10-15593

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA ALLIANCE OF CHILD AND FAMILY SERVICES,

Plaintiff,

v.

CLIFF ALLENBY, Interim Director of the California Department of Social Services, in his official capacity; MARY AULT, Deputy Director of the Children and Family Services Division of the California Department of Social Services, in her official capacity,

Defendants.

On Appeal from the United States District Court
for the Northern District of California
No. C 06-4095 MHP
The Honorable Marilyn H. Patel, Judge

APPELLANTS' REPLY BRIEF

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INTRODUCTION

In its answering brief, appellee attempts to undermine appellants' (the State's) opening brief by contending that the State (1) set forth the wrong standard of review for its appeal, (2) waived its right to challenge the district court's judgment, and (3) incorrectly asserted that the district court used the Child Welfare Act (CWA) as the basis of its judgment that foster care maintenance payments for *all* foster care group home residents be increased, whether those residents were eligible or ineligible for benefits under federal law. However, appellee does not respond to the State's key point that the district court lacked jurisdiction to order the State to increase payments for foster children who are not eligible under the federal Child Welfare Act, the sole basis for appellee's challenge to the rates paid to foster care group home operators.

ARGUMENT

I. *DE NOVO* REVIEW IS THE APPROPRIATE STANDARD

Appellee first takes issue with the State's assertion that this Court should use the *de novo* standard of review for the district court's judgment. In appellee's view, the review of the district court's judgment should be based on an abuse-of-discretion standard (for a motion to amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure) or,

perhaps, under an abuse-of-discretion-or-erroneous-application-of-legal-principles standard for an injunction order. (Appellee's Answering Brief (AB), p. 22-23.) Not necessarily.

At a simplistic level, it is true that the district court treated the State's request for a modification of its February 24, 2010 judgment as a motion to amend the judgment under Rule 59(e) (ER 8, at lines 15-18), and that an abuse of discretion standard applies to a Rule 59(e) decision. *Duarte v. Bardales*, 526 F.3d 563, 567 (9th Cir. 2008). And, even if the State's challenge to the judgment were considered a motion for reconsideration under Rule 60(b) to which an abuse of discretion standard would also apply (*Pasatiempo by Pasatiempo v. Aizawa*, 103 F.3d 796, 801 (9th Cir. 1996)), that is not the end of the analysis in this case. Here, the issue is whether the district court exceeded its authority in ordering the State to increase payments in a state only funded program when appellee brought suit under federal law. The law in this circuit aptly recognizes that the *de novo* standard of review is appropriate for a judgment that exceeds the court's authority: "We review de novo, however, a district court's ruling upon a Rule 60(b)(4) motion to set aside a judgment as void, *because the question of the validity of a judgment is a legal one*." *Export Group v. Reef*

Industries, Inc., 54 F.3d 1466, 1469 (9th Cir. 1995), emphasis added. Accordingly, the *de novo* standard of review applies.

II. THE JUDGMENT IS PROPERLY UNDER CHALLENGE

Appellee next assails the State's appeal of the judgment on the theory that the State waived its objections to the judgment's inclusion of rate increases for non-federally eligible children because the State (1) did not move to vacate the district court's judgment and (2) did not object to the district court's inclusion of non-federally eligible children in the judgment before its entry. Neither contention is accurate.

A. "Waiver" of Issue as to Whether the Judgment Was Void

In the first part of its two-prong challenge, appellee contends that the State waived any argument that the judgment is void and should be vacated because it did not raise this issue in the district court by means of a Rule 60(b) motion. (AB, pp. 24-25.) However, the very authorities that appellee cites for this proposition belie it.

First, appellee refers to the Supreme Court's statement in *Singleton v. Wulff*, 428 U.S. 106 (1976) that "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Id*. at 120. However, following that statement the Court added:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, [citation] or where "injustice might otherwise result." [citation]

Id., at 121.

Appellee also relies on this Court's decision in *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992), for the "general rule" that "an appellate court will not hear an issue raised for the first time on appeal." Yet, the *Whittaker* decision followed its recitation of the "general rule" with a qualification: "Nevertheless, no 'bright line' rule exists to determine whether a matter has been properly raised below. 'A workable standard, however, is that the argument must be raised sufficiently for the trial court to rule on it.'" *Id*., internal citations omitted.

In the instant case, there is no question that the argument was raised in the district court – it was an integral part of the State's letter to the district court[1] that precipitated the district court's "Memorandum & Order Re: Defendants Request for an Amended Judgment" (ER-8) and subsequent

[1] For the convenience of the Court, a true and correct copy of the letter is included with this reply brief as Exhibit A.

Amended Judgment (ER-1). That the district court did not specifically address the issue in its memorandum does not mean it was not raised and therefore not before the district court; the matter was squarely before it.

Moreover, none of the three "waiver" cases cited by appellee (AB, p. 25) support its theory, either. In *Idaho Watersheds Project v. Hahn*, 307 F.3d 815 (9th Cir. 2002), the pertinent issue had to with the finality or not of a Bureau of Land Management decision and whether that deprived the district court of subject matter jurisdiction under the Administrative Procedures Act. That is not akin to the lack of federal jurisdiction whatsoever in the instant case, where a full 41 percent of the putative beneficiaries of the district court's judgment are simply not eligible for the federal benefits the judgment seeks to confer on them. And neither *Palmer v. U.S. Internal Revenue Service*, 116 F.3d 1309 (9th Cir. 1997) nor *Chicago Downs Association, Inc., v. Chase*, 944 F.2d 366 (7th Cir. 1991) provides substantive support to appellee's waiver argument.

In sum, even if the extra-jurisdictional nature of the judgment had not been raised in the district court -- as it was, and as the district court's memorandum implicitly recognized -- the authority cited by appellee in support of theory that the State waived any objection to the judgment militates for review. Both the Supreme Court's decision in *Singleton* and

this Court's opinion in *Whittaker* allow – if not demand – that important matters, even if not raised below, should still be subject to review.

B. "Waiver" of Objection to Inclusion of Ineligible Children

Appellee's second prong of its waiver argument is that the State's assertion that the judgment should be amended because it exceeds the district court's authority is improper because the State did not raise this issue until after the judgment was entered. The short answer to appellee's argument is that it lacks merit because it both (1) ignores the record and (2) discounts the district court's inherent discretion to manage its own case load.

First, as noted above, the issue was properly before the district court, regardless of when it was raised –the federally eligible-ineligible distinction was an integral part of the State's letter to the district court that precipitated the district court's "Memorandum & Order Re: Defendants Request for an Amended Judgment" (ER-8) and subsequent Amended Judgment (ER-1).[2]

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[2] Further, as the record in this appeal shows, the "eligible–ineligible" distinction was initially brought to the district court's attention on November 10, 2009, in a declaration filed in the companion case of *California Alliance of Child and Family Services v. Wagner, et al.*, U.S. District Court California Northern District 3:09-cv-04398-MHP, to which the district court referred in its November 18, 2009 Memorandum & Order Re: Plaintiff's Motion for a Preliminary Injunction. (See reference to Docket No. 52, Habek Decl., at Appellee's Supplemental Excerpt of Record (SER), SER15-16.) Due to the "cross-pollination" of that case with the case at appeal here,

(continued…)

Moreover, the fact that district court not only did not reject or otherwise deem in any way the State's letter improper, but in fact treated the letter as a Rule 59(e) motion and issued an order for additional briefing in response to the letter is precisely the type of appropriate judicial discretion that appellee's answering brief trumpets, and expects the district court to exercise.

Ironically, none of the cases appellee cites to buttress its proposition that the State waived its right to seek appellate review of the district court's judgment lends support to that proposition. Here, the State assails a judgment that simply exceeds the district court's power to enter, because it attempts on the basis of the CWA -- a *federal* statute with its basis in the *federal* Constitution's Spending Clause – to order the State to pay foster care maintenance payments for children who are not eligible to receive benefits under the *federal* CWA and for whom the State does not get any *federal* monies.

(…continued)
appellee's contention that the State had not made the "eligible-ineligible" argument to the district court prior to the February 24, 2010 judgment is specious. Judge Patel was aware of the contention more than three months in advance of the February 24, 2010 judgment, as her November 18, 2009 memorandum makes explicit.

None of appellee's cases present such basic jurisdictional issues. In *Janes v. Wal-Mart Stores, Inc.,* 279 F.3d 883 (9th Cir. 2002), the contention this Court found to have been waived was whether the existence of plaintiff's written agreement should have precluded the district court from inquiring into whether an implied contract had arisen from defendant's conduct. This issue did not relate to the fundamental power of the district court to enter a judgment in excess of its authority, as in the instant case. Similarly, *Beech Aircraft Corp. v. U.S.*, 51 F.3d 834 (9th Cir. 1995), turned on an issue other than the primary jurisdiction of the court -- which party had a burden of persuasion; *Sharp Structural, Inc. v. Franklin Mfg., Inc*., 282 Fed.Appx. 585 (9th Cir. 2008), involved a contractual damages clause; *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003), notice and joinder issues; and *Idaho Watersheds Project*, 307 F.3d 815, the finality of an agency decision. By no stretch of reasoning do any of these cases have such a basic, Spending-Clause-based jurisdictional question at their hearts, as does this matter. Appellee's attempt to equate these waiver cases to this case must fail.

III. THE JUDGMENT EXCEEDS THE COURT'S AUTHORITY

Finally, appellee argues that the district court's judgment requiring the State to pay the higher foster care maintenance payments required by this

Court's "cover the costs" opinion in *Allenby II* – even for the 41 percent of group home residents *not* eligible for the federal financial benefits available under the federal CWA – is not an abuse of the district court's discretion. Appellee is wrong.

This appeal does not involve in a direct manner the issue of eligibility *vel non* of foster care group home children subject to the CWA to receive maintenance payments at the rate levels detailed in the *Allenby II* opinion. As appellee points out, the State concedes in its appeal that federally eligible children "'are entitled to the increased rates ordered by the District Court.'" (AB, p. 29, quoting the State's Opening Brief.) Similarly, appellee "concedes for purposes of this appeal that non-federally eligible children are not subject to the contours of the Child Welfare Act." *Id.* Appellee's core argument is that "the district court did not abuse its discretion in concluding under the State's current RCL system [that] the State of California must also increase funding for non-federally eligible children to ensure that the State of California covers 'the cost of (and the cost of providing)' the enumerated items set forth in Section 675 [(4)(A)] of the [CWA] to the federally eligible children." (AB, pp. 29-30.)

Appellee declares that it "is well established that a district court has substantial discretion in defining the terms of an injunction and appellate

review is correspondingly narrow," citing *Coca-Cola Co. v. Overland Co.*, 692 F.2d 1250, 1256 n. 16 (9th Cir. 1982). While as a general proposition this may be true, that is not so when the fundamental jurisdiction of the district court over the core issue is what is at bar.

Appellee also cites *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 559 (9th Cir. 1990) for the same general proposition. In that case, however, this Court also noted: "There are limitations on this discretion; an injunction must be narrowly tailored to give only the relief to which plaintiffs are entitled." *Id.,* at 558, citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). And, in another case appellee cites -- *U. S. v. AMC Entertainment, Inc*., 549 F.3d 760 (9th Cir. 2008), this Court again notes the "considerable" discretion of a district court, but adds that such discretion has limits: "However, a trial court abuses its discretion in fashioning an injunction which is overly broad." *Id.* at 768.

Here, for all the reasons set forth in the State's opening brief, the district court abused its discretion and fashioned a judgment that is overly broad: there is simply no valid basis upon which the court could issue the broad judgment it issued, because 41 percent of the children in California's foster care group homes it seeks to make beneficiaries of the CWA *are simply not eligible for the benefits of the CWA*.

Also noteworthy is that the Supreme Court has held, with respect to the federal funding under the Medicaid program -- Title XIX of the Social Security Act, of which the CWA is Title IV, Part E -- that the federal statute is *not* designed as a means to force a state to expend funds that exceeds the scope of the federal statute: "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." *Harris v. McRae*, 448 U.S. 297, 309 (1980). That decision continued: "Thus, if Congress chooses to withdraw federal funding for a particular service, a State is not obliged to continue to pay for that service as a condition of continued federal financial support of other services." *Id.*

This same reasoning should preclude the district court from ordering the State to increase payments regarding foster children who not eligible for federal funds under the CWA.[3] At its essence, the district court's order requires the State to expend state resources to increase payments regarding non-federally eligible children. As such, the district court exceeded its

[3] Indeed, the State is not even obligated under the CWA to provide services to these foster care children. This is in essence a State-funded program to which the federal CWA does not apply.

jurisdiction and, to that extent, the district court's judgment must be reversed.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in the State's opening brief, this Court should vacate or otherwise alter the district dourt's judgment in this matter to reflect the fact that only 59 percent of California's foster care group home residents are subject to the district court's power to craft a remedy in accordance with its authority and with this Court's opinion in *Allenby II*.

Dated: September 20, 2010

Respectfully submitted,

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10-15593

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA ALLIANCE OF CHILD AND FAMILY SERVICES,

Plaintiff,

v.

CLIFF ALLENBY, Interim Director of the California Department of Social Services, in his official capacity; MARY AULT, Deputy Director of the Children and Family Services Division of the California Department of Social Services, in her official capacity,

Defendants.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are two cases with differing degrees of relationship to this case: the first is *California Alliance of Child and Family Services v. Wagner, et al.,* Case No. 09-17649 (*Alliance II*). In that action an emergency motion for a stay of the preliminary injunction issued November 18, 2009 was initially denied by Judges Rymer and Goodwin on December 10, 2009, but without prejudice to renewing the motion following a decision by this Court in the second related case, *John Wagner et al. v. California State Foster Parent Association, et al.,* No. 09-15051. On August 30, 2010, this Court published its opinion in that action,

and defendants-appellants renewed their motion for a stay of the preliminary injunction on September 7, 2010, on the basis that the instant case was still yet to be fully briefed and argued.

Dated: September 20, 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 10-15593

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

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **reply** brief is

[X] Proportionately spaced, has a typeface of 14 points or more and contains 2,398 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

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

[ ] This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

[ ] This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words,

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains __ pages or __ words or __ lines of text.

[ ] 3. Briefs in **Capital Cases**.
This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words).

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☐ 4. **Amicus Briefs**.

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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September 20, 2010
Dated

/s/ George Prince
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Deputy Attorney General

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EXHIBIT A

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February 26, 2010

The Honorable Marilyn H. Patel
United States District Judge
Phillip Burton United States Courthouse
450 Golden Gate Avenue, 18th Floor
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Re: California Alliance of Child, etc. v. Allenby, et al.
United States District Court, Northern District of California, Case No. C 06-4095 MHP

Dear Judge Patel:

This letter regards the Judgment signed by you on February 23, 2010 and filed on February 24, 2010 (electronic docket Document 92) in the above-entitled action. For the reasons set forth below, defendants submit that an amended Judgment should be filed, superseding the existing Judgment, in order to address and correct two misstatements in that Judgment.

1. Non-Federally Eligible Children.

First, with respect to paragraph 4. c. of the February 24, 2010 Judgment, the inclusion of "non-federally children" is inappropriate because this provision exceeds the authority of the federal court. The complaint alleged that the California Department of Social Services was in violation of the Child Welfare Act in that the RCL system did not cover the cost of federally mandated items set forth in 42 U.S.C. section 675(4)(A) as "foster care maintenance payments." However, the foster care payments for non-federally eligible children are made with State and county monies only; there are *no* federal funds in the payments for these children and the provisions of the CWA are inapplicable to them. Therefore, this part of the Judgment goes beyond the Ninth Circuit's decision in *California Alliance of Child and Family Services v. Allenby*, 589 F.3d 1017 (9th Cir. 2009), which is based solely on the federal Child Welfare Act.

Although we understand that the Court's Judgment on this issue relies upon the Court's December 18, 2009 Order Re: Scope of Preliminary Injunction in *California Alliance of Child and Family Services v. John Wagner, et al.*, Case No. C 09-4398 MHP (electronic docket Document 67), expanding the scope of the preliminary injunction entered in that case on November 18, 2009 (electronic docket Document 57), defendants have filed notices of appeal on each of those orders. Thus, pending resolution of those appeals, the Judgment in the instant matter should not apply to non-federally eligible children as this Court's inclusion of them in its order in the companion case remains at issue on appeal.

2. Cost Increases Required by State Law Alone.

The second misstatement in the February 24, 2010 Judgment is found at paragraph 4.d. There, the Judgment references a "list" that the CDSS submits to the Legislature on an annual basis pursuant to Welfare and Institutions Code section 11462(m). The list is comprised "of any new departmental requirements established during the previous fiscal year concerning the operation of group homes and of any unusual, industrywide increase in costs associated with the provision of group care that may have significant fiscal impact on providers of group homes care." (*Id.*) The Joint Legislative Budget Committee *may* "use the list to determine whether an appropriation for rate adjustments is needed in the subsequent fiscal year." (*Id.*)

This Welfare and Institutions Code provision is not a part of the RCL rate-setting methodology, and was never intended to be tied to the RCL. Further, it was never intended to supplement the CNI adjustment factor of the RCL system, but rather was created as a means to keep the State's Legislature informed of *other* costs impacting the group home industry, which are costs *not* related to federally mandated "foster care maintenance payments" costs as defined in the Child Welfare Act at 42 U.S.C. section 675(4)(A). Therefore, this provision of the Judgment is also beyond the scope of Ninth Circuit's decision, and is not properly included in this Judgment.

3. Request for Stay.

In the event that this Court does not amend the Judgment as set forth above, CDSS respectfully requests that this Court stay this action and enforcement of the Judgment during the anticipated appeal to the Ninth Circuit concerning these provisions of the Judgment.

4. Conclusion.

For the reasons above, defendants respectfully submit that the Judgment filed February 24, 2010 be vacated and an amended Judgment reflecting the correction of the above-described misstatements be entered in its stead or, in the alternative, that this Court issue a stay.

Sincerely,

GEORGE PRINCE
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

cc: Williams Abrams (via e-mail)

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