No. 17-17

In the Supreme Court of the United States

VICKIE YATES BROWN GLISSON, IN HER OFFICIAL CAPACITY AS SECRETARY FOR THE KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES, PETITIONER,

v.

D.O.; A.O.; R.O.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONERS

Respondents concede the circuit "conflict" (Opp. 8, 11) on using § 1983 suits to challenge how states award foster care maintenance payments under Title IV-E of the Social Security Act. And they do not seriously contest the importance of that split for states and beneficiaries. Opp. 16. Instead, respondents' arguments hinge almost entirely on an eleventh-hour portrayal of this case as unrelated to that important split. They would have the Court believe the split concerns only the enforcement of 42 U.S.C. § 675(4)(A)—not 42 U.S.C. § 672(a)(1), which respondents argue is the only statute implicated in this case. Respondents thus contend that any conflict with the Sixth Circuit's decision is "illusory." Opp. 8.

That illusion, however, seems to have confounded the court of appeals, Pet. App. 8a-9a, the district court, *id.* at 30a-31a, fourteen state attorneys general, Br. of States as Amici Curiae ("Amici Br.") 4, and—until recently—*respondents' own counsel*. Indeed, the brief in opposition reads almost as if it were written by lawyers with no prior involvement in this case. Respondents' current arguments turn on the idea that private enforcement of § 672(a)(1) and § 675(4)(A) are completely different. But in both lower courts, respondents urged just as emphatically that the two provisions are tightly linked, and characterized courts as very much split on the relevant question. Thus, respondents argued below, in seeking foster-care maintenance payments, that "[a] majority of circuits and courts have found 42 U.S.C. § 672(a)(1) privately enforceable," Resp. C.A. Br. 8, invoking the very cases they now say are utterly unlike theirs, *id.* at 9.

And respondents repeatedly acknowledged what is clear from case law: Courts consider private enforcement of the two provisions inextricably linked. Block-quoting *California State Foster Parent Association* v. *Wagner*, 624 F.3d 974 (9th Cir. 2010)—which respondents now say is "unlike this case" (Opp. 11) but was then "representative" (Resp. C.A. Br. 9)—respondents previously identified "the issue" under review as "whether the C[hild] W[elfare] A[ct], at 42 U.S.C. §§ 672(a) and 675(4)(A), creates an enforceable federal right." Resp. C.A. Br. 9 (quoting *Wagner*, 624 F.3d at 977). And in district court, respondents invoked the dissent from *Midwest Foster Care and Adoption Association* v. *Kincade*, 712 F.3d 1190 (8th Cir. 2013), for the proposition that "Congress intended for §§ 672(a) and 675(4)(A) to benefit Foster Parents as the caregivers for foster children," Opp. to Mot. to Dismiss 14 [Doc. 11].

Respondents' position below was understandable. Section 675(4)(A) is purely definitional. It says nothing about when foster care maintenance payments should be made, or to whom. Any claim that § 675(4)(A) *alone* confers an individual right enforceable under § 1983 would be frivolous. The plaintiffs in *Wagner* and *Kincade* realized this, as their suits challenging the sufficiency of payments under § 675(4)(A) were *explicitly predicated* on the claim that § 672(a)(1) confers an individual right to such payments in the first place. See Appellees' Br. 3, *Wagner*, 624 F.3d 974 ("Section 672 is the provision of the [Act] that requires the State to make foster care maintenance payments."); *id.* at 5 (arguing § 672(a)(1) satisfies *Blessing* factors); Br. of Pltfs.-Appellants 14, *Kincade*, 712 F.3d 1190 ("Section 672(a) and 675(4)(A) * * * meet each of the three *Blessing* factors.").

Thus, contrary to respondents' last-minute effort to recast this case as an outlier, it squarely implicates an important question on which courts of appeals are divided. And once respondents' attempt to distinguish *Wagner* and *Kincade* is laid to rest, their efforts to downplay its importance also collapse. Kentucky and 14 other states agree: Review is urgently warranted.

A. The Circuit Split Is Real

1. a. Respondents' argument turns on a purported distinction between: (1) whether § 1983 can be used to challenge "the method by which a state sets the level of maintenance payments or the adequacy of those payments," and (2) whether § 1983 can be used to challenge an outright denial of payments. Opp. 8. Respondents concede that appellate and trial courts are split on the first question. *Id.* at 11. Nor do they seriously contest its importance. The linchpin of their argument is that the two questions are essentially independent. This premise does not withstand even momentary scrutiny.

True, in *Wagner*, the plaintiffs sought, among other things, "to compel the State to revise its payment schedule upward." 624 F.3d at 976-977. *Kincade* was similar. 712 F.3d at 1195. And this case involves a claim that benefits were denied outright.

Respondents attempt to characterize *Wagner* and *Kincade* as only addressing whether § 675(4)(A) confers a right to foster care payments of a certain rate or calculated in a certain way. This, respondents now argue, is different from whether § 672(a)(1) confers an individual right, enforceable under § 1983, to maintenance payments. Opp. 9-11. But the statutory text and structure, reasoning of appellate decisions, and

simple common sense prove otherwise. Rather, courts considering either question rely on both provisions.

b. The *Wagner* and *Kincade* plaintiffs did not—because they could not—claim a freestanding right under § 675(4)(A). That provision simply defines "[t]he term 'foster care maintenance payments.'" It says nothing about anyone making or receiving (much less entitlement to) such payments.

Unsurprisingly, then, the argument accepted in *Wagner* and rejected in *Kincade* was that § 672(a)(1), in providing that states "shall make foster care maintenance payments," confers a right to receive such payments; § 675(4)(A), in turn, specifies the scope of that right by defining "foster care maintenance payments." *Wagner* concluded that "[t]he [Act] * * * contains a provision creating a right, in § 672(a), and a provision spelling out the content of that right in § 675(4)(A)," 624 F.3d at 979 (citation omitted); accord *id.* at 981 (analyzing "combined effect of §§ 672(a) and 675(4)(A)"). And *Kincade* rejected the argument that a right to higher payments resulted from "importing the full definition of 'foster care maintenance payments' from § 675(4)(A) into § 672(a)." 712 F.3d at 1198. Thus, both decisions turned on the *very proposition* the Sixth Circuit addressed below: whether § 672(a)(1) confers a right to foster care maintenance payments enforceable through § 1983.[1]

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[1] The *Wagner* plaintiffs viewed the "centra[l]" issue as whether "the Child Welfare Act requires that states * * * provide 'foster care maintenance payments' to licensed foster parents," citing *both* § 672 and § 675(4). Compl. ¶ 25, *Cal. State Foster Parents Ass'n* v. *Wagner*, No. 3:07-cv-5086 (N.D. Cal. Oct. 3, 2007), ECF No. 1. And while respondents focus on one reference to § 675(4), Opp. 9-10, the *Kinkade* complaint cited § 672 for the proposition that "[u]nder federal law, states * * * are required to reimburse

That is why *Kincade* exhaustively analyzed the text of § 672(a)(1), evaluating it in light of the factors identified in *Blessing* v. *Freestone*, 520 U.S. 329 (1997), and *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002)—a discussion respondents implausibly dismiss as a massive swath of gratuitous dicta, Opp. 10. *See Kincade*, 712 F.3d at 1198-1199 (comparing "the first portion of § 672(a)(1)" with that provision's "series of factors that curtail the situations in which [payments are made]," and reasoning that the "focus" of § 672(a)(1) is "limitations on when a foster care maintenance payment is eligible for partial federal reimbursement"). Section 672(a)(1) played no less central a role in *Kincade* and *Wagner* than here: In all three cases, the bedrock legal question was whether § 672(a)(1) confers a right to foster care maintenance payments enforceable under § 1983.[2]

Respondents are likewise flat wrong to suggest that § 675(4)(A) was irrelevant here. In the Sixth Circuit's view, § 675(4)(A) constitutes an "itemized list of expenses that the state *must* cover," therefore alleviating concerns that § 672(a)(1) is too "vague [or] amorphous"

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foster parents * * * for the items included in the term 'foster care maintenance payments.'" Compl. ¶ 34, *Midwest Foster Care & Adoption Ass'n* v. *Kinkade*, No. 4:11-cv-1152-DW (W.D. Mo. Nov. 16, 2011), ECF No. 1.

[2] The district court cases respondents cite (Opp. 11-13) undermine their argument. *E.g.*, *N.Y. State Citizens' Coal. for Children* v. *Carrion*, 31 F. Supp. 3d 512, 516 (E.D.N.Y. 2014) ("question * * * is whether a private right of action under § 1983 arises from § 672(a) or § 675(4)(a)"); *D.G. ex rel. Stricklin* v. *Henry*, 594 F. Supp. 2d 1273, 1280 (N.D. Okla. 2009) (analyzing claim to "foster care maintenance payments in accordance with § 672 of the act"). *D.G.* distinguished the Tenth Circuit's reference to "individual causes of action" under the Act (Opp. 13) as "pre-*Gonzaga*" and instead followed post-*Gonzaga* precedent. 594 F. Supp. 2d at 1277 n.1.

for § 1983 enforcement. Pet. App. 8a (emphasis added); cf. *Wagner*, 624 F.3d at 981 (similar). Given this language, one cannot credit respondents' suggestion that "[t]he decision below does not determine what the Sixth Circuit would do [on the § 1983 question] if it were confronted with" a lawsuit challenging the adequacy of payments under § 675(4)(A), Opp. 10.

After all, if this Court reversed the Sixth Circuit, it would vindicate *Kincade* and repudiate *Wagner*. If § 1983 cannot be used to enforce a purported right to payments under § 672(a)(1), it cannot be used to enforce a purported right to payments of a certain level. Respondents' claim that this case "do[es] not even involve the same 'specific statutory provision'" as *Wagner* and *Kincade*, Opp. 9 (quoting *Blessing*, 520 U.S. at 342), is demonstrably, glaringly false.[3]

2. Respondents fare no better in arguing that granting review here would provide no guidance on the related split over case plans under § 671(a)(16). See Pet. 26-27. Although the cases in that split—unlike *Wagner* and *Kincade*—involve distinct statutory provisions, they illustrate broader confusion over how to apply this Court's precedents to Title IV-E. The idea that they stand entirely apart from *Wagner*, *Kincade*, and the Sixth Circuit's decision here (Opp. 13-14) is belied by the Ninth Circuit's using *Wagner* as a roadmap for the reasoning and result of *Henry A.* v. *Willden*, 678 F.3d 991, 1007-1008 (9th Cir. 2012).

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[3] Recognizing the textual link between § 672(a)(1) and § 675(4)(A) hardly reads the Act "as an undifferentiated whole," Opp. 1 (quoting *Blessing*, 520 U.S. at 342). Rather, it follows from the fact that one section defines a term used in the other. Cf. *Blessing*, 520 U.S. at 342 (criticizing asserted "right to have the State substantially comply with Title IV-D in all respects").

B. This Case Is An Attractive Vehicle For Resolving An Important And Recurring Issue

Respondents' claim that petitioners and amici have "overblown" the case's importance (Opp. 14) collapses with their specious argument that the question presented is somehow unique. Respondents do not dispute the serious consequences of disparate rulings on the availability of § 1983 actions to challenge how foster care maintenance payments are distributed. Rather, they argue that the question presented here has no bearing on cases like *Wagner* and *Kincade* and that it "hardly ever arises." *Ibid.*

Wrong again. Numerous "reported decisions" document recurrent § 1983 suits seeking "maintenance payments (at a state-set rate)," Opp. 14-15—including suits like this one, involving disputes over payment eligibility or an individual's "wrongful exclusion from th[e] program," Opp. 9. *E.g.*, *Lipscomb* v. *Simmons*, 962 F.2d 1374, 1376 (9th Cir. 1992) (en banc) (§ 1983 suit on behalf of foster children challenging state's "practice of not providing state-funded foster care benefits to children placed with relatives"); *Native Vill. of Stevens* v. *Smith*, 770 F.2d 1486, 1487 (9th Cir. 1985) (§ 1983 suit "after Alaska refused to pay foster care maintenance for a child," regarding eligibility of "tribally approved foster homes"); cf. *Cal. Dep't of Soc. Servs.* v. *Thompson*, 321 F.3d 835, 841, 843 (9th Cir. 2003) (addressing eligibility criteria for "foster care maintenance payments" for children "living with relatives").

Astonishingly, respondents contend that Kentucky and the fourteen other states urging review have no actual interest in resolving the question presented because the "statutory mandate to provide [such] payments * * * is so clear." Opp. 15. Nonsense. As amici

states explain (Amici Br. 5-9), this case, like others involving § 1983, implicates important federalism concerns. See *Gonzaga*, 536 U.S. at 286. States have a vital interest in knowing whether plaintiffs can hale their officers into federal court under § 1983, with attendant burdens and expense (including attorney's fees), or whether Congress expected they would instead use available state administrative and judicial remedies. Pet. 32; cf. *Thompson*, 321 F.3d at 839 (Administrative Procedure Act suit by state challenging federal government's reimbursement policy; individual foster-care provider joined as intervenor). The fact that such questions concern procedural matters does not detract from their importance. See Amici Br. 5-12.[4]

Respondents identify no vehicle problems. As petitioner explained (and respondents never disputed), this case is unusually clean of potential factual disputes, Pet. 36; no one contends petitioner waived or forfeited the § 1983 issue, *id.* at 36-37; and there are no standing or other jurisdictional problems, cf. Opp. 12; *N.Y. State Citizens' Coal. for Children* v. *Velez*, 629 Fed. Appx. 92, 94 (2d Cir. 2015) (remanding on standing issue). This case is an ideal vehicle for resolving the question presented.[5]

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[4] Suits challenging eligibility criteria affect the administration of state programs no less than challenges to "rate-setting methodologies," Opp. 16. That in other cases states may prevail on the merits, or elect to appeal other issues, does not deprive the § 1983 question of importance. Cf. *id.* at 16 n.9.

[5] Respondents are wrong to suggest that this case turns solely on whether they "are currently in foster care," Opp. 15-16. If this Court resolves the question presented in petitioner's favor, the case must be dismissed. See Pet. 37 n.14.

C. The Sixth Circuit's Decision Is Wrong

1. Respondents' merits argument is notable mostly for what it does not mention: this Court's recent and emphatic rejection of the idea that "anything short of an unambiguously conferred right [can] support a cause of action brought under § 1983." *Gonzaga*, 536 U.S. at 283. Respondents rely heavily on *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990), for the proposition that "a statute phrased in terms of what a state 'must' do can create a private right of action enforceable through Section 1983." Opp. 19; *id.* at 21-22 (analogizing to statute in *Wilder*); see also Pet. App. 9a-10a (panel relying on *Wilder*). But they ignore that this Court's "later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified," *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1386 n.* (2015).

Respondents, like the *Kincade* plaintiffs, emphasize "only the first portion of § 672(a)(1)," 712 F.3d at 1198, to show a supposed focus on beneficiaries. But there remains a "total absence * * * of any reference to individual 'rights' or the like," *Gonzaga*, 536 U.S. at 291 (Breyer, J., concurring in the judgment). Respondents virtually ignore § 672's overall focus on "factors that curtail" eligibility for federal reimbursement, *Kincade*, 712 F.3d at 1198, relegating the factors to a footnote, Opp. 21 n.11. But the focus on limiting conditions shows that § 672(a)(1) primarily concerns states' eligibility for federal reimbursement. See Pet. 28-29.[6]

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[6] Respondents weakly reply that states' entitlement to reimbursements is provided by § 674. Opp. 18. But § 672 itself is overwhelmingly concerned with limiting conditions—as one would ex-

2. Respondents identify little in the statute to bolster their flimsy § 672 arguments. About the only other provision respondents invoke is 42 U.S.C. § 1320a-2, the so-called "*Suter* fix." Respondents claim that this provision represents an "express[] state[ment]" that Title IV-E contains privately enforceable rights—evidently for "any service or benefit under th[e] Act" whatsoever. Opp. 20-22. Not so. Section 1320a-2 merely "overturn[s]" some aspects of this Court's reasoning in *Suter* v. *Artist M.*, 503 U.S. 347 (1992), while leaving its holding intact. Its relevance here is at best unclear, and neither it nor an associated committee report, Opp. 20, establish "an unambiguously conferred right," *Gonzaga*, 536 U.S. at 283. That respondents are forced to rely on a provision the court below and *Wagner* never even *mentioned* speaks volumes.

3. Respondents strain to downplay adverse textual and structural evidence. They breezily dismiss the fact that Congress expressly provided numerous other enforcement mechanisms, including federal "substantial conformity" review, state forums for individual claims, and the express federal right of action in 42 U.S.C. § 674(d)(3)(A).[7] In so doing, respondents disre-

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pect, given that Congress entitled states to partial reimbursements of the "total amount expended" for § 672 maintenance payments. See 42 U.S.C. § 674(a)(1). See *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("[s]tatutory construction * * * is a holistic endeavor").

[7] Respondents suggest Congress created § 674(d)(3)(A)'s right of action because § 1983 suits would otherwise not be available against private actors, or because it wanted to abrogate state sovereign immunity. But suits against private actors under § 1983 are not novel. See *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 942 (1982) (holding that private entity was acting under "color of law"

gard this Court's precedents showing that the presence of a substantial conformity standard and alternative enforcement mechanisms are relevant *both* to determining whether § 1983 is an available remedy *and* whether a statute confers a federal right at all, see *Gonzaga*, 536 U.S. at 288-290. Contra Opp. 24 (suggesting substantial conformity standard is "irrelevant" to latter question).

Experience demonstrates that "the ready implication of a § 1983 action," *Armstrong*, 135 S. Ct. at 1386 n.*, permits an end-run around more carefully tailored enforcement mechanisms. See Pet. 33. Thus, even if the "ability to invoke § 1983 cannot be defeated *simply*" by alternative means of enforcement, *Blessing*, 520 U.S. at 347 (emphasis added), explicit provision for numerous tailored enforcement mechanisms strongly "suggests that other means of enforcement are precluded," *Armstrong*, 135 S. Ct. at 1387 (opinion of Scalia, J.).

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for purposes of § 1983). And § 674(d)(3)(A)'s provision for actions seeking "relief from the State" is conspicuously weaker than language used elsewhere to abrogate state sovereign immunity. See, *e.g.*, 42 U.S.C. § 12202 ("State[s] shall not be immune under the eleventh amendment * * * from an action in Federal or State court * * * for a violation of this chapter"); 42 U.S.C. § 2000d-7 (similar). But even if the right of action under § 674(d)(3)(A) is broader than § 1983, it nonetheless illustrates that "when Congress wished to provide a private * * * remedy, it knew how to do so and did so expressly." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 572 (1979).

CONCLUSION

The petition should be granted.

Respectfully submitted.

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