IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRIAN A., by his next friend, Bobbi Jean Brooks; TRACY B., by her next friend, Pamela Pallas; JACK and CHARLES C., by their next friend, Linda Lloyd; AMY D., by her next friend, Frank Koon; DENISE E., by her next friend, Linda Lloyd; CHARLETTE F., by her next friend, Juanita Veasy; and TERRY G., by her next friend, Carol Oldham on their own behalf and on behalf of all others similarly situated,	)	Civil Action No. 3-00-0445 Judge Campbell Magistrate Brown
Plaintiffs,	)	
--against--	)	
PHIL BREDESEN, Governor of the State of Tennessee; and VIOLA MILLER, Commissioner of the Tennessee Department of Children's Services,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION

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Pursuant to the terms of the Settlement Agreement approved and entered by this Court on July 27, 2001, and as most recently modified in January of 2009 (collectively, the "Consent Decree"),[1] Plaintiffs respectfully submit this memorandum in support of their motion for a temporary restraining order ("TRO") or, in the alternative, for a preliminary injunction, enjoining the implementation of Section 30 of Public Chapter No. 531, which amends Tennessee Code Annotated ("T.C.A.") § 37-2-205 by adding a new subsection "f", until such time as the Court can conduct a hearing to declare unlawful and permanently enjoin T.C.A. § 37-2-205(f), together with such other and further relief as may be necessary.

STATEMENT OF FACTS

Plaintiffs in this action are a class of all foster children who are or will be in the legal custody of the Tennessee Department of Children's Services ("DCS").[2] The Consent Decree requires comprehensive reform of the child welfare system in Tennessee, and states that "[a]ll of the provisions in this Settlement Agreement are separately and independently enforceable, as set forth in this Settlement Agreement." 2009 MSA at § XVIII(A)(1). The Consent Decree "Principles of Settlement Agreement" include the following provisions:

- The state should make reasonable efforts to avoid foster care placement by providing services to preserve the biological family whenever that is reasonably possible. However, *child welfare decision-makers must have the capacity to make determinations as to when making efforts to preserve the biological family, or leaving the child with that family, is neither safe*

[1] The July 27, 2001 Settlement Agreement is attached as Exhibit A to the accompanying affidavit of Ira. P. Lustbader ("Lustbader Aff."). The January 2009 Modified Settlement Agreement, approved and entered by this Court on January 13, 2009 ("2009 MSA"), is attached as Exhibit B to the Lustbader Aff. For convenience, citations to the 2009 MSA are used throughout this motion.

[2] *See* 2009 MSA at § I(B) ("'Foster children' shall mean all children who are or will be in the legal custody of [DCS], excluding children who are or will be in the legal custody of [DCS] upon an allegation or adjudication of a delinquent or criminal act. Children who are or will be in the custody of [DCS] upon an allegation or adjudication of an unruly or status offense shall be included in the class, and children who are or will be in the custody of [DCS] upon an allegation of a delinquent or criminal act and which allegation is subsequently dropped or fails to result in an adjudication of a delinquent or criminal act and who remain in the legal custody of [DCS], shall be included in the class.").

for the child nor likely to lead to an appropriate result for the child. (*Id*. at § I(A)(2) (emphasis added)).

- All parties in judicial proceedings involving neglect, abuse, unruly and delinquency should be provided with a fair hearing and their constitutional and other legal rights should be enforced and recognized. (*Id*. at § I(A)(12)).

Among the "child welfare decision-makers" to whom § I(A)(2) refers are the judges who decide whether to commit the children brought before them to DCS custody. In most counties in Tennessee, a judge of the county's General Sessions court makes these decisions. *See* T.C.A. § 37-1-203. Other counties have established special Juvenile Courts in which jurisdiction over commitments and other juvenile matters is vested, as state law allows. *See id.*; T.C.A. § 37-1-205. The funding for both types of courts is provided by the counties in which they sit. *See* T.C.A. §§ 37-1-205, 16-15-102, 16-15-5006.

Tennessee Public Chapter No. 531 is omnibus budget legislation that became effective July 7, 2009. Section 30 of Public Chapter No. 531 amended T.C.A. § 37-2-205 by adding a new subsection "f".[3] That new subsection states, in full:

> (f)(1)(A) Notwithstanding any state law to the contrary, the Department of Children's Services shall allocate resources for children placed in state custody based on a county's child population and the average state commitment rate per thousand children. In fiscal years 2009-2010 and 2010-2011 the department shall pay for a county's commitments of dependent and neglected children and delinquent children until such commitments exceed three hundred percent (300%) of the state average commitment rate.
>
> (B) When a county exceeds the limit on either dependent and neglected children or delinquent children established in subdivision (f)(1)(A), the county shall be billed for the actual daily cost to the state for the duration of the length of stay of such child in state custody.
>
> (C) The department shall develop statewide averages for:
>
> (i) Dependent and neglected children; and

[3] The full text of Public Chapter No. 531 is attached as Exhibit C to the Lustbader Aff. The Senate precursor of the new law was introduced as Senate Bill 2357 ("S.B. 2357") on March 31, 2009. It proposed, among other things, a cap at 200% of the statewide average commitment rate.

(ii) Delinquent children.

(D) The average state commitment rate shall be based on the higher of:

(i) 2007-2008 fiscal year statewide average commitments per thousand children; or

(ii) 2008-2009 fiscal year statewide average commitments per thousand children.

(2) The department shall initiate a collaborative planning process at any such time a county is believed to be likely to exceed two hundred percent (200%) of the state average commitment rate. Upon request of the county or the court, the department shall partner with the county or the court to develop and implement strategies to identify and address underlying problems contributing to over-commitment that may exist in such county. The department shall provide commitment data to the county or the court as needed to prevent a county from exceeding the limits established in subdivision (f)(1)(A).

(3) On or before January 15 of each year, the department shall provide a report to the general assembly listing the counties that have exceeded the state average commitment limits. The report shall also detail actions taken by the department to comply with subdivision (f)(2).

(4) The Select Committee on Children and Youth is directed to study commitment patterns of children entering state custody. Findings shall be provided to the Commissioner of the Department of Children's Services and to the members of the Select Committee on Children and Youth on or before January 15, 2010.

(5)(A) The Commissioner of the Department of Children's Services is authorized to promulgate rules and regulations to effectuate the provisions of this subsection (f).

(B) The provisions of subsection (f) shall expire June 30, 2011, unless reauthorized by the general assembly.

Thus, the new law (also referred to herein as the "Commitment Cap Law") establishes fiscal penalties for counties in which judges decide to commit more than a prescribed number of children. As of July 1, 2009, the beginning of fiscal year 2009-2010, every decision made by a Juvenile Court judge to commit a child to DCS custody counts against that county's cap. The law does not distinguish among the many different statutory reasons for which a judge might decide to commit a child. Rather, all commitments – from those made because of evidence of "severe child abuse" (T.C.A. § 37-1-102(b)(21)) to those made because a child is being "unlawfully kept out of school" (*id.* at (b)(12)(C)) – are counted against each county's cap. Even

commitments *sought by DCS* are counted against the cap.[4] DCS can challenge any commitment decision it believes to be unfounded or not in the child's best interest (*see* T.C.A. § 37-1-159) but, under the new law, both commitments that DCS declines to challenge and those that are upheld against DCS challenges are counted against the cap.

The requirements of T.C.A. § 37-2-205(f) were developed by DCS in order to reduce the State's yearly expenditures. However, the law was never intended to impose *any* costs on the counties; rather, its admitted intent was to influence judges to commit fewer children to DCS custody. This intent was confirmed by DCS Commissioner Miller in her testimony at a March 31, 2009 hearing on the omnibus budget bill before the Tennessee House Finance, Ways and Means Committee:

> We have a few counties in this state that commit at 16, 20 per thousand [children]. . . . That is significant over-commitment of children. Children are coming in to state custody who should not. Now, we've been addressing this problem aggressively and we've made a lot of progress. . . . I want to work with those counties in making sure that those kids can stay safely in their homes. *I don't ever want to collect a nickel of* [the proposed penalties], *I want to reduce that commitment level . . . .*[5]

The law's purpose was further confirmed by State Senator James Kyle, the sponsor of the Senate bill that became Public Chapter No. 531, through his statement at the May 12, 2009 hearing of the Tennessee Senate Tax Subcommittee:

> [T]he policy consideration for this particular matter [the "over-commitment" provision] is to somewhat have our local governments be a little more judicious as to who they commit to state custody . . . . It makes people more responsible for

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[4] DCS files most of the commitment petitions in Tennessee. *See* Minutes of the Tennessee Council of Juvenile and Family Court Judges Executive Committee Retreat, April 16-17, 2009, at 2 ("It was stated that in most dependent and neglect cases, DCS petitions the court to remove the child/children"). A copy of these Minutes is attached as Exhibit D to the Lustbader Aff.

[5] CD: *Hearing on H.B. 2389 Before the Tennessee House Finance, Ways and Means Comm., 106th Gen. Assem.*, 01:19:00 – 01:20:45 (Nashville, March 31, 2009) (emphasis added). A certified copy of this CD is attached as Exhibit E to the Lustbader Aff.

> their decisions, and when you're more responsible for your decisions you're going to be more careful with your decisions.[6]

Also, on May 28, 2009, DCS officials attended a public hearing in Anderson County, one of the counties with a commitment rate that exceeded the then-proposed cap of 200% of the state average commitment rate. There, DCS Budget Director Doug Swisher stated:

> *The Department was charged by the governor to come up with reduction plans. . . . We were required to reduce our budget, okay*? Obviously I had to come up with ways to reduce our budget, okay? Obviously those are all painful, they were not easy . . . . Actually, this one reduction actually is the only one in our Department that actually is good for kids. . . . *Now, you as a county may say, well, no, this is affecting your county budget. Our goal with this is that we as a Department don't collect a dime from any county.* . . . And that would be what was in the best interest of kids. . . . *It's about . . . leaving [kids] with their families.*[7]

Responding to the then-proposed law, the Tennessee County Services Association ("TCSA") stated in its May 15, 2009 Update[8]: "If counties were required today to pay for children committed over the state average of 200 percent, the total cost would be more than $7.5 million paid primarily by a few counties who are having a high frequency of over-commitments." Lustbader Aff., Exhibit H at 1. The TCSA Update includes a chart, based on "current year activity," that identifies nine counties whose commitments had already exceeded 200% of the state average commitment rate for dependent and neglected and unruly children, and 19 counties that had already exceeded 200% of the state average rate for delinquent children. *See id.* at 2. In addition to the $7.5 million total, the chart includes estimates of the cost to each of the counties above 200% of the statewide average, with the cost to Anderson County alone

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[6] CD: *Hearing on S.B. 2357 Before the Tax Study Subcomm. of the Tennessee Senate Finance, Ways and Means Comm., 106th Gen. Assem.*, 01:01:04 – 01:01:45 (Nashville, May 12, 2009). A certified copy of this CD is attached as Exhibit F to the Lustbader Aff.

[7] DVD: *Hearing on Possible Effects of S.B. 2357 Before the Legis. Comm. of the Anderson County Bd. of Comm'rs*, 01:23:05 – 01:24:37 (Anderson County, May 28, 2009) (emphasis added). A copy of this DVD is attached as Exhibit G to the Lustbader Aff.

[8] According to its website, the TCSA is "a nonpartisan, nonprofit public interest group representing the state's 95 counties." http://www.tncounties.org (last visited September 8, 2009). A copy of the May 15, 2009 TCSA Update is attached as Exhibit H to the Lustbader Aff.

estimated at over $3 million. *Id*.[9] Based on the "significant charges" counties would incur should the legislation pass, the TSCA Update recommends:

> In summary . . . *what can you do* as a county official about this potential fiscal liability? First of all, counties will not be charged anything if your juvenile judge makes no commitments above the statewide average, or cap. As we have stated before, the above chart uses 2008 figures and is an example of what might happen, if this law passes, and its effect on the state. As you can tell only about four judges appear to be making the most over-commitments. *I would make sure my county juvenile judge knows this DCS cap* number and uses other alternatives in dealing with the child. Otherwise, your county will be bill [*sic*] for these over-commitments in the future. This could be addressed with the juvenile judge in the county budget process.

Id. (emphasis in original).

The Tennessee Council of Juvenile and Family Court Judges ("TCJFCJ") has expressed its concern over the Commitment Cap Law.[10] In a unanimous resolution passed on February 9, 2009 (before passage of the law), the Executive Committee of the TCJFCJ voted to oppose "any legislation to limit the number of commitments per county."[11] Subsequently, at its July 10, 2009 meeting, the Executive Committee "expressed great concern about the Legislative Branch telling the Judicial Branch how many kids they can or can not commit to state custody."[12]

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[9] This is more than *six times* the entire budget for the Anderson County Juvenile Court for 2008. *See* County of Anderson FY 2008/2009 Original Budget, attached as Exhibit I to the Lustbader Aff., at 6.

[10] The TCJFCJ is "the official organization of the judges having juvenile and family court jurisdiction in this state." T.C.A. § 37-1-501.

[11] Minutes of the February 9, 2009 TCJFCJ meeting at 3 ("There was outcry . . . . It was moved . . . and seconded . . . to oppose any legislation to limit the number of commitments per county. *Motion unanimously carried*.") (emphasis in original). A copy of these Minutes is attached as Exhibit J to the Lustbader Aff. According to the TCJFCJ website, "[t]he Executive Committee [of the TCJFCJ], elected by the membership . . . is the governing board of the Council and consists of the president, vice president, secretary/treasurer, immediate past president, seven directors, any Tennessee judge serving as an officer of the National Council of Juvenile and Family Court Judges, and a judge selected to represent TCJFCJ on the Tennessee Judicial Council." *See* http://www.state.tn.us/tcjfcj/ (last visited September 8, 2009).

[12] Minutes of the July 10, 2009 TCJFCJ meeting at 5. A copy of these Minutes is attached as Exhibit K to the Lustbader Aff.

LOCAL RULE 65.01 STATEMENT

Pursuant to Fed. R. Civ. P. 65 and Local Rule 65.01, Plaintiffs' counsel has contacted opposing counsel concerning the timing and substance of this motion, including multiple discussions with DCS counsel by telephone. *See* Lustbader Aff. at ¶ 5. Good faith efforts to resolve this issue were unsuccessful. *See id*.

SUMMARY OF ARGUMENT

Plaintiffs move for a TRO or, in the alternative, a preliminary injunction, to enjoin T.C.A. § 37-2-205(f). As set forth in the testimony, documents and other evidence submitted by Plaintiffs, if not enjoined the Commitment Cap Law will irreparably harm children who are subject to possible commitment to DCS custody. Since July 1, 2009, every decision made by a Juvenile Court judge to commit a child to DCS custody counts against that county's commitment cap. By threatening fiscal penalties against counties in which judges decide to commit more than a prescribed number of children, the challenged law unlawfully and dangerously affects the individual evaluation of children's safety and circumstances by the Juvenile Courts. The new law thus directly impacts the future members of the *Brian A.* class.

The requirements for a TRO or, in the alternative, a preliminary injunction are overwhelmingly satisfied, and this Court should exercise its discretion and grant the requested relief. *First*, the threat of irreparable harm to children is considerable. The decisions that Juvenile Court judges make can have life-or-death consequences for children.[13] The Commitment Cap Law was *designed* to affect these decisions, and to impose upon them

[13] The safety of children in Tennessee who have been brought to the attention of DCS but are not brought into custody is a documented issue of federal concern. *See* Final Report: Tennessee Child and Family Services Review, April 2009, attached as Exhibit L to the Lustbader Aff., at 4 (identifying a number of key problems, the foremost being that "[c]aseworkers fail to recognize risk and safety factors of children at home or in foster care."). This concern comes as the population of foster children in DCS custody has decreased from approximately 9,000 children in 2001, when the Consent Decree was first entered (*see* Complaint, Docket No. 1 at ¶ 20), to approximately 5,300 as of June 30, 2009 (*see* chart, "DCS Custody Counts vs. Prior Year as of 6/30/09," attached as Exhibit M to the Lustbader Aff.).

considerations that go beyond the individual circumstances and best interests of the children. The State apparently does not trust all Juvenile Court judges to make the "correct" commitment decisions in the cases before them (a position Plaintiffs do not share). But rather than address concerns about commitment rates directly with individual Juvenile Court judges, appeal individual commitment decisions it believes to be unfounded or increase services as needed to enable at-risk children to remain safely at home, the State has chosen instead to dangerously and unlawfully curb such decisions through the Commitment Cap Law.

Second, Plaintiffs have a high likelihood of success on the merits. The Commitment Cap Law clearly violates the Consent Decree provision that requires case-specific decisions and the basic independence of Juvenile Court judges. *See* 2009 MSA at § I(A)(2). By attempting to chill commitment decisions according to a county-specific cap based on an aggregate statewide rate, T.C.A. § 37-2-205(f) interferes with the capacity of Juvenile Court judges to make case-by-case decisions.

In the same way, the challenged law violates the Consent Decree provision that "[a]ll parties in judicial proceedings involving neglect, abuse, unruly and delinquency should be provided with a fair hearing and their constitutional and other legal rights should be enforced and recognized" (2009 MSA at § I(A)(12)), because it violates children's constitutional rights under both the Due Process and Equal Protection clauses of the Fourteenth Amendment. The law violates children's Due Process rights by depriving them of their right to fair hearings and to individualized commitment decisions. It violates children's Equal Protection rights because it divides similarly situated children who are the subjects of commitment hearings into two groups – those who live in counties where commitments are still comfortably below the statutory cap, and those who live in counties where commitments are approaching or have exceeded that cap – and it ensures that these two groups will, without justification, be treated differently.

The challenged law triggers but fails to withstand "strict scrutiny" review because it infringes upon children's fundamental fair hearing rights but is not narrowly tailored to advance an important state interest. The law fails to withstand even "rational basis" review because the commitment cap is arbitrary, unfair and not rationally related to any legitimate state interest. The commitment cap as defined by the "statewide average commitment rate" in the new law has absolutely no rational connection to what occurs in individual counties, let alone to the facts of individual children's cases. For example, Anderson County is an undisputed target of the new law, even though it leads the state both in the number of methamphetamine labs seized and in the number of children committed to custody due to parental substance abuse. Yet, the challenged law is completely disconnected from these realities.

Additionally, by chilling individualized decision-making, T.C.A. § 37-2-205(f) directly conflicts with – and so is pre-empted by – the plain language of the Federal Adoption Assistance and Child Welfare Act of 1980. By receiving federal funds through this Act, Tennessee has agreed to comply with its provisions, which mandate case-by-case judicial determinations of whether the state has made "reasonable efforts" to prevent or eliminate the need for the removal of the child (42 U.S.C. § 671(a)(15)(A)), and whether continuation in the home "would be contrary to the welfare of the child" (42 U.S.C. § 672(a)(2)).

Third, the threatened irreparable harm to children far outweighs any possible injury to Defendants stemming from a TRO or a preliminary injunction, if any such injury even exists. The costs the State would incur if Juvenile Courts were to continue to make case-by-case commitment decisions without regard to a commitment cap is a hypothetical "harm" at best. Similarly, the notion of "harm" to the State through "over-commitments" is a false premise since the State can appeal any commitment decisions it believes to be unfounded.

Finally, the public interest will be served by the grant of injunctive relief. The public interest in the enforcement of consent decrees is considerable, as is the public interest in ensuring that Juvenile Court commitment decisions are based on the circumstances of the individual children involved, and not arbitrarily tied to the total number of commitments in the counties in which those children live.

For the reasons set forth fully below, Plaintiffs respectfully request that this Court grant a TRO or, in the alternative, a preliminary injunction, enjoining the implementation of T.C.A. § 37-2-205(f) until such time as the Court can conduct a hearing to declare unlawful and permanently enjoin said law, together with such other and further relief as may be necessary.

ARGUMENT

I. This Court Should Grant A Temporary Restraining Order or, in the Alternative, a Preliminary Injunction, to Enjoin the Implementation of T.C.A. § 37-2-205(f).

Under Fed. R. Civ. P. 65(b), a court may grant a TRO "if it clearly appears from specific facts shown by testimony, affidavits or a verified complaint that immediate and irreparable injury, loss or damage will result to the applicant." *Leaf Funding, Inc. v. Butera*, No. 3:06-CV-00938, 2006 WL 2868976, at *3 (M.D. Tenn. Oct. 5, 2006). In determining whether to issue a TRO, a court is to consider: "(1) whether the movant has shown a strong or substantial likelihood of success on the merits; (2) whether irreparable harm will result without an injunction; (3) whether issuance of a preliminary injunction will result in substantial harm to others; and (4) whether the public interest is advanced by the injunction." *Workman v. Sundquist*, 135 F. Supp. 2d 871, 872 (M.D. Tenn. 2001) (Campbell, J.).[14] As set forth below, Plaintiffs meet the standard for injunctive relief in this case.

[14] The court should balance all four factors in determining whether to grant the TRO. *See Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1995). The grant or denial of a TRO is within the sound discretion of the trial court. *See Virginia Ry. Co. v. System Fed'n No. 40*, 300

A. Children Subject to Commitment Decisions Will Be Irreparably Harmed Without an Injunction.

The threat of irreparable harm to children posed by T.C.A. § 37-2-205(f) is considerable. Substantial evidence establishes the new law's chilling effect on Juvenile Court judges' case-by-case decisions to commit children to DCS custody as dependent and neglected or delinquent. This harm directly affects the *Brian A.* class, which includes foster children who are or will be in DCS custody. *See* 2009 MSA at § I(B).

In the context of an allegation of child abuse or neglect, the Juvenile Court must make the critical determination of whether commitment to DCS custody is necessary to keep the child safe. This determination cannot be influenced by how many other children have already been committed in that particular county, yet that is exactly the purpose of the law at issue here.[15] The evidence shows that DCS generated the Commitment Cap Law without any intent to actually impose fiscal penalties on the counties; rather, DCS intended the *threat* of such penalties to affect judges' decision-making, resulting in fewer commitments to DCS custody and savings to the State. In the words of the DCS Commissioner, "I don't ever want to collect a nickel . . . . I want to reduce that commitment level." Lustbader Aff., Exhibit E. Similarly, in the words of the DCS Budget Director: "Our goal with this is that we as a Department don't collect a dime from the county." Lustbader Aff., Exhibit G. And, in the words of State Senator Kyle: "[T]he policy consideration for this particular matter is to somewhat have our local governments be a little more judicious as to who they commit to state custody." Lustbader Aff., Exhibit F.

U.S. 515, 551 (1937). The same factors apply in determining whether to issue a TRO or a preliminary injunction. *See Ohio Republican Party v. Brunner*, 543 F.3d 357, 361 (6th Cir. 2008).

[15] Additionally, in the delinquency context, T.C.A. § 37-2-205(f) biases Juvenile Court judges towards binding children over for trial as adults so that counties will not have to pay for their incarceration as juveniles. This effect has severe consequences for children, unrelated to the facts of their individual cases. *See* Affidavit of C. Dawn Deaner, Public Defender for Nashville and Davidson County, attached as Exhibit N to the Lustbader Aff. The *Brian A.* class includes children already committed to DCS custody as dependent and neglected, who are charged with a delinquent or criminal act. *See* 2009 MSA at § I(B).

The Commitment Cap Law therefore seeks to affect the individualized consideration of each child's case, due to a judge's natural and unavoidable interest in keeping the county in which he or she serves from incurring severe financial penalties. It is clear that the counties themselves understand that this is the intent of the law. In a publication from May of this year, the Tennessee County Services Association advised county governments: "*I would make sure my county judge knows this DCS cap* number and used other alternatives in dealing with the child. Otherwise your county will be bill [*sic*] for these over-commitments in the future." Lustbader Aff., Exhibit H at 2 (emphasis in original). The chilling effect of the new law is heightened by the reality that the counties control the operational budgets of the courts.[16] *See* T.C.A. §§ 16-15-102, 16-15-5006, 37-1-203. The effect is even stronger for the special Juvenile Courts, as they only exist by virtue of decisions by their counties. *See* T.C.A. § 37-1-205. Not surprisingly, the statewide association of Juvenile Court judges (TCJFCJ) has voiced its concerns about the law's intended interference with judicial independence. *See* Lustbader Aff., Exhibits D and K.

Accordingly, the evidence amply establishes the risk of irreparable harm to children unless this Court enjoins enforcement of T.C.A. § 37-2-205(f).

B. Plaintiffs Have A Substantial Likelihood of Success on Their Legal Challenges to the Commitment Cap Law.

"In order to establish a likelihood of success on the merits of a claim, a plaintiff must show more than a mere possibility of success. However, it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them fair grounds for litigation and thus for more deliberate investigation." *Leaf Funding*, 2006

[16] Hence the recommendation of the TCSA: "This could be addressed with the juvenile judge in the county budget process." *Id.*

WL 2868976, at *2 (quoting Six Clinics Holding Corp., II v. CAFCOMP Sys., 119 F.3d 393, 407 (6th Cir. 1997)). This factor weighs heavily in Plaintiffs' favor.

1. T.C.A. § 37-2-205(f) violates § I(A)(2) of the Consent Decree, which requires that child welfare decision-makers have the professional capacity to make commitment decisions based on the child's safety.

As this Court is well aware, the Consent Decree is intended to accomplish fundamental reform of the Tennessee child welfare system. The Consent Decree's "Principles of Settlement Agreement" include the following:

> The state should make reasonable efforts to avoid foster care placement by providing services to preserve the biological family whenever that is reasonably possible. However, *child welfare decision-makers must have the professional capacity to make determinations as to when making efforts to preserve the biological family, or leaving the child with that family, is neither safe for the child nor likely to lead to an appropriate result for the child*.

2009 MSA at § I(A)(2) (emphasis added). The Commitment Cap Law violates the plain meaning of this Consent Decree provision.[17]

A Juvenile Court is of course a "child-welfare decision maker,"[18] whose core judicial function or "capacity" is to make independent case-specific decisions concerning child safety.[19] According to state law, if a child is found to be dependent or neglected, the court is to make dispositional orders "best suited to the protection and physical, mental and moral welfare of the child." T.C.A. § 37-1-130(a). One possible order is that the child be transferred to the legal custody of DCS. *See id.* at (a)(2)(B). Additionally, "[i]n determining reasonable efforts to be made with respect to a child [to prevent the need for removal or make it possible for the child to

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[17] "Consent decrees are construed for enforcement purposes as contracts. . . . A decree is always specifically enforceable as written." *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 557 (6th Cir. 1982), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984). A court "has an independent duty to ensure that the terms of the decree are effectuated" and "to protect the integrity of its decree," especially upon motion of a party. *Id.* at 557 & n. 16.

[18] *See* T.C.A. § 37-2-205(a) (authorizing "the juvenile court judge of any county . . . to commit a child to the custody of such county department of children's services.").

[19] "Judicial function" is defined as "[t]he *capacity* to act in the specific way which appertains to the judicial power[.]" BLACK'S LAW DICTIONARY 848 (6th ed. 1990) (emphasis added).

return home] . . . and in making such reasonable efforts, the child's health and safety shall be the paramount concerns." T.C.A. § 37-1-166(g)(1).

As established by the evidence set forth herein, the commitment cap imposed by T.C.A. § 37-2-205(f) violates § I(A)(2) of the Consent Decree because it is intended to affect the Juvenile Courts' decision-making in individual cases, regardless of the circumstances of those cases. This violation has "caused or is likely to cause an immediate and substantial risk of serious harm to children in the class."[20] Here, the risk of harm in implementing the Commitment Cap Law is the life-threatening risk to individual children that their commitment decisions will be based on how many other children have already been committed in their particular counties, rather than on the facts of their individual cases. Accordingly, Plaintiffs have a substantial likelihood of success on their claim that T.C.A. § 37-2-205(f) violates § I(A)(2) of the 2009 MSA.[21]

2. T.C.A. § 37-2-205(f) violates § I(A)(12) of the Consent Decree, which mandates that "[a]ll parties in judicial proceedings involving neglect, abuse, unruly and delinquency should be provided with a fair hearing and their constitutional and other legal rights should be enforced and recognized."

The Commitment Cap Law's chilling effect on the Juvenile Courts' capacity to make case-by-case commitment decisions not only violates the plain terms of § I(A)(2) of the 2009 MSA, it also violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. These constitutional protections are included in § I(A)(12) of the 2009 MSA, which requires that "[a]ll parties in judicial proceedings involving neglect, abuse, unruly and delinquency should be provided with a fair hearing and their constitutional and other legal rights

[20] 2009 MSA at § XVIII(B)(2)(c) (allowing plaintiffs to "bypass the dispute resolution provisions" of the Consent Decree where an imminent risk exists and to "seek immediate relief in court"); *see also id.* at § XVIII(A)(3) ("Nothing in this Settlement Agreement shall limit the right of the plaintiffs to seek from the court appropriate relief to remedy any violations of the Settlement Agreement.").

[21] Pursuant to the Supremacy Clause, the federal Consent Decree in this action pre-empts conflicting state law. *See, e.g., Brown v. Neeb*, 644 F.2d 551, 563–64 (6th Cir. 1981).

should be enforced and recognized." Unlike a violation of § I(A)(2), which can be determined by reference to the plain meaning of its terms, violation of the constitutional protections in § I(A)(12) must be measured against Fourteenth Amendment standards. As shown below, T.C.A. § 37-2-205(f) violates defined standards under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

a. T.C.A. § 37-2-205(f) violates children's Due Process rights under the Fourteenth Amendment.

As the Supreme Court has said, "Not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (quotation omitted).[22] This is because "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Due process, then, requires judges who are at the very least "capable of judging a particular controversy fairly *on the basis of its own circumstances*." *U.S. v. Morgan*, 313 U.S. 409, 421 (1941) (emphasis added).[23] But here, the express purpose of the Commitment Cap Law is to make Tennessee's Juvenile Court judges, when making commitment decisions, to consider something *other than* the children's own individual circumstances – namely, the threat of a fiscal penalty that hangs over the counties in which the judges sit. The new law thus deprives children who are the subjects of custody hearings of their basic Due Process right to a fair hearing in a fair tribunal.

The decision whether to commit to DCS custody a child who has allegedly been abused and/or neglected is one of indisputably great consequence, and must be based on nothing other

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[22] *See also Marshall v. Jerrico, Inc*., 446 U.S. 238, 242 (1980) (the requirement of a neutral decisionmaker "preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done").

[23] *Cf. Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) ("[T]he decisionmaker's conclusion . . . *must rest solely on the legal rules and evidence adduced at the hearing*. . . . And, of course, *an impartial decision maker is essential*.") (emphasis added) (citations omitted) (describing elements of a fair hearing to determine welfare eligibility).

than a careful, individualized consideration of each child's circumstances. That decision must not be colored by a judge's natural and unavoidable interest in keeping the county in which he or she serves from incurring severe financial penalties. Yet that is the intent of the Commitment Cap Law.

Of course, the Court must presume that Juvenile Court judges, like any judges, will act with honesty and integrity. *See Withrow*, 421 U.S. at 47 (noting that an allegation of partiality "must overcome a presumption of honesty and integrity in those serving as adjudicators").[24] But this presumption is overcome where the situation is one "which would offer a possible temptation to the average man as a judge." *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 60 (1972) (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)); *cf. Withrow*, 421 U.S. at 47 (stating that where, "under a realistic appraisal of psychological tendencies and human weakness," a decision-making practice poses "a risk of actual bias or prejudgment," that practice "must be forbidden if the guarantee of due process is to be adequately implemented").

In *Ward*, the Court found a lack of due process where a mayor's decisions as judge of his village's "violations court" brought significant revenue to the village. *See Ward*, 409 U.S. 57. The Court held that the mayor's position, even though it did not give him a direct and personal financial stake in the proceedings before him, could "make him partisan to maintain the high level of contribution from [his] court." *Id.* at 60. The Court found this met the "possible temptation" standard it had articulated in *Tumey*, and that the situation thus "necessarily involve[d] a lack of due process of law." *Id.* (quoting Tumey, 273 U.S. at 534).

Here, Tennessee's Juvenile Court judges certainly face the same sort of "possible temptation" as was found in *Ward*. The Commitment Cap Law gives a Juvenile Court judge a

[24] By making the instant application Plaintiffs do not mean to impugn the honesty, integrity or capability of any Juvenile Court judge in Tennessee. Rather, Plaintiffs argue that it is Defendants who, by urging the introduction and passage of the Commitment Cap Law, have shown that they do not trust those judges to properly carry out their sworn duty.

real financial stake in the proceedings before her, because if her commitments exceed the 300% cap, the county in which she sits (and by whom she and her staff are employed) will be penalized.[25] As a result, Juvenile Court judges will necessarily feel pressure to keep their commitments below the cap.

Because of the way it attempts to influence Juvenile Court judges, the Commitment Cap Law violates the due process rights of children who are subject to the commitment decisions those judges make.[26] Thus, Plaintiffs have a substantial likelihood of success on their claim that the Commitment Cap Law violates § I(A)(12) of the 2009 MSA.

b. T.C.A. § 37-2-205(f) violates children's Equal Protection rights under the Fourteenth Amendment.

The Commitment Cap Law divides children who are all similarly the subjects of commitment hearings in Tennessee into two groups – those who live in counties where commitments are still comfortably below the statutory cap, and those who live in counties where commitments are approaching or have exceeded that cap – and it ensures that these two groups will, without justification, be treated differently. While a child in the former group can expect her commitment decision to be made in her best interest and based solely on the individual facts

[25] For instance, the budget for the Juvenile Court of Anderson County was just under $500,000 in FY 2008-09. *See* Lustbader Aff., Exhibit I at 6. Before the enactment of the Commitment Cap Law, the TCSA estimated that Anderson county, as one of those with a "high" commitment rate, would face costs of as much as $3 million for its "excess" abuse and neglect commitments (*see* Lustbader Aff., Exhibit H at 1) – an amount *more than six times* the court's entire budget.

[26] The decision of the Supreme Court in *Dugan v. Ohio*, 277 U.S. 61 (1928) is distinguishable. In *Dugan*, which like *Tumey* and *Ward* concerned a "mayor's court" in Ohio, the Supreme Court decided that due process was still provided where a mayor made judicial decisions that brought his city revenue, since he had no direct executive function in the city government and was instead only one member of a commission which functioned as the city's legislature. *Dugan*, 277 U.S. at 63. Under those circumstances, the Court found that the mayor's relation "to the fund contributed to by his fines as judge, or to the executive or financial policy of the city, [was] remote" (*id.* at 65), and did not raise a concern for the due process rights of those who appeared in his court. But the statutes that authorized the judicial decisions at issue in *Dugan* were not *designed* to produce a biased court. In contrast, the very intent of the Commitment Cap Law is to impermissibly influence Juvenile Court judges so that they commit fewer children. In this case, rather than being a remote possibility, the influencing of judicial decisions is the entire rationale behind T.C.A. § 37-2-205(f).

of her case, the commitment decision for a child in the latter group will be influenced by how many other children have already been committed in that county. This factor has nothing to do with the evaluation of the child's safety and individual circumstances, considerations which form the basis of the child's fair hearing rights.

The Equal Protection Clause of the Fourteenth Amendment "was intended as a restriction on state legislative action inconsistent with elemental constitutional premises." *Plyler v. Doe*, 457 U.S. 202, 216 (1982). It "protects against arbitrary classifications, and requires that similarly situated persons be treated equally." *Bowman v. United States*, 564 F.3d 765, 772 (6th Cir. 2008). The classification created under T.C.A. § 37-2-205(f) arbitrarily distinguishes among similarly situated children based on a consideration entirely unrelated to their case-specific facts, their safety or their health. The classification is thus fundamentally unfair and violates the Equal Protection Clause.

"To establish a claim under the Equal Protection Clause, a plaintiff must demonstrate that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." *Brentwood Academy v. Tennessee Secondary Schools Athletic Ass'n*, No. 3:97-1249, 2008 WL 2811307 at *2 (M.D. Tenn. July 18, 2008) (Campbell, J.). A classification that infringes a fundamental right is reviewed under a "strict scrutiny" standard. *League of United Latin American Citizens (LULAC) v. Bredesen*, No. 3:04-0613, 2004 WL 3048724 at *3 (M.D. Tenn. Sept. 28, 2004) (Campbell, J.).

A right is said to be fundamental when it is "implicit in the concept of ordered liberty, or deeply rooted in this Nation's history and tradition." *Immediato v. Rye Neck School Dist.*, 73 F.3d 454, 460-61 (2d Cir. 1996) (citing Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986); Moore v. East Cleveland, 431 U.S. 494, 503 (1977); Palko v. Connecticut, 302 U.S. 319, 325-26

(1937)). Here, the classification created by T.C.A. § 37-2-205(f) infringes upon the fundamental right of children to the fair and individualized consideration of their cases by Juvenile Court judges. Thus, this Court should apply strict scrutiny review.

A statute that is not narrowly tailored to advance a compelling government interest cannot survive strict scrutiny. *Bowman*, 564 F.3d at 772 (citing City of Cleburne, 473 U.S. at 440). The purpose of T.C.A. § 37-2-205(f) is to lessen state spending by chilling Juvenile Court decisions so that fewer children will be committed to DCS custody. Even assuming for the sake of argument that such fiscal savings could be considered a *compelling* state interest in this context – a position Plaintiffs do not concede – the law is not narrowly tailored to advance that purpose, since there are innumerable ways in which the state could save money without infringing children's fundamental rights.

The Commitment Cap Law was created and enacted to pressure Juvenile Court judges to commit fewer children, beyond the case-by-case consideration of their safety and individual circumstances. This is clear from the public statements of Senator Kyle, the sponsor of the Senate bill that became Public Chapter No. 531; of Doug Swisher, DCS Budget Director; and of DCS Commissioner Miller. Such chilling of judicial decision-making can hardly be considered a compelling state interest.

Even if this Court were to decide that the classification of children established under the Commitment Cap Law does not trigger strict scrutiny review, the law fails to survive "rational basis" review. *Cf. Bowman*, 564 F.3d at 772. Under this standard, "government action amounts to a constitutional violation only if it is so unrelated to the achievement of any combination of legitimate purposes that the Court can only conclude that the government's actions were

irrational." *Brentwood Academy*, 2008 WL 2811307 at *2. That is exactly the conclusion this Court should reach with regard to T.C.A. § 37-2-205(f).[27]

Curtailing the commitment of children to DCS custody by penalizing counties that exceed a commitment cap is not rationally related to reducing state expenditures, because the commitment cap itself is irrational. The concept of "over-commitment" makes no sense, because DCS itself files most of the commitment petitions for dependent and neglected children.[28] Moreover, state law already provides a mechanism for challenging any commitments that DCS believes to be unfounded or not in the child's best interest. *See* T.C.A. § 37-1-159.

The commitment cap is also irrational because it is defined by comparison to a "statewide average commitment rate" (*see* T.C.A. § 37-2-205(f)(1)(A)), a rate which bears no rational relationship to the need for commitments in any particular county, much less to the facts in any child's particular case. For instance, Anderson County, one of the "high commitment rate counties" for dependent and neglected children, has the highest number of methamphetamine lab seizures in the state.[29] Additionally, according to DCS data, as of June 30, 2009, Anderson County also had the highest number of custodial intakes due to parental substance abuse statewide[30] and among the highest rates of substantiated findings of abuse and neglect.[31] These

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[27] *See, e.g., United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973) (holding that definition of "household" in Food Stamp Act violated Equal Protection as not furthering any legitimate government interest, where it distinguished households composed entirely of persons related to one another from households containing one or more unrelated persons and completely disqualified all households in latter group); *Ranschburg v. Toan*, 709 F.2d 1207 (8th Cir. 1983) (holding that denial of certain benefits to disabled persons, because they did not receive benefits from other enumerated programs, violated Equal Protection because classification not rationally related to a legitimate state interest); *Medora v. Colautti*, 602 F.2d 1149 (3d Cir. 1979) (holding that denial of benefits, for reasons unrelated to their need, to persons who were blind, aged, or disabled violated Equal Protection because classification was not rationally related to Pennsylvania's stated objective of providing assistance to all needy residents).

[28] *See* Lustbader Aff., Exhibit D at 2.

[29] *See* chart, "CY 2008 Tennessee Meth Lab Seizures," attached as Exhibit O to the Lustbader Aff.

[30] *See* chart, "Custody Intake Reasons for Brian A. Class Clients for Fiscal Year 2008-09," attached as Exhibit P to the Lustbader Aff.

[31] *See* chart, "CY 2007 CPS Indicated Investigations," attached as Exhibit Q to the Lustbader Aff.

local conditions have absolutely nothing to do with a "statewide average commitment rate" and thus the cap itself is arbitrary and irrational.[32]

Accordingly, the challenged law violates children's Equal Protection rights, and Plaintiffs have a substantial likelihood of success on their claim that T.C.A. § 37-2-205(f) violates § I(A)(12) of the 2009 MSA.

3. T.C.A. § 37-2-205(f) conflicts with and is pre-empted by the Federal Adoption Assistance and Child Welfare Act of 1980.

Pursuant to its powers under the Spending Clause, Congress may "condition[] receipt of federal moneys upon compliance with federal statutory and administrative directives." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting Fullilove v. Klutznick, 448 U.S. 448 (1980)). Title IV-E of the Social Security Act and, specifically, the Adoption Assistance and Child Welfare Act of 1980, as amended by the Adoption and Safe Families Act of 1997, 42 U.S.C. §§ 670 *et seq*., (collectively, the "Adoption Assistance Act" or "AAA"), creates a joint federal-state program whereby states receive federal reimbursements for certain foster-care and adoption expenses if they enter into a "qualifying plan" approved by the U.S. Department of Health and Human Services ("HHS"), and comply with its terms. 42 U.S.C. § 671. Tennessee participates in such a qualifying Title IV-E State Plan and has availed itself of the funds offered by Congress through the AAA.[33] This plan is a legal contract between the federal government and the State of Tennessee and, by entering into this plan and receiving federal funds, Tennessee has agreed to

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[32] Moreover, the Commitment Cap Law is not rationally related to saving state funds because a county with a "high" commitment rate that is able to move its committed children quickly out of custody (through return home or adoption) will nevertheless incur penalties if it exceeds the statutory cap on commitments, while a county with a commitment rate below the cap but with longer lengths of stay for children will *not* incur penalties, even though the second county will eventually cost the state *more* money than the first. A statutory classification which is based on an irrational premise cannot be said to be rationally related to a legitimate state interest.

[33] *See* Tennessee's Title IV-E State Plan, a copy of which is attached as Exhibit R to Lustbader Aff. DCS is the state agency responsible for submitting the Title IV-E State Plan to the Secretary of HHS for approval and for administering the plan.

provide child welfare services in compliance with the statutory and administrative directives of the AAA.[34]

The AAA makes clear that the decision of whether to commit a child to state custody must be based on an individualized consideration of that child's safety and circumstances by the Juvenile Courts. It requires judicial determinations that: (a) continuation in the home "would be contrary to the welfare of the child" (42 U.S.C. § 672(a)(2)); and (b) prior to the placement of a child in foster care, "reasonable efforts" were made to prevent or eliminate the need for removal of the child from his or her home. 42 U.S.C. § 671(a)(15)(A). In determining whether reasonable efforts were made, "the child's health and safety shall be the paramount concern." *Id.*

T.C.A. § 37-2-205(f) is designed to interfere with Juvenile Courts' case-by-case considerations of children's individual health and safety in making commitment decisions, and so directly violates these unambiguous provisions of the federal Adoption Assistance Act. The AAA is controlling federal law under the Supremacy Clause of the United States Constitution and, as such, preempts T.C.A. § 37-2-205(f). *See Blum v. Bacon*, 457 U.S. 132, 145–46 (1982) (holding that, under the Supremacy Clause, federal Spending Clause legislation trumps conflicting state statutes and regulations).

Additionally, T.C.A. § 37-2-205(f) violates Title IV-E as interpreted by the regulations promulgated thereunder by HHS, and applicable HHS policy issuances.[35] *Cf. Planned Parenthood Affiliates of Mich. v. Engler*, 73 F.3d 634, 639 (6th Cir. 1996) (holding a state law invalid under the Supremacy Clause based on the text of the Social Security Act, as well as the

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[34] Class members are thus intended third-party beneficiaries under the Title IV-E State Plan contract. *See Kenny A. ex rel. Winn. v. Perdue*, 218 F.R.D. 277, 297 (N.D. Ga. 2003) ("State Plans are contracts enforceable by plaintiffs as intended third-party beneficiaries").

[35] Official regulations and policy issuances of HHS, the federal agency charged with implementing the Title IV-E program, are to be given deference by the court. *See Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (requiring courts to give considerable weight to agency's construction of a statutory scheme it administers and deference to its administrative interpretations).

accompanying regulations and agency interpretation); *E.C. v. Sherman*, No. 05-0726-CV-C-SOW, 2006 WL 1194767, at * 1 (W.D. Mo. May 1, 2006) (holding that proposed amendments to state law were preempted by Title IV-E, and as interpreted and applied by official policy issuances of HHS). Tennessee explicitly agreed to be bound by these regulations and policy issuances in executing its Title IV-E State Plan:

> As a condition of the receipt of Federal funds under title IV-E . . . the [state agency] . . . hereby agrees to administer the program in accordance with the provisions of this State plan, title IV-E of the Act, and *all applicable Federal regulations and other official issuances of the Department.*

Lustbader Aff., Exhibit R at 3 (emphasis added).

Title IV-E's enabling regulations further clarify that the removal of a child from his or her home must be the result of a judicial determination "that continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interest, of the child." 45 C.F.R. § 1356.21(c). The contrary-to-the-welfare determination "must be made in the first court ruling that sanctions (even temporarily) the removal of a child from home." *Id.* Furthermore, the judicial determinations regarding the child's welfare and whether reasonable efforts were made to prevent removal "must be explicitly documented and must be made on *a case-by-case basis*." 45 C.F.R. § 1356.21(d) (emphasis added).

Likewise, the controlling official policy issuances in the HHS Child Welfare Policy Manual confirm that the judicial determinations required by Title IV-E must be made on a "case-by-case basis" to assure that the "*individual circumstances of each child* before the court are properly considered." HHS Child Welfare Policy § 8.3A.9 (emphasis added). Regarding the requirement of a judicial determination of reasonable efforts, official HHS policy states that "[i]n each individual case, the court and the State must determine the level of effort that is reasonable, based on safety considerations and the circumstance of the family." *Id*. at § 8.3C.4. These required judicial determinations serve as "important safeguard[s] against inappropriate agency

action." *Id*. at § 8.3A.7.[36]

By introducing an impermissible factor – the imposition of fiscal penalties on the county – into case-by-case considerations of children's safety and other individual circumstances in Juvenile Court commitment decisions, T.C.A. § 37-2-205(f) conflicts with, and so is pre-empted by, 42 U.S.C. §§ 672(a)(2) and 671(a)(15), and as further interpreted by 45 C.F.R. § 1356.21 and HHS Child Welfare Policies §§ 8.3A.7, 8.3A.9 and 8.3C.4. Plaintiffs thus have a substantial likelihood of success on the merits of their statutory claim under the AAA.

C. The Threat of Irreparable Harm to Children Outweighs Any Hypothetical Harm to Defendants.

"The third factor the Court must consider is whether the issuance of [injunctive relief] will cause substantial harm to others. This requires a court to balance the harm the movant would suffer if its request for an injunction [were] denied with the harm the defendants would suffer if they were to be enjoined. It also requires a court to assess the impact [injunctive relief] might have on relevant third parties." *Leaf Funding*, 2006 WL 2868976 at *4 (quotations and citations omitted).

This factor also weighs heavily in Plaintiffs' favor. The cost to the State if the Commitment Cap Law is enjoined – the only "harm" the State can claim – is certainly outweighed by the potential harm to children from the chilling effect the law will have on judges' commitment decisions.[37] There are no relevant third parties that would be harmed by the grant of injunctive relief.

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[36] A copy of HHS Child Welfare Policies §§ 8.3A.7, 8.3A.9 and 8.3C.4 are attached, collectively, as Exhibit S to the Lustbader Aff.

[37] Plaintiffs dispute whether the loss of these speculative savings can be considered a "harm" at all. In addition, the "harm" to the State from "over-commitments" is a false premise, since the law provides for legal challenges to any commitment decision. *See* T.C.A. § 37-1-159.

D. The Public Interest Will Be Served by the Grant of Injunctive Relief.

The last factor to be considered in determining whether to grant injunctive relief is "whether the public interest is advanced in issuing [the injunction]." *Id.* at *5 (quotations and citations omitted). This factor too weighs strongly in Plaintiffs' favor.

The vigorous enforcement of consent decrees is in the public interest. Additionally, the public interest is clearly served in ensuring children receive case-by-case evaluations of their safety and other circumstances when critical decisions are made regarding their commitment to DCS custody. Finally, "the public is certainly interested in the prevention of enforcement of ordinances which may be unconstitutional." *Planned Parenthood Ass'n of Cincinnati v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987).

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court issue a temporary restraining order or, in the alternative, a preliminary injunction, enjoining the implementation of T.C.A. § 37-2-205(f) until such time as the Court can conduct a hearing to declare unlawful and permanently enjoin T.C.A. § 37-2-205(f), together with such other and further relief as may be necessary.

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Respectfully Submitted,

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