No. 17-17

IN THE
SUPREME COURT OF THE UNITED STATES

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

Petitioner,

v.

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

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the
Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Federal law provides that if a state chooses to participate in the cooperative federal-state program created by the Adoption Assistance and Child Welfare Act, that state "shall make foster care maintenance payments on behalf of each child" placed in foster care who meets certain federally mandated criteria. 42 U.S.C. § 672(a)(1). The question presented in this case is:

Whether children and caregivers can bring suit under 42 U.S.C. § 1983 to enforce the right secured by Section 672(a)(1) to receive foster care maintenance payments.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes

Other Authorities

BRIEF IN OPPOSITION

This Court has long held that to determine "whether a federal statute creates rights" that can be enforced using 42 U.S.C. § 1983, a court must look to the "specific statutory provision" invoked by the plaintiff, rather than asking whether the legislation in which that provision is embedded "generally [gives] rise to rights." *Blessing v. Freestone*, 520 U.S. 329, 342 (1997) (citing *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989), and *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 430 (1987)). A court must ascertain "exactly what rights, considered in their most concrete, specific form," the plaintiff is asserting, *Blessing*, 520 U.S. at 346; it cannot ask whether an entire subtitle of a complex federal statute, "as an undifferentiated whole, gives rise to undefined 'rights,'" *id.* at 342.

In this case, the Sixth Circuit considered 42 U.S.C. § 672(a)(1). That provision is one part of the Adoption Assistance and Child Welfare Act (also referred to as Title IV-E of the Social Security Act), a cooperative federal-state program for children removed from low-income homes. The Act requires participating states to develop, and receive federal approval for, a plan that, among many other things, "provides for foster care maintenance payments." 42 U.S.C. § 671(a)(1).

Section 672(a)(1) of the Act governs children's "[e]ligibility" for receiving those payments. It provides that participating states "shall make foster care maintenance payments on behalf of each child" who meets federal statutory criteria. The Sixth Circuit held that children and caregivers who have wrongfully been denied the maintenance payments provided by a state plan may bring suit under 42 U.S.C. § 1983 and obtain an order entitling them to receive those payments going forward. That holding represents the

first time that a federal court of appeals has addressed the question whether a foster family that is being denied benefits altogether can bring suit to enforce Section 672(a)(1). It creates no conflict among the circuits and is entirely correct. It does not warrant this Court's review.

STATEMENT OF THE CASE

1. Respondents D.O. and A.O. are two young half-brothers who live in Kentucky. Their birth mother abused drugs and neglected them. Their fathers are unknown. Stipulation of Facts ¶ 1, *D.O. v. Beshear*, No. 5:15-cv-48 (E.D. Ky. Apr. 7, 2015), ECF No. 8-1 ("Stipulation"); Pet. App. 23a.

In 2012, the Clark County Family Court removed A.O. (then one year old) from his mother's custody on the basis of a dependency petition filed on his behalf by a private individual. Stipulation ¶ 4. The Kentucky Cabinet for Health and Family Services, the state agency responsible for child protection,[1] initially placed A.O. as a foster child with the individual who had filed that petition. She was not a relative. *Id.* ¶¶ 4, 6.

Shortly after A.O. was placed in foster care, the Cabinet initiated a second dependency, neglect, and abuse action (a "DNA proceeding") in Fayette County Family Court (where' the boys' mother was living), and D.O. (then eight years old) was removed from his mother's custody. Stipulation ¶¶ 2, 5. He was initially placed in state foster care, Stipulation ¶ 6, where foster care maintenance payments should have been provided.

Respondent R.O. is the boys' great-aunt. She is a single woman who works as a teacher's assistant in the Fayette County (Kentucky) Public Schools. Pet. App. 17a. The Cabinet contacted her to see whether it could place D.O. in her care. "[O]ut of a deep sense

[1] Petitioner is the Secretary of that Cabinet, and she is sued in her official capacity.

of family loyalty and dedication to [D.O.'s] welfare," she agreed, despite her limited resources. Amended Complaint ¶ 24, *D.O. v. Beshear*, No. 14-CI-3544 (Fayette Circuit Court Feb. 5, 2015) ("Amended Complaint").[2] After the state "conducted a standard home evaluation and criminal background check," Pet. App. 2a, the Fayette Family Court granted R.O. temporary custody of D.O. Stipulation ¶ 8. But when the Cabinet, several months later, asked to place A.O. in her care as well, the boys' guardian ad litem learned that, despite the fact that she wanted to "take [A.O.] and keep the brothers together," she could not afford to do so. Motion to Pay at 4, *In the Interest of* [*Redacted*], Confidential Case Nos. [redacted] (Fayette Cir. Ct. Family Branch Second Div. Jan. 20, 2014).[3] *See also* 42 U.S.C. § 671(a)(31)(A) (requiring that states make "reasonable efforts" to place siblings in the same foster care placement).

To assist R.O. in caring for D.O., and make it possible for her to obtain custody of A.O., the guardian ad litem filed a motion in the Fayette Family Court (to which A.O.'s case had been transferred when his mother moved) to obtain foster care maintenance payments on behalf of D.O. Stipulation ¶ 13. While that motion was still pending, the Family Court issued an order ostensibly closing the DNA proceedings. Stipulation ¶ 10. The Family Court granted joint custody to both R.O. and the children's mother, who had "continued to be non-compliant with Court Orders concerning drug testing," Stipulation ¶ 18. The Family Court directed that the children continue to reside with R.O. Pet. App.

[2] The amended complaint is attached to petitioner's Notice of Removal in *D.O. v. Beshear*, No. 5:15-cv-00048-DCR (E.D. Ky. Feb. 25, 2015), ECF No. 1-1 (Part 2).

[3] The Family Court records are sealed for reasons of confidentiality. *See* Pet. 15a. Accordingly, counsel has redacted identifying information from the case citation.

23a. The Family Court then declined to rule on the guardian ad litem's motion for maintenance payments. Pet. App. 2a.

2. Respondents then brought suit in state court against various state officials (including petitioner).[4] As is relevant here, they alleged that under 42 U.S.C. § 672, they were entitled to foster care maintenance payments and that Kentucky was wrongly denying them those payments. *See* Amended Complaint ¶¶ 30, 33. They further alleged that 42 U.S.C. § 1983 entitled them to declaratory relief and an injunction requiring future payments. *See* Amended Complaint ¶¶ 1, 34.

Petitioner removed the case to federal court and moved to dismiss, arguing that respondents had no private right of action. *See* Pet. 23a. The district court converted that motion into a motion for summary judgment. *Id.* 24a. Relying primarily on *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190 (8th Cir. 2013)—a case claiming that Missouri's methodology for setting the rates for foster care maintenance payments violated 42 U.S.C. § 675(4)(A)—the district court held that "there is no private right of action conferred by 42 U.S.C. §§ 671, 672 upon the plaintiffs." Pet. App. 36a. It therefore granted summary judgment for petitioner. *Id.* 40a.[5]

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[4] Respondents did not oppose the dismissal of the other defendants.

[5] The district court also rejected respondents' constitutional arguments that the denial of foster care maintenance payments violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. With respect to the due process argument, the court held that respondents had no "property interest in foster care payments for which they would be entitled to procedural due process." Pet. App. 36a.

Respondents' equal protection claim rested on their allegation that Kentucky was unlawfully treating children who were in foster care in a relative's home differently from children who were in non-relative foster care. *See* Amended Complaint ¶¶ 22, 40-42. The district court held that Kentucky had a "rational basis" for distinguishing between the two groups of foster children. Pet. App. 38a.

3. The court of appeals unanimously reversed. It held that Section 672 of the Adoption Assistance and Child Welfare Act "confers upon foster parents an individually enforceable right to foster care maintenance payments." Pet. App. 7a.

The court of appeals applied the three-part framework for determining the existence of a private right enforceable using Section 1983 that this Court laid out in *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Gonzaga University v. Doe*, 536 U.S. 273 (2002). Under that framework, a statutory provision "gives rise to a federal right" if the provision (i) uses rights-creating language intended to benefit the plaintiff, (ii) is sufficiently specific, and (iii) is stated in mandatory rather than precatory terms. *Blessing*, 520 U.S. at 340-41; *Gonzaga*, 536 U.S. at 290; *see* Pet. App. 5a, 7a (citing *Blessing* and *Gonzaga*). If those conditions are met, the right can be enforced against a state actor by means of a Section 1983 action unless the defendant shows that Congress expressly or impliedly "foreclosed" doing so. *Blessing*, 520 U.S. at 341 (citation omitted).

First, the court of appeals held that the language of Section 672(a)(1), with its requirement of "payments 'on behalf of each child," contained the "focus on individual recipients" characteristic of "rights-creating language." Pet. App. 7a (first quoting 42 U.S.C. § 672(a)(1) and then quoting *Gonzaga*, 536 U.S. at 287). It rejected petitioner's claim that Section 672(a) did nothing more than lay out a condition for receiving federal matching funds, pointing out that "once the Secretary [of Health and Human Services] approve[d] the state's plan," the state was required to make foster care maintenance payments without regard to the reimbursement provided for by Section 674 of the Act. Pet. App 9a.

The court of appeals rejected petitioner's argument that Section 672(a)(1) cannot be a rights-creating statute because it is "phrased in the active voice," with the state as the subject of the initial sentence, Pet. App. 9a. The court pointed out that this Court "had found that laws phrased in the active voice, with the state as the subject," could "confer individually enforceable rights." *Id.* (citing *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502–03 (1990)). And it explained that such phrasing was sensible, given that Congress must "unambiguously impose a binding obligation on the States," *Id.* 10a (quoting *Blessing*, 520 U.S. at 341). Making the state the subject of the sentence where a requirement is articulated "leaves no doubt about the actor's identity or what the law requires." *Id.*

With respect to the second element of the *Blessing* test, the court of appeals held that the right created by Section 672(a)(1) was sufficiently specific to be judicially enforceable. It acknowledged that questions about a state's foster care maintenance payment *rates* might call for some level of judicial forbearance with respect to a state's decisions. Pet. App. 10a (citing *Wilder*, 496 U.S. at 519). But it pointed out that in this case it was "undisputed that Kentucky [had] established foster care maintenance payment rates" and respondents had not contended "that Kentucky's rate-setting methodology is unreasonable." *Id.* 10a-11a.

As for the third element of the *Blessing* test, the court of appeals found that "§ 672(a)(1)'s 'shall make' language 'unambiguously impose[s] a binding obligation on the States.'" Pet. App. 8a (alteration in original) (quoting *Blessing*, 520 U.S. at 341).

Finally, having held that Section 672(a) secured a right to foster care maintenance payments, the court of appeals held that that right was enforceable through Section 1983. Pet. App. 11a-13a. In particular, the court of appeals rejected petitioner's claims that either

the potential for a federal funds cutoff or the state's own administrative review process foreclosed a Section 1983 suit.

The court of appeals pointed out that, as with the programs at issue in *Wilder* and *Blessing*—where this Court held that the administrative enforcement schemes did not demonstrate a congressional decision to foreclose use of Section 1983, *see Wilder*, 496 U.S. at 521-23; *Blessing*, 520 U.S. at 346-48—federal review of foster care maintenance payments was conducted "only on a program-wide basis," and the Secretary of Health and Human Services "lacks authority to ensure the state provides benefits to individual foster parents." Pet. App. 12a. Thus, section 1983 provided the only "federal mechanism" available to enforce an individual family's right to foster care maintenance payments. *Id.* 12a-13a.

Moreover, the court of appeals explained that the "availability of state administrative procedures ordinarily does not foreclose resort to § 1983." Pet App. 12a (quoting *Wilder*, 496 U.S. at 523).

The court of appeals then remanded the case to the district court for a determination of whether D.O. and A.O. are still in foster care, in which case they are entitled to the maintenance payments. Pet. App. 20a.[6]

[6] The remand was necessary because the family court records were sealed and the stipulated facts were inconclusive. *See* Pet. App. 15a-16a, 20a.

Because it had resolved the appeal on statutory grounds, the court of appeals found it unnecessary to address respondents' "constitutional arguments." Pet. App. 20a n.2. *See supra* note 5. Nonetheless, it declared that "[t]o 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." *Id.* 18a. Petitioner does not challenge that determination here. Pet. 18 n.9.

REASONS FOR DENYING THE WRIT

The Sixth Circuit's decision in this case marks the first time that any court of appeals has addressed the question whether a foster family may bring suit under 42 U.S.C. § 1983 when it is denied the foster care maintenance payments required by 42 U.S.C. § 672(a)(1) and generally provided under a state's existing foster care plan. That decision does not implicate the question whether a foster family has the right under 42 U.S.C. § 675(4)(A) to challenge either the method by which a state sets the level of maintenance payments or the adequacy of those payments. *See* Pet. App. 10a-11a. That issue—the subject of a number of reported decisions—may, or may not, warrant this Court's attention. But if it does, this Court should wait for a case in which the question is squarely presented.

I. The Sixth Circuit's decision in this case does not implicate the thin conflict asserted by petitioner.

Petitioner claims a conflict among three courts of appeals involving whether the Adoption Assistance and Child Welfare Act ("the Act") creates a privately enforceable right to foster care maintenance payments, and seeks to magnify that conflict by referring to a smattering of district court opinions. *See* Pet. 19-25. Petitioner may be correct that there is some disagreement among federal courts with respect to suits invoking 42 U.S.C. § 675(4)(A) to challenge the adequacy of states' foster care maintenance *rates* or to the methods by which states set those rates. But the Sixth Circuit's decision in this case involved a different question—one on which petitioner has failed to identify a single other decision, let alone a genuine conflict.

1. The conflict petitioner claims to find between the Sixth Circuit and other courts of appeals is not only thin, it is illusory. Petitioner points to only a single appellate case with which she claims the Sixth Circuit disagrees: *Midwest Foster Care & Adoption Ass'n*

v. Kincade, 712 F.3d 1190 (8th Cir. 2013). Pet. 22-25. But this case and *Midwest Foster Care* do not in fact involve the same rights "considered in their most concrete, specific form," *Blessing v. Freestone*, 520 U.S. 329, 346 (1997); *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989) (directing courts to examine "the provision in question" to determine "whether a federal right has been violated"). Indeed, they do not even involve the same "specific statutory provision," *Blessing*, 520 U.S. at 342.

Respondents filed suit to enforce Section 672(a)(1) of the Act—a provision governing the entitlement of individual children and foster care providers to state-provided foster care maintenance payments. Amended Complaint ¶¶ 30, 31. As the Sixth Circuit explained, respondents are seeking simply to participate in Kentucky's federally mandated program; they are challenging only their wrongful exclusion from that program. Pet. App. 10a-11a.

By contrast, the plaintiffs in *Midwest Foster Care* invoked a different provision of the Act, asserted a different right, and sought a different remedy. The plaintiffs there were organizations of foster care providers and individual providers who were already receiving maintenance payments from the state of Missouri. *See* Complaint ¶¶16-22, *Midwest Foster Care & Adoption Ass'n v. Kinkade*, No. 4:11-cv-01152-DW (W.D. Mo. Nov. 16, 2011), ECF No. 1 (*Midwest Foster Care* Complaint).[7] They challenged Missouri's "methodology" for calculating the "level" of maintenance payments. *Midwest Foster Care*, 712 F.3d at 1195. They sought a declaration that the state "violated, continues to violate, and/or will

[7] The complaint spells the defendant's surname "Kinkade," which is the correct spelling.

violate 42 U.S.C. § 675(4)(A)" and its implementing regulations. *Midwest Foster Care* Complaint at 18. They made no direct claim under Section 672(a)(1).

The Eighth Circuit opinion therefore addressed the question whether Congress had conferred "an individually enforceable right to foster care maintenance payments sufficiently large to cover the cost of each item enumerated in § 675(4)(A)" of the Act. *Midwest Foster Care*, 712 F.3d at 1203. The Eighth Circuit was not asked to, and did not, directly confront the question whether a foster child or family who is completely excluded from a state's program (taking as a given how that program is configured) has an enforceable right under Section 672(a)(1) to foster care maintenance payments (at whatever level the state program sets them).

To be sure, along the way to assessing the plaintiffs' asserted right to "adequate" payments, *see Midwest Foster Care* Complaint ¶¶3, 9, 58, the Eighth Circuit characterized Section 672(a)(1) as a "roadmap for the conditions a state must fulfill" to get reimbursement. *Midwest Foster Care*, 712 F.3d at 1198. But the Eighth Circuit did not need to construe Section 672(a)(1) to determine whether Section 675(4)(A) is enforceable through Section 1983, so its statement is at most dicta; it does not resolve whether a foster child or family in that circuit could bring suit to enforce Section 672(a)(1)'s right to the payments set by a state's plan. And the Sixth Circuit's opinion in this case stressed that Kentucky's argument "invok[ing] the Eighth Circuit's reasoning" also involved a "separate section of the Act": Section 674(a)(1). Pet. App. 8a-9a. The decision below does not determine what the Sixth Circuit would do if it were confronted with a challenge to Kentucky's reimbursement rates under Section 675(4)(A). *See* Pet. App. 10a-11a. There is thus no genuine, outcome-determinative conflict between the Sixth and Eighth Circuits.

The third appellate decision in petitioner's purported conflict, *California State Foster Parent Ass'n v. Wagner*, 624 F.3d 974 (9th Cir. 2010), *see* Pet. 19-21, is like *Midwest Foster Care* and unlike this case. It involved a challenge to a state's method for setting the level of payments, 624 F.3d at 976-77, rather than to the ability of individual children and foster parents to sue to obtain payments once the payment amount has been set by the state. Petitioner is correct that the Eighth and Ninth Circuits reached different answers on the question whether Section 675(4)(A) of the Child Welfare Act creates a privately enforceable right. *Compare California State Foster Parent Ass'n*, 624 F.3d at 978, 981 (assessing whether § 674(4)(A) creates "a federal right to payments that are based upon consideration of the expenses enumerated in the Act" and holding that "courts may review the State's compliance with a requirement to set rates that cover the costs of the enumerated expenditures") *with Midwest Foster Care*, 712 F.3d at 1193-94 (describing the asserted right as a "privately enforceable right under 42 U.S.C. § 1983 to receive payments from the State sufficient to cover the cost of certain statutorily enumerated components of foster care" and holding that Section 675(4)(A) is not privately enforceable). But the Sixth Circuit's decision in this case does not take sides on that question. If that question merits this Court's review, it should await a case that presents it.

2. The district court decisions petitioner cites, Pet. 25, do nothing to buttress her assertion that the Sixth Circuit's holding conflicts with the decisions of other lower courts. If anything, they reinforce the conclusion that whatever disagreement may exist in the lower courts involves a different issue than the one decided by the Sixth Circuit here.

Petitioner cites *New York State Citizens' Coalition for Children v. Carrion*, 31 F. Supp. 3d 512 (E.D.N.Y. 2014), for the proposition that district courts in the Second Circuit

take the position that "the Act creates no individual right of action." Pet. 25. She is doubly mistaken.

First, as with her question presented and her discussion of the Eighth and Ninth Circuit decisions, petitioner "paints with too broad a brush," *Blessing*, 520 U.S. at 342. Petitioner ignores the fact that the New York case, like the Missouri and California court of appeals decisions, involved a challenge to maintenance payment rates resting on Section 675(4)(A); it did not involve a claim of eligibility for payments *vel non* under Section 672(a)(1). *See Carrion*, 31 F.3d at 513. And the practice among district courts in the Second Circuit undermines petitioner's assertion of a split. Those courts properly proceed statutory provision by statutory provision when addressing claims under the Act. *See, e.g.*, *Elisa W. ex rel. Barricelli v. City of New York*, 2016 WL 4750178, at *3, *4-*6 (S.D.N.Y. Sept. 12, 2016) (looking separately at each of the statutory provisions invoked by the plaintiff and finding that plaintiff had an enforceable right under some sections of the Act, but lacked an enforceable right under other sections). Thus, the district court's decision in *Carrion* says nothing about how district courts in the Second Circuit would approach the issue decided by the Sixth Circuit here.

Second, petitioner fails to mention what happened on appeal to the case she cites. The Second Circuit remanded the case to determine whether the plaintiff—an organization whose members include foster care parents, but not a party itself entitled to maintenance payments—had "suffered a 'perceptible injury' so as to satisfy Article III." *N.Y. State Citizens' Coalition for Children v. Velez*, 629 F. App'x 92, 94 (2d Cir. 2015). In doing so, the Second Circuit made clear that it was "express[ing] no view on the question whether if

Plaintiff-Appellant establishes standing in the district court, there exists a private right of action that it may assert." *Id.* at 94-95.

The Tenth Circuit district court case on which petitioner relies (Pet. 25) similarly involved, inter alia, a challenge to a state's methodology for calculating foster care maintenance payments, rather than to the entitlement of individual children and care providers to receive the payments set by the state. *D.G. ex rel. Stricklin v. Henry*, 594 F. Supp. 2d 1273 (N.D. Okla. 2009). And the district court in *D.G.* acknowledged that the Tenth Circuit has held, with respect to the Adoption Assistance and Child Welfare Act, that "individual causes of action may be appropriate, depending upon the particular section or violation involved." 594 F. Supp. 2d at 1277 n.1 (quoting *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 889 (10th Cir. 1992) (interpolation by the district court omitted). Thus, one cannot infer anything about what district courts within the Tenth Circuit—let alone the Tenth Circuit itself—might do in a case like respondents'.[8]

3. Perhaps recognizing the weakness of her claim to a circuit split over whether foster children and providers who are denied maintenance payments outright can use Section 1983 to seek the payments to which they are entitled, petitioner claims that this

[8] The other case cited by petitioner, *see* Pet. 25, actually comes from a state within the Eighth Circuit, not the Tenth, and involved a claim regarding the adequacy of the state's maintenance payments. *See Carson P. ex rel. Foreman v. Heineman*, 240 F.R.D. 456, 465, 539-41 (D. Neb. 2007). It thus adds nothing to *Midwest Foster Care*.

The amicus brief filed by several states cites several additional cases. *See* States' Amicus Brief in Support of Petitioner 2 n.2. But to the extent those cases involve foster care maintenance payments, all the challenges are to a state's method of setting those payments or to the adequacy of the payments provided. As far as respondent can tell, none of the cases directly addressed the question whether an individual foster child or provider can bring suit to enforce a right to receive the payments generally provided by a state's program.

Court should grant certiorari to resolve a "broader disagreement about § 1983 enforcement of related provisions." Pet. 25 (capitalization altered). That argument fails because it flouts the fundamental principle announced by this Court: Answering the question whether a particular statutory provision creates a privately enforceable right does not resolve the question whether a *different* statutory provision creates one. *See Blessing*, 520 U.S. at 342-43, 345-46; *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 276, 282 (2002) (directing attention to "the relevant provisions" and the "provision in question" (citation omitted)). In light of the fact that some provisions of the Act undeniably confer privately enforceable rights, *see, e.g.*, 42 U.S.C. § 1320a-2 (discussed *infra* pp. 20-21), there is no disagreement disconnected from specific provisions for this Court to resolve. Consequently, deciding whether there is "rights-creating language" in 42 U.S.C. § 671(a)(16), which governs creation of a "case plan" and "case review system" for children in foster care—*see* Pet. 25-28 (discussing two cases that address this provision)—will do next to nothing to answer the legal question at the heart of this case: Can respondents sue under Section 1983 to enforce Section 672(a)(1)'s requirement that participating states "shall make foster care maintenance payments on behalf of each child" who fits the federal eligibility criteria? Nor will deciding whether Section 672(a)(1) creates an enforceable right provide useful guidance regarding still other unrelated provisions of the Child Welfare Act.

II. The importance argument advanced by petitioner and her amici is overblown.

1. The question presented hardly ever arises. As respondent has already explained, the petition fails to identify a single other case, from any court, that involves a Section 1983 suit by foster children or a caretaker seeking nothing more than enforcement of Section 672(a)(1)'s command that a state provide the maintenance payments (at a state-set rate) to

which they are entitled under federal law. So the Sixth Circuit's decision here involves an issue that apparently never produces reported decisions.

Indeed, each of the cases petitioner cites for her claim that the "sheer number of cases" demands this Court's review, *see* Pet. 34 n.13, involves either a state's process for setting maintenance payment rates or the actual adequacy of the payments a state has set. None squarely presents the question whether a child or foster care provider can bring suit over an outright refusal to provide any benefits in violation of Section 672(a)(1).

The amicus brief in support of petitioner at least acknowledges the distinction between lawsuits that "challenge program-wide payment policies," States' Amicus Br. 11, and lawsuits by an individual seeking payments under Section 672. And while amici are able to point to cases involving the former, *see id.* at 2.n.2, 11, they cannot muster a single example, other than respondents' case, of foster families bringing suit over outright exclusion from a state's program. That hardly argues for the need to grant review here.

2. At any rate, the statutory mandate to provide foster care maintenance payments on behalf of eligible foster children is so clear that states need no guidance regarding whether individuals can bring suit under Section 1983. Neither petitioner nor her amici identify any reason why answering the question presented would change any state's operation of its foster care system. In this case, for example, petitioner has not sought review of the Sixth Circuit's holding, Pet. App. 20a, that if the boys are currently in foster care, Kentucky must "make foster are maintenance payments on behalf of each" of them, 42 U.S.C. § 672(a)(1). *See* Pet. 18 n.9 (stating that petitioner "does not challenge" in this Court the Sixth Circuit's determinations that R.O. is "an approved foster care provider" and that federal law forbids treating "relative and non-relative foster care providers"

differently (quoting Pet. App. 18a)). Kentucky's obligation to provide maintenance payments for A.O. and D.O. turns entirely on whether the boys are still in foster care—a factbound question that in no way merits this Court's time—and not in the slightest on whether they can bring suit.

The importance argument offered by petitioner's amici fares no better. First, they express some concerns about the litigation costs of suits "challenging statewide systems," Amicus Br. 11, or individual suits "challenging the adequacy of foster care maintenance payments," *id.* Second, they claim that "uncertainty" over "the adequacy of their payment structure[s]" might affect the day to day operations of a state's foster care system, *id.* at 13. But as respondents have already explained, this case does not involve the systemic question of rate-setting methodologies or the adequacy of state-set rates.[9]

Moreover, amici are entirely silent as to any way in which they are uncertain about their obligation to make maintenance payments on behalf of eligible children—the sole question at issue in respondents' case. They offer no reason why they should be immunized from judicial review of a decision to exclude an individual foster family who meets federally established eligibility requirements from receiving the maintenance payments required by Section 672(a)(1).

[9] Indeed, despite claiming here that the question whether private plaintiffs can sue to enforce Section 675(4)(A) involves a "matter of great importance," Amicus Br. 5 (capitalization altered), states have generally not appealed the large number of decisions finding private rights of action challenging system-wide rate-setting processes or the adequacy of payment amounts, *see id.* at 2 n.2 (collecting cases); Pet. 34 n. 13 (same). That is why, after all, petitioner can point to only two prior court of appeals decisions in her asserted conflict.

III. The Sixth Circuit's decision is correct.

The Sixth Circuit correctly held that 42 U.S.C. § 672(a) "creates a private right to foster-care maintenance payments enforceable by a foster parent under 42 U.S.C. § 1983." Pet. App. 2a. In reaching that conclusion, it faithfully applied this Court's decisions in *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Gonzaga University v. Doe*, 536 U.S. 273 (2002).

A. Section 672(a)(1) creates a private right to foster care maintenance payments.

Taken together, *Blessing* and *Gonzaga* establish a tripartite framework for deciding whether "a specific statutory provision" gives rise to enforceable private rights. *Blessing*, 520 U.S. at 342. First, the statutory text "must be 'phrased in terms of the persons benefited.'" *Gonzaga*, 536 U.S. at 284 (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 692, n. 13 (1979)). It must be directed at "'whether the needs of any particular person have been satisfied,'" rather than having "an 'aggregate' focus" on the federal funds recipient's "policy and practice." *Id.* at 288 (quoting *Blessing*, 520 U.S. at 343). In short, the statute must have "'rights-creating' language." *Id.* at 287 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001)). Second, "the right assertedly protected by the statute" cannot be "so 'vague and amorphous' that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-41 (quoting *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 431 (1987)); *accord Gonzaga*, 536 U.S. at 282. "Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 341.

Section 672(a)(1) meets all three criteria.

1. Section 672(a)(1) contains rights-creating language. The provision is expressly directed at the "eligibility" of "each child who has been removed from the home of a relative . . . into foster care" to have "foster care maintenance payments" made by a participating state "on [his or her] behalf." 42 U.S.C. § 672(a)(1) (capitalization altered). This language, the Sixth Circuit explained, "focus[es] on individual recipients." Pet. App. 7a. "Unlike" the language in *Gonzaga*, the language in Section 672(a)(1) "requires individual payments and focuses on the needs of specific children, as opposed to merely speaking to the state's policy or practice." Pet. App. 8a.

Petitioner is simply wrong to claim (Pet. 28-29) that the "eligibility" referred to in Section 672(a)(1) is the *state's* eligibility receive federal reimbursement for the foster care maintenance payments that it is required to make as a participant in the cooperative federal-state program created by the Act. Far from being the "'overwhelming focus' of Section 672(a)(1)," Pet, 29 (quoting *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1198 (8th Cir. 2013)), the state's eligibility for reimbursement is nowhere even mentioned in that provision. Rather, as the Sixth Circuit pointed out, a state's eligibility for reimbursement appears in "a separate section of the Act." Pet. App. 9a; *see* 42 U.S.C. § 674 (governing "[p]ayments to States"). Section 672(a)(1) governs a *child*'s eligibility for maintenance payments.

Petitioner seems to have abandoned the argument she made below that Section 672(a)(1) confers no rights because it is phrased "in the active voice," *see* Pet. App. 9a—that is, the state "shall make" payments (rather than "no child shall be denied" such payments). She was wise to ditch that claim. This Court has never required that Congress "must incant magic words in order to speak clearly." *Sebelius v. Auburn Reg'l Med. Ctr.*,

568 U.S. 145, 153 (2013). So, too, with respect to magic voices. Thus, in *Wilder v. Virginia. Hospital Ass'n*, 496 U.S. 498 (1990), for example, this Court held that a statute phrased in terms of what a state "must" do can create a private right of action enforceable through Section 1983. *See id.* at 502–03, 512 (quoting 42 U.S.C. § 1396(a)(13)(A) (Supp. V 1982)). That is because, as the Third Circuit has explained, "it [is] difficult, if not impossible, as a linguistic matter, to distinguish the import" of language that a state "must provide" a specified benefit from language that "no person shall" be denied that benefit. *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 190 (3d Cir. 2004) (citations omitted); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 603 (5th Cir. 2004) (same). Both phrases are "rights-creating."[10]

Indeed, the argument that language that "'speak[s] to the states as regulated participants" cannot create rights, Pet. App. 9a ((quoting petitioner's brief in the court of appeals quoting *Midwest Foster Care and Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1197 (8th Cir. 2013)), proves far too much. The Due Process Clause of the Fourteenth Amendment after all, is phrased that way: No state "shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1. Yet it is universally understood that this is a rights-creating provision that can be enforced using 42 U.S.C. § 1983.

[10] Within the confines of the Adoption Assistance and Child Welfare Act itself, Congress has used active constructions in which the state is the subject in a provision that even petitioner acknowledges to be rights creating, Pet. 32. Section 674(d)(3)(A) of the Act provides that "[a]ny individual who is aggrieved by a violation of section 671(a)(18)" can bring suit. Section 671(a)(18), in turn, provides that "neither the State nor any other entity in the State that receives funds from the Federal Government" may "delay or deny the placement of a child . . . into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved."

Moreover, Congress has expressly stated that the Adoption Assistance and Child Welfare Act contains privately enforceable rights. After this Court's holding in *Suter v. Artist M.*, 503 U.S. 347, 363 (1992), that private individuals could not sue to enforce Section 671(a)(15)'s requirement of "reasonable efforts" to preserve and reunify families, Congress enacted 42 U.S.C. § 1320a-2. *See* Pub. L. No. 103-382, § 555, 108 Stat. 3518, 4057-58 (1994) (codified as amended at 42 U.S.C. § 1320a-2). Commonly referred to as the "*Suter* fix," Section 1320a-2 left in place this Court's holding in *Artist M.* with respect to Section 671(a)(15), but declared that "[i]n 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." Congress explained that Section 1320a-2 was designed "to provide that each individual shall have the right not to be denied any service or benefit under this Act" and to "confirm the more than two decades of Federal jurisprudence" which had recognized that Congress meant "to permit those injured" by a state's failure to comply with required provisions "to challenge, through appropriate judicial actions, that failure." H. Rep. No. 102-631, p. 366 (1992). Congress added Section 1320a-2 to the Act in 1994, several years *before* it created the only express cause of action for individuals denied rights under the Act. *See* Pub. L. 104-88, § 1808, 110 Stat. 1755, 1903-04 (1996) (adding 42 U.S.C. § 674(d)(3)(A), which allows individuals aggrieved by racial discrimination in the foster care process, to bring suit). Unless Section 1320a-2 is a nullity, then, there must be some statutory provisions in the Child Welfare Act enforceable through Section 1983 actions. The Sixth Circuit explained why Section 672(a)(1) is one such provision. *See* Pet. App. 5a-13a. Petitioner ignores Section 1320a-2 completely.

To be sure, there are no doubt provisions in the Act that speak in an aggregate focus. For example, the provision requiring that a participating state "arrange for a periodic and independently conducted audit" of its program at least every three years, 42 U.S.C. § 671(a)(13), confers no right on any identifiable individual. But Section 672(a)(1) is focused entirely on the eligibility of individuals to receive foster care maintenance payments. Any aggregate aspect of those payments is treated elsewhere. Section 672(a)(1) thus creates a right to foster care maintenance payments on behalf of eligible children.

2. The asserted right—an entitlement to receive foster care maintenance payments provided by a state's approved plan—is in no way vague or ambiguous. Congress has been quite explicit in Section 672(a) as to when foster families are entitled to maintenance payments.[11] Petitioner's reference to the fact that the amount of payments may be subject to debate in some cases, Pet. 30 n. 12, goes to an entirely different question: whether individuals can sue to enforce a right created by Section 675(4)(A).

3. Section 672(a)(1) expressly imposes a binding obligation on states that participate in the Act's cooperative federal-state program. Section 672(a)(1)'s directive that each state with an approved plan "shall make foster care maintenance payments on behalf of each [eligible] child" is every bit as mandatory as the directive in the Boren Amendment—that state Medicaid plans "'*must*' 'provide for payment'" of reasonable rates to hospitals—that this Court held "mandatory rather than precatory" in *Wilder*, 496 U.S. at 512 (quoting 42 U.S.C. § 1396a(a)(13)(A) (emphasis added by this Court)). As the Sixth

[11] The child's entitlement to maintenance payments on his or her behalf turns on his or her eligibility for certain other federal financial assistance, the circumstances of the child's removal, and placement in a foster home or child-care institution. *See* 42 U.S.C. § 672(a)(1)(B), (a)(2), and (a)(3).

Circuit explained, "once the Secretary [of Health and Human Services] approves the state's plan, the state '*shall* make foster care maintenance payments" to providers, Pet. App. 9a (quoting 42 U.S.C. § 672(a)(1); emphasis added by the court). Indeed, petitioner nowhere disputes this point. Only "after the state remits maintenance payments to the foster family" as required by Section 672(a)(1), Pet. App. 4a, does the state's eligibility to seek partial federal reimbursement kick in. If a state participates in the program, making foster care maintenance payments to eligible families "isn't optional." *Id.* 9a.

B. Section 1983 can be used to enforce the right secured by Section 672(a)(1).

Foster families denied the right to maintenance payments can use 42 U.S.C. § 1983 to bring suit for declaratory and injunctive relief. It has long been black letter law that Section 1983 provides "a generally and presumptively available remedy for claimed violations of federal law," *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994), that deprive an individual of "rights . . . secured by" that law, 42 U.S.C. § 1983.

Petitioner has not met her burden of overcoming the "rebuttable presumption," *Blessing*, 520 U.S. at 341, that respondents can use Section 1983 to enforce the right secured by Section 672(a)(1). That presumption requires that petitioner show "'by express provision or other specific evidence from the statute itself that Congress intended to foreclose'" private enforcement through Section 1983. *Wilder*, 496 U.S. at 520-21(quoting *Wright*, 479 U.S. at 423). Petitioner has shown neither.

Certainly, there is no express congressional foreclosure. If anything, the "*Suter* fix," which expressly anticipates that there will be "action[s] brought to enforce" provisions in the Act, 42 U.S.C. § 1320a-2, but provides no express cause of action, shows the opposite. *See supra* pp. 20-21 (discussing the *Suter* fix).

As for circumstantial evidence, petitioner offers two arguments. Neither is persuasive.

First, petitioner suggests (Pet. 32) that Congress's provision of an express authorization of a private right of action with respect to violations of Section 671(a)(18), *see* 42 U.S.C. § 674(d)(3)(A) somehow forecloses Section 1983 suits for violations of Section 672(a)(1). That argument fundamentally misunderstands the function of Section 674(d)(3)(A).

Section 671(a)(18), which forbids racial discrimination in the placement of foster children or children to be adopted, binds private actors as well as governmental entities. It applies both to states and to "any other entity" that "receives funds from the Federal Government and is involved in adoption or foster care placements," 42 U.S.C. § 671(a)(18). These entities can include private agencies. So had Congress not enacted Section 674(d)(3)(A), there would be no private remedy against those nongovernmental actors, because Section 1983 provides a cause of action only against individuals acting "'under color' of state law." *Filarsky v. Delia*, 566 U.S. 377, 383 (2012) (quoting 42 U.S.C. § 1983).

Moreover, in the provision petitioner highlights, Congress expressly authorizes "an action seeking relief *from the State*." 42 U.S.C. § 674(d)(3)(A) (emphasis added). Section 1983, by contrast, cannot be used to sue a state directly. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (holding that "a State is not a person within the meaning of § 1983"). Thus, Congress needed a statute to expressly abrogate state sovereign immunity. In short, "because the express cause of action created for § 671(a)(18) [in § 674(d)(3)(A)]

is actually *broader* than § 1983, it does not suggest an intent to limit § 1983 enforcement." *Henry A. v. Willden*, 678 F.3d 991, 1008 (9th Cir. 2012) (emphasis in original).

Second, petitioner is wrong to argue (Pet. 32) that the Act's requirement that states provide some administrative mechanism for individuals to seek relief somehow forecloses enforcement through Section 1983. Availability of a state forum does not deprive a plaintiff of the right to use Section 1983. This Court has repeatedly "stressed that a plaintiff's ability to invoke § 1983 cannot be defeated simply by '[t]he availability of administrative mechanisms to protect the plaintiff's interests.'" *Blessing*, 520 U.S. at 347 (alteration in original) (quoting *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989)*; see also Wright*, 479 U.S. at 427-28 ("the existence of a state administrative remedy does not ordinarily foreclose resort to § 1983").

Similarly, petitioner's argument that Congress did not expect to cut off funds as long as a state substantially complies with the requirements of the Act, Pet. 30-31, is irrelevant. Petitioner is no doubt right that if respondents are the only people wrongly denied maintenance payments, the federal government will not sanction Kentucky. But that says nothing about whether Congress has given respondents a right to those payments that they can enforce using Section 1983.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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