No. ___-_____

IN THE

Supreme Court of the United States

SHEILA J. POOLE, Commissioner of the New York State Office of Children & Family Services, in Her Official Capacity,

Petitioner,

v.

NEW YORK STATE CITIZENS' COALITION FOR CHILDREN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
CAROLINE A. OLSEN
Assistant Solicitor General

28 Liberty Street
New York, New York 10005
(212) 416-8016
barbara.underwood@ag.ny.gov
**Counsel of Record*

QUESTION PRESENTED

The Adoption Assistance and Child Welfare Act of 1980 (CWA) delegates to the federal Department of Health and Human Services the authority to approve partial federal reimbursements to States that make certain foster care maintenance payments to foster parents.

The question presented is:

Whether the CWA's criteria for partial federal reimbursement unambiguously confer on foster parents a private right of action to compel States to cover the costs of all of the eligible expenses for eligible children identified in the CWA.

RELATED PROCEEEDINGS

Prior captions:

New York Citizens' Coalition for Children v. Carrión

New York Citizens' Coalition for Children v. Velez

U.S. District Court (E.D.N.Y.), No. 10-cv-3485

Decision and Order (Sept. 29, 2017)

Report and Recommendation (Nov. 7, 2016)

Decision and Order (July 17, 2014)

U.S. Court of Appeals (2d Cir.), No. 14-2919

Order and Dissenting Opinions (Aug. 16, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Sheila J. Poole, the Commissioner of the New York State Office of Children and Family Services, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.[1]

OPINIONS BELOW

The Second Circuit decision that is the subject of this petition (Pet. App. 1a-28a) is reported at 922 F.3d 69. An earlier Second Circuit order (Pet. App. 94a-99a), which remanded the case for a determination of the plaintiff's standing, is reported at 629 F. App'x 92, and the order restoring jurisdiction to the Second Circuit is reproduced at Pet. App. 63a-64a. The district court's opinions (Pet. App. 65a-76a, 100a-130a) are reported at 2017 WL 4402461 (standing) and 31 F. Supp. 3d 512 (merits).

JURISDICTION

The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331. The Second Circuit issued its decision on April 19, 2019. A timely petition for rehearing en banc was denied on August 16, 2019. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the CWA, 42 U.S.C. § 670 et seq., are reproduced at Pet. App. 147a-269a.

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[1] Commissioner Poole was confirmed on June 20, 2019.

INTRODUCTION

Foster care in this country has traditionally been the responsibility of the States. Decisions regarding child welfare involve sensitive policy judgments, and States have made diverse choices about the administration, funding, and coverage of their foster care systems. In the Adoption Assistance and Child Welfare Act of 1980 (CWA), Pub. L. No. 96-272, 94 Stat. 500 (codified at 42 U.S.C. § 670 et seq.), Congress respected the States' historic role by offering States partial reimbursement for their foster care expenditures—limited to certain children and certain expenditures that meet federal criteria—but otherwise left States with broad leeway to structure and administer their foster care systems as they see fit.

Here, the United States Court of Appeals for the Second Circuit fundamentally upended this scheme by misconstruing the CWA's criteria for partial federal reimbursement of certain expenses as an affirmative spending mandate on the States, payable out of state funds, to cover federally specified expenses at a rate to be determined by federal courts in suits brought by individual foster parents. In so holding, the Second Circuit deepened an acknowledged and entrenched circuit split about whether the CWA creates such a privately enforceable federal right. Because this issue seriously affects the federal-state balance that Congress sought to preserve in the CWA, this Court's review is urgently warranted.

The crux of the dispute here is whether Congress intended to impose a vast new payment obligation on the States, enforceable by individual foster parents in federal court, when it provided in the CWA that, in order for a State to be eligible to receive federal

reimbursement, the State "shall make foster care maintenance payments," 42 U.S.C. § 672(a)(1), and then listed several categories of such payments, *id.* § 675(4)(A). The most natural reading of these provisions in context is that Congress intended to identify certain categories of state payments that would be eligible for partial federal reimbursement, but left to the States in the first instance the determination of which payments to make and at what rates. That interpretation accords both with Congress's long-standing recognition of the States' primary role in managing foster care, and with the consistent position of the federal Department of Health and Human Services (HHS), which supervises state compliance with the CWA. The Second Circuit concluded otherwise, holding that Congress was not merely identifying *reimbursable* expenditures, but instead dictating *mandatory* spending by the States, and that this spending obligation was enforceable by foster parents, not just HHS.

That holding, if allowed to stand, will have enormous consequences for New York and other States. Under the Second Circuit's decision, the adequacy of the States' foster care maintenance payments would be supervised by individual federal district courts, supplanting the complex rate-setting procedures that nearly all States follow in setting foster care maintenance payments. This intrusion on state policy choices would be enforced not by the expert federal agency that Congress chose to supervise federal funding, but by individual plaintiffs in private litigation. And the outcome of displacing the States' traditional supervision over foster care will be to require States to prioritize spending on the limited set of children and expenses eligible for partial federal

reimbursement, at the expense of the broader population of children and expenses that New York and other States have chosen to cover.

Certiorari is warranted to resolve the circuits' deep division on this important issue and to restore the respect for state choices about foster care that Congress sought to preserve in the CWA.

STATEMENT

A. Statutory and Regulatory Background

1. The States' principal responsibility over foster care

Foster care in the United States is, and always has been, a "traditional area of state concern." *Moore v. Sims*, 442 U.S. 415, 435 (1979). Antecedents to modern foster care emerged in the nineteenth century as charitable enterprises run by religious organizations and philanthropic agencies. Over time, States and localities assumed an ever-increasing role in the care of children living outside of their family homes, first by providing financial assistance to private entities arranging for the care of orphaned and impoverished children, and later by establishing and administering their own state or locally administered foster care programs.[2] Each State has developed its own foster

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[2] *See* Catherine E. Rymph, *Raising Government Children: A History of Foster Care and the American Welfare State* 20-42 (2017); Admin for Children & Families, U.S. Dep't of Health & Human Servs., *Report to the Congress on Kinship Foster Care* 13-16 (2000) (internet); N.Y. Temp. State Comm'n on Child Welfare, *The Children of the State: Child Protective Services in*

care system, with distinct administrative structures, levels of financial support, and areas of coverage.[3]

The federal government began providing limited financial assistance to state foster care systems in the 1930s, but it has continued to leave questions of policy and implementation largely to the States. Starting with the Social Security Act (SSA) of 1935, Congress made regular appropriations ($1.5 million for the first year, with modest increases thereafter) to be allocated among all of the States to help them "in establishing, extending, and strengthening, especially in predominantly rural areas," public services for "homeless, dependent, and neglected children, and children in danger of becoming delinquent"—a broad category that included, but was not limited to, children in foster care. Ch. 531, § 521, 49 Stat. 620, 633.[4] In 1958, among other changes, Congress eliminated the previously established requirement that funds be restricted to "predominantly rural" or "special need"

New York 3-7, 11-13 (1980) (internet). For sources available on the internet, full URLs appear in the table of authorities. All websites were last visited on October 30, 2019.

[3] *See, e.g.*, Kerry DeVooght & Dennis Blazey, *Family Foster Care Reimbursement Rates in the U.S.: A Report from a 2012 National Survey on Family Foster Care Provider Classifications and Rates* 2-3 (2013) (internet) (diversity in foster care reimbursement rates); Admin. for Children & Families, U.S. Dep't of Health & Human Servs., *State vs. County Administration of Child Welfare Services—Child Welfare Information Gateway* (2018) (internet) (diversity in administrative frameworks).

[4] *See also* U.S. House of Representatives, Comm. on Ways & Means, *Green Book: Background Material and Data on the Programs Within the Jurisdiction of the Committee on Ways and Means*, ch. 11 (2011) (internet) (describing the history of federal financial support for state foster care programs).

areas, and established a variable rate for reimbursing the States based, in part, on per capita income levels in each State. *See* Social Security Act Amendments of 1958, Pub. L. No. 85-840, sec. 601, § 521, 72 Stat. 1013, 1053.[5] In 1961, Congress created the first financial assistance program earmarked specifically to support state foster care programs—an uncapped grant to fund partial reimbursement to States for the costs of providing foster care to children under the Aid to Families with Dependent Children (AFDC) program. *See* Pub. L. No. 87-31, 75 Stat. 75, 76-78 (1961); *see also* Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 131, 76 Stat. 172, 193 (making this grant permanent).

2. The Adoption Assistance and Child Welfare Act of 1980 (CWA)

In 1980, Congress enacted the CWA, which was codified as a new Title IV-E to the SSA. Pub. L. No. 96-272, 94 Stat. 500 (codified as amended at 42 U.S.C. § 670 et seq.). The CWA created a permanent, open-ended program to provide *partial* reimbursement to States for *some* of the costs they incur in caring for *some* children in foster care. Like its predecessors, the CWA was intended to support States' efforts "to provide, in appropriate cases, foster care" services, 42 U.S.C. § 670, while leaving States substantial discretion to administer their foster care programs according to local needs.

The CWA provides the current framework for federal financial assistance to state foster care programs. State participation is voluntary. "In order

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[5] *See id.* (describing the 1958 amendments to the SSA).

for a State to be eligible" for the partial reimbursement of its foster care expenses under the CWA, the State "shall have a plan approved by" HHS (known as a "Title IV-E plan") that, among other requirements, "provides for foster care maintenance payments in accordance with section 672." *Id.* § 671(a)(1). Section 672(a)(1) (entitled "Eligibility"), in turn, provides that, to receive reimbursement, the State "shall make foster care maintenance payments on behalf of" certain children who satisfy federal eligibility requirements. These requirements include, among other things, that the placement in foster care comports with certain procedural requirements, and that the child would have qualified for assistance under the rules in effect for the now-defunct AFDC program as of July 16, 1996. *See id.* § 672(a)(2), (3).

Federal reimbursement for foster care maintenance payments under the CWA is limited in three different respects. First, as explained above, federal reimbursement is available only for payments made on behalf of certain eligible children.

Second, even for eligible children, only certain specified expenses are eligible for reimbursement. The CWA defines reimbursable "foster care maintenance payments" to "mean[] 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." *Id.* § 675(4)(A). Congress added this definition because, before the CWA, federal law had no general definition of a "foster care maintenance payment" 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. No. 96-900, at 49 (1979) (Conf. Rep.).

Third, even for eligible expenses made on behalf of eligible children, each State is reimbursed for a only portion of its foster care costs—namely, an amount equal to the State's federal medical assistance percentage (FMAP), which is the percentage of the federal government's contribution to the State's Medicaid program. *See* 42 U.S.C. § 674(a). New York, for example, is reimbursed under the CWA for only fifty percent of the costs of eligible expenditures made on behalf of eligible children in foster care.[6]

3. The CWA's provisions for HHS administration of reimbursements and for state administrative and judicial review of foster care maintenance payments

HHS is responsible for ensuring that federal funds are disbursed to the States in compliance with the CWA's requirements. It exercises that supervisory responsibility in a number of ways.

First, HHS reviews and approves each State's Title IV-E plan. In practice, HHS requires each State to fill out a pre-printed HHS form, in which a State must identify the relevant statutes and regulations that reflect its compliance with each CWA provision.[7]

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[6] *See* Federal Financial Participation in State Assistance Expenditures, 83 Fed. Reg. 61,157, 61,159 (Nov. 28, 2018).

[7] *See* N.Y. Office of Children & Family Servs., *Agency Plan for Title IV-E of the Social Security Act* (2013) (internet).

Second, States submit their qualifying expenditures to HHS every quarter—namely, the components of their foster care maintenance payments that are eligible for federal reimbursement under §§ 672(a)(1) and 675(4)(A).[8] HHS then authorizes reimbursement of a percentage of those expenditures, pegged to each State's FMAP. *See* 42 U.S.C. § 674(a)(1).

Third, every three years, HHS reviews each State's program to ensure that States "are in substantial conformity with" the requirement that they claim Title IV-E reimbursement only for children who satisfy § 672(a)(1)'s eligibility requirements and for expenses that satisfy § 675(4)(A)'s definition of foster care maintenance payments. *See* 42 U.S.C. § 1320a-2a(a); 45 C.F.R. § 1356.71.[9] To that end, HHS audits the case records and complete payment history for a random sample of eighty children for whom a State has claimed Title IV-E reimbursement. *See* 45 C.F.R. § 1356.71(c).[10] If, based on this review, HHS determines that payments were made to five or fewer ineligible children, the State is deemed to be in "substantial compliance" with the CWA. *Id.* § 1356.71(c)(4).[11] If HHS identifies payments to more than five ineligible children, the State is deemed "not in substantial compliance." *Id.* § 1356.71(c)(5).

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[8] *See* Admin. for Children & Families, U.S. Dep't of Health & Human Servs., Log No. ACYF-CB-PI-18-12, Program Instruction (Nov. 30, 2018) (internet).

[9] *See also* Admin. for Children & Families, U.S. Dep't of Health & Human Servs., *Title IV-E Foster Care Eligibility Review Guide* 4 (Dec. 2012) (internet).

[10] *See also id.* at 4-5 & app. 1.

[11] *See also id.* at 4-5.

If a State is found to be not in "substantial conformity," HHS must afford it "an opportunity to adopt and implement a corrective action plan" that is "designed to end the failure to so conform." 42 U.S.C. § 1320a-2a(b)(4); *see also* 45 C.F.R. § 1356.71(c)(5), (h). If a State fails to take corrective action, HHS may withhold a State's Title IV-E funds in full or in part. *See* 42 U.S.C. § 1320a-2a(b)(4)(c).

In addition to HHS review of Title IV-E compliance, the CWA also requires States to provide foster parents with an "opportunity for a fair hearing before [a] State agency" when they believe they have been improperly denied payment for foster care expenses. *Id.* § 671(a)(12). The state agency's decision after fair hearing may then be challenged through the State's ordinary avenues for judicial review of administrative actions.

4. New York's foster care system

Under New York Social Services Law (SSL) § 398-a, the New York Office of Children and Family Services (OCFS) establishes standards of payment to foster parents to help cover the costs of caring for children in foster care. The standards of payment, in turn, are used to determine a payment "rate," which is a flat monthly payment per child that varies depending on the age of the child and whether the child's needs warrant a "basic," "special," or "exceptional" rate. *See* 18 N.Y.C.R.R. § 427.6. This lawsuit concerns only the adequacy of New York's "basic" rate.[12]

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[12] For 2018-2019, New York's basic rate was $625 for children who were five or younger in the New York City metropolitan area and $570 upstate; up to $735 per month for

From the outset of this scheme in 1974, the basic rate has been calculated based on a general determination of the prevailing costs of food, personal care, household furnishings, household operations, education, recreation, transportation, parental supervision, and shelter—expenses that are listed in § 675(4)(A).[13] This basic rate thus does not reimburse for particular expenditures made by foster parents, but rather provides a flat aggregate subsidy. New York law does provide individual reimbursements in the form of additional "special payments" for items and services that are not encompassed by the basic rate, such as diapers, cribs, high chairs, prom attire, music lessons, recreation, and school expenses. *See* 18 N.Y.C.R.R. § 427.3(c).

After the CWA was enacted in 1980, HHS approved New York's receipt of federal funding under this rate-setting scheme.[14] HHS has approved New York's state plan continuously since 1982. In the most recent triennial review in 2018, HHS found that New York was in substantial compliance with the CWA.[15]

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children who were six to eleven in the New York City metropolitan area and $687 upstate; and up to $855 per month for children who were twelve years or older in the New York City metropolitan area and $795 upstate. *See* N.Y. Office of Children & Family Servs., Maximum State Aid Rates for Foster Care Boarding Home Payments and Adoption Subsidies, 2018-2019 Rate Year (July 1, 2018-March 31, 2019*)* (internet).

[13] *See* Decl. of David Hasse ¶¶ 3, 12-16, Dist. Ct. ECF No. 55, at 2, 7-9.

[14] *See id.* ¶ 3, ECF No. 55, at 2.

[15] *See* Decl. of John Stupp ¶¶ 32-44, Dist. Ct. ECF No. 77-1, at 105-08 (history of New York's state plan); N.Y. Office of Children & Family Servs., *Primary Review: Title IV-E Foster*

During New York's quarterly submission of foster care expenditures, as well as during the triennial review process, HHS treats the entirety of New York's basic rate as being eligible for partial federal reimbursement under the § 675(4)(A)'s definition of a foster care maintenance payment, so long as payments are made to Title IV-E eligible children. By contrast, only some "special payments" are eligible for federal reimbursement, depending on whether the special payment falls within § 675(4)(A)'s list of reimbursable expenditures.[16] For example, New York makes special payments to parents for many types of recreation, including music, art, and dancing lessons. *See* 18 N.Y.C.R.R. § 427.3(c)(2). HHS has determined that "[r]eimbursement of recreation costs per se is not permitted under title IV-E" based on the "definition of 'foster care maintenance payments,'" although the "occasional cost of such items as tickets or other admission fees" may fall within § 675(4)(A)'s coverage of a child's "personal incidentals."[17]

Federal funding does not come close to fully covering all of New York's foster care expenditures. First, as explained above, New York makes a variety of special payments that are not reimbursable under the CWA. Second, the State provides care and maintenance to many more children in foster care than the CWA considers eligible or reimbursable. For

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Care Eligibility; Report of Findings for October 1, 2017-March 31, 2018 (internet) (results of 2018 review).

[16] For a catalogue of special payments that are and are not eligible for Title IV-E reimbursement, see the OCFS Foster Care Maintenance Coding Desk Guide (Feb. 4, 2019) (internet).

[17] Admin. for Children & Families, U.S. Dep't of Health & Human Servs., *Child Welfare Policy Manual* § 8.3B.1, Question 2 (internet) ("*Child Welfare Policy Manual*").

example, while New York law does not take income into consideration for purposes of foster payments, *see* SSL § 398-a; 18 N.Y.C.R.R. § 427.6, the CWA reimburses States only for children who would have qualified for assistance under the ADFC rules in effect as of July 16, 1996, *see* 42 U.S.C. § 672(a)(3)(A). Of the 15,633 children in foster care in New York as of September 2019, only forty-six percent were Title IV-E eligible. Finally, federal reimbursement covers only fifty percent of the payments New York makes for eligible expenses for eligible children. See *supra* at 8.

The eligibility restrictions under federal law determine New York's ability to obtain federal reimbursement for its foster care maintenance payments. They do not, however, enter directly into New York's calculation of payment levels for individual foster parents, which are defined by state law. For that reason, foster parents are not generally informed whether a child is Title IV-E eligible; they are not required to establish federal eligibility before receiving foster care maintenance payments under state law; and federal eligibility does not affect foster care placement decisions made by judges or social workers.[18]

B. Procedural History

The New York State Citizens' Coalition for Children (Coalition) is a nonprofit organization that represents the interests of foster care parents and other groups and agencies that provide services to

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[18] *See* Office of the Assistant Secretary for Planning & Evaluation, U.S. Dep't of Health & Human Servs., ASPE Issue Brief, *How and Why the Current Funding Structure Fails to Meet the Needs of the Child Welfare Field* 16 (Aug. 2005) (internet).

children in foster care. It filed this lawsuit against the Commissioner of OCFS under 42 U.S.C. § 1983, contending that the CWA entitled foster parents to receive from the State payments sufficient "to cover the actual costs of providing" all of the expenditures listed in § 675(4)(A), and that New York's basic rate of payment to foster parents was too low to satisfy that federal spending mandate.[19]

The United States District Court for the Eastern District of New York (Kuntz, J.) granted the State's motion to dismiss, holding that the CWA did not create a privately enforceable right to challenge the adequacy of States' foster care maintenance payments. (Pet. App. 112a-130a.) On appeal, the United States Court of Appeals for the Second Circuit initially issued a summary order remanding the case to the district court for a further inquiry into the Coalition's standing. (Pet. App. 94a-99a.) After the district court concluded that the Coalition had standing (Pet. App. 68a-76a), the Second Circuit restored jurisdiction and resumed consideration of the appeal (Pet. App. 63a-64a).

1. The panel opinion

The court of appeals, in an opinion by Judge Calabresi, reversed, holding that foster parents have a private right of action under the CWA. The court concluded that Congress intended to confer on foster parents a private right of action to "direct[] the state to make payments . . . on behalf of each eligible child to cover costs such as food, clothing, and school supplies." (Pet. App. 13a.) The court relied on language

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[19] Compl. ¶ 6, Dist. Ct. ECF No. 1, at 4; *see also id.* at 15-16.

in § 672(a)(1)—which states that a participating State "shall make foster care maintenance payments on behalf of each child"—to conclude that Congress imposed such a spending mandate on the States, and that this mandate requires any State that receives funding under the CWA to cover all of the expenses identified as "foster care maintenance payments" in § 675(4)(A). (Pet. App. 15a-17a.) The court further construed the statute's reference to "each child" in § 672(a)(1) to indicate that Congress intended to give individual foster parents the ability to enforce this spending obligation. (Pet. App. 19a-21a.)

The court acknowledged that the CWA expressly provides multiple other avenues for review of the adequacy of foster care maintenance payments, including federal agency review and state administrative and judicial review, but it determined that these remedial mechanisms were insufficient to demonstrate congressional intent to exclude a private right of action under federal law. (Pet. App. 25a-28a.) The court also acknowledged that a private right would entangle the federal courts in determinations about how a State calculates payment rates to foster parents. (Pet. App. 22a-24a.) But the court dismissed such concerns, concluding that such "review falls comfortably within what courts regularly do." (Pet. App. 22a.)

2. The dissenting opinion

Judge Livingston dissented. (Pet. App. 29a-62a.) The dissent found nothing in the text, purpose, or structure of the CWA to suggest that Congress intended to impose a judicially enforceable spending mandate on the States in exchange for "a partial reimbursement mechanism for *some* of the expenses

that states incur as to *some* of the children in their foster care and adoption-services programs." (Pet. App. 30a.) To the contrary, the dissent explained that such an interpretation of the CWA would "upend[] the relationship between the federal government and state foster care systems," while embroiling the federal courts in "the delicate and sensitive world of local child-welfare policymaking." (Pet. App. 30a.)

The dissent interpreted §§ 672(a)(1) and 675(4)(A) as defining the criteria that States must fulfill to be eligible for federal reimbursement, not as conferring a privately enforceable federal right on individual foster parents or children. Among other problems with inferring such a private right, the dissent emphasized that the relevant language in § 675(4)(A) contains no manageable standards for federal courts to apply in adjudicating claims like the Coalition's. (Pet. App. 49a-55a.) Finally, relying on this Court's decision in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), the dissent reasoned that an implied private right of action was foreclosed by Congress's explicit provision of other federal and state review mechanisms in the CWA. (Pet. App. 55a-58a.)

3. The denial of rehearing en banc

By a vote of six to five, the Second Circuit denied the State's petition for rehearing en banc. (Pet. App. 131a-132a.) In an opinion written by Judge Livingston and joined by Judges Cabranes, Sullivan, Bianco, and Park, the dissenters described this case as "presenting an issue of 'exceptional importance'" that "now divides four United States Courts of Appeals." (Pet. App. 133a.) Judge Cabranes filed a separate dissent on behalf of himself emphasizing that the five judges who had voted for rehearing "strongly believed that the

panel opinion presented multiple legal errors of exceptional importance warranting correction," and noting that, because of the Second Circuit's long-standing reluctance to grant en banc review, "the decision not to convene the en banc court does not necessarily mean that a case either lacks significance or was correctly decided." (Pet. App. 145a-146a.) In light of the court's denial of rehearing en banc, Judge Cabranes observed that the resolution of the issues here "now rest[s] in the hands of our highest court." (Pet. App. 145a.)

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals Are Divided Over Whether the CWA Confers a Privately Enforceable Federal Right to Compel States to Make Specific Foster Care Maintenance Payments.

Certiorari is warranted to resolve a deepening circuit conflict over whether the CWA created an implied private right of action to compel States that accept federal funding to provide foster care maintenance payments to cover the full cost of all of the specific expenditures identified in 42 U.S.C. § 675(4)(A), as determined by federal courts. The Eighth Circuit has held that the CWA confers no such private right of action; by contrast, the Ninth, Sixth, and now Second Circuits have recognized such a right. This conflict will only deepen and is unlikely to be resolved without this Court's intervention.

1. In *Midwest Foster Care & Adoption Association v. Kincade*, the Eighth Circuit rejected the existence of a private right of action under the CWA to challenge the adequacy of Missouri's foster care maintenance

payments. 712 F.3d 1190 (8th Cir. 2013). In that case, individual foster parents and associations representing their interests argued that the CWA entitled them to "receive payments from the State sufficient to cover the cost of" the expenses in § 675(4)(A). *Id.* at 1194. Applying the three-factor test from *Blessing v. Freestone*, 520 U.S. 329 (1997), the Eighth Circuit concluded that the first prong of the inquiry—whether Congress "intended that the provision[s] in question benefit the plaintiff," 520 U.S. at 340—foreclosed any purported private cause of action. Like other statutes for which this Court has found no private right of action, "Sections 672(a) and 675(4)(A) speak to the states as regulated participants in the CWA and enumerate limitations on when the states' expenditures will be matched with federal dollars; they do not speak directly to the interests of" foster parents. 712 F.3d at 1197.

The Eighth Circuit specifically rejected the argument that § 675(4)(a)'s definition of "foster care maintenance payments" imposed a spending mandate on States to fully cover, out of their own funds, the unreimbursed portion of all of the expenditures listed in that provision. As the court explained, "[f]inding an enforceable right solely within a purely definitional section is antithetical to requiring unambiguous congressional intent." *Id.* Instead, the list of items in § 675(4)(A) must be read as imposing a "ceiling" on "the categories of foster care costs eligible for partial federal reimbursement." *Id.* at 1197-98.

2. The Ninth, Sixth, and now Second Circuits have expressly disagreed with the Eighth Circuit on the existence of a private right of action under the CWA, creating an irreconcilable circuit split that only this Court can resolve.

In *California State Foster Parent Association v. Wagner*, the Ninth Circuit recognized a privately enforceable right under the CWA for foster parents—represented in that case by three associations—to compel California to increase its foster care payment rates to cover the actual costs of all of the expenditures listed in § 675(4)(A). 624 F.3d 974 (9th Cir. 2010). The Ninth Circuit found that the CWA's language requiring States to make foster care maintenance payments "on behalf of each child" reflected congressional intent to benefit foster parents individually. *See id.* at 980. Foster parents thus possessed an "enforceable right under § 1983 to foster care maintenance payments from the State that cover the cost of the expenses enumerated in § 675(4)(A)." *Id.* at 982.

In *D.O. v. Glisson*, the Sixth Circuit likewise held that the CWA "creates a private right to foster-care maintenance payments enforceable by a foster parent under 42 U.S.C. § 1983." 847 F.3d 374, 375-76 (6th Cir.), *cert. denied*, 138 S. Ct. 316 (2017). In that case, a relative of children in foster care challenged the State's determination that she was not entitled to any foster care maintenance payments because she was a family member. *See id.* at 376. Like the Ninth Circuit, the Sixth Circuit found that the language in the CWA referring to payments "on behalf of each child," 42 U.S.C. § 672(a)(1), was rights-creating language that "confer[red] a monetary entitlement upon qualified foster families." *Id.* at 378.

3. The circuits are divided not only about whether Congress created a private right of action to enforce the CWA, but also more generally about the "appropriate framework for determining when a cause of action is available under § 1983." *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 409

(2018) (Mem.) (Thomas, J., dissenting from denial of certiorari). Although this Court has held that nothing short of "clear and unambiguous" language is sufficient to imply a private federal right enforceable under § 1983, *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002), there remains considerable "confusion among the lower courts" about how to apply this principle in practice, *Gee*, 139 S. Ct. at 410 (Thomas, J., dissenting from denial of certiorari).

Some courts—as in the decision below (Pet. App. 19a-21a) and the decisions from the Ninth and Sixth Circuits discussed above—find the requisite rights-creating language so long as a federal statute contains any language referring to individual beneficiaries. For example, the Seventh Circuit has held that nursing home operators have a private right of action to challenge a State's Medicaid rate-setting procedures under a provision requiring state plans to provide "for a public process for determination of rates of payment . . . for hospital services, *nursing facility services*, and services of intermediate care facilities for the mentally retarded," 42 U.S.C. § 1396a(13)(A) (emphasis added). *See BT Bourbonnais Care, LLC v. Norwood*, 866 F.3d 815, 821-22 (7th Cir. 2017).[20]

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[20] *See also, e.g.*, *Legacy Cmty. Health Servs., Inc. v. Smith*, 881 F.3d 358, 372 (5th Cir.) (holding that qualified health care providers have a private right to challenge a State's Medicaid reimbursement rates under 42 U.S.C. § 1396a(bb)(1), which provides that "the State plan shall provide for payment for services . . . furnished by a Federally-qualified health center"), *cert. denied*, 139 S. Ct. 211 (2018); *Planned Parenthood of Kan. v. Andersen*, 882 F.3d 1205, 1225-26 (10th Cir.) (holding that patients have a private right to challenge a State's decision to terminate contracts with health care providers under 42 U.S.C.

By contrast, other courts of appeals have recognized "the notable change in [this] Court's approach to recognizing implied causes of action" over the past three decades, as noted in *Ziglar v. Abbassi*, 137 S. Ct. 1843, 1857 (2017). As these courts have recognized, Spending Clause legislation that defines the terms under which federal funds will be available to States will often refer to individual beneficiaries—but only to define the limits of federal reimbursement, rather than to create privately enforceable state obligations. *See, e.g.*, *Does v. Gillespie*, 867 F.3d 1034, 1041 (8th Cir. 2017) (declining to infer private right of action from Medicaid language referring to "any individual eligible for medical assistance"); *Cuvillier v. Taylor*, 503 F.3d 397, 405-08 (5th Cir. 2007) (declining to recognize private right of action from requirement that state plans under Title IV-D provide for enforcement of child support obligations "established with respect to . . . the custodial parent"). As a result of this disagreement about how to apply this Court's precedents on inferring a private right of action, several federal statutes are privately enforceable in some circuits but not in others. *See, e.g.*, *Planned Parenthood of Kan. v. Anderson*, 882 F.3d 1205, 1225-26 (10th Cir.) (collecting cases on division of authority regarding private enforceability of 42 U.S.C. § 1396a(23)(A)), *cert. denied*, 139 S. Ct. 638 (2018).

Resolving the conflict about the existence of a private right of action under the CWA would thus also clarify the governing standard for recognizing a

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§ 1396a(a)(23), which requires an approved state plan to "provide that . . . any individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services"), *cert. denied*, 139 S. Ct. 638 (2018).

private right of action under other Spending Clause statutes. That broader question is "an important legal issue independently worthy of this Court's attention." *Gee*, 139 S. Ct. at 409 (Thomas, J., dissenting from denial of certiorari).

II. Whether the CWA Imposes a Privately Enforceable Spending Mandate on States Presents a Question of Exceptional Importance to the States' Ability to Administer Their Foster Care Systems.

Foster care has historically been an "area of state concern." *Moore*, 442 U.S. at 435. Federal intervention in this area is relatively recent, and has primarily been designed to subsidize pre-existing state efforts to provide foster care tailored to local needs. See *supra* at 4-6. Indeed, when Congress first began providing direct assistance for foster care in the 1960s, many child-welfare professionals opposed the federal government's efforts based on fears that such assistance would force States and localities to rearrange their programs to accommodate federal policy.[21] Congress was well aware of these concerns when it enacted the CWA, and it deliberately designed that statute to afford "the states considerable flexibility to develop administrative procedures compatible with their own unique foster care circumstances."[22] *State of Vt. Dep't of Soc. & Rehab.*

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[21] *See, e.g.*, Rymph, *supra*, at 167.

[22] *See also* S. Rep. No. 96-336, at 16 (1979) ("[S]ubstantial progress in this direction cannot be achieved by Federal fiat but can come about only through concerted effort and commitment on the part of State and local governments which have primary responsibility for carrying out these programs.").

Servs. v. United States Dep't of Health & Human Servs., 798 F.2d 57, 60 (2d Cir. 1986).

The decision below would upend this historic relationship between the States and the federal government, subjecting state and local foster care decisions to a uniform, judicially determined federal payment mandate as a condition of accepting the partial subsidy offered by the CWA. Such disruption presents an issue of grave concern to the States. As the dissent below correctly recognized, the court's decision, if left undisturbed, would "implicate[] numerous and difficult policy judgments about foster care and childrearing, not to mention overall program administration." (Pet. App. 51a.)

In response to the flexibility afforded by the CWA, States have developed a diverse range of foster care programs, each with distinct payment rates, areas of coverage, and administrative structures. Fiscal constraints have driven some of these choices: as HHS itself has recognized, "not all States have the financial means or budgetary inclination to invest in the full array of foster care related services for which Federal financial participation might be available."[23] But policy judgments are also important drivers of the States' foster care systems. For example, New York, has deliberately chosen to provide foster care maintenance payments to many children and expenditures that are not eligible for federal reimbursement under the CWA. These diverse choices at the state level have resulted in a range of funding levels across the States.

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[23] Office of the Assistant Secretary for Planning & Evaluation, *supra*, at 8.

According to a 2013 study, basic foster care rates vary from $7.23 per day in Wisconsin to $30.66 per day in Washington, D.C.[24] In New York, the current basic rate ranges from $18.74 per day to $28.11 per day, depending on the child's age and location.[25]

The decision below would supplant the States' policy-laden judgments about foster care with a uniform federal rule mandating the amounts to be spent for particular purposes for particular children, potentially at the expense of other children and other expenditures. And that uniform rule would be determined not through the States' own carefully calibrated processes for determining foster care spending, but instead through the judgments of federal courts in actions brought by foster parents. Such review will necessarily "entail judicial ratemaking" in a "traditional area of state concern," supplanting the judgments made by New York and other States about which children in foster care to cover, what items and services the State should fund, and how high the reimbursement rates should be. (Pet. App. 53a.) For example, by requiring that New York prioritize the expenditures identified in § 675(4)(A) for the limited number of children eligible for Title IV-E reimbursement, the court's decision will potentially harm the larger class of foster children who are federally eligible but whom New York has chosen to cover nonetheless—some fifty-four percent of the children in foster care in New York. The State will face pressure to limit its spending on those children in order to

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[24] *See* DeVooght & Blazey, *supra*, at tbl. 1.

[25] *See* N.Y. OCFS, Maximum State Aid Rates for Foster Care, *supra*.

satisfy the CWA's purported spending mandate for federally eligible children.

The proceedings on remand after the Ninth Circuit's recognition of a private right of action in *Wagner* highlight the substantial intrusion on state prerogatives that the decision below has sanctioned. To comply with the Ninth Circuit's decision and earlier district court orders, California was required to devise a new foster care maintenance rate that would take into account the actual costs of each of the expenses in § 675(4)(A). *See California State Foster Parent Ass'n v. Wagner*, No. 07-cv-5086, 2010 WL 5209388, at *1-2 (N.D. Cal. Dec. 16, 2010). Disregarding California's normal process for determining such rates, the district court ordered California to complete the rate-setting process two-and-a-half months early and to implement the new rates within one month of the completion of this judicially supervised process. *See id.* at *4. When California missed this extraordinarily expedited implementation deadline because it had not received "state legislative approval," the district court ordered "defendants to implement their new rate structure immediately," concluding that "requirements under state law for implementation of these rates are irrelevant to the question of whether defendants have complied with their federal obligations," and threatening to hold state officials "in contempt" if California did not "send checks to foster parents at the new rates beginning with the next round of checks." *California State Foster Parent Ass'n v. Lightbourne*, No. 07-cv-5086, 2011 WL 2118564, at *2-3 (N.D. Cal. May 27, 2011).

There is absolutely no indication that Congress enacted the CWA to force the States to relinquish their traditional discretion over judgments about foster care

payments—let alone that Congress intended to empower individual litigants to make an end-run around the States' well-established processes for determining foster care maintenance payments. *See Gonzaga*, 536 U.S. at 286 & n.5. To the contrary, as this Court recognized the last time it considered the availability of a private right of action under the CWA, Congress intended that implementation of the statute would, "within broad limits, [be] left up to the State," *Suter v. Artist M.*, 503 U.S. 347, 360 (1992).[26] Yet the Second Circuit's erroneous holding will lead to the very interference with core state functions that Congress sought to avoid when it enacted the CWA. Such concern about undue interference with traditional state functions is precisely why this Court has been reluctant to recognize privately enforceable rights in the absence of unambiguous statutory language. *See, e.g.*, *Gonzaga*, 536 U.S. at 286 & n.5. This Court should grant certiorari to address this important question affecting the States' proper role in shaping their own foster care systems.

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[26] This part of *Suter*'s reasoning is unaffected by Congress's subsequent enactment of the so-called "*Suter* fix," 42 U.S.C. § 1320a-2. In *Suter*, this Court relied in part on the fact that certain statutory language appeared in the CWA's list of state-plan requirements to find no implied private right of action. *See* 503 U.S. at 358. The *Suter* fix provides that this specific factor—i.e., a provision's "inclusion in a section . . . requiring a State plan or specifying the required contents of a State plan," § 1320a-2—could not by itself preclude a finding of an individually enforceable right. But Congress expressly provided that this *Suter* fix would not otherwise "limit or expand the grounds for determining the availability of private actions to enforce State plan requirements" under the CWA or elsewhere. *See id.*

III. The Decision Below Erred in Inferring a Private Right of Action to Challenge the Adequacy of State Foster Care Payments.

This Court has repeatedly cautioned that federal funding programs enacted under the Spending Clause, like the CWA, should not be read to "unambiguously confer an enforceable right" on private beneficiaries. *Suter*, 503 U.S. at 363. "[T]he 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. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981). The court here concluded otherwise by analyzing the factors articulated in *Blessing*. (Pet. App. 13a-28a.) But the court's analysis misapplied *Blessing* and disregarded this Court's caution against implying privately enforceable rights from federal statutes that merely identify the obligations that accompany participation in federal Spending Clause programs. *See, e.g.*, *Gonzaga*, 536 U.S. at 280, 287.

1. First, the relevant provisions of the CWA simply do not reflect Congress's intent—"unambiguous" or otherwise—to confer an enforceable benefit on individuals. *Gonzaga*, 536 U.S. at 280. Rather, §§ 672(a)(1) and 675(4)(A) identify the criteria that States must satisfy to be eligible for federal reimbursement.

In holding to the contrary, the court below purported to identify rights-creating language in § 672(a)(1)'s provision that States "shall make foster care maintenance payments on behalf of each [eligible] child" and § 675(4)(A)'s definition of "foster care maintenance payments" to "mean[] payments to cover the cost of (and the cost of providing)" defined

categories of expenditures. (Pet. App. 15a.) But there is no dispute that Congress attempted to bind the States; where the court erred was in identifying "exactly what is required of States by the Act." *Suter*, 503 U.S. at 358.

Here, the critical context ignored by the decision below is that, for foster care maintenance payments, the CWA operates as a reimbursement scheme under which the federal government covers a portion of certain expenditures by the States. See *supra* at 7-8. The statute's language accordingly limits federal reimbursement only to those qualifying expenditures. "In order for a State to be eligible for [these federal] payments," 42 U.S.C. § 671(a)(1), it must ("shall") first make the expenditures identified by federal law—specifically, expenditures on behalf of certain eligible children defined by § 672(a)(1), and for certain categories of purchases under § 675(4)(A). Sections 672(a)(1) and 675(4)(A) thus "focus on the *states* rather than the benefitted individuals," as the dissent below explained, because they define the expenditures for which federal reimbursement is available to the States, rather than imposing a spending mandate that States must satisfy in order to receive any federal funding at all. (Pet. App. 49a.)

HHS—the agency charged by Congress with implementing the CWA—has consistently interpreted §§ 672(a)(1) and 675(4)(A) as identifying "allowable," not mandatory, expenditures by the States.[27] In 2005, for example, HHS explained that "while title IV-E eligibility is often discussed as if it represents an

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[27] *Child Welfare Policy Manual*, *supra*, § 8.3B.1, Question 1.

entitlement of a particular child to particular benefits or services, it does not."[28] Rather, "a child's eligibility entitles a State to Federal reimbursement for a portion of the costs expended for that child's care."[29] HHS reiterated this position after Congress amended § 675(4)(A) in 2008 to include an additional category of reimbursement-eligible expenditures: "reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement." Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 204(a)(2)(B), 122 Stat. 3949, 2960. HHS made clear that States are not now *required* to pay for such travel simply because it is listed in § 675(4)(A); to the contrary, as HHS explained, "[a]s with any cost enumerated in the definition of foster care maintenance payments in [§ 675(4)(A)], the [state] agency may decide which of the enumerated costs to include in the child's foster care maintenance payment."[30]

The practical implementation of the CWA further confirms that the focus of §§ 672(a)(1) and 675(4)(A) is on the States' requests for federal reimbursement, rather than on individual foster parents' entitlement to particular payments. As discussed above (at 13), New York relies on the eligibility criteria in §§ 672(a)(1) and 675(4)(A) not to determine the payments it will make to foster parents, but rather to determine the partial reimbursements it will request

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[28] Office of the Assistant Secretary for Planning & Evaluation, *supra*, at 8.

[29] *Id.*

[30] Admin. for Children & Families, U.S. Dep't of Health & Human Servs., Log No. ACYF-CB-PI-10-11, Program Instruction 20 (July 9, 2010) (internet).

from HHS. Federal funds received from HHS pursuant to the CWA do not go directly to foster families or children, but rather help defray part of the much broader costs that New York incurs on behalf of children in foster care. Indeed, most foster families are entirely unaware of whether a particular child is Title IV-E eligible, because that eligibility neither restricts nor expands the benefits that a child receives in New York's foster care system. See *supra* at 13. HHS's administration of foster care reimbursement under the CWA thus confirms that §§ 672(a)(1) and 675(4)(A) "serve primarily to direct [HHS's] distribution of public funds" to the States, not to create private rights enforceable under § 1983. *See Gonzaga*, 536 U.S. at 290.

2. Second, the CWA lacks "sufficiently specific and definite" standards that a federal court could apply in determining whether a State has satisfied federal mandates about the adequacy of foster care maintenance payments. *See Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 432 (1987). Establishing appropriate rates for foster care is a complex, fact-intensive process that every State conducts differently.[31] See *supra* at 23-24. Yet, as the dissent below observed, the CWA is entirely silent about *any* of these details—including whether foster care payments may "vary based on a family's income level" or may take into account "county-specific" factors such as the cost of living. (Pet. App. 52a.) While States routinely make these "numerous and difficult policy judgments" in operating their own foster care programs, these

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[31] *See also* Hasse Decl., *supra*, ¶¶ 3-16, ECF No. 55, at 2-9 (describing New York's rate-setting process).

complex issues "go *entirely unaddressed*" in the CWA. (Pet. App. 51a.)

This Court has also been especially reluctant to infer a privately enforceable right from a federal statute when, as here, the required remedy would entail judicial ratemaking, given that "[t]he history of ratemaking demonstrates that administrative agencies are far better suited to this task than judges." *Armstrong*, 135 S. Ct. at 1388 (Breyer, J., concurring in part and concurring in the judgment). And federal courts are particularly ill-equipped to engage in rate-making in an area of principal state concern, such as child welfare. *Cf. Thompson v. Thompson*, 484 U.S. 174, 186 (1988) (declining to infer privately enforceable right when doing so would "entangle [federal courts] in traditional state-law questions that they have little expertise to resolve").

3. Third, the CWA's multiple, express review mechanisms foreclose any implication of a private right of action under § 1983. *See Armstrong*, 135 S. Ct. at 1385. As this Court has made clear, implied private rights of action are generally unavailable when, as here, Congress has provided other express remedies "for a State's failure to comply" with a Spending Clause statute. *Id.*

Here, Congress made a deliberate decision to vest HHS with authority to ensure that the States comply with the CWA—authority that HHS has regularly exercised in multiple ways, including by reviewing and approving New York's compliance with the CWA in 2018. See *supra* at 11. Congress also expressly provided that States can maintain federal funding so long as they "are in substantial conformity with" the CWA, 42 U.S.C. § 1320a-2a(a)—a compliance standard

indicating that Congress had "an aggregate focus" and was "not concerned with whether the needs of any particular person have been satisfied," *Gonzaga*, 536 U.S. at 288 (quotation marks and citations omitted). Unifying supervision of a complex federal funding program in a single expert agency under a substantial-compliance regime "avoid[s] the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action for damages." *Id.* at 292 (Breyer, J., concurring). The Second Circuit's holding, by contrast, would improperly interfere with this scheme by allowing private parties to second-guess HHS's judgment.

The CWA also expressly gives foster parents a right to state administrative and judicial review over disputes regarding foster care maintenance payments. *See* 42 U.S.C. § 671(a)(12). In New York, this review is particularly robust: the New York Court of Appeals has held not only that foster parents may challenge the denial of their "request[s] for foster care maintenance payments at a particular rate," but also it has extended this right beyond current foster parents to those who previously provided such care. *Matter of Claudio v. Dowling*, 89 N.Y.2d 567, 569-70, 574 (1997).

It makes sense for these types of claims to be channeled through state courts given state judges' experience and competence in child-welfare issues. *See, e.g.*, N.Y. Family Court Act §§ 1015-a (court supervision of social services), 1029 (court supervision of temporary order of removal), 1055 (court supervision of foster care placement). The CWA's express provision of state remedies makes it especially implausible that Congress intended federal courts to

police the adequacy of the States' foster care reimbursement rates.

IV. This Case Presents an Ideal Vehicle to Resolve the Private-Right-of-Action Question That Has Divided the Circuits.

The decision below provides the Court with an ideal vehicle to address whether the CWA gives rise to a privately enforceable federal right of action to challenge the adequacy of a State's foster care maintenance payments. The Second Circuit directly addressed the question in a published decision; the question turns on no factual disputes; and reversal of the decision below would conclusively resolve this case.

Certiorari is also particularly appropriate now, before this case proceeds further to summary judgment or a trial on the merits. The disruption to New York's sovereign interest in supervising its foster care system will occur on remand the moment the district court begins to second guess "how New York determined the amounts it pays to those receiving foster care maintenance payments" (Pet. App. 144a). That federal judicial scrutiny is inconsistent with Congress's deliberate decision to defer to the States' traditional administration of foster care. *See Gonzaga*, 536 U.S. at 286 n.5 (declining to assume that "Congress intended to set itself resolutely against a tradition of deference to state and local school officials"). In light of similar concerns, this Court has frequently granted certiorari from interlocutory orders where, as here, the courts of appeals declined to dismiss a claim on private-right-of-action grounds and remanded for

further proceedings.[32] Certiorari is warranted for the same reason here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
CAROLINE A. OLSEN
Assistant Solicitor General
barbara.underwood@ag.ny.gov

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* *Counsel of Record*

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[32] *See, e.g.*, *Blessing*, 520 U.S. at 337-39; *Suter*, 503 U.S. at 352-53; *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 5-10 (1981); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 504-05 (1990); *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 14-15 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 566-67 (1979); *Cort v. Ash*, 422 U.S. 66, 73-74 (1975).

APPENDIX

APPENDIX A — OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED APRIL 19, 2019

August Term 2017

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 14-2919-cv

NEW YORK STATE CITIZENS' COALITION FOR CHILDREN,

Appellant,

v.

SHEILA J. POOLE, ACTING COMMISSIONER FOR THE NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, IN HIS OFFICIAL CAPACITY,

Appellee,

June 15, 2015, Argued
April 19, 2019, Filed
April 19, 2019, Amended
April 23, 2019, Amended

On Appeal from the United States District Court for the Eastern District of New York.

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* The Honorable William K. Sessions, III, of the United States District Court for the District of Vermont, sitting by designation.

Appendix A

Before: CALABRESI, LIVINGSTON, *Circuit Judges*, and SESSIONS, *District Judge.**

JUDGE LIVINGSTON DISSENTS IN A SEPARATE OPINION.

CALABRESI, *Circuit Judge*:

This case asks whether Spending Clause legislation that directs specific payments to identified beneficiaries creates a right enforceable through 42 U.S.C. § 1983. We hold that it does.

Congress enacted the Adoption Assistance and Child Welfare Act of 1980 ("the Act") "to strengthen the program of foster care assistance for needy and dependent children." Pub. L. 96-272,94 Stat. 500 (1980). One of the ways the Act does so is by creating a foster care maintenance payment program. 42 U.S.C. § 671(a)(1). Under this program, participating states receive federal aid in exchange for making payments to foster parents "on behalf of each child who has been removed from the home of a relative." *Id.* § 672(a)(1), (2). These payments are calculated to help foster parents provide their foster children with basic necessities like food, clothing, and shelter.

The particular question before us is whether the Act grants foster parents a right to these payments enforceable through a Section 1983 action. Three Courts of Appeals have reached this issue. The Sixth and Ninth Circuits have held that it does. *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974 (9th Cir. 2010); *D.O. v. Glisson*, 847

F.3d 374 (6th Cir. 2017). The Eighth Circuit has held that it does not. *Midwest Foster Care and Adoption Ass'n v. Kincade*, 712 F.3d 1190 (8th Cir. 2013).

We join the Sixth and Ninth Circuits in holding that the Act creates a specific entitlement for foster parents to receive foster care maintenance payments, and that this entitlement is enforceable through a Section 1983 action. The district court, Kuntz *J.*, held to the contrary. Accordingly, we **VACATE** the order dismissing the case and **REMAND** for further proceedings.

I. Background

This appeal arises from a Section 1983 action filed in federal district court by the New York State Citizens' Coalition for Children ("the Coalition"). The Coalition's suit, brought on behalf of its foster parent members, alleges that the New York State Office of Children and Family Services ("the State") has failed to make adequate foster care maintenance payments as required by the Act.

The district court dismissed the Coalition's suit, holding that the Act creates no federally enforceable right to receive foster care maintenance payments. The Coalition appealed. On appeal, the State asserted, for the first time, that the Coalition lacked standing to bring this suit on behalf of its members. We remanded the case to the district court for additional factfinding on that issue. On remand, the district court found that the Coalition has standing: The Coalition must expend resources to advise and assist foster parents because of the State's allegedly inadequate reimbursement rates.

The Coalition then returned to this Court for review of the district court's original holding that they could not enforce the Act through Section 1983. The State, yet again, raised a new argument on appeal, this time that the Coalition lacks standing to bring this suit under the third-party standing rule.

Before considering the original issue before us—that is, whether the Act creates a federally enforceable right to receive foster care maintenance payments—we must address the State's claim that the Coalition lacks organizational and third-party standing to litigate these claims on behalf of its foster parent members.

II. Standing

To bring a Section 1983 suit on behalf of its members, an organization must clear two hurdles. First, it must show that the violation of its members' rights has caused the organization to suffer an injury independent of that suffered by its members. *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011). Second, it must "demonstrat[e] a close relation to the injured third part[ies]," and "a hindrance" to those parties' "ability to protect [their] own interests." *Mid-Hudson Catskill Rural Migrant Ministry v. Fine Host Corp.*, 418 F.3d 168, 174 (2d Cir. 2005). We conclude that the Coalition has cleared both hurdles.

A. Organizational Standing

In a string of opinions, this Court has held that organizations suing under Section 1983 must, without

relying on their members' injuries, assert that their own injuries are sufficient to satisfy Article III's standing requirements. *Nnebe*, 644 F.3d at 156-58; *League of Women Voters v. Nassau Cty.*, 737 F.2d 155, 160-61 (2d Cir. 1984); *Aguayo v. Richardson*, 473 F.2d 1090, 1099-1100 (2d Cir. 1973). To establish its own injury, an organization must show that it has suffered a "perceptible impairment" to its activities. *Nnebe*, 644 F.3d at 157. This showing can be met by identifying "some perceptible opportunity cost" that the organization has incurred because of the violation of its members' rights. *Id.*

The Coalition asserts that the State's alleged violations of the Act has cost it hundreds of hours in the form of phone calls from aggrieved foster families. The district court found, and we agree, that the Coalition has spent nontrivial resources fielding these calls, and that it will continue to have to do so absent relief. This showing is sufficient to establish that the Coalition has suffered its own injury.

B. Third Party Standing

When any plaintiff asserts the rights of others, it has traditionally also faced, in our court, a rule of prudential standing: the so-called third-party standing bar. With some exceptions, this rule prevents "litigants from asserting the rights or legal interests of others [simply] to obtain relief from injury to themselves." *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 40 (2d Cir. 2015) (quoting *Rajamin v. Deutsche Bank Nat. Trust Co.*, 757 F.3d 79, 86 (2d Cir. 2014)).

There is considerable uncertainty as to whether the third-party standing rule continues to apply following the Supreme Court's recent decision in *Lexmark v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014). In *Lexmark*, the Supreme Court cast doubt on the entire doctrine of prudential standing, explaining that a court can no more "limit a cause of action that Congress has created" than it can "apply its independent policy judgment to recognize a cause of action that Congress has denied." *Id.* at 1388. Nevertheless, in *United States v. Suarez*, a post-*Lexmark* case, we continued to hold that courts are required to address third-party standing. 791 F.3d 363, 367 (2d Cir. 2015). In *Suarez*, however, we did not address *Lexmark*.

But we need not, in the case before us, resolve this tension. Whatever the status of the third-party standing bar, our cases have developed an exception to it where a plaintiff can show "(1) a close relationship to the injured party and (2) a barrier to the injured party's ability to assert its own interests." *Keepers, Inc.*, 807 F.3d at 41. That exception applies here.

It is evident that the Coalition enjoys a close relationship with the foster parents it counsels, not least because those foster parents have authorized the Coalition to file suit on their behalf. The State argues, however, that the Coalition has failed to show that it would be "difficult if not impossible" for the foster parents to protect their own rights. December 22, 2017 Appellee Letter Br. at 14. But the third-party standing rule does not demand anything near impossibility of suit. *See* 15 James William Moore,

Moore's Federal Practice § 101.51[3][c][iii] (3d ed. 2008). Instead, a mere "practical disincentive to sue"—such as a desire for anonymity or the fear of reprisal—can suffice to overcome the third-party standing bar. *Id.*; *See also Keepers*, 807 F.3d at 42; *Camacho v. Brandon*, 317 F.3d 153, 160 (2d Cir. 2003).

And here, the Coalition has demonstrated that the manifest desire of their foster parent members for anonymity constitutes a significant disincentive for those parents to sue in their own names. It did so by submitting an anonymous affidavit from one of its members articulating two reasons the member desired anonymity. First, the member feared retaliation because a state agency had previously retaliated against them after they had lodged a complaint against it. Second, the parent also sought to protect their anonymity out of concern for their foster children's well-being:

> Even if the names of my children are filed under seal or redacted from public documents, disclosure of my name... puts my foster children's anonymity at risk... The children that have come from traumatic and often abusive environments. Any negative repercussions resulting from the public disclosure of the fact that they are all in foster care will only add to their history of trauma, and I want to protect my children from that.

D. Ct. Dkt. # 17-3 ¶¶ 10-11. It is no stretch to believe that foster parents, who have opened their homes to children

in need, would forgo financial benefits to protect those children.

We are thus satisfied that the Coalition is properly positioned to represent its members' rights effectively. And we are satisfied that those members are significantly impaired from pursuing those rights on their own. Accordingly, we conclude that the third-party standing rule does not bar the Coalition from pursuing its claims.

III. A Right to Foster Care Maintenance Payments Enforceable through Section 1983.

Having found that the Coalition has standing, we turn to the main question in this case: Do foster parents have a right to foster care maintenance payments enforceable through a Section 1983 action? Section 1983 is a vehicle for individuals to enforce "any *right*[] . . . secured" by federal law. 42 U.S.C. § 1983 (emphasis added). Whether that vehicle is available to foster parents seeking to obtain foster care maintenance payments turns on whether (a) the Act means to confer on foster parents a right to those payments, in which case Section 1983 would be available. Or, whether the Act, instead, intends (b) simply to focus on the operations of the regulated entity (the states), and is designed only to give states guidance in administering aid to foster parents; or (c) relies solely on the regulatory authority (the Secretary of Health and Human Services) to see to it that the Act's requirements are met, with the result that Section 1983 would be foreclosed.

Our review of the Act's text and statutory structure leads us to conclude that Congress did indeed create a specific monetary entitlement aimed at assisting foster parents in meeting the needs of each foster child under their care. What is more, we find that the Act's provision of (limited) federal agency review for a state's substantial compliance is insufficient to supplant enforcement through Section 1983. We therefore hold that the Coalition can bring a Section 1983 action on behalf of its foster parent members.

A. Statutory Background

The Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670 *et seq.*, is Spending Clause legislation directed at state administration of foster care and adoption assistance services. Relevant here, the Act creates a "Foster Care Maintenance Payments Program," the details of which must be recounted in some detail.

1. State Plan Requirements. To receive federal aid under the Act, states must submit a plan for approval to the Secretary of Health and Human Services (the Secretary). Section 671 details what a state plan must provide to qualify. Section 671's requirements are numerous and far-ranging; they run from dictating how information about individuals involved in the foster care system may be disclosed, *Id.* § 671(a)(8), to providing guidelines on how and when a state should give priority to reuniting families, *Id.* § 671(a)(15). Significantly, one of Section 671's thirty-five requirements is that the state plan provide for foster care maintenance payments. *Id.* § 671(a)(1).

2. Foster Care Maintenance Payments. Once a state plan has been approved, Section 672, titled "Foster care maintenance payments programs," directs participating states—that is, states with an approved plan—to make maintenance payments to foster parents on behalf of each foster child under their care. Section 675 then defines the costs that compose those payments.

The mandate appears in Subsection 672(a)(1). This subsection, titled "Eligibility," has two components. The first provides that "[e]ach State with a plan approved under this part shall make foster care maintenance payments on behalf of each child . . . ." *Id.* § 672(a)(1). The second addresses which foster children are eligible for foster care maintenance payments to be made on their behalf. *Id.* § 672(a)(1)(A),(B) (incorporating Section 672(a)(2),(3)). Eligibility is dictated by the financial resources of the child, how the child was removed from the home, who is responsible for the child, and where the child is placed. *Id.* § 672(a)(2),(3).

Subsection 672(b) provides that the state can make these payments either to the child's foster parent, to the institution where the child is placed, or to a local agency.

Section 675 then defines what exactly constitutes a "foster care maintenance payment":

> [T]he 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.

Section 675(4) further states that these payments "shall include," for institutional placements, the reasonable costs of operating the institution, and "shall also include" the costs of caring for the offspring of any foster children if the foster child and his or her children are in the same placement. In defining foster care maintenance payments, the Act exclusively uses mandatory language.[1]

3. Federal Reimbursement. Section 674 details when a state is entitled to reimbursement from the Federal Government. Briefly put, states are entitled to reimbursement of a percentage of payments made under Section 672, as well as other costs including training and information systems expenditures. *Id.* § 674(a)(1),(3).

4. Review and Enforcement Mechanisms. The Act creates three avenues for review of a state's compliance with its obligations under the Act: two through the state and one through the Secretary.

Both avenues for state review are dictated by Section 671, the section governing the requirements the state must meet to qualify for the program. First, Section

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1. Since children remain in foster care until they are eighteen, it occasionally occurs that a foster child has children.

671 requires the state to conduct "periodic review of the . . .amounts paid as foster care maintenance payments . . .to assure their continuing appropriateness." *Id.* § 671(a)(11). The second avenue of state review is addressed to recipients of benefits under the Act. Section 671 requires the state to provide "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." *Id.* § 671(a)(12).

The third avenue for review, found in Section 1320a-2a, is the only avenue for federal review expressly provided for in the Act. Section 1320a-2a directs the Secretary to create regulations to ensure states' "substantial conformity" with the dictates of federal law and the state's own plan. *Id.* § 1320a-2a(a). If a state fails to conform substantially, then the Secretary may withhold funds "to the extent of the [state's] failure to so conform." *Id.* § 1320a-2a(b)(3)(C).

The State has not pointed us to any mechanism for the Act's beneficiaries to obtain federal review of their claims. Thus, the only mechanism of federal control over state behavior is the cutting off of funds. Nor has the State pointed us to any claim-processing requirements—e.g., no burdens of proof, exhaustion requirements, or limitation of remedies—that allowing a Section 1983 action would upset.

* * *

In sum, the Act requires a state to submit a plan to the Secretary for approval. Once the Secretary approves the

state's plan, the Act directs the state to make payments to foster parents on behalf of each eligible child to cover costs such as food, clothing, and school supplies. The Federal Government then reimburses the state for a percentage of those payments so long as it remains in "substantial compliance" with its own plan, the regulations of the Secretary, and the requirements of the Act. While the Act requires states to conduct internal review and contemplates that the Secretary will ensure that the state remains in substantial compliance, the only individual review mechanism specifically provided for in the Act is at the state level.

B. The Presumption

The Supreme Court, in *Blessing v. Freestone*, 520 U.S. 329, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997), articulated a three-factor test for determining whether a statute creates a right enforceable through Section 1983. First, "Congress must have intended that the provision in question benefit the plaintiff." *Id.* at 340. In *Gonzaga University v. Doe*, 536 U.S. 273, 283, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002), the Court clarified that this factor requires more than a showing that the "plaintiff falls within the general zone of interest that the statute is intended to protect." The statute must confer a right on the plaintiff as shown by use of rights-creating language—that is, language that demonstrates a statutory focus on the needs of the individual, rather than the operations of the regulated entity. *Id.* at 287-88. Second, the plaintiff must "demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence." *Blessing*,

520 U.S. at 340-41 (internal quotation marks omitted). And, third, the "statute must unambiguously impose a binding obligation on the States." *Id.* at 341.

If a statute grants a right to a plaintiff class, the right is fit for judicial enforcement, and the state is obligated to fulfill the right, then a rebuttable presumption attaches that a Section 1983 action enforcing the right is available. *Id.*; *Gonzaga*, 536 U.S. at 284 & n. 4. A state defendant can overcome this presumption, however, by showing that Congress intended to foreclose a remedy under Section 1983, either expressly "or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement." *Blessing*, 520 U.S. at 341.

The dissent attempts to cast doubt on whether *Blessing*'s three-factor test remains good law after *Gonzaga*. *Gonzaga*, however, did not overrule *Blessing*; rather, it clarified the rule in *Blessing* by correcting a misinterpretation of that rule that had been adopted by some lower courts. *See Gonzaga*, 536 U.S. at 282-83. To the extent that the dissent is trying to read the tea leaves to predict that the Supreme Court may move away from *Blessing* in the future, this Court is not tasked with—and is, in fact, prohibited from—such guesswork. We are bound to follow the existing precedent of the Supreme Court until that Court tells us otherwise. *See Agostini v. Felton*, 521 U.S. 203, 238, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). Thus, we apply the *Blessing* test with the principles enunciated in *Gonzaga* firmly in mind. *See Briggs v. Bremby*, 792 F.3d 239, 242-45 (2d Cir. 2015)

(applying *Blessing*'s three-factor test after, and in light of, *Gonzaga*).

1. Binding Obligation. Since the State argues that the Act's regulation of foster care maintenance payments is permissive and not mandatory, we first consider whether the Act imposes a binding obligation on participating states. In the State's view, the Act merely details what expenses *may* be included in the payments (*i.e.* will be reimbursed by the Federal Government), not what expenses *must* be included.

This construction is belied by the Act's text. As we pointed out earlier, the Act does not use permissive language—either in creating the obligation for the state to make payments to foster parents, or in defining what expenses those payments must account for. The Act, instead, uses clearly mandatory language—"shall"—binding states to make these payments. *Id.* § 672(a). The Act then defines, with particularity and in absolute terms, what expenses constitute those payments. *See Id.* § 675(4) ("foster care maintenance payments means," "shall include," "shall also include"). Significantly, the State points to no statutory text in support of its position that the expenses listed in the definition of foster care maintenance payments are optional, rather than mandatory.

Undaunted, the State argues that the title of Section 672(a), "Eligibility," demonstrates that Section 672 is intended to outline only which portions of the foster care maintenance payments made by a state are eligible for federal reimbursement. But the State plainly misreads

Section 672(a). Its title is a reference to which *foster children* are eligible to have maintenance payments made on their behalf, not which *payments by a state* are eligible for federal reimbursement.

The overall statutory structure confirms the untenability of the State's reading. Where Congress limited which *state payments* are eligible for federal reimbursement, it did so explicitly. So in Subsections 672(d) and (e), which are addressed to children who have been removed from the home pursuant to a voluntary placement agreement, the Act clearly states that "Federal payments may" (or may not) be made. And it is not Section 672, but another section entirely—Section 674, titled "Payment to States"—that delineates the specifics of a state's entitlement to reimbursement from the Federal Government.[2] In effect, Congress has offered the states

2. To support its position that the statutory text is permissive, the State relies in part on a piece of informal guidance from the Department of Health and Human Services, which refers to the expenses listed in § 675(4) as "allowable expenses." U.S. Dep't of Health & Human Servs., *Child Welfare Policy Manual*, http://perma.cc/2KYA-SHTT. The Child Welfare Policy Manual, however, is not a product of notice and comment rulemaking and is not entitled to *Chevron* deference. *See United States v. Mead*, 533 U.S. 218, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). The State also points to 45 C.F.R. § 1355.20(a). This regulation, which is a product of notice and comment rulemaking, in relevant part states only, "Local travel associated with providing the items listed is also an allowable expense." 45 C.F.R. § 1355.20(a). It is unlikely that the agency, in this one sentence, purported to resolve the issue of whether states are required to make foster care maintenance payments that cover the costs detailed in Section 675(4). Indeed,

a reasonable bargain: pay for the expenses that we deem essential and we will partially reimburse you for them.

2. Conferral of Rights. Having determined that the Act creates an obligation for participating states to make payments covering the costs detailed in Section 675(4), the question remains whether that obligation is also an enforceable right vested in foster parents.[3]

As mentioned earlier, a statute must "manifest[]" Congress's "'unambiguous' intent to confer individual rights" in order to support a Section 1983 action. *Gonzaga*, 536 U.S. at 280 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981)). To discern Congress's intent, the Supreme Court has directed us to look to whether a statute focuses on the needs of the individual, as opposed to the operations of the regulated entity. *E.g., id.* at 287-88.

Such an inquiry has led the High Court to hold that statutory provisions with a programmatic focus do not create enforceable rights. In *Gonzaga*, a student plaintiff sought to enforce a provision of the Family Educational Rights and Privacy Act of 1974. The provision the student plaintiff relied on read:

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it would be a strange and oblique way of answering so central a question.

3. For the reasons discussed in Part I, the Coalition is an appropriate representative of the plaintiff class of foster parents.

> 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.

Gonzaga, 536 U.S. at 279 (quoting 20 U.S.C. § 1232g(b)(1)). The Supreme Court held that this provision of FERPA, directed as it is to the "policy or practice" of educational institutions, evinced that Congress lacked the intent to create a right in individuals that would be enforceable through Section 1983.

Similarly, in *Blessing*, custodial parents sought to enforce Title IV-D of the Social Security Act, 42 U.S.C. §§ 651-669b (1994), which directs participating states to operate an enforcement program for child support payments. The plaintiffs in *Blessing* sought to enforce the state's substantial compliance with the entire statutory regime, including provisions aimed at managing bureaucratic matters like staffing and data processing. 520 U.S. at 337, 344-45. While holding open the possibility that some provisions of Title IV-D might create enforceable rights, the Supreme Court rejected the plaintiffs' efforts to rectify "the State's systemic failures." *Id.* at 344-45. As the Court explained, "[f]ar from creating an *individual* entitlement to services, the [substantial compliance] standard is simply a yardstick for the Secretary to measure the *systemwide* performance of" the state. *Blessing*, 520 U.S. at 343.

In contrast, "[t]he Supreme Court has repeatedly recognized that a federal statute [that] explicitly confers a specific monetary entitlement on an identified beneficiary" *does* create an enforceable right. *Cal. State Foster Parent Ass'n*, 624 F.3d at 978. Thus, in *Wright v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 107 S. Ct. 766, 93 L. Ed. 2d 781 (1987) and *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990), the Supreme Court found that the Federal Housing Act and the Medicaid Act created enforceable rights because they bestowed on the plaintiff class a "mandatory benefit focus[ed] on the individual" and a "specific monetary entitlement," respectively.[4] *Gonzaga*, 536 U.S. at 280.

Section 672(a) and (b) of the Child Welfare Act grants precisely such a specific entitlement to an identified class of beneficiaries. The Act is aimed directly at the needs

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4. The dissent gloms on to one sentence of dicta in a footnote in *Armstrong v. Exceptional Child Center*, U.S. , 135 S. Ct. 1378, 1386, 191 L. Ed. 2d 471 n.*, to suggest that *Wright* and *Wilder* are no longer good law. But this Circuit has continued to follow *Wright* and *Wilder* even after *Armstrong. See, e.g.*, *Briggs*, 792 F.3d at 242-45. And this panel does not have the authority to overrule *Briggs*, nor does this Court have the authority to fail to follow *Wilder* and *Wright* where the Supreme Court has not overruled them. *See supra* text at 16-17.

The dissent attempts to avoid *Briggs* by noting that it did not address *Armstrong*. Indeed, *Briggs* did not address *Armstrong*—but there is no reason to view this as an oversight rather than as an indication that the panel in *Briggs* did not consider *Armstrong* to govern the facts before it. We, likewise, do not consider *Armstrong* to be controlling on the facts now before us. *See infra* text at 30-31.

of individual foster children, and, to meet those needs, it grants a monetary entitlement to those children's foster parents.

First, Section 672(a) is focused on the needs of individual foster children. The Act's use of the term "each child" indicates an individual focus. 42 U.S.C. § 672(a) (Participating states "shall make foster care maintenance payments on behalf of *each* child . . . ." (emphasis added)). "Each" is "used to refer to every one of two or more people or things, *regarded and identified separately*." Oxford English Dictionary, "each," (Online ed., Accessed May 16, 2018) (emphasis added). By referencing "each child"—rather than, for example, stating the state must establish a maintenance payment program to meet the needs of foster children—Congress expressed its concern with "the needs of . . . particular person[s]," not "aggregate services."

The definition of "foster care maintenance payments" in Section 675(4) buttresses this reading of Section 672(a). These payments relate to basic life essentials: food, clothing, shelter. Congress, in employing this definition of foster care maintenance payments, again demonstrates a concern with individual need in its most basic sense.

Second, the Act designates foster parents as the intended recipients of the payments. Section 672(a) states that payments are made "on behalf of" each foster child and Subsection (b) nominates foster parents as one of three proper recipients of the payments. Thus, the Act, which is directly concerned with the needs of foster children, *id.* § 672(a), designates foster parents as the

holders of the right, *id.* § 672(b). This statutory design is fully understandable: foster parents are the ones who incur the costs of caring for foster children. If the Act intends to ensure that foster children's basic needs are provided for, it makes sense for Congress to vest the right to defined payments in those who do the providing.

This case is therefore much closer to *Wilder* and *Wright*, where the Supreme Court found an enforceable right, than it is to *Gonzaga* and *Blessing*, where it did not. As in *Wilder* and *Wright*, the Act "unambiguously confer[s]" a "mandatory benefit," or "entitlement," to a discernible group of rights holders. *See Gonzaga*, 536 U.S. at 280. And in contrast to *Gonzaga* and *Blessing*, that entitlement is "specific and definite" and "focus[ed] on the individual." *Id.* Accordingly, we conclude that Section 672(a), read in conjunction with Subsection (b) and Section 675(4), creates a right to payments enforceable by foster parents.[5]

5. The State, relying on passing language in *Gonzaga*, seems to suggest that the presence of substantial conformity review, instead of individualized review, shows that the Act does not grant a right in the first place. In *Gonzaga*, the Court reflected on the fact that "Congress did not contemplate terminating funding on the basis of one violation of the privacy standards, but only where an institution had broader policies and practices that violated FERPA" to confirm its view that the statute, as a whole, was oriented only towards institutional policy. *Cal. State*, 624 F.3d at 980. The presence of substantial conformity review, which only garnered passing mention in *Gonzaga*, merely reinforced the absence of individually focused language. And it was actually the presence of individual federal review that drew the Court's focus. *See Gonzaga*, 536 U.S. at 289 ("Our conclusion that FERPA's

3. Fit for Judicial Enforcement. Even if a statute seems to vest rights in plaintiffs, those rights must be fit for judicial enforcement for a Section 1983 suit to lie. In other words, the right cannot be "so vague and amorphous that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-41.

The provisions of the Act requiring states to make foster care maintenance payments are fit for judicial enforcement. Section 672(a), read with Sections 672(b) and 675(4), creates a right to payments that cover certain expenses like food, shelter, and school supplies. In enforcing foster parents' right to sue for such payments, courts would, therefore, be required to review how a state had determined the amounts it pays, including how it has quantified the costs of the specific expenses listed in Section 675(4). This review falls comfortably within what courts regularly do: it requires primarily fact-finding and only very limited review of policy determinations.

The Child Welfare Act does give states some discretion as to how to calculate costs and to distribute payments.

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nondisclosure provisions fail to confer enforceable rights is buttressed by the mechanism that Congress chose to provide for enforcing those provisions.").

In any event, the State's suggestion proves too much. Under the State's reasoning, a plaintiff would be damned if the statute provides its own individual remedy, and damned if the statute does not. The only time Section 1983 would not be supplanted as a remedy would be when a statute provides for neither individual review, nor substantial compliance review. We decline to narrow the scope of the Section 1983 remedy so dramatically. We therefore limit the consideration of the agency review mechanism to the State's case for rebutting the presumption.

And courts may well defer to reasonable exercises of that discretion. *See Wagner*, 624 F.3d at 981 (holding that the court may "give deference to a reasonable methodology employed by the State" for calculating costs, and that, even with such deference, "the absence of a uniform federal methodology for setting rates 'does not render the [statute] unenforceable by a court" (quoting *Wilder*, 496 U.S. at 519)). Significantly, the State's discretion under the Act is considerably more cabined than that afforded states under the Medicaid Act in *Wilder* and the Federal Housing Act in *Wright*, both cases where the Supreme Court found that the asserted rights were enforceable.

The provision of the Medicaid Act at issue in *Wilder* required states to set rates that were "reasonable and adequate" to reimburse "efficiently and economically operated" health care facilities. 496 U.S. at 503 (quoting 42 U.S.C. § 1396a(a)(13)(A) (1982)). To determine whether a given rate satisfied these requirements, the statute set forth certain factors for consideration, such as "the unique situation (financial and otherwise) of a hospital that serves a disproportionate number of low income patients." *Id.* at 519 n. 17. The Supreme Court found that this provision provided sufficient guidance to be fit for judicial enforcement. In fact, the Supreme Court noted that the Medicaid Act "provide[d], if anything, more guidance than the provision at issue in *Wright*, which vested in the housing authority substantial discretion for setting utility allowances." *Id.*

If rate-settings that require a state to determine what is reasonable, adequate, efficient, and economical are fit for judicial review, then rate-setting that merely requires a state to quantify costs for set expenses must

also be. Accordingly, we find that foster parents' right to receive foster care maintenance payments is fit for judicial enforcement.

* * *

In sum, applying the *Blessing* factors to this case, we conclude that the Act meets the requirements to create a presumption that foster parents have a right to foster care maintenance payments that cover the enumerated expenses that is enforceable through Section 1983.[6]

C. The Rebuttal

But even when a statute grants such a right to a plaintiff class, resort to Section 1983 is barred when the statute provides "remedial mechanisms . . . sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a [Section] 1983 cause of action." *See Wright*, 479 U.S. at 425. The State argues that the Act, by directing the Secretary to review the state's actions for substantial conformity with the Act's commands, forecloses Section 1983 remedies.[7]

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6. "Plaintiffs suing under [Section] 1983 do not have the burden of showing an intent to create a private remedy because [Section] 1983 generally supplies a remedy for the vindication of rights secured by federal statutes." *Gonzaga*, 536 U.S. at 284. Hence, we start with the presumption that foster parents may bring a Section 1983 action. *See Blessing*, 520 U.S. at 340-41.

7. The State also argues that a Section 1983 action is not a proper remedy because the Act is Spending Clause legislation. It is true that the "typical remedy" for "state noncompliance" with

The State is mistaken. The Supreme Court has often rejected arguments that a statute's remedial scheme forecloses a Section 1983 action. *Blessing*, 520 U.S. at 346-48; *Wilder*, 496 U.S. at 498-99; *Wright*, 479 U.S. at 428-29; *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704-07, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979); *see also Briggs*, 792 F.3d at 245. Indeed, the Supreme Court has generally found a remedial scheme sufficiently comprehensive to supplant Section 1983 only where it "culminate[s] in a right to judicial review" in federal court. *Wilder*, 496 U.S. at 521 (describing *Smith v. Robinson*, 468 U.S. 992, 1010-1011, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984) and *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981)). Time and again, the Supreme Court has stressed the importance

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Spending Clause legislation is federal action to terminate funds to the state, rather than private causes of action, *Pennhurst*, 451 U.S. at 28. But the fact that a law is based on the Spending Clause is by no means determinative. Thus, in *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980), *Wright*, and *Wilder*, the Supreme Court found that Spending Clause legislation supported a cause of action under Section 1983. And, with respect to the entire Social Security Act, including this Child Welfare Act, Congress explicitly anticipated the possibility of Section 1983 actions. Thus, Congress amended the Act to override the reasoning in *Suter v. Artist M.*, 503 U.S. 347, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992), and thereby to enable appropriate provisions of the Social Security Act to give rise to a private enforcement action (*Suter* would have foreclosed a private enforcement action under any section governing state plan requirements). *See* 42 U.S.C. § 1320a-2. It would have been pointless for Congress to do this if it did not contemplate that some provisions of the Act would support a private enforcement action.

that some avenue for federal review exist to hear the claims of "aggrieved individuals." *See Gonzaga*, 536 U.S. at 289-90; *Blessing*, 520 U.S. at 348; *Wilder*, 496 U.S. at 521-22; *Wright*, 479 U.S. at 428; *see also City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 121, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (2005) ("[T]he existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which [the Court has] held that an action would lie under [Section] 1983 and those in which [the Court has] held that it would not.").

No such avenue exists here. The Act provides no federal court review of an individual's claim, other than what, under *Blessing*, is presumptively available under Section 1983.[8] Nor is there federal agency review for claims by an aggrieved individual. The only federal review provided under the Act is review by the Secretary for substantial conformity with the Act and with the state's approved plan, with the possibility of funding cutoffs as the sole remedy.

The Supreme Court has made clear that a federal agency's "generalized powers are insufficient to indicate a congressional intent to foreclose [Section] 1983 remedies."

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8. There is also no avenue for state court review The Act provides only for state agency proceedings for aggrieved individuals. Yet, confoundingly, the State argues that this state agency review is sufficient to foreclose resort to Section 1983. State review, standing alone, has never been deemed sufficient to supplant a Section 1983 action. *See Blessing*, 520 U.S. at 348; *Wilder*, 496 U.S. at 522-23; *Wright*, 479 U.S. at 427-28. And we will not deviate from that course here.

Wright, 479 U.S. at 428. And, in *Blessing*, the High Court explicitly rejected the notion that substantial compliance review, coupled with funding cut-offs, is sufficient to supplant a private right of action under Section 1983. 520 U.S. at 348; *see also Wright*, 479 U.S. at 428. Accordingly, we reject the state's contention that the substantial conformity review provided for in the Act supplants the Section 1983 remedy. *See Briggs*, 792 F.3d at 239.

This outcome is wholly consistent with the Supreme Court's precedent in *Armstrong v. Exceptional Child Center, Inc.*, U.S. , 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015). The dissent accuses us of ignoring *Armstrong*, which, it claims, "squarely controls our case." Dissent at 30-32. In fact, *Armstrong* is readily distinguishable on multiple grounds. First, *Armstrong* addressed the question of whether the plaintiffs had a cause of action *in equity* to enforce Section 30(A) of the Medicaid Act. *Id.* at 1385. *Armstrong* did not consider whether the plaintiffs would have had a private cause of action under Section 1983. *See id.* at 1392 (Sotomayor, J., dissenting) (distinguishing actions in equity from Section 1983 suits). The dissent, going beyond the holding in *Armstrong*, argues that, "if [the plaintiffs] could not enforce the provision in equity, *a fortiori*, they could not do so pursuant to a § 1983 theory." Dissent at 33. This reasoning is fundamentally flawed. It belittles the purpose of the Civil Rights Act of 1871, which established Section 1983 claims precisely to permit plaintiffs to sue the government for civil rights violations where they might not otherwise have had a remedy. To limit Section 1983 claims only to instances where plaintiffs would have a claim in equity would be totally inconsistent with the purposes of Section 1983.

Second, the court in *Armstrong*, in denying the existence of a cause of action in equity as to the statute before it, relied on "[t]he sheer complexity associated with enforcing § 30(A), coupled with the express provision of an administrative remedy." *Armstrong*, 135 S. Ct. at 1385. Indeed, *Armstrong* specifically states that "[t]he provision for the Secretary's enforcement by withholding funds might not, *by itself*, preclude the availability of equitable relief. But it does so when combined with the judicially unadministrable nature of § 30(A)'s text." *Id.* For the reasons discussed above in Section III.B.3, the provisions of the Child Welfare Act requiring states to make foster care maintenance payments are not judicially unadministrable. Therefore, *Armstrong* is in no way inconsistent with our holding that a cause of action under Section 1983 exists here.

* * * *

The Act uses mandatory language, binding participating states. It evinces a Congressional focus on meeting the needs of individual foster children and translates that focus into a specific monetary entitlement granted to an identified class of beneficiaries: foster parents. The Act, moreover, provides sufficient guidance to courts to make the right appropriate for judicial enforcement. Since the Act does not provide any other federal avenues for foster parents to vindicate that right, the right is enforceable through Section 1983. Accordingly, we **VACATE** the order of the district court and **REMAND** for further proceedings.

Appendix A

DEBRA ANN LIVINGSTON, *Circuit Judge*, dissenting:

The Child Welfare Act of 1980 ("the CWA" or "the Act"), provides a mechanism for partial federal reimbursement of a subcategory of state expenditures on foster care. *See* 42 U.S.C. § 670. Today, the majority concludes that this partial federal support system imposes a categorical foster care *spending requirement* on all recipient states, regardless of the limits their respective legislatures may have placed on such expenditures. Not content to stop there, the majority then holds that the CWA provides some (though not all) foster parents with a privately enforceable *right* under 42 U.S.C. § 1983 to receive some uncertain sum of money from the state.

I disagree on both counts. This Court may not recognize a right enforceable under § 1983 unless Congress has "manifest[ed] an 'unambiguous' intent to confer" such a right. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981)). The CWA does not "unambiguously" require states to cover the entire cost of a category of foster care expenditures; still less do the relevant provisions of the CWA meet our demanding standard for creating a privately enforceable right to those payments under § 1983.

"[T]he National Government, anxious though it may be to vindicate and protect federal rights . . ., always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Levin v.*

Commerce Energy, Inc., 560 U.S. 413, 431, 130 S. Ct. 2323, 176 L. Ed. 2d 1131 (2010) (quoting *Younger v. Harris*, 401 U.S. 37, 44, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)). The majority's decision today violates this principle, upending the relationship between the federal government and state foster care systems while ushering dozens of federal judges in this Circuit into the delicate and sensitive world of local child-welfare policymaking. I see nothing in the CWA indicating that Congress intended such a result—let alone that it *unambiguously* did so. I therefore respectfully dissent.

I

A

In 1980, Congress enacted the CWA, also known as Title IV-E of the Social Security Act, to assist states in providing foster care in appropriate circumstances and for appropriate periods by offering "fiscal incentives to encourage a more active and systematic monitoring of children in the foster care system." *Vermont Dep't of Soc. & Rehab. Servs. v. U.S. Dep't of Health & Human Servs.*, 798 F.2d 57, 59 (2d Cir. 1986). Passed pursuant to Congress's Spending Clause power, *see Suter v. Artist M.*, 503 U.S. 347, 355-56, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992), the CWA establishes a partial reimbursement mechanism for *some* of the expenses that states incur as to *some* of the children in their foster care and adoption-services programs. But these specified expenses, incurred within the CWA's statutory constraints, are eligible for partial reimbursement only if a state has chosen to participate

in the federal program, enacted a plan of operation for its foster care system, and received approval for that plan from the Secretary of Health and Human Services ("HHS"). 42 U.S.C. § 671(a).

As relevant here, the CWA provides for partial reimbursement of "foster care maintenance payments" and requires each state plan to "provide for [such] payments in accordance with section 672" of the Act. 42 U.S.C. § 671. Section 672(a)(1), entitled "Eligibility," dictates that states with approved plans "shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative," so long as (1) removal and foster care placement requirements have been met and (2) the child "would have otherwise qualified for assistance under the now-defunct Aid to Families with Dependent Children program."[1] *Midwest Foster Care and Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1194 (8th Cir. 2013) (discussing 42 U.S.C. § 672(a)(1)). Section 675 of the Act, entitled "Definitions," defines "foster care maintenance payments" as:

> 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

1. In other words, the statute provides for partial federal reimbursement of state support payments for only a percentage of the foster children in a state's foster care system. This percentage of eligible children has declined over time, according to Defendant-Appellee New York, because "Congress has not raised financial eligibility standards since 1996." Br. Def-Appellee at 25.

> 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.

Id. § 675(4)(A). States are eligible for federal reimbursement of their foster care maintenance payments up to "an amount equal to the Federal medical assistance percentage" for children in foster family homes or child-care institutions. *Id.* § 674(a)(1).

The Act, in pertinent part, provides for two review mechanisms to ensure state compliance with its provisions. The first requires HHS to issue regulations to monitor participating states' "substantial conformity" with the Act's requirements. *Id.* § 1320a-2a(a). HHS's regulations must, among other things:

- "specify the timetable for conformity reviews of State programs";
- "specify . . . the criteria to be used . . . to determine whether there is a substantial failure to so conform"; and
- afford a noncomplying State the "opportunity to adopt and implement a corrective action plan."

Id. §§ 1320a-2a(b)(1), (b)(2), (b)(4)(A). HHS may withhold funds "to the extent of [a state's] failure to . . . conform," *id.* § 1320a-2a(b)(3)(C), but it must allow noncompliant states to appeal such determinations to the HHS Departmental Appeals Board, and eventually to the federal courts, in "the judicial district in which the principal or headquarters office of the agency responsible for administering the program is located."[2] *Id.* § 1320a-2a(c)(3).

The second review mechanism is more particular to the foster care maintenance payments at issue here. The CWA requires states both to periodically review these payments "to assure their continuing appropriateness" and to provide an opportunity for caregivers whose claims for payments have been denied to receive "a fair hearing before the [relevant] State agency." *Id.* §§ 671(a)(11), (a)(12). In New York, the state agency's decision is thereafter subject to further review through the state's robust procedures for review of administrative action.

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2. Pursuant to this review mechanism, we reviewed (and upheld) HHS's determination in 2003 that New York was *not* in substantial conformity because of the number of children in foster care who had not received necessary judicial determinations that the state had made reasonable efforts to finalize so-called "permanency plans" on their behalf. *New York ex rel. N.Y. State Office of Children & Family Servs.*, 556 F.3d 90, 92 (2d Cir. 2009). In 2012, however, the most recent review noted in the record here, HHS conducted a "primary" analysis of 80 randomly selected cases to assess whether New York was in "substantial conformity" with the law. All 80 selected cases met eligibility requirements. New York State Title IV-E Foster Care Eligibility Review, Primary Review 2012, http://perma.cc/7GTP-PX5A .

The majority ends its brief discussion of the statute with a summary of these statutorily imposed review mechanisms. In doing so, it ignores the complex state and local foster care systems that predate the CWA. As New York reminds us, CWA funding "covers only a portion of the State's expenses, and New York's foster care program serves a broader range of children and spends money on a broader range of items and services than the federal statute covers." Br. Def-Appellee at 11-12. Before the CWA's passage, states decided the reimbursement rate for foster care providers, and payment rates varied widely. Such variance continues today, and unsurprisingly so, given that the CWA did not displace preexisting foster care systems but merely created a mechanism for partial reimbursement of a specified set of expenses associated with some children. *See* Kerry DeVooght et al., *Family Foster Care Reimbursement Rates in the U.S.*, tbl. 1 at 9-18 (2013), http://perma.cc/HY82-Q3AF .

New York's complex foster care program is largely administered at the local level. County social services departments are responsible for making payments to foster care providers in the first instance. These county departments, in turn, are reimbursed by New York's Office of Children and Family Services ("OCFS") up to certain maximum amounts. N.Y. Soc. Serv. L. § 153-k (1). A portion (but only a portion) of the funds paid by OCFS to the county departments are federal funds disbursed to the state pursuant to the CWA. *Id.* Counties are free to set their own reimbursement rates for foster parents, but the state will reimburse the counties only up to the maximum amount established at the state level. *Id.* at § 2(b).

In sum, the CWA represents a federal effort to incentivize state provision of adequate foster care arrangements. In doing so, the CWA provides important financial support to states, but this support extends to only a *portion* of large and complex state and local foster care systems, which themselves involve a complicated interplay between local demands and state funding. As for New York's foster care plan, it has been approved by the Secretary since 1982, and HHS has routinely found New York to be in compliance with the CWA.

B

Only with this background in mind does the full import of the majority's decision become clear. The majority first decides, in effect, that New York may well have been operating in rank violation of the CWA for over 35 years. (Inexplicably, no one seems to have noticed until now.) According to the majority, the partial federal reimbursement scheme enshrined in the CWA imposes a minimum foster care *spending obligation* on recipient states, which must cover the cost of a litany of specific items dictated by the federal government. This supposed spending obligation arises (again, according to the majority) because the Act employs "mandatory language" in § 672(a), which provides that participating states "shall make foster care maintenance payments," and then defines "in absolute terms" in § 675(4)(A) the expenses that constitute these mandatory "payments."[3] Maj. Op.

3. By way of reminder, Section 675, the "Definitions" section of the CWA, defines foster care maintenance payments as:

at 18. New York argues, to the contrary, that § 672(a) specifies the *conditions* under which states can receive federal reimbursement and that § 675(4)(A)'s definition of "foster care maintenance payments" simply "provide[s] an *allowable* list of items" for this reimbursement. Br. Def-Appellee at 26. But the majority rejects New York's argument and decides that any state whose payment rates fall short of covering the total "cost of (and the cost of providing)" all the items listed in § 675(4)(A) runs afoul of the statutory prerequisites for compliance with the CWA.

Respectfully, I disagree. I join the Eighth Circuit in concluding that §§ 672(a) and 675(4)(A) "speak to the states as regulated participants in the CWA and enumerate limitations on when the states' expenditures will be matched with federal dollars." *Midwest Foster Care*, 712 F.3d at 1197. So construed, § 675(4)(A) does not entitle foster parents and eligible institutions to a certain monetary sum; instead, it specifies those state expenditures that are "eligible for partial federal

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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.

reimbursement."[4] *Id.; see also* Emilie Stoltzfus, Cong. Research Serv., R42792, *Child Welfare: A Detailed Overview of Program Eligibility and Funding for Foster Care, Adoption Assistance, and Kinship Guardianship Assistance Under Title IV-E of the Social Security Act* 17 (2012) ("[T]here is no federal minimum or maximum foster care payment rate. States are permitted to set these rates and are required . . . to review them periodically to ensure their 'continuing appropriateness.'").

The majority reaches its contrary result only by reading both §§ 672(a) and 675(4)(A) selectively, rather than in light of the CWA as a whole. *Cf. Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 320, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014) (reiterating that it is "a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"

4. As highlighted below, my interpretation of the CWA, unlike the majority's, is consistent with that of HHS (which has not appeared in this litigation). To take one example, in 2008, Congress amended § 675(4)(A) to broaden the definition of "foster care maintenance payments" to include "payments to cover the cost of (and the cost of providing) . . . reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement." But HHS did not interpret this amendment as *requiring* states (as the majority would have it) to pay for such travel: "As with any cost enumerated in the definition of foster care maintenance payments in [§ 675(4)]," it said, "the [state] agency *may decide which of the costs to include* in the child's foster care maintenance payment." U.S. Dep't of Health & Human Servs., Program Instruction No. ACYF-CB-PI-10-11 at 20, http://perma.cc/9LX9-C76D (emphasis added).

(quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000))). I agree with the majority that states receiving partial reimbursement pursuant to the CWA must make foster care maintenance payments—without which there would be nothing to reimburse. But our agreement ends there. In my view, it is not reasonable to interpret § 675(4)(A) to impose some minimum spending obligation for each enumerated item on all fifty state foster care systems—much less to locate this vast new spending obligation in the "Definitions" section of the CWA.[5] As the Supreme Court reminded us in *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001), Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes," *id.* at 468 (citation omitted); *see also Midwest Foster Care*, 712 F.3d at 1197 ("Finding an enforceable right solely within a purely definitional section is antithetical to requiring unambiguous congressional intent."). So too here.

The majority argues that § 675(4)(A) must specify the precise costs that states are required to pay because, in its view, § 672(a)(1), entitled "Eligibility," provides that participating states "shall make foster care maintenance

5. To be clear, my focus here is on the claim at issue. I do not, and need not, opine as to whether there are other circumstances that might give cause for HHS to withhold federal funds to participating states on the ground that inadequate monies were being directed to foster care. It is sufficient to resolve this case to conclude only that §§ 672(a) and 675(4)(a) do not constitute an exhaustive list of mandatory payments that "complying" states "shall make."

payments" and specifies "which *foster children* are eligible to have maintenance payments made on their behalf." Maj. Op. at 17-18. But this is wholly consistent with the view that § 672(a)(1) sets out conditions for federal reimbursement—not a spending mandate. It is unsurprising that a statute providing for partial federal reimbursement of a portion of the costs associated with taking care of *some* foster children (and subject to the state complying with conditions for appropriate placement) would have a section devoted to delineating the category of children whose costs are eligible for reimbursement, and under what conditions. Indeed, the CWA is replete with provisions establishing such eligibility criteria. It is notably lacking, however, *any* provisions that clearly and cleanly mandate a spending minimum that participating states must pay for the items enumerated in § 675(4)(A).

Accordingly, § 672(a)(1) itself devotes far fewer words to the remittance of foster care maintenance payments by states than to factors *curtailing* the situations in which such remittances should be made. As noted, § 672(a)(1) makes clear that such payments are to be made on behalf of children removed from their homes only if removal and placement criteria have been met ("and the placement continues to meet" these criteria), and only then if "the child, while in the home, would [also] have met [specified] AFDC eligibility requirement[s]." Read as a whole, § 672(a)(1) thus "serve[s] as a roadmap for the conditions a state must fulfill in order for its expenditure to be eligible for federal matching funds," *Midwest Foster Care*, 712 F.3d at 1198, but falls well short of establishing an unambiguous spending condition with which states must

comply in order to receive federal money, *cf. Pennhurst*, 451 U.S. at 44 (noting that if "Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously" (citations omitted)).

Indeed, if §§ 672(a)(1) and 675(4)(A) unambiguously imposed a spending obligation on the states in "absolute terms," as the majority would have it, that obligation would surely be easier for the majority to define. If "legislation enacted pursuant to the spending power is much in the nature of a contract," *id.* at 17, what obligation, precisely, did New York take on? An obligation to reimburse all receipts for every item listed in § 675(4)(A) on behalf of a subset of children in foster care? New York warned us that *any* mandated increase in the foster care maintenance payments for which it receives partial reimbursement could result in a decrease in the payments made to the growing percentage of foster parents and other providers who are *not* covered by the CWA. Letter Br. for Def.-Appellee at 22. How much more disruptive to the foster care system, then, would it be to impose an obligation to cover *all* costs for the items listed in § 675(4)(A)? This disastrous result would appear to be the upshot of the majority's view, taken to its limit, that the CWA commands states to make "payments to cover the cost of" the items listed in § 675(4)(A).

The majority studiously avoids going quite that far. But it does so only by ducking *any* real specification of what the CWA now requires. Thus, the CWA, it says, "give[s] states some discretion as to how to calculate costs and to distribute payments" and courts "may well defer

to reasonable exercises of that discretion." Maj. Op. at 25. Yet § 674(a)(4) does not itself contain such qualifications, making it difficult to discern where the majority got them. *Cf. Alabama v. North Carolina*, 560 U.S. 330, 352, 130 S. Ct. 2295, 176 L. Ed. 2d 1070 (2010) ("We do not—we cannot—add provisions to a federal statute.").

Ultimately, the majority's rejiggering of the CWA results in a curious bargain for New York to have struck—a bargain in which New York supposedly relinquished to federal courts its longstanding control over discretionary judgments about payment rates for foster care providers in exchange for *partial* reimbursement of *some* expenses incurred in the care of a declining percentage of foster care children.[6] The majority characterizes this trade-off as part of a "reasonable bargain" that Congress struck with the states, Maj. Op. at 19, but the states themselves do not appear to agree with that characterization. Fourteen of them have submitted an amicus brief in support of New York's position (and thus against the majority's view). *See* Br. of Amici Curiae States. If these states struck such a bargain, they did so unwittingly. *See Pennhurst*, 451 U.S. at 17 ("The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the "contract.").

It is perhaps for all the above reasons that the agency tasked with implementing the Act, HHS, has not interpreted §§ 672(a)(1) and 675(4)(A) as imposing

6. See *supra* note 1.

a minimum spending mandate on the states for the enumerated items in § 675(4)(A). The definition of "foster care maintenance payments" in HHS regulations promulgated under the CWA tracks § 675(4)(A)'s definition, but the regulation continues: "[l]ocal travel associated with providing the items listed above is *also an allowable expense*."[7] 45 C.F.R. § 1355.20 (emphasis added). This language again suggests that § 675(4)(A) simply lists items for which federal reimbursement remains available, not items for which the state is obligated to fully compensate providers. The majority brushes aside HHS's pronouncements, both formal and informal, *see* Maj. Op. at 19 n.2., and I see no need to wade into the various contours of deference to agency interpretations here. Suffice it to

7. Additional informal guidance serves to buttress this interpretation. To provide another example, the agency also states, in offering guidance on the term "incidentals," as used in § 675(4)(A), that "the reasonable and occasional cost of such items as tickets or other admission fees for sporting, entertainment or cultural events," as well as the cost of "horseback riding" and "Boy/Girl Scout" dues, "*are reimbursable* under Title IV-E Foster Care as a part of the [foster care] maintenance payment." Admin. for Children & Families, U.S. Dep't of Health & Human Servs., Child Welfare Policy Manual §§ 8.3B.1(2), (9) (2018) (emphasis added). It is hard to imagine that Congress *mandated* that the states cover the cost of a foster child's participation in the Boy Scouts, although designating such a cost as reimbursable is entirely reasonable. *See also* U.S. Dep't of Health & Human Servs., Admin. on Children, Youth & Families, Program Instruction No. ACYF-CB-PI-10-11, at 20 (July 9, 2010), http://perma.cc/9LX9-c76D ("As with any cost enumerated in the definition of foster care maintenance payments in [§ 675(4)], the title IV-E agency may decide which of the enumerated costs to include in a child's foster care maintenance payment.").

say, however, that at the very least, HHS's interpretations of the CWA, embodied both in regulations promulgated through the notice and comment process and in informal guidance, "carr[y] some persuasive force" and therefore "lend[] further support" to New York's position. *Ret. Bd. of the Policemen's Annuity & Benefit Fund v. Bank of N.Y. Mellon*, 775 F.3d 154, 170 (2d Cir. 2014).

II

But there's a bigger problem with the majority's decision. For even if I'm wrong about the proper interpretation of §§ 672(a)(1) and 675(4)(A)—even if § 672(a)(1) does require states to make payments covering each of the categories of costs enumerated in § 675(4)(A) on behalf of eligible foster children—this requirement would, at most, implicate the federal government's reimbursement obligations under the Act. The majority concludes, to the contrary, that a subset of New York caregivers have a right, *enforceable under 42 U.S.C. § 1983*, to foster care payments that "cover the cost of (and the cost of providing)" the expenses outlined in § 675(4)(A). This startling conclusion (which has the effect of entitling *some* of the caregivers in a state's foster care system to sue in federal court) is squarely precluded by Supreme Court precedent. I again respectfully disagree with the majority's analysis.

A

Section 1983 provides a cause of action to remedy violations by state actors of "any rights, privileges, or

immunities secured by the Constitution and [federal] laws." 42 U.S.C. § 1983. The Supreme Court has clarified that § 1983 provides a means of redressing "the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 U.S. 329, 340, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997) (citation omitted); *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 283, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002) ("[I]t is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced [under § 1983.]"). Moreover, the Court has "rejected the notion" that its precedent "permit[s] anything short of an *unambiguously* conferred right to support a cause of action brought under § 1983." *Gonzaga*, 536 U.S. at 283 (emphasis added).

The Court has grown increasingly wary of recognizing new private rights of the sort at issue here, enforceable under § 1983.[8] As the majority well knows, this is

8. The Supreme Court's reticence in the § 1983 context is consistent with the entire swath of its implied rights jurisprudence. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857, 198 L. Ed. 2d 290 (2017) (describing "the notable change in the Court's approach to recognizing implied causes of action" over the past two decades); *Alexander v. Sandoval*, 532 U.S. 275, 287, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (repudiating the "*ancien regime*" practice of creating implied causes of action to effectuate a statute's broader purposes); *Gonzaga*, 536 U.S. at 285 (discussing the Court's implied rights and implied cause of action jurisprudence together and noting that "[a] court's role in discerning whether personal rights exist in the § 1983 context should . . . not differ from its role in discerning whether personal rights exist in the implied right of action context"); *see also* Richard H. Fallon et al., Hart & Wechsler's The Federal Courts and the Federal System 1010

particularly true with respect to "legislation enacted pursuant to the spending power," where "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*, 451 U.S. at 28). Clarity as to the existence of a *right* enforceable in a § 1983 action is *especially* important in this context because the right of action itself is a condition on a state's receipt of federal funds, and is thus a significant term in the "contract" to which the state must knowingly and voluntarily agree. *See Suter*, 503 U.S. at 356 (quoting *Pennhurst*, 451 U.S. at 17).

The Supreme Court has held that Spending Clause legislation created an individually enforceable right under § 1983 in only three cases. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990); *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 107 S. Ct. 766, 93 L. Ed. 2d 781 (1987); *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (1980). The majority cites these cases repeatedly, but glosses over the nearly three decades of case law following *Wilder*, the most recent of the trio, during which time the Supreme Court has never again recognized a private right enforceable under § 1983 in Spending Clause legislation. This trend has not been accidental. As the Court clarified in 2015, "our later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified." *Armstrong*

(7th ed. 2015) (observing that the Court's "general tenor . . . has reflected skepticism that Congress intends federal statutes to create 'rights' when it fails to provide statutory remedies").

v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1386, 191 L. Ed. 2d 471 n.* (2015) (citation omitted). The majority criticizes citation to *Armstrong* as "glom[ing] on to one sentence of dicta," but the Court's migration away from recognizing § 1983 rights is both pervasive and undeniable. Indeed, this Court has already conceded as much, *see, e.g.*, *Kapps v. Wing*, 404 F.3d 105, 127 (2d Cir. 2005) (Calabresi, *J.*) (recognizing that "the Court has appeared to be increasingly reluctant to find § 1983-enforceable rights in statutes which . . . set forth their requirements in the context of delineating obligations that accompany participation in federal spending clause programs").

In outlining the Supreme Court's jurisprudence in this area, then, I am not predicting the future but instead faithfully following existing precedent. The Court has *held* that unless Congress "speaks with a clear voice and manifests an unambiguous intent to confer individual rights, federal funding provisions provide *no basis for private enforcement* by § 1983." *Gonzaga*, 536 U.S. at 280 (emphasis added) (internal quotation marks omitted). Given this existing and demanding standard for recognizing a privately enforceable right, the Plaintiff-Appellant took on a challenging task indeed in attempting to demonstrate that the CWA confers on certain New York foster child caregivers the right to bring suit in federal court when they believe they have not been adequately compensated for the items specified in § 675(4)(A).[9] I cannot agree with the majority that the Plaintiff-Appellant has come even close to meeting this challenge.

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9. I agree with the majority that the Plaintiff-Appellant has standing to assert the rights of these caregivers.

B

The majority structures its analysis around the three *Blessing* factors.[10] At the start, however, I would note that the Supreme Court's more recent jurisprudence calls into question the vitality of the *Blessing* test. In *Gonzaga*, the Court stated that "[s]ome language in our opinions might be read to suggest that something less than an unambiguously conferred right is enforceable by § 1983. *Blessing*, for example, set forth three 'factors' to guide judicial inquiry into whether or not a statute confers a right . . . . 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." 536 U.S. at 283; *see also id.* at 291 (Breyer, *J.*, concurring in the judgment) ("[S]tatute books are too many, the laws too diverse, and their purposes too complex, for any single formula to offer more than general guidance."). Again,

10. Those three factors are: (1) whether "Congress . . . intended that the provision in question benefit the plaintiff"; (2) whether "the right assertedly protected by the statute is . . . so 'vague and amorphous' that its enforcement would strain judicial competence"; and (3) whether the statute "unambiguously impose[s] a binding obligation on the States"—*i.e.*, whether "the provision giving rise to the asserted right [is] couched in mandatory, rather than precatory, terms." *Blessing*, 520 U.S. at 340-41; *see also Gonzaga*, 536 U.S. at 288-89. If a plaintiff meets this test, thus demonstrating "that [the] federal statute creates an individual right," this creates "a rebuttal presumption that the right is enforceable under § 1983," which the defendant may rebut by showing that Congress "creat[ed] a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing*, 520 U.S. at 341.

contrary to the majority's suggestion, I do not canvas *current* Supreme Court precedent to "read the tea leaves to predict" *future* Supreme Court decisions. Maj. Op. at 16-17. In this Circuit we use the *Blessing* factors to "guide" our analysis but, in recognition of the Supreme Court's existing guidance, we *already* decline to apply these factors mechanistically, "find[ing] a federal right based on [their] rigid or superficial application . . . where other considerations show that Congress did not intend to create federal rights actionable under § 1983." *Torraco v. Port Auth. of New York & New Jersey*, 615 F.3d 129, 136 (2d Cir. 2010) (quoting *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 322 (2d Cir. 2005)).

In any event, here, each of the *Blessing* factors presents formidable obstacles for the Plaintiff-Appellant. Though I will not belabor the points, the analysis of the statutory scheme provided in Part I, *supra*, disposes of the first and third *Blessing* factors. Briefly, as to the first factor, whether "Congress . . . intended that the provision benefit the plaintiff," *Blessing*, 520 U.S. at 340, the provisions of the CWA at issue here do not suggest an "unambiguous" focus on benefit to the Plaintiff-Appellant and the subset of foster parents receiving foster care maintenance payments, *Blessing*, 520 U.S. at 340-41. As the Supreme Court noted in *Gonzaga*, "[s]tatutes that focus on the person regulated rather than the individuals protected" do not evince congressional intent to create enforceable rights. *Gonzaga*, 536 U.S. at 287 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 289, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001)). Thus, the Court cautioned there that provisions outlining the institutional or state actions

that would terminate federal funding "cannot make out the requisite congressional intent to confer individual rights enforceable by § 1983." *Id.* at 288-89. Here, because the relevant provisions of the CWA focus on the *states* rather than the benefitted individuals, the court below ended its analysis with the first *Blessing* factor, concluding that the Plaintiff-Appellant could not surmount even this hurdle. *See New York State Citizens' Coal. for Children v. Carrion*, 31 F. Supp. 3d 512, 527 (E.D.N.Y. 2014) (dismissing claim under first *Blessing* prong and determining that "there is no need to review the other *Blessing* factors"). I discern no error in the district court's able analysis.

As to the third *Blessing* factor: § 675(4)(A), correctly interpreted as listing the state expenditures *eligible* for reimbursement, does not "*unambiguously* impose a binding obligation on the State," *Blessing*, 520 U.S. at 340-41 (emphasis added), to cover the cost of each of the items enumerated in § 675(4)(A). Though the CWA undeniably imposes obligations on the states elsewhere as a precondition for federal funds, the majority errs in locating an unambiguous spending obligation in § 675(4)(A), and thus fails to identify "exactly what is required of States by the Act." *Suter*, 503 U.S. at 358.

I focus principally here on the second *Blessing* factor—that is, whether the asserted right is so deeply "undefined" that its enforcement would "strain judicial competence." *Blessing*, 520 U.S. at 345 (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 132, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994)). In fact, conscientious consideration of this factor alone is sufficient to establish that Congress

did not intend §§ 672(a)(1) and 675(4)(A) to provide individually enforceable rights. *Cf., e.g., Backer ex rel. Freedman v. Shah*, 788 F.3d 341, 344-45 (2d Cir. 2015) (finding, through an analysis of the second *Blessing* factor alone, that a federal provision did not create enforceable rights under § 1983); *Torraco*, 615 F.3d at 137-39 (same). The majority disregards Supreme Court precedent in concluding otherwise, and its ruling will impose on foster care programs within this Circuit an unfortunate and unsupportable risk of "increased litigation, inconsistent results, and disorderly administration," none of which will inure to those programs' benefit. *Armstrong*, 135 S. Ct. at 1389 (Breyer, *J.*, concurring in part and concurring in the judgment).

The Plaintiff-Appellant seeks to enforce through § 1983 an alleged federal right of certain New York foster child caregivers to receive "foster care maintenance payments" under 42 U.S.C. §§ 672(a)(1) and 675(4)(A). No one disputes that New York *does* provide such payments—the Plaintiff-Appellant's actual grievance is that the payments are not, on average, large enough. Put another way, the Plaintiff-Appellant insists that New York's foster care maintenance payments do not "cover the cost of (and the cost of providing)" each of the items listed in § 675(4)(A), and that New York caregivers receiving inadequate payments have a § 1983 right to sue for the deficiency.

This argument raises the threshold question of how to calculate "the cost of (and the cost of providing)" the items listed in § 675(4)(A). The Plaintiff-Appellant essentially contends that there is an objective "cost" to each of

the enumerated items, and that New York caregivers receiving foster care maintenance payments have a § 1983 right to payments sufficient to cover that "cost." Relying on a 2007 study by the National Foster Parent Association, Children's Rights and the University of Maryland School of Social Work ("the 2007 Study"),[11] the Plaintiff-Appellant's complaint alleges that New York's foster care maintenance payments fail to cover the "cost" of the § 675(4)(A) items by as much as 43%. The Plaintiff-Appellant also claims that by consulting "readily available data" on the cost of the enumerated items, calculating the amount that these caregivers *should* be paid involves "nothing more than basic arithmetic." Br. for Pl.-Appellant at 33. The majority largely concurs, arguing that settling upon the appropriate payments is both a judicially administrable task and one requiring "only very limited review of policy determinations." Maj. Op. at 25.

These assertions do not withstand even minimal scrutiny. In reality, calculating the "cost" of the § 675(4)(A) items implicates numerous and difficult policy judgments about foster care and childrearing, not to mention overall program administration, that federal judges are ill equipped to make and that go *entirely unaddressed* in the statute that the majority interprets to unambiguously require such judgments. The Plaintiff-Appellant points to the 2007 Study as a benchmark for performing these cost calculations. But even a cursory examination of this study

11. Children's Rights et al., *Hitting the M.A.R.C.: Establishing Foster Care Minimum Adequate Rates for Children, Technical Report* (2007), http://www.childrensrights.org/wpcontent/uploads/2008/06/hitting_the_marc_summary_october_2007.pdf.

reveals how arbitrary the administration of § 675(4)(A) by federal judges would likely be.

As an initial matter, the 2007 Study bases its cost estimates on survey data from a Consumer Expenditure Survey of the Bureau of Labor Statistics of the United States Department of Labor, which is a *national* survey of household expenditures. Yet the Plaintiff-Appellant's own submissions imply that state foster care maintenance rates should be at least state, if not county-specific. *See* Br. for Pl-Appellant at 4 (protesting that New York's "foster care maintenance payment rates rank below those of States where the cost of living is significantly lower"). Whether and how a state should take account of geography in setting its maintenance rates is not addressed in the CWA and is certainly not a question of "basic arithmetic."

Furthermore, the 2007 Study's recommended payment rates do not vary based on a family's income level. *See* 2007 Study at 40. Instead, the 2007 Study creates a uniform maintenance rate based on the national spending habits of *middle-income* families, on the assumption that the spending habits of these families represent an accurate cost estimate for all families. *Id.* at 21. Yet the "cost" of a § 675(4)(A) item may vary based on a given family's income.[12] Should family income level affect the payment

12. For instance, as the State Amici note, "in the urban Northeast, food estimates for expenditures on children ages 12-14 in a two-parent family making more than $106,000 annually were $3,420," while "[e]stimates show that the same family composition making less than $61,680 spent only $2,340"—a difference of over $1,000. Br. of Amici Curiae States at 26-27.

to which a subset of a state's foster child caregivers are entitled? The majority does not provide an answer. Nor does the CWA. Finally, the 2007 Study addresses only a "basic" foster care rate and does not even attempt to calculate the costs of caring for a foster child with special needs, including both physical disabilities and emotional difficulties. *See id.* at 2 n.1. So what is a judge to do, when the CWA itself contains nothing "sufficiently specific and definite," *Wright*, 479 U.S. at 432, to guide the court's evaluation of any rate on which a state might settle for this important category of children?

The above-listed issues provide just a sampling of the problems inherent in recognizing a § 1983 right in §§ 672(a)(1) and 675(4)(A) of the CWA. This sampling is enough to show that it is fanciful to claim that Congress manifested in the CWA an unambiguous intent to confer on a subset of foster child caregivers this private right of action, with nary a statutory word as to the criteria to be used in reaching judgments about whether a state's payments for the items enumerated in § 675(4)(A) are sufficient. The Supreme Court has been particularly reluctant to conclude that a federal cause of action exists where, as here, the required remedy would entail judicial ratemaking, given that "[t]he history of ratemaking demonstrates that administrative agencies are far better suited to this task than judges." *Armstrong*, 135 S. Ct. at 1388 (Breyer, *J.*, concurring in part and concurring in the judgment). Still less are federal courts suited for this rate-setting task in the family-relations sphere, a "traditional area of state concern." *See Moore v. Sims*, 442 U.S. 415, 435, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979);

see also Thompson v. Thompson, 484 U.S. 174, 186, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988) (holding that the Parental Kidnapping Prevention Act did not create a private cause of action enforceable in federal court because doing so would "entangle[] [federal courts] in traditional state-law questions that they have little expertise to resolve").

The majority, likely cognizant of the irregular role it today forces upon federal judges, remains somewhat evasive about the precise contours of the § 1983 right that it recognizes. The right seems to "require" courts "to review how a state ha[s] determined the amounts it pays, including how it has quantified the costs of the specific expenses listed in Section 675(4)." Maj. Op. at 25. But the majority never specifies what this review should look like. At times, the majority implies that a subset of New York foster parents have a § 1983 right to require New York simply "to quantify costs for set expenses." *Id.* at 25. At other moments, the majority suggests that federal courts must engage in a *substantive* review of a state's foster care payment scheme, *id.* at 24, but it notably demurs from informing lower courts what this "very limited review" entails. In sum, this vague analysis is a far cry from the careful "methodical inquiry" that the Supreme Court expects from lower courts when they discern § 1983 rights in federal legislation. *See Blessing*, 520 U.S. at 343.

Whatever the majority's good intentions, exposing New York's foster care system to amorphous § 1983 claims that are not contemplated in the CWA is no way to further the CWA's goals, nor to benefit foster care systems more generally. Indeed, the majority's decision raises

the prospect that scarce foster care resources, instead of going to foster children, will be squandered in litigation destined to produce arbitrary and inconsistent results.[13] As the *Blessing* Court reminds us, when an asserted right is sufficiently amorphous that its "enforcement would strain judicial competence," this is a clear indication that Congress did not intend to create such a right. *See Blessing*, 520 U.S. 329 at 341, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (quoting *Livadas*, 512 U.S. at 132). Such is the case here.

C

In its hurried desire to create a right enforceable under § 1983, the majority also misconstrues the controlling precedent provided by the Supreme Court's 2015 *Armstrong* decision. The majority observes that "[t]he only federal review provided under the [CWA] is review by the Secretary for substantial conformity . . . , with the possibility of funding cutoffs as the sole remedy." Maj. Op. at 29. According to the majority, this limited remedy signifies that Congress did not intend to foreclose private enforcement of §§ 672(a)(1) and 675(4)(A). But *Armstrong* dictates the opposite conclusion: when Congress passes a statute that is "judicially unadministrable," and the "sole remedy" for a state's noncompliance is the Secretary's

13. The beneficiaries of the majority's scheme therefore may not be foster care parents or other caregivers, but the attorneys who bring claims on their behalf. *See* 42 U.S.C. § 1988(b)(2) (providing that "[i]n any action or proceeding to enforce a provision of [§1983], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the cost . . . .").

withholding of funds, Congress has manifested an intent for "the agency remedy that it provided [to be] exclusive." *Armstrong*, 135 S. Ct. at 1385 (quoting *Gonzaga*, 536 U.S. at 292 (Breyer, *J.*, concurring in the judgment)).

In *Armstrong*, private plaintiffs attempted to sue in equity to enforce § 30A of the Medicaid Act. *See id.* That section mandated that state Medicaid plans provide payments to hospitals that were "consistent with efficiency, economy, and quality of care" while "safeguard[ing] against unnecessary utilization of . . . care and services." 42 U.S.C. § 1396a(a)(30)(A). The Medicaid Act also specified that a federal agency should withhold funds from states that fail to meet this detailed mandate. *Id.* § 1396c. The Court concluded, based on "[t]he sheer complexity associated with enforcing § 30(A), coupled with the express provision of an administrative remedy," that the Medicaid Act "precludes private enforcement of § 30(A) in courts." *Armstrong*, 135 S. Ct. at 1385. Instead, the Court determined that the "judgment-laden" § 30A demonstrated a congressional desire to "achiev[e] the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking," while "*avoiding* the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action." *Id.* (emphasis added) (quoting *Gonzaga*, 536 U.S. at 292 (Breyer, *J.*, concurring in the judgment)).

Armstrong squarely controls our case. Not only does defining "the cost of" all the § 675(4)(A) items require myriad policy choices that have no legal answer, as in

Armstrong,[14] but the Medicaid Act and CWA also have near-identical enforcement schemes. Under the CWA, HHS must issue regulations specifying criteria to determine whether a state is in substantial conformity with the CWA and may ultimately withhold funding from states that do not meet these standards. Similarly, under the Medicaid Act, "the sole remedy Congress provided for" was "the withholding of Medicaid funds by" HHS. *Armstrong*, 135 S. Ct. at 1385.

The majority attempts to distinguish *Armstrong* by noting that *Armstrong* concerned a suit in equity rather than a suit under § 1983. But it is *harder* for a private plaintiff to enforce a federal provision under § 1983 than it is for that plaintiff to enforce a federal provision by suing to enjoin allegedly unlawful actions, as the *Armstrong* plaintiffs sought to do. *See Armstrong*, 135 S. Ct. at 1392 (Sotomayor, *J.*, dissenting).; *id.* at 1384 (majority opinion). Such a plaintiff, seeking to enforce a provision in equity, benefits from a presumption that an equitable cause of action exists and that Congress did not intend to foreclose such a cause of action. *Id.; see also id.* at 1384-86 (majority opinion). A plaintiff seeking to enforce a provision under § 1983, however, faces the opposite presumption: a plaintiff "must demonstrate specific congressional intent to *create*"

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14. Contrary to the majority's assertion, §§ 672(a)(1) and 675(4)(A) of the CWA are even more indeterminate than § 30(A) of the Medicaid Act because § 30(A)—unlike §§ 672(a)(1) and 675(4)(A)—at least provides *some* criteria for setting payment rates. *See* 42 U.S.C. § 1396a(30)(A) (specifying that payments be "consistent with efficiency, economy, and quality of care," while "safeguard[ing] against unnecessary utilization of . . . care and services").

an enforceable right. *Id.* at 1392; *see also Gonzaga*, 536 U.S. at 286. For this reason, the plaintiffs in *Armstrong* did not even attempt to enforce § 30(A) pursuant to § 1983; if they could not enforce the provision in equity, *a fortiori*, they could not do so pursuant to a § 1983 theory like the one relied on here.[15] *See Armstrong*, 135 S. Ct. at 1386 n.*; *id.* at 1392 (Sotomayor, *J.*, dissenting). Any distinctions between this case and *Armstrong*, then, actually hurt the Plaintiff-Appellant.

D

Rather than acknowledging the controlling weight of the Court's *Armstrong* precedent, the majority invokes out-of-circuit case law, as well as two cases—each

15. The majority argues that it must be easier to bring a claim under § 1983 than in equity because Congress passed § 1983 to create an additional means by which "plaintiffs [can] sue the government for civil rights violations." Maj. Op. at 30-31. But its comparison is inapt. Section 1983 provides different *remedies* against different *defendants* for civil rights violations, unavailable in equity. It is precisely because of the "variety of remedies—including damages—[available] from a broad range of parties" under § 1983 that a plaintiff "invoking § 1983" cannot "simply point[] to background equitable principles authorizing the action," but must instead "demonstrate specific congressional intent to *create* a statutory right." *Armstrong*, 135 S. Ct. at 1392 (Sotomayor *J.*, dissenting); *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 119, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989) (Kennedy *J.*, concurring) (noting that equity does "not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983").

three decades old—in which the Supreme Court held that Spending Clause legislation provided a source of individually enforceable rights. *See Wright*, 479 U.S. at 418; *Wilder*, 496 U.S. at 498. The majority's approach to the slim precedent on which it *does* rely is flawed for at least four reasons.

First, as explained above, the Court has stated on more than one occasion that "the ready implication of a § 1983 action that *Wilder* exemplified" has been "repudiate[d]" by more recent precedent. *See Armstrong*, 135 S. Ct. at 1386 n.* (citing *Gonzaga*, 536 U.S. at 283). Thus, *Wilder*'s precedential value (along with *Wright*'s) is limited at best.[16] *See Doe v. Gillespie*, 867 F.3d 1034, 1040 (8th Cir. 2017) ("Later decisions, however, show that the governing standard for identifying enforceable federal rights in spending statutes is more rigorous [than *Wilder*] . . . . [T]he Court's 'repudiation' of *Wilder* is the functional equivalent of 'overruling,' as the Court uses the terms interchangeably.").

Second, even ignoring their precarious status as precedent, *Wright* and *Wilder* involved statutory provisions that were notably different from those at issue here. The majority's approach to the CWA here echoes that of the Sixth and Ninth Circuits, which have both concluded that §§ 672(a)(1) and 675(4)(A) are judicially administrable under § 1983 because courts can assess

16. Although our Circuit determined in *Briggs v. Bremby*, 792 F.3d 239, 244 (2d Cir. 2015) (Calabresi *J.*,), that *Wright* and *Wilder* are still good law, *Briggs* did not cite *Armstrong*, nor did it address *Armstrong*'s disavowal of *Wilder*.

the states' rate calculations for "reasonable[ness]." Maj. Op. at 25-26; *D.O. v. Glisson*, 847 F.3d 374, 380 (6th Cir. 2017); *Cal. State Foster Parent Ass'n v. Wagner*, 624 F.3d 974, 981 (9th Cir. 2010). Yet "[i]n both *Wright* and *Wilder* the word 'reasonable' occupied a prominent place in the critical language of the statute or regulation."[17] *Suter*, 503 U.S. at 357. By contrast, the word "reasonable" is entirely absent from § 672(a)(1), the relevant provision of the CWA. *Cf. Armstrong*, 135 S. Ct. at 1389 (Breyer, *J.*, concurring in part and concurring in the judgment) (distinguishing statutes that require courts to review rates for "reasonableness," which are administrable, from those that require courts "to engage in [] direct rate-setting," which are not). Given that the ultimate inquiry in this case is one of congressional intent, and *unambiguous* intent at that, the majority should not follow the Sixth and Ninth Circuits in improperly rewriting the text of the CWA. *Cf. E.P.A. v. EME Homer City Generation, L.P.*, 572 U.S. 489, 134 S. Ct. 1584, 1601, 188 L. Ed. 2d 775 (2014) ("[A] court's task is to apply the text of [a] statute, not to improve upon it." (quoting *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 126, 110 S. Ct. 456, 107 L. Ed. 2d 438 (1989))).

17. *Wilder* involved the (since-repealed) Boren Amendment, 42 U.S.C. § 1396a(a)(13)(A), which required a state plan for medical assistance to provide payments "which the State finds, and makes assurances satisfactory to the Secretary, *are reasonable and adequate*." 496 U.S. at 502-03 (emphasis removed). And *Wright* involved a regulation requiring state public housing authorities to impose a ceiling on the rent charged to low-income tenants that took into account, among other things, "*reasonable* amounts of utilities." 479 U.S. at 419-21 & n.3 (emphasis added).

Third, in both *Wright* and *Wilder*, the relevant statute and regulations provided detailed guidance to the states as to how they should calculate the rates in question.[18] *See Wilder*, 496 U.S. at 519; *Wright*, 479 U.S. at 431-32; *see also Suter*, 503 U.S. at 359 (noting that the Court in *Wilder* "relied in part on the fact that the statute and regulations set forth in some detail the factors to be considered in determining the methods for calculating rates"). As a result, in *Wright* and *Wilder*, a reviewing federal court had some objective benchmark for evaluating state rates. Sections 672(a)(1) and 675(4)(A), by contrast, provide *no* guidance as to how a state should calculate its rates, nor do HHS's regulations.

Finally, as the Eighth Circuit has noted, "unlike the CWA sections at issue here, the relevant provisions in the Medicaid Act [at issue in *Wilder*] did not focus on defining the conditions that must be met in order for a participating state's expenditures to be eligible for federal matching funds and, therefore, did not evince the degree of removal [from the provision's purported beneficiaries] we now confront." *Midwest Foster Care*, 712 F.3d at 1199; *see also Wright*, 479 U.S. at 420 (finding individual right

18. That said, the Court would probably now hold that the *statute*, rather than its implementing regulations, must provide an adequate benchmark; the existence of a right enforceable pursuant to § 1983 is a matter of Congressional rather than agency intent. *Cf. Alexander*, 532 U.S. at 291 ("Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not."). This is yet another reason why neither *Wilder* nor *Wright* controls here.

to claim rent overcharges under a statute that provided that "[a] family shall pay as rent the highest of" specifically defined amounts). In sum, then, the CWA does not even meet the lenient standard for articulating an enforceable right that was set during what the Court has characterized as its "*ancien regime*" of implied rights jurisprudence. *Alexander*, 532 U.S. at 287. It certainly cannot meet the more exacting test the Court now employs.

* * *

Statutes enacted under the Spending Clause create privately enforceable rights under § 1983 only if they do so "unambiguously." *See Gonzaga*, 536 U.S. at 280. Courts demand this level of clarity out of respect for congressional drafters and state legislators, both of whom are equal parties to the statutory "contract." *See Barnes v. Gorman*, 536 U.S. 181, 186, 122 S. Ct. 2097, 153 L. Ed. 2d 230 (2002) (quoting *Pennhurst*, 451 U.S. at 17). Here, Congress did not provide for private enforcement of §§ 672(a)(1) and 675(4)(A) pursuant to § 1983—unambiguously or otherwise. The states, for their parts, did not agree to subject their foster care programs to the continuous review of federal courts in § 1983 litigation—litigation that will impose on these programs the burdens of both incessant suit *and* unpredictable outcomes. The majority's decision today is inconsistent with controlling precedent and fails to give the choices made by Congress and the states in the CWA the respect they deserve. I respectfully—but firmly—dissent.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 23, 2017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

14-2919-cv

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of October, two thousand seventeen.

Guido Calabresi, Debra Ann Livingston, *Circuit Judges*, William K. Sessions III, *District Judge*.*

NEW YORK STATE CITIZENS' COALITION FOR CHILDREN,

Plaintiff-Appellant,

v.

SHEILA J. POOLE**, ACTING COMMISSIONER OF THE NEW YORK STATE OFFICE OF CHILDREN & FAMILY SERVICES, IN HER OFFICIAL CAPACITY,

Defendant-Appellee.

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* The Honorable William K. Sessions III, of the United States District Court for the District of Vermont, sitting by designation.

** Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Acting Commissioner Sheila J. Poole is automatically substituted for former Acting Commissioner Roberto Velez as Defendant-Appellee in this case.

Appendix B

ORDER

The district court (Kuntz, *J.*) having concluded proceedings in the above-captioned case subsequent to the Court's summary order of October 29, 2015, which remanded the case to the district court pursuant to *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), and the Plaintiff-Appellant having sought restoration of jurisdiction over the appeal in an October 9, 2017 letter to the Clerk of Court, we hereby order that jurisdiction in the above-captioned case be RESTORED.

Both the Plaintiff-Appellant and the Defendant-Appellee are further ordered to submit, within 30 days from the date of this order, simultaneous letter-briefs of no more than 25 double-spaced pages, addressing the question whether the district court correctly concluded that the Plaintiff-Appellant has Article III standing to pursue its claims, and also addressing the merits and, in particular, how intervening case law since the initial briefing before this Court may affect the merits of this case.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court
/s/ Catherine O'Hagan Wolfe

APPENDIX C — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED SEPTEMBER 29, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 10-CV-3485 (WFK) (RER)

NEW YORK STATE CITIZENS' COALITION FOR CHILDREN,

Plaintiff,

v.

ROBERTO VELEZ, COMMISSIONER OF THE NEW YORK STATE OFFICE OF CHILDREN & FAMILY SERVICES, IN HIS OFFICIAL CAPACITY,

Defendant.

September 29, 2017, Decided
September 29, 2017, Filed

DECISION AND ORDER

WILLIAM F. KUNTZ, II, United States District Judge:

The New York State Citizens' Coalition for Children (the "Coalition" or "Plaintiff") is a New York nonprofit organization whose mission is to advocate for and provide

support to foster parents. On July 29, 2010, Plaintiff filed suit against the Commissioner of the New York State Office of Children & Family Services ("Defendant"), alleging New York State's basic foster care reimbursement rates do not comply with the Adoption Assistance and Child Welfare Act ("CWA"), 42 U.S.C. §§ 670-679c and seeking declaratory and injunctive relief. *See generally* Compl., ECF No. 1. On July 17, 2014, this Court issued a Decision and Order granting Defendant's motion to dismiss Plaintiff's Complaint, ECF No. 66, which Plaintiff appealed, *see* ECF No. 68. On October 29, 2015, the Second Circuit issued a summary order remanding the case with instructions that this Court "address the disputed issue of Article III standing." *N.Y. State Citizens' Coal. for Children v. Velez*, 629 F. App'x 92, 94-95 (2d Cir. 2015). This Court referred the question of standing to Magistrate Judge Ramon E. Reyes, Jr. After considering testimony from an evidentiary hearing on January 28, 2016, as well as the parties' proposed findings of fact and conclusions of law, ECF Nos. 76 & 77, Magistrate Ridge Reyes issued a Report and Recommendation ("R&R") on November 7, 2016, recommending the Court find Plaintiff has Article III standing, ECF No. 78. Defendant filed Objections to the R&R on November 21, 2017, Objections, ECF No. 79, and Plaintiff filed its response to the Objections on December 13, 2017, Resp., ECF No. 81. After a *de novo* review of the record, the Court ADOPTS the R&R in full.

BACKGROUND

The Court assumes the parties' familiarity with the underlying facts and procedural history of this case, which are detailed in Magistrate Judge Reyes's R&R.

Appendix C

LEGAL STANDARD

In reviewing a report and recommendation, the Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The Court is "permitted to adopt those sections of a magistrate judge's report to which no specific objection is made, so long as those sections are not facially erroneous." *Norman v. Metro. Transp. Auth.*, 13-CV-1183, 2014 U.S. Dist. LEXIS 129010, 2014 WL 4628848, at *1 (E.D.N.Y. Sept. 15, 2014) (Matsumoto, J.). When a party raises a specific objection to a report and recommendation, however, the Court must conduct a *de novo* review of the contested portions. *Id.; cf. Barratt v. Joie*, 96-CV-0324, 2002 U.S. Dist. LEXIS 3453, 2002 WL 335014, at *1 (S.D.N.Y. Mar. 4, 2002) (Swain, J.) ("When a party makes only conclusory or general objections, or simply reiterates his original arguments, the Court reviews the Report and Recommendation only for clear error."). Furthermore, even on *de novo* review, "a district judge will nevertheless 'ordinarily refuse to consider arguments, case law and/or evidentiary material which could have been, but was not, presented to the Magistrate Judge in the first instance.'" *Kennedy v. Adamo*, 02-CV-1776, 2006 U.S. Dist. LEXIS 93900, 2006 WL 3704784, at *1 (E.D.N.Y. Sept. 1, 2006) (Vitaliano, J.) (quoting *Haynes v. Quality Mkts.*, 02-CV-0250, 2003 U.S. Dist. LEXIS 28642, 2003 WL 23610575, at *3 (E.D.N.Y. Sept. 22, 2003) (Scott, J.)).

Appendix C

DISCUSSION

On remand from the Second Circuit, Magistrate Judge Reyes concluded that Plaintiff has standing to bring its claims. R&R at 8. Defendant's Objections primarily contest the Magistrate Judge's determination that Plaintiff has suffered, and is likely to continue to suffer, a concrete injury. *See generally* Objections. After considering Defendant's Objections, conducting a *de novo* review of the contested portions of the R&R, and reviewing the uncontested portions for clear error, the Court ADOPTS the R&R in its entirety.

Article III standing is "the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). To establish standing, "a plaintiff must have suffered an 'injury in fact' that is 'distinct and palpable'; the injury must be fairly traceable to the challenged action; and the injury must be likely redressable by a favorable decision." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983) (explaining "threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical'").

Ordinarily, an organization may sue either "on behalf of its members, in which case it must show, *inter alia*, that some particular member of the organization would have had standing to bring the suit individually," *N.Y. Civil*

Liberties Union v. N. Y.C. Transit Auth., 684 F.3d 286, 294 (2d Cir. 2012), or "in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy," *Warth*, 422 U.S. at 511. But Second Circuit law is clear that, in actions brought pursuant to 42 U.S.C. § 1983, organizations "do[] not have standing to assert the rights of [their] members" and must "independently satisfy the requirements of Article III standing as enumerated in *Lujan*." *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011); *see also Knife Rights, Inc. v. Vance*, 802 F.3d 377, 388 (2d Cir. 2015) (explaining organizational plaintiffs suing on their own behalf "must independently satisfy the requirements of Article III standing").[1] Because Plaintiff is an organization that "seeks declaratory and injunctive relief under 42 U.S.C. § 1983," Compl. at 2, it must prove it satisfies each requirement of Article III standing without reference to the individual standing of its members.

I. Injury

The Second Circuit directed this Court to consider, on remand, whether Plaintiff adequately alleged injury—specifically, whether the Coalition suffered some "'perceptible opportunity cost' associated with the New York State foster care program." *Velez*, 629 F. App'x at

1. To the extent that Defendant argues Plaintiff cannot have standing without an individual foster parent as a named plaintiff, he is quite simply wrong on the law, as numerous Second Circuit decisions make abundantly clear. *E.g., N.Y. Civil Liberties Union*, 684 F.3d at 294-95 (finding standing in § 1983 action where organization was sole plaintiff).

94-95. Magistrate Judge Reyes determined Plaintiff had established an injury-in-fact because it had shown that: (1) it spent 100 hours "responding to phone calls from foster parents unable to provide for their children under the current minimum basic rate"; (2) it was "hardly speculative to expect existing reimbursement rates to remain unchanged" or "to expect the behavior of foster parents to continue unchanged"; and (3) "[a]bsent some change, it is clear that . . . [foster parents] will continue contacting the Coalition for advice and assistance." R&R at 6-8. The Court agrees.

"The Supreme Court has held that an organization establishes an injury-in-fact if it can show that it was 'perceptibly impaired' by defendant's actions." *Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 2017 WL 3596995, at *3 (2d Cir. 2017) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982)). Consistent with this holding, the Second Circuit has made clear that "only a 'perceptible impairment' of an organization's activities is necessary for there to be an 'injury in fact.'" *Nnebe*, 644 F.3d at 157 (quoting *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993)). "[W]here an organization diverts its resources away from its current activities, it has suffered an injury that has been repeatedly held to be independently sufficient to confer organizational standing." *Oyster Bay*, 868 F.3d 104, 2017 WL 3596995, at *4; *see also Nnebe*, 644 F.3d at 157 (explaining "expenditure of resources that could be spent on other activities" constitutes injury). Finally, where, as here, a plaintiff seeks only declaratory and injunctive

relief, the asserted injury must not be speculative. *See, e.g., Knife Rights*, 802 F.3d at 388.

The record supports the Magistrate Judge's finding that the resources Plaintiff expends advising and assisting foster parents with regard to inadequate reimbursement rates constitutes an injury-in-fact. Plaintiff has shown it: (1) spends a nontrivial amount of time providing such advice and assistance, *see* Gasior Decl. Ex. 1 ("Tr."), at 35:22-24, ECF No. 77-1 (Transcript of Hearing Before Magistrate Judge Reyes); *cf. Nnebe*, 644 F.3d at 157 (finding, for purposes of standing, an organization incurs "some perceptible opportunity cost" even where it only counsels a few individuals each year); (2) expends limited resources, which would otherwise be spent on other activities relevant to Plaintiff's mission, on this advice and assistance, *see* Tr. 33:5-13, 35:25-36:19; *cf. Nnebe*, 644 F.3d at 157 (explaining "expenditure of resources that could be spent on other activities" is relevant to standing inquiry);[2] and (3) is likely to continue expending resources in this manner absent the requested relief, *see* Tr. 30:13-31:11, 39:11-40:17. And although it is true that New York's reimbursement plan allows local social services districts to determine their own reimbursement rates, the State does not reimburse districts beyond the maximum

2. Of course, the fact that the expenditures Plaintiff alleges constitute an injury are also consistent with Plaintiff's mission does not defeat standing. *E.g., Nnebe*, 644 F.3d at 167 ("[S]o long as the economic effect on an organization is real, the organization does not lose standing simply because the proximate cause of that injury is 'the organization's noneconomic interest in encouraging [a particular policy preference]." (quoting *Havens*, 455 U.S. at 379 n.20)).

reimbursement rate that Defendant sets. Gasior Decl. Ex. 5, at 7-9. It is therefore likely, not merely speculative, that local social services districts will continue to set less-than-adequate reimbursement rates—meaning it is also likely, not speculative, that Plaintiff will necessarily continue to expend resources on providing advice and assistance to foster parents—unless Defendant is made to comply with the CWA, including by implementing a minimum reimbursement rate and generally setting rates that are adequate.

Through what the Court construes as two distinct objections to the R&R, Defendant attempts to characterize Plaintiff's injury—which the Magistrate Judge found to be "concrete, clearly defined, and ongoing," R&R at 7—as "largely speculative," Objections at 3-7. First, Defendant endeavors to cast doubt on whether it is likely, as opposed to speculative, that foster parents will need to continue contacting Plaintiff for advice and assistance. Objections at 3. In sum and substance, Defendant's argument is that reimbursement rates have increased since the suit was filed and they might increase again—perhaps never to the level Plaintiff seeks through this litigation, but to a level that theoretically could meet foster parents' needs—such that Plaintiffs advice and assistance will no longer be needed. *See id.* at 3-4. The Court finds this hypothetical unavailing.

As an initial matter, Defendant advances this theory for the first time in his Objections, and it is well settled that "a litigant is not allowed to oppose a magistrate's Report and Recommendation by suddenly asserting new

arguments that were not presented to the magistrate originally." *Kennedy*, 2006 U.S. Dist. LEXIS 93900, 2006 WL 3704784, at *3. Furthermore, Defendant's submissions to the Magistrate Judge included both (1) a declaration in which David Haase stated "that the reimbursement rate has been 'repeatedly enhanced over the years,'" Def.'s Proposed Findings of Fact at 8 n.8, ECF No. 77; Gasior Decl. Ex. 6, ECF No. 77-1; and (2) an argument section advancing the theory that Plaintiff's asserted injuries are speculative, but for reasons unrelated to changing reimbursement rates, Def.'s Proposed Findings of Fact at 16-18. It is therefore clear that Defendant "could have made this argument to Judge Reyes, [but] chose not to, [and so] the court need not consider it." *Santiago v. City of New York*, 15-CV-0517, 2016 U.S. Dist. LEXIS 132376, 2016 WL 5395837, at *3 (E.D.N.Y. Sept. 26, 2016) (Garaufis, J.).

Even assuming, *arguendo*, that Defendant's first objection had been properly raised, it is not an objection to *standing*, which is the focus of this Decision, because it concerns the *legal merits* of the action. Specifically, the objection, fundamentally, is to the rate Plaintiff contends is adequate as opposed to whether Plaintiff "is the wrong individual to bring these legal claims," and it is therefore "not properly understood as [a] standing argument[]" and must be set aside. *Curtis v. Cenlar FSB*, 13-CV-3007, 2013 U.S. Dist. LEXIS 161687, 2013 WL 5995582, at *2 (S.D.N.Y. Nov. 12, 2013) (Cote, J.); *cf. City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982) (explaining that "a defendant's voluntary cessation of a challenged practice does not

deprive a federal court of its power to determine the legality of the practice").

Second, Defendant questions whether Plaintiff's injury is likely, as opposed to speculative, under *Knife Rights*. Objections at 4. Specifically, Defendant argues the Magistrate Judge failed to take into account the fact that Plaintiff's injury is "dependent upon the actions of a third party," and thus improperly distinguished from *Knife Rights*.[3] *Id.* at 4-5 (explaining reimbursement rates "depend upon the independent action of third parties—the

3. But *Knife Rights* is not to the contrary. In that case, the Second Circuit determined that the organizational plaintiffs did not have standing to sue the City of New York and the New York County District Attorney for unconstitutionally applying a law criminalizing the possession of "gravity knives." *Knife Rights*, 802 F.3d at 379. The Second Circuit explained that, because the suit was for injunctive relief and the organizational plaintiffs themselves did not suffer any threat of prosecution, the organizational plaintiffs would have had to "show that both anticipated expenditures and ensuing harm to their organizations' activities are 'certainly impending,'" but they "ha[d] not even attempted to make such a showing." *Id.* at 388-89 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)). The same cannot be said of Plaintiff here, as discussed *supra*. Assuming *Knife Rights* turned on the organizational plaintiffs' injury being too "speculative because it depended on," *inter alia*, "the independent actions of a third party, law enforcement arresting and prosecuting the plaintiff's organization members," R&R at 7, the instant case is distinguishable. Reimbursement rate-setting by local social services districts cannot be deemed an "independent action[] of a third party" because the districts rely on Defendant for the funds necessary to reimburse foster parents, as discussed *supra*. Thus, even under a reading that is generous to Defendant, *Knife Rights* is not controlling.

[local social services districts] who actually administer foster care programs and set their own foster care rates"). The Court finds this second objection as unpersuasive as the first.

In sum, having conducted a *de novo* review,[4] the Court finds, for the reasons discussed above, that Defendant's objection fails because it is hardly speculative to expect that the local social services districts will not provide the reimbursement rates Plaintiff argues are necessary unless Plaintiff is granted the relief it seeks.

II. Traceability and Redressability

Because Defendant does not object to the Magistrate Judge's findings on traceability and redressability, the Court assesses whether those sections of the R&R were "facially erroneous," *Norman*, 2014 U.S. Dist. LEXIS 129010, 2014 WL 4628848, at *1, and determines they are not. There is more than sufficient evidence in the record

4. Plaintiff is correct that the Court may review the R&R for clear error on this point, as Defendant largely copied and pasted, often word-for-word, his argument to the Magistrate Judge into his Objections to this Court. *Cf. Blasters, Drillrunners & Miners Union Local 29 v. Trocom Constr. Corp.*, 10-CV-4777, 2012 U.S. Dist. LEXIS 44236, 2012 WL 1067992, at *2 (E.D.N.Y. Mar. 29, 2012) (Matsumoto, J.) (explaining that, *where* "objections to a Report and Recommendation merely rehash arguments presented to the Magistrate Judge, the standard of review undertaken by the District Court is not *de novo* but clear error"). *Compare* Def.'s Proposed Findings of Fact at 17-18, *with* Objections at 6-7. The Court nevertheless reviewed portions of the R&R *de novo*, and reached the same *conclusion*.

proving that, as to traceability, foster parents are making phone calls because of inadequate reimbursement rates; and as to redressability, the need for these calls would be negated by the relief Plaintiff requests.

CONCLUSION

For the foregoing reasons, the Court ADOPTS the R&R in full. The Clerk of Court is respectfully directed to terminate the motion pending at ECF No. 78.

SO ORDERED.

/s/ WFK
HON. WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

Dated: September 29, 2017
Brooklyn, New York

APPENDIX D — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED NOVEMBER 7, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No 10-CV-3485

NEW YORK STATE CITIZENS' COALITION FOR CHILDREN,

Plaintiff,

v.

ROBERTO VELEZ, ACTING COMMISSIONER OF THE NEW YORK STATE OFFICE OF CHILDREN & FAMILY SERVICES, IN HIS OFFICIAL CAPACITY,

Defendant.

November 7, 2016, Decided;
November 7, 2016, Filed

REPORT & RECOMMENDATION

to the Honorable William F. Kuntz,
United States District Judge.

RAMON E. REYES, JR., U.S.M.J.:

Appendix D

The New York State Citizens' Coalition for Children (the "Coalition") commenced this action against Roberto Velez, acting Commissioner of the New York State Office of Children & Family Services ("Defendant" or the "State"),[1] seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. (Dkt. No. 1 (the "Complaint")). The Coalition alleges that the State's basic foster parent reimbursement rate is inadequate and violates the Child Welfare Act, 42 U.S.C. §§ 670-679c (the "CWA"). (Complaint at 5-7).

On July 17, 2014, Your Honor granted Defendant's motion to dismiss, finding that there is no private right of action under 42 U.S.C. § 1983 for claims brought pursuant to §§ 672(a) or 675(4)(a) of the CWA. (Dkt. No. 66). Following the Coalition's appeal, the Second Circuit remanded the matter "to address the disputed issue of Article III standing[,]" which was raised for the first time on appeal. *New York State Citizens' Coalition for Children v. Velez*, 629 Fed. Appx. 92, 94 (2d Cir. 2015). Your Honor then referred the matter to me to conduct an evidentiary hearing and issue a report and recommendation on the issue of standing. After a brief period of discovery on the standing issue, the evidentiary hearing was held. The parties have submitted post-hearing findings of fact and conclusions of law. For the reasons stated below, I respectfully recommend the Coalition has Article III standing to pursue this action.

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1. The action originally named Gladys Carrion as defendant. Velez succeeded Carrion as Commissioner of the New York State Office of Children & Family Services, and is now the named defendant in this action. Also, the Coalition's website indicates that it has recently changed its name to the Adoptive and Foster Family Coalition of New York. *See* www.affcny.org.

Appendix D

FINDINGS OF FACT

These findings of fact are based upon the testimony of Sarah Gerstenzang ("Gerstenzang"), the Coalition's former executive director and current treasurer, and Richard Heyl De Ortiz ("De Ortiz"), the Coalition's executive director, at the hearing on standing (the "Hearing"), (Tr. 4:24-51; 6:5; 32:1-12), and reports annexed to the Defendant's Proposed Findings of Fact, (Dkt. No. 77).

I. The CWA

The CWA provides federal funds to states that make reimbursement payments to foster parents to offset the cost of raising a foster child. 42 U.S.C. § 670 *et seq.* States that accept funding under the CWA are required to offer reimbursement payments sufficient to cover certain costs incurred by foster parents. (Complaint at 5). New York State receives CWA funding. *Id* at 6. Under the State's reimbursement plan (the "Plan"), reimbursement rates are set by local social services districts. *Id.* The Plan sets maximum basic reimbursement rates but permits the local social services districts to offer lower basic rates. *Id* at 7. The Plan also provides for two higher rate levels for children with greater need. (Tr. 11:5-13). Only the basic rate is challenged here. (Complaint at 1-2).

The Coalition alleges that the lack of a minimum basic reimbursement rate has resulted in a basic reimbursement rate at least "43% below the actual costs of raising a child in foster care...." (Complaint at 2). The Coalition

commenced this action pursuant to 42 U.S.C. § 1983, seeking a declaration that the Plan does not to comply with federal law and violates the Coalition's federal rights, and a permanent injunction requiring the State to set an adequate minimum basic reimbursement rate. (Complaint at 15).

II. The Coalition

The Coalition was founded in the 1960s to advocate for and provide support to foster parents. (Tr. 7:17-8:1). Currently, the Coalition consists of one full-time and three-part time employees. (Tr. 33:7-10). The part-time employees work a combined 45 hours per week. *Id.* The Coalition's core mission is to "provide information, support and advocacy for foster and adoptive families across the state." (Tr. 8:3-4). In furtherance of this mission, it maintains an informational website and "a hotline where people can call...for information[]" or advice. (Tr. 8:7-24). The Coalition also sponsors a yearly conference for foster parents and professionals. *Id.* The Coalition does not provide direct care to foster children. (Tr. 18:8-12, 24-25).

At the Hearing, witnesses stated that the Coalition was forced to divert its limited resources, in the form of employee time, responding to the low reimbursement rates. These responses included: (1) trying to locate a "foster parent insurance product" that would be affordable under the current rates (Tr. 12:14-18); (2) fielding phone calls from foster parents concerned about inadequate reimbursement rates and providing advice on how to petition for higher rates (Tr. 22:25-23:15; 34:11-22; 35:12-

24); (3) advising parents on how to access resources, such as clothing, that they could not otherwise afford (Tr. 19:9-14); and (4) maintaining a publicly available list of reimbursement rates by county (Tr. 20:4-12).

Attempts to locate an insurance program consumed approximately 100 hours of work. (Tr. 15:2-3). De Ortiz stated that the Coalition received between one and three phone calls from foster parents per week regarding inadequate reimbursement rates, each call requiring one to two hours of employee time. (Tr. 35:20-24). De Ortiz testified that if the basic rate was raised, the Coalition would not receive these calls. (Tr. 42:16-18). Gerstenzang provided similar testimony (Tr. 30:22-31:1). According to the testimony provided, creating and maintaining a list of reimbursement rates by county consumed approximately 80 hours of work, but the list was not compiled every year. (Tr. 25:22-26:4).

Gerstenzang estimated that the Coalition diverted 200 hours of labor per year from core activities to researching and disseminating information related to the reimbursement rates. (Tr. 29:7-9). The Coalition claims an additional 100 hours were spent fielding phone calls.[2] (Dkt. No. 76 (Plaintiff's Proposed Findings of Fact and Conclusions of Law ("Pl.'s Br.") at 12)

2. De Ortiz only testified to the number of call received per week but not the total amount of time expended. (Tr. 35:20-24). The estimate of 100 hours is first raised in the Plaintiff's Proposed Findings of Fact and Conclusions of Law. (Pl.'s Br. at 12). However, it is consistent with the number and length of calls to which De Ortiz testified.

The Coalition's witnesses testified that the time diverted to responding to the low reimbursement rates could be better spent engaging in outreach and support to foster parent groups. (Tr. 15:4-17:10). The Coalition would also have more time and resources to dedicate to activities such as providing foster families with trauma training and information about tax filings, (Tr. 15:6-16:16), as well as information and training regarding legal rights and the family court process, (Tr. 36:14-19).

Additionally, the Coalition's witnesses testified that "not having adequate rates...impacts [the Coalition's] ability to have a robust membership..." (Tr. 10:2-5). In particular, De Ortiz testified that people frequently call the Coalition expressing an interest in fostering children but do not apply to become foster parents or coalition members because of the low reimbursement rates. (Tr. 33:20-34:10). However, expert reports submitted by Defendant suggest that changes to the reimbursement rate would not impact the number or quality of foster parents. (Dkt. No. 77 Ex. 3 (Declaration of Joseph Doyle (Doyle Decl.)) at 15-17).

DISCUSSION

I. Applicable Standards

Standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). To satisfy the standing requirement, a "plaintiff must have suffered an 'injury in fact'...the

injury has to be fairly...traceable to the challenged action of the defendant...[and] it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Carter v. HealthPort Technologies, LLC*, 822 F.3d 47, 55 (2d Cir. 2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (emphasis and brackets removed).

Generally, an organization may have either associational standing to bring suit on behalf of its members or individual standing to bring suit on its own behalf. *See New York Civil Liberties Union v. New York Transit Auth.*, 684 F.3d 286, 295 (2d Cir. 2011). However, the rights secured by Section 1983 can only be vindicated by the party directly injured and as such associational standing is not recognized. *See Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cri. 2011) ("[A]n organization does not have standing to assert the rights of its members in a case brought under 42 U.S.C. § 1983[.]).

Because this action was commenced pursuant to Section 1983, the Coalition must demonstrate individual standing. To do so, the Coalition must demonstrate that it, not its members, satisfies the injury, traceability, and redressability requirements. *See Warth*, 422 U.S. at 511. The injury to the Coalition must be "(a) concrete and particularized...and (b) actual or imminent, not conjectural or hypothetical[.]" *Carter*, 822 F.3d at 55 (internal quotations omitted).[3] Injury exists when an organization

3. Defendant incorrectly argues that the injury must also be to a right, privilege, or immunity protected under Section 1983. (Dkt. No. 77 (Defendant's Proposed Findings of Fact and Conclusions of

is forced to expend its limited resources, resulting in an "opportunity cost" such that there is a "perceptible impairment' of its activities. *Nnebe*, 644 F.3d at 157. While the claimed harm must be concrete, rather than abstract, only scant evidence of an opportunity cost is required. *See id.* at 156-57 ("The evidence supplied by [plaintiff], while 'scant,' is not abstract). The Second Circuit has consistently found injury where an organization expends time and effort responding to the defendant's actions. *See e.g. Nnebe*, 644 F.3d 147 (finding injury where an organization, in response to a government policy, spent time advising and counseling its members); *Ragin v. Harry Mackowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993) (finding injury where an organization with a small staff spent time responding to defendant's action); *Mental Disability Law Clinic v. Hogan*, 853 F. Supp.2d 307, 314 (E.D.N.Y. 2012) (finding injury even though the 600 hours an organization spent responding to the challenged government policy was "very little on a weekly basis."). Past harm is insufficient where the plaintiff seeks only declaratory and injunctive relief. *See Knife Rights, Inc., v. Vance*, 802 F.3d 377, 388 (2d Cir. 2015).

Law (Df.'s Br.)) at 20-21). Defendant relies on a misinterpretation of dicta from *Gem Financial Services, Inc. v. City of New York*, No. 13-cv-1686 (MKB), 2014 U.S. Dist. LEXIS 34770, 2014 WL 1010408 at *9 n.8 (E.D.N.Y. Mar. 17, 2014). (Df.'s Br. at 20). *Gem Financial* concerned a Rule 12(b)(6) motion, and did not decide the issue of standing. The limited discussion of standing, confined to a footnote, observes that the plaintiff must both state a claim upon which relief can be granted and also satisfy the standing requirement. *Gem Financial Services, Inc.*, 2014 U.S. Dist. LEXIS 34770, 2014 WL 1010408 at *9 n.8.

Standing further requires the injury be fairly traceable to the defendant's conduct and likely redressable by a favorable judicial decision. *See Lujan*, 504 U.S. at 590. The traceability requirement requires a causal connection between the conduct and the injury. *See In re Holocaust Victim Assets Litigation*, 225 F.3d 191, 195-96 (2d Cir. 2000). The redressability requirement is satisfied where it is likely that the plaintiff will "benefit in a tangible way from the court's intervention." *Id.* (quoting *Warth*, 422 U.S. at 508. This standard does not require certainty. *See Mhany Mgmt, Inc. v. Cnty of Nassau*, 819 F.3d 581, 602 (2d Cir. 2016) ("Redressability is not a demand for mathematical certainty.") (internal quotations omitted); *see also Huntington Branch, N.A.A.C.P. v. Town of Huntington N.Y.*, 689 F.2d 391, 394 (2d Cir. 1982) ("[T]he requirement that the relief requested be likely to redress the injuries alleged...is not a demand for complete certainty....To ask plaintiffs to show more than that they would benefit in a tangible way from the court's intervention, would be to close our eyes to the uncertainties which shroud human affairs.") (internal quotations and citations omitted).

II. The Coalition Has Standing

The Coalition bases its standing on four injuries purportedly caused by the inadequate basic reimbursement rates: (1) spending 100 hours researching a foster parent insurance product; (2) spending 80 hours compiling a list of reimbursement rates by county, (3) struggling to grow a robust membership; and, (4) spending 100 hours responding to telephone calls from foster parents

frustrated about the inadequate basic rates. (Pl's Br. at 7, 9, 10, 12).

Defendant argues for a variety of reasons that the Coalition's "evidence of injury was not distinct and palpable and not fairly traceable solely to the basic" reimbursement rate, nor "likely redressable by a favorable decision." (Df.'s Br. at 14, 16-18). Notwithstanding these arguments, some of which are well-founded, the Coalition has established its standing with respect to at least one of its alleged injuries.

I agree with Defendant that the Coalition cannot base its standing on the time it spent developing a foster parent insurance product in response to the purportedly inadequate basic reimbursement rates. The testimony at the hearing established that this is purely a past injury, and will not occur in the future. Gerstenzang's testified that she had "tried[,]" but did not suggest she was still trying, "to develop a foster parent insurance product[,]" (Tr. 12:15). Her attempt was thorough and comprehensive, yet ultimately unsuccessful. (Tr. 13:16-14:17). She contacted other foster parent organizations across the country, numerous insurance companies, and the trade association that represents New York State insurance companies. (Tr. 13:16-14:7). She also sent two separate surveys to insurance providers. (Tr. 14:8-9). She was assisted by an insurance agent, who was also a foster parent. (Tr. 14:11-17). Gerstenzang does not suggest this effort is ongoing, that she intends to try a new approach, or that repeating prior efforts will yield different results.

A plaintiff "cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he . . . will be injured in the future." *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998)); *see also Access 4 All, Inc. v. Trump Int'l Hotel & Tower Condo.*, 458 F.Supp.2d 160, 167 (S.D.N.Y. 2006) ("To establish standing for an injunction, a plaintiff must not merely allege past injury, but also a risk of future harm."). Because the Coalition will no longer spend time developing an insurance product for foster parents, this is a past injury and cannot confer standing.

The time spent compiling county-by-county reimbursement rates, while "distinct and palpable" and likely to occur in the future, is neither fairly traceable to the alleged violation nor redressable by a favorable decision. Because the State operates under a system where each county sets its own reimbursement rates consistent with a mandate from the State, the Coalition would have to compile a county-by-county list of rates even if the State's minimum basic rate was raised to comply with the CWA. Any injury has been cause by different county rates, not inadequate minimum rates, and as such is not traceable to Defendant's conduct.

The injury is also not likely redressable. There is nothing in the request for relief that would prohibit the State from adopting a minimum basic rate consistent with the CWA, but permit counties to exceed that rate, thereby necessitating the Coalition's county-by-county inquiry as to the respective basic rates nevertheless. In other words, the Coalition's county-by-county inquiries

will be necessary unless all counties adopt identical reimbursement rates, relief which is not sought here. Further, the Coalition's alleged injury in this regard would exist even if the relief were granted, as that relief would not affect the State's ability to permit counties to adopt different special and exceptional reimbursement rates. As long as those different rates exists, the Coalition will have to conduct its county-by-county inquiry regardless. The alleged injury in this regard is simply neither fairly traceable to the alleged violation nor redressable by a favorable decision.

Similarly, the Coalition has failed to establish that its attempts to create a robust membership have been adversely affected by the purportedly insufficient basic reimbursement rates. The Coalition argues (1) that the State is unable to recruit qualified foster parents due to the inadequate basic rate, and (2) that this prevents the Coalition from recruiting qualified members. (Pl.'s Br at 13). In support of this argument, Gerstenzang stated "I think not having adequate rates impacts the state's ability to recruit a robust population of foster parents[,]" but offered no further evidence. (Tr. 10:2-3). De Ortiz testified that the Coalition received calls from individuals interested in learning more about fostering children, and sometimes "the conversation [fell] apart around the issue of reimbursement." (Tr. 34:2-10).

In response to this scant anecdotal evidence of an injury several steps removed from Defendant's alleged wrongful act, Defendant submitted a declaration by Joseph Doyle, Ph.D. ("Professor Doyle"), a professor

of applied economics at the Massachusetts Institute of Technology. (Doyle Decl. at 1). According to Professor Doyle, as of 2011 approved foster parents in New York State were capable of caring for 32,988 children. *Id.* at 18. That same year, only 18,541 children where in foster care. *Id.* On this basis, Professor Doyle concluded that the State was able to recruit a sufficient number of foster parents. *Id.* He also claimed that "the quality of care could be lower if payment levels increase, as higher payments may attract less altruistic providers[.]". *Id.* at 17. The Coalition has failed to establish that it has suffered an injury, or that the injury is fairly traceable to Defendant's conduct.

Despite these deficiencies in the Coalition's argument, it has established standing with respect to the 100 hours spent responding to phone calls from foster parents unable to provide for their children under the current minimum basic rate. (Pl.'s Br. at 12). At the Hearing, witnesses testified that the Coalition is forced to expend its limited staff time answering these phone calls. (Tr. 29:7-14; 35:20-24). While some of these calls concern to the rate application process or non-basic rates, (Tr. 22:20-23), other foster parents seek help providing for their children or simply express frustration with the basic rates, (Tr. 28:7-19; 29:10-14). This testimony satisfies the 'scant' evidentiary burden imposed under *Nnebe*.

In light of the Coalition's small staff, time spent answering these phone-calls constitutes a perceptible impairment of its ability to fulfill its core mission. According to witness testimony, the Coalition receives two to three calls per week, representing approximately 2

hours of work, regarding inadequate basic reimbursement rates. (Tr. 34:19-24). With the functional equivalent of two full time employees, these calls consume a statistically significant portion of the staffs' work week.[4] This is sufficient to constitute an injury under current Second Circuit case law.

It is likely, as opposed to speculative, that these phone calls will continue in the future. Defendant's reliance on *Knife Rights* for the proposition that organizational standing cannot be based on speculative future events is misplaced. (Df.'s Br. at 16). *Knife Rights Inc.*, 802 F.3d at 384. In *Knife Rights*, the Second Circuit found evidence of past injury but held that future injury was speculative because it depended on: (1) the independent actions of a third party, law enforcement arresting and prosecuting the plaintiff organization's members, and (2) the voluntary actions of the organization, paying its members expenses. *See id* at 388. This was deemed too speculative to support standing. *See id.*

The Coalition's injury is far from speculative. It is concrete, clearly defined, and ongoing. Unlike *Knife Rights*, where future injury depended on police officers enforcing a statute under specific circumstances and against specific individuals, the Coalition's members will continue to receive current reimbursement rates unless they are affirmatively changed by the State. It is hardly speculative to expect existing reimbursement

4. With Coalition staff working approximately 85 hours per week, (Tr. 33:7-10), 2 hours represents more than 2% of the total work performed by Coalition employees.

rates to remain unchanged. Nor is it speculative to expect the behavior of foster parents to continue unchanged. Absent some change, it is clear that Coalition members will continue receiving the current reimbursement rate and will continue contacting the Coalition for advice and assistance. Further, unlike *Knife Rights* the Coalition's response is not voluntary but rather is essential to fulfilling its core mission. The Coalition cannot stop responding to these calls without also ceasing to advise foster parents of their rights and assist them with their needs. Continued harm depends not on the new affirmative actions of a third party but simply on the continuation of an existing state of affairs, and as such is not speculative.

This injury also satisfies the traceability and redressability requirements. Defendant argues that not all the calls are caused by the inadequate basic rate and that not all the calls will stop if that rate is raised. (Df.'s Br. at 15). Undoubtedly, some of the calls concern the reimbursement process, not the rates themselves. Others likely involve foster parents eligible for non-basic reimbursement rates. However, the Coalition's witnesses testified to helping foster parents cope with the inadequate basic rates, for example by helping them locate secondhand clothing or accessing other community resources. (Tr. 19:9-14). Such phone calls, from foster parents unable to adequately care for foster children under the current basic rates, are clearly traceable to the current basic rates.

Finally, the Defendant's argument that raising the minimum basic reimbursement rate will not eliminate *all* such calls misconstrues the legal standard. It is sufficient

that some of the calls will stop, affording the Coalition's small staff additional time to focus on core activities. Such a reduction would constitute a tangible benefit to the Coalition. The Coalition is not required to prove that this reduction is certain or of a significant magnitude, merely that it is likely to occur. It has done so, and therefore, it has established standing.

Accordingly, I concluded that the Coalition has demonstrated an injury in fact that is fairly traceable to the current minimum basic reimbursement rates. Further, the Coalition would likely realize a tangible benefit from a favorable ruling. As such, the standing requirements have been satisfied.

CONCLUSION

For the reasons set forth above, I respectfully recommend that the Court find the Coalition has satisfied the standing requirement.

Any objections to the recommendations made in this Report must be filed with the Clerk of the Court and the Honorable William Kuntz within fourteen (14) days of receipt hereof. Failure to file timely objections waives the right to appeal the District Court's Order. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; *Shall v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989).

SO ORDERED

Dated: November 7, 2016

Appendix D

Brooklyn, New York

/s/ Ramon E. Reyes, Jr.
RAMON E. REYES, JR.

United States Magistrate Judge

APPENDIX E — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 29, 2015

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 14-2919-cv

NEW YORK STATE CITIZENS' COALITION FOR CHILDREN,

Plaintiff-Appellant,

v.

ROBERTO VELEZ, ACTING COMMISSIONER OF THE NEW YORK STATE OFFICE OF CHILDREN & FAMILY SERVICES, IN HIS OFFICIAL CAPACITY,

Defendant-Appellee.

October 29, 2015, Decided

PRESENT: GUIDO CALABRESI, DEBRA ANN LIVINGSTON, *Circuit Judges.* WILLIAM K. SESSIONS III,* *District Judge.*

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* The Honorable William K. Sessions III, of the United States District Court for the District of Vermont, sitting by designation.

Appendix E

SUMMARY ORDER

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the matter is **REMANDED** to the district court for further proceedings.

Plaintiff-Appellant New York State Citizens' Coalition for Children ("Coalition") appeals the July 17, 2014 decision and order of the United States District Court for the Eastern District of New York (Kuntz, *J.*) granting Defendant-Appellee's motion to dismiss. Plaintiff-Appellant Coalition alleges that New York State's basic foster care reimbursement rates do not comply with the Adoption Assistance and Child Welfare Act, 42 U.S.C. §§ 670-679c ("CWA"), which the Coalition interprets to require greater funding of state-administered foster care programs. Plaintiff-Appellant seeks declaratory and injunctive relief under 42 U.S.C. § 1983 against Defendant-Appellee Roberto Velez, Acting Commissioner of the New York State Office of Children and Family Services ("Velez"). We presume the parties' familiarity with the facts and procedural history of this case, as well as with the issues on appeal.

We begin with Velez's challenge to the Coalition's standing because standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263 (2d Cir. 2006) (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)). The elements of the Article III standing requirement are well-

established. "[A] plaintiff must have suffered an 'injury in fact' that is 'distinct and palpable'; the injury must be fairly traceable to the challenged action; and the injury must be likely redressable by a favorable decision." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

Ordinarily, an organization like the Coalition can establish Article III standing by (1) showing that its members would have had standing to bring the suit individually, that the suit is "germane to the organization's purpose," and that neither the claim nor relief asserted requires members' participation in the lawsuit, *United Food Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996) (quoting *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)), or (2) demonstrating injury to itself and seeking judicial relief from that injury, *see, e.g., Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); *NY Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2011) (Calabresi, *J.*). When an organization brings suit under 42 U.S.C. § 1983, however, this Circuit has held that it must do so on its own behalf, rather than that of its members. *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011) ("It is the law of this Circuit that an organization does not have standing to assert the rights of its members in a case brought under 42 U.S.C. § 1983 . . . ."). This is because we have "interpret[ed] the rights [42 U.S.C. § 1983] secures to be personal to those purportedly injured." *Id.* (quoting *League of Women Voters of Nassau Cnty. v. Nassau Cnty. Bd. of Supervisors*, 737 F.2d 155,

160 (2d Cir. 1984)). Nevertheless, so long as an organization itself meets the constitutional standing standard spelled out in *Lujan*, it may bring suit under 42 U.S.C. § 1983. *See Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998).

In *Nnebe*, this Court determined that an organization mounting a § 1983 challenge to the automatic suspension of taxi cab drivers after arrest on certain criminal charges had constitutional standing. 644 F.3d at 158. There, the New York Taxi Workers Alliance ("NYTWA") suffered an "opportunity cost" by expending resources toward those legal proceedings that could have been allocated elsewhere. *Id.* at 156-157. While acknowledging the "scant" evidence before it, the *Nnebe* court rejected the argument that the NYTWA's injury was "abstract," adding that an organization need only show "perceptible impairment" of its activities to satisfy the "injury in fact" requirement. *Id.* at 157 (quoting *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982))).

In the instant case, Plaintiff-Appellant brought suit "on behalf of its members—licensed foster parents in New York State." A12; *see also* A14 ¶ 4 (reiterating that the Coalition brings this suit "on behalf of its members"). Plaintiff-Appellant's allegations of injury in the district court focused principally on harm to individual foster families. *See, e.g.*, A18 ¶ 20 ("The maximum reimbursement rates, however, are grossly inadequate compared to the actual costs of caring for a child."); A19

¶ 27 ("New York currently pays less to foster parents to care for a child than a kennel charges to board and feed a dog."); A20-21 ¶ 29 (citing study finding that "as of 2007 New York's reimbursement rates fell woefully short of the CWA's standards."). Granted, Plaintiff-Appellant also asserted in its complaint that it expends significant resources "by sharing information about law, policy, and best practices regarding foster care," and by providing representation to "its members with respect to system-wide issues regarding foster care through legislative and administrative advocacy." A14 ¶ 3.[1] Nonetheless, likely because Defendant-Appellee first raised the present standing argument on appeal, *see* Reply Brief for Plaintiff-Appellant at 22, the district court record does not identify any "perceptible opportunity cost" associated with the New York State foster care program. *Nnebe*, 644 F.3d at 157.

Without more specific allegations as to the "opportunity cost" imposed on the Coalition, we cannot now conclude that the Plaintiff-Appellant has adequately alleged that it has suffered a "perceptible injury" so as to satisfy Article III, but given the breadth of our holding in *Nnebe*, it is possible that it has suffered such an injury. Because this issue was not raised in the district court, however, we conclude that it should be addressed in the first instance there. We therefore remand in accordance with the procedures of *United States v. Jacobson*, 15 F.3d 19, 22 (2d

1. The Coalition adds on appeal that "[n]one of these expenditures would be necessary if the State satisfied its obligations to foster children and parents under the CWA." Reply Brief for Plaintiff-Appellant at 23-24.

Cir. 1994), for the district court to address the disputed issue of Article III standing in the first instance, and to conduct any further fact-finding that may be required. We express 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.

For the reasons stated above, we **REMAND** the case for further proceedings consistent with this order. Upon the conclusion of the proceedings before the district court, either party may restore jurisdiction to this Court by filing with the Clerk within fourteen days of the district court decision a letter (along with a copy of the relevant order or transcript) advising the Clerk that jurisdiction should be restored. In the interest of judicial economy, the renewed appeal will be assigned to this panel.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX F — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED JULY 17, 2014

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 10–CV–3485 (WFK)

NEW YORK STATE CITIZENS' COALITION FOR CHILDREN,

Plaintiff,

v.

GLADYS CARRION, COMMISSIONER OF THE NEW YORK STATE OFFICE OF CHILDREN & FAMILY SERVICES, IN HER OFFICIAL CAPACITY,

Defendant.

DECISION AND ORDER

WILLIAM F. KUNTZ, II, District Judge:

Plaintiff, a New York nonprofit organization, invites this Court to grant permanent injunctive relief fundamentally altering New York's system for setting foster care maintenance rates. Ruling on Defendant's Motion to Dismiss, the Court declines Plaintiff's invitation and holds that 42 U.S.C. §§ 672(a) and 674(5)(A), provisions of

the Adoption Assistance and Child Welfare Act of 1980, do not provide a private right of action under 42 U.S.C. § 1983. The Supreme Court's instructions in *Gonzaga Univ. v. Doe,* 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002), expounding on its previous ruling in *Blessing v. Freestone,* 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997), make clear that these provisions lack the requisite "rights-creating language" and individual focus necessary to infer that Congress intended a private right of action. The Court shares the view of the District of New Jersey that "[i]t would be the height of federal judicial arrogance for this Court to supplant the efforts of [the state's] legislative, executive, and judicial branches with respect to the everyday functioning of the child welfare system in the broad, over-reaching way suggested by Plaintiff [ ]." *Charlie H. v. Whitman,* 83 F.Supp.2d 476, 514 (D.N.J.2000) (Brown, J.). For these reasons, the Complaint is dismissed in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

"Preliminary to discussing the particular facts giving rise to this case, [the Court] review[s] the statutory scheme at issue." *New York ex rel. New York State Office of Children & Family Servs. v. U.S. Dep't of Health & Human Servs.,* 556 F.3d 90, 92 (2d Cir.2009).

I. The Child Welfare Act

In 1980, Congress passed the Adoption Assistance and Child Welfare Act (hereinafter "CWA"), 42 U.S.C. §§ 620 *et seq.,* 670 *et seq.* The statute was passed pursuant

to Congress's authority under the federal Constitution's Spending Clause. U.S. Const. art. I, § 8. The CWA set guidelines for a cooperative state-federal program to provide federal funding for foster care and adoption assistance.

The CWA establishes the scheme by which the federal government reimburses compliant states for a portion of the payments that the states make to individuals and entities in their foster care and adoption assistance programs. *See New York ex rel. New York State Office of Children & Family Servs.,* 556 F.3d at 93. In order for a state to receive its matching federal funding, the state must comply with certain eligibility standards and constraints set forth in the CWA. *See* 42 U.S.C. § 670 (stating that the purpose of the CWA is to provide foster care assistance funds for states with compliant plans). As a precondition to receiving federal funding, each state is required to submit a "State plan" to the Secretary of the Department of Health and Human Services ("HHS") for approval. *See id.;* § 671(a) ("In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary [of HHS]."). HHS's Administration for Children & Families ("ACF") administers the CWA and supervises the states' plans. *See* 45 C.F.R. § 1355.31–37.

Congress delegated many aspects of CWA oversight to the states, including the creation of state authorities responsible for maintaining foster care standards, state administrative review opportunities, and mandatory, periodic state review of disbursements. 42 U.S.C. § 671(a) (10–12). Nonetheless, HHS maintains ultimate control

of the federal funding faucet. Congress mandated that the Secretary of HHS promulgate regulations to ensure each state is in "substantial conformity" with federal statutory requirements, HHS regulations, and the state's own written plan. *See* § 1320a–2a(a). A state that fails to substantially conform with federal requirements is subject to mandatory corrective measures by HHS and ACF, including the withholding of federal funding. § 1320a–2a(b)(4). However, prior to withholding any federal funds, the Secretary is required to "afford the State an opportunity to adopt and implement a corrective action plan." § 1320a–2a(b)(4)(A), (C). Accordingly, the CWA envisions a scenario in which a state that has failed to substantially conform—with federal statutory requirements, HHS regulations, or its own written plan—still receives federal matching funds while corrective plans are in effect. *See* § 1320a–2a(b)(4)(C).

There are thirty-three conditions that must be included in a state's plan in order to qualify for federal funding. § 671(a). The first requirement is that each state plan must "provide for foster care maintenance payments in accordance with section 672." § 671(a)(1). Foster care maintenance payments are defined as:

> 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.[1]

§ 675(4)(A). In sum, a foster care maintenance payment is a state payment to a caretaker to cover the costs of the foster child's daily life.

Turning to § 672, Congress instructs that "each state ... shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative" so long as certain requirements are met. § 672(a)(1)(A), (B). The payments "may be made ... only on behalf of a child" who is eligible under § 672(a) and is in either "the foster family home of an individual ... or in a child-care institution." § 672(b). States only receive federal matching funds for foster care maintenance payments that meet § 672's dictates. *See* § 674(a)(1).

II. The Parties

Before the Court is a Complaint by Plaintiff, the New York State Citizens' Coalition for Children, a nonprofit organization that "represents the interests of foster parents who provide care and supervision for children in foster care." Dkt. 1 ("Compl.") ¶ 1. The Coalition's members include more than twenty individuals and more than twenty-five groups and agencies, which purport to represent almost 400 foster parents. *Id.* ¶ 2. Plaintiff

1. "In the case of institutional care, [foster care maintenance payments] include the reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence." 42 U.S.C. § 675(4)(A).

brings two causes of action for declaratory and permanent injunctive relief against Defendant Gladys Carrion, Commissioner of the New York Office of Children & Family Services, in her official capacity. *Id.* ¶¶ 40–45. Plaintiff alleges that New York has failed to comply with the dictates of the CWA by accepting federal funding while reimbursing foster care providers with only a fraction of the funds required by federal law. *Id.* at ¶¶ 24–39. Invoking a purported private right of action under § 1983, Plaintiff seeks to prevent New York from continuing its alleged violation of the CWA and to ensure foster parents are reimbursed by New York, with both state and federal funds, in compliance with the CWA. *See id.*

III. Procedural History

Plaintiff filed its Complaint in the United States District Court for the Eastern District of New York on July 29, 2010. The case was reassigned from the Hon. Dora L. Irizarry to this Court on October 17, 2011. Dkt. Entry of 10/17/2011. After a July 25, 2012 pre-motion conference, the parties were given leave to file dueling motions. Dkt. Entry of 7/25/12. Plaintiff filed a motion for summary judgment and the Defendant filed the motion to dismiss currently pending before the Court. On October 5, 2012, both motions were fully briefed and submitted to the Court. Dkts. 45–46.

Defendant's motion contends that Plaintiff has not established subject matter jurisdiction because there is no private right of action under 42 U.S.C. §§ 672(a), 675(4)(A) of the CWA. Dkt. 45–1 ("Def.'s Br.") at 10–14. Therefore,

before its summary judgment may be adjudicated, Plaintiff faces the initial hurdle of establishing whether Congress permitted a § 1983 private right of action for the statutes at issue. That question turns us to the merits of Defendant's motion to dismiss.

STANDARD OF REVIEW

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir.2000) (citing Fed.R.Civ.P. 12(b)(1)); *see also Morrison v. Nat'l Austl. Bank Ltd.,* 547 F.3d 167, 170 (2d Cir.2008) ("Determining the existence of subject matter jurisdiction is a threshold inquiry and a claim is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it."), *aff'd,* 561 U.S. 247, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010); *Henry v. Concord Limousine, Inc.,* 13–CV–0494, 2014 WL 297303, at *3 (E.D.N.Y. Jan. 24, 2014) (Seybert, J.). "[J]urisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Shipping Fin. Servs. Corp. v. Drakos,* 140 F.3d 129, 131 (2d Cir.1998). The party asserting subject matter jurisdiction has the burden of proving its existence by a preponderance of the evidence. *Makarova,* 201 F.3d at 113. In determining whether subject matter jurisdiction exists, courts are permitted to look to materials outside the pleadings. *See Kamen v. Am. Tel. & Tel. Co.,* 791 F.2d 1006, 1011 (2d Cir.1986) ("[W]hen ... subject matter

jurisdiction is challenged under Rule 12(b)(1), evidentiary matter may be presented by affidavit or otherwise."). When a plaintiff asserts a cause of action under a statute which contains no private right of action, the Court shall dismiss the claim for want of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1). *See Daniels v. Murphy,* No. 06–CV–5841, 2007 WL 1965303, at *2 n. 4 (E.D.N.Y. July 2, 2007) (Bianco, J.).

ANALYSIS

The question posited to this Court is whether a private right of action under § 1983 arises from § 672(a) or § 675(4)(a). In a recent and persuasive decision, the United States Court of Appeals for the Eighth Circuit addressed the very same question, and answered in the negative. *Midwest Foster Care & Adoption Ass'n v. Kincade,* 712 F.3d 1190, 1194 (8th Cir.2013).[2] This Court agrees and similarly holds that there is no private right of action under either statute. However, this ruling is a narrow one. The Court declines to hold that Congress has expressly foreclosed any private right of action against a state actor under the CWA, save for one explicit congressional carve-out for victims of discrimination in the foster care system. *See* 42 U.S.C. § 671(a)(18).

The seminal case for determining whether a private right of action lies under § 1983 is *Blessing v. Freestone,*

2. The United States Court of Appeals for the Second Circuit has not considered this question and the Court reviews the issue as an open question within the Circuit.

520 U.S. 329, 340, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997), which provided a namesake three-factor test: 1) Congress must have intended that the provision benefit the plaintiff; 2) the 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. *Id.* at 340–41, 117 S.Ct. 1353. The Supreme Court's decision in *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002), resolved the confusion over the first inquiry under the *Blessing* test. The *Gonzaga* Court "reject[ed] the notion that [its earlier] cases permit anything short of an unambiguously conferred right" can imply a cause of action under § 1983. 536 U.S. at 283, 122 S.Ct. 2268. Here, the two statutory sections Plaintiff alleges provide it with a private right of action fall far short of granting an "unambiguously conferred right." *Id.* Because Plaintiff is unable to sue a state under § 1983 actor for allegedly violating §§ 672, 675(4)(A), this Court lacks the subject matter jurisdiction to consider Plaintiff's claim, and the Complaint must be dismissed.

I. Congress May Have Precluded Any Additional Private Causes of Action Under the CWA

Before addressing the *Blessing* factors, the Court considers Defendant's argument that when Congress passed the "Removal of Barriers to Interethnic Adoption" amendment in 1996 (42 U.S.C. § 674(d)(3)(A), hereinafter "Removal of Barriers Amendment"), its express creation of a cause of action for certain violations of the CWA evinced an intent to preclude a private right of action

under any other section of the statute. While Defendant's position is persuasive, the Court declines to adopt this broad argument.

"[U]nless Congress speaks with a clear voice, and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983." *Gonzaga,* 536 U.S. at 280, 122 S.Ct. 2268 (internal quotations omitted). When Congress expressly forecloses a remedy under § 1983, no further analysis is required to find that a plaintiff is not entitled to bring suit. *See Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 19–21, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981) ("[T]he existence of [ ] express remedies demonstrates not only that Congress intended to foreclose implied private actions but also that it intended to supplant any remedy that otherwise would be available under § 1983."); *see also Smith v. Robinson,* 468 U.S. 992, 1005 n. 9, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984) (finding that a § 1983 private right of action will not lie where "Congress specifically foreclosed a remedy under § 1983"), *superseded by statute on other grounds, as recognized in Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 235, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995). "Because [the] inquiry focuses on congressional intent, dismissal is proper if Congress 'specifically foreclosed a remedy under § 1983.'" *Blessing,* 520 U.S. at 341, 117 S.Ct. 1353 (quoting *Smith,* 468 U.S. at 1005 n. 9, 104 S.Ct. 3457). "Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* (quoting

Livadas v. Bradshaw, 512 U.S. 107, 133, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994)).

Defendant's argument centers on the 1996 Removal of Barriers Amendment, § 674(d)(3)(A), which prohibits states receiving federal foster care funds from selecting foster parents or denying the placement of a child on the basis of race, color, or national origin. Defendant points out that Congress has passed no other provision allowing for a private cause of action under the CWA. Defendant also emphasizes that the 1996 Removal of Barriers Amendment was passed two years after the "*Suter* Fix." In the 1994 *Suter* Fix, Congress rejected the Supreme Court's 1992 ruling in *Suter v. Artist M.,* and established that a statute's state plan requirement could not alone preclude private enforcement of that statute. *See* 42 U.S.C. § 1320a–2; *cf. Suter v. Artist M.,* 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992). However, the *Suter* fix did not "limit or expand the grounds for determining the availability of private actions to enforce State plan requirements" and did not disturb the *Suter* Court's holding that § 671(a)(15) of the CWA was not privately enforceable. § 1320a–2. Read together and chronologically, the Defendant argues that the statutes are "evidence that Congress decided that a limit on private rights of action under the CWA was appropriate." Dkt. 45–8 ("Def.'s Reply Br.") at 2.

Defendant's position finds some support in the caselaw. Other post-*Suter* Fix district court decisions have read the Removal of Barriers Amendment as "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." *Charlie H.,* 83 F.Supp.2d at 489; *see also Daniel H. ex rel. Hardaway H. v. City of New York,* 115 F.Supp.2d 423, 428 (S.D.N.Y.2000) (Marrero, J.); *Daniels,* 2007 WL 1965303, at *2 n. 4. Moreover, in considering the related question of implied rights of action under a different statute, the Second Circuit has found that the principle of *unis est exclusion alterius* is particularly persuasive when considering the existence of an implicit causes of action. *Olmsted v. Pruco Life Ins. Co. of N.J.,* 283 F.3d 429, 433 (2d Cir.2002) (holding there was no implied right of action under §§ 26(f), 27(i) of the Investment Company Act of 1940). The Circuit explained that "Congress's explicit provision of a private right of action to enforce one section of a statute suggests that omission of an explicit private right to enforce other sections was intentional." *Id.* "Obviously ... when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly." *Touche Ross & Co. v. Redington,* 442 U.S. 560, 572, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979); *see also Olmsted,* 283 F.3d at 433.

Despite these persuasive points, the Supreme Court has instructed that federal courts "do not lightly conclude that Congress intended to preclude reliance on § 1983 as remedy." *Wright v. City of Roanoke Redevelopment and Housing Auth.,* 479 U.S. 418, 423–24, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987). Furthermore, there is no need for this Court to make such a broad holding when the *Blessing* test, read in light of *Gonzaga's* guidance, makes clear that there is no private right of action under § 1983 for the sections of the CWA involved in this litigation.

II. The *Blessing* Test and *Gonzaga* Factors Make Clear that There is No Private Right of Action Under 42 U.S.C. §§ 672(a), 675(4)(A)

In *Blessing,* the Supreme Court held that "[i]n order to seek redress through § 1983 ... a plaintiff must assert the violation of a federal *right,* not merely a violation of federal *law.*" *Blessing,* 520 U.S. at 340, 117 S.Ct. 1353. To ascertain whether "a particular statutory provision gives rise to a federal right," the *Blessing* decision articulated a three-factor test:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. 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 340–41, 117 S.Ct. 1353 (internal citations omitted); *see also Wachovia Bank, N.A. v. Burke,* 414 F.3d 305, 321–22 (2d Cir.2005). The Second Circuit has cautioned against applying these factors too strictly, explaining that: "courts should not find a federal right based on a rigid or superficial application of the *Blessing* factors where other considerations show that Congress did not intend to create federal rights actionable under

§ 1983." *Torraco v. Port Auth. of New York & New Jersey,* 615 F.3d 129, 136 (2d Cir.2010); *Wachovia Bank, N.A.,* 414 F.3d at 322.

In *Gonzaga,* the Supreme Court recognized that "[s]ome language in our opinions might be read to suggest that something less than an unambiguously conferred right is enforceable by § 1983." 536 U.S. at 283, 122 S.Ct. 2268. The resulting "confusion [had] led some courts to interpret *Blessing* as allowing plaintiffs to enforce a statute under § 1983 so long as the plaintiff [fell] within the general zone of interest that the statute [was] intended to protect." *Id.* The Court rejected the notion that "anything short of an unambiguously conferred right ... support[ed] a cause of action brought under § 1983." *Id.* ("[I]t is *rights,* not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section."). Thus, *Gonzaga* invoked important aspects of our federalist system and established "that if a state is to be subject to private suits whenever it fails to meet a funding condition, Congress should clearly put the state on notice." *Midwest Foster Care,* 712 F.3d at 1196 (citing *Gonzaga,* 536 U.S. at 286 & n. 5, 122 S.Ct. 2268).

The *Gonzaga* Court also fleshed out three factors for courts to utilize when interpreting the first prong of *Blessing*—whether Congress intended for the statute to benefit the plaintiff. First, the *Gonzaga* Court reviewed whether Congress included "rights-creating language" in the statute. 536 U.S. at 285–86, 290, 122 S.Ct. 2268; *see Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury,* 445 F.3d 136, 149 (2d Cir.2006) (Sotomayor, Cir. J.). Second,

the *Gonzaga* Court considered whether the contested statutory language manifested an aggregate focus, rather than being concerned with whether the needs of any particular person had been satisfied. *Gonzaga,* 536 U.S. at 287, 122 S.Ct. 2268; *see Midwest Foster Care,* 712 F.3d at 1196. Lastly, the Court considered the availability of a congressionally mandated federal review mechanism. *Gonzaga,* 536 U.S. at 289–90, 122 S.Ct. 2268; *see Midwest Foster Care,* 712 F.3d at 1197. Also important to the determination in *Gonzaga* was that the statute "was spending legislation that focused primarily on the government's allocation of resources." *Loyal Tire & Auto Ctr.,* 445 F.3d at 149 (citing *Gonzaga,* 536 U.S. at 290, 122 S.Ct. 2268). "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." *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 28, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981).

Thus, the requisite analysis begins with an examination of §§ 672, 675(4)(A) in light of these principles from *Blessing* and *Gonzaga.*

A. 42 U.S.C. §§ 672, 675(4)(A) Lack "Rights–Creating Language"

The first factor for interpreting the first prong of the *Blessing* test looks at whether the text and structure of the statute indicate that Congress used "rights-creating

language" in conferring the benefit on the plaintiff. *See Loyal Tire & Auto Ctr.,* 445 F.3d at 149; *see also Gonzaga,* 536 U.S. at 285–86, 290, 122 S.Ct. 2268. " 'Statutes that focus on the person regulated rather than the individuals protected' do not tend to create enforceable rights." *Midwest Foster Care,* 712 F.3d at 1197 (quoting *Gonzaga,* 536 U.S. at 287, 122 S.Ct. 2268). The text and structure of §§ 672, 675(4)(A) lack any indicia of "rights-creating language" and suggest that Congress did not intend for an individual cause of action to arise from the statute. The sections "speak to the states as regulated participants in the CWA and enumerate limitations on when the states' expenditures will be matched with federal dollars; they do not speak directly to the interests of the [foster care] Providers." *Id.*

To begin with, § 675(4)(A) provides the definition of "foster care maintenance payments," fittingly, in the CWA's definitional section. To infer a private right of action from a definitional section is antithetical to the mandate that a private right in a federal statute does not exist "unless Congress speaks with a clear voice and mandates an unambiguous intent to confer individual rights." *Midwest Foster Care,* 712 F.3d at 1197 (quoting *Gonzaga,* 536 U.S. at 280, 122 S.Ct. 2268). Other courts have confirmed this principle and refused to infer a private right of action under § 1983 from a purely definitional section. *See id.*; *31 Foster Children v. Bush,* 329 F.3d 1255, 1271 (11th Cir.2003) (statutory sections that "are definitional in nature ... alone cannot and do not supply a basis for conferring rights enforceable under § 1983"); *Crawford v. Wash. Cnty. Children and Youth Services,*

06–CV–1698, 2008 WL 239454, at *6 n. 1 (W.D.Pa. Jan. 29, 2008) (same); *Olivia Y. ex rel. Johnson v. Barbour,* 351 F.Supp.2d 543, 561 (S.D.Miss.2004) (same); *Charlie H.,* 83 F.Supp.2d at 490 (finding a provision in the definitional subsection of the CWA, standing alone, does not "confer[ ] a right upon Plaintiffs enforceable pursuant to § 1983"); *B.H. v. Johnson,* 715 F.Supp. 1387, 1401 (N.D.Ill.1989) ("It would be strange for Congress to create rights enforcing language in the definitional section of a statute."). Section 675(4)(A) simply limits the costs that the federal government will provide matching funds for by including an itemized list of permissible expenditures. The section puts states on notice as to what foster care-related expenditures will be reimbursed and gives no inference of an intent to provide a private right of action. *See Midwest Foster Care,* 712 F.3d at 1197–98. ("Section 675(4)(A) is part of an open-ended entitlement program, and when viewed in this context, it seems natural that Congress would choose to place limitations on the type of state expenditures it matches."). The language "more closely resembles an affirmative obligation on the state than a creation of an individual right." *Midwest Foster Care & Adoption Assoc. v. Kinkade,* 11–CV–1152 (D.Mo. Mar. 9, 2012) (unpublished), *aff'd,* 712 F.3d at 1194.

Beyond the CWA's definitional section, § 672(a) provides that "[e]ach state ... shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative" and then sets forth a list of scenarios in which such payments are not required. This requirement, as would be expected from a spending clause provision, focuses on how and when a state will act in order

to qualify for federal funding. *See Pennhurst,* 451 U.S. at 28, 101 S.Ct. 1531. The funding recipients' benefit (i.e. the money given to foster parents) is ancillary to the entities the statute is focused on: the states. "[T]he overwhelming focus is upon the conditions precedent that trigger the [federal government's] obligation [to reimburse]." *Midwest Foster Care,* 712 F.3d at 1198 ("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."). The key actor in § 672(a) is the state, and the operative condition consists of prerequisites that must be met for the federal government to reimburse the state. In sum, § 672(a) is focused on what a state must do to be eligible for federal funding. In these circumstances, the attention is not "individually focused" and does not suggest an unambiguous intent to allow a private right of action. *Gonzaga,* 536 U.S. at 287, 122 S.Ct. 2268; *see also Midwest Foster Care,* 712 F.3d at 1198–99.

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. (*See* Def.'s Br. at 20). Indeed, the post-*Gonzaga* cases that have found rights-creating language, have included similar text. *Cf. Torraco,* 615 F.3d at 136–37 (finding rights-creating language in 18 U.S.C. § 926A, which "entitles" non-prohibited persons to transport firearms for any lawful purpose from one place where

they may lawfully have firearms to another).[3] However, that language is not present within § 672, which is instead constructed to focus on the states' responsibilities under the statute. Clearly, Congress knew how to draft unambiguous rights-creating language in the wake of *Blessing* and *Gonzaga* if that was its desire. *See Olmsted,* 283 F.3d at 433 ("Congress's explicit provision of a private right of action to enforce one section of a statute suggests that omission of an explicit private right to enforce other sections was intentional."); *see also Touche Ross,* 442 U.S. at 572, 99 S.Ct. 2479 ("when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly"). For example, in *Wilder v. Va. Hosp. Ass'n,* 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990), where the Court did find a private right of action in the Medicaid Act, "the relevant provisions ... did not focus on defining the conditions that must be met in order for a participating state's expenditures to be eligible for federal matching

3. The full statutory provision at issue in *Torraco* read: "Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter [18 U.S.C. § 921 et seq.] from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: *Provided,* That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console." 18 U.S.C. § 926A

funds and, therefore, did not evince the degree of removal [the Court] now confront[s]" in reviewing § 672(a). *Midwest Foster Care,* 712 F.3d at 1199. Because the sections of the CWA before the Court plainly turn on whether a state is in compliance with federal requirements, there is no textual basis for finding a private right of action.

The courts that have reached the contrary conclusion have hinged their decisions on the mere inclusion of foster parents as the recipients of § 672(a)'s funding mandate. *See, e.g., Cal. State Foster Parent Ass'n v. Wagner,* 624 F.3d 974, 981–82 (9th Cir.2010); *see also Midwest Foster Care,* 712 F.3d at 1203 n. 10 (Smith, J. dissenting) (citing cases). This Court joins the *Midwest Foster Care* court in highlighting the actual consequence of § 672(a)'s reference to foster parents. "The ability to locate a nexus between § 1983 plaintiffs and a benefit conferred by a statute is necessary but not sufficient; the statutory text also must be phrased in terms of the persons benefitted." *Midwest Foster Care,* 712 F.3d at 1199 (quoting *Gonzaga,* 536 U.S. at 284, 122 S.Ct. 2268) (internal quotations omitted). This ensures that § 1983 only provides a cause of action for federal *rights* and not any federal *law. See Blessing,* 520 U.S. at 340, 117 S.Ct. 1353.

A plaintiff's mere status as a beneficiary of a federal law is insufficient to stake a claim to a congressional grant of the right to privately enforce the statute under § 1983. *See Gonzaga,* 536 U.S. at 283, 122 S.Ct. 2268. "For a statute to create private rights, its text must be phrased in terms of the persons benefited." *Gonzaga,* 536 U.S. at 274, 122 S.Ct. 2268. "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. And here, it is the states, not foster care providers, that are the textual focus of § 672(a). This is strong indication that Congress did not intend for foster care providers to have a private right of action under § 1983 for alleged violations by state actors of this section of the CWA.

B. 42 U.S.C. §§ 672(a), 675(4)(A) Have an Aggregate, Not an Individual, Focus

The next factor in analyzing the *Blessing* test's first prong is determining whether the statutory provision in question has an aggregate or an individual focus. *Gonzaga,* 536 U.S. at 288, 122 S.Ct. 2268. If a statute has an aggregate focus, it "cannot give rise to individual rights." *Id.* (quoting *Blessing,* 520 U.S. at 344, 117 S.Ct. 1353) (internal quotations omitted). A court should review the "text and structure" of the statutory provisions to discern their focus. *Id.* at 286, 122 S.Ct. 2268. As the text and structure of §§ 672(a), 675(4)(A) do not emphasize "whether the needs of any particular [foster care provider] have been satisfied," these sections lack an aggregate focus and do not give rise to an individual right. *Id.* at 288, 122 S.Ct. 2268 (quoting *Blessing,* 520 U.S. at 343, 117 S.Ct. 1353); *see also Midwest Foster Care,* 712 F.3d at 1200.

That a state need only be in "substantial conformity" with the CWA's requirements to receive federal funding strongly suggests that the statute has an aggregate focus.

Gonzaga, 536 U.S. at 288, 122 S.Ct. 2268 (finding a statute that allowed institutions to avoid termination of federal funding so long as they "compl[ied] substantially" with the statute's requirements had an aggregate focus); *Blessing,* 520 U.S. at 335, 117 S.Ct. 1353 (finding no private right of action under § 1983 in part because only "substantial compliance" with federal regulations was required); *see also Midwest Foster Care,* 712 F.3d at 1200–01 (finding the substantial compliance component of the CWA supports the denial of a private right of action); *Olivia Y.,* 351 F.Supp.2d at 562 (same). Under the CWA, a state can continue to receive federal matching funds for foster care maintenance payments even though it has objectively failed to meet federal mandates. So long as a state is in "substantial conformity" with the statutory regime, the federal faucet continues to flow. *See* 42 U.S.C. § 1320a–2a. Only when a state is so far out-of-line with Congress's express dictates does a state even begin to face the threat of termination of federal funding. *See* §§ 1320a–2a(b)(4)(A), (C) (requiring the Secretary of HHS to "afford the State an opportunity to adopt and implement a corrective action plan" before withholding federal funding). Such "[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." *Midwest Foster Care,* 712 F.3d at 1200–01. "Focusing on substantial compliance is tantamount to focusing on the aggregate practices of a state funding recipient." *Id.* at 1201; *see also Gonzaga,* 536 U.S. at 288, 122 S.Ct. 2268; *Blessing,* 520 U.S. at 335, 117 S.Ct. 1353; *Olivia Y.,* 351 F.Supp.2d at 562.

Of course, standing alone, a substantial compliance regime does not establish that a statute has an aggregate focus. *See Midwest Foster Care,* 712 F.3d at 1201 ("[W]hile a substantial compliance regime may suggest an absence of the requisite congressional intent, it cannot by itself establish an aggregate focus"); *compare Wilder,* 496 U.S. at 512, 110 S.Ct. 2510 (1990) (holding a private right of action existed in a Medicaid statute providing for "reasonable and adequate" reimbursement rate despite a substantial compliance provision). Nonetheless, here, other factors also demonstrate that Congress had an aggregate focus in drafting the CWA. When 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. *Gonzaga,* 536 U.S. at 288–89, 122 S.Ct. 2268. In other words, when the statute couches the plaintiff's purported right in terms of what *state* actions will terminate federal funding, it is indicative of an aggregate focus.

Gonzaga offered a clear example of such an occurrence. The statute in *Gonzaga,* the Family Educational Rights and Privacy Act (FERPA), refused federal funds to educational institutions that had a policy or practice of releasing student records without parental consent.[4]

4. The relevant section of the FERPA states: "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." 20 U.S.C. § 1232g(b)(1).

See Gonzaga, 536 U.S. at 279, 122 S.Ct. 2268. "In each provision [of the FERPA] the reference to individual consent is in the context of describing the type of 'policy or practice' that triggers a funding prohibition ... [and] such provisions cannot make out the requisite congressional intent to confer individual rights enforceable by § 1983." *Id.* at 288–89, 122 S.Ct. 2268. At the same time, in instances where the Court has found an enforceable right, the statutory language did not turn on actions that would terminate federal funding. *Cf. Wilder,* 496 U.S. at 502–03, 110 S.Ct. 2510 (considering 42 U.S.C. § 1396a(a)(13)(A), which contains no reference to the termination of federal funding if a health care provider does not comply with federal regulations); *Wright,* 479 U.S. at 420, 107 S.Ct. 766 (considering Pub.L. 97–35, § 322, 95 Stat. 400, which contains no reference to the termination of federal funding if a low-income family is required to pay rent higher than required under federal law). Comparing the Supreme Court's holdings in these cases, §§ 672(a), 675(4)(A) are more similar to "the statutory language at issue in *Gonzaga* than that of the statutes at issue in *Wilder* or *Wright* .... [i]n other words, the failure to meet the requirements of § 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 1201–02; *see also Olmsted,* 283 F.3d at 433 (quoting *Alexander v. Sandoval,* 532 U.S. 275, 289, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001)) ("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."). The text and structure of §§ 672(a), 675(4)(A) indicate that Congress drafted these sections of

the CWA with an aggregate focus and without an intent to create an individually enforceable right.

The final indication that the CWA, generally, has an aggregate, as opposed to individual focus, is the statute's declaration of purpose. The declaration explicitly states that the CWA was enacted to designate appropriate funds "[f]or the purpose of enabling each State to provide, in appropriate cases, foster care and transitional independent living programs for [eligible] children." 42 U.S.C. § 670. In selecting this purpose, as opposed to one ensuring that no foster care provider is deprived of federal funds, the elected branches revealed that their concern was with "enabling [the] State[s]" to oversee the functioning of their foster care systems. Defendant argues that this is "a classic statement of legislation enacted pursuant to Congress's spending power, whereby Congress rewards certain state conduct and penalizes deviation from set criteria by administrative termination of funding." (Def.'s Br. at 22). The Court agrees and finds that a spending statute turning on state compliance does not create a private right of action under § 1983. *See Pennhurst,* 451 U.S. at 28, 101 S.Ct. 1531.

Plaintiff argues that this Court should adopt the contrary finding of the United States Court of Appeals for the Ninth Circuit. *See Wagner,* 624 F.3d at 980. That court found "§ 672 of the CWA focuses squarely on the individuals protected, rather than the entities regulated. It does not purport to regulate state institutions." *Id.* at 980. The Ninth Circuit's decision turned on its finding that "§ 672's reference to 'payments on behalf of *each* child'

is individual, rather than aggregate." *Id.* This finding ignores the structure and language of the CWA. It is unsurprising that a piece of Spending Clause legislation will ultimately benefit some party. The crucial inquiry, however, is whether the congressional focus was on the "person regulated" (here, the states) and not the "individuals protected" (here, the foster care providers). *See Gonzaga,* 536 U.S. at 288, 122 S.Ct. 2268. As the CWA's funding regime turns on whether the state is in substantial conformity with federal requirements, rather than focusing on individual instances of noncompliance, its aggregate focus is without a doubt. *See id.* The Ninth Circuit in *Wagner* overvalued the reference to the individual beneficiaries and ignored the CWA's statutory design that centers on whether a state substantially conformed with federal requirements so that it may continue to receive matching funds. *Cf. Cal. v. Sierra Club,* 451 U.S. 287, 294, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981) ("The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries.").

Lastly, the Court notes that it is mindful of the *Suter* Fix in reaching its decision. *See* 42 U.S.C. § 1320a–2. In response to the Supreme Court's decision in *Suter v. Artist M,* 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992) (holding a provision of the CWA did not give right to private cause of action because of the statute's state plan requirement), Congress passed 42 U.S.C. § 1320a–2.[5]

5. "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

That provision instructed that the requirement of a state plan cannot, alone, serve as the basis for denying a private right of action. *See Rabin v. Wilson–Coker,* 362 F.3d 190, 202 (2d Cir.2004); *Boyland v. Wing,* 487 F.Supp.2d 161, 171 (E.D.N.Y.2007) (Bianco, J.). Here, it is not the mere existence of a state plan that compels a finding that no private right of action exists. Rather, it is the structure and text of §§ 672(a), 674(5)(A)—requiring only substantial conformity, placing the reference to the beneficiary within conditional language regarding the termination of federal funding, and the statute's stated purpose—that drive this Court's holding that the contested CWA sections have an aggregate focus.

C. The Existence of a Federal Review Mechanism

The final factor *Gonzaga* introduced for clarifying the first prong of *Blessing* is the consideration of an aggrieved individual's access to a federal review mechanism. *Gonzaga,* 536 U.S. at 289–90, 122 S.Ct. 2268 (finding that access to a federal review mechanism "further counsel[s] against [ ] finding a congressional intent to create individually enforceable private rights"). The

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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.,* 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (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." 42 U.S.C.A. § 1320a–2.

federal review mechanism in *Gonzaga* included express authorization for the Secretary of Education to "deal with violations" of the FERPA and a requirement that the Secretary "establish or designate [a] review board" for handling violations. *Id.* at 289, 122 S.Ct. 2268 (discussing 20 U.S.C. 1232g's review provisions and the creation of the Family Policy Compliance Office "to act as the Review Board required under the Act [and] to enforce the Act with respect to all applicable programs").

"In contrast, although the CWA 'provides for oversight and funding restrictions that may be imposed by the Secretary' on the participating states, there is no direct federal review of the claims of individual providers." *Midwest Foster Care,* 712 F.3d at 1202 (quoting *Mo. Child Care Ass'n v. Cross,* 294 F.3d 1034, 1038 (8th Cir.2002) (discussing the delegation of oversight to the states including: state administrative review opportunities for individuals whose benefits are denied and mandatory periodic state review of foster care maintenance payment amounts) (citing 42 U.S.C. §§ 671(a)(11), (12))). Meaningful federal review under the CWA is limited to mandatory HHS/ACF audits of state programs for substantial compliance with the individual state's plan and the statute's mandates. § 1320a–2a(b).[6]

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6. "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

However, the absence of a comparable federal mechanism is not fatal to Defendant's position. *Gonzaga* makes clear this factor is tertiary and supplemental to the inquiry with regard to the first two factors. *See* 536 U.S. at 289–90, 122 S.Ct. 2268. The finding of a federal review mechanism merely "buttressed" the *Gonzaga* Court's determination that Congress did not intend a private cause of action and only "*further* counsel[ed] against [the Court's] finding a congressional intent to create individually enforceable private rights." *Id.* (emphasis added). The Supreme Court's treatment of this third factor indicates that when the first two factors strongly weigh against the finding of a private right of action, the absence of a federal review mechanism will not revive a plaintiff's grasp at a § 1983 cause of action. *See Midwest Foster Care,* 712 F.3d at 1202 ("reject[ing] the notion that a failure to provide a federal enforcement mechanism equal to the one considered in *Gonzaga* is sufficient to overcome the weight of these competing considerations"). "Despite the relative lack of federal review opportunities ... the other elements of *Gonzaga's* analysis of *Blessing's* first prong strongly tilt against the finding of an unambiguous intent to create an individually enforceable right." *Id.*

Furthermore, Defendant has advocated that the "[p]resence of a comprehensive federal enforcement scheme bolsters the conclusion that the CWA confers a benefit on Plaintiff but not a right." (Def.'s Br. at 23). Defendant highlights, and this Court takes note of, the extensive statutory scheme for helping wayward states

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(3) the relevant approved State plans." 42 U.S.C.A. § 1320a–2a.

return to "substantial conformity" and the ability for HHS to use its audit power to terminate federal funding. *See* § 1320a–2a(b). While the CWA clearly places the bulk of enforcement responsibility with the states and these measures certainly fall short of the federal mechanisms present in *Gonzaga,* there remains a recurring federal role, with powerful repercussions, in the distribution of foster care maintenance payments to the states. *See* § 1320a–2a.

Indeed, the scheme Congress devised for the operation of the CWA—state enforcement coupled with federal regulatory audits and the ability to terminate funding—involves a delicate balance between the institutional players in our federal system. Congress was mindful of the importance of sending federal money to state actors responsible for these particularly needy members of American society. Of note, and as discussed above, a state that falls out of substantial conformity will not immediately lose funding, but will be provided with HHS-set benchmarks to bring its foster care system back into compliance, all while continuing to receive federal funds. *See, e.g.,* 45 C.F.R. § 1355.35(a)(1)(v); *see also* 45 C.F.R. § 1355.32(d). To have individual plaintiffs intrude on this nuanced system would divest HHS of its congressionally-prescribed role in ensuring that states remain substantially compliant with the CWA's mandates. It is hard to imagine how a noncompliant state could simultaneously work through its HHS benchmarks and be subject to a federal court injunction of the nature sought by Plaintiff here. The resulting intrusion is a powerful indication that Congress did not envision § 1983 plaintiffs barging into its carefully crafted scheme.

Plaintiff's untenable proposal reiterates what the Supreme Court has said about finding private rights of action in 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,* 451 U.S. at 28, 101 S.Ct. 1531.

In the absence of a "clear and unambiguous" congressional intent to provide a § 1983 cause of action to plaintiffs claiming that a state has failed to comply with §§ 672(a), 674(5)(A), there is no need to review the other *Blessing* factors. *See Gonzaga,* 536 U.S. at 290–91, 122 S.Ct. 2268; *Midwest Foster Care,* 712 F.3d at 1202. Accordingly, our inquiry ends after finding no indication that Congress intended to create a private right of action in these sections of the CWA.

CONCLUSION

Defendant's motion to dismiss is GRANTED. The Complaint is DISMISSED in its entirety. Furthermore, this decision renders Plaintiff's motion for summary judgment moot. The Clerk of the Court is respectfully requested to close the case.

SO ORDERED

s/WFK
HON. WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

APPENDIX G — ORDER AND DISSENTING OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 16, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

14-2919

NEW YORK STATE CITIZENS'
COALITION FOR CHILDREN,

Plaintiff-Appellant,

v.

SHEILA J. POOLE, ACTING COMMISSIONER
FOR THE NEW YORK STATE OFFICE
OF CHILDREN AND FAMILY SERVICES,
IN HIS OFFICIAL CAPACITY,

Defendant-Appellee.

PRESENT: ROBERT A. KATZMANN, *Chief Judge,* JOSÉ A. CABRANES, ROSEMARY S. POOLER, PETER W. HALL, DEBRA ANN LIVINGSTON, DENNY CHIN, RAYMOND J. LOHIER, JR., SUSAN L. CARNEY, RICHARD J. SULLIVAN, JOSEPH F. BIANCO, MICHAEL H. PARK *Circuit Judges.*

Following disposition of this appeal on April 19, 2019, an active judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted

and there being no majority favoring *en banc* review, rehearing *en banc* is hereby **DENIED**.

Debra Ann Livingston, *Circuit Judge*, joined by José A. Cabranes, Richard J. Sullivan, Joseph F. Bianco, and Michael H. Park, *Circuit Judges*, dissents by opinion from the denial of rehearing *en banc*.

José A. Cabranes, *Circuit Judge*, dissents by opinion from the denial of rehearing *en banc*.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, CLERK

Debra Ann Livingston, *Circuit Judge*, joined by José A. Cabranes, Richard J. Sullivan, Joseph F. Bianco, and Michael H. Park, *Circuit Judges*, dissenting from the denial of rehearing *en banc*:

By a vote of six to five, the active members of this Court decline to rehear a case presenting an issue of "exceptional importance"—an issue that now divides four United States Courts of Appeals.[1] Fed. R. App. P. 35(a). The panel majority holds that the Adoption Assistance and Child Welfare Act of 1980 (the "CWA" or the "Act"), 42 U.S.C. § 670 *et seq.*, creates a privately enforceable right under 42 U.S.C. § 1983 by which some foster care parents and providers may sue States for costs related to childrearing. In implying this right of action, the majority tasks federal district judges across the three States of our Circuit with setting the rates at which this subset of foster care parents and providers should be compensated

1. *Compare New York State Citizens' Coalition for Children v. Poole*, 922 F.3d 69 (2d Cir. 2019) (finding a right privately enforceable under § 1983 to recover "foster care maintenance payments" in the CWA); *D.O. v. Glisson*, 847 F.3d 374 (6th Cir. 2017) (same); *Cal State Foster Parent Ass'n v. Wagner*, 624 F.3d 974 (9th Cir. 2010) (same), *with Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190 (8th Cir. 2013) (holding that the CWA does not confer a privately enforceable right to "foster care maintenance payments"); *see Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 170 (D. Mass. 2011) ("Federal courts are divided as to whether the [CWA] creates privately enforceable rights to . . . foster care maintenance payments."); *see also 31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003) (holding that provisions of the CWA requiring that a foster care child's health and education record be reviewed do not confer a privately enforceable right under § 1983).

for items such as a child's "food, clothing, shelter, daily supervision, [and] school supplies," *id.* § 675(4)(A), pursuant to a statute that contains not a word of guidance for making such judgments.[2] In its forceful petition for rehearing *en banc*, the State of New York argues that the panel majority's holding will require States "to prioritize spending on the limited set of children and expenditures eligible for partial federal reimbursement, at the expense of the much broader population of children that New York and other States have chosen to benefit," while at the same time "subjecting States to the risk of multiple, inconsistent judgments about proper foster care reimbursement rates." Petition for Rehearing *En banc* at 1, 3, *New York State Citizens' Coalition for Children v. Poole*, 922 F.3d 69 (2d Cir. 2019) [hereinafter Petition for Rehearing]. Connecticut, along with over a dozen other States joining in an *amicus* brief, agrees with New York. It too argues that the majority's privately enforceable right will impose immense burdens on State foster care systems

2. Section 675 of the Act, entitled "Definitions," defines "foster care maintenance payments" as:

> 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.

Id. § 675(4)(A).

and represents a "costly condition . . . that Congress did not impose and to which the . . . States did not agree when entering into [this] relationship with the federal government." Brief for Amici Curiae States Supporting Respondents at 2, *New York State Citizens' Coalition for Children v. Poole*, 922 F.3d 69 (2d Cir. 2019); *see also Armstrong v. Exceptional Child Care Center*, 135 S. Ct. 1378, 1389, 191 L. Ed. 2d 471 (2015) (Breyer, *J.*, concurring in part and concurring in the judgment) (noting the "increased litigation, inconsistent results, and disorderly administration" that result from judicial rate setting).

The panel majority's decision imposes these pernicious costs on our Circuit despite the fact that the right it identifies is not even fairly discernible, much less unambiguously manifest, in the text of the CWA. Congress simply did not create an individual right to foster care maintenance payments enforceable pursuant to § 1983 in the "Definitions" section of this Spending Clause legislation. *See Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1197 (8th Cir. 2013) ("[F]inding an enforceable right solely within a purely definitional section is antithetical to requiring unambiguous congressional intent."). In deciding to the contrary, the panel majority misconstrues the Act and ignores decades of Supreme Court precedent, choosing instead to resurrect the Court's long-abandoned "*ancien regime*" of readily implied causes of action. *Alexander v. Sandoval*, 532 U.S. 275, 287, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). Because the majority's decision is wrong, will dissipate scarce foster care dollars, and will impose litigation burdens in this Circuit that far outweigh the additional work required for *en banc* review, I dissent from the denial of rehearing *en banc*.

Appendix G

* * *

The CWA, enacted almost 40 years ago, offers fiscal incentives to participating States "to encourage a more active and systematic monitoring of children in the foster care system." *Vermont Dep't of Soc. & Rehab. Servs. v. U.S. Dep't of Health & Human Servs.*, 798 F.2d 57, 59 (2d Cir. 1986). As the dissent from the panel majority's decision lays out more fully, by incentivizing appropriate foster care *arrangements*, the CWA does not in some way *sub silentio* grant a subset of New York foster parents and providers a privately enforceable right under 42 U.S.C. § 1983 to recover "foster care maintenance payments." *See Poole*, 922 F.3d at 85-101 (Livingston, *J.*, dissenting). The panel majority makes two fundamental mistakes in concluding to the contrary.

As to the first mistake: the CWA provides partial reimbursement to participating States of "foster care maintenance payments" made by these States on behalf of eligible children, if the States otherwise satisfy the requirements of the Act. *See* 42 U.S.C. §§ 671, 675. But the panel majority concludes that by providing that States "shall make" foster care maintenance payments, *id.* § 672(a)(1), the CWA *also* imposes a minimum foster care spending obligation on recipient States, requiring the States to cover the entire cost of a slew of items listed as reimbursable in § 675(4)(A), despite the fact that the States do not even receive full federal reimbursement for those items. Put differently, the panel majority determines that the partial federal support system supplied by the CWA imposes a categorical foster care *spending requirement*

on all recipient States, notwithstanding any limits their legislatures may have placed on these expenditures. This is not a reasonable interpretation of §§ 672 and 675. These provisions are instead best read as identifying certain categories of State payments that are *eligible* for partial federal *reimbursement*, but leaving to the discretion of the States which payments to make in the first instance.[3] *See Poole*, 922 F.3d at 86-92 (Livingston, *J.*, dissenting). State authorities direct their own foster care programs—not federal courts.

But even if §§ 672 and 675 *do* impose a spending obligation on the States (and they do not), the panel majority errs a second time in concluding that the CWA also confers on a subset of New York caregivers a *right*,

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3. The Department of Health and Human Services ("HHS") has consistently interpreted the statute as merely stipulating reimbursement eligibility requirements. To take one example, in 2008, Congress amended the definition of "foster care maintenance payments" to include "payments to cover the cost of (and the cost of providing) . . . reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement." Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351,122 Stat 3949 (2008) (current version at 42 U.S.C. § 675(4)(A)). But HHS did not interpret this amendment as *requiring* States to pay for such travel: "As with any cost enumerated in the definition of foster care maintenance payments," it said, "the [State] agency may decide which of the costs to include in the child's foster care maintenance payment." U.S. Dep't of Health & Human Servs., Program Instruction No. ACYF-CB-Pl-10-11 at 20, http://perma.cc/9LX9-C76D; *see also* U.S. Dep't of Health & Human Servs., Child Welfare Policy Manual § 8.3B.1(9) (2018) (noting that Boy Scout dues qualify as "incidentals" and are therefore "*reimbursable*" under the CWA (emphasis added)).

enforceable under § 1983, to a monetary amount that "cover[s] the cost of" these "foster care maintenance payments." *Poole*, 922 F.3d at 77. As the panel majority is well aware, the Supreme Court has "rejected the notion" that its precedent "permit[s] anything short of an *unambiguously* conferred right to support a cause of action brought under § 1983." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002) (emphasis added). And the Court has reminded us that the dangers of implying enforceable rights are particularly acute with regard to Spending Clause legislation, which is "much in the nature of a contract." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981). After all, "[t]he legitimacy of Congress' power to legislate . . . rests on whether the State voluntarily and knowingly accepts the terms of [this] 'contract,'" and an implied right of action constitutes a critical contractual term. *Suter v. Artist M.*, 503 U.S. 347, 356, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992) (quoting *Pennhurst*, 451 U.S. at 17); *see also Poole*, 922 F.3d at 92-93 (Livingston, *J.*, dissenting) (outlining the Court's jurisprudence in this area); *Kapps v. Wing*, 404 F.3d 105, 127 (2d Cir. 2005) (recognizing that "the Court has appeared to be increasingly reluctant to find § 1983-enforceable rights in statutes which . . . set forth their requirements in the context of delineating obligations that accompany participation in federal spending clause programs").

The CWA does not come close to satisfying this demanding standard for recognizing a privately enforceable right under § 1983 to foster care maintenance

payments.[4] The panel majority inexplicably charges that the dissent inappropriately "read[s] the tea leaves" to reach this conclusion, *Poole*, 922 F.3d at 79—that the dissent rests on a mere prediction that the Supreme Court will abandon the factors set forth in its *Blessing* decision to guide judicial inquiry into whether a statute manifests an "unambiguous[ ]" intent to create a private right, *see Blessing v. Freestone*, 520 U.S. 329, 340-41, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997), when "this Court is not tasked with—and is, in fact, prohibited from—such guesswork." *Poole*, 922 F.3d at 79. In reality, each of the *Blessing* factors uniformly weigh against the presence in the CWA of a § 1983 right to a monetary amount that covers the cost of any and all "foster care maintenance payments."[5] *See id.* at 94-97 (Livingston, *J.*, dissenting).

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4. By contrast, the CWA unambiguously confers a private right of action to prevent States from making foster-care placement decisions on the basis of race, color, or national origin. *See* 42 U.S.C. §§ 671(a)(18), 674(d)(3)(A) ("Any individual who is aggrieved by a violation of section 671(a)(18) [prohibiting racial discrimination in foster care or adoption denials] 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."). The absence of such rights-creating language in the foster care maintenance payment provisions at issue here strongly suggests that the omission was intentional. *See, e.g.*, *Olmsted v. Pruco Life Ins. Co. of N.J.*, 283 F.3d 429, 433 (2d Cir. 2002).

5. And the Supreme Court has warned against reading *Blessing* to thwart the Court's repeated directive that nothing less than an *unambiguously conferred right* is enforceable pursuant to § 1983. *See Gonzaga*, 536 U.S. at 282-83 ("Some language in our opinions might be read to suggest that something less than an unambiguously conferred right is enforceable by § 1983. *Blessing*, for example, set

For example, *Blessing* asks us to consider whether "the right assertedly protected by the statute is . . . so 'vague and amorphous' that its enforcement would strain judicial competence." *Blessing*, 520 U.S. at 340-41. If so, that factor weighs against the existence of the right. *See id.* Here, calculating the appropriate "cost" of "foster care maintenance payments" involves manifold policy judgments about foster care and childrearing, not to mention overall program administration, that federal judges are ill-suited to make and that go entirely unmentioned in the statute that the panel majority interprets unambiguously to require these judgments. *Poole*, 922 F.3d at 95-97 (Livingston, *J.*, dissenting); *cf. Armstrong*, 135 S. Ct. at 1388 (Breyer, *J.*, concurring in part and concurring in the judgment) ("The history of ratemaking demonstrates that administrative agencies are far better suited to this task than judges."). How exactly should judges determine the "cost" of daily supervision, personal incidentals, and other expenses associated with childrearing? Should rates vary based on a family's income level or location, or a child's disability? Who can say, since the CWA, which does not contemplate federal courts' involvement in rate setting, says *not a word* about the standards according to which scarce foster care dollars are to be allocated?[6]

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forth three 'factors' to guide judicial inquiry into whether or not a statute confers a right. . . . 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.").

6. As already noted, the CWA provides partial federal reimbursement of a State's foster care expenditures, but only with regard to the § 675(4)(A) items and only for *some* children—those

If the plain language of the statute and the *Blessing* factors were not formidable enough obstacles to the panel majority's conclusion, there is also the Supreme Court's recent pronouncement in *Armstrong v. Exceptional Childcare Center*, 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015). In *Armstrong*, the Supreme Court held that § 30(A) of the Medicaid Act is not privately enforceable in equity because "[t]he sheer complexity associated with enforcing § 30(A), coupled with the express provision of an administrative remedy," demonstrates that Congress did not intend for private plaintiffs to enforce § 30(A) in courts. *Id.* at 1385. The Court rested its holding on the long line of precedent catalogued above, "establish[ing] that a private right of action under federal law is not created by mere implication, but must be 'unambiguously conferred.'" *Id.* at 1388 (quoting *Gonzaga*, 536 U.S. at 283). The panel majority bizarrely claims that *Armstrong* is inapposite. *Poole*, 922 F.3d at 85. But the Medicaid Act and the CWA have similar *administrative* (rather than judicial) enforcement schemes and, as already noted, determining appropriate reimbursement rates for childrearing expenses absent

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who "would have otherwise qualified for assistance under the now-defunct Aid to Families with Dependent Children program." *Midwest Foster Care*, 712 F.3d at 1194. New York affirms that partial federal reimbursement is available for only about forty percent of the children in its foster care system. Petition for Rehearing at 7. The panel majority's conclusion that the CWA imposes a spending mandate on States, enforceable pursuant to § 1983, will thus not only confer on district courts a rate-setting obligation pursuant to a statute that provides no guidance for this task, but also have the likely effect, as New York argues, of arbitrarily "forc[ing] New York to decrease its payments for the costs and children who do not meet federal eligibility requirements." *Id.* at 15.

any statutory guidance presents major problems of judicial administrability, similar to those in *Armstrong*. *See id.* at 97-99 (Livingston, *J.* dissenting). In fact, the only significant distinction between the two cases—that the *Armstrong* plaintiffs brought suit in equity rather than pursuant to § 1983—hurts the Plaintiffs here. Those seeking to bring a cause of action in equity benefit from a presumption that an equitable cause of action exists, whereas those bringing suit under § 1983 labor under the opposite presumption. *Armstrong*, 135 S. Ct. at 1392 (Sotomayor, *J.*, dissenting). Indeed, the *Armstrong* plaintiffs did not even *attempt* to sue under § 1983, given this more exacting burden. *Id.* at 1386 n*; *see also Poole*, 922 F.3d at 98-99 (Livingston. *J*, dissenting) (discussing the *Armstrong* decision).

Parsing recent Supreme Court pronouncements on implied rights of action, however, is not really necessary here—belts and suspenders, so to speak. From the start, this case has been and remains remarkably easy. The CWA simply does not unambiguously confer a right to foster care maintenance payments enforceable pursuant to § 1983. The panel majority reaches the opposite conclusion only by adopting a flawed construction of the Act and ignoring the Supreme Court's "repudiat[ion of a] ready implication of a § 1983 action." *Armstrong*, 135 S. Ct. at 1386 n*. Its decision threatens to waste foster care resources, arbitrarily divert scarce dollars from some children to others, and push federal courts into a "traditional area of state concern." *Moore v. Sims*, 442 U.S. 415, 435, 99 S. Ct. 2371, 60 L. Ed. 2d 994 (1979). Congress neither intended nor legislated for such an outcome. Our *en banc* Court should not countenance it.

Appendix G

* * *

One final word is in order. The narrow vote by a bare majority of our Court's active judges to decline *en banc* review might lead a reader to infer that these judges concur in the panel majority's holding and reasoning, despite all the arguments presented in the dissent. That would be a big mistake. Because of our Circuit's so-called "tradition" of declining *en banc* review, the fact that six members of our Court voted to decline review does not mean that they were convinced that the panel majority is correct. *See Ricci v. DeStefano*, 530 F.3d 88, 89 (2d Cir. 2008) (Katzmann, *J.*, concurring in the denial of *rehearing en banc*) (highlighting the Circuit's supposed "longstanding tradition of general deference to panel adjudication—a tradition which holds whether or not the judges of the Court agree with the panel's disposition of the matter before it"). Nor does it follow that these six judges deemed the matter unimportant or unexceptional. *See Landell v. Sorrell*, 406 F.3d 159, 167 (2d Cir. 2005) (Sack & Katzmann, *JJ.*, concurring in the denial of rehearing *en banc*) (suggesting that *en banc* review "only forestall[s] resolution of issues destined . . . for the Supreme Court"). *But see Ricci*, 530 F.3d at 92 (Jacobs, *J.*, dissenting from the denial of rehearing *en banc*) ("If issues are important enough to warrant Supreme Court review, they are important enough for our full Court to consider and decide on the merits.").

Our so-called *en banc* "tradition," however, is not a license to disregard the substantial consequences that will accompany this Court's mistaken judgments. Once the mandate issues in this case, the district court must

commence its review of how New York "determined the amounts it pays" to those receiving foster care maintenance payments, and "how it has quantified the costs of the specific expenses listed in Section 675(4)," *Poole*, 922 F.3d at 82, so as to decide whether to approve or reject the State's foster care rates (again, as applied to a subset of its foster care parents and providers). In its petition for rehearing, New York warns that such review will unjustifiably inject federal courts into the "complex, judgment-laden process" by which New York, like other States, determines when and how to cover costs for particular children in foster care. Petition for Rehearing at 20. Resources may—and likely will—be squandered in litigation destined to produce "multiple, inconsistent" results. *Id.* at 3. Tradition shouldn't prevent this Court from reviewing an issue of such consequence.

As set forth above, the panel majority made a mistake in interpreting this Spending Clause statute to impose a mandatory spending obligation on States, enforceable under § 1983. The full Court also errs in declining *en banc* review, but perhaps with less excuse. The panel majority simply made a mistake. To the extent that this *en banc* vote comes down to nothing more than an ostensible tradition, the full Court, with eyes open, has refused to afford New York State, the *amici*, and the foster care children within our jurisdiction the consideration they deserve.

José A. Cabranes, *Circuit Judge*, dissenting from the order denying rehearing *en banc*:

I respectfully join in Judge Livingston's opinion. The dissenters having failed to persuade a majority of the active judges to rehear this appeal, our concerns necessarily now rest in the hands of our highest court. I write separately, and in my name alone, for the sole purpose of re-stating some earlier observations regarding aspects of the *en banc* practice of the Second Circuit. *See generally United States v. Taylor*, 752 F.3d 254, 255-57 (2d Cir. 2014) (Cabranes, *J.*, dissenting from order denying rehearing *en banc*).

As I observed on that earlier occasion, an observer can draw only one firm conclusion from our decision not to rehear this case before the full court of active judges—namely, that the opinion dissenting from the denial of *en banc* review (here, by Judge Livingston) is, by definition, an expression of the view of the five subscribing judges that the panel's resolution of this case presents legal issues of exceptional importance.

By contrast, the order denying rehearing without elaboration may, or may not, reflect the substantive views of the particular judges in the six-judge majority voting against rehearing.

In light of how judges in the Second Circuit have historically exercised their discretion, the decision not to convene the *en banc* court does not necessarily mean that a case either lacks significance or was correctly decided. Indeed, the contrary may be true. The story of our vaunted *en banc* "traditions" is fully described in my dissent from

the denial of rehearing in *Taylor*. Suffice it to say that this tradition is a sometime thing, and some who invoke it have no difficulty abandoning it when convenient.

All one can know for certain about a vote like this one is that six active circuit judges did not wish to rehear this case—perhaps because of a general aversion to *en banc* rehearings, perhaps out of confidence that the Supreme Court will solve our problem, or perhaps because doing so would signal their investment in "collegiality"—while the five other active circuit judges strongly believed that the panel opinion presented multiple legal errors of exceptional importance warranting correction.

APPENDIX H — RELEVANT STATUTORY PROVISIONS

42 U.S.C.A. § 670

§ 670. 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 (as such plan was in effect on June 1, 1995), adoption assistance for children with special needs, kinship guardianship assistance, and prevention services or programs specified in section 671(e)(1) of this title, there are authorized to be appropriated for each fiscal year 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.

Appendix H

42 U.S.C.A. § 671

§ 671. State plan for foster care and adoption assistance

(a) Requisite features of State plan

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

(1) provides for foster care maintenance payments in accordance with section 672 of this title, adoption assistance in accordance with section 673 of this title, and, at the option of the State, services or programs specified in subsection (e)(1) of this section for children who are candidates for foster care or who are pregnant or parenting foster youth and the parents or kin caregivers of the children, in accordance with the requirements of that subsection;

(2) provides that the State agency responsible for administering the program authorized by subpart 1 of part B of this subchapter shall administer, or supervise the administration of, the program authorized by this part;

(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;

(4) provides that the State shall assure that the programs at the local level assisted under this part will

be coordinated with the programs at the State or local level assisted under parts A and B, under division A[1] of subchapter XX of this chapter, and under any other appropriate provision of Federal law;

(5) provides that the State will, in the administration of its programs under this part, use such methods relating to the establishment and maintenance of personnel standards on a merit basis as are found by the Secretary to be necessary for the proper and efficient operation of the programs, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, or compensation of any individual employed in accordance with such methods;

(6) provides that the State agency referred to in paragraph (2) (hereinafter in this part referred to as the "State agency") will make such reports, in such form and containing such information as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports;

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1. Division A of subchapter XX, was in the original a reference to subtitle 1 of Title XX, and was translated as if referring to Subtitle A of Title XX of the Social Security Act, which is classified to division A of subchapter XX of this chapter, 42 U.S.C.A. § 1397 et seq., to reflect the probable intent of Congress. Title XX of the Act, enacting subchapter XX of this chapter, does not contain a subtitle 1.

(7) provides that the State agency will monitor and conduct periodic evaluations of activities carried out under this part;

(8) subject to subsection (c), provides safeguards which restrict the use of or disclosure of information concerning individuals assisted under the State plan to purposes directly connected with (A) the administration of the plan of the State approved under this part, the plan or program of the State under part A, B, or D or under subchapter I, V, X, XIV, XVI (as in effect in Puerto Rico, Guam, and the Virgin Islands), XIX, or XX, the program established by subchapter II, or the supplemental security income program established by subchapter XVI, (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, (C) the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need, (D) any audit or similar activity conducted in connection with the administration of any such plan or program by any governmental agency which is authorized by law to conduct such audit or activity, and (E) reporting and providing information pursuant to paragraph (9) to appropriate authorities with respect to known or suspected child abuse or neglect; and the safeguards so provided shall prohibit disclosure, to any committee or legislative body (other than an agency referred to in clause (D) with respect to an activity referred to in such clause), of any information which identifies by name or address any such applicant or recipient; except

that nothing contained herein shall preclude a State from providing standards which restrict disclosures to purposes more limited than those specified herein, or which, in the case of adoptions, prevent disclosure entirely;

(9) provides that the State agency will--

(A) report to an appropriate agency or official, known or suspected instances of physical or mental injury, sexual abuse or exploitation, or negligent treatment or maltreatment of a child receiving aid under part B or this part under circumstances which indicate that the child's health or welfare is threatened thereby;

(B) provide such information with respect to a situation described in subparagraph (A) as the State agency may have; and

(C) not later than--

(i) 1 year after September 29, 2014, demonstrate to the Secretary that the State agency has developed, in consultation with State and local law enforcement, juvenile justice systems, health care providers, education agencies, and organizations with experience in dealing with at-risk children and youth, policies and procedures (including relevant training for caseworkers) for identifying, documenting in agency records, and determining appropriate services with respect to--

(I) any child or youth over whom the State agency has responsibility for placement, care, or supervision and who the State has reasonable cause to believe is, or is at risk of being, a sex trafficking victim (including children for whom a State child welfare agency has an open case file but who have not been removed from the home, children who have run away from foster care and who have not attained 18 years of age or such older age as the State has elected under section 675(8) of this title, and youth who are not in foster care but are receiving services under section 677 of this title); and

(II) at the option of the State, any individual who has not attained 26 years of age, without regard to whether the individual is or was in foster care under the responsibility of the State; and

(ii) 2 years after September 29, 2014, demonstrate to the Secretary that the State agency is implementing the policies and procedures referred to in clause (i).

(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 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;

(11) provides for periodic review of the standards referred to in the preceding paragraph and amounts paid as foster care maintenance payments and adoption assistance to assure their continuing appropriateness;

(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;

(13) provides that the State shall arrange for a periodic and independently conducted audit of the programs assisted under this part and part B of this subchapter, which shall be conducted no less frequently than once every three years;

(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 placements[2] 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;

(17) provides that, where appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the program funded under part A and plan approved under part D, to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments under this part;

(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

2. So in original. A comma probably should appear.

> **(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(f)(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;

(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;

(C) provides procedures for criminal records checks, including fingerprint-based checks of national crime information databases (as defined in section 534(f)(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; and

(D) provides procedures for any child-care institution, including a group home, residential treatment center, shelter, or other congregate care setting, to conduct criminal records checks, including fingerprint-based checks of national crime information databases (as defined in section 534(f)(3)(A) of Title 28), and checks described in subparagraph (B) of this paragraph, on any adult

working in a child-care institution, including a group home, residential treatment center, shelter, or other congregate care setting, unless the State reports to the Secretary the alternative criminal records checks and child abuse registry checks the State conducts on any adult working in a child-care institution, including a group home, residential treatment center, shelter, or other congregate care setting, and why the checks specified in this subparagraph are not appropriate for the State;

(21) provides for health insurance coverage (including, at State option, through the program under the State plan approved under subchapter XIX) for any child who has been determined to be a child with special needs, for whom there is in effect an adoption assistance agreement (other than an agreement under this part) between the State and an adoptive parent or parents, and who the State has determined cannot be placed with an adoptive parent or parents without medical assistance because such child has special needs for medical, mental health, or rehabilitative care, and that with respect to the provision of such health insurance coverage--

(A) such coverage may be provided through 1 or more State medical assistance programs;

(B) the State, in providing such coverage, shall ensure that the medical benefits, including mental health benefits, provided are of the same type and kind as those that would be provided for children by the State under subchapter XIX;

(C) in the event that the State provides such coverage through a State medical assistance program other than the program under subchapter XIX, and the State exceeds its funding for services under such other program, any such child shall be deemed to be receiving aid or assistance under the State plan under this part for purposes of section 1396a(a)(10)(A)(i)(I) of this title; and

(D) in determining cost-sharing requirements, the State shall take into consideration the circumstances of the adopting parent or parents and the needs of the child being adopted consistent, to the extent coverage is provided through a State medical assistance program, with the rules under such program;

(22) provides that, not later than January 1, 1999, the State shall develop and implement standards to ensure that children in foster care placements in public or private agencies are provided quality services that protect the safety and health of the children;

(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;

(25) provides that the State shall have in effect procedures for the orderly and timely interstate placement of children, which, in the case of a State other than the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, or American

Samoa, not later than October 1, 2027, shall include the use of an electronic interstate case-processing system; and procedures implemented in accordance with an interstate compact, if incorporating with the procedures prescribed by paragraph (26), shall be considered to satisfy the requirement of this paragraph;

(26) provides that--

(A)(i) within 60 days after the State receives from another State a request to conduct a study of a home environment for purposes of assessing the safety and suitability of placing a child in the home, the State shall, directly or by contract--

(I) conduct and complete the study; and

(II) return to the other State a report on the results of the study, which shall address the extent to which placement in the home would meet the needs of the child; and

(ii) in the case of a home study begun on or before September 30, 2008, if the State fails to comply with clause (i) within the 60-day period as a result of circumstances beyond the control of the State (such as a failure by a Federal agency to provide the results of a background check, or the failure by any entity to provide completed medical forms, requested by the State at least 45 days before the end of the

60-day period), the State shall have 75 days to comply with clause (i) if the State documents the circumstances involved and certifies that completing the home study is in the best interests of the child; except that

(iii) this subparagraph shall not be construed to require the State to have completed, within the applicable period, the parts of the home study involving the education and training of the prospective foster or adoptive parents;

(B) the State shall treat any report described in subparagraph (A) that is received from another State or an Indian tribe (or from a private agency under contract with another State) as meeting any requirements imposed by the State for the completion of a home study before placing a child in the home, unless, within 14 days after receipt of the report, the State determines, based on grounds that are specific to the content of the report, that making a decision in reliance on the report would be contrary to the welfare of the child; and

(C) the State shall not impose any restriction on the ability of a State agency administering, or supervising the administration of, a State program operated under a State plan approved under this part to contract with a private agency for the conduct of a home study described in subparagraph (A);

(27) provides that, with respect to any child in foster care under the responsibility of the State under this part or part B and without regard to whether foster care maintenance payments are made under section 672 of this title on behalf of the child, the State has in effect procedures for verifying the citizenship or immigration status of the child;

(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;

(30) provides assurances that each child who has attained the minimum age for compulsory school attendance under State law and with respect to whom there is eligibility for a payment under the State plan is a full-time elementary or secondary school student or has completed secondary school, and for purposes of this paragraph, the term "elementary or secondary school student" means, with respect to a child, that the child is--

(A) enrolled (or in the process of enrolling) in an institution which provides elementary or secondary education, as determined under the law of the State or other jurisdiction in which the institution is located;

(B) instructed in elementary or secondary education at home in accordance with a home school law of the State or other jurisdiction in which the home is located;

(C) in an independent study elementary or secondary education program in accordance with the law of the State or other jurisdiction in which the program is located, which is administered by the local school or school district; or

(D) incapable of attending school on a full-time basis due to the medical condition of the child, which incapability is supported by regularly updated information in the case plan of the child;

(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;

(32) provides that the State will negotiate in good faith with any Indian tribe, tribal organization or tribal consortium in the State that requests to develop an agreement with the State to administer all or part of the program under this part on behalf of Indian children who are under the authority of the tribe, organization, or consortium, including foster care maintenance payments on behalf of children who are placed in State or tribally licensed foster family homes, adoption assistance payments, and, if the State has elected to provide such payments, kinship guardianship assistance payments under section 673(d) of this title, and tribal access to resources for administration, training, and data collection under this part;

(33) provides that the State will inform any individual who is adopting, or whom the State is made aware is considering adopting, a child who is in foster care under the responsibility of the State of the potential eligibility of the individual for a Federal tax credit under section 23 of the Internal Revenue Code of 1986;

(34) provides that, for each child or youth described in paragraph (9)(C)(i)(I), the State agency shall--

> **(A)** not later than 2 years after September 29, 2014, report immediately, and in no case later than 24 hours after receiving information on children or youth who have been identified as being a sex trafficking victim, to the law enforcement authorities; and

(B) not later than 3 years after September 29, 2014, and annually thereafter, report to the Secretary the total number of children and youth who are sex trafficking victims;

(35) provides that--

(A) not later than 1 year after September 29, 2014, the State shall develop and implement specific protocols for--

(i) expeditiously locating any child missing from foster care;

(ii) determining the primary factors that contributed to the child's running away or otherwise being absent from care, and to the extent possible and appropriate, responding to those factors in current and subsequent placements;

(iii) determining the child's experiences while absent from care, including screening the child to determine if the child is a possible sex trafficking victim (as defined in section 675(9)(A) of this title); and

(iv) reporting such related information as required by the Secretary; and

(B) not later than 2 years after September 29, 2014, for each child and youth described in paragraph

(9)(C)(i)(I) of this subsection, the State agency shall report immediately, and in no case later than 24 hours after receiving, information on missing or abducted children or youth to the law enforcement authorities for entry into the National Crime Information Center (NCIC) database of the Federal Bureau of Investigation, established pursuant to section 534 of Title 28, and to the National Center for Missing and Exploited Children;

(36) provides that, not later than April 1, 2019, the State shall submit to the Secretary information addressing--

(A) whether the State licensing standards are in accord with model standards identified by the Secretary, and if not, the reason for the specific deviation and a description as to why having a standard that is reasonably in accord with the corresponding national model standards is not appropriate for the State;

(B) whether the State has elected to waive standards established in 671(a)(10)(A) of this title for relative foster family homes (pursuant to waiver authority provided by 671(a)(10)(D) of this title), a description of which standards the State most commonly waives, and if the State has not elected to waive the standards, the reason for not waiving these standards;

(C) if the State has elected to waive standards specified in subparagraph (B), how caseworkers are trained to use the waiver authority and whether the State has developed a process or provided tools to assist caseworkers in waiving nonsafety standards per the authority provided in 671(a)(10)(D) of this title to quickly place children with relatives; and

(D) a description of the steps the State is taking to improve caseworker training or the process, if any; and

(37) includes a certification that, in response to the limitation imposed under section 672(k) of this title with respect to foster care maintenance payments made on behalf of any child who is placed in a setting that is not a foster family home, the State will not enact or advance policies or practices that would result in a significant increase in the population of youth in the State's juvenile justice system.

(b) Approval of plan by Secretary

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

(c) Use of child welfare records in State court proceedings

Subsection (a)(8) shall not be construed to limit the flexibility of a State in determining State policies relating to public access to court proceedings to determine child

abuse and neglect or other court hearings held pursuant to part B or this part, except that such policies shall, at a minimum, ensure the safety and well-being of the child, parents, and family.

(d) Annual reports by the Secretary on number of children and youth reported by States to be sex trafficking victims

Not later than 4 years after September 29, 2014, and annually thereafter, the Secretary shall report to the Congress and make available to the public on the Internet website of the Department of Health and Human Services the number of children and youth reported in accordance with subsection (a)(34)(B) of this section to be sex trafficking victims (as defined in section 675(9)(A) of this title).

(e) Prevention and family services and programs

(1) In general

Subject to the succeeding provisions of this subsection, the Secretary may make a payment to a State for providing the following services or programs for a child described in paragraph (2) and the parents or kin caregivers of the child when the need of the child, such a parent, or such a caregiver for the services or programs are directly related to the safety, permanence, or well-being of the child or to preventing the child from entering foster care:

Appendix H

(A) Mental health and substance abuse prevention and treatment services

Mental health and substance abuse prevention and treatment services provided by a qualified clinician for not more than a 12-month period that begins on any date described in paragraph (3) with respect to the child.

(B) In-home parent skill-based programs

In-home parent skill-based programs for not more than a 12-month period that begins on any date described in paragraph (3) with respect to the child and that include parenting skills training, parent education, and individual and family counseling.

(2) Child described

For purposes of paragraph (1), a child described in this paragraph is the following:

(A) A child who is a candidate for foster care (as defined in section 675(13) of this title) but can remain safely at home or in a kinship placement with receipt of services or programs specified in paragraph (1).

(B) A child in foster care who is a pregnant or parenting foster youth.

(3) Date described

For purposes of paragraph (1), the dates described in this paragraph are the following:

> **(A)** The date on which a child is identified in a prevention plan maintained under paragraph (4) as a child who is a candidate for foster care (as defined in section 675(13) of this title).
>
> **(B)** The date on which a child is identified in a prevention plan maintained under paragraph (4) as a pregnant or parenting foster youth in need of services or programs specified in paragraph (1).

(4) Requirements related to providing services and programs

Services and programs specified in paragraph (1) may be provided under this subsection only if specified in advance in the child's prevention plan described in subparagraph (A) and the requirements in subparagraphs (B) through (E) are met:

> **(A) Prevention plan**
>
> The State maintains a written prevention plan for the child that meets the following requirements (as applicable):

Appendix H

(i) Candidates

In the case of a child who is a candidate for foster care described in paragraph (2)(A), the prevention plan shall--

> **(I)** identify the foster care prevention strategy for the child so that the child may remain safely at home, live temporarily with a kin caregiver until reunification can be safely achieved, or live permanently with a kin caregiver;
>
> **(II)** list the services or programs to be provided to or on behalf of the child to ensure the success of that prevention strategy; and
>
> **(III)** comply with such other requirements as the Secretary shall establish.

(ii) Pregnant or parenting foster youth

In the case of a child who is a pregnant or parenting foster youth described in paragraph (2)(B), the prevention plan shall--

> **(I)** be included in the child's case plan required under section 675(1) of this title;
>
> **(II)** list the services or programs to be provided to or on behalf of the youth to

ensure that the youth is prepared (in the case of a pregnant foster youth) or able (in the case of a parenting foster youth) to be a parent;

(III) describe the foster care prevention strategy for any child born to the youth; and

(IV) comply with such other requirements as the Secretary shall establish.

(B) Trauma-informed

The services or programs to be provided to or on behalf of a child are provided under an organizational structure and treatment framework that involves understanding, recognizing, and responding to the effects of all types of trauma and in accordance with recognized principles of a trauma-informed approach and trauma-specific interventions to address trauma's consequences and facilitate healing.

(C) Only services and programs provided in accordance with promising, supported, or well-supported practices permitted

(i) In general

Only State expenditures for services or programs specified in subparagraph (A) or (B) of paragraph (1) that are provided in accordance

with practices that meet the requirements specified in clause (ii) of this subparagraph and that meet the requirements specified in clause (iii), (iv), or (v), respectively, for being a promising, supported, or well-supported practice, shall be eligible for a Federal matching payment under section 674(a)(6)(A) of this title.

(ii) General practice requirements

The general practice requirements specified in this clause are the following:

(I) The practice has a book, manual, or other available writings that specify the components of the practice protocol and describe how to administer the practice.

(II) There is no empirical basis suggesting that, compared to its likely benefits, the practice constitutes a risk of harm to those receiving it.

(III) If multiple outcome studies have been conducted, the overall weight of evidence supports the benefits of the practice.

(IV) Outcome measures are reliable and valid, and are administrated consistently and accurately across all those receiving the practice.

(V) There is no case data suggesting a risk of harm that was probably caused by the treatment and that was severe or frequent.

(iii) Promising practice

A practice shall be considered to be a "promising practice" if the practice is superior to an appropriate comparison practice using conventional standards of statistical significance (in terms of demonstrated meaningful improvements in validated measures of important child and parent outcomes, such as mental health, substance abuse, and child safety and well-being), as established by the results or outcomes of at least one study that--

(I) was rated by an independent systematic review for the quality of the study design and execution and determined to be well-designed and well-executed; and

(II) utilized some form of control (such as an untreated group, a placebo group, or a wait list study).

(iv) Supported practice

A practice shall be considered to be a "supported practice" if--

(I) the practice is superior to an appropriate comparison practice using conventional standards of statistical significance (in terms of demonstrated meaningful improvements in validated measures of important child and parent outcomes, such as mental health, substance abuse, and child safety and well-being), as established by the results or outcomes of at least one study that--

(aa) was rated by an independent systematic review for the quality of the study design and execution and determined to be well-designed and well-executed;

(bb) was a rigorous random-controlled trial (or, if not available, a study using a rigorous quasi-experimental research design); and

(cc) was carried out in a usual care or practice setting; and

(II) the study described in subclause (I) established that the practice has a sustained effect (when compared to a control group) for at least 6 months beyond the end of the treatment.

Appendix H

(v) Well-supported practice

A practice shall be considered to be a "well-supported practice" if--

(I) the practice is superior to an appropriate comparison practice using conventional standards of statistical significance (in terms of demonstrated meaningful improvements in validated measures of important child and parent outcomes, such as mental health, substance abuse, and child safety and well-being), as established by the results or outcomes of at least two studies that--

(aa) were rated by an independent systematic review for the quality of the study design and execution and determined to be well-designed and well-executed;

(bb) were rigorous random-controlled trials (or, if not available, studies using a rigorous quasi-experimental research design); and

(cc) were carried out in a usual care or practice setting; and

(II) at least one of the studies described in subclause (I) established that the practice has a sustained effect (when compared to a

control group) for at least 1 year beyond the end of treatment.

(D) Guidance on practices criteria and pre-approved services and programs

(i) In general

Not later than October 1, 2018, the Secretary shall issue guidance to States regarding the practices criteria required for services or programs to satisfy the requirements of subparagraph (C). The guidance shall include a pre-approved list of services and programs that satisfy the requirements.

(ii) Updates

The Secretary shall issue updates to the guidance required by clause (i) as often as the Secretary determines necessary.

(E) Outcome assessment and reporting

The State shall collect and report to the Secretary the following information with respect to each child for whom, or on whose behalf mental health and substance abuse prevention and treatment services or in-home parent skill-based programs are provided during a 12-month period beginning on the date the child is determined by the State to be a child described in paragraph (2):

(i) The specific services or programs provided and the total expenditures for each of the services or programs.

(ii) The duration of the services or programs provided.

(iii) In the case of a child described in paragraph (2)(A), the child's placement status at the beginning, and at the end, of the 1-year period, respectively, and whether the child entered foster care within 2 years after being determined a candidate for foster care.

(5) State plan component

(A) In general

A State electing to provide services or programs specified in paragraph (1) shall submit as part of the State plan required by subsection (a) a prevention services and programs plan component that meets the requirements of subparagraph (B).

(B) Prevention services and programs plan component

In order to meet the requirements of this subparagraph, a prevention services and programs plan component, with respect to each 5-year period for which the plan component is in operation in the State, shall include the following:

(i) How providing services and programs specified in paragraph (1) is expected to improve specific outcomes for children and families.

(ii) How the State will monitor and oversee the safety of children who receive services and programs specified in paragraph (1), including through periodic risk assessments throughout the period in which the services and programs are provided on behalf of a child and reexamination of the prevention plan maintained for the child under paragraph (4) for the provision of the services or programs if the State determines the risk of the child entering foster care remains high despite the provision of the services or programs.

(iii) With respect to the services and programs specified in subparagraphs (A) and (B) of paragraph (1), information on the specific promising, supported, or well-supported practices the State plans to use to provide the services or programs, including a description of--

(I) the services or programs and whether the practices used are promising, supported, or well-supported;

(II) how the State plans to implement the services or programs, including

how implementation of the services or programs will be continuously monitored to ensure fidelity to the practice model and to determine outcomes achieved and how information learned from the monitoring will be used to refine and improve practices;

(III) how the State selected the services or programs;

(IV) the target population for the services or programs; and

(V) how each service or program provided will be evaluated through a well-designed and rigorous process, which may consist of an ongoing, cross-site evaluation approved by the Secretary.

(iv) A description of the consultation that the State agencies responsible for administering the State plans under this part and part B engage in with other State agencies responsible for administering health programs, including mental health and substance abuse prevention and treatment services, and with other public and private agencies with experience in administering child and family services, including community-based organizations, in order to foster a continuum of care for children described in paragraph (2) and their parents or kin caregivers.

(v) A description of how the State shall assess children and their parents or kin caregivers to determine eligibility for services or programs specified in paragraph (1).

(vi) A description of how the services or programs specified in paragraph (1) that are provided for or on behalf of a child and the parents or kin caregivers of the child will be coordinated with other child and family services provided to the child and the parents or kin caregivers of the child under the State plans in effect under subparts 1 and 2 of part B.

(vii) Descriptions of steps the State is taking to support and enhance a competent, skilled, and professional child welfare workforce to deliver trauma-informed and evidence-based services, including--

(I) ensuring that staff is qualified to provide services or programs that are consistent with the promising, supported, or well-supported practice models selected; and

(II) developing appropriate prevention plans, and conducting the risk assessments required under clause (iii).

(viii) A description of how the State will provide training and support for caseworkers in assessing what children and their families

need, connecting to the families served, knowing how to access and deliver the needed trauma-informed and evidence-based services, and overseeing and evaluating the continuing appropriateness of the services.

(ix) A description of how caseload size and type for prevention caseworkers will be determined, managed, and overseen.

(x) An assurance that the State will report to the Secretary such information and data as the Secretary may require with respect to the provision of services and programs specified in paragraph (1), including information and data necessary to determine the performance measures for the State under paragraph (6) and compliance with paragraph (7).

(C) Reimbursement for services under the prevention plan component

(i) Limitation

Except as provided in subclause (ii), a State may not receive a Federal payment under this part for a given promising, supported, or well-supported practice unless (in accordance with subparagraph (B)(iii)(V)) the plan includes a well-designed and rigorous evaluation strategy for that practice.

(ii) Waiver of limitation

The Secretary may waive the requirement for a well-designed and rigorous evaluation of any well-supported practice if the Secretary deems the evidence of the effectiveness of the practice to be compelling and the State meets the continuous quality improvement requirements included in subparagraph (B)(iii)(II) with regard to the practice.

(6) Prevention services measures

(A) Establishment; annual updates

Beginning with fiscal year 2021, and annually thereafter, the Secretary shall establish the following prevention services measures based on information and data reported by States that elect to provide services and programs specified in paragraph (1):

(i) Percentage of candidates for foster care who do not enter foster care

The percentage of candidates for foster care for whom, or on whose behalf, the services or programs are provided who do not enter foster care, including those placed with a kin caregiver outside of foster care, during the 12-month period in which the services or programs are provided and through the end of

the succeeding 12-month period.

(ii) Per-child spending

The total amount of expenditures made for mental health and substance abuse prevention and treatment services or in-home parent skill-based programs, respectively, for, or on behalf of, each child described in paragraph (2).

(B) Data

The Secretary shall establish and annually update the prevention services measures--

(i) based on the median State values of the information reported under each clause of subparagraph (A) for the 3 then most recent years; and

(ii) taking into account State differences in the price levels of consumption goods and services using the most recent regional price parities published by the Bureau of Economic Analysis of the Department of Commerce or such other data as the Secretary determines appropriate.

(C) Publication of State prevention services measures

The Secretary shall annually make available to the public the prevention services measures of each State.

(7) Maintenance of effort for State foster care prevention expenditures

(A) In general

If a State elects to provide services and programs specified in paragraph (1) for a fiscal year, the State foster care prevention expenditures for the fiscal year shall not be less than the amount of the expenditures for fiscal year 2014 (or, at the option of a State described in subparagraph (E), fiscal year 2015 or fiscal year 2016 (whichever the State elects)).

(B) State foster care prevention expenditures

The term "State foster care prevention expenditures" means the following:

(i) TANF; IV-B; SSBG

State expenditures for foster care prevention services and activities under the State program funded under part A (including from amounts made available by the Federal Government), under the State plan developed under part B (including any such amounts), or under the Social Services Block Grant Programs under subtitle A of title XX (including any such amounts).

(ii) Other State programs

State expenditures for foster care prevention services and activities under any State program that is not described in clause (i) (other than any State expenditures for foster care prevention services and activities under the State program under this part (including under a waiver of the program)).

(C) State expenditures

The term "State expenditures" means all State or local funds that are expended by the State or a local agency including State or local funds that are matched or reimbursed by the Federal Government and State or local funds that are not matched or reimbursed by the Federal Government.

(D) Determination of prevention services and activities

The Secretary shall require each State that elects to provide services and programs specified in paragraph (1) to report the expenditures specified in subparagraph (B) for fiscal year 2014 and for such fiscal years thereafter as are necessary to determine whether the State is complying with the maintenance of effort requirement in subparagraph (A). The Secretary shall specify the specific services and activities under each program referred to in subparagraph (B) that are

"prevention services and activities" for purposes of the reports.

(E) State described

For purposes of subparagraph (A), a State is described in this subparagraph if the population of children in the State in 2014 was less than 200,000 (as determined by the United States Census Bureau).

(8) Prohibition against use of State foster care prevention expenditures and Federal IV-E prevention funds for matching or expenditure requirement

A State that elects to provide services and programs specified in paragraph (1) shall not use any State foster care prevention expenditures for a fiscal year for the State share of expenditures under section 674(a)(6) of this title for a fiscal year.

(9) Administrative costs

Expenditures described in section 674(a)(6)(B) of this title--

(A) shall not be eligible for payment under subparagraph (A), (B), or (E) of section 674(a)(3) of this title; and

(B) shall be eligible for payment under section 674(a)(6)(B) of this title without regard to whether

the expenditures are incurred on behalf of a child who is, or is potentially, eligible for foster care maintenance payments under this part.

(10) Application

(A) In general

The provision of services or programs under this subsection to or on behalf of a child described in paragraph (2) shall not be considered to be receipt of aid or assistance under the State plan under this part for purposes of eligibility for any other program established under this chapter, nor shall the provision of such services or programs be construed to permit the State to reduce medical or other assistance available to a recipient of such services or programs.

(B) Candidates in kinship care

A child described in paragraph (2) for whom such services or programs under this subsection are provided for more than 6 months while in the home of a kin caregiver, and who would satisfy the AFDC eligibility requirement of section 672(a)(3)(A)(ii)(II) of this title but for residing in the home of the caregiver for more than 6 months, is deemed to satisfy that requirement for purposes of determining whether the child is eligible for foster care maintenance payments under section 672 of this title.

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(C) Payer of last resort

In carrying out its responsibilities to ensure access to services or programs under this subsection, the State agency shall not be considered to be a legally liable third party for purposes of satisfying a financial commitment for the cost of providing such services or programs with respect to any individual for whom such cost would have been paid for from another public or private source but for the enactment of this subsection (except that whenever considered necessary to prevent a delay in the receipt of appropriate early intervention services by a child or family in a timely fashion, funds provided under section 674(a)(6) of this title may be used to pay the provider of services or programs pending reimbursement from the public or private source that has ultimate responsibility for the payment).

Appendix H

42 U.S.C.A. § 672

§ 672. 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, with a parent residing in a licensed residential family-based treatment facility, but only to the extent permitted under subsection (j), or in a child-care institution, but only to the extent permitted under subsection (k).

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(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, 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.

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(b) Additional qualifications

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

For purposes of this part:

(1) Foster family home

(A) In general

The term "foster family home" means the home of an individual or family--

(i) that is licensed or approved by the State in which it is situated as a foster family home

that meets the standards established for the licensing or approval; and

(ii) in which a child in foster care has been placed in the care of an individual, who resides with the child and who has been licensed or approved by the State to be a foster parent--

(I) that the State deems capable of adhering to the reasonable and prudent parent standard;

(II) that provides 24-hour substitute care for children placed away from their parents or other caretakers; and

(III) that provides the care for not more than six children in foster care.

(B) State flexibility

The number of foster children that may be cared for in a home under subparagraph (A) may exceed the numerical limitation in subparagraph (A)(ii)(III), at the option of the State, for any of the following reasons:

(i) To allow a parenting youth in foster care to remain with the child of the parenting youth.

(ii) To allow siblings to remain together.

(iii) To allow a child with an established meaningful relationship with the family to remain with the family.

(iv) To allow a family with special training or skills to provide care to a child who has a severe disability.

(C) Rule of construction

Subparagraph (A) shall not be construed as prohibiting a foster parent from renting the home in which the parent cares for a foster child placed in the parent's care.

(2) Child-care institution

(A) In general

The term "child-care institution" means a private child-care institution, or a public child-care institution which accommodates no more than 25 children, which is licensed by the State in which it is situated or has been approved by the agency of the State responsible for licensing or approval of institutions of this type as meeting the standards established for the licensing.

(B) Supervised settings

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.

(C) Exclusions

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), 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) 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.

(g) Revocation of voluntary placement agreement

In any case where--

> **(1)** the placement of a minor child in foster care occurred pursuant to a voluntary placement agreement entered into by the parents or guardians of such child as provided in subsection (a), and

(2) such parents or guardians request (in such manner and form as the Secretary may prescribe) that the child be returned to their home or to the home of a relative,

the voluntary placement agreement shall be deemed to be revoked unless the State agency opposes such request and obtains a judicial determination, by a court of competent jurisdiction, that the return of the child to such home would be contrary to the child's best interests.

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

(1) For purposes of subchapter XIX, any child with respect to whom foster care maintenance payments are made under this section is deemed to be a dependent child as defined in section 606 of this title (as in effect as of July 16, 1996) and deemed to be a recipient of aid to families with dependent children under part A of this subchapter (as so in effect). For purposes of division A[3] of subchapter XX, any child with respect to whom foster care maintenance payments are made under this section is deemed to be a minor child in a needy family under a State program funded under part

3. Division A of subchapter XX, was in the original a reference to subtitle 1 of Title XX, and was translated as if referring to Subtitle A of Title XX of the Social Security Act, which is classified to division A of subchapter XX of this chapter, 42 U.S.C.A. § 1397 et seq., to reflect the probable intent of Congress. Title XX of the Act, enacting subchapter XX of this chapter, does not contain a subtitle 1.

A of this subchapter and is deemed to be a recipient of assistance under such part.

(2) For purposes of paragraph (1), a child whose costs in a foster family home or child care institution are covered by the foster care maintenance payments being made with respect to the child's minor parent, as provided in section 675(4)(B) of this title, shall be considered a child with respect to whom foster care maintenance payments are made under this section.

(i) Administrative costs associated with otherwise eligible children not in licensed foster care settings

Expenditures by a State that would be considered administrative expenditures for purposes of section 674(a)(3) of this title if made with respect to a child who was residing in a foster family home or child-care institution shall be so considered with respect to a child not residing in such a home or institution--

(1) in the case of a child who has been removed in accordance with subsection (a) from the home of a relative specified in section 606(a) of this title (as in effect on July 16, 1996), only for expenditures--

(A) with respect to a period of not more than the lesser of 12 months or the average length of time it takes for the State to license or approve a home as a foster home, in which the child is in the home of a relative and an application is pending for licensing or approval of the home as a foster family home; or

(B) with respect to a period of not more than 1 calendar month when a child moves from a facility not eligible for payments under this part into a foster family home or child care institution licensed or approved by the State; and

(2) in the case of any other child who is potentially eligible for benefits under a State plan approved under this part and at imminent risk of removal from the home, only if--

(A) reasonable efforts are being made in accordance with section 671(a)(15) of this title to prevent the need for, or if necessary to pursue, removal of the child from the home; and

(B) the State agency has made, not less often than every 6 months, a determination (or redetermination) as to whether the child remains at imminent risk of removal from the home.

(j) Children placed with a parent residing in a licensed residential family-based treatment facility for substance abuse

(1) In general

Notwithstanding the preceding provisions of this section, a child who is eligible for foster care maintenance payments under this section, or who would be eligible for the payments if the eligibility were determined without regard to paragraphs

(1)(B) and (3) of subsection (a), shall be eligible for the payments for a period of not more than 12 months during which the child is placed with a parent who is in a licensed residential family-based treatment facility for substance abuse, but only if--

(A) the recommendation for the placement is specified in the child's case plan before the placement;

(B) the treatment facility provides, as part of the treatment for substance abuse, parenting skills training, parent education, and individual and family counseling; and

(C) the substance abuse treatment, parenting skills training, parent education, and individual and family counseling is provided under an organizational structure and treatment framework that involves understanding, recognizing, and responding to the effects of all types of trauma and in accordance with recognized principles of a trauma-informed approach and trauma-specific interventions to address the consequences of trauma and facilitate healing.

(2) Application

With respect to children for whom foster care maintenance payments are made under paragraph (1), only the children who satisfy the requirements of paragraphs (1)(B) and (3) of subsection (a) shall

be considered to be children with respect to whom foster care maintenance payments are made under this section for purposes of subsection (h) or section 673(b)(3)(B) of this title.

(k) Limitation on Federal financial participation

(1) In general

Beginning with the third week for which foster care maintenance payments are made under this section on behalf of a child placed in a child-care institution, no Federal payment shall be made to the State under section 674(a)(1) of this title for amounts expended for foster care maintenance payments on behalf of the child unless--

(A) the child is placed in a child-care institution that is a setting specified in paragraph (2) (or is placed in a licensed residential family-based treatment facility consistent with subsection (j)); and

(B) in the case of a child placed in a qualified residential treatment program (as defined in paragraph (4)), the requirements specified in paragraph (3) and section 675a(c) of this title are met.

(2) Specified settings for placement

The settings for placement specified in this paragraph are the following:

(A) A qualified residential treatment program (as defined in paragraph (4)).

(B) A setting specializing in providing prenatal, post-partum, or parenting supports for youth.

(C) In the case of a child who has attained 18 years of age, a supervised setting in which the child is living independently.

(D) A setting providing high-quality residential care and supportive services to children and youth who have been found to be, or are at risk of becoming, sex trafficking victims, in accordance with section 671(a)(9)(C) of this title.

(3) Assessment to determine appropriateness of placement in a qualified residential treatment program

(A) Deadline for assessment

In the case of a child who is placed in a qualified residential treatment program, if the assessment required under section 675a(c)(1) of this title is not completed within 30 days after the placement is made, no Federal payment shall be made to the State under section 674(a)(1) of this title for any amounts expended for foster care maintenance payments on behalf of the child during the placement.

(B) Deadline for transition out of placement

If the assessment required under section 675a(c)(1) of this title determines that the placement of a child in a qualified residential treatment program is not appropriate, a court disapproves such a placement under section 675a(c)(2) of this title, or a child who has been in an approved placement in a qualified residential treatment program is going to return home or be placed with a fit and willing relative, a legal guardian, or an adoptive parent, or in a foster family home, Federal payments shall be made to the State under section 674(a)(1) of this title for amounts expended for foster care maintenance payments on behalf of the child while the child remains in the qualified residential treatment program only during the period necessary for the child to transition home or to such a placement. In no event shall a State receive Federal payments under section 674(a)(1) of this title for amounts expended for foster care maintenance payments on behalf of a child who remains placed in a qualified residential treatment program after the end of the 30-day period that begins on the date a determination is made that the placement is no longer the recommended or approved placement for the child.

(4) Qualified residential treatment program

For purposes of this part, the term "qualified residential treatment program" means a program that--

(A) has a trauma-informed treatment model that is designed to address the needs, including clinical needs as appropriate, of children with serious emotional or behavioral disorders or disturbances and, with respect to a child, is able to implement the treatment identified for the child by the assessment of the child required under section 675a(c) of this title;

(B) subject to paragraphs (5) and (6), has registered or licensed nursing staff and other licensed clinical staff who--

(i) provide care within the scope of their practice as defined by State law;

(ii) are on-site according to the treatment model referred to in subparagraph (A); and

(iii) are available 24 hours a day and 7 days a week;

(C) to extent appropriate, and in accordance with the child's best interests, facilitates participation of family members in the child's treatment program;

(D) facilitates outreach to the family members of the child, including siblings, documents how the outreach is made (including contact information), and maintains contact information for any known biological family and fictive kin of the child;

(E) documents how family members are integrated into the treatment process for the child, including post-discharge, and how sibling connections are maintained;

(F) provides discharge planning and family-based aftercare support for at least 6 months post-discharge; and

(G) is licensed in accordance with section 671(a)(10) of this title and is accredited by any of the following independent, not-for-profit organizations:

(i) The Commission on Accreditation of Rehabilitation Facilities (CARF).

(ii) The Joint Commission on Accreditation of Healthcare Organizations (JCAHO).

(iii) The Council on Accreditation (COA).

(iv) Any other independent, not-for-profit accrediting organization approved by the Secretary.

(5) Administrative costs

The prohibition in paragraph (1) on Federal payments under section 674(a)(1) of this title shall not be construed as prohibiting Federal payments for administrative expenditures incurred on behalf of a child placed in a child-care institution and for which payment is available under section 674(a)(3) of this title.

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(6) Rule of construction

The requirements in paragraph (4)(B) shall not be construed as requiring a qualified residential treatment program to acquire nursing and behavioral health staff solely through means of a direct employer to employee relationship.

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42 U.S.C.A. § 673

§ 673. Adoption and guardianship assistance program

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

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

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

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

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

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

> **(i)** in the case of a child who is not an applicable child for the fiscal year (as defined in subsection (e)), the child--
>
> > **(I)(aa)(AA)** was removed from the home of a relative specified in section 606(a) of this title (as in effect on July 16, 1996) and placed in foster care in accordance with a voluntary placement agreement with respect to which Federal payments are provided under section 674 of this title (or section 603 of this title, as such section was in effect on July 16, 1996), or in accordance with a judicial determination to the effect that continuation in the home would be contrary to the welfare of the child; and
> >
> > > **(BB)** met the requirements of section 672(a)(3) of this title with respect to the home referred to in subitem (AA) of this item;
> >
> > **(bb)** meets all of the requirements of subchapter XVI with respect to eligibility for supplemental security income benefits; or
> >
> > **(cc)** is a child whose costs in a foster family home or child-care institution are

covered by the foster care maintenance payments being made with respect to the minor parent of the child as provided in section 675(4)(B) of this title; and

(II) has been determined by the State, pursuant to subsection (c)(1), to be a child with special needs; or

(ii) in the case of a child who is an applicable child for the fiscal year (as so defined), the child--

(I)(aa) at the time of initiation of adoption proceedings was in the care of a public or licensed private child placement agency or Indian tribal organization pursuant to--

(AA) an involuntary removal of the child from the home in accordance with a judicial determination to the effect that continuation in the home would be contrary to the welfare of the child; or

(BB) a voluntary placement agreement or voluntary relinquishment;

(bb) meets all medical or disability requirements of subchapter XVI with respect to eligibility for supplemental security income benefits; or

(cc) was residing in a foster family home or child care institution with the child's minor parent, and the child's minor parent was in such foster family home or child care institution pursuant to--

(AA) an involuntary removal of the child from the home in accordance with a judicial determination to the effect that continuation in the home would be contrary to the welfare of the child; or

(BB) a voluntary placement agreement or voluntary relinquishment; and

(II) has been determined by the State, pursuant to subsection (c)(2), to be a child with special needs.

(B) Section 672(a)(4) of this title shall apply for purposes of subparagraph (A) of this paragraph, in any case in which the child is an alien described in such section.

(C) A child shall be treated as meeting the requirements of this paragraph for the purpose of paragraph (1)(B)(ii) if--

(i) in the case of a child who is not an applicable child for the fiscal year (as defined in subsection (e)), the child--

(I) meets the requirements of subparagraph (A)(i)(II);

(II) was determined eligible for adoption assistance payments under this part with respect to a prior adoption;

(III) is available for adoption because--

(aa) the prior adoption has been dissolved, and the parental rights of the adoptive parents have been terminated; or

(bb) the child's adoptive parents have died; and

(IV) fails to meet the requirements of subparagraph (A)(i) but would meet such requirements if--

(aa) the child were treated as if the child were in the same financial and other circumstances the child was in the last time the child was determined eligible for adoption assistance payments under this part; and

(bb) the prior adoption were treated as never having occurred; or

(ii) in the case of a child who is an applicable child for the fiscal year (as so defined), the

child meets the requirements of subparagraph (A)(ii)(II), is determined eligible for adoption assistance payments under this part with respect to a prior adoption (or who would have been determined eligible for such payments had the Adoption and Safe Families Act of 1997 been in effect at the time that such determination would have been made), and is available for adoption because the prior adoption has been dissolved and the parental rights of the adoptive parents have been terminated or because the child's adoptive parents have died.

(D) In determining the eligibility for adoption assistance payments of a child in a legal guardianship arrangement described in section 671(a)(28) of this title, the placement of the child with the relative guardian involved and any kinship guardianship assistance payments made on behalf of the child shall be considered never to have been made.

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

may the amount of the adoption assistance payment made under clause (ii) of paragraph (1)(B) exceed the foster care maintenance payment which would have been paid during the period if the child with respect to whom the adoption assistance payment is made had been in a foster family home.

(4)(A) Notwithstanding any other provision of this section, a payment may not be made pursuant to this section to parents or relative guardians with respect to a child--

(i) who has attained--

(I) 18 years of age, or such greater age as the State may elect under section 675(8)(B)(iii) of this title; or

(II) 21 years of age, if the State determines that the child has a mental or physical handicap which warrants the continuation of assistance;

(ii) who has not attained 18 years of age, if the State determines that the parents or relative guardians, as the case may be, are no longer legally responsible for the support of the child; or

(iii) if the State determines that the child is no longer receiving any support from the parents or relative guardians, as the case may be.

(B) Parents or relative guardians who have been receiving adoption assistance payments or kinship guardianship assistance payments under this section shall keep the State or local agency administering the program under this section informed of circumstances which would, pursuant to this subsection, make them ineligible for the payments, or eligible for the payments in a different amount.

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

(6)(A) For purposes of paragraph (1)(B)(i), the term "nonrecurring adoption expenses" means reasonable and necessary adoption fees, court costs, attorney fees, and other expenses which are directly related to the legal adoption of a child with special needs and which are not incurred in violation of State or Federal law.

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

Appendix H

(7)(A) Notwithstanding any other provision of this subsection, no payment may be made to parents with respect to any applicable child for a fiscal year that--

> **(i)** would be considered a child with special needs under subsection (c) (2);
>
> **(ii)** is not a citizen or resident of the United States; and
>
> **(iii)** was adopted outside of the United States or was brought into the United States for the purpose of being adopted.

(B) Subparagraph (A) shall not be construed as prohibiting payments under this part for an applicable child described in subparagraph (A) that is placed in foster care subsequent to the failure, as determined by the State, of the initial adoption of the child by the parents described in subparagraph (A).

(8)(A) A State shall calculate the savings (if any) resulting from the application of paragraph (2)(A) (ii) to all applicable children for a fiscal year, using a methodology specified by the Secretary or an alternate methodology proposed by the State and approved by the Secretary.

(B) A State shall annually report to the Secretary--

(i) the methodology used to make the calculation described in subparagraph (A), without regard to whether any savings are found;

(ii) the amount of any savings referred to in subparagraph (A); and

(iii) how any such savings are spent, accounting for and reporting the spending separately from any other spending reported to the Secretary under part B or this part.

(C) The Secretary shall make all information reported pursuant to subparagraph (B) available on the website of the Department of Health and Human Services in a location easily accessible to the public.

(D)(i) A State shall spend an amount equal to the amount of the savings (if any) in State expenditures under this part resulting from the application of paragraph (2)(A)(ii) to all applicable children for a fiscal year, to provide to children of families any service that may be provided under part B or this part. A State shall spend not less than 30 percent of any such savings on post-adoption services, post-guardianship services, and services to support and sustain positive permanent outcomes for children who otherwise might enter into foster care under the responsibility of the State, with at least $^{2}/_{3}$ of the spending by the State to comply with such 30 percent requirement being spent on post-adoption and post-guardianship services.

(ii) Any State spending required under clause (i) shall be used to supplement, and not supplant, any Federal or non-Federal funds used to provide any service under part B or this part.

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

(1) For purposes of subchapter XIX, any child who is described in paragraph (3) is deemed to be a dependent child as defined in section 606 of this title (as in effect as of July 16, 1996) and deemed to be a recipient of aid to families with dependent children under part A (as so in effect) in the State where such child resides.

(2) For purposes of division A[4] of subchapter XX, any child who is described in paragraph (3) is deemed to be a minor child in a needy family under a State program funded under part A and deemed to be a recipient of assistance under such part.

(3) A child described in this paragraph is any child--

(A)(i) who is a child described in subsection (a)(2), and

4. Division A of subchapter XX, was in the original a reference to subtitle 1 of Title XX, and was translated as if referring to Subtitle A of Title XX of the Social Security Act, which is classified to division A of subchapter XX of this chapter, 42 U.S.C.A. § 1397 et seq., to reflect the probable intent of Congress. Title XX of the Act, enacting subchapter XX of this chapter, does not contain a subtitle 1.

(ii) with respect to whom an adoption assistance agreement is in effect under this section (whether or not adoption assistance payments are provided under the agreement or are being made under this section), including any such child who has been placed for adoption in accordance with applicable State and local law (whether or not an interlocutory or other judicial decree of adoption has been issued),

(B) with respect to whom foster care maintenance payments are being made under section 672 of this title, or

(C) with respect to whom kinship guardianship assistance payments are being made pursuant to subsection (d).

(4) For purposes of paragraphs (1) and (2), a child whose costs in a foster family home or child-care institution are covered by the foster care maintenance payments being made with respect to the child's minor parent, as provided in section 675(4)(B) of this title, shall be considered a child with respect to whom foster care maintenance payments are being made under section 672 of this title.

(c) Children with special needs

For purposes of this section--

(1) in the case of a child who is not an applicable child for a fiscal year, the child shall not be considered a child with special needs unless--

> **(A)** the State has determined that the child cannot or should not be returned to the home of his parents; and
>
> **(B)** the State had first determined (A) that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX, and (B) that, except where it would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as a foster child, a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX; or

(2) in the case of a child who is an applicable child for a fiscal year, the child shall not be considered a child with special needs unless--

(A) the State has determined, pursuant to a criterion or criteria established by the State, that the child cannot or should not be returned to the home of his parents;

(B)(i) the State has determined that there exists with respect to the child a specific factor or condition (such as ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that the child cannot be placed with adoptive parents without providing adoption assistance under this section and medical assistance under subchapter XIX; or

(ii) the child meets all medical or disability requirements of subchapter XVI with respect to eligibility for supplemental security income benefits; and

(C) the State has determined that, except where it would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of the parents as a foster child, a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX.

Appendix H

(d) Kinship guardianship assistance payments for children

(1) Kinship guardianship assistance agreement

(A) In general

In order to receive payments under section 674(a)(5) of this title, a State shall--

(i) negotiate and enter into a written, binding kinship guardianship assistance agreement with the prospective relative guardian of a child who meets the requirements of this paragraph; and

(ii) provide the prospective relative guardian with a copy of the agreement.

(B) Minimum requirements

The agreement shall specify, at a minimum--

(i) the amount of, and manner in which, each kinship guardianship assistance payment will be provided under the agreement, and the manner in which the payment may be adjusted periodically, in consultation with the relative guardian, based on the circumstances of the relative guardian and the needs of the child;

(ii) the additional services and assistance that the child and relative guardian will be eligible for under the agreement;

(iii) the procedure by which the relative guardian may apply for additional services as needed; and

(iv) subject to subparagraph (D), that the State will pay the total cost of nonrecurring expenses associated with obtaining legal guardianship of the child, to the extent the total cost does not exceed $2,000.

(C) Interstate applicability

The agreement shall provide that the agreement shall remain in effect without regard to the State residency of the relative guardian.

(D) No effect on Federal reimbursement

Nothing in subparagraph (B)(iv) shall be construed as affecting the ability of the State to obtain reimbursement from the Federal Government for costs described in that subparagraph.

(2) Limitations on amount of kinship guardianship assistance payment

A kinship guardianship assistance payment on behalf of a child shall not exceed the foster care maintenance

payment which would have been paid on behalf of the child if the child had remained in a foster family home.

(3) Child's eligibility for a kinship guardianship assistance payment

(A) In general

A child is eligible for a kinship guardianship assistance payment under this subsection if the State agency determines the following:

(i) The child has been--

(I) removed from his or her home pursuant to a voluntary placement agreement or as a result of a judicial determination to the effect that continuation in the home would be contrary to the welfare of the child; and

(II) eligible for foster care maintenance payments under section 672 of this title while residing for at least 6 consecutive months in the home of the prospective relative guardian.

(ii) Being returned home or adopted are not appropriate permanency options for the child.

(iii) The child demonstrates a strong attachment to the prospective relative guardian and the relative guardian has a strong commitment to caring permanently for the child.

(iv) With respect to a child who has attained 14 years of age, the child has been consulted regarding the kinship guardianship arrangement.

(B) Treatment of siblings

With respect to a child described in subparagraph (A) whose sibling or siblings are not so described--

(i) the child and any sibling of the child may be placed in the same kinship guardianship arrangement, in accordance with section 671(a)(31) of this title, if the State agency and the relative agree on the appropriateness of the arrangement for the siblings; and

(ii) kinship guardianship assistance payments may be paid on behalf of each sibling so placed.

(C) Eligibility not affected by replacement of guardian with a successor guardian

In the event of the death or incapacity of the relative guardian, the eligibility of a child for a kinship guardianship assistance payment under this subsection shall not be affected by reason of the replacement of the relative guardian with a successor legal guardian named in the kinship guardianship assistance agreement referred to in paragraph (1) (including in any amendment to the agreement), notwithstanding subparagraph (A) of this paragraph and section 671(a)(28) of this title.

(e) Applicable child defined

(1) On the basis of age

(A) In general

Subject to paragraphs (2) and (3), in this section, the term "applicable child" means a child for whom an adoption assistance agreement is entered into under this section during any fiscal year described in subparagraph (B) if the child attained the applicable age for that fiscal year before the end of that fiscal year.

(B) Applicable age

For purposes of subparagraph (A), the applicable age for a fiscal year is as follows:

In the case of fiscal year:	The applicable age is:
2010	16
2011	14
2012	12
2013	10
2014	8
2015	6
2016	4
2017 through 2023	2

2024 ..... 2 (or, in the case of a child for whom an adoption assistance agreement is entered into under this section on or after July 1, 2024, any age)

2025 or thereafter ..... any age

(2) Exception for duration in care

Notwithstanding paragraph (1) of this subsection, beginning with fiscal year 2010, such term shall include a child of any age on the date on which an adoption assistance agreement is entered into on behalf of the child under this section if the child--

(A) has been in foster care under the responsibility of the State for at least 60 consecutive months; and

(B) meets the requirements of subsection (a)(2)(A)(ii).

(3) Exception for member of a sibling group

Notwithstanding paragraphs (1) and (2) of this subsection, beginning with fiscal year 2010, such term shall include a child of any age on the date on which an adoption assistance agreement is entered into on behalf of the child under this section without regard to whether the child is described in paragraph (2)(A) of this subsection if the child--

(A) is a sibling of a child who is an applicable child for the fiscal year under paragraph (1) or (2) of this subsection;

(B) is to be placed in the same adoption placement as an applicable child for the fiscal year who is their sibling; and

(C) meets the requirements of subsection (a)(2)(A)(ii).

Appendix H

42 U.S.C.A. § 674

§ 674. 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) subject to subsections (j) and (k) of section 672 of this title, 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); plus

(2) 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 adoption assistance payments under section 673 of this title pursuant to adoption assistance agreements (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); plus

(3) subject to section 672(i) of this title an amount equal to the sum of the following proportions of the total amounts expended during such quarter as found necessary by the Secretary for the provision of child placement services and for the proper and efficient administration of the State plan--

> **(A)** 75 per centum of so much of such expenditures as are for the training (including both short- and long-term training at educational institutions through grants to such institutions or by direct

financial assistance to students enrolled in such institutions) of personnel employed or preparing for employment by the State agency or by the local agency administering the plan in the political subdivision,

(B) 75 percent of so much of such expenditures (including travel and per diem expenses) as are for the short-term training of current or prospective foster or adoptive parents or relative guardians, the members of the staff of State-licensed or State-approved child care institutions providing care, or State-licensed or State-approved child welfare agencies providing services, to children receiving assistance under this part, and members of the staff of abuse and neglect courts, agency attorneys, attorneys representing children or parents, guardians ad litem, or other court-appointed special advocates representing children in proceedings of such courts, in ways that increase the ability of such current or prospective parents, guardians, staff members, institutions, attorneys, and advocates to provide support and assistance to foster and adopted children and children living with relative guardians, whether incurred directly by the State or by contract,

(C) 50 percent of so much of such expenditures as are for the planning, design, development, or installation of statewide mechanized data collection and information retrieval systems (including 50 percent of the full amount of expenditures for

hardware components for such systems) but only to the extent that such systems--

> **(i)** meet the requirements imposed by regulations promulgated pursuant to section 679(b)(2) of this title;
>
> **(ii)** to the extent practicable, are capable of interfacing with the State data collection system that collects information relating to child abuse and neglect;
>
> **(iii)** to the extent practicable, have the capability of interfacing with, and retrieving information from, the State data collection system that collects information relating to the eligibility of individuals under part A (for the purposes of facilitating verification of eligibility of foster children); and
>
> **(iv)** are determined by the Secretary to be likely to provide more efficient, economical, and effective administration of the programs carried out under a State plan approved under part B or this part; and

(D) 50 percent of so much of such expenditures as are for the operation of the statewide mechanized data collection and information retrieval systems referred to in subparagraph (C); and

(E) one-half of the remainder of such expenditures; plus

(4) an amount equal to the amount (if any) by which--

(A) the lesser of--

(i) 80 percent of the amounts expended by the State during the fiscal year in which the quarter occurs to carry out programs in accordance with the State application approved under section 677(b) of this title for the period in which the quarter occurs (including any amendment that meets the requirements of section 677(b)(5) of this title); or

(ii) the amount allotted to the State under section 677(c)(1) of this title for the fiscal year in which the quarter occurs, reduced by the total of the amounts payable to the State under this paragraph for all prior quarters in the fiscal year; exceeds

(B) the total amount of any penalties assessed against the State under section 677(e) of this title during the fiscal year in which the quarter occurs; plus

(5) an amount equal to the percentage by which the expenditures referred to in paragraph (2) of this subsection are reimbursed of the total amount expended during such quarter as kinship guardianship assistance payments under section 673(d) of this title pursuant to kinship guardianship assistance agreements; plus

(6) subject to section 671(e) of this title--

(A) for each quarter--

(i) subject to clause (ii)--

(I) beginning after September 30, 2019, and before October 1, 2026, an amount equal to 50 percent of the total amount expended during the quarter for the provision of services or programs specified in subparagraph (A) or (B) of section 671(e)(1) of this title that are provided in accordance with promising, supported, or well-supported practices that meet the applicable criteria specified for the practices in section 671(e)(4)(C) of this title; and

(II) beginning after September 30, 2026, 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 the quarter for the provision of services or programs specified in subparagraph (A) or (B) of section 671(e)(1) of this title that are provided in accordance with promising, supported, or well-supported practices that meet the applicable criteria specified for the practices

in section 671(e)(4)(C) of this title (or, with respect to the payments made during the 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 the Indian tribe, tribal organization, or tribal consortium made the 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); except that

(ii) not less than 50 percent of the total amount expended by a State under clause (i) for a fiscal year shall be for the provision of services or programs specified in subparagraph (A) or (B) of section 671(e)(1) of this title that are provided in accordance with well-supported practices; plus

(B) for each quarter specified in subparagraph (A), an amount equal to the sum of the following proportions of the total amount expended during the quarter--

(i) 50 percent of so much of the expenditures as are found necessary by the Secretary for the proper and efficient administration of the State plan for the provision of services or programs specified in section 671(e)(1) of this title, including expenditures for activities approved by the Secretary that promote the development of necessary processes and procedures to establish and implement the provision of the services and programs for individuals who are eligible for the services and programs and expenditures attributable to data collection and reporting; and

(ii) 50 percent of so much of the expenditures with respect to the provision of services and programs specified in section 671(e)(1) of this title as are for training of personnel employed or preparing for employment by the State agency or by the local agency administering the plan in the political subdivision and of the members of the staff of State-licensed or State-approved child welfare agencies providing services to children described in section 671(e)(2) of this title and their parents or kin caregivers, including on how to determine who are individuals eligible for the services or programs, how to identify and provide appropriate services and programs, and how to oversee and evaluate the ongoing appropriateness of the services and programs; plus

(7) an amount equal to 50 percent of the amounts expended by the State during the quarter as the Secretary determines are for kinship navigator programs that meet the requirements described in section 627(a)(1) of this title and that the Secretary determines are operated in accordance with promising, supported, or well-supported practices that meet the applicable criteria specified for the practices in section 671(e)(4)(C) of this title, without regard to whether the expenditures are incurred on behalf of children who are, or are potentially, eligible for foster care maintenance payments under this part.

(b) Quarterly estimates of State's entitlement for next quarter; payments; United States' pro rata share of amounts recovered as overpayment; allowance, disallowance, or deferral of claim

(1) The Secretary shall, prior to the beginning of each quarter, estimate the amount to which a State will be entitled under subsection (a) for such quarter, such estimates to be based on (A) a report filed by the State containing its estimate of the total sum to be expended in such quarter in accordance with subsection (a), and stating the amount appropriated or made available by the State and its political subdivisions for such expenditures in such quarter, and if such amount is less than the State's proportionate share of the total sum of such estimated expenditures, the source or sources from which the difference is expected to be derived, (B) records showing the number of children in the State receiving assistance under this part, and

(C) such other investigation as the Secretary may find necessary.

(2) The Secretary shall then pay to the State, in such installments as he may determine, the amounts so estimated, reduced or increased to the extent of any overpayment or underpayment which the Secretary determines was made under this section to such State for any prior quarter and with respect to which adjustment has not already been made under this subsection.

(3) The pro rata share to which the United States is equitably entitled, as determined by the Secretary, of the net amount recovered during any quarter by the State or any political subdivision thereof with respect to foster care and adoption assistance furnished under the State plan shall be considered an overpayment to be adjusted under this subsection.

(4)(A) Within 60 days after receipt of a State claim for expenditures pursuant to subsection (a), the Secretary shall allow, disallow, or defer such claim.

(B) Within 15 days after a decision to defer such a State claim, the Secretary shall notify the State of the reasons for the deferral and of the additional information necessary to determine the allowability of the claim.

(C) Within 90 days after receiving such necessary information (in readily reviewable form), the Secretary shall--

(i) disallow the claim, if able to complete the review and determine that the claim is not allowable, or

(ii) in any other case, allow the claim, subject to disallowance (as necessary)--

(I) upon completion of the review, if it is determined that the claim is not allowable; or

(II) on the basis of findings of an audit or financial management review.

(c) Automated data collection expenditures

The Secretary shall treat as necessary for the proper and efficient administration of the State plan all expenditures of a State necessary in order for the State to plan, design, develop, install, and operate data collection and information retrieval systems described in subsection (a)(3)(C), without regard to whether the systems may be used with respect to foster or adoptive children other than those on behalf of whom foster care maintenance payments or adoption assistance payments may be made under this part.

(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.

(e) Discretionary grants for educational and training vouchers for youths aging out of foster care

From amounts appropriated pursuant to section 677(h)(2) of this title, the Secretary may make a grant to a State with a plan approved under this part, for a calendar quarter, in an amount equal to the lesser of--

(1) 80 percent of the amounts expended by the State during the quarter to carry out programs for the purposes described in section 677(a)(6) of this title; or

(2) the amount, if any, allotted to the State under section 677(c)(3) of this title for the fiscal year in which the quarter occurs, reduced by the total of the amounts payable to the State under this subsection for such purposes for all prior quarters in the fiscal year.

(f) Reduction for failure to submit required data

(1) If the Secretary finds that a State has failed to submit to the Secretary data, as required by regulation, for the data collection system implemented under section 679 of this title, the Secretary shall, within 30 days after the date by which the data was due to be so submitted, notify the State of the failure and that payments to the State under this part will be reduced if the State fails to submit the data, as so required, within 6 months after the date the data was originally due to be so submitted.

(2) If the Secretary finds that the State has failed to submit the data, as so required, by the end of the 6-month period referred to in paragraph (1) of this subsection, 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 amounts otherwise payable to the State under this part, for each quarter ending in the 6-month period (and each quarter ending in each subsequent consecutively occurring 6-month period until the Secretary finds that the State has submitted the data, as so required), by

(A) $^{1}/_{6}$ of 1 percent of the total amount expended by the State for administration of foster care activities under the State plan approved under this part in the quarter so ending, in the case of the 1st 6-month period during which the failure continues; or

(B) ¼ of 1 percent of the total amount so expended, in the case of the 2nd or any subsequent such 6-month period.

(g) Continued services under waiver

For purposes of this part, after the termination of a demonstration project relating to guardianship conducted by a State under section 1320a-9 of this title, the expenditures of the State for the provision, to children who, as of September 30, 2008, were receiving assistance or services under the project, of the same assistance and services under the same terms and conditions that applied during the conduct of the project, are deemed to be expenditures under the State plan approved under this part.

Appendix H

42 U.S.C.A. § 675

§ 675. Definitions

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

(1) The term "case plan" means a written document which meets the requirements of section 675a of this title and includes at least the following:

(A) A description of the type of home or institution in which a child is to be placed, including a discussion of the safety and appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement entered into or judicial determination made with respect to the child in accordance with section 672(a)(1) of this title.

(B) A plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan. With respect to a child who has attained 14 years of age, the plan developed for the child in accordance with this paragraph, and any revision or addition to the plan, shall be developed in consultation with

the child and, at the option of the child, with up to 2 members of the case planning team who are chosen by the child and who are not a foster parent of, or caseworker for, the child. A State may reject an individual selected by a child to be a member of the case planning team at any time if the State has good cause to believe that the individual would not act in the best interests of the child. One individual selected by a child to be a member of the child's case planning team may be designated to be the child's advisor and, as necessary, advocate, with respect to the application of the reasonable and prudent parent standard to the child.

(C) The health and education records of the child, including the most recent information available regarding--

(i) the names and addresses of the child's health and educational providers;

(ii) the child's grade level performance;

(iii) the child's school record;

(iv) a record of the child's immunizations;

(v) the child's known medical problems;

(vi) the child's medications; and

(vii) any other relevant health and education information concerning the child determined to be appropriate by the State agency.

(D) For a child who has attained 14 years of age or over, a written description of the programs and services which will help such child prepare for the transition from foster care to a successful adulthood.

(E) In the case of a child with respect to whom the permanency plan is adoption or placement in another permanent home, documentation of the steps the agency is taking to find an adoptive family or other permanent living arrangement for the child, to place the child with an adoptive family, a fit and willing relative, a legal guardian, or in another planned permanent living arrangement, and to finalize the adoption or legal guardianship. At a minimum, such documentation shall include child specific recruitment efforts such as the use of State, regional, and national adoption exchanges including electronic exchange systems to facilitate orderly and timely in-State and interstate placements.

(F) In the case of a child with respect to whom the permanency plan is placement with a relative and receipt of kinship guardianship assistance payments under section 673(d) of this title, a description of--

(i) the steps that the agency has taken to determine that it is not appropriate for the child to be returned home or adopted;

(ii) the reasons for any separation of siblings during placement;

(iii) the reasons why a permanent placement with a fit and willing relative through a kinship guardianship assistance arrangement is in the child's best interests;

(iv) the ways in which the child meets the eligibility requirements for a kinship guardianship assistance payment;

(v) the efforts the agency has made to discuss adoption by the child's relative foster parent as a more permanent alternative to legal guardianship and, in the case of a relative foster parent who has chosen not to pursue adoption, documentation of the reasons therefor; and

(vi) the efforts made by the State agency to discuss with the child's parent or parents the kinship guardianship assistance arrangement, or the reasons why the efforts were not made.

(G) A plan for ensuring the educational stability of the child while in foster care, including--

(i) assurances that each placement of the child in foster care takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement; and

(ii)(I) an assurance that the State agency has coordinated with appropriate local educational agencies (as defined under section 7801 of Title 20) to ensure that the child remains in the school in which the child is enrolled at the time of each placement; or

(II) if remaining in such school is not in the best interests of the child, assurances by the State agency and the local educational agencies to provide immediate and appropriate enrollment in a new school, with all of the educational records of the child provided to the school.

(2) The term "parents" means biological or adoptive parents or legal guardians, as determined by applicable State law.

(3) The term "adoption assistance agreement" means a written agreement, binding on the parties to the agreement, between the State agency, other relevant agencies, and the prospective adoptive parents of a minor child which at a minimum (A) specifies the nature and amount of any payments, services, and

assistance to be provided under such agreement, and (B) stipulates that the agreement shall remain in effect regardless of the State of which the adoptive parents are residents at any given time. The agreement shall contain provisions for the protection (under an interstate compact approved by the Secretary or otherwise) of the interests of the child in cases where the adoptive parents and child move to another State while the agreement is effective.

(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.

(5) The term "case review system" means a procedure for assuring that--

(A) each child has a case plan designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child, which--

(i) if the child has been placed in a foster family home or child-care institution a substantial distance from the home of the parents of the child, or in a State different from the State in which such home is located, sets forth the reasons why such placement is in the best interests of the child, and

(ii) if the child has been placed in foster care outside the State in which the home of the parents of the child is located, requires that, periodically, but not less frequently than every 6 months, a caseworker on the staff of the State agency of the State in which the home of the

parents of the child is located, of the State in which the child has been placed, or of a private agency under contract with either such State, visit such child in such home or institution and submit a report on such visit to the State agency of the State in which the home of the parents of the child is located,

(B) the status of each child is reviewed periodically but no less frequently than once every six months by either a court or by administrative review (as defined in paragraph (6)) in order to determine the safety of the child, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to and safely maintained in the home or placed for adoption or legal guardianship, and, for a child for whom another planned permanent living arrangement has been determined as the permanency plan, the steps the State agency is taking to ensure the child's foster family home or child care institution is following the reasonable and prudent parent standard and to ascertain whether the child has regular, ongoing opportunities to engage in age or developmentally appropriate activities (including by consulting with the child in an age-appropriate manner about the opportunities of the child to participate in the activities);

(C) with respect to each such child, (i) procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a permanency hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than 12 months after the date the child is considered to have entered foster care (as determined under subparagraph (F)) (and not less frequently than every 12 months thereafter during the continuation of foster care), which hearing shall determine the permanency plan for the child that includes whether, and if applicable when, the child will be returned to the parent, placed for adoption and the State will file a petition for termination of parental rights, or referred for legal guardianship, or only in the case of a child who has attained 16 years of age (in cases where the State agency has documented to the State court a compelling reason for determining, as of the date of the hearing, that it would not be in the best interests of the child to return home, be referred for termination of parental rights, or be placed for adoption, with a fit and willing relative, or with a legal guardian) placed in another planned permanent living arrangement, subject to section 675a(a) of this title, in the case of a child who will not be returned to the parent, the hearing shall consider in-State and out-of-State placement options, and, in the case of a child described in subparagraph (A)(ii), the

hearing shall determine whether the out-of-State placement continues to be appropriate and in the best interests of the child, and, in the case of a child who has attained age 14, the services needed to assist the child to make the transition from foster care to a successful adulthood; (ii) procedural safeguards shall be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents; (iii) procedural safeguards shall be applied to assure that in any permanency hearing held with respect to the child, including any hearing regarding the transition of the child from foster care to a successful adulthood, the court or administrative body conducting the hearing consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child; and (iv) if a child has attained 14 years of age, the permanency plan developed for the child, and any revision or addition to the plan, shall be developed in consultation with the child and, at the option of the child, with not more than 2 members of the permanency planning team who are selected by the child and who are not a foster parent of, or caseworker for, the child, except that the State may reject an individual so selected by the child if the State has good cause to believe that the individual would not act in the best interests of the child, and 1 individual so selected by the child may be designated to be the child's

advisor and, as necessary, advocate, with respect to the application of the reasonable and prudent standard to the child;[5]

(D) a child's health and education record (as described in paragraph (1)(A)) is reviewed and updated, and a copy of the record is supplied to the foster parent or foster care provider with whom the child is placed, at the time of each placement of the child in foster care, and is supplied to the child at no cost at the time the child leaves foster care if the child is leaving foster care by reason of having attained the age of majority under State law;[1]

(E) in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law) or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be

5. So in original. The semicolon probably should be a comma.

joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption, unless--

> **(i)** at the option of the State, the child is being cared for by a relative;
>
> **(ii)** a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or
>
> **(iii)** the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in section 671(a)(15)(B)(ii) of this title are required to be made with respect to the child;[1]

(F) a child shall be considered to have entered foster care on the earlier of--

> **(i)** the date of the first judicial finding that the child has been subjected to child abuse or neglect; or
>
> **(ii)** the date that is 60 days after the date on which the child is removed from the home;[1]

(G) the foster parents (if any) of a child and any preadoptive parent or relative providing care for the child are provided with notice of, and a right to be heard in, any proceeding to be held with respect to the child, except that this subparagraph shall not be construed to require that any foster parent, preadoptive parent, or relative providing care for the child be made a party to such a proceeding solely on the basis of such notice and right to be heard;

(H) during the 90-day period immediately prior to the date on which the child will attain 18 years of age, or such greater age as the State may elect under paragraph (8)(B)(iii), whether during that period foster care maintenance payments are being made on the child's behalf or the child is receiving benefits or services under section 677 of this title, a caseworker on the staff of the State agency, and, as appropriate, other representatives of the child provide the child with assistance and support in developing a transition plan that is personalized at the direction of the child, includes specific options on housing, health insurance, education, local opportunities for mentors and continuing support services, and work force supports and employment services, includes information about the importance of designating another individual to make health care treatment decisions on behalf of the child if the child becomes unable to participate in such decisions and the child does not have, or does not want, a relative who would otherwise be

authorized under State law to make such decisions, and provides the child with the option to execute a health care power of attorney, health care proxy, or other similar document recognized under State law, and is as detailed as the child may elect; and

(I) each child in foster care under the responsibility of the State who has attained 14 years of age receives without cost a copy of any consumer report (as defined in section 1681a(d) of Title 15) pertaining to the child each year until the child is discharged from care, receives assistance (including, when feasible, from any court-appointed advocate for the child) in interpreting and resolving any inaccuracies in the report, and, if the child is leaving foster care by reason of having attained 18 years of age or such greater age as the State has elected under paragraph (8), unless the child has been in foster care for less than 6 months, is not discharged from care without being provided with (if the child is eligible to receive such document) an official or certified copy of the United States birth certificate of the child, a social security card issued by the Commissioner of Social Security, health insurance information, a copy of the child's medical records, and a driver's license or identification card issued by a State in accordance with the requirements of section 202 of the REAL ID Act of 2005, and any official documentation necessary to prove that the child was previously in foster care.

(6) The term "administrative review" means a review open to the participation of the parents of the child, conducted by a panel of appropriate persons at least one of whom is not responsible for the case management of, or the delivery of services to, either the child or the parents who are the subject of the review.

(7) The term "legal guardianship" means a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decisionmaking. The term "legal guardian" means the caretaker in such a relationship.

(8)(A) Subject to subparagraph (B), the term "child" means an individual who has not attained 18 years of age.

(B) At the option of a State, the term shall include an individual--

(i)(I) who is in foster care under the responsibility of the State;

(II) with respect to whom an adoption assistance agreement is in effect under section 673 of this title if the child had attained 16 years of age before the agreement became effective; or

(III) with respect to whom a kinship guardianship assistance agreement is in effect under section 673(d) of this title if the child had attained 16 years of age before the agreement became effective;

(ii) who has attained 18 years of age;

(iii) who has not attained 19, 20, or 21 years of age, as the State may elect; and

(iv) who is--

(I) completing secondary education or a program leading to an equivalent credential;

(II) enrolled in an institution which provides post-secondary or vocational education;

(III) participating in a program or activity designed to promote, or remove barriers to, employment;

(IV) employed for at least 80 hours per month; or

(V) incapable of doing any of the activities described in subclauses (I) through (IV) due to a medical condition, which incapability is supported by regularly updated information in the case plan of the child.

(9) The term "sex trafficking victim" means a victim of--

> **(A)** sex trafficking (as defined in section 7102(10) of Title 22); or
>
> **(B)** a severe form of trafficking in persons described in section 7102(9)(A) of Title 22.

(10)(A) The term "reasonable and prudent parent standard" means the standard characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child while at the same time encouraging the emotional and developmental growth of the child, that a caregiver shall use when determining whether to allow a child in foster care under the responsibility of the State to participate in extracurricular, enrichment, cultural, and social activities.

> **(B)** For purposes of subparagraph (A), the term "caregiver" means a foster parent with whom a child in foster care has been placed or a designated official for a child care institution in which a child in foster care has been placed.

(11)(A) The term "age or developmentally-appropriate" means--

> > **(i)** activities or items that are generally accepted as suitable for children of the same chronological age or level of maturity or that are

determined to be developmentally-appropriate for a child, based on the development of cognitive, emotional, physical, and behavioral capacities that are typical for an age or age group; and

(ii) in the case of a specific child, activities or items that are suitable for the child based on the developmental stages attained by the child with respect to the cognitive, emotional, physical, and behavioral capacities of the child.

(B) In the event that any age-related activities have implications relative to the academic curriculum of a child, nothing in this part or part B shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State or local educational agency, or the specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction of a school.

(12) The term "sibling" means an individual who satisfies at least one of the following conditions with respect to a child:

(A) The individual is considered by State law to be a sibling of the child.

(B) The individual would have been considered a sibling of the child under State law but for a termination or other disruption of parental rights, such as the death of a parent.

(13) The term "child who is a candidate for foster care" means, a child who is identified in a prevention plan under section 671(e)(4)(A) of this title as being at imminent risk of entering foster care (without regard to whether the child would be eligible for foster care maintenance payments under section 672 of this title or is or would be eligible for adoption assistance or kinship guardianship assistance payments under section 673 of this title) but who can remain safely in the child's home or in a kinship placement as long as services or programs specified in section 671(e)(1) of this title that are necessary to prevent the entry of the child into foster care are provided. The term includes a child whose adoption or guardianship arrangement is at risk of a disruption or dissolution that would result in a foster care placement.