No. _____

In the Supreme Court
of the United States

STATE OF OREGON, by and through its DEPARTMENT OF HUMAN SERVICES; BRUCE GOLDBERG, in his official Capacity as Director, OREGON DEPARTMENT OF HUMAN SERVICES,

Petitioners,

v.

ASW, Individually and as Guardian Ad Litem for MSW and OSW, Minors; SSW; ALC, Individually and as Guardian Ad Litem for SRC and JSC, Minors; JKC; JSS, Individually and as Guardian Ad Litem for BKS, a Minor; SDS; CEW,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
***MARY H. WILLIAMS**
Solicitor General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
Counsel for Petitioners

***Counsel of Record**

QUESTIONS PRESENTED

Faced with an overwhelming budget crisis in 2002, Oregon implemented a 7.5% reduction in the adoption-assistance payments made under the Title IV-E Adoption Assistance Program. Plaintiffs brought suit under 42 U.S.C. § 1983 to enforce the federal obligation of concrete, individualized adoption-assistance benefits and the federal obligation of an individualized fact-specific hearing prior to any reduction in benefits. Although both purported to apply this Court's analysis in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), the district court and the circuit court reached different conclusions about whether Congress intended to create private rights enforceable under § 1983. This case presents the following questions:

1. In the Adoption Assistance Program, Congress included a requirement that adoption-assistance benefits be individually determined based on the needs of the child and circumstances of the adoptive family, but limited by a rate ceiling based on what would have been paid if the adopted child were still in foster care. Congress also limited the State's authority to adjust the payments and required that these individually determined benefits be quantified in a binding agreement between the state agency and the adoptive parents. Did Congress unambiguously confer a private federal right that these individualized benefits, once established, could not be reduced by an across-the-board percentage reduction and a right to an individualized hearing prior to any reduction?

2. Where Congress requires an individualized determination of benefits that must be quantified in a binding agreement between the state agency and the recipients, is

the agreement requirement the enforcement mechanism intended by Congress or does it establish a separate federal right, enforceable under § 1983?

3. When Congress has provided a remedy different from, and more restrictive than, § 1983, does the presumption of enforceability under § 1983 apply or does the burden shift from the State to the plaintiff to prove that Congress intended to supplement the remedy provided by also permitting actions under § 1983?

4. On the merits of plaintiffs' claim that the challenged benefit reduction violated federal law, did the Ninth Circuit erroneously conclude that the across-the-board percentage reduction in adoption-assistance payments is not permitted—a conclusion that is contrary to the view expressed by the federal agency in charge of implementing this federal law?

PARTIES TO THE PROCEEDING

Petitioners are the State of Oregon, by and through its Department of Human Services, and Bruce Goldberg, in his official Capacity as Director of the Oregon Department of Human Services.

Respondents are adopted children and parents of adopted children with special needs who receive adoption-assistance payments from the State of Oregon under the federal Adoption Assistance Program.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the State of Oregon and the Director of the Department of Human Services, respectfully pray that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *A.S.W. v. State of Oregon*, 424 F.3d 970 (9th Cir. 2005).

OPINIONS BELOW

The district court's opinion and order was not reported and is attached to this petition. App. 1-16. The Ninth Circuit Court of Appeals' decision is reported at 424 F.3d 970 (9th Cir. 2005), and also is attached to this petition. App. 17-36. The State sought rehearing *en banc* and the Ninth Circuit's denial is attached to this petition at App. 37-38.

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was filed on September 13, 2005. The order of the court of appeals denying rehearing *en banc* was filed on November 28, 2005. This petition is timely filed within the additional time allowed by Justice Kennedy on February 21, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves adoption-assistance payments made pursuant to 42 U.S.C. §§ 671-679a. The statutory provisions pertinent to this discussion are set forth at App. 39-45.

STATEMENT

This case concerns the Adoption Assistance and Child Welfare Act of 1980 and questions related to whether recipients of adoption-assistance benefits under the Act may pursue an action under 42 U.S.C. § 1983 when the State institutes an across-the-board percentage reduction to those benefits.

I. The Adoption Assistance and Child Welfare Act of 1980

Respondents are recipients of adoption-assistance benefits under Title IV-E of the Social Security Act, adopted in 1980 as the Adoption Assistance and Child Welfare Act (the Act). 42 U.S.C. §§ 620-628, 670-679a. The Act authorizes block grants to states for foster-care and adoption-assistance programs to support children with special needs. *See* 42 U.S.C. § 670. Those funds are conditioned upon the state's submission of a Title IV-E plan, approved by the Secretary of Health and Human Services. 42 U.S.C. § 671(a). The approved plan must satisfy the specific requirements set forth in § 671(a)(1)-(17). One of those requirements is that the plan must provide "for adoption assistance in accordance with section 673 of this title." 42 U.S.C. § 671(a)(1).

Section 673, in turn, requires that participating states enter into adoption-assistance agreements with the adoptive parents of "special needs" children. 42 U.S.C. § 673(a)(1)(A). An "adoption assistance agreement" is defined as an agreement, binding between the parties, specifying (*inter alia*) the adoption-assistance payments to be provided. 42 U.S.C. § 675(3). The amounts of these payments are to be determined by agreement between the

adoptive parents and the agency, taking into consideration the circumstances of the parents and the needs of the child. 42 U.S.C. § 673(a)(3). The amount of the payments may be adjusted by agreement, but "in no case may the amount of the adoption assistance payment * * * exceed the foster care maintenance payment" that would have been paid if the child were in foster care. *Id.*

II. Oregon's administrative reduction in adoption-assistance payments

Facing extraordinary budget shortfalls, the Oregon Department of Human Services found it necessary to impose a general 7.5% administrative reduction in foster-care maintenance payments under its Title IV-E program, effective February 1, 2003. The State also found it necessary to reduce adoption-assistance benefits by a similar proportion, effective on the same date. The State deemed the latter reduction necessary, both as a cost-cutting measure and to ensure that the adoption-assistance payment not exceed what would have been available for foster-care maintenance if the child had not been adopted, as mandated by 42 U.S.C. § 673(3). The State informed recipients of the payments by letter of the planned reductions, including plaintiffs.

III. Litigation in the District Court

Plaintiffs brought this class action against the State under § 1983, alleging that the challenged administrative reductions in adoption-assistance benefits violated their federal rights under the Adoption Assistance Act. Specifically, plaintiffs asserted that the reductions violated their right to have their payments individually determined, based on the individual needs of the adopted child

and the individual circumstances of the adoptive family. Plaintiffs also argued that the unilateral reductions were not authorized by the Act, specifically 42 U.S.C. §§ 673(a)(3), (a)(4).

The State moved to dismiss under Fed. R. Civ. P. 12(b), arguing that the plaintiffs' allegations failed to state a violation either of federal law or of any federal right. The State argued that the challenged across-the-board percentage reduction in benefits did not violate the Adoption Assistance Act and, in any event, the Act's provisions do not create a federal right against this kind of benefit reduction that can be remedied through an action under § 1983.

The trial court noted that both sides relied on *Gonzaga* to support their positions. App. 7. Plaintiffs argued that the Act's provisions require "individualized, concrete monetary entitlements," which are just the kind of federal rights this Court found enforceable in *Gonzaga*. App. 9. The State argued that the "rights" at issue in this case were not sufficiently clear to be enforceable under § 1983. The trial court agreed with the State:

> The question here is whether the statute at issue demonstrates Congress' intent that "it could not be clearer," in conferring "specific and definite entitlements," and thus, leaving no doubt of its intent for private enforcement." The issue specifically is whether these statutory provisions unambiguously confer upon the adoptive families federal rights to concrete, individualized AAP benefits. See Gonzaga, 536 U.S. at

> 283-84. The answer to this question must be no.

App. 10 (emphasis in original).

The trial court looked to a recent decision of the Eleventh Circuit applying *Gonzaga* to the federal statutes at issue in this case. In *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003), *cert. denied sub nom Reggie B. v. Bush*, 540 U.S. 984 (2003), the appellate court noted this Court's emphasis that Congress unambiguously confer a federal right on the individual. The appellate court examined the text and structure of the federal statutes, including many of those at issue in this case, and concluded that Congress had not spoken with the necessary "clear voice."

The trial court in this case examined the requirement that States enter into binding adoption-assistance agreements—a provision not at issue in the Eleventh Circuit case. However, instead of seeing this binding-agreement requirement as distinguishing plaintiffs' case from the Eleventh Circuit case, the trial court saw it as an additional and "strong indicator that Congress did not intend to create a new federal right to specific adoption assistance payments[.]" App. 11. In other words, the trial court rejected plaintiffs' argument that the necessity of binding agreements showed Congress's clear intent to establish privately enforceable federal rights and instead viewed the agreements as evidence of Congress's clear intent to provide a different remedy to enforce claims of entitlement to specific payment amounts. *Id.*

The trial court also relied on language in the federal Department of Health and Human Services' Child Wel-

fare Policy Manual and a letter from the Assistant Secretary of the United States Department of Health and Human Services that supported Oregon's position that the across-the-board reduction in adoption-assistance payments complied with federal law and policy. App. 12-13, 15. The trial court granted the State's motion to dismiss.

IV. Appeal to the Ninth Circuit Court of Appeals

Plaintiffs appealed the dismissal to the Ninth Circuit Court of Appeals. After considering the three factors this Court identified in *Blessing v. Freestone*, 520 U.S. 329 (1997), the appellate court concluded that Congress intended to create a right to individualized payment determinations enforceable by an individual under § 1983.

The appellate court took a very different view than the trial court had taken of the requirement that the State enter into binding agreements with adoptive parents such as the plaintiffs. Where the trial court saw this requirement as evidence of Congress's intent to create an enforcement mechanism other than § 1983 claims, the appellate court viewed it as containing the requisite "rights-creating" language "that evinces a congressional intent to confer an entitlement to individualized payment determinations." App. 26. The appellate court also was "not persuaded" by the Eleventh Circuit's analysis in *31 Foster Children*, dismissing it as addressing "a different provision of Title IV-E[.]" App. 30, n. 12.

The appellate court next turned to the question whether the State had rebutted the presumption that Congress did not intend these individualized rights to be enforced under § 1983, either by showing that Congress has expressly foreclosed that remedy or "impliedly, by creat-

ing a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." App. 30 (quoting *Blessing*, 520 U.S. at 341). The appellate court set a high bar for the State to rebut the presumption of enforceability under § 1983, returning to this Court's statement in *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 520 (1990), that we do "not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." App. 31. Because Congress had not mentioned nor precluded federal review and "did not place any temporal or remedial limitations" on a state enforcement mechanism, the appellate court concluded that the State had failed to rebut the presumption of enforceability under § 1983. App. 32.[1]

The appellate court also concluded that plaintiffs have a federal right under 42 U.S.C. § 671(a)(12) to an individualized hearing prior to a reduction in the payments. App. 33. The appellate court rejected the State's argument that the challenged reductions fall squarely within an exception recognized by 45 C.F.R. § 205.10(5), which permits a unilateral adjustment to benefits where required by state law. App. 34. The court did not address the

[1] The appellate court also rejected the State's argument that the binding agreements reflected Congress's intent that there be a state-court remedy to enforce the individualized payment determinations, relying on this Court's statement in *Wright* that "the state-court remedy is hardly a reason to bar an action under § 1983, which was adopted to provide a federal remedy for the enforcement of federal rights." App. 33 (quoting *Wright*, 479 U.S. at 429).

State's argument that the federal agency responsible for implementing and enforcing the provisions at issue in this case agreed with the State's reading of the federal law. The appellate court reversed and remanded.

REASONS FOR GRANTING THE PETITION

Review is warranted in this case because, in spite of this Court's efforts to resolve ambiguity in this area, courts continue to struggle in determining when Congress implicitly established a federal right individually enforceable under § 1983.

In *Maine v. Thiboutot*, 448 U.S. 1 (1980), this Court first expressly recognized the availability of § 1983 to enforce rights created by federal spending legislation. However, questions concerning *when* a § 1983 claim may be raised have arisen frequently. Unquestionably, the inquiry focuses on Congressional intent: a private right of action must be created by Congress. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). When Congress has not explicitly provided for private enforcement of a federal law, the inquiry becomes more challenging as courts attempt to determine whether Congress impliedly created a federal right enforceable by an individual under § 1983.

Some parameters of the inquiry have been settled. The inquiry actually involves two separate questions: whether Congress intended to create a private right and whether Congress intended to create a corresponding remedy. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84

(2002).[2] A federal regulation, on its own, cannot create a private right. *Sandoval*, 532 U.S. at 291. Federal statutes drafted in "hortatory, not mandatory" terms do not create a private right. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). Similarly, vague and amorphous obligations and statutory provisions that merely reflect a Congressional preference as opposed to a binding obligation do not create a private right. *Wilder v. Virginia Hosp. Assn.*, 496 U.S. 498, 509 (1990).

In *Blessing v. Freestone*, 520 U.S. 329 (1997), this Court announced a methodology for determining whether a federal statute creates an implied right.[3] The case in-

[2] If the answer to the first question is that Congress did not intend to create a private right, there is no need to proceed to the second question.

[3] Prior to *Blessing*, this Court found an implied federal right, enforceable under § 1983, in only two cases. In *Wright v. City of Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418 (1987), this Court treated the availability of § 1983 to enforce violations of federal statutes by agents of the State as the general rule and determined that Congress intended in the Brooke Amendment to the Housing Act to authorize a private action to enforce the cap on rent in public housing projects. In *Wilder*, *supra*, this Court found a privately enforceable right under the Boren Amendment to the Medicaid Act, which required reimbursement of certain costs to medical providers at reasonable rates. Focusing the inquiry "on whether the provision in question was intended to benefit the putative plaintiff[,]" *id*. at 509 (internal quotations and brackets omitted), this Court determined that the provision was intended to benefit the plaintiff, did not reflect merely a Congressional preference, and was sufficiently definite to enforce.

volved a challenge to Arizona's implementation—or alleged failure to implement—Title IV-D of the Social Security Act. The plaintiffs contended that Arizona failed to "substantially comply" with its obligations under the title. This Court clarified the three factors courts must look to in order to determine whether a federal statute creates a federal right that is enforceable under § 1983: (1) whether Congress intended that the provision at issue benefit the plaintiff; (2) whether the asserted right is so vague and amorphous that its enforcement would strain judicial competence; and (3) whether the provision creates a binding obligation on the State. The Court then stressed the importance of clearly identifying the specific provision of federal law relied upon to establish the right at issue. In *Blessing*, the Court concluded that the requirement that states "substantially comply" with Title IV-D was not adequately specific and was not intended to benefit the plaintiffs individually and, therefore, found no Congressional intent to create an implied right, enforceable under § 1983. *Id.*

Although lower courts adopted this Court's formulation of the three-part *Blessing* test, conflict between courts still arose. As this Court noted in *Gonzaga*. 536 U.S. at 278, "The fact that all of these courts have relied on the same set of opinions from this Court suggests that our opinions in this area may not be models of clarity. We therefore granted certiorari to resolve the conflict among the lower courts and in the process resolve any ambiguity in our own opinions." (citation omitted).

The plaintiffs in *Gonzaga* brought suit against the university and one of its staff members under § 1983 for

the release of personal information to an "unauthorized person" in violation of the Family Educational Rights and Privacy Act of 1974 (FERPA), 88 Stat. 571, 20 U.S.C. § 1232g. This Court quoted with approval its pronouncement in *Pennhurst* that, "[i]n legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funding to the State." *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst*, 451 U.S. at 28). *Pennhurst* "made clear that unless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement under § 1983." *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst*, 451 U.S. at 17, 28 and n. 21).

This Court acknowledged that some language in its previous opinions could be read as suggesting that something less than an unambiguously conferred right might be enforceable under § 1983. *Gonzaga*, 536 U.S. at 282. But the Court expressly disavowed that proposition, stating "We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id.* at 283. Moreover, in that context, the Court rejected the view expressed in *Wilder* that "rights" under § 1983 are distinguishable from "rights" in the implied-rights-of-action cases. Instead, this Court explicitly limited the scope of enforceable "rights" under § 1983 to those circumstances in which it would find an "implied right of action" against a private party. *Id.*

While this Court in *Gonzaga* did not reject the three-factor test set out in *Blessing*, it did express great concern that the factors, particularly the first factor, caused confusion. The Court emphasized that § 1983 allowed the enforcement of "*rights*, not the broader or vaguer 'benefits' or 'interests'" that the first factor suggests. *Id.* (emphasis in original). To determine whether Congress has unambiguously conferred federal rights, a court should look first to whether the provision at issue is phrased in "rights-creating" terms. *Id.* at 284. Rights-creating language focuses on the individuals protected, such as the language of Titles VI and IX: "no person shall be subjected to discrimination." In addition, the Court emphasized that Congressional intent to create an individual right is not sufficient on its own. "[E]ven where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Id.* at 284 (quoting *Sandoval*, 532 U.S. at 286; emphasis added by Court).

In examining the provisions at issue in *Gonzaga*, the Court noted that the statute focused on the regulated educational institutions, not on the individuals. *Id.* at 284. The Court also concluded that the statute had an "aggregate focus" that could not "give rise to individual rights." *Id.* The Court noted, too, that the statute contained administrative procedures to enforce the requirements of the law, which "counsel against our finding a congressional intent to create individually enforceable private rights." *Id.* at 289-90. Considering those criteria, this

Court rejected the plaintiff's claim to federal rights under FERPA.

I. In spite of this Court's efforts in *Gonzaga* to "resolve any ambiguity" in its opinions, the lower courts still struggle when seeking to determine Congressional intent to create a federal right that an individual can enforce under § 1983, especially in the context of cooperative federal-state benefits programs.

If this Court intended in *Gonzaga* to restrain courts in identifying federal rights enforceable under § 1983, it has met with limited success in cases dealing with the cooperative federal-state programs under which the federal government directs funds to the States for the purpose of providing benefits to specific qualified individuals. Courts have not been uniform in how high to set the bar for plaintiffs to establish an unambiguous federal right under these programs. For example, the First Circuit viewed *Gonzaga* as "chart[ing] a firm course among prior Supreme Court precedents in some tension with one another" and compelling a narrower view of when Congress creates a federal right enforceable under § 1983. *Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 57 (1st Cir. 2004). Although, prior to *Gonzaga*, the First Circuit had found a right in 42 U.S.C. § 1396a(a)(30)(A) enforceable under § 1983, *Visiting Nurse Ass'n v. Bullen*, 93 F.3d 997 (1st Cir. 1996), *cert. denied*, 519 U.S. 1114 (2000), post-*Gonzaga* the court reversed, finding "the ready inference in favor of private enforcement no longer applies." *Ferguson*, 362 F.3d at 57.

Nevertheless, the First Circuit Court of Appeals found a different Medicaid provision to permit a health center serving medically underserved populations to sue under § 1983 to require "wraparound payments" to be paid as they became due. *Rio Grande Community Health Center v. Rullan*, 397 F.3d 56 (1st Cir. 2005). While acknowledging that "*Gonzaga* tightened up the *Blessing* requirements[,]" *id.* at 73, the appellate court found the provision at issue in *Rullan* to contain "rights-creating language" for a specific, discrete beneficiary group. The court also noted that the provisions at issue "are written in highly specific terms" and "in individualistic terms, rather than at the aggregate level of institutional policy or practice." *Id.* at 74-75; *see also Bryson v. Shumway*, 308 F.3d 79, 88-89 (1st Cir. 2002) (Medicaid provision requiring state plans to provide medical assistance "with reasonable promptness to all eligible individuals" establishes right enforceable under § 1983 because it is intended to benefit the plaintiffs and is not vague or amorphous and unambiguously binds the states).

Similarly, the Third Circuit Court of Appeals acknowledged that this Court in *Gonzaga* "has set a high bar for plaintiffs" seeking to establish an unambiguous federal right enforceable under § 1983, but nevertheless found that Congress intended to create such a right in the Medicaid provisions dealing with mentally retarded adults in need of medical services from an intermediate care facility. *Sabree v. Richman*, 367 F.3d 180, 182 (3rd Cir. 2004). After a thoughtful summary of the pre-*Gonzaga* cases and how *Gonzaga* appeared to change the requirements for finding an enforceable right, the court carefully examined the particular statutory language and

concluded that Congress unambiguously conferred specific entitlements on the plaintiffs in that case. *Id.* at 190.

At the same time, the court noted the difficulty of examining that narrow statutory language when the overall structure of the federal-state program suggested a different result:

> In *Gonzaga University*, the Court instructs that not only should the text of the statute be examined, but also its structure. *Gonzaga Univ.*, 536 U.S. at 286. This instruction makes good sense: we cannot presume to confer individual rights—that is a task for Congress. As the Court aptly put it, we "may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval*, 532 U.S. at 291. Our judicial function is limited to recognizing those rights which Congress "unambiguously confers," and in doing so we would be remiss if we did not consider the whole of Congress's voice on the matter—the statute in its entirety.
>
> Turning our sights beyond the narrow provisions invoked by plaintiffs gives us some pause. Indeed, the District Court, basing its decision largely on the structural elements of Title XIX, reached the opposite conclusion from that we reach. The District Court in large part grounded its analysis on 42 U.S.C. §§ 1396 and 1396c, and concluded that those provisions do not contain

> the rights-creating language required by *Gonzaga University*. *Sabree* [*v. Houston*], 245 F. Supp. 2d [653,] 659 [(E.D. Pa. 2003)]. Undoubtedly, the Court was correct in that regard.

Sabree, 367 F.3d at 191.

After considering the trial court's analysis, the appellate court rejected its conclusions, but not without acknowledging some uncertainty:

> But while the District Court correctly recognized that sections 1396 and 1396c do not contain the "sort of explicit, rights-creating language found in Title VI," it did not consider the existence of rights-creating language in other relevant provisions of Title XIX. *Sabree*, 245 F. Supp. 2d at 659. The language used by Congress in 42 U.S.C. §§ 1396a(a)(10), 1396d(a)(15), and 1396a(a)(8), however, explicitly creates rights. Admittedly, plumbing for congressional intent by balancing the specific language of a few discrete provisions of Title XIX against the larger structural elements of the statute is a difficult task. Nonetheless, it is evident, at least to us, that the statutory language, despite countervailing structural elements of the statute, unambiguously confers rights which plaintiffs can enforce.

Id. at 192.

In contrast, the Eleventh Circuit has taken a more restrictive view of what is necessary to establish federal rights enforceable under § 1983 post-*Gonzaga*. In *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003), the court considered provisions of Title IV-E pertaining to the States' case review systems for foster children. Although the provisions at issue were directed at benefiting the child and contained mandatory language for the State ("the State shall file a petition"), the court determined they did not have the rights-creating language required by *Gonzaga*. *Id.* at 1272. Instead, the court held that "[t]he references to individual children and their placements are made in the context of describing what the procedure is supposed to ensure, and such provisions 'cannot make out the requisite congressional intent to confer individual rights enforceable by § 1983.'" *Id.* (quoting *Gonzaga*, 536 U.S. at 289).

The Eleventh Circuit reached a similar conclusion in reviewing the requirements in 42 U.S.C. § 657 related to distribution of child support payments. *Arrington v. Helms*, 438 F.3d 1336 (11th Cir. 2006). Taking *Gonzaga* to raise the bar for plaintiffs in order to establish enforceable rights, the court concluded that § 657 was "at best ambiguous. And as *Gonzaga* made clear, 'ambiguity precludes enforceable rights.'" *Id.* at 23 (quoting *31 Foster Children*, 329 F.3d at 1270).

In this case, the trial court relied on the Eleventh Circuit's reading of *Gonzaga* in *31 Foster Children* and concluded that the plaintiffs in this case had failed to reach the bar necessary to establish enforceable rights. At best, the provisions of the Adoption Assistance Program

that require an individualized determination of the payments, which must then be quantified in a binding agreement between the state agency and the adoptive parents provides only "some indication" that Congress may have intended to create enforceable rights and that is not enough. Moreover, the trial court found the requirement of binding agreements to be "[a] strong indicator that Congress did not intend to create a new federal right to specific adoption assistance payments." App. 11. The appellate court, however, viewed this same requirement as evidence of a clear Congressional intent to create an enforceable federal right.

Although this case involves specific provisions of the Adoption Assistance Program, the questions it presents arise in a number of federal-state cooperative programs, including Medicaid. This Court should grant certiorari to clarify how courts are to evaluate specific provisions which arguably contain rights-creating language within the larger context of a spending-clause program designed to regulate how States carry out a federal benefit program. The Fifth Circuit has cautioned that a provision aimed at individuals should not be deemed unenforceable simply because it is a requirement of a state plan under these programs, *S.D. v. Hood*, 391 F.3d 581, 603 (5th Cir. 2004), but neither should a state-plan requirement, described in terms of the individual Congress intended to benefit from the program, be sufficient to establish that Congress also intended to create a federally enforceable right. This case will enable this Court to further clarify how to determine the existence of a federally enforceable right under these federal-state programs.

II. This Court should review the Ninth Circuit's conclusion that the congressional mandate that payments be quantified in a binding adoption-assistance agreement does not reflect the intent to establish an enforcement mechanism that precludes a remedy under § 1983 and that the burden rests with the State to show that Congress intended the alternative remedy to supplant a remedy under § 1983.

In *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), this Court held that, ordinarily, Congress's provision of one remedy for the violation of a federal statute implies that Congress intended to supplant the remedy under § 1983. This Court explained that Congress's "provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." *Id.*, 544 U.S. at 121, 125 S. Ct. at 1458. Especially where the remedy provided in the statute at issue is more restrictive than § 1983, such as where it does not include attorney fees for a prevailing plaintiff, there is an inference that Congress intended the remedy to be exclusive. *Id.* at 122-23.

In this case, the trial court viewed the requirement that the adoption-assistance payments be quantified in a binding agreement between the State agency and the adoptive parents as indicative of Congress's intent not to establish a right enforceable under § 1983. App. 11. The Ninth Circuit took a different approach. Not only did the court consider the agreement as evidence of Congress's intent to establish an enforceable right, but the court re-

jected the State's argument that the only remedy Congress intended for any individual right would be an action to enforce the rights under the agreement. App. 32-33. The court concluded that, "even if Plaintiffs were able to sue on their contracts to enforce their right to individualized payment determinations, 'the state-court remedy is hardly a reason to bar an action under § 1983, which was adopted to provide a federal remedy for the enforcement of federal right.'" *Id.*, quoting *Wright*, 479 U.S. at 429.

This Court's statement in *Wright* addressed a state-court remedy which was not provided by Congress. Rather, the lease requirement discussed there, which would give rise to a state-court remedy, was imposed only by a federal regulation. *See id.* at 440-41 (O'Connor, J., dissenting). In those circumstances, this Court did not hesitate to hold that the state-court remedy had no bearing on the analysis of Congress's intent to provide a remedy under § 1983. But the binding adoption-assistance agreement at issue in this case was established as a requirement by Congress itself. And this Court's discussion of alternative remedies in *Rancho Palos Verdes* calls into serious question the Ninth Circuit's refusal to consider the effect of a congressionally created state-court remedy in determining whether Congress intended to create a federal right enforceable under § 1983.

Moreover, the Ninth Circuit placed the burden on the State to establish that Congress expressly foreclosed a remedy under § 1983, or impliedly did so by creating a comprehensive enforcement scheme, incompatible with an action under § 1983. App. 30, quoting *Blessing*, 520

U.S. at 341. *Rancho Palos Verdes* suggests that the burden should, instead, be on the plaintiffs to show that Congress, in providing a specific remedy in the statutes, nevertheless intended that remedy to supplement rather than supplant a remedy under § 1983. As this Court stated, "[t]he provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." 544 U.S. at 121.

Because the evidence of Congress's implied intent often is difficult to read clearly, how the burden is allocated often will be determinative of the outcome. This case presents the Court with the opportunity to answer an important question of great significance to the States.

III. This Court should review the Ninth Circuit's construction of federal law, which disregarded a contrary interpretation by the federal agency in charge of enforcing that law.

Oregon argued below that the across-the-board percentage reduction of benefits was authorized by the federal statutory requirement that adoption-assistance payments not exceed the foster-care maintenance payments that would have been paid instead but for the adoption. 42 U.S.C. § 675(a)(3); App. 44-45. In support of this argument, the State relied on a Question and Answer from the federal Department of Health and Human Services' Child Welfare Policy Manual (set out at App. 12-13) and a letter from the Assistant Secretary of the United States Department of Health and Human Services stating:

> Federal policy does permit a state to reduce the adoption assistance payment[s] when

> there is an across-the-board reduction in foster care payment[s]. Accordingly, because Oregon has an across-the-board reduction in foster care payments, its action to reduce adoption assistance payments by the same amount is in accord with federal policy.

Second Affidavit of David E. Leith, Ex. 1, p. 1.

The trial court found this argument persuasive, App. 13-15, but the Ninth Circuit rejected the argument without discussion of the manual or the letter. Instead, the appellate court ruled that the across-the-board percentage reduction was not authorized under the foster-care cap.

In this case, there is no challenge to the legality of Oregon's across-the-board reduction of foster-care payments by 7.5 percent. The question is whether that reduction authorized Oregon to do a similar reduction in adoption-assistance payments in order to ensure compliance with the foster-care cap. Oregon's view that the reduction in adoption-assistance payments challenged in this case was a permissible method to ensure compliance with the foster-care cap finds support in HHS's manual, which states, in pertinent part:

> [A]doption assistance payments may not be automatically adjusted without the agreement of the adoptive parents for any reason other than an across-the-board reduction or increase in foster care maintenance rates.

See App. 12-13. The letter from HHS confirmed Oregon's reading of the manual.

The Ninth Circuit nevertheless rejected the view that a state may implement the foster-care cap through an across-the-board percentage reduction in adoption-assistance payments. The court did not discuss the position of HHS and did not address the deference usually accorded to such an agency interpretation. *See Skidmore v. Swift & Co.*, 323 U.S. 124 (1944). Although Oregon had explained that requiring individual determinations to ensure compliance with the foster-care cap would effectively hamstring a participating State, precluding reductions under both the adoption-assistance program and the foster-care program, the Ninth Circuit dismissed the State's concern, characterizing it as bearing only on "the convenience of the State." *Id.* at n. 9.

The Ninth Circuit's construction of the federal statutory obligations warrants further review. The court's holding significantly limits a state's ability to make cost-effective reductions in foster-care benefits because they will necessitate individualized review of all adoption-assistance agreements to ensure that the foster-care cap is met. Rather than direct the federal money to the benefits Congress intended, the state will be forced to direct a significant amount to providing this review. Thus the proper construction of the statutory requirements is also an important federal question that this Court should address.

CONCLUSION

For all of the reasons set forth above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS
Solicitor General
Counsel for Petitioners

April 27, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ASW, Individually and as Guardian ad litem for MSW and OSW, minors; SSW; ALC, Individually and Guardian ad litem for SRC and JSC, minors; JKC; JSS, Individually and as-Guardian ad litem for BKS, a minor; SDS; NBW, Individually and as Guardian ad litem for MAW; MRW, and DLW, minors; and CEW,

Plaintiffs,

vs.

JEAN I. THORNE, in her official capacity as Director, Oregon Department of Human Services; and STATE OF OREGON by and through its DEPARTMENT OF HUMAN SERVICES,

Defendants.

No. 03-6038-M
OPINION AND ORDER

Arthur C. Johnson
Derek C. Johnson
Johnson, Clifton, Larson & Corson, P.C.

975 Oak Street, Suite 1050
Eugene, Oregon 97401-3176

Maria F. Ramiu
Alice Bussiere
Youth Law Center
417 Montgomery Street, Suite 900
San Francisco, California 97104
Attorneys for Plaintiffs

Hardy Myers
Attorney General
David E. Leith
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, Oregon 97301-4096
Attorneys for Defendants

AIKEN, Judge:

This lawsuit is brought as a class-action by plaintiffs challenging defendant Oregon Department of Human Services (DHS) actions to reduce and terminate Adoption Assistance Program (AAP) payments for children with special needs and deny recipients the right to an administrative hearing to contest defendants' actions. Pursuant to Fed. R. Civ. P. 12(b), defendants have moved to dismiss this action asserting that plaintiffs have failed to state a claim as a matter of law. The court reviewed the briefing and heard oral argument on October 7, 2003. Defendants' motion is granted and this case is dismissed.

BACKGROUND

The named plaintiffs are adopted foster children and their adoptive parents who have adoption assistance agreements with the defendants and who have been subjected to defendants' actions implementing a 7.5% reduction in their adoption assistance payments. Specifically, plaintiff adoptive parents entered into AAP agreements with DHS for their respective "special needs" adopted children. In December 2002, DHS sent a form letter to all families receiving Adoption Assistance from the State of Oregon informing them that beginning February 1, 2003, due to State budgetary reasons, a 7.5% reduction would be made to the contracted amount in their assistance agreements. The letter informed adoptive parents that since their assistance agreements did not allow the State to unilaterally reduce the payments for budgetary reasons, DHS would require adoptive families to agree to the reduction within ten days of receipt of the letter or have their agreements terminated effective January 31, **2003**. The letter included a proposed change to the Oregon Administrative Rules to establish a process by which DHS would implement budget reductions for AAP. DHS also informed adoptive families that they would not be afforded a hearing to contest the reductions. DHS makes AAP payments to more than 7,000 children. Thus, DHS mailed the form letter to several thousand adoptive families.

Generally, the AAP agreements are titled, "Adoption Assistance Agreements for Title IV-E Eligible Children," and provide that the agreement is effective from the specified effective date through the date of each child's

eighteenth birthday. Each agreement provides that it will terminate automatically when the child turns 18 years old; that it may be modified, amended, rescinded or cancelled at any time by mutual agreement of the parties; that DHS may terminate the agreement after written notice if the adoptive parents are no longer responsible for the child or are no longer providing for the child's support or in the event of legal or legislative action requiring discontinuance of Adoption Assistance; and that parents have the right to contest any decision to change, reduce or terminate Adoption Assistance in accordance with the Oregon Administrative Rules.

STANDARDS

Under Fed. R. Civ. P. 12(b)(6), dismissal for failure to state a claim is proper only when it appears to a certainty that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984), cert. denied, 470 U.S. 1052 (1985). For the purpose of the motion to dismiss, the complaint is liberally construed in favor of the plaintiffs, and its allegations are taken as true. Rosen v. Walters, 719 F.2d 1422, 1424 (9th Cir. 1983).

DISCUSSION

The Title IV-E Adoption Assistance Program is a mandated federal entitlement program that confers individualized benefits to adoptive parents and their adopted foster children. 42 U.S.C. § 670 et seq. The program provides funds to States to assist in providing ongoing financial and medical assistance for adopted foster children, who by definition have special needs. The purpose

is to give families an incentive to adopt foster children into permanent and stable homes by assisting financially with the long range difficulties presented by raising children who have suffered early neglect, abuse and disruption. 42 U.S.C. §§ 670 and 670(a)(3). The State of Oregon provides the majority of its AAP payments under Title IV-E with matching federal funds. Adopted foster children who are not Title IV-E eligible receive AAP payments from State only funds.

Plaintiffs assert that AAP differs from other public benefit programs in several ways. First, the incentive under AAP is created through binding adoption assistance agreements that federal law requires the States to enter into with the adoptive parents. 42 U.S.C. § 673(a)(1). Second, each agreement includes an individually negotiated monthly amount to be paid to the adoptive family until the child reaches the age of majority. The payment amount must be determined on the basis of the individual needs of the child and circumstances of the family, but the payment cannot exceed the amount that would have been paid for the child in a foster family home. 42 U.S.C. § 673(a)(3). Finally, with limited exception, the payment amount may only be adjusted if based on a change in individualized and particular circumstances and if the parents concur. Id.

Plaintiffs argue that defendants' action in unilaterally reducing the assistance amount and thereby altering the negotiated contracts, violates plaintiffs' federal rights under the AAP provisions of Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679b, and deprive plaintiffs of property to which they are entitled under state and

federal law in violation of their due process rights under the United States Constitution.

Defendants assert two reasons for their actions: (1) the 7.5% across-the-board reduction in AAP payments was necessary to ensure compliance with the mandate of 42 U.S.C. § 673(a)(3) that adoption assistance payments not exceed what would have been paid if the child had been in a foster family home; and (2) Oregon is currently facing a budget crisis.

The AAP provisions of Title IV-E prohibit a State from unilaterally adjusting or terminating AAP payments except under very narrow circumstances: (1) the AAP payment exceeds the amount the child would receive if the child had remained in a foster family home; (2) the child has attained the age of eighteen (or twenty-one if continued assistance is warranted due to mental or physical handicap); or (3) the parents are no longer legally responsible for or supporting the child. 42 U.S.C. §§ 673(a)(3), (4). Outside of these specific exceptions, adjustments in AAP amounts may only be made upon a change in the circumstances of the adopting parents or needs of the child and also require the parents' concurrence. 42 U.S.C. § 673(a)(3). Moreover, the federal statute makes clear that the written adoption assistance agreements are binding. 42 U.S.C. § 675(3).

Plaintiffs allege that the defendants violated the AAP provisions of Title IV-E by failing to establish Adoption Assistance payments by agreement as required by 42 U.S.C. §§ 673(a)(1)(A), 673(a)(3), by unilaterally reducing payments for reasons other than those specified in 42 U.S.C. §§ 673(a)(3), (a)(4), and by imposing additional

requirements on the determination of AAP payments that are not authorized by 42 U.S.C. § 673(a)(3). Plaintiffs argue that these statutory provisions unambiguously confer upon the adoptive families federal rights to concrete, individualized AAP benefits.

The court here is presented with a very narrow issue. That is, do plaintiffs' have a viable § 1983 cause of action, or a 'federal remedy,' based on defendants' actions. This court has not been asked to, nor will it, examine or comment upon the wisdom of a state's decision to unilaterally reduce adoption assistance payments from families and children who relied on the contracted payments as an incentive to enter into these special needs adoptions.

Turning to the issue at hand, the court notes that both parties rely on the Supreme Court's recent discussion of the standards for inferring whether a federal right is enforceable pursuant to § 1983 in Gonzaga Univ. v. Doe, 536 U.S. 273 (2002). There, the Court held that the confidentiality of student records provisions of the Family Educational Rights Privacy Act (FERPA) did not create enforceable rights. The Court found that the statutory provision: (1) lacked "rights-creating" language as it spoke "only to the Secretary of Education," directing him to withhold funds if the prohibited practice exists; (2) focused on the aggregate rather than the individual through language phrased in terms of "institutional policy and practice, not about individual instances of disclosure;" (3) imposed no absolute duty on recipient institutions since termination of funding could be avoided by substantial compliance with the statute; and (4) provided a federal administrative process to review, investigate and

adjudicate complaints from families alleging violations of FERPA. Id. at 288-90.

Plaintiffs assert that under the analysis in Gonzaga, the AAP provisions in 42 U.S.C. § 673 meet the test for conferring an enforceable right. Plaintiffs assert that the AAP statute is phrased in "rights-creating" language that is focused on protecting the individual rather than an aggregate focus on the general policies of the State agency. As evidence that Congress intended to "focus on the individual," plaintiffs point to the fact that Congress placed the AAP program requirements in § 673 separate and apart from the State plan requirements contained in § 671. Section 673(a)(1) requires that each State with an approved plan enter into adoption assistance agreements (as defined in § 675) with the adoptive parents of children with special needs. Section 675(3) defines adoption assistance agreements as a written agreement binding on the State agency, adoptive parents and any other relevant agencies that, at a minimum, specifies the nature and amount of any payments, services, and assistance to be provided. Section 673(a)(3) specifies the requirements for determining payments:

> The amount of the payments to be made in any case . . . shall be determined through agreement between the adoptive parents and the State or local agency administering the program under this section, which shall take into consideration the circumstances of the adopting parents and the needs of the child being adopted, and may be readjusted periodically, with the concurrence of the

> adopting parents (which may be specified in the adoption assistance agreement), depending upon changes in such circumstances. However, in no case may the amount of the adoption assistance payment made under clause (ii) of paragraph (1)(B) exceed the foster care maintenance payment which would have been paid during the period if the child with respect to whom the adoption assistance payment is made had been in a foster family home.

Section 673(a)(4) provides that no payments may be made to parents once the child reaches the age of majority, or if the parents are no longer legally responsible for the support of the child, or are no longer supporting the child. The statute also places a specific requirement on the parents to keep the agency notified of any circumstances that would make them ineligible for AAP payments. 42 U.S.C. § 673(a)(1)(A). Finally, the statute does not provide plaintiffs with any federal administrative review process to adjudicate their claims.

Plaintiffs assert that Gonzaga confirms that the type of individualized, concrete monetary entitlements provided by the federal AAP statute are enforceable federal rights. The Court further noted that the keys to the inquiry in each case were that Congress spoke in terms that "could not be clearer," conferred specific and definite entitlements, and left no doubt of its intent for private enforcement because neither statute provided the beneficiaries with a sufficient federal administrative means of

enforcing the federal requirements against the States that failed to comply.

Finally, plaintiffs contend that the AAP statute is couched in rights-creating language that is focused on the individual adoptive parents and adopted child rather than the general policies and duties of the agency with respect to the federal agency.

The question here is whether the statute at issue demonstrates Congress' intent that "it could not be clearer," in conferring "specific and definite entitlements," and thus," leaving no doubt of its intent for private enforcement." The issue specifically is whether these statutory provisions unambiguously confer upon the adoptive families federal rights to concrete, individualized AAP benefits. See Gonzaga, 536 U.S. at 283-84. The answer to this question must be no. On May 8, 2003, in a case directly on point, the Eleventh Circuit Court of Appeals considered the application of Gonzaga to an alleged violation of Title IV-E. See 31 Foster Children v. Bush, 329 F.3d 1255 (11th Cir. 2003). The court first noted that in order to have a "viable cause of action under § 1983 based on the violation of a federal statute, . . . a plaintiff must establish that the statute allegedly violated gives the plaintiff enforceable rights." Id. at 1268. The court explained:

> We emphasize, as did the Court in Gonzaga, that in cases brought to enforce legislation enacted pursuant to Congress' spending power, such as the Adoption Act, Congress must 'speak with a clear voice' and manifest an 'unambiguous' intent to confer

> individual rights before federal funding provisions will be read to provide a basis for private enforcement.

Id.

The Eleventh Circuit concluded that Gonzaga requires a court to look to the text and structure of a statute to determine whether it unambiguously confers an enforceable right. If the text and structure provide no indication that Congress intended to create a new federal right, there is no basis for a § 1983 action. Id., 329 F.3d at 1270. Further, if that analysis provides only "some indication that Congress may have intended to create individual rights, and some indication that it may not have," then "Congress has not spoken with the requisite 'clear voice.'" Id. "Ambiguity precludes enforceable rights." Id.

A strong indicator that Congress did not intend to create a new federal right to specific adoption assistance payments is that Congress provided that adoption assistance agreements must themselves be binding. Thus, Congress provided a specific mechanism for private enforcement through direct enforcement of the binding agreements. In these circumstances, there would be no need for a separate federal right enforceable under § 1983. The provision for private enforcement of the adoption assistance agreements defeats plaintiffs' claim that Congress unambiguously intended to create a federal right to the payment amounts stated in the agreements.

I am also mindful that only twice since Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981), has the Supreme Court held that spending legislation has

given rise to rights enforceable via § 1983. See Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990) (holding that health care providers could, pursuant to § 1983, enforce the Boren Amendment to the Medicaid Act); and Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987) (holding that the Brooke Amendment to the Housing Act provided a cause of action under § 1983).

The defendants also rely on a Question and Answer from the federal Department of Health and Human Services' Child Welfare Policy Manual to support their contention that a State agency may make an across-the-board reduction in AAP payments. The Question and Answer from the Manual are as follows:

> Question: A State agency wants to include a list of specific circumstances in the adoption assistance agreement that would lead to an automatic reduction in the adoption subsidy amount if the State determines the circumstances occur. These circumstances could include an improvement in the condition of the child or the financial circumstances of the parent, the child's eligibility for other forms of assistance, or the child's re-entry into foster care. Is this practice allowable?
>
> Answer: No. Once a child is adopted and determined to be eligible for title IV-E adoptive assistance, the adoption assistance payments may not be automatically adjusted without the agreement of the adop-

> tive parents for any reason other than an across-the-board reduction or increase in foster care maintenance rates. The statute requires that the adoption assistance payment "take into consideration the circumstances of the adopting parents and the needs of the child being adopted, and may be readjusted periodically, with the concurrence of the adopting parents depending upon changes in such circumstances (section 473(a)(3) of the Social Security Act)." A State would not be considering the unique circumstances of the child and parents by automatically adjusting the subsidy.
>
> The State agency may describe in the agreement specific circumstances such as those articulated in the question that may warrant a future re-negotiation and adjustment of the payments. Agreements that are not negotiated to the specific needs of the adoptive child and the circumstances of the family, however, are not permissible.

Department of Health and Human Resources, Children's Bureau, Child Welfare Policy Manual, Section 8.24.4, question 2 (emphasis added).

Defendants assert that is exactly the situation at bar. The plaintiffs argue that the only interpretation of the Question and Answer that is consistent with the statute is that the agency may place in the adoption assistance agreement a provision that the agency may reduce the AAP payment without the concurrence of the parent if

foster care rates are reduced and the AAP payment amount exceeds the foster care rate. Plaintiffs assert that any reduction of the payment in this circumstance would have to be determined individually based on whether, and by how much, the AAP payment exceeded the foster care rate.

The defendants counter that their across-the-board reduction in AAP was authorized by the language in the statute stating that, "in no case may adoption assistance payments exceed the foster care maintenance payments that would have been paid if the child had been in a foster home." 42 U.S.C. § 675(a)(3). Defendants acknowledge that while Title IV-E provides an express prohibition on such excess payments, it fails to provide any further guidance on how a participating state may assure compliance with the prohibition. Defendants contend that plaintiffs' suggestion that the State must provide individual hearings to each beneficiary under the program to determine that amount that would have been paid for each child in a foster family home would be so cumbersome and expensive that any savings gained by the reduction would be offset by the expense of processing each adoption assistance beneficiary individually.

Defendants assert that another acceptable method that ensures compliance with § 673(a)(3) is to use the method that Oregon did here – to apply a similar across-the-board reduction to adoption assistance, where an across-the-board reduction is also applied to foster care payments.

In further support of their position, defendants secured a letter from the Assistant Secretary of the United

States Department of Health and Human Services that states in part, "Federal policy does permit a state to reduce the adoption assistance payment[s] when there is an across-the-board reduction in foster care payment[s]. Accordingly, because Oregon has an across-the-board reduction in foster care payments, its action to reduce adoption assistance payments by the same amount is in accord with federal policy." Second Affidavit of David E. Leith, Ex. 1, p. 1.

In conclusion, I am persuaded by the Eleventh Circuit's application of Gonzaga in 31 Foster Children v. Bush, supra, where the court found that the very statute at issue here did not unambiguously confer an enforceable right under § 1983. Further, using Gonzaga's analysis, the fact that Congress did not intend to create a new federal right to specific adoption assistance payments is evidenced by the fact that Congress provided that adoption assistance agreements must themselves be binding, and thus, Congress provided a specific mechanism for private enforcement through direct enforcement of the binding agreements. I find further support for defendants' action from the language in the statute itself stating that, "in no case may adoption assistance payments exceed the foster care maintenance payments that would have been paid if the child had been in an foster home." Title VI-E provides an express prohibition on such excess payments. Finally, I note defendants' letter from the Assistant Secretary of the U.S. Department of Health and Human Services expressly authorizing Oregon's across-the-board reduction to adoption assistance payments as in accord with federal policy.

CONCLUSION

Defendants' motion to dismiss (doc. 30) is granted and this case is dismissed.

IT IS SO ORDERED.

Dated this 22 day of October 2003.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ASW, Individually and as Guardian ad litem for MSW and OSW, minors; SSW; ALC, Individually and as Guardian ad litem for SRC and JSC, minors; JKC; JSS, Individually and as Guardian ad litem for BKS, a minor; SDS; CEW,

Plaintiffs-Appellants,

v.

STATE OF OREGON, by and through its DEPARTMENT OF HUMAN SERVICES; JEAN I. THORNE, in her official capacity as Director, Oregon Department of Human Services,

Defendants-Appellees.

No. 03-35950
D.C. No. CV-03-06038-ALA
OPINION

Appeal from the United States District Court for the District of Oregon Ann L. Aiken, District Judge, Presiding

Argued and Submitted May 2, 2005—Portland, Oregon

Filed September 13, 2005

Before: Procter Hug, Jr., A. Wallace Tashima, and Richard R. Clifton, Circuit Judges.

Opinion by Judge Clifton

COUNSEL

Maria F. Ramiu (argued) and Alice Bussiere, Youth Law Center, San Francisco, California, and Arthur C. Johnson and Dennis M. Gerl, Johnson, Clifton, Larson & Corson, PC, Eugene, Oregon, for the plaintiffs-appellants.

Hardy Myers, Attorney General, Mary Williams, Solicitor General and David E. Leith, Assistant Attorney General (argued), State of Oregon, Salem, Oregon, for the defendants-appellees.

OPINION

CLIFTON, Circuit Judge:

Plaintiffs are parents of adopted children with special needs[1] who receive adoption assistance payments from

[1] Children with special needs include, *inter alia*, a child who has a documented medical, physical, mental, or emotional condition, a history of abuse, neglect or other identified predisposing factor that places the child at risk for future problems and need for treatment, is a member of a sibling group which will be placed together and is difficult to place because there are three or more children, is a member of an ethnic/racial/cultural minority, or is eight years of age or older. Or. Admin. R. 413-130-0020.

the State of Oregon. They appeal the district court's dismissal of their class action lawsuit under 42 U.S.C. § 1983, which alleged several violations of their statutory rights under the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620 *et seq*. (the "Act"), as well as their right to due process prior to reduction of their adoption assistance payments. Defendants, the State of Oregon and the Director of the Oregon Department of Human Services (together, "Oregon" or the "State"), moved to dismiss the action asserting that Plaintiffs failed to state a claim as a matter of law. The district court granted the State's motion. Because we conclude 42 U.S.C. §§ 671(a)(12) and 673(a)(3) create federal rights enforceable through a § 1983 cause of action, we reverse.

I. BACKGROUND

The Adoption Assistance and Child Welfare Act of 1980 established a program of federal payments to participating states to provide funds for financial assistance to aid families adopting special needs children out of foster care. 42 U.S.C. §§ 670-76. The State of Oregon accepts funds from the federal government under this program and thus obligates itself to abide by the federal requirements.[2] Accordingly, Oregon must enter into a binding written agreement with each pair of adoptive parents. 42 U.S.C. §§ 673(a)(1) & 675(3). The amount each family receives in adoption assistance payments "shall take into consideration the circumstances of the adopting par-

[2] Oregon's Adoption Assistance Program is codified at Or. Admin. R. 413-130-0000 *et seq*.

ents and the needs of the child being adopted, and may be readjusted periodically, with the concurrence of the parents" if the circumstances of the parents or the needs of the child change. § 673(a)(3). Additionally, the federal statute provides that each grant recipient is entitled to a fair hearing before the applicable state agency to challenge any claim for benefits that "is denied or is not acted upon with reasonable promptness." § 671(a)(12).

The State sent a form letter in December 2002 to all families in Oregon receiving adoption assistance payments to inform them that because of budgetary shortfalls their payments would be reduced 7.5%. The form letter asked the families to agree to the reduction or risk having their adoption assistance payments terminated. The families were also informed that they would not be entitled to individual hearings to challenge the reductions. Although the families did not agree to the reductions, their adoption assistance payments were not terminated. The payments were, however, uniformly reduced by 7.5% beginning in February 2003. The State selected 7.5% as the amount of the reduction to coincide with its decision to reduce foster care maintenance payments by that same amount, also effective February 2003.

Plaintiffs brought a 42 U.S.C. § 1983 class action against the State, asserting, *inter alia*, that they have a federal right to have the amount of their adoption assistance payments based on an individualized assessment of their special needs and circumstances, as well as a federal right to have a fair hearing before an administrative agency to contest reductions in their payments. Plaintiffs claimed these rights were violated by the State's unilat-

eral action.[3] Plaintiffs sought a declaration of their rights and an injunction to prevent the State from uniformly and unilaterally reducing their adoption assistance payments and denying them the opportunity to challenge the reductions in a "contested case hearing." The district court concluded that the rights Plaintiffs claimed the State violated were not enforceable through a § 1983 cause of action and granted the State's motion to dismiss. Plaintiffs timely appealed.

II. MOOTNESS

Oregon argues that Plaintiffs' claims are moot because a state administrative rule, Or. Admin. R. 413-130-0127, which became effective November 1, 2003, increased monthly adoption assistance payments by 8.108%, thus making the amount of the monthly payments slightly larger than they had been before the reduction nine months earlier. Mootness is a question of law that we review de novo. *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1133 (9th Cir. 2004). We conclude the case is not moot because, although the increase authorized by rule 413-130-0127 exceeded the 7.5% reduction, it did nothing to alter the provisions of rule 413-130-0125 challenged here.

[1] "A case loses its quality as a 'present, live controversy' and becomes moot when there can be no effective relief." *San Lazaro Ass'n. v. Connell*, 286 F.3d 1088, 1095 (9th Cir. 2002). Because Plaintiffs brought suit under *Ex parte Young*, 209 U.S. 123 (1908), they cannot

[3] Plaintiffs' complaint also included a breach of contract claim. That cause of action is not before us.

seek monetary redress for a past harm and thus their case is moot unless they are in a position to benefit from prospective relief. *See Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002); *Taylor v. Westly*, 402 F.3d 924, 929-930 (9th Cir. 2005) (explaining that the Eleventh Amendment generally "shields state governments from money judgments in federal courts, and from declaratory judgments against the state governments that would have the practical effect of requiring the state treasury to pay money to claimants").[4] The State argues that because there is no ongoing violation of federal law, there is no valid form of relief Plaintiffs can be awarded. The cases Oregon relies on, however, are inapposite. *See, e.g.*, *Green*, 474 U.S. at 73 (holding that plaintiff's claim was moot where Congress amended the relevant statute clarifying, and thereby resolving, the controversy that had arisen due to ambiguities in the original statute); *In re Investigation Pursuant to the Comprehensive Envtl. Response*, 820 F.2d 308, 311-12 (9th Cir. 1987) (dismissing the case because Congress enacted substantial amendments to the relevant statutory

[4] We do not believe that Plaintiffs' request for a declaration that Or. Admin. R. 413-130-0125 violates Title IV-E of the Social Security Act would effect an "'end run' around . . . *Edelman v. Jordan*, 415 U.S. 651 (1974)." *Green v. Mansour*, 474 U.S. 64, 73 (1985). The requested declaratory relief addresses the methodology for determining adoption assistance payments under 42 U.S.C. § 673(a) and does not resolve Oregon's liability for any withheld funds. As the State concedes, should Plaintiffs seek monetary damages, they would need to bring individual contract claims against the State to enforce the terms of their binding agreements.

provisions while the case was on appeal, the court reasoned that "[w]here new legislation represents a complete substitution for the law as it existed . . . arguments based upon the superseded part are moot"). By contrast, Or. Admin. R. 413-130-0127 did not repeal, substitute, or even amend the challenged administrative rule in any way. Accordingly, its adoption did not eliminate Plaintiffs' claim for relief.

[2] Moreover, we are "particularly cautious when a case has become moot because the defendant has voluntarily ceased to pursue the challenged course of action." *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1194 (9th Cir. 2000). Here, not only was the increase in benefits voluntary, Oregon explicitly left the mechanism in place whereby it can uniformly reduce adoption assistance payments at any time in the future. The posture of this case therefore contrasts sharply with *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994), where the relevant statute had been repealed and the plaintiffs simply feared the possibility that the state would continue to discriminate under the new statute. It is not a mere "theoretical possibility" that Oregon could adopt an administrative rule providing for uniform reductions in adoption payments. Oregon already has such a rule, which it purposely chose not to repeal. Indeed, based on its arguments before this Court, it is probable that when faced with a similar budgetary crisis, Oregon would again consider uniformly and unilaterally reducing adoption assistance payments. In light of that very real possibility, Oregon has not met its "heavy burden of persuading" the court that "subsequent events make it absolutely clear that the allegedly wrongful behavior could

not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-90 (2000).

[3] Because Plaintiffs' challenge to Or. Admin. R. 413-130-0125 is not rendered moot by the adoption of Or. Admin. R. 413-130-0127, we proceed to a discussion on the merits.

III. MERITS

We review de novo the district court's decision to grant the State's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Decker v. Advantage Fund Ltd.*, 362 F.3d 593, 595-596 (9th Cir. 2004). We accept as true all well pleaded facts in the complaint and construe them in the light most favorable to the nonmoving party. *See Decker*, 362 F.3d at 595; *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th Cir. 2002).

[4] Plaintiffs correctly point out that legislation enacted pursuant to Congress's spending power can give rise to enforceable rights under 42 U.S.C. § 1983. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 280-81 (2002) (explaining why the two cases in which it had previously found enforceable rights, *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987) and *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) were correctly decided).[5] To sustain a § 1983 cause of action, Plaintiffs

[5] *See, e.g., Price v. City of Stockton*, 390 F.3d 1105, 1114 (9th Cir. 2004) (42 U.S.C. § 5304(k) provides individuals displaced by federally funded redevelopment activities with an enforceable right to benefits); *Rabin v. Wilson-Coker*, 362

must demonstrate that they are seeking redress for the violation of a federal right, not merely violation of federal law. *Id*. at 283. In other words, Plaintiffs must establish either that they have a federal right under 42 U.S.C. § 673(a)(3) to individualized adoption assistance payment determinations, or that under § 671(a)(12) they have a federal right to a fair hearing before the State agency to challenge reductions in their adoption assistance payments.

[5] The Supreme Court has identified three factors, which if present, establish a rebuttable presumption of an enforceable federal right.[6] *Blessing v. Freestone*, 520 U.S. 329, 341 (1997). A federal statutory provision creates an individual right if (1) Congress intended the provision in question to benefit the plaintiff;[7] (2) the plaintiff

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F.3d 190, 201-02 (2d Cir. 2004) (42 U.S.C. § 1396r-6 creates an enforceable right to transitional medical assistance benefits); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 605-06 (5th Cir. 2004) (under 42 U.S.C. § 1396a(a)(10)(A) of the Medicaid Act plaintiff had an enforceable right to medically necessary incontinence supplies).

[6] In *Gonzaga University*, the Court acknowledged the continuing relevance of the *Blessing* test to "guide judicial inquiry into whether or not a statute confers a right." 536 U.S. at 282. *See Price*, 390 F.3d at 1109 n. 4 (concluding that "the *Blessing* test still applies to claims asserted under Section 1983").

[7] Clarifying the first prong of the *Blessing* analysis, in *Gonzaga University* the Court explained that if Congress intends to confer individual rights on a class of beneficiaries, it must do so unambiguously through "explicit right- or duty-

demonstrates that the right assertedly protected by statute is not so "vague and amorphous" that its enforcement would strain judicial competence; and (3) the statute unambiguously imposes a binding obligation on the state. *Id.*

A. Statutory Right to Individualized Payment Determination

Our initial inquiry is whether the text and structure of the Act contains the requisite "rights-creating" language that evinces a congressional intent to confer an entitlement to individualized payment determinations. *Price*, 390 F.3d at 1110. We conclude that it does.

[6] Section 671 requires Oregon to have a plan that mandates that adoption assistance will be provided in accordance with § 673. Section 673(a)(3) requires that the amount of adoption assistance payments be determined "through agreement between the adoptive parents and the State . . . which . . . take[s] into consideration the circumstances of the adopting parents and the needs of the child being adopted." Furthermore, the amount of the payment may only be readjusted "with the concurrence of the adopting parents, depending upon changes" in the circumstances of the adopting parents and the needs of the child.[8] This language evinces a clear intent to create a

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creating language" that is "phrased in terms of the person benefited." 536 U.S. at 283-84, 284 n. 3.

[8] This assumes that the parents continue to qualify to participate in the adoption assistance program. Additionally, Oregon is correct that the amount of the adoption assistance payment is limited under § 673(a)(3) in that it cannot "exceed

federal right. *See Price*, 390 F.3d at 1111. The statutory text unambiguously requires the State to engage in an individualized process with each family that takes into account their unique requirements in determining the amount of their adoption assistance payments throughout the duration of their participation in the program.[9] Just as "Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 create individual rights because those statutes are phrased with an *unmistakable focus* on the benefitted class," *Gonzaga Univ.*,

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the foster care maintenance payment which would have been paid during the period if the child with respect to whom the adoption assistance payment was made had been in a foster family home." It is the methodology of calculating the payments, however, not the particular amount of the payment, that Plaintiffs challenge here. Furthermore, Plaintiffs contend, and the State does not dispute, that at no time did their adoption assistance payments exceed the applicable foster care maintenance payments, even after the reduction in foster care payments made by the State in February 2003. Accordingly, the limiting language contained in § 673(a)(3) is not applicable.

[9] Oregon's argument that it would be economically inefficient to engage in individualized determinations for recipients of adoption assistance payments whenever it lowered its foster care maintenance payments is irrelevant. Unlike foster care maintenance payments, codified in a standardized rate schedule, § 673(a)(3) explicitly creates a right to individualized payment determinations for adoption assistance payments. That right cannot be abrogated for the convenience of the State.

536 U.S. at 284,[10] these particular statutory provisions are unambiguously framed in terms of the specific individuals benefitted and contain explicit duty creating language. Thus, this case is analogous to *Price v. City of Stockton*, where, in concluding that 42 U.S.C. § 5304 created enforceable individual rights, we emphasized that the statutory text "require[d] that benefits be provided to particular persons . . . evinc[ing] a clear intent to create a federal right." 390 F.3d at 1111. *See also Rabin*, 362 F.3d at 201 (the phrase "each family" suggests an individualized as opposed to an aggregate focus); *Hood*, 391 F.3d at 603 (a statute that provides medical assistance to all individuals who meet certain eligibility requirements "is precisely the sort of 'rights-creating' language identified in *Gonzaga*").

[7] The second and third prongs of the *Blessing* test are also satisfied. The right to individualized payment determinations that reflect the unique circumstances of the parents and the special needs of their adopted child is a concrete and objective right, the enforcement of which

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[10] In *Gonzaga University*, the Court emphasized that the Family Educational Rights and Privacy Act of 1974 did not speak in terms of the individual, but instead had an aggregate focus that was "not concerned with whether the needs of any particular person have been satisfied." 536 U.S. at 288. Unlike the statute in *Gonzaga University*, which was "two steps removed from the interests of the individual student" who had his personal records disclosed, *id.* at 287, the focus of the particular statutory provisions at issue here is on the individual parents and their right to individualized payment determinations.

does not "strain judicial competence." *Blessing*, 520 U.S. at 340-41. Furthermore, there is no ambiguity as to what Oregon was required to do under § 673(a)(3) as a condition of receiving federal funding under Title IV-E. *Cf. Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24-25 (1981) (holding that the phrases "appropriate treatment" and "least restrictive" were too vague to be enforceable as the State did not agree to any specific terms and conditions as a prerequisite to receiving federal funding); *Suter v. Artist M.*, 503 U.S. 347, 358, 363 (1992) (referencing *Pennhurst*, the Court explained that the phrase "reasonable efforts" standing alone does not provide specific information regarding "exactly what is required of States by the Act" and thus was not an enforceable individual right).

We are not persuaded by the fact that in *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003), the Eleventh Circuit reviewed a different provision of Title IV-E, namely § 671(a)(16), and concluded that it did not create the right the plaintiffs were seeking to enforce. We do not look at the Act in its entirety and determine at that level of generality whether it creates individual rights. *See Blessing*, 520 U.S. at 342-43.[11] Instead, we review

[11] In response to the Court's broad reasoning in *Suter*, Congress enacted 42 U.S.C. § 1320a-2, explicitly stating that simply because § 671(a)(15), the provision at issue in *Suter*, did not create an enforceable private right of action, does not mean that other provisions in Title IV-E did not create federal rights. Section 1320a-2 also overturned *Suter* to the extent the Court held that simply by virtue of being a plan requirement Congress foreclosed the possibility that the provision could

only the particular statutory provision at issue.[12]

Because Plaintiffs have asserted a federal right presumptively enforceable under § 1983, the burden falls on the State to rebut this presumption by showing that Congress has "specifically foreclosed a remedy under § 1983" either expressly "or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing*, 520 U.S. at 341. Section 673(a) does not explicitly foreclose a § 1983 action, therefore, the State must demonstrate that Congress created a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983. *See id.*

[8] We begin our analysis by recognizing that we do "not lightly conclude that Congress intended to preclude

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create an individually enforceable federal right. *See*, *e.g.*, *Price*, 390 F.3d at 1113 (holding that notwithstanding the fact that the provision at issue was a plan certification requirement, based on a review of the text and structure of the legislation, Congress also intended the provision to confer an enforceable entitlement to specific benefits).

[12] The plaintiffs in *31 Foster Children* brought suit under § 675 asserting they had a right to prompt placement with permanent families and to have their medical and educational backgrounds provided to their caregivers as part of the case review system. 329 F.3d at 1261. There is no mention in the statutory text, however, of a right to prompt placement or to have medical and education backgrounds provided to caregivers. By contrast, § 673(3) unambiguously creates a right to individualized payment determinations. Thus, the reasoning of *31 Foster Children* is inapposite.

reliance on § 1983 as a remedy for the deprivation of a federally secured right." *Price*, 390 F.3d at 1114 (quoting *Wilder*, 496 U.S. at 520). The Act provides that disputes over adoption assistance benefits may be heard before the State agency, but does not mention nor preclude federal review. 42 U.S.C. § 671(a)(12). The mere availability of administrative review mechanisms to protect Plaintiffs' interests cannot defeat their ability to invoke § 1983. *See Blessing*, 520 U.S. at 348; *Mo. Child Care Ass'n v. Cross*, 294 F.3d 1034, 1039 (8th Cir. 2002) (concluding that the provisions for administrative review in the Act were "not sufficiently indicative of Congress's true intent to limit the available remedies").

[9] Oregon cites a recent decision of the Supreme Court, *City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453 (2005), in which the Court held that the alternative judicial remedy Congress provided in the Telecommunications Act of 1996 ("TCA") precluded the petitioner from sustaining a § 1983 cause of action. Oregon argues that because Congress provided for the enforcement of adoption assistance agreements under state law, §§ 671(a)(12) and 673(a)(3) do not create rights that are enforceable under § 1983. The Court, however, explicitly rejected the proposition that the availability of a private judicial remedy conclusively establishes a congressional intent to preclude a § 1983 cause of action. 125 S. Ct. at 1459. Instead, the Court explained that the dispositive issue is whether the private remedy provided by statute is more restrictive than those available through a § 1983 action, such that the § 1983 action would function as an end run around the enforcement mechanism Congress provided. *Id.* at 1458, 1460. Observing that the enforce-

ment mechanism provided by the TCA limited relief in ways that § 1983 did not,[13] the Court concluded that "[e]nforcement of § 332(c)(7) through § 1983 would distort the scheme of expedited judicial review and limited remedies created by [the TCA]." *Id.* at 1462.

[10] By contrast, the Act does not include a comprehensive enforcement mechanism incompatible with a § 1983 action. It simply provides the beneficiary with an "opportunity for a fair hearing before the State agency" to contest individual benefit claims under the Act. 42 U.S.C. § 671(a)(12). Notably, Congress did not place any temporal or remedial limitations such as those the Court considered dispositive in concluding that Congress intended the statutory enforcement mechanism in 47 U.S.C. § 332(c)(7) to be exclusive. Furthermore, Oregon's argument that § 673(a)(1), which requires the State to enter into binding agreements with adoptive parents, creates a comprehensive enforcement scheme incompatible with § 1983 mischaracterizes the right Plaintiffs are seeking to enforce here. Regardless of whether their contracts have been breached, Plaintiffs are seeking to enforce their right under § 673(a)(3) to individualized payment determinations, which is a federal statutory right that is not dependent on the terms of their individual contracts. And, even if Plaintiffs were able to sue on their

[13] The enforcement mechanism available under the TCA (1) mandated that judicial review be sought within 30 days and the final action heard and decided on an expedited basis; (2) likely excluded compensatory damages; and (3) did not provide for attorneys' fees and costs. *Rancho Palos Verdes*, 125 S. Ct. at 1459-60.

contracts to enforce their right to individualized payment determinations, "the state-court remedy is hardly a reason to bar an action under § 1983, which was adopted to provide a federal remedy for the enforcement of federal rights." *See Wright*, 479 U.S. at 429.

[11] We conclude therefore that Plaintiffs may proceed with an action under § 1983 on their claim that they were entitled to individualized payment determinations. We do not comment on the merits; we merely hold that Plaintiffs' claim is not subject to dismissal for failure to state a claim.

B. Statutory Right to an Administrative Hearing

[12] Plaintiffs also contend that they have a federal right under 42 U.S.C. § 671(a)(12) to individual hearings challenging the reduction of their adoption assistance payments.[14] We agree. Section 617(a)(12) requires that an individual, whose claim for benefits is denied or not acted upon with reasonable promptness, be given an opportunity for a fair hearing before the State agency. Applying the *Blessing* test discussed in the preceding section confirms that Congress intended to create a federal right to a fair hearing before a State agency, in that the text of the provision explicitly describes an objective individual and judicially reviewable right that is phrased in mandatory rather than precatory terms. *See, e.g.*, *Timmy S. v. Stumbo*, 916 F.2d 312, 317 (6th Cir. 1990) (holding

[14] Plaintiffs contend that right was violated when Oregon issued Or. Admin. R. 413-130-0125(4), which denied them access to a "contested case hearing."

that the Act grants foster parents an enforceable right to an administrative hearing).

Oregon counters that 45 C.F.R. § 205.10(a)(5), made applicable to Title IV-E through 45 C.F.R. § 1355.30, defines and restricts Plaintiffs' right to a hearing. Specifically, § 205.10(a)(5) provides that a "hearing need not be granted when either State or Federal law requires automatic grant adjustments for classes of recipients unless the reason for an individual appeal is incorrect grant computation." Yet, accepting as true the facts pled in their complaint, neither State nor Federal law required automatic grant adjustments, as none of the Plaintiffs were receiving adoption assistance payments in excess of the applicable cap after the uniform reduction in foster care payments.

Oregon also argues that although Plaintiffs were denied an opportunity for a contested case hearing, they could have challenged the rule implementing the reduction through a rule hearing under Or. Rev. Stat. § 183.400.[15] Section 183.400, however, restricts the scope of the available hearing and limits the possible remedies. In particular, rules are reviewed only for compliance with the statutory provisions authorizing the rule and the rulemaking procedures followed. *See Beaver Creek Co-Op. Tel. Co. v. Pub. Util. Comm'n*, 50 P.3d 1231, 1235 (Or. Ct. App. 2002) (explaining that while "numerous

[15] Oregon's Administrative Procedures Act provides for three distinct types of hearings: hearings to challenge a rule (§ 183.400), hearings in "contested cases" (§ 183.482) and hearings in "other than contested cases" (§ 193.484).

individual fact situations can arise under any rule . . . judicial review of the rule as applied to each of those situations is reserved to other forums," i.e., "contested case" hearings). Moreover, monetary relief can only be sought through a contested case hearing, not a rule hearing. *Burke v. Children's Servs Div.*, 607 P.2d 141, 147-48 (Or. 1980).

[13] We conclude that the right to a hearing under Or. Rev. Stat. § 183.400 does not meet the requirements of a § 671(a)(12) hearing. Section 671(a)(12) falls squarely within the category of what Oregon defines as a "contested case" hearing as it invokes the application of a rule to a particular factual situation. Furthermore, as monetary relief is not available under a rule hearing, such a hearing does not satisfy the requirement for a "fair hearing" for "any individual whose claim for benefits" has been denied. Pursuant to § 671(1)(12), Plaintiffs have a right to an individualized fact-specific hearing to adjudicate their unique situation in which benefits were "denied or . . . not acted upon with reasonable promptness," resulting in monetary relief where appropriate.

IV. CONCLUSION

[14] Because it is possible that Plaintiffs could prove a set of facts in support of their claims that would entitle them to relief, we hold the district court erred in dismissing Plaintiffs' action for failure to state a claim under Rule 12(b)(6). Specifically, the district court erred in concluding that Plaintiffs do not have federally enforceable rights to individualized payment determinations and to a fair hearing before a State agency to challenge indi-

vidual benefit reductions pursuant to 42 U.S.C. §§ 673(a)(3) and 671(a)(12), respectively.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ASW, Individually and as Guardian ad litem for MSW and OSW, minors; SSW; ALC, Individually and as Guardian ad litem for SRC and JSC minors; JKC; JSS, Individually and as Guardian ad litem for BKS, a minor; SDS; CEW,	No. 03-35950 D.C. No. CV-03-06038-ALA District of Oregon, Eugene ORDER
Plaintiffs-Appellants, v. STATE OF OREGON, by and through its Department of Human Services; JEAN I. THORNE, in her official capacity as Director, Oregon Department of Human Services, Defendants-Appellees.	

Before: HUG, TASHIMA, and CLIFTON, Circuit Judges.

Judge Clifton has voted to deny the petition for rehearing en banc, and Judges Hug and Tashima so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc, filed October 24, 2005, is DENIED.

42 U.S.C. § 671. State plan for foster care and adoption assistance

(a) Requisite features of State plan

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—

(1) provides for foster care maintenance payments in accordance with section 672 of this title and for adoption assistance in accordance with section 673 of this title;

* * * * *

(12) provides for granting an opportunity for a fair hearing before the State agency to any individual whose claim for benefits available pursuant to this part is denied or is not acted upon with reasonable promptness;

* * * * *

42 U.S.C. § 673. Adoption assistance program

(a) Agreements with adoptive parents of children with special needs; State payments; qualifying children; amount of payments; changes in circumstances; placement period prior to adoption; nonrecurring adoption expenses

(1)(A) Each State having a plan approved under this part shall enter into adoption assistance agreements (as defined in section 675(3) of this title) with the adoptive parents of children with special needs.

(B) Under any adoption assistance agreement entered into by a State with parents who adopt a child with special needs, the State—

(i) shall make payments of nonrecurring adoption expenses incurred by or on behalf of such parents in connection with the adoption of such child, directly through the State agency or through another public or nonprofit private agency, in amounts determined under paragraph (3), and

(ii) in any case where the child meets the requirements of paragraph (2), may make adoption assistance payments to such parents, directly through the State agency or through another public or nonprofit private agency, in amounts so determined.

(2) For purposes of paragraph (1)(B)(ii), a child meets the requirements of this paragraph if such child—

(A)(i) at the time adoption proceedings were initiated, met the requirements of section 606(a) of this title or section 607 of this title (As such sections were in effect on July 16, 1996) or would have met such requirements except for his removal from the home of a relative (Specified in section 606(a) of this title (as so in effect)), either pursuant to a voluntary placement agreement with respect to which Federal payments are provided under section 674 (or 603 (as such section was in effect on July 16, 1996)) of this title or as a result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child,

(ii) meets all of the requirements of subchapter XVI of this chapter with respect to eligibility for supplemental security income benefits, or

(iii) is a child whose costs in a foster family home or child-care institution are covered by the foster care maintenance payments being made with respect to his or her minor parent as provided in section 675(4)(B) of this title,

(B)(i) would have received aid under the State plan approved under section 602 of this title (as in effect on July 16, 1996) in or for the month in which such agreement was entered into or court proceedings leading to the removal of such child from the home were initiated, or

(ii) (I) would have received such aid in or for such month if application had been made therefore, or (II) had been living with a relative specified in section 606(a) of this title (as in effect on July 16, 1996) within six months prior to the month in which such agreement was entered into or such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such a relative and application therefore had been made, or

(iii) is a child described in subparagraph (A)(ii) or (A)(iii), and

(C) has been determined by the State, pursuant to subsection (c) of this section, to be a child with special needs.

The last sentence of section 672(a) of this title shall apply, for purposes of subparagraph (B), in any case where the child is an alien described in that sentence.

Any child who meets the requirements of subparagraph (C), who was determined eligible for adoption assistance payments under this part with respect to a prior adoption, who is available for adoption because the prior adoption has been dissolved and the parental rights of the adoptive parents have been terminated or because the child's adoptive parents have died, and who fails to meet the requirements of subparagraphs (A) and (B) but would meet such requirements if the child were treated as if the child were in the same financial and other circumstances the child was in the last time the child was determined eligible for adoption assistance payments under this part and the prior adoption were treated as never having occurred, shall be treated as meeting the requirements of this paragraph for purposes of paragraph (1)(B)(ii).

(3) The amount of the payments to be made in any case under clauses (i) and (ii) of paragraph (1)(B) shall be determined through agreement between the adoptive parents and the State or local agency administering the program under this section, which shall take into consideration the circumstances of the adopting parents and the needs of the child being adopted, and may be readjusted periodically, with the concurrence of the adopting parents (which may be specified in the adoption assistance agreement), depending upon changes in such circumstances. However, in no case may the amount of the adoption assistance payment made under clause (ii) of paragraph (1)(B) exceed the foster care maintenance

payment which would have been paid during the period if the child with respect to whom the adoption assistance payment is made had been in a foster family home.

(4) Notwithstanding the preceding paragraph, (A) no payment may be made to parents with respect to any child who has attained the age of eighteen (or, where the State determines that the child has a mental or physical handicap which warrants the continuation of assistance, the age of twenty-one), and (B) no payment may be made to parents with respect to any child if the State determines that the parents are no longer legally responsible for the support of the child or if the State determines that the child is no longer receiving any support from such parents. Parents who have been receiving adoption assistance payments under this section shall keep the State or local agency administering the program under this section informed of circumstances which would, pursuant to this subsection, make them ineligible for such assistance payments, or eligible for assistance payments in a different amount.

(5) For purposes of this part, individuals with whom a child (who has been determined by the State, pursuant to subsection (c) of this section, to be a child with special needs) is placed for adoption in accordance with applicable State and local law shall be eligible for such payments, during the period of the placement, on the same terms and subject to the same conditions as if such individuals had adopted such child.

(6)(A) For purposes of paragraph (1)(B)(i), the term "nonrecurring adoption expenses" means reasonable and necessary adoption fees, court costs, attorney fees, and

other expenses which are directly related to the legal adoption of a child with special needs and which are not incurred in violation of State or Federal law.

(B) A State's payment of nonrecurring adoption expenses under an adoption assistance agreement shall be treated as an expenditure made for the proper and efficient administration of the State plan for purposes of section 674(a)(3)(E) of this title.

(b) Aid for dependent children; assistance for minor children in needy families.

* * * * *

(c) Children with special needs.

* * * * *

42 U.S.C. § 675. Definitions

As used in this part of part B of this subchapter:

* * * * *

> **(3)** The term "adoption assistance agreement" means a written agreement, binding on the parties to the agreement, between the State agency, other relevant agencies, and the prospective adoptive parents of a minor child which at a minimum (A) specifies the nature and amount of any payments, services, and assistance to be provided under such agreement, and (B) stipulates that the agreement shall remain in effect regardless of the State of which the adoptive parents are residents at any given time. The agreement shall contain provisions for the protection (under an interstate compact approved by the Secretary or otherwise) of the interests of the child in cases where the adoptive

parents and child move to another State while the agreement is effective.