA[,]” and must also “designate a state agency to administer the plan once approved, and agree to amend its plan to comply with changes made to the CWA or other applicable federal law.” *Id.*

Judge Rymer then adds: “The CWA further provides that any state with an approved plan ‘shall make foster care maintenance payments *on behalf of each’ qualifying child.*” *Allenby* at 1018, emphasis added. This requirement – that for a child to benefit from federal funding under the Act, she or he must qualify for that funding – has always been fundamental to the federal funding participation for state foster care. See, for example, *Miller v. Youakim*, 440 U.S. 125 (1979), where Justice Marshall wrote -- in ruling that Illinois could not exclude from its AFDC-FC (foster care) program children

who resided with relatives as compared to those residing with unrelated persons -- that “[a] participating State may not deny assistance to persons who meet eligibility standards defined in the Social Security Act unless Congress clearly has indicated that the standards are permissive.” *Id.* at 133, emphasis added. Thus, both the broad scope of federal foster care financial funding and the inclusiveness of potential beneficiaries begin with meeting the eligibility standards set by the federal government.

Here, while 59 percent of the group home residents meet those eligibility standards under the CWA – and thus are subject to this Court’s ruling in *Allenby*, that under the system the State has chosen, the State must also employ the cost-indexing mechanism built into the system to cover the rising costs of maintenance payments – the remaining 41percent do not meet the standards and are *not* subject to *Allenby*. California has chosen to support foster care services more expansively than required by the CWA, but federal courts cannot compel further expansiveness of the State’s generosity on the basis of the federal Act. See, for example, *Harris v. McRae*, 448 U.S.297 (1980). There, in the context of Medicaid – Title XIX of the Social Security Act that, like Title IV-E of the Social Security Act at issue here, is another program in which states and the federal government share in the costs of providing social welfare services -- the Supreme Court

noted: “Title XIX was designed as a cooperative program of shared financial responsibility, not as a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund.” (*Id.* at 309.) Similarly, the federal courts should not use the CWA here to prevent California from exercising control over its state-only foster care program that receives no financial support from the federal government.

No other part of the *Allenby* decision otherwise supports the district court’s extra-jurisdictional injunction, either. Again, the basis for this Court’s reversal of the district court’s grant of summary judgment for the State defendants and remand for determination of the proper scope of declaratory and injunctive in *Allenby* was clear: “Because the State is not covering the costs required by the CWA” *Allenby*, 589 F.3d at 1023, emphasis added. The requirements of the CWA do not and cannot extend to compelling the State defendants to disregard and violate valid state law as to group home residents who simply do not meet the CWA’s eligibility standards.

D. The Preliminary Injunction Violates Principles of Sovereign Immunity Reflected in the Eleventh Amendment

In effect, the district court’s preliminary injunction requires that State defendants Wagner and Rose ignore the Legislature’s Budget Act of 2009,

as approved and signed by the Governor, which requires a 10 percent reduction in the RCL payment levels for foster care group homes. At its essence, the injunction requires the State to pay the increase with the state-only General Fund dollars with a contribution from the counties.¹³

To the extent that it purports to require the State to increase spending on foster care group homes beyond the amount supported by the CWA in concert with this Court's opinion in *Allenby*, the preliminary injunction violates principles of sovereign immunity reflected in the Eleventh Amendment.

The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

¹³ None of California's 58 counties is a party to this action. A county may pay rates higher than those dictated by statute; however, the portion of the rate that exceeds the state standard must be paid using county funds: California's Welfare and Institutions Code § 11460(e) states, "Nothing shall preclude a county from using a portion of its county funds to increase rates paid to family homes and foster family agencies within that county, and to make payments for specialized care increments, clothing allowances, or infant supplements to homes within that county, solely at that county's expense."

The Eleventh Amendment, and the concept of sovereign immunity inherent in it, “largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State’s own tribunals.” *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). An individual may, in limited circumstances, sue a state official for prospective injunctive relief under the Ex Parte Young exception to the Eleventh Amendment. See *Edelman v. Jordan*, 415 U.S. 651, 664–65 (1974) (describing the scope of the *Young* exception). This exception, however, does not apply to the relief ordered by the district court below.

Under the Supreme Court’s decision in *Young*, a state official may, in limited circumstances, be sued for prospective injunctive relief without running afoul of the Eleventh Amendment. The district court’s preliminary injunction, however, to the extent it requires increased rate payments to federally ineligible group home residents, does not involve injunctive relief for purposes of the Eleventh Amendment. Rather, it is a bare order to pay group home providers from the State Treasury in contravention of state law. The district court’s preliminary injunction would not have the sort of “ancillary” effect on the treasury contemplated by *Edelman*, 415 U.S. at 667–68, but requires the direct payment of funds as to non-federally eligible

group home children that -- unlike the payment of funds to federally eligible children -- is not a payment supported whatsoever by the federal CWA.

The Supreme Court has cautioned that the *Young* exception should not be interpreted in such a manner as to eviscerate the underlying protections of the Eleventh Amendment and state sovereign immunity. Even where state officials are being sued, “the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake.” *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997). The proper application of *Young* in this case must recognize that it is one thing to order payments for those eligible for benefits under the CWA children; it is an entirely different matter to effectively direct the payment of monies to those not eligible for CWA benefits, which is effectively what enjoining the state-law budget reductions does.

In other words, by extending the CWA’s federal benefits to those not eligible for them, the preliminary injunction in fact requires the direct payment of money from the State Treasury. Accordingly, that fact weighs heavily in favor of a finding that California’s sovereign interests are implicated. “Courts of Appeals have recognized the vulnerability of the State’s purse as the most salient factor in Eleventh Amendment determinations.” *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 at

48; see also *id.* at 49 (“[T]he state treasury factor is the most important factor to be considered . . . and, in practice, [courts] have generally accorded this factor dispositive weight.”). Consequently, the preliminary injunction should properly be viewed as against the State, not the Director or Deputy Director of CDSS, and thus violates the Eleventh Amendment and California’s sovereign immunity to the extent it extends beyond those group home residents not eligible for benefits under the CWA. “[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.” *Ford Motor Co. v. Department. of Treasury of Indiana*, 323 U.S. 459, 464 (1945). Thus, albeit the preliminary injunction by its own terms purports to provide only prospective injunctive relief, the fact remains that it is the State’s interests, not that of the named State defendants, that are paramount. “The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury...” *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981) at 101, n. 11. To “adher[e] to an empty formalism” in the instant case would render the Eleventh Amendment ineffective, and contravene the Supreme Court’s instruction “that Eleventh Amendment immunity represents a real limitation

on a federal court's federal question jurisdiction." *Coeur d'Alene*, 521 U.S. at 270.

Accordingly, to the extent the district court's preliminary injunction exceeds the scope of the CWA – which it undeniably does by purporting to extend federal benefits to the 41 percent of foster care group home children in California not eligible for those benefits – it violates the State's sovereign immunity, and thus violates the Eleventh Amendment.

CONCLUSION

For the reasons set forth above, the district court's preliminary injunction directing an increase in funding levels for *all* foster care group home residents in California exceeds the district court's jurisdiction. Therefore, this Court should direct that the preliminary injunction be amended to reflect the fact that only 59 percent of California's foster care group home residents are subject to the district court's authority to craft injunctive relief.

Dated: October 22, 2010

Respectfully submitted,

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No. 09-17649

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA ALLIANCE OF CHILD
AND FAMILY SERVICES,

Plaintiff,

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.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are two active cases with differing degrees of relationship to this case: the first is *California Alliance of Child and Family Services v. Allenby, et al.*, Case No. 10-15593, the State's appeal from the judgment filed February 24, 2010 is pending, with the matter fully briefed but no date yet set for oral argument; the second is issues in *California State Foster Parent Association, et al. v. John A. Wagner, et al.*, No. 09-15025, in which the State on September 20, 2010, petitioned this Court for rehearing en banc of its opinion of August 30, 2010, that 42 U.S.C. sections 672 and 675(4)(A) of the Child Welfare Act create

rights that are privately enforceable by foster parents under 42 U.S.C.
section 1983.

Dated: October 22, 2010

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR No. 09-17649**

I certify that: (check (x) appropriate option(s))

1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

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2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because

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4. **Amicus Briefs.**

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October 22, 2010

Dated

/s/ George Prince

George Prince

Deputy Attorney General