Docket No. 09-16022

In the

United States Court of Appeals

for the

Ninth Circuit

PEG BALL, JAMES CREE, a minor person by and through her grandfather and guardian Bennie James, JEANNE SPINKA, VENNETTA GRAHAM, COLIN PHELAN, a minor person by and through his mother Kim Bowman, JUDETH HINTON, VIRGINIA HASKELL, as individuals and as representatives of a class of persons similarly situated,

Plaintiffs-Appellees,

v.

ANTHONY D. RODGERS, Director of the Arizona Health Care Cost Containment System, THE ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM ADMINISTRATION and STATE OF ARIZONA,

Defendants-Appellants.

Appeal from a Decision of the United States District Court for Arizona (Tucson), No. 00-CV-00067 · Honorable Earl H. Carroll

AMENDED OPENING BRIEF

LOGAN T. JOHNSTON, ESQ.
JOHNSTON LAW OFFICES, P.L.C.
1402 East Mescal Street
Phoenix, Arizona 85020
(602) 452-0600 Telephone
(602) 716-5997 Facsimile

Attorney for Appellants, Anthony D. Rodgers, The Arizona Health Care Cost Containment System Administration and State of Arizona

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

STATUTES

RULES

JURISDICTIONAL STATEMENT

A. The bases for the district court's jurisdiction were 28 U.S.C.§1331 and 28 U.S.C.1343(a)(3) and (4). The plaintiffs alleged violations of 42 U.S.C.§§1396n(c)2(C) and 1396n(d)(2)(C) (Medicaid's "freedom of choice" statutes), the Americans with Disabilities Act ("ADA"), and §504 of the Rehabilitation Act of 1970 ("§504"). They sought equitable relief to protect their civil rights and to redress alleged deprivation of rights secured by the Federal Civil Rights Act.

B. The basis of the Court of Appeals' jurisdiction is 28 U.S.C. §1291. The district court on April 24, 2009 entered its Order, which is its final decision as to the merits of the case. Excerpt of Record (hereafter "ER") 5-15.

C. This appeal was timely filed on May 13, 2009. ER 19. On May 28, 2009, the Plaintiffs moved to dismiss the appeal as not being an interlocutory appeal. The District Court thereupon clarified its injunction is permanent. ER 2-3. The motion to dismiss the appeal was denied on September 17, 2009.

D. This appeal is from a final decision of the district court on the merits that disposes of all parties' claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did Arizona's failure to deliver individual home and community based services ("HCBS") in the "full amount" as prescribed or scheduled to 30 people out of thousands receiving such services violate the Medicaid "freedom of choice" statutes that require the state to (a) inform eligible Medicaid recipients of available HCBS services and (b) allow them to choose those services instead of institutional care?

2. Did "unnecessary" failure to deliver individual HCBS services in the full amount as prescribed or scheduled constitute discrimination against disabled persons served by Arizona's long-term care Medicaid program in violation of the integration mandate of the ADA and §504?

3. Is the district court's injunction tailored to address violations of freedom of choice, the ADA, and §504, or did the court abuse its discretion by requiring Arizona to administer its HCBS program so as to guarantee the court's notion of what constitutes "adequate health care"?

STATEMENT OF THE CASE

On January 27, 2000, the Plaintiffs filed their complaint against the Arizona Health Care Cost Containment System ("AHCCCS," pronounced "access"), the state agency that administers Arizona's Title XIX Medicaid

program, and its Director. Civil Docket (hereafter "Dkt.") 1. The complaint sought a judgment declaring the Defendants to be in violation of a numerous provisions of the United States Constitution, federal statutes and rules, and state statutes and rules. It also sought a permanent injunction against future violations of these laws. *Id.*

On July 21, 2000 seven individuals represented by plaintiffs' counsel were granted leave to intervene in support of the plaintiffs. Dkt. 27. On August 7, 2000, the Honorable Alfredo C. Marquez granted a motion to certify a class pursuant to Rule 23(b)(2), FRCP, of "all persons in the State of Arizona who have been or will be eligible for Home and Community Based Services ("HCBS") from the Arizona Health Care cost Containment System ("AHCCCS"), but are not provided with the full amount of such services prescribed in their care plans." Dkt. 31.

The plaintiffs did not seek temporary or preliminary injunctive relief. The discovery cut-off was August 31, 2001. Dkt. 67, 73.

On October 10, 2001, the Plaintiffs moved for summary judgment as to their primary theories. Dkt. 77. On November 14, 2001, the Defendants filed a cross-motion for summary judgment on these same allegations. Dkt. 82.

On May 8, 2002, Judge Marquez denied the Plaintiffs' motion for summary judgment in its entirety and granted summary judgment to the Defendants on the allegations of violation of the Medicaid laws requiring provision of services to eligible individuals and provision of services with reasonable promptness, the allegation that the defendants had violated the terms of Arizona's state plan, and due process allegations regarding insufficient notice to beneficiaries. The surviving claims were allegations of violation of the Medicaid statutes regarding "equal access" and "freedom of choice" and the allegations under the ADA and the Rehabilitation Act. Dkt. 101.

On August 9, 2002, the parties filed a joint proposed pretrial order. ER 367-77. On October 8, 2003, the case was reassigned to the Honorable Earl H. Carroll. Dkt. 175. A bench trial was held October 21 through October 24, 2003. Dkt. 193-196. On August 13, 2004, Judge Carroll filed his findings of fact, conclusions of law, and order, holding in favor of the Plaintiffs on the equal access and freedom of choice theories but failing to mention the ADA or §504. ER 27-29.

On August 26, 2004, the Defendants filed a Motion For New Trial Or, In The Alternative, Stay. Dkt. 220. On September 10, 2004, the defendants filed their original notice of appeal. Dkt. 214; Dkt. 220.

On January 4, 2005, Judge Carroll denied the motion for New Trial And, In The Alternative, Stay. Dkt. 233. On June 28, 2005, he entered his injunction. ER 23-26.

On appeal, this Court reversed in part, affirmed in part, and remanded to "1) if appropriate make a factual determination as to which federal statutes apply in this case, 2) have the opportunity to decide whether there are other legal bases upon which to grant the Medicaid beneficiaries relief; and 3) amend the terms of the current injunction as needed." *Ball v. Rodgers*, 492 F. 3d 1094, 1117 (9th Cir. 2007) ("*Ball I*"). Based upon the decision in *Sanchez v. Johnson*, 416 F.3d 1051, 1060 (9th Cir. 2005), the Court held Plaintiffs had no private right of action to enforce the equal access provision but held they did have such a right regarding freedom of choice. Judge Carroll was directed to amend the injunction to "reflect that Arizona can no longer be held liable under §1396a(a)(30)(A) [the "equal access" statute]" and "modify the terms of its injunction, if any, to accord with any statutory or regulatory violations found on remand". Id. at 1120.

By stipulation, the parties agreed to file cross-motions for summary judgment. Dkt. 328. They did so on December 21, 2007. Dkts. 331and 333. On April 24, 2009, after briefing but without oral argument, Judge Carroll ruled

in favor of Plaintiffs granting their motion for judgment and denying Defendants' corresponding motion. ER 5-15. He decided there were legal bases to grant relief under the ADA or Rehabilitation Act and the freedom of choice provisions. He did not modify the relief previously granted, other than to delete the equal access statute as a basis for the relief.

This appeal followed on May 13, 2009. ER 19.

STATEMENT OF FACTS

AHCCCS is the state agency that administers Arizona's Medicaid program. A major portion of that program is the Arizona Long Term Care System ("ALTCS"), which provides long-term care for eligible elderly or disabled recipients, including the Plaintiffs, either through nursing facilities or home and community based services. ER 27-28, Findings of Fact 1-4. At the time of trial, approximately 32,000 persons out of a total AHCCCS population of 963,000 received long-term care services; serving this group accounted for about 27% of the AHCCCS budget. ER 55. In 2001, there were 7,319 persons receiving services in their own homes. ER 28, Finding No. 11. Additional persons received HCBS services in adult foster care residences, assisted living homes or centers, hospices, and group homes. *Id*., Finding No. 9. Individual recipients are enrolled with one of several "program contractors" that contract

with AHCCCS. The program contractors coordinate the recipients' care, by contracting with local licensed home health agencies. These agencies employ the recipients' actual caregivers. ER 401.

The plaintiff class consists of "all persons in the State of Arizona who have been or will be eligible for Home and Community Based Services ("HCBS") from the Arizona Health Care cost Containment System ("AHCCCS"), but are not provided with the *full amount* of such services prescribed in their care plans." Dkt. 31 (emphasis added). Thus, the class consists of persons who chose or will choose HCBS instead of institutional care and afterwards did not receive all their individual services.

The Plaintiffs introduced evidence of a total of "30 or so" people whose individual services during the period from 1998 through August 2001 were not provided in the full amount as prescribed in their care plans. ER 344-345. Four plaintiffs testified at trial.

Peg Ball testified she became eligible for HCBS in 1995. She spent ten days in a nursing facility in 1999 when her companion and caregiver became too ill to care for her. Her testimony was unclear as to whether the services this person provided were ones she was entitled to receive through AHCCCS or were additional services that, in her words, were services her "volunteer"

caregiver provided "beyond what was already covered". ER 221. She went home as soon as her companion was no longer ill. ER 237. On other occasions, she testified she did not receive particular services as scheduled for a variety of reasons. Sometimes, to be sure, this was the fault of her providers. Sometimes workers called in sick, quit on short notice, or had transportation problems. Sometimes, however, Ms. Ball refused workers who smoked or wore scents, missed her own appointments, or declined the worker who was scheduled for other reasons. ER 217, 221,231-233, 240-243. She moved from Arizona in April 2000. ER 236.

Jeanne Spinka testified to the special care needs she has because of her disabilities. ER 246-253. She testified about instances of hardship when she was left unattended. ER 258. She testified to a variety of reasons caregivers had for not appearing. ER 261-263.

Melissa Richardson testified to her special needs and hardship when left unattended by a caregiver. ER 278-79, 288. Judeth Hinton described her special needs and her desire to live at home rather than in a nursing facility, even when caregivers were temporarily unavailable. ER 348-49, 353-54.

Plaintiffs have frequently contended plaintiffs Hinton and Grace Collier were institutionalized as a result of unreliable HCBS services. E.g. Dkt. 334, p.

29. The facts were that Ms. Collier died in a nursing home, but there is no evidence that she moved there because of any failure in the HCBS system rather than for medical reasons. ER 372, ¶¶ 30-31. When Ms. Hinton first chose the HCBS program she was in a rehabilitation facility for an injury. A prescribed "attendant care" worker was temporarily unavailable. She accepted "personal care" HCBS services as a substitute and went home. ER 352-54.

The Plaintiffs also called Ann Meyer, the head of a facility in Tucson that trains, educates, and advocates on behalf of disabled individual (ER 147, 170). She testified over objections to hearsay and lack of foundation as to her lay opinions. ER 155-56, 163-164. Based solely on what she had been told by others rather than any first-hand knowledge (ER 170), she testified there was a chronic shortage of attendant care workers due to low pay and lack of benefits; that the problem was county-wide; that unidentified people were told by other unidentified people there was no help available and they could get assistance from family or friends; and that some unidentified people were scared to leave nursing facilities because of the problems they heard about. ER 159-175.

Phil Pangrazio, who headed an entity that provides attendant care services in Phoenix and Maricopa County, testified in 1999-2000 recruiting workers was difficult, there were "ongoing" waiting lists of 20-40 people, and

there were sometimes "difficulties" getting people out of nursing facilities into HCBS due to low wages. ER 89-96. Then, in response to questions from Judge Carroll and Plaintiffs' counsel, he testified that after AHCCCS increased its rates significantly in 2000-2001, the waiting lists "essentially disappeared," recruiting workers became easy enough by word of mouth that he discontinued advertising for them, and he was able to move people from nursing facilities to HCBS at a more rapid rate. ER 100-101.

The plaintiffs' expert was Dr. Dorie Seavey, a labor economist who focused on the rates the AHCCCS system paid HCBS caregivers. She testified the state lacked methods and procedures to adequately monitor gaps in the provision of prescribed services, and the rates prior to the discovery cut-off were not high enough to enlist a sufficient supply of providers. ER 114, 124.

The plaintiffs also called AHCCCS' Susan Luark, a registered nurse whose job at AHCCCS includes, among other things, investigating complaints about long-term care services, including HCBS. She testified to reports AHCCCS gathered on the named plaintiffs' complaints and on other recipients who had complained about their services. ER 297-327. She explained that during October 1998-September 1999 there had been 314 individual complaints over non-delivered services by 220 long-term care members, half of which

concerned HCBS services. Of all the 314 complaints, almost two-thirds could not be substantiated upon investigation. ER 141, 379-81.

(Omitting reference to witnesses and testimony regarding the "equal access" claim), the defendants called former Deputy Director Branch MacNeal, who explained that AHCCCS has every incentive to make HCBS work because it is far less costly than nursing home care. ER. 176-177.

Alan Schafer, the manager of the AHCCCS long-term care system, testified that a 2000-2001 survey of 840 randomly sampled long-term care recipients in Maricopa County (greater Phoenix) funded by the Flinn Foundation and conducted by the Health Services Advisory Group and Arizona State University (ER 130-134; ER 431) showed that those receiving HCBS were highly satisfied with their caregivers. Over 94% said they were satisfied or very satisfied and only 5.3% said they were dissatisfied or very dissatisfied. ER 438.

Mr. Schafer described the various means the agency used to monitor provision of services, including corrective action plans when indicated by review of the contractors' provider networks, finances, operations, quality management, case management, and grievance patterns. ER 134.1-135. He

admitted there were instances in a program of this size when an individual's service would not be provided as scheduled. ER 137.

Phyllis Biedess, the AHCCCS Director from 1999 until mid-2003, testified she had attempted to make AHCCCS "lead the industry" by developing HCBS as an alternative to nursing home care. ER 196, 55.1-55.2**.** She explained that AHCCCS discusses the available long-term care alternatives with recipients in light of their individual needs. ER 59-61. She denied that AHCCCS had in any way forced people into nursing facilities. ER 56.

There was no evidence at trial that any eligible person:

- had not been informed of HCBS as an available option to nursing facility care,
- had been denied the right to choose to receive community based services,
- had given up on HCBS in favor of nursing facility care because of unreliable HCBS service, or
- had chosen to remain in an institution because of perceived problems with the HCBS program.

ARGUMENT

SUMMARY OF ARGUMENT

On remand, the district court was called upon to determine whether the Plaintiffs had proved their surviving claims in light of this Court's opinion in *Ball I* and, if so, to tailor any injunctive relief to remedy the specific harm found. The Defendants respectfully submit the decision below is based upon clearly erroneous findings of fact and an erroneous legal standard that equates the failure to deliver all individual HCBS services as prescribed or scheduled with a denial of "freedom of choice" and discrimination based on the recipients' disabilities. Assuming *arguendo* any injunction were justified, the court also abused its discretion by issuing an overbroad injunction that continues to address the rejected "equal access" theory rather than the goals of either the "freedom of choice" or ADA statutes.

This Court in *Ball I* did not reach the issue of whether the "freedom of choice" statutes, 42 USC §§ 1396n(c)(2)(C) and 1396n(d)(2)(C), had been violated. It expressly found only that the freedom of choice claim did not fail as a matter of law for lack of a private right of action. "[W]e do not go beyond that conclusion in this appeal. Instead we remand to the district court for further fact-finding and, if the facts and law so merit, entry of a new injunction

tailored to the scope of the surviving claims." *Ball I*, 492 F.3d at 1098. The Court provided extensive explanation of what constitutes a violation of freedom of choice and warned that a more expansive interpretation might exceed its parameters.

The Court made clear the "explicit rights" these provisions create are "the right to be informed of alternatives to institutional care and the right to choose from among those alternatives". *Id.*, at 1115. The Court said nothing to suggest these provisions reach issues regarding how the alternative services must be delivered or what quality of care the HCBS alternative must afford. To the contrary, the Court explained that "a court can readily determine whether a state is fulfilling these statutory obligations" because they do not require the kind of policy choices, balancing of competing state goals, and analysis of variables such as "efficiency, economy, and quality of care" as did the "equal access" statute. For these statutes, courts have no need to reach "interpretation and balancing of the statute's indeterminate and competing goals [that] would involve making policy decisions for which [a] court has little expertise and even less authority" (citing *Sanchez v. Johnson*, 416 F.3d 1051, 1060 (9th Cir. 2005). *Id.* The Court warned against reading more into these statutes by trying to convert these information and choice requirements into "vague and amorphous"

challenges that might cause the Plaintiffs' claims to fail on the merits, being no longer enforceable under §1983. Id. at 1115-1116.

Yet that is what happened on remand. The district court disregarded this Court's analysis of "freedom of choice," and, without explanation or analysis, interpreted 42 USC §§ 1396n(c)(2)(C) and 1396n(d)(2)(C) as a basis upon which to prohibit gaps in individual services and, toward that end, to direct how the State must monitor wages and delivery of individual services, how it must write its contracts and policies, how and when it must fill gaps when they occur, what sort of contingency plans it may use, what rates it must pay caregivers (rates that "guarantee that each qualified individual will receive critical services without gaps"), and what sort of notice and appeal system the State must use with respect to gaps. ER 23-26. The district court's reading of "freedom of choice" has no legal basis and would, if permitted, allow these statutes to be used to challenge any perceived fault in a state program on the theory that the fault could force recipients to make a "choice between adequate health care and institutionalization". ER 37.

As to the ADA and §504 claims, the district court was so little impressed by these theories in 2004 it omitted any reference to them in its decision. ER 27-39. Nevertheless, in 2009 the court held the same evidence it had considered

before constituted unjustified isolation of the Plaintiffs by means of threatened and *de facto* institutionalization. The court reasoned that the Defendants' "failure to prevent unnecessary gaps in service and properly monitor its HCBS program" limited the Plaintiffs' ability to maintain their social and economic independence and deprived them of a "real choice between home and institutional care". ER 13. There is no basis for these findings or this interpretation of the statutes. Factually, except for a single ten-day stay in a nursing facility by a single plaintiff, after which that person resumed receiving HCBS services, there is no evidence that anyone was institutionalized even temporarily for the reasons Judge Carroll finds. The conclusion that the Plaintiffs were segregated and denied a real choice between home and institutional care is erroneous, most obviously because all plaintiffs were receiving HCBS services and no person was identified who opted for institutional care instead. Arizona's HCBS program is functioning and growing apace. Though it cannot guarantee provision of every individual service to thousands of recipients as scheduled, the irony of this case is that AHCCCS offers precisely the real choice the district court seeks to vindicate.

Thus the case presents two remaining questions. First, have the Defendants violated the "freedom of choice" Medicaid statutes either by (a)

failing to inform eligible recipients of the option to receive HCBS services rather than institutional care or by (b) failing to afford them the opportunity to choose available HCBS services? Second, have the Defendants unjustifiably institutionalized any recipients eligible for HCBS services, thereby violating either the ADA or §504? Only if either of these questions is answered in the affirmative does a third question arise, that being whether the injunction even speaks to these issues or is instead overbroad and an abuse of discretion.

Judge Carroll provided a remarkably brief analysis of these issues, given their history, complexity, and his stated desire to "do whatever is available" to assist the disabled. ER 33, fn.3. His decision cites few facts precisely because there is *no* evidence that Defendants have failed to inform eligible recipients of the HCBS option, denied them that option, or unjustifiably institutionalized anyone. The factual findings the district court cites are either clearly erroneous or irrelevant to a correct interpretation of the surviving legal theories, and the court's legal analysis is unprecedented and erroneous. The decision must be reversed.

STANDARD OF REVIEW

The district court's findings of fact are reviewed for clear error, while its conclusions of law are reviewed *de novo*. *Lentini v. California Center for the*

Arts, Escondido, 370 F. 3d 837, 843 (9th Cir. 2004). The clearly erroneous standard is significantly deferential, requiring a "definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

I. THERE WAS NO VIOLATION OF FREEDOM OF CHOICE .

A. Legal Analysis of "Freedom of Choice"

What case law there is from other jurisdiction teaches that freedom of choice is violated by the *de facto* failure of a state to offer an HCBS alternative. Thus, programs that existed only on paper, as in *Cramer v. Chiles*, 33 F.Supp.2d 1342 (S.D.Fla. 1999) and *Benjamin H. v. Ohl*, 1999 WL 34783552 (S.D.W.Va. 1999) or that required waiting periods measured in years as in *Cramer*, *Ohl*, and *Boulet v. Celluci*, 107 F.Supp.2d 61 (D. Mass. 2000), raised a question as to whether there was a real alternative to institutional care (Judge Carroll's "real choice"). In these cases, there was no meaningful choice because the states had so underfunded their HCBS programs that beneficiaries, as in Ohl, had "no choice at all, except to languish on a waiting list for one unavailable service or another". 1999 WL 34783552 *14. There is nothing remotely similar in this case.

No decision of which we are aware has ever found a violation of freedom of choice because of problems delivering individual services. The freedom of choice statutes do *not* dictate the type or quality of HCBS alternatives states may offer, much less standards for the delivery of services. As the Seventh Circuit noted at the same time this Court was defining the limits of these statutes in *Ball I*, in a challenge under the freedom of choice provision that applies to the disabled (as opposed to the elderly):

> 42 U.S.C. §1396n(c)(2)(C) offers [plaintiff] no assistance. This subsection says that persons entitled to care must be "informed of the feasible alternatives, if available under the waiver, at the choice of the individuals". Patterson does not say that he has been kept ignorant of options open to him. His argument is that CILA services should be "available," but this subsection does not *make* any particular option "available" to anyone. It just requires the provision of information about options that *are* available.

Bertrand v. Maram, 495 F.3d 452, 459 (7th Cir. 2007)(emphasis in original).

The Tenth Circuit, in *Mandy R. v. Owens*, 464 F3d 1139, 1145 (10th Cir. 2006), stated that the freedom of choice provisions require the state to provide a choice but do not "assign to the State, or any other party, the responsibility to ensure that such facilities are in fact available". This follows in part from the fact that a state's obligation under Medicaid is to pay for services, not provide them. 464 F.3d at 1143; *Equal Access for El Paso, Inc. v. Hawkins*, 562 F.3d

724, 728 (5th Cir. 2009); *Westside Mothers v. Olszewski*, 454 F.3d 532, 540 (6th Cir. 2006); *Bruggerman v. Blagojevitch*, 324 F.3d. 903, 910 (7th Cir. 2003).

B. This Court Defined the Parameters of Freedom of Choice in *Ball I*.

In *Ball I*, this Court pointedly did not uphold the 2004 conclusion that there had been a violation of the freedom of choice statutes. It held there is a private right of action to enforce those provisions and did not go beyond this and did not address what constitutes a substantive violation of the freedom of choice provisions. *Id*. at 1116. It instructed the district court on remand to determine if "a new injunction tailored to the scope of the surviving claims" was merited by the facts and the law. *Ball I*, 492 F.3d at 1098.

The Court then explained repeatedly and in detail that the freedom of choice provisions create "specific rights":

> Section 1396n(c)(2)(C), which is focused on HCBS for the disabled, codifies one such assurance [by the state to the federal government]. Under that provision, a state must guarantee that, such *individuals* who are determined to be likely to require the level of care provided in a hospital, nursing facility, or intermediate care facility for the mentally retarded *are informed of the feasible alternatives*, if available under the waiver, *at the choice of such individuals*, to the provision of inpatient hospital services, nursing facility services, or services in an intermediate care facility for the mentally retarded.(Emphases added.)
>
> Section 1396n(d)(2)(C) contains a closely analogous requirement, although it pertains to a different segment of the Medicaid population, the elderly. Under this provision, a state must guarantee the Secretary that,

> such *individuals* who are determined to be likely to require the level of care provided in a skilled nursing facility or intermediate care facility *are informed of the feasible alternatives* to the provision of skilled nursing facility or intermediate care facility services, which *such individuals may choose* if available under the waiver. (Emphases added.)

492 F.3d at 1107. (All emphasis in original.)[1]

The Court found there to be a private right of action to enforce the freedom of choice statutes in part because these provisions do not require the courts to balance and interpret "indeterminate and competing goals," as the equal access provision (42 U.S.C.§1396a(a)(30)(A)) does with respect to delivery of services. As opposed to having to deal with the complexities of "efficiency, economy, and quality of care," courts can "readily determine" whether a state is complying with freedom of choice by looking at "a state's Medicaid plan, agency records and documents, and the testimony of Medicaid recipients and providers." *Id*.

In other words, the question that is readily determined under freedom of choice does not go beyond whether the state is informing members of alternatives and affording them the right to choose among them. These provisions do not create a basis to challenge the quality of the delivery of care

[1] The corollary regulation provides that recipients must be "(1) Informed of any feasible alternatives available under the waiver; and (2) given the choice of either institutional or home and community-based services." 42 C.F.R.§441.302(d).

that is provided after the recipient makes her choice. The Court cautioned the Plaintiffs on remand: "If the Medicaid beneficiaries indeed seek to interpret their rights under the 'free choice' provisions so expansively that they truly become 'vague and amorphous,' their cause of action may fail on the merits." 492 F.3d at 1116.

The individual rights the statutes create are to be informed of the available, feasible alternatives to nursing facility care and to be able to choose that alternative. It can indeed be "readily determined" that AHCCCS complies with these duties. There has never been a dispute that AHCCCS recipients are informed of the HCBS alternative[2] and are allowed to choose HCBS.[3] *No one* has ever been identified by either the district court or the Plaintiffs who was denied the information and choice these statutes require.

C. The District Court's Interpretation Is Inconsistent with *Ball I* and Erroneous.

The district court's analysis of this issue defaults without comment to the "cursory" (*Ball I*, fn.9) references to freedom of choice in its 2004 decision and bears no relationship to the standards explained in *Ball I*. It is apparent from

[2] The Plaintiffs admitted "[T]here is no dispute the plaintiffs knew about [HCBS] services". Dkt. 339, p. 7.

[3] They did not dispute the fact that no class representative was ever prevented from choosing HCBS. *Id.*

those conclusions that Judge Carroll had a different "choice" in mind than the one described by this Court.

First, he made no finding that AHCCCS had either failed to inform anyone of the feasible alternatives or denied anyone a choice among those alternatives. Second, he instead held Arizona had a duty to people who, like the class representatives, had already been informed of, and have exercised, the choice required by 42 U.S.C.§§1396n(c)2(C) and 1396n(d)(2)(C). This duty is to "monitor and manage" the program to provide the class members with the "freedom of choice to which they were entitled". ER 37, Conclusions of Law ("COL") 19 and 20. And he posits that choice as being between "adequate health care and institutionalization". *Id.*, COL 18.

Not only is "adequate health care" of any individual not something Medicaid assures, [4] but also it is difficult to imagine a more open-ended, indefinite interpretation of these statutes. This reading would inject the courts into any dispute over particular problems in a state Medicaid program if they are alleged to be jeopardizing "adequate" health care and thereby denying free

[4] Medicaid provides payment for a group of services. As Justice Marshall explained, it has never assured "the amorphous objective of adequate health care" to each eligible individual. "Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs." *Alexander v. Choate*, 469 U.S. 287, 303 (1985).

choice. The right the district court assumes is indeed so "vague and amorphous' that its enforcement would strain judicial competence". *Gonzaga University v. Doe*, 536 U.S. 237, 282 (2002).

Ball I left Arizona's argument about such an interpretation to another day. ("This argument is, however, inapposite to our present inquiry." 492 F.3d at 1116.) Now, by merely resubmitting its 2004 decision on this point, the district court makes the issue unavoidable. Because the district court's interpretation of the statutes far exceeds the statutory language, especially as explained by this Court, it is legally incorrect, unenforceable under 42 U.S.C. §1983, and cannot be sustained.

D. The Few Facts Cited By The District Court Do Not Constitute A Violation Of Freedom Of Choice Under This Court's Analysis.

The Plaintiffs consistently urged the district court to interpret freedom of choice in a manner that exceeds the language of the statutes. They have never alleged AHCCCS failed to inform or offer HCBS as a choice but have instead sought to criticize the operations of the program. For example, in 2003 they summarized their position as follows:

> Defendants' practices of underfunding HCBS services so that services are not reliably provided, threatening people with institutionalization because of the unavailability of services, allowing people to stay in institutions because of a lack of home

> care services, or allowing people to go into institutions because no home care services were provided, violates the Freedom of Choice provisions of the Medicaid statute and regulations.

Dkt. 207, p. 5.

The problems with their argument are numerous. First and foremost, they ignore the limited reach of the statutes. No court has held that they create operational standards. Indeed, the case law describes widely and fundamentally differing HCBS programs. For example, while AHCCCS does not limit HCBS availability to a certain number of slots, most states do.

1. **The Finding that Defendants' Failure to Provide All Services "Threatened Institutionalization" Is Clearly Erroneous and Based upon an Incorrect Legal Standard.**

More particularly, the 2004 Order does not find or hold that the failure to provide plaintiffs with the full amount of services "threatened" Plaintiffs with institutionalization (as the court did find in 2009 with respect to the ADA allegations, discussed below). *See* ER 13. Under neither theory did the court ever find that anyone had been affirmatively "threatened" with institutionalization by the Defendants. But even if one were to assume the passive threat the court concluded unreliable services created applied to both theories, this is a matter of what is "adequate," rather than whether the available choice was offered. Moreover, this finding is clearly erroneous (as to either

theory). Judge Carroll cites no evidence, and there is none, that *any* person ever considered choosing staying in a nursing facility because of unreliable HCBS services.

2. Only One Person Was Ever Briefly Institutionalized.

There is evidence of only one person, Peg Ball, who went to a nursing facility even temporarily due to problems with HCBS services. She testified she went to a nursing facility, for an undated 10-day period, because her caregiver/roommate became ill and a substitute was not available. ER 221. It is not even clear she went to the nursing facility for lack of any service provided by the Defendants. She testified she was unable to find someone to "cover the essential parts of my day *beyond what was already covered*" when her "volunteer" who provided these additional services became ill. *Id.* (Emphasis added). She went home when that person recovered and thereafter she continued to receive HCBS care until she moved to Michigan shortly after the complaint was filed. ER 221, 236.

The Plaintiffs often assert that Judeth Hinton and Grace Collier were forced into institutions. The evidence, however, was that Ms. Hinton complained that an attendant care worker was not immediately available to assist her when she was first placed in the HCBS program while she was at a

rehabilitation center being treated for an injury. A personal care HCBS worker was substituted, and she went home. ER 352-354.

Grace Collier received HCBS services for some years but then shortly after this suit was filed went into a nursing facility where she died. The Plaintiffs offered no evidence whatever as to why Ms. Collier went into the nursing home. ER 372, ¶¶ 30-31. There is no evidence, as surely would have been offered if it existed, that she was institutionalized because of problems with HCBS services rather than problems with her health.

The Plaintiffs did not, as promised (ER 189-190), demonstrate that the experiences of the Plaintiffs who testified were "typical" of the thousands of HCBS recipients. [5] Though Judge Carroll cited the 1999 Auditor General report that found areas in which AHCCCS could improve its quality assurance, the report did not suggest that any person had been unable to choose HCBS or remain in the community because of the problems it noted. ER 398-414.

[5] The only additional evidence was the lay opinion of an independent living center administrator, Ann Meyer, who admitted her only source of knowledge about the HCBS program was what other people told her. ER 170. Her only testimony regarding institutionalization was the statement that unnamed AHCCCS recipients "are told" by AHCCCS contractors that there is difficulty getting caregivers and "they're aware of the problem, so they're less likely to want to leave the nursing home". Asked if anyone had been forced into an institution, she replied simply "Yes" without further detail. ER164-166. Her testimony was improperly received over Defendants' objections as to foundation and hearsay. ER 153-57, 172.

3. The Defendants' "Policy" of Assumption of Risk

The Court adopted two aspects of the Plaintiffs' argument to expand the reach of "freedom of choice," namely, that AHCCCS knew the system was not perfect and that it required members to assume a risk that services may not always be delivered. The first is true in that AHCCCS knew gaps sometimes occurred. But mere knowledge that the program was not gap-free is not a violation of any statute.

As to the second, Judge Carroll found AHCCCS had a policy that HCBS recipients "assume the risk, by choosing to remain at home rather than being institutionalized, that services that they are dependant upon will not be delivered," *citing* Finding 61 of the 2004 Order, (ER 32.1), which in turn cited the trial transcript at pages 535 and 613 (ER 136 and 59) and Exhibit 2. ER 12. This finding, especially as a basis for a violation of freedom of choice, is completely erroneous. No one can fairly construe these two bits of evidence as a policy of indifference to recipients or deliberate failure to meet responsibilities. [6] More to the point, this evidence shows AHCCCS was doing what freedom of choice requires, advising recipients of the feasible alternative to nursing facility care.

[6]Trial Exhibit 2, to which the court also referred, was the Defendant's First Supplemental Disclosure Statement. The court's reference is unclear.

The first testimony the court cited was from Alan Schafer, the AHCCCS HCBS program manager, who made the simple point that AHCCCS provides recipients with an emergency alert system in case a caregiver may not be able to appear as expected, in which case a provider, a case manager, or an ambulance can be summoned to help the person on an emergency basis. ER 135-136.

The second testimony was that of Phyllis Biedess, the AHCCCS Director from 1999-2003. She testified that AHCCCS makes sure a long-term care recipient who has severe restrictions understands the HCBS system "may not always be everything that the individual needs to have" and the person has the right to find a nursing facility preferable. ER 59. This was no admission of a "policy" that cavalierly throws members to the wolves. It was a statement of the obvious, that there is a difference between HCBS, which brings services to the recipient's home, and a nursing facility where back-up services are already on the premises. Judge Carroll at the time seemed to understand Ms. Biedess' comments, as he immediately thereafter commented, "And I don't say it's wrong, as seemingly is done, that there's risk in everything. And if you want to be, quote, risk free, go into a nursing care home and face whatever risks you might run in being in such a facility and the care you might receive there." ER

62. Even if the "policy" he found had existed, there was no evidence it adversely affected any person's choice of HCBS services.

Far from showing any violation of freedom of choice, this evidence shows that AHCCCS did *exactly* what freedom of choice requires. It informed recipients of what the available "feasible alternative" was so they could decide whether HCBS was what they wanted.

Thus, the Defendants should have been granted judgment on the freedom of choice claim. The evidence was that Arizona had a functioning HCBS program that served thousands of people, *very* few of whom complained about gaps. It informed eligible recipients of HCBS as an alternative to nursing care. It afforded them that choice. The Plaintiffs failed to establish a violation of freedom of choice as correctly construed by this Court. The district court's decision seeks to dictate compliance with a standard that does not exist, and should be reversed.

II. THERE WAS NO VIOLATION OF THE ADA OR §504.

The Plaintiffs argued (Dkt. 354, p. 16), and the district court held, the Defendants had violated the integration mandate of the ADA and §504. ER 12-13. Title II of the ADA, 42 U.S.C. §12132 states in relevant part that:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the

> benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Section 504 of the Rehabilitation Act, 29 U.S.C.§794(a) states in relevant part that:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

Services must be provided in the most integrated setting appropriate to the person's needs. 28 C.F.R.§35.130(d) (ADA) and 28 C.F.R.§41.51(d) (§504). Qualified AHCCCS recipients were therefore entitled to receive care in the community rather than an institution. *Olmstead v. L.C.*, 527 U.S. 581, 607 (1999).

The District Court's analysis of the ADA and §504 in 2009 consists of a little more than one page and cites three cases. It ends with the conclusion that the Defendants are guilty of "unjustified isolation" of Plaintiffs, in a manner prohibited by *Olmstead*.

Because the courts analyze the ADA and §504 identically, *Zukle v. Regents of the University of California*, 166 F.3d 1041, 1045, n. 11 (9th Cir.

1999), the Defendants will refer to the ADA and §504 together, unless otherwise indicated, simply as the ADA.

A. Failure to Prevent Gaps Is Not a Violation of the ADA.

Judge Carroll held the Defendants had threatened or caused unjustified institutionalization of HCBS eligible-recipients by "fail[ing] to prevent unnecessary gaps in service and properly monitor the HCBS program". *Id.*, p. 9. His choice of words seems to concede some gaps are unavoidable or not the fault of the Defendants. [7] Judge Carroll does not explain which gaps he considered "unnecessary" or how many he found. The "failure to monitor" he refers to seems to mean the failure to monitor the program in such a way as to prevent the unnecessary gaps.

Judge Carroll did not find that gaps affected only disabled HCBS recipients or that the Defendants' conduct targeted the disabled, as in, for

[7] Indeed, some gaps are not entirely the fault of the Defendants. Some services are not provided because the recipient is not home when the worker arrives or does not like the worker who is provided (e.g. Peg Ball, ER 231; Judeth Hinton, ER141-42); sometimes recipients choose not to have services filled by a substitute or the recipient prefers to rely on family or friends instead of training a new person. ER241. In addition, some, like Cree James, live in remote areas that become inaccessible due to weather and roads, and some have much more complicated needs than others, thereby making finding substitutes more difficult. ER 113. For example, Jeanne Spinka's medical and physical conditions are so complex Judge Carroll observed after she testified that it would be "a remarkably low number" of members who have such special needs. ER 264.

example, *Rodde v. Banta*, 357 F.3d 988, 998 (9th Cir. 2004), where the defendants planned to close a hospital that primarily provided rehabilitation services to the disabled "while continuing to operate the facilities providing the same category of services to non-disabled individuals". Instead, he seems to have concluded that gaps had threatened or caused institutionalization but without finding that unnecessary gaps had effectively excluded any person from HCBS benefits or denied those benefits. He simply says generally that gaps caused these effects. This conclusion is not supported by the evidence or the case law.

B. Neither the ADA nor Medicaid Requires Gap-Free Services.

In some instances the mere threat of institutionalization has been found to be actionable under the ADA. In *Banta, supra*, the facially discriminatory plans of the state of California were preliminarily enjoined. In *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175 (10th Cir. 2003), disabled HCBS recipients challenged a decision to stop providing unlimited, medically-necessary prescription benefits to disabled persons in the HCBS program while continuing to provide such benefits to recipients who were already institutionalized. The plaintiffs alleged, and expert testimony confirmed, that the policy would place the recipients at "high risk for premature entry into a

nursing home" in order to continue receiving medically necessary prescriptions or for premature death if they refused. *Id.*, at 1184. The 10th Circuit therefore reversed a decision granting summary judgment to the state of New Mexico. In *Townsend v. Quasim*, 328 F. 3d 511 (9th Cir. 2003), this Court reversed a decision granting summary judgment to the state of Washington because the state refused to offer services in the community to some qualified disabled persons but not to others, and the Court held this could violate the ADA. No such facial discrimination existed in this case.

Moreover, the events challenged in these cases concerned policy decisions affecting the relevant disabled population as a group, as opposed to operational mistakes affecting individuals. An important problem with the district court's analysis is the premise that perfection is the relevant standard. On a common sense basis alone, this is erroneous. Judge Carroll noted at the end of the trial that the number of gaps the Plaintiffs were able to prove was "statistically small," given the number of people in the HCBS program and indicated AHCCCS must be doing a "somewhat decent job". ER 73. His decision, however, ignores the thousands of people served, and the thousands of services provided, without complaint, as well as survey evidence of high satisfaction among HCBS recipients. ER 423-39.

Even if it were fair to view whatever small number of gaps Judge Carroll considered unnecessary out of context, the idea that perfection is required has no basis in the law. As stated above, Medicaid does not assure "adequate health care" to individual recipients. *Alexander, supra,* 469 U.S. at 303. The Court in *Alexander* rejected claims that §504 was violated by cuts in Tennessee's Medicaid benefit package. Though the disabled were expected to be disparately affected by the cuts, what the disabled recipients were entitled to was "evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance". 469 U.S. at 304. Section 504 entitles the disabled to "meaningful and equal access" to the particular benefit. ***Id.***, at 305-306. The Court held Tennessee had not excluded or denied disabled persons from benefits available to the non-disabled. The same is true in this case.

Moreover, distribution and delivery of services are governed by Medicaid provisions that are not at issue in this case, including 42 U.S.C.§§1396a(a)(1) requiring statewide services, 1396a(a)(8) requiring provision of services with reasonable promptness, and 1396a(a)(10)(B) requiring that medical assistance "shall not be less in amount, duration, or scope" than is made available to other individuals. *See Sobky v. Smoley*, 855 F.Supp. 1123, 1138-39 (E.D.Cal. 1994).

[8] Here, the Plaintiffs' claim regarding reasonable promptness was denied by summary judgment, and there is no evidence gaps made services less in amount, duration or scope for the disabled than for other recipients.

No case cited yet by the district court or the Plaintiffs holds that the imperfect delivery of individual Medicaid services under a facially neutral policy is a violation of the ADA. And, where the ADA issue is intertwined with the Medicaid HCBS requirements, the ADA, as the later and more general act, should not, "unless absolutely necessary to have any meaning at all," serve to create HCBS rights the Medicaid Act did not. *See Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003)(Beezer, Circuit Judge, dissenting, *citing Traynor v. Turnage*, 485 U.S. 535, 547-48 (1988)).

The ADA requires only "reasonable" changes in existing policies that are not facially discriminatory. *Olmstead, supra*, 527 U.S. at 603. Here, the gaps do not deprive the disabled of services that "remain open and easily accessible by others". *See Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996). Gaps

[8] "And the state need not meet its obligations perfectly. A service is sufficient in amount, duration, and scope if it adequately meets the needs of *most* individuals eligible for Medicaid assistance to pay for that service. *Charleston Memorial Hosp. v. Conrad*, 693 F.2d 324, 330 (4th Cir. 1982): *Virginia Hosp. Ass'n v. Kenley*, 427 F. Supp. 781, 786 (E.D.Va. 1977)." *King by King v. Sullivan*, 776 F.Supp. 645, 652-53 (D.R.I.1991)(emphasis in original**).**

in a program of this size are not something that one can reasonably expect to eliminate, for either the disabled or the non-disabled. Judge Carroll tacitly conceded this.

Individuals whose services are not provided as prescribed may grieve or appeal such failures, but the issue here is whether the isolated cases proved at trial establish that the State was discriminating against the disabled. Without identification of which gaps and how many the district court considered "unnecessary" it is difficult even to review his conclusion that service was so "poor" as to violate the ADA. Which gaps suffered by Peg Ball, for instance, were the Defendants' fault, and how did they demonstrate a policy of discrimination?

The incidence of gaps did not discriminate against the disabled. Ordering the Defendants to eliminate gaps goes beyond the requirements of Medicaid and does not address institutional segregation. The Plaintiffs received meaningful and equal access to HCBS benefits. Despite being understandably frustrated by services that were not always reliable, no one opted out of HCBS.

C. The Evidence Does Not Support The District Court's Conclusions.

1. Arizona Did Not Force Anyone to Enter or Remain in Institutions.

The Plaintiffs had argued Defendants' conduct resulted in "imminent risk of institutionalization and actual institutionalization" of class members. Dkt. 334, p. 22. Judge Carroll made no finding that anyone had been at imminent risk, but, as discussed above, he did find that Defendants' conduct had "threatened plaintiffs with institutionalization, prevented them from leaving institutions, and in some instances forced them into institutions in order to receive their necessary care. (See, e.g. Dkt. 193 at 37, 41, & 106 [ER 221, 225 & 290])." ER 13.

As discussed above with regard to freedom of choice, there was evidence of only one person, Peg Ball, who arguably entered a nursing facility briefly as a result of problems with HCBS services.[9] On the other hand, there was evidence that only 1% of HCBS recipients complained about lack of HCBS services, and many of these could not be substantiated. ER 143-44; Ex. 5, Ans. To Interrogatory 19. When Judge Carroll asked if the Plaintiffs had investigated the number of incidents of what he called "poor service" as compared to the

[9] Even if Judeth Hinton's testimony could be construed to mean she spent a short "while" longer in her rehabilitation facility before accepting personal care services instead of the prescribed attendant care worker, as this was her initial HCBS placement it would not violate the ADA. "It is reasonable for the State to ask someone to wait until a community placement is available." *Olmstead, supra*, 527 U.S. at 606.

number of people getting services, Plaintiffs' counsel admitted they had documents to support substantiated allegations of lack of service in "maybe about 30" cases. ER 344-45.

The Plaintiffs' expert, Dr. Dorie Seavey, concluded that people were not getting all their services because there were too few caregivers (due to low wages). Unlike the plaintiffs' expert in *Fisher*, *supra*, she did not conclude or contend that these problems would force people into nursing facilities. ER 439-445.

While Defendants do not deny they should have been able to prevent or fill gaps in many of the 30 cases that were substantiated, this number of incidents taken from a several-year period of time out of thousands of HCBS recipients does not demonstrate that the State was denying or excluding the disabled from HCBS benefits. As Judge Carroll stated at the end of the trial, if anything the number of substantiated gaps actually suggested the reverse. ER 73. And those who suffered through not receiving all their services continued to choose HCBS.

2. The Evidence of Waiting Lists Did Not Violate the ADA.

The 2009 conclusion that "denying individuals a choice between institutional and home-based care violates the ADA non-discrimination policy

since it unnecessarily segregates the individuals" cannot be justified by the two waiting list decisions Judge Carroll cites for this proposition.

First, in *Makin ex re. Russell v. Hawaii*, 114 F.Supp.2d 1017, 1034 (D.Haw. 1999), the plaintiffs were on a waiting list for HCBS services and claimed the ADA was violated because Hawaii did not properly use available funding to create sufficient individual slots for HCBS care. The court merely found there were issues of fact and the Hawaii statute in question "could potentially force Plaintiffs into institutions in violation of the ADA's non-discrimination policy." This decision has no application to the theory that Arizona discriminates by making HCBS available but delivering the service imperfectly.

Second, in *Cramer v. Chiles*, 33 F.Supp.2d 1342 (S.D. Fla. 1999), cited by *Makin*, the state of Florida was found to violate the ADA and the freedom of choice statutes because the cutback in HCBS funding it enacted would have exacerbated an existing situation where "thousands of individuals [capable of living in the community] continue to live, involuntarily, in large institutions." 33 F.Supp.2d at 1350. The court found that the underfunding of HCBS effectively eliminated it as a choice in violation of 42 U.S.C.§1396n(c)(2)(C). 33 F. Supp. 2d at 1352. By using what funding there was to provide

institutional care, the state violated the ADA. *Id.* at 1354. Our case lacks any similarity to *Chiles.*

Here, each of the Plaintiffs was already receiving HCBS services in a community setting. None testified about ever being on a waiting list. There was no evidence that the few waiting lists in evidence failed to move at a reasonable pace. There was no evidence that the state was using waiting lists to keep its nursing homes filled.

To the contrary, the evidence was clear that AHCCCS was rapidly expanding HCBS. ER 176-78, 55.1-55.2. The evidence was that the average time one spent on a waiting list in Pima County was one to two months. ER 393. *Compare, Lewis v. New Mexico Dept of Health*, 275 F. Supp.2d 1319, 1337-38 (D.N.M. 2003)(New Mexico's smaller HCBS program had waiting lists of over 5,000 individuals, some of whom had been waiting ten to twelve years). In addition, people on the AHCCCS waiting lists for attendant care services received alternative HCBS services while they were waiting. ER 54, 387, 392.

In *Olmstead,* the Supreme Court interpreted the ADA as forbidding arbitrary segregation of the disabled in state institutions. If Judge Carroll implied that Arizona's waiting lists somehow moved too slowly or otherwise

violated the ADA, such a finding was clearly erroneous and the conclusion was error.

3. The Finding of an AHCCCS "Policy" that Recipients Assume the Risk of Non-Delivery of HCBS Services is Clearly Erroneous and Does Not Support a Violation of the ADA In Any Event.

The reasons why inferring a "policy" on the part of AHCCCS that recipients "assume the risk" of services not being delivered is clearly erroneous were discussed above. Judge Carroll cited this evidence as a basis for finding a violation of the ADA, and the same analysis of the evidence applies in the ADA context. Lacking any motive to adopt such a policy and considering the risks it would entail for both recipients and the State, one can only review this evidence and conclude Judge Carroll was mistaken.

But even if his construction of the evidence were supportable, such a "policy" applied to all HCBS recipients, disabled and non-disabled alike. It was not discriminatory, and there was no evidence anyone was institutionalized as a result of the policy or the failures it is implied to have condoned.

4. That Defendants Were Aware Not All Services Were Delivered Is Not Evidence of Violation of the ADA.

Finding 62 (ER 32.1) was that, "AHCCCS was aware that not all of its beneficiaries were receiving their prescribed services. (Tran. At 539, 587, 614; Stip. 49 [ER 137, 54.3, 60, and 374]". As with the assumption of risk finding, if

this Finding were meant to convey that AHCCCS ignored, or was indifferent to, beneficiaries not receiving their services, it is clearly erroneous. First, the cited Stipulation 49 (ER 374) is the unremarkable statement, "ALTCS management is aware that there have been complaints about members not getting particular services specified in their HCBS care plans." The cited testimony at page 614 (ER 60) was that of Phyllis Biedess about providing "panic buttons" to enable members to call for assistance if their caregiver failed to appear. The cited testimony at page 539 (ER 137) was Mr. Schafer's in response to the Court's questions:

> The Witness: [T]here may be a person here and a person there that has their type of situation that goes on where they're not able to find a caregiver. There are going to be instances when someone is not going to be available, I admit that. This is a very large program.
> The Court: Yeah, but it's made up of individuals.
> The Witness: Yes, it is.
> The Court: Okay
> The Witness: In our program every individual is very important, but there are – When consumers make the choice to live in the community –
> The Court: Well, that's a choice –
> The Witness: - they are aware of the responsibility they have to develop an informal network to support them as well when there is that situation where you cannot get a substitute caregiver.

This exchange came immediately after Mr. Schafer had described an emergency alert system and the court asked what the beneficiary does if, as the

Court put it, "nothing happens" in response to the emergency alert. ER 135-36. All Mr. Schafer did was acknowledge that this might rarely happen and, again as a matter of common sense, rather than a policy of indifference, recipients are advised to have some plan to deal with this possibility.

Finally, at page 587 (ER 54.3), cited by the district court, the Court cross-examined Mr. Schafer regarding waiting lists.

> The Court: All of the people that want service in any period of time, are not getting the services that they want or they're entitled to; right? There's always someone that isn't getting that.
> The Witness: Yes, there always is.
> The Court: Okay.

The context was that Mr. Schafer was simply acknowledging that at any given time among the figures for 1998 that the Court was looking at in Exhibit 82 (ER 391-97) there were people on the waiting list. *See* ER 54.1-54.2**.** Exhibit 82 shows small numbers of people who averaged less than two months waiting time. The court's decision made no attempt to connect this testimony to the ADA allegation, but, as discussed above, this exchange proves nothing.

This evidence does nothing to prove a violation of the ADA. It does show that AHCCCS informed recipients of what to do in the unlikely possibility that, despite all efforts to the contrary, the recipient would want and need an informal backup system. The concession that the system is not perfect

was hardly an admission that the system was discriminating against the disabled or impeding anyone's choice of HCBS services.

E. Why Judgment In Favor of Defendants Should Have Been Granted

The issue under the ADA is not whether the full amount of each particular service is effectively provided after one qualifies for and chooses HCBS. It is whether people are being prevented from choosing HCBS so they may live in the community. Of 20,150 elderly or physically disabled persons receiving ALTCS services as of October 2001, 7,319 were receiving these services in their own homes. ER 28, Findings 10-11. AHCCCS increased the participation in HCBS from 10% of the long-term care members in 1988 to 52% by 2003; it worked to increase recipient choice, improve the work force, and "lead the [HCBS] industry". ER 55.1-55.3. The Plaintiffs are themselves participating in an HCBS program that is effectively allowing them to realize their choice to live in their communities. The ADA does not extend to making the HCBS choice perfect. *See Sanchez*, 416 F.3d at 1067-1068.

The Plaintiffs argued below, "[T]he issue here is not participation [in HCBS] but whether those in the program are getting the promised and needed services." Dkt. 339, p. 16. They simply misread the ADA. Affording access to a viable HCBS alternative *is* the issue. The ADA does not serve as a vehicle for

beneficiaries to challenge non-discriminatory, unintentional mistakes in the delivery of individual services. No one was unjustifiably isolated in an institution, and the district court erred in finding a violation of the ADA.

III. THE INJUNCTION IS NOT DESIGNED TO REMEDY ANY VIOLATION OF THE REMAINING LEGAL THEORIES AND SHOULD BE VACATED.

A. Standard of Review

The exercise of the power to grant a permanent injunction is reviewed for an abuse of discretion. *Krug v. Lutz*, 329 F. 3d 692, 695 (9th Cir. 2003). "The district court necessarily abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact," *citing Rodde v. Bonta*, 357 F.3d 988, 994 (9th Cir. 2004). *Katie A., ex rel. Ludin v. Los Angeles County*, 481 F.3d 1150, 1155 (9th Cir. 2007).

The scope of an injunction is also reviewed for abuse of discretion. As this Court has summarized its standard of review of injunctions against state governments,

> Due to concerns of comity and federalism, the scope of federal injunctive relief against an agency of state government must always be narrowly tailored to enforce federal constitutional and statutory law only. *Toussaint v. McCarthy*, 801 F.2d 1080,1089 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069, 107 S.Ct. 2462, 95 L.Ed.2d 871 (1987). This is critical because "a federal district court's exercise of discretion to enjoin state political bodies raises serious questions regarding the legitimacy of its authority." *Id.* Thus, in reviewing a district court's injunction against an

> agency of state government, we scrutinize the injunction closely to make sure that the remedy protects the plaintiffs' federal constitutional and statutory rights but does not require more of state officials than is necessary to assure their compliance with federal law. *Id.* We will defer to the district court so long as any injunctive relief it provides remains within these parameters. The district court will be deemed to have committed an abuse of discretion, however, if its injunction requires any more of state officers than demanded by federal constitutional or statutory law. *Id.*

Clark v, Coye, 60 F.3d 600, 603-604 (9th Cir. 1995).

B. This Injunction Was Never Premised Upon Existing Conditions.

Ball I did not reach the question of whether the injunction was improper "because it failed to account for more recent reforms undertaken by the state to improve its HCBS program". 492 F.3d at 1119. The 2004 decision revolved around the rates AHCCCS paid and the alleged effects they created regarding the reliability of services. The evidence was that AHCCCS had increased its rates in 2000 by 10% and was increasing them by another 15% in October 2001. ER54.1.

Judge Carroll stated he had "note[d] the efforts that the State has made in curing some of these failures and has taken those efforts into consideration." ER 33, fn. 3. Clearly, however, he did not take into account the only evidence before him about current conditions at the time of the trial. The head of the state's largest attendant care agency, whose testimony the court cited for other

propositions, testified for the Plaintiffs that at the time of trial waiting lists had "essentially disappeared," recruiting caregivers was "much" easier, and people were moving from institutions to HCBS at a more rapid rate because of the 2000-2001 rate increases AHCCCS put into effect. ER 94-101.

We mention this to show not only that the district court's analysis was inconsistent even on issues of the accessibility of HCBS services but also that the court based its injunction solely on prior conditions rather than evidence of currently threatened harm to the Plaintiffs. The injunction did not meet "the "fundamental precept of the law of remedies: a plaintiff is entitled to forward-looking relief only if there is a great and immediate threat that without that relief the plaintiff will suffer an injury." *Nava v. City of Dublin*, 121 F.3d 453 (9th Cir. 1997): Past injury alone is "simply insufficient". *Id.*, at 459. Ms. Ball, for instance, had moved to Michigan in 2000. Neither she nor any other class member demonstrated any threatened injury cognizable under the surviving theories.

C. The Injunction Is Overbroad.

The Court in *Ball I* expected the district court on remand to enter a "new" injunction "tailored to the scope of the surviving claims" "*if the facts and law so merit*". 492 F.3d at 1098 (emphasis added). On remand, the district court

determined that the facts that had supported its original decision also supported maintaining the 2004 injunction without change. It found "the relief granted in the injunction helps to ensure that Defendants [sic] are given an actual choice between in-home and institutional care and prevent violations of the ADA, RA, and Medicaid's free choice provisions." ER 14. It provided no explanation of how the injunction accomplishes these goals.

In fact, nothing in the injunction addresses helping people be informed of HCBS alternatives or enabling them to choose HCBS. Nothing in the injunction addresses unjustified institutionalization or discrimination against the disabled. Instead, the injunction that was designed in 2004 to remedy an "equal access" rate violation has been left in place as if all these statutes cover the same territory and eradicating gaps is an all-purpose remedy for any perceived violation.

As a result, the injunction goes far beyond what either Medicaid or the ADA requires and is an abuse of discretion. The injunction intervenes in the day-to-day operations of AHCCCS in an effort to improve the "adequacy" of the choice afforded to recipients. It dictates there be no "gaps" in individual services. It directs Defendants as to how they must monitor rates paid to caregivers, monitor delivery of individual services, write contracts and policies,

fill "gaps" if they occur, write contingency plans, and create hotlines and forms to expedite appeal when gaps occur. The injunction requires the State to pay caregivers rates that "guarantee[] that each qualified individual will receive critical services without gaps". ER 25.

Only if one assumes that gap-free services are required by freedom of choice or the ADA (and only if one further assumes all gaps can indeed be prevented and that only this will avoid recipients feeling threatened by the possibility that a caregiver may fail to appear as scheduled) could this injunction be justified in any manner. Plainly, the injunction is not tailored, let alone narrowly, to address violations of the ADA or freedom of choice, two theories that received almost no comment in the decision that is the injunction's basis.

CONCLUSION

Arizona informed members of the HCBS alternative to institutional care and offered it to those who qualified for its benefits, as required by the Medicaid freedom of choice statutes. Its HCBS program is a "meaningful" alternative to nursing care, and all Plaintiffs had equal access to it. The State did not exclude disabled persons from the program, deny them HCBS services, or segregate

anyone in institutions. Thus, the judgment below in favor of the Plaintiffs on both the ADA and freedom of choice theories was erroneous.

The decision of April 24, 2009 should be reversed, and the injunction it maintained should be vacated.

RESPECTFULLY SUBMITTED this 1st day of December 2009.

JOHNSTON LAW OFFICES, P.L.C.

By s/Logan Johnston

Logan T. Johnston
One N. 1st Street, Suite 250
Phoenix, AZ 85004
(602) 452-0615
Attorney for Defendants/Appellants

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,176 words, excluding the portions of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii).

2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word 98 in Times New Roman type style and 14-point font.

s/Logan Johnston
Attorney for Defendants/Appellants

Dated: December 1, 2009

STATEMENT OF RELATED CASES

There are no known related cases pending in this Court.

s/Logan Johnston
Logan T. Johnston

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Elizabeth Hong