IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-23037-CIV-JORDAN/O'SULLIVAN

FLORIDA PEDIATRIC SOCIETY/THE FLORIDA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS; FLORIDA ACADEMY OF PEDIATRIC DENTISTRY, INC., et al.,

Plaintiffs,

vs.

ELIZABETH DUDEK, et al.,

Defendants.
_____/

PLAINTIFFS' REPLY IN SUPPORT OF PROPOSED DECLARATORY JUDGMENT

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Pursuant to this Court's Order, D.E. 1340, Plaintiffs submit this Reply in Support of Proposed Declaratory Judgment, D.E. 1332.

INTRODUCTION

The Court should enter Plaintiffs' Proposed Declaratory Judgment, *see* D.E. 1332, without further delay. Defendants identify no issues with the form of the Proposed Declaratory Judgment, and they cannot dispute that a declaratory judgment is an appropriate Section 1983 remedy that the Court may then follow, as needed, with injunctive relief. While the declaratory judgment is not an appealable order,[1] and by itself does not compel specific action, it is the necessary first step to final resolution of this matter.

Numerous states have at one point or another resolved similar cases by a consent judgment, at times after the district court has made its findings. *See, e.g., Memisovski v. Maram*, No. 92 C 1982, 2007 WL 4232716, at *1 (N.D. Ill. 2007). Throughout this case, however, Defendants have refused to meaningfully engage in discussions over a consent judgment, citing a self-enacted policy of not entering into consent decrees. *See* 4/24/15 Hearing Tr. at 64:1–6 (Ms. Daniel: "[W]e have an irreconcilable difference in that Plaintiffs want, and we can't give, a consent decree as part of the settlement. . . . [T]hat's a bedrock issue for the State, we will not do it."). With the entry of a declaratory judgment, however, the discussion will not be about a consent decree, but rather about what steps the State will take to address the declaratory judgment entered by the Court. We presume conscientious officials of the executive and

[1] A declaratory judgment is not a final appealable judgment under Fed. R. Civ. P. 54(b) in a case where plaintiffs are seeking declaratory and injunctive relief on each count. *See Edwards v. Prime, Inc.*, 602 F.3d 1276, 1289 (11th Cir. 2010) ("judgment must completely dispose of at least one substantive claim"); *see also Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1976) (Rule 54(b) did not apply because the complaint contained a single claim but that even if the Rule were applicable, the district court's order could not have properly been certified because it did not dispose of the request for injunctive relief).

legislative branches in Florida will pay attention to a formal declaratory judgment of this Court, and that a court-ordered mediation in this context may be productive.

Nonetheless, because of the prospect that injunctive relief will be required, Plaintiffs will shortly file a motion to permit a limited amount of discovery on each side in preparation for a hearing on injunctive relief. We believe this is the process the Court envisioned during the long trial of this case; it is an appropriate process; and it is the process which should be followed.

Aside from a number of obviously wrong[2] or previously rejected arguments,[3] Defendants raise the following three objections to the Proposed Declaratory Judgment: (1) that the case is moot—an argument this Court has fully considered on several occasions over the past years and which must once again fail for lack of evidence that changes in the Florida Medicaid system have in practice permanently eradicated the statutory deficiencies found by the Court; (2) that the record is stale—an argument not grounded in *Ex parte Young*, not established by the mere passage of time, and, in any event, refuted by the most recent official statistical evidence presented by Plaintiffs, and (3) that this Court does not have the authority to issue relief to stop violations of federal rights whose causative chain includes inadequate compensation to attract a sufficient supply of doctors and dentists to meet the needs of Medicaid children—an argument that misreads the *Armstrong* opinion and ignores the plethora of legal support for federal courts to fully enforce federal rights under Section 1983. Each of these arguments is discussed in turn below.

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[2] For example, Defendants argue that due process requires hearing to resolves disputed factual issues, *see* D.E. 1339 at 23 – 24, ignoring that they have had an entire trial, following which the Court made extensive findings.

[3] For example, Defendants repeat previously rejected arguments about the existence of an enforceable right under Section 43, and object to the Court's reliance on Section 43(b) and (c) as not properly embraced in the original pleadings of the case.

ARGUMENT

I. DEFENDANTS HAVE AGAIN FAILED TO MEET THE FORMIDABLE BURDEN OF ESTABLISHING MOOTNESS

To show Plaintiffs' claims are moot, Defendants must establish that they "have completely and irrevocably eradicated the effects of the alleged violations." *Thomas v. Bryant*, 614 F.3d 1288, 1321 (11th Cir. 2010) (quoting *LaMarca v. Turner*, 995 F.2d 1526, 1542 (11th Cir.1993) (internal quotation marks and citation omitted)). That is a "heavy burden." *Id.* Defendants must show "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur" or that the challenged conduct has been unambiguously terminated." *Doe v. Wooten*, 747 F.3d 1317, 1324-24 (11th Cir. 2014) (internal citations omitted). "Subsequent events, such as improvements in the allegedly infirm conditions …, while potentially relevant, are not determinative of whether injunctive relief is no longer warranted." *Thomas*, 614 F.3d at 1320 – 21 (internal quotation marks and citation omitted). The burden is especially heavy where allegedly corrective action is taken after suit has been filed. *Id.*; *see also LaMarca*, 995 F.2d at 1542 ("When a defendant corrects the alleged infirmity after suit has been filed, a court may nevertheless grant injunctive relief unless the defendant shows that absent an injunction, the institution would not return to its former, unconstitutionally deficient state.") (internal citations omitted).

Once certified, a class action only becomes moot if the claims of the certified class are moot. *See Birmingham Steel Corp. v. Tenn. Valley Auth.*, 353 F.3d 1331, 1342 n.11 (11th Cir. 2003) ("[O]nce certified, a class acquires a legal status separate from that of the named plaintiffs."); *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1268 n.30 (11th Cir. 2001) ("[I]f a plaintiff had standing at the time of the complaint and at the time a class is certified, subsequent events that may moot her own claim . . . do not necessarily defeat her

ability to continue to represent a class whose members still have live claims."); *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) ("[M]ootness of the named plaintiff's individual claim after a class has been duly certified does not render the action moot." (citing *Sosna v. Iowa*, 419 U.S. 393 (1975)). Defendants argued to the contrary at the prior hearing before the Court but, unsurprisingly, have not been able to produce any case law to support their position.

In their latest filing, D.E. 1339, Defendants have nonetheless renewed their mootness claim once again—and once again, they fall far short of carrying their "heavy burden." *Thomas*, 614 F.3d at 1321. Defendants nominally "acknowledge," as they must, "that it is their burden to demonstrate that Plaintiffs' claims are moot." D.E. 1339 at 7. Even considering Defendants' recent declarations, Defendants cannot meet the "formidable burden" of making "absolutely clear" that this case is moot as a result of a change by Defendants. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013) (citation omitted); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."). Defendants have at times conceded as much, *see* 1/30/15 Hearing Tr. at 23:13–15 (The Court: "You're not prepared to prove mootness in the next two weeks or so, in other words?" Mr. Bowden: Oh, no, of course not. Oh, no.").

A. Claims Against AHCA and CMS

Defendants argue that the claims against AHCA and DOH/CMS are moot because most children on Medicaid are in managed care, there are detailed provider network requirements for the managed care organizations, and AHCA has implemented a detailed and robust system to monitor the performance of the managed care plans. *See* D.E. 1339 at 10-12. However, those assertions are just a variation of an argument that Defendants presented at trial. Nearly half of

Florida's Medicaid children were covered by managed care by October 2009. D.E. 1294, Amended Findings, at ¶ 313. Then, as now, there were network adequacy requirements and other paper assurances of adequate care. *See* D.E. 1327, Pls.' Proffer, D.E. 1318 at Ex. 24, Flint Decl. ¶ 11. Yet the Court determined that "the same problems that plague fee-for-service Medicaid—failure to provide well-child check-ups, a scarcity of specialists, excessive wait times and travel distances for specialty care, and a lack of dental care—infect the Medicaid HMOS," and that "ACHA's HMO system fails to meet the federal requirements for providing EPSDT care, in violation of (a)(10) [and] do not provide care with reasonable promptness, as required by (a)(8)." D.E. 1294, Amended Findings, at 151.

Nor do Defendants offer any systematic evidence to support their self-serving assertions that the Florida Medicaid system has improved to the extent that the sweeping deficiencies found by this Court have been eliminated. Indeed, Defendants' own declarations acknowledge that Defendants lack any such systematic evidence. *See* 1327-8, Decl. of R. Croix at ¶ 13 ("AHCA has reconciled itself to the fact that the first year of HEDIS measure reporting to how the effectiveness of the MMA will come in July 2016, as CY 2015 is the first full year of MMA operations."); 1327-17, Decl. of M. Vergeson at ¶ 9 ("Unfortunately, it will not be until July 2016 before audited data is available for a full years' worth of services under MMA") (declaration of M. Vergeson).

In fact, the most recent systematic evidence available shows that the problems persist. Florida's CMS 416 for the federal fiscal year ending September 30, 2013 shows that more than 700,000 children on Medicaid who should have received at least one EPSDT screen did not receive any in that federal fiscal year. D.E. 1327, Pls. Proffer, Exh. 23, Darling Report at Exh. F. It also shows that 900,000 children on Medicaid over the age of two did not receive any dental

care in the federal fiscal year ending on Sept. 30, 2013. *Id.* It further shows that while there has been an increase in the number of lead blood screens only about 25% of the children in the 1-2 and 3-5 age categories receive one. *Id.* at 20-21 and Exh. F.

In addition, since the last hearing, the federal Centers for Medicare and Medicaid Services has posted on its website Florida's newest CMS 416 Report, for the year ending September 30, 2014, and this report (of which the court may take judicial notice) not only shows problems persist, but that they continue to worsen. Now, over 800,000 children in Florida are, by the State's own records, not receiving a single preventative screen, and the participant ratio has declined to 53% (down from 68% in 2007). That report, the most recent available, can be found at http://www.medicaid.gov/medicaid-chip-program-information/by-topics/benefits/downloads/fy-2014-epsdt-data.zip, and is attached hereto as Exhibit A.

B. Claims Against DCF

Defendants contend that declarations they have submitted show that the claims against DCF are moot. *See* D.E. 1339 at 9. Defendants' self-serving declarations, unsupported by any systematic analysis, let alone any rigorous, independent evaluation, are insufficient to establish that these long-running violations of the Medicaid Act are permanently ended.[4]

The very declarations submitted by DCF demonstrate that DCF cannot meet the heavy burden of showing that the claims against it are moot. *See* D.E. 1327-26, N. Lewis Decl. at ¶ 8 ("With the reduction in coverage categories and streamlined use of the primary categories, DCF has eliminated a significant amount of potential movement among categories, *minimizing* potential opportunities for 'switching.' (emphasis added)); *id.* ¶ 17 ("To be clear, MES [DCF's

[4] *See* 7/8/14 Hearing Tr. at 89:3-24 (The Court: "So, if the program is implemented at some point, and we have studies or findings about how well or how badly it's working, then it may be time to revisit the issue . . . . But I just want to let you know that the date of full implementation is not, for me, going to be a magical point with regards to mootness. I will want to know whether or not it's working.").

new computer system] addressed the deficiencies in DCF's software that were identified as potentially error-prone and *minimizes the possibility* that DCF eligibility actions will adversely affect Medicaid recipients because of how those actions are interested by AHCA's computers system." (emphasis added)); *see* D.E. 1327-27, T. Veltkamp Decl. at ¶ 20 ("The oversight of all eligibility determinations has been enhanced significantly since 2012 and *should result in improved accuracy* in Medicaid eligibility determinations." (emphasis added)); D.E. 1327-37, P. Turner Decl. at ¶ 15 ("With the implementation of MES, both Release I and Release II, there are a number of systems' improvements that *should result in greater protection* to children's period of protected Medicaid coverage as well as enhanced reliability and accuracy in Medicaid determinations and redeterminations." (emphasis added)). Plaintiffs have submitted declarations from physicians that show there is a live controversy on this issue as switching continues to occur. *See* 1318-1, Fox-Levine Decl. at ¶¶ 10-11; 1318-3, Jimenez Decl. at ¶¶ 17-18; 1318-4, Cosgrove Decl. at ¶¶ 10, 12; 1318-5, Robinson Decl. at ¶¶ 11-14; 1318-6, Rowley Decl. at ¶¶ 13-14; 1318-7, Schechtman Decl. at ¶¶ 11-13; 1318-8, Castro Decl. at ¶¶ 10-14.

Even taking Defendants' declarations at face value, assertions that changes in DCF's computer system and operations, which have been made long after this litigation started, should "minimiz[e] potential opportunities for 'switching'" or "should result in improved accuracy" or "should result in greater protection" fall far short of the required showing to moot the claims against DCF because DCF "has failed to establish that the challenged conduct has been unambiguously terminated" or "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur[.]" *Doe v. Wooten*, 747 F.3d at 1324-24. DCF's own declarations also show continuing problems with other parts of DCF's operations. *See* D.E. 1327-28 ¶, L. Sykes Decl. at 18 ("The December 2014 abandonment rate was 20.3%, the busy

signal 29%, and the average wait time was 11 minutes and 38 seconds."); *see also* D.E. 1327-33, W. Martinez Decl. at ¶ 8 (same).

II. PLAINTIFFS' EVIDENCE IS NOT STALE AND *EX PARTE YOUNG* DOES NOT PRECLUDE THIS COURT FROM ENTERING THE PROPOSED DECLARATORY JUDGMENT.

A. This Case Seeks Prospective Declaratory and Injunctive Relief Fully in Accord with *Ex Parte Young*

Defendants continue to invoke *Ex parte Young* as an all-purpose talisman, ignoring its meaning, despite this Court's repeated explanations regarding this iconic decision. It is true that "*Ex Parte Young* authorizes only prospective relief that is aimed at ending an ongoing or continuing violation of federal law." D.E. 1332, Def. Response at 5. But that is precisely the sort of relief Plaintiffs seek in this case, which is why Plaintiffs had the burden under Article III to "prove not only harm, but also 'a 'real and immediate threat' of future injury in order to satisfy the 'injury in fact' requirement.'" D.E. 1314, Amended Findings of Fact and Conclusions of Law, at 8 (quoting *Koziara v. City of Casselberry*, 392 F.3d 1302, 1305 (11th Cir. 2004)). Plaintiffs would lack standing to pursue their entirely prospective claims if they could not show an ongoing violation; merely proving past injuries would have been insufficient. But as this Court determined, *Plaintiffs have already satisfied this burden*. *See id.* at 9 – 12. Now that Plaintiffs carried their burden, it is Defendants who must prove that Plaintiffs no longer face an ongoing threat of harm—by carrying their "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC v. Nike*, 133 S. Ct. 721, 727 (2013) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 190 (2000)); *accord id.* at 733 (Kennedy, J., concurring) ("As the Court now holds and as the precedents instruct, when respondent Nike invoked the covenant not

to sue to show the case is moot, it had the burden to establish that proposition. The burden was not on Already to show that a justiciable controversy remains.").

Defendants ignore this well established framework, arguing that there is a continuing burden on Plaintiffs "to show that there is an ongoing violation throughout the proceedings, including up to the entry of relief." Defs.' Response, D.E. 1332, at 7. Neither the Eleventh Amendment nor *Ex parte Young* impose any such burden. *See, e.g., K.P. v. LeBlanc*, 729 F.3d 427, 439 (5th Cir. 2013) (rejecting argument that Eleventh Amendment "work[s] an end-run around the voluntary-cessation exception to mootness where a state actor is involved"). As indicated in cases cited by Defendants, the Eleventh Amendment and *Ex parte Young* merely limit the Court's power to award certain types of relief; they have absolutely nothing to do with burdens of proof. *See, e.g., Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1639 (2011) (explaining "that '[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective'" (quoting *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)); *Green v. Mansour*, 474 U.S. 64, 71 (1985) ("Because 'notice relief' is not *the type of remedy* designed to prevent ongoing violations of federal law, the Eleventh Amendment limitation on the Art. III power of federal courts prevents them from ordering it as an independent form of relief." (emphasis added)); *Fla. Ass'n of Rehabilitative Facilities, Inc. v. State of Fla. Dept. of Health & Rehabilitative Servs.*, 225 F.3d 1208, 1211 (11th Cir. 2000) (vacating judgment "[b]ecause the Eleventh Amendment bars retrospective relief affecting the state treasury" and remanding "for determination of whether Plaintiffs' entitlement to prospective relief had become moot" under Article III); *id.* at 1219 ("The availability of [the *Ex*

parte Young] doctrine turns, in the first place, on whether the plaintiff seeks retrospective or prospective relief."). Far from imposing an independent, continuing burden of proving an ongoing controversy, the Eleventh Amendment itself simply requires dismissal of claims for retrospective relief in the event plaintiffs lack standing—under Article III—to pursue claims for prospective relief.

Green v. Mansour is erroneously relied upon by Defendants. There, the plaintiffs did not claim any "continuing violation of federal law," and only disputed "the lawfulness of respondent's past actions." 474 U.S. at 73. Thus, the lower courts properly concluded that the plaintiffs' claims for prospective relief were moot for Article III purposes. *Id.* at 67. The Supreme Court agreed that there was no ongoing violation and granted review to decide whether *Ex parte Young* would allow courts to "issue a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law." *Id.* The Court answered that declaratory relief regarding past actions was barred by the Eleventh Amendment because it was "not the type of remedy designed to prevent ongoing violations of federal law," *id.* at 71. By contrast, the relief sought by Plaintiffs in this case is entirely prospective and targeted at ongoing violations of federal law.

B. The Record is Not Stale and Does Not Preclude Entry of Appropriate Relief

Defendants, after themselves prolonging the length of trial by opposing any reasonable time limitations on testimony, now claim that this record is too "stale" to support entry of relief. There is no particular staleness doctrine that relieves Defendants of the consequences of the Court's thorough 153-page findings simply because the record closed in 2012 and discovery ended before that.[5] Many institutional-reform cases stretch for years and such a principle would

[5] *Webb v. Mo. Pac. R. Co.*, 98 F.3d 1067 (8th Cir. 1996), is not to the contrary. There the court found injunctive relief was not warranted, not because the evidence was stale, but rather because

only incent Defendants to extend the trial, delay the day of reckoning, and then assert the evidence is too old. The evidence is not stale because the record at trial shows problems inherent in the structure of Florida's Medicaid program. Evidence of inadequate access due to low Medicaid reimbursements is not stale because the same rate structure governs reimbursement, even under the new managed care regime.

Moreover, insofar as the Court has called on plaintiffs to proffer evidence of ongoing violations, it has done so with statistical evidence not disputed by Defendants. That evidence from the State's own reports shows that the denials of preventative medical and dental care to Florida's children are not receding, they are increasing. As noted, Florida's 2013 CMS 416 report, for the year ending Sept. 30, 2013, shows, among other things, that 700,000 children on Medicaid who should have received at least one EPSDT screen did not receive any and that 900,000 children on Medicaid over the age of two did not receive any dental care. And Florida's 2014 CMS 416 report, which became publicly available just this week, demonstrates those problems continued, and worsened, for the fiscal year ending Sept. 30, 2014. Defendants' declarations concede that systematic evidence regarding the effectiveness of changes in Medicaid managed care will not even be available until mid-2016. *See* 1327-8 at ¶ 13; 1327-17 at ¶ 9.

Defendants, as an alternative, propose that the Court do nothing until completion of a remedies phase that would stretch well into 2016, if not beyond, and would entail virtually limitless discovery. *See* D.E. 1299, Corrected Joint Scheduling Report (proposed remedies

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there was no evidence of a present or likely future injury in this employment discrimination case. Rather, the only evidence submitted to the court during the last five years since the trial ended, evidence that was submitted shortly before the district court issued its injunction, showed the "effective implementation of comprehensive antidiscrimination and affirmative action programs[.]" *Id.* at 1068. That, of course, is not the case here where the most recent CMS 416 report provides systemic evidence of continuing problems with Florida's Medicaid program.

phase); 4/24/15 Hearing Tr. at 57:3–57:4 (Mr. Bowden: "I know that on our side we want to depose everyone."); *id*. at 59:17 (Mr. Bowden stating that there should be "[n]o limits" on the number of depositions). They have told the Court that no relief can be entered until the Court hears additional testimony from the named plaintiffs—even though the law says otherwise. *Contrast* 4/24/15 Hearing Tr. at 52:14 – 52:20 (Ms. Daniel stating that "the class action jurisprudence" says that "[the named plaintiffs] are required to take and present evidence of their own injury") *with Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 704 (11th Cir. 2014) ("Even if the individual claims are somehow deemed moot, the class claims remain live, and the named plaintiffs retain the ability to pursue them.").

III. *ARMSTRONG* DOES NOT PRECLUDE THIS COURT FROM ENTERING THE PROPOSED DECLARATORY JUDGMENT

This Court has properly rejected Defendants' argument that the Supreme Court's recent decision in *Armstrong v. Exceptional Care Center, Inc.*, 135 S. Ct. 1378 (2015), means that there are no rights enforceable through Section 1983 for other provisions in the Medicaid Act, specifically, the rights to receive EPSDT care, (a)(10), to do so with reasonable promptness, (a)(8), and for effective outreach and to receive screenings and treatment, (a)(43)(A), (B), and (C). Defendants now argue that *Armstrong* should be read to mean that Section 1983 rights are enforceable only if the Court does not have to make judgments about the adequacy of reimbursement rates. This position is wrong for a number of reasons.

First, once rights are found to be enforceable under Section 1983, a federal court is obligated to use the full panoply of its remedial powers to effectively enforce those rights. "Federal courts, it was early and famously said, have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 590-91 (2013) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

"Jurisdiction existing, . . . a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Id.* at 591 (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)); *cf. Fortin v. Comm'r of Mass. Dep't of Pub. Welfare*, 692 F.2d 790, 798 (1st Cir. 1982) (panel decision including then-Judge Breyer) ("Because the court had the power to adjudicate the issue, it also had the power to order appropriate relief . . . ").

In *Armstrong*, by contrast, the issue was whether Congress intended federal courts to have jurisdiction at all, as part of their general equitable powers, to enforce the "equal access" provision, Section 30(a) of the Medicaid Act, after the Court took it as a given—Respondents did not argue otherwise—that Section 30(a) was not enforceable under Section1983. Here, federal courts around the country have without exception found that the relevant statutory sections are privately enforceable under Section 1983, and this Court has correctly held that this remains true even after *Armstrong.* Thus, the ability and obligation of the Court to fully adjudicate and enforce rights under those provisions is unimpaired.

A simple example, given at oral argument, demonstrates the folly of the Defendants' position. Clearly, if Section (a)(10) and a(8) are enforceable, Defendants cannot refuse outright to make a covered service, such as dental care, available. Under Defendants' current rationale, however, the State could effectively deny that right by compensating dentists at $1 for filling a tooth. And if the Court can say $1 is inadequate, why cannot it say the existing rate structure is inadequate? (This example is not purely hypothetical, as the Court has found Florida's reimbursements for dentists to be grossly inadequate—below costs—leading to the lowest level of children on Medicaid receiving dental services in the nation.) The Court must be able to prevent states from giving lip service to rights by making treatments "available" but not

providing the resources such that the services are truly available, and are available promptly throughout the state.

Many Section 1983 issues ultimately involve increasing state expenditures. When § 1983 or another statute gives a court jurisdiction to enforce a federal right, however, the court cannot avoid redressing a violation of that right simply because doing so requires the court to order public officials to make payments. *See generally Lane v. Cent. Ala. Cmty. College*, 772 F.3d 1349, 1351 (11th Cir. 2014) ("The Supreme Court has recognized that compliance with the terms of prospective injunctive relief will often necessitate the expenditure of state funds. And [s]uch an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*." (alteration in original) (citations and internal quotation marks omitted)).

Second, the proposed declaratory judgment does not specifically set a reimbursement rate that the Defendants must follow (again unlike the decision in Idaho reversed by *Armstrong*, 135 S. Ct. at 1392; *Inclusion, Inc. v. Armstrong*, No. 1:09-cv-00634-BLW, ECF No. 50 (D. Idaho Apr. 12, 2012)). Defendants, at this juncture, have discretion in fashioning changes to the Medicaid program so long as at the end of the day children are receiving EPSDT treatments, are doing so with reasonable promptness, and receiving effective outreach and treatment upon request. Plaintiffs proved, and this Court's findings' establish, that effectively redressing the access to care problems requires Florida to increase its reimbursement level. But the declaratory judgment does not specify the level and it does not limit the State in devising its means of compliance.

To be sure, the day may come when Plaintiffs ask the Court to issue injunctive relief, and that injunctive relief may at some point need to direct Defendants to increase inadequate

capitation payments paid to the managed care plans and in turn, improve reimbursement levels by such plans if they are inadequate to assure children receive adequate access to medical and dental care. Even such relief is not foreclosed by Armstrong, or Justice Breyer's concurring opinion in *Armstrong*. Justice Breyer did not join the broader plurality that would have rejected private enforcement of the Medicaid Act and other spending clause legislation. Instead, he carefully tailored his rejection of judicial authority, in a suit not under Section 1983, to enforce a statute that he found required more "direct rate-setting," and balancing of competing economic considerations. *See Armstrong*, 135 S. Ct. at 1388 (Breyer, J., concurring). He said this analysis was based on "several characteristics of the federal statute before us," that he was not prepared to rule more than necessary for the instant case, and even suggested that direct rate-setting judgments might be appropriate in a particular case. *See id.* at 1388 – 89.

Neither the plurality opinion in *Armstrong* nor Justice Breyer's opinion addressed the long history of courts making rate-related decisions or similar judgments as part of their job in enforcing Section 1983 rights. The scope of judicial enforcement authority under Section 1983 was not before the *Armstrong* Court. The power of federal courts to address rates is well established both for privately enforceable provisions of the Medicaid Act and for federal rights in other contexts. For a Medicaid example, 42 U.S.C. § 1396a(bb) obligates states participating in Medicaid to reimburse federally qualified health centers and rural clinics at certain rates for services they provide to Medicaid enrollees. A provider "suing under § 1983 may enforce not only its right to receive wraparound payments but also *its right to have those payments properly calculated*." *Concilio de Salud Integral de Loiza, Inc. v. Perez-Perdomo*, 551 F.3d 10, 17 (1st Cir. 2008) (emphasis added). Numerous other circuit courts have likewise held that a provider may sue under § 1983 to enforce a claim that the formula used by the state agency to calculate

reimbursements was improper under § 1396a(bb). *E.g.*, *N.J. Primary Care Ass'n v. State Dep't of Human Servs.*, 722 F.3d 527 (3d Cir. 2013); *Concilio de Salud Integral*, 551 F.3d at 18 (collecting cases).

Courts also routinely address rate-setting under § 1983 in a variety of non-Medicaid contexts. For one example, the Ninth Circuit held under the Child Welfare Act, 42 U.S.C. §§ 670-679b, that the California Department of Social Services was failing to make "payments to cover the cost of (and the cost of providing) food, clothing, shelter" and other types of "foster care maintenance payments." *Cal. Alliance of Child & Family Servs. v. Allenby*, 589 F.3d 1017, 1018 (9th Cir. 2009) (quoting 42 U.S.C. § 675(4)(A)). The court found that the agency's officials should be ordered to make annual adjustments to the agency's payment rates, either according to the California Necessities Index or to "some other inflationary adjustment." *Id.* at 1022. On remand, the district court issued a judgment requiring the agency's officials to adjust the payments according to a detailed, 1½-page rate-setting system. Judgment in *Cal. Alliance of Child & Family Servs. v. Allenby*, Case No. C 06-4096, Dkt. No. 92, ¶ 4 (N.D. Cal. Feb. 24, 2010), attached as Exhibit B, *modified*, 2010 U.S. Dist. LEXIS 43537 (N.D. Cal. Apr. 30, 2010), *aff'd*, 425 F. App'x 660 (9th Cir. 2011).

In *Chester-Upland School District v. Pennsylvania*, the plaintiffs sought, for "the Court to enjoin Defendants from reducing funding to the District at a rate different from that to school districts with low percentages of minority students, and from funding the District 'in a racially discriminatory manner.'" 861 F. Supp. 2d 492, 498 (E.D. Pa. 2012).

As another example, when a class of African-American homeowners asserted a Fair Housing Act challenge to the formula that the Louisiana Recovery Authority ("LRA") used to calculate grant amounts for a post-Katrina rebuilding program, the Court of Appeals held that

"the district court has jurisdiction to order LRA to use a different formula for future grantees." *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep't of HUD*, 639 F.3d 1078, 1084 (D.C. Cir. 2011).

Courts also enforce rights requiring similar judgments in other contexts. For example, the Telecommunications Act of 1996 requires state public utility commissions to set rates by which local incumbent carriers lease network elements to competitors. *See* 47 U.S.C. § 252. If a federal court "finds the rates [set by a public utility commission] to be in violation of federal law, it has the authority not only to enjoin the PUC's enforcement of those illegal rates, but also to order the PUC to establish new, legally compliant rates." *Bell Atl.-Pa., Inc. v. Pa. Pub. Util. Comm'n*, 295 F. Supp. 2d 529, 542 (E.D. Pa. 2003) (citing *MCI Telecom. Corp. v. Bell Atl.-Pa.*, 271 F.3d 491, 514-15 (3d Cir. 2001)); *cf. BellSouth Telcoms., Inc. v. Ga. Pub. Serv. Comm'n*, 400 F.3d 1268, 1271 (11th Cir. 2005) ("[W]e see no basis to question the power of the district court, acting under the ordinary federal question jurisdiction of 28 U.S.C. § 1331, to award relief by requiring the [Georgia Public Service Commission], upon remand, to recompense BellSouth for any damages suffered as a result of the erroneous rates set by the GPSC [under 47 U.S.C. § 252]."). In earlier briefing, Plaintiffs showed the long history—back to Blackstone—of courts making judgments as to what is "reasonable." *Bryson v. Shumway*, 308 F.3d 79, 89 (1st Cir. 2002) ("Common law courts have reviewed actions for reasonableness since time immemorial." (citing 1 W. Blackstone, *Commentaries* *77)).

This long-established authority of federal courts to fully enforce rights under Section 1983 was not at issue in *Armstrong*. The same Supreme Court, however, just two years earlier affirmed the rights of a federal court to take what may be considered even more intrusive and judgmental action by upholding an order specifying the exact percentage of overcrowding above

which a state was directed to release prisoners. In *Brown v. Plata*, 131 S. Ct. 1910 (2011), the Court affirmed an injunction requiring California to reduce its prison population to 137.5% of design capacity within two years because it found that overcrowding caused prisoners with serious medical or mental health problems to receive inadequate health care, *id*. at 1924. The injunction was grounded on the finding that inmates were not receiving adequate medical care, and required a judgment as to the causal link between overcrowding and inadequate care. *See id*. at 1944 ("Establishing the population at which the State could begin to provide constitutionally adequate medical and mental health care, and the appropriate time frame within which to achieve the necessary reduction, requires a degree of judgment.").

The function of judging requires the exercise of judgment, and when federal rights that Congress intended the courts to enforce under Section 1983 are at issue—as this Court has determined is true for the EPSDT, reasonable promptness, and effective outreach and treatment provisions of the Medicaid Act—this Court properly may and should exercise its declaratory and injunctive relief powers to protect those rights. The time has come to do that here.

CONCLUSION

For the reasons discussed above, this Court should issue the proposed declaratory judgment.

Dated: June 19, 2015

Respectfully Submitted,

By: /s/ Stuart H. Singer

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 19, 2015, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system and that the foregoing document is being served this day on all counsel of record identified below via transmission of Notice of Electronic Filing generated by CM/ECF.

/s/ Stuart H. Singer
Stuart H. Singer

SERVICE LIST

Florida Pediatric Society/The Florida Chapter of The American Academy of Pediatrics; Florida Academy of Pediatric Dentistry, Inc., et al. v. Liz Dudek in her official capacity as Secretary of the Florida Agency for Health Care Administration, et al.

Case No. 05-23037-CIV-JORDAN/BANDSTRA
United States District Court, Southern District of Florida

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Exhibit A

Annual EPSDT Participation Report
Form CMS-416
Fiscal Year: 2014
State: Florida

Description	Cat	Total	< 1	1-2	3-5	6-9	10-14	15-18	19-20
1a. Total individuals eligible for EPSDT	CN	2,396,312	147,892	290,428	404,502	518,092	539,367	374,206	121,825
	MN	22,528	673	858	1,612	2,876	4,073	4,239	8,197
	Total	2,418,840	148,565	291,286	406,114	520,968	543,440	378,445	130,022
1b. Total Individuals eligible for EPSDT for 90 Continous Days	CN	2,246,195	119,028	279,032	387,557	493,036	509,789	351,180	106,573
	MN	1,684	460	226	56	72	112	134	624
	Total	2,247,879	119,488	279,258	387,613	493,108	509,901	351,314	107,197
1c. Total Individuals Eligible under a CHIP Medicaid Expansion	CN	2,065	876	1,187	1	1	0	0	0
	MN	0	0	0	0	0	0	0	0
	Total	2,065	876	1,187	1	1	0	0	0
2a. State Periodicity Schedule			6	4	3	2	5	4	2
2b. Number of Years in Age Group			1	2	3	4	5	4	2
2c. Annualized State Periodicity Schedule			6.00	2.00	1.00	0.50	1.00	1.00	1.00
3a. Total Months of Eligibility	CN	23,516,312	875,328	3,050,826	4,237,512	5,313,203	5,420,719	3,653,605	965,119
	MN	14,754	3,623	1,817	529	810	1,205	1,233	5,537
	Total	23,531,066	878,951	3,052,643	4,238,041	5,314,013	5,421,924	3,654,838	970,656
3b. Average Period of Eligibility	CN	0.87	0.61	0.91	0.91	0.90	0.89	0.87	0.75
	MN	0.73	0.66	0.67	0.79	0.94	0.90	0.77	0.74
	Total	0.87	0.61	0.91	0.91	0.90	0.89	0.87	0.75
4. Expected Number of Screenings per Eligible	CN		3.66	1.82	0.91	0.45	0.89	0.87	0.75
	MN		3.96	1.34	0.79	0.47	0.90	0.77	0.74
	Total		3.66	1.82	0.91	0.45	0.89	0.87	0.75
5. Expected Number of Screenings	CN	2,357,192	435,642	507,838	352,677	221,866	453,712	305,527	79,930
	MN	2,869	1,822	303	44	34	101	103	462
	Total	2,360,061	437,464	508,141	352,721	221,900	453,813	305,630	80,392
6. Total Screens Received	CN	2,246,090	607,436	620,963	333,333	285,182	258,201	129,595	11,380
	MN	5,772	3,603	1,895	41	40	57	58	78
	Total	2,251,862	611,039	622,858	333,374	285,222	258,258	129,653	11,458
7. SCREENING RATIO	CN	0.95	1.00	1.00	0.95	1.00	0.57	0.42	0.14
	MN	1.00	1.00	1.00	0.93	1.00	0.56	0.56	0.17
	Total	0.95	1.00	1.00	0.95	1.00	0.57	0.42	0.14

Annual EPSDT Participation Report
Form CMS-416
Fiscal Year: 2014
State: Florida

Description	Cat	Total	< 1	1-2	3-5	6-9	10-14	15-18	19-20
8. Total Eligibles Who Should Receive at Least One Initial or Periodic Screen	CN	1,811,772	119,028	279,032	352,677	221,866	453,712	305,527	79,930
	MN	1,430	460	226	44	34	101	103	462
	Total	1,813,202	119,488	279,258	352,721	221,900	453,813	305,630	80,392
9. Total Eligibles Receiving at least One Initial or Periodic Screen	CN	963,618	109,866	199,669	207,603	184,199	169,047	86,203	7,031
	MN	648	395	171	12	9	19	10	32
	Total	964,266	110,261	199,840	207,615	184,208	169,066	86,213	7,063
10. PARTICIPANT RATIO	CN	0.53	0.92	0.72	0.59	0.83	0.37	0.28	0.09
	MN	0.45	0.86	0.76	0.27	0.26	0.19	0.10	0.07
	Total	0.53	0.92	0.72	0.59	0.83	0.37	0.28	0.09
11. Total Eligibles Referred for Corrective Treatment	CN	58,030	8,174	12,420	11,433	10,745	9,798	5,091	369
	MN	36	24	8	1	1	2	0	0
	Total	58,066	8,198	12,428	11,434	10,746	9,800	5,091	369
12a. Total Eligibles Receiving Any Dental Services	CN	660,901	431	25,620	127,901	204,086	184,215	100,910	17,738
	MN	73	1	6	5	2	7	5	47
	Total	660,974	432	25,626	127,906	204,088	184,222	100,915	17,785
12b. Total Eligibles Receiving Preventive Dental Services	CN	575,946	200	22,101	113,866	183,185	163,529	80,885	12,180
	MN	30	0	4	4	1	3	3	15
	Total	575,976	200	22,105	113,870	183,186	163,532	80,888	12,195
12c. Total Eligibles Receiving Dental Treatment Services	CN	256,664	50	2,992	38,405	85,972	72,958	47,380	8,907
	MN	34	0	0	0	0	4	4	26
	Total	256,698	50	2,992	38,405	85,972	72,962	47,384	8,933
12d. Total Eligibles Receiving a Sealant on a Permanent Molar Tooth	CN	102,599				56,314	46,285		
	MN	0				0	0		
	Total	102,599				56,314	46,285		

Annual EPSDT Participation Report
Form CMS-416
Fiscal Year: 2014
State: Florida

Description	Cat	Total	< 1	1-2	3-5	6-9	10-14	15-18	19-20
12e. Total Eligibles Reciving Dental Diagnostic Services	CN	605,235	397	24,074	119,206	188,075	168,474	89,387	15,622
	MN	61	1	6	5	2	5	3	39
	Total	605,296	398	24,080	119,211	188,077	168,479	89,390	15,661
12f. Total Eligibles Receiving Oral Health Services provided by a Non-Dentist Provider	CN	74,464	3,052	55,518	15,614	191	74	12	3
	MN	54	13	41	0	0	0	0	0
	Total	74,518	3,065	55,559	15,614	191	74	12	3
12g. Total Eligibles Reciving Any Dental Or Oral Health Service	CN	724,923	3,461	75,383	138,992	204,177	184,253	100,916	17,741
	MN	125	14	45	5	2	7	5	47
	Total	725,048	3,475	75,428	138,997	204,179	184,260	100,921	17,788
13. Total Eligibles Enrolled in Managed Care	CN	1,695,608	30,110	236,644	325,082	389,928	385,341	254,298	74,205
	MN	586	0	143	421	0	0	2	20
	Total	1,696,194	30,110	236,787	325,503	389,928	385,341	254,300	74,225
14. Total Number of Screening Blood Lead Tests	CN	221,326	2,274	150,684	68,368				
	MN	408	11	387	10				
	Total	221,734	2,285	151,071	68,378				

Exhibit B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA ALLIANCE OF CHILD AND FAMILY SERICES,

Plaintiff,

v.

CLIFF ALLENBY, Interim Director of the California Department of Social Services, in his official capacity, and MARY AULT, Deputy Director of the Children and Family Services Division of the California Department of Social Services, in her official capacity,[1]

Defendants.

_____/

No. C 06-4095 MHP
Related to No. C 09-4398 MHP

JUDGMENT

On December 14, 2009, the United States Court of Appeals for the Ninth Circuit ruled that defendants have violated federal law because "the State is not covering the costs required by the [Child Welfare Act.]" *California Alliance of Child & Family Servs. v. Allenby,* ___ F.3d ___, 2009 WL 4755730, at *5 (9th Cir. Dec. 14, 2009). The Court of Appeals ordered this court to enter judgment in favor of plaintiff California Alliance of Child and Family Services (the "Alliance") as a matter of law. *See id.* The Ninth Circuit's mandate was received by this court on January 6, 2010. Docket No. 85. The issues in this matter having been heard and a written opinion having been duly rendered and filed by the Court of Appeals on December 14, 2009, it is hereby ORDERED and ADJUDGED as follows:

1. The Alliance's motion for summary judgment, filed on July 16, 2007, *see* Docket No. 34, is GRANTED in its entirety, and the court's prior order granting defendants' cross-motion for summary judgment, *see* Docket No. 57, is VACATED.

2. The Clerk's Judgment entered in favor of defendants Cliff Allenby and Mary Ault and against the Alliance, filed on March 12, 2008, *see* Docket No. 58, is VACATED.

3. The Alliance's request for declaratory relief in its complaint is GRANTED. The court hereby finds that the standard rates paid under California's Rate Classification Level ("RCL") system violate the Child Welfare Act ("the Act"), 42 U.S.C. §§ 670-679b, because the State does not "cover the cost" of providing the items and services enumerated in the Act.

4. The Alliance's request for permanent injunctive relief in its complaint is GRANTED. Defendants Cliff Allenby and Mary Ault, and their successors, including John Wagner and Gregory Rose, and their respective agents, officers, servants, employees, attorneys and representatives, and all persons 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, and each of them, are hereby ORDERED to:

a. Adjust the current standard rates paid under the RCL system to group homes to an amount equal to the standard rates in the original standardized schedule of rates for state fiscal year 1990-91 to include the 76.25% cumulative increase in the California Necessities Index ("CNI") from 1990-91 through 2009-10, effective and to be applied to amounts paid as of December 14, 2009, the date on which the Court of Appeals entered its opinion, for each RCL as follows:

Rate Classification Level	Rate (Effective December 14, 2009)
1	$2,085
2	$2,605
3	$3,125

4	$3,643
5	$4,159
6	$4,681
7	$5,199
8	$5,719
9	$6,237
10	$6,757
11	$7,274
12	$7,795
13	$8,319
14	$8,835

b. The standardized schedule of rates shall be adjusted annually, no later than the first day of the State's fiscal year, July 1, to reflect the change in the CNI for the current fiscal year. Such adjustments are not subject to the availability of funds.

c. The new fully-funded standardized schedule of rates, reflected in paragraph 4(a) above, which rates are adjusted to include the 76.25% cumulative increase in the CNI from 1990-91 through 2009-10, shall be used to establish the AFDC-Foster Care rates paid for both federally-eligible and non-federally eligible children.[2]

d. The standardized schedule of rates shall be adjusted annually, no later than the first day of the State's fiscal year, July 1, to reflect, as described at California Welfare and Institutions Code section 11462(m), "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," to the extent that the additional costs of such new departmental requirements and industrywide increase in costs are excluded from the CNI calculations.[3]

5. The Alliance may bring a motion to recover its attorneys' fees and costs within the statutory time period.

6. The court retains jurisdiction to enforce this Judgment.

IT IS SO ORDERED.

Dated: February 23, 2010

MARILYN HALL PATEL
United States District Court Judge
Northern District of California

ENDNOTES

1. By operation of Federal Rule of Civil Procedure 25(d), the current Director of the California Department of Social Services and Deputy Director of the Department's Children and Family Services Division are automatically substituted as defendants. To distinguish this action from the related action filed in 2009, the original caption is nevertheless used here.

2. 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).

3. "[T]he CWA does not set rates or tell states how they are supposed to cover costs. It does not require states to apply an index such as the CNI, or to adopt any particular system for arriving at the amount to be reimbursed. But . . . under the system the State chose to follow, it must make yearly CNI adjustments (or some other inflationary adjustment) to account for the rise (or fall) in its standardized schedule of rates." *Allenby,* 2009 WL 4755730, at *5. The State has the authority to develop an alternate system that meets the requirements of the Child Welfare Act. Counsel for defendants has indicated that the California Department of Social Services is considering options for replacing the RCL system with some other system to cover the costs of foster children in group homes. Paragraph 4 of this order, including subparagraphs (a) through (d), remains in force until such time as the State—after receiving the approvals required by law, including that of the United States Department of Health and Human Services—implements an alternative system that meets the requirements of the Child Welfare Act.