C.A. NO. 08-16267

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA ALLIANCE OF CHILD AND FAMILY SERVICES, Appellant, 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, Respondents.	USDC Case No. 3:06-cv-04095-MHP

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 4

A. The State Misinterprets The Child Welfare Act 4

B. The State Concedes That There Is No "Substantial Compliance Test" In The Child Welfare Act 10

C. The State Concedes That The Child Welfare Act Does Not Explicitly Permit A State To Take Budgetary Considerations Into Account In Determining The Amount Of Foster Care Maintenance Payments 14

III. CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Blanco v. Anderson,
39 F.3d 969 (9th Cir. 1994) 17, 18, 19

California State Foster Parent Association v. Wagner,
No. C 07-05086 WHA, 2008 WL 4679857 (N.D. Cal. Oct. 21, 2008)2, 6, 10, 12

Haskins v. Stanton,
794 F.2d 1273 (7th Cir. 1986) 13

Robertson v. Jackson,
766 F. Supp. 470 (E.D. Va. 1991) 13

Sherman v. U.S. Parole Comm'n,
502 F.3d 869 (9th Cir. 2007) 5

Southside Welfare Rights Organization v. Stangler,
156 F.R.D. 187 (W.D. Mo. 1993).....13

Withrow v. Concannon,
942 F.2d 1385 (9th Cir. 1991) 12, 13

STATUTES

42 U.S.C. § 671(a)(1).....11, 15

42 U.S.C. § 671(a)(11).....15

42 U.S.C. § 672.....11, 15

42 U.S.C. § 672(a)(1).....11, 15

Cal. Welf. & Inst. Code § 11453(a).....8

Cal. Welf. & Inst. Code § 11462(c).....16

Cal. Welf. & Inst. Code § 11462(g)(2).....16

I. INTRODUCTION

The Child Welfare Act requires the State of California to make foster care maintenance payments that "cover" the costs of providing foster care. The State does not dispute that its system for making foster care maintenance payments covers only a percentage of such costs. The district court erroneously held that the State is in compliance with the Child Welfare Act, despite the State's admission that it pays only a portion of the costs. The dispositive question before this Court is whether the Child Welfare Act means what it says in requiring states to make foster care maintenance payments that cover the costs of providing foster care, or whether the district court was correct in reading into the Act an implied "substantial compliance" for covering a percentage of these costs.

In its Opening Brief, the California Alliance of Child and Family Services (the "Alliance") demonstrated that the district court's decision was based on three fundamental legal and interpretive errors. *First*, the district court misinterpreted the Child Welfare Act to permit California to make foster care maintenance payments that do not "cover" the costs of providing foster care. *Second*, the district court incorrectly held that the Child Welfare Act requires only "substantial compliance," rather than full compliance, and that California's foster care maintenance payment levels are substantially compliant. *Third*, the district court erroneously carved out a "lack of funds" exception to the Child Welfare Act that

excuses states from covering the entire cost of providing foster care when they are faced with budgetary constraints.

The State's Answering Brief misconstrues the Alliance's arguments. *First*, the State misstates the Alliance's statutory arguments as an analysis over the definition of the term "cost" instead of the term "cover," and the State never specifically addresses the term "cover" in its statutory analysis. As is evident from a plain reading of Section 675(4)(A), the term "cover" is the operative term that requires the states to make foster care maintenance payments that are "enough to pay" or "sufficient to defray, meet or offset the cost" of providing the enumerated items in the Child Welfare Act.

Second, recognizing that there is no support for the district court's substantial compliance test, the State argues that the Court did not create such a test, but instead held that California is in full compliance with the Act. In support of this argument, the State argues that as long as it takes into account the requisite statutory criteria, the Child Welfare Act only requires California to make *a payment* (of any amount). This argument is misplaced. The statutory criteria is precisely what requires California to "cover" the costs. Furthermore, an identical argument made by the State was rejected in *California State Foster Parent Association v. Wagner*, No. C 07-05086 WHA, 2008 WL 4679857 (N.D. Cal. Oct. 21, 2008).

Lastly, the State's assertion that the Child Welfare Act does not require cost of living increases is without merit. Not only does the Child Welfare Act require California to "cover" the costs of providing the enumerated items, it requires California to periodically review its foster care maintenance payments to ensure their continuing appropriateness. If the State were permitted to keep its rates at historical levels without making periodic adjustments, it would not actually "cover" the costs of providing the enumerated items, and non-profit foster care providers would be unable to provide California's foster care children with the basic necessities required under federal law. The State's interpretation cannot be reconciled with either the plain language or purpose of the Act.

The language of the Act commands that states "shall" make foster care maintenance payments that "cover" the costs of providing foster care. For twelve of the past seventeen years, the State of California has failed to adjust its payment rates to correspond with substantial cost of living increases. This failure has culminated in an approximately 20 percent gap between the amount that the State currently pays foster care providers and the amount foster care providers spend to provide foster care. Thus, California does *not* "cover" the cost of providing foster care.

For these reasons, the district court's holding that California is in compliance with the Child Welfare Act must be reversed.

II. ARGUMENT

A. The State Misinterprets The Child Welfare Act

The Alliance established two basic undisputed facts in its Opening Brief: *first*, the Child Welfare Act requires states with an approved plan to make "foster care maintenance payments," defined as payments "to cover the cost of (and the cost of providing)" the enumerated items stated in Section 675(4)(A), to foster care providers; and *second*, that the ordinary, plain meaning of "cover" in the context of costs or money payments is an amount "enough to pay" or "sufficient to defray, meet or offset the cost." Thus, the State is required to make "foster care maintenance payments" in an amount that is "enough to pay," "meet" or "cover" the enumerated items in the Child Welfare Act.

The Answering Brief does not challenge these basic facts or the authority presented in the Opening Brief. Instead, the State mischaracterizes the Alliance's argument as an analysis of the definition of the term "cost" instead of the term "cover."[1] "Foster care maintenance payments" is defined in Section 675(4)(A) as "payments *to cover the cost of (and the cost of providing)* food, clothing, shelter,

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[1] By way of example, the State argues: "Appellant makes much of the word 'cost' in its brief as it attempts to expand the meaning of the word to mean 'actual costs', and cites various cases regarding statutory construction in its efforts, along with the dictionary and the Child Welfare Policy Manual." (Answer Br., at 11.) This misconstrues the Alliance's statutory analysis.

daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation . . . ."[2] 42 U.S.C. § 675(4)(A) (emphasis added). As is evident from a plain reading of Section 675(4)(A), the term "cover" requires the states to pay the actual or entire costs of providing the enumerated items in the Child Welfare Act. The common, ordinary definition of "cover" in the context of money payments or costs is an amount "enough to pay" or "sufficient to defray, meet or offset the cost." *See* Concise Oxford English Dictionary 330 (Catherine Soanes & Angus Stevenson, eds., 11th ed., Oxford Univ. Press 2004) ("(of money) *be enough to pay* (a cost): there are grants to cover the cost of materials for loft insulation.") (emphasis added); *see also* American Heritage Dictionary 421 (4th ed., Houghton Mifflin 1989) ("To compensate or make up for" or "[t]o be sufficient to defray, *meet, or offset the cost* or charge of: *had enough funds to cover her check*.") (first emphasis added). The State neither addresses nor challenges this well-established, ordinary definition of the term "cover." *See Sherman v. U.S. Parole Comm'n*, 502

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[2] The definition of "foster care maintenance payments" in Section 674(4)(A) was recently amended on October 7, 2008. The definition now includes costs to cover "reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement." Fostering Connections to Success & Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat 3949, 3960 (2008) (to be codified at 42 U.S.C. § 675(4)(A)). The amendments to the Act do not affect the arguments in the Alliance's appeal.

F.3d 869, 874 (9th Cir. 2007) ("when Congress uses a term of art, such as 'warrant,' unless Congress affirmatively indicates otherwise, we presume Congress intended to incorporate the common definition of that term") (citations and quotations omitted).

The Alliance's focus on the term "cover" is further supported by the recent decision in *California State Foster Parent Association v. Wagner*, No. C 07-05086 WHA, 2008 WL 4679857 (N.D. Cal. Oct. 21, 2008). The *California State Foster Parent* court emphasized the term "cover" throughout its opinion and rejected the State's argument that "even if California's payment rates for foster parents are insufficient to cover the actual costs of the enumerated item categories set forth in the Act, that does not result in a violation of the Act." *Id.* at *8. In response to the State's argument that "the Act nowhere requires states to pay the 'actual costs' of providing foster care," the court explained that the Act requires that the State "'*shall* make foster care maintenance payments,' which are 'payments to *cover* the costs of (and the cost of providing)' specific child care costs." *Cal. State Foster Parent Ass'n*, 2008 WL 4679857, at *8 (quoting 42 U.S.C. §§ 672, 674(4)(A)) (emphasis in original). Therefore, while "[t]he Act does not set foster care payment rates [or] describe *how* states are to cover the listed foster care costs," the Act "does mandate that states *cover* those costs . . . ." *Id.* (emphasis in original). Thus, not only does the court consistently emphasize "cover" as the operative term,

but it also rejects the State's argument that it is not required to "cover" the costs of the enumerated items.

Ignoring the term "cover" and proceeding with the incorrect premise that the Alliance's statutory argument is based on the term "cost," the State injects two statutory arguments that are supported neither by logic nor the plain text of the Child Welfare Act. First, the State argues that the Alliance's statutory arguments are incorrect because "[t]he Act says 'cost' without the use of any of the qualifiers proposed by appellant, or otherwise." (Answer. Br., at 8.) The State further asserts that "[i]f Congress had wanted to qualify the word 'cost' in the primary descriptive portion of section 675(4)(A) with words such as 'actual,' 'full,' or something of the like, it could have done so explicitly." (Answer. Br., at 10.) The State misinterprets the relevant language. The operative qualifier that requires the State to reimburse actual costs is the term "*cover*." The term "cover" in this context means payment of *all* costs, not merely to make payments toward (i.e., partial payments) the cost of providing the enumerated items. Based on the ordinary and *undisputed* meaning of the term "cover" in the context of the Child Welfare Act, it was unnecessary for Congress to modify the term "cost" with the terms "all," "entire" or "actual" because such language would result in a redundancy.

Second, the State argues that the Act contains "a degree of categorical variability" and does not define other terms within Section 675(4)(A). (Answer. Br., at 8.) The State argues, for example, that it is unclear what the term "food" means because the Act does not identify the type of food to be provided, what kind of diet within those sorts is to be provided, or what type of food within those kinds might satisfy the law. (*Id.*) While the State is correct that the Act provides the State with some discretion in determining, for example, the type of food to provide to the children, the Act is unequivocally clear that the State's foster care maintenance payments must *cover* these items. California has chosen to follow the California Necessities Index ("CNI"), which is the weighted average of these items for "*low income consumers*." Cal. Welf. & Inst. Code § 11453(a) (emphasis added). Thus, the CNI is the bare minimum amount that must be expended to cover the enumerated items. The State concedes that California's rates fall well-below this weighted average for low income consumers. Thus, it is undisputed that the State does not satisfy this minimum threshold.

Equally erroneous is the State's assertion that the U.S. Department of Health & Human Services' Child Welfare Manual does not provide support for the position that the State is required to *cover* the actual costs. (Answer. Br., at 8-9.) Contrary to the State's argument, the Child Welfare Manual does not merely provide "identical phraseology" of the language in the Act. (Answer. Br., at 9.)

Rather, it contains additional language that supports the Alliance's interpretation of Section 675(4)(A). For instance, the Manual states that the Child Welfare Act requires states to pay to a minor parent "*an amount necessary to cover the costs* of maintenance of the son or daughter living in the same foster home or institution with such minor parent . . . . [I]t is the title IV-E eligibility of the minor parent that allows the increased payment to include *an amount to meet* the son's or daughter's needs in that home." Child Welfare Policy Manual, Section 8.3 A.5(2) (emphases added). The U.S. Department of Health & Human Services' inclusion of the phrases "necessary to cover" and "amount to meet" in the Child Welfare Policy Manual provides further support for the Alliance's statutory construction. The State's contention that it need only make payments (of any amount) towards the enumerated items does not constitute an "*amount to meet*" and is not an amount "*necessary*" to cover such costs. The State simply fails to explain how the use of these terms can possibly be reconciled with its construction of the Act.

Accordingly, the Child Welfare Act requires California to *cover* the entire costs of providing the enumerated items. Because California admits that it fails to do so, the district court erred in granting the State's Motion for Summary Judgment.

B. The State Concedes That There Is No "Substantial Compliance Test" In the Child Welfare Act

The State concedes that the Child Welfare Act does not permit California to merely substantially comply with the amount of its foster care maintenance payments.[3] (Answer. Br., at 12.) Instead, the State asserts that it complies fully with the Act because it follows the Child Welfare Act's statutory criteria by making a "payment" of any amount. Specifically, the State argues: "Appellant's suggestion that the issue is one of the level of payments -- rather than simply that the payments are made, as they are, and that the system for establishing the payment rates system and setting its initial levels are in compliance with the Act, as Judge Patel so found they were -- must be rejected." (Answer. Br., at 14.) This argument is unsupported by the plain language of the Act. The Child Welfare

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[3] The State argues that the district court did not create a substantial compliance test with respect to the level of payments necessary to comply with the Child Welfare Act. The State misinterprets the district court's decision. The district court specifically stated: "[T]oday the RCL provides for at least 80% of the costs associated with the items enumerated in the CWA. Consequently, the process for determining foster care payment rates is still substantially compliant with the statutory criteria outlined in the CWA." (March 11, 2008 Order at p. 7; ER 10; CR 57.) The court in California State Foster Parent agreed that the district court in this case created a substantial compliance test with respect to the level of payments. 2008 WL 4679857, at *4. As discussed in detail in the Alliance's Opening Brief, the district court misinterpreted both the Child Welfare Act and Missouri Child Care Ass'n. v. Martin, 241 F. Supp. 2d 1032 (W.D. Mo. 2003), the main case upon which it relied. The State does not dispute this analysis.

Act's statutory criteria specifically requires California to "cover" the costs of providing the enumerated items. Absent from the State's analysis is any discussion or analysis of the requisite statutory criteria or how California purportedly complies with such criteria.

The Child Welfare Act's statutory criteria are clear and indisputable. To receive federal funding, the Child Welfare Act requires each state to submit a plan to the U.S. Department of Health & Human Services that "provides for foster care maintenance payments . . . ." 42 U.S.C. § 671(a)(1). Section 672 requires that "[e]ach State with a plan approved . . . *shall* make foster care maintenance payments on behalf of each child who has been removed from the home of a relative . . . into foster care . . . ." 42 U.S.C. § 672(a)(1) (emphasis added). "*The definition of foster care maintenance payment is incorporated into 42 U.S.C. § 672 of the Child Welfare Act and that provision is mandatory*." *Martin*, 241 F. Supp. 2d at 1044 (emphasis added). The court in *Martin* specified the statutory criteria: "[t]he payments must cover 1) the cost of certain items, 2) the cost of providing certain items, and 3) the reasonable costs of administration for institutional providers." *Id.*

Thus, since the statutory criteria requires the States to "cover" the costs of the enumerated items, the State's assertion that it is following the statutory criteria even though it does not actually "cover" the costs of providing the enumerated

items is simply untenable The court in *California State Foster Parent* wholly rejected the identical position asserted by the State, holding: "[t]o accept defendants sweeping claim would be to hold that any state payment greater than zero dollars will satisfy the Act. . . . The act requires not only a payment but a 'foster care maintenance payment.'" 2008 WL 4679857, at *8.

Moreover, the State's interpretation renders the phrase "to cover the cost of (and the cost of providing)" meaningless and would eliminate the phrase altogether or revise it to say: "payments that contribute *a portion of the* amount toward the cost of (and the cost of providing)" the enumerated items. As the State cautions, "another canon of statutory construction is to not presume that Congress intended an absurd result." (Answer. Br., at 11 (citing *In re Pacific-Atlantic Trading Co.*, 64 F.3d 1292, 1303 (9th Cir. 1995).) The State's interpretation, however, leads precisely to this result.

Likewise, the State's discussion of *Withrow v. Concannon*, 942 F.2d 1385, 1387 (9th Cir. 1991) misses the point entirely. (Answer. Br. at, 12-14.) In *Withrow*, the state had to provide certain hearings within specific time frames. This Court held that it was not enough that Oregon provided the hearings, it was also required to provide them in a particular time frame. 942 F.2d at 1387. As the Court explained: "[the] *language of the federal regulations is unequivocal*, and states that a decision '*shall'* or 'must' be made within the specified number of

days." *Id.* (emphasis added). The State argues that by analogy to the facts in *Withrow*, the Alliance's "argument here is akin to arguing that even if the hearings in *Withrow* were provided on a timely basis," the appellant in *Withrow* "would still have a legitimate basis to argue that there was a violation of its rights if it were aggrieved about the outcomes of those hearings, or quality of the hearing officers, or some other function of the hearing process." (Answer. Brief, at 13.) Here the State simply creates a false analogy to knock it down. The more apt analogy is that, just as the state in *Withrow* had to provide timely hearings, the State here must provide foster care maintenance payments that cover the cost of the enumerated items. It is necessary that the State make "payments" pursuant to the Child Welfare Act. Making "payments," however, is insufficient unless the State's payments actually "cover the cost of (and cost of providing)" the enumerated items.[4]

Ultimately, case law compels the conclusion that the State must determine the amount of foster care maintenance payments using the appropriate statutory criteria and then make that payment, not a partial payment. The Act itself is clear:

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[4] Tellingly, the State does not discuss numerous other cases cited in support of the Alliance's position, including *Haskins v. Stanton*, 794 F.2d 1273, 1277 (7th Cir. 1986), *Southside Welfare Rights Organization v. Stangler*, 156 F.R.D. 187, 195 (W.D. Mo. 1993) and *Robertson v. Jackson*, 766 F. Supp. 470, 475 (E.D. Va. 1991), which all stand for the proposition that substantial compliance is insufficient.

once the State determines the costs using the factors listed in the Act, it ***shall*** make foster care maintenance payments that must cover the costs of the enumerated items.

C. The State Concedes That The Child Welfare Act Does Not Explicitly Permit A State To Take Budgetary Considerations Into Account In Determining The Amount Of Foster Care Maintenance Payments

The State agrees that the Child Welfare Act does not contain a "lack of funds" exception enabling states to take budgetary considerations into account in determining the amount of foster care maintenance payments. (Answer. Br., at 14.) However, the State argues that "Judge Patel did not create a lack of funds exception to the Act, but merely pointed out that federal law does not compel cost of living increases, and that state budgetary considerations are entirely and properly among the considerations a state may take into account in its rate-setting methodology." (Answer. Br., at 16.) The State further asserts that "in the absence of any federal law requiring that a cost-of-living type of indexing system be an integral part of a state's IV-E plan, there is simply no such federal requirement, and California cannot be said to be violating the Act on that basis." (Answer. Br., at 15.) These assertions are without merit and are based on a fundamental misinterpretation of the Child Welfare Act.

The requirement that California must adjust its rates schedule to ensure that it is covering the cost of the enumerated items is stated clearly in the Child Welfare Act.[5] To receive federal funding, the Child Welfare Act requires each state to submit a plan to the Department of Health and Human Services which "provides for foster care maintenance payments in accordance with section 672 of this title and for adoption assistance in accordance with section 673 of this title . . . ." 42 U.S.C. § 671(a)(1). Section 672 commands that "[e]ach State with a plan approved . . . shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative . . . into foster care . . . ." 42 U.S.C. § 672(a)(1). The Child Welfare Act defines "foster care maintenance payments" as payments "to cover the cost of (and the cost of providing)" the enumerated items set forth in Section 675(4)(A). 42 U.S.C. § 675(4)(A). The Act further requires that each state plan must periodically review the "amounts paid as foster care maintenance payments and adoption assistance to assure their continuing appropriateness[.]" 42 U.S.C. § 671(a)(11). Thus, in summary, not

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[5] Although the State frames the issue as "cost-of-living" increases, the Act requires that the State must provide "foster care maintenance payments" that "cover" the costs of providing the enumerated items. There is no dispute that the costs of providing the enumerated items has increased over the years, while California's foster care maintenance payments have not increased in tandem. Thus, there is no dispute that California does not "cover" the cost of providing the enumerated items.

only does the Act require the State to make foster care maintenance payments that "cover" the costs of providing the enumerated items, it also requires states to periodically review their foster care maintenance payments to ensure that they are appropriate.

The California legislature recognized the importance of periodic adjustments in the rate levels to reflect cost of living increases. When the statute was originally enacted it provided that the rates were "developed using 1985 calendar year costs and *reflect adjustments* to the costs for each fiscal year, starting with the 1986-87 fiscal year, *by the amount of the California Necessities Index* . . . ." *See* Cal. Welf. & Inst. Code § 11462(c) (emphasis added). Furthermore, the California statutory scheme also provides that the "standardized schedule of rates *shall be adjusted annually by an amount equal to the CNI* computed pursuant to Section 11453, subject to the availability of funds." Cal. Welf. & Inst. Code § 11462(g)(2) (emphasis added). Unfortunately, although California's statutory scheme provides for annual adjustments in an amount equal to the CNI, the State does not dispute that it has failed to make the requisite adjustments, resulting in a substantial deficiency in the amount of foster care maintenance payments.

Equally fundamental, the State's interpretation results in an absurdity that renders the Child Welfare Act ineffective to address the critical issues that Congress sought to address on behalf of the country's foster care children. Under

the State's interpretation of the Act, California is not required to "cover" the costs of providing the enumerated items, and is permitted to take budgetary considerations into account in determining the amount of foster care maintenance payments. Furthermore, the State argues that there is no requirement that it adjust its rates, yearly or otherwise, to ensure that its foster care maintenance payments actually "cover" the cost of providing the enumerated items. Thus, so long as a state makes foster care maintenance payments of any amount, it is compliant with the Child Welfare Act and permitted to receive federal funding. This interpretation cannot be reconciled with the plain language of the Act as it essentially removes the requirement that states "cover" the costs of the enumerated items. Furthermore, the State's interpretation effectively ensures that foster care maintenance payments will never actually "cover" the costs of providing the enumerated items because states will always have budgetary constraints and interested parties lobbying for their limited funds. As a result, many non-profit institutional providers will be forced to close as they will not have the critical funds necessary to provide for the required, basic needs of California's foster care children. This could not have been Congress' intent in passing the Child Welfare Act.

In addition to its flawed statutory analysis, the States also unpersuasively attempts to distinguish this Court's decision in *Blanco v. Anderson*, 39 F.3d 969

(9th Cir. 1994). The State argues that "[t]he statutory entitlement in *Blanco* was explicit: the law at issue there required an availability of assistance in county welfare offices that was compromised by weekday closings of those offices, and a lack of resources argument was rejected by this Court under the circumstances of that case, which involved a regulation that explicitly prohibited budgetary considerations to be taken into account." (Answer. Br., at 16.)

Similar to *Blanco*, the statutory entitlement in this case is also explicit: the law at issue requires states to make foster care maintenance payments that "cover" the costs of providing the enumerated items set forth in the Child Welfare Act. Furthermore, contrary to the State's assertion, there was no "explicit" regulation in *Blanco* that prevented states from taking budgetary considerations into account. Rather, as the district court pointed out, this Court relied upon the regulation requiring "arrangements to assist applications and recipients in obtaining medical care and services in emergency situations on a 24-hour basis, 7 days a week." *Blanco*, 39 F.3d at 973.

Thus, based on the explicit language of the statute requiring immediate assistance to food stamp applicants and the lack of language in the regulation permitting the consideration of budgetary constraints, this Court found that a lack of resources was "no excuse for failing to provide the plaintiffs their statutory entitlements." *Id.* at 972-73. Similarly, the explicit language in the Child Welfare

Act requires states to "cover" the costs of the enumerated items, and there is no language in the Act that excuses full and complete foster care maintenance payments based on a lack of resources. Accordingly, *Blanco* supports the assertion that the State cannot use lack of funds as an excuse to make deficient foster care maintenance payments.

In sum, the Child Welfare Act does not contain a lack of funds exception that permits the State to take budgetary considerations into account in determining the amount of foster care maintenance payments. Furthermore, the Child Welfare Act unequivocally requires States to *cover* the costs of providing the enumerated items in the Act, and therefore California must periodically adjust its rates to ensure that its payments are compliant. There is no dispute that California's current rate schedule does not come close to "covering" the costs of providing the enumerated items.

III. CONCLUSION

The State of California, as a recipient of federal funds under the Child Welfare Act, is required to make foster care maintenance payments that "cover" the cost of providing the basic necessities set forth in the Act to California's foster care children. It is undisputed that California's foster care maintenance payments do not "cover" such costs. Notwithstanding these facts, the district court erroneously concluded that California has not violated the Child Welfare Act and

is in compliance with federal law. As established in the Alliance's Opening Brief and reemphasized herein, the district court made several legal and interpretative errors in reaching these conclusions. Thus, the Alliance respectfully requests that the Court reverse the district court's order granting the State's Motion for Summary Judgment and denying the Alliance's Motion for Summary Judgment.

DATED: October 31, 2008 Bingham McCutchen LLP

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CERTIFICATE OF COMPLIANCE PURSUANT

TO FRAP 32(A)(7)(C) & CIRCUIT RULE 32-1

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DATED: October 31, 2008 Bingham McCutchen LLP

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