UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MISSOURI DEPARTMENT OF SOCIAL SERVICES Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al. Defendants.	)	Case No. 1:15-cv-01329 (EGS)

DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendants, by and through their undersigned counsel, respectfully move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss this action for failure to state a claim. The grounds for this motion are set forth in the attached memorandum of points and authorities. For the reasons stated in the attached memorandum, the Court should also deny Plaintiff's motion for summary judgment. A proposed order is attached hereto.

Dated: October 23, 2015

Respectfully submitted,

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DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case involves a dispute over how the state of Missouri should administer its Medicaid program. Notably, however, Plaintiff does not contend that the Medicaid policy at issue contravenes an applicable statute or regulation; rather, the only objection Plaintiff has raised against the policy in this suit is that its enforcement is restricted by a temporary injunction entered in another case pending before this Court, *Texas Children's Hospital v. Burwell*, No. 14-2060 (D.D.C. 2014). But the preliminary injunction in *Texas Children's* was put in place only to provide a measure of *temporary* protection to the plaintiffs in that case while that action remains pending. It is not a proper basis for granting permanent relief in a separate case brought by a different plaintiff. Further, even if there were some basis for Plaintiff in this case to rely on the *Texas Children's* preliminary injunction to support its claims, Plaintiff's Complaint would still fail to state a claim for relief because the preliminary injunction in *Texas Children's* does not extend to the state of Missouri, which is not a plaintiff in *Texas Children's*. Plaintiff in this case also has not sought to assert separate claims that mirror the claims raised in *Texas Children's*; rather, it has relied on the preliminary injunction alone. For these reasons, this Court should both dismiss Plaintiff's Complaint for failure to state a claim and deny Plaintiff's motion for summary judgment.[1]

BACKGROUND

I. The Federal-State Partnership in Medicaid

In 1965, Congress established the Medicaid program, Title XIX of the Social Security Act, 79 Stat. 343, P.L. 89-97, codified as amended at 42 U.S.C. §§ 1396 *et seq.* ("the Medicaid Act"), as a cooperative venture between federal and state governments to assist states in

[1] Pursuant to Local Rule 7(h)(1), Defendants note that there are no genuine issues of material fact necessary to be litigated.

providing medical care to individuals "whose income and resources are insufficient to meet the costs of necessary medical services," *see* 42 U.S.C. § 1396, *i.e.*, low-income families with dependent children, the elderly, and persons with disabilities. States are not required to participate in the Medicaid program, but those choosing to do so must comply with the Act and regulations promulgated by the Secretary of Health and Human Services ("HHS"). *Id.* § 1396a.

Each state administers its own Medicaid program pursuant to a state plan that must be reviewed and approved by the Centers for Medicare & Medicaid Services ("CMS"). *See id.* §§ 1396, 1396a. If CMS approves a state's plan, the federal government provides federal financial participation based on the federal medical assistance percentage ("FMAP"), to reimburse each state for a portion of the costs that the state incurs for Medicaid patient care. *See* 42 U.S.C. § 1396a. The federal government calculates the FMAP based on a formula tied to the per-capita income in each state. *See* § 1396d(b). FMAP varies from a minimum of 50 percent to as much as 83 percent. *Id.* The remaining portion of a state's Medicaid expenditures is paid by the state itself. *Id.* § 1396b.

II. The Role of Disproportionate Share Hospitals in the Medicaid Program

Concerned with the "greater costs it found to be associated with the treatment of indigent patients," *see District of Columbia Hosp. Ass'n v. District of Columbia*, 224 F.3d 776, 777 (D.C. Cir. 2000), Congress amended the Medicaid Act in 1981 to ensure that payments to hospitals providing Medicaid-eligible services to indigent patients "take into account . . . the situation of hospitals which serve a disproportionate number of low-income patients." 42 U.S.C. § 1396a(a)(13)(A); *see also West Va. Univ. Hosps., Inc. v. Casey*, 885 F.2d 11, 23 (3d Cir. 1989). Congress's intent "was to stabilize the hospitals financially and preserve access to health care

services for eligible low-income patients." *Va. Dep't of Med. Assistance Servs. v. Johnson*, 609 F. Supp. 2d 1, 3 (D.D.C. 2009).

III. State-Specific Limits on DSH payments

Although States have discretion in deciding precisely how to implement the Medicaid DSH provisions, *see* 42 U.S.C. § 1396r-4, the Medicaid statute does impose certain limitations. Section 1396r-4(f)(2) establishes state-specific DSH funding limits (i.e. allotments) for each fiscal year to control "the overall level of federal DSH funding" within each state. *See Va. Dep't of Med. Assistance Servs.*, 609 F. Supp. 2d at 3. These allotments establish a finite pool of DSH funds in each state to be allocated among the hospitals eligible for DSH payments. In practice, this means that if one hospital gets more DSH funding, other DSH-eligible hospitals in the state get less. Subject to broad federal requirements, hospital eligibility for DSH payments and the precise methodology used to allocate state DSH funds are questions of state law. *See* 42 U.S.C. § 1396r-4(b)(4).

IV. Hospital-Specific Limits on DSH payments

In addition to establishing DSH allotments for each state, Congress established hospital-specific DSH payment limits, meaning that a DSH payment to a specific hospital may not exceed the hospital-specific limit. Congress enacted the hospital-specific limit on DSH payments in response to reports that some hospitals received DSH payment adjustments that exceeded "the net costs, and in some instances the total costs, of operating the facilities." H.R. Rep. No. 103-111, at 211-12 (1993), reprinted in 1993 U.S.C.C.A.N. 278, 538-39. To that end, § 1396r-4(g) provides that DSH payments made to a hospital cannot exceed:

> the costs incurred during the year of furnishing hospital services (as determined by the Secretary and net of payments under this subchapter, other than under this section, and by uninsured patients) by the hospitals to individuals who either are eligible for medical assistance under the State [Medicaid] plan or have no health

> insurance (or other source of third party coverage) for services provided during the year.

42 U.S.C. § 1396r-4(g)(1)(A) (emphasis added). "Only costs that are not otherwise paid for by the patient, insurance, another third party, Medicaid, or any other program are eligible for DSH reimbursement." *Va. Dep't of Med. Assistance Servs.*, 609 F. Supp. 2d at 3.

V. Auditing and Reporting Requirements

In 2003, Congress enacted into law a requirement that each state provide to the Secretary an annual report and audit on its DSH program. *See* 42 U.S.C. § 1396r-4(j). In so doing, Congress sought "to ensure the appropriateness of" DSH payment adjustments, *id.* § 1396r-4(j)(1)(B), and to verify that "*[o]nly the uncompensated care costs* of providing inpatient and outpatient hospital services to [Medicaid-eligible or uninsured individuals] are included in the calculation of the hospital-specific limits." *Id.* § 1396r-4(j)(2)(C) (emphasis added).

In 2008, CMS issued a final rule implementing the statutory reporting and auditing requirement. Regarding the audit requirement, the rule specified that audits for a specific Medicaid plan year must be completed by the state "by the last day of the Federal fiscal year ending three years from the end of the Medicaid State plan rate year under audit," and completed audit reports must be submitted to CMS within 90 days thereafter. 42 C.F.R. § 455.304(b). So, for example, audits for the 2011 plan year must have been completed by the state by September 30, 2014, and must have been submitted to CMS by December 31, 2014. If an audit of Medicaid state plan years 2005 through 2010 revealed an overpayment, the excess payment was not recouped, although the information could be used to adjust DSH payments prospectively. *See* 73 Fed. Reg. at 77,906.

Beginning with the 2011 state plan rate year ("SPRY 2011"), if an audit reveals payments in excess of the hospital's specific DSH payment limit for that plan year, those excess payments

will be treated as overpayments, the federal portion of which must be refunded to CMS. *See* 42 C.F.R. § 433.312(a). However, the state need not refund the federal portion of the overpayment or redistribute to other DSH hospitals immediately; it has up to one year from the discovery of the overpayment to do so. *See id.* CMS's regulations define "discovery" as the "identification by any State Medicaid agency official or other State official, the Federal Government, or the provider of an overpayment, and the communication of that overpayment finding or the initiation of a formal recoupment action without notice as described in § 433.316." 42 C.F.R. § 433.304. This means that Missouri, which completed its SPRY 2011 audit on or about December 23, 2014 and submitted it to CMS on or about December 31, 2014, has until on or about December 31, 2015 to either redistribute any DSH overpayment made for plan year 2011 to other DSH-eligible hospitals in the state or refund to CMS the federal share of the overpaid amount.[2]

As noted, a state has the option of redistributing the overpayment to other hospitals within the state whose DSH payments are below their hospital-specific limit, in which case the state would *not* be required to refund the federal share of the overpayment. *See, e.g.*, 73 Fed. Reg. at 77,906; *id.* at 77,908. The process of recouping overpayments from hospitals and refunding the federal portion or redistributing it to other DSH hospitals is state-specific, as it is governed by the individual state plans and by other state law. As relevant here, the Missouri state plan provides that overpayments revealed by an audit will be recouped and redistributed to other DSH hospitals. *See* Pl.'s Br. at 2-3.

[2] This assumes that Missouri did not recover the overpayments in a prior quarter. Under 42 C.F.R. § 433.320(a)(2), the state must refund the overpayments on the earlier of (1) the quarter in which the state recovers the overpayment from the provider, or (2) the quarter in which the 1-year period following discovery ends.

Finally, on January 10, 2010, CMS provided additional guidance on the DSH reporting and auditing requirement in the form of answers to frequently asked questions.[3] In response to question number 33 ("FAQ No. 33"), CMS explained how existing laws and regulations—principally, § 1396r-4(g)(1) and the 2008 rule—applied to private insurance payments made on behalf of Medicaid-eligible patients. *See id.* at 18. In short, CMS explained that such payments should be considered (*i.e.*, used as an offset) in a hospital's calculation of its uncompensated care costs when determining the hospital-specific DSH payment limit. *See id.*

VI. *Texas Children's Hospital v. Burwell*

On December 5, 2014, Texas Children's Hospital and Seattle Children's Hospital filed an action in this Court, challenging CMS's January 2010 publication of FAQ No. 33. *Texas Children's Hospital v. Burwell*, No. 14-2060 (D.D.C. Dec. 5, 2014). Specifically, the plaintiffs alleged that FAQ No. 33 is contrary to the provisions of the Medicaid Act and that CMS's publication of this guidance violates the procedural requirements of the Administrative Procedure Act ("APA"). On the same day that they filed the action, the plaintiffs in *Texas Children's* moved for emergency injunctive relief, seeking to enjoin CMS's implementation and application of FAQ No. 33.

On December 29, 2014, this Court granted the plaintiffs' motion for preliminary injunction and entered an order enjoining CMS from enforcing, applying, or implementing FAQ No. 33 pending further order of the Court, and further ordering CMS to notify the Texas and Washington state Medicaid programs that, pending further order by the Court, the enforcement of FAQ No. 33 is enjoined and that CMS will take no action to recoup any federal DSH funds

[3] *See* Additional Information on the DSH Reporting and Auditing Requirement, http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Financing-and-Reimbursement/Downloads/AdditionalInformationontheDSHReporting.pdf (last visited Oct. 15, 2015).

provided to Texas and Washington based on a state's noncompliance with FAQ No. 33. *Texas Children's Hospital*, No. 14-2060, ECF No. 19 (D.D.C. Dec. 29, 2014).

CMS complied with the Court's order by temporarily halting the enforcement, application, and implementation of FAQ No. 33 in Texas and Washington, and notifying the Texas and Washington state Medicaid programs that, pending further order by the Court, the enforcement of FAQ No. 33 is enjoined and that CMS will take no action to recoup any federal DSH funds provided to Texas and Washington (disallow federal financial participation) based on a state's noncompliance with FAQ No. 33. *See Joint Status Report* at 2, *Texas Children's Hospital*, No. 14-2060, ECF No. 22 (D.D.C. Feb. 10, 2015).

Thereafter, the parties in *Texas Children's* filed cross-motions for summary judgment, which are currently pending before this Court.

VII. May 1, 2015 Letter to Missouri

On May 1, 2015, CMS sent a letter to the Missouri Department of Social Services, in response to a letter it had received on April 7, 2015. *See* Compl. ¶ 35. Among other things, the letter stated that for states other than Texas and Washington, including Missouri, "CMS may disallow federal financial participation if a state does not comply with the policy articulated in FAQ No. 33." *See id.*

STANDARD OF REVIEW

Defendants seek dismissal of Plaintiff's Complaint under Rule 12(b)(6) on the basis that it fails to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads

factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Under Rule 12(b)(6), "[t]he court assumes the truth of all well-pleaded factual allegations in the complaint and construes reasonable inferences from those allegations in the plaintiff's favor . . . but is not required to accept the plaintiff's legal conclusions as correct." *Sissel v. U.S. Dep't of Health & Human Servs.*, 760 F.3d 1, 2 (D.C. Cir. 2014) (citations omitted).

ARGUMENT

I. PLAINTIFF'S COMPLAINT FAILS TO ALLEGE A COGNIZABLE CAUSE OF ACTION

Plaintiff asserts a single claim against Defendants: "Declaratory Judgment that CMS is enjoined from Implementing its Policy in FAQ 33." This request appears to be based solely on the preliminary injunction issued by this Court in *Texas Children's*. Compl. ¶ 1. But Plaintiff fails to identify any cause of action that could support a request for declaratory relief. As the D.C. Circuit has held, a party that has not "alleged a cognizable cause of action" under some source of law has "no basis upon which to seek declaratory relief" under the Declaratory Judgment Act. *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011); *see also C&E Serv., Inc. v. District of Columbia Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002). This is because the Declaratory Judgment Act creates a remedy, not a cause of action. *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 33 n.3 (1st Cir. 2007); *see also Rumsfeld*, 649 F.3d at 778 (D.C. Cir. 2011) ("Congress [in the Declaratory Judgment Act] enlarged the range of remedies available in the federal courts but did not extend their jurisdiction.") (internal quotation marks and citation omitted).

The sole basis Plaintiff has identified for its claim is the preliminary injunction entered in *Texas Children's*. But a preliminary injunction entered to protect the plaintiffs in one case

cannot be a basis for a claim raised by a different plaintiff in another case. First, "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). But Plaintiff has not cited a single federal statute authorizing such a claim. *See id.* ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. . . . [because] [w]ithout it, a cause of action does not exist and courts may not create one.").[4] Second, it would make no sense to afford final relief in one case for a purported violation of a preliminary injunction in another case, when a preliminary injunction by its terms signifies that the court has yet to finally resolve the merits of the dispute. *See Consumers Union of the U.S., Inc. v. CPSC*, 561 F.2d 349, 355-56 (D.C. Cir. 1977) (noting that a preliminary injunction is not a ruling on the merits). Indeed, Plaintiff has not cited a single case in which a court treated a supposed violation of a preliminary injunction as a ground for final relief in another case.

Although Plaintiff summarily states that this case involves the same issue presented in *Texas Children's*, Compl. ¶ 1, Plaintiff has not brought its own separate claim under the APA based on the same legal theory as the plaintiffs in *Texas Children*'s or otherwise. Indeed, Plaintiff makes no suggestion in either the Complaint or its motion for summary judgment that the issue presented in *Texas Children's* is the issue in this present action.[5]

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[4] Plaintiff asserts that jurisdiction is conferred by 28 U.S.C. §§ 1331 and 1361 (federal question and mandamus jurisdiction), and 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act). *See* Compl. ¶ 7. Like the Declaratory Judgment Act, 28 U.S.C. §§ 1331 and 1361 must be supported by independently created substantive causes of action. *See Mead Corp. v. United States*, 490 F. Supp. 405, 407 (D.D.C. 1980), *aff'd*, 652 F.2d 1050, 1053 (D.C. Cir. 1980) (explaining that 28 U.S.C. §§ 1331 and 1361 do not themselves create substantive rights or causes). None of these statutes authorizes such a claim.

[5] If Plaintiff were permitted to amend its Complaint in this case to assert claims based on the same legal grounds as the plaintiffs in *Texas Children's*, Defendants would likely seek a stay of the litigation at least until a ruling in *Texas Children's*. This Court undoubtedly has the authority to stay proceedings, *Int'l Painters & Allied Trades Indus. Pension Fund v. Painting*

In short, Plaintiff has failed to allege a cognizable cause of action for Defendants' purported violation of the preliminary injunction in *Texas Children's*. The Complaint thus fails to state a claim to relief that is plausible on its face, and this Court should dismiss the Complaint under Rule 12(b)(6).

II. THE PRELIMINARY INJUNCTION IN *TEXAS CHILDREN'S* DOES NOT EXTEND TO MISSOURI

Even if Missouri had alleged a cognizable cause of action for Defendants' purported violation of the preliminary injunction in *Texas Children's*, the Complaint would still fail to state a claim for relief because the preliminary injunction in *Texas Children's* does not extend to the state of Missouri. It is clear that Missouri is not a party in *Texas Children's*. It also clear that the plaintiffs in *Texas Children's* sought relief for themselves and their own states in their application for a preliminary injunction, and that this Court's order was similarly focused on Texas and Washington. *Compare [Proposed] Order*, *Texas Children's Hospital*, No. 14-2060, ECF No. 3-2 (D.D.C. Dec. 5, 2015) *with Order*, *Texas Children's Hospital*, No. 14-2060, ECF No. 19 (D.D.C. Dec. 29, 2015). Indeed, in their application for a preliminary injunction, the plaintiffs in *Texas Children's* focused on the allegedly impending harm to themselves, not on the harm to hospitals in other states. *See Memo. in Support of Application for Prelim. Injunction*, *Texas Children's Hospital*, No. 14-2060, ECF No. 3-1 (D.D.C. Dec. 5, 2015). In granting the preliminary injunction, the Court made no findings regarding Missouri, such as a finding that Missouri would suffer irreparable harm, to support application of the preliminary injunction as to it. *See Mem. Op.*, *Texas Children's Hospital*, No. 14-2060, ECF No. 20 (D.D.C. Dec. 29, 2015). After the preliminary injunction was granted, Defendants informed the plaintiffs and this Court

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Co., 569 F. Supp. 2d 113, 120 (D.D.C. 2008), and a stay would promote efficiency and avoid unnecessary expenditure of resources by both parties and this Court.

of the steps they were taking to comply with the preliminary injunction. *See Joint Status Report*, *Texas Children's Hospital*, No. 14-2060, ECF No. 22 (D.D.C. Feb. 10, 2015). Notably, the plaintiffs in *Texas Children's* have not once raised any question about Defendants' compliance with this Court's order.[6]

This Court's order in *Texas Children's* is consistent with principles regarding the appropriate scope of injunctive relief. Even with respect to permanent injunctive relief, the Supreme Court has cautioned that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). And the D.C. Circuit has long held that "an injunction must be narrowly tailored to remedy the specific harm shown." *Nebraska v. HHS*, 435 F.3d 326, 330 (D.C. Cir. 2006) (*quoting Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 108 (D.C. Cir. 1976)). For this reason, this Court has in the past declined to issue nationwide injunctions of challenged regulations when the Court could instead enjoin the agency from applying the challenged regulation to the particular plaintiff. *See, e.g.*, *Russell-Murray Hospice, Inc. v. Sebelius*, 724 F. Supp. 2d 43, 60 (D.D.C. 2010) (prospectively enjoining HHS from applying a reimbursement regulation to a particular Medicare hospice provider in spite of the plaintiff's

[6] As previously discussed, CMS complied with this Court's order by temporarily halting the enforcement, application, and implementation of FAQ No. 33 in Texas and Washington, and by notifying the Texas and Washington state Medicaid programs, on December 31, 2014, that, pending further order by this Court, the enforcement of FAQ No. 33 is enjoined and that CMS will take no action to recoup any federal DSH funds provided to Texas and Washington (disallow federal financial participation) based on a state's noncompliance with FAQ No. 33. *See Joint Status Report* at 2, *Texas Children's Hospital*, No. 14-2060, ECF No. 22 (D.D.C. Feb. 10, 2015). In accordance with the terms of the order, CMS extended the order to all of Texas and Washington. *See Order*, *Texas Children's Hospital*, No. 14-2060, ECF No. 19 (D.D.C. Dec. 29, 2015) (ordering CMS to notify Texas and Washington that CMS "will take no action to recoup any federal DSH funds provided to Texas and Washington based on a state's noncompliance with FAQ No. 33.").

request for a nationwide injunction). As the Fourth Circuit aptly explained, a broad injunction has the effect of precluding other circuits from ruling on the constitutionality of a regulation, which conflicts with the principle that a federal court of appeal's decision is only binding within its circuit, and would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue." *See Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393-94 (4th Cir. 2001) (*quoting United States v. Mendoza*, 464 U.S. 154, 160 (1984)) (vacating the nationwide injunction), *overruled on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012)).

The need for narrow tailoring of injunctive relief is particularly important in the context of a preliminary injunction, where the court has yet to finally resolve the merits of the dispute. In *United States Association of Reptile Keepers, Inc. v. Jewell*, this Court concluded that the scope of a preliminary injunction should be limited to the plaintiffs in that case even after counsel at oral argument suggested that the injunction should extend to third parties, explaining that "because the Court has not finally determined that the rule is unlawful and because there is no evidence of irreparable harm to persons other than Plaintiffs or members of [plaintiff's association] before the Court, the Court concludes that its preliminary injunction should be limited in scope to protect only those persons." No. 13–2007 (RDM), 2015 WL 2396074, at *3 (D.D.C. May 19, 2015), *appeal docketed*, No. 15-5199 (D.C. Cir. July 22, 2015). Other courts have acknowledged that a preliminary injunction is a drastic measure that should be no broader than necessary to accomplish its purpose, *see Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 715 (5th Cir. 1984), and have gone as far as dissolving a preliminary injunction that was excessively broad. *See Spiegel v. City of Houston*, 636 F.2d 997, 1002–03 (5th Cir. Unit A 1981).

The sole case cited by Plaintiff for the proposition that the preliminary injunction in *Texas Children's* applies to Missouri is inapposite. *See* Pl.'s Br. at 6-7. Among other reasons, *American Mining Congress v. United States Army Corps of Engineers* involved a *final* injunction that had been issued after a rule was declared invalid and set aside. 951 F. Supp. 267, 278 (D.D.C. 1997), *aff'd Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998). Indeed, in *United States Association of Reptile Keepers, Inc. v. Jewell*, the court concluded that the defendants successfully distinguished *National Mining Association* (the D.C. Circuit case that affirmed *American Mining Congress*) because it dealt with the scope of a *final* injunction as opposed to a preliminary injunction. 2015 WL 2396074, at *3 (D.D.C. May 19, 2015).

Because the preliminary injunction in *Texas Children's* does not extend to the state of Missouri, Defendants could not have violated this Court's order by telling Missouri that it may disallow federal financial participation if it does not comply with the policy articulated in FAQ No. 33.

CONCLUSION

For the reasons articulated above, this Court should both dismiss Plaintiff's Complaint for failure to state a claim and deny Plaintiff's motion for summary judgment.

Dated: October 23, 2015

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