IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

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| M.D., b/n/f Sarah R. Stukenberg, et al.,<br><br>Plaintiffs,<br>v.<br><br>GREG ABBOTT, in his official capacity as Governor of the State of Texas, et al.,<br><br>Defendants. | ) | Civil Action No. 2:11-CV-00084 |

**PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO SPECIAL MASTER RECOMMENDATIONS**

This Response to Defendants' Objections (Dkt. 479) is organized as follows: Part 1 highlights how Defendants' most recent filing in this Court cannot be squared with their recent public admissions outside of the courtroom. Part 2 responds to their Global Objections, and Part 3 responds to their Clustered Objections. Finally, Part 4 cross-references the attached Appendix A, which provides detailed citations to evidentiary proof in the trial record to support the Court's findings of constitutional violations and the Special Master Recommendations to remedy those violations.

## 1. DEFENDANTS' FILING IS AT ODDS WITH THEIR RECENT PUBLIC ADMISSIONS

The Court has found that children in the State's permanent managing conservatorship face an unreasonable risk of harm in a structurally deficient foster care system, and this harm is a direct result of Texas's collective policies and practices. Mem. Op. and Verdict of the Ct. (Dkt. 368) at 17, 186, 200, 217, 234, 240, 242 (Dec. 17, 2015). To remedy a system that is "broken for Texas's PMC children, who almost uniformly leave State custody more damaged than when they entered," *id*. at 254, the Court appointed Special Masters "to help craft the reforms and oversee their implementation." *Id*. at 245; Appointment Order (Dkt. 379) (Mar. 21, 2016). As instructed, the

Special Masters have offered Recommendations to remedy the constitutional harms found, based on the extensive factual determinations in the Opinion and Verdict.

In Response, Defendants have filed a blunderbuss of objections, disagreeing with and opposing every Recommendation from the Special Masters. And sparing neither expense nor trees, they repeat the same litany of complaints over and over, confusing repetition for persuasive argument or meaningful feedback to the Court. But despite their length and scattershot approach, the essence of the Objections can be readily summed up. According to Defendants, who are responsible for the care of thousands of children placed into their legal custody, none of the Recommendations are warranted because the Texas foster care system is neither significantly broken nor in need of urgent repair.

Before Plaintiffs respond to specific Objections, it bears saying, first and foremost, that Defendants' filing is grossly at odds with their post-trial public comments, legislative testimony, and correspondence to legislators and executive branch officials. That is, even as they insist otherwise in court, outside of the courtroom Defendants have made open admissions, of which this Court can take judicial notice, about the longstanding systemic problems that plague its foster care system—and of the urgent need for reform. Though troubling, these contradictory positions are no surprise, given that before and at trial Defendants insisted that the foster care system is beyond reproach, even as the record was replete with testimony from their own witnesses, and evidence from their own records and reports, showing that Texas's PMC children face an unreasonable risk of harm from a structurally deficient system. Yet, Defendants continue to say one thing in court, while saying something completely different to the public. The following are a few examples:

**Inadequate Placement Array**. In their Objections, Defendants deny that DFPS lacks an adequate number of foster care placements. They insist that "occasional use of overnight office

placements," Objs. at 34, is not significantly harmful to children. And, they object to every Recommendation to ensure that DFPS has an adequate placement array, including by number, geographic distribution, and placement type, so that children can be appropriately placed. They deny the necessity to assess placement needs, to plan, to increase the number of foster homes, and generally to ensure an adequate supply of appropriate places for children to live.

Outside of court, Defendants' words are quite different. For example, on September 6, 2016, Defendant Commissioner Whitman submitted a Legislative Appropriation Request for the next two fiscal years. In his opening Administrator's Statement, he admits the inadequacy of available placements:

> For a variety of reasons, including population growth, a shift in the needs of children who are entering the foster care system, and ever-increasing health care costs, Texas lacks adequate, high-quality foster care capacity, particularly for high-needs children. Many children suffer from trauma and mental illness, emotional/behavioral health problems, or are medically fragile from what they have experienced. Our system must be strengthened to take special care of these children who through no fault of their own are now the state's responsibility.

LEGISLATIVE APPROPRIATIONS REQUEST, SUBMITTED TO THE GOVERNOR'S OFFICE OF BUDGET, PLANNING & POLICY & THE LEGISLATIVE BUDGET BOARD, FOR FISCAL YEARS 2018 AND 2019 ("LAR 2018-19"), *Administrator's Statement* at 5 (p. 16/837 of the pdf), available at https://www.dfps.state.tx.us/About_DFPS/Financial_and_Budget_Information/LAR/FY18-19/documents/18-19_LAR.pdf.

On October 12, 2016, Defendant Governor Abbott, along with Lt. Governor Patrick and Speaker Straus, wrote to Commissioner Whitman complaining of serious problems at DFPS. "We would be remiss if we did not acknowledge that quality capacity should be a high priority. It is unacceptable that children are sleeping in Child Protective Services offices. We also will not tolerate inferior residential foster care operations. The state's residential providers must be held to the highest standards while caring for our most vulnerable or no longer operate in our system."

Letter from Gov. Abbott, et al., Oct. 12, 2016, at 2, available at http://gov.texas.gov/files/press-office/DFPS_Whitman_10122016.pdf.

On October 20, 2016, Defendant Whitman replied to the joint letter from Defendant Abbott, Lt. Governor Patrick, and Speaker Straus, noting that "CPS has seen an increase in the number of children without placement." He continued:

> The result of this capacity issue is that the agency must enter into expensive child-specific contracts with providers that are not the best setting for children's needs, or have children spend extended time sleeping in CPS offices, hotels, or emergency shelters.

Letter from Commissioner Hank Whitman to Gov. Abbott, et al., Oct. 20, 2016, at 5, available at http://www.lrl.state.tx.us/scanned/archive/2016/32952.pdf.

On October 26, 2016, Commissioner Whitman testified before the Senate Committee on Finance: "Like face-to-face visits, the Agency has struggled to find placements for some of our higher needs children." Hearing Before the Tex. Senate Committee on Finance, 84th Leg. Session Interim, Oct. 26, 2016, at 3:05:42-3:06:00, available at http://www.senate.state.tx.us/75r/senate/commit/c540/c540.htm. He further conceded, "[b]ecause of this, some children have had to spend the night in CPS offices," and he passionately exclaimed: "This is unacceptable to me." *Id* at 3:05:51-3:05:54.

And on November 24, 2016, Department of Family & Protective Services spokesperson Shari Pulliam wrote, "[w]e are desperate for foster parents all across the state." G. Evans, "Local, State Officials Say Placement Need For Foster Care Rises," Longview News-Journal, Nov. 27, 2016 (quoting email received from Ms. Pulliam), available at https://www.news-journal.com/news/2016/nov/27/local-state-officials-say-placement-need-for-foste/. "Children are being placed outside the county they are removed from every day, because we just don't have the foster care placements in their own counties," she continued. *Id*.

These recent admissions confirm the trial evidence, including testimony and documents from Defendants' witnesses and files, that amply support the Court's determination that "DFPS's inadequate array places children far from their home communities, separated from their siblings, and in inappropriate placements," and its "inadequate placement array causes an unreasonable risk of harm" to Texas's foster care children, Mem. Op. at 227, as well as the Recommendations to remedy these constitutional violations.

**Caseworker Caseloads, Turnover, Safety of Children**. In their Objections, Defendants deny that DFPS lacks an adequate number of caseworkers needed to keep PMC children safe. Moreover, they object to every Recommendation to ensure that an adequate number of caseworkers be hired and retained by DFPS. They also deny that DFPS has a turnover problem which significantly harms children and that any of the Recommendations would help reduce turnover. They even deny that caseworker caseloads and turnover significantly bear upon child safety. Objs. at 24.

Yet on September 6, 2016, in a Legislative Appropriations Request, Commissioner Whitman concedes that DFPS needs to hire hundreds of additional conservatorship caseworkers. LAR 2018-19, *Administrator's Statement*, at 4 (p. 15/837 of pdf), available at https://www.dfps.state.tx.us/About_DFPS/Financial_and_Budget_Information/LAR/FY18-19/documents/18-19_LAR.pdf. He submitted that the additional caseworkers are needed to allow caseworkers to see children "timely" and "more often." *Id*. Unfortunately, his request is still inadequate as it would leave caseloads at a level far in excess of that which is needed to ensure that children do not face an unreasonable risk of harm. *Id*. (noting that if his request for additional funds is fulfilled, average caseloads per worker would be *reduced* to 25.47).

On October 26, 2016, Commissioner Whitman admitted to a Senate Committee that "when caseworkers are overworked, mistakes will happen." Hearing Before the Tex. Senate Committee

on Finance, 84th Leg. Session Interim, Oct. 26, 2016, at 3:04:15, available at http://www.senate.state.tx.us/75r/senate/commit/c540/c540.htm. He went on to say that conservatorship caseworkers are "stretched…with increasing need." *Id*. at 3:05:26-3:05:31. He added with detailed emphasis: "I know these caseworkers have a tough job.... The pay is not worth beans.... And, they are overworked. Something has got to give." *Id*. at 3:35:50, 3:36:01-3:36:19.

On October 27, Commissioner Whitman wrote to Chair Jane Nelson of the Senate Finance Committee: "A glaring cause of this crisis is that our workers are outnumbered by the opponent – child abuse and neglect." Letter from Commissioner Whitman, Oct. 27, 2016, available at http://www.lrl.state.tx.us/scanned/archive/2016/33026.pdf. Because "Texas children cannot wait for the next biennium to begin, in recent weeks, Governor Abbott, Lt. Governor Patrick, and Speaker Straus directed me to identify staffing needs necessary on an urgent basis to address the most critical needs. In response, I submitted to you last week a request to hire a portion of those workers now." *Id*. In the same letter, he said "bringing in new staff" was "one component of ensuring child safety," but "I also want to make clear that bringing in new staff is just one component of ensuring child safety. The agency must continue efforts to retain our caseworkers." *Id*. He pointed out that improved program training would help, but "will not end the high turnover at CPS." *Id*. Among other reforms, "providing a salary increase will have a positive impact on retention," which in turn could help save the agency money in the long run. *Id*. (a salary increase "may reduce our staffing exceptional item in the FY2018-19 [LAR]").

Commissioner Whitman's letter was consistent with his testimony, given the day before, to the Senate Committee on Finance. He emphasized, among other key points, that there was a turnover emergency at DFPS. Hearing before the Texas Senate Committee on Finance, Oct. 26, 2016, at 4:07:22 - 4:09:12 (acknowledging, in reply to a question from Senator West regarding

caseworker turnover, that there is "an emergency in [DFPS] surrounding compensating caseworkers" and that the State has "to do something about that today").

Finally, Defendants' objections to caseworker loads ignores that the Recommendations were "strongly inform[ed]" by the State's own Work Measurement Study conducted from August 1, 2015 to March 31, 2016. Recommendations, at 11.1. That study, which purported to measure how much time workers actually spent on various caseworker activities, reports that the average PMC caseload for CVS caseworkers is 14 cases. *Id*. Now, to be sure, there are many reasons to doubt the accuracy of this finding, including that it is almost certain that (as they have consistently done in the past) Defendants have miscalculated the denominator, which should only include the number of full-time, case-carrying caseworkers in that ratio. Even so, the study's finding cannot be squared with DFPS's admission that average caseloads are far higher. As noted, DFPS's most recent Legislative Appropriations Request reflects that if the agency's request for additional funding is fulfilled, average caseloads per worker would be *reduced* to 25.47. LAR 2018-19, *Administrator's Statement*, at 4 (p. 15/837 of the pdf), available at https://www.dfps.state.tx.us/About_DFPS/Financial_and_Budget_Information/LAR/FY18-19/documents/18-19_LAR.pdf. On top of all of this, the study did not address how much time workers should be spending on their cases to ensure children are adequately protected.

Nevertheless, given that the study purported to find an average caseload of 14, that figure would appear to represent a caseload level that Defendants believe is adequate to protect children from unreasonable risk of harm since they have represented to the Court that current caseworkers loads are adequate. Thus, it is difficult to fathom how Defendants can object to the Recommendation that DFPS implement a caseload standard in the range of 14 to 17 PMC cases, a range that would permit average loads to be even higher than what Defendants say they are now, for caseworkers who are assigned to serve PMC children and who work full-time in that role.

In total, Defendants' recent admissions confirm the trial evidence, including testimony and documents from their own witnesses and files, that amply support this Court's determination that even though "CVS caseworkers are crucial to the safety and well-being of all foster children, . . . DFPS has known for decades that its primary CVS caseworkers are overburdened to the point where they cannot perform their required duties, namely protecting their foster children from an unreasonable risk of harm," (Mem. Op. at 198) as well as the Recommendations to remedy these constitutional violations.

**Urgent Need to Fix a Broken System**. In their Objections, Defendants deny that children in long-term foster care are being harmed, and they assert that that not a single remedy recommended by the Special Masters should be implemented. According to Defendants, "the Court's underlying findings of class-wide constitutional violations are unsupported by reliable expert testimony or other competent, admissible evidence." Objs. at 1.

However, on April 11, 2016, Defendant Abbott issued an official statement addressing foster care. "The status quo at CPS is unacceptable. Our children are too important to suffer through the challenges they've faced. I've insisted on overhauling a broken system…." Governor Abbott, Press Release, Apr. 11, 2016, available at http://gov.texas.gov/news/press-release/22183.

On October 12, 2016, Governor Abbott, Lt. Governor Patrick, and Speaker Straus wrote to Commissioner Whitman. In their letter, in which they addressed numerous systemic deficiencies, they expressed deep "concerns" that children at risk of abuse and neglect are not being seen in a timely manner and that this "exacerbates backlogs throughout the entire system," leaving children in dangerous situations. Letter from Gov. Abbott, et al., Oct. 12, 2016, available at http://gov.texas.gov/files/press-office/DFPS_Whitman_10122016.pdf. The "increasing number of reports of abuse and neglect are beyond what the agency's current workforce can support," they

continued, noting that "additional resources are required ... to protect our children who are in harm's way." *Id*. They directed Whitman to "immediately" undertake numerous actions, including hiring and training more special investigators, and "a strategic hiring and training schedule, which will ensure DFPS is staffing an increased number of the necessary caseworkers to account for the increase in workload and system backlog of serving children and families." *Id*. "Quality capacity should be a high priority," they continued, emphasizing that it is "unacceptable" for children to be sleeping in CPS offices, and that "inferior" residential foster care operations continue to exist. *Id*. Finally, they concluded on a somber note that underlined the urgency of the situation: "We have much work to do; and while we wish we could give you and your team more time to do so, too much is at stake. We must act now." *Id*.

On October 20, 2016, Defendant Whitman responded by letter to Defendant Abbott, noting the shortage of CVS caseworkers and inadequate placement array: "Texas children remain at risk. This is unacceptable." Letter from Commissioner Whitman, Oct. 20, 2016, at 1, available at http://www.lrl.state.tx.us/scanned/archive /2016/32952.pdf.

On October 26, 2016, while Commissioner Whitman was testifying before the Senate Committee on Finance, Senator Kirk Watson asked: "[a]re you going to fight what the Special Masters say you should do?" After some back and forth, Commissioner Whitman answered: "I am personally not going to fight it." Hearing Before the Tex. Senate Committee on Finance, 84th Leg. Session Interim, Oct. 26, 2016, at 4:23:16 - 4:25:10, available at http://www.senate.state.tx.us/75r/senate/commit/c540 /c540.htm. At the hearing, DFPS General Counsel Trevor Woodruff testified that DFPS would attempt to address all the foster care issues "with all due speed." *Id*. at 4:35:00 - 4:36:30.

Also on October 26, 2016, Defendant Whitman testified about the problems with children aging out of the system: "27% of [children aging out of foster care] end up in the criminal justice system." *Id*. at 4:46:00. He added his concern was especially great. "Because we know that a lot of these children that age out, that just age out, ... a majority of them will fall into sex trafficking." *Id*. at 4:37:50. Speaking more generally of the risks children face, he continued: "To this point, Senators, the children of this state are at risk." *Id*. at 3:07:32. For emphasis, he added: "When I walked into the whole system, it stunk bad." *Id*. at 3:31:49.

On October 27, 2016, Defendant Whitman wrote to Chair Jane Nelson of the Senate Finance Committee: "I have been on the job as commissioner of DFPS for almost six months. In that time, I have discovered a crisis in the making for the past decade or more." Letter from Commissioner Whitman, Oct. 27, 2016, available at http://www.lrl.state.tx.us/scanned/archive/2016/33026.pdf.

And on November 22, 2016, literally the day after Defendants filed their Objections, Defendant Abbott issued a public statement in which he spoke, in no uncertain terms, of the risk that all children in the state's custody face:

> Texas children in the child protective system continue to be at risk, and we must not delay providing the critical resources and support that CPS urgently needs.

Julie Chang, "State Rejects Court-Ordered Proposal to Fix Foster Care System," Austin American-Statesman, Nov. 22, 2016 (quoting Statement of the Governor), available at http://www.mystatesman.com/news/state--regional-govt--politics/state-rejects-court-ordered-proposal-fix-foster-care-system/wm5HHnSK92OtAoMevSFbVL/.

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What can be made of the gap between Defendants' public and legal positions? In their legal filings, they turn a blind eye to the harms being suffered by children, even as they profess to

recognize in public testimony, statements, and letters the depth of the harms being done, and the urgent need to do something to protect children who face risk of harm. Defendants have been given an opportunity to hone the Recommendations in an effort to stop the harm being done to the children in long term foster care. Instead of taking advantage of the opportunity, they have responded with blanket denials, legalese, and miscast legal arguments. Instead of a constructive back and forth, Defendants have legally dug in deeper for what can only be considered a fight without reason or concern for the children who have been placed in the State's legal custody.

### 2. RESPONSES TO DEFENDANTS' GLOBAL OBJECTIONS

In this Part, Plaintiffs respond to the "Global Objections" Defendants lodged in their Objections labeled as 1(a)-1(l). *See* Objs. at 1-3.

**Global Objection 1(a)**. Defendants' assertion that any injunctive remedy is improper because the Court's underlying findings of class-wide constitutional violations are unsupported by reliable expert testimony or other competent, admissible evidence, is not focused on the content or substance of the Recommendations. Rather, Defendants simply indicate their apparent intention, upon entry of a final judgment, to seek another appeal to the Fifth Circuit based upon the purported inadequacy of the proof at trial. Without undertaking prematurely to address merits issues now, it should be sufficient for present purposes to say that this Court's verdict is amply supported by substantial evidence in the trial record. In the attached Appendix A, cross-referenced in Part IV, below, Plaintiffs provide specific evidentiary citations to support the determinations this Court previously reached of constitutional harm and the recommendations made by the Special Masters to remedy those harms.

**Global Objection 1(b)**. This objection is also not focused on the content or substance of the Recommendations. Rather, Defendants generally object, without proffering any supporting

legal authority, that this Court's December 17, 2015 Memorandum Opinion and Verdict of the Court is "too vague" in rendering findings of constitutional violations to facilitate the shaping of a proper remedy. However, this Court's extensive Memorandum Opinion and Verdict makes numerous findings of clearly identified constitutional violations based upon specific findings of fact and law that are amply supported by the trial record and applicable case law. In proffering this global objection, Defendants simply make a conclusory and blanket assertion of vagueness while failing to direct the Court to any exemplar liability finding that is unduly vague, or to any exemplar Recommendation that consequently is not precisely tailored to cure an identified constitutional violation.

**Global Objection 1(c)**. Defendants assert that the Recommendations derive from an incorrect articulation or understanding of the substantive due process rights to be cured insofar as they make reference to "risk of harm." This erroneous objection flows from a misperception of the Special Master role. The Special Masters were not instructed to examine the trial record and to fashion remedies for constitutional violations they independently identify through application of the applicable legal standard. Rather, the Special Masters were tasked with recommending remedies crafted to abate the constitutional violations as found by this Court and as reflected in the remedial goals set forth by this Court. The Special Masters have made no application of law to fact and have rendered no independent liability determinations, instead conducting themselves exclusively in accordance with the appointment order.

**Global Objection 1(d)**. Defendants assert that the Recommendations reflect best practice as opposed to constitutional standards and, therefore, are "overbroad." Nowhere, however, do the Recommendations state or even suggest that conformance with best practice is the goal to be achieved. Significantly, Defendants do not identify any Recommendation that is crafted to impose

a best practice, as opposed to a constitutional, standard. Nor do they proffer any narrowed Recommendation or alternative recommendations limited in scope or application to meeting the constitutional standard. The Recommendations are appropriately tailored to meet the remedial goals defined by this Court for purposes of abating the specific constitutional violations it found based on the trial evidence.

**Global Objection 1(e)**. Defendants seek, without citation to supporting legal authority, to impose a duty on the Special Masters to affirmatively demonstrate that their Recommendations constitute the "least intrusive" approach to curing their constitutional violations. It is this Court, and not the Special Masters, who will shape the final remedy with the benefit of input from the Special Masters and the parties through their objections. Notably, Defendants, in asserting this objection, fail to assist the Court by coming forward with any lesser intrusive remedial recommendations that would be suitable to abate one or more of the constitutional violations found in the Court's verdict. Finally, Defendants' objection seeks to unduly circumscribe the broad equitable powers of this Court by applying the remedial provisions of 18 U.S.C. §§3626(a)(1)(A) and 3626(a)(2) outside the context of prison reform litigation.

**Global Objection 1(f)**. Defendants suggest that each Recommendation must be capable of "in fact" curing the underlying, class-wide constitutional violations found to exist in this Court's verdict. However, the law does not require that an injunction be capable of abating all contributing factors leading to the constitutional harm. Rather, the injunction may be directed to abating one or more causes of the unconstitutional harm, though these contributing causes may be among other conditions or practices with a causal nexus to the harm. Here, the Recommendations target DFPS practices or conditions, as identified by this Court, possessing a clear casual nexus to the unreasonable risk of harm to children in DFPS foster care custody. If Defendants proceed to

formally move to oppose incorporation of the Recommendations into an eventual final judgment by this Court, Plaintiffs will provide legal briefing to this Court in support of these points, if the Court requests it.

**Global Objection 1(g)**. Defendants seek to revive an earlier challenge (Dkt. 389) to the Appointment Order (Dkt. 379) that previously has been rejected. This Court properly appointed and tasked the Special Masters, and their Recommendations are based upon a valid exercise of authority.

**Global Objection 1(h)**. Defendants assert that the Recommendations fail to "describe in reasonable detail … the act or acts restrained or required," thereby purportedly running afoul of Federal Rule of Civil Procedure 65(d)(1)(C). However, the Recommendations clearly and succinctly identify the actions to be taken or restrained by Defendants. Moreover, this Court can further define or refine the Recommendations in crafting its final injunction order as it deems appropriate.

**Global Objection 1(i)**. Defendants assert that the Recommendations fail to conceive of remedies that are applicable to the General Class or Subclasses as a whole pursuant to Federal Rule of Civil Procedure 23(b)(2). Defendants, however, do not come forward with any example to demonstrate this blanket contention. The Recommendations focus upon common deficient structures and practices that place all children in DFPS custody at unreasonable risk of harm such that abatement of these deficiencies will benefit all children in the subject class or subclass. None of the Recommendations outline a remedy that would require individualized determinations regarding individual children in its application.

**Global Objection 1(j)**. This objection is not focused on the content or substance of the Recommendations. Rather, Defendants generally assert that Plaintiffs have failed to satisfy the

elements of Federal Rule of Civil Procedure 23, thereby foreclosing class-wide relief. This Court properly determined in its August 27, 2013 Order granting class certification (Dkt. 213) that Plaintiffs met the requirements of Rule 23.

**Global Objection 1(k)**. Defendants assert that the Recommendations are deficient insofar as they include the Special Masters' own "descriptions or characterizations of testimony and documents in the evidentiary record." Defendants further assert that such descriptions and characterizations of the trial evidence amount to hearsay and do not constitute the best evidence in the record. These objections are of no moment. The Special Masters have not made independent legal or factual findings in shaping their Recommendations. Nor have they undertaken any fact-finding or evidentiary process outside of the trial record. Rather, the Special Masters have crafted Recommendations based upon the facts and law as determined by this Court in its Memorandum Opinion. Defendants do not cite to a single Recommendation that finds its basis in facts or evidence outside of the trial record and this Court's factual findings.

**Global Objection 1(l)**. Defendants assert, without any citation to supporting legal authorities, that the Recommendations fail to include time limitations and are tantamount to the imposition of a receivership. Injunctive remedies designed to cure ongoing, systemic, constitutional violations, as here, do not reasonably lend themselves to an arbitrary or pre-ordained termination date. Rather, the duration of the injunction will be dictated by the Defendants' performance and progress in implementing the injunction and their ultimate ability to demonstrate durable reform. Moreover, the Recommendations do not create or even suggest the imposition of a receivership. The Recommendations contemplate that Defendants will continue to manage the day-to-day operations of DFPS and will continue to exercise daily decision-making authority as to

those operations while abiding the requirements of the final injunction order to be entered by the court.

### 3. RESPONSES TO DEFENDANTS' CLUSTERED OBJECTIONS

In this Part, Plaintiffs respond to Defendants' "Clustered Objections" labeled as 2(a) – 2(e). *See* Objections at 3-8. Without undertaking prematurely to provide full legal briefing on the merits issues that Defendants raise, Plaintiffs show that Defendants' Clustered Objections are all unfounded. If Defendants proceed to formally oppose incorporation of the Recommendations into an eventual final judgment by this Court, Plaintiffs stand ready to provide more detailed legal briefing to the Court on the points discussed below, should the Court request it.

**Clustered Objection 2(a)**. Defendants assert that various elements of the Recommendations are already covered in DFPS policy or practice and, therefore, are not properly included in an injunction order. (Defendants here cite to Recommendations 1.1, 1.2, 3.1, 4.1, 4.2, 4.3, 4.4, 12.1, 19.1 and 19.2.). To the extent that Defendants intend to argue that certain claims are mooted and consequently no longer properly subject to the Court's remedial power, they fail to meet their heavy burden under the governing law.

It is settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc.*, 528 U.S. 167, 189 (2000) (citation omitted); *see also United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). "[I]f it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" *Friends of the Earth*, 528 U.S. at 189 (citation omitted). The standard for determining whether the defendant's voluntary conduct has mooted the case is very strict; the burden which lies on the party asserting mootness "is a heavy one." *W.T. Grant*, 345 U.S. at 633. A case will only be considered moot if the defendant can show

that "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968).

The Fifth Circuit has consistently recognized and upheld the heavy burden defendants must carry in establishing mootness based on their purported voluntary cessation of illegal conduct. *See, e.g. Pederson v. Louisiana State University*, 213 F.3d 858, 875 (5th Cir. 2000) ("We will not second-guess the district court's reasoned judgment by declaring this issue moot when Appellees have failed to demonstrate that their Title IX effective accommodation violations will not recur."); *K.P. v. Le Blanc*, 729 F.3d 427, 438, 439 (5th Cir. 2013) (rejecting defendants' contention of no 'ongoing' violation of federal law and finding defendants' challenged action reasonably subject to recurrence); *IQ Products Co. v. Onyx Corp.* 48 Fed. App'x 107, 107 (5th Cir. 2002) (citing *Pederson* in rejecting defendant's claim that the injunction was mooted).

Further, the Fifth Circuit weighs defendants' insistence that their discontinued activity is legal against them in analyzing voluntary cessation and mootness. In *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983), the court reasoned that the defendants did not meet their "heavy burden," and this was "particularly true in the face of [their] continuing insistence that their discontinued activities were legal …." *Id.* at 1461 (citations omitted).

**Clustered Objection 2(b)**. Defendants assert that various Recommendations improperly call upon Defendants themselves to submit remedial plans designed to reduce the risk of harm to children flowing from constitutional violations found by this Court. (Defendants here cite to Recommendations 2.1, 4.4, 5.1, 5.3, 7.1, 7.2, 11.2, 12.1, 13.1, 13.2, 13.3, 18.2 19.1, 19.7, 20.1, 23.1, 24.1, 24.4 and 27.1.). Defendants protest that this directive would erroneously shift the burden of proof. However, they ignore that Plaintiffs have previously met their burden of proof at

trial and that this Court's liability findings and remedial goals find ample support in the evidentiary record.

Read together with Global Objection 1(e), Clustered Objection 2(b) reveals the obstructive nature of Defendants' overbroad and scattershot objections. On the one hand, Clustered Objection 1(e) generally asserts that the Recommendations unduly intrude upon the management and operation of DFPS. Yet, in in Clustered Objection 2(b), Defendants take the opposite position and protest that DFPS management is improperly being directed to undertake the burden of designing its own approach to abating constitutional violations found by this Court. This Court in the exercise of its broad equitable and remedial power properly may direct the Defendants to submit a reform plan or plans. Numerous courts have taken this approach to fashioning equitable relief that addresses the constitutional violations to be abated while giving deference to the interest of the State to retain control over its operations throughout implementation of the judicial remedy. *See, e.g., Bounds v. Smith*, 430 U.S. 817, 818-20, 832-33 (1977) (district court "scrupulously respected the limits on [its] role," by "not ... thrust[ing] itself into prison administration" and instead permitting "[p]rison administrators [to] exercis[e] wide discretion within the bounds of constitutional requirements" by submitting their own proposed remedy).

**Clustered Objection 2(c)**. Defendants assert, without any citation to case law, that various Recommendations are unduly vague in their construction and, therefore, fail to meet the requirements of Federal Rule of Civil Procedure 65(d). (Defendants here cite to Recommendations 1.1, 1.2, 1.3, 2.1, 3.3, 4.3, 4.4, 5.1, 7.2, 11.1, 11.2, 12.1, 13.1,13.2, 16.1, 16.2, 17.1, 18.2, 19.3, 20.1, 22.2, 22.3, 22.4, 24.1, 24.2 and 28.1.). The Fifth Circuit has held injunctive orders to be impermissibly vague where they merely require an agency to follow law, policies, and procedures. For example, in *Scott v. Schedler*, 826 F.3d 207 (5th Cir. 2016), a voting rights case, the Court

found as unduly vague an injunction to "maintain in force and effect his ... policies, procedures, and directives, as revised, relative to the implementation of the [voting requirements at issue]." *Id.* at 209. The Recommendations here, far from constituting a broad "follow the law" directive as in *Scott*, set forth specific and well-defined actions to be taken by DFPS in order to bring its system into constitutional compliance. To the extent that certain phrases or terms within the Recommendations may require greater clarity, this Court may supply further definition in crafting its final injunctive order. The adequate level of specificity has been described as one where "an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed." *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016); *see also U.S. Steel Corp. v. United Mine Workers of Am.*, 519 F.2d 1236, 1246 n. 20 (5th Cir. 1975) ("The specificity requirement is not unwieldy, however. An injunction must simply be framed so that those enjoined will know what conduct the court has prohibited."); *Meyer v. Brown & Root Const. Co.*, 661 F.2d 369, 373 (5th Cir. 1981).

This objection places extensive focus on Recommendations 11.1 and 11.2 which address the issue of caseworker caseloads. Defendants assert that the term "caseload standard" is unduly vague, professing uncertainty as to whether the upper limit of the caseload standard (17 PMC cases) would act as a fixed caseload cap in application. Defendants' professed lack of clarity is easily resolved by reference to the Special Masters' language in Recommendation 11.1 explicitly providing that "we do not recommend a fixed caseload cap." The Special Masters further make clear that the caseload standard in Recommendation 11.1 would not "inhibit DFPS' ability to assign cases." There simply is no vagueness in the usage and meaning of "caseload standard."

Defendants further object to Recommendation 11.1 insofar as it utilizes the notion of "caseworker caseloads" as opposed to "caseworker workloads." This objection is of no moment

as it ignores the fact that the "caseload standard" recommended by the Special Masters derives from Defendants' own Work Measurement Study and the findings in it. The Recommendations contemplate that DFPS will effectuate the agency's own determination as to the work burden caseworkers can shoulder without exposing children to an unreasonable risk of harm.

**Clustered Objection 2(d)**. Defendants assert that they possess no power to appropriate funds and that any Recommendation requiring additional funding for purposes of its implementation is unenforceable. (Defendants cite to Recommendations 2.1, 4.4, 4.5, 5.1, 5.3, 11.1, 11.2, 12.1, 13.2, 16.1, 19, 21, 22, 23 and 31.1.).

Under established constitutional law, budgetary constraints do not absolve constitutional violations. *M.D.* at 244. The Fifth Circuit has long recognized that "if the state chooses" to take custody of its citizens, then "it must pay the cost of maintaining" that custody "according to fundamental and well-established concepts of constitutional law." *Newman v. Alabama*, 522 F.2d 71, 80 (5th Cir. 1975). Consistent with this mandate, the Fifth Circuit has expressly rejected as a defense the State's financial inability to implement injunctive relief directed to remedying a systemic constitutional violation. *Gates v. Collier*, 501 F.2d 1291, 1319 (5th Cir. 1974); *Smith v. Sullivan*, 611 F.2d 1039, 1043-44 (5th Cir. 1980). In *Gates*, the Court explained further, citing a prior court's description of prison reform litigation:

> Where state institutions have been operating under unconstitutional conditions and practices, the defenses of fund shortage and the inability of the district court to order appropriations by the state legislature, have been rejected by the federal courts. . . . "Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If [the State] is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States."

*Gates*, 501 F.2d at 1319-20 (citation omitted).

The tenet that insufficient funding does not relieve states from constitutional compliance is well established in Supreme Court jurisprudence. *See, e.g., Milliken v. Bradley*, 433 U.S. 267, 289 (1977) ("federal courts [can] enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury"); *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974); *Quern v. Jordan*, 440 U.S. 332, 337 (1979).

**Clustered Objection 2(e)**. Defendants assert that Recommendations 2.1, 7.1, 7.2, 20.1 and 28.1 – those going beyond the Goals set forth in the Court's Memorandum Opinion - are divorced from any application of the constitutional standard and, therefore, to be treated as "irrelevant." In proffering this objection, Defendants place sole reliance on the introductory comment to the Recommendations providing that "[t]his report does not address any legal issues; legal issues are reserved for the Court." Defendants conclude from this language that the identified cluster of Recommendations concededly has no legal basis. Defendants' objection is unavailing in at least two respects: (1) this Court properly instructed the Special Masters to limit their Recommendations, including any going beyond the Court's stated Goals, to those "that are deemed necessary to cure the State's constitutional violations outlined in this Opinion," and (2) the Recommendations are not binding on this Court, but provide guidance subject to the Court's independent determination of its legal validity. Significantly, Defendants fail to demonstrate precisely how any of the identified cluster of Recommendations fails to comport with the law, but merely infer a legal defect.

**4. Responses to Defendants' Specific Objections**

Finally, to rebut Defendants' specific objections assertions that none of the specific Recommendations have evidentiary support, Plaintiffs provide numerous citations to the trial record in the attached Appendix A. Note, however, that for present purposes Plaintiffs did not try to canvass all available evidentiary support. If Defendants proceed to formally oppose

incorporation of the Recommendations into an eventual final judgment by this Court, Plaintiffs stand ready to point to additional evidentiary support, should the Court request it.

## CONCLUSION

For these reasons, Plaintiffs respectfully request the Court to overrule Defendants' Objections (Dkt. 479) to the Special Master Recommendations (Dkt. 471) and enter such remedial Order or Orders as warranted by the evidence at trial and in the record, including information provided by Defendants to the Special Masters, giving due consideration to the thorough and careful Recommendations now before the Court, as well as awarding Plaintiffs all other equitable relief as is necessary and proper.

Respectfully submitted:

Dated: December 8, 2016

/s/ Christina Wilson _____

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**CERTIFICATE OF SERVICE**

I certify that on this 8th day of December, 2016, I electronically filed this pleading with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants, and that I have mailed by United States Postal Service the pleading to all non-CM/ECF participants.

/s/ Christina Wilson
Christina Wilson