

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

ERIC STEWARD, <i>et al.</i> ,	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	
	§	
CECILE YOUNG, in her official	§	
capacity as the Executive Commissioner of	§	
Texas' Health and Human Services	§	
Commission, <i>et al.</i> ,	§	
<i>Defendants.</i>	§	
	§	Case No. 5:10-CV-1025-OLG
	§	
THE UNITED STATES OF AMERICA,	§	
<i>Plaintiff-Intervenor,</i>	§	
	§	
v.	§	
	§	
THE STATE OF TEXAS,	§	
<i>Defendant.</i>	§	

**PLAINTIFFS' AND THE UNITED STATES' RESPONSE
TO DEFENDANTS' OBJECTIONS**

I. Introduction

In response to the Court's June 17, 2025 Order, Dkt. 717, directing the parties to submit a proposed remedial order, Defendants instead filed lengthy Objections, styled as a request for reconsideration, Dkt. 719. In their Objections, Defendants: (1) object to any finding of liability or the entry of a remedial order, arguing that the Court's Findings of Fact and Conclusions of Law are limited by the Court's fact cutoff date and, therefore, these Findings do not reliably demonstrate an ongoing violation sufficient to support a prospective injunction; (2) assert that some of the Court's Findings are contradicted by information in Defendants' November 2022 Advisory to the

Court, or otherwise may no longer be accurate; and (3) argue that the Conclusions concerning Plaintiffs' Medicaid claims have been superseded by the Supreme Court's decision in *Medina v. Planned Parenthood South Atlantic*, 606 U.S. ___, 145 S. Ct. 2219 (June 26, 2025).

The Court's Findings of Fact and Conclusions of Law are based on reliable and continuing evidence of federal law violations, are controlling, and should not be disturbed. Defendants' filing is not a proper motion for reconsideration, and application of a fact cutoff date for trial was well within the Court's discretion. The Court also has authority to issue prospective injunctive relief on the record presently before it, in the form proposed by Plaintiffs and the United States, Dkt. 720-1. The Court's Findings establish a likelihood that the violations are continuing or will recur, and neither Defendants' Objections nor their 2022 Advisory demonstrate that Defendants are in compliance with federal law and that there is a durable remedy in place to prevent future violations of law. Nonetheless, to resolve Defendants' concerns about the extended passage of time and assertions of changes they have made since trial, Plaintiffs and United States propose a narrowly tailored and efficient fact-gathering process that assesses the legally required accommodations, choices, services, and supports provided to class members. This process will serve to provide updated, pertinent evidence to assist the Court in crafting an effective, narrowly tailored remedial order.

Finally, the proposed remedial order submitted by Plaintiffs and the United States properly acknowledges the Supreme Court's *Medina* decision on Plaintiffs' Medicaid claims.

II. The Self-Styled Objections or Motion for Reconsideration Are Not Proper.

Without citing to or complying with the requirements of any Rule of Civil Procedure, Defendants ask the Court to sustain their Objections "in full" and abandon its carefully crafted and detailed findings and conclusions. Dkt. 719 at 38. Defendants demand that "no remedial order be

issued based on said objections.” *Id.* To the extent Defendants seek relief from, or reconsideration of, the Court’s June 17, 2025 Order, such relief or reconsideration is not proper.¹ The Court should deny the Objections, decline to reverse its findings, and refuse to restart this litigation.

III. The Court Properly Adopted a Fact Cutoff Date to Determine Liability at Trial.

The Court properly adopted a fact cutoff date of September 1, 2017, to determine liability at trial. The Court set the fact cutoff date in its Scheduling Order issued on March 2, 2017, to govern discovery. Dkt. 311. The Court reaffirmed its decision on numerous occasions. *E.g.*, Dkt. 377, 551, 594, 598, 599, 604, 607, 611, 695. After initially objecting to the fact cutoff date, Defendants later “acquiesced by including it in agreed orders, sought to enforce it, sought protection under it, and even argued why it should not be changed,” despite having “numerous opportunities to argue against and move to vacate, suspend, or extend the fact cutoff.” Dkt. 695 at

¹ The Fifth Circuit has noted that “[t]he Federal Rules do not recognize a ‘motion for reconsideration’ *in haec verba*.” *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990), *abrogated on other grounds by Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994); *Lightfoot v. Hartford Fire Ins. Co.*, 2012 WL 711842 at *2 (E.D. La. 2012). Whether a request for reconsideration should be considered pursuant to Rule 54(b), 59(e) or 60(b) depends on the timing and circumstances. *Id.* Here, Defendants’ request for reconsideration is neither timely nor proper. *See Brown v. District of Columbia*, No. CV 10-2250 (PLF), 2025 WL 2374386 at **5-6 (D.D.C. Aug. 15, 2025) (explaining “high hurdle” for Rule 59(e) motions); *see also Lightfoot*, 2012 WL 711842 at *2 (“The general practice of courts in this district has been to evaluate Rule 54(b) motions to reconsider interlocutory orders under the same standards that govern Rule 59(e) motions to alter or amend a final judgment.”). As to Defendants’ objections to the Quality Service Review (QSR) as a tool for measuring compliance with a remedial order, Dkt. 719 at 38, such objections are improperly raised in their request for relief from the June 17, 2025 Order. *Brown*, 2025 WL 2374386 at **5-6. That Defendants rejected the QSR pre-trial is not a proper basis for challenging the Court’s findings or for opposing the entry of a remedial order. *See* Dkt. 717 at ¶211.

Even if Defendants’ Objections could be considered as a request for relief pursuant to Rule 60(b), Defendants have not attempted to meet their burden of establishing the basis for such relief. *Osborne v. Belton*, 131 F.4th 262, 270 (5th Cir. 2025) (“The burden of establishing at least one of the grounds for Rule 60(b) relief is on the movant.”). Nor could they, as discussed herein. *See, e.g., BLOM Bank SAL v. Honickman*, 145 S. Ct. 1612, 1619, 221 L. Ed. 2d 850 (2025) (“Relief under Rule 60(b)(6) requires extraordinary circumstances.”).

9 (citing Dkt. 362, 364, 367, 378). It was only on the sixteenth day of trial, November 6, 2018, that Defendants apparently again decided that the fact cutoff was not in their favor. Tr. 3465:18-11. But even then, Defendants were unable to provide any authority supporting their request to submit post-fact cutoff evidence. *See* Dkt. 695 at 8 (quoting Dkt. 631 at 4 n.2).

As Plaintiffs and the United States previously have briefed, the imposition of a fact cutoff was prudent and necessary, and it promoted finality and efficiency in a complex and lengthy litigation. *E.g.*, Dkt. 253 at 3-11, 307 at 4-10, 630 at 4-15. The decision to do so remains well within the Court’s discretion and supported by authority. *See, e.g., Brown v. Plata*, 563 U.S. 493, 522-23 (2011) (holding that the imposition of a fact cutoff date was within the sound discretion of the three-judge court).

The Court’s finding of liability—as set forth fully in the Court’s Findings of Fact and Conclusions of Law—should not be disturbed based solely on Defendants’ attempt to introduce evidence on liability that has not been able to be tested by discovery and that is beyond the cutoff date. As the Court previously explained, having found liability, the Court may now “determine . . . whether and to what extent facts that occurred after the evidentiary cutoff should be considered” for purposes of determining the appropriate injunctive relief. Dkt. 695 at 10.

IV. The Court Has the Authority to Issue a Prospective Injunction Based upon Its Liability Findings and Conclusions.

A. It Is Proper for the Court to Rely upon Evidence Subject to the Fact Cutoff to Support a Prospective Injunction.

Having properly established a fact cutoff for considering evidence of liability at trial, it is entirely appropriate for the Court to issue a remedial order and prospective injunction based upon its findings and conclusions of liability. As the Court concluded: “The scope of the relief granted

depends upon the scope of the violation proven at trial.” Dkt. 717 at 474 ¶1630 (citing *Lewis v. Casey*, 518 U.S. 343, 357 (1996)).

Defendants erroneously argue that the intervening period of time between the fact cutoff and the determination of liability, as set forth in the Court’s June 17, 2025 Order, in and of itself, precludes issuance of an injunction. Objections at 4-5. Defendants rely on *Webb v. Missouri Pacific R. Co.*, 98 F.3d 1067, 1068-69 (8th Cir. 1996), for their oversimplified proposition. But even the *Webb* court acknowledged that a prospective injunction is appropriate if “the record shows ‘a real threat of [a] future violation [of the law] or a contemporary violation of a nature likely to continue or recur.’” *Webb*, 98 F.3d at 1068 (quoting *U.S. v. Oregon State Medical Soc.*, 343 U.S. 326, 333 (1952)).² Here, the State’s violation of the ADA and the NHRA is both readily capable of repetition and not yet remedied.

In determining whether continuing violations are likely, the court should consider several factors, including: “the (1) egregiousness of the defendant’s conduct, (2) isolated or recurrent nature of the violation, (3) degree of scienter, (4) sincerity of [the] defendant’s recognition of his transgression, and (5) likelihood of the defendant’s job providing opportunities for future

² Defendants’ reliance on *Valentine v. Collier*, 993 F.3d 270, 289 (5th Cir. 2021), is misplaced. In *Valentine*, the Fifth Circuit found that given the “perfect storm” of the pandemic and confined prison conditions, and defendants’ swift, measurable, and meaningful steps to ameliorate harms to prisoners during the first six months of the pandemic, the circumstances did not warrant a finding of deliberate indifference. Because plaintiffs thus did not show success on the merits, the Fifth Circuit reversed the district court’s issuance of a permanent injunction. *Id.* at 288-89. *Valentine* also explained that injunctive relief is appropriate if “a defendant’s past conduct gives rise to an inference that, in light of present circumstances, there is a reasonable likelihood of future transgressions.” *Id.* at 280 (quoting *Sec. & Exch. Comm’n v. Life Partners Holdings, Inc.*, 854 F.3d 765, 784 (5th Cir. 2017) (internal quotations omitted)). Here, Defendants have not shown that they have remedied the violations the Court found, and this Court correctly concluded that Defendants’ conduct is likely to recur. Dkt. 717 at ¶1622. Moreover, the circumstances here are obviously distinguishable from a pandemic, and Defendants do not even attempt to argue otherwise.

violations.” *Sec. & Exch. Comm’n*, 854 F.3d at 784. “The critical question in issuing [an] injunction and also the ultimate test on review is whether [the] defendant's past conduct indicates that there is a reasonable likelihood of further violations in the future.” *Ramsey v. Sheet Pile, L.L.C.*, 130 F.4th 193, 202 (5th Cir. 2025) (quoting *Sec. & Exch. Comm’n v. Blatt*, 583 F.2d 1325, 1334 (5th Cir. 1978)). A district court’s decision to award injunctive relief based on evidence of past violations and continued noncompliance must be upheld unless it is determined that the court has abused its discretion. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 290 (2d Cir. 2003) (quoting with approval *U.S. v. Carson*, 52 F.3d 1173, 1183-84 (2d Cir. 1995), *cert. denied* 516 U.S. 1122 (1996) (“In general, a district court has broad discretion to enjoin possible future violations of law where past violations have been shown Courts are free to assume that past misconduct is highly suggestive of the likelihood of future violations.”)). For these reasons, a delay between the conclusion of a trial and the issuance of a judgment does not warrant reversal where the court complies with Rule 52(a),³ which this Court has done. *See Hudson v. Burke*, 913 F.2d 427, 430-31 (7th Cir. 1990).

And, as the Supreme Court has noted, even post-trial efforts to cure federal law violations do not moot a case or preclude ongoing prospective relief, absent persuasive evidence that the past violations will not recur. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000) (noting that “a defendant claiming voluntary compliance [] bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.”); *see also Donovan v. Cunningham*, 716 F.2d 1455, 1461 (5th Cir. 1983) (“It is well-settled that, in a suit for injunctive relief, the voluntary cessation of allegedly

³ Federal Rule of Civil Procedure 52(a) requires that the court “find the facts specially and state its conclusions of law separately.”

illegal conduct does not moot the controversy [A] defendant bears a heavy burden to show that “there is no reasonable expectation that the wrong will be repeated.””).

Applying these principles, this Court concluded violations and harms have “continued unabated,” and that “even if the State has made some changes since the trial of this case, past conduct has shown a likelihood of future repetition.” Dkt. 717 at ¶1622. The Court made 1,430 factual findings⁴ to support its legal conclusions concerning liability for numerous federal law violations. Defendants only objected to 99 of those findings of fact. Dkt. 719 at 5-37. Thus, there is no basis to set aside the 1,331 other findings to which the Defendants have not objected. Nor, as discussed below, should the Court adopt most of Defendants’ 99 objections since they lack merit. Finally, Defendants have not shown that any of the findings are clearly erroneous, and thus, their objections should be rejected.

Based upon the large number of uncontested findings, as well as the lack of any evidence or data that the federal law violations are not ongoing and will not recur, the Court may properly issue a prospective injunction designed to protect the federal rights of class members with intellectual and developmental disabilities and to cure the federal law violations set forth in its June 17, 2025 Order. *Chafin v. Chafin*, 568 U.S. 165, 172 (2023) (case is moot and no injunction is needed only “when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (internal quotation marks omitted))).

B. The Defendants’ Objections Do Not Demonstrate that the Defendants Are in Compliance with Federal Law or Even That All of the Cited Findings Have Been Corrected.

⁴ The Court’s Findings of Fact and Conclusions of Law included 49 paragraphs concerning its jurisdiction and an overview of the law, 1,430 paragraphs solely addressing findings of fact, and 151 paragraphs setting forth its conclusions of law.

Defendants identify 99 out of a total of 1,430 Findings of Fact in the Court's June 17, 2025 decision that they claim are contradicted by evidence submitted by Texas' Health and Human Services Commission (HHSC) in its November 11, 2022 Advisory. Defendants submit no objections with respect to the remaining 1,331 findings.

Most of the objections involve findings that address HHSC's training program, monitoring process, and guidance documents, as described by the agency's own officials in depositions or at trial. Most of the new evidence cited from the Advisory involves new trainings, monitoring, and guidance HHSC developed between 2019-2022, but does not include data or statistical evidence showing meaningful changes for nursing facility residents with IDD. Dkt. 719 at 8, 9, 12, 14, 15 17, 19, 20-26, 30-33, 35-37. Significantly, the 99 contested findings do not address the many other issues and facts found by the Court, such as whether individual class members receive a comprehensive functional assessment, receive all necessary specialized services, make knowing and informed choices, and are offered appropriate community service options that will meet their needs. *Id.* at 6-37.

Several of the objections are plainly wrong and address issues not relevant to the cited finding. For instance, in ¶430, the Court's finding is actually based on Randall Webster's expert report, not "depositions that occurred in 2017" or "Mr. (sic) Weston's" report, as the Defendant's contend in their objections. Also, in ¶419, the Court's findings concerning the initial client review are based upon a random sample of 27 individuals, not just the ten persons reviewed by one expert, Dr. Coleman.

Other objections do not rebut or contradict the Court's finding. For instance, regarding ¶339, HHSC's new evidence does not claim that individuals actually receive all needed specialized services, or even that their Level II evaluations properly identified all needed specialized services.

Nor does their objection contradict the Court’s conclusion that many people were not properly determined to need specialized services and did not actually receive all needed services, as demonstrated by the initial and second client review. *See, e.g.*, ¶¶327-29, 339, 474-538. Similarly, the creation of a PASRR form that auto-populates certain services, as discussed in objections to ¶¶339, 419, does not undermine that conclusion, because the form does not verify whether or not Defendants have, in fact, provided the auto-populated services.

Most importantly, objections to many paragraphs (*i.e.* ¶¶750, 783, 785, 789, 928; 338, 340, 343, 620, 960, 1111, 1112) concern Defendants’ new and revised policy documents, like the IDD PASRR Handbook and TSC regulations, both of which Plaintiffs’ and the United States’ proposed remedial order acknowledges as recent actions and incorporates. Dkt. 720-1. Taken together, the objections do not undermine the Court’s Findings that Texas violated the rights of people with IDD in nursing facilities.

C. The Proposed Remedial Order Properly Allows HHSC to Immediately Demonstrate Compliance with Any Provision Based upon Current Evidence.

While the Court could issue a remedial order based solely upon evidence as of the fact cutoff date, Plaintiffs and the United States did—and the Court can—account for new evidence in two ways, as explained in the Joint Response, Dkt. 720, and in Plaintiffs and the United States’ Proposed Order, Dkt. 720-1. First, the Court could account for new evidence by considering Defendants’ updated rules, procedures, and agency activities in the intervening time between trial and the present to craft an appropriate remedial order, as proposed by Plaintiffs and the United States. Plaintiffs and the United States carefully reviewed Defendants’ 2022 Advisory, Dkt. 701, and, as noted in the parties’ Joint Response, “The Proposed Order accounts for several of the systemic improvements discussed in the Advisory,” Dkt. 720 at 2 ¶¶1, 2. For example, the Proposed Order includes reference to Defendants’ IDD-PASRR Handbook as well as HHSC’s

revised rules, which Defendants developed post-trial and discussed in their Advisory. *See* Dkt. 720-1 at ¶¶1, 6, 10. Thus, while not required by the Court’s Findings and Conclusions, the Proposed Order incorporates some of the more recent documents that HHSC developed to address the deficiencies presented at trial and requires compliance with these voluntarily adopted reforms. Conversely, the Proposed Order does not mandate additional new procedures, but instead relies upon those already developed by HHSC and is consistent with many of the activities that the State claims it is already doing. Accordingly, the Proposed Order adequately accounts for relevant updates that the State asserts it has made.

Second, the Court could account for new evidence by using it to assess compliance. As described in the Joint Response: “the Proposed Order seeks to avoid additional discovery, expert reviews and disclosures, and a new trial on this evidence, but provides an immediate pathway for Defendants to demonstrate compliance with any or all provisions based upon current evidence.” Dkt. 720 at 2 ¶1. Plaintiffs and the United States offer a mechanism by which Defendants may be relieved of their obligations at any time—beginning immediately—using compliance measures, including the previously agreed-to Quality Service Review (QSR), that are objectively measurable and reasonably achievable. Dkt. 720-1 at ¶18, 720-2, Att. A.⁵ Defendants also have discretion to “present other evidence that they believe demonstrates compliance with each provision of [the] Order.” Dkt. 720-1 at ¶18. Finally, mindful of federalism concerns, and the Supreme Court’s admonition in *Horne v. Flores*, 557 U.S. 433, 447 (2009), the Proposed Order provides that the Court may incrementally disengage any provision based on a finding of compliance and a durable remedy as described above. Dkt. 720-1 at ¶19. These aspects of the Proposed Order would further

⁵ Attachment A to the Proposed Remedial Order contains a detailed crosswalk of remedial order provisions and the corresponding PASRR Outcome Measures. Dkt. 720-2.

bolster the appropriateness of the Court issuing prospective injunctive relief based on the existing Findings of Fact and Conclusions of Law.

Plaintiffs and the United States believe that this approach—using previously agreed-to and tested compliance measures, while offering Defendants substantial discretion to choose how and when to demonstrate compliance, including immediately—is properly within the Court’s authority and a workable remedy. However, as more fully described below, to address any potential arguments to the contrary, Plaintiffs and the United States propose, and respectfully request the Court to order an alternative, efficient approach for crafting an appropriate and narrowly tailored remedial order.

V. The Court Should Order a Focused and Limited Fact-Gathering Process Based upon a QSR Process to Craft an Appropriate Remedial Order.

To address Defendants’ objections, account for the passage of time since trial, and enable the class to receive the appropriate relief without undue delay, protracted discovery, and a new trial, Plaintiffs and the United States propose that the Court order a focused fact-gathering process, based upon the previously agreed-to QSR, to craft an appropriate remedial order.

Defendants presented information indicating that they have updated procedures, manuals, and forms, but they provided no evidence whether the approximately 3,500 people with IDD in nursing facilities, today, are receiving screenings, evaluations, specialized services, active treatment, accommodations, community services, and opportunities to make informed choices about whether to enter or remain in a nursing facility, as required by federal law. Given the evidence submitted at trial regarding the QSR, which the Court relied on to issue its Findings of Fact and Conclusions of Law, a narrow, similar fact-gathering process, using the previously agreed-to QSR, is the most efficient and effective method for determining the scope of relief.

Specifically, the Court could order a process based on HHSC's prior QSR process,⁶ with some modifications to account for HHSC's current procedures and workflows and to align with the Court's legal conclusions.

The Court entered extensive findings concerning HHSC's QSR. *See* Dkt. 717, ¶¶117-223. The Court noted that the Expert Reviewer and later HHSC consultant developed this QSR process after extensive discussion by the parties and with the endorsement of Defendants; that the Expert Reviewer based the QSR upon sampling and scoring methodologies; that the parties and Expert Reviewer organized the QSR into six Outcomes and the Expert Reviewer developed specific Outcome Measures and Indicators to measure the Outcomes; that the Defendants implemented the QSR through in-person interviews with individual class members, guardians and Legally Authorized Representatives (LARs), nursing facility and Local Intellectual and Developmental Disability Authority (LIDDA) staff; that the Expert Reviewer augmented the QSR with various HHSC agency reports that correlate to specific Outcome Measures; and that the Defendants implemented the QSR successfully for several years. *Id.*

The Court concluded that the QSR was designed to measure compliance with federal legal requirements and to assess facts that were fundamental to evaluating compliance with the integration mandate, reasonable modification provision, and informed choice requirements of the ADA; the screening, evaluation, diversion, and specialized services provisions of PASRR; and the assessment, service planning, and service coordination elements of the ADA, PASRR, and NHRA. Significantly, the Court relied upon QSR results and scores in making numerous findings and

⁶ Defendants do not specifically object to any finding involving the QSR, although they do devote one paragraph of their 40-page filing to objecting generally that the QSR does not necessarily "reflect[] current HHSC workflows." Dkt. 719 at 38.

reaching most of its conclusions that HHSC was violating the federal rights of class members. Dkt. 717, at ¶118 (“The QSR’s basic purpose is to evaluate the State’s efforts to meet PASRR requirements and standards under the Americans with Disabilities Act (ADA) and to comply with the Steward Interim Settlement Agreement, which itself was designed to meet PASRR and ADA requirements”); *see also* ¶¶119, 120, 135, 138. The Court found that “Meeting all QSR outcomes and outcome measures is necessary to have an effective diversion, specialized services, and transition program that satisfies PASRR and ADA requirements.” *Id.* ¶170. “In sum, they [the outcomes] measure compliance with the law.” *Id.* ¶169. This QSR process remains available, relevant, and the best evidentiary tool for the Court to craft an appropriate remedial order.

To ensure consistency and reliability, the Court should appoint an independent expert witness pursuant to Federal Rule of Evidence 706 to conduct the focused QSR process. Courts may rely upon independent expert witness appointed under Rule 706 to assess contested facts. *Morales v. Turman*, 569 F. Supp. 332, 338 (E.D. Tex. 1983) (“It has been recognized that such court-appointed experts can be of ‘invaluable assistance’ in creating a record from which a court can make an independent evaluation of disputed facts.”) (quoting Manual for Complex Litigation § 1.46, 69 (1982)). Plaintiffs and the United States propose that the parties would propose one to two names of qualified disability professionals with demonstrated experience in conducting client-focused reviews of service delivery for people with intellectual and developmental disabilities, as well as experience in conducting such reviews in the context of litigation. The Court would select an expert from among the parties’ recommendations and appoint the person as its Rule 706 expert witness. This person would not be a court monitor and would not have any quasi-judicial powers to make rulings. This person would serve only a limited role and time and then be dismissed from their charge.

The expert witness would determine whether and how to incorporate any warranted modifications to the QSR and its sampling methodology in a manner that does not compromise the reliability, generalizability, and comparability of the QSR. The expert witness would have discretion to select qualified professionals to assist in conducting the review, ensure inter-rater reliability amongst these assistants, and generally coordinate and supervise their work. The parties would cooperate with the expert in providing information, access, and support for the QSR, consistent with past practices.⁷ The expert witness's focused QSR report would augment the trial record, subject to the provisions of Rule 706(b), thereby avoiding the delays and expense of open-ended discovery. The Court and the parties would use the expert witness to determine an appropriate remedial order, thereby avoiding further delays in affording effective relief to the class.

Given the realities and complexities of this process, the Court should establish a schedule for its prompt completion, including recommending and selecting a Rule 706 expert; modifying, if appropriate, the QSR process; conducting the QSR on a sample of class members; issuing a QSR report; and submitting a proposed remedial order. The Court would direct the compensation of the expert witness, as required by Rule 706(c). A proposed order that reflects past practices, current realities, and the urgency of relief for the class is attached.

VI. The Proposed Remedial Order Properly Acknowledges Recent Supreme Court Decisions on the Enforcement of Medicaid Claims.

Plaintiffs note that the Joint Response acknowledges the Supreme Court's *Medina* decision and that the proposed remedial order is not based on Plaintiffs'⁸ Medicaid reasonable-promptness provision, 42 U.S.C. § 1396a(a)(8), or the freedom-of-choice provision, 42 U.S.C.

⁷ As with prior QSRs, Defendants would provide the expert witness with assistance in identifying the nursing facilities which serve class members, access to electronic medical records, and the use of sampling and scoring technology.

⁸ The United States does not have claims under the Medicaid Act.

§1396n(c)(2)(c). Dkt. 720 at 3, n.1. The Plaintiffs’ sole Medicaid claim that does animate the injunction is part of the Nursing Home Reform Amendments (NHRA), which was explicitly found to create a privately enforceable right by the Supreme Court in its prior Medicaid decision, *Health and Hospital Corporation of Marion Cty. v. Talevski*, 599 U.S. 166, 143 S. Ct. 1444 (2024), and which the Court reaffirmed in *Medina*. 145 S. Ct. at 2233. The Court explicitly concluded that the NHRA satisfied its demanding test for the creation of enforceable rights “precisely because [it] ‘expressly’ employed the sort of clear and unambiguous ‘rights-creating language’ *Gonzaga* demands.” 599 U.S. at 184, 186, 143 S. Ct. 1444 (referencing the now-accepted test for enforceability of Spending Clause legislation such as the Medicaid Act articulated in *Gonzaga University v. Doe*, 536 U.S. 273 (2002)) (internal citations omitted). Thus, the proposed remedial order is appropriately tailored to recent Supreme Court decisions and eschews reliance on other Medicaid provisions.

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Respectfully submitted,

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