No. 23-12331-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STATE OF FLORIDA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

PLAINTIFF-APPELLEE UNITED STATES' OPPOSITION TO MOTION TO STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The United States files this Certificate of Interested Persons and Corporate Disclosure Statement pursuant to Eleventh Circuit Rules 26.1-1 to 26.1-3. In addition to the persons identified by defendant-appellant's Certificate of Interested Persons, the following persons may have an interest in the outcome of this case:

Dermody, Eliza, counsel for the United States

England, Travis W., former counsel for the United States

Esposito, Beth A., counsel for the United States

Johnson, Christopher N., counsel for Florida

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Scott, Angela, former counsel for the United States

Welan, Joy L., counsel for the United States

Williams, Stuart F., counsel for Florida

The United States is not aware of any publicly traded company or corporation that has an interest in the outcome of this case.

s/ Sydney A.R. Foster
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Date: August 31, 2023

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INTRODUCTION

In Florida, approximately 140 children with complex medical needs reside in nursing facilities, where they have little interaction with their communities, non-disabled peers, and even their families. After a two-week bench trial, the district court concluded that the State of Florida administers its Medicaid system in a manner that leads to the unnecessary institutionalization of children with medical complexity and a serious risk that other such children will be unnecessarily institutionalized in the future. The court determined that Florida is violating Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.*, and it entered a narrow injunction. Florida now seeks a stay pending appeal.

This Court should deny that extraordinary relief. Florida has little likelihood of success on the merits issues it raises, many of which simply quarrel with the district court's factual findings. Florida will not suffer irreparable harm without a stay, but any stay will seriously injure the children at the center of this case, who should not have to wait any longer to be reunited with their families and communities. Indeed, there is a strong public interest in promptly providing these children the equality and freedom from isolation to which they are entitled.

STATEMENT

1. Legal Background

Title II of the ADA prohibits States from discriminating based on disability. 42 U.S.C. 12132. Under the "integration mandate," States must administer services "in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. 35.130(d). States must make "reasonable modifications" to policies and practices when "necessary to avoid discrimination," unless they "can demonstrate" that the modifications would "fundamentally alter the nature of the service." 28 C.F.R. 35.130(b)(7).

In *Olmstead* v. *L.C.*, 527 U.S. 581, 600 (1999), the Supreme Court held that the "unjustified institutional isolation of persons with disabilities is a form of discrimination" under Title II. The Court concluded that under the integration mandate, individuals with disabilities are entitled to services in the community when (1) those services are "appropriate" to their needs; (2) they do "not oppose" community-based treatment; and (3) community-based placement can be "reasonably accommodated." *Id.* at 607 (plurality opinion). An *Olmstead* claim can be brought on behalf of institutionalized individuals or those at "serious risk" of institutionalization. *E.g.*, *Waskul* v. *Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 460-461 (6th Cir. 2020).

2. Factual And Procedural Background

a. Through its Medicaid program, Florida administers a system of services for children with complex medical needs. Doc. 1170, at 30-33.[1] Such children require long-term care to help them perform activities of daily living, and they often need devices for mobility, breathing, and other tasks. In Florida, approximately 140 such children live in nursing facilities, and over 1800 reside in the community. *Id.* at 5.

The federal Medicaid statute requires Florida's Medicaid program to provide children with medical complexity living in the community all "medically necessary" private-duty nursing—one-on-one care from a skilled nurse. Doc. 1170, at 34, 72; 42 U.S.C. 1396a(a)(43), 1396d(a), 1396d(r)(5). Despite that requirement, Florida provides the children an average of only 70-80% of authorized (*i.e.*, medically necessary) hours, with a quarter of children receiving less than 60% of authorized hours. Doc. 1170, at 35. Florida also offers these children "care-coordination" services, meaning that a professional works with families to identify and access needed services. *Id.* at 38.

[1] "Doc. __, at __" refers to district-court document and page numbers, respectively. "Mot.__" refers to Florida's stay motion filed in this Court on August 21.

b. The United States brought this *Olmstead* suit against Florida in 2013. The district court dismissed the case in 2016 after concluding that Title II does not grant the Attorney General the right to sue. Doc. 543, at 3. This Court disagreed and remanded. *United States* v. *Florida*, 938 F.3d 1221, 1250 (11th Cir. 2019), reh'g en banc denied, 21 F.4th 730 (11th Cir. 2021), cert. denied, 143 S. Ct. 89 (2022).

Following a two-week bench trial, the district court issued a 79-page opinion concluding that Florida is violating Title II by administering its Medicaid program in a manner that results in the unjustifiable institutionalization of children with medical complexity and that places other such children at serious risk of unnecessary institutionalization. Doc. 1170, at 5, 79. The court found that the "lack of access to [private-duty nursing]" is "by far" the most "critical problem" and is "causing systemic institutionalization" and the serious risk of such institutionalization. *Id.* at 6, 34-37, 44-45. The court further determined that widespread failures concerning care-coordination and other services contribute to that result. *Id.* at 18, 38-45, 68 n.55. It concluded that the United States established the *Olmstead* elements and explained that Florida had "ample opportunity" to present a fundamental-alteration defense but "chose not to do so." *Id.* at 45-67.

The court entered an injunction that principally requires Florida to (1) use any tools it chooses to provide each child 90% of authorized and requested private-duty-nursing hours; and (2) increase oversight over the care-coordination system in particular ways. Doc. 1171, at 3-6.

c. Florida appealed, and the district court denied a stay pending appeal. Doc. 1178.

ARGUMENT

FLORIDA HAS NOT CARRIED ITS BURDEN TO OBTAIN A STAY

A stay is "not a matter of right, even if irreparable injury might otherwise result"; it is instead an "exercise of judicial discretion." *Nken* v. *Holder*, 556 U.S. 418, 433 (2009) (citation omitted). In deciding whether to exercise that discretion, this Court considers four factors: (1) whether the movant has made a "strong showing that he is likely to succeed on the merits"; (2) whether the movant will be "irreparably injured" absent a stay; (3) whether a stay would "substantially injure the other parties interested in the proceeding"; and (4) "where the public interest lies." *Id.* at 434 (citation omitted). A stay is an "exceptional response" that must be denied in the absence of a movant's showing of "a probable likelihood of success on the merits" or, alternatively, "a substantial case on the merits" when the final three factors "weigh[] heavily in favor" of a stay. *United States* v. *Hamilton*, 963 F.2d 322, 323 (11th Cir. 1992) (citation omitted).

The movant bears the burden of justifying a stay. *Nken*, 556 U.S. at 433-434. As the district court concluded (Doc. 1178), Florida has not carried that heavy burden here.

A. Florida Has Not Established A Substantial Case On The Merits, Let Alone A Strong Likelihood That It Will Prevail On The Merits

Florida contends that the district court committed six errors, but it has not made the requisite strong showing that it is likely to succeed on appeal, or even the lesser showing of a substantial case on the merits.

1. The District Court Acted Within Its Discretion In Finding That Parents Overwhelmingly Do Not Oppose Community Placement

Florida argues (Mot.5-10) that the district court applied an incorrect standard in evaluating whether parents and guardians of children with medical complexity (whom this brief refers to as "parents") are unopposed to community-based treatment. Because the United States sought "systemwide relief," it had to show that Florida's ADA violations are sufficiently "widespread," *Lewis* v. *Casey*, 518 U.S. 343, 359 (1996)—and thus that parents' non-opposition is sufficiently widespread. The district court applied the correct non-opposition standard, and it acted within its discretion in finding that parents are overwhelmingly unopposed to community placement. See *Collegiate Licensing Co.* v. *American Cas. Co. of Reading*, 713 F.3d 71, 77 (11th Cir. 2013) (grant of injunction reviewed for abuse of discretion).

a. The district court correctly concluded that "[t]he relevant question" when evaluating non-opposition is whether parents would accept community-based services "if they were actually available and accessible." Doc. 1170, at 56. *Olmstead* explained that the non-opposition element derives from a regulation specifying that individuals with disabilities need not "accept an accommodation" that they "choose[] not to accept." 527 U.S. at 602 (quoting 28 C.F.R. 35.130(e)(1)). It follows that the non-opposition inquiry does not ask whether individuals would accept community placement *now*, notwithstanding deficiencies in state services that are challenged in a lawsuit. Rather, the question is whether individuals would accept community placement if the State provided accessible community-based services and adequate information about them. See *Disability Advocs., Inc.* v. *Paterson*, 653 F. Supp. 2d 184, 260-267 (E.D.N.Y. 2009), vacated on other grounds sub nom. *Disability Advocs., Inc.* v. *New York Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149 (2d Cir. 2012). Indeed, a standard looking to present-day circumstances "would defeat the purpose of the integration mandate." Doc. 1170, at 57.

Contrary to Florida's argument (Mot.7), the district court recognized that "when a family chooses institutionalization, that choice should be honored." Doc. 1170, at 52. And the court specifically evaluated whether enough parents had "personal reasons (*outside* the State's failure to provide services) for choosing

nursing facilit[ies]" to "render the group as a whole to be 'opposed' to community living." *Id.* at 57. The court "acknowledge[d]" that some parents "testified to being unable to bring their children home" for "reasons unrelated to the availability of Medicaid services," but it found "as a factual matter" that "those instances are outliers." *Ibid.*

b. That factual finding is not clearly erroneous. As an initial matter, parents of the more than 1800 children with medical complexity at serious risk of institutionalization (Doc. 1170, at 5) are plainly unopposed, given those parents have already chosen community placement. That group's non-opposition is enough, standing alone, to justify systemic relief here. See *Doe 1-13* v. *Chiles*, 136 F.3d 709, 722 n.23 (11th Cir. 1998) (violations systemwide when they affected "hundreds, perhaps even thousands," of individuals).

Additionally, the district court properly found that parents of currently institutionalized children are overwhelmingly unopposed. Doc. 1170, at 57, 61. The court relied heavily on the "credible and convincing" testimony of Dr. Amy Houtrow—an expert in qualitative research, medical decisionmaking, and the care of children with medical complexity. *Id.* at 55 & n.47. Dr. Houtrow and two colleagues used qualitative-research methods to conduct and analyze "semi-structured interview[s]" with parents of 45 of the 140 institutionalized children. *Id.* at 57-58.

Based on that analysis, Dr. Houtrow opined that, overall, parents of the 140 institutionalized children are unopposed to community placement. Doc. 1170, at 58; Doc. 907, at 295. Setting aside one couple opposed to community placement for unique reasons (Doc. 907, at 201-202), Dr. Houtrow identified three "themes" arising from her analysis. Doc. 1170, at 58 n.49. First, many parents were "actively seeking their children's discharge" and thus were unopposed. Doc. 907, at 202. Second, some parents were unopposed because they were amenable to placement in a "community dwelling" other than "their own home." *Ibid.*

Third, many parents "desired their children to be at home but believe[d] that they had insurmountable barriers." Doc. 907, at 202. Parents frequently face three "major barriers": (1) the "lack of access to reliable [private-duty] nursing"; (2) the "lack of active and effective discharge planning"; and (3) "incomplete or inaccurate information" that "alter[ed] [parents'] choices." *Id.* at 203, 229. Significantly, those barriers are within Florida's control. Indeed, they are the very barriers addressed by the district court's narrowly tailored injunction. Doc. 1171, at 4-7. Parents facing them are therefore properly deemed unopposed, and Florida errs in contending (Mot.8) that Dr. Houtrow focused on parents' "future, perfect-world preferences."

Given Dr. Houtrow's rigorous analysis and other corroborating evidence (Doc. 1170, at 59-60), the district court did not clearly err in finding that parents of

institutionalized children are overwhelmingly unopposed to community-based placement.[2] Nor is that finding undermined by Florida's claim (Mot.5-7) that certain parents chose nursing facilities "for reasons that have nothing to do with Florida."

As explained (at 6), the United States had to show only that non-opposition is sufficiently "widespread" to justify systemwide relief—a showing plainly met where a "substantial number" of parents are unopposed, *Clement* v. *California Dep't of Corr.*, 364 F.3d 1148, 1153 (9th Cir. 2004), or where opposition is the "exception rather than the rule," *Walters* v. *Reno*, 145 F.3d 1032, 1049 (9th Cir. 1998). Thus, even if parents of all 24 children Florida highlights were opposed, that would not establish that it was clearly erroneous to find that parents of the *140* institutionalized children are "*overall*" unopposed. Doc. 1170, at 61.

In any event, the cited testimony does not show that the parents of all 24 children are opposed. For 15 children, Florida cites testimony by nursing-facility employees providing a snapshot of the *employee's* understanding of the child's

[2] Florida asserts (Mot.9) that Dr. Houtrow's testimony was hearsay. But Dr. Houtrow relied on interviews of a type reasonably relied on by other medical researchers and applied her clinical and research expertise in performing her analysis. Doc. 1170, at 55-58 & nn.47-48; Doc. 907, at 136-207. The district court therefore acted within its discretion in admitting her testimony under Federal Rule of Evidence 703 (Doc. 907, at 196). See *United States* v. *Garcia*, 447 F.3d 1327, 1336-1337 (11th Cir. 2006).

status. Mot.5-7 (citing Doc. 896, at 101-157, and Doc. 912 at 238-268). The district court was entitled to discount those snapshots in favor of Dr. Houtrow's rigorous study relying on well-established techniques to elicit reliable information from parents (Doc. 1170, at 57-58 & n.48; Doc. 907, at 160-192). That is particularly so because evidence showed that nursing-facility employees sometimes inaccurately believed parents were uninterested in community placement. Compare, *e.g.*, Doc. 912, at 264 (nursing-facility-employee testimony that mother currently "[un]ready" for transfer), with Doc. 909, at 4-6, 18, 24, 36-37 (contradictory testimony by parent (Doc. 881, Att. at 4)).

Florida's arguments are faulty for other reasons too. For example, Florida references (Mot.6) a parent who was homeless. It ignores, however, the parent's testimony that care coordinators neither told her about available Medicaid housing benefits, nor discussed community placement in a group home, which the parent was interested in exploring because she preferred a home setting for her child. Doc. 908, at 52-53, 59-64, 82-86; see also, *e.g.*, Doc. 952-1, at 11031773-75, 11031780-81; Doc. 899, at 16-17, 148-149 (housing benefits available through managed-care plans). In short, Florida provides no basis for disturbing the district court's well-supported non-opposition finding.

2. The District Court Properly Found Widespread Title II Violations

Florida argues (Mot.10-11) that the ADA does not prohibit the serious risk of unnecessary institutionalization and that the State's private-duty-nursing failings have not caused widespread ADA violations warranting systemic relief.

The district court correctly rejected Florida's view of the law. Doc. 1170, at 8-9. Indeed, all six courts of appeals to have addressed the question have agreed that Title II prohibits not only the unnecessary institutionalization of individuals with disabilities, but also the "serious risk" of such institutionalization. *Waskul*, 979 F.3d at 460-461 (collecting cases). Florida ignores those decisions and offers no basis for departing from them.

The district court also properly rejected Florida's view of the facts. Significantly, Florida does not challenge the court's determination that children with medical complexity are "institutionalized or at serious risk of being so because of a *combination* of the State's systemic failings" beyond its private-duty-nursing failings. Doc. 1170, at 18, 38-45, 68 n.55 (emphasis added). It follows that Florida's narrow claim (Mot.10)—that its private-duty-nursing failings, standing alone, have not caused widespread ADA violations—is beside the point. In any event, the court did not clearly err in rebuffing Florida's factual contention.

Florida does not dispute the widespread nature of its substantial shortfalls in providing private-duty nursing to children with medical complexity. Doc. 1170, at

33-39, 68 n.55. The district court properly found that Florida's private-duty-nursing failings have caused pervasive ADA violations. *Id.* at 6, 36-37. Contrary to Florida's assertion (Mot.9-10), the court did not rely *solely* on evidence that seven children were placed in nursing facilities as a direct result of inadequate private-duty-nursing coverage. Doc. 1170, at 36-37. The court also cited testimony by two other families that insufficient nursing coverage delayed their children's transfers; a nursing-facility official's testimony that "the lack of around-the-clock nursing was the biggest obstacle to discharging children"; and testimony describing the struggles families face when they attempt to cover gaps in private-duty nursing—struggles that have resulted in death, lost jobs and homes, and other precarious circumstances, not to mention fears for their children's safety. *Id.* at 22-25, 28-30, 37.

Based on this and other evidence—including Dr. Houtrow's finding that the "lack of access to reliable nursing" is a "reason so many of these children are residing in nursing facilities" (Doc. 907, at 203, 205)—the district court acted well within its discretion in reaching the commonsense conclusion that widespread gaps in providing children medically necessary private-duty nursing result in widespread ongoing institutionalization and a corresponding serious risk of institutionalization.

Taking a different tack, Florida claims (Mot.11) that children at serious risk of institutionalization do not satisfy Article III's injury-in-fact requirement. But this suit was brought by the United States, which not only has a cause of action, *Florida*, 938 F.3d at 1250, but also has suffered an "injury to its sovereignty arising from violation of its laws" sufficient to satisfy Article III standards. *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000).

3. The Injunction Respects Federalism Principles

Florida contends that the injunction violates federalism principles for two reasons, neither of which withstands scrutiny. The State first claims (Mot.13) that the injunction "dragoons Florida into seeking appropriations for a [pay-]rate increase" for private-duty nurses. But Florida does not explain why that is so, nor could it. The injunction allows Florida to use *any means* to provide children 90% of covered private-duty-nursing hours. Doc. 1171, at 3-5; Doc. 1170, at 68-72, 76-78. Moreover, Florida "chose not to present evidence that requiring it to deliver a particular threshold percentage of [private-duty-nursing] hours would necessitate a legislative appropriation." Doc. 1178, at 5.[3] The district court therefore

[3] As the district court concluded in a ruling that goes unchallenged in the State's stay motion, Florida was "on notice" that the United States was seeking such a modification and thus had "ample opportunity" to present such evidence. Doc. 1170, at 67.

appropriately concluded that "[n]othing in [its] injunction requires Florida to seek appropriations." Doc. 1170, at 72.

Nor does an injunction run afoul of federalism principles simply because it pressures a State to expend funds to comply with federal law. *Milliken* v. *Bradley*, 433 U.S. 267, 288-291 (1977). The lack of federalism concerns is particularly evident here, where the court's private-duty-nursing remedy requires even *less* than the 100% coverage Florida must provide under the Medicaid statute, and where Florida's legislature has "recognized the need to improve the delivery of [private-duty nursing] and attempted to take steps to address it." Doc. 1178, at 4; Doc. 1170, at 69-72.

Florida's remaining claim (Mot.13)—that the injunction "encumber[s] its Medicaid program" with "layers" of new "mandates"—fails, given Florida offers no examples of offending provisions. In fact, the injunction is limited. Other than the private-duty-nursing remedy, which directs Florida to take actions *already* mandated by the Medicaid statute, the injunction principally requires Florida to (1) increase oversight over the care-coordination system in particular ways; and (2) follow certain steps—many of which are *already* required by state regulation and contract—to facilitate transferring children from nursing facilities when desired by families. Doc. 1171, at 5-7; Doc. 1170, at 68, 75 & n.67.

4. The District Court Applied The Correct Reasonable-Modification Standard

Florida argues (Mot.14) that the injunction's modifications are not "reasonable modifications" under 28 C.F.R. 35.130(b)(7). Although Florida highlights that *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2368 (2023) (citation omitted), interpreted the word "modify" in a student-loan statute to mean "change moderately or in [a] minor fashion," the State offers no reason for importing that interpretation into the Title II context—a context in which Section 35.130(b)(7)'s fundamental-alteration defense provides a vehicle for addressing concerns about substantial changes.[4] In any event, as explained (at 15), the modifications here are moderate.

Florida also claims (Mot.14) that when the district court analyzed the reasonable-modification element, it relieved the United States of any "evidentiary burden" and instead "essentially" required it to satisfy a mere "pleading standard." Not so. Rather, the court found—after evaluating extensive evidence—that the United States had shown the existence of numerous specific modifications that are both "plausible" and "reasonable." Doc. 1170, at 62-66. Supporting that conclusion, the court explained that the modifications (1) call for using "existing"

[4] In another ruling Florida's stay motion does not challenge, the district court determined that Florida had "ample opportunity" to present a fundamental-alteration defense but "chose not to do so." Doc. 1170, at 67; Doc. 1178, at 4-6.

tools to "expand[] access to [existing] State services" and (2) "comport with Florida's own standards and obligations." *Id.* at 66. Florida offers no basis for second-guessing that factbound determination.

5. The District Court Properly Determined That The Modifications Will Redress Injuries

Florida asserts (Mot.14-15) that the United States offered no evidence that its proposed modifications would redress any children's injuries. Florida seems to contend that those changes are accordingly not "reasonable modifications" and that Article III redressability is lacking. The district court properly rejected Florida's factual contention. Doc. 1170, at 16-18, 61-66.

With respect to the private-duty-nursing modification, for example, the court found that the "lack of access to [private-duty nursing]" is "causing systemic institutionalization" and the serious risk of such institutionalization. Doc. 1170, at 6, 44-45. The court heard considerable evidence on the means Florida can use to expand access to such nursing, and it found the modifications reasonable. *Id.* at 62-66; see also *id.* at 17, 76-78. Given those extensive findings—which Florida ignores altogether—it is hard to fathom Florida's argument that no children's

injuries will be redressed by the expansion of access to nursing services required by the injunction.[5]

6. The District Court Acted Within Its Discretion In Determining That Florida Can Meet The Private-Duty-Nursing Benchmark

Florida argues (Mot.16-18) that it will be impossible to comply with the injunction's requirement that it provide children with 90% of all authorized and requested private-duty-nursing hours—a benchmark Florida will work towards on a reasonable timetable (Doc. 1171, at 3-5). The district court did not abuse its discretion in finding the benchmark "well within [Florida's] capabilities." Doc. 1170, at 68; see also Doc. 1178, at 4 (Florida "had a full and fair opportunity" to raise its "alleged inability to comply" by presenting a fundamental-alteration defense, which it "chose not to put on"); note 4, *supra*.

After considering extensive evidence, the court determined that Florida has numerous tools at its disposal for expanding access to private-duty nursing. As just one example among many (Doc. 1170, at 62-66, 69-72, 76-78; Doc. 1178, at 6 & n.4), the court "heard credible testimony that—not surprisingly—increasing

[5] Florida complains (Mot.15) that the United States' expert on modifications, Dr. Sara Bachman, "could not say" whether her proposals would "make any difference for any particular child." But that is because Dr. Bachman—a "leading expert[] in Medicaid program policy, structure, and financing" (Doc. 1170, at 30)—looks at gaps affecting larger "population[s]" of children, not "individual names of individual children." Doc. 909, at 218-219; *id.* at 42-58.

nurses' pay would result in more available nurses." Doc. 1170, at 17, 63. The court accordingly acted within its discretion in finding that Florida can meet the 90% benchmark, which is *less* than what Florida must provide under the federal Medicaid statute. *Id.* at 68, 72. Moreover, on average, children with medical complexity already receive 70-80% of authorized private-duty-nursing hours. *Id.* at 35. Significantly, those figures reflect hours undelivered for *any* reason. Doc. 909, at 171-175. By contrast, the court's benchmark is based on a more State-friendly ratio: (nursing hours delivered)/(authorized hours *minus* hours undelivered because of hospitalization or parental refusals). Doc. 1171, at 3.

Rather than grapple with the court's factual findings, Florida argues (Mot.16-17) that the 90% benchmark is unachievable because of a nationwide nursing shortage. But Florida points to no evidence that the shortage precludes it from expanding access to private-duty-nursing services. Moreover, as the court explained, the United States' expert opined—based on her careful analysis of data about nursing-service gaps in Florida—that "a national nursing shortage is not primarily responsible for th[ose] gaps," and Florida's expert agreed.[6] Doc. 1170,

[6] Florida is incorrect that its expert testified that "the average utilization rate for in-home nursing in other States is less than 70 percent." Mot.16 (emphasis omitted). Instead, the expert said that *one* private-duty-nursing company's average utilization rate in seven states is less than 70%. Doc. 897, at 42. Significantly, the low rate was due *not* to "staffing shortages" but to "lots of other reasons." *Ibid.*

at 35. Florida does not argue that the court clearly erred in crediting those opinions, which are reinforced by the extensive evidence just discussed.

Florida also contends (Mot.17) that the 90% benchmark is unachievable because private-duty-nursing hours might not be used for other reasons beyond its control—for example, a "child's condition might improve." But the "injunction addresses that problem" (Doc. 1170, at 72) by not counting against the State any hours that have been "refused" by the child's parents (Doc. 1171, at 3). Accordingly, nearly all hours Florida worries about in its hypotheticals will not count against it. Doc. 1178, at 3 n.3.

In sum, the district court acted within its discretion in determining that the 90% benchmark is feasible. See, *e.g.*, *South Carolina* v. *United States*, 907 F.3d 742, 764-765 (4th Cir. 2018). Moreover, should the court's well-supported predictions turn out to be unduly optimistic, Florida can always move to modify the injunction or, if needed, raise impossibility as a defense to a contempt proceeding. See *id.* at 765 (also relying on this consideration in affirming injunction).

B. Florida Has Not Established Irreparable Injury

As the district court concluded (Doc. 1178, at 4-6), Florida has not shown it will suffer irreparable harm absent a stay. "[S]imply showing some 'possibility of irreparable injury' fails to satisfy the second factor." *Nken*, 556 U.S. at 434-435

(citation omitted). Additionally, irreparable-harm evidence cannot be "speculative." *Florida* v. *Department of Health & Hum. Servs.*, 19 F.4th 1271, 1292 (11th Cir. 2021).

Florida claims (Mot.18) that the "personnel and other resources necessary" to implement the injunction are "staggering," and that it will be "forced to divert extraordinary resources" from programs for needy individuals. But the declaration Florida cites merely asserts that the injunction will "*strain*" the "limited resources" of the relevant state agency and will require it to "*divert resources*" with "*potential* adverse repercussions" for needy populations. Mot., Ex. A at 2-3 (emphasis added). Such vague statements that the agency will spend an unspecified quantum of resources to comply with the limited injunction do not meet Florida's burden. See *Florida*, 19 F.4th at 1292. Moreover, as the district court explained in denying a stay, "[i]f there were any substance or merit to these arguments, the State could have attempted to rely upon a fundamental alteration defense" at trial. Doc. 1178, at 4-6; note 4, *supra*. It did not.

Florida also worries (Mot.19) about the costs of funding a court-appointed monitor during this appeal's pendency, but it presents no basis to think those costs will be comparable to those incurred in the substantially more complex case it cites. See Settlement Agreement, Doc. 112, Ex. A at 1-41, *United States* v. *Georgia*, No. 10-cv-249 (N.D. Ga. Oct. 19, 2010), adopted with modifications,

Doc. 115, *United States* v. *Georgia*, No. 10-cv-249 (N.D. Ga. Oct. 29, 2010). Florida's final contention (Mot.20)—that the injunction "will have dangerous ramifications for people who need nursing care"—is entirely speculative and therefore meritless.

C. A Stay Would Substantially Harm Other Interested Parties And Is Not In The Public Interest

As the district court concluded (Doc. 1178, at 6-7), the remaining two stay factors likewise cut strongly against a stay.

1. The third factor looks to whether a stay would "substantially injure the other parties interested in the proceeding." *Nken*, 556 U.S. at 434 (citation omitted). Contrary to Florida's assertion (Mot.20), the "parties *interested in* the proceeding" include both parties to the suit and affected nonparties. *E.g.*, *Democratic Exec. Comm. of Fla.* v. *Lee*, 915 F.3d 1312, 1315, 1327 (11th Cir. 2019) (evaluating impacts on nonparties); *Drummond* v. *Fulton Cnty. Dep't of Fam. & Children's Servs.*, 532 F.2d 1001, 1002 (5th Cir. 1976) (same). The decision Florida cites—*Swain* v. *Junior*, 958 F.3d 1081, 1090-1091 (11th Cir. 2020)—did not opine on that question.

A stay would have a substantial detrimental impact on the children at the heart of this case. The district court found that most of the 140 children with medical complexity living in nursing facilities are being unnecessarily institutionalized. And it found that another 1800 or more face a serious risk of

such institutionalization. Doc. 1170, at 5, 79. As the court explained, "the need for swift action to remedy the State's discriminatory conduct cannot be more clear." *Id.* at 9; see also, *e.g.*, *id.* at 51 (emphasizing the "profound psychological and emotional benefits" of residing at home); *id.* at 37 (describing a death resulting from Florida's private-duty-nursing failures).

Florida has only two rejoinders (Mot.21), neither of which is persuasive. First, Florida repeats its fantastical contention that the injunction provides no redress for children with medical complexity, an argument refuted above (at 17-18). Second, Florida observes that the United States did not take the extraordinary step of seeking to expedite this litigation and sought an 18-month discovery period when the case was remanded after being dormant for many years. Florida points to no case law suggesting those reasonable actions warrant a stay.

2. The public interest—the fourth factor—also weighs heavily against a stay. The Supreme Court has held that the third and fourth stay factors "merge" when, as here, "the [federal] Government is the opposing party [to the stay]." *Nken*, 556 U.S. at 435. True, *Swain* also concluded that where "the government"—there, a county government—"oppos[es] the [underlying] injunction, its interest and harm merge with the public interest" for purposes of evaluating a stay motion. 958 F.3d at 1091. But *Swain* did not involve a case in

which the federal government and a state or local government are opposing parties. In that circumstance, *Nken*'s mandate controls.

The United States' interest, and the public's, lie in ensuring the prompt remediation of systemic discrimination. Indeed, the ADA itself specifies that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, [and] independent living." 42 U.S.C. 12101(a)(7)-(8); *Ramsay* v. *National Bd. of Med. Exam'rs*, 968 F.3d 251, 263 (3d Cir. 2020) (injunction "further[ed] the public interest in ADA compliance"). As the district court explained, not only do the children here "deserve better," but so do Floridians "whose taxes are already paying for the[] services" the children seek to use. Doc. 1178, at 7.

In arguing that the public interest favors a stay, Florida simply rehashes (Mot.21-22) its arguments as to why it will be injured without one—arguments refuted above (at 20-22). Regardless, the strong public interest in remedying the discriminatory isolation of vulnerable children with disabilities far outweighs the amorphous interests Florida invokes. The public interest, like the other factors, weighs strongly against a stay.

CONCLUSION

This Court should deny a stay.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5200 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 26.1-3(c). This response also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

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