No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Title IV-E of the Social Security Act, 42 U.S.C. § 670 *et seq.*, confers an individual right to foster care maintenance payments that is enforceable by bringing suit under 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDINGS

Petitioner Vickie Yates Brown Glisson, in her official capacity as Secretary for the Kentucky Cabinet for Health and Family Services, was the defendant below. Respondents, who were plaintiffs below, are identified below and herein as D.O., A.O., and R.O. Because the related Kentucky family-court proceedings here are sealed, respondents are identified only by their initials.

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PETITION FOR A WRIT OF CERTIORARI

Vickie Yates Brown Glisson, in her official capacity as Secretary for the Kentucky Cabinet for Health and Family Services, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a-20a, is reported at 847 F.3d 374. The district court's order granting petitioner's motion to dismiss, App. 21a-40a, is unreported but available at 2016 WL 1171532.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 2017. On April 13, 2017, Justice Kagan extended the time in which to file a petition for writ of certiorari to and including June 26, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this petition. App. 41a-65a.

INTRODUCTION

Throughout the Nation's history, states have had primary responsibility for protecting child welfare, including the administration of foster care programs. Respecting the states' primary role, Congress has favored cooperative frameworks that offer federal funds to support states' primary work, and create incentives to provide certain benefits. Title IV-E of the Social Security Act, 42 U.S.C. § 670 *et seq.*, is one

such cooperative program. It reimburses states for a portion of eligible foster care expenses. Under the Act, however, states continue to have broad leeway in structuring their foster-care programs and bear a significant share of the cost of running those programs. State agencies and courts retain primary responsibility for administration and oversight of foster care systems.

To be eligible for federal reimbursement, states must submit to the U.S. Department of Health and Human Services ("HHS") a plan demonstrating compliance with the Act's eligibility criteria. States that provide financial support to foster parents or other caregivers of children meeting specific financial (and other) eligibility criteria can seek federal reimbursement of a defined class of "foster care maintenance payments." 42 U.S.C. § 671(a)(1). If a state "fail[s] substantially to so conform" with the Act's eligibility criteria, the federal government may take corrective measures, such as imposing a corrective action plan or ultimately withholding federal funds. *Id.* § 1320a-2a(b)(4)(A). The Act creates an express individual right of action if a state fails to conform with certain eligibility criteria; that right of action does not apply to the provision of foster care maintenance payments. *Id.* § 674(d)(3)(A).

Here, the Sixth Circuit joined an acknowledged and entrenched circuit split about whether the Act creates an individual right to foster care maintenance payments that is enforceable by bringing suit under 42 U.S.C. § 1983. The question arises with striking frequency in state and federal courts nationwide, is central to proper administration of this important

federal welfare program, will seriously affect state budgets, and has significant implications for the relationship between the states and the federal government. This Court's review is urgently warranted.

STATEMENT

A. Title IV-E of the Social Security Act

1. Congress has long respected state primacy in the field of child welfare, including provision for foster care. Since the Social Security Act of 1935, Congress has provided federal funds to support the work of state welfare agencies and to encourage states to create certain programs, in a cooperative federal-state framework. See Pub. L. No. 74-271, § 1, 49 Stat. 620 (1935); see also Kasia O'Neill Murray & Sarah Gesiriech, Pew Commission on Children in Foster Care, *A Brief Legislative History of the Child Welfare System* 1 (2004), https://goo.gl/fgHfVJ; H. Comm. on Ways & Means, *Background Material and Data on the Programs Within the Jurisdiction of the Comm. on Ways & Means*, Ch. 11 (2011) ("*Green Book*").

Congress has also provided financial support to help states address the specific problem of children who cannot remain in their own homes. *E.g.*, Pub. L. No. 87-31, § 2, 75 Stat. 75, 76 (1961) (providing federal reimbursement for qualifying state expenses of foster-home care); Pub. L. No. 87-543, § 135, 76 Stat. 172, 196 (1962) (same, for state-licensed childcare institutions); Pub. L. No. 90-248, § 205, 81 Stat. 821, 892 (1967) (encouraging states to provide foster-care assistance as part of Aid to Families with

Dependent Children program). These programs were criticized for creating an incentive against permanent placements by providing "open-ended" subsidies for foster care. 123 Cong. Rec. 24,861 (1977).

2. a. The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended as Title IV-E of the Social Security Act, 42 U.S.C. § 670 *et seq*.) (as amended, "the Act"), "establishes a federal reimbursement program for certain expenses incurred by the States in administering foster care and adoption services." *Suter* v. *Artist M.*, 503 U.S. 347, 350-351 (1992), abrogated on other grounds by 42 U.S.C. § 1320a-2; see also 42 U.S.C. § 670 (appropriating funds for purpose of making federal "payments to states"). "The Act provides that States will be reimbursed for a percentage of foster care * * * payments when the State satisfies the requirements of the Act." *Suter*, 503 U.S. at 351.

To be eligible for federal reimbursement, a state must develop a foster care services plan and submit it to the Secretary of HHS. 42 U.S.C. § 671(a)(1). The state plan is evaluated under dozens of detailed eligibility criteria. Some relate to the state plan's structure and administration: *e.g.*, a plan must provide a state administrative authority that is "responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of [relevant] national organizations," § 671(a)(10), and must ensure that individuals claiming benefits have "an opportunity for a fair hearing before the State agency,"

§ 671(a)(12). Other criteria relate to the benefits a state provides. A qualifying state plan will, *e.g.*, "provide for foster care maintenance payments in accordance with [42 U.S.C. § 672]," § 671(a)(1); set state-specific annual "goals" for the maximum number of children who "remain in foster care after having been in such care for a period in excess of twenty-four months," § 671(a)(14); provide for "the development of a case plan * * * for each child receiving foster care maintenance payments" and a "case review system" that ensures a "permanency" hearing is held for each child within 12 months of being placed in foster care, §§ 671(a)(16), 675(5)(C); "consider giving preference to an adult relative over a non-related caregiver, when determining a placement for a child," § 671(a)(19); and ensure that "reasonable efforts shall be made to preserve and reunify families," § 671(a)(15).

As these eligibility provisions indicate, the Act reflects "attention to both reducing placements in foster care and establishing permanency for children who did enter care." *Green Book*, *supra*, ch. 11 at 6; accord 126 Cong. Rec. 14,761 (1980) ("incentive structure" to "lessen the emphasis on foster care" and "encourage greater efforts to find permanent homes"); see also Pub. L. No. 105-89, §§ 101, 302, 111 Stat. 2115, 2116, 2128. To further the goal of permanency, Congress provided that—"at the option of the State"—a state may choose to "enter into kinship guardianship assistance agreements to provide kinship guardianship assistance payments" (distinct from "foster care" payments) "on behalf of children to grandparents and other relatives who have assumed

legal guardianship of the children for whom they have cared as foster parents and for whom they have committed to care *on a permanent basis*." 42 U.S.C. § 671(a)(28) (emphasis added).

"Each State with a plan approved under this part shall make foster care maintenance payments on behalf of each [eligible] child who has been removed from the home of a relative * * * into foster care." 42 U.S.C. § 672(a)(1). "[F]oster care maintenance payments" cover the cost of such things as "food, clothing, shelter, daily supervision, [and] school supplies." *Id.* § 675(4)(A).

To qualify for federal reimbursement, foster care maintenance payments must meet further eligibility criteria. Among other things, the child must have otherwise qualified for assistance under the former Aid to Families With Dependent Children program. See 42 U.S.C. § 672(a)(3) (child "would have received aid under the State plan approved under [42 U.S.C. §] 602 * * * (as in effect on July 16, 1996)"). The "removal and foster care placement" must have been made pursuant to a voluntary agreement or court order. The relevant state or tribal agency must be responsible for the child's placement and care. And reimbursement is available "*only*" for payments made "on behalf of a [qualifying] child * * * who is (1) in the foster family home of an individual" or (2) "in a child-care institution" formally "licensed" or "approved" by the State. *Id.* § 672(b)-(c); 45 C.F.R. § 1355.20 ("Anything less than full licensure or approval is insufficient for meeting Title IV-E eligibility requirements"). States are responsible for licensing

or approving foster homes or institutions. 42 U.S.C. § 672(c).

If a state's plan and expenditures qualify for federal reimbursement, "each quarter * * *, each State which has a plan approved * * * shall be entitled to a payment" according to a statutory formula. 42 U.S.C. § 674(a)(1).

b. The Act contains a detailed remedial scheme, which balances review by the Secretary of HHS for aggregate conformity, on the one hand, with state and federal forums for individual claims on the other, including an express (but tailored) private right of action in federal court.

The Secretary must review state plans regularly for "substantial conformity" with the eligibility criteria. 42 U.S.C. § 1320a-2a(a); see also 45 C.F.R. §§ 1355.31-1355.37, 1356.71. In the event of "a fail[ure] substantially to so conform," the Act ensures States an opportunity to "adopt and implement a corrective action plan." 42 U.S.C. § 1320a-2a(b)(4)(A).[1] If a state develops and implements such a plan, the Act prohibits the Secretary from withholding federal funds. *Id.* § 1320a-2a(b)(4)(C). Only if a state fails to remediate does the Act direct the withholding of federal funds. *Id.* § 1320a-2a(b)(3)(A), (4)(A). "[T]he amount of such funds

[1] The Act specifies that states may challenge a non-conformity determination before a Departmental Appeals Board and ultimately in federal district court. See 42 U.S.C. § 1320a-2a(c)(2)-(3); 45 C.F.R. § 1355.39.

withheld is related to the extent of the failure to so conform." *Id.* § 1320a-2a(b)(3)(C).[2]

The Act specifically addresses individual enforcement. To qualify for federal reimbursement, a state must provide "an opportunity for a fair hearing before the State agency" for "any individual whose claim for benefits * * * is denied or is not acted upon with reasonable promptness." 42 U.S.C. § 671(a)(12). Kentucky law, for instance, provides appeal rights for the denial, reduction, modification, suspension, or termination of foster care benefits. See 922 Ky. Admin. Regs. 1:320 (right to administrative hearing); *id.* 1:350 § 9(20) (available for foster parents); Ky. Rev. Stat. Ch. 13B (judicial review in Kentucky state courts).

Congress also created an express private right of action in federal court for "individual[s] who [are] aggrieved by a violation of" certain enumerated eligibility criteria. For example, 42 U.S.C. § 671(a)(18) prohibits discrimination on the basis of race, color, or national origin with respect to prospective foster parents or foster-child placements. Congress explicitly provided that:

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[2] If "during any quarter" a state plan violates certain enumerated eligibility provisions—i.e., those prohibiting discrimination based on race, color, or national origin as to potential foster parents or foster-child placements, 42 U.S.C. § 671(a)(18), and facilitating placement with qualifying adoptive families outside the jurisdiction of the responsible agency, *id.* § 671(a)(23)—the Act directs the Secretary to "reduce the amount otherwise payable to the State" by a fixed percentage until the state has "implemented a corrective action plan." *Id.* § 674(d)(1).

> Any individual who is aggrieved by a violation of [42 U.S.C. §] 671(a)(18) * * * by a State or other entity may bring an action seeking relief from the State or other entity in any United States district court.

42 U.S.C. § 674(d)(3)(A). The Act creates a specific limitations period: any such action "may not be brought more than 2 years after the date the alleged violation occurred." *Id.* § 674(d)(3)(B).

B. Section 1983 Enforcement Of Spending Clause Legislation

Section 1983 "imposes liability on anyone who, under color of state law, deprives a person 'of any rights, privileges, or immunities secured by the Constitution and laws'" of the United States. *Blessing* v. *Freestone*, 520 U.S. 329, 340 (1997). For most of its history, the statute was applied only to claimed violations of constitutional rights. See *Bomar* v. *Keyes*, 162 F.2d 136, 138-139 (2d Cir. 1947). Not until *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), did this Court confirm that § 1983 also "encompasses claims based on purely statutory violations of federal law."[3]

Blessing set forth three factors to guide judicial inquiry into whether a statute confers a right enforceable under § 1983: (1) "Congress must have intended that the provision in question benefit the plaintiff"; (2) "the plaintiff must demonstrate that the

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[3] Dicta in previous cases foreshadowed that result, but the question remained unsettled until *Thiboutot*. *E.g.*, *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence"; and (3) "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 340-341. This Court subsequently clarified, however, that "it is only violations of *rights*, not *laws*, which give rise to § 1983 actions." *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 282-283 (2002). Nothing "short of an unambiguously conferred right [can] support a cause of action brought under § 1983." *Id.* at 283. Because only "*rights*, not the broader or vaguer 'benefits' or 'interests,' * * * may be enforced under the authority of [§ 1983]," the question is "whether Congress *intended to create a federal right*." *Ibid.*

In determining whether Congress intended a particular statute to create a private right of action, *Gonzaga* analyzed several factors, including: (a) whether a statute contains "rights-creating language" with an "unmistakable focus" on individuals, *Gonzaga*, 536 U.S. at 287; (b) whether a statute focuses on "whether the needs of any particular person have been satisfied," or instead has a programmatic or "aggregate focus," *id.* at 288; and (c) whether the statute lacks a federal enforcement scheme for individuals, *id.* at 290.

"'In 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 funds to the State.'" *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst*

State School & Hosp. v. *Halderman*, 451 U.S. 1, 28 (1981)). Thus, "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 by § 1983." *Ibid.* (quoting *Pennhurst*, 451 U.S. at 17, 28 & n.21). "[O]nly twice" since *Pennhurst* has this Court "found spending legislation to give rise to enforceable rights." *Ibid.* (citing *Wright* v. *Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418 (1987) and *Wilder* v. *Va. Hosp. Ass'n*, 496 U.S. 498 (1990)). More recently, in *Suter*, this Court held that the "reasonable efforts" provision in 42 U.S.C. § 671(a)(15) did not create a right enforceable under § 1983. *Suter*, 503 U.S. at 363; accord 42 U.S.C. § 1320a-2.

C. Procedural Background

1. The Commonwealth of Kentucky funds and administers numerous child welfare programs. See generally Ky. Rev. Stat. ch. 600-645. Kentucky receives federal funding to support some of those programs. Among other things, pursuant to the Act, the Secretary of HHS has approved Kentucky's foster care and adoption assistance plan. See U.S. Dep't of Health & Human Servs., Agency Plan for Title IV-E of the Social Security Act, Foster Care and Adoption Assistance, State of Kentucky, OMB Approval No. 0980-0141 (rev. Aug. 2015), https://goo.gl/kTsSVe. As part of that plan, Kentucky provides foster-care maintenance payments that satisfy the Act's reimbursement eligibility requirements. See *ibid.* pp. 11-120 (collecting provisions of Kentucky law).

The Kentucky Cabinet for Health and Family Services ("Cabinet") is a state agency authorized to "expend available funds to provide for the board, lodging and care of children * * * who are placed by the [C]abinet in a foster home or boarding home." Ky. Rev. Stat. § 605.120(1). The Cabinet is charged with establishing a "reimbursement system, within existing appropriation amounts, for foster parents that comes as close as possible to meeting the actual cost of caring for foster children." *Id.* § 605.120(2). "To the extent that funding is available, reimbursement rates paid to foster parents shall be increased on an annual basis to reflect cost of living increases." *Id.* § 605.120(3). "To the extent funds are available," the Cabinet is also authorized to establish a "kinship care" program to provide "a more permanent placement with a qualified relative for a child that would otherwise be placed in foster care." *Id.* § 605.120(5).[4]

2. In 2012, the Cabinet commenced a Dependency, Neglect, and Abuse proceeding in state court, against the mother of two boys, D.O. and A.O. App. 2a. The mother stipulated to neglecting D.O., and to A.O.'s dependency. Stipulation of Facts ¶ 6, *D.O.* v. *Beshear*, 5:15-cv-48 (E.D. Ky. Apr. 7, 2015), ECF No. 8-1 ("Stipulation"). A.O. was initially placed with a non-relative caregiver, and D.O. in foster care. *Ibid.* The Cabinet conducted a home evaluation and

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[4] In 2013, Kentucky suspended new enrollment in its kinship care program, due to inadequate state appropriations. Kentucky has not sought federal approval or reimbursement for the "option[al]" "kinship guardian assistance" payments contemplated in 42 U.S.C. § 671(a)(28).

background check of R.O., the children's great-aunt. *Id.* ¶ 7. The family court awarded the aunt temporary custody of D.O. in 2013; she accepted placement of A.O. in 2014. *Id.* ¶¶ 8-9.

During the family-court proceedings, the children's guardian sought an order directing Kentucky to pay foster care maintenance benefits to R.O., as D.O.'s caretaker. Stipulation ¶ 13.[5] The family court declined to do so, concluding that a permanent placement had been achieved, and the children were no longer in foster care. *Id.* ¶ 19. On September 10, 2014, "the family court closed the action and granted joint custody to both the mother and the [great-]aunt, though the boys remained living with the [great-]aunt." *Id.* ¶ 10; App. 2a.

3. a. Nine days later, and without having pursued available administrative or other remedies from the Cabinet, R.O. filed suit in Kentucky state court seeking foster-care maintenance payments. The complaint invoked 42 U.S.C. § 1983 and alleged (as relevant here) a violation of the Act. App. 2a. In particular, the complaint alleged that Kentucky had a "longstanding policy" of "refus[ing] to make foster care maintenance payments to all children who, like D.O. and [A].O., are in relative custodial foster care." Am. Compl. ¶¶ 17, 22. The complaint sought declaratory and permanent injunctive relief, costs, and attorneys' fees pursuant to 42 U.S.C. § 1988.

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[5] R.O. separately receives financial support for D.O. and A.O. under the federal Supplemental Nutrition Assistance Program, Medicaid, and Kentucky's Transitional Assistance Program. App. 23a-24a.

b. Petitioner and the other defendants removed the case to the U.S. District Court for the Eastern District of Kentucky.[6] The parties stipulated to relevant facts. See Stipulation. Petitioner moved to dismiss and, in the alternative, sought summary judgment. Among other things, petitioner argued that the Act creates no private right of action under § 1983 for foster care maintenance payments, and in any event, the children were not in "foster care" because the family court granted custody to the great-aunt.

The district court adopted the stipulated facts and held that the Act does not support a private right of action for foster care maintenance payments under § 1983. App. 23a, 35a-36a. Following the Eighth Circuit, the district court viewed § 672(a) as focusing on "the persons or institutions being regulated"—i.e., the States—not "the individuals who benefit." App. 30a (citing *Midwest Foster Care & Adoption Ass'n* v. *Kincade*, 712 F.3d 1190 (8th Cir. 2013)). While foster children were "the ultimate beneficiaries, the focus of [§ 672] and its subparts are the conditions precedent that trigger the federal government's obligation to reimburse funds expended by the state on the behalf of those beneficiaries." App. 30a.

The district court found no "'*unmistakable focus* on the benefited class,'" such as a statute providing that "no person . . . shall . . . be subject to discrimination." App. 31a-32a (ellipses and emphasis

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[6] Although the complaint initially named Kentucky's Governor and Attorney General as additional defendants, respondents did not oppose their dismissal.

in original; quoting *Gonzaga*, 536 U.S. at 284). And the court rejected an analogy to *Wright* and *Wilder*, emphasizing that "[u]sing the *Blessing* test, as elaborated in *Gonzaga*, the statutes on which the plaintiffs rely [here] do not evidence an 'unambiguously conferred right to support a cause of action.'" *Ibid.* (quoting *Gonzaga*, 536 U.S. at 283).

The district court also viewed the Act as "ha[ving] an aggregate, rather than individual, focus." App. 33a. That conclusion followed from the Act's enforcement mechanism requiring only "substantial conformity" to the law's provisions, akin to provisions at issue in *Blessing*. *Ibid.* (quoting *Blessing*, 520 U.S. at 343).[7] Concluding the first *Blessing* factor weighed strongly against finding an enforceable right, the district court granted petitioner summary judgment on the statutory claim. App. 35a-36a.[8]

4. a. The Sixth Circuit reversed. The court analogized to prior circuit precedent holding that other Spending Clause statutes created a private right. App. 6a (citing *Harris* v. *Olszewski*, 442 F.3d 456 (6th Cir. 2006) (Medicaid's freedom-of-choice provision), and *Barry* v. *Lyon*, 834 F.3d 706 (6th Cir. 2016) (Supplemental Nutrition Assistance Program)). Those statutes, in the panel's view, used the requisite "individually focused terminology" by referring to

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[7] The district court acknowledged that "the overall plan is reviewed and approved through centralized federal review," but considered this feature "not alone sufficient" to find an individual right under *Blessing*. App. 35a.

[8] Respondents also pleaded violations of due process and equal protection. The district court rejected those claims on the merits, App. 36a-40a, and they are not at issue here.

beneficiaries of a state-federal program. See App. 6a (under Medicaid, a qualifying state plan "must * * * provide that [] any individual eligible for medical assistance * * * may obtain such assistance from any [qualified provider]"); *ibid.* ("[a]ssistance under th[e] [SNAP] program shall be furnished to all eligible households"). In the panel's view, the Act's reference to foster care maintenance payments "on behalf of each child" evidenced a similar "focus on individual recipients." While acknowledging that states "are given the choice of complying with the Act's conditions or forgoing federal funding," App. 4a, the panel read the Act to "require[] individual payments and focus[] on the needs of specific children," *id.* at 7a-8a.

The panel further held that the Act's "itemized list of expenses that the state must cover" avoided concerns about "vague and amorphous terms that might strain judicial competence." App. 8a. And, in the panel's view, § 672(A)(1)'s use of the words "shall make" imposed a binding obligation on states. *Ibid.*

The panel "disagree[d]" with the Eighth Circuit's *Kincade* decision, rejecting Kentucky's (and the district court's) reliance on that authority as not "persuasive." App. 8a-9a. The Sixth Circuit declined to read § 672 as "'a roadmap for the conditions a state must fulfill in order for its expenditure to be eligible for federal matching funds.'" App. 8a (quoting *Kincade*, 712 F.3d at 1198). In the panel's view, if § 672(a) only imposed eligibility conditions for reimbursement, "Congress would not have phrased the section in mandatory terms." *Ibid.*; accord *id.* at 8a-9a ("[O]nce the Secretary approves the state's

plan, the state '*shall* make foster care maintenance payments * * *. [N]othing in § 672 mentions funding.'").

The panel acknowledged that Congress had used "the active voice, making the state the subject" of the provisions, App. 9a, and that other courts have held that Congress would have more clearly indicated that it was creating individual rights. See *ibid.* (citing *N.Y. State Citizens' Coal. for Children* v. *Carrion*, 31 F. Supp. 3d 512, 521 (E.D.N.Y. 2014) ("[If] § 672(a) read: 'No eligible child shall be denied foster care maintenance payments by a State with an approved plan,' a reasonable reader might find the requisite 'rights-creating' language.")). The panel read this Court's 1990 *Wilder* case to suggest "that laws phrased in the active voice, with the state as the subject, confer individually enforceable rights," App. 9a-10a, even if the Act gives States "substantial discretion" in calculating reimbursement rates, *id.* at 10a. The panel thus sided with *California State Foster Parent Association* v. *Wagner*, 624 F.3d 974 (9th Cir. 2010), which recognized a private right.

b. In the panel's view, the Secretary's programmatic oversight and the availability of "state administrative procedures" (and state judicial review) did not foreclose a § 1983 right of action. App. 12a-13a (quoting *Wilder*, 496 U.S. at 522-523). Dismissing the Act's enforcement mechanisms, the panel reasoned that HHS enforcement was inadequate to ensure the state provides benefits to individual foster parents. App. 12a. In the panel's view, "[a]bsent resort to § 1983, foster families possess no *federal* mechanism to ensure compliance

with the Act." *Ibid.* (emphasis added). The panel did not discuss the Act's express private right of action in 42 U.S.C. § 674(d)(3)(A).

c. Although the district court had no occasion to reach merits questions, the panel went on to address whether respondents were eligible for foster care payments. The panel noted § 672(a)(2)(B), which only contemplates foster care maintenance payments while a child remains in the State's legal custody. App. 14a. Concluding that the record did not conclusively resolve whether the state court had formally "discharged the children from the Cabinet's custody" under Kentucky law, the panel remanded for the district court to make that determination. App. 16a.[9]

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[9] The panel also addressed § 672(a)(2)(C), which conditions reimbursement on a child having been placed in a qualifying "foster family home"—i.e., one that complies with applicable safety and non-safety standards, and has been licensed or approved by the state. App. 16a. Petitioner argued below that all foster-care providers (even relatives) must meet those standards, and that although Kentucky had performed a standard home evaluation and criminal background check, R.O. never applied to become an approved or licensed foster-care provider, and never completed the mandatory training required of all foster parents. See C.A. Appellee Br. 29, 32. Without directly addressing licensing or approval deficiencies, the panel reasoned that federal law does not permit a "distinction between relative and non-relative foster care providers," and concluded that R.O. was "an approved foster care provider." App. 18a. Petitioner does not challenge that determination here.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SHARP AND ACKNOWLEDGED SPLIT OVER WHETHER TITLE IV-E CREATES A PRIVATELY ENFORCEABLE RIGHT TO FOSTER CARE MAINTENANCE PAYMENTS

"Federal courts are divided as to whether the [Act] creates privately enforceable rights to * * * foster care maintenance payments." *Connor B. ex rel. Vigurs* v. *Patrick*, 771 F. Supp. 2d 142, 170 (D. Mass. 2011). As courts and commentators alike recognize, "[s]ome courts have found that the [Act's] provisions relating to foster care payments and reimbursement furnish a basis for an action under 42 U.S.C. § 1983, although other courts have declined to recognize such an action." *Actions Under 42 U.S.C.A. § 1983 for Violations of Adoption Assistance and Child Welfare Act*, 42 A.L.R. Fed. 2d 411 (2009). The split is entrenched and mature, and is generating disparate outcomes for beneficiaries and states alike, based solely on where a case is filed. Review is urgently warranted.

A. The Ninth And Sixth Circuits Allow § 1983 Suits For Foster Care Maintenance Payments

The Ninth and Sixth Circuits, joined by district courts in numerous other circuits, hold that the Act creates a private right to foster care maintenance payments enforceable under § 1983.

1. In *California State Foster Parent Association* v. *Wagner*, 624 F.3d 974, 977 (2010), the Ninth Circuit was "squarely faced with the issue of whether the

[Act], at 42 U.S.C. §§ 672(a) and 675(4)(A), creates an enforceable federal right" to foster care maintenance payments enforceable under § 1983, and answered "yes." The court focused on the first *Blessing* factor. Closely following circuit precedent, see *Price* v. *City of Stockton*, 390 F.3d 1105 (9th Cir. 2004), the Ninth Circuit concluded that the Act "creat[es] a right" in § 672(a) and "spell[s] out the content" of that right in § 675(4)(A). *Wagner*, 624 F.3d at 979. In the Ninth Circuit's view, § 672 "unambiguously designates foster parents as one of three types of recipients who can receive funds on foster children's behalf." *Ibid.* Contrary to *Kincade*, the Ninth Circuit read the statute to focus on individuals, not states as regulated entities. *Id* at 980. *Wagner* also reasoned that § 672(a)'s reference to "payments on behalf of *each* child" reflects an "individual, rather than aggregate" focus, and noted that foster care maintenance payments are paid to individuals. *Id*. at 980-981. The court also viewed the Act as lacking a federal remedy for individual claims. *Id*. at 982.

Wagner also concluded that foster care maintenance payments are sufficiently specific to be amenable to judicial enforcement. 624 F.3d at 981-982. And the court read the statute to use mandatory terms. *Id*. at 982. On that basis, the Ninth Circuit held that the Act's foster care maintenance provisions create a private right enforceable under § 1983. *Ibid.*

Judge Callahan concurred to emphasize that although he agreed the panel's application of the *Blessing* factors was "controlled by * * * *Price*," "[w]ere [he] writing on a blank slate, [he] would not find that there is the requisite 'unambiguously

conferred right' for a private action under * * * § 1983." 624 F.3d at 983 (citing *Gonzaga*, 536 U.S. at 283). The full Ninth Circuit denied a petition for rehearing en banc, over Judge Callahan's dissent.

2. In this case, the Sixth Circuit sided squarely with the Ninth, holding that "§ 672 confers an individually enforceable right to foster care maintenance payments." App. 11a. As in *Wagner*, the Sixth Circuit relied on prior circuit law interpreting other Spending Clause statutes. App. 6a. The Sixth Circuit viewed the Act's references to payments "on behalf of each child," § 672(a)(1), as evincing a focus on "individual recipients" to a specific "monetary entitlement." App. 7a-8a. In so holding, the Sixth Circuit addressed and expressly rejected the Eighth Circuit's reasoning and result in *Kincade*, and decisions of other courts refusing to find a private right. App. 8a-9a (citing *Kincade*, 712 F.3d at 1198 and *Carrion*, 31 F. Supp. 3d at 521).

3. Published district court decisions in the First, Seventh, Eleventh, and D.C. Circuits align with the Sixth and Ninth Circuits, while acknowledging the split of authority. *E.g.*, *Connor B.*, 771 F. Supp. 2d at 170, 172 (recognizing that "[f]ederal courts are divided" but following *Wagner* and holding that the Act creates a right to foster care maintenance payments); *C.H.* v. *Payne*, 683 F. Supp. 2d 865, 877-878 (S.D. Ind. 2010) (recognizing disagreement, citing cases, and finding private right); *Kenny A. ex rel. Winn* v. *Perdue*, 218 F.R.D. 277, 290-291 (N.D. Ga. 2003) (finding private right); *LaShawn A.* v. *Dixon*, 762 F. Supp. 959 (D.D.C. 1991) (same), aff'd on other grounds, 990 F.2d 1319 (D.C. Cir. 1993).

B. The Eighth Circuit Has Held That The Act Does Not Create A Private Right To Foster Care Maintenance Payments Enforceable Under § 1983

1. In *Midwest Foster Care and Adoption Association* v. *Kincade*, 712 F.3d 1190 (8th Cir. 2013), individual foster-care providers sued a state child welfare agency under § 1983, arguing that the Act creates a privately enforceable right to receive foster care maintenance payments. See 712 F.3d at 1193-1194. The plaintiffs there argued (like respondents here) that §§ 671(a)(1) and 672 of the Act "endow[] eligible foster care providers with an individually enforceable right to [foster care maintenance] payments," according to the "element[s] of care" in § 675(4)(A) of the Act. *Id.* at 1195. The Eighth Circuit held that "Congress did not unambiguously confer" such an "individually enforceable right to foster care maintenance payments." *Id.* at 1203.

Like the district court's judgment here, *Kincade* was rooted in this Court's decisions in *Blessing* and *Gonzaga*, and emphasized the "absence of any rights-creating language in the relevant portions of the [Act]." 712 F.3d at 1197. The Eighth Circuit observed that, rather than "speak[ing] directly" to the interests of program beneficiaries, the Act "speak[s] to the states as regulated participants." *Ibid.* As the Eighth Circuit recognized, finding an "enforceable right solely within [§ 675(4)(A)'s] purely definitional [language would be] antithetical to requiring unambiguous congressional intent." *Ibid.* Rather, § 675(4)(A) was best construed as "a ceiling imposed

by Congress on the categories of foster care costs eligible for partial federal reimbursement." *Ibid.*

The court held that §§ 671 and 672 did not contain sufficiently unambiguous rights-creating language. 712 F.3d at 1198-1199. Section 671(a)(1)'s mandatory-sounding language, the court observed, was followed by "a series of factors that curtail the situations in which state plans 'shall make foster care maintenance payments.'" *Id.* at 1198. The Eighth Circuit recognized that the statute's "overwhelming focus" was on conditions the *state* must satisfy to receive federal funds. *Ibid.*[10] In short, § 672(a) "serve[s] as a roadmap for the conditions a state must fulfill in order for its expenditure to be eligible for federal matching funds." *Ibid.*

The Eighth Circuit acknowledged, but expressly declined to follow, the Ninth Circuit's contrary approach in *Wagner*, 624 F.3d 974. Even accepting the Ninth Circuit's premise that Congress intended foster parents and children to *benefit* from foster care maintenance payments, the Eighth Circuit stressed that the operative question is the existence of a *right*, not a *benefit*. *Kincade*, 712 F.3d at 1199. Thus, "locat[ing] a nexus between § 1983 plaintiffs and a benefit conferred by a statute [was] necessary but not sufficient" to establish an individually enforceable right. *Ibid.*

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[10] While focusing its analysis on congressional intent, the Eighth Circuit also noted "the [HHS] Secretary's long-standing interpretation of th[e] enumerated list [in § 675(4)(A)] as a constraint on the scope of a state's claim for matching funds." 712 F.3d at 1198 n.5 (citing 45 C.F.R. § 1355.20(a)).

The Eighth Circuit also concluded—contrary to the Sixth Circuit here—that the relevant statutory provisions evince "an 'aggregate,' rather than an individual, focus." 712 F.3d at 1200. Even when a state "avails itself" of federal funds, "perfect compliance is not demanded." Rather, "states risk diminution or termination of funding" only if they fail to be "'in substantial conformity' with the [Act's] funding conditions." *Ibid*. (citing 42 U.S.C. § 1320a-2a). Under *Gonzaga*, a second "indicator of aggregate focus" was that the Act refers to the supposed individual right "'in the context of describing the type of [action] that triggers a funding prohibition.'" *Id.* at 1201 (quoting *Gonzaga*, 536 U.S. at 288-289). Despite the Act's "relative lack of federal review opportunities," the Eighth Circuit found that the remaining *Blessing-Gonzaga* factors "strongly tilt against the finding of an unambiguous intent to create an individually enforceable right." *Id.* at 1202.

Judge Smith dissented, acknowledging the division of authority but siding with those courts that have recognized a private right of action. See 712 F.3d at 1203 (Smith, J., dissenting). Judge Smith acknowledged, however, some tension between this Court's recent decisions in *Blessing* and *Gonzaga*, and older cases such as *Wilder*. "While the analysis and decision of the District Court [and panel majority] *may reflect the direction that future Supreme Court cases in this area will take*," Judge Smith concluded that "currently binding precedent" supported finding an individual right. 712 F.3d at 1206 n.11 (emphasis added) (Smith, J., dissenting). The Eighth Circuit denied a petition for rehearing en banc, over three

dissents. *Id.* at 1190 (Murphy, Bye, Smith, dissenting from denial of reh'g en banc).

2. District courts in the Second and Tenth Circuits have likewise concluded that the Act creates no individual right of action, while acknowledging the conflict of authority. *E.g.*, *Carrion*, 31 F. Supp. 3d at 516, 524 ("This Court agrees [with the Eighth Circuit] and similarly holds that there is no private right of action under either [§ 672(a) or § 675(4)(A) of the Act]," while noting "the contrary finding of the * * * Ninth Circuit"); *D.G. ex rel. Stricklin* v. *Henry*, 594 F. Supp. 2d 1273 (N.D. Okla. 2009) (in action brought by foster children, finding no clear congressional intent to confer a private right to foster care maintenance payments); *Carson P. ex rel. Foreman* v. *Heineman*, 240 F.R.D. 456, 539 (D. Neb. 2007) (no private right).

C. The Split Over Foster Care Maintenance Payments Implicates Broader Disagreement About § 1983 Enforcement Of Related Provisions

The split over enforcement of foster care maintenance payments implicates and overlaps with broader disagreement about whether other provisions in the Act create individually enforceable rights. See *Braam ex rel. Braam* v. *State*, 81 P.3d 851, 863 (Wash. 2003) (en banc) (finding no private right under § 1983 to enforce §§ 671(a)(16) and 675(1) of the Act, and noting that "courts around the country are divided on whether a cause of action is implied or maintainable under 42 U.S.C. § 1983"). Although the analysis in those cases depends in part on the specific provisions at issue, substantial portions of the

reasoning is common to cases involving foster care maintenance payments—including, for instance, the significance of the Act's overall remedial scheme, whether the Act evinces an aggregate or individual focus, and the relevance of definitional provisions in § 675. By resolving the question presented here, this Court would provide much-needed guidance to state and federal courts about enforcement of those other provisions.

To take just one example, state and federal appellate courts have divided over whether the Act creates an enforceable right to a "case plan (as defined in section 675(1) of this title) for each child receiving foster care maintenance payments." 42 U.S.C. § 671(a)(16). In *Henry A.* v. *Willden*, 678 F.3d 991, 1006 (2012), the Ninth Circuit acknowledged a conflict of authority on that question, but held that "the case plan provisions [in § 671(a)(16)] are enforceable through § 1983." Relying heavily on *Wagner*, the court observed that both statutory provisions use the phrase "each child," language that (in its view) shows an "individual, rather than an aggregate, interest." 678 F.3d at 1007 (citing *Wagner*, 624 F.3d at 979-981). In addressing the second and third *Blessing* factors, the Ninth Circuit continued its heavy reliance on *Wagner*, reasoning that (1) the Act's definition section (§ 675) "describes exactly" the content of the asserted right; (2) "the repeated use of the word 'shall' in the [Act] shows that the statute is written in mandatory rather than precatory terms"; and (3) the lack of a federal mechanism for individual claims "weighs in favor of

enforcement through § 1983." *Id.* at 1007-1008 (citing *Wagner*, 624 F.3d at 981-982).[11]

In sharp contrast, the Supreme Court of Washington, sitting en banc, unanimously held that a class of foster children lacked a private right to enforce these *very same provisions* using § 1983. See *Braam*, 81 P.3d at 693-694. The Washington court noted *Gonzaga*'s instruction that Spending Clause legislation must contain "specific 'rights creating' language before a court can find a[] * * * right enforceable under 42 U.S.C. § 1983," and noted this Court's reluctance to imply "enforceable claims of right" from "various federal administrative or funding schemes." 81 P.3d at 864-865 (citing *Alexander* v. *Sandoval*, 532 U.S. 275 (2001)). The *Braam* Court "d[id] not find such rights creating language here." *Id.* at 865. The conflict between a state court of last resort and its regional federal circuit about a matter that can be brought in state or federal court is particularly intolerable, underscoring the need for prompt guidance on individual enforcement of the Act under § 1983. *E.g.*, *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 761-762 (1994) (noting certiorari granted to resolve conflict between Eleventh Circuit and Florida Supreme Court).

Given the significant overlap in the *Blessing-Gonzaga* analysis, a decision in this case would provide guidance to state and federal courts

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[11] In so holding, the Ninth Circuit aligned itself with prior decisions of other circuits. See *Lynch* v. *Dukakis*, 719 F.2d 504, 508 (1st Cir. 1983) (finding an enforceable private right under 42 U.S.C. §§ 671(a)(16) and 675); *L.J. ex rel. Darr* v. *Massinga*, 838 F.2d 118, 123 (4th Cir. 1988) (same).

nationwide in deciding whether various provisions of the Act are enforceable under § 1983.

II. THE SIXTH CIRCUIT'S DECISION IS WRONG

The Act's text, structure, and legislative history are bereft of the "unambiguous[]" evidence of congressional intent, *Gonzaga*, 536 U.S. at 283, needed to confer an individual right enforceable under § 1983. The Act neither dictates the amount that states must spend on foster care, nor compels states to provide any minimum level of support for foster parents or children. By defining "foster care maintenance payments" in the Act, Congress simply intended to limit what expenditures would be eligible for partial federal reimbursement, and did not unambiguously create any privately enforceable right. In holding otherwise, the Sixth Circuit misread the statute, departed from this Court's recent guidance on § 1983, and split from the weight of better-reasoned authority. This Court should reverse.

1. a. The Act's "clear and unambiguous terms" do not demonstrate that "Congress intended to confer individual rights upon a class of beneficiaries." *Gonzaga*, 536 U.S. at 283, 285, 290. To the contrary, the statute is focused on what a state must do to be eligible for federal funding. By its plain text, § 671(a)(1) is one among dozens of criteria a state plan must satisfy "for a State to be eligible for payments under [the Act]." 42 U.S.C. § 671(a)(1).

Section 672(a)(1), in turn—titled "Eligibility"—sets forth conditions for foster-care maintenance

payments to qualify for reimbursement. Among other things, a child must have been placed in foster care pursuant to certain procedures (§ 672(a)(1)(A)), must have met certain financial eligibility standards (§ 672(a)(1)(B)), and must have been placed in a family home or institution meeting certain minimum criteria (§ 672(a)(2)(C)). The "overwhelming focus" of § 672(a)(1) "is upon the conditions precedent that trigger th[e] obligation [to pay federal reimbursement]." *Kincade*, 712 F.3d at 1198. Although § 672(a)(1) uses the phrase "shall make [payments]," that simply describes what a state must do to be "[e]ligib[le]" for reimbursement. This Court has rejected attempts to enforce other statutes under § 1983 where Congress used similar language in the Spending Clause context. *Blessing*, 520 U.S. at 334-335.

Nothing in § 675(4)'s definitional section changes this analysis. To begin, "[f]inding an enforceable right solely within a purely definitional section is antithetical to requiring unambiguous congressional intent." *Kincade*, 712 F.3d at 1197. As the federal agency responsible for administering the Act has explained, § 675(4)(A)'s definition of "foster care maintenance payments" provides an *allowable* list of items that are eligible for federal reimbursement—not "a mandatory set of costs that must be fully covered by a state's foster care maintenance payments," *ibid.* The HHS regulations implementing § 675 characterize the list as containing "allowable

expense[s]." 45 C.F.R. § 1355.20(a).[12] This reading aligns with the legislative history: Congress enacted the definition of "foster care maintenance payments" in 1980 because prior law had no uniform definition that would limit federal reimbursement to "only those items which are included in the case of foster care provided in a foster family home." H.R. Rep. 96-900, at 49 (1980) (Conf. Rep). The definition makes clear that foster care payments are *not* "in the nature of a salary for the exercise by the foster family parent of ordinary parental duties." *Id.* at 50. In the context of "an open-ended entitlement program," "it seems natural that Congress would choose to place limitations on the type of state expenditures it matches." *Kincade*, 712 F.3d at 1197-1198. The "focus" of these provisions is "removed" from the interest of foster care providers, and instead "speak[s] to the states as regulated participants in the [Act] and enumerate[s] limitations on when the states' expenditures will be matched with federal dollars." *Id.* at 1197.

2. The Act's tailored enforcement and review mechanisms confirm that Congress did not "clear[ly]

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[12] For instance, Congress amended the Act in 2008 to include payments for "reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement," Pub. L. No. 110-351, § 204, 122 Stat. 3949, 3960 (2008). Federal implementing guidance explained that "[a]s with any cost enumerated in the definition of foster care maintenance payments in [§ 675(4)], the [State] agency may decide which of the enumerated costs to include in a child's foster care maintenance payment." U.S. Dep't of Health & Human Servs., Program Instruction No. ACYF-CB-PI-10-11 at 20 (2010), https://www.acf.hhs.gov/sites/default/files/cb/pi1011.pdf.

and unambiguous[ly]" "confer individual rights upon a class of beneficiaries," *Gonzaga*, 536 U.S. at 283, 285, 290, enforceable through § 1983. Congress did not condition federal funding on *perfect* compliance; rather, a state may claim federal funds so long as its plan is "in substantial conformity" with the Act's various provisions, including those addressing foster care maintenance payments. 42 U.S.C. § 1320a-2a(a). Even if a state is not in substantial conformity, the federal government must "afford the State an opportunity to adopt and implement a corrective action plan" that is "designed to end the failure to so conform." *Id.* § 1320a-2a(b)(4). Congress flatly prohibited HHS from withholding "any Federal matching funds * * * while such a corrective action plan is in effect." *Ibid.*

This scheme is incompatible with the idea that Congress intended the Act to be enforced through individual § 1983 actions covering every instance of alleged noncompliance. This Court has repeatedly held that "substantial compliance" enforcement regimes undercut claims of individually enforceable federal rights. See *Gonzaga*, 536 U.S. at 288; *Blessing*, 520 U.S. at 343. A "substantial compliance regime cuts against an individually enforceable right because, even where a state substantially complies with its federal responsibilities, a sizeable minority of its beneficiaries may nonetheless fail to receive the full panoply of offered benefits." *Kincade*, 712 F.3d at 1200-1201. Because failure to meet § 672(a)'s requirements "triggers a funding prohibition," and the asserted individual right is mentioned in the

context of those funding prohibitions, the Act is best understood as having an "aggregate" focus. *Ibid.*

Congress's express provision of forums for individual claims further counsels against implying a private right under § 1983. The Act specifies that a state plan must include an "opportunity for a fair hearing before a State agency" to challenge the denial or delay of benefits. 42 U.S.C. § 671(a)(12). Kentucky, like other states, provides both an administrative forum and judicial review in state courts. See 922 Ky. Admin. Regs. 1:320; Ky. Rev. Stat. Ch. 13B; accord 18 N.Y.C.R.R. § 358-3.1 (administrative hearing); *Matter of Claudio* v. *Dowling*, 89 N.Y.2d 567, 569-570 (1997).

Finally, that the Act expressly authorizes "[a]ny individual who is aggrieved by a violation of section 671(a)(18) * * * [to] bring an action seeking relief from the State * * * in any United States district court," 42 U.S.C. § 674(d)(3)(A), is "strong evidence that Congress did not intend these other various state plan elements in 42 U.S.C. § 671(a) to confer rights enforceable pursuant to § 1983," *Carrion*, 31 F. Supp. 3d at 518 (citing cases). "[W]hen 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). More generally, "the explicitly conferred means of enforcing compliance * * * by the Secretary's withholding funding suggests that other means of enforcement are precluded." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387 (2015) (opinion of Scalia, J.); accord *id.* at 1389-1390 (Breyer, J., concurring in part and concurring in the judgment) (availability of

"other forms of relief," including Administrative Procedure Act suit against relevant federal agency, weighs against allowing individual enforcement by suit for injunctive relief against states).

3. *Wilder* does not compel a different approach. There, this Court interpreted a provision of the Medicaid Act, 42 U.S.C. § 1396a(a)(13)(A), as giving healthcare providers an individually enforceable right to reimbursement at "reasonable and adequate" rates. But *Wilder* predates *Blessing* and *Gonzaga*'s instruction about the need for unambiguous evidence of Congress's intent to create a private right. This Court's "later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified." *Armstrong*, 135 S. Ct. at 1386 n.* (opinion of the Court) (citing *Gonzaga*, 536 U.S. at 283). Among other things, *Gonzaga* "'reject[ed] the notion, implicit in *Wilder*, 'that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.'" *Ibid.* (quoting *Gonzaga*, 536 U.S. at 283). And *Wilder* does not address the relevance of a "substantial conformity" enforcement mechanism—which plays a central role under current law. Compare *Wilder*, 496 U.S. at 521, with *Gonzaga*, 536 U.S. at 288. In any event, it is telling that when *Wilder*'s private enforcement scheme soon became unworkable, Congress amended the Medicaid Act to overturn the decision. See Pub. L. No. 105-33, § 4711, 111 Stat. 251, 507 (1997).

III. THIS CASE IS AN ATTRACTIVE VEHICLE TO RESOLVE A RECURRING ISSUE OF NATIONAL IMPORTANCE

1. The question of individual enforcement of claims for foster care maintenance payments under § 1983 arises with unusual frequency and persistence. Not only are circuit and district courts nationwide intractably split, but the sheer number of cases decided in recent years illustrates the importance of the issue to administration of this federal program.[13] In addition, a wave of cases addressing related provisions of the Act has swept jurisdictions nationwide. See 42 A.L.R. Fed. 2d 411 (collecting cases); see also 5 West's Fed. Admin. Prac. § 6162 (June 2017 update) (same).

2. This Court should grant review to resolve this "important question[] affecting the nationwide administration of a major federal welfare program." *Quern* v. *Mandley*, 436 U.S. 725, 734 (1978); accord *Bhd. of Locomotive Eng'rs* v. *Atchison, Topeka & Santa Fe R.R. Co.*, 516 U.S. 152, 156 (1996) (granting certiorari in light of "the importance of uniform

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[13] For cases recognizing a private right to foster care maintenance payments enforceable under § 1983, see, *e.g.*, *Foster Parents Ass'n of Wash. State* v. *Dreyfus*, No. C 11–5051 BHS, 2013 WL 496062, at *3 (W.D. Wash. Feb. 7, 2013); *Sam M. ex rel. Elliott* v. *Chafee*, 800 F. Supp. 2d 363, 387 (D.R.I. 2011); *Connor B.*, 771 F. Supp. 2d at 172; *C.H.* v. *Payne*, 683 F. Supp. 2d 865, 877 (S.D. Ind. 2010); *Cal. Alliance of Child & Family Servs.* v. *Allenby*, 459 F. Supp. 2d 919, 925 (N.D. Cal. 2006); *Kenny A.*, 218 F.R.D. at 303; *Mo. Child Care Ass'n* v. *Martin*, 241 F. Supp. 2d 1032, 1042 (W.D. Mo. 2003). For cases reaching the opposite conclusion, see, *e.g.*, *Carrion*, 31 F. Supp. 3d at 524; *Henry*, 594 F. Supp. 2d 1273; *Heineman*, 240 F.R.D. at 539.

nationwide application" of a federal "regulatory scheme"). Whether individual foster children or their caregivers may bring a federal-court suit claiming foster care maintenance payments—and whether state programs are subject to this additional enforcement mechanism—now depends entirely on the jurisdiction in which a case arises and is filed.

For states, the need for resolution is particularly acute, given the significant effect that private lawsuits have on the management and administration of foster care programs. Recognizing a private right to foster care maintenance payments enforceable under § 1983 "presents the potential"—very real in this case—"for a federal court to instruct the State's elected representatives to increase appropriations to the State's foster care program," *Kincade*, 712 F.3d at 1196—a power Congress did not (and could not) provide in the Act.

While petitioner shares and supports the goal of improving foster care for Kentucky's children, the impact of private litigation and federal judicial supervision of state foster-care programs cannot be overstated, both in imposing tremendous costs and limiting the flexibility that Congress plainly intended to afford states in structuring and operating their programs. Indeed, the expense of federal-court litigation can detract from funds that would otherwise be available for programs. As the *Braam* court observed, there is a nationwide trend of using litigation to alter state officials' operation of foster care systems, noting "at least 17 similar cases brought in other states, most of which had ended in consent decrees." 81 P.3d at 854 & n.2. The

availability of attorneys' fees and costs can mean that states spend "more money in attorneys' fees [awards] than § 1983 costs [them] in actual [substantive awards]." Municipal Liability under 42 U.S.C. § 1983, *Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary* at 524, 531, 97th Cong., 1st Sess. (1981) (statement of Kenneth O. Eikenberry, National Ass'n of Attorneys General).

There is strong reason to doubt that Congress intended federal-court litigation—rather than administrative oversight complemented by tailored individual remedies—to be available here. To the contrary, the Act's "substantial conformity" regime reflects a legislative choice to foster dialogue between the states and the federal government—and has proven effective in addressing systemic deficiencies in state programs. Even where a state program falls short, individual enforcement actions seeking declaratory and permanent injunctive relief will shape state policies in ways that inevitably differ from an HHS-crafted "corrective action plan." 42 U.S.C. § 1320a-2a(b)(4)(A), (C). Allowing every putative beneficiary to bring and enforce a claim for foster care maintenance payments cannot be reconciled with Congress's standard of "substantial conformity."

3. This case presents an ideal vehicle to resolve the circuit split and provide guidance to states, courts, and beneficiaries. This case was adjudicated in district court based on a short joint stipulation of facts, ensuring that this Court will not be drawn into factual disputes. The question was pressed and

passed upon below: petitioner promptly raised the § 1983 issue in moving to dismiss or, in the alternative, for summary judgment. And the district court and Sixth Circuit squarely addressed the question.[14]

[14] That the Sixth Circuit remanded for the district court to consider a factual issue relevant to the *merits* is no obstacle to certiorari. This Court has not hesitated to grant review where a party might in the future prevail on an alternative ground. *E.g.*, *Abbott* v. *Abbott*, 560 U.S. 1, 22 (2010) (deciding question presented and remanding for adjudication of alternative defenses). The district court here deferred proceedings on remand, pending disposition of this petition and any subsequent proceedings in this Court. See Minute Entry, *D.O.* v. *Glisson*, No. 5:15-cv-48 (E.D. Ky. Mar. 24, 2017), ECF No. 21.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-5461

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

Plaintiffs-Appellants,

v.

VICKIE YATES BROWN GLISSON, in her official capacity as Secretary for the Cabinet for Health and Family Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.
No. 5:15-cv-00048—Danny C. Reeves, District Judge.

Argued: November 29, 2016
Decided and Filed: January 27, 2017
Amended: May 19, 2017

Before: DAUGHTREY, CLAY, and COOK, *Circuit Judges*:

COOK, *Circuit Judge*:

The federal Child Welfare Act ("the Act") specifies that "[e]ach State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative ... into foster care." 42 U.S.C. § 672(a). This appeal asks whether the Act creates a private right to foster-care maintenance payments enforceable by a foster parent under 42 U.S.C. § 1983. We find that it does, and therefore reverse the district court's contrary decision.

I.

In 2012, Kentucky's Health and Family Services commenced a Dependency, Neglect, and Abuse proceeding against the mother of two young boys. The mother stipulated to neglecting her children, and Kentucky placed both boys in foster care. Plaintiff R.O., the mother's aunt, sought custody of the children. The state "conducted a standard home evaluation and criminal background check on R.O. and eventually both children were placed in her home by Court Order." In September 2014, the family court closed the action and granted joint custody to both the mother and the aunt, though the boys remained living with the aunt.

R.O. filed a motion with the family court seeking foster care maintenance payments. The court declined to rule on the issue, however, "indicating that permanency had been achieved." R.O. then sued the Secretary for Kentucky's Cabinet for Health and Family Services ("the Cabinet" or "Kentucky") in state court, arguing that the federal Child Welfare Act required the state to provide maintenance payments, and that the failure to make payments

violated the Constitution's Equal Protection and Due Process Clauses. The Cabinet removed the case to federal court and filed a motion to dismiss, or in the alternative, a motion for summary judgment. The district court granted the Cabinet's motion, reasoning that the Child Welfare Act provides no privately enforceable rights, that the family lacked a property interest in the payments, and that Kentucky's scheme rationally distinguished between relative and non-relative foster care providers. The family appealed.

II.

The court "review[s] a grant of summary judgment de novo, construing the evidence and drawing all reasonable inferences in favor of the nonmoving party." *Hirsch v. CSX Transp., Inc.*, 656 F.3d 359, 362 (6th Cir. 2011) (citing *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009)). "Summary judgment is appropriate where the movant demonstrates that there is 'no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Rocheleau v. Elder Living Constr., LLC*, 814 F.3d 398, 400 (6th Cir. 2016) (quoting Fed. R. Civ. P. 56(a)).

III.

In 1980, Congress passed the Child Welfare Act, also known as Title IV-E of the Social Security Act. This federal-state grant program facilitates state-run foster care and adoption assistance for children removed from low-income homes. *See* 42 U.S.C. § 670. Congress passed the Act under its Spending Clause

power, U.S. Const. art. I, § 8, and like other federal-state cooperative programs, states are given the choice of complying with the Act's conditions or forgoing federal funding.

Three sections of the Act are relevant here. First, to be eligible for federal funds, a state must submit a plan to the Secretary of Health and Human Services that satisfies thirty-five specific criteria. 42 U.S.C. § 671(a). If a state's plan fails to "substantial[ly] conform[]" to the Act's requirements, *id.* § 1320a-2a, the Secretary, after giving the state an opportunity to implement a corrective action plan, must withhold federal money, *id.* § 1320a-2a(b)(3)(A), (4)(A).

Second, the plan must "provide[] for foster care maintenance payments in accordance with section 672." *Id.* § 671(a)(1). Under § 672, "[e]ach State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative ... into foster care." *Id.* § 672(a)(1). Foster care maintenance payments cover the cost of, among other things, the child's food, clothing, and shelter. *Id.* § 675(4)(A).

Third, after the state remits maintenance payments to the foster family, it may seek partial reimbursement from the federal government. Section 674(a)(1) provides that "each State which has a plan approved under this part shall be entitled to a payment equal to the sum of" an "amount equal to the Federal medical assistance percentage ... of the total amount expended during such quarter as foster care maintenance payments under section 672 of this title for children in foster family homes or child-care institutions."

IV.

We first address the central issues on appeal: 1) whether the Act confers upon foster families a private right to foster care maintenance payments; and 2) whether that right is enforceable under § 1983.

1. Private Right

Title 42 U.S.C. § 1983 imposes liability on anyone who, acting under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." This section authorizes suits to enforce individual rights under federal statutes as well as the Constitution. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). Nonetheless, "§ 1983 does not provide an avenue for relief every time a state actor violates a federal law." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119 (2005). Rather, "to sustain a § 1983 action, the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs." *Id.* at 120, 125 S.Ct. 1453 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002)).

For this court to find an individually enforceable right: 1) "Congress must have intended that the provision in question benefit the plaintiff"; 2) the asserted right must not be "so vague and amorphous that its enforcement would strain judicial competence"; and 3) "the statute must unambiguously impose a binding obligation on the States." *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997) (internal citations and quotation marks omitted).

To illustrate, in *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006), we evaluated whether Medicaid's freedom-of-choice provision established enforceable rights. The provision reads: "A State plan for medical assistance must ... provide that [ ] any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required." 42 U.S.C. § 1396a(a)(23). We held that the provision granted Medicaid-recipients an individually enforceable right to choose their medical provider, reasoning that the phrase "any individual eligible for medical assistance" evinced "the kind of individually focused terminology that unambiguously confers an individual entitlement under the law." *Harris*, 442 F.3d at 461 (internal citation and quotation marks omitted). We noted that "the mandate [ ] does not contain the kind of vagueness that would push the limits of judicial enforcement." *Id.* at 462. And we explained that "the 'must ... provide' language of the provision confirms that the statute is 'couched in mandatory, rather than precatory, terms.' " *Id.* (omission in original) (quoting *Blessing*, 520 U.S. at 341); *see also Barry v. Lyon*, 834 F.3d 706, 717 (6th Cir. 2016) (holding that the federal Supplemental Nutrition Assistance Program—mandating that "[a]ssistance under this program shall be furnished to all eligible households," 7 U.S.C. § 2014(a)—created a privately enforceable statutory right).

By contrast, in *Gonzaga University* the Supreme Court held that the Family Educational Rights and Privacy Act ("FERPA") failed to grant students a

privacy right in their education records. 536 U.S. at 290. The relevant statutory section provided:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents to any individual, agency, or organization.

Id. at 279 (omission in original) (quoting 20 U.S.C. § 1232g(b)(1)). The Court reasoned in part that FERPA lacked "the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Id*. at 287 (citing *Alexander v. Sandoval*, 532 U.S. 275, 288–89 (2001), and *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n.13 (1979)). In particular, "FERPA's provisions speak only to the Secretary of Education, directing that 'no funds shall be made available' to any 'educational agency or institution' which has a prohibited 'policy or practice.' " *Id*. (quoting 20 U.S.C. § 1232g(b)(1)). The nondisclosure provisions evinced an "aggregate focus" that "speak only in terms of institutional policy and practice, not individual instances of disclosure," and "are not concerned with 'whether the needs of any particular person have been satisfied.' " *Id.* at 288, (quoting *Blessing*, 520 U.S. at 343–44).

Applied here, we conclude the Act confers upon foster parents an individually enforceable right to foster care maintenance payments. First, the Act mandates payments "on behalf of each child." 42 U.S.C. § 672(a)(1). This focus on individual recipients is similar to language creating private rights in

Harris and *Barry*. Unlike *Gonzaga*, the Act requires individual payments and focuses on the needs of specific children, as opposed to merely speaking to the state's policy or practice. Second, the Act confers a monetary entitlement upon qualified foster families and includes an itemized list of expenses that the state must cover. 42 U.S.C. § 675(4)(A). It therefore lacks vague and amorphous terms that might strain judicial competence. Finally, § 672(a)(1)'s "shall make" language "unambiguously impose[s] a binding obligation on the States." *Blessing*, 520 U.S. at 341.

Kentucky makes several arguments to the contrary, though none are persuasive. It first argues that § 672(a) simply sets out the preconditions that a state must satisfy to receive federal reimbursement. In support, it points to a different statutory section, § 674(a)(1), which provides that "each State which has a plan approved under this part shall be entitled to a payment equal to the sum of" an "amount equal to the Federal medical assistance percentage ... of the total amount expended during such quarter as foster care maintenance payments under section 672 of this title for children in foster family homes or child-care institutions." 42 U.S.C. § 674(a)(1). Based on this section, Kentucky invokes the Eighth Circuit's reasoning that the "function of § 672(a) is to serve as a roadmap for the conditions a state must fulfill in order for its expenditure to be eligible for federal matching funds; otherwise, the state bears the full cost of these payments." *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1198 (8th Cir. 2013) (citing § 674(a)(1)).

We disagree. If § 672(a) simply provides a roadmap that states may choose to follow to receive matching

funds, then Congress would not have phrased the section in mandatory terms. Indeed, once the Secretary approves the state's plan, the state "shall make foster care maintenance payments." 42 U.S.C. § 672(a)(1) (emphasis added). It isn't optional. And although a separate section of the Act requires the federal government to partially reimburse these costs, nothing in § 672(a) mentions funding.

Kentucky next contends that the Act " 'do[es] not speak directly to the interests' of foster parents; rather, [it] 'speak[s] to the states as regulated participants in the [Act].' " Appellee Br. 36 (quoting *Midwest Foster Care*, 712 F.3d at 1197). Kentucky suggests that when Congress writes in the active voice, making the state the subject, its focus is on the state as the regulated entity, and courts should not infer a private right to whatever benefit the state is supposed to provide. Thus, because Congress wrote in the active voice—"[e]ach State with a plan approved under this part shall make foster care maintenance payments on behalf of each child," 42 U.S.C. § 672(a)—Kentucky argues the law does not create a private right. *Cf. New York State Citizens' Coal. for Children v. Carrion*, 31 F. Supp. 3d 512, 521 (E.D.N.Y. 2014) ("If the statute were worded differently, and § 672(a)(1) read: 'No eligible child shall be denied foster care maintenance payments by a State with an approved plan,' a reasonable reader might find the requisite 'rights-creating' language.").

Both the Supreme Court and the Sixth Circuit, however, have found that laws phrased in the active voice, with the state as the subject, confer individually enforceable rights. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502–03 (1990), *superseded*

on other grounds by statute; *Harris*, 442 F.3d at 461–62. This should not be surprising: Congress must not only use rights-creating language, but also "unambiguously impose a binding obligation on the States." *Blessing*, 520 U.S. at 341. When Congress names the state as the subject, writes in the active voice, and uses mandatory language, it leaves no doubt about the actor's identity or what the law requires.

Last, Kentucky argues that because the Act "does not dictate the amounts that States must pay to foster parents," it is not "sufficiently specific and definite to qualify as enforceable under § 1983." But the Supreme Court in *Wilder* recognized a private right to a monetary benefit even though the law granted states discretion to set the applicable rate.[1] "That the [statute] gives the States substantial discretion in choosing among reasonable methods of calculating rates may affect the standard under which a court reviews whether the rates comply with the [statute], but it does not render the [statute] unenforceable by a court." *Wilder*, 496 U.S. at 519. And as the Ninth Circuit explained when evaluating this provision, "[i]f a statute or applicable federal requirement does not prescribe a particular methodology for calculating costs, we give deference to a reasonable methodology employed by the State." *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 981 (9th Cir. 2010). Here, it is undisputed that Kentucky established foster care maintenance

[1] The relevant provision of the Medicaid Act mandates that "a State plan for medical assistance must provide for payment of the hospital services ... through the use of rates ... which the State finds ... are reasonable and adequate." *Wilder*, 496 U.S. at 502–03 (internal alterations and citation omitted).

payment rates. And neither party contends that Kentucky's rate-setting methodology is unreasonable.

Accordingly, § 672(a) confers an individually enforceable right to foster care maintenance payments.

2. Enforcement Under § 1983

Once a plaintiff demonstrates that a statute creates a private right, "there is only a rebuttable presumption that the right is enforceable under § 1983." *Abrams*, 544 U.S. at 120 (quoting *Blessing*, 520 U.S. at 341). The state may rebut the "presumption by demonstrating that Congress did not intend that remedy for a newly created right." *Id.* (citing *Blessing*, 520 U.S. at 341, and *Smith v. Robinson*, 468 U.S. 992, 1012 (1984)). "[E]vidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* (internal quotations and citations omitted).

In *Wilder*, the Medicaid Act "authorize[d] the Secretary to withhold approval of plans," to "curtail federal funds to States whose plans are not in compliance," as well as required States to set up an administrative review system. 496 U.S. at 521–22. Notwithstanding these procedures, the Court found that "the Secretary's limited oversight" and "[t]he availability of state administrative procedures ... do[ ] not foreclose resort to § 1983." *Id.* at 522–23. Similarly, in *Harris*, we held that a plaintiff could sue under § 1983 because the Medicaid Act "does not provide other methods for private enforcement of the Act in federal court." 442 F.3d at 462 (citations

omitted). Further, we noted that the Secretary's authority to "withhold funds to non-complying States" and "the Act's requirement that States grant an opportunity for a fair hearing ... [are not] inconsistent with a private action." *Id*. at 463 (internal quotation marks and citations omitted); *see also Blessing*, 520 U.S. at 348 (finding that Congress left open access to § 1983 because the statute "contains no private remedy ... through which aggrieved persons can seek redress," and the Secretary could "audit only for 'substantial compliance' on a programmatic basis"); *Wright v. Roanoke Redevelopment & Hous. Auth*., 479 U.S. 418, 427–28 (1987) (same).

Here, the Act's weak enforcement mechanisms fall short of foreclosing access to § 1983 remedies. Like in *Wilder*, *Blessing*, and *Harris*, the Secretary reviews the state's plan only on a program-wide basis, and lacks authority to ensure the state provides benefits to individual foster parents. Indeed, a state could implement a plan that substantially conforms to the Act's requirements, yet neglect to pay foster parents in individual cases. Absent resort to § 1983, foster families possess no federal mechanism to ensure compliance with the Act. And although the Act requires states to provide for administrative review of denied claims, 42 U.S.C. § 671(a)(12), the "availability of state administrative procedures ordinarily does not foreclose resort to § 1983." *Wilder*, 496 U.S. at 523; *see also Harris*, 442 F.3d at 463.

Kentucky's arguments to the contrary rely on the Supreme Court's *Gonzaga* decision. There, however, FERPA "expressly authorized the Secretary of Education to 'deal with violations' of [FERPA]," and

established a review board to adjudicate individual written complaints. *Gonzaga*, 536 U.S. at 289 (quoting 20 U.S.C. § 1232g(f)). The Court found that "[t]hese administrative procedures squarely distinguish this case from *Wright* and *Wilder*, where an aggrieved individual lacked any federal review mechanism." *Id.* at 289–90. Notably, the Court inserted a footnote opining that it "need not determine whether FERPA's procedures are 'sufficiently comprehensive' to offer an independent basis for precluding private enforcement, due to our finding that FERPA creates no private right to enforce." *Id.* at 290 n.8 (citation omitted). In any event, the Child Welfare Act, unlike FERPA, includes no private federal review mechanism that an aggrieved foster family can employ.

In sum, we hold that the Act confers foster families with an individual right to foster care maintenance payments enforceable under § 1983.

V.

Having determined that the Act creates an individually enforceable statutory right, we next evaluate whether the Plaintiffs are entitled to maintenance payments. Section 672(a) restricts the class of children entitled to benefits in two relevant ways. First, the child must be in the Cabinet's custody; once the child is adopted or placed in a permanent guardianship, the Act no longer requires maintenance payments. 42 U.S.C. § 672(a)(2)(B). Second, the child must be placed in a licensed or approved "foster family home." *Id.* § 672(a)(2)(C). The district court did not address whether the children satisfy these qualifications because it found the Act

failed to create a private right. Plaintiffs contend that both conditions are met, and ask the court to order the Cabinet to make payments. We address each criterion in turn.

1. State Custody

Section 672(a)(2)(B) requires the Cabinet to make maintenance payments only when "the child's placement and care are the responsibility of ... the State agency administering the State plan." 42 U.S.C. § 672(a)(2)(B). Both parties agree that the Cabinet need only make payments on behalf of children that are in its custody. Furthermore, there is no doubt that the Cabinet obtained responsibility for the children when the family court removed them from their mother's home.

The issue is whether the family court discharged the children from the Cabinet's care when it ordered the boys to live with the aunt and closed the case. The answer turns on Kentucky law. In Kentucky, "[i]f a child has been removed from the home and placed in the custody of ... the cabinet, a judge of the District Court shall conduct a permanency hearing" on an annual basis. Ky. Rev. Stat. Ann. § 610.125(1) (West 2016). At the permanency hearing, the judge must decide, among other things, whether the child should be placed for adoption, placed with a permanent custodian, returned to the parent, or kept in foster care. *Id*. The Family Court Rules of Procedure and Practice provide that "[a]ny order of permanent custody" must be on form AOC-DNA-9. Fam. Ct. R. P. Prac. 22(4). Pursuant to that form, the court must affirmatively place the child in permanent custody and discharge the Cabinet of further responsibility.

The parties proceeded below on stipulated facts because the family court records are sealed. The only facts regarding the children's placement with the aunt are as follows:

- "R.O. was granted temporary custody by the Fayette Family Court of D.O. on March 27, 2013."
- "R.O. also accepted placement of A.O. on February 21, 2014 via Order of Fayette Family Court where the DNA case of A.O. had also been transferred."
- "On September 10, 2014, the Fayette Family Court closed the DNA action of both boys by granting joint custody to R.O. and C.O. The children were Ordered to reside with R.O."
- "Although the [guardian ad litem] made a Motion [to Order the Cabinet to pay maintenance fees] on May 14, 2014, the Court declined to issue further Orders on May the 21st, indicating that permanency had been achieved."

Though the Cabinet avers that R.O. is the children's permanent guardian, it has not identified evidence that the family court held a permanency hearing or discharged the children from the Cabinet's care. For its part, the family contends that the Order granting R.O. custody "was issued in a DNA review hearing, not in a permanent custody hearing as required" by state law, and that the "order was simply written on the docket sheet. It was not entered on the AOC-DNA-9 Order-Permanent Custody form as required by Rule 22."

In a supplemental memo and at oral argument, the Cabinet contended that the children must be in R.O.'s permanent custody because the family court closed the case. According to the Cabinet, if we find the children remain in state custody, it will create an "indeterminate legal purgatory" for children not in permanent custody, but also without an open family court case. But under Kentucky law, there is nothing indeterminate about the children's status: foster children remain in the Cabinet's custody until formally discharged by court order. The Cabinet also suggested that requiring strict adherence to state law elevates form over substance. We are unpersuaded. Requiring the Cabinet to abide by proper procedures promotes important interests—namely, certainty about the custody status of foster children.

Thus, on remand the district court should determine whether the family court affirmatively discharged the children from the Cabinet's custody. If the court finds no affirmative discharge, then the children remain the Cabinet's responsibility.

2. Foster Family Home

The Cabinet must provide maintenance payments only if "the child has been placed in a foster family home or child-care institution." 42 U.S.C. § 672(a)(2)(C). The Act defines "foster family home" to mean a "home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for such licensing." *Id.* § 672(c) (emphasis added).

The Act contemplates two categories of foster families. The first category includes licensed foster

parents, who usually care for unrelated foster children. To become licensed, prospective foster parents must satisfy certain safety standards, which include passing a background check and submitting to a home evaluation. *Id.* § 671(a)(20). The state also establishes non-safety standards, *id.* § 671(a)(10), which in Kentucky include mandatory periodic training.

The second category consists of approved foster homes, which typically care for a relative child. Reflecting Congress's preference that children live with family members, *id.* § 671(a)(19), the Act allows states to place children with unlicensed relatives. To obtain approval, the home must "meet[ ] the standards established for such licensing." *Id.* § 672(c). Each state may waive non-safety standards on a case-by-case basis for children in relative foster family homes. *Id.* § 671(a)(10)(D). Furthermore, the Act requires states to give preference to adult relative caregivers only when the relative caregiver meets the relevant safety standards. *Id.* § 671(a)(19).

Here, the parties stipulated to the following:

- "[The mother] stipulated to dependency of A.O. on December 13, 2012 in the private petition in Clark County and to neglect of D.O. in April of 2013 in the Fayette County Family Court DNA proceeding. Accordingly, A.O. was initially placed with the person who made the petition, a non-relative placement, and D.O. was initially placed in foster care."
- "R.O. is the maternal great aunt of the children. She is a para-educator (teacher's assistant) for Fayette County public schools. CHFS conducted a standard home evaluation

> and criminal background check on R.O. and eventually both children were placed in her home by Court Order."

The family argues that the Cabinet approved R.O. to be a foster parent. Prior to placement, the Cabinet verified that R.O. met relevant safety standards by conducting a home evaluation and a background check. After determining that her home was safe, the family court moved the children from another foster provider to her care. R.O. therefore argues that the Cabinet "approved" her as a foster parent for the children.

Kentucky offers several arguments in response. Kentucky distinguishes between "foster care" and "kinship care." According to Kentucky, "foster care" refers to licensed foster family homes. "Kinship care," by contrast, refers to relative caregivers. Although the Cabinet must remit maintenance payments to foster parents, the Cabinet need only pay kinship care providers "[t]o the extent funds are available." Ky. Rev. Stat. Ann. § 605.120(5) (West 2016). Due to inadequate appropriations, Kentucky ceased funding its kinship care program.

To the extent the Cabinet's failure to make maintenance payments turns on the distinction between relative and non-relative foster care providers, it plainly violates federal law. In *Miller v. Youakim*, 440 U.S. 125 (1979), Illinois placed two children with their older sister, Linda Youakim, and her husband. *Id.* at 130. "The Department investigated the Youakim home and approved it as meeting the licensing standards established for unrelated foster family homes...." *Id.* Yet, "[d]espite this approval, the State refused to make Foster Care

payments on behalf of the children because they were related to Linda Youakim." *Id.* The Court reviewed the definition of "foster family home." *Id.* at 130–31. After noting that the statute "defines this phrase in sweeping language," the Court found that "Congress manifestly did not limit the term to encompass only the homes of nonrelated caretakers. Rather, any home that a State approves as meeting its licensing standards falls within the ambit of this definitional provision." *Id.* at 135.

Though Congress changed aspects of the Act over the ensuing years, it has not added any provision distinguishing relative and non-relative foster care providers. Nor has it modified the definition of "foster family home" that the Court interpreted in *Youakim*. *Compare id.* (defining "foster family home" under prior version of the Act), with 42 U.S.C. § 672(c). Thus, if Kentucky is denying benefits because the aunt is related to the children, it is violating federal law.

Second, Kentucky notes that the Act makes kinship guardianship assistance optional:

> [A]t the option of the State, [the plan] provides for the State to enter into kinship guardianship assistance agreements to provide kinship guardianship assistance payments on behalf of children to grandparents and other relatives who have assumed legal guardianship of the children for whom they have cared as foster parents and for whom they have committed to care on a permanent basis, as provided in section 673(d) of this title.

42 U.S.C. § 671(a)(28). Under § 673(d), states may provide kinship guardianship assistance on behalf of

children who previously resided "for at least 6 consecutive months in the home of the prospective relative guardian" and for whom the prospective guardian committed to caring on a permanent basis. *Id.* § 673(d)(3)(A). But kinship guardianship assistance applies only when the relative becomes the child's permanent guardian, not while the child is in temporary status. As noted above, it is unclear whether R.O. is the children's permanent guardian, or whether the placement is temporary. If R.O. has temporary custody of the children, then the Cabinet's argument about kinship guardianship assistance is irrelevant.

Accordingly, because the Cabinet "conducted a standard home evaluation and criminal background check on R.O." prior to delivering the children to her care, she is an approved foster care provider.

VI.

For the foregoing reasons, the district court's decision is reversed. Upon remand, the district court shall determine whether the Cabinet maintains responsibility for the children's "placement and care." If the Kentucky court discharged the children from the Cabinet's custody, then the district court should dismiss the case. If not, then the district court shall award foster care maintenance payments.[2]

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[2] Because we resolve this appeal on statutory grounds, we need not address the family's constitutional arguments.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

D.O., et al.

Plaintiffs,

-v-

STEVE BESHEAR, in his official capacity as Governor of Kentucky, et al.,

Defendants.

Civil Action No. 5:15-048-DCR

MEMORANDUM OPINION AND ORDER

This matter is pending for consideration of the motion to dismiss or for summary judgment filed by Defendant Vickie Yates Brown Glisson, in her official capacity as Secretary of the Kentucky Cabinet for Health and Family Services ("CHFS").[1] [Record No. 8] For the reasons that follow, the defendant's motion

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[1] Vickie Yates Brown Glisson was named as Secretary of the Kentucky Cabinet for Health and Family Services in December 2015, after the Complaint was filed. The Clerk of Court is directed to replace Audrey Tayse Haynes with Vickie Yates Brown Glisson in the caption of the docket.

for summary judgment will be granted and the plaintiffs' claims will be dismissed.

I.

Plaintiffs D.O. and A.O. are minor children who were removed from their mother's custody and permanently placed with Plaintiff R.O., who is a relative guardian of the minor children. [Record No. 1-1, pp. 21–22] The plaintiffs allege that they are entitled to foster care maintenance payments under federal law. Congress passed the Adoption Assistance and Child Welfare Act of 1980 ("CWA"), which created Title IV-E of the Social Security Act, 42 U.S.C. §§ 620, et seq., 670, *et seq*., pursuant to its authority under the Constitution's Spending Clause. U.S. Const. art. I, § 8. A participating state is eligible for partial reimbursement of some of the state's expenditures on foster care maintenance payments made to those who qualify under Title IV-E. The plaintiffs argue that Title IV-E, specifically 42 U.S.C. §§ 671 and 672, creates a mandatory obligation for the state to make foster care maintenance payments to Plaintiff R.O., a relative guardian. The defendant admits that the state does not make payments to relative care providers under §§ 671 and 672. The plaintiffs argue that the defendants' failure to make these payments is a violation of the statute itself, and their equal protection and due process rights under the Kentucky and United States Constitutions. The plaintiffs seek declaratory and injunctive relief under 42 U.S.C. § 1983.

The defendant contends that the state is not required to make payments on behalf of (or to) these plaintiffs. First, the defendant claims that the state is immune from suit under the Eleventh Amendment

and that the doctrine of *Ex parte Young* does not apply. *Ex parte Young*, 209 U.S. 123 (1908). Second, the defendant argues that the plaintiffs do not have a private right of action to enforce §§ 671 and 672, but even if they do, R.O. is not a foster care provider who qualifies as a party entitled to payments under the CWA. Thus, the defendant asserts that she has not violated the plaintiffs' due process rights. Further, the defendant claims that she has not violated the plaintiffs' right to equal protection because there is a rational basis for the classification.

The parties agreed to certain stipulated facts, which are adopted in this opinion. [Record No. 8-1] The Commonwealth of Kentucky filed Dependency, Neglect and Abuse proceedings against the children's mother, C.O., in Clark County in 2012 when her minor boys were one and eight years old. A.O. is now four. He is a half-brother to D.O., who is now even years old. C.O. has a history of using illegal drugs, including cocaine. These cases were transferred to Fayette County after C.O. relocated there. A.O. and D.O. were placed with R.O., their great aunt, at different times while the Dependency, Neglect and Abuse cases against C.O. were pending. On September 10, 2014, the Fayette Family Court closed the family court cases so that the children would achieve "permanency." The state family court granted joint legal custody of the children with the birth mother and R.O. However, R.O. was granted physical custody and the children are assumed to continue to reside with her.

R.O. did not file for relief through any administrative proceedings with the CHFS before she filed suit in the Fayette Circuit Court. R.O. currently

receives $225.00 per month in K-TAP benefits, $110.00 per month in Supplemental Nutrition Assistance benefits and Medicaid health care benefits for her nephews to assist with the costs of childcare.

II.

Rule 12(d) of the Federal Rules of Civil Procedure provides that if "matters outside the pleadings are presented and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." The Court "may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein" without converting a motion to a summary judgment motion. *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). The obligation to convert to a summary judgment motion is mandatory if matters outside the pleadings are not excluded by the Court. *Max Arnold & Sons, LLC v. W.L. Hailey & Co., Inc.*, 452 F.3d 494, 503 (6th Cir. 2006) (applying Rule 12(d) to a Rule 12(c) motion); *see Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 487–88 (6th Cir. 2009). In this case, the Court will consider the parties' stipulated facts and affidavits submitted by the defendants.

Summary judgment is appropriate when there are no genuine disputes regarding any material facts and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Chao v. Hall Holding Co.*, 285 F.3d 415, 424 (6th Cir. 2002). A dispute over a material fact is not "genuine" unless a reasonable jury could return a verdict for the nonmoving party.

That is, the determination must be "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986); *see Harrison v. Ash*, 539 F.3d 510, 516 (6th Cir. 2008). In deciding whether to grant summary judgment, the Court views all the facts and inferences drawn from the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Here, the parties agree that there are no genuine issues of material fact in dispute. Thus, the matter may be resolved the standards set forth in Rule 56 of the Federal Rules of Civil Procedure.

III.

A. *Ex parte Young*

The Eleventh Amendment bars "all suits, whether for injunctive, declaratory or monetary relief, against the state and its departments by citizens of another state, foreigners or its own citizens." *Thiokol v. Dep't of Treasury, State of Mich., Revenue Div.*, 987 F.2d 376, 381 (6th Cir. 1993) (internal citations omitted). Suits for monetary relief against state officials sued in their official capacity are also barred, but the amendment "does not preclude actions against state officials sued in their official capacity for prospective injunctive or declaratory relief." *Thiokol*, 987 F.2d at 381 (citing *Ex parte Young*, 209 U.S. 123 (1908)).

Where relief is based upon past acts, and not continuing conduct, the relief does not fall under the doctrine of *Ex parte Young*. 209 U.S. at 155–56. "[W]hen a federal court commands a state official to do nothing more than refrain from violating federal

law, he is not the [s]tate for sovereign immunity purposes." *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). However, the "doctrine is limited to that precise situation" and does not apply if the state is the real, substantial party in interest, "as when 'the judgment sought would expend itself on the public treasury or domain, or interfere with public administration.'" *Stewart*, 563 U.S. at 255 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984)). However, "an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*." *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

"When a court addresses a claim made under *Ex parte Young*[,] it should simply ask 'whether a complainant alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Westside Mothers v. Haveman*, 289 F.3d 852, 861 (6th Cir. 2002) (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Conner, J., concurring)). Here, the plaintiffs have brought suit against the defendant in her official capacity for prospective injunctive and declaratory relief based on an alleged ongoing violation of federal law. [See Amended Complaint, Record No. 1] The plaintiffs do not ask for damages or monetary relief for past violations, but ask that the defendant comply with the federal mandate to provide the same benefits to relative care providers as non-relative care providers.

While the relief sought would have an impact on the treasury, the impact is only ancillary to the extent that payment from the treasury would be required to comply with federal law in the future.

Ernst v. Rising, 427 F.3d 351, 368 (6th Cir. 2005) (quoting *Papasan v. Allain*, 478 U.S. 265, 278 (1986)) ("[R]elief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury."); *see Edelman*, 415 U.S. at 668. The relief requested is for future compliance with the federal statute, rather than monetary relief alone. Thus, sovereign immunity does not bar this case and the plaintiffs' claims may proceed under the doctrine of *Ex parte Young*.

B. There Is No Private Right Of Enforcement Under The Subject Provisions.

Having determined that the defendant is not immune from suit, the next question is whether the plaintiffs have asserted a claim for violation of a statute that creates a right privately enforceable against state officers through 42 U.S.C. § 1983.

"[T]o seek redress through § 1983 . . . a plaintiff must assert the violation of a federal right, not merely a violation of federal law." *Blessing v. Freestone*, 520 U.S. 329, 341 (1997) (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989)). As outlined in *Blessing*, a statute will be found to create an enforceable right if, after a particularized inquiry, the court concludes that (i) the statutory section was intended to benefit the putative plaintiff; (ii) it sets a binding obligation on a government unit, rather than merely expressing a congressional preference; and (iii) the interests the plaintiff asserts are not so "vague and amorphous that their enforcement would strain judicial competence." *Westside Mothers v. Haveman*, 289 F.3d

852, 862–63 (6th Cir. 2002) (quoting *Blessing*, 520 U.S. at 341).

If the conditions identified above are met, a statute is presumed to create an "enforceable right unless Congress has explicitly or implicitly foreclosed" it. *Westside Mothers*, 289 F.3d at 863. Thus, if a provision meets the three factors of the *Blessing* test, there is a rebuttable presumption that the federal statutory right is enforceable under 42 U.S.C. § 1983; however, the claim may be dismissed if Congress has foreclosed a remedy under § 1983. See 42 A.L.R. Fed. 2d 411, § 2 (2009). "Anything short of an unambiguously conferred right" will not support a cause of action under § 1983. *Gonzaga v. Doe*, 536 U.S. 273, 283 (2002). "[I]t is rights, not the broader or vaguer 'benefits' or 'interests' that may be enforced under [Section 1983]." *Gonzaga*, 536 U.S. at 283.

Legislation enacted pursuant to Congress' spending powers, such as the CWA, can give rise to enforceable rights under 42 U.S.C. § 1983 if Congress " 'speaks with a clear voice' and manifests an 'unambiguous' intent to confer individual rights." *See Gonzaga*, 536 U.S. at 279–80 (quoting *Pennhurst*, 451 U.S. at 17, 28, and n.21) (describing prior cases in which spending legislation gave rise to enforceable rights). Here, the plaintiffs correctly argue that the court must examine the individual sections at issue, rather than the statutory scheme as a whole, to determine whether there is a private right conferred. The majority of courts considering the CWA have determined that each provision must be reviewed under the *Blessing* test on an individual basis, rather than looking at the CWA as a whole.

The plaintiffs argue that the mandatory language in 42 U.S.C. § 672(a)(1) applies. That provision requires that "[e]ach State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative . . . into foster care if—(A) the removal and foster care placement met and the placement continues to meet, the requirements of [§ 672(a)](2); and (B) the child, while in the home, would have met the AFDC eligibility requirement of [§ 672(a)] (3)." Under § 672(a)(2)(C), the child must be placed in a "foster family home" or "child care institution." R.O. contends that the children's placement qualifies as a "foster family home," meaning that it "is licensed by the State in which it is situated or has been approved, by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for such licensing." 42 U.S.C. § 672(b).

In addressing the first part of the *Blessing* analysis—whether the statutory section was intended to benefit the putative plaintiff—the Supreme Court in *Gonzaga* looked at three specific factors to be applied. *See Hughlett v. Romer-Sensky*, 497 F.3d 557, 562 (6th Cir. 2006*); Westside Mothers v. Olszewski*, 454 F.3d 532, 541–42 (6th Cir. 2006); *New York Citizens' Coalition for Children v. Carrion*, 31 F. Supp. 3d 512, 519 (E.D.N.Y. 2014). The statute must contain rights-creating language "that is unmistakably focused on the individuals benefitted." *Hughlett*, 497 F.3d at 562. Second, the court must consider whether the statute has an individual focus, as opposed to a systemwide or aggregate focus. *Hughlett*, 497 F.3d at 562. Third, a court must

"consider[] the availability of a congressionally mandated federal review mechanism." *Carrion*, 31 F. Supp. 3d at 519. In other words, the "statute must lack an enforcement scheme for aggrieved individuals" to find that the statute creates an actionable right. *Hughlett*, 497 F.3d at 562.

In *Midwest Foster Care and Adoption Ass'n v. Kincade*, 712 F.3d 1190 (8th Cir. 2013), the United States Court of Appeals for the Eighth Circuit found that § 672(a) did not confer a private right of enforcement. The court initially concluded that § 672(a) did not contain "rights-creating language," because the focus of the language was on the persons or institutions being regulated rather than "in the terms of the individuals who benefit." *Midwest Foster Care*, 712 F.3d at 1196, 1198; *see also Carrion*, 31 F. Supp. 3d at 520. That provision requires that "[e]ach State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative . . . into foster care if—(A) the removal and foster care placement met and the placement continues to meet, the requirements of [§ 672(a)](2); and (B) the child, while in the home, would have met the AFDC eligibility requirement of [§ 672(a)](3)." 42 U.S.C. § 672(a)(1). While the text of § 672(a) identifies that the children are the ultimate beneficiaries, the focus of the provision and its subparts are the conditions precedent that trigger the federal government's obligation to reimburse funds expended by the state on the behalf of those beneficiaries. *Id.*; see 42 U.S.C. § 672(a)(1). "Where the statutory language primarily concerns itself with commanding how states are to function within a federal program, the statute is less likely to have

created an individually enforceable right." *Midwest Foster Care*, 712 F.3d at 1200 (citing *Walters v. Weiss*, 392 F.3d 306, 313 (8th Cir. 2004)). Identification of the plaintiffs as the beneficiary of a federal law and, in this case, a reimbursement program, in the statutory language is insufficient to conclude that a statutory right has been conferred. *Carrion*, 31 F. Supp. 3d at 522. Instead, "to create private rights, [the statute's] text must be phrased in terms of the persons benefitted." *Gonzaga*, 536 U.S. at 274.

For instance, "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 benefited class.' " *Gonzaga*, 536 U.S. at 284 (citations omitted). Both statutes include the language "no person . . . shall . . . be subject to discrimination." *Id.* "There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds. . . ." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690–93 (1979).

The plaintiffs do not dispute the validity of this analysis, but argue that the statutes at issue are more similar to those in *Wright* and *Wilder*, which the Supreme Court found gave rise to enforceable rights. *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418 (1987); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). In *Wright*, tenants were permitted to bring a § 1983 suit to "recover past overcharges under a rent-ceiling provision of the Public Housing Act, on the ground that the provision

unambiguously conferred 'a mandatory [benefit] focusing on the individual family and its income.'" *Gonzaga*, 536 U.S. at 280. Similarly, in *Wilder*, claims under § 1983 were permitted by health care providers seeking to reimburse certain provisions of the Medicaid Act. In both cases, the provisions at issue "explicitly conferred specific monetary entitlements upon the plaintiffs." *Gonzaga*, 536 U.S. at 280.

In *Wright* and *Wilder*, the Supreme Court noted that "Congress spoke in terms that 'could not be clearer.'" *Gonzaga*, 536 U.S. at 280. But such is not the case here. Using the *Blessing* test, as elaborated in Gonzaga, the statutes on which the plaintiffs rely do not evidence "an unambiguously conferred right to support a cause of action brought under § 1983." *Gonzaga*, 536 U.S. at 283.

The plaintiffs argue that § 672 speaks to the interests of the child, who is the real party in interest. Certainly, the children are the intended beneficiaries of the statutory scheme. However, the statute itself is not phrased in terms of giving the child, or the foster parent or facility, any rights or privileges. The statute is phrased in terms of qualifying events for the state plan to receive reimbursement. "Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Hughlett*, 497 F.3d at 563 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001)). Thus, the statute does not have an unmistakable focus on the individual benefitted, but on the state as the regulated party. This weighs

strongly against finding that the statute confers an individual right upon the plaintiffs.

Likewise, in looking to the second factor discussed in *Gonzaga*, the statutory language at issue has an aggregate, rather than individual, focus. The Secretary of Health and Human Services is charged with promulgating regulations for the review of state programs to determine if there is "'substantial conformity' between the terms of the state plan and federal requirements, as well as between the state plan as written and the way in which it is implemented." *Midwest Foster Care*, 712 F.3d at 1194; 42 U.S.C. § 1320a-2a(a), (b)(3)(A). If a state's plan does not substantially comply, the Secretary of Health and Human Services may take corrective actions, including termination of federal funds. 42 U.S.C. § 1320a-2a(b)(3)(C). "'[S]ubstantial compliance' provisions in Spending Clause legislation are inconsistent with individually enforceable rights, and indicate an aggregate or system-wide focus." *Hughlett*, 497 F.3d at 564; *Blessing*, 520 U.S. at 343 ("[T]he [substantial compliance] standard is simply a yardstick for the Secretary to measure the system-wide performance."). As discussed in *Midwest Foster Care* and *Carrion*, the CWA only requires "substantial conformity" with its requirements to receive funding, which "counsels against the creation of individually enforceable rights." *Midwest Foster Care*, 712 F.3d at 1200–01; *Carrion*, 31 F. Supp. 3d at 522–23.

Additionally, "[w]hen the reference to the asserted individual right is in the context of describing the type of action that triggers a funding prohibition, an aggregate focus is evident." *Carrion*, 31 F. Supp. 3d

at 523 (quoting *Gonzaga*, 536 U.S. at 288–89) (quotations omitted). In *Hughlett*, the United States Court of Appeals for the Sixth Circuit noted that the enforcement scheme of Title IV-D of the Social Security Act suggested that the remedy for noncompliance militated against finding that an enforceable right was conferred under that statutory scheme. *Hughlett*, 497 F.3d at 564. "In 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 funds to the state." *Hughlett*, 497 F.3d at 564 (quoting *Pennhurst*, 451 U.S. at 281).

In other words, an aggregate focus is indicated "when the statute couches the plaintiff's purported right in terms of what state actions will terminate federal funding." *Carrion*, 31 F. Supp. 3d at 523. In contrast to the decisions in *Wilder* and *Wright* in which there is no termination of funding associated with noncompliance, the failure to meet the requirements in § 672(a) "'triggers a funding prohibition' and the asserted right is only mentioned in the context of these funding prohibitions." *Midwest Foster Care*, 712 F.3d at 1202. Thus, the second factor weighs heavily against finding that Congress intended to create a private right of action.

The third factor of the first *Blessing* issue is whether Congress provided a "centralized federal review mechanism for individuals asserting statutory violations." *Midwest Foster Care*, 712 F.3d at 1202. Such a mechanism weighs against finding that Congress intended to create individually enforceable

rights through the courts. *Midwest Foster Care*, 712 F.3d at 1202.

In this case, the plaintiffs challenge Kentucky's implementation of the plan itself. They argue that the plan incorrectly fails to provide benefits to these plaintiffs. The plan has been reviewed by the Secretary for Health and Human Services, as described above, although there are no means by which an individual can request individual federal review. 42 U.S.C. § 1320a-2a(a). Instead, each state is responsible for "granting an opportunity for a fair hearing before the State agency to any individual whose claim for benefits . . . is denied or is not acted upon with reasonable promptness." 42 U.S.C. § 671(a)(12). Thus, while review of individual benefits is delegated to the State under § 671, the overall plan is reviewed and approved through centralized federal review. However, consistently with the analysis in *Midwest Foster Care* and *Carrion*, and because the other factors weigh against finding an unambiguous intent to create an individually enforceable right, the court concludes that the lack of a federal review mechanism is not alone sufficient to find that the first Blessing factor supports finding an individual right of action. *See Midwest Foster Care*, 712 F.3d at 1202; *Carrion*, 31 F. Supp. 3d at 525–27.

Because the first factor of the *Blessing* test weighs strongly against finding that the statute confers a private right of enforcement, it is unnecessary to address the remaining conditions or the parties' arguments regarding whether the plaintiffs qualify as a "foster family home" under 42 U.S.C. § 672(c)(1) or whether the federal foster care maintenance program mandates payments to the plaintiffs by its

terms. The Court concludes that there is no private right of action conferred by 42 U.S.C. §§ 671, 672 upon the plaintiffs.

C. Due Process

The plaintiffs also contend that the defendant has deprived them of their due process guarantees under the Fourteenth Amendment to the United States Constitution and the corresponding guarantees under the Kentucky Constitution. "To determine whether a due process violation has occurred, the court must first decide whether plaintiffs had a property right that entitled them to procedural protections." *Hughlett*, 497 F.3d at 566 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985)). Only then can the court determine the process that is due. *Id*.

"To have a property interest in a benefit, a recipient must have a legitimate claim of entitlement to it." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). This entitlement to a benefit must be grounded in some statute, rule, or policy. *Roth*, 408 U.S. at 576. The plaintiffs rely on 42 U.S.C. §§ 670–72 as the source of their asserted property rights. However, they do not have a right to payments under that statute, as described above. Thus, the plaintiffs have not established that they have a property interest in foster care payments for which they would be entitled to procedural due process and the defendant is entitled to summary judgment on this claim.

D. Equal Protection

The plaintiffs argue that the defendant's determination that they are not entitled to foster care maintenance payments violates the equal protection

clause. They contend that the children are similarly-situated to children in non-relative foster homes who are receiving payments. Plaintiff R.O., the relative caregiver, also argues that she is similarly-situated to non-relative caregivers who are receiving foster care maintenance payments.

"The Equal Protection Clause protects against arbitrary classifications, and requires that similarly situated persons be treated equally." *Bowman v. United States*, 564 F.3d 765, 772 (6th Cir. 2008) (internal quotations and citation omitted). The Kentucky Constitution mirrors the federal guarantees. See *Vision Mining v. Gardner*, 364 S.W.3d 455, 465 (Ky. 2011). "To state an equal protection claim, a party must claim that the government treated similarly situated persons differently." *Braun v. Ann Arbor Charter Tp.*, 519 F.3d 564, 574 (6th Cir. 2008). Generally, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). "An equal protection claim is subject to rational basis review unless it involves infringement of a fundamental right or application to a suspect class." *Bowman*, 564 F.3d at 772. The plaintiffs have not argued that they are members of a suspect class or that a fundamental right is implicated by the statutory scheme. The plaintiffs agree that their claim shall be evaluated under a rational basis inquiry.

"[G]overnmental action subject to equal protection scrutiny under the rational basis test must be sustained if any conceivable basis rationally supports

it." *Fed. Commc'n Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993). There is no need for the government to "produce evidence to sustain the rationality of its action; its choice is presumptively valid and 'may be based on rational speculation unsupported by evidence or empirical data.'" *TriHealth, Inc. v. Bd. of Comm'rs, Hamilton Cnty. Ohio*, 430 F.3d 783, 790–91 (6th Cir. 2005) (quoting *Beach Commc'ns*, 508 U.S. at 315).

The defendant contends that Congress and the Kentucky Legislature may rely on several rational bases for treating these groups differently. First, they argue that family members may need less financial incentive than other non-family foster care providers to take foster children into their homes. Moreover, the additional training and requirements for licensed foster-care providers justifies treating them differently.

The defendant also argues that foster care payments are made to temporary caregivers, but do not apply once permanent placement is achieved. Thus, she asserts that the plaintiffs' permanent status prohibits them from qualifying for foster care benefits regardless of their relative placement status. Finally, the defendant contends that the state's need to maximize the state funds available, and to extend the federal funds allowable for reimbursement, is rational.

The Court agrees that the distinction recognized by Kentucky has a rational basis. And as the Supreme Court has recognized, "[i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results

in some inequality.'" *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)). "[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Id.*

In *Lipscomb v. Simmons*, 962 F.2d 1374 (9th Cir. 1992) (en banc), the Court of Appeals for the Ninth Circuit addressed claims by children in foster care that Oregon's statutory scheme allowing state-funded foster care benefits to children placed with nonrelatives, but disallowing benefits to children placed with relatives, violated the children's equal protection rights. The plaintiffs in Lipscomb were divided into two subclasses: (i) children who claimed that they were entitled to state funding even though their relatives were willing and financially able to care for them; and (ii) children who would be denied placements because their relatives are financially incapable of accepting the placement without the foster care benefits at issue. *Id.* at 1376–77. The court rejected the plaintiffs' arguments that heightened scrutiny applied. Instead, it examined whether Oregon had a rational basis for choosing to provide benefits to nonrelative foster parents but not relative foster parents. Oregon argued that it was maximizing the amount of money available for the benefit of foster care children. The court found that "[t]he state has a rational basis for not paying state funds to family members who provide foster care: The state wished to take advantage of relatives who are willing and able to take care of foster children regardless of whether they receive help from the state." *Id.* at 1380.

"The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific," yet those classifications "will not be set aside if any state of facts reasonably may be conceived to justify it." *Dandridge*, 397 U.S. at 485 (internal quotations and citations omitted). Likewise, Kentucky's need to maximize limited resources and to make the most of funds available for federal reimbursement provide a rational basis to justify treating these plaintiffs differently from children placed with certified foster families. Based on the foregoing analysis, the defendant is entitled to summary judgment on the plaintiffs' claim alleging a violation of equal protection.

IV.

For the reasons outlined above, it is hereby

ORDERED that the defendant's motion to dismiss or, in the alternative, for summary judgment [Record No. 8], shall be construed as a motion for summary judgment. That motion is GRANTED.

This 23rd day of March, 2016.

Signed By: /s/ Danny C. Reeves (DCR)
UNITED STATES DISTRICT JUDGE

APPENDIX C
STATUTORY PROVISIONS

1. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. 42 U.S.C. § 670 provides:

Congressional declaration of purpose; authorization of appropriations

For the purpose of enabling each State to provide, in appropriate cases, foster care and transitional independent living programs for children who otherwise would have been eligible for assistance under the State's plan approved under part A of this subchapter (as such plan was in effect on June 1, 1995) and adoption assistance for children with

special needs, there are authorized to be appropriated for each fiscal year (commencing with the fiscal year which begins October 1, 1980) such sums as may be necessary to carry out the provisions of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans under this part.

3. 42 U.S.C. § 671 provides in pertinent part:

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;

* * *

(3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

* * *

(10) provides--

(A) for the establishment or designation of a State authority or authorities that shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for the institutions or

homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, and which shall permit use of the reasonable and prudent parenting standard;

(B) that the standards established pursuant to subparagraph (A) shall be applied by the State to any foster family home or child care institution receiving funds under this part or part B of this subchapter and shall require, as a condition of each contract entered into by a child care institution to provide foster care, the presence on-site of at least 1 official who, with respect to any child placed at the child care institution, is designated to be the caregiver who is authorized to apply the reasonable and prudent parent standard to decisions involving the participation of the child in age or developmentally-appropriate activities, and who is provided with training in how to use and apply the reasonable and prudent parent standard in the same manner as prospective foster parents are provided the training pursuant to paragraph (24);

(C) that the standards established pursuant to subparagraph (A) shall include policies related to the liability of foster parents and private entities under contract by the State involving the application of the reasonable and prudent parent standard, to ensure appropriate liability for caregivers when a child participates in an approved activity and the caregiver approving the activity acts in accordance with the reasonable and prudent parent standard; and

(D) that a waiver of any standards established pursuant to subparagraph (A) may be made only

on a case-by-case basis for nonsafety standards (as determined by the State) in relative foster family homes for specific children in care;

* * *

(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;

* * *

(14) provides (A) specific goals (which shall be established by State law on or before October 1, 1982) for each fiscal year (commencing with the fiscal year which begins on October 1, 1983) as to the maximum number of children (in absolute numbers or as a percentage of all children in foster care with respect to whom assistance under the plan is provided during such year) who, at any time during such year, will remain in foster care after having been in such care for a period in excess of twenty-four months, and (B) a description of the steps which will be taken by the State to achieve such goals;

(15) provides that--

(A) in determining reasonable efforts to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child's health and safety shall be the paramount concern;

(B) except as provided in subparagraph (D), reasonable efforts shall be made to preserve and reunify families--

(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and

(ii) to make it possible for a child to safely return to the child's home;

(C) if continuation of reasonable efforts of the type described in subparagraph (B) is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan (including, if appropriate, through an interstate placement), and to complete whatever steps are necessary to finalize the permanent placement of the child;

(D) reasonable efforts of the type described in subparagraph (B) shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that--

(i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);

(ii) the parent has--

(I) committed murder (which would have been an offense under section 1111(a) of Title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

(II) committed voluntary manslaughter (which would have been an offense under section 1112(a) of Title 18, if the offense had

occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

(III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or

(IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or

(iii) the parental rights of the parent to a sibling have been terminated involuntarily;

(E) if reasonable efforts of the type described in subparagraph (B) are not made with respect to a child as a result of a determination made by a court of competent jurisdiction in accordance with subparagraph (D)--

(i) a permanency hearing (as described in section 675(5)(C) of this title), which considers in-State and out-of-State permanent placement options for the child, shall be held for the child within 30 days after the determination; and

(ii) reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child; and

(F) reasonable efforts to place a child for adoption or with a legal guardian, including identifying appropriate in-State and out-of-State placements2 may be made concurrently with reasonable efforts of the type described in subparagraph (B);

(16) provides for the development of a case plan (as defined in section 675(1) of this title and in accordance with the requirements of section 675a of this title) for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meets the requirements described in sections 675(5) and 675a of this title with respect to each such child;

* * *

(18) not later than January 1, 1997, provides that neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements may—

(A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the person, or of the child, involved; or

(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved;

(19) provides that the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards;

(20)(A) provides procedures for criminal records checks, including fingerprint-based checks of national crime information databases (as defined in section 534(e)(3)(A) of Title 28), for any prospective foster or adoptive parent before the foster or adoptive parent may be finally approved for placement of a child

regardless of whether foster care maintenance payments or adoption assistance payments are to be made on behalf of the child under the State plan under this part, including procedures requiring that--

(i) in any case involving a child on whose behalf such payments are to be so made in which a record check reveals a felony conviction for child abuse or neglect, for spousal abuse, for a crime against children (including child pornography), or for a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault or battery, if a State finds that a court of competent jurisdiction has determined that the felony was committed at any time, such final approval shall not be granted; and

(ii) in any case involving a child on whose behalf such payments are to be so made in which a record check reveals a felony conviction for physical assault, battery, or a drug-related offense, if a State finds that a court of competent jurisdiction has determined that the felony was committed within the past 5 years, such final approval shall not be granted; and3

(B) provides that the State shall--

(i) check any child abuse and neglect registry maintained by the State for information on any prospective foster or adoptive parent and on any other adult living in the home of such a prospective parent, and request any other State in which any such prospective parent or other adult has resided in the preceding 5

years, to enable the State to check any child abuse and neglect registry maintained by such other State for such information, before the prospective foster or adoptive parent may be finally approved for placement of a child, regardless of whether foster care maintenance payments or adoption assistance payments are to be made on behalf of the child under the State plan under this part;

(ii) comply with any request described in clause (i) that is received from another State; and

(iii) have in place safeguards to prevent the unauthorized disclosure of information in any child abuse and neglect registry maintained by the State, and to prevent any such information obtained pursuant to this subparagraph from being used for a purpose other than the conducting of background checks in foster or adoptive placement cases; and

(C) provides procedures for criminal records checks, including fingerprint-based checks of national crime information databases (as defined in section 534(e)(3)(A) of Title 28), on any relative guardian, and for checks described in subparagraph (B) of this paragraph on any relative guardian and any other adult living in the home of any relative guardian, before the relative guardian may receive kinship guardianship assistance payments on behalf of the child under the State plan under this part;

* * *

(23) provides that the State shall not--

(A) deny or delay the placement of a child for adoption when an approved family is available outside of the jurisdiction with responsibility for handling the case of the child; or

(B) fail to grant an opportunity for a fair hearing, as described in paragraph (12), to an individual whose allegation of a violation of subparagraph (A) of this paragraph is denied by the State or not acted upon by the State with reasonable promptness;

(24) includes a certification that, before a child in foster care under the responsibility of the State is placed with prospective foster parents, the prospective foster parents will be prepared adequately with the appropriate knowledge and skills to provide for the needs of the child, that the preparation will be continued, as necessary, after the placement of the child, and that the preparation shall include knowledge and skills relating to the reasonable and prudent parent standard for the participation of the child in age or developmentally-appropriate activities, including knowledge and skills relating to the developmental stages of the cognitive, emotional, physical, and behavioral capacities of a child, and knowledge and skills relating to applying the standard to decisions such as whether to allow the child to engage in social, extracurricular, enrichment, cultural, and social activities, including sports, field trips, and overnight activities lasting 1 or more days, and to decisions involving the signing of permission slips and arranging of transportation for the child to and from extracurricular, enrichment, and social activities;

* * *

(28) at the option of the State, provides for the State to enter into kinship guardianship assistance agreements to provide kinship guardianship assistance payments on behalf of children to grandparents and other relatives who have assumed legal guardianship of the children for whom they have cared as foster parents and for whom they have committed to care on a permanent basis, as provided in section 673(d) of this title;

(29) provides that, within 30 days after the removal of a child from the custody of the parent or parents of the child, the state shall exercise due diligence to identify and provide notice to the following relatives: all adult grandparents, all parents of a sibling of the child, where such parent has legal custody of such sibling, and other adult relatives of the child (including any other adult relatives suggested by the parents), subject to exceptions due to family or domestic violence, that--

(A) specifies that the child has been or is being removed from the custody of the parent or parents of the child;

(B) explains the options the relative has under Federal, State, and local law to participate in the care and placement of the child, including any options that may be lost by failing to respond to the notice;

(C) describes the requirements under paragraph (10) of this subsection to become a foster family home and the additional services and supports that are available for children placed in such a home; and

(D) if the State has elected the option to make kinship guardianship assistance payments under

paragraph (28) of this subsection, describes how the relative guardian of the child may subsequently enter into an agreement with the State under section 673(d) of this title to receive the payments;

* * *

(31) provides that reasonable efforts shall be made—

(A) to place siblings removed from their home in the same foster care, kinship guardianship, or adoptive placement, unless the State documents that such a joint placement would be contrary to the safety or well-being of any of the siblings; and

(B) in the case of siblings removed from their home who are not so jointly placed, to provide for frequent visitation or other ongoing interaction between the siblings, unless that State documents that frequent visitation or other ongoing interaction would be contrary to the safety or well-being of any of the siblings;

* * *

(b) Approval of plan by Secretary

The Secretary shall approve any plan which complies with the provisions of subsection (a) of this section.

* * *

4. 42 U.S.C. § 672 provides:

Foster care maintenance payments program.

(a) In general

(1) Eligibility

Each State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative specified in section 606(a) of this title (as in effect on July 16, 1996) into foster care if--

(A) the removal and foster care placement met, and the placement continues to meet, the requirements of paragraph (2); and

(B) the child, while in the home, would have met the AFDC eligibility requirement of paragraph (3).

(2) Removal and foster care placement requirements

The removal and foster care placement of a child meet the requirements of this paragraph if--

(A) the removal and foster care placement are in accordance with--

(i) a voluntary placement agreement entered into by a parent or legal guardian of the child who is the relative referred to in paragraph (1); or

(ii) a judicial determination to the effect that continuation in the home from which removed would be contrary to the welfare of the child and that reasonable efforts of the type described in section 671(a)(15) of this title for a child have been made;

(B) the child's placement and care are the responsibility of--

(i) the State agency administering the State plan approved under section 671 of this title;

(ii) any other public agency with which the State agency administering or supervising the administration of the State plan has made an agreement which is in effect; or

(iii) an Indian tribe or a tribal organization (as defined in section 679c(a) of this title) or a tribal consortium that has a plan approved under section 671 of this title in accordance with section 679c of this title; and

(C) the child has been placed in a foster family home or child-care institution.

(3) AFDC eligibility requirement

(A) In general

A child in the home referred to in paragraph (1) would have met the AFDC eligibility requirement of this paragraph if the child--

(i) would have received aid under the State plan approved under section 602 of this title (as in effect on July 16, 1996) in the home, in or for the month in which the agreement was entered into or court proceedings leading to the determination referred to in paragraph (2)(A)(ii) of this subsection were initiated; or

(ii)

(I) would have received the aid in the home, in or for the month referred to in clause (i), if application had been made therefor; or

(II) had been living in the home within 6 months before the month in which the agreement was entered into or the proceedings were initiated, and would have

received the aid in or for such month, if, in such month, the child had been living in the home with the relative referred to in paragraph (1) and application for the aid had been made.

(B) Resources determination

For purposes of subparagraph (A), in determining whether a child would have received aid under a State plan approved under section 602 of this title (as in effect on July 16, 1996), a child whose resources (determined pursuant to section 602(a)(7)(B) of this title, as so in effect) have a combined value of not more than $10,000 shall be considered a child whose resources have a combined value of not more than $1,000 (or such lower amount as the State may determine for purposes of section 602(a)(7)(B) of this title).

(4) Eligibility of certain alien children

Subject to title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [8 U.S.C. 1601 et seq.], if the child is an alien disqualified under section 1255a(h) of Title 8 or 1160(f) of Title 8 from receiving aid under the State plan approved under section 602 of this title in or for the month in which the agreement described in paragraph (2)(A)(i) was entered into or court proceedings leading to the determination described in paragraph (2)(A)(ii) were initiated, the child shall be considered to satisfy the requirements of paragraph (3), with respect to the month, if the child would have satisfied the requirements but for the disqualification.

(b) Additional qualifications

Foster care maintenance payments may be made under this part only on behalf of a child described in subsection (a) of this section who is--

(1) in the foster family home of an individual, whether the payments therefor are made to such individual or to a public or private child-placement or child-care agency, or

(2) in a child-care institution, whether the payments therefor are made to such institution or to a public or private child-placement or child-care agency, which payments shall be limited so as to include in such payments only those items which are included in the term "foster care maintenance payments" (as defined in section 675(4) of this title).

(c) "Foster family home" and "child-care institution" defined

For the purposes of this part, (1) the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for such licensing; and (2) the term "child-care institution" means a private child-care institution, or a public child-care institution which accommodates no more than twenty-five children, which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing, except, in the case of a child who has attained 18 years of age, the term shall include a supervised setting in which the individual is living independently, in accordance

with such conditions as the Secretary shall establish in regulations, but the term shall not include detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of children who are determined to be delinquent.

(d) Children removed from their homes pursuant to voluntary placement agreements

Notwithstanding any other provision of this subchapter, Federal payments may be made under this part with respect to amounts expended by any State as foster care maintenance payments under this section, in the case of children removed from their homes pursuant to voluntary placement agreements as described in subsection (a) of this section, only if (at the time such amounts were expended) the State has fulfilled all of the requirements of section 622(b)(8) of this title.

(e) Placements in best interest of child

No Federal payment may be made under this part with respect to amounts expended by any State as foster care maintenance payments under this section, in the case of any child who was removed from his or her home pursuant to a voluntary placement agreement as described in subsection (a) of this section and has remained in voluntary placement for a period in excess of 180 days, unless there has been a judicial determination by a court of competent jurisdiction (within the first 180 days of such placement) to the effect that such placement is in the best interests of the child.

(f) "Voluntary placement" and "voluntary placement agreement" defined

For the purposes of this part and part B of this subchapter, (1) the term "voluntary placement" means an out-of-home placement of a minor, by or with participation of a State agency, after the parents or guardians of the minor have requested the assistance of the agency and signed a voluntary placement agreement; and (2) the term "voluntary placement agreement" means a written agreement, binding on the parties to the agreement, between the State agency, any other agency acting on its behalf, and the parents or guardians of a minor child which specifies, at a minimum, the legal status of the child and the rights and obligations of the parents or guardians, the child, and the agency while the child is in placement.

* * *

5. 42 U.S.C. § 674 provides:

Payments to States

(a) Amounts

For each quarter beginning after September 30, 1980, each State which has a plan approved under this part shall be entitled to a payment equal to the sum of--

> (1) an amount equal to the Federal medical assistance percentage (which shall be as defined in section 1396d(b) of this title, in the case of a State other than the District of Columbia, or 70 percent, in the case of the District of Columbia) of the total amount expended during such quarter as foster care maintenance payments under section 672 of this title for children in foster family homes or child-care institutions (or, with respect to such

payments made during such quarter under a cooperative agreement or contract entered into by the State and an Indian tribe, tribal organization, or tribal consortium for the administration or payment of funds under this part, an amount equal to the Federal medical assistance percentage that would apply under section 679c(d) of this title (in this paragraph referred to as the "tribal FMAP") if such Indian tribe, tribal organization, or tribal consortium made such payments under a program operated under that section, unless the tribal FMAP is less than the Federal medical assistance percentage that applies to the State);

* * *

(d) Reduction for violation of plan requirement

(1) If, during any quarter of a fiscal year, a State's program operated under this part is found, as a result of a review conducted under section 1320a-2a of this title, or otherwise, to have violated paragraph (18) or (23) of section 671(a) of this title with respect to a person or to have failed to implement a corrective action plan within a period of time not to exceed 6 months with respect to such violation, then, notwithstanding subsection (a) of this section and any regulations promulgated under section 1320a-2a(b)(3) of this title, the Secretary shall reduce the amount otherwise payable to the State under this part, for that fiscal year quarter and for any subsequent quarter of such fiscal year, until the State program is found, as a result of a subsequent review under section 1320a-2a of this title, to have

implemented a corrective action plan with respect to such violation, by--

(A) 2 percent of such otherwise payable amount, in the case of the 1st such finding for the fiscal year with respect to the State;

(B) 3 percent of such otherwise payable amount, in the case of the 2nd such finding for the fiscal year with respect to the State; or

(C) 5 percent of such otherwise payable amount, in the case of the 3rd or subsequent such finding for the fiscal year with respect to the State.

In imposing the penalties described in this paragraph, the Secretary shall not reduce any fiscal year payment to a State by more than 5 percent.

(2) Any other entity which is in a State that receives funds under this part and which violates paragraph (18) or (23) of section 671(a) of this title during a fiscal year quarter with respect to any person shall remit to the Secretary all funds that were paid by the State to the entity during the quarter from such funds.

(3)(A) Any individual who is aggrieved by a violation of section 671(a)(18) of this title by a State or other entity may bring an action seeking relief from the State or other entity in any United States district court.

(B) An action under this paragraph may not be brought more than 2 years after the date the alleged violation occurred.

(4) This subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978 [25 U.S.C.A. § 1901 et seq.].

* * *

6. 42 U.S.C. § 675 provides:

* * *

(4)(A) The term "foster care maintenance payments" means payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement. In the case of institutional care, such term shall include the reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence.

(B) In cases where--

(i) a child placed in a foster family home or child-care institution is the parent of a son or daughter who is in the same home or institution, and

(ii) payments described in subparagraph (A) are being made under this part with respect to such child,

the foster care maintenance payments made with respect to such child as otherwise determined under subparagraph (A) shall also include such amounts as may be necessary to cover the cost of

the items described in that subparagraph with respect to such son or daughter.

7. 42 U.S.C. § 1320a-2 provides:

In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 671(a)(15) of this title is not enforceable in a private right of action.

8. 42 U.S.C. § 1320a-2a provides:

Reviews of child and family services programs, and of foster care and adoption assistance programs, for conformity with State plan requirements

(a) In general

The Secretary, in consultation with the State agencies administering the State programs under parts B and E of subchapter IV of this chapter, shall promulgate regulations for the review of such programs to determine whether such programs are in substantial conformity with—

(1) State plan requirements under such parts B and E,

(2) implementing regulations promulgated by the Secretary, and

(3) the relevant approved State plans.

(b) Elements of review system

The regulations referred to in subsection (a) of this section shall—

(1) specify the timetable for conformity reviews of State programs, including--

(A) an initial review of each State program;

(B) a timely review of a State program following a review in which such program was found not to be in substantial conformity; and

(C) less frequent reviews of State programs which have been found to be in substantial conformity, but such regulations shall permit the Secretary to reinstate more frequent reviews based on information which indicates that a State program may not be in conformity;

(2) specify the requirements subject to review (which shall include determining whether the State program is in conformity with the requirement of section 671(a)(27) of this title), and the criteria to be used to measure conformity with such requirements and to determine whether there is a substantial failure to so conform;

(3) specify the method to be used to determine the amount of any Federal matching funds to be withheld (subject to paragraph (4)) due to the State program's failure to so conform, which ensures that--

(A) such funds will not be withheld with respect to a program, unless it is determined

that the program fails substantially to so conform;

(B) such funds will not be withheld for a failure to so conform resulting from the State's reliance upon and correct use of formal written statements of Federal law or policy provided to the State by the Secretary; and

(C) the amount of such funds withheld is related to the extent of the failure to so conform; and

(4) require the Secretary, with respect to any State program found to have failed substantially to so conform--

(A) to afford the State an opportunity to adopt and implement a corrective action plan, approved by the Secretary, designed to end the failure to so conform;

(B) to make technical assistance available to the State to the extent feasible to enable the State to develop and implement such a corrective action plan;

(C) to suspend the withholding of any Federal matching funds under this section while such a corrective action plan is in effect; and

(D) to rescind any such withholding if the failure to so conform is ended by successful completion of such a corrective action plan.

(c) Provisions for administrative and judicial review

The regulations referred to in subsection (a) of this section shall--

(1) require the Secretary, not later than 10 days after a final determination that a program of the State is not in conformity, to notify the State of--

(A) the basis for the determination; and

(B) the amount of the Federal matching funds (if any) to be withheld from the State;

(2) afford the State an opportunity to appeal the determination to the Departmental Appeals Board within 60 days after receipt of the notice described in paragraph (1) (or, if later, after failure to continue or to complete a corrective action plan); and

(3) afford the State an opportunity to obtain judicial review of an adverse decision of the Board, within 60 days after the State receives notice of the decision of the Board, by appeal to the district court of the United States for the judicial district in which the principal or headquarters office of the agency responsible for administering the program is located.