No. 17-17

In The Supreme Court Of The United States

VICKIE YATES BROWN GLISSON, SECRETARY, KENTUCKY CABINET FOR HEALTH AND FAMILY SERVICES,

Petitioner,

v.

D.O., A.O., AND R.O.,

Respondents.

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

STATES' AMICUS BRIEF IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The amici States, like all fifty States, administer foster care programs and receive partial reimbursements for eligible foster care payments from the federal government. These partial reimbursements are made pursuant to Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-679, and are available only for certain types of expenses made on behalf of particular foster children. Under its spending power, Congress has placed conditions on the ability of States to receive partial reimbursements under Title IV-E and has required that States substantially conform to those conditions.

The amici States have an interest in ensuring that Spending Clause legislation in general—and Title IV-E legislation in particular—is interpreted in a manner that guarantees that States are aware of their litigation exposure before deciding whether to accept federal funding. The amici States also have an interest in retaining control over their foster care programs and avoiding intrusions by courts in the absence of clear and unambiguous authorization by Congress.[1]

SUMMARY OF ARGUMENT

The amici States respectfully request that the Court grant the petition and hold that Title IV-E of the Social Security Act does not create an individual right to receive foster care maintenance payments. As

[1] Counsel of record for the parties were notified of the States' intent to file this amicus curiae brief and consented to the filing of this brief. *See* Rule 37.2(a).

evidenced by lawsuits around the nation,[2] inferring the existence of a right to foster care maintenance payments inexorably leads to lawsuits challenging the scope of the inferred right and the adequacy of payments made by States. Accordingly, the issue of whether States may be sued under 42 U.S.C. § 1983 by persons seeking to receive foster care maintenance payments is one of particular importance.

Inferring a privately enforceable right undermines principles of federalism. It does so by imposing additional requirements on States that are not clearly and unambiguously included in the text of Title IV-E. In this context, the asserted right would require expenditures of *state* funds, which may or may not be reimbursed later by the federal government.

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[2] *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1203 (8th Cir. 2013); *California State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 982 (9th Cir. 2010); *Ah Chong v. McManaman*, 154 F. Supp. 3d 1043, 1046 (D. Haw. 2015); *New York State Citizens' Coal. for Children v. Carrion*, 31 F. Supp. 3d 512, 513 (E.D.N.Y. 2014); *Foster Parents Ass'n of Washington State v. Dreyfus*, No. C11-5051 BHS, 2013 WL 496062, at *2-3 (W.D. Wash. 2013); *Sam M. v. Chafee*, 800 F. Supp. 2d 363, 383-84 (D.R.I. 2011); *Connor B. v. Patrick*, 771 F. Supp. 2d 142, 167-68 (D. Mass. 2011); *C.H. v. Payne*, 683 F. Supp. 2d 865, 878 (S.D. Ind. 2010); *D.G. v. Henry*, 594 F. Supp. 2d 1273, 1280 (N.D. Okla. 2009); *Carson P. v. Heineman*, 240 F.R.D. 456, 465 (D. Neb. 2007); *California All. of Child & Family Servs. v. Allenby*, 459 F. Supp. 2d 919, 921 (N.D. Cal. 2006); *Olivia Y. v. Barbour*, 351 F. Supp. 2d 543, 558 (S.D. Miss. 2004); *Laurie Q. v. Contra Costa Cty.*, 304 F. Supp. 2d 1185, 1191 (N.D. Cal. 2004); *Missouri Child Care Ass'n v. Martin*, 241 F. Supp. 2d 1032, 1041-42 (W.D. Mo. 2003); *Kenny A. v. Perdue*, 218 F.R.D. 277, 302-03 (N.D. Ga. 2003); *In re Scott Cty. Master Docket*, 672 F. Supp. 1152, 1200 (D. Minn. 1987).

Inferring a privately enforceable federal right also creates separation of powers concerns. Cases from around the country demonstrate that litigants are calling upon courts to intrude into the policymaking decisions appropriately left to the political branches of government. Some courts are accepting those invitations.

For those States in circuits that have not yet addressed the issue of the existence of a federal right to receive foster care maintenance payments, the uncertainty is itself harmful. The uncertainty invites costly litigation and leaves policymakers unsure of the limits on their ability to design efficient, responsive, and innovative foster care systems.

In addition, this case presents a valuable opportunity for the Court to provide additional guidance to the lower courts. The Courts of Appeal continue to misapprehend the relationship between, on one hand, the analytical framework adopted in *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Gonzaga University v. Doe*, 536 U.S. 273 (2002), and, on the other hand, the Court's earlier holdings in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), and *Wright v. City of Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987). Lower courts continue to rely on *Wilder* and *Wright* to infer the existence of a privately enforceable federal right where *Blessing* and *Gonzaga University* establish that no such right exists.

REASONS FOR GRANTING THE PETITION

I. There is a Direct Conflict as to the Existence of a Federal Right

The Petitioner has ably demonstrated the existence of a direct conflict among the Sixth, Eighth, and Ninth Circuit Courts of Appeal. *Compare D.O. v. Glisson*, 847 F.3d 374, 381 (6th Cir. 2017) (holding that Title IV-E "confers foster families with an individual right to foster care maintenance payments enforceable under § 1983"), *and California State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 982 (9th Cir. 2010) (holding that Title IV-E establishes "a presumptively enforceable right under § 1983 to foster care maintenance payments from the State that cover the cost of the expenses enumerated in § 675(4)(A)"), *with Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1203 (8th Cir. 2013) (holding "that Congress did not unambiguously confer" an individually enforceable right to foster care maintenance payments).

The split of authority deepens when considering decisions of district courts in other circuits. *Compare, e.g.*, *New York State Citizens' Coal. for Children v. Carrion*, 31 F. Supp. 3d 512, 527 (E.D.N.Y. 2014) (finding no private right), *and D.G. v. Henry*, 594 F. Supp. 2d 1273, 1280 (N.D. Okla. 2009) (same), *with Connor B. v. Patrick*, 771 F. Supp. 2d 142, 172 (D. Mass. 2011) (finding a private right), *and C.H. v. Payne*, 683 F. Supp. 2d 865, 878 (S.D. Ind. 2010) (same).

II. Whether Title IV-E Creates a Private Right is a Matter of Great Importance

A. The Sixth Circuit's Decision Undermines Fundamental Principles of Federalism

By inferring a federal right to receive foster care maintenance payments, the Sixth Circuit has subjected unconsenting States to private lawsuits. Even where States possess sovereign immunity from suits for retroactive monetary relief, *Edelman v. Jordan*, 415 U.S. 651, 677 (1974), they become susceptible to private lawsuits under 42 U.S.C. § 1983 for prospective injunctive relief if a federal right is inferred, so long as those lawsuits are pleaded against a state official in an official capacity. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989). In light of the consequences that flow from recognizing a federal right, the Court has appropriately narrowly constrained the circumstances in which it will infer such a right. *See, e.g.*, *Gonzaga Univ.*, 536 U.S. at 283; *cf. Alden v. Maine*, 527 U.S. 706, 749 (1999) (recognizing that "'subjecting a state to the coercive process of judicial tribunals at the instance of private parties'" is an "'indignity'" (quoting *Ex parte Ayers*, 123 U.S. 443, 505 (1987)).

In ascertaining whether a statute enacted pursuant to Congress' spending power creates a right, the States' understanding of the statute is a key consideration. The Court does not lightly presume that States have surrendered their immunity from suit, "a fundamental aspect of [State] sovereignty." *Alden*, 527 U.S. at 713. Instead, Spending Clause

legislation "is much in the nature of a contract," and "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

States have not voluntarily and knowingly consented to recognition of a federal right to foster care maintenance payments, which would permit private lawsuits. As the Court explained in *Pennhurst*, the starting point in this inquiry is a presumption that there is *not* a privately enforceable right: "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." *Id.* at 28; *cf.* 42 U.S.C. §§ 1320a through 1320a-2a(b)(3) (providing for termination of Title IV-E funds by the federal government).

In order to overcome this presumption, Congress must create a right "in clear and unambiguous terms." *Gonzaga Univ.*, 536 U.S. at 290. Nothing in Title IV-E refers to foster care maintenance payments as a "right." There is a "total absence (in the relevant statutory provision) of any reference to individual 'rights' or the like." *Id.* at 291 (Breyer, J., concurring). Indeed, even such a reference would not be sufficient. *Pennhurst State Sch.*, 451 U.S. at 18. Nor do Title IV-E's foster care maintenance provisions contain the sort of "'*unmistakable focus* on the benefited class'" that is present in Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. *Gonzaga Univ.*, 536 U.S. at 284

(emphasis added by *Gonzaga Univ.*) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 691 (1979)).

The aggregate focus of Title IV-E's foster care maintenance payment provisions further buttresses the conclusion that States did not voluntarily and knowingly agree to the creation of a privately enforceable right. *See Blessing*, 520 U.S. at 343-44. Considering "the statutory provisions in detail, in light of the entire legislative enactment," *Suter v. Artist M.*, 503 U.S. 347, 357 (1992), States at most agreed only to "conform substantially" to a requirement that they make foster care maintenance payments.[3] 42 U.S.C. § 1320a-2a(a), (b)(3)(A). In light of this limitation, States would not have understood the foster care maintenance provisions to create any *individually* enforceable right.

The Sixth Circuit's inference of a federal right alters the terms of the bargain that States have struck with the federal government. States agreed that they would achieve "substantial conformity" with the "State plan requirements under" Title IV-E. 42 U.S.C. § 1320a-2a(a). The terms of the agreement, set forth in the statute itself, provided that if a State is unable to achieve substantial conformity, it will be afforded "an opportunity to adopt and implement a corrective

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[3] As Petitioners point out, the foster care maintenance payment provisions in Title IV-E are properly interpreted as limitations on expenses for which the federal government will reimburse States. Pet. at 28-30. Even if these provisions were to be construed more expansively, however, a "requirement" that States make payments does not automatically rise to the level of a "right" that may be claimed by potential recipients of those payments. *Blessing*, 520 U.S. at 340 (distinguishing between "a violation of federal *law*" and "the violation of a federal *right*").

action plan," 42 U.S.C. § 1320a-2a(b)(4)(A), and, only if that corrective action plan is unsuccessful could the federal government withhold federal matching funds, 42 U.S.C. § 1320a-2a(b)(4)(C). While Title IV-E provides for an administrative hearing to challenge the denial of a claim for benefits, 42 U.S.C. § 671(a)(12), nothing in Title IV-E provides that States might be subjected to the broad equitable powers of courts for isolated nonconformity.

The Sixth Circuit's decision re-writes this agreed-upon federal-State relationship. By inferring a federal right, the Sixth Circuit has changed a requirement of "substantial conformity" into one of *strict compliance* (i.e., compliance in each individual case). The Sixth Circuit's decision has deprived States of the opportunity to correct any possible deficiencies through a corrective action plan, instead substituting a process by which a third party may seek immediate injunctive relief. This is not the federal-State relationship to which States agreed under Title IV-E. The Sixth Circuit's revision of the federal-State relationship is an important issue that merits review by the Court.

Federalism concerns are particularly acute in the context of Title IV-E. Title IV-E reimbursements are not block grants; they are after-the-fact partial reimbursements for eligible payments. There is necessarily some uncertainty as to whether a given payment will be deemed eligible for reimbursement under Title IV-E. The condition in Title IV-E that requires States to make foster care maintenance payments on behalf of Title IV-E eligible foster children therefore requires States to make expenditures of *state* funds from *state* treasuries

without any guarantee that States will receive even partial reimbursement. Courts should be particularly wary of inferring from Spending Clause legislation a federal right that would allow courts to compel the expenditure of state funds.

B. The Sixth Circuit's Decision Raises Separation of Powers Concerns

The Sixth Circuit's decision will result in litigants calling upon judges to replace foster care policy decisions made by state legislatures and child welfare professionals. Litigants may seek injunctive relief compelling States to increase the amount of foster care maintenance payments and/or to restructure how those payments are made and what expenses they must cover.

The proper operation of child welfare programs involves policy decisions that should be left to the political branches of government. Those policy decisions necessarily involve system-wide considerations, such as balancing child welfare expenditures against expenditures on other aspects of the social safety net, appropriate revenue sources and optimal taxation rates, and balancing the needs of various participants within the child welfare system.

Leaving the matter to political branches ensures that all relevant stakeholders have the opportunity to contribute to the decision-making process, not just the parties to the litigation. And the political branches employ, and receive input from, child welfare experts who have spent their careers considering the important question of how to best meet the needs of foster children in the particular State or region. This contrasts with private litigation,

where the personal interests of the litigants may predominate over the broader public interest in the welfare of foster children.

The Sixth Circuit's inference of a private right to receive foster care maintenance payments invites courts to upset this delicate balancing process by myopically focusing on a narrow aspect of the child welfare system advanced by litigants, to the detriment of other systemic needs.

This concern is not hypothetical. Lawsuits brought to enforce an alleged right to receive foster care maintenance payments frequently demand changes to statewide rate-setting methodologies and budgeting processes. *E.g.*, *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1036-37 (8th Cir. 2002) (identifying plaintiff's desired relief as a "cost-based method of reimbursement" (internal quotation marks omitted)); *Sam M. v. Chafee*, 800 F. Supp. 2d 363, 384 (D.R.I. 2011) (noting that plaintiffs sought to compel the State to "increase foster care maintenance rates"). Effects on other state programs are not considered.

Not only have plaintiffs sought intrusive relief, courts have granted it. *C.H.*, 683 F. Supp. 2d at 885 (restraining the State of Indiana from "reducing or otherwise altering all foster care maintenance payments" below levels in place on December 31, 2009, or reclassifying children to a less expensive rate); *California All. of Child & Family Servs. v. Wagner*, No. C 09-4398 MHP, 2009 WL 3920364 (N.D. Cal. 2009) (entering injunction against California legislature's rate reduction).

By granting the petition for certiorari and reversing the decision of the Sixth Circuit, the Court

will ensure that, in the absence of clear congressional intent, the judicial branch is not called upon to intrude on the policymaking authority of State legislative and executive branches of government.

C. The Sixth Circuit's Decision Invites Costly Litigation

Under the rule adopted by the Sixth Circuit, States face the prospect not only of litigation challenging the system-wide rate-setting process, but also individual disagreements with foster care payment decisions. Under the Sixth Circuit's rule, even minor disputes regarding the adequacy of an individual foster care maintenance payment may give rise to a 42 U.S.C. § 1983 lawsuit.

One well-documented consequence of inferring a right to receive foster care maintenance payments is that it leads to lawsuits challenging the adequacy of those payments. *E.g.*, *Ah Chong v. McManaman*, 154 F. Supp. 3d 1043, 1046 (D. Haw. 2015). These challenges may be class actions, *id.*, lawsuits by organizations, *New York State Citizens' Coal. for Children*, 31 F. Supp. 3d at 513, and even lawsuits by individuals, *D.O.*, 847 F.3d at 376.

These lawsuits are costly when they challenge program-wide payment policies. Defending the adequacy of payment levels typically requires expert witnesses, such as economists, to analyze state- and/or region-specific costs. *See, e.g.*, *Ah Chong*, 154 F. Supp. 3d at 1052. Lawsuits challenging statewide systems, such as class actions and lawsuits by organizations, necessarily involve onerous and costly discovery. In short, inferring a right to receive foster care maintenance payments leads to costly

litigation. These are moneys that may well be needed more urgently in other aspects of the child welfare system or to fund other critical aspects of the social safety net.

Lawsuits challenging the adequacy of foster care maintenance payments pose additional problems when brought on an individual basis. States generally do not simply provide a flat monthly rate on behalf of all foster children. Instead, States offer payments in graduated tiers based on the child's needs. *E.g.*, Wash. Admin. Code § 388-25-0003. States offer additional payments, such as clothing allowances. *E.g.*, Wis. Admin. Code § 56.23. States provide direct services to foster children. 40 Tex. Admin. Code § 700.332(b) (authorizing state agency to "provide day care for authorized purposes to a foster parent"). Inferring a federal right to receive foster care maintenance payments thereby invites individual lawsuits that contend that a given foster care maintenance payment is inadequate based on decisions made at each of these stages. That is, recognition of such an individual right invites 42 U.S.C. § 1983 lawsuits challenging a State's assessment of a child's behavioral needs or even the denial of an individual clothing voucher.

D. Even Uncertainty as to the Existence of a Private Right Harms States

The Court should not wait for additional Courts of Appeal to weigh in on the issue of a private right to receive foster care maintenance payments. Uncertainty is itself a harm, as it results in costly litigation and leaves policymakers without certainty

regarding the adequacy of their payment structure specifically, and more generally, their authority. This creates an incentive for States to adopt foster care maintenance payment systems that minimize legal risk instead of systems that maximize positive outcomes for foster children.

The uncertainty as to the existence of a federal right has given rise to many legal challenges around the nation.[4] There is no reason to believe that this litigation trend will abate.

The uncertainty arises from the "vague and amorphous," *Blessing*, 520 U.S. at 340 (quoting *Wright*, 479 U.S. at 431), and "broad and nonspecific," *Gonzaga Univ.*, 536 U.S. at 292 (Breyer, J., concurring), definition of "foster care maintenance payments." Congress defined "foster care maintenance payments" as "payments to cover the cost of (and cost of providing)" nine enumerated categories of expenses. 42 U.S.C. § 675(4)(A). Congress provided no guidance on how to measure those costs. Nor has the Department of Health and Human Services provided such guidance by regulation. *See* 45 C.F.R. §§ 1355.10-1356.86.

In the absence of clear guidance, States are left to guess at how courts will measure their compliance with an asserted right to receive foster care maintenance payments that "cover" the enumerated "costs." As a starting point, what is the relevant "cost" that must be covered? A foster parent's actual expenditures? The average amount spent on the category by families across the nation? The average

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[4] *See supra* note 2.

amount spent by low-income families whose children would be eligible for Title IV-E reimbursement? May the availability of other resources, such as free school breakfast and lunch or local community clothing drives, be considered in setting foster care maintenance payments? In covering the cost of shelter, must foster care maintenance payments cover a pro rata share of a foster parent's mortgage? The simplest and best way to answer these questions—and the way that is most consistent with *Gonzaga University* and *Blessing*—is to hold that Title IV-E confers no federal right to receive foster care maintenance payments and, therefore, that these questions are for state policymakers to decide. If States are unclear as to whether there is a federal right, they are necessarily uncertain as to the scope of that right and, therefore, the scope of their discretion in making foster care maintenance payments.

Further, uncertainty may cause States to adopt foster care systems based in part on legal considerations instead of systems based exclusively on the consideration of the welfare of foster children. While even more individualized foster care maintenance payment systems may be in the best interests of foster children, customization also involves a greater legal risk in that each individual decision would be subject to a new lawsuit. Were the Court to hold that there is no such private right, States would have more latitude to adopt foster care systems based on the needs of foster children in their states, not on the risk of being haled into court, which brings with it the attendant risk of losing the freedom to innovate.

III. The Sixth Circuit's Decision Reveals the Need for Further Guidance Regarding Private Rights

The Sixth Circuit's decision in the case, and the Ninth Circuit's decision in *Wagner*, illustrate the need for additional guidance regarding the circumstances in which Congress has created a federal right that is privately enforceable under 42 U.S.C. § 1983. Specifically, the lower courts need additional guidance regarding the relationship of *Gonzaga University* and *Blessing* on one hand and *Wilder* and *Wright* on the other hand.

The Court held in *Pennhurst State School*, and reaffirmed in *Gonzaga University*, that, for Spending Clause legislation, "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." *Pennhurst State Sch.*, 451 U.S. at 28; *see also Gonzaga Univ.*, 536 U.S. at 280. The Court in *Gonzaga University* noted that in spite of *Wilder* and *Wright*, its "more recent decisions . . . have rejected attempts to infer enforceable rights from Spending Clause statutes." *Gonzaga Univ.*, 536 U.S. at 281. In *Armstrong v. Exceptional Child Care Center, Inc.*, 135 S. Ct. 1378, 1386 n.*[second asterisk] (2015), the Court noted that *Gonzaga University* had "plainly repudiate[d] the ready implication of a § 1983 action that *Wilder* exemplified."[5]

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[5] Additionally, the result in *Wilder* was superseded by Congress when it repealed the Boren Amendment, Pub. L. No. 105-33, § 4711, 111 Stat. 251, 507 (1997).

In spite of the Court's admonitions, lower courts have continued to rely on *Wilder* and *Wright* to, in effect, hold that any statute containing mandatory language and identifying a beneficiary creates a federal right that is privately enforceable. *See, e.g.*, *Wagner*, 624 F.3d at 978 ("The Supreme Court has repeatedly recognized that a federal statute can create an enforceable right under § 1983 when it explicitly confers a specific monetary entitlement on an identified beneficiary" (citing *Wilder* and *Wright*)); *see also D.O.*, 747 F.3d at 378-80.

The *Wilder*/*Wright* framework employed by the Courts of Appeal is inconsistent with the analysis set forth in *Gonzaga University*. Under *Wilder*, the inquiry into whether a provision creates a federal right "turns on whether 'the provision in question was intend[ed] to benefit the putative plaintiff.'" *Wilder*, 496 U.S. at 509 (alteration in original). The Court emphatically rejected that approach in *Gonzaga University*: "We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983 . . . . [I]t is *rights*, not the broader and vaguer 'benefits' and 'interests,' that may be enforced under the authority of that section." *Gonzaga Univ.*, 536 U.S. at 283.

The Courts of Appeal's continued application of the disavowed *Wilder*/*Wright* analytical framework reveals the need for further guidance by the Court.

CONCLUSION

The petition for a writ of certiorari should be granted and the Court should hold that Title IV-E of the Social Security Act does not create an individual right to receive foster care maintenance payments.

RESPECTFULLY SUBMITTED.

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