08-16267

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' OPENING BRIEF

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STATEMENT OF JURISDICTION

This is an appeal from a judgment filed on February 24, 2010[1] by the District Court following the reversal and remand of the District Court's March 13, 2008 Memorandum & Order re: Cross-Motions for Summary Judgment by this Court's decision of December 14, 2009 in *California Alliance of Child and Family Services v. Cliff Allenby, et al. (Allenby)*, reported at 589 F.3d 1017 (9th Cir. 2009). The District Court had subject matter jurisdiction of the matter under 28 United States Code section 1331.

Defendants/appellants (the State defendants) timely filed their notice of appeal on March 12, 2010; this Court has jurisdiction under 28 United States Code section 1291.

ISSUE PRESENTED

Did the District Court enter a judgment exceeding the scope of the pleadings in the original complaint, the District Court's jurisdiction, and the scope of this Court's decision in *Allenby,* because the basis for the District Court's Judgment requiring the State to increase funding rates for *all* foster

[1] The Judgment from which this appeal was taken (Clerk's Record (CR) 92 is reproduced at Excerpt of Record (ER) 11. An Amended Judgment was filed on May 5, 2010 (CR 112) (ER 1); the portion amended does not affect the issues in the instant appeal and the Amended Judgment is identical to the Judgment as to those matters at issue in the instant appeal.

care group home residents in California is the federal Child Welfare Act (Title IV-E of the Social Security Act, 42 United States Code §§ 670-679b), even though only 59 percent of residents of foster care group homes in California are "federally eligible" under the Act and thus subject to the Act for purposes of benefitting from the federal funding it supports?

STATEMENT OF THE CASE

The original complaint was filed in this action on June 30, 2006. (*California Alliance of Child and Family Services v. Cliff Allenby, et al.*, U.S. District Court California Northern District 3:06-cv-04095-MHP (*Alliance I*), CR 1; ER 100.) Following various proceedings, Plaintiff/Appellee (the Alliance) filed its motion for summary judgment on July 16, 2007 (CR 34); the State defendants' motion for summary judgment was filed July 17, 2007 (CR 37). Oral argument occurred on September 24, 2007. On December 12, 2007, the District Court asked the California Department of Social Services (CDSS) for supplemental evidence regarding its annual assessment of the rate schedules used by it for purposes of rate-setting purposes (CR 54); CDSS submitted the supplemental evidence in the form of a declaration with exhibits on January 24, 2008 (CR 56).

On March 12, 2008, the District Court entered its memorandum and order granting summary judgment to the State defendants (CR 57) (ER 90),

and the clerk entered judgment in favor of the State defendants (CR 58). The Alliance filed a motion for reconsideration and relief on March 21, 2008 (CR 60); the District Court denied that motion on April 9, 2008 (CR 74). The Alliance's notice of appeal was filed on April 29, 2008 (CR 75).

The Alliance's opening brief was filed on August 29, 2008 (see Ninth Circuit General Docket report for Court of Appeals Docket #08-16267 (NCGD, reproduced at ER 86-89), item 7 at ER 87). The State defendants filed their answering brief October 14, 2008 (NCGD item 6 at ER 87); the Alliance's reply was filed October 31, 2008 (NCGD items 8,9, at ER 87).

Oral argument took place in this Court on October 7, 2009, before Judges Alfred T. Goodman, Pamela Ann Rymer, and George H. Wu (NCGD item 19 at ER 88). On December 12, 2009, the Court filed its opinion, which reversed and remanded the case to the District Court (NCGD item 21 at ER 88; ER 74).

Prior to the oral argument and issuance of the Ninth Circuit's decision, the Alliance filed another action in District Court against the State defendants – *California Alliance of Child and Family Services v. Wagner, et al.*, U.S. District Court California Northern District 3:09-cv-04398-MHP

(*Alliance II*).[2] In *Alliance II,* the Alliance sought, inter alia, injunctive relief to prevent CDSS from implementing a budget cut that stemmed from California's fiscal emergency and was scheduled to go into effect on October 1, 2009, as required by the 2009 Budget Act that revised the State's budget for fiscal year 2009-10.

Alliance I and *Alliance II* involve the same parties and the same basic Child Welfare Act foster care group home funding issues, the State's efforts to meet its funding obligations for its share of the group home costs,[3] with

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[2] Although the named defendants are different in the 2009 action, the parties are essentially identical: the Alliance as an entity again sued the director of the CDSS and his deputy director of the Children and Family Services Division of CDSS. The docket sheet for *Alliance II* is reproduced at ER 64-73; a notice of appeal on the preliminary injunction issued in that case was filed on November 19, 2009 (ER 71, item 59), and is pending in this Court as *California Alliance of Child and Family Services v. Wagner, et al.,* Case No. 09-17649. An emergency motion for a stay of the preliminary injunction issued in *Alliance II* was denied by Judges Rymer and Goodwin on December 10, 2009, without prejudice to renewing it after a decision by this Court issues in *John Wagner et al. v. California State Foster Parent Association, et al.,* No. 09-15051 (as to whether a private right of action exists to enforce the Child Welfare Act), which remains pending before this Court following oral argument and submission on December 7, 2009.

[3] The costs are shared by the federal government (covering some 50% of total), California's counties (roughly 30%), and the State (roughly 20%). The attorney for the State defendants informed the District Court that the State defendants estimated that the full financial impact of implementing the District Court's order – assuming that payments for both eligible *and* non-eligible residents were made at the court-ordered rates – would be roughly a quarter of one billion dollars, with about $77 million coming from the State,

(continued…)

the primary difference being that *Alliance II* uses as a springboard California's Budget Act of 2009, which further reduces State spending in response to the State's budget crisis and does not spare foster care programs from the broad spending cuts it makes. Despite the Budget Act focus, both *Alliance* complaints share the identical federal-only statutory bases for their causes of action. Not surprisingly, there has been "cross-pollination" between the cases; specifically, the District Court based a crucial portion of its Judgment in *Alliance I* – the specific issue raised in this appeal as to the scope of the Judgment – on findings set forth in its "ORDER Re: Scope of Preliminary Injunction," filed December 18, 2009 in *Alliance II* (ER 46-50).

In that order, the District Court also informed the parties that it would "schedule a status conference with the parties to solicit their views on the impact upon this action, if any, of the recent decision in *California Alliance of Child and Family Services v. Allenby"* (i.e., this Court's December 14, 2009 decision) (ER 48-49). That status conference ("Further Case Management Conference") was held on January 11, 2010 (ER 45); although the conference was nominally in the *Alliance II* matter, the District Court

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(…continued)
another $50 million from federal funding participation, and some $115 million from California's 58 counties, collectively. (See transcript of February 22, 2010 hearing, text at ER 17:20-18:2.)

used the parties' presence in court to direct that a proposed judgment for *Alliance I*, and response to it, be submitted.

The Alliance submitted a proposed judgment on January 15, 2010 (CR 87, ER 41.) The State defendants filed their response and objections to that proposed judgment on January 29, 2010 (CR 88, ER 35); the Alliance replied to the response and objections on February 5, 2010 (CR 89, ER 28). A hearing was held regarding the proposed order on February 22, 2010 (CR 110, ER 16).

The District Court issued its Judgment on February 24, 2010 (CR 92, ER11).[4] The State defendants filed their notice of appeal on March 12, 2010 (CR 99, ER 5).

STATEMENT OF FACTS

"New" Facts

There is but a single "new" fact germane to this appeal, which is that only 59 percent of the foster care group home residents in California meet the eligibility requirements under the Child Welfare Act such that the State

[4] As indicated above, for reasons not implicated in this appeal, an amended judgment was sought and ultimately entered on May 5, 2010 (CR 112, ER 1). Although it does not play a role in this appeal, for purposes of completeness a copy of the memorandum and order re: the amended judgment (CR 111) is provided at ER 8.

may recover federal funding for these individuals. They are referred to as are "federally eligible." (See "ORDER Re: Scope of Preliminary Injunction," filed December 18, 2009 in *Alliance II,* ER 46-50.)

With knowledge of the 59 percent-eligible figure before it, the District Court entered an order in *Alliance II* on December 18, 2009, that it thereafter incorporated into the Judgment on appeal here. The *Alliance II* order states:

> Pending final adjudication of the merits of the instant action, named defendants John Wagner and Gregory Rose, and their successors, agents, officers, servants, employees, attorneys and representatives, and all person acting in concert or participating with defendants in their respective official capacities as Director of the California Department of Social Services and Deputy Director of the Children and Family Services Division of the California Department of Social Services, are HEREBY ENJOINED 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 4 4, 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. *Implementation of such reduction is enjoined in relation to federally eligible children and non-federally eligible children.*

("ORDER Re: Scope of Preliminary Injunction" at p. 3, lines 15-25 (ER 48), emphasis added.)

This directive by the District Court removing any distinction between non-federally eligible children and federally eligible children for funding purposes, along with the reference to *Alliance II's* reasoning supporting it,

was thereafter incorporated into the Judgment in *Alliance I*, on February 24, 2010 (Judgment, p. 3:16-19 (ER 13), and endnote 2 to the Judgment, p. 4 :4-5 (ER 15); this provision was not altered by the Amended Judgment filed May 4, 2010 (ER 1-4), though the cross-reference to the *Alliance II* order appears in endnote 3 of the Amended Judgment instead of in endnote 2 in the Judgment.)

As distinct from the 59 percent of foster care group home residents in California who *are* federally eligible, the remaining 41 percent are *not* federally eligible, which means that the State may not recover any federal funding for them.[5] They are not eligible under the Child Welfare Act to benefit from the federal financial participation afforded by the Child Welfare Act and, necessarily. In other words, the entire amount of foster care maintenance payments for non-federally eligible residents comes from the State and its 58 individual counties, without federal financial participation and outside the purview of the Child Welfare Act. Thus, and necessarily,

[5] California's statutory authority for State and county payments to foster care providers comes from California Welfare and Institutions Code § 11460 (a), which also states that State functions shall be performed by CDSS or by delegation of CDSSto county welfare departments. Although the Alliance made passing reference to §11460 in its complaint (ER 104:23), it did not allege any violation of in the complaint, or include it in any cause of action.

this non-federal funding is not immune from the State's budget crisis nor shielded from California's Budget Act of 2009, which legislated a 10 percent cut in RCL rates as of October 1, 2009.[6] The District Court's order, precluding the State from implementing the the 10 percent budget cut enacted by state law with regard to children for whom neither the State nor its counties receives federal funding because those children do not meet the eligibility requirements of the Child Welfare Act, as grafted onto the Judgment from *Alliance II*, underpins this appeal.

With this "new" fact in mind, a brief review of the facts underpinning the original case before this Court provides helpful information for purposes of context. The facts set forth below are distilled from the a recitation of the facts first presented as "Defendants' Statement of Facts Not Reasonably in Dispute" in the State defendants' August 17, 2007 motion for summary judgment (CR 37, at pp. 3-6), and later produced as the "Statement of Facts" in the answering brief of the State defendants, filed October 14, 2008; these

[6] Separate provisions of state regulations specifically crafted to ease the burden on foster care group home providers due to the 10 percent rate reduction -- by granting them higher funding levels than usually allowed without requiring provision of a commensurately higher level of services for residents – are not directly relevant to the issue before the Court in this appeal.

statements of fact were not disputed by the Alliance in the District Court nor in this Court when recited in the answering brief.

The *Allenby* Facts

Prior to 1990, there had been negotiations and advisory discussions and meetings with stakeholder groups made up of CDSS employees, counties, and provider groups, which studied options for a new rate setting system [for foster care group homes]. Senate Bill (SB) 370 (Chapter 1294, Statutes of 1989) established the Foster Care Group Home Rate structure and was the authority for that initial promulgation of regulations for rate setting for group home programs.

In 1990, a group of CDSS employees with the Foster Care Branch worked on the drafting of regulations pursuant to SB 370 that were implemented July 1, 1990. SB 370 established both a standard rate for each of the 14 Residential Care Levels (RCLs) and a rate floor. In fiscal year 1990-1991, each provider submitted data on rate, costs, and staffing levels from the prior fiscal year that substantiated the RCL at which its program would enter the flat rate system. The standard rates were to be phased in over a three-year period beginning July 1, 1990, with a rate floor for each of the three years. The implementing legislation required CDSS to raise the standard rate for each RCL based on information from the California

Necessities Index (CNI) for fiscal years 1991-1992 and 1992-1993. Thereafter, annual CNI-based rate increases for group homes would become a discretionary item in the State budget process.

The RCL point system measures the number of "paid/awake" hours worked per month by a program's child care and social work 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 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% of the program's licensed capacity to compute the program's RCL points, which are used in the determination of the amount of payments the program receives.

Federal reimbursement funding to states is conditional upon states meeting the requirements of Title IV-E (the Child Welfare Act). The federal government does not prescribe a particular system for payment for children placed in group homes, nor does in set any particular method for determining how costs are to be measured, set, or calculated. However, the State is required to submit a plan that identifies the state law that meets the

federal requirements. The plan is submitted with a certificate of compliance, which ensures compliance with federal requirements, to the appropriate federal regional office.

California's Title IV-E State Plan consists of a compilation of California statutes, regulations, All County Letters (ACLs), All County Information Notices (ACINs), County Fiscal Letters (CFLs)[7], and other documents that implement federal requirements and instructions for the federal foster care program, which must be followed in order for the State to claim Federal Financial Participation (FFP) in payments made under the program. CDSS amends California's state plan when the federal Department of Health and Human Services (DHHS) issues new federal requirements, changes existing federal regulations, or when a new state requirement as the result of law or court order substantially affects the state's foster care program. Updates to the State Plan that are submitted to DHHS in response to such requirements or instructions include any new statutes, regulations, and ACLs that came into effect since the previous update. Any changes to the state plan must be approved by Region IX of

[7] These documents are primary means of communication between CDSS and the counties.

DHHS, the regional division of DHHS that oversees the agencies activities in California and several other states.

The common practice in preparing ACLs that substantially change the way California claims FFP in the foster care program is that CDSS provides drafts to, and consults informally with, Region IX DHHS staff about the contents of the proposed ACL. The purpose of the consultation is to ensure that the ACL will ultimately be approved by DHHS as an amendment to California's Title IV-E State Plan. If Region IX indicates disagreement with the contents of the ACL, attempts are made to address the federal agency's concerns by changing the contents of the ACL.

SUMMARY OF THE ARGUMENT

In *Allenby*, this Court ruled that "[b]ecause the State is not covering the costs required by the [Child Welfare Act]," the Court was reversing the District Court's grant of summary judgment to the State and denying summary judgment to the Alliance, and remanded the case to the District Court "to determine the proper scope of declaratory and injunctive relief." 589 F.3d at 1023.

In its effort to comply with this Court's decision, the District Court entered a Judgment directing the State to increase its foster care group home rate payment levels to the full amount required by the cost index

incorporated into the State's statutory scheme[8] for rate setting. However, the District Court's Judgment goes beyond the scope of its authority, and of this Court's opinion in *Allenby*, by requiring that the increased funding be provided to *all* foster care group home residents, when in fact only 59 percent of those residents are eligible for the federal funding available through the Child Welfare Act.

As to those federally eligible residents there is no issue in this appeal that they are entitled to the increased rates ordered by the District Court.[9] However, the District Court's Judgment specifically requires that the group home rates be increased for *all* residents, including the 41 percent who are *not* federally eligible and thus *not* subject to the requirement that this Court found -- based on the *federal* Child Welfare Act, and not on any provision of California *state* law – requiring California to "cover the costs" enumerated in the Child Welfare Act as adjusted by California's statutory cost index.

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[8] California Welfare and Institutions Code §11462(g)(2).

[9] In a similar case pending before this Court brought on almost precisely similar grounds on behalf of foster care *parents* in California – as compared to foster care *group home operators*, as is the Alliance in this case and in *Alliance II* – the threshold issue is whether a private right of action exists to enforce the Child Welfare Act. As noted -- *ante*, at note 2 -- that case – *John Wagner et al. v. California State Foster Parent Association, et al.,* No. 09-15051 -- has been under submission since oral argument was heard on December 7, 2009.

In effect, the District Court's Judgment requires that the Director and Deputy Director of CDSS 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 District Court's Judgment requires the State to pay the increase with the General Fund dollars with a contribution from the counties.[10]

Because the Judgment entered exceeds the scope of the pleadings, the District Court's jurisdiction, and this Court's *Allenby* opinion, it must be vacated or otherwise amended to reflect the fact that a federal court decision based on the Child Welfare Act alone cannot negate a validly enacted state statute beyond the purview of the Act or federal court decisions based on it.

Additionally, to the extent the Judgment compels the State to pay funds beyond those required under the Child Welfare Act, it is barred by principles of sovereign immunity reflected in the Eleventh Amendment.

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[10] 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: 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."

ARGUMENT

I. THE JUDGMENT ENTERED BY THE DISTRICT COURT EXCEEDS THE SCOPE OF THE PLEADINGS, THE DISTRICT COURT'S JURISDICTION, AND THIS COURT'S DECISION

A. Introduction

Following a reversal on December 14, 2009 by this Court of the District Court's March 12, 2008 order granting the State defendants' motion for summary judgment and denying the Alliance's motion for summary judgment, this Court remanded the matter to the District Court to determine the proper scope of declaratory and injunctive relief. *Allenby*, 589 F.3d at 1023. However, the Judgment entered by District Court exceeds the scope of the pleadings in the original complaint, the District Court's jurisdiction based on those pleadings, and, correspondingly, the scope of this Court's *Allenby* decision.

In *Allenby,* this Court ruled that while the Child Welfare Act 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 Child Welfare Act 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 implementing the Ninth Circuit's opinion, however , the District Court purports to require the State to increase funding rates for *all* foster care group home residents in California, even though – as the District Court was informed and recognized -- only 59 percent of residents of foster care group homes in California are "federally eligible" under the standards of the Child Welfare Act. Said another way, the Judgment – based on the federal Child Welfare Act -- requires that California increase its foster care group home maintenance payments rates for not *just* the 59 percent of residents covered by the Act, but *also* the 41 percent of residents who are *not* covered by the Act. Funding for these "federally ineligible" residents is provided by state and county funds alone, with*out* federal financial participation.

Due to their status as being "federally ineligible," these residents are not covered, at least financially, by the Child Welfare Act, and without that financial coverage they are outside the scope of the financial "protection" sought in the original complaint and thus in all the proceedings that followed it, in both the District Court and this Court. Simply put, the federal courts in these circumstances have no jurisdiction over the state-only funding paid for the federally ineligible residents. Consquently, as draconian as the results

may be for the non-eligible residents, the non-federal funding that supports them is subject to the budget cuts of California's 2009 Budget Act.

B. Standard of Review

The question of whether a judgment is void is a legal issue subject to *de novo* review. *See Retail Clerks Union Joint Pension Trust v. Freedom Food Center, Inc.,* 938 F.2d 136, 137 (9th Cir. 1991). The State submits that for purposes of this appeal the Judgment at issue is akin to a void judgment.

C. The District Court's Judgment Exceeds its Jurisdiction

1. The Alliance's Original Pleading

The Alliance's original complaint framed this action, as does any complaint. In hornbook shorthand, this makes a plaintiff the "master" of the 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 laws. The Alliance's original 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 102:18-25.)

Further, in its specific allegations against the State defendants, the Alliance sought relief only under federal law: First, in Count I, on the issue "as to whether the RCL system fails to comply with federal law in setting rates for foster care maintenance payments[,]" the Alliance alleged that the State defendants violated 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 106:8-17.) Second, in Count II, the Alliance alleged that the State defendants would continue to violate the Child Welfare Act – and that Act alone – if the District Court did not enjoin the State defendants. (ER 106:22-107:1.)

Moreover, in its prayers for relief the Alliance sought relief *only* under federal law, that law being the Child Welfare Act. (ER 107:5-25.)

These federal-only claims were made notwithstanding the Alliance's unambiguous averment that State defendant "Allenby is responsible for implementing the policies contained in the approved state plans and assuring

DSS' complaince with state and federal law." (ER 102:12-13.) 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 101:8-28), 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 Child Welfare Act. Nonetheless, the Alliance's complaint did not state a cause of action for the direct 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

It is axiomatic that the District Court's jurisdiction necessarily depends on the pleadings of a party. The Alliance's complaint, as detailed above, was based on federal law. 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

jurisdicition 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 Child Welfare Act is undeniably an "Act of Congress." 28 U.S.C. § 1343 itself does not extend a district court's jurisdiction beyond federal law.

Thus, plainly on the face of the pleadings before it, the District Court's jurisdiction was limited to provisions of the federal Child Welfare Act, 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 Child Welfare Act.

3. *Allenby* Did Not Expand District Court Jurisdiction

This Court's decision in *California Alliance of Child and Family Services v. 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 set forth above, there was nothing in the 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 Child Welfare Act upon which the complaint was based.

As Judge Rymer stated in the opinion, "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 hit the note that sets the tone for the instant appeal: "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 Child Welfare Act – and *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*. That California has chosen to support foster care services more expansively than required by the Child Welfare Act is laudable, but the federal courts cannot compel further expansiveness of the State's generosity on the basis of the federal Act.

No other part of the *Allenby* decision otherwise supports the District Court's extra-jurisdictional Judgment, 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. The requirements of the Act 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 Act's eligibility standards.

4. The District Court's Own Orders Do Not Self-Validate the Judgment

The District Court's Judgment (CR 92), at p. 4, endnote 2 (ER 15), refers to the order filed December 18, 2009 in *Alliance II* (ER 46-50)[11] as providing the basis for extending the judgment to cover both federally eligible and non-eligible group home residents, stating: "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. See Case No. C 09-4398 (N.D. Cal.) (Patel, J.), Docket No. 67 (Order Re: Scope of Preliminary Injunction)."[12]

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[11] See footnotes 2 and 9, *ante*, as to the pending appeals in *Alliance II* and in *Wagner et al. v. California State Foster Parent Association, et al.*

[12] The Amended Judgment (CR 112) contains the identical language and reference in its endnote 3, at p. 4 (ER 4). As previously noted, the Amended Judgment differs not from the Judgment as to the issue on appeal.

In the December 18, 2009 order, Judge Patel first quotes her own November 18, 2009 order entering a preliminary injunction against the State defendants in *Alliance II* as to how it "prohibits implementation of the reduction only with respect to payments made in connection with children subject to the CWA. Execution of the injunction SHALL NOT be carried out in such a manner that will reduce in any amount the full entitlement to such federally eligible children under this order." (ER 46.) The December 18, 2009 order then recites the November 18, 2009 order's directive to the State to submit a plan as to how it would satisfy the order as to foster care group home maintenance payments in view of the federally eligible/non-eligible distinction. *Id*.

The December 18, 2009 order then discusses the All County Letter issued by State defendant CDSS Deputy Director Greg Rose that was submitted to the District Court, "which provided instructions to counties pertaining to the funding of foster care group home programs in light of the preliminary injunction" and contained "two separate tables setting forth RCL schedules for group homes – one schedule for federally eligible children, i.e., those covered by the Child Welfare Act . . . and one schedule for the non-federally eligible children." (ER 47, lines 3-8.) The District Court then notes that "Plaintiff objects to the State's 'plan,' noting 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." *Id*., lines 19-22. Along with these recitations, the District Court noted that the State's submission had not contested or addressed 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 47:27-48:2.)

Following these statements, 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 a dilution of funds to federally eligible children." (ER 48, lines 1-4.) After setting out a "for example" arithmetic expression of how the dilution would work, the District Court observed: "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 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." *Id*., lines 9-13. The District Court then

declared: "Accordingly, the court HEREBY AMENDS AND SUPERSEDES the preliminary injunction order currently in effect." *Id*., lines 13-14. Directly after that declaration came the District Court's amended directive to the State defendants:

> Pending final adjudication of the merits of the instant action, named defendants John Wagner and Gregory Rose, and their successors, agents, officers, servants, employees, attorneys and representatives, and all person acting in concert or participating with defendants in their respective official capacities as Director of the California Department of Social Services and Deputy Director of the Children and Family Services Division of the California Department of Social Services, are HEREBY ENJOINED 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 4 4, 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. *Implementation of such reduction is enjoined in relation to federally eligible children and non-federally eligible children.*

(ER 48, lines 15-25, emphasis added.)

The State defendants are mindful of the District Court's concerns for group home residents and for the integrity of its preliminary injunction order. Nevertheless, those concerns are not sufficient to extend the District Court's jurisdiction beyond what the complaint before it defined, and what this Court's opinion in *Allenby* did not change: that, in a case based on the federal Child Welfare Act, the District Court's jurisdiction cannot extend beyond the federal law it is empowered to enforce.

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

To the extent that it purports to require the State to increase spending on foster care group homes beyond the amount supported by the Child Welfare Act in concert with this Court's opinion in *Allenby,* the Judgment 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.

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 Judgment, 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. Even though the funding would redound to the benefit of foster care children, it does not change the fact that the District Court's Judgment is not the sort of ancillary effect on the treasury contemplated by *Edelman*, 415 U.S. at 667–68, but is a direct effect on the treasury.

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). As a result, the Supreme Court has cautioned that "[t]o interpret *Young* to permit a federal-court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual

capacity, would be to adhere to an empty formalism. . . ." *Id*. The proper application of *Young* in this case must recognize that it is one thing to order something to be done that would necessarily cost money where the cost is supported by the matter that is within the jurisdiction of the District Court; it is another thing to order what amounts to the direct payment of money as to matters beyond the District Court's reach.

The fact that the District Court's Judgment as far as it exceeds the Child Welfare Act essentially involves the direct payment of money from the State Treasury 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 Judgment 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 lacks a basis in the Child Welfare Act. "[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). Accordingly, even though the Judgment is framed as propsective injunctive relief, the fact remains that it is the State's interests, not that of the named State defendants, that are paramount in this case. "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 this 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 Judgment exceeds the scope of the Child Welfare Act, on the record before the District Court and this Court, it violates principles of sovereign immunity and violates the Eleventh Amendment.

CONCLUSION

For the reasons set forth above, the District Court's Jdgment directing an increase in funding levels for *all* foster care group home residents in California exceeds its jurisdiction. Therefore, this Court should vacate or otherwise alter the District Court'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 and this Court's opinion in *Allenby*.

Dated: July 6, 2010

Respectfully submitted,

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08-16267

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: in *California Alliance of Child and Family Services v. Wagner, et al.,* Case No. 09-17649 (*Alliance II*), an emergency motion for a stay of the preliminary injunction issued therein on November 18, 2009, was denied by Judges Rymer and Goodwin on December 10, 2009, without prejudice to renewing it after a decision by this Court issues in *John Wagner et al. v. California State Foster Parent Association, et al.,* No. 09-15051 (as to whether a private right of action

exists to enforce the Child Welfare Act), which remains pending before this Court following oral argument and submission on December 7, 2009.

Dated: July 6, 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 08-16267

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

[✓] Proportionately spaced, has a typeface of 14 points or more and contains 7,291 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

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July 6, 2010
Dated

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